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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

Administrative Plans must be submitted to the Supreme Court by July 1, 2013.

CRIMINAL

Lambert v. State, 2013 Ark. App. 64 [**probation**] The circuit court, relying on testimony from appellant's probation officer, correctly concluded that appellant received a written copy of the conditions of her probation. [**revocation**] The circuit court's decision to revoke appellant's probation was not clearly against the preponderance of the evidence. (Clawson, C.; CACR 12-33; 2-6-13; Harrison, B.)

Lacy v. State, 2013 Ark. 34 [**Rule 37; hearing**] The circuit court erred in denying appellant's Rule 37 petition without conducting an evidentiary hearing. (Green, R.; CR 12-142; 2-7-13; Hannah, J.)

State v. Allen, 2013 Ark. 35 [**stop; search; boats; Fourth Amendment**] The circuit court correctly determined that in the absence of objective facts supporting the stop or a plan embodying explicit neutral limitations, a law-enforcement officer's practice of stopping vessels on bodies of water to perform a safety check constitutes an act of unfettered discretion by law enforcement that violates the Fourth Amendment to the United States Constitution. (Wright, J.; CR 12-568; 2-7-13; Hannah, J.)

Martin v. State, 2013 Ark. App. 82 [**probation**] Arkansas Code Annotated § 5-4-303(e) does not require that the conditions of probation be signed by a judge. (Wright, H.; CACR 12-515; 2-13-13; Walmsley, B.)

Dillard v. State, 2013 Ark. App. 87 [**admission of evidence**] Under the *res gestae* exception, the State is entitled to introduce evidence showing all circumstances that explain the charged act, show a motive for acting, or illustrate the accused's state of mind if other criminal offenses are brought to light; all of the circumstances connected with a particular crime may be shown to put the jury in possession of the entire transaction. Appellant's statements of his alleged plan to kill someone revealed a reason for: (1) jumping into the victim's car and demanding to be driven to another city; and (2) carrying a gun. The statement was also evidence of appellant's intent with regard to possibly shooting his victim. Thus, the statement was part of the entire transaction, and the circuit court did not abuse its discretion by admitting the evidence pursuant to the *res gestae* exception. [**excited utterance**] The circuit court did not abuse its discretion in admitting the victim's statement, which she gave to law enforcement officials at the hospital shortly after the crime occurred, as an excited utterance. (Storey, W.; CACR 11-1075; 2-13-13; Gruber, R.)

Roberts v. State, 2013 Ark. 56 [**error coram nobis**] Because Roberts, who waited at least four years before filing his petition, failed to proceed with diligence in pursuing error-coram-nobis relief, his petition was denied. (CR 02-22; 2-14-13; Corbin, D.)

Roberts v. State, 2013 Ark. 57 [**petition to reinvest jurisdiction in circuit court**] An evaluation, more recent in time and for the purpose of inquiring whether Roberts had the capacity to choose between life and death and to knowingly and intelligently waive all rights to postconviction relief, prior to Roberts's waiver of postconviction rights was necessary to adequately determine Roberts's competency to elect execution and waive his right to postconviction remedies. Because the Supreme Court neglected to identify the lack of such an evaluation when it reviewed the record of Roberts's waiver-of-postconviction-rights hearing, a breakdown in the appellate process occurred that warranted reopening Roberts's postconviction proceedings. (CR 03-780; 2-14-13; Danielson, P.)

Robinson v. State, 2013 Ark. 60 [**speedy trial**] Because charges had not been filed against appellant at the time the prosecutor learned of his incarceration on other charges, Rule 29.1(a) of the Rules of Criminal Procedure did not apply to appellant's case. The circuit court correctly concluded that "date of arrest," which commences the running of the speedy-trial period under Ark. R. Crim. P. 28.2(a), does not mean the date on which the State has issued arrest warrants. (Sims, B.; CR 12-576; 2-14-13; Hoofman, C.)

Bradley v. State, 2013 Ark. 58 [**sufficiency of the evidence; capital felony murder; aggravated robbery**] There was substantial evidence to support appellant's convictions. (Sims, B.; CR 12-745; 2-14-13; Baker, K.)

