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

This is the final issue of *Appellate Update* for this term of court.

On June 3rd, the Supreme Court announced various rules changes related to recommendations of the Civil Practice Committee. The amendments are effective July 1, 2010. A copy of the per curiam order was included in the weekly mailout.

On June 17th, the Supreme Court adopted Administrative Order Number 21, dealing with E-Filing, and a copy of the per curiam order was included in the weekly mailout.

On June 17th, the Supreme Court published for comment proposed Supreme Court Rule 1-8. The comment period runs to September 1, 2010. A copy of the per curiam order was included in the weekly mailout.

On May 20th, a proposed change to Supreme Court Rule 5-3 was published for comment. The comment period ends September 1, and a copy of the proposal was included in the weekly mailout.

On May 27th, the following rule changes were announced, and the per curiam orders were included in the mail-out: Administrative Orders Number 1, 14, 16 (special/appointed judges); Administrative Order Number 6 (broadcasting oral arguments); and Rule of Criminal Procedure 16 (motions to withdrawal counsel).

CRIMINAL

Webb v. State: **[motion to suppress]** The trial court did not err in declining to suppress items found in appellant's motel room in plain view during the apprehension of appellant's boyfriend by law enforcement. (Tabor, S.; CACR 09-911; 5-5-10; Pittman).

Hampton v. State: **[admission of evidence]** Because law enforcement officials obtained the murder weapon as a result of a violation of appellant's *Miranda* rights, the trial court erred in admitting the weapon into evidence at appellant's trial. However, the error was not reversible because law enforcement officials would have inevitably discovered the evidence by lawful means. (Fogleman, J.; CACR 09-1132; 5-5-10; Pittman).

Douglas v. State: **[revocation of suspended imposition of sentence]** The circuit court's decision to revoke appellant's suspended sentence was not clearly against the preponderance of the evidence. (Cox, J.; CACR 09-1216; 5-5-10; Robbins).

Howard v. State: **[trial court findings]** The findings made by the trial court were consistent. (Wright, H.; CACR 09-1077; 5-5-10; Kinard).

Banks v. State: **[motion to suppress]** The circuit court's ruling denying appellant's motion to suppress was not clearly against the preponderance of the evidence. (Pope, S.; CACR 09-1212; 5-5-10; Kinard).

M.E. v. State: **[revocation of conditional release]** The trial court's finding that appellant violated the terms and conditions of his conditional release following an acquittal by reason of mental disease or defect was not clearly erroneous. (Herzfeld, R.; CA09-1235; 5-5-10; Baker).

State v. Richardson: **[speedy trial]** Because appellant filed a motion to dismiss pursuant to a speedy-trial violation after he had already been tried, his motion was ineffective. Because appellant's motion was ineffective, the circuit court's order granting the motion was a nullity. (Simes, L.T.; CR 09-952; 5-6-10; Corbin).

Lewis v. State: **[sufficiency of the evidence; rape; kidnapping]** There was substantial evidence to support appellant's convictions. (Fogleman, J.; CR 09-703; 5-6-10; Danielson).

Robinson v. State: **[motion for mistrial]** The circuit court did not abuse its discretion when it denied appellant's request for a mistrial. (McCallum, R.; CACR 10-10; 5-12-10; Glover).

Allen v. State: **[motion to suppress]** The trial court did not err in denying appellant's motion to suppress evidence that was found in plain view during a traffic stop. (Wright, H.; CACR 09-1338; 5-12-10; Henry).

Wright v. State: **[motion to suppress]** Because the State established that appellant's custodial statement

was given after a knowing and intelligent waiver of his *Miranda* rights, the trial court did not err in denying appellant's motion to suppress the statement. (Storey, W.; CACR 09-1385; 5-12-10; Brown).

Ingle v. State: **[search warrant]** The affidavit supporting the request for a search warrant of appellant's home established probable cause that illegal activity occurred in appellant's home and that contraband was located in appellant's home. It was permissible for law enforcement officials to search an automobile located in the curtilage of appellant's home pursuant to the original search warrant even if the affidavit did not separately establish probable cause for the search of the automobile because the automobile was reasonably thought to contain the objects of the search. The totality of the circumstances established that the search warrant, which was not executed until seventeen days after it was issued, was not stale. (Sims, B.; CACR 09-848; 5-12-10; Gladwin).

Arkansas Public Defender Commission v. Pulaski County Circuit Court: **[public defender funds]** Arkansas law does not require appellant to be represented by appointed counsel in order for the circuit court to authorize the use of funds from the Arkansas Public Defender Commission to pay for necessary and reasonable expenses associated with his defense. (Wright, H.; CR 10-120; 5-13-10; Danielson).

Kamgno v. State: **[probation]** The trial court did not err in revoking appellant's probation. (Maggio, M.; CACR 10-123; 5-19-10; Pittman).

Lewis v. State: **[revocation of suspended imposition of sentence]** The circuit court's decision to revoke appellant's suspended sentence was not clearly against the preponderance of the evidence. (Cox, J.; CACR 09-957; 5-19-10; Hart).

Robinson v. State: **[waiver of right to counsel]** The trial court's finding that appellant made an unequivocal, knowing, and intelligent waiver of his right to counsel was clearly against the preponderance of the evidence. (Glover, D.; CACR 09-1206; 5-19-10; Vaught).

Leonard v. State: **[appeal from district court]** Because appellant's certified record contained the minimum documents needed to constitute the record of the proceedings from the district court, his appeal was perfected and the circuit court erred in dismissing the appeal. (Gibson, B.; CACR 09-789; 5-26-10; Hart).

Childs v. State: **[motion for mistrial]** The trial court did not abuse its discretion by denying appellant's motion for a mistrial, which was based upon remarks made by the prosecutor. **[motion to sever]** The trial court did not err when it denied appellant's pretrial motion for severance. (Wright, H.; CACR 09-778; 5-26-10; Brown).

Butler v. State: **[pedophile exception]** The trial court properly admitted testimony regarding appellant's prior bad acts pursuant to the pedophile exception to Rule 404(b) of the Arkansas Rules of Evidence. (Wright, J.; CR 09-1353; 5-27-10; Danielson).

Marcyniuk v. State: **[sufficiency of the evidence; capital murder]** There was substantial evidence to support appellant's conviction. **[admission of photographs]** The circuit court did not abuse its discretion

by allowing the State to enlarge and publish to the jury seventeen photographs of the victim's body taken at the crime scene and during the autopsy. **[suppression of statement]** Appellant sought to suppress pre-*Miranda* statements that he made when seated in an officer's patrol car while the officer was preparing a warning citation for a traffic violation. The trial court denied appellant's motion. On appeal, the Supreme Court concluded that based upon the totality of the circumstances, the trial judge's denial was not clearly against the preponderance of the evidence. (Storey, W.; CR 09-634; 5-27-10; Gunter).

Cockrell v. State: **[motion to suppress]** A law enforcement official lawfully approached appellant's vehicle pursuant to Rule 2.2 of the Arkansas Rules of Criminal Procedure. Upon observing appellant's actions in the vehicle, and in combination with other factors, such as the location of the vehicle, law enforcement officials then had reasonable suspicion that justified detaining appellant pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure. Thus, the evidence that was obtained during the search was lawfully collected. Accordingly, the trial court did not err in denying appellant's motion to suppress. (Piazza, C.; CR 09-1254; 5-27-10; Gunter).

Mance v. State: **[sufficiency of the evidence; aggravated assault]** There was substantial evidence to support two of appellant's aggravated-assault convictions. The remaining two convictions for aggravated assault were reduced to the lesser-included offense of first-degree assault. (Proctor, W.; CACR 09-1281; 6-2-10; Glover).

