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ANNOUNCEMENTS

REMINDER: Administrative Plans are due July 1st.

On May 26th, the Supreme Court published for comment proposed rules changes recommended by the court's Criminal Practice Committee. The comment period ends July 1st, and a copy of the per curiam was included in the mailout.

CRIMINAL

Populis v. State: **[sufficiency of the evidence; manufacturing marijuana]** There was substantial evidence to support appellant's conviction. **[Ark. R. Crim. P. 17.1]** Appellant was not prejudiced by the admission of evidence from a witness whose identity was not disclosed by the prosecutor in pretrial discovery. (Williams, C.; CACR 10-1162; 5-4-11; Hoofman).

Fowler v. State: **[motion to suppress]** The affidavit in support of the search warrant established the reliability of the confidential informant. The affidavit also established that if the search warrant was not executed at night, the evidence would be destroyed. Thus, based upon the totality of the circumstances, the trial court did not err in denying appellant's motion to suppress the evidence obtained during the search. **[404(b)]** Because evidence of appellant's prior conviction was probative of his motive, knowledge, and absence of mistake, and the introduction of the evidence was not

unfairly prejudicial, the trial court did not abuse its discretion in admitting the evidence. (Ramey, J.; CACR 10-310; 5-4-11; Pittman).

Jones v. State: [**hearsay**] The trial court did not abuse its discretion when it excluded certain hearsay testimony. (Sims, B.; CACR 10-1041; 5-4-11; Gladwin).

Boatright v. State: [**Ark. R. Evid. 401**] The trial court did not abuse its discretion when it determined that certain evidence was irrelevant and excluded its admission. (Storey, W.; CACR 10-1065; 5-4-11; Robbins).

Nelson v. State: [**probation revocation**] The circuit court's findings that appellant violated the terms of his probation was not clearly against the preponderance of the evidence. [**confrontation clause**] During appellant's trial, a law enforcement official was permitted to testify about statements made by appellant's accomplice. The accomplice was not present during the testimony and appellant was not able to cross examine him. At the end of the trial, the circuit court found that the State would have met its burden of proof even without the hearsay testimony from the officer. On appeal, appellant challenged the admission of the testimony as a violation of the confrontation clause. The Court of Appeals concluded that because the circuit court did not rely on the challenged testimony when it revoked appellant's probation, appellant was not prejudiced by its admission. (Proctor, R.; CACR 10-1256; 5-4-11; Gruber).

Robertson v. State: [**admission of photos**] The trial court did not abuse its discretion when it admitted into evidence certain photographs, which were not cumulative, unduly prejudicial or inflammatory, and were relevant to the intent element of the crime and the nature, extent, and location of the wounds. (Cooper, T.; CR 10-1052; 5-5-11; Henry).

Lynch v. State: [**appointed counsel**] The trial court did not err when it denied a posttrial motion that was filed by a lawyer other than appellant's court-appointed counsel. (Moore, R.; CACR 10-532; 5-11-11; Gladwin).

Reed v. State: [**sufficiency of the evidence; first-degree battery**] There was substantial evidence to support appellant's conviction. [**amendment to criminal information**] Because the amendment to the criminal information did not change the nature or degree of the crime charged but merely clarified the manner in which the offense was committed, appellant was not prejudiced by the trial court allowing the prosecutor to amend the information at the close of its case. [**jury instruction**] The trial court concluded that appellant's proffered jury instruction, which added an additional element to the offense charged, was not a lesser-included offense to first-degree battery. Thus, it was not an abuse of discretion for the trial court to refuse to give the instruction. (Clinger, D.; CACR 10-961; 5-11-11; Gruber).

Garcia v. State: [**admission of evidence**] Where challenged evidence was cumulative to other evidence that was admitted at trial without objection, appellant could not establish that he was prejudiced by the trial court's decision to admit the challenged evidence. The trial court did not

abuse its discretion when it permitted evidence of appellant's character to be offered by the State to rebut character evidence offered by appellant. **[closing argument]** The trial court did not abuse its discretion by permitting the prosecutor to make certain statements during closing arguments because the statements were supported by the evidence in the record. **[conflict of interest]** It was not a conflict of interest for the prosecuting attorney's office to prosecute appellant at the same time that the prosecuting attorney's wife was representing the victims from appellant's case in separate dependency- neglect proceedings. (Arnold, G.; CACR 10-383; 5-11-11; Vaught).

