

APPELLATE UPDATE

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PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE COURTS
JULY, 2009 VOLUME 16, NO. 11

ANNOUNCEMENTS

On June 4th, the Supreme Court published for comment proposed changes to Supreme Court Rules 4-1 and 4-2. The comment period expires on August 1, 2009. A copy of the per curiam order was included in the weekly mailout.

This is the last edition of *Appellate Update* for this term of court.

CRIMINAL

Jackson v. State: [**sufficiency of the evidence; internet stalking of a child**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] Appellant objected to the admission of transcripts from internet conversations between appellant and a law enforcement official. Appellant argued that the transcripts should not be admitted because they were not properly authenticated and because they contained hearsay. On review, the Court of Appeals explained that the authentication problems with a random page on the internet are absent when the parties who produced the document are present in court. The court further explained that to have the chat-room transcripts admitted, the State need only demonstrate a reasonable probability that the evidence had not been

altered in any significant manner. Finally, the court concluded that the statements within the transcripts were not hearsay. Accordingly, the trial court did not abuse its discretion when it admitted the transcripts into evidence. (Clawson, C.; CACR 08-1495; 6-3-09; Brown).

Henson v. State: **[sufficiency of the evidence; rape; kidnapping]** There was substantial evidence to support appellant's convictions. (Webb, G.; CACR 08-1300; 6-3-09; Henry).

Blakes v. State: **[revocation of probation]** There was sufficient evidence to support the trial court's finding that appellant was associating with felons and individuals who were violating criminal laws. Thus, the trial court did not err in revoking appellant's suspended sentence. (Fogleman, J.; CACR 09-16; 6-3-09; Gladwin).

Blanchard v. State: **[appellate review]** Because appellant failed to make specific objections to the items he wanted to exclude from evidence, the issue of whether the items were properly admitted was not preserved for appellate review. (Phillips, G.; CR 08-1380; 6-4-09; Gunter).

Jackson v. State: **[sufficiency of the evidence; capital murder]** There was substantial evidence to support appellant's conviction. **[continuance]** The circuit court did not abuse its discretion when it concluded that good cause did not exist for granting appellant's request for a continuance. **[jury deliberations]** During jury deliberations, the jury requested to hear some testimony from the trial. The trial court permitted the court reporter to play the taped testimony for the jury. The jury heard the testimony in the courtroom, which was closed, without the presence of the judge, the attorneys, or the appellant. The court reporter stayed in the courtroom while the jury listened to the testimony. The jurors were instructed not to speak or to otherwise communicate during the replaying of the testimony. After the testimony was played, the jurors returned to the jury room. Appellant asserted that allowing the testimony to be reviewed by the jury under these facts violated Ark. Code Ann. § 16-89-125 (e) and led to the possibility of a jury that was tainted or prejudiced. The Supreme Court noted that the information that was heard by the jury had previously been admitted into evidence. The court further noted that the court reporter remained in the courtroom merely to operate the equipment. Thus, the court concluded that appellant failed to demonstrate that he was prejudiced by the replaying of the tape under the above-described circumstances. (Proctor, W.; CR 08-459; 6-4-09; Danielson).

Snider v. State: **[admission of evidence; hearsay, Confrontation Clause]** At appellant's trial, the State was permitted to introduce into evidence a videotaped interview of a witness, who did not testify at the trial. Appellant objected to the admission of the videotape by arguing that the evidence was hearsay and that its admission was a violation of the Confrontation Clause. On appeal, the Court of Appeals concluded that although the trial court erroneously admitted the videotaped interview into evidence, the error was harmless beyond a reasonable doubt because the elements of each of the offenses for which appellant was convicted were proven by evidence that was independent from evidence that was contained in the videotape. **[admission of evidence; Rule 403]** The State was also permitted to introduce a tape of several 911 calls that were made by one of the victims near the time of the crimes. Appellant argued that the tape should not have been admitted because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The Court of Appeals agreed with appellant but once again concluded that the error was harmless. (Chandler, L.; CACR 08-507; 6-17-09; Hart).

