APPELLATE UPDATE

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 (http://courts.state.ar.us/opinions/opinions.html).

PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE COURTS
JUNE, 2006 VOLUME 13, NO. 110

ANNOUNCEMENTS

This is the last issue for this term of court. *Appellate Update* will return in the fall.

On June 29th, the supreme court issued three *per curiam* opinions of interest, all of which were included in the weekly mailout, and dealing with the following subjects:

- Update on status of publication of the *Arkansas Reports*
- Petition by IOLTA Board to amend Rule 1.15 of the Arkansas Rules of Professional Conduct, published for comment through October 1, 2006
- Proposed Administrative Order on Access to Court Records, published for comment through October 1, 2006

CRIMINAL

McEwing v. State: **[exclusion of defense witness; late disclosure]** Because the appellant failed to disclose an alibi witness until the day of trial, the circuit court did not abuse its discretion by excluding the witness from testifying. Moreover, the appellant failed to proffer the excluded witness's testimony for appellate review. (Proctor, W.; SCCR 05-1366; 6-1-06; Hannah)

Utley v. State: **[sufficiency of the evidence; negligent homicide]** The appellant, who was driving a garbage truck around a curve and on a bridge, should have been aware that driving on the wrong side of the road presented a substantial and unjustifiable risk that he might hit a car traveling in the opposite direction and kill a person in that car. Substantial evidence supported the appellant's conviction of negligent homicide. (Wilson, R.; SCCR 05-1400; 6-1-06; Gunter)

Childs v. State: **[*Batson*]** Although the trial court's decision to uphold the State's *Batson* challenges to four jurors struck by the appellant was clearly against the preponderance of the

evidence, the appellant failed to make the proper argument on appeal and the conviction was affirmed. (Glover, D.; CACR 05-1245; 6-14-06; Robbins)

Brown v. State: **[discovery; work product]** The trial court erred in ruling at trial that a calendar (which was prepared by the minor victim and her mother in preparation for trial) was a work product of the prosecutor. The trial court erred in not finding the calendar discoverable under A.R.Cr.P. Rule 17.1 as exculpatory information regarding the offense charged (first degree sexual assault), and the conviction was reversed and remanded. **[expert testimony regarding investigation]** The trial court did not err in denying the appellant's request to present the testimony of a police lieutenant from a different jurisdiction as an expert witness in investigation and interrogation in cases of sexual abuse against children. **[prosecutorial misconduct]** The instances cited by the appellant as prosecutorial misconduct, whether considered individually or collectively, did not rise to a level of misconduct such as to inflame the passions of the jury against the defendant. Furthermore, the prosecutor's failure to disclose the calendar (although a discovery violation constituting reversible error) did not constitute prosecutorial misconduct. (Phillips, G.; CACR 05-33; 6-14-06; Bird)

Deshazo v. State: **[search and seizure; eviction; writ of possession; good faith]** The trial court did not err in finding that the sheriff acted in good-faith reliance on a facially valid court order in executing an "Order of Immediate Possession" on the appellant at his rented home. The trial court did not err in refusing to suppress the evidence found as a result of the actions taken by law enforcement in executing the order and in subsequently obtaining a search warrant for the appellant's premises. (Yeargan, C.; CACR 04-1001; 6-21-06; Vaught)

Donovan v. State: **[contempt; indefinite suspension of sentence]** The appellant, an attorney, was found in contempt for her failure to appear at her client's court hearing. The trial court assessed one day of jail time and a fine of $50, both of which were suspended, but no time period was given for the suspension. At a second contempt hearing, the trial court revoked the original suspended sentence and imposed additional penalties for the second contempt conviction. The trial court erred in ordering the original indefinite suspension. Furthermore, the original one-day suspended sentence expired on the day after it was pronounced where the trial court pronounced a fixed term of imprisonment as opposed to simply specifying a definite period of probation. The trial court erred as a matter of law in executing the suspended sentence at the second contempt hearing, and the appellant's sentence (both the fine and jail time) was reversed and dismissed. However, the appellant's second conviction for contempt and sentence of one day in jail and a $50 fine (neither of which were suspended) was affirmed. (Storey, W.; CA 05-655; 6-21-06; Bird)

Wilson v. State: **[confession; suppression; right to counsel; promises of leniency]** During his in custody interrogation on burglary and theft charges, the appellant never personally invoked his right to counsel. The trial court did not err in finding that there were no false promises of leniency made to the appellant by either officers or a deputy prosecutor during the interrogation. The trial court did not err in denying the appellant's motion to suppress his statements made during the interrogation. (Williams, C.; CACR 05-1013; 6-21-06; Neal)

