APPELLATE UPDATE

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ANNOUNCEMENTS

REMINDER: Administrative Judge selections should have been reported to the Supreme Court by **February 1, 2009.** Administrative Plans are to be submitted by **July 1, 2009.**

On January 8, 2009, the Supreme Court published for comment proposed changes to the speedy trial rules and Administrative Order Number 4. The order was included in the mailout. The comment period ends April 1, 2009.

On January 15, 2009, the Supreme Court amended various rules regulating official court reporters. The amendments are effective immediately. A copy of the order was included in the mailout.

CRIMINAL

Bedsole v. State: **[motion to suppress]** The trial court erred when it denied appellant's motion to suppress evidence that was obtained during the illegal detention of appellant after the completion of a traffic stop. (Sutterfield, D.; CACR 08-376; 1-7-09; Marshall).

Jackson v. State: **[sufficiency of the evidence; capital murder]** There was substantial evidence to support appellant's conviction for capital murder. **[voir dire]** Although appellant raised numerous challenges to the voir dire portion of his trial, the majority of his challenges were procedurally barred from the Supreme Court's review. **[ineffective assistance of counsel]** On appeal, appellant claimed that he was denied effective assistance of counsel because one of his attorneys fell asleep during voir dire. The Supreme Court rejected appellant's claim because appellant, who was represented by four attorneys, was never without the assistance of counsel. **[jury instructions]** Appellant requested that the court instruct the jury on the lesser-

included offense of manslaughter. The trial court denied appellant's request. A review of the facts by the Supreme Court revealed that there was no rational basis for giving a manslaughter instruction. Thus, the trial court did not abuse its discretion in denying appellant's request. **[medical examiner's report]** The circuit court did not err when it permitted the jurors to take the medical examiner's report, which had been introduced into evidence, into the jury room. (Glover, D.; CR 07-1016; 1-8-09; Wills).

Teater v. State:**[motion in limine]** The trial court did not abuse its discretion when it granted the State's motion in limine and prohibited appellant from introducing into evidence text messages that were not relevant to the issues in the case. (Keaton, E.; CACR 08-641; 1-21-09; Baker).

Stokes v. State: **[standing; 4th Amendment]** Appellant had standing to challenge the suppression of evidence that was obtained from a rental car that was rented to a third party because appellant was "seized" for Fourth Amendment purposes at the time she was stopped in the rental car by a law enforcement official and a reasonable person in appellant's circumstances would not have believed herself free to terminate the encounter. **[motion to suppress]** There was no probable cause to believe that appellant was committing a traffic offense. Thus, there was no probable cause for the law enforcement official to stop appellant. Accordingly, any evidence obtained as a result of the unlawful traffic stop should have been suppressed. (Arey, F.; CR 08-86; 1-22-09; Gunter).

Neal v. State: **[witnesses]** The trial court did not abuse its discretion when it refused to allow appellant to offer the testimony of a witness, the identity of whom, was not disclosed to the State until the day of the trial. (Fox, T.; CR 08-859; 1-22-09; Corbin).

Davis v. State: **[speedy trial]** The trial court correctly denied appellant's motion to dismiss the charges against him based upon speedy-trial violations because appellant's trial occurred within 360 days of his arrest. **[stipulations]** A decision of the circuit court on whether the parties have stipulated to an issue is a finding of fact. **[fitness to proceed]** A circuit court must order a hearing on competency *sua sponte* when there is reasonable doubt about the defendant's competency to stand trial. Based upon the facts in appellant's case, the trial court had no duty to *sua sponte* order a competency hearing. **[jury instructions]** The trial court did not abuse its discretion when it refused to instruct the jury with Arkansas Model Jury Instruction Criminal 202, which involves prior inconsistent statements by a witness other than the accused. (Jones, B.; CR 08-148; 1-22-09; Hannah).

