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CRIMINAL

Rangel v. State, 2017 Ark. 197 **[writ of habeas corpus]** Because appellant was in Mexico, having been deported, and not in "custody" of the circuit court at the time that the court considered appellant's habeas corpus petition, the trial court properly concluded that it did not have jurisdiction to grant appellant habeas relief. (Pearson, W.; CV-16-886; 6-1-17; Baker, K.)

Latham v. State, 2017 Ark. 210 **[recusal]** A serious appearance of impropriety is created when a judge rules on a post-trial motion from a case in which he or she was originally the prosecuting attorney. Because the judge who ruled on appellant's petition filed pursuant to Ark. Code Ann. § 16-90-111 was the prosecuting attorney at appellant's trial, the case must be reversed and remanded so that a different circuit judge can consider appellant's petition. (Haltom, B.; CR-16-1126; 6-1-17; per curiam)

Hill v. State, 2017 Ark. 196 **[Ark. Code Ann. § 16-68-607]** Arkansas Code Annotated § 16-68-607 was intended to regulate the procedure in all civil actions and proceedings in the courts of this State. The statute plainly and unambiguously was intended to apply only to civil proceedings. Accordingly, Ark. Code Ann. § 16-68-607 does not confer authority on the trial court to impose a "strike" in a criminal case. (Williams, C.: CR-16-767; 6-1-17; Baker, K.)

Edwards v. State, 2017 Ark. 207 **[Rule 37]** The circuit court did not clearly err in denying appellant's Rule 37 petition because in one of his allegations appellant failed to establish that his attorney's performance was deficient and in the remaining allegations appellant failed to establish that his counsel's alleged deficient performance prejudiced him. (Wright, J.; CR-16-891; 6-1-17; Wynne, R.)

Holly v. State, 2017 Ark. 201 **[sufficiency of the evidence; residential burglary]** There was substantial evidence to support appellant's conviction. **[motion in limine; mitigating factor]** The circuit court did not err when it granted the State's motion in limine and found that appellant's offer to plead guilty to capital murder in exchange for a life sentence was not admissible as a mitigating factor to show his acceptance of responsibility for his crimes. **[motion to suppress]** Although appellant's wife encouraged him to speak to law enforcement, which led to him giving incriminating statements, she was not acting as an agent of the State but rather was motivated by her own desire to have her husband "clear his name." Additionally, the contact that appellant had with law enforcement after he had invoked his right to counsel was the result of appellant initiating the contact and thereafter knowingly and intelligently waiving his right to counsel. Thus, the circuit court did not err when it denied appellant's motions to suppress. (Karren, B.; CR-15-899; 6-1-17; Hart, J.)

U.S. Currency in the Amount of $31,418.00 and Nathan Stevens v. State, 2017 Ark. App. 379 **[forfeiture]** For property to be subject to forfeiture, the State must prove by a preponderance of the evidence that the property was "used, or intended to be used" to facilitate a violation of the Uniform Controlled Substances Act. If, however, the property is found in close proximity to a forfeitable controlled substance, then it is presumed to be forfeitable, and the burden of proof rests with the claimant of the property to rebut this presumption by a preponderance of the evidence. (Elmore, B. CV-16-975; 6-7-17; Brown, W.)

Robinson v. State, 2017 Ark. App. 377 **[waiver of right to counsel]** Appellant, who was warned of the dangers associated with proceeding without counsel, knew first-hand of such danger, and was questioned about his understanding of the legal process, made a knowing and intelligent waiver of his right to counsel. (Gibson, B.; CR-16-908; 6-7-17; Brown, W.)

Johnson v. State, 2017 Ark. App. 373 **[jury instruction]** In order for a jury to be instructed on extreme-emotional-disturbance manslaughter, there must be evidence that the defendant killed the victim in the moment following some kind of provocation, such as physical fighting, a threat, or a brandished weapon. Passion alone will not reduce a homicide from murder to manslaughter. In appellant's case, he had an argument with his wife then traveled to his ex-wife's house and killed her. There was no evidence that the ex-wife provoked the situation. Although appellant's marital problems may have "aroused unbalanced passions" in appellant, a manslaughter instruction required proof of provocation. Thus, the trial court did not abuse its discretion when it refused to instruct the jury on manslaughter. (Ramey, J.; CR-16-811; 6-7-17; Vaught, L.)

