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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 2nd, the Supreme Court published for comment a new Rule of Professional Conduct, Rule 1.19. It addresses maintenance of a client's files and the rights and obligations to materials contained in the file. The comment period ends September 1, 2016.

On June 23rd, the Supreme Court published for comment an amendment to Rule of Professional Conduct 1.5. It addresses retainers and other fee issues. The comment period ends September 1, 2016.

CRIMINAL

McCall v. State, 2016 Ark. App. 300 **[waiver of jury trial]** In considering a motion to withdraw a waiver of the right to a jury trial, a trial court must consider the timeliness of the motion to withdraw, whether it will cause a delay of the trial, and whether, if so, a delay of the trial will impede justice or inconvenience witnesses. Because the circuit court failed to consider the foregoing issues before denying appellant's motion to withdraw his waiver of his right to a jury trial, the trial court abused its discretion. (Clawson, C.; CR-15-617; 6-1-16; Gruber, R.)

Friar v. State, 2016 Ark. 245 **[motion to suppress; arrest warrant]** Probable cause to arrest without a warrant exists when the facts and circumstances within the collective knowledge of the officers and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed by the person to be arrested. Based upon the totality of the circumstances surrounding appellant's arrest, the circuit court did not clearly err in ruling that the officers had probable cause to arrest appellant. **[motion to suppress; right to counsel]** When evaluating whether a defendant voluntarily and intelligently waived his right to counsel, a court should look to see if the statement was the product of free and deliberate choice rather than intimidation, coercion, or deception. To make this determination the court should consider the totality of the circumstances surrounding the waiver, including the age, education, and intelligence of the accused; the lack of advice as to his constitutional rights; the length of detention; the repeated or prolonged nature of the questioning; the use of physical or mental punishment; and statements made by the interrogating officers and the vulnerability of the defendant. In appellant's case, he made a valid waiver of his right to counsel and voluntarily gave several statements to law enforcement. **[motion in limine]** For a statement tending to expose the declarant to criminal liability and offered to exculpate the accused to be admissible under Rule 804(b)(3), the proponent of the testimony must show (1) that the declarant is unavailable, (2) that the statement was at the time of its making "so far tended to subject him to criminal liability" that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true, and (3) that corroborating circumstances clearly indicate the trustworthiness of the statement. In appellant's case, the circuit court did not err in ruling that appellant failed in his burden of demonstrating trustworthiness of the statement. Thus, the trial court properly granted the State's motion in limine to exclude testimony that a third person had confessed to the crimes for which appellant was convicted. **[jury instruction; lesser included offenses]** When a defendant makes a claim of innocence, no rational basis exists to instruct the jury on a lesser included offense because the jury need only determine whether the defendant is guilty of the crime charged. Because appellant asserted the defense of compete denial of any wrongdoing, the circuit court did not abuse its discretion by not giving instructions on lesser-included offenses. (Erwin, H.; CR-15-825; 6-9-16; Goodson, C.)

Wertz v. State, 2016 Ark. 249 **[recall of mandate]** The Supreme Court's failure to *sua sponte* raise the issue of the submission of a single set of penalty phase verdict forms following appellant's conviction on two counts of capital murder constituted a defect or breakdown in the appellate process that was sufficient enough to justify the recall of the Court's mandate that issued following the disposition of appellant's direct appeal and a remand of appellant's case for resentencing. (CR-07-1155; 6-9-16; Wynne, R.)

Waller v. State, 2016 Ark. 252 **[parole eligibility]** Because appellant received the sentence to which he agreed, the then-existing version of Ark. Code Ann. § 16-90-804(c) did not apply, and appellant failed to demonstrate that the Department of Correction erred in computing his parole-

eligibility date. Thus, the trial court did not err when it denied appellant's petition for declaratory judgment. **[Ark. Code Ann. § 16-68-607]** When reviewing the circuit court's determination to impose a "strike" pursuant to Ark. Code Ann. § 16-68-607, the appellate court will use the same standard that it uses when reviewing the grant of a motion to dismiss pursuant to Ark. R. Civ. P. 12(b)(6). (Dennis, J.; CV-15-345; 6-9-16; Wynne, R.)

Floyd v. State, 2016 Ark. 264 **[attorney disqualification]** The circuit court did not err when it disqualified appellant's attorney, who had previously served in a judicial capacity in the criminal proceeding. The proper disqualification was based upon the attorney's personal and substantial participation in the case. (Jackson, S.; CR-15-813; 6-23-16; Goodson, C.)

Beavers v. State, 2016 Ark. 277 **[Rule 37]** The circuit court erred when it denied appellant's petition seeking postconviction relief, which was based upon trial counsel making erroneous statements to appellant regarding his parole eligibly, which caused appellant to reject a plea offer and stand trial where he received a less favorable outcome. (Wright, J.; CR-15-971; 6-23-16; Hart, J.)

