

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 June 22, 2012, the Supreme Court adopted new Rule 4.7 addressing the recording of custodial interrogations. The rule is effective September 1, 2012. The per curiam was included in the mail out.

It also published rules for comment recommended by the Criminal Practice Committee. The comment period ends August 31st and the per curiam was included in the mail out.

CRIMINAL

Chambers v. State, 2012 Ark. App. 383 [**confrontation clause**] The trial court did not abuse its discretion in admitting certificates, which established that an officer was certified to administer BAC tests and that the machine used to administer the tests had been calibrated, because the documents were not testimonial hearsay and did not trigger appellant's constitutional right under the Confrontation Clause of the Sixth Amendment to confront the witnesses against him. (McCallister, B.; CACR 11-1195; 6-13-12; Wynne, R.)

Joiner v. State, 2012 Ark. App. 380 [**continuance**] The trial court did not abuse its discretion when it denied appellant's motion for a continuance, which was made after he had received eight previous continuances, and which was based upon his desire to locate a witness, whom appellant had not

attempted to locate in two years. **[violation of terms of probation]** The trial court did not err in finding that appellant had inexcusably failed to pay his fines and court costs. (Davis, B.; CACR 11-746; 6-13-12; Hart, J.)

Lemmond v. State, 2012 Ark. App. 390 **[admission of testimony]** Appellant's Sixth Amendment Right to confront the witnesses against him was not violated when the trial court admitted certain hearsay testimony because appellant was thereafter permitted to cross examine the declarant. **[violation of terms of probation]** The trial court did not err in finding that appellant had inexcusably failed to pay his court-ordered fines. (Kemp, J.; CACR 11-1155; 6-13-12; Brown, W.)

Scamardo v. State, 2012 Ark. App. 392 **[Ark. R. Evid. 613]** Impeachment of a witness by introducing extrinsic evidence of a prior inconsistent statement through the testimony of a second witness or through the admission of documentary evidence (regardless of whether the statement was given under oath) must be allowed; otherwise, Rule 613(b) of the Arkansas Rules of Evidence would have no meaning. The trial court abused its discretion in refusing to admit impeachment testimony pursuant to Rule 613 in appellant's case. **[excited utterance exception to the hearsay rule]** The trial court abused its discretion when it admitted a hearsay statement into evidence based upon the excited utterance exception to the hearsay rule because the statement was made approximately one month after the traumatic event, which led to the statement, occurred. (Tabor, S.; CACR 10-1144; 6-20-12; Vaught, L.)

Pickering v. State, 2012 Ark. 280 **[suppression of evidence; territorial jurisdiction]** The officer, who arrested appellant, was not acting outside of his territorial jurisdiction when he transported appellant to a different county to perform a breathalyzer test. Accordingly, the test results were lawfully obtained and the circuit court did not err in denying appellant's motion to suppress. (Pearson, W.; CR 12-19; 6-21-12; Gunter, J.)

Jordan v. State, 2012 Ark. 277 **[Ark. R. Evid. 609]** The circuit court did not abuse its discretion in finding that appellant's prior convictions were admissible for impeachment purposes pursuant to Rule 609 of the Arkansas Rules of Evidence. (Clinger, D.; CR 11-1209; 6-21-12; Corbin, D.)

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

Mixon v. State, 2012 Ark. App. 398 (theft of property) CACR 12-26; 6-20-12; Gruber, R.

Robelo v. State, 2012 Ark. App. 425 (possession of methamphetamine with intent to deliver, possession of cocaine with intent to deliver; maintaining a drug premises) CACR 11-1249; 6-27-12; Martin, D.

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:

Nutt v. State, 2012 Ark. App. 396 (probation) CACR 11-1275; 6-20-12; Robbins, J.

CIVIL

Boje v. Abbey Carpet and Floors, 2012 Ark. App. 388 [**sufficiency of the evidence**] It is the province of the trial court to weigh the evidence and determine the credibility of the witnesses. (Wood, R.; CA 11-1024; 6-13-12; Martin, D.)