Hammonds v. State: **[sufficiency of the evidence; abuse of a corpse]** There was not substantial evidence to support appellant's conviction. (Ramey, J.; CACR 09-855; 6-2-10; Robbins).

Glass v. State: **[Confrontation Clause]** A defendant retains the right to confront witnesses in a revocation proceeding. The trial court erred by allowing a law enforcement official to offer hearsay testimony from a confidential informant over appellant's Confrontation-Clause objection, without making a specific finding of good cause. (Fitzhugh, M.; CACR 09-1390; 6-2-10; Brown).

Bayless v. State: **[competency]** The trial court did not err in finding that appellant was competent for his revocation hearing. (Whiteaker, P.; CACR 09-1305; 6-2-10; Vaught).

Burkhart v. State: **[revocation of suspended imposition of sentence]** The trial court did not err in finding that appellant's failure to pay fines and costs was inexcusable. (Cottrell, G.; CACR 09-1291; 6-2-10; Gladwin).

Jones v. State: **[motion for a mistrial]** The trial court did not abuse its discretion in denying appellant's motion for a mistrial. (Humphrey, M.; CACR 09-1074; 6-2-10; Gruber).

Wormley v. State: **[motion to suppress]** The trial court's finding that the affidavit and search warrant sufficiently described appellant's residence was not clearly erroneous. Appellant's challenges to the information contained in the affidavit supporting the request for a search warrant were without merit. Accordingly, the trial court did not err in denying appellant's motion to suppress. **[motion for a continuance]** The trial court did not abuse its discretion when it denied appellant's motion for a continuance. (Pope, S.; CACR 08-1344; 6-2-10; Henry).

Lockhart v. State: **[sufficiency of the evidence; capital murder; theft of property]** There was substantial evidence to support appellant's convictions. **[admission of evidence]** The trial court did not abuse its discretion when it admitted evidence of prior bad acts pursuant to Arkansas Rules of Evidence 404 (b) and Rule 403 because the challenged evidence was independently relevant and more probative than prejudicial. (Proctor, W.; CR 09-1120; 6-3-10; Sheffield).

Eastin v. State: **[Rule 37]** The circuit court did not clearly err in finding that trial counsel's performance was not ineffective. (Thomas, J.; CR 08-1189; 6-3-10; Hannah).

Hill v. State: **[motion for mistrial]** The trial court did not abuse its discretion when it denied appellant's motion for a mistrial, which was based on appellant's assertion that evidence that he considered to be irrelevant and unfairly prejudicial was admitted during his trial. **[Rule 403]** The trial court did not abuse its discretion in ruling that the probative value of certain evidence regarding the victim's criminal history was outweighed by the danger of unfair prejudice or confusion of the issues. (Wyatt, R.; CACR 09-334; 6-16-10; Pittman).

Pace v. State: **[admission of evidence]** The trial court did not abuse its discretion by considering testimony from the manager of a store and ruling that there was a sufficient foundation for the admission of his testimony and the register receipt that he prepared regarding the value of stolen merchandise. (Proctor, W.; CACR 09-1347; 6-16-10; Gladwin).

Wicks v. State: **[revocation of suspended imposition of sentence]** The circuit court's decision to revoke appellant's suspended sentence was not clearly against the preponderance of the evidence. **[motion to dismiss]** The circuit court did not have jurisdiction to entertain appellant's motion to dismiss. (Tabor, S.; CACR 09-1218; 6-16-10; Henry).

Reed v. State: **[revocation of suspended imposition of sentence]** The circuit court's decision to revoke appellant's suspended sentence was not clearly against the preponderance of the evidence. (Halsey, B.; CACR 10-138; 6-16-10; Baker).

State v. Thompson: **[probable cause; search]** A positive alert following a dog sniff, standing alone, provides probable cause to search. (Wright, J.; CR 10-18; 6-17-10; Danielson).

Carter v. State: **[sufficiency of the evidence; possession of cocaine and marijuana with intent to deliver; possession of drug paraphernalia; simultaneous possession of drugs and firearm; maintaining a drug premises]** There was substantial evidence to support appellant's convictions. (Singleton, H.; CR 09-831; 6-17-10; Gunter).

Forrester v. State: **[right to counsel]** There is no right to confer with counsel prior to taking a breathalyzer test. The pretrial procedure of submitting to a breathalyzer test is not a critical stage in the criminal proceedings subject to the right to counsel because it is a scientific test that presents minimal risk that counsel's absence might derogate from the defendant's right to a fair trial.
(Green, R.; CR 09-872; 6-17-10; Hannah).

Canada v. State: **[motion to suppress]** The trial court correctly denied appellant's motion to suppress evidence obtained during a lawful search. (Wright, H.; CACR 09-1211; 6-23-10; Vaught).

Hadley v. State: **[possession of a firearm by a felon]** The felon-in-possession-of-a-firearm statute, which is codified at Ark. Code Ann. § 5-73-103 (c)(1)(B), is an independent offense rather than an enhancement statute. (Humphrey, M.; CACR 09-1282; 6-23-10; Pittman).

Aquilino v. State: **[revocation of probation]** The trial court did not err in finding that appellant willfully and inexcusably violated the conditions of her probation. (Reynolds, D.; CACR 10-33; 6-23-10; Pittman).

Gill v. State: **[sufficiency of the evidence; first-degree murder; use of a firearm in the commission of a felony]** There was substantial evidence to support appellant's convictions. **[admission of evidence]** The trial court did not abuse its discretion when it admitted certain evidence and testimony during appellant's trial. **[motion for mistrial]** Appellant, who received less than the maximum sentence, cannot show that he was prejudiced by the trial court's denial of his motion requesting a mistrial, which was based upon comments made by the prosecutor during closing arguments. (Anthony, C.; CACR 09-368; 6-23-10; Gruber).

State v. Tyler: **[expungement]** Because appellant's convictions from 1989 were ineligible for expungement under Act 531 of 1993, the circuit court erred in entering an order to seal them pursuant to that statute. (Proctor, W.; CR 10-121; 6-24-10; Danielson).

Cooper v. State: **[motion to suppress]** The trial court did not err in denying appellant's motion to suppress physical evidence seized from appellant's car during an inventory search. (McCallum, R.; CACR 09-1229; 6-30-10; Hart).

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

Moss v. State: (rape) CACR 09-390; 5-5-10; Brown.

Skomp v. State: (abuse of an endangered or impaired person) CACR 09-1171; 5-5-10; Baker.

Rambeau v. State: (theft of property; breaking or entering) CACR 09-1058; 5-5-10; Hart.

Slade v. State: (manufacturing marijuana) CACR 09-966; 5-12-10; Pittman.

Bates v. State: (aggravated robbery; first-degree murder) CACR 09-1184; 5-12-10; Gruber.
Hogan v. State: (possession of cocaine with intent to deliver; possession of marijuana) CACR 09-1020; 5-19-10; Robbins.

Harris v. State: (aggravated robbery; theft of property) CACR 09-1143; 5-26-10; Hart.

Patton v. State: (possessing cocaine with intent to deliver; simultaneously possessing drugs and firearms) CACR 09-1156; 5-26-10; Gruber.

Cox v. State: (domestic battering in the second degree) CACR 09-1335; 6-2-10; Baker.

Montgomery v. State: (rape) CACR 09-1259; 6-16-10; Baker.

Stewart v. State: (possession of a controlled substance) CACR 10-76; 6-16-10; Kinard.

Sartin v. State: (aggravated robbery) CACR 08-1104; 6-16-10; Kinard.

Tucker v. State: (delivery of crack cocaine) CACR 09-1329; 6-16-10; Hart.

Grissom v. State: (theft of property) CACR 09-1277; 6-16-10; Brown.

Mack v. State: (possession of cocaine and marijuana) CACR 09-1106; 6-23-10; Pittman.

