

# APPELLATE UPDATE

PUBLISHED BY THE  
ADMINISTRATIVE OFFICE OF THE COURTS

MAY 2014  
VOLUME 21, NO. 9

*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](http://courts.arkansas.gov/opinions/sc_opinions_list.cfm) or Court of Appeals - [http://courts.arkansas.gov/opinions/coa\\_opinions\\_list.cfm](http://courts.arkansas.gov/opinions/coa_opinions_list.cfm)).

## ANNOUNCEMENTS

The Supreme Court amended Ark. R. Crim. P. 7.1 and 13.1 and adopted a new rule, 33.9 on May 29<sup>th</sup>. The rules are effective July 1, 2014. The per curiam was included in the weekly mailout.

## CRIMINAL

*Britton v. State*, 2014 Ark. 192 [**competency**] There was not sufficient evidence before the circuit court to cause a reasonable doubt about appellant's capacity to understand the nature and object of the proceedings against him, to consult with his counsel, or to assist in preparing his defense. Therefore, the circuit court did not err by failing to stop the trial and conduct a competency hearing on its own volition. [**mistrial**] Because appellant was responsible for the outburst that formed the basis for the request for a mistrial, the circuit court did not abuse its discretion by failing to reward appellant's misbehavior with a mistrial. [**restraints in the courtroom**] Where appellant attempted to verbally and physically attack a witness and it took multiple deputies to restrain appellant and remove him from the courtroom, the circuit court did not abuse its discretion in determining that the use of restraints on appellant were reasonably necessary to maintain order and security in the courtroom. (Clawson, C.; CR-13-815; 5-1-14; Danielson, P.)

*Walden v. State*, 2014 Ark. 193 [**multiple periods of probation; consecutive vs. concurrent**] Arkansas Code Annotated § 5-4-307 (b)(1) requires that multiple periods of suspension or probation are to run concurrently regardless of whether they were imposed at the same or different times.

[**multiple sentences of imprisonment; consecutive vs. concurrent**] Arkansas Code Annotated § 5-4-403 (a) requires that when multiple sentences of imprisonment are imposed on a defendant convicted of more than one offense, including an offense for which a previous suspension or probation has been revoked, the sentences shall run concurrently unless, upon recommendation of the jury or the court's own motion, the court orders the sentences to run consecutively. Although the General Assembly has clearly provided that multiple sentences of imprisonment for multiple offenses may run consecutively upon a trial court's order, it has not similarly provided that suspended sentences may run consecutively to a term of imprisonment when multiple offenses are involved. (Fitzhugh, M.; CR-13-643; 5-1-14; Goodson, C.)

*Smith v. State*, 2014 Ark. App. 289 [**motion to suppress; plain view**] Because law enforcement officials were lawfully located in a place that allowed them to plainly view prohibited items, and because the prohibited nature of the objects in plain view was readily apparent, the trial court did not err when it denied appellant's motion to suppress. (Webb, G.; CR-13-913; 5-7-14; Whiteaker, P.)

*Whitson v. State*, 2014 Ark. App. 283 [**probation; revocation**] Because no evidence was presented and no determination was made that appellant was a habitual offender, the circuit court had the authority to sentence appellant to probation. Appellant's sentences upon revocation, which were within the statutory range, were not illegal. (Webb, G.; CR-13-326; 5-7-14; Wynne, R.)

*Guevara v. State*, 2014 Ark. 200 [**Rule 37**] It was error for the circuit court to deny appellant's Rule 37 petition by relying on email correspondence that was not part of the file, record, or petition as contemplated by Rule 37.3(a). Further, the circuit court erred in denying the petition in the absence of an evidentiary hearing because if the circuit court had to rely on the email correspondence, it cannot be said that the file, record, and petition conclusively showed that appellant was not entitled to relief. (Green, R.; CR-13-406; 5-8-14; Corbin, D.)

*Nance v. State*, 2014 Ark. 201 [**motion to suppress**] The State established that appellant freely and voluntarily consented to the search of her property and that appellant's consent was given without actual or implied coercion or duress. Thus, the circuit court did not err when it denied appellant's motion to suppress. [**jurisdiction**] The circuit court was without jurisdiction to act pursuant to Ark. Code Ann. § 5-62-106. (Huckabee, S.; CR-13-655; 5-8-14; Corbin, D.)

