

APPELLATE UPDATE

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

ANNOUNCEMENTS

On October 6th, the supreme court amended Rule 13.4 of the Rules of Criminal Procedure to be effective November 1, 2011. A copy of the per curiam was included in the weekly mailout.

On October 6th, the supreme court approved administrative plans to be effective January 1, 2012, and a copy of the per curiam was included in the mailout.

CRIMINAL

Osburn v. State, 2011 Ark. 406 [**double jeopardy**] When a jury deadlocks during the penalty phase of a trial and the circuit court is required by law to impose a life sentence, principles of double jeopardy do not prevent the State from seeking the death penalty during a retrial of the case. (Pope, S.; CR 11-116; 10-6-11; Hannah, J.)

Thompson v. State, 2011 Ark. App. 605 [**motion to suppress**] The trial court did not err in denying appellant's motion to suppress his confession, which the Court of Appeals concluded was voluntarily given. [**consecutive or concurrent sentence**] The trial court, who found that appellant was a "sexual predator" based upon evidence presented at trial, did not abuse its discretion when it rejected the jury's sentencing recommendation and ordered that appellant's sentences would be served consecutively rather than concurrently. (Johnson, K.; CACR 10-1333; 10-12-11; Pittman, J.)

Brown v. State, 2011 Ark. App. 608 [**victim-impact evidence**] The trial court did not abuse its discretion when it admitted evidence about the Albert-Pike flood during the sentencing phase of appellant's trial. (Hearnsberger, M.; CACR 11-198; 10-12-11; Gladwin, R.)

Vankirk v. State, 2011 Ark. 428 [**confrontation clause**] The right of confrontation, which is guaranteed by both the Sixth Amendment to the United States Constitution and article 2, section 10, of the Arkansas Constitution, applies during the sentencing phase of a trial. (Wilson, R.; CR 11-182; 10-13-11; Corbin, D.)

Nelson v. State, 2011 Ark. 429 [**sufficiency of the evidence; sexual assault in the first degree; sexual assault in the second degree**] There was substantial evidence to support appellant's convictions. [**rape-shield statute**] The rape-shield statute achieves its intended purpose without supplanting the Supreme Court's rulemaking power or its ability to control the admissibility of evidence in the courts. (Shirron, P.; CR 11-336; 10-13-11; Corbin, D.)

Webb v. State, 2011 Ark. 430 [**motion to suppress**] Because the search of appellant's vehicle was consensual following a valid traffic stop, the trial court did not err in denying appellant's motion to suppress the evidence found during the search. (Gibson, B.; CR 10-1146; 10-13-11; Gunter, J.)

Williams v. State, 2011 Ark. 432 [**sufficiency of the evidence; capital murder; endangering the welfare of a minor**] There was substantial evidence to support appellant's convictions. [**mistrial**] The trial court did not err in denying appellant's mistrial motion, which was based upon a statement that was made by a witness, which was brief, unsolicited, not repeated, and not patently inflammatory. (Glover, D.; CR 11-364; 10-13-11; Henry, C.)

Ritter v. State, 2011 Ark. 427 [**search warrant**] A search warrant is not automatically rendered invalid if it contains an incorrect address for the property to be searched. (Ramey, J.; CR 11-296; 10-13-11; Hannah, J.)

Stribling v. State, 2011 Ark. App. 635 [**illegal sentence**] Although a circuit court has the authority to place conditions on a defendant when he is placed on probation or is given a suspended imposition of sentence, there is no similar provision that allows a court to place specific conditions on a sentence of incarceration. Thus, the trial court's imposition of the condition that appellant complete a mandatory drug treatment program while incarcerated constituted an illegal sentence. (Jones, B.; CACR 10-370; 10-26-11; Glover, D.)

Everetts v. State, 2011 Ark. App. 629 [**double jeopardy**] An overriding necessity to end the defendant's trial did not exist at the time that the circuit court granted the State's mistrial motion. Thus, the trial court rendered a manifestly incorrect decision when it denied appellant's motion to dismiss the charges against him on retrial based upon double-jeopardy grounds. (Cottrell, G.; CACR 11-186; 10-26-11; Robbins, J.)