CIVIL

Conmac Investments, Inc. v. Entergy Arkansas, Inc.: **[easement]** Utility had a valid easement and had the right to enter the property to fix a power line. (Erwin, H.; CA09-862; 5-6-10; Brown)

Walnut Ridge Golf Club, Inc. v. City of Walnut Ridge: **[lease]** Implied covenant of quiet enjoyment is not applicable because under the deed by which the city acquired the property the city has a overarching duty to ensure the safety of the airport, and the lease recognizes this obligation. By vacating the lease, the city is not taking the property because the city already owns the property. (Erwin, H.; CA09-1044; 5-6-10; Vaught)

NCCF Support, Inc., Trustee v. Harris McHaney Real Estate Co.: **[summary judgment]** Summary judgment was not proper because there are unresolved issues of material fact. (Scott, J.; CA09-842; 5-6-10; Kinard)

*Household Recovery Services v. Vega***: [new trial]** Amount of the deficiency judgment does not conform to the proof at trial but to the amount pled in the complaint. Court abused its discretion by not granting the motion for a new trial. (Fitzhugh, M.; CA09-456; 5-6-10; Henry)

Bell v. Hoofman: **[appeal from county court]** In suit by landowner brought in the county court to lay out a private road, an appeal to circuit court is de novo.
The doctrines of res judicata and law of the case do not apply, and the circuit court erred in dismissing the appeal on these bases. (Hughes, T.; CA09-434; 5-6-10; Hart)

Mullen v. Taylor: **[final order]** Summary judgment order from which the appeal was taken was not final

as several claims were not resolved by the order. (Cottrell, G.; CA 09-973; 5-6-10; PC)

Scales v. Vaden: **[partition]** Court did not err in refusing to modify his order on party's motion to modify the legal description in a consent decree. Court did not err in restricting the purpose of the survey – to delineate the boundary line. (Gibson, B.; CA 09-895; 5-12-10; Gruber)

Scales v. Vaden: **[tax sale]** Tax commissioner's notice complied with statutory and due process requirements. (Fox, T.; CA 09-984; 5-12-10; Gruber)

L and L Energy Co. v. Chesapeake Exploration: **[oil/ gas lease]** Leases expired by their own terms because there was no actual production at the expiration of the primary term. Acceptance of royalty payments after the expiration did not estop the lessors from asserting lease cancellation. (Hughes, T.; CA 09-1263; 5-12-10; Glover)

Bonds v. Hunt, Trustee: **[contract]** Parties entered into an enforceable contract. **[pierce corporate veil]** There was no evidence to support piercing the corporate veil; there was no abuse of the corporate form to hold the individual personally liable. **[pre- judgment interest]** An award was proper but the date of commencement was adjusted on appeal. (McCallister, B.; CA 09-979; 5-12-10; Kinard)

Herrington v. Ford Motor Co.: **[jurors]** Court did not err in sitting jurors after challenge based on their responses to voir dire questioning. (Smith, K., B.; CA 08-624; 5-12-10; Pittman)

Jennings v. Architectural Products: **[judicial notice]** Court did not err in refusing to take judicial notice of an admission made in a pleading to the effect that the fall occurred on defendant's property. The location is not an adjudicative fact under Evidence Rule 201. (Fox, T.; CA 09-529; 5-12-10; Robbins)
Pogue, Admx. v. Transcontinental Ins. Co. **[AMI 2303]** This instruction correctly sets out the law on the issue of whether the plaintiff was fully compensated in an underinsured motorist claim. (Weaver, T.; SC 09-1356; 5-13-10; Hannah)

Barnes v. DFA: **[administrative appeal]** The Alcoholic Beverage Control Board failed to issue sufficient findings of fact and conclusions of law to permit judicial review. (Guthrie, D.; CA 09-39; 5-19-10; Glover)

Kennedy Funding, Inc. v. Shelton: **[foreclosure]** The party did not offer proof to support its claim of usury and thus failed to carry its burden of proof. Court properly awarded prejudgment interest. (Fox, T.; CA 09-79; 5-19-10; Henry)

Wetzel v. Mortgage Electronic Registration Systems: **[certified question]** The question certified is whether an affidavit of lost mortgage with a copy of the mortgage appended, or merely a copy of an admittedly lost original mortgage, separately or collectively recorded, constitutes constructive notice sufficient to defeat the claim of a bona fide purchaser under the laws of the State of Arkansas.

The answer is No. The affidavit of lost mortgage is not an instrument affecting title to real property pursuant to section 14-15-404(a)(1), and although accepted for recording by the Circuit Clerk, it was not entitled to recordation pursuant to section 14-15-402. The recording of the affidavit of lost mortgage does

not constitute constructive notice sufficient to defeat the claim of a bona fide purchaser. (SC 09-1410; 5-20-10; Corbin)

Minor v. Chase Auto Finance Corp.: **[certified question]** The question is whether non-waiver and no-unwritten-modifications clauses in a financing agreement preclude a creditor from waiving future strict compliance with the agreement by accepting late payments.

When a contract does not contain a non-waiver and a no-unwritten-modification provision and the creditor has established a course of dealing in accepting late payments from the debtor, the creditor waives its right to insist on strict compliance with the contract and must give notice to the debtor that it will no longer accept late payments before it can declare default of the debt.

However, if a contract includes non-waiver and no-unwritten-modification clauses, the creditor, in accepting late payments, does not waive its right under the contract to declare default of the debt, and need not give notice that it will enforce that right in the event of future late payments. A security agreement is effective according to its terms between the parties. Non-waiver clauses are legal and valid. (SC 09-801; 5-20-10; Sheffield)

Baber v. State Medical Board: **[administrative appeal]** There was no final agency action for judicial review because the doctor voluntarily surrendered his license before the Board could render a decision on his request for a closed hearing and voluntary restriction of his license. Court has no jurisdiction in the absence of final agency action. (Epley, A.; SC 09-1355; 5-20-10; Wills)

Morgan v. Turner: **[dismissal/complaint]** Trial court erred when complaint was dismissed on the bases of accord and satisfaction, collateral estoppel, and failure to join indispensable parties. (Plegge, J.; SC 09-557; 5-20-10; Sheffield)

Farmers Union Mutual Ins. v. Robertson: **[class certification]** Typicality requirement satisfied despite contention that claim unique to the plaintiff was pending because that claim was superseded by subsequent pleadings which did not incorporate by reference earlier pleadings. Court's other findings to certify the class were not in error. Court declined to overrule Arkansas's alleged approach to class-action litigation – certify now, decertify later. Precedent allows class actions to be certified first when there are predominating threshold issues of liability common to the class, even though there may be individualized issues that come later requiring either the creation of subclasses or decertification altogether. The facts of this case raise no federal due-process concerns.(Sutterfield, D.; SC 09-619; 5-20-10; Corbin)

Moore v. Dunsworth: **[adverse possession]** Party failed to establish adverse possession when he never paid property taxes on the land as required by statute. Party did not satisfy this requirement by attempting,

without success, to list the tax assessment in his name and qualifying for an homestead tax credit. (Guthrie, D.; CA 09-10190; 5-26-10; Pittman)

West Memphis Adolescent Residential, LLC v. Compton: **[tortious interference]** Court properly granted summary judgment on tortious interference claim because alleged actionable conduct was nothing more than privileged competition rather than improper interference. (Hill, V.; CA 09-167; 5-26-2010; Robbins)

Pulaski Choice, LLC v. 2735 Villa Creek: **[quiet title]** Commissioner of State Lands failed to obtain proper service; therefore, decree quieting title must be set aside. Also, the failure to include the correct parcel number in the notice of sale rendered the sale void. (Fox, T.; CA 09-331; 5-26-10; Kinard)

