

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 February 3rd, the Supreme Court adopted changes to Administrative Order Number 10 and the Rules of Procedure of the Judicial Discipline and Disability Commission. Copies of the per curiam orders were included in the weekly mailout.

On February 3rd, the Supreme Court published for comment proposed rules changes regarding the Procedures of the Professional Conduct Committee. The comment period is through April 1, 2011. Copies were included in the weekly mailout.

On February 9th, the Supreme Court adopted changes to Administrative Orders Numbers 4 and 18 dealing with civil jurisdiction of state district courts. In addition, the court authorized the use of electric recording equipment to make the verbatim record when these courts are hearing circuit court cases by reference or consent. The rules changes are effective July 1, 2011. Copies of the per curiam order were included in the weekly mailout.

On February 9th, the Supreme Court adopted changes to Ark. R. Crim. P. 37.2 (c), Ark. R. App. P.-Crim. 3, and Administrative Order No. 8 (III)(a), to be effective April 1, 2011. Copies of the per curiam orders were included in the weekly mailout.

CRIMINAL

Tatum v. State: **[sufficiency of the evidence; first-degree terroristic threatening]** There was substantial evidence to support appellant's conviction. **[mistrial]** The trial court did not abuse its discretion when it denied appellant's motion for a mistrial, which was based upon an alleged discovery violation. (Phillips, G.; CACR 10-788; 2-2-11; Gruber).

Williamson v. State: **[sufficiency of the evidence; first-degree battery]** There was substantial evidence to support appellant's conviction. **[admission of photographs]** The trial court did not abuse its discretion when it admitted certain photographs from appellant's Facebook page because they were relevant to show that appellant was engaging in violent, criminal group activity with two or more individuals in violation of Ark. Code Ann. § 5-74-108. (Humphrey, M.; CACR 10-741; 2-2-11; Gladwin).

Keister v. State: **[hearsay]** The trial court correctly applied the excited-utterance exception to the hearsay rule to allow a witness to testify about statements made by the victim to her immediately after the crime occurred. **[closing arguments]** The trial court did not err when it allowed the State to discuss the class of felony and the punishment range for the offense for which appellant was charged during its closing argument in the guilt phase of appellant's trial. (Wyrick, K.; CACR 10-618; 2-2-11; Hart).

Fowler v. State: **[expert witness]** The trial court erred in refusing to allow a defense witness to testify as an expert. (Ramey, J.; CACR 10-495; 2-2-11; Hart).

Hayes v. State: **[motion for a new trial]** The circuit court erred by refusing appellant's request to conduct a hearing pursuant to Rule 33.3(a) of the Arkansas Rules of Criminal Procedure. **[continuance]** The trial court did not abuse its discretion when it denied appellant's motion requesting a continuance. (Storey, W.; CACR 10-522; 2-2-11; Gruber).

Tatum v. State: **[sufficiency of the evidence; possession of cocaine; possession of marijuana]** There was substantial evidence to support appellant's convictions. **[chain of custody]** Because the trial court satisfied itself that certain evidence was genuine and that it had not been tampered with, it was not an abuse of discretion for the court to admit the evidence at appellant's trial. (Pope, S.; CACR 10-626; 2-2-11; Glover).

Evans v. State: **[sufficiency of the evidence; capital murder]** There was substantial evidence to support appellant's conviction. (Sims, B.; CR 10-936; 2-3-11; Danielson).

Jackson v. Norris: **[writ of habeas corpus]** Following convictions for capital murder and aggravated robbery, appellant was sentenced to life imprisonment without the possibility of parole. Appellant was fourteen years old when the crimes occurred. After his conviction was affirmed on appeal, appellant filed a petition seeking a writ of *habeas corpus*. Appellant argued that his sentence violated the United States Constitution and the Arkansas Constitution. The

circuit court dismissed appellant's petition. On appeal, the Supreme Court concluded that appellant failed to establish that the original commitment was invalid on its face or that the original sentencing court lacked jurisdiction to enter the challenged sentence. Thus, the court concluded that the circuit court's dismissal of appellant's petition was not clearly erroneous. (Wyatt, R.; 09-145; 2-9-11; Baker)

Smith v. State: **[mental examination]** The trial court did not err in denying appellant's motion for a mental evaluation and proceeding with a revocation hearing. (Laser, D.; CACR 10-465; 2-9-11; Gruber).

