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
FEBRUARY, 2006 VOLUME 13, NO. 6

ANNOUNCEMENTS

On February 2nd, the Supreme Court issued two *per curiam* orders which were included in the weekly mailout:

* Rule 37.1 was amended to clarify the verification requirement, and the change is effective March 1, 2006.

* Proposed rules for appeals in dependency-neglect cases were published for comment, and the comment period expires on March 1, 2006**.**

See Daniels v. Dennis (2-23-06) in which Act 1448 of 2005 was held unconstitutional. The Act prevented an appointed judge from running for any circuit judgeship in the circuit.

CRIMINAL

Swan v. State: **[vehicle search; passenger's standing to challenge]** The appellant, a back-seat passenger in the vehicle, did not have standing to challenge the officer's consent (obtained from the car's driver) search of the vehicle. The trial court did not err in denying the appellant's motion to suppress a crack-pipe found in the vehicle's back seat. **[search of person incident to arrest]** Once the officer found the crack-pipe in the back seat, where the appellant was sitting, the officer had probable cause to arrest the appellant, and the officer's subsequent search of the appellant's mouth (where two baggies of cocaine were found) was lawful. **[confession; spontaneous statement; *Miranda*]** Where the appellant, after being arrested, spontaneously blurted out the statement "The pipe's mine," the statement was properly admitted into evidence although no *Miranda* warnings were given. (Sims, B.; CACR 04-795; 2-1-06; Vaught)

Schiller v. State: **[search and seizure; issue preservation]** The appellant moved to suppress the

evidence (almost three kilograms of cocaine found pursuant to a traffic stop) on the general ground that it was illegally obtained, but did not apprise the trial court of his particular contentions that the traffic stop was illegal or that his detention was excessive. Because the appellant's arguments on appeal were not specifically made at trial, the issues were not preserved for appeal. (Patterson, J.; CACR 05-471; 2-1-06; Robbins)

Ayala v. State: **[district court appeal; failure to appear for pretrial hearing; dismissal]** The circuit court erred in dismissing the appellant's *de novo* appeal from district court based on the appellant's failure to appear for a pre-trial hearing on the case in circuit court. The case was remanded in order for the appellant to be afforded his right to a jury trial. (Storey, W.; SCCR 05-1138; 2-2-06; Imber)

Cluck v. State: **[sufficiency of the evidence]** There was sufficient evidence to support the appellant's conviction for possession of drug paraphernalia with intent to manufacture methamphetamine. **[A.R.E. Rule 404(b)]** The trial court did not err in permitting the introduction of evidence that the appellant was on parole for a conviction of conspiracy to manufacture methamphetamine, and in permitting evidence of the appellant's prior conviction for possession of methamphetamine with intent to deliver. **[rebuttal witness]** Because the witness (a police officer) was a proper rebuttal witness, the State was not required to disclose information regarding this witness prior to trial, and the trial court did not abuse its discretion in allowing the testimony. **[jury instructions]** The trial court did not err in refusing to give a non-model jury instruction regarding the definition of drug paraphernalia. The trial court did not err in refusing to give a lesser included instruction (for attempted possession of drug paraphernalia with intent to manufacture methamphetamine) where the appellant offered no rational basis for the giving of the instruction. (Cottrell, G.; SCCR 05-677; 2-2-06; Brown)

Young v. State: **[*habeas corpus*; statute of limitations; rape]** A 1987 amendment to the statute of limitations for rape (which added language that the statute of limitations begins running when minor turns 18) did not constitute an *ex post facto* law as applied to the appellant. (Wyatt, R.; SCCR 05-1167; 2-2-06; *per curiam*)

Henson v. State: **[sufficiency of the evidence]** The appellant's conviction for theft by receiving (for being in possession of a recently stolen credit card) was supported by substantial evidence. **[right to testify]** The trial court did not abuse its discretion in refusing the appellant's request to testify, where the request was not made until after both sides had rested, and where the appellant had previously clearly and on the record stated his intention not to testify in response to a direct question put to him by the trial court at the close of the evidence. (Fox, T.; CACR 05-679; 2-8-06; Roaf)