Newton v. State: The appellant was convicted of capital murder and sentenced to life

imprisonment without parole. **[warrantless home search; inevitable discovery]** Even if police had not illegally entered the appellant's home without a warrant (while following a "bloody drag trail" from the victim's body, which had been found outside the appellant's home), the police would have later entered the appellant's home under a valid search warrant and inevitably discovered the evidence inside the appellant's home. (Pope, S.; SCCR 05-1247; 6-22-06; Hannah)

Bedford v. State: **[revocation of probation]** The circuit court revoked the appellant's probation based on the appellant's commission of a forgery while on probation. Because the State failed to prove that the check passed by the appellant was issued or presented for payment by the appellant prior to the closure of the bank account upon which it was drawn, the trial court could not reasonably infer that the check was forged. The trial court erred in finding that the appellant violated the terms of her probation by passing a forged instrument, and the revocation was reversed and dismissed. (Burnett, C.; CACR 04-706; 6-28-06; Baker)

Howard v. State: The appellant was convicted of two counts of capital murder and one count of attempted capital murder, and was sentenced to death plus thirty years' imprisonment. **[Rule 37.5; prosecutorial misconduct]** The issue of alleged prosecutorial misconduct was an issue that should have been raised on direct appeal, and was not a claim that could be raised for the first time in a Rule 37 petition. **[felony information; aggravating factors]** The issue of defects in the felony information was an issue that should have been raised on direct appeal, and was not a claim that could be raised for the first time in a Rule 37 petition. **[juror misconduct]** The appellant's claims pertaining to a juror's alleged untruthfulness during *voir dire* were not cognizable in the Rule 37.5 proceeding. **[sheriff as witness and bailiff]** Where both the appellant and the State stipulated prior to trial that the sheriff could remain in the courtroom, even though he was a witness and a bailiff, the appellant's argument regarding the issue was waived. **[ineffective assistance of counsel]** The appellant failed to describe how a more searching pre-trial investigation or a more thorough cross-examination of the State's DNA expert would have changed the outcome of his trial. **[ineffective assistance; *ex parte* communication between judge and juror]** Trial counsel's decision not to request a hearing regarding an *ex parte* communication between the judge and a juror amounted to trial strategy. **[ineffective assistance; jury selection]** Trial counsel were not ineffective for their failure to excuse four jurors, and the decision to seat the jurors was a matter of trial strategy. **[ineffective assistance; closing argument]** Trial counsel were not ineffective for failing to object to several statements made by the prosecutor in closing argument. **[ineffective assistance; mitigating evidence]** The appellant failed to provide evidence proving that further investigation by trial counsel would have produced proof that he suffered from any sort of mental disorder that would have functioned as mitigating evidence. **[ineffective assistance; jury forms; mitigating factors]** Trial counsel's decision not to submit the statutory mitigating circumstances was a matter of trial strategy, and counsel was not ineffective. **[mitigating circumstances; offer of life sentence]** It was not ineffective assistance of counsel for trial counsel to fail to submit the fact that the State offered the appellant a life sentence as a mitigating circumstance. **[jury forms; mitigating factors]** Where the jury found beyond a reasonable doubt that four aggravating circumstances existed, and that those aggravating factors outweighed any mitigating circumstances beyond a reasonable doubt, any error by the jury in filling out the mitigating factors form was harmless error, and counsel could not have been ineffective for failing to challenge the manner in which the jury filled out the jury

form regarding mitigating factors. (Yeargan, C.; SCCR 05-699; 6-29-06; Hannah)

Dickinson v. State: The appellant was convicted of capital murder and attempted first-degree murder, and sentenced to life imprisonment plus twenty years' imprisonment. **[search and seizure]** After being *Mirandized* at the police station, the appellant agreed to surrender his pistol to the police for ballistics testing. When the police came to the appellant's home the same morning at 4:00 a.m., the appellant voluntarily retrieved his pistol from his vehicle and surrendered it to police officers. No search of the appellant's premises occurred, which would have warranted advising the appellant of his right to refuse consent. The circuit court correctly denied the appellant's motion to suppress. (Goodson, D.; SCCR 05-1264; 6-29-06; Brown)

