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Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

ANNOUNCEMENTS

On June 18th, the supreme court finalized the revised rule on licensing, Rule VII of the Rules of the Governing Admission to the Bar, and announced institution of a pilot project for electronic filing of motions in the appellate courts.

On June 25th, the supreme court announced the following:

1. Revised Ark. R. App. P.–Crim.–2 and Ark. R. Crim. P. 37.2, to provide for limited-implementation of the "mail-box rule for pro se inmates filing notices of appeal and Rule 37 petitions. The amendments are effective September 1, 2015, and the per curiam was included in the mailout.

2. Published for comment a proposed new rule – Ark. R. App. P.–Crim.–19. The comment period ends September 1, 2015, and the per curiam was included in the mailout. The proposal addresses motions in the appellate courts seeking copies of briefs or records.

3. Published for comment an amendment to Rule 1.15 of the Rules of Professional Conduct. The comment period ends September 15, 2015, and the per curiam was included in the mailout. The proposal addresses unclaimed or unidentifiable trust account funds.

4. Adopted a revised Withholding for Support Form.

On July 2nd, the supreme court adopted revisions to several rules and administrative orders to establish a warrant docket for arrest and search warrants. The amendments are effective September 1, 2015, and the per curiam was included in the mailout.

CRIMINAL

Briggs v. State, 2015 Ark. App. 364 **[sufficiency of the evidence; DWI]** There was substantial evidence to support appellant's conviction. **[admission of evidence; results from breathalyzer]** Because the law enforcement official substantially complied with Ark. Code Ann. § 5-65-204 (e) by advising appellant verbally and in writing that he had the right to obtain an additional test to determine his blood alcohol content, the trial court proper permitted the State to introduce the results from appellant's breathalyzer test. The officer was not required to take appellant or his family members to locate funds to cover the cost of the second test. (Johnson, L.; CR-14-947; 6-3-15; Glover, D.)

Allen v. State, 2015 Ark. App. 360 **[jury instructions]** Appellant was convicted of attempted second-degree murder. At trial, he sought a jury instruction on "attempted reckless manslaughter." The trial court denied appellant's request. On review, the Court of Appeals affirmed the circuit court and concluded that the offense of "attempted reckless manslaughter" does not exist in Arkansas and that the instruction proffered by appellant was inherently inconsistent by requiring appellant to have acted both recklessly and purposely. (Sims, B.; CR-14-746; 6-3-15; Harrison, B.)

Houghton v. State, 2015 Ark. 252 **[Rule 37]** The circuit court did not err when it denied appellant's Rule 37 petition without a hearing and found that the files and records in appellant's case conclusively showed that appellant was not entitled to postconviction relief. (Pearson, W.; CR-14-760; 6-4-15; Baker, K.)

Turman v. State, 2015 Ark. App. 383 **[illegal sentence]** The sentence appellant received as a result of her probation revocation, which was within the statutory range for the crime for which she was placed on probation, was not illegal. (Medlock, M.; CR-14-911; 6-17-15; Harrison, B.)

Foster v. State, 2015 Ark. App. 412 **[sufficiency of the evidence; possession of a Schedule I or II controlled substance]** There was substantial evidence to support appellant's conviction. **[motion to suppress]** The law enforcement official had a reasonable suspicion that appellant was involved in criminal activity and was justified pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure in detaining appellant. Thus, the trial court did not err when it denied appellant's request to suppress the evidence collected as a result of the detention. (Johnson, L.; CR-15-58; 6-17-15; Hoofman, C.)

Thompson v. State, 2015 Ark. 271 **[sentencing]** A circuit court has the authority to sentence a defendant for the underlying felony supporting a first-degree-felony murder charge as well as the felony of first-degree murder itself. (Sims, B.; CR-13-438; 6-18-15; Danielson, P.)

Nichols v. State, 2015 Ark. 274 **[jury instruction]** Instruction 302 of the Arkansas Model Jury Instructions for use in criminal cases is a correct statement of the law and is not ambiguous. (Griffen, W.; CR-14-1132; 6-18-15; Hart, J.)