Hatcher v. State: **[motion to suppress]** As a condition of appellant's parole, he agreed to consent to warrantless searches of his home by his probation officer. After such a search was conducted and contraband was discovered, appellant sought to suppress the evidence recovered during the search. The Court of Appeals held that appellant's prior consent was sufficient to support the search and affirmed the trial court's denial of appellant's motion to suppress. (Tabor, S.; CACR 08-1457; 6-17-09; Gruber).

Wickham v. State: **[statutory interpretation]** Marion County Ordinance No. 2005-15 does not conflict with Ark. Code Ann. § 12-41-505. (Webb, G.; CR 08-1309; 6-18-09; Corbin).

McClanahan v. State: **[statute of limitations; abuse of a corpse]** The beheading and dismembering of a corpse and the subsequent dumping of the body parts into a pond falls within the prohibited conduct in Arkansas's abuse-of-a-corpse criminal statute. The concealment of body parts is not a continuing offense pursuant to Arkansas's abuse-of-a-corpse criminal statute. Thus, the trial court erred when it

failed to dismiss the abuse-of-a-corpse charge against appellant because it was not filed until after the statute of limitations had run. (Danielson, E.; CACR 08-1086; 6-24-09; Vaught).

J.F. v. State: [**appellate review**] The rules of criminal procedure apply to juvenile-delinquency proceedings. Because appellant failed to comply with Rule 33.1 of the Arkansas Rules of Criminal Procedure, which requires a defendant in a bench trial to make a specific challenge to the sufficiency of the evidence at the close of all of the evidence, he was not permitted to raise the issue on appeal. (Cook, V.; CA 08-1487; 6-24-09; Hart).

Lewis v. State: [**sufficiency of the evidence; aggravated residential burglary**] There was sufficient evidence to support appellant's conviction of aggravated residential burglary. (Piazza, C.; CACR 08-1343; 6-24-09; Kinard).

Rodriguez v. State: [**motion to suppress; mistake of law**] Appellant was stopped by law enforcement because he failed to dim his bright headlights as he approached other vehicles. During the stop, appellant consented to a search of the vehicle and the law enforcement official discovered contraband. Appellant sought to suppress the items found during the search. He argued that the law enforcement official lacked probable cause to believe that he committed a traffic violation. Appellant asserted that the law enforcement official stopped his vehicle based upon a mistake of law. The mistake of law was identified in the law enforcement official's testimony. The officer misstated the distance requirements of the statute pertaining to the failure to dim headlights. The Court of Appeals rejected appellant's argument and explained that the question of whether the officer has probable cause to make a traffic stop does not depend upon whether the defendant is actually guilty of a violation that was the basis of the stop. The proper inquiry is whether there are facts or circumstances within the police officer's knowledge that are sufficient to permit a person of reasonable caution to believe that an offense has been committed by the person suspected. The appeals court concluded that because appellant did not dim his lights at all as he approached other vehicles, the officer's misstatement of the statute's distance requirements made no legal difference. The court further concluded that the officer had probable cause to stop appellant's vehicle. Because the stop was lawful, and because appellant gave consent for the search, the trial court did not err in denying appellant's motion to suppress the evidence that were obtained during the search. (Medlock, M.; CACR 08-1362; 6-24-09; Henry).

Cole v. State: [**motion to suppress**] Because the driver of appellant's car, who had apparent authority over the vehicle, gave consent to search the car, the trial court did not err in denying appellant's motion to suppress the evidence that was obtained during the search. (Laser, D.; CACR 09-31; 6-24-09; Brown).

White v. State: [**404(b)**] During appellant's trial, the State asked a witness if she had seen appellant with a gun. Appellant sought to exclude this testimony as a violation of Rule 404(b) of the Arkansas Rules of Evidence. The Supreme Court concluded that the trial court did not abuse its discretion by admitting the witness's testimony because it did not contain evidence of prior crimes, wrongs, or bad acts and thus did not violate Rule 404(b). (Sims, B.; CR 08-1402; 6-25-09; Brown).