Neal v. State, 2016 Ark. 287 **[drug courts]** Appellant's due process rights were violated when the circuit court expelled him from the court's drug-court program without holding a hearing. Accordingly, the circuit court clearly erred in denying appellant's petition for postconviction relief, which was based upon the due process violation. (McCallister, B.; CR-15-983; 6-30-16; Baker, K.)

Cases in which the Arkansas Court of Appeals concluded that there was substantial evidence to support the appellant's conviction(s):

Crozier v. State, 2016 Ark. App. 307 (theft by receiving) CR-16-37; 6-8-16; Abramson, R.

Oliver v. State, 2016 Ark. App. 332 (unlawful discharge of a firearm from a vehicle) CR-15-539; 6-22-16; Virden, B.

CIVIL

Hadder v. Heritage Hill Manor, Inc., 2016 Ark. App. 303 (Proctor, R.; CV-15-837; 6-1-16; Hixson, K.), and *Patterson v. Heritage Hill Manor, Inc.*, 2016 Ark. App. 301 (Proctor, R.; CV-15-835; 6-1-16; Glover, D.) **[landlord/tenant--negligence]** Under Arkansas law, it is irrelevant whether a third-party visitor to leased property is classified legally as a "licensee" or an "invitee" as long as the third-party visitor is present with the consent of the tenant. An injured third party must establish a landlord's contractual duty to repair a defect in the premises before he may recover

for an injury suffered upon leased property over which the landlord has relinquished possession and control to a tenant. In this case, there is no proof whatsoever of an agreement or contractual undertaking of a legal duty to maintain or repair the leased premises. Moreover, the landlord did not otherwise assume any duty to repair. Despite the plaintiff's contention, there was simply no proper evidence that the premises were an assisted living facility rather than an apartment complex.

Courtyard Gardens Health, LLC v. Sheffield, 2016 Ark. 235 **[AMCA/arbitration]** A custodian of a ward under the Adult Maltreatment Custody Act (AMCA) does not have the authority to bind the ward to arbitration. The legislature intended for custodians to play a more limited role than guardians. The main purpose of a custodian is to ensure that the ward is safe and cared for appropriately and that the ward's assets are secure. If needed, the AMCA specifically permits the court to appoint a guardian of the estate if the ward requires additional assistance. The circuit court appointed Mitchell as custodian of Holliman, but he had no authority to make decisions concerning her estate, and he could not bind Holliman to arbitration. Therefore, the arbitration agreement is invalid. (McCallum, R.; CV-15-1053; 6-2-16; Wood, R.)

In re Corn, 2016 Ark. 229 **[special needs trust]** The circuit court found that the establishment of the trust would be against Arkansas public policy and that there was insufficient evidence presented to support that a special-needs trust should be established. The circuit court erred in finding that the establishment of a D4A trust in this case would be against Arkansas public policy. D4A trusts are clearly provided for by 42 U.S.C. § 1396p(d)(4)(A), and although a state's participation in the federal Medicaid program is voluntary, states that choose to participate must comply with the requirements of the federal Medicaid statute. Moreover, there was sufficient evidence of disability. (Gray, A.; CV-15-902; 6-2-16; Danielson, P.)

James Tree, Inc. v. Fought, 2016 Ark. App. 320 **[new trial]** The attorney's conduct did not constitute "misconduct" or an "irregularity in the proceeding" within the meaning of Rule 59(a)(1) or (2) to justify the granting of a new trial. Neither Ark. R. Civ. P. 59(a)(6), which requires that the jury's verdict be contrary to the evidence; or Ark. R. Civ. P. 59(a)(5), which requires that the jury erred in assessing zero damages justified the granting of a new trial. The circuit court erred in finding that the verdict was clearly against the preponderance of the evidence. The circuit court substituted its view of the evidence in lieu of the jury's, which it may not do, and a manifest abuse of discretion resulted. (Gray, A.; CV-14-585; 6-8-16; Hixson, K.)

Spore v. GEICO, 2016 Ark. App. 306 **[insurance-cooperation clause]** The evidence demonstrates that the insurer was diligent in attempting to locate the Fords and to determine the reason for their absence and failure to cooperate. Nothing occurred to relieve the Fords of their obligation to continue cooperating in their defense, including in the preparation of discovery responses and otherwise complying with the trial court's orders. This court has held that an insurance company is prejudiced where the insured's breach of the insurance contract leads to the entry of a default

judgment against the insured. It is further prejudiced when its insured's failure to cooperate prevents it from fully defending the case. (Piazza, C.; CV-15-1065; 6-8-16; Gladwin, R.)

Helena-West Helena School District v. Shields, 2016 Ark. App. 312 **[service]** The Shields failed to obtain proper service of process on the district. Therefore, the circuit court erred in entering a default judgment against the district and further erred in failing to set aside the default judgment. Rule 4(d)(7), provides for service on a school district: "(7) Upon a state or municipal corporation or other governmental organization or agency thereof, subject to suit, by delivering a copy of the summons and complaint to the chief executive officer thereof, or other person designated by appointment or by statute to receive such service, ..." Thus, Howard, as the district's superintendent, would have been the proper person to serve with Shields's complaint. There may have been others at the school offices authorized to accept service. However, it was incumbent on Shields to identify the person served. She did not do so. Service is not proper where the plaintiff fails to produce evidence that a person authorized by Rule 4 was served with process or refused service. (Simes, L; CV-15-425; 6-8-16; Gruber, R.)