In re Ruby Owen Trust, 2012 Ark. App. 381 [**trusts**] Court properly denied request to modify trust when purpose of the modification was to impoverish the beneficiary or to qualify her for government benefits. Such a modification is against public policy. (Wyatt, R.; CA 12-10; 6-13-12; Gladwin, R.)

Armstrong Remodeling v. Cardenas, 2012 Ark. App. 387 [**parol evidence**] Parol evidence was admissible. There was no merger clause in the agreements and the agreements were ambiguous. [**instructions**] There was no error in refusing to give proffered instruction when there was a model instruction on the issue. (Medlock, M.; CA 11-1090; 6-13-12; Abramson, R.)

Clinical Study Centers, Inc. v. Boellner, 2012 Ark. 266 [**IRA/garnishments**] Ark. Code Ann. 16-66-220, exempting IRA accounts from garnishment, is constitutional. The statute is not an absolute exemption of all personal property, and, as such, does not violate article 9, section 2 of the constitution. (Brantley, E.; SC 11-1225; 6-14-12; Brown, R.)

Brumley v. Keech, 2012 Ark. 263 [**punitive damages**] The exclusion by the trial court of evidence of the driver's failure to comply with federal trucking regulations requiring post-accident drug testing was not error. This evidence does not support a punitive damages award. The violation occurred after the accident, and there is no indication that the violations contributed to or caused the accident, and there was no evidence that the driver was in any way impaired or under the influence of drugs. (Cottrell, G.; SC 11-874; 6-14-12; Hannah, J.)

Daugherty v. Jacksonville Police Dept., 2012 Ark. 264 **[FOIA]** Department's response to FOIA request that "it was too broad and burdensome" did not constitute a timely and compliant response. Department's requirement of an approximately \$2500 deposit violated the statute. Citizen merely requested a copy of recordings of traffic stops. The department could not charge fees that exceeded the cost of reproduction and could not include an hourly rate charge. Department's purging of records after period of time did not violate FOIA. (Sanders, E.; SC 11-344; 6-14-12; Corbin, D.)

Welsher v. Mercy Health System, 2012 Ark. App. 394 **[fraudulent inducement]** Summary judgment was in order in fraudulent inducement of contract claim because evidence failed to establish element of justifiable reliance. (Clinger, D.; CA 11-239; 6-20-12; Pittman, J.)

Hobbs v. Jones, 2012 Ark. 293 **[capital punishment]** Ark. Code. Ann. 5-4-617 governing lethal injections is unconstitutional because the legislature has improperly delegated to the executive branch the unfettered discretion to determine all protocol and procedures for a state execution. The statute fails to provide reasonable guidelines for the selection of chemicals and fails to provide any general policy with regard to lethal injections procedures. (Fox, T.; SC 11-1128; 6-22-12; Gunter, J.)

DOMESTIC RELATIONS

Dixon v. Dixon, 2012 Ark. App. 384 **[alimony]** The parties' divorce decree in 2001 provided that appellant husband agreed to pay alimony of \$3,250 a month to appellee "for as long as he is employed full-time at...[his employer's]." In 2008, he stopped making payments. At the hearing, he testified that he no longer worked full-time. He continued to perform the same job for reduced hours, at a reduced salary. The trial court found he had a continuing duty of support and ordered him to pay \$133,250 for past-due alimony. In affirming, the Court of Appeals found no error in the circuit court's finding that the appellant is still a full-time employee. He chooses how many hours to work, his reduction in income was not based upon the hours he works, and neither his job description nor his employment benefits changed. He is still an upper-level executive with the discretion to set his own schedule and work hours. (Hendricks, A.; No. CA 11-1307; 6-13-12; Wynne, R.)