Ernst and Young v. Reid: **[limitations]** Tolling agreement did not apply to claims presented in suit; therefore, limitations defense was applicable and barred claim. (Tabor, S.; SC 09-735; 5-27-10; Hannah)

Walters v. Dobbins: **[civil rights act]** Appellant cites no Arkansas authority in his brief and only cites federal cases; he has failed to cite to any convincing legal authority and the trial court is affirmed. (Yeargan, C.; SC09-1004; 5-27-10; Danielson)

Smith v. Arkansas Midstram Gas Services: **[eminent domain/constitutionality]** Statute is neither unconstitutional on its face or as applied. It does not grant the power of eminent domain for a private use. (Hughes, T.; SC 09-1186; 5-27-10; Brown)

Hickey v. Gardisser:**[workers comp]** Commission has jurisdiction over case involving drug and alcohol use, and burden is on the employee to rebut presumption that the injury was occasioned by the illegal drug use. (Finch, J.; CA 10-98; 6-2-10; Gladwin)

Borland v. Travis: **[admissions]** Party's failure to timely respond to admission request had the effect of that party admitting that there was no consideration offered for the execution of a promissory note. (Moody, J.; CA 09-1392; 6-2-10; Hart)

Bisbee v. Decatur Bank: **[res judicata]** There is no basis to argue that tract of land should have been included in prior foreclosure litigation involving related tracts when tract had not been release from bankruptcy stay. Res judicata did not prevent foreclosure when stay was lifted as to that tract. (Epley, A.; CA 09-1096; 6-2-10; Pittman)

Agracat, Inc. v. AFS-NWA, LLC: **[damages]** Value of plaintiff's lost business relationships is difficult to ascertain, but directed verdict was not proper in the case because of problems with the evidence introduced. There was evidence from which the jury could calculate an award. (Lindsay, M.; CA 09-1095; 6-2-10; Vaught)

Fitton v. Bank of Little Rock: **[homestead exemption]** A married person with a beneficiary interest in a property that she maintains as a principal residence is entitled to a homestead exemption even though the title of the property is held by a revocable trust. (Piazza, C.; SC 09-1273; 6-3-10; Sheffield)

Walker v. Board of Education: **[school closure]** The Board's action in closing a school constitutes an adjudication and is subject to the Arkansas Administrative Procedures Act, and the parents have standing to challenge the Board's action. The parents have not demonstrated that the Board's action in approving the petition for closure prejudiced their substantial rights under section 25-15-212. The Board did not violate the constitution or statute. (Kilgore, C.; SC 09-1253; 6-3-10; Danielson)

Snowden v. JRE Investments, Inc. **[oil/gas lease]** Ark. Code Ann. Section 15-73-201 operates to extend the lease to all lands under the lease and not just where production has occurred. The lessee was entitled to suspend drilling operations while the litigation was pending because the lessor had attacked the validity of the lease. (Clark, D.; SC 09-1149; 6-3-10; Gunter)

Southern Farm Bureau v. Krouse: **[declaratory judgment/attorney fees]** Ark. Code Ann. Section 23-79-209 controls in this declaratory action in which insured prevailed against insurer's counterclaim for declaratory judgment attempting to void its obligation to pay under-insured motorist coverage. Awarded amount of attorney's fees was reasonable. (Guthrie, D.; CA 09-1264; 6-16-10; Robbins)

Druyvestein v. Summit Brokerage Services: **[constructive trust]** Imposition of constructive trust was in order following a mistake in the changing of beneficiary form for the account. (Cox, J.; CA 09-921; 6-16-10; Henry)

Parkerson v. Brown: **[intervention]** Holder of an easement should be allowed to intervene in a title confirmation action regarding property bought at a tax sale. (Williams, L.; CA 09-871; 6-16-10; Brown)

Born v. Hosto and Buchan: **[claims against attorneys for debt collection practices]** Statute provided immunity to lawyers who were sued by debtors because there was no privity of contract between debtors and attorneys. Attorneys were representing creditor-clients in connection with actions giving rise to the lawsuit. Debtors had no claim for abuse of process because suits were not filed for an ulterior purpose but only to collect debts. Even if a suit filed by the attorney against a debtor was time-barred, an abuse of process claim does not lie. There can be no claim for civil conspiracy between an attorney and his client for actions undertaken in the furtherance of legal representation. Claims under Fair Debt Collection Practices Act were properly dismissed because complaint fails to state claim under the Act. (Fox, T.; SC 09-971; 6-17-10; Brown)

Miletello v. Pugh: **[summary judgment]** Record did not support resolution of the case via summary judgment. (Glover, D.;CA 09-1177; 6-23-10; Glover)

Crum v. Craig: **[boundary line]** Evidence supported court's decision to locate borders for one section in accordance with survey. Regarding another section, a riparian conveyance extends to the center of the creek and the order should be modified to so reflect. Regarding dispute over usage of water from creek for irrigation purposes, court's finding that both owners' use was reasonable was proper and neither was entitled to injunction. (Henry, D.; CA 09-1203; 6-23-10; Henry)

Ark. Appraiser Licensing Board v. Quast: **[administrative appeal]** Board's decision in sanctioning an appraiser was not supported by findings of fact and conclusions of law. (Cook, V.; CA 09-1187; 6-23-10; Vaught)

Exigence v. Baylark: **[sanctions]** Judge's order striking answer and awarding default judgment as a sanction was not proper because order, which allegedly was disobeyed giving rise to the sanction, was deficient. Thus a violation of that order cannot be a proper basis for the award of sanctions. (Simes, L.; SC 09-1272; 6-24;10; Gunter)

DISTRICT

Frolos v. State: **[district court appeal]** Appellant filed a notice of appeal in the district court within 30 days of judgment. More than 40 days later, appellant's attorney filed an affidavit in circuit court stating that a notice of appeal had been filed but that the record had not yet been certified by or lodged with the circuit clerk. The circuit court granted the State's motion to dismiss the appeal and affirm the district court judgment because the appeal was not timely filed. The Court of Appeals held that Rule 36 of the Rules of Criminal Procedure governs the matter and that a notice of appeal is not required. It was also held that Rule 36 provides an affidavit may be filed within 40 days of judgment stating that the clerk failed to certify the record; the attorney affidavit was outside the 40 day limit. Appellant also argued for a belated appeal; however no rule gives circuit court authority to accept untimely appeals from district court. The trial court properly dismissed the appeal and affirmed the district court judgment. (Erwin, J.; CACR09-1117; 6/16/10)

Johnson v. Dawson: **[district court appeal]** Appellant filed an appeal transcript in his circuit court appeal of a district court judgment. District Court Rule 9 requires a certified copy of the docket sheet from district court not its equivalent. Appellant failed to perfect his appeal and the circuit court erroneously concluded that it possessed jurisdiction to entertain the appeal. Appeal dismissed. (Pearson, J.; 09-1367; 6/24/10)

DOMESTIC RELATIONS

Davenport v. Burnley: **[domestic abuse; order of protection]** The testimony at the hearing on an order of protection indicated that the appellant stood on the appellee's porch, beat on the door, demanded to be let inside, and fired three shots from a gun. Although the appellee did not testify at the hearing that he was afraid, circumstantial evidence was sufficient to support that the appellee was placed in fear of imminent physical harm, bodily injury, or assault, and to support a finding of domestic abuse. (Benton, W.; No. CA 09-1180; 5-5-10; Kinard).

Buehne v. Buehne: **[child support]** The trial court ordered the appellant father to pay child support on monies he received upon the sale of non-marital property following the parties' divorce. Appellant contended on appeal that the trial court erred by not considering the tax basis in the property and the taxes owed on the transaction in calculating the amount of net income generated from the sale. The appellant conceded that he did not present his arguments to the trial court and that he offered no evidence regarding the taxes that he paid. The court declined to address the issues that were raised for the first time on appeal and affirmed the trial court. (Scott, J.; No. CA 09-1059; 5-5-10; Henry).