Wilson v. State, 2017 Ark. 217 **[sufficiency of the evidence; aggravated robbery; robbery]** There was substantial evidence to support appellant's convictions. **[sentencing]** A conviction imposed on a juvenile sentenced as an adult may be used as the basis for an increased penalty imposed under the habitual-offender statute. (Huckabee, S.; CR-16-1062; 6-8-17; Hart, J.)

Ward v. State, 2017 Ark. 215 **[sentencing; mandate]** Because the Supreme Court's mandate conferred only limited jurisdiction to the trial court to resentence appellant upon remand, the circuit court exceeded its jurisdiction when it attempted to correct a perceived error in the Supreme Court's opinion. (Wright, H.; CR-16-858; 6-8-17; Hart, J.)

Coleman v. State, 2017 Ark. 218 **[motion to suppress]** Appellant unequivocally invoked his right to remain silent. However, law enforcement officials never stopped questioning him. Thus, appellant could not have waived the earlier invocation of his right to remain silent. Accordingly, the trial court clearly erred in refusing to suppress appellant's statement. **[habitual-offender statutes]** Habitual-offender statutes are not ex post facto laws. (Wilson, R.; CR-16-831; 6-8-17; Wynne, R.)

Lewis v. State, 2017 Ark. 211 **[motion to suppress]** Although appellant's statement was properly suppressed, a recording of the victim, which was played during appellant's suppressed statement, was admissible. The recording was not a testimonial statement made by appellant. In reaching this conclusion, the trial court properly relied upon *United States v. Patane*, 542 U.S. 630 (2004), in which the United States Supreme Court held that the lack of a *Miranda* warning does not justify the suppression of the physical evidence seized pursuant to a search warrant derived from a voluntary "un-warned" statement. **[prosecutor's subpoenas]** Appellant lacked standing to challenge certain evidence that was obtained through prosecutorial subpoenas because the subpoenas were issued to third parties. (Wright, H.; CR-16-413; 6-8-17; Kemp, J.)

Harmon v. State, 2017 Ark. 224 **[State Prison Inmate Care and Custody Reimbursement Act]** Pursuant to the State Prison Inmate Care and Custody Reimbursement Act, before a circuit court may issue an order disbursing funds, the court "shall take into consideration and make allowances for the maintenance and support of the spouse, dependent children . . . or other persons having a moral or legal right to support and maintenance." Additionally, any compensatory damages available after attorney's fees and costs "awarded to a prisoner in connection with a civil action brought against any state or local jail, prison, or correctional facility" shall be paid to satisfy outstanding restitution orders; the remainder shall then be transferred to the prisoner. Because the circuit court failed to make the required findings pursuant to the State Prison Inmate Care and Custody Reimbursement Act before it ordered that funds from appellant's inmate account be distributed to the State for reimbursement of the costs associated with his incarceration, the case was remanded for further evidentiary findings. (Piazza, C.; CV-16-898; 6-15-17; Womack, S.)

Sorum v. State, 2017 Ark. App. 384 **[sufficiency of the evidence; rape; second-degree sexual assault; computer exploitation]** There was substantial evidence to support appellant's convictions. **[rape-shield statute]** The trial court did not abuse its discretion when it excluded a crime-lab report that revealed that two semen stains were found on clothing worn by the victim and that neither sample belonged to appellant because the State's theory of the case was that appellant penetrated the victim with a foreign instrument and therefore evidence about semen was irrelevant. (Karren, B.; CR-16-781; 6-21-17; Virden, B.)

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

Wiseman v. State, 2017 Ark. App. 371 (rape) CR-16-995; 6-7-17; Klappenbach, N.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to deny appellant's Rule 37 petition was not clearly erroneous:

Harris v. State, 2017 Ark. App. 381; CR-16-480; 6-21-17; Abramson, R.

Mardis v. State, 2017 Ark. App. 404; CR-16-813; 6-21-17; Virden, B.