Barron-Gonzalez v. State, 2013 Ark. App. 120 [**sufficiency of the evidence; first-degree forgery**] There was substantial evidence to support appellant's conviction. [**statute of limitations**]

Appellant's fraud suspended the statute of limitations until the offense was discovered. After the offense was discovered, charges were timely filed. Thus, the trial court correctly concluded that the prosecution against appellant was not barred by the statute of limitations. **[hearsay]** The trial court did not abuse its discretion when it allowed the interpreter's statement to the officer to be admitted into evidence at appellant's trial because an interpreter is viewed as an agent of the defendant; thus, the translation, which is offered by the interpreter, is attributable to the defendant as her own admission and is properly characterized not as hearsay, but as an admission by a party opponent. (Cooper, T.; CACR 12-681; 2-20-13; Hixson, K.)

Earls v. State, 2013 Ark. App. 111 **[sentencing]** The sentences imposed by the trial court exceeded the allowable statutory range for the two underlying felonies and therefore were illegal. (Fitzhugh, M.; CACR12-439; 2-20-13; Gruber, R.)

Martin v. State, 2013 Ark. App. 110 **[sufficiency of the evidence; rape]** There was substantial evidence to support appellant's conviction. **[search warrant]** The trial court did not err in making the practical, common-sense determination that the items listed in the search warrant were in appellant's residence. **[hearsay]** The trial court abused its discretion when it admitted a video-taped interview between the victim and a forensic interviewer into evidence because the evidence was hearsay. **[admission of evidence]** The trial court did not abuse its discretion when it admitted certain photographs into evidence. **[mistrial]** The trial court did not err when it denied appellant's request for a mistrial, which was based upon comments made by the prosecutor during closing arguments. (Hearnberger, M.; CACR 12-643; 2-20-13; Wynne, R.)

Bruner and Workman v. State, 2013 Ark. 68 **[admission of evidence]** Evidence concerning appellants' ability to conform their conduct to the requirements of the law was not relevant during the guilt phase of their trial because they did not assert the affirmative defense of mental disease or defect. Thus, the trial court did not abuse its discretion when it excluded appellants' psychological evaluations. **[jury instructions; lesser included offense]** There was no rational basis for giving an instruction on the lesser-included offense of third-degree battery for recklessly causing physical injury because the evidence showed only that the victim sustained a *serious* physical injury. **[jury instructions]** Because the model instruction, which the trial court gave the jury, accurately stated the law and included all necessary elements, the circuit court did not abuse its discretion by declining to give appellants' proffered non-model instruction. (Fitzhugh, M.; CR 12-124; 2-21-13; Goodson, C.)

Villanueva v. State, 2013 Ark. 70 **[traffic violations]** A windshield with a crack running from roof post to roof post across the driver's field of vision is the type of "safety defect" contemplated by Ark. Code Ann. § 27-32-101(a)(2)(A). **[racial profiling]** There was no evidence to establish that appellant's traffic stop was the result of racial profiling. (Storey, W.; CR 12-621; 2-21-13; Hart, J.)

Washington v. State, 2013 Ark. App. 148 **[sufficiency of the evidence; felony theft of property; commercial burglary]** There was substantial evidence to support appellant's commercial-burglary conviction. However, because the State failed to establish that the market value of the stolen

property was at least \$1000, there was insufficient evidence to support appellant's felony-theft-of-property conviction. (Dennis, J.; CACR 12-508; 2-27-13; Wood, R.)

Branch v. State, 2013 Ark. App. 129 [**continuance**] The trial court did not err when it denied appellant's request for a continuance. (Wilson, R.; CACR 12-778; 2-27-13; Gladwin, R.)

Taylor v. State, 2013 Ark. App. 146 [**admission of evidence**] The trial court did not abuse its discretion by excluding any reference to a shotgun or shotgun shells, which were found at the scene of the crime but not used during the crime, as irrelevant to the issues before the jury. [**amending criminal information**] The State is entitled to amend an information at any time before the case is submitted to the jury as long as the amendment does not change the nature or degree of the offense charged. An amendment does not change the nature of the offense if it only changes the manner in which the crime was committed. [**jury instruction**] There was evidence from which the jury could have considered whether appellant was an accomplice or a principle to certain criminal activity. Thus, the trial court did not abuse its discretion when it gave the jury the accomplice-liability instruction. (Sims, B.; CACR 12-178; 2-27-13; Hixson, K.)

Weaver v. State, 2013 Ark. App. 144 [**illegal sentence**] Requiring an inmate to participate in special programs as a condition of his or her incarceration is an illegal sentence. (Medlock, M.; CACR 11-988; 2-27-13; Vaught, L.)

