

THIS BOOK CONTAINS THE OFFICIAL  
ARKANSAS REPORTS

Volume 348

CASES DETERMINED  
IN THE

Supreme Court  
of Arkansas

FROM  
March 21, 2002 — May 17, 2002  
INCLUSIVE<sup>1</sup>

AND

ARKANSAS APPELLATE  
REPORTS

Volume 77

CASES DETERMINED  
IN THE

Court of Appeals  
of Arkansas

FROM  
March 20, 2002 — May 15, 2002  
INCLUSIVE<sup>2</sup>

PUBLISHED BY THE  
STATE OF ARKANSAS  
2002

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<sup>1</sup>Arkansas Supreme Court cases (ARKANSAS REPORTS) are in the front section, pages 1 through 790-B. Cite as 348 Ark. \_\_\_\_ (2002).

<sup>2</sup>Arkansas Court of Appeals cases (ARKANSAS APPELLATE REPORTS) are in the back section, pages 1 through 352. Cite as 77 Ark. App. \_\_\_\_ (2002).



*[T]he law can only bring us freedom.*

—JOHANN WOLFGANG VON GOETHE  
(1749-1832)

Set in Bembo

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LINCOLN, NEBRASKA 68521  
2002

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## PER CURIAM

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STANDARDS FOR PUBLICATION OF OPINIONS

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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 appeal 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 publications 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



ARKANSAS REPORTS  
VOLUME 348

ARKANSAS  
APPELLATE REPORTS  
VOLUME 77

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

— SAMUEL JOHNSON  
(1709-1784)

ARKANSAS  
REPORTS

Volume 348

CASES DETERMINED  
IN THE

Supreme Court  
of Arkansas

FROM  
March 21, 2002 — May 17, 2002  
INCLUSIVE

WILLIAM B. JONES, JR.  
REPORTER OF DECISIONS

CINDY M. ENGLISH  
DEPUTY  
REPORTER OF DECISIONS

VICTORIA M. FREY  
EDITORIAL ASSISTANT

PUBLISHED BY THE  
STATE OF ARKANSAS  
2002

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JUSTICES AND OFFICERS  
OF THE  
SUPREME COURT OF  
ARKANSAS

DURING THE PERIOD COVERED  
BY THIS VOLUME  
(March 21, 2002 — May 17, 2002 inclusive)

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JUSTICES

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

OFFICERS

MARK PRYOR	Attorney General
LESLIE W. STEEN	Clerk
AVA M. HICKS	Librarian ( <i>interim</i> )
WILLIAM B. JONES, JR.	Reporter of Decisions

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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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OPINIONS NOT DESIGNATED FOR PUBLICATION

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- Allen *v.* State, CR 01-547 (Per Curiam), affirmed April 11, 2002.
- Arnold *v.* State, CR 01-277 (Per Curiam), reversed and remanded April 11, 2002.
- Bell *v.* Jones, CR 98-1037 (Per Curiam), Pro Se Petition for Writ of Mandamus moot March 21, 2002.
- Berger *v.* Reynolds, CR 02-41 (Per Curiam), Pro Se Petition for Writ of Mandamus moot April 11, 2002.
- Brady *v.* State, CR 00-929 (Per Curiam), rebriefing ordered April 18, 2002.
- Brooks *v.* Glover, CR 02-367 (Per Curiam), Pro Se Petition for Writ of Mandamus moot May 9, 2002.
- Brothers *v.* State, CR 02-36 (Per Curiam), affirmed April 11, 2002.
- Buchheit *v.* State, 01-915 (Per Curiam), Petition for Rehearing denied April 18, 2002.
- Charton *v.* State, CR 02-60 (Per Curiam), Pro Se Motion for Extension of Time to File Brief granted April 25, 2002.
- Clay *v.* State, CR 01-469 (Per Curiam), affirmed May 9, 2002. Rehearing denied May 30, 2002.
- Douthitt *v.* State, CR 01-1 (Per Curiam), appeal dismissed April 11, 2002; Petition for rehearing denied May 9, 2002.
- Eckler *v.* State, CR 02-69 (Per Curiam), Pro Se Motion for Appointment of Counsel moot; appeal dismissed May 16, 2002.
- Edwards *v.* State, CR 01-1396 (Per Curiam), Pro Se Motion for Reconsideration of Motion for Belated Appeal of Judgment denied April 18, 2002.
- Emery *v.* State, CR 02-282 (Per Curiam), Pro Se Petition for Writ of Certiorari dismissed May 16, 2002.
- Faulkens *v.* State, CR 01-907 (Per Curiam), affirmed March 21, 2002.
- Ford *v.* State, CR 02-174 (Per Curiam), Pro Se Motions for Copy of Record and for Appointment of Counsel moot; appeal dismissed May 2, 2002.
- Fouse *v.* State, CR 01-1221 (Per Curiam), affirmed May 9, 2002.
- Gaines *v.* State, CR 02-101 (Per Curiam), Motion for Extension of Time to File Brief granted; Motion for Appointment of

- counsel denied; Motion for Leave to File Overlength Brief denied April 11, 2002.
- Gooden *v.* State, CR 00-845 (Per Curiam), Pro Se Motion to Compel Counsel to File Brief and for Sanctions stayed; show cause order issued March 21, 2002.
- Hall *v.* State, CR 01-917 (Per Curiam), Pro Se Motions to Relieve Counsel and Appoint Other Counsel and to Strike Brief denied; Motion for Extension of Time to File Pro Se Points for Reversal granted April 18, 2002.
- Harris *v.* State, 01-1270 (Per Curiam), affirmed May 9, 2002.
- Houston *v.* State, 01-1248 (Per Curiam), affirmed May 9, 2002.
- Hunt *v.* State, CR 01-1257 (Per Curiam), affirmed April 18, 2002.
- Johnson *v.* State, CR 02-152 (Per Curiam), Pro Se Motion for Belated Appeal of Order; treated as motion for rule on clerk and denied April 25, 2002.
- Koch *v.* State, CR 00-1189 (Per Curiam), Petition for Rehearing denied May 9, 2002.
- Lamere *v.* State, CR 02-155 (Per Curiam), Pro Se Petition for Writ of Certiorari to Complete the Record; treated as motion to supplement record with transcript lodged on direct appeal; granted in part and declared moot in part April 18, 2002.
- Marquez *v.* State, CR 01-1431 (Per Curiam), Pro Se Motion for Belated Appeal of Judgment remanded May 16, 2002.
- Medlock *v.* Holt, CR 02-379 (Per Curiam), Pro Se Motion for Rule on Clerk to File Mandamus Petition Without Record dismissed May 2, 2002.
- Page *v.* State, CR 02-204 (Per Curiam), Pro Se Motion for Belated Appeal of Judgment denied April 18, 2002.
- Pollard *v.* State, CR 02-56 (Per Curiam), Pro Se Motion for Extension of Time to File Appellant's Brief moot; appeal dismissed April 25, 2002.
- Presley *v.* State, CR 97-282 (Per Curiam), Pro Se Motion for Copy of Transcript at Public Expense denied March 21, 2002.
- Prince *v.* Norris, 01-894 (Per Curiam), Petition for Rehearing denied March 21, 2002.

- Ragsdale *v.* State, CR 01-1399 (Per Curiam), Pro Se Motion for Extension of Time to File Reply Brief granted May 2, 2002.
- Reeves *v.* State, CR 02-125 (Per Curiam), Pro Se Motion for Belated Appeal of Judgment granted May 16, 2002.
- Troub *v.* Patterson, CR 02-200 (Per Curiam), Pro Se Petition for Writ of Mandamus moot April 11, 2002.
- Troub *v.* State, CR 02-361 (Per Curiam), Pro Se Petition for Writ of Certiorari denied May 16, 2002.
- Vaughn *v.* State, CR 02-35 (Per Curiam), Pro Se Motion for Extension of Time to File Brief moot; appeal dismissed March 21, 2002.
- Washington *v.* State, CA CR 98-728 (Per Curiam), Pro Se Petition to Reinvest Jurisdiction in the Trial Court to Consider a Belated Petition for Postconviction Relief Pursuant to Criminal Procedure Rule 37 dismissed May 16, 2002.
- Wickliffe *v.* State, 01-1220 (Per Curiam), Pro Se Motion for Photocopy of Record at Public Expense denied May 2, 2002.
- Williams *v.* State, CR 02-113 (Per Curiam), Pro Se Motion for Belated Appeal of Order; treated as motion for rule on clerk and denied March 21, 2002.
- Worthern *v.* State, CR 01-1207 (Per Curiam), Petition for Rehearing denied April 11, 2002.

APPENDIX

Rules Adopted  
or Amended by  
Per Curiam Orders



IN RE: PROPOSED RULE for MASTERS and REFEREES  
PURSUANT to AMENDMENT 80, SECTION 8(A)

Supreme Court of Arkansas  
Opinion delivered March 21, 2002

**P**ER CURIAM. Section 8 (A) of Amendment 80 to the Arkansas Constitution states:

REFEREES, MASTERS AND MAGISTRATES. (A) A Circuit Court Judge may appoint referees or masters, who shall have power to perform such duties of the Circuit Court as may be prescribed by Supreme Court rule.