Sisson v. Sisson, 2012 Ark. App. 385 **[child custody; evidence]** The circuit court found that the appellant's evidence was primarily speculative and did not prove a material change in circumstances warranting a change in custody. In reversing, the Court of Appeals said that the circuit court applied the wrong standard of law, erroneously relying on its conclusion that appellant was required to prove that the children had suffered an adverse impact from appellee's actions and judgment. The court reversed and remanded for further proceedings. On the issue of the circuit court's denial of introduction of court documents concerning the appellee's boyfriend,

the court found no abuse of discretion in the circuit court's excluding the proffered documents. (Wright, J.H.; No. CA 12-53; 6-13-12; Gruber, R.)

Mason v. Mason, 2012 Ark. App. 393 [**Rule 2(a)(1), App. Rules of Pro.-Civil**] Because the decree from which the appellant appealed was not a final, appealable order, the Court of Appeals had no jurisdiction to reach the merits of the appeal. The divorce decree awarded alimony and provided for the division of some, but not all, of the parties' property. The decree contemplates further proceedings to clarify and decide issues concerning the disposition of the marital home. Therefore, it would be premature for the court to consider the issues raised by the appellant before the circuit court has entered its final order. (Smith, V.; No. CA 11-1122; 6-20-12; Vaught, L.)

Bowen v. Bowen, 2012 Ark. App. 403 [**grandparent visitation**] The appellant father and his former wife, the children's mother, were divorced and granted joint custody of their two children. Sole custody subsequently was granted to the father. The appellee grandparents and the appellant, their son, had a strained relationship. After the divorce, the father limited the grandparents' access to the children's lunch hour at school once a week, and that ceased when the appellant's wife began home-schooling them. The circuit court granted the grandparents visitation of one weekend a month and extended time during the summer and holidays. In reviewing the decision under Arkansas's grandparent visitation statute, Ark. Code Ann. Section 9-13-103, the Court of Appeals said the primary issue was whether visitation was in the best interest of the children. To prove that it was in the children's best interests, the grandparents had to show (1) their capacity to give the children love, affection, and guidance, (2) that the loss of the relationship between them would likely cause harm to the children, and (3) that they are willing to cooperate with their son if visitation is allowed. The court said that the first and third elements were beyond question, and looked at the issue of likely harm resulting from the loss of the relationship. The court examined cases from other states with similar statutory requirements, and said that our statute places the burden on the grandparents to show that visitation is in the child's best interest. Here, the court said, the circuit court "substituted a benefit analysis for our required statutory presumption in favor of the parent's decision," requiring the appellant father to prove that visitation would be harmful. Instead, the court should have required the grandparents to show (1) that appellant's requiring the visitation to be "on his terms" (or be denied) would likely harm the children, and (2) that granting visitation was the remedy for this harm. These burdens were neither required by the trial court nor met by the petitioners, so the decision of the trial court was reversed. (Shirron, P.; No. CA 11-868; 6-27-12; Vaught, L.)

Williams v. Nesbitt, 2012 Ark. App. 408 [**child support; res judicata; access to medical records**] Res judicata prevented the consideration of the appellant's issues concerning the award of interest and attorney fees on unpaid support. Her claim that the trial court erred because she was entitled to have an child-support arrearage owed to her reduced to judgment is without merit. Finally, the circuit court did not err in granting the appellee a HIPAA release, which he needed to

obtain medical records to verify that the medical services were actually being provided to his child, in light of his assertion that appellant previously had presented him with medical bills for services provided to other children. (Huckabee, S.; No. CA 11-1113; 6-27-12; Hart, J.)

PROBATE

In the Matter of the Guardianship of A.M., a Minor, 2012 Ark. 278 [**guardianship; constitutional challenge to statutes**] The appellant appealed from the circuit court's granting a permanent guardianship of her son to her mother, the appellee. She stipulated below that the evidence was sufficient to establish a need for the guardianship, but did not agree to the guardianship because she wanted to maintain constitutional challenges based on equal protection and substantive due process. The Supreme Court said that it could not address the merits of the constitutional arguments because the Attorney General was not notified of the constitutional challenges to the guardianship statutes as required by Arkansas law, and there was not a full and adversarial development of the constitutional issues. The court reversed and remanded for compliance with Ark. Code Ann. Section 16-111-106(b). (Scott, J.; No. SC 11-1092; 6-21-12; Corbin, D.)