Magana-Galdamez v. State: **[juvenile-transfer statute]** Based upon the application of the facts in the case to the appropriate statutory provisions, the Court of Appeals concluded that the trial court did not commit clear error in its decision to deny appellant's motion to transfer his case from circuit court to juvenile court. (Finch, J.; CA 08-460; 1-28-09; Gruber).

Dirickson v. State: **[best-evidence rule]** Appellant was convicted of two counts of internet stalking of a child. At trial, the State introduced computer printouts of the conversations between appellant and a member of law enforcement, who was posing as a fourteen-year-old girl. On appeal, appellant asserted that the trial court abused its discretion when it admitted the printouts into evidence. First, appellant argued that the trial court violated the best-evidence rule when it admitted the printouts of the conversations. Rule 1002 of the Arkansas Rules of Evidence states: "to prove the contents of a writing. . . the original writing is required." Rule 1001 (3) of the Arkansas Rules of Evidence defines an "original" in the context of computers. The Rule provides: "if data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an 'original.'" The Court of Appeals concluded that the trial court properly admitted the computer printouts of the conversations because the printouts were the "originals" and thus constituted the best evidence under Rule 1002. **[hearsay]** Appellant also asserted that the computer printouts were hearsay. The two witnesses, who made the statements, were appellant and an undercover law enforcement official. The statements made by appellant were admissions by a party-opponent and thus were not hearsay. The statements made by the undercover officer were not offered for the truth of the matter asserted and thus were not hearsay. Accordingly, the trial court did not abuse its discretion in admitting the evidence. **[Confrontation Clause]** Finally, appellant argued that admission of

the printouts violated his constitutional confrontation-clause rights. Because appellant was able to confront the individuals, who participated in the conversations, which were contained in the printouts, the Court of Appeals concluded that the evidence was properly admitted. (Williams, C.; CACR 08-173; 1-28-09; Vaught).

Johnson v. State: **[sufficiency of the evidence; attempted capital murder]** There was substantial evidence to support appellant's conviction for attempted capital murder. (Piazza, C.; CR 08-930; 1-30-09; Danielson).

CIVIL

Osborn v. Bryant: **[devise of property\small estate]** Ark. Code Ann. Section 28-40-104(b) excepts small estate proceedings. The legislature intended that a will that had not been admitted to probate could still be used as evidence of a devise of property in cases where the small estate procedure is used. (Smith, P.; CA08-589; 1-14-09; Gladwin)

Duke v. Shinpaugh: **[affirmance]** Where the trial court based its decision on two independent grounds and appellant challenges only one of them on appeal, the appellate court will affirm without addressing either. (Lindsay, M.; SC 08-311; 1-15-09; Danielson)

Post v. Franklin County Board of Elections: **[elections/law of the case]** In this second appeal, appellant is still challenging the opponent's eligibility and his certification as the winner. The trial court lacked subject matter jurisdiction under the law of the case doctrine. The candidate's legal action precluded the Election Board from certifying the election. Once the appellate court concluded the legal action and the impediment to certification, the candidate could not challenge the Election Board's certification as untimely. The doctrine of invited error operates so that appellant cannot now be heard to complain that any certification is untimely. (Kennedy, J.; SC 08-723; 1-15-09; Corbin)

Pine Meadow Autoflex v. Taylor: **[good faith purchaser/ucc]** Lien on vehicle in favor of dealer was released because of a forged document. Owner then sold vehicle to third party. Subsequently, dealer repossessed the vehicle. Third person was a good-faith purchaser for value. Her seller had voidable title. (Smith, K.; CA08-299; 1-21-09; Pittman)