CIVIL

Daniel v. DHS, 2017 Ark. 206 **[postjudgment interest on attorney fees]** Statutory postjudgment interest on attorney's fees accrue when the fees were actually quantified in dollars and cents. The circuit court entered a money judgment confirming a jury verdict; by the same order, it also ruled that the plaintiff was entitled to attorney's fees. However, the court specified the precise attorney's fee amount by a separate order entered months later. Statutory postjudgment interest on the attorney's fees accrues from this second order. (Fox, T.; CV-16-1038; 6-1-17; Wood, R.)

Kilgore v. Robert Mullenax, LLC, 2017 Ark. 204 **[arbitration]** Because the agreements and their prohibited activities involve interstate commerce and are the type of activities that usually involve interstate commerce, the FAA applies to this arbitration. Accordingly, the arbitrator's findings and jurisdictional adjudication are conclusive. Kilgore seeks to vacate the award on public policy grounds; however, he ignores the fact that the FAA provides that a court "must" confirm an arbitration award absent one of the four "exclusive grounds" for vacatur. The circuit court did not err in refusing to read into the FAA an additional "public policy" ground that is not there. (Piazza, C.; CV-16-238; 6-1-17; Wood, R.)

Holmes v. Potter, 2017 Ark. App. 378 **[irrevocable trusts]** While the terms of the trusts executed by Fred and Betty were virtually identical, there is no writing evidencing a contract not to revoke the trusts. Instead, the trusts clearly indicate a contrary intent of the settlors. Both Betty and Fred reserved the right to amend, modify, or revoke the trusts in whole or part at any time. Under these circumstances, it cannot be concluded that Betty and Fred executed irrevocable trusts. **[promissory estoppel]** The circuit court found that there was no promise or agreement between Betty and Fred that they would not revoke their respective trusts. Appellants presented testimony asserting that there was an agreement between Fred and Betty; Fred denied that there was such an agreement. Where the pivotal issue is the credibility of interested parties, whose

testimony is in direct conflict, the appellate court defers to the circuit judge's determination. (McCormick, D.; CV-16-563; 6-7-17; Brown, W.)

Barton v. Brockington, 2017 Ark. App. 369 **[boundary line]** Under the law, the circuit court is required to credit a survey that relies on GLO methods and practices over one that doesn't. But that is not the case here because the two competing boundary lines (the Ross/Foster line and the Tyler line) were drawn by surveyors who all claim to have based their methods and practices on GLO principles. As it stands, this case falls into the general category of when the appellate court defers to the circuit court's determination of the credibility of competing surveyors. Given the deferential standard of review and the so-called "dueling experts," the circuit court's conclusion is affirmed that the Tyler survey was the closest approximation to the original range line and was therefore the boundary line. **[adverse inference]** There is no inference on appeal that the testimony of a witness under the control of a party would be unfavorable to that party when the witness is not present at the trial and is not called to testify. (Foster, H.; CV-16-989; 6-7-17; Harrison, B.)

City of Little Rock v. Circuit Court, 2017 Ark. 219 **[sanctions]** Payment of the $10,000 sanction was intended as a resolution of the matter, as the City, immediately upon making the payment, requested that the circuit court cancel the show-cause hearing as moot. The City voluntarily paid the penalty in order to avoid a contempt finding; however, the attempt was unsuccessful. In sum, the payment by the City was voluntary, and the appeal from the April 25, 2016 order is accordingly dismissed as moot. (Fox, T; CV-16-600; 6-8-17; Wynne, R.)

State Medical Bd. v. Byers, 2017 Ark. 213 **[sovereign immunity]** Because a judgment for Byers would operate to control the action of the State or subject it to liability, her ACRA claims against the Board and against Cryer in her official capacity are barred by article 5, section 20 of the Arkansas Constitution. Regarding the ACRA claim against Cryer in her individual capacity, Byers has merely stated, in conclusory fashion, that Cryer acted with malice when she fired Byers. Byers's bare allegation is insufficient to demonstrate malice. Cryer is entitled to statutory immunity on Byers's individual capacity race-discrimination and retaliation claims under the ACRA. (Piazza, C.; CV-16-755; 6-8-17; Kemp, J.)