JUVENILE

N.D. v. State, 2012 Ark. 265 [**EJJ Designation**]

The trial court was affirmed in granting the state's EJJ designation. Appellant argued that the state's motion for EJJ had previously been raised at a prior transfer hearing. While the transfer statute does allow a court to conduct a transfer hearing and EJJ designation hearing simultaneously, there was nothing in the original transfer order that referenced EJJ. The transfer to the juvenile division was at the directive of the Supreme Court in *N.D. I* and there was no direction as to an EJJ designation.

Appellant argued that this was a violation against double jeopardy because a life sentence for him as an adult was no longer possible after this court transferred the case without an EJJ designation. The first two protections of double jeopardy are not applicable because N.D. has not been acquitted or convicted of any of the underlying offenses in the petition. Appellant's claim that he could face multiple punishments for the same offense is premature because he has not been adjudicated, nor has there been a disposition. (Brown, E.; 11-1157; 6-14-2012; Brown, R.)

C.B. v. State, 2012 Ark. 220 [**Transfer**] Appellant, charged with capital murder, challenged the constitutionality of the juvenile transfer statute. Appellant argued the statute was a violation of separation of powers by vesting power to the prosecutor charging discretion that ultimately determined initial jurisdiction over a certain class of juveniles. The Supreme Court found that the transfer statute was not a rule of pleading, practice, and procedure, but rather substantive law

rooted in public policy. Appellant next argued that the statute violated article 2, section 12 of the Arkansas Constitution because it allows the prosecutor to set aside the statutory protections afforded juveniles. Yet, this section of the Constitution provides that the General Assembly has the power to suspend or set aside the laws of the state.

Appellant argued that the statute denied him equal protection. The equal-protection clause permits classification with a rational basis that is reasonably related to a legitimate government purpose. Appellant failed to show how the statute was arbitrary or irrational. Appellant also lacks standing to challenge the transfer state on the basis of cruel and unusual punishment because it allows for adult sentencing. The circuit court considered and made written findings of all the statutory factors. There was clear and convincing evidence to support the circuit court's order denying appellant's transfer. (Wyatt, R.; 11-1163; 5-24-2012; Hannah, J.)

C.L. v. State, 2012 Ark. App. 377 [**Transfer**] Appellant, charged with capital murder and aggravated robbery, argued that the circuit court abused its discretion in allowing the State to introduce evidence of a nolle-prossed juvenile adjudication. However, appellant failed to preserve the issue for appeal and it does not fall within one of the four recognized exceptions to the contemporaneous objection rule, known as the Wicks exceptions. (Johnson, L.; 11-999; 5-30-2012; Brown, W.)

C.L. v. State, 2012 Ark. App. 374 [**Transfer**] Appellant, charged with aggravated robbery, theft of property and theft by receiving, argued that the circuit court erred in allowing the State to introduce evidence of a prior juvenile court proceeding. At the transfer hearing, defense counsel objected to the evidence based on relevance and on appeal a specific objection was based on the juvenile confidentiality statute. The court will not address an argument raised for the first time on appeal. (Sims, L.; 111-998; 5-30-2012; Martin, D.)

D.D.R. v. State, 2012 Ark. App. 329 [**Transfer**] Appellant, charged with four counts of aggravated robbery, four counts of theft of property, one count of theft by receiving, and one count of aggravated assault argued that the trial court's denial of his motion was clearly erroneous. The circuit court was affirmed where the evidence demonstrated that the allegations were serious, violent, and premeditated. They were committed against persons and property. Appellant had prior delinquent behavior and had been offered services but continued with his delinquent behavior. (Sims, L.; 11-1202; 5-9-2012; Robbins, D.)