In response to this provision, the Supreme Court Committee on Criminal Practice has deliberated about the use of referees or masters in criminal proceedings and considered the adoption of possible rules to implement the procedures. The Committee has now recommended to the court a proposed rule, which appears at the end of this order.

We express our gratitude to the members of the Criminal Practice Committee for their work on this matter. We are publishing the Committee's proposal for comment from the bench and bar. Comments and suggestions may be made in writing and submitted no later than May 31, 2002, and be addressed to:

Leslie Steen, Arkansas Supreme Court Clerk  
Attn: Magistrate Rule  
Justice Building  
625 Marshall Street  
Little Rock, AR 72201

**RULE \_\_\_\_\_****APPOINTMENT AND AUTHORITY OF CRIMINAL  
MAGISTRATE**

(a) A Circuit Judge who hears criminal cases may appoint a referee or master, who shall be referred to as a Criminal Magistrate, and who shall perform any of the following duties as may be assigned by the appointing Court:

- (1) Conduct first appearance and probable cause hearings and pretrial release inquiries pursuant to ARCrP Rules 8.1, 8.3 — 8.6 and ARCrP Rules 9.1 — 9.5 including conditions of release and money bail;
- (2) Appoint counsel pursuant to ARCrP Rule 8.2, conduct arraignments and accept pleas of not guilty and not guilty by reason of mental disease or defect;
- (3) Issue warrants of arrest pursuant to ARCrP Rule 7.1 and ACA § 16-81-104 or summons pursuant to ARCrP Rule 6.1;
- (4) Issue search warrants pursuant to ARCrP Rule 13.1;
- (5) Conduct preliminary revocation hearings pursuant to ACA § 5-4-310;
- (6) Preside over execution of waivers of extradition pursuant to ACA § 16-94-103 and make the preliminary findings and set bail pursuant to ACA 16-94-216.

(b) The territorial jurisdiction of the Criminal Magistrate shall be coextensive with that of the appointing judge or judges, unless specifically limited by the order of appointment.

(c) A Criminal Magistrate shall possess the same qualifications as a Circuit Judge.

(d) A Criminal Magistrate appointed pursuant to this Rule shall not engage in the practice of criminal law in the judicial circuit in which he serves.

(e) Any party aggrieved by any decision of the Criminal Magistrate may apply for de novo relief to the Division of Circuit Court to which the case has been assigned, and if unassigned, to any division of Circuit Court.



(f) The appointment shall be in writing and filed with the Circuit Clerk. All findings and orders of the Criminal Magistrate shall be in writing and filed with the clerk of the appropriate court.

**Comments:** The committee chose not to address the issue of the term of the appointment. It was anticipated by the committee that the magistrate would schedule trial dates at the arraignment proceedings.

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IN RE: REGULATIONS of the BOARD of CERTIFIED  
COURT REPORTER EXAMINERS, Section 13

Supreme Court of Arkansas  
Opinion delivered April 18, 2002

**P**ER CURIAM. The Board of Certified Court Reporter Examiners has recommended an amendment to Section 13 of the Regulations. We have considered the Board's proposal and agree with it. We thank the Board for its work.

We hereby amend, effective immediately, and republish Section 13 of the Regulations of the Board of Certified Court Reporter Examiners as set out below. The changes made to Section 13 are illustrated in the footnote.<sup>1</sup>

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<sup>1</sup> *(Added language has been underlined; deleted language has been stricken)*

Section 13. In the event of an emergency where no Certified Court Reporter is immediately available, a judge of a circuit ~~or chancery~~ court may, in his ~~or her~~ discretion, grant a one hundred twenty calendar day, non-renewable emergency certificate in order to continue the conduct of the court's business; provided a copy of the one hundred twenty day emergency certificate shall be forthwith filed with the Clerk of the Arkansas Supreme Court and Secretary of this Board. A circuit judge shall not grant an emergency certificate to a court reporter whose court reporter board certification is at the time of the issuance of the emergency certificate revoked or suspended in Arkansas or any other state.

**REGULATIONS OF THE BOARD OF CERTIFIED  
COURT REPORTER EXAMINERS**

\* \* \*

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IN RE: ARKANSAS RULES GOVERNING ADMISSION  
to the BAR of ARKANSAS

Supreme Court of Arkansas  
Delivered April 25, 2002

**P**ER CURIAM. On November 30, 2000, this Court adopted broad changes to the Arkansas Bar Examination, effective with the July 2002 examination. In that per curiam order, we noted that subsequent per curiam orders would issue to implement those changes.

On February 1, 2001, we issued a per curiam order providing for scaling of the Arkansas essay questions to the Multistate Bar Examination (MBE).

On May 10, 2001, we issued another per curiam order to incorporate the increased passing standard set on the Multistate Professional Responsibility Examination (MPRE).

We now issue this order to finalize the implementation process. The issues before the Court are twofold: what "weight" to be given the MBE; and what "value" to be given each of the two Multistate Performance Test (MPT) questions.

The Board, in its consideration of these issues, had access to many sources of information. The policies of 22 other jurisdictions which have adopted the MPT were reviewed. The Board sought and received comment from a consultant retained by the Board early in this process. Further comment was sought and received from consultants in the employ of the National Conference of Bar Examiners (NCBE). Additionally, the Board sought and received comment from the Deans of the Arkansas law schools, as well as representatives of the law students. The Board recommends as follows:

- (1) The MBE should continue to be "weighted" as one-third of the overall final score.
- (2) Each MPT question should be "valued" as 1.5 times an essay question.

We accept the Board's recommendations and amend and adopt Section A of Rule IX and Regulations 1 through 7 as they appear on the attachment to this order. The changes are effective with scores used for the July 2002 examination.

\* \* \*

## **Rule IX. Examination — Subjects — Passing Grade**

### **A. General Examination**

All examinations shall be in writing and shall cover the subjects hereinafter listed and such other subjects as the Board may direct, subject to prior Court approval.

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**Business Organizations**

This subject heading may include corporations, partnerships, agency and master-servant relationships.

**Commercial Transactions**

This subject heading may include the general coverage of the U.C.C. This will not include the general subject of contracts and will not include matters relating to warranties under product liability, both of which may be covered under other headings.

**Criminal Law and Procedure**

This subject heading may include constitutional law as it applies to criminal law and procedure.

**Constitutional Law**

This subject heading may include both the Arkansas Constitution and the Constitution of the United States. This subject will not be primarily directed to matters relating to criminal law and procedure.

**Torts**

This subject heading may include the entire field of Tort law and questions concerning product liability.

**Property**

This subject heading may include the law of real property and, or, personal property. Emphasis here should not be placed on the U.C.C. and other such questions arising primarily under the subject heading "Commercial Transactions."

**Wills, Estates, Trusts**

Because of the broad scope of this subject heading, questions concerning taxation shall not be covered. Guardianship of both the person and the estate may be included.

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**Evidence****Practice and Procedure**

This subject heading may include both state and federal trial and appellate practice and, where applicable, remedies and choice of forum.

**Equity and Domestic Relations****Contracts**

This subject heading should place emphasis upon the traditional basics of contract law. Only where duplication cannot be avoided, should matters such as the application of the Uniform Commercial Code be covered under this heading.

**Multistate Performance Test**

The Multistate Performance Test (MPT) presents problems which arise in a variety of fields of law which include the subject area as set forth in the preceding paragraphs as well as other fields of law. However, materials provided with the examination provide sufficient substantive information to complete the task set forth in each MPT question.

NOTE: Conflict of Laws is not included as a separate subject on the examination. However, conflict questions may arise in the subjects included on the examination and should be recognized as such.

**Pass/Fail Determination**

The answers to each essay question and each MPT question will be graded on a scale ranging from 65 to 85. This score shall be designated as the applicant's "raw" score on a question. The raw score on each MPT question will be multiplied by 1.5. The resulting products from the MPT questions will be added to the sum of the raw scores from the essay questions to yield a "total written raw" score.

The distribution of the total written raw scores acquired by applicants on a given examination will be converted to a score distribu-

tion that has the same mean and standard deviation as those same applicants' Multistate Bar Examination scale scores on that examination. The score on this converted scale that corresponds to the applicant's total written raw score shall be designated as the applicant's "written scale" score. An applicant's total examination score shall be determined by the following formula:

$$\text{Total Score} = (\text{written scale score} \times 2) + \text{MBE scale score}$$

An applicant shall pass the examination if he or she earns a total score of 405 points or higher.

A bar examination applicant may retain: the applicant's written scale score that corresponds to a total written raw score of 825 or more; or, the applicant's Multistate Bar Examination scale score of 135 or more. The retained score may be used in the immediately succeeding examination only. An applicant may transfer from another jurisdiction a Multistate Bar Examination scale score of 135 or more for use in the immediately succeeding examination only.