Cross v. Cross, 2016 Ark. App. 327 **[pleadings conform to proof]** The circuit court did not specifically grant appellees' motion to amend the pleadings to conform to the evidence. Although the court did not specifically say that it was granting the motion, it is clear that it did so. The appellants were not prejudiced by the amendment. **[boundary]** Specifically, appellants argue that there was no proof of an agreement to recognize the fence as the proper boundary. However, proof of an explicit agreement is unnecessary because a boundary line by acquiescence is inferred from the landowners' conduct over many years so as to imply the existence of an agreement about the location of the boundary line. **[attorney's fees]** Appellees argue that the circuit court erred in failing to award fees under section 16- 22-309 because res judicata clearly barred appellants' claims. Section 16-22-309(b) provides that a lack of a justiciable issue may be found where "the action . . . was commenced, used, or continued in bad faith solely for purposes of harassing or maliciously injuring another . . . or that the party or the party's attorney knew, or should have known, that the action . . . was without any reasonable basis in law or equity[.]" The circuit court did not abuse its discretion in disallowing fees under this standard. Appellants brought this action based on their contention that appellees were trespassing over the southwest corner of the Cox property to access another tract owned by appellees on which a lake is located. Although the circuit court found that appellants' claims were barred by res judicata and that there was a boundary by acquiescence, there was nothing to indicate that this argument was made in bad faith or that it was made solely for the purpose of harassing or of maliciously injuring appellees. (Capeheart, T.; CV-15-881; 6-8-16; Abramson, R.)

Johnson v. Butler, 2016 Ark. 253 **[whistle-blower act (AWBA)/sovereign immunity]** When the legislature authorized a cause of action against a "public employer" in the AWBA, it expressly waived sovereign immunity. Here, the only basis alleged for surmounting the State's sovereign

immunity was that "[t]he state of Arkansas has waived its sovereign immunity for actions arising under the [AWBA]." Here, Butler's complaint does not identify any conduct attributable to either Johnson or the Board that violates the AWBA. While he makes the conclusory statement that he was terminated for reporting waste or a violation of UAPB's code of ethics, it is unclear what, if anything, he actually reported. Furthermore, it is unclear what he refused to lie about or that he was terminated because he refused to lie. The circuit court erred in denying appellants' motion to dismiss under Rule 12(b)(6) because Butler has failed to state a claim under the AWBA; therefore, no exception to sovereign immunity exists and this suit is barred by the doctrine of sovereign immunity. (Fox, T.; CV-15-480; 6-9-16; Wynne, R.)

Landers v. Stone, 2016 Ark. 272 **[judicial retirement]** Judicial retirement provisions are constitutional. For over fifty years, the General Assembly has conditioned the eligibility for receiving benefits upon retirement at the age of seventy. Eligibility for benefits demonstrably is not the equivalent of a qualification for holding judicial office. The statutes do not constitute an additional qualification in contravention of the constitution. The statutes do not violate amendment 80, equal protection, or due process. (Piazza, C.; CV-16-85; 6-23-16; Goodson, C.)

Kelley v. Johnson, 2016 Ark. 268 **[lethal injection]** The capital-offense inmates failed to plead and to prove that the use of the three-drug Midazolam protocol imposes cruel or unusual punishment, as prohibited by article 2, section 9 of the Arkansas Constitution. The inmates did not meet their burden of establishing either that the alternative execution methods proposed by the inmates are feasible and readily implemented by the ADC or that a 500-milligram intravenous dose of Midazolam is sure or very likely to cause needless suffering. Other objections raised are without merit -- secrecy about suppliers of drugs for the lethal injection process, or about expenditure of public money. (Griffen, W.; CV-15-992; 6-23-16; Goodson, C.)

Integrated Direct Marketing, LLC v. May, 2016 Ark. 281 **[certified question answered -- conversion]** Intangible property, such as electronic data (electronically stored documents), standing alone and not deemed a trade secret, can be converted if the actions of the defendant are in denial of or inconsistent with the rights of the owner or person entitled to possession. (U.S. Dist. Ct., Virginia; CV-15-944; 6-23-16)