Rasul v. State, 2013 Ark. App. 137 [**motion for mistrial; motion for new trial**] The trial court did not abuse its discretion when it denied appellant's requests for a mistrial and a new trial, which were based on alleged jury misconduct. [**recusal**] It was not error for the judge who presided over the guilt phase of appellant's trial to recuse from the sentencing phase. (Wright, H.; CACR 11-858; 2-27-13; Wynne, R.)

Duggar v. State, 2013 Ark. App. 135 [**sufficiency of the evidence; possession of marijuana**] There was substantial evidence to support appellant's conviction. [**chain of custody**] The circuit court did not abuse its discretion when it determined that in all reasonable probability the evidence in appellant's case was not tampered with. (Wright, H.; CACR 12-521; 2-27-13; Harrison, B.)

Morris v. Weaver, 2013 Ark. 83 [**extraordinary writ**] Petitioner failed to demonstrate that an extraordinary writ was clearly warranted. (Weaver, T.; CR 12-243; 2-28-13; Corbin, D.)

Christian v. State, 2013 Ark. 86 [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. (Griffen, W.; CR 12-496; 2-28-13; Goodson, C.)

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

Green v. State, 2013 Ark. App. 63 (failure to comply with registration and reporting requirements applicable to sex offenders; residing within 2000 feet of a daycare facility as a level 4 sex offender) CACR 12-185; 2-6-13; Pittman, J.

Barber v. State, 2013 Ark. App. 105 (endangering the welfare of a minor in the first degree) CACR 12-514; 2-20-13; Pittman, J.

Moore v. State, 2013 Ark. App. 107 (theft of property) CACR 12-461; 2-20-13; Walmsley, B.

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:

Hendricks v. State, 2013 Ark. App. 109 (probation) CACR 12-717; 2-20-13; Harrison, B.

CIVIL

APERS v. Taylor, 2013 Ark. 37 [**elected official retirement/double dipping**] Elected county treasurer had not terminated her employment when she "retired", went off the payroll but continued performing job duties. She had elected to retire and in her case was precluded from rejoining APERS. Her failure to terminate her employment did not mean that she was not retired only that she was required to forfeit her retirement benefits until she fulfilled the termination requirements. (Fox, T.; SC12-252; 2-7-13; Hart, J.)

St. Vincent Infirmary v. Shelton, 2013 Ark. 38 [**tort reform/joint**] Defendant hospital could not bring another party that had settled with the plaintiff into the action via a third party complaint for the purpose of assessing fault. Third party complaint was properly struck. Subsequent to the enactment of the civil justice reform act, under which several liability was eliminated, two hospital and nursing home are not joint tortfeasors and do not have an express right of contribution. Defendant was allowed to present evidence to show non-party's responsibility. (Moody, J.; SC12-283; 2-7-13; Hoofman, C.)

DCC v. City of Pine Bluff, 2013 Ark. 36 [**sovereign immunity**] The circuit court erred in concluding that the General Assembly intended to waive the State's sovereign immunity in section 16-93-1603. The circuit court lacked jurisdiction to hear the City's petition pursuant to the doctrine of sovereign immunity. (Wyatt, R.; SC12-666; 2-7-13; Hannah, J.)

Renfro v. Smith, 2012 Ark. 40 [**DCC grievance review**] Petition did not set forth facts to show deprivation of a liberty interest and, as a result, failed to sustain a claim under section 25-15-212 to support a judicial review of the Department of Corrections' decision. (Dennis, J.; SC 11-955; 2-7-13; (per curiam)

Bailey-Gray v. Martinson, 2013 Ark. App. 80 [**medical malpractice**] In medical malpractice case, doctor's deposition was properly struck because he was expressing an expert opinion but was not shown to be familiar with the medical standards in the community. Case of *Padilla v. Archer* was distinguished. (Crow, K.; CA 12-57; 2-13-13; Pittman, J.)

Marlow v. United Systems of Ark., 2013 Ark App. 100 [**fees/wrongful discharge**] Attorney's fees can be awarded in a wrongful-discharge-against-public-policy case. (Johnson, L.; CA 11-780; 2-13-13; Brown, W.)

Longing Family Revocable Trust v. Snowden, 2013 Ark App. 81 [**deed reformation**] Court did not err in reforming deed to reserve the mineral interests because parties did not intend to convey mineral interests at time of its execution. (Maggio, M.; CA 12-470; 2-13-13; Pittman, J.)

Veverka v. Gibson, 2013 Ark. 59 [**mandamus**] County judge's order establishing a private road was a final order. Party's recourse was to appeal to circuit court rather than by mandamus relating to contention that mandatory language was missing from original order. (Sutterfield, D.; SC12-504; 2-14; Hart, J.)