Adams v. State: [**sufficiency of the evidence**] There was substantial evidence to support appellant's capital-murder conviction. [**appellate review; contemporaneous objection**] Because appellant failed to make a contemporaneous objection to an alleged irregularity with the jury's verdict, the Supreme Court was precluded from considering the matter on appeal. [**jury selection**] Even though a juror expressed an opinion on the subject of murder, the trial court did not abuse its discretion when it refused to excuse the juror because she: (1) did not demonstrate any specific bias against appellant; (2) did not express an opinion concerning appellant's guilt; and (3) agreed to follow the jury instructions. [**jury instructions**] The trial court did not err when it gave the jury AMI criminal instructions rather than appellant's proffered instructions. (Edwards, R.; CR 08-1353; 6-25-09; Wills).

Osburn v. State: [**suppression of statement; 5th Amendment**] Because law enforcement officials violated appellant's Fifth Amendment Rights during custodial interrogations, the trial court erred when it denied appellant's motion to suppress statements that appellant gave while in custody. [**404 (b)**] The trial court did not abuse its discretion when it permitted a witness to testify about an incident that

occurred many years before appellant's trial in which the appellant allegedly attacked the witness. (Pope, S.; CR 08-1146; 6-25-09; Danielson).

Kelley v. State: **[404 (b); pedophile exception]** Appellant was convicted of raping a child less than fourteen years of age. During appellant's trial, the circuit court admitted testimony from a second victim whom appellant had allegedly raped. Appellant challenged the admission of this testimony and the Supreme Court concluded that the evidence was properly admitted pursuant to the pedophile exception of Rule 404 (b) of the Arkansas Rules of Evidence. **[admission of prior convictions]** The trial court admitted into evidence certified documentary proof of appellant's two prior convictions. Appellant, arguing that the evidence violated Rule 404 (b) of the Arkansas Rules of Evidence, objected to its admission. Because the documents lacked facts or details concerning the victims or circumstances of the two prior offenses, the Supreme Court concluded that the trial court could not perform an analysis of the applicability of the pedophile exception of Rule 404 (b) to the evidence. Thus, admission of the evidence was error. However, the Supreme Court affirmed appellant's conviction because the error was slight and the evidence of guilt was overwhelming. (Piazza, C.; CR 08-1502; 6-25-09; Imber).

Shelton v. State: **[mistrial; double jeopardy]** At appellant's trial, the State moved for a mistrial based on comments made by defense counsel during opening statements that the State alleged amounted to a change in defense theories. Over appellant's objection, the trial court granted the State's motion and discharged the jury. The trial court then reset the case for a jury trial. Appellant moved to dismiss the charges pending against him based upon double jeopardy. The trial court denied appellant's request. On appeal, the Supreme Court, citing Article 2 Section 8 of the Arkansas Constitution, concluded that because the trial court granted a mistrial over appellant's objection and without his express or implied consent, and because there was no manifest or overruling necessity that justified the mistrial, the double jeopardy provision of the Arkansas Constitution precluded any subsequent attempt at prosecuting appellant. Accordingly, the trial court erred when it denied appellant's motion to dismiss. (Wyatt, R.; CR 08-1035; 6-25-09; Corbin).

Joe v. State: **[revocation of probation]** The State presented sufficient evidence to establish that appellant violated the terms and conditions of his probation by using controlled substances. (Thomas, J.; CACR 08-1106; 7-1-09; Brown).

Owens v. State: **[revocation of suspended sentence]** The trial court did not have jurisdiction to consider a petition to revoke appellant's suspended imposition of sentence because the petition was filed after the expiration of the period of suspension. (Fitzhugh, M.; CACR 08-1002; 7-1-09; Glover).