Burton v. State: **[Rule 37; ineffective assistance of counsel; felon-in-possession charge; severance]** The appellant's trial counsel was deficient in failing to request a severance of the felon-in-possession of a firearm charge from the other charges (two counts of aggravated assault, and one count of criminal mischief), and the appellant suffered prejudice as a result of counsel's failure. The case was reversed and remanded. (Henry, D.; SCCR 05-494; 6-29-06; Imber)

O'Connor v. State: **[Rule 37; factual basis for *nolo contendere* plea; A.R.Cr.P. Rule 24.6]** It was not necessary, under the circumstances, for the appellant, who entered a plea of *nolo contendere*, to admit that he committed the acts described by the prosecutor (two counts of rape). The trial court did not err in holding that there was substantial compliance with Rule 24.6. (Patterson, J.; SCCR 05-1057; 6-29-06; *per curiam*)

Lee v. State: The appellant was convicted of capital murder and sentenced to death. **[Rule 37.5; ineffective assistance of counsel during post-conviction proceedings; mandate recall]** The appellant was denied effective assistance of counsel during his Rule 37 postconviction proceeding due to the fact that his appointed counsel was impaired by a substance abuse problem at the time of the Rule 37 hearing. The Supreme Court recalled its previous mandate affirming the denial of Rule 37 relief, and remanded the matter to the circuit court. (SCCR 99-1116; 6-29-06; Corbin)

CIVIL

City of Farmington v. Smith: **[immunity]** City officials were not entitled to immunity from suit arising from actions when police illegally entered residence and failed to disclose to occupants that they were free to refuse to consent to search. (Storey, W.; SC 05-1208; 6-1-06; Corbin)

First United v. Chicago Tile: **[title insurance]** Title insurance coverage did not cover potential liability as a successor-in-interest under the Arkansas Time Share Act. The loss in real estate value does not constitute a defect in title. (Smitherman, E.; SC 05-796; 6-1-06; Dickey)

Farm Bureau Ins. v. Running M Farms: **[insurance/standing]** Individual did not have standing to enforce policy issued to a corporation as third party beneficiary, guarantor, or shareholder. Arkansas does not recognize the tort of negligent performance of an insurance contract. (Johnson,

K.; SC 05-920; Brown)

Pro-Camp Management v. R.K. Enterprises: **[trade secrets]** Damages for unjust enrichment are recoverable under the trade secrets act and are not limited solely to an analysis of profits. General principles of unjust enrichment may be relied upon.
(Gunn, M.; SC 05-459; 6-1-06; Hannah)

Cooper Clinic v. Barnes: **[child abuse/ reporting]** Doctor failed to report suspected child abuse to hotline as required by statute, but statute was unclear as to whether the clinic employing the doctor was included in the entities having a duty to report. Because the statute was unclear and penal in nature, the clinic could not be construed to apply to the clinic. (Jennings, J.; SC 05-1166; 6-15-06; Imber)

Delanno v. Peace: **[legal malpractice]** Client failed to prove fraudulent concealment to avoid dismissal on limitations grounds. Attorney clearly made an inaccurate statement to the client, but plaintiff failed to prove positive fraud in connection with the making of the statement.
(McGowan, M.; SC 05-1386; 6-15-06; Dickey)

Southeastern Distributing Co. v. Miller Brewing: **[summary judgment]** Suit by a distributer against brewer alleging various claims arising out of alleged forced sale of distributorship to buyer chosen by brewer -- Various fact issues exist to be resolved by the jury and preclude resolution of case via summary judgment. (Plegge, J.; SC 05-969; 6-15-06; Gunter)

National Home Centers v. First Arkansas Valley Bank: **[foreclosure priorities]** Although statutory form for a corporate acknowledgment of the mortgage was not complied with, evidence was clear that person was signing on behalf of the corporation and not in an individual capacity. Statute specifying form for acknowledgment will not be used to invalidate the mortgage. In order to challenge the notice requirements of the foreclosure sale, it is necessary to file a notice of appeal from the order confirming sale. (Patterson, J.; SC 05-1184; 6-15-06; Glaze)

Arkansas Dept. Health and Human Services v. Smith: **[revivor]** Rule 25 of the Rules of Civil Procedure addresses substitution of parties, but it does not determine which claims survive the death of a party. (Smith, V.; SC 06-06; 6-15-06; Per Curiam)

Seay v. C.A.R Transportation: Appeal dismissed.
(Finch, J.; SC 05-970; 6-15-06; Corbin)

Pest Management v. Langer: **[arbitration]** Under parties' agreement, parties dispute should have been subject to arbitration pursuant to the Federal Arbitration Act. (Clawson, C.; CA 05-1387; 6-21-06; Bird)