The Board shall destroy all examination papers, including questions and answers, at the time of the next succeeding bar examination. However, the original copy of each question shall be maintained in accordance with Rule III.

#### **Appendix — Rules Governing Admission to the Bar Regulations**

1. Subsequent to an examination, an applicant may not have access to copies of his or her answers.
2. A passing score under this rule shall remain valid for a period of one (1) year after its determination, or a final vote of the Board on admissibility of the applicant, whichever is earlier, subject to the following exceptions:
  - (a) In the event of Board denial of initial admission, followed by an appeal to the Arkansas Supreme Court pursuant to Rule XIII of these rules, or other litigation challenging such denial, the examination score shall remain valid until the conclusion of the appeal or litigation; or,

- (b) In the event the applicant opts to participate in the deferral of initial admission program as set forth in Rule XIII of these rules, then the examination score shall remain valid until final Board determination of admissibility, or administrative termination, whichever is earlier; and,
  - (c) Periods of delay attributable to actions of the Board or its Executive Secretary shall be excluded from the calculation of the aforementioned one year period.
3. The application required by this rule shall be in the office of the Secretary of the State Board of Law Examiners no later than 5:00 p.m. on the date that is determined by the provisions of Rule X.
4. Telefacsimile copies of documents required by the Board of Law Examiners in connection with the application for initial admission or reinstatement shall not be accepted.
5. In those instances where the Chair of the Board determines that an evidentiary hearing is required, and a bond is requested by the Executive Secretary, pauper status is not available to the applicant.
6. Pursuant to the section of this rule titled "Board Decision — Evidentiary Hearing — Appeal After Denial" only those votes conveyed to the Executive Secretary within thirty (30) days after receipt of the transcript by the respective Board members shall be counted. In the event of abstention by a Board member prior to a vote on the transcript, the Court shall appoint a substitute examiner to review the record de novo.
7. Miscellaneous Fee Schedule  
Application packet fee \$25.00  
MBE transfer fee 25.00  
Copies — per page .25

The miscellaneous fees set forth above are in addition to any other fees or expenses the applicant may be required to submit in connection with his or her application.





Appointments to  
Committees



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

Supreme Court of Arkansas  
Delivered March 21, 2002

**P**ER CURIAM. The Hon. John Langston, Circuit Judge of the Sixth Judicial Circuit, the Hon. Larry Jegley, Prosecuting Attorney of the Sixth Judicial District, Charles Baker, Esq., of Alma, and Brenda Stallings, Esq., of Little Rock are hereby appointed to our Committee on Model Jury Instructions—Criminal for three-year terms to expire on February 28, 2005. Scott Hickam, Esq., of Hot Springs is reappointed to the Committee for a three-year term to expire on February 28, 2005. Judge John Cole is designated the Chair of the Committee. Additionally, we are designating Professor Scott Stafford of the University of Arkansas Law School at Little Rock as the Reporter for the Committee.

The Court thanks Judge Langston, Mr. Jegley, Mr. Baker, and Ms. Stallings for accepting appointment to this important Committee and Mr. Hickam for accepting reappointment.

The Court expresses its gratitude to Dale Adams, Larry Carpenter, Lea Ellen Fowler, and Leslie Middleton, whose terms have expired, for their years of service on the Committee.

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IN RE: CLIENT SECURITY FUND COMMITTEE

Supreme Court of Arkansas  
Opinion delivered April 18, 2002

**P**ER CURIAM. The Court is informed that Othello C. Cross has tendered his resignation from the Client Security Fund Committee effective April 18, 2002.

We hereby appoint Ernest E. Brown, Jr., to replace Mr. Cross effective April 18, 2002. Mr. Brown will serve the remainder of Mr. Cross's term, which concludes July 31, 2002.

The Court thanks Mr. Brown for accepting this appointment.

The Court wishes to express its gratitude to Mr. Cross for his faithful service to this Court.

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IN RE: APPOINTMENTS to the SUPREME COURT  
COMMITTEE on MODEL JURY INSTRUCTIONS—CIVIL

Supreme Court of Arkansas  
Delivered April 25, 2002

**P**ER CURIAM. Jennifer Haltom Doan, Esq., of Texarkana, is hereby appointed to the Supreme Court Committee on Model Jury Instructions—Civil for a three-year term to expire on April 30, 2005. The Honorable Kim Smith, Circuit Judge of Fayetteville, Donis Hamilton, Esq., of Paragould, and Paul Rainwater, Esq., of Crossett, are hereby reappointed to the Committee for three-year terms to expire on April 30, 2005.

The Court extends its thanks to Ms. Doan for accepting appointment and to Judge Smith and Messrs. Hamilton and Rainwater for accepting reappointment to this most important Committee.

The Court expresses its appreciation to United States Magistrate Tom Ray, whose term has expired, for his service to this Committee.

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IN RE: COMMITTEE on the UNAUTHORIZED  
PRACTICE of LAW

Supreme Court of Arkansas  
Delivered April 25, 2002

**P**ER CURIAM. Jim Coutts, Esq., of Russellville, Third Congressional District, and Ms. Catherine Conlin Duvall of Lewisville, At-Large Position, are hereby reappointed to the Supreme Court Committee on the Unauthorized Practice of Law for three-year terms to expire on May 31, 2005.

The Court expresses thanks to Mr. Coutts and Ms. Duvall for accepting reappointment to this important Committee.

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IN RE: STATE BOARD of LAW EXAMINERS

Supreme Court of Arkansas  
Delivered May 9, 2002

**P**ER CURIAM. Jim Van Dover of Little Rock is appointed to the Board of Law Examiners for the purpose of grading the July, 2002 Bar Examination. Mr. Van Dover replaces Eugene Hunt of Pine Bluff.

The Court thanks Mr. Van Dover for accepting appointment to this Board for the purpose of grading this examination.



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Whether or not to move for severance matter of trial strategy, matters of trial strategy & tactics are not grounds for finding of ineffective assistance of counsel. *Id.*  
Ark. R. App. P.—Civ. 11, attorney's pleadings, motion, & argument constituted clear violation. *White v. Priest*, 783  
Attorney's disrespectful language toward court, attorney's refusal to recognize & adhere to precedent. *Id.*  
Inexcusable breach of obligation of professional conduct, order entered striking brief. *Id.*  
Professional conduct, matter referred to Committee. *Id.*

## CIVIL PROCEDURE:

Common-defense doctrine, provisions of. *Davenport v. Lee*, 148  
Common-defense doctrine, test for determining applicability. *Id.*  
Common-defense doctrine, applicable with respect to appellees' right to assert defense of limitations. *Id.*  
Nonexistent complaint, cannot be corrected. *Id.*  
Amendment to pleadings, trial court's discretion in allowing or denying. *Id.*  
Amended complaint, trial court did not abuse discretion in striking. *Id.*  
Relation-back doctrine, when applicable. *St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County*, 197  
Ark. R. Civ. P. 15, when applicable. *Id.*  
Rule inapplicable here, trial court's reliance misplaced. *Id.*

Ark. R. Civ. P. 15(c), purpose. *Id.*  
Who may bring cause of action, real party in interest discussed. *Id.*  
John Doe defendants were never identified, served, or made parties to action, appellee was under no obligation to file nonsuit requesting voluntary dismissal pursuant to Ark. R. Civ. P. 41(a). *D'Arbonne Constr. Co. v. Foster*, 375  
Nonsuit, absolute right. *White v. Perry*, 675  
Nonsuit, when absolute right & when discretionary. *Id.*  
Nonsuit, court order. *Id.*  
Nonsuit, trial court erred in not granting appellant's motion for nonsuit without prejudice. *Id.*  
Nonsuit, entry of order granting before submission of case not subject to analysis based on affirmative defense included in defendant's motion. *Id.*  
Nonsuit, defense of *res judicata* could not thwart appellant's absolute right. *Id.*  
Nonsuit, protections under rules of civil procedure to curb abuse. *Id.*  
Ark. R. Civ. P. 11, proper vehicle for correcting multiple-filings abuse. *Id.*  
Nonsuit, order dismissing complaint reversed & remanded with directions to enter order granting nonsuit. *Id.*  
Motion for judgment notwithstanding verdict, can be made only upon grounds raised during trial. *Wal-Mart Stores, Inc. v. Lee*, 707

#### CONFLICTS OF LAW:

Forum law traditionally governs statutes of limitations, exception to rule. *Gomez v. ITT Educ. Servs., Inc.*, 69  
Foreign statutes of limitations barring right, action will not be entertained in another state if it is barred in state of otherwise applicable law by statute of limitations that bars right & not merely remedy. *Id.*  
Texas's wrongful-death statute of limitations barred right & not merely remedy, trial court did not err in determining that Texas law should apply to bar appellant's action. *Id.*  
Choice-of-law, five choice-influencing considerations. *Id.*  
Choice-influencing approach adopted, cases applying *lex loci delicti* rule not overruled. *Id.*  
Five considerations tie in with common law, common law on choice of law continues to serve its precedential function. *Id.*  
Application of first factor, appellant family clearly engaged in forum shopping even though issue of predictability of results was not necessarily of paramount concern. *Id.*  
Application of second factor, consideration further militated in favor of applying Texas law. *Id.*  
Application of third factor, application of Texas law was outcome-determinative & easy to apply. *Id.*  
Application of fourth factor, Arkansas had few, if any, governmental interests. *Id.*  
Application of fifth consideration, Arkansas did not have sufficient relationship to parties or to injury that would cause final consideration to be controlling factor. *Id.*  
Trial court correctly applied Texas law, grant of summary judgment affirmed. *Id.*  
Right to confrontation, two types of protection provided. *Ridling v. State*, 213  
Right to confrontation not violated, appellant's voluntary absence from hearing did not result in prejudice. *Id.*  
Due Process Clause, substantive component. *Linder v. Linder*, 322