CIVIL

Ark. Commission on Law Enforcement Standards v. Davis **[appeal]** Evidence supported Commission's revocation of officer's certification based upon his resignation while he was the subject of a pending internal investigation. (Plegge, J.; CA 08-1248; 6-3-09; Gruber)

Cato v. Craighead County Circuit Court: **[service on person on military duty]** Ark. Code Ann. § 12-62-403, barring service of process on persons on military duty, is constitutional. The statute grants a substantive right; thus, it is substantive law and not procedural, and does not violate the separation of powers. The statute does not establish an alternate procedure; therefore, it does not conflict with the supreme court's rule making authority. (SC 09-4; 6-4-09; Imber)

McCourt Manufacturing Corp. v. Rycroft: **[statutory penalty for commissions/ACA 11-4-405]** The employee failed to satisfy the statutory requirement that his demand for earned but unpaid wages was received by his foreman or the keeper of his time within seven days. **[rule 50]** A motion for a directed-verdict is not mandatory at the close of the plaintiff's case to preserve a sufficiency of the evidence argument so long as the motion is made at the close of the evidence. (Fitzhugh, M.; SC 08-653; 6-4-09; Hannah)

Fort Smith School District v. Beebe:**[amendment 74]** Amendment 74 does not place any limits on the General Assembly as to how it appropriates the money in excess of that generated by the amendment following the legislature's assessment of the resources needed to provide for an adequate education for the students of the state. (Humphrey, M.; SC08-618; 6-4-09; Imber)

Gassman v. McAnulty: **[damages]** Jury's finding that plaintiff sustained no injury and incurred no damages in accident was supported by substantial evidence. (Piazza, C.; CA 08-902; 6-17-09; Pittman)

Campbell v. Hankins: **[jury misconduct]** Court properly granted new trial based upon jury's conduct in ignoring judge's instructions, visiting the accident site on their own, and considering extrinsic evidence. (Dennis, J.; CA 08-1163; 6-17-09; Kinard)

Adams v. Moody: **[default judgment]** Entry of default judgment was proper. Defendants never received an extension of time to file their answer. They had duty to ascertain whether motion for extension had been granted. They should not have relied upon alleged statements made by the judge and court clerk about status of pending motion. (Putman, J.; CA 08-870; 6-17-09; Gladwin)

Quapaw Care v. Ark. Health Services Permit Comm.:**[appeal]** Appeal is dismissed because the agency did not rule at the administrative level regarding whether the change in the bed-need chart constituted a rule change. Case is not ripe for judicial review. (Proctor, W.; SC 08-1490; 6-18-09; Hannah)

Seiz Co. v. Ark. State Highway Dept.:**[billboard permit]** Department's interpretation of statute was proper and decision to deny billboard permit affirmed. If overall land within the area is predominantly used for residential purposes, the area is ineligible for a billboard. (McGowan, M.; SC 09-46; 6-18-09; Gunter)

Ark. Game and Fish Comm. v. Eddings:**[appeal]** (Appeal under former version of District Court Rule 9 involving the creation of a road by county court) Under facts of case, appeal from county court to circuit court was perfected. (Putman, J.; SC 08-1220; 6-18-09; Brown)

Greenwood v. Anderson: **[parental immunity]** In light of the record developed in the trial and on appeal, no change to parental immunity in Arkansas was made in this case. (Erwin, H.; SC 08-1200; 6-18-09; Gunter)

Bronakowski v. Lindhurst: **[trees/ punitive damages]** Amount of punitive damages in case in which property owner intentionally cut trees on neighbor's property did not shock the conscience nor violate due process. (Putnam, J.; CA 08-1151; 6-24-09; Baker)

Charles Griffith Farms v. Grauman: **[adverse possession]** Adverse possession was not established, but the parties had agreed to a property line by acquiescence. (Bell, K.; CA 08-497; 6-24-09; Brown)

Collins v. Ark. Board of Embalmers: **[administrative appeal]** Appellant was found to have violated rules relating to the requirement that the funeral director must file the death certificate with the Dept. of Health within 10 days of death. She was fined and her license was suspended for a year. Board's action was supported by the evidence and the sanction was not arbitrary and capricious. (Brantley, E.; CA 08-1227; 6-24-09; Pittman)

Fireman's Funds Ins. Co. v. Care Management, Inc. **[Certified Question accepted from U.S. District Court]** When an insurance policy requires the insured to give notice of a claim as soon as practicable and the insured fails to give the insurer notice of the claim as soon as practicable, must the insurer prove that it was prejudiced by the failure to give timely notice in order to avoid coverage?