Brown v. State: **[sufficiency of the evidence; felony theft of property; failure to appear]** Because evidence regarding the value of the stolen property was not introduced at appellant's trial, there was insufficient evidence to support his conviction for felony theft of property. Documentary proof of a judge's verbal or written order to appear in court at a specific time and place is required to sustain a conviction for failure to appear. Because such evidence was not admitted at appellant's trial, the circuit court erred in denying his motion for a directed verdict on the failure-to-appear charge. **[sufficiency of the evidence; aggravated assault]** There was sufficient evidence to support appellant's aggravated-assault conviction. (Crow, G.; CACR 10-1063; 5-18-11; Pittman).

Serrano v. State: **[harmless error]** The trial court improperly admitted certain evidence pursuant to the pedophile exception to Rule 404 (b). On review, the Court of Appeals acknowledged the error but declared that it was harmless. **[testimony]** The trial court did not abuse its discretion when it permitted the State to ask the child victim the same question several times. (Arnold, G.; CACR 10-838; 5-25-11; Hoofman).

Basham v. State: **[double jeopardy]** Appellant's trial ended in a mistrial without a final verdict of acquittal entered in the record. Neither the transitional jury instruction nor the jury's written note that outlined the vote on the lesser-included charge negated the requirement for a formal verdict. The jury's note reflecting its vote on the lesser-included offense of second-degree murder did not constitute an implicit acquittal on the charge of first-degree murder. Entry of the jury's note into the record did not render it controlling for the purposes of double jeopardy on the first-degree charge. (Cox, J.; CACR 11-79; 5-25-11; Gruber).

Percefull v. State: **[sufficiency of the evidence; manufacturing marijuana]** There was substantial evidence to support appellant's conviction. **[motion to suppress]** Because appellant did not have a reasonable expectation of privacy in the area where the law enforcement official was standing when he viewed certain contraband, the trial court did not err in denying appellant's motion to suppress the seizure of the contraband. **[voir dire]** During *voir dire*, the trial court did not abuse its discretion when it permitted the State to ask questions that explored the link between marijuana and the use of hard drugs. **[introduction of evidence]** The State failed to provide appellant with a list, which contained items that had been submitted to the crime lab. However, the trial court permitted the State to admit the list into evidence. The Court of Appeals concluded that appellant did not suffer any prejudice by admission of the list and affirmed the trial court's ruling. **[jury instruction]** Because appellant relied on a complete-denial defense, there was no rational basis for giving a jury instruction on a lesser-included offense. (Shirron, P.; CACR 10-1173; 5-25-11; Gladwin).

Dover v. State: **[mistrial]** The trial court did not abuse its discretion when it denied appellant's motion requesting a mistrial, which was based upon comments made by the State during opening statements. (Whiteaker, P.; CACR 10-1331; 5-25-11; Vaught).

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

Massey v. State: (third-degree-domestic battery) CACR 10-224; 5-18-11; Hart.

Ockerman v. State: (first-degree battery) CACR 10-1012; 5-25-11; Hart.

Robinson v. State: (third-degree assault) CACR 10-1281; 5-25-11; Robbins.

Wilson v. State: (delivery of cocaine) CACR 10-897; 5-25-11; Wynne.

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:

Cargill v. State: (suspended imposition of sentence) CACR 10-928; 5-4-11; Hart.

Caldwell v. State: (suspended imposition of sentence) CACR 10-974; 5-11-11; Martin.

Holcombe v. State: (probation) CACR 10-949; 5-11-11; Abramson.

Anderson v. State: (suspended imposition of sentence) CACR 10-973; 5-11-11; Wynne.

CIVIL

Bolen v. Washington County Zoning Board: **[zoning]** Conditional-use permit grant was a legislative act rather than an administrative act and on appeal to circuit court, appellant was not entitled to either a de novo review or a jury trial. (Lindsey, M.; CA 10-352; 5-4-11; Vaught)

Roberts v. Jackson: **[prescriptive easement]** Prescriptive easement was established and it was not abandoned. (Tabor, S.; CA 10-1294; 5-4-11; Hoofman)

Ark. State Highway Dept. v. Lamar Advantage Holding Co. **[billboard permit]** Department's denial of application for billboard permit on the basis that the property was not zoned commercial or industrial was affirmed. (Fox, T.; SC 10-932; 5-5-11; Danielson)