Kelley v. Gordon, 2015 Ark. 277 **[*Miller v. Alabama*]** The circuit court correctly vacated appellant's sentence of life without parole, which was entered when appellant was a juvenile and which is now unconstitutional pursuant to *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Additionally, the circuit court properly reinvested jurisdiction in the sentencing court to hold a new sentencing hearing. (Proctor, R.; CV-14-1082; 6-18-15; Wynne, R.)

Davis v. State, 2015 Ark. 284 **[jury instruction]** Because there was no evidence of provocation, the circuit court did not abuse its discretion when it refused to give the jury the extreme-emotional-disturbance-manslaughter jury instruction. (Elmore, B.; CR-15-57; 6-25-15; Hannah, J.)

Pickle v. State, 2015 Ark. 286 **[motion to suppress]** The officers from the Arkansas Game and Fish Commission completed their investigation into appellant's compliance with hunting laws without developing reasonable suspicion that appellant had committed a crime. Thus, it was unlawful for the officers to continue to conduct a criminal investigation and to search and arrest appellant based upon the unlawful criminal investigation. Accordingly, the trial court erred when it denied appellant's motion to suppress. (Thyer, C.; CR-15-3; 6-25-15; Hart, J.)

CIVIL

Bettger v. Lonoke County, 2015 Ark. App. 366 **[nuisance]** This is an appeal from an order of the Lonoke County Circuit Court that denied appellants' request to abate a public road as an alleged public nuisance. Appellants argued that the County's construction of a road did resulted in an inverse condemnation of appellants' properties as a result of flooding allegedly caused by the road's construction. The circuit court did not abuse its discretion in refusing to grant the injunction because the evidence supported a finding that the flooding of appellants' homes was not the result of the county's construction of the road. (Huckabee, S.; CV-14-597; 6-3-15; Vaught, L.)

Clayton v. Batesville Casket Co., 2015 Ark. App. 361 **[pleadings]** The complaint is devoid of specific facts showing that an identifiable defect existed in the particular casket that they purchased and that the defect caused their alleged damages. A conclusory statement that a product is defective is not sufficient; some factual support is required. If a plaintiff asserts that he has been damaged, then his complaint must state facts that link his damages to the conduct of, or

product supplied by, the defendant. The complaint also fails to include facts pertaining to all elements of the causes pled. Dismissal with prejudice, without another chance to replead, was correct under the two dismissal rule and the facts of the case. (Sutterfield, D.; CV-13-819; 6-3-15; Harrison, B.)

Danner v. Discover Bank, 2015 Ark. App. 357 **[mandate]** The trial court erred in concluding that the Arkansas Court of Appeals's mandate required the trial court to enter a judgment in favor of appellee Discover Bank. For clarification, Danner I held that Discover Bank's burden of proof could not be shifted to Danner. Danner II held that the underlying debt could be proved by other evidence, besides, or in addition to, written documents signed by Danner. Case is remanded for the trial court to weigh all of the evidence in reaching its decision. The evidence has been presented to the trial court, and the trial court should render a decision based on that evidence. (McCallum, R.; CV-15-15; 6-3-15; Gladwin, R.)

Walther v. Weatherford Artificial Lift Systems, Inc., 2015 Ark. 255 **[taxation]** "Proppants" are "equipment" under Arkansas Code Annotated section 26-52-402 and thus exempt from taxation. Rule GR-57(E)(5) is invalid and unenforceable as applied in this case because it is contrary to the applicable statutory provisions. (Fox, T.; CV-14-535; 6-4-15; Hart, J.)

GGNSC Arkadelphia, LLC v. Lamb, 2015 Ark. 253 **[class action]** The common, overarching issues concern whether appellants have liability for chronic under staffing under the admission agreement and the asserted statutes. These central issues can be decided on a classwide basis, and they manifestly predominate over individual issues concerning a class member's right to recovery, which can be determined in bifurcated proceedings. The circuit court did not abuse its discretion in concluding that the element of predominance was satisfied based on the common issues of establishing liability. The significant number of class members that have agreed to arbitration does not override the certification of the class. The determination of under staffing is not unmanageable simply because twelve facilities are involved. There is little to be gained by requiring class-action suits for each facility. The promotion of judicial economy is best served by a single proceeding rather than twelve separate class actions. The class definition is notoverbroad and imprecise because it does not limit the class to members who suffered an injury and sustained damages as a result of under staffing. It would be improper to define a class by reference to actual injury because this would require a determination of the merits of a putative class member's claim. (Guthrie, D.; CV-14-1033; 6-4-15; Goodson, C.)