*Smith v. State*, 2014 Ark. 204 [**habeas corpus**] Because appellant's sentence to life imprisonment for first-degree murder was not mandatory, the holding in *Miller v. Alabama*, \_\_ U.S. \_\_, 132 S.Ct. 2455 (2012) is inapplicable to appellant's case. Additionally, because the jury in appellant's case was permitted to consider sentencing-related mitigating evidence, he is not entitled to a resentencing hearing as described in *Jackson v. Norris*, 2013 Ark. 175, \_\_ S.W.3d \_\_. (Dennis, J.; CV-13-1115; 5-8-14; Hart, J.)

*Watson v. State*, 2014 Ark. 203 [**Rule 37**] The circuit court did not err when it denied appellant's Rule 37 petition because appellant failed to establish that he received ineffective assistance of counsel at trial or on direct appeal. (Wright, H.; CR-13-668; 5-8-14; Goodson, C.)

*Seaton v. State*, 2014 Ark. App. 296 [**404 (b); probation**] The trial court did not abuse its discretion by admitting evidence regarding an arrest, which was not alleged in the State's petition for revocation, during appellant's revocation hearing because the evidence was not relied upon by the court as proof that appellant violated the conditions of his probation. (Fogelman, J.; CR-13-771; 5-14-14; Gladwin, R.)

*Coakes v. State*, 2014 Ark. App. 298 [**waiver of counsel**] The trial court did not err in finding that appellant made a knowing and intelligent waiver of his right to counsel. (Henry, D.; CR-13-672; 5-14-14; Pittman, J.)

*Adams v. State*, 2014 Ark. App. 308 [**sufficiency of the evidence; first-degree terroristic threatening; first-degree interference with emergency communications**] There was substantial evidence to support appellant's convictions. [**sentencing enhancement**] A judge in a bench trial may enhance a defendant's sentence pursuant to Ark. Code Ann. § 5-4-502. [**habitual offender**] Habitual offender status pursuant to Ark. Code Ann. § 5-4-504 may be established by any evidence that satisfies the trial court beyond a reasonable doubt that the defendant was convicted or found guilty. Presentation of a certified copy of a prior conviction will satisfy the statutory requirement. (Griffen, W.; CR-13-712; 5-14-14; Hixson, K.)

*Hobbs v. Gordon*, 2014 Ark. 225 [**writ of habeas corpus**] Pursuant to Ark. Code Ann. § 16-112-103, before a court may issue a writ of habeas corpus, it must determine that there is probable cause to believe that the petitioner is being detained without lawful authority. (Proctor, R.; CV-13-942; 5-15-14; Baker, K.)

*Foshee v. State*, 2014 Ark. App. 315 [**sufficiency of the evidence; first-degree terroristic threatening**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] The trial court did not abuse its discretion when it permitted the victim in appellant's case to testify about her state of mind after hearing appellant's threats because the evidence was relevant to the issue of the type and nature of the trauma suffered by the victim. (Pearson, W.; CR-13-934; 5-21-14; Pittman, J.)

*Jeffries v. State*, 2014 Ark. 239 [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. [**voir dire; burden of proof**] Although the State may have misrepresented the applicable burden of proof during voir dire, the circuit judge corrected the error during voir dire and provided detailed instructions to the jury on the burden of proof at the close of the case. [**pedophile exception to Rule 404(b)**] The trial court did not abuse its discretion when it permitted individuals, who appellant had victimized, but were not the subject of the current case, to

testify about prior sexual abuse because the evidence was: (1) relevant; (2) fell within the pedophile exception to Rule 404(b); and (3) was more probative than prejudicial. (Williams, C.; CR-13-850; 5-22-14; Danielson, P.)

*Wertz v. State*, 2014 Ark. 240 [**Rule 37**] Appellant failed to establish that he received ineffective assistance of counsel during the guilt phase or the penalty phase of his trial. (Erwin, H.; CR-12-655; 5-22-14; Baker, K.)

*Ciesielski v. State*, 2014 Ark. App. 329 [**Sixth Amendment right to self-representation**] The trial court erred by failing to conduct the proper inquiry before refusing to allow appellant to waive his right to counsel and to represent himself at trial. (Sims, B.; CR-13-1070; 5-28-14; Pittman, J.)