Substantive component of Due Process Clause, liberty right of parent to have & raise children. *Id.*

U.S. Supreme Court's approach to governmental intrusions on parent-child relationship, liberty right of parent to have & raise children long recognized. *Id.*

Liberty right of parent over children, fit parent presumed to be acting in child's best interests. *Id.*

Parental "fitness" determination, little guidance offered as to scope. *Id.*

Statute in *Troxel* did not require court to accord parent's decision any presumption of validity, court's order was not founded on any special factors that might have justified State's interference with parent's fundamental right to make decisions concerning child rearing. *Id.*

Impingement on parent's fundamental liberty right to raise children requires heightened review, parental unfitness is one "special factor" that might warrant state interference. *Id.*

Statute infringed on parent's fundamental right to make child-rearing decisions, *Troxel* statute held unconstitutional. *Id.*

Fourteenth Amendment, appellant had fundamental right to prohibit state intrusion on her parenting of child. *Id.*

Examining constitutionality of state's intrusion upon right to parent, level of scrutiny to be applied. *Id.*

Assessment of intrusions on other fundamental rights, strict-scrutiny standard used by U.S. Supreme Court. *Id.*

Only fundamental right at issue is parent's right to raise her child, strict-scrutiny standard applicable. *Id.*

State had no compelling interest in judicially interfering with appellant's fundamental parenting rights, statute unconstitutional as applied. *Id.*

Unfitness solely to decide visitation matters does not equate to unfitness to parent, state could not interfere without compelling interest. *Id.*

Appellees' contention without merit, cutting off some or all grandparental visitation was not critical point on which *Troxel* decision turned. *Id.*

Supreme court disagreed with appellees' conclusion, case relied upon did not find GPVA to be constitutional. *Id.*

#### CONSTITUTIONAL LAW:

Double jeopardy, jeopardy attaches in adjudicatory proceeding in juvenile court. *Bailey v. State*, 524

Construction of provisions, plain meaning. *Brewer v. Fergus*, 577

Construction of provisions, standard of review. *Id.*

Interpretation of constitutional amendment, look to how existing law changed. *Id.*

Amendment 29, purpose. *Id.*

Construction, rules apply to interpretation of constitutional amendments. *Id.*

Construction of amendment, legislative interpretation considered only when doubt exists. *Id.*

Amendment 29, office of circuit judge refers to single elective office. *Id.*

Sentence in issue clear & easily understood, neither appellee succeeding himself in position to which he was appointed. *Id.*

Person appointed to fill vacancy in one division of judicial circuit who subsequently runs for office in different division of same circuit, does not succeed himself in violation of Amendment 29, § 2. *Id.*

Waiver of rights, when trial court's finding as to voluntariness reversed. *Jenkins v. State*, 686

Validity of waiver, first component. *Id.*

Validity of waiver, second component. *Id.*

Waiver of rights, intoxication reflects on credibility of statement. *Id.*

Trial court's determination not clearly erroneous, waiver knowingly & intelligently made. *Id.*

Victim-impact statute previously declared constitutional, declaration stands. *Kemp v. State*, 750

Utilization of victim-impact evidence in sentencing phases of appellant's first two trials was not so unduly prejudicial that it rendered trial fundamentally unfair in violation of due process clause, previous holding stands. *Id.*

Taxation, *ad valorem* tax to repay capital improvement bonds authorized by Amendment 62. *Williams v. City of Fayetteville*, 768

Amendment 62, purpose was to authorize municipalities to issue bonds upon approval of voters. *Id.*

#### CONTEMPT:

Master appointed. *Gooden v. State*, 302

Show-cause order issued. *Grady v. State*, 455

#### CONTRACTS:

Parties to contract, substantial evidence supported appellant Board's decision that contract was between appellee's company & municipal court. *Arkansas Prof'l Bail Bondsman Lic. Bd. v. Oudin*, 48

Independent contractors, exemption from prohibition of bail bondsmen & bail bond companies from engaging in employment with courts of law would defeat purpose of regulation. *Id.*

Formation, essential elements. *Cash in a Flash v. Spencer*, 459

Mutuality of obligation, neither party is bound unless both are bound. *Id.*

Mutuality of obligation, real liability must be imposed upon both parties. *Id.*

Mutuality of obligation, nonexistent where one party uses arbitration agreement to shield itself from litigation. *Id.*

#### COURTS:

Precedent, Attorney General opinions not binding. *Arkansas Prof'l Bail Bondsman Lic. Bd. v. Oudin*, 48

Conflicting appellate precedents, inconsistencies must be resolved in favor of supreme court. *Box v. State*, 116

Jurisdiction, out-of-state court had authority to decide issue presented to it. *Three Sisters Petroleum, Inc. v. Langley*, 167

Jurisdiction, immaterial that *res* of controversy is beyond territorial jurisdiction where necessary parties are before court. *Id.*

Judicial comity, principle stated. *Id.*

Judicial comity, power to enjoin foreign suits to be used sparingly. *Id.*

Judicial comity, when restraint should be imposed in foreign suits. *Id.*  
Subject-matter jurisdiction, duty of court to determine. *Farm Bureau Mut. Ins. Co. v. Running M Farms, Inc.*, 313  
Subject-matter jurisdiction, parties to action cannot confer upon appellate court. *Id.*  
Overruling common law, test. *Magby v. State*, 415  
Overruling common law, procedural change. *Id.*  
Abuse of discretion, manifested by erroneous interpretation of law. *Howard v. State*, 471  
Jurisdiction, issue of circuit court's loss of jurisdiction to modify sentence can be raised by supreme court. *Bailey v. State*, 524  
Jurisdiction, sentence void where trial court lacks authority to impose it. *Id.*  
Jurisdiction, trial court lacked authority to commit appellant to juvenile detention facility & later make any disposition it could have imposed at time appellant was placed on probation. *Id.*  
Jurisdiction, matter reversed & dismissed where trial court was without jurisdiction to enter amended order revoking appellant's probation. *Id.*

## CRIMINAL LAW:

Second-degree murder, conviction reversed & matter remanded. *Flores v. State*, 28  
Intent, can be inferred. *Harshaw v. State*, 62  
"Knowingly," jury could infer that appellant knowingly killed victim with extreme indifference to value of human life. *Id.*  
Second-degree murder, supreme court declined to overturn conviction & sentence. *Id.*  
Bifurcated trial procedure, jury fixes punishment. *Rodgers v. State*, 106  
Sentencing, trial judge must exercise judgment. *Id.*  
Trial judge customarily imposed sentence recommended by jury without exercising his discretion, reversed & remanded for resentencing. *Id.*  
*Corpus delicti* rule, what State must prove. *Ware v. State*, 181  
*Corpus delicti* rule, fact & cause of death may be shown by strong & unequivocal circumstantial evidence. *Id.*  
*Corpus delicti* rule, weight & sufficiency of proof left to jury. *Id.*  
*Corpus delicti* rule, circumstantial evidence that both victims died as result of criminal act of another. *Id.*  
*Corpus delicti* rule, circumstantial evidence of fact of older child's death & appellant's responsibility for it. *Id.*  
*Corpus delicti* rule, appellant's combined actions could be considered by jury as corroborative of guilt. *Id.*  
Proof of guilt, defendant's improbable explanations of suspicious circumstances may be admissible. *Id.*  
Competency to stand trial, presumption. *Id.*  
Competency to stand trial, test for determining. *Id.*  
Competency to stand trial, trial court did not err in finding appellant competent. *Id.*  
Rape-shield statute, broadened to exclude certain kinds of evidence. *Ridling v. State*, 213  
Testimony of accomplice, must be corroborated by other evidence. *McGehee v. State*, 395  
Accomplice status, mixed question of law & fact. *Id.*  
Accomplice liability, test. *Id.*  
Accomplice liability, relevant factors. *Id.*  
Accomplice liability, issue should have been submitted to jury had counsel requested. *Id.*