Powell v. ISC North, LLC, 2017 Ark. App. 394 **[attractive nuisance]** This appeal boils down to whether the partially submerged truck-bed liner sufficiently obscured the nature of the otherwise open-and-obvious pond to create a jury question on whether it constituted a dangerous instrumentality that was attractive to children and about which they could not have realized or appreciated the danger. It did not, and the trial court did not err in dismissing this case. The truck-bed liner, although partially submerged, was not hidden, and it did not mask the inherently dangerous nature of the pond, which was open and obvious. **[negligence/entry on land]** A licensee is one who goes upon the premises of another with the consent of the owner for one's

own purposes and not for the mutual benefit of oneself and the owner. No duty is owed a licensee until the licensee's presence on the property is known or reasonably should be known, and once the presence is known, the duty owed to the licensee is to refrain from injuring the licensee through willful or wanton conduct. To constitute willful or wanton conduct, there must be a course of action that shows a deliberate intent to harm or utter indifference to, or conscious disregard of, the safety of others. If the landowner knows or has reason to know of a condition on the premises that is not open and obvious and that creates an unreasonable risk of harm to the licensee, the landowner is under the duty to use ordinary care and to make the condition safe or to warn those licensees who do not know or have reason to know of the danger. Here, the proof submitted to the trial court did not establish that the landowners knew or should have known children were on the property. Moreover, even if that fact had been established, for the reasons previously discussed with respect to the inapplicability of the attractive-nuisance doctrine, there was no condition on the land that was not open and obvious. Consequently, even if the child was found to be a licensee, the duty owed to her was to refrain from causing her injury by willful or wanton conduct. No allegations of willful or wanton conduct by the defendant landowners were pleaded. No proof of such conduct was presented to the trial court. (Martin, D.; CV-16-305; 6-21-17; Glover, D.)

DOMESTIC RELATIONS

Mason v. Robertson, 2017 Ark. App. 370 **[visitation; child support]** The appellant mother appeals the order entered by the circuit court concerning visitation and child support. She argues three errors on appeal: that the circuit court erred in (1) finding that she is required to have a nanny present for visitation with her son; (2) limiting her to one additional visitation a month with her son; and (3) finding that her former husband, the appellee, expends $3,900 per month in extraordinary expenses for their autistic son. On the first issue, the Court of Appeals affirmed the circuit court in finding that the parties' 2012 agreed order provided that a nanny shall be present for the appellant's visitation with the child. The appellate court said the circuit court discussed the importance of consistency when dealing with an autistic child and had said that it really needed to be the same nanny all the time. The circuit court was open to the possibility of the appellant hiring her own nanny for visitation so long as it did not negatively affect the child. The Court said on this point the circuit court did not clearly err. On the second issue, the limitation to one additional visitation per month, the Court of Appeals said that appellant's argument on this point ignored the primary reason for the modification according to the circuit court—the parties' inability to communicate with each other. The circuit court has continuing jurisdiction over visitation and may modify or vacate orders when circumstances change or when facts arise not known at the time of the initial order. Best interest of the child is the primary consideration in visitation decisions. The appellate court affirmed the circuit court on this issue. On the final issue of child support, the Court of Appeals said the evidence supported the appellee's testimony and the exhibits about the extraordinary expenses he incurred and the circuit court's order with respect to the amount of child support. The circuit court did not abuse its discretion and affirmed on this point, as well. (Hannah, C.; No. CV-17-2; 6-7-17; Harrison, B.)