Rial v. Boykin: **[cemetery plots]** Family had "set aside" plots and under custom and usage, this marking created an interest in the plots. Cemetery Association had legal title to the plots, but this legal interest was subject to the interest created by marking the plots. (Lineberger, J.; CA 05-995; 6-21-06; Roaf)

Asbury Automotive Group v. Campbell: **[class action]** Class action certification was proper. The class representative displayed the minimal level of interest in this class, he was familiar with the challenged practice of charging a documentary fee as part of a car sale, and he was able to assist in litigation decisions with counsel. **(**Moody, J.; SC 06-215; 6-22-06; Brown)

Mitchell v. Lincoln: **[medical malpractice]** Medical expert was required because matter was not within jurors' common knowledge. Issue did not hinge on merely following the recommendation of an expert, but also on why the recommendation must be followed. In this case, the medical knowledge involved blood types, blood transfusions, and effects on a leukemia patient. Also, expert's affidavit was deficient on the issue of the standard of care in the locality. (Logan, R.; SC 05-1369; 6-22-06; Glaze)

Sears v. Burkeen: **[child support/garnishment]** Mother did not agree to receive sum from lawsuit settlement as full satisfaction of judgment for child support arrearage; therefore, she was entitled to garnish additional settlement sums held by garnishee. (Wright, J.; CA 05-1337; 6-28-06; Bird)

Martin v. Shew: **[restrictive covenant]** There was not a division of the tract prior to the filing of the restrictive covenant, which prevented division of the tract. (Logan, R.; CA 05-1314; 6-28-06; Vaught)

Calvary Christian School v. Huffstuttler: **[parochial school]** Claims by parents and student against parochial school were dismissed for lack of subject matter jurisdiction as they involved ecclesiastical matters. Outrage claim arising out of a hidden camera was without merit as it merely involved the possibility that the school could have taped student while he was changing clothes although there was no evidence that the school did tape him with the hidden camera. (Simes, L.; SC 05-343; 6-29-06; Imber)

Kale v. State Medical Board: **[admin. hearing]** Board acted within its powers in concluding that regulation applied to physician and that he violated it. (Fitzhugh, M.; SC 05-1401; 6-29-06; Dickey)

DHS v. Howard: **[gay foster parents]** DHS violated the separation of powers doctrine by usurping legislative authority with respect to public morality. (Fox, T.; SC 05-814; 6-29-06; Corbin)

McGraw v. Jones: **[default]** Excusable neglect was not established to set aside default judgment. Doctor who was sued for malpractice turned the complaint over to hospital administrators who failed to follow through and provide the defense. However, doctor did nothing to check on the matter and ensure that it was being handled. Doctor was not entitled to notice of the hearing to establish damages after default. Record failed to show how the damages award was arrived at. (Scott, J.; SC 06-48; 6-29-06; Imber)

Murchison v. Safeco: **[order to set aside]** Court was without jurisdiction to set aside summary judgment order. The court lacked jurisdiction to consider subsequent motions and to hold

hearings when a prior motion was deemed denied under Rule 4 of the appellate procedure rules. (Moody, J.; SC 05-826; 6-29-06; Gunter)

Beverly Enterprises v. Harkey: **[class action/supersedeas]** Court erred in requiring defendant to file supersedeas in order to appeal decision on class certification. Plaintiff requested supersedeas to secure payment of any judgment based on financial instability of defendant. Supersedeas is to secure judgment for damages ; case has not been tried, and there is no judgment. It was an abuse of discretion to require the bond. (Harkey, J.; SC 06-608; 6-29-06; Hannah)

Kinchen v. Wilkins: **[ballot title]** The text of the city ordinance itself was not a sufficient ballot title because the text failed to include relevant information that would allow the voter to make an informed decision. (Patterson, J.; SC 05-1402; 6-29-06; Corbin)

Archer Daniels v. Beadles Enterprises: **[fraud]** Court's findings were supported by the evidence. (Yates, H.; SC 05-1192; 6-29-06; Hannah)

Weaver v. City of West Helena: **[rule 11 sanctions]** Sanctions were imposed arising out of the filing of a motion for recusal. Rule 11 was not followed and the party was subjected to a de facto hearing without notice. There was an abuse of discretion in imposing sanctions.
(Simes, L.; SC 05-580; 6-29-06; Dickey)