Rogers v. Jennings (Rogers): **[divorce–property settlement agreement; payment of child's college expenses]** The trial court awarded the appellee mother of the child $12,400.09, which it found the appellant father owed for their daughter's college expenses, and $750 in attorney's fees. In affirming the trial court, the Court of Appeals noted that there was no modification of the parties' property settlement agreement, despite the fact that appellant talked about an "agreement" between him and his daughterThe parties' property settlement agreement said that he was obligated to pay for "books, tuition and expenses associated with attending college." Because the phrase separately mentioned books and tuition, it included college expenses beyond those two items, and the court did not order him to pay for anything outside of that definition. The appellant agreed at the time of the divorce to be responsible for his daughter's college expenses with no corresponding duty for her to minimize her

expenses. The court said "[t]he fact that appellant entered into an agreement which later appeared improvident to him is no ground for relief." The court discussed the trial court's awarding a judgment to the appellee, since the money was not for child support. Appellant did not, however, raise that issue with the circuit court, so he could not raise it on appeal. Finally, the court affirmed the award of an attorney's fee, which the court could award based upon its inherent authority to award in domestic relations cases, the statutory authority to award in breach-of-contract cases, and by the terms of the property settlement agreement. (Cole, J.; No. CA 09-1376; 5-12-10; Brown).

Goldman v. Goldman: **[contempt; appeal]** In an appeal from an order finding appellant in contempt in a divorce case, the Court of Appeals set out the appellant's entire argument of less than one page. In affirming the circuit court, the court said:

> Appellant has merely made a general assertion of error without identifying any specific error he believes to have occurred or explaining why he believes the trial court was mistaken. An argument is not sufficient if it simply invites the court to search the record generally for errors.

(Benton, W.; No. CA 08-639; 5-12-10; Pittman).

Shannon v. McJunkins: **[change in custody]** The trial court did not err in finding a material change of circumstances that created a situation in which it was in the child's best interest to be placed in the custody of her father. The change in custody was unrelated to the appellant mother's petition to relocate, as the court did not consider relocation as a change of circumstances upon which it based the change-in-custody decision. (VanAusdall, R.; No. CA 09-491; 5-19-10; Baker).

Adams v. Adams: **[reduction in child support]** Upon hearing testimony that the appellant left his job voluntarily, the trial judge excused the witness and did not allow appellee to testify further or to present additional evidence. The court found no basis to excuse a parent's child-support obligations because a parent quit a job "to do something different." The Court of Appeals found that the trial court erred in ruling that no circumstances could exist under Arkansas law to find reasonable cause to justify appellant's voluntarily quitting his job. (Lineberger, J.; No. CA 09-1270; 5-19-10; Baker).

Green v. Green: **[modification of alimony]** While a court has power to modify an existing decree of alimony in a continuing action, the court may do so only upon a showing of a material alteration of circumstances. Such a modification cannot be based on errors in the original decree that were not challenged on appeal. The requirement of a change in circumstances as a basis for modification of an alimony decree is based on considerations relating to the finality of judgments. These considerations apply not only to original judgments, but also to subsequent orders regarding modification: only changes in circumstances occurring after the most recent modification order can support a further modification. (Smith, V.; No. CA 09-962; 5-26-10; Pittman).

Shields v. Kimble: **[change in custody; UCCJEA; relocation; unclean hands]** The parties divorced in 2007 and a few months after the divorce, appellant mother moved with the parties' child to Montana. On the appellee father's motion, custody was changed to him in 2008. In affirming the trial court, the Court of Appeals found that the circuit court properly relied upon the UCCJEA in finding that the court had

continuing jurisdiction of the case. The trial court also considered the *Hollandsworth* factors to determine that the move was not in the best interest of the child. Finally, the appellant was precluding from arguing unclean hands because she failed to raise it in the pleadings or to the trial court as an equitable defense. (Smith, P.; No. CA 09-985; 6-2-10; Baker).

Bradford v. Johnson: **[modification of child support; change in circumstances; Administrative Order No. 10]** Changed circumstances must be shown for a modification of child support, and the burden is on the party seeking modification to show that change. Any order for support must include the court's findings in conformity with Administrative Order No. 10. (Clawson, C.; No. CA 10-292; 6-16-10; Gladwin).

Ross v. Ross: **[child custody]** The trial court's finding that it was in the child's best interest to be placed in the custody of her mother was not clearly erroneous. It is within the province of the trial court to make credibility determinations. The order was affirmed. (Landers, M.; No. CA 10-70; 6-16-10; Gruber).

Collins v. Collins: **[divorce--marital property]** The appellant husband owned the real property in question before the parties were married. After the marriage, the appellant executed a warranty deed conveying property to the parties as husband and wife. The trial court found that it was marital property subject to equal division between the parties. The appellant claims the court should have granted him full ownership. The Court of Appeals cited authority providing that property acquired before marriage is not considered marital property. However, when property is placed in the names of husband and wife, a presumption arises that they own the property as tenants by the entirety. The presumption can be overcome only by clear and convincing evidence that a spouse did not intend it as a gift. It is presumed when husband and wife hold as tenants by the entirety that the spouse who furnished the consideration made a gift in favor of the other spouse, and this presumption may also be rebutted by clear and convincing evidence. The appellant failed to overcome the strong presumption of a gift and the trial court did not err. (Harkey, J.; No. CA 10-56; 6-16-10; Brown).

Friend v. Friend: **[divorce–property division; marital debts]** On this second appeal after remand, the appellant contended that the trial court erred in not giving him credit for payment of marital debts, in ordering him to pay the appellee's attorney's fee because of his contemptuous actions, in awarding the appellee payments on a real-estate contract for the sale of property he agreed to convey to the appellee, in requiring him to pay additional CPA fees that appellee incurred as a result of erroneous tax forms he reported to the IRS, and in the court's findings concerning gold and silver the parties' owned. The Court of Appeals noted the deference it gives to the circuit court's credibility determinations, and the detail of the trial court's findings on certain issues. The Court affirmed the trial court in all respects. (Spears, J.; No. CA 09-1189; 6-23-10; Gruber).

Wommack v. Ingram: **[appeal; jurisdiction; contempt]** The parties filed cross-actions for contempt. The court found the appellant in contempt and imposed sanctions, and he appealed. The Court of Appeals dismissed the appeal without prejudice for failure to have a final, appealable order. The court said that, because the trial court had cross-actions for contempt based upon the same underlying order of the court and the same facts involving the same parties, the one contempt order is not final without a decision on the counter petition. (Zimmerman, S.; No. CA 09-1275; 6-23-10; Glover).

Pearce v. Pearce: **[divorce--property; alimony; debt]** From a final decree of divorce, the appellant appealed, asserting that the trial court erred (1) in finding three tracts of land the appellant conveyed to appellee to be the appellee's sole property; (2) in awarding the appellee alimony of $250 a month; and (3) in ordering appellant to pay half of the credit card debt on a card used exclusively by the appellee. The Court of Appeals affirmed the trial court on all three points. (Looney, J.; No. CA 09-1407; 6-23-10; Baker).

Zobrist v. Zobrist: **[child custody–material change in circumstances]** The parties were awarded joint custody of their five-year-old son at the time of divorce. Four months later, the appellant mother sought sole custody, alleging that the parties could not cooperate with each other. The trial court found the evidence insufficient to show a material change of circumstances. The Court of Appeals found "substantial differences" between the parties with respect to day care, school, and visitation. The appellee had testified that the parties could not or would not communicate or cooperate, that he would not always answer the phone when the appellant called to talk to the child, that they did not have conversations, and that he refused to allow her to visit the child at day care. The child's counselor found him "anxious and depressed." She described a picture he had drawn for her in which the mother had a gun pointed at the father and the father was going to run over the mother. He had used a red marker to depict blood. The court said that the exercise of joint custody requires the parties to cooperate in making shared decisions affecting the child and that the failure to so cooperate constitutes a material change in circumstances. The court reversed and remanded for further proceedings to determine what disposition will be in the child's best interests. (Huckabee, S.; No. CA 09-1249; 6-30-10; Pittman).

