

ARKANSAS REPORTS
VOLUME 327

ARKANSAS
APPELLATE REPORTS
VOLUME 56

*[T]he law is the last result of human
wisdom acting upon human experience
for the benefit of the public.*

— SAMUEL JOHNSON
(1709-1784)

THIS BOOK CONTAINS THE OFFICIAL
ARKANSAS REPORTS
Volume 327

CASES DETERMINED
IN THE

Supreme Court
of Arkansas

FROM
January 13, 1997 — March 24, 1997
INCLUSIVE¹

AND

ARKANSAS APPELLATE
REPORTS
Volume 56

CASES DETERMINED
IN THE

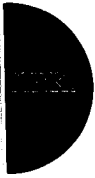
Court of Appeals
of Arkansas

FROM
January 15, 1997 — March 19, 1997
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PUBLISHED BY THE
STATE OF ARKANSAS
1997

¹Arkansas Supreme Court cases (ARKANSAS REPORTS) are in the front section, pages 1 through 783. Cite as 327 Ark. ____ (1997).

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ARKANSAS
REPORTS

Volume 327

CASES DETERMINED
IN THE

Supreme Court
of Arkansas

FROM
January 13, 1997 — March 24, 1997
INCLUSIVE

WILLIAM B. JONES, JR.
REPORTER OF DECISIONS

CINDY M. ENGLISH
ASSISTANT
REPORTER OF DECISIONS

PUBLISHED BY THE
STATE OF ARKANSAS
1997

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JUSTICES AND OFFICERS
OF THE
SUPREME COURT OF
ARKANSAS

DURING THE PERIOD COVERED
BY THIS VOLUME
(January 13, 1997 —
March 24, 1997, inclusive)

JUSTICES

W.H. "DUB" ARNOLD	Chief Justice
DAVID NEWBERN	Justice
TOM GLAZE	Justice
DONALD L. CORBIN	Justice
ROBERT L. BROWN	Justice
ANNABELLE CLINTON IMBER	Justice
RAY THORNTON	Justice

OFFICERS

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

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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

- Allen *v.* State, CR 96-881 (Per Curiam), Pro Se Motion for Record and for Extension of Time to File Brief granted January 21, 1997.
- Ayers *v.* State, 96-464 (Per Curiam), affirmed February 3, 1997.
- Banks *v.* State, CR 96-966 (Per Curiam), Pro Se Motion to Dismiss Appeal Without Prejudice granted in part; appeal dismissed with prejudice to its reinstatement February 17, 1997.
- Benton *v.* State, CR 96-1052 (Per Curiam), Pro Se Motion for Rule on Clerk denied January 21, 1997.
- Bradley *v.* State, CR 95-895 (Per Curiam), Pro Se Motion for Transcript denied March 3, 1997.
- Bradley *v.* State, CR 96-971 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied and Pro Se Motion to Amend Motion for Belated Appeal granted January 27, 1997.
- Brooks *v.* Glover, CR97-215 (Per Curiam), Pro Se Petition for Writ of Mandamus, Pro Se Petition for Writ of Prohibition moot and Pro Se Motion for Extraordinary and Expedited Consideration moot March 17, 1997.
- Coleman *v.* State, Cr 96-883 (Per Curiam), Pro Se Motion for Extension of Time to File Brief granted January 27, 1997.
- Cook *v.* State, CR 96-917 (Per Curiam), Pro Se Motion for Extension of Time denied and appeal dismissed February 10, 1997.
- Davis *v.* Norris, CR 96-1143 (Per Curiam), Pro Se Motion for Transcript, Pro Se Motion for Appointment of Counsel and Pro Se Motion to Have Appellant's Brief Duplicated at Public Expense denied and appeal dismissed March 24, 1997.
- Davis *v.* State, CR 96-467 (Per Curiam), affirmed February 3, 1997.
- Gomez *v.* State, CR 96-816 (Per Curiam), affirmed February 17, 1997.
- Hodges *v.* Norris, CR 96-1303 (Per Curiam), Pro Se Motion to Strike Appellee's Brief denied and appeal dismissed March 10, 1996.
- Jackson *v.* State, CR96-836 (Per Curiam), Pro Se Motion for Appointment of New Counsel denied March 17, 1997.

- Jacob *v.* Cole, CR 95-727 (Per Curiam), Pro Se Petition for Writ of Mandamus moot March 24, 1997.
- Johnson *v.* Davis, 96-1372 (Per Curiam), Pro Se Petition for Writ of Mandamus moot January 21, 1997.
- Johnson *v.* State, CR 96-1070 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied and Pro Se Motion to Amend Motion moot February 3, 1997.
- Johnson *v.* State, CR 96-748 (Per Curiam), Appellant's Counsel's Motion to be Relieved as Counsel granted, Appellant's Pro Se Motion for Extension of Time to File Pro Se Brief moot and Appellee's Motion to Dismiss Appeal granted March 3, 1997.
- Jones *v.* State, CR 95-33 (Per Curiam), Pro Se Motion for Photocopy of Trial Transcript at Public Expense denied February 10, 1997.
- Jordan *v.* State, CR 96-228 (Per Curiam), affirmed January 21, 1997.
- Kerr *v.* State, CR 96-694 (Per Curiam), affirmed February 24, 1997.
- Kindall *v.* State, CR 86-222 (Per Curiam), Pro Se Petition to Proceed Pursuant to Criminal Procedure Rule 37 denied and Pro Se Motion to Amend Petition granted; petition denied March 3, 1997.
- King *v.* State, CR 96-165 (Per Curiam), Pro Se Motion for Rule on Clerk to File Belated Pro Se Petition for Rehearing denied February 3, 1997.
- Leding *v.* State, CR 96-1068 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied February 24, 1997.
- Martin *v.* State, CR 95-1314 (Per Curiam), Pro Se Motion for Court to Consider Videotape on Appeal and for Appellant to be Present at Oral Argument denied January 21, 1997.
- Mayzes *v.* State, CR 96-1056 (Per Curiam), Pro Se Motions for Extension of Time to File Brief granted January 27, 1997.
- Mitchell *v.* State, CR 96-788 (Per Curiam), affirmed March 10, 1997. Rehearing denied April 14, 1997.
- Morris *v.* State of Arkansas, CR 95-1285 (Per Curiam), affirmed March 24, 1997.
- Nard *v.* State, CR 96-672 (Per Curiam), affirmed February 17, 1997.

- Olles *v.* State, 96-697 (Per Curiam), affirmed March 10, 1997.
- Phillips *v.* State, CR 96-986 (Per Curiam), Pro Se Motion for Record and Pro Se Motion for Extension of Time to File Brief denied and appeal dismissed March 3, 1997.
- Phills *v.* State, CR 96-540 (Per Curiam), affirmed January 27, 1997.
- Pickens *v.* Davis, CR 97-128 (Per Curiam), Pro Se Petition for Writ of Mandamus moot March 3, 1997.
- Pike *v.* State, CR 96-1326 (Per Curiam), Pro Se Motion for Record and Pro Se Motion for Extension of Time to File Brief granted, Pro Se Motion to Expedite Ruling moot February 24, 1997.
- Prichard *v.* State, CR 96-1283 (Per Curiam), Pro Se Motion for Belated Appeal of Order denied March 10, 1996.
- Reed *v.* State of Arkansas, CR 96-493 (Per Curiam), affirmed March 24, 1997.
- Reed *v.* State, CR 96-705 (Per Curiam), affirmed February 10, 1997.
- Reyes *v.* State, CR 96-1385 (Per Curiam), Joint Pro Se Motion for Substitution of Counsel denied February 17, 1997.
- Rhodes *v.* State, CR96-1154 (Per Curiam), Pro Se Motion for Extension of Time to File Brief and Pro Se Motion for Interpretation of Statute denied and appeal dismissed March 17, 1997.
- Richardson *v.* State, CR96-1216 (Per Curiam), Pro Se Motion for Extension of Time to File Brief and Pro Se Motion for Access to Record denied and appeal dismissed March 17, 1997.
- Roberts *v.* State, CR 96-669 (Per Curiam), affirmed January 21, 1997.
- Rowbottom *v.* State, CR 96-956 (Per Curiam), Pro Se Motion to Recall Mandate denied February 17, 1997.
- Sales *v.* State, CR 96-594 (Per Curiam), Pro Se Motion to Amend Appellant's Brief denied and appeal dismissed February 3, 1997.
- Shabazz *v.* State, 96-595 (Per Curiam), affirmed January 21, 1997.
- Sims *v.* Rogers, CR 96-129 (Per Curiam), Pro Se Petition for Writ of Mandamus moot March 24, 1997.