Coulter v. State: The appellant was convicted of capital murder and sentenced to death in 1989. **[mandate recall; error *coram nobis*; execution; mental retardation]** The Supreme Court denied the petitioner's motion to recall the mandate and his request to file another Rule 37 petition containing a claim of mental retardation. Neither did the petitioner state good cause to grant leave to proceed with a petition for writ of error *coram nobis* in the circuit court. (SCCR 90-126; 2-9-06; Gunter)

Rankin v. State: The appellant was convicted of capital murder and sentenced to death. **[Rule 37; ineffective assistance of counsel; mitigation witnesses]** In light of the appellant's specific directive during the penalty phase that his mother not be called as a witness, trial counsel's decision not to call the appellant's brother and aunt as witnesses was clearly a question of trial strategy. The trial court did not err in denying the appellant's ineffective assistance claim. (Davis, F.; SCCR 04-1188; 2-9-06; Imber)

Carter v. State: **[double jeopardy; acquittal on erroneous grounds; retrial]** Although the trial judge made a legal error in reducing the appellant's aggravated robbery charge to robbery (by requiring the State to prove that a gun was used as a "gun" and not as a club) the appellant could not be retried on the aggravated robbery charge. (Fox, T.; SCCR 04-164; 2-9-06; Glaze)

Boveia v. State: **[sufficiency of the evidence; filing a false police report]** Where the State presented no proof that the appellant had committed a crime that the filing of the false police report was designed to cover up, there was insufficient evidence to convict her of felony filing a false police report; however, there was sufficient evidence to support a class A misdemeanor conviction for filing a false police report. (Humphrey, M.; CACR 05-828; 2-15-06; Roaf)

Bunch v. State: **[sentencing; double jeopardy; attempted capital murder; underlying felony]** The trial court erred in failing to merge appellant's aggravated robbery conviction (underlying felony for attempted capital murder) with the charge of attempted capital murder. (Storey, W.; CACR 05-726; 2-15-06; Crabtree)

Davis v. State: **[selective prosecution]** The appellant (an elected circuit judge) failed to establish a prima-facie case that he was selectively prosecuted because he was an elected official, and the trial court did not err in refusing to dismiss the charge (attempting to evade or defeat a state tax). **[DNA sample; suspended sentence]** Where the appellant was found guilty of a felony by a jury, but was given a three year suspended sentence, the trial court did not err in requiring the appellant to submit a DNA sample. (Bogard, D.; CACR 05-608; 2-15-06; Vaught)

May v. State: **[sufficiency of the evidence; first degree sexual assault; temporary caretaker/person in position of trust or authority over victim]** There was sufficient evidence that the appellant (the minor victim's long-time taekwondo instructor) was a "temporary caretaker, or other person in a position of trust or authority over the victim" when he engaged in sex acts with the minor victim. **[speedy trial]** The appellant's right to a speedy trial was not violated. (Webb, G.; CACR 05-523; 2-15-06; Robbins)

Estacuy v. State: **[sufficiency of the evidence]** The appellant's multiple convictions (including first degree battery, aggravated assault, leaving the scene, and D.W.I.) arising out of a hit-and-run motor vehicle accident were supported by substantial evidence. **[mistrial; *voir dire*]** The trial court did not abuse its discretion in denying the appellant's mistrial motion during *voir dire* based on a comment made by the prosecutor. **[closing argument]** Where the trial court admonished the prosecutor during closing argument at the request of the appellant, and the appellant requested no further relief, there was no error. (Epley, A.; CACR 04-1195; 2-15-06; Pittman)

Breshears v. State: **[search and seizure; warrantless home entry; consent by landlord]** Although the appellant had previously been served with a notice to vacate by the landlord, the notice to vacate did not comply with the Arkansas Code, and Drug Task Force investigators' assessment that the appellant's landlord had apparent authority to consent to the warrantless entry into the appellant's residence was unreasonable. The trial court erred in denying the appellant's motion to suppress. **[confession; fruit of poisonous tree]** The trial court also erred in failing to suppress a statement given by the appellant to the police after the search and arrest. (Wright, J.; CACR 05-393; 2-15-06; Hart)