*Hart v. State*, 2014 Ark. 250 [**sentencing enhancement**] Arkansas Code Annotated § 5-4-702(a), which permits enhanced penalties for certain offenses committed in the presence of a child, does not apply to the offense of manslaughter. (Singleton, H.; CR-13-579; 5-29-14; Hannah, J.)

*Williams v. State*, 2014 Ark. 253 [**suppression; in-court identification**] The circuit court did not err when based upon the totality of the circumstances, it concluded that the witness's in-court identification of appellant was reliable. [**mistrial**] The trial court did not abuse its discretion when it denied appellant's motion for a mistrial, which was based upon an improper remark made by the prosecutor during closing arguments. (Wright, H.; CR-13-563; 5-29-14; Goodson, C.)

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

*Wheeler v. State*, 2014 Ark. App. 281 (first-degree battery) CR-13-695; 5-7-14; Harrison, B.

*Cox v. State*, 2014 Ark. App. 321 (theft of property) CR-13-610; 5-21-14; Gruber, R.

*Harrell v. State*, 2014 Ark. App. 319 (first-degree murder; possession of a firearm by certain persons) CR-13-720; 5-21-14; Wynne, R.

*Jordan v. State*, 2014 Ark. App. 325 (second-degree battery) CR-13-997; 5-21-14; Wood, R.

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:

*Rogers v. State*, 2014 Ark. App. 310 (suspended sentence) CR-13-760; 5-14-14; Wood, R.

*Boyd v. State*, 2014 Ark. App. 336 (suspended sentence) CR-13-1014; 5-28-14; Whiteaker, P.

## CIVIL

*Earls v. Harvest Credit Mgmt.*, 2014 Ark. App. 294 [**summons**] The summons told the defendants that they had 30 days to respond if they were incarcerated. That misstated the rule, which says a defendant has 60 days to respond if incarcerated. Thus, the summons was defective, regardless of the fact the defendants were not incarcerated. (Honeycutt, P.; CV-13-550; 5-7-14; Wood, B.)

*Venable v. Fred's Inc.*, 2014 Ark. App. 286 [**pharmacist**] The evidence presented by the expert witness failed to establish a genuine issue of material fact regarding whether the misfilled prescription proximately caused the injuries. (Pope, S.; CV-13-592; 5-7-14; Gruber, R.)

*Ark. Fed. Credit Union v. Pigg.*, 2014 Ark. App. 279 [**debt**] Suit was filed over credit card bill and defendant denied authorizing the charges on the credit card. Court erred in granting the directed verdict. The executed loan agreement provided the necessary proof of authorization to survive the motion to dismiss. The agreement explicitly identified defendant as a cardholder and the charges as authorized. The trial court erroneously required plaintiff to prove that defendant used or benefitted from the credit card or authorized individual charges made by her husband. (Griffen, W.; CV-13-1013; 5-7-14; Walmsley, B.)

*Unifund Partners v. Thornton*, 2014 Ark. App. 307 [**default judgment**] The trial court did not err in refusing to set aside the default judgment. The party was served with a counterclaim and did not answer it, apparently thinking that the filing of an amended complaint would serve as a response. This mistake of the law is inexcusable and is not a mistake permitting a default judgment to be set aside under Rule 55. (Cook, V.; CV-13-738; 5-14-14; Whitaker, P.)

*Bailey v. Martin*, 2014 Ark. 213 [**elections**] In appealing her name being struck from the ballot, Appellant failed to expedite the appeal. Rather than immediately filing an appeal, she sought reconsideration in the trial court. Thus, when the appeal reached this court, the ballot had been printed without her name appearing on it. This appeal is moot as there is no meaningful remedy available. (Cole, J.; CV 14-358; 5-14-14; Corbin, D.)

*Kelly v. Martin*, 2014 Ark. 217 [**elections**] Judge was delinquent in paying his annual license fee. Suspension for nonpayment of license fee did not constitute a revocation or termination of his license. He remained a licensed attorney during the period of suspension. Consequently, he met the qualification for candidacy – licensed for six years immediately preceding the date of assuming office. (Bird, S.; CV 14-367; 5-14-14; Hart, J.)

*Chandler v. Martin*, 2014 Ark. 219 [**elections**] (See *Kelly* above) Rule VII (C) of the Rules Governing Admission to the Bar providing for automatic suspension of license to practice law for failure to timely pay license fee violates procedural due process. (Griffen, W.; CV 14-369; 5-14-14; Hoofman, C.)