- Accomplice testimony, test for corroborating evidence. *Id.*  
Accomplice testimony, corroborative evidence must be substantial evidence. *Id.*  
Accomplice testimony, corroboration can be provided by acts, declarations, or testimony of accused. *Id.*  
Accomplice testimony, proof of ill will & threats sufficient to corroborate. *Id.*  
Death penalty, issue is arbitrariness rather than proportionality. *Id.*  
Purposeful mental state, jury permitted to consider evidence of cover-up. *Burley v. State*, 422  
"Knowingly," defined. *Id.*  
Second-degree murder, evidence sufficient to support judgment. *Id.*  
Possession of contraband, constructive possession. *Polk v. State*, 446  
Constructive possession, how established. *Id.*  
Single occupant of borrowed car subject to general inquiry for constructive possession, no inquiry into elements of joint occupancy needed. *Id.*  
Possession of contraband, factors indicative of possession. *Id.*  
Firearms, recognized tool of drug dealer's trade. *Id.*  
Allegations of void or illegal sentences, reviewed whether or not objection made at trial. *Bailey v. State*, 524  
Rape, uncorroborated testimony of victim sufficient to sustain conviction. *Jones v. State*, 619  
Crime of rape within marriage, recognized in Arkansas. *Id.*  
Rape-shield statute, purpose of. *Id.*  
Admission of evidence of victim's prior sexual conduct, prohibited by rape-shield statute. *Id.*  
Admission of evidence to establish consent, prior acts of sexual conduct alone are not relevant. *Id.*  
Rape-shield statute, conditions for admissibility of victim's prior sexual conduct. *Id.*  
Rape-shield statute, trial court vested with great discretion. *Id.*  
Evidence of victim's previous sexual acts found relevant to issue of consent, trial court's ruling not abuse of discretion. *Id.*  
Manufacture of controlled substance, sufficiency argument without merit where personal-use exception did not apply. *Stone v. State*, 661  
Accomplice testimony, burden of proof. *Jenkins v. State*, 686  
*Corpus delicti* rule, proof required. *Id.*  
Sufficient other proof existed that murder occurred, mandate of *corpus delicti* rule complied with. *Id.*  
Intent or state of mind usually inferred, factors from which intent may be inferred. *Id.*  
Circumstances of death clear, evidence sufficient from which jury could have to inferred premeditated & deliberate intent. *Id.*  
Deadly physical force, when justified as self-defense. *Kemp v. State*, 750

**CRIMINAL PROCEDURE:**

- Request to accompany police, steps required. *Shields v. State*, 7  
Ark. R. Crim. P. 2.3, verbal warning of freedom to leave no longer required. *Id.*  
Whether consent to accompany officer is voluntary is determined by totality of circumstances, when person is "seized" within meaning of Fourth Amendment. *Id.*  
Vehicular stop, no error by officer in making. *Hoay v. State*, 80

- Order denying suppression reversed, matter remanded for second suppression hearing. *Id.*
- Custodial statement, presumptively involuntary. *Whitaker v. State*, 90
- Right to remain silent, must be scrupulously honored. *Id.*
- Right to remain silent, defendant may waive. *Id.*
- Right to remain silent, accused must be unambiguous & unequivocal when invoking *Miranda* right. *Id.*
- Right to remain silent, clearly articulated by appellant. *Id.*
- Right to remain silent, interrogating officer must cease questioning after right invoked. *Id.*
- Trial court clearly erred in refusing to suppress custodial statement, reversed & remanded. *Id.*
- Defendant tried in prison garb, not permissible absent waiver. *Box v. State*, 116
- Defendant tried in prison garb, right to fair trial placed in serious jeopardy. *Id.*
- Defendant tried in prison garb, issue preserved for review. *Id.*
- Treatment of defendant, appearance of free & innocent man. *Id.*
- Defendant tried in prison garb, prejudice attached when potential jurors saw appellant before pretrial proceedings began. *Id.*
- Waiver of rights, State's burden to establish. *Id.*
- Waiver of rights, appellant did not waive right to appear in civilian clothing. *Id.*
- Defendant tried in prison garb, fundamental constitutional right should not be sacrificed for sake of expediency. *Id.*
- Defendant tried in prison garb, matter reversed & remanded for new trial where trial court erred in finding appellant had waived right to be tried in civilian clothing. *Id.*
- Accused absent when significant step taken in his trial, reversal required. *Ridling v. State*, 213
- Federal rules provide that defendant may waive his absolute right to be present at every stage of trial if he voluntarily absents himself, governmental prerogative to proceed with trial may not be defeated by conduct of accused that prevents trial from going forward. *Id.*
- Doyle* rule, arrested person's silence may not be used to impeach explanation subsequently offered at trial. *Robinson v. State*, 280
- Doyle* rule, when questioning about silence is harmless error. *Id.*
- Doyle* rule, no issue for appeal in two instances where post-arrest silence was raised. *Id.*
- Doyle* rule, trial court's failure to give limiting instruction did not rise to reversible error. *Id.*
- Denial of petition for writ of error *coram nobis*, no sound reason to continue to require petition for writ of certiorari. *Magby v. State*, 415
- Denial of petition for writ of error *coram nobis*, precedent requiring petition for writ of certiorari overturned. *Id.*
- Writ of error *coram nobis*, common-law origins. *Id.*
- Writ of error *coram nobis*, matter of common law. *Id.*
- Speedy trial, defendant must be tried within twelve months excluding authorized periods of delay. *Miles v. State*, 544
- Speedy trial, commencement of twelve-month period. *Id.*
- Speedy trial, burden of proof. *Id.*
- Speedy trial, thirty-day delay resulting from continuance granted at defendant's request was excludable. *Id.*
- Speedy trial, continuance granted at request of prosecuting attorney excluded. *Id.*

Speedy trial, periods excludable without written order. *Id.*  
Speedy trial, 160 days properly excluded pursuant to Ark. R. Crim. P. 28.3(d)(1). *Id.*  
Speedy trial, appellant's right not violated where 190 days properly excluded. *Id.*  
Custodial confessions presumed involuntary, State bears burden of proof. *Id.*  
*Miranda* rights, form containing express waiver is not prerequisite to finding of knowing & intelligent waiver. *Id.*  
*Miranda* rights, right to remain silent may be waived by merely answering questions. *Id.*  
*Miranda* rights, trial court properly ruled that appellant made knowing & intelligent waiver of rights. *Id.*  
Postconviction relief, proof required to prevail on claim of ineffective assistance of counsel. *Jenkins v. State*, 686  
Postconviction relief, presumption & burden of proof in claim of ineffective assistance. *Id.*  
Postconviction relief, judgment will stand unless petitioner demonstrates that counsel's error had prejudicial effect on actual outcome of proceeding. *Id.*  
Decision to call witness matter of trial strategy, Ark. R. Crim. P. 37 appeal not appropriate forum to debate trial tactics. *Id.*  
Postconviction relief, trial court's denial of appellant's ineffective-assistance-of-counsel claims affirmed. *Id.*  
Juvenile prosecuted in circuit court, juvenile code inapplicable. *Id.*  
Appellant's charges filed in circuit court, appellant had no right to have mother present. *Id.*  
Appeal from trial court's ruling on postconviction relief, standard of review. *Kemp v. State*, 750  
Postconviction relief, proof required to prevail on claim of ineffective assistance of counsel. *Id.*  
Denial of relief under Ark. R. Crim. P. 37, standard of review. *Id.*  
Severance of offenses discretionary with trial court, when denial of motion to sever will be affirmed. *Id.*  
Four murders clearly result of single scheme or plan, severance of offenses not proper. *Id.*  
Points decided on direct appeal may not be reargued in a Ark. R. Crim. P. 37 proceeding, Rule 37 is narrow remedy designed to prevent incarceration under sentence so flawed as to be void. *Id.*  
Issues raised by appellant already considered on direct appeal, issues not cognizable under Rule 37. *Id.*

**DAMAGES:**

Compensatory & punitive damages, award must stand where supreme court affirmed jury's verdict on at least one cause of action. *Wal-Mart Stores, Inc. v. Lee*, 707

**DEEDS:**

Appellee's timber deed on record prior to appellant's receipt of warranty deed, appellant had constructive notice of appellee's deed. *Bonds v. Carter*, 591

**DISCOVERY:**

Trial court's discretion, exercise of not reversed absent abuse. *Loghry v. Rogers Group, Inc.*, 369

Failure to comply with Ark. R. Civ. P. 56(f), trial court did not abuse discretion in denying additional time for discovery. *Id.*

Request for information by defendant, disclosure by prosecutor. *Howard v. State*, 471  
Request for information by defendant, not substitute for defendant's own investigation. *Id.*  
Sanctions, trial court's discretion. *Id.*

## ELECTIONS:

Request for declaratory judgment finding ballot title & popular name sufficient, review granted. *White v. Priest*, 135  
Request for review of finding that ballot title & popular name were sufficient, review granted. *Id.*  
Secretary of State had not determined sufficiency of ad valorem tax proposal & so supreme court was without jurisdiction to consider matter, Count 6 dismissed. *Id.*  
Secretary of State had not determined sufficiency of measure to abolish taxes on used goods & so supreme court was without jurisdiction to consider matter, Count 7 dismissed. *Id.*