Hardaway v. State: **[witness testimony]** Where the identity of a witness was not provided to the State until the day before appellant's trial began, the trial court did not abuse its discretion in precluding the witness's testimony. (Erwin, H.; CACR 10-358; 2-9-11; Robbins).

Delp v. State: **[mistrial]** The trial court did not err when it denied appellant's motion for a mistrial, which was based upon a crying spectator approaching appellant during *voir dire*. **[Ark. R. Evid. 609]** The trial court did not abuse its discretion when it refused to allow testimony about a witness's prior conviction that was more than ten years old. (Tabor, S.; CACR 10-802; 2-9-11; Hoofman).

Smith v. State: **[sufficiency of the evidence; possession of a controlled substance with intent to deliver]** There was substantial evidence to support appellant's conviction. **[search warrant]** Because there were no defects in the application for the search warrant or the execution of the search warrant, the trial court did not err in denying appellant's motion to suppress evidence obtained during the search of appellant's apartment. **[continuance]** The trial court did not abuse its discretion when it denied appellant's request for a continuance. (Henry, D.; CACR 10-265; 2-9-11; Brown).

Delgado v. State: **[continuance]** The trial court did not abuse its discretion when it denied appellant's motion seeking a continuance. (Tabor, S.; CACR 10-804; 2-16-11; Wynne).

Lemaster v. State: **[proffer of evidence]** The trial court erred when it refused to allow appellant to proffer testimony from excluded witnesses. (Elmore, B.; CACR 10-964; 2-16-11; Abramson).

Gregory v. State: **[forfeiture]** The State failed to prove by a preponderance of the evidence that appellant's computer should be forfeited under Ark. Code Ann. § 5-64-505. Thus, the trial court erred when it entered an order forfeiting the item. (Womack, S.; CA 10-774; 2-16-11; Hoofman).

Jackson v. State: **[jurisdiction; revocation]** A trial court has jurisdiction to revoke a suspended sentence if it finds by a preponderance of the evidence that a defendant has inexcusably failed to comply with the conditions of his suspension or probation at any time prior to the expiration of the period of suspension or probation. (Glover, D.; CACR 10-832; 2-16-11; Gruber).

Hadley v. State: **[revocation of probation]** It was error for the trial court to revoke appellant's probation based upon actions that occurred before the judgment, which placed appellant on probation, was entered. (Humphrey, M.; CACR 09-1019; 2-23-11; Pittman).

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

Warden v. State: (aggravated assault) CACR 10-784; 2-2-11; Robbins.

Magness v. State: (failing, as a sex offender, to report a change of address; being a sex offender living within 2000 feet of a daycare facility) CACR 10-493; 2-9-11; Abramson.

Warren v. State: (first-degree criminal mischief) CACR 10-475; 2-9-11; Wynne.

Jones v. State: (first-degree murder) CACR 10-447; 2-9-11; Vaught.

Singleton v. State: (possession of cocaine with intent to deliver; possession of methamphetamine with intent to deliver; maintaining a drug premise; tampering with evidence) CACR 10-913; 2-23-11; Glover.

Brown v. State: (second-degree domestic battery) CACR 10-623; 2-23-11; Hoofman.

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:

Hillman v. State (probation) CACR 10-917; 2-16-11; Brown.

CIVIL

Buffington v. Diamond Transport LLC: **[venue]** Contract did not contain a valid venue-selection clause. Contract provided that Louisiana law was to apply, but it did not mandate that venue for litigation had to be in Louisiana. (Wyrick, K.; CA 10-614; 2-2-11; Robbins)

Fletcher v. Fletcher: **[inter vivos gift]** Court properly found that a gift had been made. The elements of an inter vivos gift are: (1) the donor was of sound mind; (2) an actual delivery of the property took place; (3) the donor clearly intended to make an immediate, present, and final gift; (4) the donor unconditionally released all future dominion and control over the property; and (5) the donee accepted the gift. (McCormick, D.; CA 10-701; 2-2-11; Hoofman)

Intents, Inc. v. Southwestern Electric Power Co.: **[work near high voltage lines]** Utility was not liable to persons injured because utility was not notified by injured workers' employer as

required by statute that entity was planning to conduct activity near the power lines. **[damages]** Utility was entitled to indemnification from employer under the statute, including attorney's fees incurred in defending suits by those injured. It did not matter that the utility did not sustain any property damage or personal injury. Workers' Compensation did not give the employer any immunity. (Smith, K.; SC 10-589; 2-3-11; Gunter)