Prochazka v. Bee-Three Development, LLC, 2015 Ark. App. 384 **[contract]** Trial court found that contract was not ambiguous and granted summary judgment on exercise of right to terminate. On appeal, contract was found to be ambiguous. Resolution of the ambiguity is remanded to the trial court. (Sutterfield, D.; CV-15-13; 6-17-15; Harrison, B.)

Lone v. Koch, 2015 Ark. App. 373 **[judgment]** In order to set aside the default judgment due to fraud in the procurement, one must establish certain necessary elements of fraud by clear, strong, and satisfactory proof. Here, plaintiff failed to prove the necessary elements of fraud in the

procurement: (1) a false representation of a material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance upon the representation; and (5) damage suffered as a result of the reliance. Circuit court stayed any execution of the judgment until Koch appeared in person in court to show cause why he should not be held in contempt for failing to appear at his deposition. Because there has been no order violated, much less a finding that Koch was in contempt of any such order, the circuit court erred in staying the execution of the judgment. (Fox, T.; CV-14-1067; 6-17-15; Gladwin, R.)

Ark. Dept. Veterans Affairs v. Okeke, 2015 Ark. 275 **[class action]** Class-action certification affirmed in a lawsuit that claims the Department of Veterans Affairs failed to pay some nurses overtime in violation of minimum wage laws. The circuit court did not abuse its discretion in finding that the question of whether ADVA's lunch auto-deduct policy is illegal and whether ADVA's time reclamation policy is reasonable can be determined on a classwide basis and is common for all putative class members. Predominance and superiority requirements also satisfied. (Palmer, C.; CV-14-1011; 6-18-15; Wynne, R.)

Waters v. Millsap, 2015 Ark. 272 **[securities]** The unifying thread in our cases addressing whether an instrument constitutes a security is the *Schultz* test, which requires a review of all of the facts. Here, the circuit court considered only the *Smith* factors, concluding that "the law in Arkansas remains *Smith v. State*. The instruments in question here do not qualify as securities under that test." The circuit court did not mention *Schultz* and failed to consider the sophistication of the parties, a factor that is prominent in this court's prior cases. While the *Smith* test remains instructive, the all-inclusive nature of the *Schultz* test is better suited to the purposes of the Act. The Act is clearly remedial and is intended to prevent fraudulent practices and activities from becoming a burden upon unsophisticated investors and the general public. Case is remanded to address *Schultz* test. (Piazza, C.; CV-15-18; 6-18-15; Baker, K.)

Anderson's Taekwondo v. Landers, 2015 Ark. 268 **[unlawful detainer]** No partnership existed; party did not have a license to occupy the premises and merely occupied the premises at will. **[promissory estoppel]** ATC met proof with proof that there was an agreement or promise between the parties and that ATC allegedly relied on that agreement in expending money to improve the property. A genuine issue of material fact remains as to whether ATC detrimentally relied on Landers's promise to use the property and what improvements were actually made by ATC. Issues of promissory estoppel and detrimental reliance are remanded. (Fox, T.; CV-14-594; 6-18-15; Hannah, J.)

Sanford v. Walther, 2015 Ark. 285 **[illegal exaction]** An action for an illegal exaction does not arise under article 16, section 13, of the Arkansas Constitution when an Arkansas taxpayer claims that the interest imposed, levied, or collected on a tax delinquency is illegal but does not claim that the underlying tax itself is illegal. The Arkansas Tax Procedure Act ensures that a hearing is available to taxpayers seeking to protest an assessment prior to the filing of a certificate of indebtedness. Appellants did not show that they were denied the ability to challenge

the determinations of the director either administratively or by seeking judicial relief as authorized under the TPA. The circuit court correctly ruled that appellants failed to plead facts to support their due-process-violation claims. (Griffen, W.; CV-14-1056; 6-25-15; Hannah, J.)