PROBATE DIVISION

Rice v. Seals, et al.: **[sale of real estate and confirmation of sale; partial distribution of estate]** The standard of review for confirmation of a judicially-ordered sale is abuse of discretion. The trial court's decision to authorize the sale was more than adequately supported by appellee Seal's testimony at the hearing. Confirmation of a sale cures all errors not jurisdictional or clearly violative of some fundamental right secured through the provisions of the probate code. The appellant was afforded more than sufficient opportunity to present her objections and to make her position clear, and she received "all of the process that she was due." The appellant's argument is without merit that the trial court abused its discretion in directing appellees to take necessary steps to close the estate, rather than letting the proceeding remain indefinitely on the court's docket while the parties resolve their problems. (Jamison, L.; No. CA 09-844; 5-5-10; Baker).

The Estate of Helen Virginia Coan, et al. v. The Estate of Joseph Coan, Jr., et al.: **[probate proceedings–statute of limitations]** This dispute is whether the proceeds of a wrongful-death settlement for appellee's decedent are a part of the appellant estate or the appellee estate. Ark. Code Ann.§16-56-114 provides that actions on all judgments and decrees shall be commenced within ten years after the cause of action accrues. However, these two consolidated estates are still pending and no final distribution has not been made in either. Therefore, the period of limitations has not yet run. Ark. Code Ann. § 28-1-115 establishes an extended period in which courts have jurisdiction to modify or vacate orders in probate proceedings. The statute has been interpreted to mean that a probate order may be vacated or modified at any time before a final order is entered. The executor of the appellee estate can

still take action on the 1992 decree ordering the distribution of the wrongful death proceeds to the then-living appellant's guardian, and the ten-year statute of limitations will not begin to run until the appellee estate is closed. (Landers, M.; No CA 08-1230; 5-12-10; Gladwin).

Anderson, et al. v. Holada, et al.: **[wills; "personal effects"]** One provision in decedent's will was to give "all [of my] personal and household effects, automobiles and collections to my sisters who survive me in equal shares." Another article in the will distributed the residue of the estate to a trust, to be divided between the sisters under the trust, with the share of a predeceased sister to go to that sister's children. The appellants are the decedent's niece and nephew, whose mother died before the decedent. The trial court interpreted the first provision to mean all of the decedent's personal property. The appellants argued that the interpretation was too broad, and that the phrase did not include assets such as certificates of deposit, bank accounts, life insurance proceeds, and individual retirement accounts. The Court of Appeals noted that the term "personal effects" has no settled meaning and reviewed cases in Arkansas and other jurisdictions for definitions. The court found that the language in the decedent's will was more limiting than in cases relied upon by the appellee, and that it did not include all personal property, specifically property such as bank deposits, certificates of deposit, securities, and life insurance proceeds. (Maggio, M.; No CA 09-57; 5-12-10; Brown).

Hill, et al. v. Hill: **[guardianship; conservatorship]** At issue were competing petitions for a guardianship or a conservatorship of Kristin Kuelbs, the adult sister of appellant Donald Hill and appellee Kimberly Hill. After suffering head injuries in a car accident, Ms. Kuelbs moved from Wisconsin to Arkansas to live with her brother, the appellant, to whom she gave power of attorney. Appellee sister, who lives in Minnesota, filed a guardianship petition in Arkansas, alleging, among other things, that appellant Hill had absconded with Ms. Kuelbs' funds. Mr. Hill filed a counter-petition to be appointed her conservator. The circuit judge appointed an attorney ad litem to represent Ms. Kuelbs. After appointing a psychologist and receiving the results of a psychological evaluation and recommendations, the court appointed a social worker as guardian of the person and a bank as guardian of the estate. The brother appealed on behalf of himself and Ms. Kuelbs. The Court of Appeals affirmed the appointment of the attorney ad litem, affirmed the denial of the motion to dismiss the guardianship petition, affirmed the court's granting appellee's motion for an order of protection when she was noticed for a deposition, affirmed the court's not granting appellant's motion to strike the psychologist's testimony, and affirmed the appointment of a bank as the guardian of the estate. In addition, the Court of Appeals found no demonstration of bias of the trial court, as appellant contended, and noted that the record did not reflect that they asked the judge to recuse. The court commented that the judge's interaction with the parties was thoughtful and respectful, that she was mindful of protecting Ms. Kuelbs' rights and imposing as few restrictions as possible, and that she was patient and compassionate toward her. (Cook, V.; No. CA 09-231; 5-12-10; Brown).

Truitt v. Freeman: **[probate of will; jurisdiction, venue]** The appellant appealed from a judgment denying his motion to set aside an order admitting a will to probate. The denial was based upon the fact that the order was not timely challenged. On appeal, the appellant alleged that the trial court had no jurisdiction to enter the order in the first place. The Court of Appeals said that the appellant actually was arguing venue and that he had cited a venue section from the probate code in support of his contention that he was raising a question of jurisdiction, not venue. The decision affirmed the court's denial of the

motion filed after the time for appeal from the order had expired. (Halsey, B.; No. CA 09-108; 6-2-10; Vaught).

JUVENILE

T.C. v. State. **[Delinquency Adjudication]** Circuit Court reversed and remanded. Court of Appeals reversed. T.C. was found delinquent in the second degree murder of his sister. **[Sufficiency of Evidence]** Motions made at the close of the evidence were not specific enough to advise the court as to the exact element of the crime that the state failed to prove and did not preserve the argument for appeal. A brief filed in support of a motion to dismiss in a bench trial that is made after a case is taken under advisement is untimely and does not cure a defective motion under Rule 33.1. **[Motion to Suppress]** Appellant's waiver of *Miranda* rights was not voluntary, knowing, and intelligent. When the juvenile asked the police officer what "waiver" meant the officer gave him the definition of voluntariness. As a result, his waiver was not made with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." The circuit judge's finding that T.C. knowingly and intelligently waived his rights was clearly against the preponderance and the confession is suppressed **[Brady Violation]** Appellant failed to show a Brady violation occurred. The state provided the defense the witness and the statement in question. T.C.'s counsel failed to interview the witness or subpoena him. Appellant also failed to show that the evidence was exculpatory or material. **[Disposition]** There was no error in circuit judge's disposition of commitment to DYS and probation if released prior to the age of 18. *(*Keaton, E.; 09-1128; 5-14-2010 *substituted opinion*; Br*own*)

State v. K.B. **[Ark. R. Evid. 503]** The court erred in holding that a minor victim and her mother can waive the physician-patient privilege under 503(d)(3)(A) because they are not parties to the criminal prosecution. The state, not the victim, is the party.