Thomas v. State, 2011 Ark. App. 637 [**sufficiency of the evidence; theft by receiving**] Substantial evidence did not exist to support appellant's conviction. (Phillips, G. CACR 10-1130; 10-26-11; Abramson, R.)

Dixon v. State, 2011 Ark. 450 [**sufficiency of the evidence; capital-felony murder**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] Because testimony that appellant sold drugs constituted res gestae evidence, the trial court did not abuse its discretion when it admitted the evidence. [**photographs**] The trial court did not abuse its discretion when it admitted five autopsy photographs during the medical examiner's testimony because the photographs enhanced and clarified the doctor's testimony regarding the victim's injuries. [**mistrial**] Appellant failed to establish that he was prejudiced by remarks that were made during a witness's testimony and he failed to accept the judge's offer to issue an admonition to the jury follow the challenged testimony. Thus, it was not an abuse of discretion for the trial court to deny appellant's motion for a mistrial. (Johnson, K.; CR 10-1223; 10-27-11; Baker, K.)

State v. Kindall, 2011 Ark. 451 [**rape-shield statute**] Where evidence is admitted under the rape-shield statute, a written order that is specific and sets out the relevant facts in issue must be entered. In the written order, the court must also determine whether the evidence is more probative than prejudicial. (Humphrey, M.; CR 11-194; 10-27-11; Baker, K.)

State v. Cantrell, 2011 Ark. 449 [**Rule 37**] When a defendant files a Rule 37 petition, he puts in controversy the professional conduct of counsel, and as a condition of pursuing that petition, he must waive all attorney-client privilege with respect to the issues raised in the petition. (McGowan, M; CR 10-934; 10-27-11; Baker, K.)

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

Murphy v. State, 2011 Ark. App. 607 (first-degree murder) CACR 10-1306; 10-12-11; Hart, J.

Alexander v. State, 2011 Ark. App. 610 (simultaneous possession of drugs and firearms, possession of cocaine with intent to deliver; possession of drug paraphernalia; being a felon in possession of a firearm) CACR 11-221; 10-12-11; Robbins, J.

Butler v. State, 2011 Ark. App. 621 (possession of a firearm by certain persons) CACR 11-0039; 10-12-11; Brown, W.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to revoke appellant's probation or suspended sentence was not clearly against the preponderance of the evidence:

Westbrook v. State, 2011 Ark. App. 615 (suspended imposition of sentence) CACR 11-127; 10-12-11; Gruber.

Hunter v. State, 2011 Ark. App. 618 (probation) CACR 11-94; 10-12-11; Hoofman.

Phillips v. State, 2011 Ark. App. 613 (suspended imposition of sentence) CACR 11-126; 10-12-11; Wynne, R.

Amos v. State 2011 Ark. App. 638 (probation) CACR 11-154; 10-26-11; Abramson, R.

CIVIL

Kasinger v. East End School Dist., 2011 Ark. App. 595 [**appeal-teacher dismissal**] District properly did not renew teaching contract, and it substantially complied with its personnel policies. (Smith, V.; CA 11-133; 10-5-11; Martin, D.)

In Re Gaucha-IGA., 2011 Ark. App. 591 [**civil forfeiture**] Firearms found in search of house related to manufacture of meth were in close proximity to the drug paraphernalia and the forfeiture was proper. (Pope, S.; CA 10-1245; 10-5-11; Glover, D.)

Smith v. Smith Trust, 2011 Ark. App. 598 [**adverse possession**] Quieting title upon finding of adverse possession was proper. It was not necessary to satisfy statutory elements enacted in 1995 because claim vested prior to that time. (Bell, K.; CA 11-15; 10-5-11; Hoofman, C.)

IC Corp. v. Hoover Wood Products, Inc., 2011 Ark. App. 589 [**limitations**] Arkansas Products Liability Act provides for a three-year limitations period, and the discovery rule for triggering the time applies to products liability actions. (Clawson, C.; CA 10-1266; 10-5-11; Gruber, R.)

Worley v. City of Jonesboro, 2011 Ark. App. 594 [**constructive fraud**] Disclosure statements in residential home sale with respect to flooding were not shown to be false nor was any reliance shown with respect to any alleged misrepresented statements. [**attorneys fees**] Fees under the statute are discretionary with the court, but the terms of a contract may require an award of attorney's fees to a prevailing party. (Laser, D.; CA 10-468; 10-5-11; Martin, D.)