DOMESTIC RELATIONS

Bullard v. Coleman, 2016 Ark. App. 324 **[divorce decree; criminal contempt]** The appellant ex-wife was held in willful contempt of an April 2005 divorce decree. In the 2015 order, the appellant was ordered to be incarcerated in the county jail for twenty days, and was ordered to pay her ex-husband, the appellee, $143,708. She contends the trial court erred in (1) depriving her of due process by holding her in criminal contempt without proper notice; (2) giving her an

unduly severe punishment of twenty days in jail; and (3) awarding an excessive amount of money to the appellant instead of to Olivia, her stepdaughter and the rightful owner of the money. The Court of Appeals affirmed, noting that she had notice of the pending contempt proceeding, an opportunity to defend, and she knew that she was facing incarceration for criminal contempt. The Court found that she clearly was afforded due process. On her argument that twenty days was too severe, the Court said that the maximum sentence was thirty days, and the court had the discretion to fashion a penalty to fit the circumstances. The appellant admitted that over a number of years, she repeatedly violated a court order by taking money from her stepdaughter's account for her own use without permission of the court. Finally, she argued that the amount of the judgment was erroneous because no "credit" was given to her for the amounts she spent on her stepdaughter. In rejecting the argument, the Court said she spent the stepdaughter's funds without getting the court's permission, which she knew was a prerequisite. In addition, she testified that she did not know how much she spent directly on her. Therefore, the circuit court had no basis to even determine a proper "credit." (Jamison, L.; No. CV-15-1054; 6-8-16; Hixson, K.)

Lyons v. Hoover, 2016 Ark. App. 322 **[modification of child custody]** Of particular interest in this change of custody case is the "legal lexicon" provided by the Court of Appeals. The original custody order, based on the parties' agreement, was for "joint legal custody with Melanie [appellant mother] being the primary custodial parent subject to Joel's [appellee father] standard visitation." The father subsequently filed a motion to modify custody. In a footnote, the majority noted that the "legal lexicon used in the original divorce decree and the order modifying custody and the order modifying custody on appeal present a challenge to avoid a misunderstanding on appeal." The Court said it appears that the circuit court modified one version of joint custody to another, with neither being "true joint custody." The Court said, "To avoid confusion, we are going to refer to the mother's position herein as 'the trial court erred in changing joint custody with primary physical custody in mother; to 'joint custody with shared physical custody.'" The majority said there was a material change in circumstances and that the record indicates that both parents are capable parents who love their children. The Court noted that the modified custody order made changes that will reduce the need for the parties' interaction and was not clearly erroneous. (Smith, V.; No. CV-15-615; 6-8-16; Hixson, K.)

Balcom v. Crain, 2016 Ark. App. 313 **[mediated property settlement; contempt]** The parties were divorced by decree that incorporated their mediated property settlement into the decree. On appeal, the appellant ex-husband argued that the court had no authority to modify the parties' agreement and that the court erred in holding him in civil contempt. The appellant argued that he was not in "willful contempt," so the court erred in holding him in civil contempt. The Court of Appeals held that the order of contempt was not clearly against the preponderance of the evidence. The decision was affirmed. (Naramore, W.; No. CV-15-848; 6-8-16; Gruber, R.)

Bennett v. Bennett, 2016 Ark. App. 308 **[divorce--marital property; attorney's fees; division of debt; alimony]** The parties were married for thirty years before divorcing. One circuit judge heard the case initially and a second circuit judge in the same circuit completed it. The appellant ex-husband raised four points on appeal: (1) that the second circuit judge misinterpreted the first judge's temporary order concerning the mortgage payments, which led to an error after the marital home was sold; (2) that the circuit court abused its discretion in awarding the appellee the amount of attorney's fees it did; (3) that the circuit court erred in not making appellee liable for one of the parties' debts; and (4) that the circuit court erred in awarding the amount of alimony it did. The Court of Appeals found no error on any of the points appellant raised and affirmed the case. (Hughes, T.; No. CV-15-310; 6-8-16; Virden, B.)

Jones, et al. v. Miller, et al., 2016 Ark. App. 317 **[divorce—res judicata; collateral estoppel]** Separate appellant Thomas Jones and separate appellee Kimberly Miller were divorced by decree entered in 2007. In March 2008, the circuit court entered a supplemental decree and final order that, among other things, awarded appellee Miller a judgment in excess of $20,000 against appellant Jones. A writ of execution was issued directing the sheriff to take possession of four vehicles owned by appellant Jones. Subsequently, separate appellant Ollye Mae Jones filed a motion to intervene, claiming that she had an ownership interest in three of the vehicles subject to the writ of execution. After two hearings, the court entered an order denying her motion to intervene with respect to one of the vehicles, lifting the stay of the writ of execution, ordering the sheriff to proceed with seizing the vehicles, and enjoining each party from disposing of or removing from the court's jurisdiction any of the vehicles. Appellee Ms. Jones appealed, but because of briefing deficiencies that she failed to correct, the Court of Appeals affirmed the trial court's order on procedural grounds and her petition for rehearing was denied. Subsequently, the appellants, now married, filed a petition for replevin seeking possession of the four vehicles, which was dismissed by the circuit court based upon law of the case, res judicata, collateral estoppel, lack of standing, and failure to state a cause upon which relief can be granted. They timely appealed the dismissal of their replevin petition with prejudice. On appeal, they addressed only two of the five grounds upon which the trial court dismissed the petition. The Court of Appeals affirmed summarily, because when a trial court bases its decision on two or more independent grounds and appellant challenges fewer than all of the grounds, the appellate court will affirm without addressing either. The appellants' arguments could not be examined because they did not challenge the other three grounds that the trial court relied on in making its decision to dismiss their petition for replevin. (Bishop, D.; No. CV-15-989; 6-8-16; Vaught, L.)