Burgess v. Lewis: **[deed]** Language in deed did not limit the reservation clause. The clear intent was for the grantors to retain the royalty interest. (Maggio, M.; CA 10-1272; 5-11-11; Brown)

Page v. Ballard: **[faulty construction/damages]** The issue of damages was submitted using the value method rather than the cost-of-repair method. Owner's testimony as to property's value was sufficient. (Looney, J.; CA 10-1184; 5-11-11; Abramson)

Bussey v. Bearden: **landlord's duty** Landlord is under no obligation to a tenant for injuries sustained from criminal acts of third parties absent an agreement to assume some duty to protect the tenant. (Hill, V.; CA 10-895; 5-11-11; Glover)

Maguire v. Jines: **[dismissal]** Complaint was properly dismissed because plaintiff was not served within 120 days. (Proctor, W.; CA 10-474; 5-11-11; Hoofman)

Mercy Hospital v. Bicak: **[covenant not to compete]** Non-competition agreement was not enforceable because hospital failed to establish that it had a valid interest requiring protection; agreement was designed to eliminate competition; and it interfered with the public's right of access to a physician of their choice. (Clinger, D.; CA 10-1057; 5-11-11; Vaught)

Forever Green Athletic Fields v. Lasiter Const.: **[contract]** Order granting new trial based on court's decision that it was error to give instruction on the statute of frauds was proper. **[Ark. Contractor's licencing law]** Defendant had contractor's license but opponent contended that defendant was barred from bringing a counterclaim because of alleged violations of licensing law, but no such bar would arise under the circumstances alleged. **[attorney disqualification]** Court did not abuse its discretion in refusing to disqualify firm on the eve of trial because a lawyer would be a witness; however, on retrial, there is time for the defendant to obtain new counsel. (Moody, J.; CA 10-1049; 5-11-11; Gladwin)

Baptist Health v. Hutson: **[class cert]** Definition of the class was definite and administratively feasible for determining whether a particular person was a member. Findings of predominance and superiority were also proper. (Fox, T.; SC 10-1150; 5-12-11; Baker)

Kirkland v. Sandlin: **[boundary by agreement]** Evidence supported finding that a valid boundary line agreement had been made between the parties. (Gunn, M.; SC 10-1059; 5-12-11; Danielson)

Crockett v. C.A.G. Investments: **[res judicata]** Summary judgment was proper based on claim preclusion because the plaintiff was closely connected to previous litigation as the sole stockholder, chairman of the board, and president of the corporation in that case. She took part in the litigation and should have exercised her rights in real property as an individual that she sought to assert in this subsequent action. **[fees/sanctions]** Court did not abuse its discretion in assessing attorney's fees and Rule 11 sanctions. (Honeycutt, P.; SC 10-987; 5-12-11; Gunter)

Kesal v. Almand: **[dismissal/costs]** Rule 41 provides that costs assessed upon dismissal of a case cannot be assessed until there has been a refiling of the same case. The court erred in ordering the

payment of costs on the same day that the nonsuit was entered. (Martin, W.; SC 10-1185; 5-12-11; Corbin)

Macon v. State: **[civil forfeiture]** Title to car was in name of mother or son. Since son consented to the forfeiture, the failure of the State to name the mother in the proceeding was of no legal effect because son alone could transfer interest in car. (McCallum, R.; CA 10-970; 5-18-11; Hoofman)

Jones v. Bourassa: **[contract]** Evidence supported court's finding of an implied agreement and that one of the party's frustrated the agreement. **[unjust enrichment]** Party was unjustly enriched by retaining the improvements to the property made by the other party. Money spent on the property does not fall under the voluntary-payment rule. (Harkey, A.; CA 10-1277; 5-18-11; Wynne)

Wilson v. Phillips County Election Commission: **[election]** Complaint contesting the election was not filed within 20 days of the election date as required by law; therefore, the court had no subject matter jurisdiction to hear it. (Proctor, R.; SC 11-166; 5-19-11; Brown)

Henry v. Continental Ins. Co. : **[direct action statute]** Insurer, as the hospital's liability-insurance carrier, is subject to a direct cause of action, and the law does not require the joinder of the allegedly negligent employees. (Lindsay, M.; SC 10-1255; 5-19-11; Baker)