Curry v. Pope County Equalization Board, 2011 Ark.408 [**Amendment 79**] Improvements were made prior to taxpayer's 65th birthday and constituted "substantial improvements;" therefore, improvements were properly included in assessment of property. Assessor's appraised value was proper. (Rogers, R.; SC 10-1297; 10-6-11; Gunter, J.)

Garner v. XTO Energy, 2011 Ark. App. 606 [**contract**] Lease was extended beyond primary term pursuant to terms of the contract as there were operations on the drilling site. (Weaver, T.; CA 11-139; 10-12-11; Pittman, J.)

Hipp v. Vernon Smith Assoc., 2011 Ark. App. 611 [**limitations**] Both limitations period for fraud (3 years) and deceptive practices act (5 years) had expired prior to filing of complaint. (Weaver, T.; CA 11-142; 10-12-11; Robbins, J.)

Pinto v. Sims, 2011 Ark. App. 609 [**rule 60**] Court abused its discretion in setting aside a dismissal order beyond 90 days of its entry pursuant to Rule 60 because order was entered in error by the court but it was not a clerical error. (Herzfeld, R.; CA 11-241; 10-12-11; Gladwin, R.)

Comcast, Inc. v. Bradshaw, 2011 Ark. 431 [**PSC jurisdiction**] Public Service Commission had exclusive jurisdiction over Comcast's challenge to assessment of its property. There is no merit to Comcast's illegal exaction argument because Comcast does not challenge the validity of the underlying tax but that the assessment was carried out in an illegal fashion. (Piazza, C.; SC 11-277; 10-13-11; Danielson, P.)

David Arrington, Inc. v. Sutterfield, 2011 Ark. App. 626 [**decl. judgment**] Plaintiff non-suited its breach of contract action; defendant's counterclaim for declaratory judgment was dismissed by the court. This was not error as the court did not abuse its discretion in light of the fact that there was a pending federal court action to address the dispute. (Maggio, M.; CA 11-172; 10-26-11; Hart, J.)

Gore Engineering, Inc. v. Ark. Contractors Licensing Bd., 2011 Ark. App. 640 [**admin app.**] Board failed to make findings of fact so appeal could not be heard and matter was remanded to the Board. (Duncan, X.; CA 11-297; 10-26-11; Abramson, R.)

Phillippy v. ANB Financial Services, LLC, 2011 Ark. App. 639 [**directed verdict**] Court erred in directing verdict on bid-rigging claim as the plaintiff presented sufficient evidence of proximate cause and damages to go to the jury. (Clinger, D.; CA 10-378; 10-26-11; Abramson, R.)

Mauldin v. Snowden, 2011 Ark. App. 630 [**deed reformation**] Court's decision to reform deeds to reflect the reservation of mineral rights was not clearly erroneous. (Maggio, M.; CA 11-204; 10-26-11; Robbins, J.)

Still v. Perroni Law Firm, 2011 Ark. 447 [**contract/limitations**] Language in a security agreement sufficiently acknowledged an existing oral obligation so as to start the statute of limitations period of three years running anew, but it did not transform it into a written obligation with a five years limitations period. (Williams, L.; SC 10-948; 10-27-11; Brown, R.)

DOMESTIC RELATIONS

Hansen v. Hansen, 2011 Ark. App. 586 [**property-settlement agreement–breach**] The Court of Appeals held that the circuit court did not err in finding that, while the appellee's failure to pay on two credit cards and to reaffirm those debts in her bankruptcy proceeding constituted a breach of

the parties' property-settlement agreement, the breach was not material, and did not substantially defeat the purpose of the agreement. For several years before falling on hard times, the appellee upheld her end of the bargain. The remedy the trial court employed, ordering her to fulfill her obligations regarding the two credit cards in question and ordering her to pay the appellant's attorney's fees in the amount of \$500, plus \$120 in costs, was proper. (Herzfeld, R.; CA 10-599; 10-5-11; Wynne, R.)