Barre v. Hoffman: **[limitations/repressed memory syndrome]** Plaintiff alleged sexual abuse by a scoutmaster that occurred over 30 years ago. Fraudulent concealment was not shown because of the lack of proof of fraudulent acts by the defendants. The plaintiff and his parents knew of the sexual abuse when it occurred. The defendants Boy Scouts and the Church Troop knew of the abuser's conduct and made him resign, but it was not shown that they knew that plaintiff was a victim. Repressed memory syndrome was not a disability that tolled the statute of limitations. (Brantley, E.; SC07-1305; 6-25-09; Hannah)

Roop v. Cook: **[attorney's fees]** Party failed to specify in the trial court the legal basis for its claim for attorney's fees; accordingly, trial court's decision denying fees will not be considered on appeal. (Hannah, C.; CA 08-1441; 7-1-09; Baker)

Roop v. Cook: **[oral lease]** There was not clear and convincing evidence to establish an oral lease of farm land. Award for benefits bestowed for improvement to the property on theory of unjust enrichment was affirmed. (Fogleman, J.; CA 08-63; 7-1-09; Brown)

DOMESTIC RELATION

Myers v. McCall: **[change of custody]** The circuit court ordered custody of the parties' children changed from the appellant mother to the appellee father. Of the four issues the appellant raised on appeal, the Court of Appeals did not consider two of them because the appellant had not brought them to the trial court's attention or had not argued them below. On the issue of material change in circumstances, the trial judge determined that, when considered in isolation, any one factor of remarriage, relocation, or children's preference could not support the finding of a material change in circumstances, but, when considered together, the change was sufficient for the court to examine the best interests of the children. The Court of Appeals noted that the children expressed a strong, well-reasoned preference to return to Arkansas and their father's custody. The trial court's observation of their maturity level and the weight afforded their preference were supported by their testimony. Considering all the factors, the Court of Appeals affirmed the decision of the circuit court. (Spears, J.; No. CA 09-19; 7-1-09; Baker)

PROBATE

Norwood v. Sellers, Administratrix of the Estate of Thomas Norwood: **[proof of will]** The trial court did not err in denying probate for failure to prove the will by two attesting witnesses. One witness testified that there were no other signatures on the document when she signed it; that the testator did not tell her that the document was his will or acknowledge his signature to her; that she did not see the testator or the other witness sign the document, and that neither told her he had signed it; that the testator and the other witness left the room and she could not hear what was being said; that she thought she was signing a loan; and that she did not know she had signed a will until the probate proceeding began. The Court of Appeals defers to the trial court to make credibility determinations. The Court of Appeals disagreed with the appellant's argument that, despite the witness's testimony, there was substantial compliance with the pertinent statute. The trial court's decision was affirmed. (VanAusdall, R.; No. CA 08-952; 6-24-09; Pittman)

Osborn, et al. v. Bryant, et al.: **[declaratory judgment]** Appellants appealed from the circuit court's declaration that the appellants' and appellees' decedent died intestate and that his will could not be used as evidence of appellant Osborn's claim to certain real property. Lacy Bryant died, survived by his wife and eight children. By will, he devised a life estate in his 20-acre homestead and 60-acre tract to his wife, with the remainder to his daughter, appellant Osborn, conditioned upon her payment of \$200/acre to the remaining heirs of the 60-acre tract. If she elected not to purchase from the other heirs, the will provided that it was to be divided equally between the children. When the father died, appellant Osborn filed an affidavit for collection of small estate, with the will attached to her affidavit. She also filed a "Notice of Probate" on the same day, with a proof of publication. She subsequently filed an "Administrator's Deed," incorporating the terms of her father's will. Following her mother's death about 9 years later, she asserted her claim to the remainder interest and tendered payment to the remaining heirs. Some of the heirs declined payment and elected to seek a declaratory judgment, partition, and they claimed a breach of contract. The circuit court found that the will was never probated and that it was never revoked, but that appellant Osborn could not use it as evidence to support her claim of ownership of the land. The court reserved ruling on a request for partition and a breach-of-

contract claim until a final hearing could be held. The appellants appealed, but the Court of Appeals dismissed the appeal for lack of a final order. The trial court thereafter entered a decree of partition and ordered the property sold and the proceeds divided among the heirs. (The Supreme Court noted that