Stoliker v. Arkansas Dept. of Human Services, 2012 Ark. App. 155 [**D-N Adjudication/Disposition**] Appellant argued that the trial court erred in removing his son from his home as a result of a finding of dependency-neglect. DHS removed appellant's five year old son, I.S., due to the mental abuse the child was enduring over the appellant's coaching and telling him that he had been abused as result of him making numerous unfounded reports on I.S.'s

mother and stepfather. The trial court found that I.S. was dependent-neglected as a result of abuse and neglect by appellant and appellant's father. The court also found that appellant failed to protect I.S. from abuse by appellant's father and to provide a home free of emotional trauma and providing for his son's emotional needs. The court's findings that the inappropriate interviews with the child were emotionally traumatizing were supported by the testimony of the investigators, a therapist and confirmed by a video submitted by the appellant.

Appellant also argued that placing his child with his mother was not in his best interest. In absence of a Rule 54(b) certification or a permanent custody placement, this is not a final order subject to appeal. (Wood, R.; CA12-155; 6-27-2012; Robbins, J)

Lewis v. Arkansas Dept. of Human Services, 2012 Ark. App. 347 [**D-N Adoption**] Appellant's, former foster parents, argued that the court erred in determining that it was not in the best interest of the child to be adopted by the appellants. The issue was whether DHS was unreasonably withholding consent to the adoption petition. The trial court was affirmed in finding that there was insufficient evidence to show that DHS was unreasonably withholding its consent and that the adoption was in the child's best interest. Evidence that supported this decision included information that appellant's adult son lived at their home and had a true finding of having sex with a foster child in appellant's home and that the appellants left children in his care when they were not home. Appellant's uncle lived in a shed on appellant's property and appellants did not file documents required nor did the court find appellants credible. (Branton, W.; CA11-1177; 5-16-2012; Abramson, R.)

Chase v. Arkansas Dept. of Human Services, 2012 Ark. App. 311 [**D-N PPH – Permanent Custody**] Appellant, the children's father, appealed the trial court's permanent custody award to the maternal grandparents. The appellate court agreed with appellant that there was insufficient evidence to award custody to the grandparents. Six months prior to ordering custody with the grandparents appellant had not had a positive drug test, maintained employment and was living in an approved housing situation with his parents co-parenting another child, all with minimal assistance from DHS. The appellate court reversed and remanded the trial court to reinstate temporary custody while DHS provides service to determine if he can parent the children. (Brown, E.; CA11-1120; 5- 2-2012; Glover, D.)

Mann v. Arkansas Dept. of Human Services, 2012 Ark. App. 352 [**D-N Intervention**] Appellant argued that the court abused its discretion in denying his motion to intervene in a case involving his great-niece and great-nephew subsequent to the termination of parental rights. Appellant failed to meet the threshold requirement that the motion to intervene is timely. Appellant was aware that the children had been removed from their home and waited fifteen months after they were removed and seven months after parental rights were terminated. Appellant's was a legal stranger to the children. Appellant also failed to provide evidence that he had contacted the children or attempted to contact the children. He admitted the children had never been to his

home and when he had seen the children in his sister's home he never noticed developmental delays and environmental issues. (Wilson, R.; CA 12-12; 5-16-2012; Hoofman, C.)

Gregory v. Arkansas Dept. of Human Services, 2012 Ark. App. 364 [**D-N Review**] Appellant's only issue on appeal is whether there was sufficient evidence to support the trial court's order setting a termination hearing six months after the case was opened. However, without a 54(b) certification this is not a final appealable order. (Cook, V.; CA 12-18; 5-23-2012; Brown, W.)

Davis v. Arkansas Dept. of Human Services, 2012 Ark. App. 419 [**TPR – best interest**] Appellant's argument that the termination was not in the best interest since the children were being cared for by a relative failed. She cited the permanency planning statute. However, appellant did not appeal the permanency planning order and stipulated to the change in the case goal to adoption. The trial court considered permanent custody but found the children needed a permanent home that adoption could provide. (Yeargan, C.; CA12-200; 6-27-2012; Gruber, R.)