*Williams v. Martin*, 2014 Ark. 210 [**elections**] (*see Kelly and Chandler above*) (Griffen, W.; CV 14-370; 5-14-14; Hannah, J.)

*Ark. Bd. of Election Commissioners v. Pulaski County Election Commission*, 2014 Ark. 215 [**Voter id law**] Constitutionality of law was not properly before the trial court. The trial judge's ruling was sua sponte and is vacated. Rules promulgated by state board to provide process for absentee voters to remedy failure to have proper identification were unconstitutional. The administrative agency violated the separation of powers doctrine as the legislature did not authorize such rules. (Fox, T.; CV 14-371; 5-14-14; Danielson, P.)

*Bank of the Ozarks v. Walker*, 2014 Ark. 223 [**arbitration**] Case was remanded to the circuit court to determine, in the first instance, whether there is a valid agreement to arbitrate between the parties. If the circuit court finds that there is a valid agreement to arbitrate, then it must determine whether the dispute falls within the scope of the agreement. If the court finds that the dispute falls within the scope of the agreement, then it may consider whether appellees have a defense that may be applied to invalidate the agreement. (Huckabee, S.; CV 13-80; 5-15-14; Hannah, J.)

*Stacy v. Dixon*, 2014 Ark. App. 314 [**fence by acquiescence**] Title by virtue of a boundary by acquiescence was established. Evidence of the use and maintenance of the property in question, as well as the party's longstanding mutual recognition of the fence as the boundary in his day-to-day treatment of the property supports this finding, despite assertion that he always intended to use the property as his own. Additionally, no oral agreement to place a new fence on the surveyed boundary line was established. Such an agreement requires: (1) there must be uncertainty or dispute about the boundary line; (2) the agreement must be between the adjoining landowners; (3) the line fixed must be definite and certain; and (4) there must be possession following the agreement. Even assuming the first three factors were present, there was never possession of the land in question following any such agreement, as no new fence was built on the survey line. (Putman, J.; CV-13-782; 5-21-14; Gladwin, R.)

*Lewis v. Benton County*, 2014 Ark. App. 316 [**zoning**] Member of board recused from voting on the proposal, but he spoke against the proposal as a member of the general public and as a witness. There was no violation of due process. (Karren, B.; CV-13-856; 5-21-14; Walmsley, B.)

*Schwyhart v. Hunt*, 2014 Ark. App. 324 [**res judicata**] The two suits in question did not involve the same claim or cause of action; therefore res judicata did not apply; nor did they involve the same parties or their privies. [**assignment**] There was no evidence that the indemnity agreement had been assigned; therefore, the original signatory party had the power to enforce the agreement. (Schrantz, D.; CV-13-260; 5-21-14; Hixson, K.)

*Lafferty v. Everett*, 2014 Ark. App. 332 [**adverse possession**] Party failed to show actual possession by sporadic use of the disputed tract. Fence was a convenience fence rather than a

boundary line. As such, the maintenance and repair of the fence was not of such unequivocal character as to reasonably indicate to the owner visiting the premises during the statutory period an appropriation of ownership to another. Other acts were not sufficient to “fly the flag” over the land and put the true owner on notice that his land was held under an adverse claim of ownership. (Weaver, T.; CV-13-766; 5-28-14; Gruber, R.)

*Strange v. Mary Reed Trust*, 2014 Ark. App. 333 [**prescriptive easement**] Circuit court’s finding that the Trust established an easement by prescription is not clearly erroneous. The use became adverse, at the latest, in 2000 and the roadway was used in spite of attempts to prevent it from that time until at least 2008 or 2009, more than seven years. (Maggio, M.; CV-14-69; 5-28-14; Gruber, R.)

*Wilson v. Greg Williams Farm, Inc.*, 2014 Ark. App. 334 [**crop dusting**] Crop dusting is not an inherently dangerous activity nor is the application of the chemical Surmount. (Haltom, B.; CV-13-998; 5-28-14; Glover, D.)

*DHS v. Pierce*, 2014 Ark. 253 [**medicaid**] A spouses’ individual retirement account (“IRA”) and 401(k) may be countable resources under the Medicare Catastrophic Coverage Act of 1988, 42 U.S.C. § 1396r-5. DHS’s policy of considering as countable resources a community spouse’s retirement accounts does not violate federal law. (Henry, D.; CV-13-870; 5-29-14; Hannah, J.)

