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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 January 21st, Administrative Order Number 16 was amended to authorize retired district court judges to sit on assignment in district court. A copy of the per curiam was included in the weekly mailout.

On January 28th, the Supreme Court published for comment recommendations for rules changes by the Civil Practice Committee. The proposals include a comprehensive rewrite of Ark. R. Civ. P. 4 (Summons). The comment period expires on April 1, 2016. A copy of the per curiam was included in the weekly mailout.

CRIMINAL

Watts v. State, 2016 Ark. App. 16 **[final judgment; revocation]** A judgment is effective only upon entry of record. This principle, embodied in Arkansas Rule of Civil Procedure 58 and in Supreme Court Administrative Order No. 2, is equally applicable in civil and criminal cases. Because an effective judgment of conviction was never entered in appellant's case, the circuit court erred in

granting the State's petitions for revocation, and the revocation must be reversed and dismissed. (Sims, B.; CR-15-30; 1-13-16; Whiteaker, P.)

Meeks v. State, 2016 Ark. App. 9 **[motion to suppress]** Appellant's act of leaving the parking lot where an officer observed appellant's passenger vomiting did not constitute an attempted flight or an evasive procedure that somehow gave the law enforcement official reasonable suspicion to then activate her blue lights and conduct a traffic stop on appellant's vehicle. Additionally, there were no facts that could lead a reasonable person to think that either appellant or his passenger was in immediate need of medical assistance or in imminent danger. Accordingly, the stop and search of appellant's vehicle was not proper pursuant to Ark. R. Crim. P. 3.1 or the community-caretaking function or emergency-aid exception to the warrant requirement. Thus, the circuit court should have granted appellant's motion, and all evidence obtained after the illegal seizure should have been suppressed. (Lindsey, M.; CR-15-502; 1-13-16; Gladwin, R.)

Kimbrell v. State, 2016 Ark. App. 17 **[First Offender Act; sealing record]** Although not the current law, the version of the First Offender Act in effect at the time appellant was sentenced required that a court automatically enter an order to seal when the defendant fulfilled the terms and conditions of his probation. Entry of the order was considered an administrative function and did not require a petition from the defendant. (Looney, J.; CR-15-281; 1-13-16; Whiteaker, P.)

Conway v. State, 2016 Ark. 7 **[sufficiency of the evidence; capital murder; aggravated robbery]** There was substantial evidence to support appellant's convictions. **[jury instructions]** The trial court did not abuse its discretion when it inserted additional language into a model jury instruction, which was a correct statement of the law, and which was merely duplicative of another model jury instruction that was also properly given to the jury. (Wright, J.; CR-15-481; 1-14-16; Hart, J.)

Chantharath v. State, 2016 Ark. App. 35 **[cross examination; Confrontation Clause]** The trial court did not abuse its discretion or deny appellant the opportunity to fully confront a witness, when it limited cross examination of a witness on the issues of whether she was on probation or facing pending criminal charges because those issues were of marginal relevance and were unduly prejudicial. (Lindsey, M.; CR-14-1111; 1-20-16; Hoofman, C.)

Figueroa v. State, 2016 Ark. App. 30 **[continuance; exculpatory evidence]** The trial court abused its discretion when it denied appellant's request for a continuance, which was based upon appellant's desire to investigate information in an affidavit and to test evidence obtained pursuant to a search warrant, which the State failed to timely disclose to appellant. (Lindsey, M.; CR-15-645; 1-20-16; Gruber, R.)

Mackintrush v. State, 2016 Ark. 14 **[motion to suppress]** Although the initial stop of appellant's car may have been valid, after the lawful purpose of the stop was concluded, the law enforcement official lacked reasonable suspicion to continue to seize appellant while waiting for the drug dog to arrive at the scene and conduct a canine sniff of the automobile. Accordingly, the trial court

erred when it denied appellant's motion to suppress the evidence that was obtained during the unlawful search and seizure of appellant's vehicle. (Wright, H.; CR-15-387; 1-21-16; Danielson, P.)