Deen v. Hopkins, 2013 Ark. App. 116 [**new trial**] Court did not err in granting a new trial based upon the failure of the jury to award damages in light of the evidence presented. (Comstock, J.; CA 12-391; 2-20-13; Glover, D.)

Arvest Bank v. Bank of America, 2013 Ark. App. 105 [**note/foreclosure priority**] Arvest, second lien holder, argued that Bank of America was not entitled to enforce note and first mortgage. However even if Bank of America was not the proper party to enforce the note, the fact remains that Arvest's mortgage was inferior in priority and it was not prejudiced. (Taylor, J.; CA 12-612; 2-20-13; Gruber, R.)

Dray v. Likens, 2013 Ark. App. 118 [**easement**] Court did not err in granting an easement over objection of a bona fide purchaser of the property. There had been a mutual mistake in a prior conveyance which would justify reformation of the deed. However, no prejudice resulted to the purchaser because other easements are already in place. (Medlock, M.; CA 12-633; 2-20-13; Whiteaker, P.)

Wesleyan Corp. v. Anderson Electric, Inc., 2013 Ark. App. 121 [**continuance**] Court did not abuse its discretion in denying a continuance because the party was not diligent in seeking new counsel or presenting its witnesses. (Wyatt, R.; CA 12-610; 2-20-13; Hixson, K.)

Crews v. Deere Co., 2013 Ark. 67 [**post-trial jurisdiction**] Circuit court did not have jurisdiction to enter a consent judgment in a case that had been dismissed for lack of prosecution. Rule 60 (a) was not applicable. (Fogleman, J.; SC12-137; 2-21-13; Danielson, P.)

Progressive Halcyon Ins. v. Saldivar, 2013 Ark. 69 [**subrogation/reimbursement**] Insurer was entitled to subrogation (23-79-146) because requirements for reimbursement (23-89-207) were not satisfied. (Fitzhugh, M.; SC12-458; 2-21-13; Goodson, C.)

City of Fayetteville v. Fayetteville Sch. Dist., 2013 Ark. 71 [**millage**] School millage was improperly applied to retire bonds. The statute did not impair contracts as it did not abolish a source of revenue for the bonds. (Mason, C.; SC12-579; 2-21-13; Hart, J.)

Ausman v. Hiram Shaddox Geriatric Center., 2013 Ark. 66 [**substitution/revivor**] Administrator filed suit on behalf of the estate and then died. The one-year limitations period in 16-62-108 is applicable to this case. Rule 25's provision for substitution of parties does not govern alone. The death of the administrator abated the action, necessitating its revivor. The Estate's failure to move for substitution within one year from the date of death prevents the revivor of the action. (Webb, G.; SC12-183; 2-21-13; Corbin, D.)

Hughes v. Dalton, 2013 Ark. App. 142 [**deed/undue influence**] There was no showing of a confidential relationship; party failed to sustain its burden to establish undue influence. (Fitzhugh, M.; CA12-547; 2-27-13; Whiteaker, P.)

Searcy County Council Good Government v. Hinchey, 2013 Ark. 84 [**sale of county property**] Scrap or junk county property may be disposed of at the county judge's discretion pursuant to section 14-16-106. The additional disposition procedures found in section 14-16-105 are not applicable. (Plegge, J.; SC12-603; 2-28-13; Danielson, P.)

May v. Goodman, 2013 Ark. 82 [**summons**] Summons was issued stating that defendant had 20 days to answer; before service, rule was amended changing time from 20 days to 30 days. Summons was not defective; 20 days was applicable. (Tabor, S.; SC12-369; 2-28-13; Hannah, J.)

Ford Motor Co. v. Washington, 2013 Ark. 88 [**final judgment**] The judgment is not final because it does not set forth a specific dollar amount owed by Ford. Instead, the circuit court merely reproduced the jury's answers to the interrogatories and gave no further guidance. Ford asked the appellate court to clarify the judgment so as to ascertain the exact dollar amount owed by Ford. (Jones, B.; SC12-910; 2-28-13; Hoofman, C.)