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the dismissal was improper, as probate orders are appealed during the course of probate administration regardless of whether the estate has been closed.) On appeal, the Court of Appeals reversed and this petition for review was filed in the Supreme Court. The Supreme Court found that Ark. Code Ann. 28-40-104 provides an exception to the prohibition against using an unprobated will to prove title or right to property disposed of by a will. The exception is when a small-estate proceeding is used under Ark. Code Ann. 28-41-101, as appellant Osborn filed in this case. The Supreme Court said that appellant Osborn's filing of the small-estate affidavit and the issuance of the administrator's deed constituted a proceeding in circuit court concerning the succession of the estate, and that the proceeding is excepted from the requirements of Section 28-40-104. The Supreme Court reversed and remanded the case. (Smith, P.; No. SC 09-73; 6-18-09; Corbin)

JUVENILE

J.F. v. State: **[appellate review]** The rules of criminal procedure apply to juvenile-delinquency proceedings. Because appellant failed to comply with Rule 33.1 of the Arkansas Rules of Criminal Procedure, which requires a defendant in a bench trial to make a specific challenge to the sufficiency of the evidence at the close of all of the evidence, he was not permitted to raise the issue on appeal. (Cook, V.; CA 08-1487; 6-24-09; Hart).

EIGHTH CIRCUIT

Parkhurst v. Belt: **[torts]** Evidence was sufficient to support the jury's verdict that defendant sexually abused his seven-year-old daughter; district court did not abuse its discretion in allowing the victim to testify by closed circuit television after it interviewed her and determined that appearing in the courtroom would be too traumatic for her. (W.D. Ark.; # 08-2668; 6-9-09)

United States v. Bernardo Ruiz: **[searches/trucks]** Warrantless inspections of commercial truck advances government interest and are necessary. The Arkansas Motor Carrier Act provides a permissible warrant substitute, and thus the search of the cargo of defendant's commercial truck did not violate the Fourth Amendment. (W.D. Ark.; # 08-3360; 6-18-09)

Parkhurst v. Tabor: District court did not err in dismissing civil rights action brought by crime victims against state prosecutors claiming violation of equal protection based on prosecutor's decision to issue a nolle prosequi and forego prosecution of minor's biological father for felony sexual assault because crime victims lacked standing. (W.D. Ark.; #08-2610; 6-25-09)

Clarendon Natl. Ins. Co. v. United Fire & Casualty Co. **[insurance]** Defendant's demand for plaintiff to be involved in the defense of anticipated suits by injured parties is enough to create an actual controversy and give plaintiff the right to bring this declaratory judgment action to determine priority of coverage. District court did not err in determining that defendant's policy provided primary coverage for the accident and that its umbrella policy would also be triggered before the policy issued by plaintiff came into play. (E.D. Ark.; No. 08-3535; 7-2-09)

SUPREME COURT

Bobby v. Bies: **[mental retardation/capitol punishment]** In *Atkins v. Virginia*, the Supreme Court held that the Eighth Amendment bars execution of mentally retarded offenders. Nearly a decade before *Atkins*, respondent Bies was tried and convicted in Ohio of the aggravated murder, kidnapping, and