*Hotel Associates, Inc.*, 2014 Ark. 254 [**oral contingency fee contract**] Under the facts of the case, the oral contingency fee agreement is enforceable. (Moody, J.; CV-13-1114; 5-29-14; Goodson, C.)

## DOMESTIC RELATIONS

*Wyatt v. Dent*, 2014 Ark. App. 343 [**change of custody; relocation**] The appellee custodial father filed a motion to modify visitation and to relocate out of state as a result of his new wife’s getting a job in Virginia. The appellant mother filed a motion for a change of custody. The circuit court ruled in favor of the appellee father. On appeal, the Court of Appeals affirmed, finding no change in circumstances warranting a change of custody. The court pointed out that relocation is not a change in circumstances that supports a change in custody. The appellant also contended that the circuit court failed to find that it was in the child’s best interest to relocate. The court said that a noncustodial parent seeking a change in custody has the burden to rebut a presumption in favor of relocation for a custodial parent with primary custody. Here the appellant attempted to shift the burden to the custodial father to prove it was in the child’s best interest to relocate. She also contended that the circuit court did not analyze each factor under *Hollandsworth*. Had she wanted an explanation of how the court analyzed each factor, she could have requested specific findings of fact. The Court of Appeals said the court applied the best-interest standard, considered the factors, and made findings that were not clearly erroneous, based on the record. (Smith, V.; No. CV-14-21; 5-28-14; Wood, R.)

*Smithson v. Smithson*, 2014 Ark. App. 340 [**alimony**] The appellant wife contended on appeal that a rehabilitative alimony award of \$1,000 a month for one year was inadequate in both amount and duration. The Court of Appeals held that its de novo review of the record failed to show an abuse of discretion. The circuit court record indicated that the trial court considered the parties' debts, the responsibility for the debts, the division of marital assets, and alimony. The appellant wife was awarded \$10,000 cash from the equity in the nonmarital home, she was awarded her marital portion of the appellee's retirement and investment accounts, and she was relieved of significant marital debt. The appellee husband was ordered to pay half of her accrued marital indebtedness and \$2,000 of her attorney fees. Both parties were relatively young and were married a relatively short period of time. The court said that rectification of economic imbalances is not necessarily appropriate when the marriage relationship did not influence the imbalances in earning capacity. The fact that the husband came into the marriage and left the marriage with significantly greater earning capacity does not automatically equate to a long-term sizable alimony award. The circuit court had to consider the facts and circumstances of the parties before the court. The appellate court will not substitute its judgment for that of the trial court, but will determine only whether the alimony decision is reasonable under the circumstances. The decision was affirmed. (Fox, T.; No. CV-13-1064; 5-28-14; Hixson, K.)

## **PROBATE**

*In the Matter of the Estate of H. Ripley Thompson, Deceased, et al. v. Thompson*, 2014 Ark. 237 [**decedents' estates; trusts**] The Supreme Court held that "once a circuit court determines that a settlor had the intent of depriving his or her spouse of marital-property rights when creating or amending an inter vivos revocable trust, the effect of that intent is to have the trust assets included in the settlor's estate for the limited purpose of calculating the surviving spouse's elective share. The intent to defeat the marital rights or the elective share will not invalidate any other lawful purpose of the trust." The circuit court's decision was affirmed. Professor Lynn Foster from the UALR Bowen School of Law, who is Editor in Chief of the *Arkansas Probate and Trust Law Review*, noted in the just-released 2013-2014 publication that the ruling in this important decision "places Arkansas in the majority of states," and that "[t]he modern trend of court decisions also allows spouses to receive revocable trust assets when they elect to take against the will." (Story, B.; No. CV-13-881; 5-22-14; Corbin, D.)