- Smith *v.* State, CR 96-1312 (Per Curiam), Pro Se Joint Petition for Writ of Certiorari denied March 24, 1997.
- Stipes *v.* State, CR 96-985 (Per Curiam), Pro Se Motion to Supplement Record and Pro Se Motion for Duplication of Brief at Public Expense denied and appeal dismissed February 17, 1997.
- Strawn *v.* State, CR 96-1132 (Per Curiam), Pro Se Motion for Belated Appeal of Judgment denied March 24, 1997.
- Strawn *v.* State, CR 96-1132 (Per Curiam), Pro Se Motion for Belated Appeal of Judgment remanded and Pro Se Motion to Relieve Counsel denied February 17, 1997.
- Taylor *v.* State, CR 96-443 (Per Curiam), affirmed January 27, 1997.
- Thornton *v.* Davis, CR 96-1245 (Per Curiam), Pro Se Petition for Writ of Mandamus moot January 21, 1997.
- Van *v.* State, CR 96-1144 (Per Curiam), Pro Se Motion for Extension of Time and Pro Se Motion for Appointment of Counsel denied January 27, 1997.
- Washington *v.* State, CR 94-1096 (Per Curiam), Pro Se Motion for Photocopy of Trial Transcript at Public Expense denied February 24, 1997.
- Williams *v.* State, CR 96-1053 (Per Curiam), Pro Se Motion for Extension of Time; Pro Se Motion to Supplement Record; and Pro Se Motion for Record denied and appeal dismissed February 10, 1997.
- Williams-Stone *v.* Clinger, CR 97-1 (Per Curiam), Pro Se Petition for Writ of Mandamus moot February 10, 1997.

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APPENDIX

Rules Adopted
or Amended by
Per Curiam Orders



IN THE MATTER OF CHANGES TO THE RULES OF
CIVIL PROCEDURE, RULES OF APPELLATE
PROCEDURE, AND INFERIOR COURT RULES

Supreme Court of Arkansas
Opinion delivered January 13, 1997

PER CURIAM. By *per curiam* order dated November 18, 1996, this court adopted numerous changes to the Arkansas Rules of Civil Procedure, the Arkansas Rules of Appellate Procedure—Civil, and the Inferior Court Rules. These changes are to be effective March 1, 1997. We have since determined that certain errors are contained in our order. Accordingly, we hereby make the following technical amendments¹, which shall be effective when the rules changes take effect on March 1, 1997:

1. REPORTER'S NOTES TO RULE 30, PARAGRAPH 3 OF SUBDIVISION (D) (OPINION, ITEM 9, 9TH PARAGRAPH OF NOTES, SECOND SENTENCE)

A comma is misplaced, and the following sentence should be substituted in lieu of that appearing in the order: "In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer."

2. RULE 34 (B) AND REPORTER'S NOTES (OPINION, ITEM 13)

The following language should be substituted in lieu of that appearing in the order: "The first and second sentences of the second paragraph of Rule 34(b) are amended to read as follows:

The party upon whom the request has been served shall serve a written response within 30 days after the service of the request, except that a defendant must serve a response within 30 days after the service of the request upon him or within 45 days after the summons and complaint have been served upon him, whichever is longer. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

¹ The references for the corrections will be to the court's order as it appears in the *Arkansas Reports*, 326 Ark. 1106, hereafter referred to as "Opinion."

The Reporter's Notes accompanying Rule 34 are amended by adding the following: ADDITION TO REPORTER'S NOTES, 1997 AMENDMENT: The first and second sentences of the second paragraph of Rule 34(b) have been amended to track Rule 33(b)(3). In accordance with the prior version of Rule 34(b), the court may shorten or lengthen the time for responding to requests for production. New language expressly permits the parties to extend or shorten the response time by written agreement, a modification in discovery procedures that is permissible under Rule 29."

3. RULE 37 (A)(2) (OPINION, ITEM 15, 1ST PARAGRAPH OF RULE, LINE 9)

The reference should be to Rule 35(c) and not 35(a).

4. REPORTER'S NOTES TO RULE 37 (OPINION, ITEM 15, 1ST PARAGRAPH OF NOTES, LINE 8)

The reference should be to Rule 35(c) and not 35(a).

5. REPORTER'S NOTES TO RULE 37 (OPINION, ITEM 15, SECOND PARAGRAPH OF NOTES, LINE 4)

The following sentence should be substituted in lieu of that appearing in the order: "Interrogatories and requests for inspection should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions."

6. REPORTER'S NOTES TO RULE 37 (OPINION, ITEM 15, LAST PARAGRAPH OF NOTES)

The following language should be substituted in lieu of that appearing in the order:

"Under revised subdivision (d), a party seeking discovery via interrogatory or inspection request must make an effort to obtain responses before filing a motion for sanctions. Similar requirements to attempt resolution of discovery disputes without court action appear in revised Rules 26 (c) and 37 (a)(2)."

7. REPORTER'S NOTES TO RULE 54 (OPINION, ITEM 16, 7TH PARAGRAPH OF NOTES, LINE 10)

The sentence lacks an initial capital letter and should read: "This option . . ." and not "this. . ."

8. REPORTER'S NOTES TO CIVIL APPELLATE RULE 11 (OPINION, ITEM 2, 1ST PARAGRAPH OF NOTES, LINE 2)

The reference should be to 1997 and not 1996.

9. REPORTER'S NOTES TO INFERIOR COURT RULE 4 (OPINION, ITEM 3, NOTES, LINE 11)

The reference should be to 1997 and not 1996.

10. REPORTER'S NOTES TO INFERIOR COURT RULE 5 (OPINION, ITEM 4, NOTES, LINE 5)

The reference should be to 1997 and not 1996.

11. REPORTER'S NOTES TO INFERIOR COURT RULE 7 (OPINION, ITEM 6, NOTES)

The following language should be substituted in lieu of that appearing in the order:

"The Reporter's Notes accompanying Rule 7 are amended by adding the following:

ADDITION TO REPORTER'S NOTES, 1997 AMENDMENT: Former subdivisions (a) and (b) have been redesignated as subdivisions (b) and (c), respectively, and have been reworded to reflect the terminology of the Rules of Civil Procedure. New subdivision (a) requires the court to dismiss for lack of subject matter jurisdiction if the plaintiff's claim exceeds the jurisdictional amount, which for municipal courts is presently \$3,000. Previously, the court could transfer the case to circuit court in this situation. *Bonnell v. Smith*, 322 Ark. 141, 908 S.W.2d 74 (1995)."

IN THE MATTER OF A PROPOSED RULE OF
CRIMINAL PROCEDURE GOVERNING ALTERNATE
JURORS IN CRIMINAL TRIALS

Supreme Court of Arkansas
Opinion delivered February 17, 1997

PER CURIAM. The Arkansas Supreme Court Committee on Criminal Practice has recommended the adoption of a new Rule of Criminal Procedure to govern the use of alternate jurors in criminal trials when a regular juror is unable to serve or is disqualified. Presently, there is no rule on this subject in the Rules of Criminal Procedure. *Compare*, Ark. Code Ann. § 16-30-102 (Repl. 1994) and Ark. R. Civ. P. 47 (b).

We are publishing the Committee's proposal for comment from the bench and bar. Comments and suggestions on this proposed rule may be made in writing prior to May 17, 1997. They should be addressed to:

Leslie Steen, Clerk
Arkansas Supreme Court
Attn: Criminal Procedure Rules
Justice Building
625 Marshall Street
Little Rock, AR 72201

We express our gratitude to the members of the Criminal Practice Committee for their work on this matter.

Rule 32.3. Alternate Jurors.

(a) The court may direct that additional jurors be called and impanelled in addition to the regular jury to sit as alternate jurors. The number of alternate jurors shall be at the discretion of the court, taking into consideration the estimated length and cost of the trial, the number of witnesses, and the ages and health of the regular jurors. Alternate jurors in the order in which they are called shall replace jurors who are discharged by the court for good cause upon being found unable or disqualified to perform

their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. Each side shall be entitled to one peremptory challenge for each alternate juror to be impanelled. The additional peremptory challenge may be used against an alternate juror only, and all other peremptory challenges allowed by law shall not be used against an alternate juror.