Capps. Carroll Electric Co. **[PSC jurisdiction]** Capital credits are not private-property rights, but arise from a public right, and the Public Service Commission is charged by law to administer them and has exclusive jurisdiction. (Schrantz, D.; SC 10-667; 2-9-11; Danielson)

Kowalski v. Rose Drug. **[pharmacist's duty]** There is no statutory or regulatory framework that imposes on a pharmacist a duty to warn, to refuse to fill a legally written prescription, or to consult with a physician. (Sullivan, T.; SC 10-459; 2-9-11; Corbin)

Lawrence v. City of Texarkana. **[termination/civil service]** Appellant contends that he was terminated under rules not validly adopted. He was terminated pursuant to rules and regulations of the fire department that had been approved by the civil service commission, but the issue is whether those rules were required by statute to be approved by the city's board of directors because they dealt with the day-to-day operations of the fire department. As long as the rules approved by the commission do not interfere with the department's day-to-day operations, they are validly approved in compliance with state law. Termination letter gave Appellant sufficient notice that his conduct – fleeing from law enforcement officers – was the reason for his termination. Statute requires only that Appellant's letter of termination state a reason for the discharge. There is no statutory requirement that the letter refer to a specific rule violation. (Johnson, K.; SC 10-146; 2-9-11; Corbin)

County Judge Brown v. County Judge Hicks. **[vacating road]** Contention that only citizens residing in the county where the road is "considered useless" may object to a petition to vacate the road is without merit. There is no county citizenship requirement to object to a petition to vacate a county road. While one petitioning the court to vacate a county road must be a citizen of that county, there is no requirement that one objecting to a petition to vacate a road must be a citizen of the county where the road is located. Any person may object to a petition to vacate a county road. A party to a county court proceeding who is aggrieved by the court's ruling may appeal to the circuit court. (Weaver, T.; SC 10-641; 2-9-11; Hannah)

Harrill and Sutter v. Kosin. **[attorney discharge/compensation]** Attorney was discharged for cause and was entitled to compensation based upon quantum-meruit recovery rather than the parties' fee agreement. The attorney-lien law allows an attorney to obtain a lien for services based upon his or her agreement with the client. However, attorneys who are discharged with cause retain a lien, but the amount is determined on a quantum-meruit basis. (Williams, L.; SC 10-518; 2-9-11; Henry)

Hunter v. Runyan: **[subject matter jurisdiction]** Arkansas law does not consider a lack of adverseness between parties to be a requirement of subject-matter jurisdiction. Moreover, Rule 23(e) requires court approval of a class-action settlement. Therefore, pursuant to Amendment 80 and Rule 23(e), the circuit court had jurisdiction of the subject matter in this case. **[intervention]** Circuit court's properly denied motion to intervene because it was not accompanied by a pleading as required by Rule 24(c). (Moody, J.; SC 10-306; 2-9-11; Corbin)

Game and Fish Comm. v. Eddings: **[Sovereign immunity/county road]** Article 7, section 28, which grants exclusive original jurisdiction in the county courts over roads, is not self-executing with regard to the power of eminent domain to establish roads over landlocked property. The implementing authority for road establishment is found in the acts of the General Assembly, as set out at Arkansas Code Annotated sections 27-66-401 to -404. This constitutional authority giving original jurisdiction over roads to the county courts does not vitiate or impair the State's sovereign immunity, as found in article 5, section 20 of the constitution. (Putman, J.; SC10-567; 2-9-11; Brown)

Yancey v. Yancey: **[constructive trust]** Divorce decree required that ex-husband provide life insurance benefits to former wife, but husband wrongfully changed the beneficiary of the policy in violation of the divorce decree and the separation agreement. Ex-wife had an equitable interest in the proceeds and a constructive trust was necessary to place the parties in the position they would have otherwise occupied had the decree not been violated. Where a divorce decree or property settlement agreement requires a party to maintain a life insurance policy in effect and to retain a specific beneficiary, that beneficiary has a vested interest in the insurance policy proceeds and may assert that vested interest. (Hughes, T.; CA 10-619; 2-9-11; Hart)