Crenshaw v. Admin. Este of Ayers: **[limitations]** Plaintiff named a deceased person as the defendant in his suit. The complaint was void ab initio and a nullity because this was not a case of a misnomer; therefore, there was no legal proceeding ever commenced. The original complaint was not subject to an amendment or relation back or substitution of parties and the plaintiff cannot rely on the nonclaim statute. When the plaintiff filed a claim against the estate it was outside the limitations period. (Hughes, T.; SC 11-8; 5-19-11; Hannah)

Hester v. Ark. Professional Bail Bondsman Bd.: **[admin appeal]** Court's decision to affirm Board's revocation of bail bond license was proper. (Fox, T.; CA 10-1127; 5-25-11; Martin)

Dunn v. Womack: **[personal liability]** Individual was personally obligated for entity's debt. Although there was not a writing, the Statute of Frauds was not violated because there was clear and convincing evidence that individual agreed to be responsible for the debt. An oral agreement is taken out of the statute if there is such proof of an agreement. (Pearson, W.; CA 11-1; 5-25-11; Brown)

Po-Boy Land Co. v. Mullins: **[summary judgment]** Even though both sides moved for summary judgment, if it impossible to determine on appeal that either party is entitled to judgment as a matter of law, summary judgment is not in order. (Patterson, J.; CA 10-1249; 5-25-11; Robbins)

Wilson v. Pulaski Bank and Trust: **[constructive trust]** Order on motion for summary judgment imposing constructive trust was proper. (Fox, T.; CA 10-1152; 5-25-11; Wynne)

Southern Farm Bureau v. Watkins: **[attorney's fees]** Statutes 23-79-208 and 23-79-209 provide alternative provisions for awarding attorney's fees, and an award in this case pursuant to 23-79-209 was proper. The court also should have awarded a 12% penalty due to the insurer's failure to timely pay benefits and prejudgment interest. (Fox, T.; CA 10-1031; 5-25-11; Abramson)

Hempstead County Hunting Club v. SWEPCO: **[certified question/PSC]** Plaintiff was required to bring its claims before the PSC before filing suit in federal court; therefore, court review of the claims is precluded until plaintiff exhausts its administrative remedies. (SC 10-1094; 5-26-11; Baker)

Bunn Builders, Inc. v. Womack: **[spoliation]** Court did not abuse its discretion in giving AMI 106 without a prior determination of bad faith. Court found that a party intentionally destroyed evidence. (McCallum, R.; SC 10-125; 5-26-11; Brown)

Harrisburg School Board v. Neal : **[annexation /school board]** Board's method to choose members of interim school board violated the law. In situation presented, law required existing members to draw lots to reduce board membership to required number, but board reduced members by voting rather than drawing lots. (Fogleman, J.; SC 11-75; 5-26-11; Danielson)

DOMESTIC RELATIONS

Norman v. Alexander: **[child support; reimbursement of health-insurance premiums]** The Court of Appeals affirmed the trial court's order of child support based upon income the appellee derived from a monthly monetary gift of support from his father, who testified that he would "try to take care of my son until I go broke." The court reversed the trial court's order to the extent of the reimbursement for health-insurance premiums for coverage during the period when appellee failed to provide the coverage required by the parties' property-settlement agreement. The court said the agreement was an independent, binding contract that was incorporated, but not merged, into the decree. "Even if this provision could be construed in the nature of child support, subject to modification by the trial court under appropriate circumstances, appellee never moved to be relieved from its unambiguous provision." (Brantley, E.; No. CA 10-914; 5-4-11; Robbins).

Scoggins v. Medlock: **[paternity]** In a case of first impression, the Supreme Court held that Ark. Code Ann. §9-10-104, which provides that a putative father may file a petition to establish paternity of a child born outside a marriage, does not contemplate DNA testing when the out-of-wedlock child is deceased. The circuit court's dismissal of the petition to establish paternity under Arkansas Rules of Civil Procedure 12(b)(1) and (6) was affirmed. (McGowan, M.; No. SC 10-246; 5-5-11; Corbin).

Zimmer v. Wright: **[divorce decree–modification]** The trial court retains jurisdiction beyond ninety days to interpret its decree to resolve any ambiguity and to clarify what the court actually

intended. Here, the Court of Appeals held that the ninety-day limitation of Arkansas Rules of Civil Procedure 60 is inapplicable because the court's post-decree orders did not modify the original decree but instead interpreted and enforced it. (McCormick, D.; CA No. 10-709; 5-11-11; Pittman).