Nelson v. State: **[traffic stop; consent; search and seizure]** Where the patrolman initiated a traffic stop after watching the appellant run a stop sign, the appellant's suppression argument was without merit. The trial court did not err in finding that the appellant had consented to a search of his vehicle subsequent to the lawful traffic stop. **[A.R.E. Rule 404(b); remoteness]** During the appellant's trial for possession of drug paraphernalia with intent to manufacture methamphetamine and possession of pseudoephedrine, the trial court did not err in allowing the State to introduce evidence of the appellant's prior convictions from 1988 (including possession of methamphetamine and two counts of delivery of methamphetamine). **[impeachment; prior conviction]** The trial court did not err in allowing the State to impeach the appellant with evidence of a marijuana conviction which had occurred during the last ten years. (Smith, K.; SCCR 05-1045; 2-16-06; Dickey)

Graham v. State: **[sufficiency of the evidence; permitting child abuse]** The trial court could have reasonably inferred, from the fact that the abuse of the baby (by the father) continued to occur after the appellant (the mother) acknowledged her awareness of it, that the appellant consciously disregarded a substantial risk that the abuse existed and would continue to occur, and that she failed to take action to prevent the abuse. **[constitutionality; vagueness of statute]** The appellant's actions clearly fell within the conduct proscribed by the statute (permitting child abuse), and she could not claim to be one of the "entrapped innocent" who did not receive fair warning of the consequences of her actions. (Langston, J.; SCCR 05-1018; 2-16-06; Glaze)

Turner v. State: **[vehicle search; consent; scope]** The officer's search of the truck's (in which the appellant was a passenger) exterior was within the scope of the consent granted by the driver. The police officer's observations of modifications beneath the bed of the truck indicative of a false compartment for the concealment of contraband gave rise to probable cause to perform the more intrusive search of drilling holes in the truck's bed (under which was found the false compartment containing over 50 pounds of cocaine). (Sutterfield, D.; CACR 05-912; 2-22-06; Pittman)

Fitting v. State: **[sufficiency of the evidence]** There was sufficient evidence to corroborate the testimony of an accomplice, and there was sufficient evidence to support the appellant's conviction for possession of drug paraphernalia with intent to manufacture methamphetamine. **[A.R.E. Rule 404(b)]** The trial court did not err in allowing testimony concerning items found in the appellant's work vehicle sixteen days after his arrest on the charges in the case at bar, where the evidence was offered to corroborate the testimony of the accomplice. (Hanshaw, L.; CACR 05-628; 2-22-06; Bird)

Mitchell v. State: **[forfeiture; federal guilty plea agreement]** The appellant's guilty plea agreement to federal drug charges did not operate to waive the appellant's right to contest a state forfeiture proceeding involving $22,543. **[limitations period; tolling]** The State neglected to toll the limitations period to invoke the one-year savings statute (pursuant to A.C.A. §16-56-126) because it did not file the forfeiture complaint within the 120 day period as set forth in A.C.A. §5-64-505. The trial court erred in granting the State's motion to strike, and the case was reversed and remanded. (Clawson, C.; CA 05-737; 2-22-06; Neal)

Scott v. State: **[right to counsel; indigency; posting of bond]** The trial court abused its discretion in determining that the appellant was not indigent (and in requiring the appellant to stand trial and represent himself) merely because he or his sisters were able to make a bond (in the amount of $40,000) and obtain his release from jail before trial. The case was reversed and remanded for re-trial. (Maggio, M.; CACR 04-922; 2-22-06; Bird)

Wilkerson v. State: The appellant was convicted of capital murder and sentenced to life imprisonment without parole. **[confession; suppression; *Miranda* warnings; rights form]** The totality of the circumstances surrounding the interrogation of the appellant revealed that the appellant knowingly and intelligently waived his *Miranda* rights prior to giving a confession. The rights forms used adequately explained the appellant's right to have an appointed lawyer, free of charge, present during questioning, and the trial court did not err in refusing to suppress the appellant's confession. (Langston, J.; SCCR 05-1187; 2-23-06; Imber)