Parks v. Rogers Group: **[arbitration]** Court's role is not to determine if the arbitrators decided the dispute correctly but only whether the arbitrators acted within their jurisdiction. Appellants argue that courts should recognize that an arbitration award may be vacated on the basis of manifest disregard of the law and that the arbitration award in this case manifestly disregarded the law of Arkansas. The arbitration panel found that the renewal provisions of the lease constituted an express covenant for continued renewals and reflected the intent of the parties. It is not for courts to determine if the arbitrators decided the dispute correctly, but they acted within their jurisdiction. (McCormack, D.; CA 10-569; 2-9-11; Hoofman)

Hall v. Bias: **[land contract]** The trial court found that there was no meeting of the minds between the parties and, as such, no enforceable contract. Hall did not appeal these findings. Without a contract, Hall's arguments regarding forfeiture, rescission, and the payment of rents simply do not apply. However, under facts of case, court should have considered unjust enrichment. Case remanded with instructions for the trial court to make findings of fact and to enter an order fashioning a remedy consistent with its finding that there was no enforceable contract between the parties. (Cottrell, G.; CA 09-257; 2-9-11; Vaught)

Barger v. Ferrucci: **[deed]** The issue is whether the language in the deed reserved a valid mineral interest. Court properly found that the disputed deed conveyed no mineral rights to the grantees and that appellee and her former husband retained all oil, gas, and minerals. (Hughes, T.; CA 10-797; 2-9-11; Gruber)

Myers v. Bogner: **[closing road]** County judge's order to close road was vacated by circuit court. The notice provisions of Rule 4(f) apply to the county-court proceeding. Appellants were required to comply with Rule 4(f), which requires that thirty days elapse before a judgment can be taken. Because appellants waited only nineteen days before obtaining an order, the county court's judgment was void. (Crow, K.; CA10-636; 2-9-11; Gladwin)

Smith v. Decatur School District: **[contract/impossibility]** School district was taken over by the state because of fiscal distress. As a result, superintendent's contract was impossible for the district to perform and afforded a defense to breach of contract action filed by the defendant. (Schrantz, D.; CA 10-665; 2-16-11; Gruber)

Quality Petroleum, Inc. v. Windward Petroleum, Inc.: **[interference with contract]** Accord and satisfaction between parties to the contract did not extinguish the tortious interference claim that one of the parties to the contract had against a third party. (Moody, J.; CA10-713; 2-16-11; Vaught)

Farmer v. Riddle: **[unjust enrichment]** Finding of unjust enrichment was supported because plaintiff conferred a benefit upon the defendant in the form of the renovation of a garage into an apartment which defendant now has the use of. The amount of the quantum meruit recovery is measured by the value of the benefit conferred upon the party unjustly enriched. (Fox, T.; CA 10-672; 2-16-11; Hart)

Evans v. Hamby: **[malpractice/usury]** Under facts of case, the failure of the attorney to raise usury as a defense in the underlying trial to enforce a promissory note did not constitute malpractice. Party making claim is estopped from claiming usury as a defense because he selected the interest rate on the note. Additionally, on another issue raised, an attorney is not liable as a matter of law for a mistaken opinion on a point of law that has not been settled by a court of the highest jurisdiction. (Sullivan, T.; SC 10-411; 2-17-11; Brown)

Green v. George's Farms, Inc. **[law of case/remand]** On the retrial of the case, court's decisions on evidentiary issues related to scientific evidence were settled in the earlier trial. There had not been a significant change in circumstances for court to reconsider the evidence's admissibility. (Smith, K.; SC 10-26; 2-17-11; Henry)

Vicentic v. Bishop: **[summary judgment]** Summary judgment was not proper in dispute involving a land sale even though there was no written contract. (Williams, L.; CA 10-815; 2-23-11; Abramson)

Wildlife Farms, LLC v. Robinson: **[default]** Even though party was in default, court did not abuse its discretion in refusing to enter a default judgment. (Story, B.; CA 10-278; 2-23-11; Robbins)

In re Gilmore v. Board of Prof. Engineers: **[license revocation]** Board was justified in revoking surveyor's license based on findings of gross negligence. (McGowan, M.; CA 10-593; 2-23-11; Gladwin)

Fairpark, LLC v. Healthcare Essentials, Inc.: **[lease]** Tenant was constructively evicted as a result of landlord's breach in failing to repair heating and air problems. Tenant did not commit a breach in vacating the premise prior to the end of the lease term. Court did not err in finding that promissory estoppel was not established. (Lindsay, M.; CA 10-772; 2-23-11; Glover)