The victim does not have a claim in the criminal prosecution for purposes of the exception to the physician-patient privilege rule. (Williams Warren, J.; 09-1018; 5-13-2010; Sheffield)

D.B. v. State **[Delinquency Adjudication]** Appellant challenged the sufficiency of the evidence in a delinquency finding that he committed rape of his 11 year old cousin. A rape victim's testimony need not be corroborated, nor is scientific evidence required. Appellant failed to make a motion to dismiss at the close of the evidence as required by Rule 33.1. A motion for dismissal must specify the element of the crime that the state failed to prove. (Harrod, L.; CA10-72; 5-19-2010; Gladwin)

P.G. v. State **[Delinquency Adjudication** Appellant appealed finding that he committed aggravated assault. The evidence did not support a conclusion that a substantial risk of death was created by appellant's use of his car. (Hewett, M.; CA09-1214; 5-12-2010; Vaught)

Timmons v. Arkansas Dept. of Human Servs. **[TPR - ICWA]** Appellant's challenge of the sufficiency of the evidence of the circuit court's best interest finding was affirmed. Since this was an ICWA case, the circuit court made its findings based on a beyond a reasonable doubt standard. However, the Court of Appeals found that clear and convincing evidence was the appropriate burden. The court found no error since the appropriate standard of proof was encompassed in the trial court's higher standard of proof. The court recommended, "the better practice for the circuit court would have been to employ a dual burden of proof to separate sets of findings under Ark. Code Ann. §9-27-341 and 25 U.S.C.A. §1912(f)." (Hewett, M.; CA10-71; 5-12-2010; Gruber)

Kinard v. Arkansas Dept. of Human Servs. **[TPR]** Appellant's sole argument is that the judge erred in viewing her home during the termination hearing and by failing to ensure that a record was made of what occurred during the visit. If the visit was undertaken for the purpose of understanding proof already on the record it would be permissible. However, the purpose was to acquire new evidence regarding the current state of appellant's home. This is an error. The better practice would be to have attorneys, parties and witnesses observe the apartment and then report back on the record. Ark. R. Evid. 605 prohibits a trial judge from acting as a witness in a case. However, based on the remaining proof in the hearing, the error was harmless. Where evidence is improperly admitted but the same evidence is admitted through another source there is no reversible error. (Hewett, M.; CA10-71; 5-12-2010; Gruber)

Rogers v. Arkansas Dept. of Human Servs. **[TPR]** There was sufficient evidence to terminate mother's parental rights. The "other factors" ground found at Ark. Code Ann. § 9-27-341(b)(3)(B)(vii) was affirmed. Appellant failed two in-patient substance abuse programs because of threats she made to patients and staff. Transportation services were terminated because of her verbally abusive behavior. She made statements that she could have more children that exhibited an indifference in remedying the subsequent issues. (Thyer, C.; CA09-606; 5-26-2010; Kinard)

Reed v. Arkansas Dept. of Human Servs. **[TPR - Best Interest]** There was evidence by a case worker that the 17 month old child was likely to be adopted. The court also addressed the potential harm factor in appellant's continued lack of stability in not having a permanent home for her child. There was sufficient evidence to support the court's best interest finding. (Zimmerman, S.; CA10-12; 5-12-2010; Kinard)

Blakes v. Arkansas Dept. of Human Servs, **[No Merit TPR]** Minor mother in foster care with delinquent behaviors had been provided numerous services. Appellant failed to avail herself or remedy her issues with violence, aggression, and anger management resulting in an inability to provide for child. Termination was affirmed. (Wilson, R.; CA09-858; 5-5-2010; Gladwin)

Barber v. Arkansas Dept. of Human Servs. **[No Merit TPR]** Appellant father was sentenced in a criminal proceeding for a period that would constitute a substantial period of the juvenile's life. Termination of parental rights was affirmed. (Hewett, M.; CA091405; 5-5-2010; Robbins)

Thorne v. Arkansas Dept. of Human Servs..(Griffin, J.; CA09-583; 5-19-2010; *substituted opinion;* Gruber); *Myers v. Arkansas Dept. of Human Servs.* (Griffin, J.; CA09-569; 5-19-2010; *substituted opinion*; Baker) **[D-N Adjudication]** The Court of Appeals handed down substituted opinions correcting nonmaterial mistakes of fact and denied appellants' petition for rehearing.

C.H. v. State. **[Criminal Division Transfer]** The criminal division relinquished its exclusive jurisdiction to set aside its transfer order once it transferred the case to the juvenile division. The proper remedy for the state was to file a timely appeal of the transfer order. (Cottrell, G.; CR10-255 6-3-2010; Sheffield)

T.Y.R. v. State **[Juvenile Sex Offender Registration]** Affirmed. Trial court did not take juvenile's refusal to admit rape in to consideration in violation of statute. In fact, court expressly stated that it did not do so in its findings in reviewing the assessor's recommendations. The court focused on the report and testimony that the juvenile failed to make any progress in a program specifically designed for him that did not require him to admit the rape and that despite treatment efforts he lacked motivation in completing the program. Although the assessor recommended additional treatment time, the trial court noted that rehabilitation was unlikely due to his failure to make significant progress and that his prognosis for completing the program was poor. (Wood. R., C09-1300; 6-2-2010; Henry)

A.F. v. State **[Delinquency Adjudication]** Affirmed. Appellant was charged with criminal mischief and theft of property. Appellant argued that their was insufficient evidence of the witness's identification. Yet, the witness testified that she saw appellant run from her car and identified appellant. (Halsey, B.; 10-140; 6-23-2010; Kinard)

Culclager-Hayes v. Arkansas Dept. of Human Servs. **[Dependency-Neglect Adjudication]** Affirmed. Appellant challenged adjudication based on abandonment. Appellant failure to take charge of her child following the child's release from juvenile detention constituted an articulated intent to forego parental responsibility. The court also made credibility findings that the appellant understood the ramifications of her choice (Brown, E.; 10-117; 6-23-2010; Pittman)

Henderson v. Arkansas Dept. of Human Servs. **[TPR - Continuance]** Appellant challenged the court's denial of her continuance for a TPR pending her criminal charges that stemmed from the same facts initiating the dependency-neglect proceedings. She argued that the continuance was necessary to protect her constitutional right against self-incrimination, and her right to effective assistance of counsel. She further argued that the continuance would not thwart the purpose of the juvenile code because the children had been placed with their fathers and permanency would not be delayed. Appellant did not prove that she was prejudiced by the continuance because she failed to assert those rights at earlier proceedings. Appellant's involvement in the death of her child and the endangerment of her other children had already been litigated at the adjudication and she failed to appeal that decision. (Wilson, R.; 10-28; 6-2-2010; Baker)

Burhalter v. Arkansas Dept. of Human Servs. **[TPR - Special Judge]** Affirmed. Appellant's sole argument on appeal is that the order is void because the special judge who heard the TPR and signed the case was not elected pursuant to the procedures and was not sitting as special judge when the order was filed. Appellant has abandoned any challenge as to court's findings as to the child's best interest and grounds for TPR. *Foundation Telecommunication Inc. v, Moe Studio,* Inc, 341 Ark 231 (2001), sets forth the requirements necessary to preserve this issue for appeal on the record. Appellant failed to raise any argument regarding the election of the special judge or her lack of authority to sign the termination order with the trial court. Therefore, it cannot be addressed by the appellate court. (Warren, J.; 10-164; 6-23-2010; Gladwin)

Davis v. Arkansas Dept. of Human Servs. **[TPR]** Affirmed. This case was originally filed as a no-merit TPR brief and was sent back to be rebriefed and is now before the court in merit form. Appellant's challenged the court's failure to allow additional time for the children's maternal grandmother to remedy the deficiencies in the denied home study or to explore a least restrictive placement through mediation and the court's best interest finding. The court's decision to deny placement with grandparent was not clearly erroneous. The appellate court reasoned that preferential placement with a relative as set forth in Ark. Code Ann. §9-27-355 concerns initial placement after a juvenile is taken into custody, not TPR. It also requires that relatives meet all child-protection standards and be in the child's best interest, which the trial court found was not the case. (Warren, J.; 09-702; 6-2-2010; Kinard)

Cases in which the Court of Appeals affirmed No-Merit TPR:

Watkins v. Arkansas Dept. of Human Servs., Long- term cocaine addiction including testing positive the day of TPR, failure to visit child since birth, or make any meaningful progress to remedy the issues that caused removal (Thyer, C.; 10-56; 6-2-2010; Robbins)