Cox v. State: **[probation; revocation; sentence]** Where the appellant was originally placed on four years' probation and fined, no sentence was imposed on the appellant, and upon revocation A.C.A. § 5-4-309(f)(1) applied (rather than A.C.A. § 16-93-402(e)(5)), and the trial court did not err in ordering the appellant to serve a forty year sentence upon revocation as it could have done originally. **[ineffective assistance of counsel; seventy percent rule]** The appellant's counsel did not have a legal basis upon which to object to the sentence given by the trial judge, and the appellant failed to illustrate that the outcome of the case would have been different had his counsel objected. (Erwin, H.; SCCR 05-80; 2-23-06; Dickey)

CIVIL

Keahey v. Plumlee: **[realtor arbitration]** Ark. Code Ann. 17-42-107 does not bar a realtor from going to circuit court to confirm an arbitration award. The statute precludes a broker from "suing" to recover a commission unless the suit is against his principal broker. (Switzer, D.; CA 05-482; 2-1-06; Vaught)

Cox v. Vernon: **[civil procedure rule 8/pleading damages]** The rule requires that claims for unliquidated damages, if not specified, are limited to an amount less than that required [$75,000] for removal. This provision did not preclude recovery of damages in excess of $75,000. Removal was not an issue in the case as there was no diversity of citizenship. The purpose of the rule is not to limit damages but to prevent a party from avoiding removal. (Maggio, M.; CA 05-749; 2-1-06;

Bird)

Industrial Electronic Supply v. Lytle Manufacturing: **[ucc damages]** The seller failed to raise the lack of the buyer's notice of defective goods until opening argument. The failure to properly plead notice is waived unless pled with specificity. (Yates, H.; CA 04-1351; 2-1-06; Robbins)

Byme, Inc. V. Ivy: **[contract]** Provision in contract was a condition subsequent, and it relieved the relocator company from its obligations to buy employee's home when the employer failed to perform its obligations. (Laser, D.; CA 05-28; 2-1-06; Robbins)

White v. Ark. Capital Corp. : **[illegal exaction]** Taxpayer's suit was moot. Acts were complied with in good faith and all appropriations have been spent. (Smith, V.; SC 05-337; 2-2-06; Imber)

El-Farra v. Sayyed: **[ecclesiastical matters]** Circuit court lacked subject matter jurisdiction over dispute between minister and his principal because the dispute involved ecclesiastical matters. (Sims, B.; SC 05-419; 2-2-06; Gunter)

Posey v. St. Bernard's Healthcare: **[insufficiency of process]** Original complaint was a nullity because attorney signing it was not licensed in Arkansas. Amended complaint was signed by licensed attorney and filed within 120 days of the original complaint but was not served. One of the defendants obtained a copy of the amended complaint from the clerk's office, and it answered both complaints and did not raise the defense of insufficiency of service of process. The defendant had knowledge of the amended complaint and was required to raise the defense of insufficient process or the defense is waived. Here, the defense was waived.
(Burnett, D.; SC 05-383; 2-2-06; Corbin)

Baptist Health v. Murphy: **[preliminary injunction]** Baptist adopted policy that doctors who had an ownership interest in another hospital could not have privileges at Baptist. Doctors sought a preliminary injunction to bar Baptist from enforcing the policy. Court properly issued injunction as doctors demonstrated that they would likely succeed on the merits of their tortious interference claim and that absent the injunction, they would suffer irreparable harm.
(Kilgore, C.; SC 04-430; 2-2-06; Hannah)

Austin v. Centerpoint Energy: **[PSC jurisdiction]** Supreme Court had previously held that PSC lacked the authority to make public policy and authorize a surcharge on gas customers to render assistance to low-income customers. In this case, a customer who had paid the surcharge bought suit in circuit court in the nature of an illegal exaction claim. PSC had jurisdiction over claim as basis of the claim was a rate issue involving the refund of the surcharge and was not a tax claim.
(Moody, J.; SC 05-72; 2-2-06; Glaze)

Harris v. Altheimer: **[teacher dismissal]** Plaintiff was not a "teacher" under the Fair Dismissal Act. He held a position that did not require a teaching license. (Dennis, J.; CA 05-646; 2-8-06; Griffen)