*Adams v. Howard*, 2014 Ark. App. 328 [**attorney's fee—method of calculation**] In 2002, the appellant lawyer, Ms. Adams, represented the appellee, Mr. Howard, in a suit against his stepmother, Mabel Howard, to recover forty-six acres of land from a trust that held the assets of Howard's late father. Howard was a beneficiary and co-trustee with his stepmother, who with the assistance of lawyer Bill Watkins had amended the trust to reduce Howard's beneficial interest and to eliminate him as trustee. The real property was successfully recovered in 2005 and placed it in the decedent father's estate, of which Howard was the sole heir. The stepmother's dower and homestead interests as widow were settled for \$110,500. After the recovery of the property, the parties disagreed over the attorney's fee. Howard said that Adams had agreed to collect her fees through a legal-malpractice claim against Watkins. Adams

disagreed and said that she had a contingency-fee contract which entitled her to “33% of all amounts recovered after filing suit.” She contended that her fee was 33% of the property’s \$1.8 million value at the time it was recovered in February 2005, and she filed a claim against the estate for “33% of the real property recovered or the sum of \$613,333,” and an attorney-fee lien for “33% of the proceeds...[of]...the [46 acres] including but not limited to sale proceeds.” In 2011, Adams sought to establish her fee as \$613,333. Howard responded that, if the property were sold, Adams should recover a third of any sales price, less the \$110,500 paid to the stepmother. (From the time the property was recovered in 2005, it had decreased in value.) The circuit court ordered that Adams be allowed to foreclose on her attorney-fee lien, but that she was entitled to receive 33% of the net sale price of the real estate, whether a forced sale on the courthouse steps or on the open market. Also, the \$110,500 paid to the stepmother would be deducted from the total sales price before computation of the 33% representing Adams’s lien. The Court of Appeals agreed with the trial court saying that Adams’s contract with Howard did not establish a method of calculating her fee, but simply stated that it would be one-third of the “amount recovered.” She took the risk, the court said, that the amount of the fee would depend on the proceeds of a sale. She filed her lien for 33% of the “proceeds” of the property. The circuit court could reasonably conclude that her fee would not be fixed until the property was sold. The decision was affirmed. (Duncan, X.; No. CV-13-935; 5-28-14; Gladwin, R.)

## JUVENILE

*A.S. v. State*, 2014 Ark. App. 323. [**FINS – extension of supervision terms**]

In 2012, a FINS petition was filed on fifteen-year-old A.S. for being “habitually and without justification” absent from school. The circuit court ordered that A.S. attend school and that she be placed on court-ordered supervision. An agreed order was entered that A.S.’s juvenile supervision be extended until September 2013. The court later found her in contempt of the order and entered orders. A review hearing was subsequently held and the court found that she was a member of FINS again and ordered the supervision to be extended until May 2014. A.S. appealed the extension of the court’s supervision pursuant to the FINS petition, arguing that there was insufficient evidence to support the court’s extension. The court of appeals held that the circuit court had not clearly erred, as it was undisputed that A.S. had truancy problems; that it was important for A.S. to complete high school; and that an extension would allow her to complete a program previously ordered by the court. (Medlock, M.; CV-13-929; 5-21-14; Vaught, L.)

*Clary v. Ark. Dep’t of Human Servs.*, 2014 Ark. App. 338 [**DN Adjudication - sufficiency**]

The circuit court adjudicated appellant’s two children dependent-neglected based on a threat of harm to the children and appellant’s mental instability. Evidence of appellant’s threats of self-harm and harm to her children, along with her emotional instability and her admitted depression were sufficient to support a finding of parental unfitness for a dependency-neglect finding.

[**hearsay**] Appellant argued the court erred in allowing a police officer to testify to threats appellant made to a third party. The Court of Appeals noted that even if this was inadmissible hearsay it was not reversible error absent a manifest abuse of discretion and showing of

prejudice. There was sufficient evidence to support the court's finding and admission, even if improper, was harmless. **[closing statements outside the record]** The argument regarding the AAL's remarks were raised for the first time on appeal and not preserved for review. (Chandler, L.; CV-14-68; 5-28-14; Whiteaker, P.)

*Donley v. Ark. Dep't of Human Servs.*, 2014 Ark. App. 335 **[TPR – relative placement]**  
Appellant appealed the circuit court's termination of her parental rights to her daughter. Appellant argued that the circuit court erred by not placing her daughter with her sister, who had custody of her daughter's younger sibling. Appellant acknowledged the court's prior holdings, but contended that preferential treatment to a relative to maintain sibling connections was a unique circumstance. The Court of Appeals declined, holding that a preferential consideration of relative placement was not found in the termination statutes and not relevant. (French, T.; CV-14-131; 5-28-14; Glover, D.)