Billingsley v. Benton NWA Properties, LLC, 2015 Ark. 291 **[settlement agreement]** Both parties admit that there was no agreement between them as to the scope of the release agreement. The email correspondence between them shows that their views on the scope of the release have been diametrically opposed from the outset. They continue on appeal to insist that the other, by virtue of simply having agreed to settle the case, automatically assented to their favored release terms. Instead of resolving this disagreement and, in the process, reaching an actual settlement of the dispute, the parties submitted competing motions to enforce a settlement to the circuit court. The circuit court then concluded that the release favored by appellee was the one that had been agreed on by the parties. Because this conclusion is in error, the orders of the circuit court enforcing a settlement that includes the release terms submitted by appellee cannot be allowed to stand. The orders of the circuit court entered for the purpose of enforcing settlement between the parties are reversed and the case is remanded to the circuit court for further proceedings. (Lineberger, J.; CV-15-19; 6-25-15; Wynne, R.)

DOMESTIC RELATIONS

Fox v. Fox, 2015 Ark. App. 367 **[divorce–joint custody]** "Although our legislature has amended Arkansas Code Annotated section 9-13-101 to state than an award of joint custody is favored in Arkansas, joint custody is by no means mandatory, and our law remains consistent that custody awards are to be made solely in accordance with the welfare and best interest of the children." The court was affirmed on its denial of joint custody. **[child support]** Because the appellant father was unemployed and receiving no income on the date of the divorce, a rebuttable presumption existed that zero income for him should have been factored into the child support chart to determine support. To rebut the presumption, the court could have made written findings that the application of the chart would be unjust or inappropriate. Because the court did not do that, it erred in its calculation of child support. The court could also impute income to the appellant under Section III(d) of Administrative Order No. 10, based upon the facts and circumstances of this case. The Court of Appeals reversed the child support award and remanded for a reassessment of appellant's child-support obligation. **[alimony]** The circuit court had awarded alimony that would escalate over the years as the child support decreased when the children each reached the aged of majority. The Court of Appeals noted that, in this case, the child support and alimony "are inextricably intertwined." Because the court was remanding for recalculation of the appellant's child-support obligation, it remanded on the issue of alimony, as well, since it would be affected by the resolution of the child-support issue. Affirmed in part; reversed and remanded in part. (Hendricks, A.; No. CV-14-1078; 6-3-15; Hixson, K.)

Covenant Presbytery v. First Baptist Church, Osceola, Arkansas v. Sun Trust Bank, As Trustee Under the Will of Stanley Carpenter, 2015 Ark. App. 417 **[testamentary trust]** This decision results from a petition for rehearing that the Court of Appeals denied. The first opinion is at 2015 Ark. App 233, and the facts of the case are set out in Vol. 22, No. 8 of Appellate Update (April, 2015). In this substituted opinion, the court addressed appellee First Baptist's argument that Covenant Presbytery has no interest in the Carpenter trust because First Presbyterian did not deed its interest in the farmland to Covenant Presbytery, relying on the statute of frauds and insufficient legal description in a deed. The court said First Baptist's argument was unpersuasive for three reasons:

One, First Presbyterian's assets could include the remainder of Carpenter's estate that is held in trust by SunTrust Bank, in which case it falls within the scope of the parties' stipulation....[that Covenant Presbytery was First Presbyterian's successor in interest]....Second, the purpose of the statute of frauds is to protect the conveyor...First Presbyterian...not...to protect third parties to the transaction like First Baptist....Finally, First Presbyterian did not hold title to the property. Sun Trust Bank was the legal owner, so First Presbyterian could not convey its remainder interest by deed to Covenant Presbytery....

The court said that because the trust was not a charitable one, the doctrine of *cy pres* did not apply and the order for Sun Trust to distribute assets that would otherwise have been paid to First Presbyterian was error. The decision of the circuit court was therefore reversed, and the court held that Covenant Presbytery is the successor in interest to First Presbyterian under the last will and trust of Stanley Carpenter. (Philhours, R.; No. CV-14-891; 6-17-15; Harrison, B.)