Emis v. Emis, 2017 Ark. App. 372 **[modification of child custody]** The appellant mother of twin boys, now about eight years old, appeals from the circuit court's order changing primary custody to the appellee father of the children and providing the mother with visitation. She also appeals from an award of attorney's fees and a denial of other post-trial motions. The parties divorced in 2011 and the mother was awarded custody and the father visitation. After that, the parties agreed on a modification of custody, support and visitation. The agreement specified joint physical custody with legal custody with the mother. In 2014, the court modified support, custody, and visitation pursuant to the parties' agreement. Later, both sought primary custody and the mother requested the court's permission to relocate with the children to Florida. After a three-day hearing in 2015, the court denied the appellant mother's motions and granted the appellee father's request to change custody. The mother has appealed from that order. The Court of Appeals found no error in the trial court's conclusion that the parties' agreed order in 2014 was ambiguous. The Court said it was unclear from the agreement itself exactly what the nature of that modification of the divorce decree was intended to be. The Court said that because the nature of custody provided for in the 2014 agreed order was ambiguous, the trial court's consideration of extrinsic evidence was not clearly erroneous. The Court considered the extrinsic evidence that was presented in testimony before the trial court and noted that the trial court clearly found the appellant mother's testimony to be less than credible. The Court said it could not hold that the trial court's decision to treat the September 2014 order as one granting joint custody was clearly erroneous. On the issue of material change in circumstances, the Court of Appeals could not conclude that the trial court's finding that there had been a material change of circumstances was clearly erroneous nor did it have a definite or firm conviction that a mistake had been made. The Court also held that the trial court's finding that it was in the best interest of the children to award primary custody to the appellee father was not clearly erroneous. The Court said because it was affirming the trial court's decision to award custody to the appellee father, the appellant's relocation argument was moot. The post-trial motions "suffer from procedural difficulties" or from insufficiency of the argument or briefing in the appellate court, so the Court of Appeals did not reach those issues on appeal. The decision was affirmed in its entirety. (Welch, M.; No. CV-15-993; 6-7-17; Whiteaker, P.)

Cooper v. Kalkwarf, 2017 Ark. App. 405 **[custody—relocation]** On March 29, 2017, the Court of Appeals issued on opinion reversing the trial court's order granting the appellee's petition to relocate with the parties' minor son. *Cooper v. Kalkwarf*, 2017 Ark. App. 200. The appellee's petition for rehearing was granted, and the Court issued a substituted opinion. The parties had entered into an Agreement to share "joint, legal custody" with the wife to have "primary physical custody...subject to the reasonable and liberal visitation with husband as set out in...[the]...Agreement...." The circuit court determined that the parties "did not enjoy true joint custody," and the court applied the presumption in favor of relocation as set out in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), rather than applying *Singletary v. Singletary*, 2013 Ark. 506, 431 S.W.,3d 234, which applies to parties who share joint custody. The Court held that the court improperly applied *Hollandsworth*. In deciding whether the result was correct even though the wrong reason was the basis, the Court concluded that it was not the right result, noting that the wife failed to prove there had been a material change in circumstances. In the substituted opinion, the Court of Appeals held again that the trial court improperly relied on *Hollandsworth*. The Court reversed and remanded to the trial

court for further proceedings consistent with its opinion. This is a four-judge majority opinion with one concurrence and four dissents. (Smith, V.; No. CV-16-897; 6-21-17; Brown, W.)

Mason v. Mason, 2017 Ark. 225 **[alimony—statutory interpretation--certified question answered]** The appellant appeals from an order of the circuit court terminating her previous award of alimony pursuant to Ark. Code Ann. sec. 9-12-312(a)(2)(D) (Repl. 2015). She argues the statute may not be applied retroactively to divorce decrees entered before a statutory amendment, the statute is unconstitutionally vague, and the circuit court's previous order stated the only grounds upon which alimony would terminate, rendering the statute inapplicable. The Court of Appeals certified the case to the Supreme Court based upon its involving issues of first impression, significant issues needing clarification or development of the law; and substantial questions of law about the validity, construction, or interpretation of an act of the General Assembly. The Supreme Court held that the mandatory termination language in the statute does not apply retroactively to terminate automatically alimony awards entered before the 2013 amendment. The case was remanded to the Court of Appeals to address the merits. (Smith, V.; No. CV-16-488; 6-22-17; Womack, S.)