## ESTATES:

Administrator's role, fiduciary capacity. *Davenport v. Lee*, 148  
Trustee or personal representative, does not act for himself. *Id.*  
Administrator's role, trustee of conduit. *Id.*  
Proceeds from wrongful-death action, held in trust by administrator for benefit of widow & next of kin. *Id.*  
Administrator's role, attempts to distinguish case law were meritless. *Id.*

## EVIDENCE:

Sufficiency, test for determining. *Reinert v. State*, 1  
Substantial evidence defined. *Id.*  
Challenge to sufficiency, standard of review. *Id.*  
Convictions supported by sufficient evidence, trial court affirmed. *Id.*  
Ruling on motion to suppress, standard of review. *Shields v. State*, 7  
Admission or rejection, trial court's discretion. *Flores v. State*, 28  
Hearsay, trial court's ruling not reversed unless appellant can demonstrate abuse of discretion. *Id.*  
Medical-diagnosis exception, two-part *Iron Shell* test. *Id.*  
Medical-diagnosis exception, *Renville* child-abuse analysis not applicable. *Id.*  
Medical-diagnosis exception, first part of *Iron Shell* test met. *Id.*  
Medical-diagnosis exception, second part of *Iron Shell* test met. *Id.*  
Medical-diagnosis exception, identification of appellant as culprit had no pertinence to diagnosis or treatment & was inadmissible hearsay. *Id.*  
Excited-utterance exception, factors to be considered. *Id.*  
Excited-utterance exception, requirements. *Id.*  
Excited-utterance exception, requisite factors not met. *Id.*  
Residual exception, intended to be used only in exceptional circumstances. *Id.*  
Residual exception, criteria not met. *Id.*  
Substantial evidence, defined. *Arkansas Prof'l Bail Bondsman Lic. Bd. v. Oudin*, 48  
Sufficiency challenge, supreme court considers only evidence that supports verdict. *Harshaw v. State*, 62  
Circumstantial evidence, when it provides basis to support conviction. *Id.*  
Sufficiency challenge, conviction affirmed if substantial evidence supports. *Id.*

- Circumstantial evidence, must exclude every other reasonable hypothesis than that of accused's guilt. *Id.*
- Admission, trial court's ruling not reversed absent abuse of discretion or showing of prejudice. *Box v. State*, 116
- Letter contained no admission of guilt, evidence of camera was not prejudicial & not needlessly cumulative. *Id.*
- Admission of letter & envelope, no error where no prejudice shown. *Id.*
- Challenge to sufficiency of, test on appeal. *Ware v. State*, 181
- Admissibility, relevant evidence defined. *Ridling v. State*, 213
- Credibility of witness always in issue, scope of cross-examination extends to matters of credibility. *Id.*
- Appellant was charged with rape of girl who was less than fourteen years old, statements 4 through 8 had no relevance to charge. *Id.*
- Trial court permitted appellant to effectively cross-examine victim on statements relating to credibility, appellant properly prohibited from confusing jury by going into collateral matters. *Id.*
- Trial court properly engaged in balancing test & ruled evidence not relevant, no abuse of discretion found. *Id.*
- Evidence of victim's other sexual encounters irrelevant to determination of whether she had sex with appellant before age of fourteen, trial court did not abuse its discretion in excluding. *Id.*
- Rape-shield statute applicable during sentencing, trial court did not err in refusing to permit introduction of evidence at sentencing phase of trial. *Id.*
- Exceptions in Ark. R. Evid. 404(b) not exhaustive, when evidence of other criminal activity is permitted. *Spencer v. State*, 230
- Charge involving unnatural sex acts, evidence of prior similar offenses. *Id.*
- Admission or rejection under Ark. R. Evid. 404(b) left to trial court's discretion, standard of review. *Id.*
- testimony showed appellant's proclivity toward incestuous sexual contact with children & demonstrated that appellant's depraved sexual instinct was not substantially outweighed by danger of unfair prejudice, trial court did not abuse its discretion in admitting testimony. *Id.*
- Rape conviction, victim's testimony constitutes substantial evidence. *Id.*
- Testimony of five-year-old victim, constituted substantial evidence to support conviction. *Id.*
- Additional evidence overwhelmingly supported conviction, any error that may have been committed by allowing introduction of cousin's testimony rendered harmless. *Id.*
- Trial court's decision to disallow, not overturned absent showing of prejudice. *Smith v. Rogers Group, Inc.*, 241
- Testimony regarding police involvement, not apparent without further research that appellant's argument was well-taken. *Robinson v. State*, 280
- Admission discretionary, ruling on hearsay reversed only upon abuse of discretion. *Hawkins v. State*, 384
- "Hearsay," defined. *Id.*
- Medical-treatment exception to hearsay rule, basis for exception. *Id.*
- Medical-treatment exception to hearsay rule, test for determining whether hearsay evidence fits within exception. *Id.*



- Medical-treatment exception to hearsay rule, two-prong test reflects policy justifications for rule. *Id.*
- Modification of principles of Ark. R. Evid. 803(4) for child abuse, medical-treatment exception to hearsay rule. *Id.*
- Modification of principles of Ark. R. Evid. 803(4) where child abuse present, justifications for. *Id.*
- Child's statements to doctor identifying appellant as her abuser fell within medical-treatment exception, statements were properly admitted by trial court. *Id.*
- Sufficiency of, test for determining. *Burley v. State*, 422
- Sufficiency of, evidence viewed in light most favorable to State. *Id.*
- Circumstantial evidence, when it provides basis to support conviction. *Id.*
- Sufficiency of, appellate review of challenge to. *Id.*
- Only that most favorable to jury's verdict considered, not weighed against other conflicting proof. *Id.*
- Ark. R. Evid. 404(b), admission or rejection of evidence in trial court's discretion. *Id.*
- Other crimes, wrongs, or acts, unsubstantiated allegation did not amount to crime, wrong, or act & should not have been allowed. *Id.*
- Other crimes, wrongs, or acts, evidence of conduct may be admissible with cautionary instruction. *Id.*
- Other crimes, wrongs, or acts, not excluded if relevant to show offense of which appellant is accused. *Id.*
- Other crimes, wrongs, or acts, motive evidence was independently relevant & not unfairly prejudicial. *Id.*
- Other crimes, wrongs, or acts, means to prove motive. *Id.*
- Ark. R. Evid. 403, balancing test satisfied. *Id.*
- Other crimes, wrongs, or acts, exercise of trial court's discretion affirmed. *Id.*
- Circumstantial evidence, when sufficient to support conviction. *Polk v. State*, 446
- Evidence sufficient to link appellant to drugs & gun, conviction for possession of controlled substance with intent to deliver affirmed. *Id.*
- Acquired immunity, doctrine discussed. *Smith v. Rogers Group, Inc.*, 241
- Acquired immunity, purpose of doctrine. *Id.*
- Acquired immunity, still viable defense. *Id.*
- Acquired immunity, appellee contractor entitled to rely on defense where contract performed in full compliance with specifications. *Id.*
- Acquired immunity, provides immunity from liability. *Id.*
- Immunity from suit, does not extend to independent contractors working for state. *Id.*
- Sufficiency of, appellate review of challenge to. *Howard v. State*, 471
- Sufficiency of, test for determining. *Id.*
- Circumstantial evidence, basis to support conviction. *Id.*
- Sufficiency of, conviction affirmed if substantial evidence supports. *Id.*
- Circumstantial evidence, longstanding rule. *Id.*
- Conflicting testimony & inconsistent evidence, jury may resolve. *Id.*
- Improbable explanation of suspicious circumstances, admissible as proof of guilt. *Id.*
- Evidence of guilt, accused seen in proximity to scene of crime. *Id.*
- Evidence of guilt, flight following commission of offense. *Id.*
- Hearsay, preservation of objection. *Id.*

- Hearsay, appellant could not advance argument on appeal where he only stated a general objection. *Id.*
- Hearsay, statement may be related by witness to show basis of action. *Id.*
- Showing motive, trial court's discretion. *Id.*
- Showing motive, disclosing motive for killing. *Id.*
- Relevance, trial court's discretion. *Id.*
- Demonstrative evidence, trial court's discretion. *Id.*
- State-purchased demonstrative evidence, admission not abuse of discretion. *Id.*
- Demonstrative evidence, admissibility within wide discretion of trial court. *Hamilton v. State*, 532
- Demonstrative evidence admissible to aid in understanding case, lack of exactitude does not result in prejudice. *Id.*
- Diagram of assistance to jury & of neutral evidentiary value, trial court did not abuse discretion in admitting it into evidence. *Id.*
- Admission of videotape, factors considered. *Id.*
- Videotapes, function of. *Id.*
- Videotape admitted, no abuse of discretion found. *Id.*
- Relevant evidence defined, ruling on relevance given great weight. *Miles v. State*, 544
- Testimony ruled irrelevant & inadmissible, no error found. *Id.*
- Sufficiency of evidence, standard of review. *Jones v. State*, 619
- Rape, proof of more than sufficient. *Id.*
- Sufficiency of, appellate review. *Stone v. State*, 661
- Substantial evidence, defined. *Id.*
- Fruit of poisonous tree, methamphetamine & methamphetamine-manufacturing products suppressed. *Id.*
- Sufficiency, standard on review. *Jenkins v. State*, 686
- Sufficiency challenge without merit, only that evidence supporting verdict considered. *Id.*
- Weight given, left to jury. *Id.*
- Evidence sufficient, capital-murder conviction sustained. *Id.*
- Similar evidence previously admitted without objection, later testimony not prejudicial. *Id.*
- Substantial evidence, defined. *Wal-Mart Stores, Inc. v. Lee*, 707
- Substantial evidence, appellate review. *Id.*
- Sufficiency, appellate court need only consider evidence most favorable to appellee. *Id.*
- Circumstantial evidence, may meet substantial-evidence test. *Id.*
- IMMUNITY:**
- Immunity from suit & from liability, distinguished. *Clayborn v. Bankers Standard Ins. Co.*, 557
- Charitable immunity from tort liability, distinction exists between right to sue & power to execute judgment. *Id.*
- Argument that nonprofit was not subject to suit for tort because it was charitable organization meritless, charitable organizations are not altogether immune from suit. *Id.*
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ARKANSAS  
APPELLATE  
REPORTS