Johnson v. State, 2016 Ark. App. 59 **[admission of evidence]** The trial court did not abuse its discretion when it refused to admit evidence that appellant asserted would have established that the victim and her husband were biased against appellant and had motive to lie at trial. The trial court concluded that appellant could establish that the victim's husband was biased against appellant but that was irrelevant because the husband was not the subject of appellant's terroristic-threatening charge. Appellant failed to offer evidence that the victim was biased against appellant or that her husband's bias against appellant caused the victim to falsely accuse the appellant of terroristic threatening. (Wright, H.; CR-15-555; 1-27-16; Brown, W.)

Perez v. State, 2016 Ark. App. 54 **[hearsay; impeachment; prior inconsistent statements]** The trial court abused its discretion when during the cross examination of the victim, the State was permitted to play for the jury the victim's entire forensic interview. The interview constituted inadmissible hearsay and its admission during the cross examination of the victim while the defense was attempting to impeach the victim's testimony failed to comply with Ark. R. Crim. P. 613(b). (Huckabee, S.; CR-15-139; 1-27-16; Hixson, K.)

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

Reep v. State, 2016 Ark. App. 21 (DWI, sixth offense) CR-15-140; 1-13-16; Brown, W.

Harris v. State, 2016 Ark. App. 23 (second-degree domestic battery) CR-15-594; 1-20-16; Gladwin, R.

Fulton v. State, 2016 Ark. App. 28 (first-degree murder) CR-15-492; 1-20-16; Kinard, M.

Freeman v. State, 2016 Ark. App. 36 (aggravated assault) CR-15-440; 1-20-16; Brown, W.

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:

Alsbrook v. State, 2016 Ark. App. 8 (probation) CR-15-514; 1-6-16; Brown, W.

Ferguson v. State, 2016 Ark. App. 4 (probation) CR-15-400; 1-6-16; Kinard, M.

Glennon v. State, 2016 Ark. App. 25 (probation) CR-15-633; 1-20-16; Abramson, R.

CIVIL

Bishop v. Farm Bureau Ins., 2016 Ark. App. 27 **[insurance]** The definitions of "residence premises" and "business pursuit" are ambiguous, and the ambiguity in the insurance policy should be resolved in favor of the insured. (Compton, C.; CV-15-55; 1-20-16; Virden, B.)

Davis v. Davis. 2016 Ark. App. **[Securities]** Complaint alleging violation of Arkansas Securities Act makes only conclusory statements and fails to comply with Rule 9(b)'s requirement that it state the circumstances constituting fraud with particularity; therefore, the trial court did not abuse its discretion in dismissing the complaint for failure to state facts upon which relief can be granted. Moreover, claim for common law deceit fails. Due to the lack of particular allegations of a false representation of material fact, the information that Scott admittedly had prior to the sale, and his acknowledgment that he had everything he needed to make an informed decision about the sale of his stock and that there were no representations between the parties outside the Agreement, support the dismissal of claim for deceit. Plaintiff failed to state facts to support his claim that appellees made a false representation of material fact or that he justifiably relied on any alleged false representation of material fact by appellees. (Laser, D.; CV-15-23; 1-20-16; Vaught, L.)

Shamburger v. Shamburger, 2016 Ark. App. 57 **[contract]** Based on our rules of construction, the circuit court erred in interpreting the buy-sell agreements in such a manner as to find that the death-or-divorce provisions did not apply to the offer to purchase appellant's interest in the LLPs. The specific provision governing transfers in the event of a divorce or death of a partner controls over the more general provision found in Paragraph 1. Summary judgment reversed and case remand for further proceedings. (Foster, H.; CV-15-323; 1-27-16; Hoofman, C.)