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attempted rape of a ten-year-old boy. Instructed at the sentencing stage to weigh mitigating circumstances (including evidence of Bies' mild to borderline mental retardation) against aggravating factors (including the crime's brutality), the jury recommended a death sentence, which the trial court imposed. Ohio's Court of Appeals and Supreme Court affirmed the conviction and sentence, each concluding that Bies' mental retardation was entitled to "some weight" as a mitigating factor, but that the aggravating circumstances outweighed the mitigating circumstances. Bies then filed an unsuccessful petition for state postconviction relief, contending for the first time that the Eighth Amendment prohibits execution of a mentally retarded defendant. Soon after Bies sought federal habeas relief, this Court decided *Atkins*. The opinion left to the States the task of developing appropriate ways to determine when a person claiming mental retardation would fall within *Atkins*' compass. The state court ordered a full hearing on the *Atkins* claim. Rather than proceeding with that hearing, Bies returned to federal court, arguing that the Double Jeopardy Clause barred the State from relitigating the mental retardation issue.

Held: The Double Jeopardy Clause does not bar the Ohio courts from conducting a full hearing on Bies' mental capacity. The State did not twice put Bies in jeopardy because there was no acquittal here. Bies' jury voted to impose the death penalty. At issue is his attempt to vacate that sentence, not an effort by the State to retry him or to increase his punishment. Nor did the state courts' mental retardation determinations entitle Bies to a life sentence. At the time of his sentencing and direct appeal, the dispositive issue was whether the mitigating factors were outweighed by the aggravating circumstances beyond a reasonable doubt. (No. 08-598; June 1, 2009)

Caperton v. A.T. Massey Coal Co. **[recusal]** After a West Virginia jury found respondents (hereinafter Massey) liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations and awarded petitioners (hereinafter Caperton) \$50 million in damages, West Virginia held its 2004 judicial elections. Knowing the State Supreme Court of Appeals would consider the appeal, Don Blankenship, Massey's chairman and principal officer, supported Brent Benjamin rather than the incumbent justice seeking reelection. His \$3 million in contributions exceeded the total amount spent by all other Benjamin supporters and by Benjamin's own committee. Benjamin won by fewer than 50,000 votes. Before Massey filed its appeal, Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and the State's Code of Judicial Conduct, based on the conflict caused by Blankenship's campaign involvement. Justice Benjamin denied the motion, indicating that he found nothing showing bias for or against any litigant. The court then reversed the \$50 million verdict. During the rehearing process, Justice Benjamin refused twice more to recuse himself, and the court once again reversed the jury verdict. Four months later, Justice Benjamin filed a concurring opinion, defending the court's opinion and his recusal decision.

Held: In all the circumstances of this case, due process requires recusal. The Due Process Clause incorporated the common-law rule requiring recusal when a judge has "a direct, personal, substantial, pecuniary interest" in a case, but this Court has also identified additional instances which, as an objective matter, require recusal where "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. (Number 08-22; June 8, 2009)

District Attorney v. Osborne: **[dna]** Osborne was convicted of sexual assault and other crimes in state court. Years later, he filed this suit under 42 U. S. C. sec.1983, claiming he had a due process right to access the evidence used against him in order to subject it to DNA testing at his own expense.

The Federal District Court first dismissed his claim, holding that Osborne must proceed in habeas because he sought to set the stage for an attack on his conviction. The Ninth Circuit reversed, concluding that sec.1983 was the proper vehicle for Osborne's claims. On remand, the District Court granted Osborne summary judgment, concluding that he had a limited constitutional right to the new

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testing under the unique and specific facts presented, i.e., that such testing had been unavailable at trial, that it could be accomplished at almost no cost to the State, and that the results were likely to be material.

Held: Assuming Osborne's claims can be pursued using sec.1983, he has no constitutional right to obtain postconviction access to the State's evidence for DNA testing.

The Ninth Circuit erred in finding a due process violation. The question is whether consideration of Osborne's claim within the framework of the State's postconviction relief procedures "offends some [fundamental] principle of justice" or "transgresses any recognized principle of fundamental fairness in operation." Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided. There is nothing inadequate about Alaska's postconviction relief procedures in general or its methods for applying those procedures to persons seeking access to evidence for DNA testing. The State provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence. It also provides for discovery in postconviction proceedings, and has--through judicial decision--specified that such discovery is available to those seeking access to evidence for DNA testing. These procedures are similar to those provided by federal law and the laws of other States, and they satisfy due process. The same is true for Osborne's reliance on a claimed federal right to be released upon proof of "actual innocence." Even assuming such a right exists, which the Court has not decided and does not decide, there is no due process problem, given the procedures available to access evidence for DNA testing.