Ponder v. Gorman: **[negligent entrustment]** Summary judgment was proper because the

plaintiff failed to establish the element that the driver was incompetent, inexperienced, or reckless prior to entrusting the vehicle to him. (Dennis, J.; CA 05-817; 2-8-06; Baker)

Smith v. AJ&K Operating Co: **[mandate]** Trial court , upon remand, must execute the appellate court's mandate. (Guthrie, D.; SC 05-193; 2-9-06; Corbin)

Health Facilities Management Corp. v. Hughes: **[long term care]** Under A.C.A. 20-10-1209, only a licensee of a nursing home may be sued for violation of a resident's rights. The owner of the facility, not the manager, is required to be licensed. There is no concept of a "de facto licensee" contemplated by the statute. The common law negligence claim is separate from the statutory claim for violation of a resident's rights. (Proctor, W.; SC 05-90; 2-9-06; Brown)

Bradley v. Welch: **[negligence/failure to supervise]** Child was injured at a swimming party. There was no conscious and deliberate shifting of responsibility from the parent to the sponsors of the party. Parent was still supervising the child. (Johnson, K.; CA 05-588; 2-15-06; Pittman)

Weaver v. Simes: **[extraordinary writs]** Writs of prohibition, mandamus, or certiorari are not available when there is an adequate remedy at law, such as appeal. (Simes, L.; SC 05-651; 2-16-06; Brown)

Helena Daily World v. Simes: **[prior restraint]** Injunction issued to prevent newspaper from reporting testimony given in open court during a pretrial hearing was an unconstitutional prior restraint on the press. (Simes, L.; SC 05-146; 2-16-06; Dickey)

Fryar v. Touchstone Physical Therapy: **[negligence / violation of statute]** Violation of statute that therapist practiced chiropractory without a license did not justify giving of AMI 601 instruction (violation of statute was evidence of negligence). **[expert witness]** Expert's affidavit was not sufficient to avoid summary judgment because it did not state the standard of care nor did it connect the alleged negligence with the victim's injuries. (Sims, B.; SC 05-394; 2-16-06; Imber)

Lewis v. Creilia: **[judicial estoppel]** Plaintiff did not list lawsuit in his bankruptcy proceeding, and as a result, trial court found that he was judicially estopped from prosecuting lawsuit in state court. A genuine issue of fact existed as to whether plaintiff intended to manipulate judicial process to gain an unfair advantage, which is an essential element for judicial estoppel. (Patterson, J.; SC 05-660; 2-16-06; Gunter)

State v. Jeske: **[condemnation]** State failed to follow A.C.A. 22-2-106, which sets out the procedure for condemnation, in condemning land for park use. Argument that since funding for the property stemmed from a specific appropriation, the appropriation act was specific legislation negating the requirement to follow the condemnation process was without merit. (Scott, J.; SC 05-684; 2-16-06; Corbin)

Swink v. Lasiter Construction Co.: **[prior conviction]** A convicted felon can be questioned about the nature of the offense. **[interrogatories]** Answers to interrogatories were not inconsistent

because the same jurors did not agree to all the questions. It is not necessary that each interrogatory be signed by the same nine jurors in order for each interrogatory to be considered the verdict of the jury.**[attorney fees]** The judge did not explain his basis for reduction of the hourly rate in awarding attorney fees; therefore, the matter must be remanded for an explanation. (Proctor, W.; CA 05-563; 2-22-06; Gladwin)

Daniels, Secretary of State v. Dennis: **[Act 1448/appointed judge eligibility to run for position]**
Act is unconstitutional because it sets out additional qualifications for judicial office when such qualifications are fixed by the constitution. (Fox, T.; SC 05-1351; 2-23-06; Hannah)