*Hamman v. Ark. Dep't of Human Servs.* 2014 Ark. App. 295 **[TPR – sufficiency]**  
Appellants appealed the circuit court's termination of their parental rights to their three children. **[best interest/adoptability]** The Court of Appeals affirmed, holding that while no testimony was submitted regarding the effect of the children's age or race on their adoptability, other sufficient evidence, such as the caseworker's testimony that there were two adoptive homes for two of the children and that one child was not ready at that time, was sufficient to support the circuit court's finding of adoptability. **[potential harm]** The potential harm to the children was that the children had already been in DHS custody for 15 months. The children would remain in DHS custody for undetermined amount of time waiting for both parents to be released from incarceration and comply with case plan. The court stated, "this kind of wait-and-see is the definition of instability that the termination statute is intended to protect children from."  
**[statutory ground- failure to remedy]** Appellants also asserted that there was insufficient evidence to support termination under the failure to remedy ground disputing that DHS failed to make meaningful efforts to provide them with services to remedy the issues that caused removal. The circuit court found that DHS made reasonable efforts in prior orders. Appellants did not appeal those findings and that issue was waived. (Sullivan, T.; CV-13-1065; 5-7-14; Brown, W.)

*Wise v. Ark. Dep't of Human Servs.*, 2014 Ark. App. 290. **[TPR – sufficiency]**  
Appellant appealed the circuit court's decision to terminate his parental rights to his daughter on the basis that appellant had manifested the incapacity or indifference to remedy subsequent factors that arose after the removal of the child. On appeal, appellant challenged the sufficiency of the evidence supporting the circuit court's findings on the risk of potential harm if the child were returned to him and the statutory grounds for termination. The Court of Appeals affirmed, stating that it was "satisfied with the decision of the circuit court and the accompanying quantum of evidence and findings supporting the order." (Branton, W.; CV-13-1101; 5-7-14; Whiteaker, P.)

*Loveday v. Ark. Dep't of Human Servs.*, 2014 Ark. App. 282 [TPR – sufficiency] Appellant appealed the circuit court's termination of her parental rights to three of her children. [best interest/potential harm] Appellant denied any evidence to show potential harm to the children if returned to her care after her release from prison. The appellate court held that the circuit court's best-interest determination was based on appellant's credibility and that there was no guarantee that appellant's release from prison was imminent or that she could establish the requisite stability after her release. [statutory ground – failure to remedy] Appellant contended that her failure to protect one child from sexual abuse, her drug use, and her lack of safe housing had been remedied before the TPR hearing. The Court of Appeals affirmed, holding that the circuit court did not clearly err in finding that appellant failed to remedy the conditions that caused removal because appellant was incarcerated and had not established safe and stable housing for herself or the children before the TPR hearing. (Elmore, B.; CV-14-23; 5-7-14; Harrison, B.)

*King v. Ark. Dep't of Human Servs.*, 2014 Ark. App. 278. [TPR – sufficiency] The circuit court terminated appellant's parental rights to appellant's infant and two school-aged children. [best interest/potential harm] The Court of Appeals deferred to the circuit court's findings that the infant was removed due to neglect resulting in severe malnourishment and that she failed to demonstrate what she had been taught to be able to supervise her children from potential danger. [statutory grounds – failure to remedy] Appellant argued that the evidence was insufficient that DHS provided meaningful reunification services. The Court of Appeals affirmed, holding that appellant failed to preserve her argument regarding meaningful efforts. Appellant also testified at the TPR hearing that there were not any other services that she felt that DHS should have provided that would have helped her. Despite numerous services appellant still had no stable transportation, housing, employment or the ability to safely care for her children. (Coker, K.; CV-13-1147; 5-7-14; Pittman, J.)

*Gwinup v. Ark. Dep't of Human Servs.*, 2014 Ark. App. 337. [TPR – best interest] The circuit court terminated the parental rights to appellant's daughter. Appellant conceded that DHS sufficiently established a statutory ground for termination, the prior involuntary termination of her parental rights to another sibling based on that child's death in a house fire. Appellant challenged that it was in her child's best interest to terminate her parental rights. The Court of Appeals affirmed based on evidence of appellant's incarceration, drug use, unstable housing and employment, and criminal activity. In addition, the court noted the child was young and adoptable. (Smith, T.; CV-13-1107; 5-28-14; Whiteaker, P.)