(b) Any alternate juror, who has not replaced a regular juror prior to the time the jury retires to consider its verdict, shall be further instructed by the court in addition to the usual instruction regarding discussion of the case and not permitting any one to discuss the case with him, to remain where instructed by the court during deliberation or to be on call. During deliberation should any regular juror die, or upon good cause shown to the court be found unable or disqualified to perform his or her duties, the court may order the juror to be discharged. The court may in its discretion, as an alternative to mistrial, replace such juror with the next alternate. In such event, the court shall instruct the jury to disregard all previous deliberation, and to commence deliberation anew.

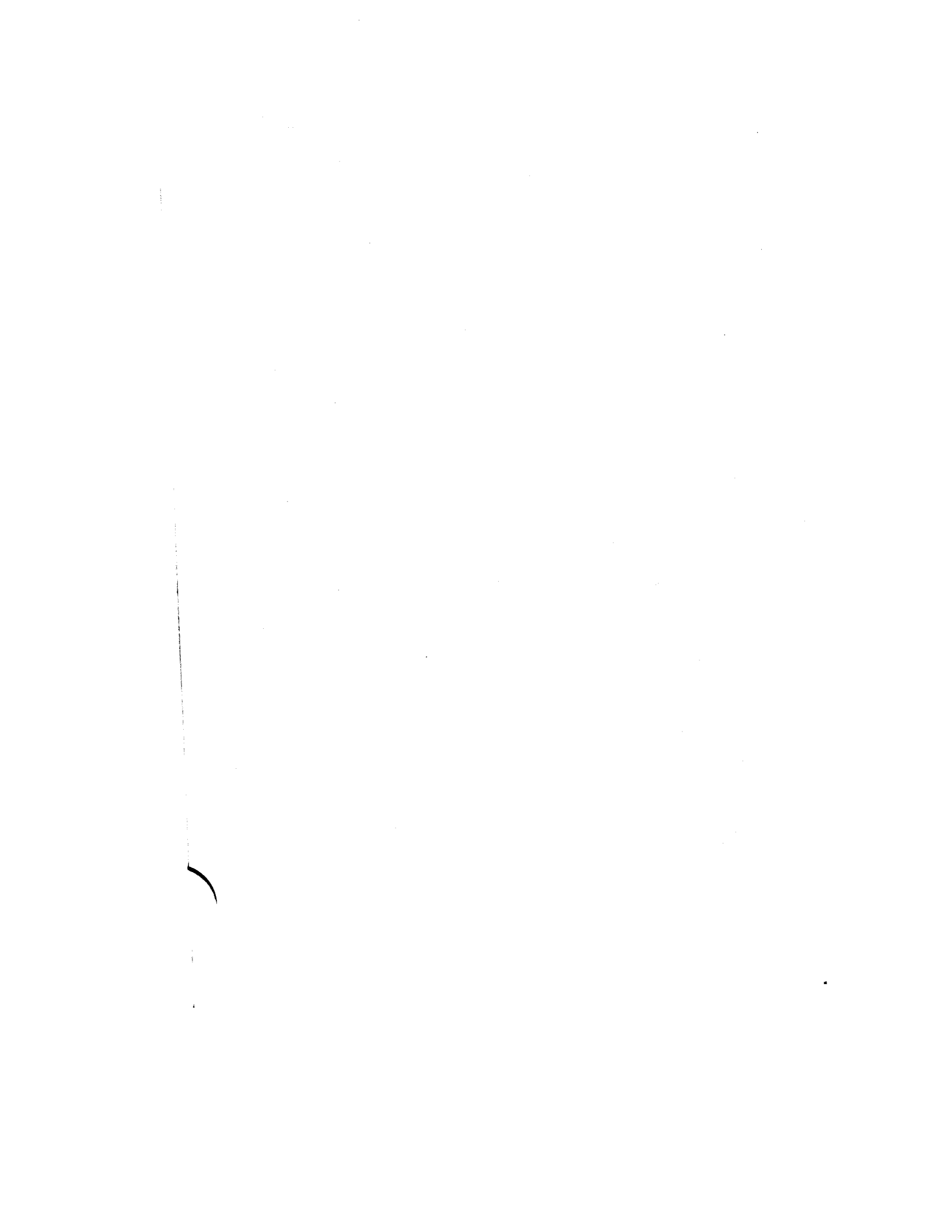
(c) In the case of a bifurcated trial with alternate jurors remaining after the jury has returned a verdict of guilty, the next alternate jurors, not to exceed two, shall be placed in the jury box along with the regular jurors. Any alternate jurors in addition to these two shall be dismissed. The trial will proceed with the penalty phase. When the jury retires to deliberate the penalty, the remaining alternate juror or jurors will again remain where instructed by the court or be on call.

(d) If at any time after a verdict of guilty, but before a verdict fixing punishment a juror who participated in the guilt phase of the trial dies, becomes ill, or is otherwise found to be unable or disqualified to perform his duties, such juror shall be discharged. The court may in its discretion, as an alternative to mistrial or any other option available by statute or these rules, replace such juror with the next alternate. However, in such event, the court may first give the defendant, with the agreement of the prosecution,

the option to waive jury sentencing, in which case the court shall impose sentence, or to accept a verdict by the remaining jurors. If the defendant does not waive jury sentencing, or agree to accept a verdict by the remaining jurors, the trial will continue with the alternate participating in the penalty phase. In such event, the court shall instruct the jury to commence deliberation anew as to the sentencing phase only.

(e) Notwithstanding Section 5-4-602(3), which requires that the same jury sit in the sentencing phase of a capital murder trial, the court may in its discretion proceed pursuant to this rule and seat an alternate juror.

Appointments to
Committees



IN RE: SUPREME COURT COMMITTEE ON
CRIMINAL PRACTICE

Supreme Court of Arkansas
Opinion delivered January 21, 1997

PER CURIAM. The Honorable Robert Edwards of Searcy, the Honorable John Langston of Little Rock, James A. Ross, Jr., Esq., of Monticello, and Helen Rice Grinder, Attorney at Law, of Conway are hereby reappointed to the Supreme Court Committee on Criminal Practice for three-year terms to expire on January 31, 2000. Judge Edwards shall continue to serve as chair. Jeff Rosenzweig, Esq., of Little Rock and Kelly Hill, Attorney at Law, of Little Rock are hereby appointed to the Committee for three-year terms to expire on January 31, 2000.

The Court thanks Judge Edwards, Judge Langston, Mr. Ross, and Ms. Grinder for accepting reappointment, and Mr. Rosenzweig and Ms. Hill for accepting appointment to this most important Committee.

The Court expresses its appreciation to Bobby McDaniel, Esq., of Jonesboro and Clint Miller, Esq., of Little Rock for their years of faithful service to this Committee.

IN RE: COMMITTEE ON AUTOMATION

Supreme Court of Arkansas
Opinion delivered February 24, 1997

PER CURIAM. Margaret M. Newton, Attorney at Law, of Little Rock is appointed to our Committee on Automation for a term of three years to begin March 1, 1997. The Court thanks Ms. Newton for accepting appointment to this most important Committee.

IN RE: SUPREME COURT ALTERNATE COMMITTEE
ON PROFESSIONAL CONDUCT

Supreme Court of Arkansas
Opinion delivered March 10, 1997

PER CURIAM. Stacey DeWitt of Little Rock is hereby reappointed to the Supreme Court Alternate Committee on Professional Conduct for a seven-year term to expire on March 9, 2004.