Torres v. Arkansas Dept. of Human Services, 2012 Ark. App. 423 [**TPR – best interest**] Appellant only contested that DHS failed to show that termination was in her children's best interest because there was insufficient evidence that she posed any harm to their return home. There was sufficient evidence of a risk of potential harm where her children had spent seventy-five percent of their young lives in foster care. Appellant was unable to demonstrate once she was released from jail how she would provide a stable home or sufficient income. There was evidence as to her poor judgment, including maintaining a drug premise, drug related offenses, choosing poor relationships with men and not taking advantage of opportunities that gave rise to why her children were removed. (Hewett, M.; CA12-150; 6-27-2012; Abramson, R.)

Henderson v. Arkansas Dept. of Human Services, 2012 Ark. App. 420 [**TPR – Best Interest**] Appellant's argument that the termination was not in the best interest because there was a lesser restrictive alternative in placement with the paternal grandmother failed. Appellant cited A.C.A. 9-27-355(c) (1) to support her position in favor of relative placement. However, the Supreme Court has already held that this statute refers to the initial placement of a juvenile, not termination. Appellant also argued the exception to termination at A.C.A. 9-27-338 when a relative is caring for a juvenile and the court finding it is in the child's best interest. However, the children were not being cared for by a relative and the home study had been performed on the relative had been denied. (Sullivan, T.; CA12-221; 6-27-2012; Brown, W.)

Pratt v. Arkansas Dept. of Human Services, 2012 Ark. App. 339 [**TPR – ADA**] Appellant (mom who had a 55 IQ) argued that the trial court was fully aware of her mental challenges yet did not made sure that she was offered reasonable accommodations under the American with Disabilities Act. Even if this was not raised below she argues that it was within the third exception to the

contemporaneous objection requirement, known as a *Wicks* exception, relating to the trial court's duty to intervene, even without an objection. Yet, the trial court did not ignore appellant's deficiencies. The court appointed a guardian ad litem to represent the appellant and there were special efforts made to adapt her parenting classes that were acknowledged by her counsel that benefitted appellant. Further, appellant never requested services. The appellate court found that the court did not commit an error that would require the rare application of the *Wicks* exception.

Appellant (dad) argued that there was insufficient evidence to support the best interest finding specifically that C.J.'s health and safety were at risk. There was no error were the court did not find appellant credible and there was evidence of domestic abuse, drug and alcohol abuse, and mental health issues. The trial court also had concerns about appellants' capability to understand or care for the child's significant needs. (Branton, W.; CA12-172; 6-20-2012; Glover, D.)

Reed v. Arkansas Dept. of Human Services, 2012 Ark. App. 369 [TPR – best interest]

Appellant only contested that DHS failed to show that termination was in her children's best interest because there was insufficient evidence that she posed any harm to their return home. The trial court did not err and the potential harm was evident. Appellant did not demonstrate she could provide a stable home or sufficient income. The trial court found her credibility lacking and she did not demonstrate good decision making in her relationships or roommates. (Halsey, B.; CA12-130; 5-30-2012; Robbins, J.)

Bates-Zingleman v. Arkansas Dept. of Human Services, 2012 Ark. App. 426 [No Merit TPR]

Appellate court order rebriefing and order counsel to supplement addendum in accordance with this order and Rule 6-9(I) (King, K.; CA11-1146; 6-27-2012; Martin, D.)