Holliman v. Johnson, 2016 Ark. App. 39 **[trust-mental capacity/undue influence]** Based on de novo review, and giving due deference to the superior position of the circuit court to view and judge the credibility of the witnesses, the trial court's finding that Zoe possessed the requisite capacity to execute the Trust was not clearly erroneous. The trial court's finding of no undue influence was not against the preponderance of the evidence. Appellees garnered no advantage to themselves as a result of the trust. Zoe's assets under her Will would have been divided equally among her six children and her Trust directs that her assets be divided in such a way. Appellee Leon was named a joint trustee along with his mother and Garry. Also, Garry testified that his brothers visited Zoe later on the day she signed the Trust, and she told them about the Trust. He further testified that none of his brothers ever expressed to him that they thought Zoe was mentally incompetent. Finally, the trial court had the benefit of watching a twenty-minute video of Zoe signing the trust documents and deeds (Weaver, T.; CV-15-263; 1-27-16; Gladwin, R.)

Roggasch v. Sims, 2016 Ark. App. 44 **[deceptive trade practices]** There is sufficient evidence to support the deceptive-trade-practices claim. Roggasch argues that he should not be personally liable because he acted in his capacity as president of Elite Homes when he built the home, and

the court erred when it allowed the jury to pierce the corporate veil. Need not address whether the corporate veil should be pierced because there is a separate and unchallenged basis upon which the jury could hold Roggasch individually liable in this case. He could be held individually liable because he violated the deceptive trade practices act. Appellants' argument that the court should have instructed the jury to determine damages for each claim and defendant separately is not preserved. Arkansas Rule of Civil Procedure 51 states that "no party may assign as error the failure to instruct on any issue unless such party has submitted a proposed instruction on that issue." The appellants never proffered special interrogatories or special-verdict forms for the jury to award separate damages for each successful claim. Therefore, their argument that the court failed to correctly instruct the jury regarding separate damages for each defendant is waived. (Phillips, G.; CV-11-1243; 1-27-16; Harrison, B.)

Madden v. Mercedes-Benz, Inc., 2016 Ark. App. 45 **[products liability]** To prevail in a products liability case against a supplier, a plaintiff bears the burden of proving both (1) that the product was defective when it left the defendant's control such that it was unreasonably dangerous and (2) that the defect caused the injury. Here, the first element -- whether the seatbelt was defective when it left the control of Mercedes and TRW – was not met. **[warranty]** Madden failed to present evidence of a defect, and the presence of a defect is an essential element of the claim. Arkansas Code Annotated section 4-2-316(b) is only applicable when the defendants assert the exclusion or modification of an implied warranty due to the buyer's opportunity to examine the goods or a sample or model. The "as is" clause in the bill of sale was sufficient to disclaim all implied warranties. Madden also argues that her breach-of-warranty claim against the LRW defendants should have survived because the defective seatbelt amounted to a latent defect that could not be disclaimed. Madden failed to establish a triable dispute on the point that a seatbelt defect was present when she bought the vehicle. Madden also argues that the circuit court mistakenly dismissed her express warranty claim. The bill of sale contains no express warranty other than the conveyance of good and marketable title. The only potential evidence that there was any other express warranty comes from Madden's testimony that Sandra David told her that the car was a good vehicle that drove well. The statements purportedly made by Sandra David are insufficient to create an express warranty because it is error to introduce oral testimony to vary the terms of a sales agreement. Additionally, a necessary element for a breach-of-express-warranty claim is that the party asserting the breach relied on the warranty term in making the decision to buy the vehicle. Madden made no allegation that she relied on Sandra David's statements, and a failure to plead reliance on the warranty torpedoes an express-warranty claim. (Erwin, H.; CV-15-63; 1-27-16; Harrison, B.)

Desoto Gathering Co. v. Ramsey, 2016 Ark. 22 **[writ of prohibition]** The circuit court entered an order denying DeSoto's motion to dismiss or transfer for improper venue. DeSoto filed a petition for writ of prohibition in the Supreme Court requesting a writ of prohibition to prevent the circuit court from proceeding. The circuit court properly confined its review to the pleadings in the case.

DeSoto has failed to demonstrate that the circuit court was wholly without jurisdiction on the issue of venue; therefore, a writ of prohibition is not in order. (CV-15-65; 1-28-16; Brill, H.)

Lambert Investors, Inc. v. Harris, 2016 Ark. 24 **[class action]** Class action involves issues of contract, usurious interest, and deceptive trade practices. The elements of commonality, predominance, superiority, and typicality were satisfied. (Gibson, B.; CV-15-559; 1-28-16; Danielson, P.)