Stehle v. Zimmerebner, 2016 Ark. 290 **[child support—arrearage; contempt]** The appellant contends on appeal that the circuit court erred (1) by incarcerating her for civil contempt without finding that she is able to pay a child-support arrearage, and (2) in finding her in contempt and incarcerating her when its orders were too indefinite for her to know the duties imposed upon her. The Supreme Court found that both arguments had merit and reversed and remanded. On

the first issue, the court said that the circuit court incarcerated her until she purged herself of the contempt, but did so without making any finding at all that she had the ability to pay. The Court said that the record does not indicate that the circuit court even took this into consideration. The Court said, "Imprisonment for disobedience of an order to pay a sum into the court, without finding whether the party is able to pay the sum, is imprisonment for debt in violation of the Arkansas Constitution." The Court remanded on this issue for the circuit court to make this critical determination. On the second issue, The Court agreed that the circuit court's order failed to follow the familiar rule of law that an order such as this must include, to let her know how she might purge herself of the contempt. " [It] must be definite in its terms, clear as to what duties it imposes, and express in its commands." What the appellant here must do in order to purge herself is uncertain, and "falls woefully short of being definite, clear, and express in its commands." The Court reversed on this point, as well. (Foster, H.G.; No. CV-15-953; 6-30-16; Goodson, C.)

PROBATE

Bates v. State, 2016 Ark. App. 326 **[involuntary admission]** The Court of Appeals held that the State failed to meet its burden of proof that the appellant teacher was a danger to herself and others based upon the testimony. No one testified to fearing that she was a present danger to herself or anyone else. The State contended the court should consider the petition out of an abundance of caution, but the Court of Appeals, in reversing and dismissing, said the statute does not allow an abundance of caution to take the place of clear and convincing evidence when someone is being involuntarily committed. The Court also ordered that the record of the involuntary commitment be removed from the treatment records of the facility. (Cottrell, G.; No. CV-15-1015; 6-8-16; Brown, W.)

Donley v. Donley, 2016 Ark. 243 **[guardianship—termination]** The appellant and the appellee are half-sisters. The appellee filed a petition for temporary guardianship of the appellant's daughter, a hearing was conducted, and a temporary guardianship was granted upon the court's finding that the appellant was not a fit parent and that the appellee was qualified to serve as guardian. About two months later, with the appellant mother's consent, the court entered a permanent guardianship order. The order stated that "the parties and their attorneys appeared...and...the parties 'acknowledged their agreement to this action by way of their signature thereon.'" The order did not include a finding of unfitness of the appellant mother. A little over a year later, the appellant mother filed a petition to terminate the guardianship, contending that the guardianship was no longer necessary and revoking her consent. After a hearing at which the court heard extensive testimony, the court granted the appellee guardian's motion for directed verdict, finding that the guardianship was still necessary and that termination of the guardianship was not in the child's best interest. The Court of Appeals affirmed and the

Supreme Court granted review. On appeal, the appellant mother contends that (1)the court erred when it applied the wrong legal standard for the termination proceeding because it applied the findings of the temporary order to the permanent guardianship; (2) the court erred in considering the mother's fundamental liberty interest and did not afford her the presumption that, as a natural parent, she was a fit parent; and (3) the court erred by placing the burden on the mother to prove that the guardianship was no longer necessary, rather than affording her the fit-parent presumption and shifting the burden to the guardian. The Supreme Court reviewed its recent case law governing terminations of guardianships. In considering the presumption that a fit parent acts in his or her child's best interest, the court said that the temporary order had expired and was superseded by the entry of the permanent order. From the entry of that order forward, the fit-parent presumption applied, so the circuit court erred in not affording the mother the fit-parent presumption. Once the mother, a fit parent, revoked her consent, the burden shifted to the appellee guardian to demonstrate that the guardianship was still necessary or in the ward's best interest. "Stated differently," the Court said, "when [the mother] revoked her consent, the statute was triggered, the presumption applied and the burden shifted to [the guardian]." The Court reversed the case and remanded to the circuit court to apply the correct legal standard. (Pierce, M.; No. CV-15-824; 6-9-16; Baker, K.)