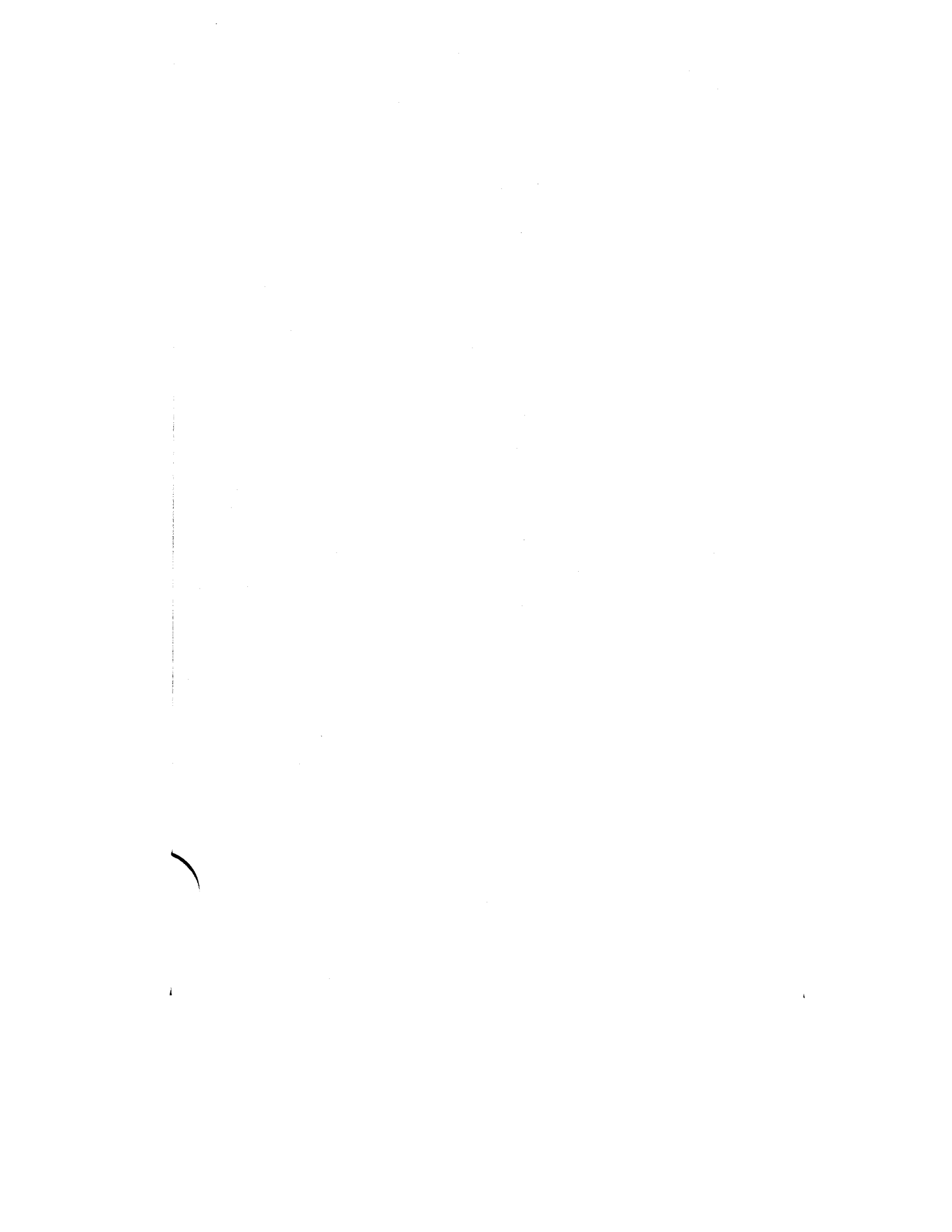
The Court thanks Ms. DeWitt for accepting reappointment to this most important Committee.

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

Supreme Court of Arkansas
Opinion delivered March 10, 1997

PER CURIAM. Jack Lassiter, Esq., of Little Rock, Frank Newell, Esq., of Little Rock, Didi Sallings, Attorney-at-Law, of Little Rock, and the Honorable Henry Wilkinson of Forrest City are hereby reappointed to the Supreme Court Committee on Model Jury Instructions—Criminal for three-year terms to expire on February 28, 2000.

The court thanks Mr. Lassiter, Mr. Newell, Ms. Sallings, and Judge Wilkinson for accepting reappointment to this most important Committee.



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Motion to unseal brief denied, motion to submit Rule 37 petition under seal granted, motion to strike State's response denied. *Ivy v. State*, 683
Argument offered without citation to authority, argument not considered. *Lee v. State*, 692
Argument unsupported by authority, argument not considered. *Id.*
Petition for rehearing denied, cross-appellant not relieved of burden of presenting argument on ground that he may have made similar appellee's argument. *Hall v. Freeman*, 720
Issue not preserved for review. *Bokker v. Hill*, 742
Strong presumption of validity of prior decision. *Hopson v. State*, 749
Presumption of validity of prior decision not overcome, trial court did not err in rejecting proffered jury instruction on eyewitness identification. *Id.*
Probate cases, standard of review. *Reynolds v. Guardianship of Sears*, 770
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- Warrantless arrest, when officer may make. *Brunson v. State*, 567
Smell of marijuana or its smoke gives rise to reasonable suspicion to arrest occupants of vehicle. *Id.*

Smell of marijuana provided reasonable cause to arrest occupants of vehicle in which appellant was passenger. *Id.*
Warrantless arrest, grounds for, burden of demonstrating error. *Humphrey v. State*, 753
Warrantless arrest, police officers had probable cause to arrest appellant for committing felony. *Id.*
Warrantless entry, trial court was not clearly erroneous in determining appellant's grandmother consented to officers' entry. *Id.*
Warrantless entry, exigent circumstances defined. *Id.*
Warrantless entry, six potential exigent circumstances. *Id.*
Warrantless entry, trial court was not clearly erroneous in denying motion to suppress on illegal-arrest ground. *Id.*

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Ineffective-assistance claim, appellant did not show reasonable probability that outcome of trial would have been different. *Drymon v. State*, 375
Ineffective-assistance claim, what must be shown. *Id.*
Ineffective-assistance claim, must show reasonable probability that decision would have been different absent errors. *Id.*
Ineffective-assistance claim, totality of evidence must be considered. *Id.*
Proof clear that appellant failed to properly communicate with his client, no error found. *Mays v. Neal*, 302
Practice of law, why limited to performance by licensed lawyers. *Id.*
Evidence sufficient to support finding, appellant assisted nonlawyer in unauthorized practice of law. *Id.*
Award of attorney's fees, amount pleaded in plaintiff's complaint generally accepted as amount in controversy. *Steward v. Wurtz*, 292
Attorney's fees available for claims made without any basis in law or fact, complaint taken at face value in determining amount in controversy. *Id.*
Attorney's fees awarded upon finding of bad faith, award limited by statute. *Id.*
Legal malpractice, controlling principles. *Pugh v. Griggs*, 577
Legal malpractice, when attorney is not liable. *Id.*
Legal malpractice, trial court did not err in deferring to appellees' decision to seek voluntary dismissal of appellant's case, matter within counsel's discretion. *Id.*
Legal malpractice, appellant's continued retainment of appellees as counsel constituted waiver of negligence claim. *Id.*
Claim of ineffective assistance of counsel not considered on direct appeal, issue was not raised in motion for new trial. *Hicks v. State*, 652

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Award permitted in custody-decree modification cases. *Jones v. Jones*, 195
Appellate courts may award in response to original motions. *Id.*
Factors considered. *Id.*
Petition not governed by Ark. Sup. Ct. R. 2-3, collateral matter not considered or decided earlier by supreme court, petition not untimely. *Id.*
Decision on entitlement requires separate inquiry. *Id.*
Motion granted, request for sanctions denied. *Id.*
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Computation of fees due from employer in Second Injury Fund case. *Stucco Plus, Inc. v. Rose*, 314

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Damaged goods, return, inference of negligence. *Ozark Auto Transp., Inc v. Starkey*, 227

Damaged goods, overcoming inference of negligence, burden of proof. *Id.*

Damaged goods, trial court's decision finding that appellant had not overcome inference of negligence and awarding damages not clearly against preponderance of evidence. *Id.*

BANKS & BANKING:

Debtor-creditor relationship not sufficient to establish fiduciary relationship, appellants failed to submit proof to establish fiduciary relationship. *Milam v. Bank of Cabot*, 256

CIVIL PROCEDURE:

Judgments, trial court has inherent authority to modify order. *Steward v. Wurtz*, 292

Order modified within required ninety-day period, order validly entered. *Id.*

Dismissal of cause not permitted when pending action is in jurisdiction served by courts other than Arkansas courts. *National Bank of Commerce v. DOW Chem. Co.*, 504

Ark. R. Civ. P. 12(b)(8) prohibits identical cases from proceeding in different courts within state. *Id.*

Ark. R. Civ. P. 12(b)(8) does not apply where same action is pending in federal court or court of another state, trial court lacked authority to dismiss state action. *Id.*

Actions shall be prosecuted by real party in interest, appellee clearly had property interest. *White v. Welsh*, 465

Appellants' argument that estate's complaint was conclusory was without merit, appellants answered complaint with denials to allegations therein. *Id.*

When rules applicable, exception limited to special proceedings. *In Re: Adoption of Baby Boy Martindale*, 685

Action and special proceeding distinguished. *Id.*

Summary judgment, proof required and pleadings considered. *Albright v. Southern Farm Bureau Life Ins. Co.*, 715