Owens v. Office of Child Support Enforcement: **[child support]** The appellant appealed from an order denying his motion for transcript, his petition to hold support in abeyance or to reduce support while he is incarcerated, and his petition for modifications. He argued that the initial child-support hearing was held without his being present and in violation of his constitutional rights. This argument had no connection to the order from which he appealed, and he cited no authority. The record included no evidence that appellant had raised his constitutional arguments before the trial court, so they were waived on appeal. (Spears, J.; No. CA 10-430; 5-11-11; Wynne).

Kemp v. Kemp: **[child support]** The Court of Appeals found that the trial court did not err in declining to modify the appellee's child support obligation despite the fact that his income had increased. In leaving child support at the parties' agreed-upon level of \$9,210.52 per month, the trial court found that the actual needs of the children were being met by the current child support and that those actual needs were exceeded by the chart amount. The circuit court referred to the chart, as is required, and considered the financial information, both needs and ability to pay, in considering whether to modify child support. A part of the consideration was that the children's expenses were about \$5,700 a month, so that the amount being paid left \$3,473 a month over the needs paid to the appellant. The trial court reviewed the twenty factors for deviation found in Administrative Order No. 10 in finding that the children's needs were being provided for with money left over. The trial court found that an increase in monthly child support would be inappropriate at this time. (McGowan, M.; No. CA 10-1132; 5-11-11; Glover).

Carroll v. Carroll: **[divorce--property]** The dispute in this case involved whether membership in a hunting club that the appellee husband purchased after the parties were married was marital or non-marital property. The appellee contended and the circuit court found it to be non-marital property. The Court of Appeals found the trial court's findings clearly erroneous. The court said it is undisputed that the hunting club membership, which cost \$35,000, was purchased after the parties were married. All property acquired by either spouse subsequent to marriage is considered marital property except for some specific statutory exceptions, including property acquired by gift. The hunting club property, purchased after the marriage, was presumptively marital property. The appellee, arguing that the membership was his separate property, had the burden of rebutting the presumption. The court said the evidence in the case was simply insufficient to rebut the presumption. Appellee's testimony was the only evidence that he purchased the property with his own funds, and the court said that was not sufficient to satisfy the clear-and-convincing-evidence standard needed to overcome the presumption that the membership interest was marital property. (Benton, W.; No. CA 10-677; 5-11-11; Abramson).

Horton v. Horton: **[divorce--division of property and debt]** The Court of Appeals found that, in light of the economic disparities between the parties, the circuit court's unequal division of the property was not clearly erroneous. (McGowan, M.; No. CA 10-874; 5-11-11; Brown).

Tanner v. Kadusheva: **[child custody]** The Court of Appeals affirmed the trial court's award of joint custody of the parties' son, with the appellee mother being designated primary caregiver. The court said the circuit court was in the best position to evaluate the evidence and to make credibility determinations, and that the court's findings were not clearly erroneous. The court also found that the trial court's making the appellee mother the primary caregiver was not based upon speculation regarding future events. The court's "impression" that appellant would transfer to Oklahoma was supported by the evidence. If circumstances change and the appellant father does not move, the court said, the appellant can petition for a review based upon material change in circumstances. Finally, the appellant's contention that the circuit court erred in refusing to hold appellee in contempt for discovery violations, destruction of evidence, and violation of court orders was not properly preserved for appeal. (Smith, V.; No. CA 10-1119; 5-25-11; Gladwin).

PROBATE

Hicks v. Faith, et al.: **[guardianship of a minor]** The Court of Appeals affirmed the award of guardianship of the minor to his maternal grandparents, finding that the trial court had complied with the statutory requirements and Supreme Court precedent in awarding guardianship of a minor. The court found that the circuit court's findings were whether the adoptive father was qualified and suitable and what was in the best interest of the child, and that those findings were not clearly erroneous. (Guthrie, D.; No. CA 10-1174; 5-4-11; Gruber).