PROBATE

In the Matter of the Guardianship of W.L., a Minor, 2015 Ark. 289
[guardianship–termination] The Supreme Court held that a guardianship is no longer necessary when a fit parent who consented to a guardianship revokes consent. It reversed the circuit court's order keeping the guardianship of the child's grandparents in place and remanded for the court to enter an order terminating the guardianship and placing W.L. in the father's custody. In reaching its decision, to the extent the decisions are in conflict with this case, the court overruled *Graham v. Matheny*, 2009 Ark. 481,346 S.W.3d 273, *In re Guardianship of S.H. (1)*, 2012 Ark. 245, 409 S.W.3d 307, and *In re Guardianship of S.H. (2),* 2015 Ark. 75, 455 S.W.3d 313. (McCormick, D.; No. CV-15-126; 6-25-15; Wood, R.)

JUVENILE

Matthews v. Ark. Dep't of Human Services, 2015 Ark. App. 359 **[ICWA - DN Adjudication]** Appellant argued that there was insufficient evidence that she failed to meet her child's needs which resulted in her child's failure to thrive diagnosis and adjudication. She also argued that

DHS did not provide active efforts to prevent removal. "In dependency-neglect cases where the Indian Child Welfare Act (ICWA) applies, the court must find through the testimony of a qualified expert witness, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child and that active efforts have been made to prevent the breakup of the Indian family and those efforts have proved unsuccessful by clear and convincing evidence." The circuit court was affirmed, where the doctor testified that appellant's infant suffered from failure to thrive as a result of appellant's inability to properly feed her child, including skipped feedings and improper feeding amounts. There was evidence that a medical team tried to work with appellant during her child's hospitalization, but that appellant was not responsive and the nursing staff ultimately took over and the infant's health improved. The doctor also testified that healthy brain development depends on receiving the proper nutrition and that if an infant suffers six weeks of malnutrition brain growth will stop. He testified that he did not believe that appellant was capable of providing the care that her child needed. In addition, the Cherokee Nation child-welfare specialist testified that DHS made active efforts to prevent removal and that return to appellant would result in serious emotional or physical damage to the child. (Zimmerman, S.; CV-15-122; 6-3-2015; Abramson, R.)

Metcalf v. Ark. Dep't of Human Services, 2015 Ark. App. 402 **[DN Permanent Custody]** Appellant unsuccessfully argued that the circuit court erred in placing custody of her daughter with her father and closing the case. Appellant argued that she was only given seven months to remedy the conditions that caused removal and that she had made progress and continued to improve her condition. The appellate court found that, "the paramount concern in a custody determination is best interest and all other considerations are secondary, including strict adherence to a calendar." At the time of the final hearing, appellant had moved multiple times, only had a part-time job making minimum wage, and still had pending drug charges. There was evidence that her daughter was thriving in her father's temporary custody and that she was provided stability and structure. The daughter also testified that she wanted to live with her father. (Williams Warren, J.; CV-14-1130; 6-17-2015; Whiteaker, P.)

Martin v. Ark. Dep't of Human Services, 2015 Ark. App. 407 **[TPR - continuance]** The appellate court will not reverse a denial of a motion for continuance absent an abuse of discretion amounting to denial of justice, and absent a showing of prejudice. Lack of diligence by the moving party is a sufficient reason to deny a continuance motion, as here where appellant did not request the continuance until the beginning of the termination hearing. Appellant also did not provide any evidence of prejudice. The appellate court noted that if the court allowed a continuance until appellant was out of prison, he was unlikely to comply with the steps needed to reunify with his child based on his prior history. Appellant while out of prison never exercised visitation had any communication with his child or provided any type of material support. He also did not refrain from drug and alcohol use or criminal activity. Appellant did not challenge the courts findings as to best interest or grounds and has no legal basis for reversal. (King, K.; CV-15-110; 6-7-2015; Vaught, L.)