JUVENILE

Taffner v. Ark. Dep't of Human Services, 2016 Ark. 231 **[TPR – ineffective assistance of counsel]** Prior to and at the termination hearing, appellants argued they had ineffective appointed counsel at the adjudication hearing that tainted the dependency-neglect proceedings. On appeal they argued the ineffective assistance of counsel at the adjudication resulted in termination of parental rights. In *Jones v. Ark. Dep't of Human Services, 361* Ark. 161 (2005), the Arkansas Supreme Court adopted the *Strickland* standard for ineffective assistance of counsel claims. In *Jones,* the Court stated that it would not consider a claim of ineffective assistance of counsel on appeal, unless the issue was first raised in the trial court and the facts and circumstances were fully developed by the trial court. Where the issue is raised but the trial court does not rule on it, it will not be raised on appeal. While there was evidence that the trial court considered whether or not appellants had a meaningful adjudication hearing, there was no hearing on the ineffectiveness of counsel claim or any specific ruling regarding the effectiveness of counsel for either parent. The Supreme Court cannot address the ineffective assistance of counsel claim because the circuit court did not rule on it. **[recusal]** Appellant also argued that the circuit court abused its discretion when it denied the mother's motion for recusal. The Code of Judicial Conduct, Canon 3E(1) requires a judge to recuse from cases in which his/her impartiality might be reasonably questioned. This decision is within the trial court's discretion and will not be reversed absent abuse demonstrating judicial bias or prejudice. Adverse rulings are insufficient and appellant failed to show bias or prejudice. **[confrontation of witnesses]**

Appellant argued that she was denied her Sixth Amendment Right to confront witnesses because the circuit court allowed witnesses to testify as to hearsay statements of her children's sexual abuse that had been adjudicated. Appellant argued that she should be allowed to confront her children with these allegations. The Supreme Court held that the Sixth Amendment applies to all criminal prosecutions and decided not to extend this right to termination cases. (Zimmerman, S.; CV-16-965; 6-2-2016; Baker, K.)

Ponder v. Ark. Dep't of Human Services, 2016 Ark. 261 **[PPH – sufficiency Relative Custody]** In December 2014, the circuit court held a PPH hearing finding it was not in the children's best interest to return to the appellant and set the goal for placement with permanent custodians. The PPH order was entered on January 12, 2015. On January 9, 2015 the court conducted a hearing and granted permanent custody to family members and the order was entered on January 25, 2015. Appellant appealed this order arguing insufficient evidence. However at the January 9th hearing appellant conceded there was no additional evidence to be presented and the testimony would be the same. There is nothing in the record to support appellant's claim and it is appellant's burden to bring up a record sufficient to demonstrate that the trial court was in error. (Keaton, E.; CV-16-114; 6-16-2016; 6-16-2016, Baker, K.)

Scrivner v. Ark. Dep't of Human Services, 2016 Ark. App. 316 **[TPR – best interest]** Appellant argued that that TPR was not necessary because his children were placed with their maternal grandmother and it was contrary to their best interest. The Court of Appeals noted that the children were in DHS custody, but placed with the grandmother which could change since her rights derived from the mother's rights which had been terminated. The trial court did not err in finding it in the children's best interest to terminate parental rights where the father was incarcerated off and on during the pendency of the case and he was incarcerated at the time of the termination hearing with charges still pending. He continued to deny he had a substance abuse problem and there was not proof of any employment or housing upon release or if he would be able to maintain any stability. **[due process]** Appellant argued he was denied due process when he was prevented from attending the PPH where the goal was changed to adoption and termination. However, appellant failed to preserve this argument because he did not designate the PPH hearing in his notice of appeal or bring forth the record from that hearing. (Zuerker, L.; CV-16-154; 6-8-2016; Whiteaker, P.)

Wafford v. Ark. Dep't of Human Services, 2016 Ark. App. 299 **[TPR – best interest/potential harm]** The trial court was not clearly erroneous in finding that her marriage and living arrangements, against the court's orders, would subject her children to potential harm. Both parents admitted to being long time drug abusers, the father failed to submit to drug treatment, and neither parent had completed their parenting or counseling as ordered by the court **[grounds/subsequent factors]** There was sufficient evidence as to the subsequent factors ground. After the petition was filed the mother was sentenced to DCC for a year for probation

revocation and when she was released she failed to follow the court orders and case plan. The father failed to comply with the case plan, continued to test positive for drugs, and did not address his mental health issues. A psychological evaluation recommended that he receive intensive psychotherapy and a drug assessment recommended treatment. Yet, he failed to avail himself to any treatment. (Johnson, K.; CV-15-932; 6-1-2016; Kinard, M.)

Dowden v. Ark. Dep't of Human Services, 2016 Ark. App. 296 **[TPR – late compliance]** Appellant's did not challenge the grounds or best interest finding, only that the court did not properly consider their late compliance with the case plan and court orders. The appellate court found that the trial court considered the entire history of the case, including events after the TPR petition had been filed. No reversible error where the trial court reviewed and weighed the evidence. (Thyer, C.; CV-15-1070; 6-1-2016; Virden, B.)