Proper plaintiff, requirements. *Reynolds v. Guardianship of Sears*, 770

Standing, record did not reflect that appellant attorney sought to intervene or had interest to be protected. *Id.*

Standing, probate court did not err in denying appellant time to plead further because he lacked standing and was nonparty. *Id.*

CONSTITUTIONAL LAW:

Admissibility of in-court identification, review of trial court's ruling. *Phillips v. State*, 1

Photographic lineups, accused not entitled to lineup where all suspects wear similar clothing. *Id.*

Lineup not unduly suggestive, nothing in lineup directed witness toward appellant as primary suspect. *Id.*

Petition for partial waiver of Rule IX(B) requirement denied. *In Re: McIntyre*, 129

- Report requested on reasons for requiring passage of Ethics Exam before Bar Exam. *Id.*
- Roadblocks, no warrant necessary for operation of fixed roadblock. *Mullinax v. State*, 41
- Right to jury trial, waiver. *Burton v. State*, 65
- Right to jury trial, waiver, public not excluded from hearing in chambers. *Id.*
- Right to jury trial, waiver, hearing in chambers satisfied open-court requirement. *Id.*
- Inmate's constitutional right to access to court, adequate law libraries, adequate assistance from persons trained in law. *Rowbottom v. State*, 76
- Effective method of access to courts must be provided, physical access to courts not required. *Id.*
- Appellant failed to show that appointment of standby counsel deprived him of access to courts, trial court free to appoint standby counsel rather than granting appellant access to law library. *Id.*
- Due process, appellant not prejudiced by any confusion in notices. *Williams v. State*, 97
- Claim of *res judicata* in connection with death penalty viewed as facet of double-jeopardy protection. *Ford v. Wilson*, 243
- Double jeopardy, person whose conviction is set aside may be retried. *Id.*
- Racial bias in jury selection can be corrected by new trial, does not negate subsequent prosecution, prohibition denied. *Id.*
- Supremacy Clause, state action may be preempted by conflicting federal law. *Gentry v. Gentry*, 266
- Equal protection, disparate statutory treatment of county and city officers, must be shown to be arbitrary and capricious. *Allen v. State*, 350
- Game & Fish Commission has broad discretion to regulate manner of taking game, appellant's power does not translate into general power to regulate possession of all firearms on roads. *Arkansas Game & Fish Comm'n v. Murders*, 426
- Amended rule unconstitutionally overbroad, decision of trial court affirmed. *Id.*
- Right to confront witnesses, when right may be forfeited. *Goston v. State*, 486
- No authority cited for argument that appellant was deprived of due process, statutes were not in conflict. *Ricks v. State*, 513
- Statutes not overlapping or unconstitutional, issue decided adversely to appellant. *Lee v. State*, 692
- No proof of discriminatory purpose shown, denial of motion to prohibit State from seeking death penalty not error. *Id.*

CONTEMPT:

- Show-cause order issued. *Guss v. State*, 127
- Hearing ordered on contempt charge, master appointed, counsel's burden of proof. *In Re: Atkinson*, 193
- Show-cause order issued. *Caple v. State*, 372
- Contempt order issued. *Guss v. State*, 379
- Master Appointed. *In Re: Stephens*, 544
- Counts of rape, continuing offense discussed. *Ricks v. State*, 513
- When multiple charges will lie, rape is not continuing offense. *Id.*
- Rape, separate penetrations as result of separate impulses, each constitutes offense. *Id.*

Presumption that parties contract only for themselves, when contract is actionable by third parties. *Cherry v. Tanda, Inc.*, 600

When indemnitor's obligation to reimburse against loss generally becomes due, there can be no third-party beneficiary to an indemnity contract. *Id.*

Appellee was not in business of insurance, appellant could not maintain direct action against appellee as insurer of city. *Cherry v. Tanda, Inc.*, 600

Parties never intended appellee to be city's insurer, indemnity agreement not insurance contract. *Cherry v. Tanda, Inc.*, 600

Substitute master appointed. *In Re: Contempt of Counsel*, 779

Charge of contempt, plea change to guilty accepted. *Propst v. State*, 779

Appellant's counsel found in contempt and fined for failure to timely file appellant's brief, motion to file belated grief granted. *Id.*

Counsel ordered to appeal and show cause. *Rankin v. State*, 781

CORPORATIONS:

Corporation separate entity from its stockholders, corporation loses ability to sue upon revocation of its charter. *Calandro v. Parkerson*, 131

Malpractice and contract claims, individual appellants could not bring corporate cause of action. *Id.*

COURTS:

Federal courts cannot remand matter to state trial court, may grant conditional writ of habeas corpus on collateral review. *Ford v. Wilson*, 243

Defendant seeking relief from bond established by inferior court must file pleading with clerk of superintending court. *State v. Pulaski County Circuit Court*, 287

Circuit court has superintending power over municipal court's setting of bail bonds. *Id.*

State's petition for writ of prohibition granted, bond-reduction issue not properly filed with circuit court. *Id.*

Supreme court is loath to engage in judicial legislation. *Bokker v. Hill*, 742

CRIMINAL LAW:

Admission of evidence discretionary under rape shield statute, relief on appeal barred where provisions of statute not invoked at trial. *Bradley v. State*, 6

DWI, prior convictions are elements of crime for second, third, or fourth offense. *Payne v. State*, 25

Revocation of probation, factors to be considered. *Jordan v. State*, 117

Determination must be made that failure to pay is willful, when probation may be revoked. *Id.*

No record of determination that appellant's failure to pay restitution was result of willful failure to pay, judgment revoking probation reversed and remanded. *Id.*

Terms of theft-by-receiving statute not altered by amended theft statute, State only required to show value of stolen property exceeded \$200. *Coleman v. State*, 381

Consolidation-of-offenses statute does not authorize court to alter elements of one type of theft offense by applying statute that amended different theft offense. *Id.*

Appellant guilty of class C felony under existing law. *Id.*

When information sufficient, information here was sufficient. *Sawyer v. State*, 421

Allowable scope of investigation of criminal activities. *Hammons v. State*, 520

Less than presumptive amount of marijuana found in possession of accused but other proof of intent to deliver present, appellant's conviction for possession with intent to deliver proper. *Wright v. State*, 558

Capital murder and first-degree murder statutes constitutional. *Camargo v. State*, 631

Narrowing of death-eligible class. *Id.*

Required narrowing of death-eligible class provided by Ark. Code Ann. § 5-4-603(a), appellant's argument meritless. *Id.*

Intent, nature and extent of victim's wounds relevant to showing of. *Camargo v. State*, 631

Death penalty, sentencing phase, narrowing function. *Camargo v. State*, 631

Death penalty, jury cannot impose sentence of death until it finds that all three parts of Ark. Code Ann. § 5-4-603(a) apply. *Id.*

Death penalty, failure of jury unanimously to return written finding that aggravating circumstances justified death sentence beyond reasonable doubt was error requiring reversal and remand for new sentencing. *Id.*

Death penalty, sentencing phase, appellant permitted to argue mental retardation as mitigating circumstance to jury, no deliberate exclusion. *Id.*

CRIMINAL PROCEDURE:

Three categories of police-citizen encounters, Ark. R. Crim. P. 2.2 provides authority for police to act in nonseizure encounter. *State v. McFadden*, 16

Approach of citizen pursuant to policeman's investigative law enforcement function, balancing test required. *Id.*

Actions under Ark. R. Crim. P. 2.2, when such action valid. *Id.*

Officer's approach of Appellee neither a nonseizure encounter nor done for purpose of aiding in investigation or prevention of a crime, trial court's ruling not clearly erroneous. *Id.*

Conditional plea of guilty, strict compliance with A.R.Cr.P. Rule 24.3(b) required to convey appellate jurisdiction. *Payne v. State*, 25

Conditional plea of guilty, Rule 24.3(b) permits appellate review solely as to adverse rulings on motions to suppress illegally obtained evidence. *Id.*

Conditional plea of guilty, case involved attempt to appeal admissibility of evidence of prior convictions, appeal dismissed because it did not involve suppression issue within ambit of A.R.Cr.P. Rule 24.3(b). *Id.*

Conditional plea of guilty, reservation-in-writing requirement of Rule 24.3(b) must be strictly followed. *Id.*

Reasonable cause to arrest and detain, matter to be determined by judicial officer. *Williams v. State*, 97

Postconviction relief, once undertaken proceeding must be fundamentally fair. *Larimore v. State*, 271