DOMESTIC RELATIONS

Shanie Furrow Perez v. Craig Furrow: **[child custody; jurisdiction]** Appeal was dismissed because the appellant failed to file a timely notice of appeal. A written order changing custody was entered July 7, 2005, but issues of visitation and child support were reserved. The appellant filed a notice of appeal August 16, 2005, more than 30 days after the order and therefore untimely under Rule 2(d) of the Rules of Appellate Procedure – Civil. An order entered November 2, 2005, disposed of the other issues in the case, but the appellant filed no notice of appeal of that order. Because the only notice of appeal was filed August 16 and was untimely, the appellate court's jurisdiction was never invoked. (McGowan, M.; No. CA05-1253; 6-14-06; Pittman)

David Bier, et al. v. Norma Mills: **[grandparent visitation]** Appellant paternal grandparents sought visitation with their grandson, who was in the custody of his maternal grandmother. The trial court denied visitation and ordered that they have no contact with their grandson, which they alleged on appeal was an abuse of discretion. In affirming the circuit court, the Court of Appeals pointed out that Arkansas's grandparent visitation statutes provide that visitation may be granted only if the court determines that visitation with the petitioning grandparents is in the best interest and welfare of the child. The Court's review of the record indicated that the trial court's determination was not clearly erroneous or an abuse of discretion. (Zimmerman, S.; No. CA06-28; 6-14-06; Gladwin)

PROBATE

Laurie Martin, v. Robert Decker, et al.: **[guardianship]** The Court of Appeals affirmed the circuit court's appointment of the ward's brother as the guardian of her person and a financial institution as the guardian of her estate, over the objection of her daughter, who sought to be appointed her mother's guardian. The Court noted the statutory qualifications of a guardian and noted that the preference of a ward is only one factor for the court to consider. In addition, no statutory preference exists for the appointment of children over siblings, as in the statutes governing inheritance. (Guthrie. D.; No. CA05-1190; 6-28-06; Roaf)

JUVENILE

Arkansas Dep't of Human Servs. v. Briley **[DHHS Contempt]**
DHHS appealed a Circuit Court order finding DHHS in civil contempt for failing to obey prior court orders and imposing a sanction of a $160 fee reimbursement to parents and a written report on future staffing issues. DHHS argued that the petition did not provide sufficient notice of what court orders had been violated. In the petitioner's affidavit she attested that DHHS failed to provide random drug screens, home visitation, counseling and transportation. The hearings and pleadings revealed the following. DHHS went to the home two times between February and September 2005, and never visited the children. DHHS did not provide transportation to AA or for job interviews. DHHS did not provide counseling, but the petitioner sought counseling for her children. DHHS never provided random drug screens although the petitioner requested drug screens. DHHS' only defense was caseload shortages and they were doing the best that they could The supervisor testified that her caseload was 85.

DHHS next argued that the sanctions imposed by the court were improper. As to the $160 reimbursement fee, DHS did not object to the expense when presented at the trial court at the contempt hearing. Further there is no ruling on that issue in DHHS' motion for reconsideration so the issue was not preserved for appeal. With regard to the report DHHS did not have an opportunity to object to this sanction because the judge issued that sanction *sua sponte* without notice to either party. The court had retained jurisdiction of the case in anticipation of a request for sanction or contempt, the report could not benefit the petitioner because her case had been closed. Therefore, the civil sanction imposed to submit a staffing report was an inappropriate civil contempt sanction. (Isbell G.; 05-1278; 6-1-2006; Imber)

Long v. *Arkansas Dep't of Human Servs. v. Kirby* **[TPR]**
The Court of Appeals found that "the best interests of the children" dictates that TPR be reversed and to "reinstate reunification services with a goal of returning the children to appellant's custody." Appellant's children were removed in February 2003, as a result of an arrest for methamphetamine possession, drug paraphernalia, and two counts of child endangerment. The court ordered a psychological evaluation, drug evaluation, random drug screens, out patient treatment, weekly attendance at AA/NA meetings, parenting classes, visitation, and therapy specifically to address issues with one of her children. During the first eight months of the case the appellant did nothing to comply with the court's orders or case plan. At the Permanency Planning Hearing (PPH) in February 2004 appellant had made measurable progress so the court

continued the case and held a second PPH for May 2004 at which time the court set the goal of the case for termination.