Morton v. Ark. Dep't of Human Services, 2015 Ark. App. 388 **[TPR – failure to remedy]** Appellant did not remedy the condition that caused removal (drug abuse) which caused neglect, where appellant continued to use for several months when her children were removed, was later incarcerated due to new felony drug charges and failed to get a drug assessment ordered by the court despite appointments scheduled by DHS. She also did not have appropriate and safe housing. Appellant's late attempts to request more time are insufficient reasons to reverse. **[potential harm]** Appellant argued that there was no evidence of potential harm because she was complying and demonstrating a willingness to have her children returned. The circuit court's findings were not clearly erroneous in finding that appellant did not have a suitable home for her children. The circuit court recognized that although appellant was currently testing clean for controlled substances, she had been jailed for felony drug charges and still has not had an assessment or treatment 14 months into the current case. Appellant also had a previous case before the court in 2008 that involved her children being removed due to drug usage. A court may consider past behavior as a predictor of likely potential harm in determining if a child should be returned to a parent. Appellant's continued use of illegal drug for years is sufficient evidence of potential harm. (Edwards, R.; CV-15-154; 6-17-2015; Harrison, B.)

Delacruz v. Ark. Dep't of Human Services, 2015 Ark. App. 387 **[TPR – best interest]** Appellant does not challenge the court's best interest finding as to adoptability or potential harm, but argued that the court should consider the impact of terminating the relationship between her children and their maternal grandparents in the best interest analysis. Appellant cites *Caldwell* and *Lively* to support her argument. However, these cases are distinguishable and not applicable here. Unlike the cases cited, the goal in this case is adoption and the children are in a placement with guardians who wish to adopt them and testified that they did not want to continue visitation with the maternal grandparents. There was also testimony by the CASA volunteer that continued visits would not be in the children's best interest. Further, appellant did provide any evidence that there was a close bond between her children and her parents or that continued visits would be in their best interest. (Zimmerman, S.; CV-15-153; 6-17-2015; Harrison, B.)

Simmons v. Ark. Dep't of Human Services, 2015 Ark. App. 374 **[TPR – potential harm]** Appellant argued that the circuit court made five clearly erroneous findings in its potential harm analysis. The appellate court addressed each of the following findings and held none of the arguments persuasive. First, the circuit court found that appellant did not successfully complete impatient treatment. Although there was evidence that appellant attended a 14 day inpatient treatment and participate in an outpatient program, she continued to test positive for methamphetamine and amphetamines. Second, there was evidence that appellant failed to submit to random drug screens. Third, appellant had a duty to provide proof that she attended NA meetings as ordered, and the court did not have to believe that she failed to bring her attendance sheets or that the trinkets on a key chain were proof of attendance. Fourth, the circuit court correctly found that appellant found clean, safe and stable housing at the PPH, a year into the case. Finally, the circuit court finding that appellant failed to maintain stable employment was a correct finding at the PPH, as she had only been employed one month prior to that hearing.

Although appellant had been employed for a longer period at the time of the termination. (Thyer, C.; CV-15-146; 6-17-2015; Gladwin, R.)

Cases in which the Court of Appeals affirmed No-Merit TPR and Motion to Withdraw Granted:

1. *Bradshaw v. Ark. Dep't of Human Services,* 2015 Ark. App. 403 **[Memorandum Opinion]** (Arnold, G.; CV-15-167; 6-17-2015; Whiteaker, P.)

2. *Ozuna v. Ark. Dep't of Human Services, 2015 Ark. App. 381* ***[failure to remedy & aggravated circumstances]*** *(Sullivan, T.; CV-15-69; 6-17-2015; Virden, B.)*

3. *Ransom v. Ark. Dep't of Human Services, 2015 Ark. App. 377* ***[failure to remedy, subsequent factors & aggravated circumstances]*** *(James, P.; CV-14-1013; 6-17-2015; Abramson, R.)*

4. *Quails v. Ark. Dep't of Human Services, 2015 Ark. App. 371* ***[failure to remedy, subsequent factors & aggravated circumstances]*** *(Sullivan, T.; CV-15-119; 6-3-2015; Brown, W.)*

5. *Studway v. Ark. Dep't of Human Services, 2015 Ark. App. 365* ***[failure to remedy, willful failure to support or maintain contact, abandonment & subsequent factors]*** *(Hudson, A.; CV-15-142; 6-3-2015; Glower, D.)*

Nichols v. State, 2015 Ark. App. 397 **[Transfer]**
Appellant, at age 16, was charged in criminal division with being an accomplice to aggravated robbery, a Class Y felony, and an accomplice to first–degree battery, a Class B felony. He filed a filed a motion to transfer to juvenile division court or in the alternative to extended juvenile jurisdiction. The circuit court was not clearly erroneous. The appellate court acknowledged that while using marijuana and running away may not be considered adult activities in some circumstances, that did not nullify the fact that appellant had been placed on juvenile probation on two separate times, resulting in having his probation revoked both times, and was now a three time offender who committed a serious and violent offense that left the victim seriously incapacitated. (Storey, W.; CV-14-579; 6-17-2015; Glover, B.)