Larry Hobbs Farm Equipment, Inc. v. CNH America: **[certified questions/franchise act]**
Question 1. Under the facts of this case, whether the market withdrawal of a product or of a trademark and trade name for the product constitutes "good cause" to terminate a franchise under Arkansas Code Annotated section 4-72-204(a)(1).
Answer: No.
Question 2. Under the facts of this case, whether liability under Arkansas Code Annotated section 4-72-310(b)(4) is created when a manufacturer terminates, cancels, fails to renew, or substantially changes the competitive circumstances of the dealership agreement based on rebranding of the product or ceasing to use a particular trade name or trademark for a product while selling it under a different trade name or trademark.
Answer: No
Question 3. Under the facts of this case, whether the sole remedies for a violation of the Arkansas Farm Equipment Retailer Franchise Protection Act are: (1) the requirement that the manufacturer repurchase inventory for a termination without good cause, and (2) damages, costs, and attorneys' fees that result from the failure to repurchase inventory as provided in Arkansas Code Annotated section 4-72-309, or whether other remedies are also available.
Answer: No. The remedies available are limited to other than money damages, such as injunctive and declaratory relief.
(E.D. Ark.; Judge Holmes; SC08-1056; 1-22-09; Hannah)

Seth v. St. Edwards Mercy Hospital:**[charitable immunity doctrine]** Hospital did not waive the defense because it was not pled in its original answer. The rules allow for an amended answer at which the defense was asserted. A party may amend his pleadings at any time without leave of court unless upon motion of an opposing party, the court determines that prejudice would result. Here, there was no motion to strike; therefore, the defense was not waived by waiting until the filing of the amended answer to raise the defense. (Fitzhugh, M.; SC07-1348; 1-22-09; Wills)

Anderson v. BNSF Railway: **[preemption]** The Interstate Commerce Commission Termination Act preempts the Arkansas Highway Commission's jurisdiction in the matter of reopening a private "at-grade" railroad crossing. (Laser, D.; SC 08-232; 1-30-09; Wills)

Arkansas Conference of AME Church v. New Direction Praise and Worship Center: **[church property]** Trial court had subject matter jurisdiction to resolve dispute over deed conveying church property. Court properly quieted title in favor of appellee. This dispute could be decided by neutral principles of law without resort to interpretation of church religious beliefs, practices, customs, etc.(Piazza, C.; SC 08-167; 1-30-09; Hannah)

City of Centerton v. City of Bentonville: **[annexation]** Court properly found that annexation was invalid. None of the criteria in Section 14-40-302(a) was met. (Clinger, D.; SC 08-380; 1-30-09; Hannah)

DOMESTIC RELATIONS

Byrd v. Vanderpool: **[child custody; material change in circumstances; contempt] Change in circumstances:** A material change in circumstances affecting the best interest of a child must be shown before a court may modify an order regarding child custody. The burden of proving a material change so as to warrant modification and that the best interest of the child requires a change of custody is on the party seeking modification. **Contempt:** The appellee failed to connect appellant's act of changing the children's health insurance without notification to him, resulting in retroactive reimbursement, with a specific court order. Therefore, the trial court did not abuse its discretion in refusing to hold appellant in contempt for violating one of the court's orders. (Duncan, X.; CA 07-1313; 1-7-09; Vaught)

Stehle v. Zimmerebner: **[child custody; material change in circumstances]** The trial court denied the appellant's motion for change of custody of the parties' daughter and she appealed that order to the Court of Appeals. That court reversed the circuit judge's decision and awarded the appellant custody based upon a material change in circumstances. The appellee father petitioned the Supreme Court for review, which was granted, and the Supreme Court affirmed the circuit court's order and reversed the decision of the Court of Appeals. The Supreme Court held that the circuit court did not clearly err in finding that the appellant failed to prove a material change of circumstances so as to justify a change of custody for the child. The court clarified its standard of review for child custody cases, with regard to de novo review and the clearly erroneous standard. (Clawson, C.; SC 08-610; 1-30-09; Brown)

PROBATE

Adams v. Arkansas Dept. of Health and Human Services: **[no-merit appeal]** Issue of first impression: May a court-appointed attorney for an alleged endangered, indigent adult file an *Anders* no-merit appeal from an order of long-term custody in an adult-protective case? Assuming that an *Anders* no-merit appeal is possible, counsel for the appellant asserted that the circuit court did not err when it awarded custody of the appellant to DHS. The Supreme Court adopted the *Anders* no-merit procedures for appeals by indigent

adults subject to orders of long-term custody, affirmed the circuit court's order, and granted counsel's motion to withdraw. (Wilson, R.; SC 08-806; 1-22-09; Danielson)