Ellis v. Ark. Dep't of Human Services, 2016 Ark. App. 318 **[PPH – relative placement]** Appellant and DHS argued the circuit court erred in denying DHS's recommendation that appellant's child be placed with appellant's brother, instead of changing the goal to adoption. The appellate court found that A.C.A. 9-27-338 is controlling and it provides for the permanency goals in order of preference based on the juvenile's best interest, health and safety. Placement with a relative is listed as the sixth preferred goal. The circuit court did not err in failing to apply the general relative placement preference because the preference was not applicable at this stage in the case. **[parent/custodian]** Appellant's argument that the third goal of plan for placement with a parent or custodian is also misplaced. This goal requires compliance with the case plan and measurable progress toward remedying the issues that caused removal. Appellant argued that his only barrier to regain custody was his work schedule. However, the evidence indicated that he had failed to comply with several provisions of the case plan, was combative, only visited his child nine times in a year and physically abused his wife. **[best interest]** The appellate court went further and stated that even if the relative preference was applicable at this stage, it would still affirm based on the circuit court's finding of the best interest of the child. The appellate court noted all of the relative preference statutes are conditioned on the best interest of the child. The child's best interest is the paramount consideration the court makes at all stages of juvenile court proceedings. The only evidence presented concerning placement with the uncle was a home study. The uncle had never met the child and lived in Germany. The appellate court noted there was ample evidence to support the child's current placement, including that the child was thriving, his needs were fully met, and he had weekly visitation with his siblings. Appellant's counsel argued in oral argument that since appellant had never been found unfit his determination of his child's placement should be controlling. Appellant could cite no authority where a child remains in DHS custody and a parent retains the right to determine the child's best interest. The appellate court stated that the fact that appellant had never been found unfit was irrelevant; the child had been adjudicated dependent-neglected. As a result, the circuit court is tasked with determining the child's best interest and permanency. Appellant had never parented

his child and was not legally entitled to determine his child's best interest. Circuit court affirmed setting termination of parental rights and adoption as the case goal. (Wilson, R.; CV-15-1008; 6-8-2016; Vaught, L.)

Bushee v. Ark. Dep't of Human Services, 2016 Ark. App. 339 **[PPH – final order)]**
Appeal dismissed without prejudice. The appellate court held that the 54(b) certificate did not satisfy the requirements of Ark. Sup. Ct. R. 6-9(a)(1) and Ark. R. Civ. P. 54(b). The record must show facts to support the conclusion that there is a likelihood of hardship or injustice that would be alleviated by an immediate appeal. Although the order set forth findings from the PPH order, it concluded by stating a hardship or injustice may result if an appeal is not permitted. The order failed to explain the hardship or injustice or tie the findings to its conclusion. (Zimmerman, S.; CV-16-177 6-22-2016; Gruber.)

Bean v. Ark. Dep't of Human Services, 2016 Ark. App. 350 **[DN Adjudication - sufficiency]**
Circuit Court affirmed based on the prior adjudication of siblings currently in foster care. The appellate court noted that a prior adjudication should never be an automatic decision, but found that there was more than a preponderance of evidence that the infant, while not removed from the parents, was at substantial risk of serious harm due to the contingency of the return of three of appellant's children who were currently in foster care. (Smith, T.; CV-16-171 6-22-2016; Brown, W.)

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

Greenhaw v. Ark. Dep't of Human Services, 2016 Ark. App. 294 [failure to remedy] (Layton, S.; CV-16-81; 6-1-2016; Gladwin, R.)

Greatches v. Ark. Dep't of Human Services, 2016 Ark. App. 344 [subsequent factors aggravated circumstances] (Medlock, M.; CV-16-33; 6-22-2016; Vaught, L.)
Motion denied and rebriefing ordered as to appellant father in same case

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

Moore v. Ark. Dep't of Human Services, 2016 Ark. App. 346 [Custody] (Hudson, A.; CV-15-979; 6-22-2016; Hixson, K.)

W.J.S. v. State, 2016 Ark App. 310 **[Sex Offender Registration]**
Appellant appealed the circuit order requiring him to register as a sex offender. Appellant argued that the state could not seek registration because he was not adjudicated delinquent for one of the offenses listed in A.C.A. 9-27-356(a). The appellate court noted that the court can

conduct a registration hearing and require registration when the assessment results recommend registration for any delinquency offense with an underlying sexually motivated component. A.C.A. 9-27-365(b). Appellant also argued that the trial court failed to make specific finding as the statutory factors required in subsection (e). Remanded with instruction to enter findings required by the statute. (Medlock, M.; CR 15-895; 6-8-2016; Kinard, M.)

Brown v. State, 2016 Ark. App. 234 **[Transfer]** Appellant argued that his prior history should have been excluded under A.C.A. 9-27-309(k). The appellate court was unable to reach the merits of the argument due to lack of written findings required by statute. A.C.A. 9-27-318(h)(1). Remanded to comply with the statutory requirement for written findings of factors in A.C.A. 9-27-318(g). (Johnson, L; CR-15-985; 6-11-2016; Harrison, B.)