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

*Washington v. Ark. Dep't of Human Servs.*, 2014 Ark. App. 293. (Halsey, B.; CV-13-716; 5-7-14; Hixson, K.)

*Jackson v. Ark. Dep't of Human Servs.*, 2014 Ark. App. 288 (Clark, D.; CV-14-47; 5-7-14; Glover, D.)

*Lint v. Ark. Dep't of Human Servs.*, 2014 Ark. App. 280 (Zimmerman, Stacey; CV-13-1075; 5-7-14; Walmsley, B.)

*Grife v. Ark. Dep't of Human Servs.*, 2014 Ark. App. 284 (Medlock, M.; CV-13-1125; 5-7-14; Wynne, R.)

## **DISTRICT COURT**

*Hudson v. State*, 2014 Ark. App. 305 [**ARCrP. Rule 33.1 motion to dismiss**]. An appeal of a DWI conviction and two other convictions in district court was taken to circuit court. After a bench trial, appellant was again convicted of all three offenses. On appeal, it is argued that there was insufficient evidence to support the circuit court findings. It was held that appellant's counsel never moved for dismissal of the charges, though a closing argument was made. A challenge to the sufficiency of the evidence made during closing argument, instead of at the close of evidence, does not preserve a sufficiency argument for appellate review. (Edwards, R.; CR-13-948; 5/14/2014; Glover, D.)

## **U.S. SUPREME COURT**

*Hall v. Florida*, [**capital punishment/IQ**] After U.S. Sup. Ct. held that the 8<sup>th</sup> and 14<sup>th</sup> Amendments forbid the execution of persons with intellectual disability, Hall asked a Florida state court to vacate his sentence, presenting evidence that included an IQ test score of 71. The court denied his motion, determining that a Florida statute mandated that he show an IQ score of 70 or below before being permitted to present any additional intellectual disability evidence. The Florida Supreme Court found the State's 70-point threshold constitutional.

Held: The IQ threshold requirement, as interpreted by the Florida Supreme Court, is unconstitutional.

As interpreted by the Florida Supreme Court, Florida's rule disregards established medical practice in two interrelated ways: It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts would consider other evidence; and it relies on a purportedly scientific measurement of a defendant's abilities, while refusing to recognize the measurement's inherent imprecision. While professionals have long agreed that IQ test scores should be read as a range, Florida uses the test score as a fixed number, thus barring further consideration of other relevant evidence, e.g., deficits in adaptive functioning, including evidence of past performance, environment, and upbringing. When a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. This legal determination of intellectual disability is distinct from a medical diagnosis but is informed by the medical community's diagnostic framework, which is of particular help here, where no alternative intellectual disability definition is presented, and where this Court and the States have placed substantial reliance on the medical profession's expertise. (No. 12-10882; 5-27-14)

*Plumhoff v. Rickard*, [**police chase**] Rickard led police officers on a high-speed car chase that came to a temporary halt when Rickard spun out into a parking lot. Rickard resumed maneuvering his car, and as he continued to use the accelerator even though his bumper was flush against a patrol car, an officer fired three shots into Rickard's car. Rickard managed to drive away, almost hitting an officer in the process. Officers fired 12 more shots as Rickard sped away, striking him and his passenger, both of whom died from some combination of gunshot wounds and injuries suffered when the car eventually crashed. Respondent, Rickard's daughter, filed a 1983 action, alleging that the officers used excessive force in violation of the 4<sup>th</sup> and 14<sup>th</sup> amendments.

Held: The officers' conduct did not violate the 4<sup>th</sup> amendment.

The officers acted reasonably in using deadly force. A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the 4<sup>th</sup> amendment, even when it places the fleeing motorist at risk of serious injury or death. Rickard's outrageously reckless driving—which lasted more than five minutes, exceeded 100 miles per hour, and included the passing of more than two dozen other motorists—posed a grave public safety risk. Under the circumstances when the shots were fired, all that a reasonable officer could have concluded from Rickard's conduct was that he was intent on resuming his flight, which would again pose a threat to others on the road.

The officers did not fire more shots than necessary to end the public safety risk. It makes sense that, if officers are justified in firing at a suspect in order to end a severe threat to public safety, they need not stop shooting until the threat has ended. Here, during the 10-second span when all the shots were fired, Rickard never abandoned his attempt to flee and eventually managed to drive away. (No. 12-1117; May 27, 2014)