Appellant argued there was insufficient evidence to terminate her parental rights. She argued that she had substantially complied with the court's orders and that she remedied the reason that caused removal of her children. No drug testing had shown a positive tests for methamphetamine. Testimony was provided by one of the children's therapist that the child had a very strong bond with her mother and she would regress if rights were terminated. Appellant could not produce evidence that she attended AA/NA meetings or that she was receiving outpatient therapy in later months, despite the fact she tested positive for Darvon in July and opiates in August. Appellant argued that her failure to consistently visit her children and maintain contact with the agency was a result of problems with caseworker turnover. The majority writing for the court held that the trial court was clearly erroneous in finding that continued contact with appellant would be detrimental because appellant had substantially complied with the court's orders and had a strong bond with one of her children. (Williams Warren, J.; CA 05-306; 6-28-2006; Hart)

Masters v. *Arkansas Dep't of Human Servs. v. Kirby* **[D-N Adjudication]**
Appellant argued that the trial court erred in a dependency-neglect adjudication because the probable cause hearing was untimely and that there was insufficient evidence to find that appellant posed a danger to his child. Subsequent to this appeal the trial court terminated parental rights on the appellant. He did not appeal that order. Appeal dismissed as moot. Any decision by the appellate court in this appeal would have not legal effect on an existing controversy. (Collier L., CA05-915; 6-14-2006; Roaf)

EIGHTH CIRCUIT

AIG Centennial Ins. v. Fraley-Landers: **[insurance]** Arkansas law does not require any showing of prejudice to the insurer when the insured fails to give the insurer notice of a loss, and the giving of notice was made a condition precedent to coverage. (W.D. Ark.; # 05-2918; 6-13-06)

U.S. SUPREME COURT

Hudson v. Michigan: **[knock and announce]** Because Michigan has conceded that the entry here was a knock-and-announce violation, the only issue is whether the exclusionary rule is appropriate for such a violation.

Detroit police executing a search warrant for narcotics and weapons entered petitioner Hudson's home in violation of the Fourth Amendment's "knock-and-announce" rule. The trial court granted Hudson's motion to suppress the evidence seized, but the Michigan appellate courts reversed the Fourth Amendment claim.

Held: Justice Scalia delivered the opinion of the Court with respect to parts of the opinion, concluding that violation of the knock-and-announce rule does not require suppression of evidence found in a search.

This Court has rejected indiscriminate application of the exclusionary rule, holding it

applicable only where its deterrence benefits outweigh its substantial social costs. Exclusion may not be premised on the mere fact that a constitutional violation was a but-for cause of obtaining the evidence. The illegal entry here was not the but-for cause, but even if it were, but-for causation can be too attenuated to justify exclusion. Attenuation can occur not only when the causal connection is remote, but also when suppression would not serve the interest protected by the constitutional guarantee violated. The interests protected by the knock-and-announce rule include human life and limb (because an unannounced entry may provoke violence from a surprised resident), property (because citizens presumably would open the door upon an announcement, whereas a forcible entry may destroy it), and privacy and dignity of the sort that can be offended by a sudden entrance. But the rule has never protected one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests violated here have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

The social costs to be weighed against deterrence are considerable here. In addition to the grave adverse consequence that excluding relevant incriminating evidence always entails-the risk of releasing dangerous criminals-imposing such a massive remedy would generate a constant flood of alleged failures to observe the rule, and claims that any asserted justification for a no-knock entry had inadequate support. Another consequence would be police officers' refraining from timely entry after knocking and announcing, producing preventable violence against the officers in some cases, and the destruction of evidence in others. Next to these social costs are the deterrence benefits. The value of deterrence depends on the strength of the incentive to commit the forbidden act. That incentive is minimal here, where ignoring knock-and-announce can realistically be expected to achieve nothing but the prevention of evidence destruction and avoidance of life-threatening resistance, dangers which suspend the requirement when there is reasonable suspicion that they exist. Massive deterrence is hardly necessary. Contrary to Hudson's argument that without suppression there will be no deterrence, many forms of police misconduct are deterred by civil-rights suits, and by the consequences of increasing professionalism of police forces, including a new emphasis on internal police discipline. (No. 04-1360; June 15, 2006)

Samson v. California: **[parolee search**] Pursuant to a California statute-which requires every prisoner eligible for release on state parole to agree in writing to be subject to search or seizure by a parole officer or other peace officer with or without a search warrant and with or without cause and based solely on petitioner's parolee status, an officer searched petitioner and found methamphetamine. The trial court denied his motions to suppress that evidence, and he was convicted of possession. Affirming, the State Court of Appeal held that suspicionless searches of parolees are lawful under California law and that the search in this case was reasonable under the Fourth Amendment because it was not arbitrary, capricious, or harassing.