DOMESTIC RELATIONS

Hancock v. Hancock, 2013 Ark. App. 79 [**domestic violence; order of protection**] The appellant argued that evidence was insufficient to show that the victims listed in appellee's petition for an order of protection were in immediate and present danger of domestic violence. He contended that the testimony of the witnesses was inconsistent with each other's testimony as well as with the testimony of the appellee, and he questioned her veracity. In affirming, the Court of Appeals noted that the appellant was actually requesting the court to re-weigh the disputed testimony and the credibility of the witnesses. The court said it gives due regard to the trial court's decisions of credibility and the weight to be given to the testimony. On the trial court's failure to address the issue of visitation in the final order of protection, the court said that the award of visitation in an order of protection is discretionary, citing Arkansas Code Annotated section 9-15-205(a)(3), and that the appellant had not raised this issue with the trial court at the time of its ruling.

Therefore, the court declined to address that issue. (Williams, C.; No. CA 12-516; 2-33-13; Gladwin, R.)

Wingfield v. Wingfield, 2013 Ark. App. 124 [**child custody–modification**] The appellant mother of the child argued on appeal that the trial court erred in finding that she failed to demonstrate changed circumstances to support a change in custody. In affirming, the Court of Appeals noted that the trial court did modify visitation, granting the appellant additional time in the summer and extending her usual visitation to include Sunday nights. The court said that the appellant’s numerous allegations involved the credibility of the witnesses, which lies within the duty of the trial court. (Fox, T.; No. CA 11-1179; 2-20-13; Brown, W.)

Magee v. Magee, 2013 Ark. App. 108 [**child custody; evidence**] The appellant mother alleged that the trial court erred in admitting specific pages from her journal into evidence. The Court of Appeals said it will not reverse a ruling on the admissibility of evidence absent a manifest abuse of discretion and that, even if the court erred, it would affirm absent a showing of prejudice. Here, the admission of the journal entries was not an abuse of discretion. The appellant also argued that the court erred in granting custody to the appellee father of their three children. The court said that based upon all the evidence and the trial court’s superior ability to observe the parties, it could not say the trial court clearly erred in its award of custody, based upon the welfare and best interest of the children. (Schrantz, D.; No. CA 12-580; 2-20-13; Walmsley, B.)

Cole v. Griffin, 2013 Ark. App. 125 [**child support**] The appellant mother appealed a circuit court decision reducing the amount of child support the appellee father was paying. Her first point on appeal was the court abused its discretion in not following the requirements of Administrative Order No. 10 to determine the payor’s income, recite the amount of support the guidelines require, and recite whether the court is deviating from the chart. The trial court imputed an income of \$500 to the appellee, recited the amount required under the guidelines, and awarded that amount. However, the evidence showed that the appellee had an actual income. The court’s failure to show how it reached the imputed income amount prevented the Court of Appeals from determining whether or not Administrative Order No. 10 was violated. The appellant’s second point was that the court erred in reducing the child support obligation and by imputing less than his actual income. Administrative Order No. 10 permits a court to grant more or less support if it determines that the dependents’ needs require a different level of support, and it allows a court to deviate from the chart amount after considering certain factors. In this case, the court did not deviate and provide reasons for the deviation, but instead imputed an amount without providing sufficient findings for the Court of Appeals to conduct a meaningful review. The appellate court reversed and remanded for sufficient findings to support the income calculation. Upon remand, the court said, the trial court may consider its decision in light of changed circumstances that occurred during the appeal. (Huckabee, S.; No. CA 12-328; 2-20-13; Brown, W.)

Winn v. Bonds, 2013 Ark. App. 147 [**child custody**] The appellant mother of a child and the custodian of the child, the appellant’s former step grandmother and her current husband, the appellees were involved in a custody dispute. The appellant mother appealed a temporary order and a subsequent amended order awarding the appellee custody of the child, with visitation awarded to the appellant. The appellant argued that the court erred in allowing the appellee to

intervene in the proceedings and in awarding her temporary custody pending a custody hearing that resulted in a final custody order. The Court of Appeals said the standard of review for a decision to allow someone to intervene is abuse of discretion. Here, the trial court did not abuse its discretion in allowing the step grandmother to intervene. On the issue of temporary custody, the Court of Appeals noted that final custody had been decided in a final hearing. The final order was not appealed. Any error in the temporary hearing is now moot. A temporary order is terminated upon entry of a subsequent permanent order, so the appellant was challenging an order that was terminated and no longer in effect. The final order of custody to the appellee will be unaffected by any decision concerning the temporary-custody order. The rights of the parties were determined by the final order, which the appellant did not contest, so the court said it did not need to address that challenge to the temporary award of custody. The decision was affirmed. (Brantley, E.; No. CA 11-1250; 2-27-13; Hixson, K.)