Volume 77

CASES DETERMINED  
IN THE

Court of Appeals  
of Arkansas

FROM  
March 20, 2002 — May 15, 2002  
INCLUSIVE

WILLIAM B. JONES, JR.  
REPORTER OF DECISIONS

CINDY M. ENGLISH  
DEPUTY  
REPORTER OF DECISIONS

VICTORIA M. FREY  
EDITORIAL ASSISTANT

PUBLISHED BY THE  
STATE OF ARKANSAS  
2002

*Law is order, and good law is good order.*

—ARISTOTLE  
(384 - 322 B.C.)

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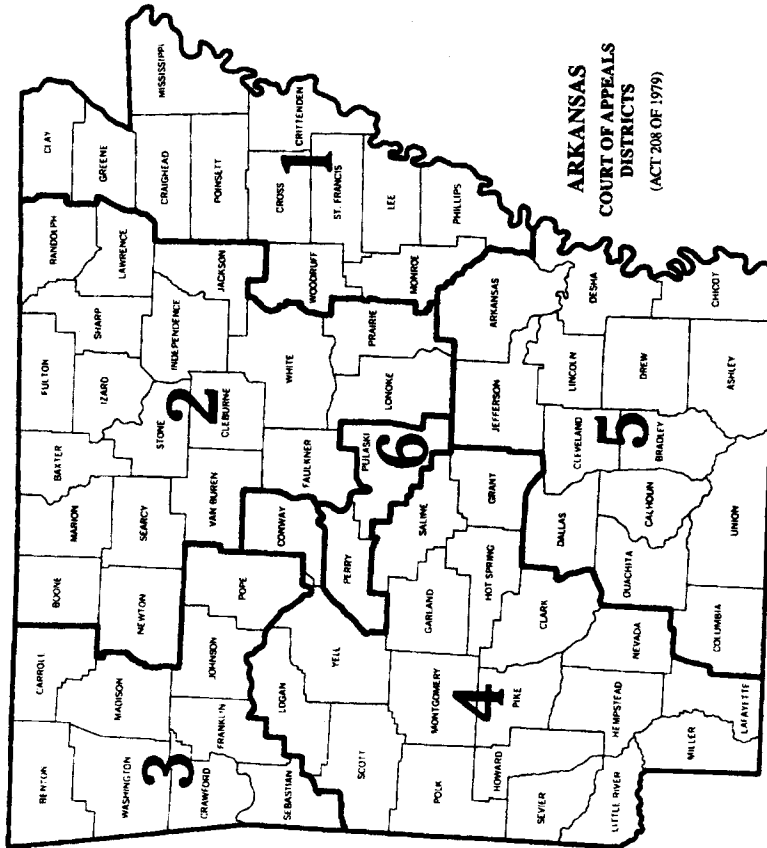


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**OF THE**  
**COURT OF APPEALS**  
**OF ARKANSAS**  
 DURING THE PERIOD COVERED  
 BY THIS VOLUME  
 (March 20, 2002 — May 15, 2002 inclusive)

JUDGES

JOHN F. STROUD	Chief Judge <sup>1</sup>
JOHN MAUZY PITTMAN	Judge <sup>2</sup>
JOSEPHINE LINKER HART	Judge <sup>3</sup>
JOHN E. JENNINGS	Judge <sup>4</sup>
JOHN B. ROBBINS	Judge <sup>5</sup>
SAM BIRD	Judge <sup>6</sup>
WENDELL L. GRIFFEN	Judge <sup>7</sup>
OLLY NEAL	Judge <sup>8</sup>
LARRY D. VAUGHT	Judge <sup>9</sup>
TERRY CRABTREE	Judge <sup>10</sup>
KAREN R. BAKER	Judge <sup>11</sup>
ANDREE LAYTON ROAF	Judge <sup>12</sup>

OFFICERS

MARK PRYOR	Attorney General
LESLIE W. STEEN	Clerk
AVA M. HICKS	Librarian ( <i>Interim</i> )
WILLIAM B. JONES, JR.	Reporter of Decisions

- <sup>1</sup> Position 7.
- <sup>2</sup> District 1.
- <sup>3</sup> District 2.
- <sup>4</sup> District 3.
- <sup>5</sup> Position 4.
- <sup>6</sup> District 5.
- <sup>7</sup> District 6.
- <sup>8</sup> Position 8.
- <sup>9</sup> Position 9.
- <sup>10</sup> Position 10.
- <sup>11</sup> Position 11.
- <sup>12</sup> Position 12.

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STANDARDS FOR PUBLICATION OF OPINIONS

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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 appeal 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 publications 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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OPINIONS NOT DESIGNATED FOR PUBLICATION

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- Area Agency on Aging v. McGuire*, CA 01-905 (Crabtree, J.), affirmed March 20, 2002.
- Arkansas Dep't of Human Servs. v. Avaritt*, CA 01-1055 (Jennings, J.), reversed April 24, 2002. Rehearing denied June 5, 2002.
- Arnold v. LeBlanc*, CA 01-978 (Griffen, J.), affirmed April 10, 2002.
- Baker v. Campora*, CA 01-1026 (Jennings, J.), affirmed May 15, 2002.
- Baker v. House Doctors Handyman Serv.*, CA 01-1151 (Roaf, J.), affirmed April 10, 2002. Rehearing denied May 15, 2002.
- Baker v. Stringer*, CA 01-937 (Jennings, J.), affirmed May 8, 2002.
- Barnes v. Barnes*, CA 01-1162 (Bird, J.), affirmed April 24, 2002.
- Bishop v. Mac Norton*, CA 01-1074 (Robbins, J.), affirmed April 17, 2002.
- Brady v. Brady*, CA 01-949 (Bird, J.), affirmed April 3, 2002.
- Brannon v. State*, CA CR 01-518 (Per Curiam), Appellant's Motion for Clarification & to Stay Briefing Schedule granted March 20, 2002.
- Branum v. State*, CA CR 01-1345 (Hart, J.), affirmed May 15, 2002.
- Burkhart v. Hutchens*, CA 01-1290 (Hart, J.), affirmed May 15, 2002. Rehearing denied June 19, 2002.
- Burnett v. Philadelphia Life Ins. Co.*, CA 01-991 (Pittman, J.), appeal dismissed April 24, 2002.
- Candelaria v. State*, CA CR 01-1046 (Neal, J.), affirmed March 20, 2002.
- Caple v. Lambert*, CA 01-863 (Robbins, J.), affirmed March 20, 2002.
- Clarendon Nat'l Ins. Co. v. Roberts*, CA 01-1075 (Per Curiam), dismissed April 24, 2002.
- Clark v. Wal-Mart Stores, Inc.*, CA 01-652 (Crabtree, J.), reversed & remanded March 20, 2002.
- Con Agra Frozen Foods v. Schiavo*, CA 01-1129 (Pittman, J.), affirmed May 8, 2002.