Holiday Inn Franchising, Inc. v. Hotel Assoc., Inc.: **[directed verdict]** Even though counsel had not rested in the presence of the jury, he had so moved at the conclusion of all the evidence after the last witness had testified and before any instructions or arguments were made. **[fraud]** Under the facts of the case, party had a duty to disclose the existence of a report. **[punitive damages]** Trial court erred in reducing the amount of punitive damages on due process grounds. (Honeycutt, P.; CA 10-21; 2-23-11; Abramson)

Boellner v. Clinical Study Centers, LLC: **[contract]** Substantial evidence supports jury's finding of a breach of the contract and the damages awarded with respect to lost profits. **[defamation]** Defamation instructions were proper. Information supplied in AMI 404 was proper as a summary of the allegations. Court ruled properly in giving AMI 411 and rejecting the proffered alternative. (Brantley, E.; SC 10-348; 2-24-11; Henry)

DOMESTIC RELATIONS

Baber v. Baber: **[visitation; child support; attorney's fees]** The circuit court did not err in modifying visitation based upon the evidence demonstrating a material change in circumstances. The court clearly considered the best interest of the child, despite the fact that the court did not use those words. The circuit court also did not clearly err in finding that appellant failed to meet his burden of showing a material change in circumstances sufficient to warrant a reduction in child support. Finally, on the issue of attorney's fees, the appellant contended that because he should have prevailed on the only contested issues before the court, he, not the appellee, should be awarded attorney's fees. The Supreme Court disagreed that he should have prevailed on both issues, affirmed the award of attorney's fees, and affirmed the decision in its entirety. (Pierce, M.; No. SC 10-285; 2-9-11; Hannah).

Bethany v. Jones: **[visitation]** In a case of first impression, the Supreme Court affirmed the circuit court's award of visitation to the appellee, appellant's former same-sex partner, based

upon the theory of in loco parentis, and the finding that visitation with the appellee was in the best interest of the child. (Smith, V.; No. SC 10-295; 2-17-11; Corbin).

Wall v. Wall: [**contempt; property settlement agreement; statute of limitations**] The parties divorced in 2002. The decree incorporated a property-settlement agreement, which provided that appellee would pay the indebtedness on property the appellant was purchasing. If the sale was not finalized, the appellee would be responsible for the indebtedness on the purchase of a home of the same value, \$100,000. In addition, the appellee agreed to pay appellant \$50,000 at the rate of \$10,000 per year, beginning in January, 2003, and continuing each January thereafter until January, 2007. In her motion for contempt filed in 2009, the appellant alleged that the appellee had paid nothing. Appellee asserted the defense of statute of limitations. He also asserted that his conduct was not willful, but was because of a psychological condition occurring after they had entered into the agreement and which rendered him unable to perform. The trial court denied the motion for contempt, and awarded appellant \$30,000, for the \$10,000 payments due in 2005, 2006, and 2007. The court found that the property-settlement agreement was an independent agreement that did not merge into the decree, subject to the five-year statute of limitations found in Ark. Code Ann. 16-56-111. The court found that the \$100,000 house obligation accrued in 2002, six months after the divorce decree was entered. The court found the claim barred by the statute of limitations. (Henry, D.; No. CA 10-657; 2-23-11; Gruber).

Hardy v. Hardy: [**paternity**] The trial court found that res judicata foreclosed appellant's challenge to the paternity of and the duty to pay child support for T.H. The court quashed , discovery intended to show that appellee had committed fraud, and denied appellant's motion for acknowledgment of DNA test results excluding him as the father of the child. The court also found various Arkansas paternity statutes constitutional. When the parties' were divorced in 2003, a decree of divorce was entered in which appellee was awarded custody and appellant was granted visitation and ordered to pay child support. No express finding of paternity was made in the decree, but eight days later, the court denied appellant's motion for paternity testing, finding it was not in the best interest of the child. Appellant did not appeal from any of the court's orders at that time. In affirming the trial court, the Supreme Court said that the issue of paternity was clearly litigated in the divorce proceeding. Because he did not appeal, he is barred by res judicata and cannot now challenge paternity. The court noted that res judicata bars not only issues that were litigated, but issues that could have been raised in the first litigation. (Clark, D.; No. SC 10-698; 2-24-11; Baker)

PROBATE

Smith v. Lovelace, et al.: [**guardianship of a child**] The appellant maternal grandfather of the child contended that the court erred (1) in finding it in the child's best interests that the appellees be appointed guardians; (2) in applying the statutory parental preference; and (3) in not recognizing appellant's statutory preferential status. For each point, the Court of Appeals found that the circuit court had properly analyzed and found the best interest of the child. The court's

decision to issue a permanent order of guardianship to the appellees was affirmed. (McGowan, M.; No. CA 10-406; 2-2-11; Gladwin).