Hadley v. Hamilton, et al., 2011 Ark. App. 611 [**name change of a minor**] The circuit court ordered the surname of a four-year-old child changed from that of her biological father to that of her mother. The Court of Appeals noted that the circuit court inquired fully into the best interest of the child, the dispositive inquiry in determining whether a child's surname should be changed. The appellate court said the circuit court also considered the *Huffman* factors. When a trial court inquires regarding the implication of these factors and makes a determination with due regard to the best interest of the child, the trial court's decision will be upheld where it is not clearly erroneous. The decision was affirmed. (McGowan, M.; CA 11-228; 10-12-11; Wynne, R.)

French v. French: 2011 Ark. App. 612 [**divorce--post-decree; attorney fees**] Appellant argued that the circuit court erred in its order for appellant to retire the parties' business debts, in amending the divorce decree to allow the appellee to elect a survivor annuity under appellant's pension, and in ordering appellant to pay appellee's attorney fees. The Court of Appeals found all of the appellant's arguments unconvincing or without support and affirmed the decision in its entirety. (Moore, R.; CA 11-214; 10-12-11; Robbins, J.)

Fox v. Glassing, 2011 Ark. App. 633 [**child custody; visitation**] The Court of Appeals affirmed an order awarding custody of the parties' son to the appellee mother, with liberal visitation to the appellant father. The court reversed and remanded the trial court's denial of visitation to the appellee's other son by another man, to whom the appellant had stood in loco parentis for five years. The court cited authority that visitation may be awarded to a stepparent who stands in loco parentis. *Robinson v. Ford-Robinson*, 362 Ark. 232, 208 S.W.3d 140 (2005). The court also cited authority that a person may qualify as a child's "parent" in loco parentis if that is in the child's best interest, even if the party is not married to the biological parent. *Bethany v. Jones*, 2011 Ark. 67, ___ S.W.3d ___. (McCallum, R.; CA 11-96; 10-26-11; Gruber, R.)

Robinson v. Robinson, 2011 Ark. App. 624 [**alimony; attorney's fee**] The trial court did not abuse its discretion in awarding permanent alimony to the appellee or in ordering the appellant to pay a fee of \$500 to appellant's attorney. Given the circumstances--the trial court found the appellee to be unemployable and appellant to be employed and recently to have been given a significant raise in salary--the alimony award was not an abuse of discretion. On the issue of the attorney's fee, which the court had inherent authority to award, the court discussed the differences in the parties' income and earning potential, the type of proceeding, and the amount of legal work performed. The decision was affirmed. (Honeycutt, P.; CA 10-1228; 10-26-11; Pittman, J.)

PROBATE

Lucas v. Wilson, 2011 Ark. App. 584 [**decedent's estate—appointment of administratrix**]

Because appellant was not a creditor of the estate, she was not an interested person within the meaning of Ark. Code Ann. § 28-1-102(a)(11), and she had no standing to petition for appointment of an administrator pursuant to Ark. Code Ann. § 28-40-107(a)(3). Also, she did not provide an explanation of her entitlement to appointment as provided in Ark. Code Ann. § 28-40-107(c). Finally, she would have no interest in the estate under a wrongful death action. Since she had no standing, the court should not have considered her petition. The case was reversed and remanded for further proceedings for appointment of an administrator/administratrix in the decedent's estate. (Smith, P.; CA 11-58; 10-4-11; Gladwin, R.)

Kuelbs, et al. v. Hill, 2011 Ark. App. 628 [**guardianship**] In this fifth opinion the Court of Appeals has issued in this guardianship (of an adult) case, the appellants challenged three orders entered by the trial court. The court said it lacked jurisdiction to hear an appeal of the entry of a no-contact order because it was untimely filed. The other two challenges, that orders were improperly entered without a hearing and that appellant had no notice of the orders, were raised for the first time on appeal, so the court declined to address them. The court addressed an ethical matter that stemmed from the legal representation of the ward by two attorneys, both whom were disqualified by the trial court from representing her. The court said they have continued to file legal documents on behalf of the ward, filed the notices of the appeal, and purport to be her legal representatives filing on her behalf. The court said that a ward adjudged of unsound mind cannot file her own actions. Those actions must be brought by her guardian. In addition, Arkansas's Rules of Professional Conduct address conflicts of interest, representing clients with diminished capacity, and terminating representation. Because the two attorneys' actions raise questions under these rules, the court referred the matter to the Supreme Court Committee on Professional Conduct. (Cook, V.; CA 09-1326; 10-26-11; Gladwin, R.)