EIGHTH CIRCUIT

Independence County, Arkansas v. Pfizer, Inc. **[meth-related cold medicines]** Suit by Arkansas Counties against manufacturers and distributors of over-the-counter cold and allergy medications containing ephedrine or pseudoephedrine for damages resulting from the societal costs associated with the methamphetamine epidemic was dismissed on the pleadings. Connection between sales of cold medicines to the costs of government services is too attenuated to give rise to an implied contract to state a cause of action for unjust enrichment. Nuisance and statutory claims fail as a matter of law because of a lack of proximate cause between manufacturer's sale of products through legal retail channels and ultimate increased government services due to methamphetamine production. (E.D. Ark.; #08-1491; 1-5-09)

Charles Brooks Co. v. Georgia-Pacific: **[contracts]** District court did not err in finding plaintiff Mr. "B" Logging did not have a separate corporate existence at the time the action was filed because it had merged with Charles Brooks Co. Court did not err in finding that plaintiff Charles Brooks Co. lacked capacity to sue because its corporate charter had been revoked at the time the complaint was refiled. Charles Brooks did not have an injury separate from the corporation's, and he did not have standing to sue. (W.D. Ark.; #07-3938; 1-14-09)

Presley v. Lakewood Engineering and Mfg. **[expert witness]** District court did not err in refusing to admit plaintiffs' expert's opinion on the cause of the fire in question as he failed to apply the standards of NFPA 921 reliably to the facts of the case. (W.D. Ark.; #07-3846; 1-21-09)

U.S. SUPREME COURT

Herring v. U.S. **[search/exclusionary rule]** Officers arrested Herring based on a warrant listed in neighboring County's database. A search incident to that arrest yielded drugs and a gun. It was then revealed that the warrant had been recalled months earlier, though this information had never been entered into the database. Herring was indicted on federal gun and drug possession charges and moved to suppress the evidence on the ground that his initial arrest had been illegal. Assuming that there was a Fourth Amendment violation, the District Court concluded that the exclusionary rule did not apply and denied the motion to suppress. The Eleventh Circuit affirmed, finding that the arresting officers were innocent of any wrongdoing, and that the County's failure to update the records was merely negligent. The court therefore concluded that the benefit of suppression would be marginal or nonexistent and that the evidence was admissible under the good-faith rule.

> Held: When police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply.

(No. 07-513; January 14, 2009)

Oregon v. Ice: **[sentencing]** Respondent Ice twice entered an 11-year-old girl's residence and sexually assaulted her. For each of the incidents, an Oregon jury found Ice guilty of first-degree burglary for entering with the intent to commit sexual abuse; first-degree sexual assault for touching the victim's

vagina; and first-degree sexual assault for touching her breasts. Ice was sentenced under a state statute providing, generally, for concurrent sentences, but allowing the judge to impose consecutive sentences in these circumstances: (1) when "a defendant is simultaneously sentenced for ... offenses that do not arise from the same ... course of conduct," and (2) when offenses arise from the same course of conduct, if the judge finds either "(a) [t]hat the ... offense ... was an indication of defendant's willingness to commit more than one criminal offense; or ... "(b) [t]he ... offense ... caused or created a risk of causing greater or qualitatively different ... harm to the victim," . The trial judge first found that the two burglaries constituted separate incidents and exercised his discretion to impose consecutive sentences for those crimes. The court then found that each offense of touching the victim's vagina met the two criteria, giving the judge discretion to impose the sentences for those offenses consecutive to the two associated burglary sentences. The court elected to do so, but ordered that the sentences for touching the victim's breasts run concurrently with the other sentences. On appeal, Ice argued, inter alia, that the sentencing statute was unconstitutional because the Sixth Amendment's jury-trial guarantee requires that the jury, rather than the judge, determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular crime.