Havard, et al. v. Clark: **[step-parent adoption–consent; child support]** The appellant mother and her husband, the child’s step-father, filed an adoption petition, claiming the appellee father’s consent was not required because he had failed to provide support for and/or to have contact with the child for at least one year. The circuit court found the father’s support was required and that the adoption was not in the child’s best interest. The court denied the adoption petition. The Court of Appeals said that the evidence was conflicting on the issue of the father’s contact with the child and that the circuit court was in the best position to weigh credibility and to observe the issues. The Court of Appeals affirmed on the issue of contact. On the issue of child support, the circuit court had found that the payment records did not show that the father failed to make support payments for a year while under a court order to do so. The Court of Appeals found that he had a duty to pay whether a court ordered it or not, and reversed and remanded for further proceedings on the issue of support. (Elmore, B.; No. CA 10-681; 2-2-11; Abramson).

Racine v. Nelson: **[adoption–consent; constitutionality]** Appellant contended the trial court erred in finding that his consent to the adoption of appellee’s child was not required. The Supreme Court said that his consent to the adoption was not required under Ark. Code Ann. 9-9-207(a)(2), because he failed significantly to communicate with and to support the child from her birth in 2006 until his paternity action in 2008. He also alleged that Ark. Code Ann. 9-9-207(a)(11) is unconstitutional. However, the Supreme Court said the section does not apply to appellant because he never registered on the Arkansas Putative Father’s Registry before the adoption petition was filed so he had no standing to challenge the constitutionality of the provision. Regarding appellant’s challenge to the trial court’s finding regarding the best interest of the child, the court found no error in the circuit court’s consideration of the best interest of the child. Finally, the appellant argued that the circuit court should have adjudicated his paternity petition before appellee’s adoption petition. By acknowledging paternity and filing his petition for an adjudication of paternity, he asserted he had tolled the limitations period. However, he failed to obtain a ruling on the issue from the circuit court, so the Supreme Court was precluded from considering it. (Pierce, M.; No. SC 09-1192; 2-9-11; Henry).

JUVENILE

Barton v. State **[EJJ - Imposition of Adult Sentence]** The trial court was affirmed in imposing a 20 year adult sentence following an EJJ Review Hearing. Appellant argued that he was rehabilitated and cannot be sentenced as an adult on the original offense alone. The appellate court found that evidence of rehabilitation must be assessed in light of the factors listed in §9-27-507(e)(2) . Here, appellant exhibited a pattern of rule breaking in his rehabilitation program; due to appellant’s age he was not eligible for the juvenile aftercare program and there was no equivalent program with any adult probation program; and the facts of the underlying crime of first degree murder and residential burglary. (Culpepper, D; 10-293; 2-16-2011; Pittman)

State v. D.S. [Delinquency Dismissal - Writ of Certiorari] The order dismissing the case was vacated and the charges against appellee were reinstated. The Supreme Court held that the circuit court usurped prosecutorial, constitutional, and statutory duties and violated the separation of powers doctrine when it dismissed the charges against appellee *sua sponte*. (Finch J.; 10-360; 2-9-2011; Brown)

Chambers v. Arkansas Dept. of Human Servs. [Dependency-Neglect Adjudication] Appellants argued insufficient evidence, but the appellate court found that record supported the trial court's findings that the children were at substantial risk of neglect and parental unfitness. Appellants had no home, were living in a tent and using drugs while relatives cared for the children. There was also evidence that they transported the children while under the influence of drugs. (Cook, V.; 10-1058; 2-2-2011; Brown)

Maynard v. Arkansas Dept. of Human Servs. [Dependency-Neglect Adjudication] Appellant argued there was insufficient evidence to support the trial court's finding that her child was neglected. Evidence was sufficient that included drug use and irregular income to support her child. (Cook, V., 10-1054; 2-9-2011; Gruber)

Clingenpeel v. Arkansas Dept. of Human Servs. [TPR] The only issue on appeal was whether the trial court properly considered the child's adoptability in its best interest analysis. Appellant argued that the evidence was not specific enough as to who would adopt the children. The appellate court noted that while the trial court must find that TPR is in the child's best interest by clear and convincing evidence, the court does not have to find that every factor is established by this burden. The trial court found that the children were likely to be adopted, there was a family waiting to adopt them, and that the likelihood of adoption was very high. (Coker, K.; 10-1044; 2-2-2011; Glover)