Russell v. Russell, 2013 Ark. App. 151 [**divorce–property**] The appellant argued that the divorce decree entered by the trial court unlawfully ordered him to buy corporate shares in a family business from the appellee instead of distributing existing property. He also argued that the appellee offered no competent evidence that the business had a fair market value independent of the personal goodwill of appellant’s stepfather. The Court of Appeals found that the decree required him, not to buy corporate shares from the appellee, because no evidence was presented by either party that appellee owned any shares or interest in the company. Rather, she was owed one-half of appellant’s one-third interest in the company as marital property. He was required to give her half the value of what he already owned. On the second issue, the court said the trial court heard testimony on the calculation of the fair market value of the business, and it did not find the trial court’s valuation clearly erroneous. The issue of goodwill is a question of fact. The strength or lack of strength of evidence on which an expert’s opinion is based goes to the weight and credibility, rather than the admissibility, of the opinion in evidence. If the testimony shows a questionable basis for the opinion of the expert, the issue becomes one of credibility for the fact-finder, rather than a question of law. The fact-finder may accept or reject all or part of the testimony of expert witnesses. The decision was affirmed as modified by the court’s finding the circuit court’s award was a division of property and not alimony. (Spears, J.; No. CA 12-331; 2-27-13; Brown, W.)

PROBATE

Meadows v. Ferrell, 2013 Ark. App. 106 [**holographic will**] The decedent had filled in the blanks on a will form. After his death, the primary beneficiary attempted to have it admitted to probate. The trial court ruled it a valid holographic will and granted the petition. In reversing, the Court of Appeals said that our state’s holographic-will statute requires that the will be written entirely in the testator’s handwriting, although the Supreme Court has held it permissible to ignore superfluous printed words so long as the body of the will and the signature are in the handwriting of the testator. In this case, however, about one-half of the will was a preprinted form with blanks, most of which were filled in with handwriting that is largely unintelligible. The printed portions are not superfluous, but are intended to be part of the body of the document. The writer’s

intent cannot be discerned in their absence. Therefore, the writing did not satisfy the requirements of the statute so it was error to admit it to probate. (Wright, W.; No. CA 12-599; 2-20-13; Pittman, J.)

JUVENILE

R.B. v. State, 2013 Ark. App. 145 [**EJJ and Delinquency**] Rebriefing ordered due to appellant's failure to comply with abstract, brief, and addendum requirements. Appellant argued that trial court erred in allowing the state to orally petition to revoke a suspended sentence to the Department of Corrections and that the court erred in revoking the suspended sentence. He also argued that the court erred in finding him delinquent on a subsequent charge. (Cook, V.; CA12-785; 2-27-2013; Vaught, L.). *Note: A.C.A. 9-27-306 provides If adjudicated as an EJJ offender the court shall order any of the delinquency dispositions authorized by A.C.A. §9-27-330 and suspend imposition of an adult sentence pending court review.*

J.W.H. v. State, 2013 Ark. App. 139 [**Delinquency**] Appellant failed to preserve his argument on appeal that the trial court erred in determining the victim was competent to testify. The Supreme Court has held that there is no precise age of competency, but the court must determine whether the child has the ability to observe, remember and related the truth of the matter being litigated, and has moral awareness of the duty to tell the truth. (Fryauf, M.; CA12-806; 2-27-2013; Wynne, R.)

M.L. v. State, 2013 Ark. App. 130 [**Delinquency – Probation Revocation**] Appellant argued that the state failed to prove that he committed the act of terroristic threatening in violation of his probation. Appellant argued that he was unsure whether he was on probation at the time of the incident. However, the evidence revealed he had been in court and placed on probation on the same day he threatened others with violence at the park. (Fergus, L.; CA12-509; 2-27-2013; Gladwin, R.)

M.W. v. State, 2013 Ark. App. 123 [**Delinquency**] Appellant argued that there was insufficient evidence and that the court abused its discretion by terming appellant's testimony ridiculous. Appellant waived the appeal under Ark. R. Crim. P. 33.1(c) for failure to state specific grounds for appeal. Further, appellant's argument that the court abused its discretion by finding that appellant's testimony was ridiculous is without merit because it was credibility decision. The appellate court did remand with instructions to correct errors in the record to reflect the proper statute. The delinquency petition included a statute that was repealed and the order for probation listed another statute. Yet, this issue was not raised on appeal and is barred. The court noted the importance of accurate pleadings. (Fergus, L.; CA12-507; 2-20-2013; Wood, R.)