PROBATE

Miesner v. Estate of Allred, et al., 2017 Ark. App. 390 **[decedent's estate; appointment of personal representative; family-settlement agreement]** In this case involving a decedent's estate, the appellant is the daughter of the decedent and the appellees are the administrator, the estate, another daughter, and the daughter-in-law of the decedent. The dispute involves the appointment of a personal representative and a family settlement agreement entered into before the death of the decedent and the decedent's son, who predeceased the decedent. The appellant argues on appeal that the petition for appointment of a personal representative was filed by a nonlawyer, so that all the subsequent orders are null and void. The Court of Appeals said that, for the purposes of this case, "the unauthorized-practice-of-law issue had to be raised and ruled on by the circuit court, like nearly every other issue, including constitutional ones, to preserve it for appeal." Therefore, the Court could not consider the issue. The appellant also argued on appeal that the family-settlement agreement is unenforceable. The Court said there are also preservation problems with this issue. The appellee bank was a limited guardian to the decedent, Mrs. Allred, and to her estate. In acting as limited guardian, the attorney for the bank testified that the bank always operated under the family-settlement agreement that was drafted in 2012. There was testimony about the signing of the agreement and the mother's wishes and knowledge about what the agreement meant. The circuit court ruled that the Allred Family Settlement Agreement was reached by all the parties in settlement of litigation that was going on at the time, that the agreement "survives...and should be enforced." The appellant gave four reasons on appeal why the agreement was not an enforceable contract. One was "mutual mistake." However, mutual mistake was never pleaded as a contract defense, nor did the circuit court rule on the question of mistake one way or the other. Neither did the court expressly rule on appellant's arguments about the parties' understanding of the contract terms related to successors in interest or blood relatives. Therefore, the Court of Appeals did not address them. The decision was affirmed. (Singleton, H.; No. CV-16-946; 6-21-17; Harrison, B.)

JUVENILE

Smith v. DHS, 2017 Ark. App. 368 **[termination parental rights]** Although appellant asked for more time to prove her sobriety and stability, this "wait-and-see" situation is the type of instability from which the termination of parental rights statute intends to protect children. Living in a state of prolonged uncertainty is not in the child's best interest. Moreover, most of appellant's testimony amounts to merely hopeful speculation about future employment, housing, and maintained sobriety. Evidence of parental improvement as termination of rights becomes imminent will not outweigh other evidence demonstrating a failure to remedy the situation that caused the child's initial removal. (Threet, J.; CV-17-74; 6-7-17; Gladwin, R.)

Bunch v. DHS, 2017 Ark. App. 374 **[termination parental rights]** The children are in the custody of their grandmother. There is ample evidence that continued contact with their mother is in the children's best interest. The evidence is beyond dispute that these children are strongly bonded with the mother and would like to return to her custody. Although the mother was not in a position to regain custody of the children at the time of the termination hearing, the testimony showed that she lived in appropriate housing and was trying to find employment. She had only a single positive drug test for marijuana several months before the termination hearing and had ended her relationship with the children's father, who had consistently tested positive for drugs during the case. She had been complying with the case-plan requirements, and there was no evidence that she had ever harmed the children. It appears that the primary reason for termination was her lack of financial means. A DHS caseworker testified that she expressed the desire for the children to be adopted by their grandmother, thereby remaining in her custody, and to continue having contact with their mother. This being so, there is no urgency for permanency and stability in this case because, whether or not termination occurs, the children will remain in the custody of their grandmother in the same place they have lived since shortly after their removal. On this record, the trial court clearly erred in finding that termination of Haylee's parental rights was in the children's best interest. (Layton, D.; CV-17-101; 6-1-17; Gruber, R.)

Wallace v. DHS, 2017 Ark. App. 376 **[termination parental rights]** Wallace does not challenge the finding that D.W. is adoptable, nor does she dispute that potential harm existed. Instead, Wallace argues that she was not provided with appropriate services to address her mental-health issues and that she needs more time to reach a point at which she will be stable enough to parent her child. However, as the circuit court noted, "[T]here remains a substantial question as to whether she has the motivation to quit using drugs." The child's need for permanency and stability may override the parent's request for additional time to improve the parent's circumstances. Parental rights will not be enforced to the detriment of the health and well-being of the child. This court is sympathetic to mental illness and the challenges of receiving the proper drug treatment at a dual-diagnosis facility, but in this case, it is not clear that more time would have been beneficial and that a mistake has been made by the circuit court. D.W. has been in

foster care for twelve of his fifteen months of life; his need for permanency overrides Wallace's need for more time. (Branton, W.; CV-16-1127; 6-7-17; Murphy, M.)

Barris v. DHS, 2017 Ark. App. 380 **[termination parental rights]** The court specifically found that appellant had not demonstrated that she had maintained employment, stable housing, or sufficient income to support herself and KJ. All of these things relate to parental unfitness. With regard to appellant's mental instability, appellant was ordered in October 2015 to undergo a psychological evaluation and follow the recommendations. Because appellant was incarcerated from November 2015 through March 2016, appellant did not undergo the evaluation until May 2016. Appellant, not DHS, was responsible for this delay. Moreover, the court found that, although she had submitted to a psychological evaluation, appellant had not followed the recommendations to completion and had missed several appointments. Finally, appellant had failed to exercise visitation for over a year at the time of the hearing. The court's finding that appellant failed to remedy her parental unfitness due to her instability is not clearly erroneous. (Thyer, C.; CV-17-147; 6-21-17; Gruber, R.)