DOMESTIC RELATIONS

Fowler v. Hendrix, 2016 Ark. App. 7 **[contempt; equitable estoppel]** The circuit court found the appellant mother in contempt and responsible for child support after her visitation terminated. She claimed to be relying on a previous order that "made child support contingent on visitation." The Court of Appeals disagreed that the order was in effect because a subsequent modification established monthly support that was not contingent on her visitation with the children. She alternatively contended that the circuit court erred in not applying the doctrine of equitable estoppel. She argued, first, that equitable estoppel applied because the appellee failed to demand child support for four years and intended for her to rely on his silence to his detriment. Second, she argued that the appellee acted continually to defeat her visitation rights and to alienate the affections of the children. However, the Court of Appeals said, "the mere fact one delays pursuing rights to obtain a judgment on past due support does not prevent one from seeking a judgment." In addition, she admitted that she had voluntarily agreed to stop her visitation without any involvement of the appellee, and that she did not pursue further court intervention before the contempt proceedings even though the court had specifically invited that. The Court deferred to the circuit court's determination of credibility and weight of the witnesses' testimony, and could not say that the court erred in finding that appellant failed to prove that appellee should be estopped from collecting the child-support arrearage. The decision was affirmed. (Richardson, M., No. CV-15-552; 1-6-16; Hoofman, C.)

Neumann v. Smith, 2016 Ark. App. 14 **[divorce—marital property; child support; bias of court; joint custody; motion for reconsideration]** The parties were divorced in 2008. The appellant appeals from a modification order and denial of a motion for reconsideration. She alleged that the court's meeting with her twelve-year-old twins in chambers on "[the court's] own initiative" was an abuse of discretion, compounded by the court's failure to have the proceedings recorded. The Court of Appeals said that the appellant filed a motion requesting that the court confer with the children in chambers to determine their wishes, and that she did not object when the court inquired about objections. Although she asserted that she did not waive recording the in-chambers discussion, she did not follow the proper procedures to recreate a statement of the proceedings as set out in Rule 6(d) of the Rules of Appellate Procedure--Civil. Therefore, her own "statement of evidence" was not "settled and approved" below, is not a part of the record, and could not be

considered on appeal. She also contended the court erred in not modifying the joint-custody order at the reconsideration hearing. After considering the disputed evidence, the Court of Appeals held that the court did not clearly err in its findings and its award of "true" joint custody. The Court also found that the court did not err in its declining to order the sale of the marital residence, since the parties' settlement agreement provided that it was being used "in a manner for the children" and the appellee had never ceased living there. The court ruled that it could not order the sale of the home but that the parties themselves could decide to do so. On the issue of child support, the Court of Appeals found that the appellant made an alternative request that neither party be ordered to pay child support, so she cannot complain on appeal about receiving the relief she requested. Finally, she alleged that the trial court was biased and that reversal is mandated. Although she noted fourteen alleged instances of bias, she made no timely motion to the trial court to recuse, so she waived the issue for appellate review. The decision was affirmed on all points. (Haltom, B.; No. CV-15-123; 1-13-16; Gruber, R.)

Johnson v. Bennett, 2016 Ark. App. 24 **[grandparent visitation]** In this grandparent visitation case, the appellant grandfather appealed from the circuit court's denial of his petition for visitation with his granddaughter. He raised two issues on appeal: (1) that the court erred in denying his request to deem admitted the requests for admissions he had served on the appellee mother of the child after she claimed that she never received them; and (2) that the court erred in its analysis of the best interest of the child under the grandparent visitation statute. The Court of Appeals affirmed the decision, noting that the evidence was contradictory but giving due regard to the trial court's determination of the credibility of the witnesses and holding the court's findings were not clearly erroneous. (Honeycutt, P.; No. CV-15-624; 1-20-16; Gladwin, R.)