R.R. v. State, 2013 Ark. App. 115 [**Delinquency**] Appellant was charged with refusal to submit to arrest. Appellant failed to comply with Ark. R. Crim. P. 33.1(b) by making a specific motion for dismissal or directed verdict at the close of all the evidence and the specific grounds. A motion must specify how the evidence is insufficient. (Coker, K.; CA12-222; 2-20-2013; Glover, D.)

Figueroa v. Arkansas Dept. of Human Services, 2013 Ark. App. 83 [**D-N Adjudication**] The trial court was reversed and adjudication was dismissed where trial court found the child dependent-neglected as a result of inadequate supervision and physical abuse. The appellate court found that the evidence did not support the finding of inadequate supervision. The court noted that the mother's suicide was a traumatic event and that it was understandable that appellant lost track of a knife after he cut his wife's body down. The court acknowledged that the child's hand was cut by a knife, but that the evidence was inconsistent as to how it occurred and it was a superficial cut that required treatment with a Band-Aid. The court noted that appellant's slapping the child on the face or head could support a finding of physical abuse. However, there was no evidence that the act was knowing or intentional, caused injury, or that it occurred on more than one occasion. (Elmore, B.; CA12-912; 2-13-2013; Walmsley, B).

Davison v. Arkansas Dept. of Human Services, 2013 Ark. App. 136 [**TPR – subsequent issues**] Appellant had children removed in 2007 due to methamphetamine drug use, but they were eventually returned and the case was closed. Her children came back into care in 2011 after she left a child alone overnight resulting from her drug use. Appellant's challenge to the court's finding of subsequent issues failed where instability and drug use made it impossible for her to visit with her children. She lacked stable housing and agreed at the termination hearing she could not take care of her children but wanted more time. *Note Best Practice: The appellate court noted that the trial court ordered DHS to meet with the girl's therapist and appellant to work out a "really good and healthy visit for both the girls...it could be really helpful for these children to know that their mother does love them."* (Thyer, C.; CA12-946; 2-27-2013; Harrison, B.).

Weatherspoon v. Arkansas Dept. of Human Services, 2013 Ark. App. 104 [**TPR – Best Interest**] Appellant argued that the trial court erred in finding that she was incapable of providing a safe and healthy environment. The appellate court found that the evidence supported the court's finding that appellant's anger-control problems could expose her children to potential harm. Appellant also asserted that she could not be unfit since DHS closed previous cases and did not remove all the children from her home. Appellant's argument was not preserved for appeal, but the court stated that even if it were preserved the court must make an individual determination on whether termination is in each child's best interest and cannot treat the children as an amorphous group in which the best interest of one will meet the interest of all the children. (Branton, W.; CA12-862; 2-20-2013; Gladwin, J).

Fenstermacher v. Arkansas Dept. of Human Services, 2013 Ark. App. 88 [**TPR – Subsequent Grounds**] The appellate court agreed with appellant that there was insufficient evidence to support the ground stated in the court's order to terminate parental rights based on the 12 month parent removal ground and failure to remedy, because it did not apply to him. The children were not removed from him; he did not cause their removal and could not remedy the situation. However, the subsequent condition ground was also alleged in the petition. On de novo review, the appellate court can affirm other grounds alleged in the petition and prove them. Appellant failed to provide adequate and stable housing, failed to complete drug and alcohol screening and treatment as ordered, and was unable to provide for the needs of his children. (Medlock, M.; CA12-710; 2-13-2013; Gruber, R.).

Spencer v. Arkansas Dept. of Human Services, 2013 Ark. App. 96 [**TPR – sufficiency of the evidence**] Two appeals were filed, a no merit by appellant mother listed below and a sufficiency appeal by appellant father as to his four children. First, appellant argued that the court failed to consider whether DHS had an appropriate permanency plan for the children since they were placed in three different foster homes. There was evidence that the children were adoptable and that they were seeking parents willing to adopt a sibling group, indicating a proper permanency plan for the children. Appellant then argued that the trial court failed to give special weight to the progress he had made during the case including resolving his criminal charges, obtaining employment and transportation, and testing negative on his drug screens. The completion of a case plan is not determinative; what matters is whether the completion of the case plan achieved the intended result of making the parent capable of caring for his child. Appellant failed to maintain stable housing and could not even tell the caseworker where his children would sleep if they were returned to him even though he recently got a new apartment. (Hewett, M.; CA12-801; 2-13-2013 Hixson, K.)

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

Tatum v. Arkansas Dept. of Human Services, 2013 Ark. App. 101 (Burgess, E.; CA 12-868; 2-13-2013; Brown, W.).