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

- *Sprangler v. Arkansas Dept. of Human Services*, 2012 Ark. App. 404 (Hewett, M.; CA11-882; 6-27-2012; Vaught, L.).
- *Ball v. Arkansas Dept. of Human Services*, 2012 Ark. App. 406 (Zimmerman, S.; CA11-1158; 6-27-2012; Pittman, J.).
- *Craft v. Arkansas Dept. of Human Services*, 2012 Ark. App. 409 (Thyer, C.; CA 11-12-1219; 6-27-2012; Hart, J.).
- *Juraez-Rosaldol v. Arkansas Dept. of Human Services*, 2012 Ark. App. 413 (Coker, K.; CA12-173; 6-27-2012; Gladwin, R.).
- *Robert v. Arkansas Dept. of Human Services*, 2012 Ark. App. 417 (Branton, W.; CA 12-68; 6-27-2012; Wynne, R.).
- *Shirling v. Arkansas Dept. of Human Services*, 2012 Ark. App. 421 (Harrod, L. CA12-158; 6-27-2012; Glover, D.).
- *Harris v. Arkansas Dept. of Human Services*, 2012 Ark. App. 427 (Chandler; CA12-3; 6-27-2012; Hooffman, C.).

- *Harris v. Arkansas Dept. of Human Services*, 2012 Ark. App. 427 (Chandler; CA12-3; 6-27-2012; Hooffman, C.).
- *Fant v. Arkansas Dept. of Human Services*, 2012 Ark. App. 428 (Cook; CA12-30; 6-27-2012; Hooffman, C.).
- *Crutchfield v. Arkansas Dept. of Human Services*, 2012 Ark. App. 421 (Spears, J.; CA11-1014; 5-23-2012; Abramson, R.).

U.S. SUP. CT.

Miller v. Alabama (Together with No. 10–9647, *Jackson v. Hobbs, Director, Arkansas*)

[juvenile/mandatory life sentences] In each of these cases, a 14-year-old was convicted of murder and sentenced to a mandatory term of life imprisonment without the possibility of parole. In *Jackson*, petitioner Jackson accompanied two other boys to a video store to commit a robbery; on the way to the store, he learned that one of the boys was carrying a shotgun. Jackson stayed outside the store for most of the robbery, but after he entered, one of his co-conspirators shot and killed the store clerk. Arkansas charged Jackson as an adult with capital felony murder and aggravated robbery, and a jury convicted him of both crimes. The trial court imposed a statutorily mandated sentence of life imprisonment without the possibility of parole. Jackson filed a state habeas petition, arguing that a mandatory life-without-parole term for a 14-year-old violates the Eighth Amendment. The Arkansas Supreme Court affirmed.

In *Miller*, along with a friend, Miller beat a neighbor and set fire to his trailer after an evening of drinking and drug use. The neighbor died. Miller was initially charged as a juvenile, but his case was removed to adult court, where he was charged with murder in the course of arson. A jury found Miller guilty, and the trial court imposed a statutorily mandated punishment of life without parole.

Held: The Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile homicide offenders.

The mandatory penalty schemes at issue here prevent the sentencer from considering youth and from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender. This contravenes foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children. (No. 10–9646; June 25, 2012)

EIGHTH CIRCUIT

Twiggs v. Selig: **[Employment discrimination]** Defendants Angel and Selig were entitled to qualified immunity on plaintiff’s claim of gender discrimination because she failed to show that

the stated ground for her discharge was a pretext for discrimination. (E.D. Ark.; #11-1682; 6-25-12)

Kennedy v. Ferguson: [**Malpractice**] Because plaintiff's father's estate was still open and plaintiff could still raise a challenge to the estate's distribution in probate court, it is not yet known whether defendant's alleged malpractice in handling the estate caused plaintiff a cognizable injury, and his claim is not ripe. (E.D. Ark.; #11-3395; 6-4-12)

Dansby v. Norris: [**Habeas**] Provisions in U.S. Supreme Court case of *Martinez v. Ryan* do not apply to Arkansas because Arkansas law permits a petitioner to raise claims of ineffective assistance of counsel on direct appeal (W.D. Ark.; # 10-1990; 6-21-12)

Aamodt v. City of Norfolk: [**Zoning**] 2008 zoning ordinance was valid under Arkansas law; argument that the district court interpreted the Arkansas Freedom of Information Act in violation of the Privileges and Immunities Clause would not be considered as the constitutional aspect of the claim was raised for the first time on appeal. (W.D. Ark.; #11-3191; 6-25-12)