PROBATE

Jackson v. Stratton, 2015 Ark. App. 6 **[contempt; Rule 11, Ark.R.Civ.P.]** The appellant appealed from the circuit court's finding him in criminal contempt. The Court of Appeals found that substantial evidence supported the finding of contempt because, the appellant, a lawyer, admitted that he perfected an appeal because he believed he was acting in his clients' best interest, despite the fact that the circuit court had ordered it stayed. The Court said that when a person is held in contempt for failure or refusal to abide by a judge's order, the reviewing court will not look behind the order to determine whether it is a valid order. The fact that an order may be erroneous does not excuse disobedience on the part of those who are bound by its terms until the order is reversed. The appellant also challenged the imposition of Rule 11 sanctions in two cases. First, he did not file the record from one of the cases, so his appeal from the sanctions in that case could not be considered. Second, the circuit court based its decision on more than one independent ground and the appellant challenged fewer than all of the grounds on appeal. In that case, the Court will affirm without addressing any of the grounds on the merits, which the Court did. The decision was affirmed. (Schrantz, D.; No. CV-14-1043; 1-4-16; Vaught, L.)

Carlton v. Rice, 2016 Ark. App. 48 **[trusts]** This appeal is from a circuit court's order removing the appellant as trustee of three trusts. She raised three points on appeal, but the Court of Appeals considered only one, on which it reversed and remanded for further proceedings. The circuit court had granted a petition for removal and removed the appellant as trustee without her ever having the opportunity to file a responsive pleading to the petition seeking her removal. The Court said that "[In granting the petition for removal in this fashion, the trial court short-circuited our procedural rules." (Feland, W.; No. CV-15-516; 1-27-16; Glover, D.)

JUVENILE

Samuels v. Ark. Dep't of Human Services, 2016 Ark. 2 **[DN Adjudication - sufficiency]**Appellants argued that that the trial court erred in its legal finding that their child was at substantial risk of harm. There was testimony that the nurses had instructed the parents that the mother should not be left alone with her child. The father left the mother alone with the child and the mother dropped the infant, placing the infant at substantial risk of serious harm. Further, the appellants did not dispute the trial court's finding that appellant's (father) inadequate supervision placed the child at substantial risk of harm. Only one basis for dependency-neglect is required. The Court of Appeals affirmed the adjudication on the unchallenged basis that the father inadequately supervised the child, placing the child at substantial risk of harm. **[reasonable efforts]** Appellants argued that the trial court failed to make the reasonable efforts findings required by the statute, and that the emergency findings were in error. The trial court was not required to make reasonable efforts findings because this was an emergency situation and reasonable efforts were not required. **[prior case involvement]** Appellants waived their argument that the trial court considered services provided in 2013 case that resulted in TPR. The services were referenced in the affidavit attached to the emergency petition, but there was no evidence that DHS provided services. (Zimmerman, S.; CV-15-669; 1-6-2016; Virden, B.)

Ponder v. Ark. Dep't of Human Services, 2016 Ark. 61 **[Review – Permanent Custody sufficiency]** A review hearing and order following a PPH placed permanent custody of appellant's children with two separate sets of grandparents following the death of a sibling. The Appellate Court found that despite the language in the review order awarding custody to relatives there was no testimony, evidence, coherent arguments of counsel, or findings of the circuit court concerning best interest. Reversed and remanded. (Keaton, E.; CV-15-330; 1-27-2016; Gladwin, R.)

Bean v. Ark. Dep't of Human Services, 2016 Ark. 58 **[PPH – Rule 54(b)]**At the PPH the court announced the duel goal of reunification and TPR and continued custody with DHS. Denial of a Rule 54(b) motion is not an appealable order. It does not dismiss the parties or conclude their rights to the subject matter in controversy. Appellants are not barred from raising the merits of the preserved arguments on appeal once a final order is entered. Appeal dismissed without prejudice. (Smith, T.; CV-15-783; 1-27-2016; Hoofman, C.)