SUPREME COURT

Ohio v. Clark **[confrontation clause]** Respondent Darius Clark sent his girlfriend away to engage in prostitution while he cared for her 3-year-old son L. P. When L. P.'s preschool teachers noticed marks on his body, he identified Clark as his abuser. Clark was subsequently tried on multiple counts related to the abuse of both children. At trial, the State introduced L. P.'s statements to his teachers as evidence of Clark's guilt, but L. P. did not testify. The trial court

denied Clark's motion to exclude the statements under the Sixth Amendment 's Confrontation Clause. A jury convicted Clark. The state appellate courts reversed the conviction on Confrontation Clause grounds.

> *Held*: The introduction of L. P.'s statements at trial did not violate the Confrontation Clause.

Mandatory reporting obligations do not convert a conversation between a concerned teacher and her student into a law enforcement mission aimed at gathering evidence for prosecution. It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution. And this Court's Confrontation Clause decisions do not determine whether a statement is testimonial by examining whether a jury would view the statement as the equivalent of in-court testimony. Instead, the test is whether a statement was given with the "primary purpose of creating an out-of-court substitute for trial testimony." Here, the answer is clear: L. P.'s statements to his teachers were not testimonial.
(No. 13–1352; June 18, 2015)

Glossip v. Gross **[death penalty]** Because capital punishment is constitutional, there must be a constitutional means of carrying it out. After Oklahoma adopted lethal injection as its method of execution, it settled on a three-drug protocol of (1) sodium thiopental (a barbiturate) to induce a state of unconsciousness, (2) a paralytic agent to inhibit all muscular-skeletal movements, and (3) potassium chloride to induce cardiac arrest. Oklahoma death-row inmates filed an action claiming that the use of midazolam violates the Eighth Amendment. Four of those inmates filed a motion for a preliminary injunction and argued that a 500-milligram dose of midazolam will not render them unable to feel pain associated with administration of the second and third drugs. After a three-day evidentiary hearing, the District Court denied the motion. It held that the prisoners failed to identify a known and available alternative method of execution that presented a substantially less severe risk of pain. It also held that the prisoners failed to establish a likelihood of showing that the use of midazolam created a demonstrated risk of severe pain. The Tenth Circuit affirmed.

> *Held*: Petitioners have failed to establish a likelihood of success on the merits of their claim that the use of midazolam violates the Eighth Amendment.

(No. 14–7955; June 29, 2015)

Kingsley v. Hendrickson **[detainer/excessive force]** While petitioner Kingsley was awaiting trial in county jail, officers forcibly removed him from his cell when he refused to comply with their instructions. Kingsley filed a complaint in Federal District Court claiming, as relevant here, that two of the officers used excessive force against him in violation of the Fourteenth Amendment's Due Process Clause. At the trial's conclusion, the District Court instructed the jury that Kingsley was required to prove, that the officers "recklessly disregarded [Kingsley's] safety" and "acted with reckless disregard of [his] rights." The jury found in the officers' favor. On appeal, Kingsley argued that the jury instruction did not adhere to the proper standard for judging a pretrial

detainee's excessive force claim, namely, objective unreasonableness. The Seventh Circuit disagreed, holding that the law required a subjective inquiry into the officers' state of mind, i.e., whether the officers actually intended to violate, or recklessly disregarded, Kingsley's rights.

> Held: Under 42 U. S. C. §1983, a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable to prevail on an excessive force claim. This determination must be made from the perspective of a reasonable officer on the scene, including what the officer knew at the time. None of the cases respondents point to provides significant support for a subjective standard. Applying the proper standard, the jury instruction was erroneous. Taken together, the features of that instruction suggested that the jury should weigh respondents' subjective reasons for using force and subjective views about the excessiveness of that force.

(No. 14–6368; June 22, 2015)