Trial court's dismissal of petition as untimely affirmed, argument that sixty-day deadline was fundamentally unfair unsupported by authority. *Id.*

Writ of error *coram nobis*, Rule 37 petition distinguished. *Id.*

Writ of error *coram nobis*, due diligence required in making application for relief. *Id.*

When writ of error *coram nobis* will lie, circuit court can entertain writ after appeal only if supreme court grants permission. *Id.*

Writ of error *coram nobis*, when allowed. *Id.*

- Writ of error *coram nobis*, distinction between fundamental error and newly discovered evidence. *Id.*
- State conceded its prosecutorial misconduct violated constitutional principles of due process, trial court granted leave to consider writ of error *coram nobis*. *Id.*
- Consideration of writ of error *coram nobis*, guidelines for trial court. *Id.*
- Proper time to object to sufficiency of information or indictment, subject-matter jurisdiction of trial court is not implicated when sufficiency of information is questioned. *Sawyer v. State*, 421
- Postconviction relief, evidentiary hearing. *Bohanan v. State*, 507
- Postconviction relief, written findings required upon denial, when supreme court may affirm. *Id.*
- Postconviction proceedings, case remanded for written findings required by Ark. R. Crim. P. 37.3(a). *Id.*
- Death penalty, competency to elect execution. *Greene v. State*, 511
- Death penalty, matter remanded for evaluation of appellant's mental capacity and for further hearing on issue. *Id.*
- Quoted language dictum, appellee's reliance on *obiter dictum* meritless. *State v. Vasquez-Aerreola*, 617
- Felony defendant not entitled to have his guilty plea accepted without assent of prosecutor, when criminal cases which require trial by jury may be otherwise tried. *Id.*
- Appellants have no constitutional right to have guilty plea accepted, right may only be conferred by rule or statute. *Id.*
- Appellant attempted to plead guilty over State's objection, trial court erred in accepting guilty plea. *Id.*
- Amendment of information by trial judge over State's objection violates separation of powers, choice of which charges to file against accused entirely within prosecutor's discretion. *State v. Vasquez-Aerreola*, 617
- No factual basis found for charge, trial court must call upon defendant to affirm or withdraw plea. *Id.*
- Trial judge lacked authority to dismiss charge, count five reinstated on remand. *Id.*
- Motion for severance properly denied, rule regarding severance inapplicable where appellant charged with single count of capital murder. *Lee v. State*, 692
- Custodial statements, waiver of *Miranda* rights, inquiry. *Humphrey v. State*, 753
- Custodial statements, State's burden. *Id.*
- Voluntariness of confessions, factors on review. *Id.*
- Voluntariness of confessions, age and mental capacity alone are not sufficient to suppress confession. *Id.*
- Voluntariness of confessions, trial court was not clearly erroneous in determining that appellant's statement was voluntary. *Id.*
- Waiver of *Miranda* rights, appellant's waiver was knowingly and intelligently made. *Id.*
- DAMAGES:**
- Allegation damages excessive, factors on review. *Collins v. Hinton*, 159
- Damages did not shock conscience of court, judgment affirmed. *Id.*
- DEEDS:**
- Interpretation of, primary intent given to intent of grantor. *Sides v. Beene*, 401

Fee tail at common law discussed, adopted persons traditionally excluded from class of "bodily heirs" in construing fee tail. *Id.*
Modern trend would include adoptees in term "heirs of her body", under law in effect at time deed was drafted adopted person would not qualify as heir. *Id.*
Interpretation, primary consideration. *Riffle v. Worthen*, 470

DISCOVERY:

Imposing sanctions for discovery violations, standard of review. *State v. Vasquez-Aerreola*, 617
Action alternatively viewed as discovery sanction, trial court still abused its discretion. *Id.*
Trial court's alternative theories for dismissal of count without merit, dismissal of charge as discovery sanction violated separation of powers. *State v. Vasquez-Aerreola*, 617

DIVORCE:

Courts without power to enforce private agreement dividing future Social Security payments, Social Security Act prohibits assignment of future receipt of benefits. *Gentry v. Gentry*, 266
Independent property-settlement agreement incorporated into divorce decree, court may not subsequently modify agreement. *Id.*
Parties may not contract to transfer unpaid Social Security benefits, agreement between parties unenforceable. *Id.*
Easements appurtenant and easements in gross distinguished. *Riffle v. Worthen*, 470
Language of quitclaim deed was clear and unambiguous, intent to convey personal right of access. *Id.*
Chancellor did not err in ruling that deed did not establish appurtenant easement. *Id.*
Existence, burden of proof. *Id.*
Easement of necessity, prerequisites. *Id.*
Easement of necessity, degree of necessity must be more than convenience. *Id.*
Easement of necessity, appellants did not meet burden, could not raise easement of necessity. *Id.*

ESTATES:

Distribution, supreme court would not apply Ark. Code Ann. § 28-52-106 to bar appellant's objections to certificates of deposit. *Swaffar v. Swaffar*, 235
Probate court's application of erroneous standard of proof precluded review of ownership issue, matter remanded for development of facts of ownership. *Id.*
Appellant's failure to file objections to orders barred review of shop-rent issue. *Id.*

EVIDENCE:

Exception to exception provided in hearsay rule, when such a statement may be admissible. *Bradley v. State*, 6
Statements within "memory or belief" portion of A.R.E. Rule 803(3) admissible, admission of such an out-of-court statement discretionary with trial court when it is also proof of declarant's state of mind. *Id.*
Friend's testimony as to victim's statement about what appellant had told her admitted, no abuse of discretion found. *Id.*

- Review of trial court's determination granting defendant's motion to suppress, when trial court will be reversed. *State v. McFadden*, 16
- Sufficiency of, preservation of issue for appeal. *Dulaney v. State*, 30
- Inconsistencies in testimony do not cause proof to be insufficient as matter of law, testimony of one eyewitness is sufficient to sustain conviction. *Rawls v. State*, 34
- Eyewitness unequivocally identified appellant, evidence sufficient to sustain jury's verdict with respect to delivery conviction. *Id.*
- Accused placed own character in issue with testimony of witness, State properly allowed to offer other evidence of character. *Id.*
- Capital murder, state of mind is but one element of offense, causation of death must also be proved. *Webb v. State*, 51
- Trial court accorded wide discretion in rulings. *Id.*
- Relevant evidence defined, trial court's ruling on relevancy entitled to great weight. *Id.*
- Admission by party-opponent, appellant's statement offered by prosecution against appellant, not hearsay. *Id.*
- Expert testimony, when admissible. *Matthews v. State*, 70
- Expert testimony, no abuse of discretion in permitting witness to testify to legal standard for criminal insanity. *Id.*
- More required than just general motion for directed verdict, issue not adequately preserved for review. *Gray v. State*, 113
- Lay testimony may provide substantial evidence of controlled substance. *Springston v. State*, 90
- Substantial evidence supported juvenile adjudication for possession of marijuana. *Id.*
- No proffer made, no determination of prejudice possible. *Williams v. State*, 97
- Sufficiency of, factors on review. *Balentine v. Sparkman*, 180
- Admission of evidence discretionary, no abuse of discretion found. *Id.*
- Matter not collateral, trial judge's ruling excluding prior inconsistent statement was abuse of discretion. *Id.*
- Emergency-room statements cumulative, right decision made for wrong reason. *Id.*
- Challenge on appeal to ruling excluding evidence, excluded evidence must be proffered. *Duque v. Oshman's Sporting Goods—Servs., Inc.*, 224
- Offers to compromise, ARE Rule 408 is not blanket prohibition against admission. *Ozark Auto Transp., Inc v. Starkey*, 227
- Review of sufficiency of. *Allen v. State*, 350
- Trier of fact weighs evidence and passes on witness credibility. *Id.*
- Sufficient evidence supported appellant's guilty verdict on charge of receiving municipal services without paying public rate. *Id.*
- Sufficient evidence supported appellant's conviction on charges of adjusting bills of persons using water and sewer services. *Id.*
- Rape, uncorroborated testimony of rape victim sufficient to sustain conviction. *Drymon v. State*, 375
- Procedural claim never raised below, suggested evidentiary findings harmless, Committee fully met its burden of proof. *Mays v. Neal*, 302
- Trial court may impose reasonable limits on cross-examination, ruling will not be reversed absent abuse of discretion. *Newman v. State*, 339