The Oregon Supreme Court reversed, holding that the *Apprend*i rule applied because the imposition of consecutive sentences increased Ice's quantum of punishment.

> Held: In light of historical practice and the States' authority over administration of their criminal justice systems, the Sixth Amendment does not inhibit States from assigning to judges, rather than to juries, the finding of facts necessary to the imposition of consecutive, rather than concurrent, sentences for multiple offenses.

(No. 07-901; January 14, 2009)

Pearson v. Callahan: **[search]** After the Utah Court of Appeals vacated respondent's conviction for possession and distribution of drugs, which he sold to an undercover informant he had voluntarily admitted into his house, he brought this 42 U. S. C. sec.1983 damages action in federal court, alleging that the officers who supervised and conducted the warrantless search of the premises that led to his arrest after the sale, had violated the Fourth Amendment. The District Court granted summary judgment in favor of the officers. Noting that other courts had adopted the "consent-once-removed" doctrine--which permits a warrantless police entry into a home when consent to enter has already been granted to an undercover officer who has observed contraband in plain view--the court concluded that the officers were entitled to qualified immunity because they could reasonably have believed that the doctrine authorized their conduct.

The Tenth Circuit held that the officers were not entitled to qualified immunity. The court disapproved broadening the consent-once-removed doctrine to situations in which the person granted initial consent was not an undercover officer, but merely an informant. The court concluded that the officers could not reasonably have believed that their conduct was lawful because they knew that (1) they had no warrant; (2) respondent had not consented to their entry; and (3) his consent to the entry of an informant could not reasonably be interpreted to extend to them.

> Held: (a) The *Saucier* case mandated a two-step sequence for resolving government officials' qualified immunity claims: A court must decide (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) if so, whether that right was "clearly established" at the time of the defendant's alleged misconduct. Qualified immunity applies unless the official's conduct violated such a right.

These officers are entitled to qualified immunity because it was not clearly established at the time of the search that their conduct was unconstitutional. When the entry occurred, the consent-once-removed doctrine had been accepted by two State Supreme Courts and three Federal Courts of Appeals, and not one of the latter had issued a contrary decision. Petitioners were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on consent-once-removed entries.

(No. 07-751; January 21, 2009)

Waddington v. Sarausad: **[accomplice liability/instructions]** Respondent Sarausad drove the car in a drive-by shooting at a high school, which was the culmination of a gang dispute. En route to school, Ronquillo, the front seat passenger, covered his lower face and readied a handgun. Sarausad abruptly slowed down upon reaching the school, Ronquillo fired at a group of students, killing one and wounding another, and Sarausad then sped away. He, Ronquillo, and Reyes, another passenger, were tried on murder and related charges. Sarausad and Reyes, who were tried as accomplices, argued that they were not accomplices to murder because they had not known Ronquillo's plan and had expected at most another fistfight. In her closing argument, the prosecutor stressed Sarausad's knowledge of a shooting, noting how he drove at the scene, that he knew that fighting alone would not regain respect for his gang, and that he was "in for a dime, in for a dollar." The jury received two instructions that directly quoted Washington's accomplice-liability law. When it failed to reach a verdict as to Reyes, the judge declared a mistrial as to him. The jury then convicted Ronquillo on all counts and convicted Sarausad of second-degree murder and related crimes.

In affirming Sarausad's conviction, the State Court of Appeals, among other things, referred to an "in for a dime, in for a dollar" accomplice-liability theory. The State Supreme Court denied review, but in its subsequent Roberts case, it clarified that "in for a dime, in for a dollar" was not the best descriptor of accomplice liability because an accomplice must have knowledge of the crime that occurred. The court also explicitly reaffirmed its precedent that the type of jury instructions used at Sarausad's trial comported with Washington law.