Billings v. Arkansas Dept. of Human Servs. [TPR] Appellant challenged the sufficiency of the evidence and argued that she stopped using cocaine and had a place to live. Yet, she continued marijuana use and admitted her continued smoking to deal with stress. (French, T ; 10-889; 2-9-2011; Brown)

Martin v. Arkansas Dept. of Human Servs. [TPR] No merit and motion to withdraw denied and rebriefing ordered. Appellant had not received "hands on parenting" as recommended and ordered by court. (Finch, J., 10-116; 2-23-2011; Brown)

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

Richardson v. Arkansas Dept. of Human Servs. [TPR] (Harrod, L.; 10-908; 2-9-2011; Pittman)

Dawson v. Arkansas Dept. of Human Servs. [TPR] (Gilbert, M.; 10-1055; 2-9-2011; Glover)

Gipson v. Arkansas Dept. of Human Servs. [D-N Adjudication] (Branton, W.; 10-117; 2-23-2011; Vaught)

DISTRICT COURT

McGraw v. State: [district court appeal]. Appellant timely perfected a *de novo* appeal from district court to the circuit court. At a bench trial, it was asserted there was insufficient evidence to support the district court judgment. The circuit court again imposed the fines for violating a city ordinance as originally imposed in district court. Now, on appeal of the circuit court order, appellant challenges the sufficiency of the evidence. It was held that appellant did not comply with Ark. R. Crim. P. 33.1(b) for failing to challenge the sufficiency of the evidence at the time and in the manner specified in the rule. The issue, therefore, could not be reached on appeal. (Piazza, J.; CACR10-718; 2/22/11)

Colgan v. State: [district court appeal] [challenge to sufficiency of evidence] Appellant filed an appeal of her misdemeanor convictions in district court for violating several city ordinances. Specifically, she argued that the convictions were not supported by sufficient evidence. At the conclusion of a bench trial in circuit court, appellant's attorney made a closing argument but did not make any motion for directed verdict or dismissal. It was held that Ark. R. Crim. P. 33.1(b) requires that in order to preserve a challenge to the sufficiency of evidence in a bench trial, a criminal defendant must make a specific motion for dismissal or for directed verdict at the close of all evidence. Even though a closing argument was made, at no time did the attorney request that the charges be dismissed. Therefore, the challenge to the sufficiency of the evidence was not preserved for appellate review. (Webb, J.; CACR10-580; 2/2/11)

EIGHTH CIRCUIT

Cooper v. Martin: [civil rights] Assuming the facts plaintiff alleged about Martin's investigatory efforts are true, Martin conducted a negligent investigation, but the facts do not rise to the level of recklessness that shocks the conscience. As a result, plaintiff failed to establish that Martin's investigation violated a constitutional right, and Martin was entitled to qualified immunity. (E.D. Ark.; # 10-1073; 2-11-11)

Lexicon v. Ace American Insurance Co.: **[insurance]** District court did not properly apply governing Arkansas law when it held property damage resulting from faulty work by the insured's subcontractor was not "an occurrence" for purposes of a commercial general liability policy. The relevant Arkansas case law justified the insurer's decision to deny claims for coverage for damages to the "work product itself," which, here, would exclude coverage for reconstruction of an iron storage silo; however, the insurer, in the absence of some other exclusion, would be obligated to reimburse the insured for all property damage other than to the silo, including damage to the product stored in the silo and damage to adjacent equipment. (E.D. Ark.; # 10-1100; 2-14-11)

U.S. SUPREME COURT

Michigan v. Bryant: **[confrontation clause]** Michigan police dispatched to a gas station parking lot found Covington mortally wounded. Covington told them that he had been shot by respondent Bryant outside Bryant's house and had then driven himself to the lot. At trial, the officers testified about what Covington said. Bryant was found guilty of second-degree murder. Ultimately, the Michigan Supreme Court reversed his conviction, holding that the Sixth Amendment's Confrontation Clause rendered Covington's statements inadmissible testimonial hearsay.

Held: Covington's identification and description of the shooter and the location of the shooting were not testimonial statements because they had a "primary purpose . . . to enable police assistance to meet an ongoing emergency." (2-28-11; No. 09-150)