Held: The Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee. (04-9728; 6-19-06)

Davis v. Washington: **[confrontation clause**] A 911 operator ascertained from McCottry that she had been assaulted by her former boyfriend, petitioner Davis, who had just fled the scene. McCottry did not testify at Davis's trial for felony violation of a domestic no-contact order, but the court admitted the 911 recording despite Davis's objection, which he based on the Sixth Amendment's Confrontation Clause. He was convicted. The Washington Supreme Court

affirmed, concluding that the portion of the 911 conversation in which McCottry identified Davis as her assailant was not testimonial.

In a companion case, No. 05-5705, when police responded to a reported domestic disturbance at the home of Amy and Hershel Hammon, Amy told them that nothing was wrong, but gave them permission to enter. Once inside, one officer kept petitioner Hershel in the kitchen while the other interviewed Amy elsewhere and had her complete and sign a battery affidavit. Amy did not appear at Hershel's bench trial for domestic battery, but her affidavit and testimony from the officer who questioned her were admitted over Hershel's objection that he had no opportunity to cross-examine her. Hershel was convicted, and the Indiana Supreme Court affirmed, concluding that, although Amy's affidavit was testimonial and wrongly admitted, it was harmless beyond a reasonable doubt.

Held: The Confrontation Clause bars admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination. These cases require the Court to determine which police interrogations produce statements that fall within this prohibition. Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

(a) McCottry's statements identifying Davis as her assailant were not testimonial. The statements in Davis were taken when McCottry was alone, unprotected by police, and apparently in immediate danger from Davis. She was seeking aid, not telling a story about the past. The question in Davis, therefore, is whether, objectively considered, the interrogation during the 911 call produced testimonial statements. Thus, the circumstances of her interrogation objectively indicate that its primary purpose was to enable police assistance to meet an ongoing emergency. She was not acting as a witness or testifying.

(b) Hammon's statements were testimonial. It is clear from the circumstances that her interrogation was part of an investigation into possibly criminal past conduct. There was no emergency in progress, she told the police when they arrived that things were fine, and the officer questioning her was seeking to determine not what was happening but what had happened. Objectively viewed, the primary, if not sole, purpose of the investigation was to investigate a possible crime. Subject to evidence produced on remand, the Sixth Amendment operates to exclude Hammon's affidavit. (Nos. 05-5224 and 05-5705; 6-19-06)

Dixon v. U.S.: **[burden/affirmative defense of duress]** Petitioner was charged with receiving a firearm while under indictment and with making false statements in connection with the acquisition of a firearm. She admitted at trial that she knew she was under indictment when she purchased the firearms and knew that doing so was a crime, but claimed that she was acting under duress because her boyfriend had threatened to harm her and her daughters if she did not buy the guns for him. Bound by Fifth Circuit precedent, the District Court declined her request for a jury instruction placing upon the Government the burden to disprove, beyond a reasonable doubt, her duress defense. Instead, the jury was instructed that petitioner had the burden to establish her

defense by a preponderance of the evidence. She was convicted.

Held: The jury instructions did not run afoul of the Due Process Clause. The crimes require that petitioner have acted knowingly which merely requires proof of knowledge of the facts that constitute the offense. The Government bore the burden of proving beyond a reasonable doubt that petitioner knew that she was making false statements and knew that she was breaking the law when she acquired a firearm while under indictment. It clearly met its burden when petitioner testified to that effect. Modern common law does not require the Government to bear the burden of disproving petitioner's duress defense beyond a reasonable doubt. The long-established common-law rule places the burden of proving that defense on the defendant. (No. 05-7053; June 22, 2006)

Washington v. Recuenco: **[enhancements/jury]** After respondent threatened his wife with a handgun, he was convicted of second-degree assault based on the jury's finding that he had assaulted her "with a deadly weapon." A "firearm" qualifies as a "deadly weapon" under Washington law, but nothing in the verdict form specifically required the jury to find that respondent had engaged in assault with a "firearm," as opposed to any other kind of "deadly weapon." Nevertheless, the state trial court applied a 3-year firearm enhancement to respondent's sentence, rather than the 1 year enhancement that specifically applies to assault with a deadly weapon, based on the court's own factual findings that respondent was armed with a firearm. Then U.S. Supreme Court decided *Apprendi v. New Jersey*, holding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. Because the trial court could not have subjected respondent to a firearm enhancement based only on the jury's finding that respondent was armed with a "deadly weapon," the State conceded a Sixth Amendment violation before the Washington Supreme Court, but urged the court to find the error harmless. Held: Error is not harmless. Sentencing factors are treated like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. (# 05-83; 6-26-06)