- Proffered testimony marginally relevant at best, no abuse of discretion in trial court's imposing reasonable limits on cross-examination. *Id.*
- Admissibility of evidence left to trial court's sound discretion, purpose of establishing chain of custody discussed. *Id.*
- State established with reasonable probability that evidence had not been tampered with, admission of exhibits not abuse of discretion. *Id.*
- Appellant's contention not supported by authorities cited, trial court did not err in denying motion to suppress. *Id.*
- Challenge to sufficiency of evidence, evidence sufficient to submit issue to jury. *Bridges v. State*, 392
- Challenge to sufficiency of evidence insufficient, trial court's holding affirmed. *White v. Welsh*, 465
- Trial court properly denied motion to suppress, judgment of conviction affirmed. *Rhea v. State*, 518
- Evidence sufficient to give officer reasonable cause to believe appellant violated DWI laws, evidence put appellant in constructive possession of whiskey. *Wright v. State*, 558
- State's witness rebutted appellant's direct testimony, trial court properly overruled appellant's objection to testimony. *Wright v. State*, 558
- Photographs, admission and relevancy within trial court's discretion. *Camargo v. State*, 631
- Photographs, when admissible. *Id.*
- Photographs, pictures helped jury understand testimony, trial court did not abuse discretion in admitting. *Camargo v. State*, 631
- Photographs, trial court did not abuse discretion in admitting autopsy pictures. *Id.*
- Sufficiency of, factors on review. *Hicks v. State*, 652
- Substantial evidence existed to support convictions, jury's determination on witness credibility will not be disturbed. *Id.*
- Admission of paraphernalia prejudicial to possession of paraphernalia charge, no connection established between appellant and items admitted. *Hicks v. State*, 652
- Erroneous admission of evidence harmless error as to other convictions, abundant evidence supported convictions on other charges. *Id.*
- Affidavits containing new evidence were merely sufficient for impeachment, trial judges refusal to grant new trial not abuse of discretion. *Hicks v. State*, 652
- State's duty to preserve evidence, without bad faith failure to preserve potentially useful evidence does not constitute denial of due process. *Lee v. State*, 692
- Bare contention of bad faith not enough, due process claim properly rejected by trial court. *Id.*
- State entitled to produce evidence showing a motive for killing, testimony that appellant was on his way to purchase drugs shortly after murder properly allowed. *Id.*
- Victim-impact evidence considered by jury at same time it considers mitigating evidence introduced by defendant, jury need not be instructed on how to weigh any particular fact in capital-sentencing decision. *Id.*
- Victim-impact evidence properly admitted, sister's testimony not so unduly prejudicial as to render trial fundamentally unfair. *Id.*
- Proof undisputed that appellant previously was convicted of and had committed rape, appellant failed to show that he was prejudiced by absence of *in camera* hearing. *Id.*

Victim-impact testimony, videotapes not rendered inadmissible merely because they are cumulative. *Hicks v. State*, 727

What may be offered as legitimate victim-impact testimony, State has legitimate interest in counteracting mitigating evidence presented by defendant. *Id.*

Admissibility of purported cumulative and prejudicial photos, where trial court has exercised sound discretion the supreme court will not reverse. *Id.*

Trial court carefully reviewed and closely monitored victim-impact tape, trial court's decision admitting tape affirmed. *Id.*

Argument that rules of evidence supersede requirements of UCC without merit, appellee failed to either produce original of note or satisfy requirements for lost negotiable instrument. *McKay v. Capital Resources Co., Ltd.*, 737

EXECUTORS & ADMINISTRATORS:

Administrator can recover money judgment after death of one entitled to that judgment, Ark. Code Ann. § 16-65-502 (1987) supports such recovery. *Darr v. Bankston*, 723

Appellant was entitled to take action to enforce estate's entitlement to any existing accrued child-support payment, case reversed and remanded. *Id.*

FRAUD:

Five elements of, proof required by preponderance of evidence. *Calandro v. Parkerson*, 131

Privity of contract not required to have cause of action against attorney for fraud, individual appellants could bring claim. *Id.*

GIFTS:

Inter vivos, promissory note may be subject. *Chalmers v. Chalmers*, 141

Inter vivos, requirements. *Id.*

Delivery, family transactions. *Id.*

Inter vivos, acceptance by donee required. *Id.*

Delivery, requirements. *Id.*

Delivery, placing of item in lockbox not sufficient. *Id.*

Delivery, indorsement and declaration supported chancellor's decision that present gift was intended and delivery requirement was satisfied. *Id.*

inter vivos, burden of proof. *Swaffar v. Swaffar*, 235

inter vivos, elements of. *Id.*

inter vivos, appellee's burden to prove that certificate of deposit was gift to him, matter reversed and remanded for further consideration. *Id.*

GUARDIAN & WARD:

Probate court correctly found that appellant attorney was neither guardian nor party. *Reynolds v. Guardianship of Sears*, 770

HABEAS CORPUS

When writ will issue. *Sawyer v. State*, 421

Court's interpretation of legislation clear, interpretation stands until law is changed. *Id.*

INSURANCE:

- Interpretation of policies, when resort to rules of construction necessary. *Smith v. Shelter Mut. Ins. Co.*, 208
- Proof of future financial responsibility not in issue, statute relied upon by appellant irrelevant. *Id.*
- Compulsory insurance law not intended to affect validity of policy exclusions, appellant's argument rejected. *Id.*
- Cancellation notice, purpose of. *Grubbs v. Credit Gen. Ins. Co.*, 479
- Cancellation notice, ten days' prior notice construed to mean ten full days of notice. *Id.*
- Cancellation notice, plain language fixed by statute or policy must be strictly followed, notice was ineffective. *Id.*
- Cancellation notice, invalid effective date of cancellation voided cancellation, coverage remained in effect. *Id.*
- Insurance defined, three factors considered to determine whether particular agreement fits definition. *Cherry v. Tanda, Inc.*, 600
- Direct-action statute, necessary elements. *Cherry v. Tanda, Inc.*, 600
- Insurance contract not carried by immune city, first necessary element not met. *Id.*

INTEREST:

- Award of prejudgment interest, award not dependant on whether action is in tort or contract. *Woodline Motor Freight, Inc. v. Troutman Oil Co.*, 448
- Award of prejudgment interest, allowable where exact amount of damages is definitely ascertainable. *Id.*
- Appellee's damages could not be computed without reliance on opinion or discretion, trial court erred in awarding prejudgment interest. *Id.*
- Second appellee relied on subjective opinion regarding value of items damaged, amount due him was not liquidated as a dollar sum. *Id.*
- Trial court erred in awarding prejudgment interest, trial court reversed and remanded. *Id.*

JUDGMENT:

- Review of grant of summary judgment, factors on appeal. *Calandro v. Parkerson*, 131
- Prima facie entitlement to summary judgment established, opposing party must meet proof with proof. *Id.*
- Summary judgment on claim of deceit reversed, disputed facts remained to be solved. *Id.*
- Summary judgment, when granted. *Shackelford v. Patterson*, 172
- Summary judgment, material question of fact remained to be resolved, reversed and remanded. *Id.*
- Summary judgment entered in appellee's favor, no error found. *Smith v. Shelter Mut. Ins. Co.*, 208
- Summary judgment, standard of review. *Milam v. Bank of Cabot*, 256
- Summary judgment, standard of review. *Kelley v. National Union Fire Ins. Co.*, 329
- Summary judgment, slip-and-fall case, movant cannot shift burden to plaintiff to show genuine issue of material fact. *Id.*
- Summary judgment, appellant's testimony and sister's affidavit sufficient to raise material fact question concerning foreign substance. *Id.*

Summary judgment, plaintiff's recollection does not constitute offer of proof. *Id.*
 Summary judgment reversed, matter remanded. *Id.*
 Legal remedy exists for judgment obtained by fraud in probate court, chancellor lacked subject-matter jurisdiction to review probate court's actions. *Wilson v. Wilson*, 386
 Summary judgment, denial of motion for summary judgment neither reviewable nor appealable. *White v. Welsh*, 465
 Order styled Summary Judgment of Dismissal was in actuality judgment following bench trial, order was treated as such. *Honeycutt v. City of Fort Smith*, 530
 Summary judgment, when granted. *Pugh v. Griggs*, 577
 Summary judgment, standard of review. *Id.*
 Summary judgment, may be appropriate in legal malpractice suit. *Id.*
 Trial court's grant of summary judgment in favor of appellees was proper. *Panfugh v. Griggs*, 577

JURISDICTION:

Appellant cited no authority militating against remand for probable-cause hearing. *Williams v. State*, 97
 Motions for attorney's fees left within trial court's jurisdiction even though appeal has been docketed. *Jones v. Jones*, 195
 Supreme court retains jurisdiction to consider motion for attorney's fees even after mandate has been issued. 131 *Id.*
 Lawyers, Professional Conduct Committee has subject-matter jurisdiction to consider issues that fall within parameters of Model Rules of Professional Conduct. *Mays v. Neal*, 302
 Approval of settlement of damage claims against third party was within trial court's jurisdiction. *Vanderpool v. Fidelity & Cas. Ins. Co.*, 407
 Subject-matter jurisdiction, appellate court obligated to raise question. *Id.*
 Action in tort is action at law, jurisdiction properly before circuit court. *Id.*
 Trial court had subject-matter jurisdiction. *Id.*
 Even erroneous judgment by probate court that has not been reversed cannot be attacked collaterally, subject-matter jurisdiction of courts of equity. *Wilson v. Wilson*, 386
 Appellee sought to collaterally attack probate court's order, appellee should have sought relief in probate court. *Id.*
 Circuit courts vested with concurrent jurisdiction to hear illegal exaction cases. *Barker v. Frank*, 589
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ARKANSAS
APPELLATE
REPORTS

Volume 56

CASES DETERMINED
IN THE

Court of Appeals
of Arkansas

FROM
January 15, 1997 — March 19, 1997
INCLUSIVE

WILLIAM B. JONES, JR.
REPORTER OF DECISIONS

CINDY M. ENGLISH
ASSISTANT
REPORTER OF DECISIONS

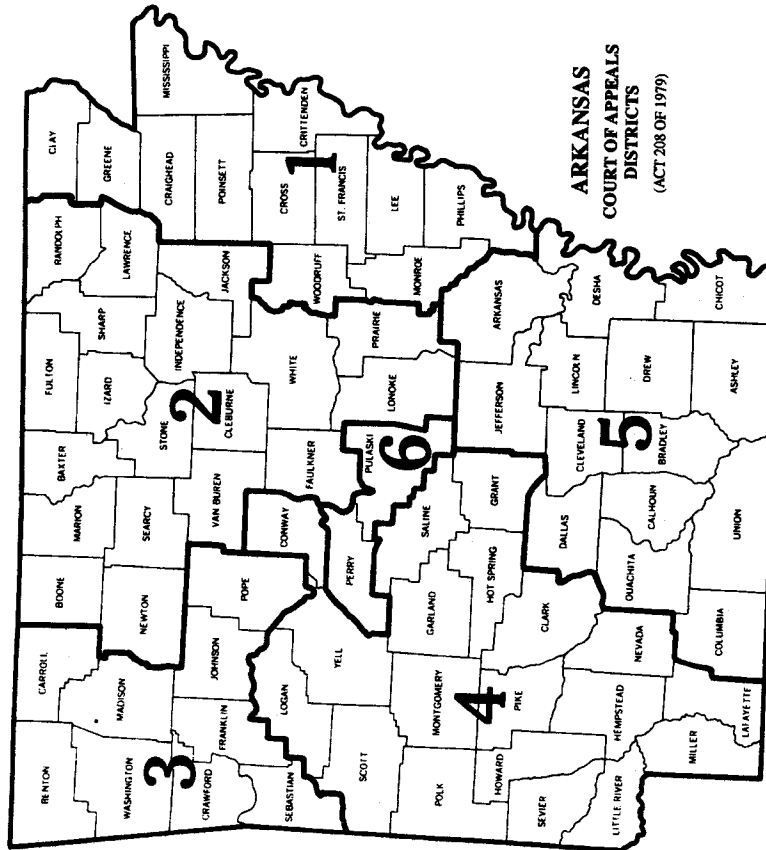
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JUDGES AND OFFICERS OF THE COURT OF APPEALS OF ARKANSAS

DURING THE PERIOD COVERED
BY THIS VOLUME
(January 15, 1997 —
March 19, 1997, inclusive)

JUDGES

JOHN B. ROBBINS	Chief Judge ¹
JOHN MAUZY PITTMAN	Judge ²
JAMES R. COOPER	Judge ³
JOHN E. JENNINGS	Judge ⁴
SAM BIRD	Judge ⁵
JUDITH ROGERS	Judge ⁶
JOHN F. STROUD, JR.	Judge ⁷
OLLY NEAL	Judge ⁸
WENDELL L. GRIFFEN	Judge ⁹
TERRY CRABTREE	Judge ¹⁰
MARGARET MEADS	Judge ¹¹
ANDREE LAYTON ROAF	Judge ¹²

OFFICERS

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

¹ District 4. Appointed Chief Judge, effective January 16, 1997, by Chief Justice W.H. "Dub" Arnold.

² District 1.

³ District 2.

⁴ District 3.

⁵ District 5.

⁶ District 6.

⁷ Position 7.

⁸ Position 8.

⁹ Position 9.

¹⁰ Position 10.

¹¹ Position 11.

¹² Position 12.

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PER CURIAM

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STANDARDS FOR PUBLICATION OF OPINIONS

Rule 5-2

Rules of the Arkansas Supreme Court and Court of Appeals

OPINIONS

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

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

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

(d) COURT OF APPEALS — UNPUBLISHED OPINIONS. Opinions of the Court of Appeals not designated for publication shall not be published in the *Arkansas Reports* and shall not be cited, quoted, or referred to by any court or in any argument,

brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case). Opinions not designated for publication shall be listed in the *Arkansas Reports* by case number, style, date, and disposition.

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

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- Akin *v.* State, CA CR 95-1298 (Stroud, J.), affirmed January 15, 1997.
- Allen *v.* State, CA CR 96-703 (Cooper, J.), affirmed February 26, 1997.
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- Brown *v.* State, CA CR 96-233 (Neal, J.), affirmed January 15, 1997.
- Burton *v.* State, CA CR 96-688 (Stroud, J.), affirmed February 19, 1997.
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- Chaffin *v.* Burns, CA 96-604 (Robbins, C.J.), affirmed March 19, 1997. Rehearing denied April 23, 1997.
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- Dunahue *v.* State, CA CR 96-386 (Per Curiam), Contempt Order issued February 5, 1997.
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- White *v.* State, CA CR 96-104 (Bird, J.), affirmed March 5, 1997.
- Wiginton *v.* City of Fort Smith, CA CR 96-505 (Cooper, J.), affirmed February 19, 1997. Rehearing denied March 26, 1997.
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COURT OF APPEALS WITHOUT WRITTEN
OPINION PURSUANT TO RULE 5-2(B),
RULES OF THE ARKANSAS SUPREME COURT
AND COURT OF APPEALS

- Adams *v.* Director of Labor, E 96-62, March 19, 1997.
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- Public Employee Workers' Compensation Act, appellee was "state employee" and therefore "public employee" entitled to compensation. *South Central Ark. Drug Task Force v. Ray*, 30
- Standard of review, Commission's determination that appellee qualified as state employee supported by substantial evidence. *Id.*
- Asbestosis claim, limitations exception inapplicable, case turned on failure to timely file claim. *Chambers v. International Paper Co.*, 90
- Asbestosis claim, limitations exception inapplicable, based on faulty premise contrary to findings of fact. *Id.*
- Standard of review. *Id.*
- Commission's finding that appellant knew or should have known of his condition supported by substantial evidence. *Id.*
- Commission's decision that asbestosis claim was barred by statute of limitations supported by substantial evidence. *Id.*

- Standard of review, substantial evidence defined. *Mikel v. Engineered Specialty Plastics*, 126
- Burden of proof, deference to Commission. *Id.*
- Accidental injury defined, must be proved by medical evidence supported by objective findings. *Id.*
- Appellant did not prove claim by preponderance of evidence. *Id.*
- Determining sufficiency of evidence, factors on review. *City of Blytheville v. McCormick*, 149
- Review of Commission's decision, function and duties of Commission. *Id.*
- Strict construction of workers' compensation law mandated. *Id.*
- Term "accident" construed, Commission did not err in finding that an accident was major cause of appellee's heart attack. *Id.*
- Work that precipitated appellee's heart attack was unusual and extraordinary, Commission's finding not in error. *Id.*
- Medical evidence sufficient to support finding that appellee's work incident was major cause of his heart attack, testimony upon which Commission based its decision substantial. *Id.*
- Public policy considerations not applied by appellate court in construction of relevant statutes, appellant not prejudiced. *Id.*

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