- Conn *v.* Arkansas Dep't of Human Servs., CA 01-536 (Stroud, C.J.), affirmed May 8, 2002.
- Crews *v.* Crews, CA 01-786 (Baker, J.), affirmed as modified March 20, 2002.
- Crockett *v.* State, CA CR 01-1018 (Stroud, C.J.), affirmed April 24, 2002.
- Cross *v.* Ouachita R.R., Inc., CA 01-648 (Neal, J.), affirmed; remanded in part March 20, 2002.
- Curne *v.* State, CA CR 01-1059 (Baker, J.), affirmed May 1, 2002.
- Davidson *v.* State, CA CR 01-779 (Vaught, J.), affirmed May 8, 2002.
- Dunsworth *v.* State, CA CR 01-968 (Griffen, J.), affirmed April 24, 2002.
- Eiland *v.* State, CA CR 01-1245 (Neal, J.), affirmed April 24, 2002.
- Engelke *v.* Chelstrom, CA 01-981 (Pittman, J.), affirmed April 17, 2002.
- Entertainment & Leisure Corp. *v.* Razorback Entertainment Corp., CA 01-1260 (Pittman, J.), appeal dismissed May 1, 2002. Rehearing denied June 5, 2002.
- European Motorsport Co. *v.* Director, E 01-177 (Crabtree, J.), April 10, 2002.
- Faucher *v.* Bitzer, CA 01-526 (Bird, J.), affirmed March 20, 2002.
- Fleming Co. *v.* Tucker Abstract Co., CA 01-1216 (Bird, J.), reversed and remanded May 1, 2002.
- Fulcher *v.* State, CA CR 01-353 (Roaf, J.), affirmed March 20, 2002.
- Gardea *v.* State, CA CR 01-926 (Vaught, J.), affirmed April 3, 2002.
- Gibson *v.* Brooks, CA 01-1138 (Neal, J.), affirmed April 10, 2002. Rehearing denied May 8, 2002.
- Grant *v.* Meek, CA 01-929 (Baker, J.), affirmed March 20, 2002.
- Guy *v.* State, CA CR 01-1179 (Vaught, J.), affirmed April 17, 2002.
- Hardman *v.* State, CA 01-1198 (Neal, J.), affirmed April 10, 2002.
- Hawkins *v.* State, CA CR 01-1102 (Roaf, J.), affirmed May 1, 2002.

- Hewitt *v.* State, CA CR 01-976 (Pittman, J.), affirmed May 1, 2002.
- Holmesley *v.* Walk, CA 01-1121 (Pittman, J.), reversed & remanded March 20, 2002.
- Housley *v.* State, CA CR 01-542 (Stroud, C.J.), affirmed May 8, 2002.
- Huff *v.* State, CA 01-919 (Stroud, C.J.), reversed and dismissed April 10, 2002. Rehearing denied May 1, 2002.
- James *v.* State, CA CR 01-886 (Stroud, C.J.), affirmed May 1, 2002.
- Johnson *v.* State, CA CR 01-1025 (Vaught, J.), affirmed May 1, 2002.
- Jones *v.* Jones, CA 01-567 (Neal, J.), affirmed March 20, 2002.
- Jones *v.* State, CA CR 00-1274 (Bird, J.), affirmed April 24, 2002.
- Jordan *v.* State, CA 01-1203 (Hart, J.), affirmed May 1, 2002.
- King *v.* Arnold, CA 01-853 (Hart, J.), reversed and dismissed April 10, 2002.
- Krimmel *v.* State, CA CR 01-589 (Pittman, J.), affirmed April 3, 2002.
- Landers *v.* Jameson, CA 01-269 (Baker, J.), reversed and remanded April 3, 2002.
- Lee *v.* State, CA CR 01-1291 (Jennings, J.), affirmed May 8, 2002.
- Lewis *v.* Reed Lewis Temps., CA 01-1031 (Baker, J.), affirmed April 17, 2002.
- Little *v.* Little, CA 01-1027 (Stroud, C.J.), affirmed as modified April 24, 2002.
- Loring *v.* Loring, CA 01-998 (Stroud, C.J.), affirmed March 20, 2002.
- McAdams *v.* Faulk, CA 01-1350 (Baker, J.), affirmed in part; reversed and remanded in part April 24, 2002.
- Miller *v.* Meyers Bakeries, Inc., CA 01-811 (Crabtree, J.), affirmed April 10, 2002.
- Morning *v.* State, CA CR 01-1041 (Stroud, C.J.), reversed & dismissed March 20, 2002.
- Nevils *v.* State, CA CR 01-1368 (Griffen, J.), affirmed May 15, 2002.
- Norton *v.* Pulaski County Indus. Dev. Comm'n, CA 01-658 (Roaf, J.), affirmed April 24, 2002.

- Nuvell Fin. Servs. Co. *v.* Director, E 01-228 (Robbins, J.), reversed and remanded May 8, 2002.
- Peevy *v.* Director, E 01-149 (Pittman, J.), affirmed April 17, 2002.
- Petty *v.* State, CA CR 01-1173 (Roaf, J.), affirmed April 3, 2002.
- Pratt *v.* Carpenter, CA 01-1306 (Crabtree, J.), affirmed May 1, 2002.
- Puckett *v.* Director, E 01-275 (Griffen, J.), reversed and remanded May 1, 2002.
- Roberson *v.* State, CA CR 01-263 (Griffen, J.), affirmed May 1, 2002.
- Rogers Tool Works *v.* Black, CA 01-1107 (Pittman, J.), affirmed April 24, 2002.
- Rosamond *v.* Arkansas Dep't of Human Servs., CA 01-942 (Roaf, J.), affirmed May 8, 2002.
- Rouse *v.* State, CA CR 01-336 (Hart, J.), affirmed April 10, 2002.
- Runke *v.* State, CA CR 01-854 (Crabtree, J.), affirmed April 24, 2002.
- Schueller *v.* Schueller, CA 01-1118 (Crabtree, J.), affirmed April 24, 2002. Rehearing denied June 5, 2002.
- Shepherd *v.* Combs, CA 01-494 (Hart, J.), affirmed March 20, 2002.
- Smeltzer *v.* Smackover Sch. Dist., CA 01-1080 (Robbins, J.), affirmed May 15, 2002.
- Smith *v.* State, CA CR 01-962 (Roaf, J.), affirmed May 15, 2002.
- Smith Auto Salvage *v.* City of Pine Bluff, CA 01-711 (Vaught, J.), affirmed March 20, 2002.
- Sowell *v.* State, CA CR 01-872 (Crabtree, J.), reversed and remanded May 15, 2002.
- Stone *v.* Arkansas Dep't of Human Servs., CA 01-954 (Crabtree, J.), affirmed March 20, 2002.
- Stone *v.* Pico, CA 01-799 (Robbins, J.), affirmed April 10, 2002.
- Summons *v.* State, CA CR 01-841 (Jennings, J.), affirmed March 20, 2002.
- Superior Surgical Mfg. *v.* Pride, CA 01-1112 (Robbins, J.), affirmed April 3, 2002.
- Taylor *v.* State, CA 01-1163 (Griffen, J.), affirmed April 10, 2002.
- Thornton *v.* State, CA CR 01-1152 (Baker, J.), affirmed April 10, 2002.

- 
- Tim Parker Jeep Eagle *v.* Milam, CA 01-955 (Griffen, J.), affirmed May 1, 2002.
- Trubey *v.* Gray, CA 01-1214 (Griffen, J.), affirmed April 24, 2002.
- Tucker *v.* State, CA CR 01-946 (Bird, J.), affirmed April 24, 2002.
- Vaag *v.* Vaag, CA 01-724 (Robbins, J.), reversed and remanded April 24, 2002.
- Volvo Commercial Fin. *v.* Lard, CA 01-1184 (Hart, J.), reversed and remanded April 17, 2002.
- Wal-Mart Stores, Inc. *v.* Daniels, CA 01-1281 (Robbins, J.), affirmed May 1, 2002.
- Wal-Mart Stores, Inc. *v.* United States Fidelity & Guar. Co., CA 01-1139 (Griffen, J.), affirmed April 24, 2002.
- Walton *v.* State, CA CR 01-750 (Robbins, J.), affirmed April 3, 2002.
- Weatherford *v.* State, CA CR 01-1322 (Roaf, J.), affirmed May 15, 2002.
- White *v.* Remington Arms Co., CA 01-1229 (Robbins, J.), affirmed in part; remanded in part May 8, 2002.
- Wilson *v.* Glenbrook Subdiv. Prop. Owners' Ass'n, CA 01-1254 (Pittman, J.), affirmed May 1, 2002.
- Wimberly *v.* State, CA CR 01-1235 (Hart, J.), affirmed May 8, 2002.
- Yellow Freight Sys. *v.* Parker, CA 01-1211 (Bird, J.), affirmed May 1, 2002.
- Young *v.* Cross County Hosp., CA 01-1208 (Hart, J.), affirmed May 1, 2002.
- Young *v.* State, CA CR 01-984 (Griffen, J.), affirmed March 20, 2002. Rehearing denied June 5, 2002.
-



CASES AFFIRMED BY THE ARKANSAS  
COURT OF APPEALS WITHOUT WRITTEN  
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RULES OF THE ARKANSAS SUPREME COURT  
AND COURT OF APPEALS

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Armes *v.* Director of Labor, E 01-280, April 24, 2002.  
Badgett *v.* Director of Labor, E 01-260, April 10, 2002.  
Ballanger *v.* Director of Labor, E 01-252, March 20, 2002.  
Becht *v.* Director of Labor, E 01-294, May 1, 2002.  
Beth *v.* Director of Labor, E 02-19, May 15, 2002.  
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STANDARDS FOR PUBLICATION OF OPINIONS

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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 appeal 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 publications 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





*[T]he law can only bring us freedom.*  
—JOHANN WOLFGANG VON GOETHE  
(1749-1832)

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JOE CHRISTENSEN PRINTING COMPANY  
1540 ADAMS STREET  
LINCOLN, NEBRASKA 68521  
2002