JUVENILE

Keckler v. Arkansas Dept. of Human Services: **[D-N Custody]** Appellant argued that the trial court erred in granting custody of D.D. to his father. Appellant's dependency-neglect case began in 2008, and D.D. was removed from appellant's home on two separate occasions, first for neglect and later for physical abuse. The trial court did not err in granting custody to the father because appellant was unable to provide D.D. the stability and structure to meet his mental health needs. (Chandler, L.; CA10-1075; 5-25-2011; Pittman)

Bryant v. Arkansas Dept. of Human Services: **[TPR]** Appellant failed to designate the permanency planning hearing in her notice of appeal and there is no indication that appellant's argument on appeal was ever raised before the trial court and as such it will not be considered on appeal.(Chandler, L; CA11-62; 5-25-2011; Martin).

Porter v. Arkansas Dept. of Human Services: **[TPR]** Appellant argued that she had no obligation to comply with the case plan or court orders because DHS did not prove the reason for removal at the termination hearing. First, appellant failed to appeal the adjudication order and is precluded from review in an appeal of a subsequent order. Second, appellant's claim that the Arkansas State Police did not substantiate the sexual-abuse allegation is not supported by the document she claims. Finally, the law recognizes grounds not based on the child's removal from the home although those reasons must be substantiated in the adjudication hearing. In this case, the child was removed for sexual abuse by appellant's live-in companion. Yet, subsequent issues arose including: chronic violence in appellant's home; appellant's continuing to live with the man that perpetrated the violence and who was found to have sexually abused her child, yet who failed to

participate in any of the dependency-neglect proceedings; appellant's failure to participate in therapy; and appellant's threats, hostility and erratic behavior toward DHS and CASA. (Yeargan, C.; CA10-368; 5-11-2011; Pittman)

No-Merit TPR and Motion to Withdraw Cases:

Sloan v. Arkansas Dept. of Human Services: Affirmed by memorandum opinion. (Thyer, C.; CA10-1327; 5-18-201; Gruber)

Tenny v. Arkansas Dept. of Human Services: Affirmed based on aggravated circumstances in the form of extreme and repeated cruelty due to appellant's exposure of child to operational methamphetamine lab. (Zimmerman, S.; CA10-1260; 5-11-2011; Hoofman)

DISTRICT COURT

Watkins v. Dale: **[FOIA Hearing]**. Appellant's district court conviction for disorderly conduct was affirmed on de novo appeal to circuit court and on appeal to the Arkansas Court of Appeals. Appellant then filed a pro se petition and complaint against the prosecutor pursuant to the Arkansas Freedom of Information Act. Appellant admitted that appellee provided all requested documents except for the exculpatory handwritten notes. The trial court dismissed the petition. Appellant brought this appeal contending that the trial court improperly applied FOIA and that appellant was entitled to a hearing. Because the trial court dismissed the petition without a hearing and made no mention in its order whether the handwritten notes fell within FOIA's ambit, the Court of Appeals could not review the notes. The case was reversed and remanded for the trial court to hold an *in camera* review to determine if the handwritten notes are exempt under FOIA. If not, appellee must provide appellant with the handwritten notes. (Wilson, J.; CA10-876; 5/25/11)

U.S. SUPREME COURT

Kentucky v. King: **[search]** Police officers followed a suspected drug dealer to an apartment complex. They smelled marijuana outside an apartment door, knocked loudly, and announced their presence. As soon as the officers began knocking, they heard noises coming from the apartment; the officers believed that these noises were consistent with the destruction of evidence. The officers announced their intent to enter the apartment, kicked in the door, and found respondent and others. They saw drugs in plain view during a protective sweep of the apartment and found additional evidence during a subsequent search. The state trial court denied respondent's motion to suppress the evidence, holding that exigent circumstances—the need to prevent destruction of evidence—justified the warrantless entry. Respondent entered a conditional guilty plea, reserving his right to appeal the suppression ruling. The Supreme Court of Kentucky reversed. The court assumed that exigent circumstances existed, but it nonetheless invalidated the search. The exigent circumstances rule did not apply, the court held, because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence.

Held : The exigent circumstances rule applies when the police do not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment.

Assuming an exigency did exist, the officers' conduct—banging on the door and announcing their presence—was entirely consistent with the Fourth Amendment . Respondent has pointed to no evidence supporting his argument that the officers made any sort of “demand” to enter the apartment, much less a demand that amounts to a threat to violate the Fourth Amendment. The record makes clear that the officers' announcement that they were going to enter the apartment was made after the exigency arose. (No. 09-1272), 5-6-11)