Kansas v. Marsh: **[death sentence]** Finding three aggravating circumstances that were not outweighed by mitigating circumstances, a Kansas jury convicted respondent Marsh of capital murder and sentenced him to death. Marsh claimed on direct appeal that Kansas statutes establishes an unconstitutional presumption in favor of death by directing imposition of the death penalty when aggravating and mitigating circumstances are in equipoise. Agreeing, the Kansas Supreme Court concluded that the statutes' weighing equation violated the Eighth and Fourteenth Amendments and remanded for a new trial.

Held: Kansas' capital sentencing statute is constitutional. A state death penalty statute may give the defendant the burden to prove that mitigating circumstances outweigh aggravating circumstances. Kansas' death penalty statute, consistent with the Constitution, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the two are in equipoise. Kansas' death penalty statute satisfies the constitutional mandates of *Furman* and its progeny because it rationally narrows the class of death-eligible defendants and permits a jury to consider any mitigating evidence relevant to its sentencing determination. The State's weighing equation merely channels a jury's discretion by

providing criteria by which the jury may determine whether life or death is appropriate. (# 04-1170; June 26, 2006)

U.S. v. Gonzalex-Lopez: **[right to counsel]** Respondent hired attorney Low to represent him on a federal drug charge. The District Court denied Low's application for admission pro hac vice on the ground that he had violated a professional conduct rule and then, with one exception, prevented respondent from meeting or consulting with Low throughout the trial. The jury found respondent guilty. Reversing, the Eighth Circuit held that the District Court erred in interpreting the disciplinary rule, that the court's refusal to admit Low therefore violated respondent's Sixth Amendment right to paid counsel of his choosing, and that this violation was not subject to harmless-error review.

Held: A trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to reversal of his conviction. The Court rejects the Government's contention that the violation is not complete unless the defendant can show that substitute counsel was ineffective within the meaning of *Strickland v. Washington*. The right to counsel of choice, however, commands not that a trial be fair, but that a particular guarantee of fairness be provided-to wit, that the accused be defended by the counsel he believes to be best. That right was violated here; no additional showing of prejudice is required to make the violation complete. (#05-352; 6-26-06)

Clark v. Arizona: **[insanity defense]** Petitioner Clark was charged with first-degree murder under an Arizona statute prohibiting intentionally or knowingly killing a police officer in the line of duty. At his bench trial, Clark did not contest that he shot the officer or that the officer died, but relied on his own undisputed paranoid schizophrenia at the time of the incident to deny that he had the specific intent to shoot an officer or knowledge that he was doing so. Accordingly, the prosecutor offered circumstantial evidence that Clark knew the victim was a police officer and testimony indicating that Clark had previously stated he wanted to shoot police and had lured the victim to the scene to kill him. In presenting the defense case, Clark claimed mental illness, which he sought to introduce for two purposes. First, he raised the affirmative defense of insanity, putting the burden on himself to prove by clear and convincing evidence that, in the words of another state statute, at the time of the crime, he was afflicted with a mental disease or defect of such severity that he did not know the criminal act was wrong. Second, he aimed to rebut the prosecution's evidence of the requisite mens rea, that he had acted intentionally or knowingly to kill an officer. He was found guilty.

Clark moved to vacate the judgment and life sentence, arguing, among other things, that Arizona's insanity test and its Mott rule each violate due process. He claimed that the Arizona Legislature had impermissibly narrowed its insanity standard in 1993 when it eliminated the first of the two parts of the traditional M'Naghten insanity test. The trial court denied the motion. Affirming, the Arizona Court of Appeals held, among other things, that the State's insanity scheme was consistent with due process. The court read Mott as barring the trial court's consideration of evidence of Clark's mental illness and capacity directly on the element of mens rea.

Held: Due process does not prohibit Arizona's use of an insanity test stated solely in terms of the capacity to tell whether an act charged as a crime was right or wrong. The Arizona Supreme Court's Mott rule does not violate due process. Mott held that testimony of a professional

psychologist or psychiatrist about a defendant's mental incapacity owing to mental disease or defect was admissible, and could be considered, only for its bearing on an insanity defense, but could not be considered on the element of mens rea. (No. 05-5966; June 29, 2006)