Robinson v. Ark. Dep't of Human Services, 2016 Ark. App. 53 **[TPR - sufficiency] [failure to remedy]** Appellant argued that the court erred in considering her general capacity to care for her children in considering the failure to remedy ground. However, the appellate court disagreed and noted that appellant's mental and psychological impairments prevented her from caring for her children and related to the original reasons for removal. **[other factors]** There was sufficient evidence of the subsequent factors ground, including involvement with inappropriate men during the case, violation of court orders, the death of appellant's mother who was a support system, and the recognition of the extent and severity of appellant's mental illness. **[best interest]** Best interest affirmed even with a finding that adoption might not be immediately available to the children due to their severe behavioral and emotional problems. The children also faced risk of harm as evidenced by the fact that the trial placement with appellant failed and appellant was unable to maintain stable housing. (Haltom, B.; CV-15-749; 1-27-2016; Vaught, L.)

Johnson v. Ark. Dep't of Human Services, 2016 Ark. App. 47 **[TPR –IQWA]**Appellant argued that the trial court failed to present a qualified expert witness and failed to show that return to her custody was likely to result in serious emotional and physical damage as required by IQWA. Tad Teehee, a representative of the Cherokee nation, attended hearings following the adjudication and offered an unsworn recommendation at the termination hearing. He explained that it was the Nation's opinion that termination should be granted, that the children where adoptable, and that the return of the children to either parent would result in emotional or physical damage to the children. The appellate court held that appellant's argument is not a sufficiency argument and appellant should have raised the issue with the trial court and failure to do so precludes review by the appellate court. (Medlock, M.; CV-15-777; 1-27-2016; Glover, D.)

Norton v. Ark. Dep't of Human Services, 2016 Ark. App. 43 **[TPR - sufficiency] [failure to remedy]** The trial court could reasonably conclude that appellant's drug abuse problem had not been remedied due to his refusal to take drug tests. Appellant failed to remedy his lack of stable housing and admitted he could not provide a home for his child at the time of the termination hearings due to his incarceration. The appellate court noted that appellant's lack of stable housing was sufficient to affirm the failure to remedy ground. **[other factors]** Appellant correctly raised that there was no document or testimony concerning a DWI arrest or conviction. However, appellant did not object to the caseworker's testimony regarding his criminal history. Appellant was also correct that there was no evidence that he was ordered to attend therapy. However, other subsequent issues existed including failure to take drug tests as ordered by the court. Also his incarceration as a result of his sentence for battering his wife occurred subsequent to the case. (Halsey, B.; CV-15-750; 1-27-2016; Virden, B.)

Whitehead v. Ark. Dep't of Human Services, 2016 Ark. App. 42 **[TPR –putative father]** The circuit court held that although appellant had performed a DNA test, he had neither executed an order of paternity, nor had he established sufficient contacts such that his parental rights had attached. The trial court terminated appellant's parental rights. The appellate court held that the circuit court erred in terminating appellant's parental rights because the court had established that

the appellant had no parental rights to terminate. (Williams Warren, J.; CV-15-550; 1-27-2016; Virden, B.)

Edwards v. Ark. Dep't of Human Services, 2015 Ark. App. 37 **[TPR – best interest]** Appellant (father) argued that termination was not in his child's best interest because he was not the cause of his child's injuries, he had not been found to be unfit, nor did he pose any danger to his child, and he arranged for his mother to take care of his child prior to his incarceration and relative placement was preferred in the law. The appellate court held that the trial court did not err in finding that termination was in the child's best interest where there was evidence that the appellant had been incarcerated throughout the life of the case and there was no evidence that appellant had any contact with his child while he was incarcerated. There was no evidence of the nature and extent of the child's relationship with the paternal grandmother, other than visitation had occurred. **[criminal sentencing]** Sentencing ground affirmed where appellant failed to raise an argument about the lack of notice or failure to plead this ground and where his attorney argued that the only evidence against appellant was his incarceration. Evidence of appellant's sentence was also included in appellant's motion for a continuance that attached the sentence letter and reported that appellant was sentenced to eight years imprisonment in 2013. **[due process – participate in TPR hearing]** Appellant argued that he should have been allow to participate in the TPR hearing and his lack of presence at the hearing falls within the *Wicks* exception. The Court of Appeals noted that the federal courts have held that inmates do not have a due-process right to be present at civil hearings, including termination hearings as long as they are represented by counsel, counsel participates by making evidentiary objections, cross-examining witnesses, and the inmate has the opportunity to present testimony by deposition or other recorded format if that testimony could influence the outcome of the proceedings. The appellate court found that although appellant was not present, his attorney fully participated during the proceeding and there was no indication that his due-process rights could not have been safe-guarded in his absence. The *Wicks* exception does not apply. **[due process – service]** Although appellant raised improper service of process in his answer to the termination petition, he failed to raise it again. Appellant's attorney appeared at the termination hearing on appellant's behalf did not object to service and participated fully in the hearing. Any argument with regard to service was waived. (Wilson, R.; CV-15-650; 1-20-2016; Brown, W.)