Miller and Crosby v. DHS, 2017 Ark. App. 396 **[termination parental rights]** The trial court clearly considered the adoptability prong. There was testimony from the family-service worker that she believed both children were adoptable, along with details concerning their health and how they were progressing and how they were getting along in their placements. Based on the evidence presented, the trial court found it was likely the children would be adopted. A parent's failure to comply with court orders can serve as a "subsequent factor" upon which termination can be based. Here, Dana, the father, was ordered to do several things throughout the course of this case. He completed some of the things he was ordered to do, but not all. DHS presented several areas of noncompliance, and the trial court was satisfied that DHS proved several specific deficiencies. In addition, Dana acknowledges that he was ordered to complete parenting classes and undergo a drug-and-alcohol assessment throughout the case and that he did not do so. During the course of the case, he tested positive for THC, even as late as January 2016. He also did not pay child support as ordered. (Zimmerman, S.; CV-17-26; 6-21-17; Glover, D.)

U.S. SUPREME COURT

Bristol-Myers v. Superior Court of California. **[personal jurisdiction]** A group of plaintiffs, most of whom are not California residents, sued Bristol-Myers (BMS) in California state court, alleging that the pharmaceutical company's drug Plavix had damaged their health. BMS is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. Although it engages in business activities in California and sells Plavix there, BMS did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory approval for Plavix in the State. And the

nonresident plaintiffs did not allege that they obtained Plavix from a California source, that they were injured by Plavix in California, or that they were treated for their injuries in California.

The California Superior Court denied BMS's motion to quash service of summons on the nonresidents' claims for lack of personal jurisdiction, concluding that BMS's extensive activities in the State gave the California courts general jurisdiction. The State Court of Appeal found that the California courts lacked general jurisdiction. But the Court of Appeal went on to find that the California courts had specific jurisdiction over the claims brought by the nonresident plaintiffs. Affirming, the State Supreme Court applied a "sliding scale approach" to specific jurisdiction, concluding that BMS's "wide ranging" contacts with the State were enough to support a finding of specific jurisdiction over the claims brought by the nonresident plaintiffs. That attenuated connection was met, the court held, in part because the nonresidents' claims were similar in many ways to the California residents' claims and because BMS engaged in other activities in the State.

Held: California courts lack specific jurisdiction to entertain the nonresidents' claims.

(a) This Court's decisions have recognized two types of personal jurisdiction: general and specific. For general jurisdiction, the "paradigm forum" is an "individual's domicile," or, for corporations, "an equivalent place, one in which the corporation is fairly regarded as at home.". Specific jurisdiction, however, requires "the suit" to "aris[e] out of or relat[e] to the defendant's contacts with the forum.

(b) Settled principles of specific jurisdiction control this case. For a court to exercise specific jurisdiction over a claim there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State."). When no such connection exists, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. The California Supreme Court's "sliding scale approach"—which resembles a loose and spurious form of general jurisdiction—is thus difficult to square with this Court's precedents. That court found specific jurisdiction without identifying any adequate link between the State and the nonresidents' claims. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California does not allow the State to assert specific jurisdiction over the nonresidents' claims. Nor is it sufficient (or relevant) that BMS conducted research in California on matters unrelated to Plavix. What is needed is a connection between the forum and the specific claims at issue.