Sarausad sought state postconviction relief, arguing that the prosecutor's improper "in for a dime, in for a dollar" argument may have led the jury to convict him as an accomplice to murder based solely on a finding that he had anticipated that an assault would occur. The Ninth Circuit granted habeas relief to Sarausad.

Held: Because the state-court decision did not result in an "unreasonable application of ... clearly established Federal law,", the Ninth Circuit erred in granting habeas relief to Sarausad. Even if the instructions were ambiguous, the Ninth Circuit still erred in finding it so ambiguous as to cause a federal constitutional violation requiring reversal under AEDPA. The Washington courts reasonably applied this Court's precedent when they found no "reasonable likelihood" that the prosecutor's closing argument caused the jury to apply the instruction in a way that relieved the State of its burden to prove every element of the crime beyond a reasonable doubt. The prosecutor consistently argued that Sarausad was guilty as an accomplice because he acted with knowledge that he was facilitating a drive-by shooting. She never argued that the admission by Sarausad and Reyes that they anticipated a fight was a concession of accomplice liability for murder. Sarausad's attorney also homed in on the key question, stressing a lack of evidence

> showing that Sarausad knew that his assistance would promote or facilitate a premeditated murder. Every state and federal appellate court that reviewed the verdict found the evidence supporting Sarausad's knowledge of a shooting legally sufficient to convict him under Washington law. Given the strength of that evidence, and the jury's failure to convict Reyes--who had also been charged as an accomplice to murder and admitted knowledge of a possible fight--it was not objectively unreasonable for the Washington courts to conclude that the jury convicted Sarausad because it believed that he, unlike Reyes, had knowledge of more than just a fistfight.

(No. 07-772; January 21, 2009)

Arizona v. Johnson: [4th Amendment] In Terry v. Ohio, the Supreme Court held that a"stop and frisk" may be conducted without violating the Fourth Amendment's ban on unreasonable searches and seizures if two conditions are met. First, the investigatory stop(temporary detention) must be lawful, a requirement met in an on-the-street encounter when a police officer reasonably suspects that the person apprehended is committing or has committed a crime. Second, to proceed from a stop to a frisk (patdown for weapons), the officer must reasonably suspect that the person stopped is armed and dangerous.

While patrolling near a Tucson neighborhood associated with the Crips gang, police officers serving on Arizona's gang task force stopped an automobile for a vehicular infraction warranting a citation. At the time of the stop, the officers had no reason to suspect the car's occupants of criminal activity. Officer Trevizo attended to respondent Johnson, the back-seat passenger, whose behavior and clothing caused Trevizo to question him. After learning that Johnson was from a town with a Crips gang and had been in prison, Trevizo asked him get out of the car in order to question him further, out of the hearing of the front-seat passenger, about his gang affiliation. Because she suspected that he was armed, she patted him down for safety when he exited the car. During the patdown, she felt the butt of a gun. At that point, Johnson began to struggle, and Trevizo handcuffed him. Johnson was charged with, inter alia, possession ofa weapon by a prohibited possessor. The trial court denied his motion to suppress the evidence, concluding that the stop was lawful and that Trevizo had cause to suspect Johnson was armed and dangerous. Johnson was convicted.

The Arizona Court of Appeals reversed. While recognizing that Johnson was lawfully seized, the court found that, prior to the frisk, the detention had evolved into a consensual conversation about his gang affiliation. Trevizo, the court therefore concluded, had no right to pat Johnson down even if she had reason to suspect he was armed and dangerous.

> Held: Officer Trevizo's patdown of Johnson did not violate the Fourth Amendment's prohibition on unreasonable searches and seizures. The Arizona Court of Appeals recognized that, initially, Johnson was lawfully detained incident to the legitimate stop of the vehicle in which he was a passenger, but concluded that once Officer Trevizo began questioning him on a matter unrelated to the traffic stop, patdown authority ceased to exist, absent reasonable suspicion that Johnson had engaged, or was about to engage, in criminal activity. However, an officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the stop's duration.

(No. 07-1122; January 26, 2009)