Dunn v. Ark. Dep't of Human Services, 2015 Ark. App. 34 **[TPR – best interest]** The trial court's best interest finding was not clearly erroneous where appellants tested positive to drugs shortly before the termination hearing, the father remained incarcerated, and neither parent could sustain consistent employment or housing, and after 14 months of DHS involvement the parents were unable to take custody of their children. **[aggravated circumstances]** The trial court did not err in finding little likelihood that services would result in successful reunification where appellant father testified that he no longer used drugs, but tested positive seven weeks prior to the TPR hearing and the trial court specifically found him not credible. There was also evidence that the parents' employment and housing had been sporadic throughout the case. Further, the appellant

(father) acknowledged that they were not in a position to have custody of their children at the time of the hearing. (James, P.; CV-15-721; 1-20-2016; Hixson, K.)

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

Byrd v. Ark. Dep't of Human Services, 2016 Ark. App. 32 **[aggravated factors, sex abuse, and subsequent factors]** (Medlock, M.; CV-15-767; 1-20-2016; Whiteaker, P.)

Carroll v. Ark. Dep't of Human Services, 2016 Ark. App. 3 **[aggravated factors, failure to remedy, and subsequent factors]** (Williams Warren, J.; CV-15-690; 1-6-2016; Harrison, B.)

A.I. v. State, 2016 Ark App. 5 **[Delinquency – witness testimony]** Appellant argued that the CACD investigator's testimony that she found the victim credible and appellant not credible was inadmissible and should be reversed. Appellant acknowledged his failure to raise the issue with the trial court, but argued that the appellate court should consider it under the third and fourth *Wicks* exceptions. The appellant's argument was not preserved for appeal and does not fall within the *Wicks* exception. The third *Wicks* exception requires a trial court to intervene on its own motion to correct a serious error. The investigator's testimony is not a fundamental or structural error where the legal process has been corrupted and there is not an opportunity to cure it. The fourth *Wicks* exception concerns the admission or exclusion of evidence that affects a defendant's substantial right. Appellant's argument is evidentiary and does not involve constitutional issues. (Naramore, W.; CV 15-486; 1-6-2016; Glover, D.)

U. S. SUPREME COURT

Hurst v. Florida **[capital/sentencing]** Under Florida law, the maximum sentence a capital felon may receive on the basis of a conviction alone is life imprisonment. He may be sentenced to death, but only if an additional sentencing proceeding "results in findings by the court that such person shall be punished by death." In that proceeding, the sentencing judge first conducts an evidentiary hearing before a jury. Next, the jury, by majority vote, renders an "advisory sentence." Notwithstanding that recommendation, the court must independently find and weigh the aggravating and mitigating circumstances before entering a sentence of life or death.

A Florida jury convicted petitioner Hurst of first-degree murder for killing a co-worker and recommended the death penalty. The court sentenced Hurst to death, but he was granted a new sentencing hearing on appeal. At resentencing, the jury again recommended death, and the judge again found the facts necessary to sentence Hurst to death. The Florida Supreme Court affirmed, rejecting Hurst's argument that his sentence violated the Sixth Amendment in light of *Ring* v. *Arizona*, in which the Court found unconstitutional an Arizona capital sentencing scheme that permitted a judge rather than the jury to find the facts necessary to sentence a defendant to death.