Bank of America, N.A. v. Charles A. Brown, et al., 2011 Ark. 446 [**trusts**] The appellee, Charles A. Brown, was named in inter vivos trust and testamentary trust instruments as the person who should be employed "for any legal matters or advice" concerning the administration of the trusts. The inter vivos trust provided that if the selected trustee, Worthen Bank, were foreclosed by some reason from administering the trust, the appellee Brown should select a successor trustee. The testamentary trust provided that if the selected trustee, Worthen Bank, could not administer the trust from its trust department in Little Rock, then Brown should select a successor trustee. Through a series of mergers over the years, the Bank of America succeeded Worthen as trustee of both trusts. In 2009, Bank of America notified Brown that a client team located in Dallas, Texas would service the trusts. Brown filed a "Petition for Order Changing Trustees," asserting that management of the trusts from outside of Little Rock violated the terms of the trusts. He asserted authority to bring the action and contended that he was entitled to select the new trustees. The trial court granted the petition and found Brown authorized to select the successor trustee. The Supreme Court noted that under the Trust Code, the court, a settlor, a co-trustee, or a beneficiary may initiate an action to remove a trustee. Brown fit in none of those categories. The court agreed

that the terms of the trusts provide for a new trustee when the trust administration is moved from Little Rock, but said that the trusts do not provide a means for removing a trustee. “Thus, Brown obtains no authority from the trusts to bring an action to change the trustees and has no interest in the trusts that grants him standing and permits him to enforce the terms of the trusts. He lacked standing to bring the petition to change the trustees.” The court reversed and remanded, directing the circuit court to dismiss the case upon remand. (Smith, V.; 09-1333; 10-27-11; Hannah, J.)

Bridges v. Shields, Administrator, 2011 Ark. 448 [**curtesy; chose in action**] The circuit court rejected the appellant’s claim that he was entitled to a curtesy interest in a wrongful death award involving the death of his deceased wife’s former husband. Appellant’s deceased wife married the appellant after her second husband, Mr. Frazier, died. When she died, she was survived by her husband, the appellant, and her seven children, the stepchildren of Mr. Frazier. After her death, the appellee (one of the stepchildren) petitioned to authorize him to file a claim against the Merck Co., the manufacturer of Vioxx, on behalf of Mr. Frazier. He subsequently obtained a \$123,846 settlement on behalf of Mr. Frazier’s estate. The proceeds of the settlement were funneled into the Estate of Ms. Frazier, since she and the seven stepchildren were his only known relatives when he died. That money was the sole asset of Ms. Frazier’s estate, and the appellant claimed the estate owed him a curtesy interest of \$41,278.10. The appellee, as administrator of Ms. Frazier’s estate, moved for summary judgment, contending that appellant was not entitled to any of the settlement proceeds. He emphasized that the wrongful-death claim was not pursued until after Ms. Frazier died so that, at the time of her death, she was not seized and possessed of those proceeds and that appellant had no curtesy interest. The appellant contended that when Ms. Frazier died, she had a vested property right to sue for the wrongful death of her former husband and, further, that she had a chose in action, a recognized property right in Arkansas. The Supreme Court found that Ms. Frazier had no chose in action. She did not have a right to the Merck proceeds during her lifetime, nor did she have an individual right to bring suit under the wrongful-death statute. The circuit court reached the right result in denying appellant’s claim under the curtesy statute. (Singleton, H.; SC 11-69; 10-27-11; Brown, R.)

JUVENILE

Austin v. Arkansas Department of Human Servs., 2011 Ark. 581 [**d-n adjudication motion for new trial**] The circuit court did not abuse its discretion in denying appellant’s motion to vacate and motion for a new trial based on newly discovered evidence that appellant’s daughter recanted and had been forced to lie about the sexual abuse. Newly discovered evidence is the least favored ground to justify a new trial. The trial court did not find the hearsay evidence credible and found that it would not impact the outcome of the case. (Halsey, B.; 11-145; 10-5-2011; Pittman, J.)