The Court rejects Osborne's invitation to recognize a freestanding, substantive due process right to DNA evidence untethered from the liberty interests he hopes to vindicate with it. (Number 08-06; 6-18-09)

Melendez-Diaz v. Massachusetts: **[confrontation clause]** At petitioner's state-court drug trial, the prosecution introduced certificates of state laboratory analysts stating that material seized by police and connected to petitioner was cocaine of a certain quantity. As required by Massachusetts law, the certificates were sworn to before a notary public and were submitted as prima facie evidence of what they asserted. Petitioner objected, asserting that the analysts were required to testify in person. The trial court disagreed, the certificates were admitted, and petitioner was convicted. The Massachusetts Appeals Court affirmed, rejecting petitioner's claim that the certificates' admission violated the Sixth Amendment.

Held: The admission of the certificates violated petitioner's Sixth Amendment right to confront the witnesses against him. (No. 07-591; June 25, 2009)

Safford School Dist. v. Redding **[search/student]** After escorting 13-year-old Redding from her school classroom to his office, Assistant Principal Wilson showed her a day planner containing knives and other contraband. She admitted owning the planner, but said that she had lent it to her friend Marissa and that the contraband was not hers. He then produced four prescription-strength, and one over-the-counter, pain relief pills, all of which are banned under school rules without advance permission. She denied knowledge of them, but Wilson said that he had a report that she was giving pills to fellow students. She denied it and agreed to let him search her belongings. He and Helen Romero, an administrative assistant, searched Savana's backpack, finding nothing. Wilson then had Romero take Savana to the school nurse's

office to search her clothes for pills. After Romero and the nurse, Peggy Schwallier, had Savana remove her outer clothing, they told her to pull her bra out and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found. Savana's mother filed suit against petitioner school district (Safford), Wilson, Romero, and Schwallier, alleging that the strip search violated Savana's Fourth Amendment rights. Claiming qualified immunity, the

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individuals (hereinafter petitioners) moved for summary judgment. The District Court granted the motion, finding that there was no Fourth Amendment violation, and the en banc Ninth Circuit reversed. Following the protocol for evaluating qualified immunity claims, the court held that the strip search was unjustified under the Fourth Amendment test for searches of children by school officials. It then applied the test for qualified immunity. Finding that Savana's right was clearly established at the time of the search, it reversed the summary judgment as to Wilson, but affirmed as to Schwallier and Romero because they were not independent decision makers.

Held: The search of Savanna's underwear violated the Fourth Amendment.

Wilson had sufficient suspicion to justify searching Savanna's backpack and outer clothing. A student who is reasonably suspected of giving out contraband pills is reasonably suspected of carrying them on her person and in her backpack. Looking into Savanna's bag, in her presence and in the relative privacy of Wilson's office, was not excessively intrusive, any more than Romero's subsequent search of her outer clothing.

Because the suspected facts pointing to Savanna did not indicate that the drugs presented a danger to students or were concealed in her underwear, Wilson did not have sufficient suspicion to warrant extending the search to the point of making Savanna pull out her underwear. When suspected facts must support the categorically extreme intrusiveness of a search down to an adolescent's body, petitioners' general belief that students hide contraband in their clothing falls short; a reasonable search that extensive calls for suspicion that it will succeed. Noncancerous school contraband does not conjure up the specter of stashes in intimate places, and there is no evidence of such behavior at the school; neither Jordan nor Marissa suggested that Savanna was doing that, and the search of Marissa yielded nothing. Wilson also never determined when Marissa had received the pills from Savanna; had it been a few days before, that would weigh heavily against any reasonable conclusion that Savanna presently had the pills on her person, much less in her underwear. (No. 08-479; June 25, 2009)