(c) BMS's decision to contract with McKesson, a California company, to distribute Plavix nationally does not provide a sufficient basis for personal jurisdiction. It is not alleged that BMS engaged in relevant acts together with McKesson in California or that BMS is derivatively liable for McKesson's conduct in California. The bare fact that BMS contracted with a California

distributor is not enough to establish personal jurisdiction in the State.
(No. 16–466; June 19, 2017)

McWilliams v. Dunn **[indigent criminal defendant/mental health expert]** *Ake* v. *Oklahoma* clearly established that when an indigent "defendant demonstrates . . . that his sanity at the time of the offense is to be a significant fact at trial, the State must" provide the defendant with "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." One month after *Ake* was decided, Alabama charged petitioner McWilliams with rape and murder. Finding him indigent, the trial court appointed counsel, who requested a psychiatric evaluation of McWilliams. The court granted the motion and the State convened a commission, which concluded that McWilliams was competent to stand trial and had not been suffering from mental illness at the time of the alleged offense. A jury convicted McWilliams of capital murder and recommended a death sentence. Later, while the parties awaited McWilliams' judicial sentencing hearing, McWilliams' counsel asked for neurological and neuropsychological testing of McWilliams. The court agreed and McWilliams was examined by Dr. Goff. Dr. Goff filed a report two days before the judicial sentencing hearing. He concluded that McWilliams was likely exaggerating his symptoms, but nonetheless appeared to have some genuine neuropsychological problems. Just before the hearing, counsel also received updated records from the commission's evaluation and previously subpoenaed mental health records from the Alabama Department of Corrections. At the hearing, defense counsel requested a continuance in order to evaluate all the new material, and asked for the assistance of someone with expertise in psychological matters to review the findings. The trial court denied defense counsel's requests. At the conclusion of the hearing, the court sentenced McWilliams to death.

On appeal, McWilliams argued that the trial court denied him the right to meaningful expert assistance guarantee by *Ake*. The Alabama Court of Criminal Appeals affirmed McWilliams' conviction and sentence, holding that Dr. Goff's examination satisfied *Ake*'s requirements. The State Supreme Court affirmed, and McWilliams failed to obtain state postconviction relief. On federal habeas review, a Magistrate Judge also found that the Goff examination satisfied *Ake* and, therefore, that the State Court of Criminal Appeals' decision was not contrary to, or an unreasonable application of, clearly established federal law. The Eleventh Circuit affirmed.

> *Held*: The Alabama courts' determination that McWilliams received all the assistance to which *Ake* entitled him was contrary to, or an unreasonable application of, clearly established federal law.

This Court does not have to decide whether *Ake* requires a State to provide an indigent defendant with a qualified mental health expert retained specifically for the defense team. That is because Alabama did not meet even *Ake*'s most basic requirements in this case. *Ake* requires more than

just an examination. It requires that the State provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] evaluation, [3] preparation, and [4] presentation of the defense." Even assuming that Alabama met the examination requirement, it did not meet any of the other three. No expert helped the defense evaluate the Goff report or McWilliams' extensive medical records and translate these data into a legal strategy. No expert helped the defense prepare and present arguments that might, *e.g.*, have explained that McWilliams' purported malingering was not necessarily inconsistent with mental illness. No expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing. Since Alabama's provision of mental health assistance fell so dramatically short of *Ake*'s requirements, the Alabama courts' decision affirming McWilliams' sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law." (No. 16–5294; June 19, 2017)

Pavan v. Smith **[Arkansas-same sex/birth certificates]** Plaintiffs brought this suit in Arkansas state court against the director of the Arkansas Department of Health—seeking, among other things, a declaration that the State's birth-certificate law violates the Constitution. The trial court agreed, holding that the relevant portions of §20–18–401 are inconsistent with *Obergefell* because they "categorically prohibi[t] every same-sex married couple . . . from enjoying the same spousal benefits which are available to every opposite-sex married couple." But a divided Arkansas Supreme Court reversed that judgment, concluding that the statute "pass[es] constitutional muster." "The statute centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife," and so it "does not run afoul of *Obergefell.*"

> *Held:* The Arkansas Supreme Court's decision denied married same-sex couples access to the "constellation of benefits that the Stat[e] ha[s] linked to marriage."

Arkansas insists a birth certificate is simply a device for recording biological parentage—regardless of whether the child's parents are married. But Arkansas law makes birth certificates about more than just genetics. When an opposite-sex couple conceives a child by way of anonymous sperm donation—just as the petitioners did here—state law requires the placement of the birth mother's husband on the child's birth certificate. Arkansas has thus chosen to make its birth certificates more than a mere marker of biological relationships. The State uses those certificates to give married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition. (No. 16-992; June 26, 2017)