Threadgill v. Arkansas Department. of Human Servs., 2011 Ark. App. 642 [**TPR – best interest**] The trial court’s finding that termination of parental rights was in the children’s best interest was not clearly erroneous. Although the children had behavior problems, there was evidence supporting the likelihood of adoption, including possibility of an adoptive placement with an aunt.

Evidence of potential harm if returned to appellant included appellant's continued drug use, pending criminal charges, and evidence of her inability to parent her children safely and independently. (Branton, W.; 11-653; 10-26-2011; Hoffman, C.)

Jones v. Arkansas Department of Human Servs., 2011 Ark. App. 632 **[TPR]** The appellate court agreed that mistakes were made in the termination order, but declined to reverse. Although the trial court made a mistake in finding that appellants' rights were involuntarily terminated as to five children, it was of no legal consequence. Appellant had five prior children terminated and only three had been involuntarily terminated in 2010. The ground only requires prior involuntary termination.

The appellate court also noted that due process requires notice to a parent and grounds must be pled in a petition to constitute a ground for termination. The court also cautioned the judiciary not to alter or disregard the language of termination grounds. If the facts do not fit the grounds as worded, it should not be used. (Zimmerman, B., 11-657; 10-26-2011; Wynne, R.)

New v. Arkansas Department of Human Servs., 2011 Ark. App. 604 **[TPR – maternal grandparent rights]** Appellants argued that the trial court's decision to limit Null's (maternal grandfather) participation in the termination proceeding violated his due process rights and impacted their parental rights. It was Null's burden to show how his due process rights were violated and there was no evidence or argument justifying how or why this burden should or could be shifted to a third party. Appellants failed to make an objection or argument of the alleged prejudice or that they suffered harm by the court limiting his role in the proceeding. (Elmore, B.; 11-639; 11-12-2011; Vaught, L.)

Burnett v. Arkansas Department of Human Servs., 2011 Ark. App. 596 **[TPR – ADA]** Appellant failed to preserve for appeal her argument that she had a disability as an alcoholic and DHS failed to make reasonable accommodations under ADA. **[best interest]** The court did not err in its finding of best interest that the children were likely to be adopted. Although appellant complied with significant portions of the case plan, the completion did not achieve its intended result of making appellant capable of caring for her children. Despite additional time and intensive services she continued to abuse alcohol and failed to remedy the reasons that resulted in the children's removal. (Morley, R. 11-456; 10-5-2011; Martin, D.)

Jordan. v. State, 2011 Ark. App. 592 **[TPR – consent to terminate]** The trial court did not abuse its discretion and gave appellant an opportunity to declare her intention to consent to termination. Appellant testified that she had spoken to her attorney and understood the difference between voluntary and involuntary termination, but wanted the judge to consider accepting a consent if the court was inclined to terminate her parental rights. The trial court refused on the grounds that the case had been set for a month and had already been continued once. She had time to consent and was still ambivalent about doing so at the time of the hearing. (Sullivan, T. 10-1073; 10-5-2011; Abramson, J.)

Murray. v. State, 2011 Ark. App. 588 [**TPR – sufficiency of the evidence**] Appellant argued that there was no evidence to prove that he failed to remedy the conditions causing removal because he did not commit sexual abuse of his children. Although the court never found that appellant sexually abused the children, the court found that the children were sexually abused while in his custody. It was not necessary for the court to find that appellant himself committed the abuse, but that the conditions that caused the removal remained and based on the evidence that finding was not clearly erroneous. As to the subsequent factors ground, there was evidence that one of the children disclosed that appellant began inappropriate touching of her and one child developed night terrors and enuresis when overnight visits with appellant began. There was also evidence of instability with appellant’s relationships. (Zimmerman, S. 11-455; 10-5-2011; Wynne J.)

EIGHTH CIRCUIT

Williams v. Hobbs: [**Dismissal of challenge to Arkansas's Method of Execution Act as violating the ex post facto clause and due process right to access the court**]

There is not an ex post facto clause violation because the possibility that the director could eliminate anesthesia does not create a significant risk of increased punishment. The due process claims fail because inability to discover potential claims is not a due process violation and no actual injury has been shown. (E.D. Ark.; 10-1573 and 10-2899; 10-7-11)