Stairs v. Arkansas Dept. of Human Services, 2013 Ark. App. 98 (Sullivan, T.; CA12-924; 2-13-2013; Wood, R.).

Spencer v. Arkansas Dept. of Human Services, 2013 Ark. App. 96 (appellant –mom) (Hewett, M.; CA12-801; 2-13-2013 Hixson, K.)

Hume v. Arkansas Dept. of Human Services, 2013 Ark. App. 93 (Hewett, M.; CA12-939; 2-13-2013; Whiteaker, P.)

Collins v. Arkansas Dept. of Human Services, 2013 Ark. App. 90 (Wilson, R.; CA12-811; 2-13-2013; Glover, D.)

Campbell v. Arkansas Dept. of Human Services, 2013 Ark. App.84 (Williams Warren, J.; CA12-874; 12-871; Harrison, B.)

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

E.S. v. State, 2013 Ark. App. 138 (Fryauf, M.; CA 12-805; 2-27-2013; Wynne, R.). Juvenile was adjudicated delinquent for rape, Class Y felony, and placed on supervised probation.

U. S. SUPREME COURT

Bailey v. U. S.: **[search]** While police were preparing to execute a warrant to search a basement apartment for a handgun, detectives conducting surveillance in an unmarked car outside the apartment saw two men later identified as petitioner Chunon Bailey and Bryant Middleton leave the gated area above the apartment, get in a car, and drive away. The detectives waited for the men to leave and then followed the car approximately a mile before stopping it. They found keys during a patdown search of Bailey, who initially said that he resided in the apartment but later denied it when informed of the search. Both men were handcuffed and driven in a patrol car to the apartment, where the search team had already found a gun and illicit drugs. After arresting the men, police discovered that one of Bailey's keys unlocked the apartment's door.

At trial, the District Court denied Bailey's motion to suppress the apartment key and the statements he made to the detectives when stopped, holding that Bailey's detention was justified under *Michigan v. Summers*, as a detention incident to the execution of a search warrant, and, in the alternative, that the detention was supported by reasonable suspicion under *Terry v. Ohio*. Bailey was convicted. The Second Circuit affirmed denial of the suppression motion. Finding that *Summers* authorized Bailey's detention, it did not address the alternative *Terry* holding.

Held: The rule in *Summers* is limited to the immediate vicinity of the premises to be searched and does not apply here, where Bailey was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question.

(February 19, 2013)

Florida v. Harris: **[drug dog]** Officer Wheatley pulled over respondent Harris for a routine traffic stop. Observing Harris's nervousness and an open beer can, Wheatley sought consent to search Harris's truck. When Harris refused, Wheatley executed a sniff test with his trained narcotics dog, Aldo. The dog alerted at the driver's-side door handle, leading Wheatley to conclude that he had probable cause for a search. That search turned up nothing Aldo was trained to detect, but did reveal pseudoephedrine and other ingredients for manufacturing methamphetamine. Harris was arrested and charged with illegal possession of those ingredients. In a subsequent stop while Harris was out on bail, Aldo again alerted on Harris's truck but nothing of interest was found. At a suppression hearing, Wheatley testified about his and Aldo's extensive training in drug detection. Harris's attorney did not contest the quality of that training, focusing instead on Aldo's certification and performance in the field, particularly in the two stops of Harris's truck. The trial court denied the motion to suppress, but the Florida Supreme Court reversed. It held that a wide array of evidence was always necessary to establish probable cause, including field-performance records showing how many times the dog has falsely alerted. If an officer like Wheatley failed to keep such records, he could never have probable cause to think the dog a reliable indicator of drugs.

Held: Because training and testing records supported Aldo's reliability in detecting drugs and Harris failed to undermine that evidence, Wheatley had probable cause to search Harris's truck.

(February 19, 2013)

Evans v. Michigan: **[double jeopardy]** After the State of Michigan rested its case at petitioner Evans' arson trial, the court granted Evans' motion for a directed verdict of acquittal, concluding that the State had failed to prove that the burned building was not a dwelling, a fact the court mistakenly believed was an "element" of the statutory offense. The State Court of Appeals reversed and remanded for retrial. In affirming, the State Supreme Court held that a directed verdict based on an error of law that did not resolve a factual element of the charged offense was not an acquittal for double jeopardy purposes.

Held: The Double Jeopardy Clause bars retrial for Evans' offense. Retrial following a court-decreed acquittal is barred, even if the acquittal is "based upon an egregiously erroneous foundation.

(February 20, 2013)