Diemer v. Arkansas Dept. of Human Servs, Drugs, mental health issues, and environmental neglect with significant noncompliance and inability to provide safe home for children (Gilbert, M.; 10-179; 6-23-2010; Robins)

Huges v. Arkansas Dept. of Human Servs. Lack of stable or adequate housing and failure to remedy (Wilson, R.; 10-173; 6-2-2010; Gruber)

Hune v. Arkansas Dept. of Human Servs. Drugs and failure to provide for children's needs - children remained out of home for year and despite appropriate services appellate failed to remedy cause for removal (Branton, W.; 10-283 6-30-2010)

EIGHTH CIRCUIT

Burkhart v. American Railcar Industries: **[sexual harassment and retaliation]** Grant of summary judgment to employer is affirmed. Federal claim for sexual harassment was time-barred; state claims are

also untimely and continuing violation doctrine did not save claims. Retaliation claims fail because no reasonable factfinder could infer a causal connection between her complaint and her termination based on poor performance or conclude the reason for her termination was pretextual. Conduct did not meet standard for state claim of outrage. (E.D. Ark.; # 09-3043; 5-10-10)

Sitzes v. City of West Memphis Arkansas: **[civil rights]** District court did not err in concluding that the behavior of the police officer driving the vehicle which struck plaintiff's decedent's vehicle was not so egregious, outrageous or conscience-shocking that it could serve as the basis for liability on plaintiffs' substantive due process claims. District court did nor err in applying an intent-to-harm standard, or in rejecting plaintiffs' arguments that the officer was not responding

to an emergency at the time of the accident. The failure to train and failure to supervise claims against the City cannot be sustained in the absence of a constitutional violation by the officer. (E.D. Ark.; # 09-2090; 6-4-10)

Griffis v. Anadarko E&P Company: **[quiet title]** Under Arkansas law, reservation of mineral rights was sufficient to include the rights to natural gas. (E.D. Ark.; # 09-3117; 6-8-10)

U.S. SUPREME COURT

Abbott v. Abbott: **[Hague Convention on the Civil Aspects of International Child Abduction]**

After the Abbotts, a married couple, moved to Chile and separated, the Chilean courts granted respondent wife daily care and control of their minor son, A. J. A., while awarding petitioner husband visitation rights. Mr. Abbott also had a *ne exeat* right to consent before Ms. Abbott could take A. J. A. out of the country under Chilean law. When Ms. Abbott brought A. J. A. to Texas without permission from Mr. Abbott or the Chilean family court, Mr. Abbott filed this suit in the Federal District Court, seeking an order requiring his son's return to Chile under the Hague Convention on the Civil Aspects of International Child Abduction (Convention) and the implementing statute, the International Child Abduction Remedies Act. The District Court denied relief, holding that the father's *ne exeat* right did not constitute a "right of custody" under the Convention and, thus, that the return remedy was not authorized. The Fifth Circuit affirmed.

> *Held:* A parent has a right of custody under the Convention by reason of that parent's *ne exeat* right. The Convention applies and the child was wrongfully removed from Chile in violation of the Convention.

Chilean law determines the content of Mr. Abbott's right, while the Convention's text and structure resolve whether that right is a "right of custody." This holding also accords with the Convention's objects and purposes. There is no reason to doubt the ability of other contracting states to carry out their duty to make decisions in the best interests of the children. To interpret the Convention to permit an abducting parent to avoid a return remedy, even when the other parent holds a *ne exeat* right, runs counter to the Convention's purpose of deterring child abductions to a country that provides a friendlier

forum. Denying such a remedy would legitimize the very action, removal of the child, that the Convention was designed to prevent, while requiring return of the child in cases like this one helps deter abductions and respects the Convention's purpose to prevent harms to the child resulting from abductions. (Number 08-645; 5-17-10)

Graham v. Florida:**[juveniles]** Petitioner Graham was 16 when he committed armed burglary and another crime. Under a plea agreement, the Florida trial court sentenced Graham to probation and withheld adjudication of guilt. Subsequently, the trial court found that Graham had violated the terms of his probation by committing additional crimes. The trial court adjudicated Graham guilty of the earlier charges, revoked his probation, and sentenced him to life in prison for the burglary. Because Florida has abolished its parole system, the life sentence left Graham no possibility of release except executive clemency. He challenged his sentence under the Eighth Amendment 's Cruel and Unusual Punishments Clause, but the State Court of Appeal affirmed.

> *Held:* The Eighth Amendment does not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime.

(No. 08-7412; 5-17-10)

U. S. v. O'Brien: **[jury question]**: Respondents O'Brien and Burgess each carried a firearm during an attempted robbery. Count three of their indictment charged them with using a firearm in furtherance of a crime of violence, which carries a mandatory minimum 5-year prison term. Count four alleged use of a machine-gun (here, a pistol that authorities believed operated as a fully automatic firearm) in furtherance of that crime, which carries a 30-year mandatory minimum term. The Government moved to dismiss the fourth count on the basis that it could not establish the count beyond a reasonable doubt, but it maintained that the machine-gun provision was a sentencing enhancement to be determined by the District Court upon a conviction on count three. The court dismissed count four and rejected the Government's sentencing-enhancement position. Respondents then pleaded guilty to the remaining counts.

> *Held:* The fact that a firearm was a machine-gun is an element to be proved to the jury beyond a reasonable doubt, not a sentencing factor to be proved to the judge at sentencing.

Generally, a fact that increases the prescribed range of penalties to which a criminal defendant is exposed is an element of a crime to be charged in an indictment and proved to a jury beyond a reasonable doubt, rather than proved to a judge at sentencing by a preponderance of the evidence. Subject to this constitutional constraint, Congress determines whether a factor is an element or a sentencing factor. (No. 08-1569; 5-24-10)

Berghuis v. Thompkins: **[miranda]** After advising respondent Thompkins of his Miranda rights, officers interrogated him about a shooting in which one victim died. At no point did Thompkins say that he

wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. He was largely silent during the 3-hour interrogation, but near the end, he answered "yes" when asked if he prayed to God to forgive him for the shooting. He moved to suppress his statements, claiming that he had invoked his right to remain silent, that he had not waived that right, and that his inculpatory statements were involuntary. The trial court denied the motion.

> *Held* : Thompkins' silence during the interrogation did not invoke his right to remain silent. A suspect's *Miranda* right to counsel must be invoked "unambiguously." If the accused makes an "ambiguous or equivocal" statement or no statement, the police are not required to end the interrogation. There is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel. Both protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked.

(No. 08-1470; June 1, 2010)

Ontario v. Quon: **[4th Amendment/employee's test messages]** Petitioner City acquired pagers able to send and receive text messages. Its contract with its service provider provided for a monthly limit on the number of characters each pager could send or receive, and specified that usage exceeding that number would result in an additional fee. The City issued the pagers to respondent Quon and other police officers. When Quon and others exceeded their monthly character limits for several months running, the police chief sought to determine whether the existing limit was too low, i.e., whether the officers had to pay fees for sending work-related messages or, conversely, whether the overages were for personal messages. The service provider provided transcripts of Quon's and another employee's text messages, and it was discovered that many of Quon's messages were not work related, and some were sexually explicit. Quon was disciplined for violating department rules. Quon filed this suit alleging that the City violated his Fourth Amendment rights. After the jury concluded that the chief's intent was legitimate, the court granted the City summary judgment on the ground it did not violate the Fourth Amendment. The Ninth Circuit reversed, finding that Quon had a reasonable expectation of privacy in his text messages, and that the search was not reasonable even though it was conducted on a legitimate, work-related rationale.

> Held: Because the search of Quon's text messages was reasonable, the City did not violate Quon's rights, and the Ninth Circuit erred by concluding otherwise.

(#08-1332; 6-17-10)