Held: Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*. Any fact that "expose[s] the defendant to a greater punishment than that authorized by the

jury's guilty verdict" is an "element" that must be submitted to a jury. *Apprendi* v. *New Jersey.* Applying *Apprendi* to the capital punishment context, the *Ring* Court had little difficulty concluding that an Arizona judge's independent fact finding exposed Ring to a punishment greater than the jury's guilty verdict authorized. *Ring*'s analysis applies equally here. Florida requires not the jury but a judge to make the critical findings necessary to impose the death penalty. That Florida provides an advisory jury is immaterial. As with Ring, Hurst had the maximum authorized punishment he could receive increased by a judge's own fact finding.

(No. 14–7505; January 12, 2016)

Kansas v. Carr **[capital sentencing]** A Kansas jury sentenced respondents Reginald and Jonathan Carr, brothers, to death after a joint sentencing proceeding. Respondents were convicted of various charges stemming from a notorious crime spree that culminated in the brutal rape, robbery, kidnaping, and execution-style shooting of five young men and women. The Kansas Supreme Court vacated the death sentences, holding that the sentencing instructions violated the Eighth Amendment by failing "to affirmatively inform the jury that mitigating circumstances need only be proved to the satisfaction of the individual juror in that juror's sentencing decision and not beyond a reasonable doubt." It also held that the Carrs' Eighth Amendment right "to an individualized capital sentencing determination" was violated by the trial court's failure to sever their sentencing proceedings.

Held: 1. The Eighth Amendment does not require capital-sentencing courts to instruct a jury that mitigating circumstances need not be proved beyond a reasonable doubt. The instructions make clear that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt but that mitigating circumstances must merely be "found to exist," which does not suggest proof beyond a reasonable doubt. No juror would have reasonably speculated that "beyond a reasonable doubt" was the correct burden for mitigating circumstances.

2. The Constitution did not require severance of the Carrs' joint sentencing proceedings. The Eighth Amendment is inapposite when a defendant's claim is, at bottom, that evidence was improperly admitted at a capital-sentencing proceeding. The question is whether the allegedly improper evidence "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." In light of all the evidence presented at the guilt and penalty phases relevant to the jury's sentencing determination, the contention that the admission of mitigating evidence by one Carr brother could have "so infected" the jury's consideration of the other's sentence as to amount to a denial of due process is beyond the pale.

(No. 14–449; January 20, 2016)

Montgomery v. Louisiana **[Miller /retroactive]** Petitioner Montgomery was 17 years old in 1963, when he killed a deputy sheriff in Louisiana. The jury returned a verdict of "guilty without capital punishment," which carried an automatic sentence of life without parole. Nearly 50 years after

Montgomery was taken into custody, this Court decided that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' Montgomery sought state collateral relief, arguing that *Miller* rendered his mandatory life-without-parole sentence illegal. The trial court denied his motion, and his application for a supervisory writ was denied by the Louisiana Supreme Court, which had previously held that *Miller* does not have retroactive effect in cases on state collateral review.

Held:

1. This Court has jurisdiction to decide whether the Louisiana Supreme Court correctly refused to give retroactive effect to *Miller*. When a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. A Court has no authority to leave in place a conviction or sentence that violates a substantive rule, regardless of whether the conviction or sentence became final before the rule was announced. This Court's precedents may not directly control the question here, but they bear on the necessary analysis, for a State that may not constitutionally insist that a prisoner remain in jail on federal habeas review may not constitutionally insist on the same result in its own postconviction proceedings. *Miller*'s prohibition on mandatory life without parole for juvenile offenders announced a new substantive rule that, under the Constitution, is retroactive in cases on state collateral review.

2. A State may remedy a *Miller* violation by extending parole eligibility to juvenile offenders. This would neither impose an onerous burden on the States nor disturb the finality of state convictions. And it would afford someone like Montgomery, who submits that he has evolved from a troubled, misguided youth to a model member of the prison community, the opportunity to demonstrate the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change.

(No. 14–280; January 25, 2016)