U. S. SUPREME COURT

Williams v. Pennsylvania **[recusal]** Petitioner Williams was convicted of the 1984 murder of Amos Norwood and sentenced to death. During the trial, the then-district attorney of Philadelphia, Ronald Castille, approved the trial prosecutor's request to seek the death penalty against Williams. Over the next 26 years, Williams's conviction and sentence were upheld on direct appeal, state postconviction review, and federal habeas review. In 2012, Williams filed a successive petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), arguing that the prosecutor had obtained false testimony from his codefendant and suppressed material, exculpatory evidence in violation of *Brady* v. *Maryland*. Finding that the trial prosecutor had committed *Brady* violations, the PCRA court stayed Williams's execution and ordered a new sentencing hearing. The Commonwealth asked the Pennsylvania Supreme Court, whose chief justice was former District Attorney Castille, to vacate the stay. Williams filed a response, along with a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the motion to the full court for decision. Without explanation, the chief justice denied Williams's motion for recusal and the request for its referral. He then joined the State Supreme Court opinion vacating the PCRA court's grant of penalty-phase relief and reinstating Williams's death sentence. Two weeks later, Chief Justice Castille retired from the bench.

> *Held*: Chief Justice Castille's denial of the recusal motion and his subsequent judicial participation violated the Due Process.

The Court's due process precedents do not set forth a specific test governing recusal when a judge had prior involvement in a case as a prosecutor; but the principles on which these precedents rest dictate the rule that must control in the circumstances here. Under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case. The Court applies an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable." A constitutionally intolerable probability of bias exists when the same person serves as both accuser and adjudicator in a case. No attorney is more integral to the accusatory process than a prosecutor who participates in a

No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. As a result, a serious question arises as to whether a judge who has served as an advocate for the State in the very case the court is now asked to adjudicate would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. In these circumstances, neither the involvement of multiple actors in the case nor the passage of time relieves the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences his or her own earlier, critical decision may have set in motion.

Because Chief Justice Castille's authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision, his failure to recuse from Williams's case presented an unconstitutional risk of bias. The decision to pursue the death penalty is a critical choice in the adversary process, and Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against Williams. Given the importance of this decision and the profound consequences it carries, a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion. The fact that many jurisdictions, including Pennsylvania, have statutes and professional codes of conduct that already require recusal under the circumstances of this case suggests that today's decision will not occasion a significant change in recusal practice. (No. 15–5040; June 9, 2016).

Utah v. Strieff **[search/seizure]** Narcotics detective Fackrell conducted surveillance on a South Salt Lake City residence based on an anonymous tip about drug activity. The number of people he observed making brief visits to the house over the course of a week made him suspicious that the occupants were dealing drugs. After observing respondent Strieff leave the residence, Officer Fackrell detained Strieff at a nearby parking lot, identifying himself and asking Strieff what he was doing at the house. He then requested Strieff's identification and relayed the information to a police dispatcher, who informed him that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell arrested Strieff, searched him, and found methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that it was derived from an unlawful investigatory stop. The trial court denied the motion, and the Utah Court of Appeals affirmed. The Utah Supreme Court reversed, however, and ordered the evidence suppressed.

> *Held*: The evidence Officer Fackrell seized incident to Strieff's arrest is admissible based on an application of the attenuation factors from *Brown* v. *Illinois*, 422 U. S. 590. In this case, there was no flagrant police misconduct. Therefore, Officer Fackrell's discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest

(No. 14–1373; June 20, 2016).

Birchfield v. North Dakota **[DWI]** All States have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) exceeding a specified level. BAC is typically determined through a direct analysis of a blood sample or by using a machine to measure the amount of alcohol in a person's breath. To help secure drivers' cooperation with such testing, the States have also enacted "implied consent" laws that require drivers to submit to BAC tests. Originally,

the penalty for refusing a test was suspension of the motorist's license. Over time, however, States have toughened their drunk-driving laws, imposing harsher penalties on recidivists and drivers with particularly high BAC levels. Because motorists who fear these increased punishments have strong incentives to reject testing, some States, including North Dakota and Minnesota, now make it a crime to refuse to undergo testing.

In these cases, all three petitioners were arrested on drunk-driving charges. The state trooper who arrested petitioner Danny Birchfield advised him of his obligation under North Dakota law to undergo BAC testing and told him, as state law requires, that refusing to submit to a blood test could lead to criminal punishment. Birchfield refused to let his blood be drawn and was charged with a misdemeanor violation of the refusal statute. He entered a conditional guilty plea but argued that the Fourth Amendment prohibited criminalizing his refusal to submit to the test. The State District Court rejected his argument, and the State Supreme Court affirmed.

> *Held*: The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests. Taking a blood sample or administering a breath test is a search governed by the Fourth Amendment.

Because the impact of breath tests on privacy is slight, and the need for BAC testing is great, the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. Blood tests, however, are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. No warrant is needed in this situation. Motorists may not be criminally punished for refusing to submit to a blood test based on legally implied consent to submit to them. It is one thing to approve implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a State to insist upon an intrusive blood test and then to impose criminal penalties on refusal to submit.
(No. 14–1468; June 23, 2016)