DOMESTIC RELATIONS

Nancy Gail Epperson v. Charles Lawson Epperson: **[marital property]** The trial court found that appellee husband's termination benefits under his contracts of employment were not marital property. Husband was a State Farm Insurance agent and derived most of his compensation from commissions earned on renewal premiums. Termination benefits were governed by his "agency agreement" with State Farm and his "transition agreement." The trial court found the termination benefits were not marital property. The Court of Appeals affirmed, based upon *Lawyer v. Lawyer*, 288 Ark. 128, 702 S.W.2d 790 (1986). The Supreme Court found in *Lawyer* that the same type of benefits in that case were too speculative to be considered marital property. Because an agent's compensation, and thus the termination benefits, were based on commissions generated from renewal premiums, benefits that might be received in the future would bear no relation to present earnings. (Clawson, C.; No. CA 05-548; 1-1-06; Crabtree)

Vicki McKinney v. Randall K. McKinney: **[modification of child support–changed circumstances]** The primary issue was whether the facts of the non-custodial father's financial situation constituted changed circumstances for purposes of the trial court's order of a reduction in child support. The Court of Appeals affirmed the trial court. (Gunn, M.A.; No. CA 05-381; 2-1-06; Robbins)

Tisha Pauline Sill v. Charles Bradley Sill: **[child custody--relocation]** Appellant custodial mother filed a petition to relocate from Bentonville to Miami, Oklahoma, about one hour and fifteen minutes away. Appellant moved before the court ruled on her motion. The trial court found that the appellee father had rebutted the presumption in favor of relocation, denied appellant mother's petition to relocate, and ordered her to move back to Arkansas. The court determined that the sole purpose of the relocation was to thwart the father's visitation with his children and found that relocation was not in the best interests of the children. In affirming the trial court, the Court of Appeals outlined the factors from *Hollandsworth v. Knyzewski*, 353 Ark. 470 (2003), and found that the trial court had applied the presumption in favor of relocation required by *Hollandsworth*. (Duncan, X.; No. CA 05-703; 2-15-06; Griffen)

State of Arkansas Office of Child Support Enforcement v. Bobby Ray Adams: **[child support; UIFSA]** The trial court denied registration of a 1984 divorce decree from the state of Washington

and found that the defendant had fulfilled his child support obligation. In affirming the trial court, the Court of Appeals held that the Arkansas court used express language nullifying the Washington decree, entered in 1984, at its first opportunity after being made aware of the existence of the divorce decree. It could not have addressed the nullification issue any earlier. Second, the Court found that OCSE was barred by res judicata from relitigating the issue of satisfaction of the obligation because it did not appeal from a 1999 order finding that appellee had satisfied his child-support obligation and owed no arrearages. (Culpepper, D.; No. CA 05-802; 2-15-06; Glover)

Donald Gene Hudson, Jr. v. Christina Kyle: **[visitation]** This is the second appeal of this case, which was remanded for a new trial on the issue of termination of visitation. See *Hudson v. Kyle*, 352 Ark. 346, 101 S.W.3d 202 (2003). The trial court denied the appellant father's request for visitation with his daughter, finding that it would not be in the child's best interests for visitation with her father to resume and that, in fact, it would be extremely harmful for such visitation to take place after four years. The Supreme Court found that the trial court's decision was not clearly erroneous, that the court had not clearly erred in its judgment of the credibility of the witnesses, and that the court had not erred in revisiting facts received in the earlier trial of this matter in 2001. The judgment was affirmed. (Garrett, R.; NO. SC 05-509; 2-23-06; Glaze)

PROBATE

Terry Hooten, Special Adm'r v. Jacqueline Jensen: **[mental capacity; undue influence]** The Court of Appeals found the evidence was sufficient to affirm the trial court's finding that the decedent was mentally competent to make certain decisions and that he was not unduly influenced by his wife. (Gardner, S.; No. CA 05-742; 2-8-06; Gladwin)

JUVENILE

Arkansas Dept. of Human Servs v. Dix: **[d-n adjudication/disposition]** DHHS appealed arguing that the trial court erred in its disposition concerning custody of the children and in failing to issue findings of fact and conclusions of law as requested by DHHS pursuant to Ark. R. Civ. P. 52. Appeal dismissed because the appellate court lacked jurisdiction to hear the appeal due to DHHS' failure to file a timely appeal. The trial court announced its ruling on March 11, 2005, at which time DHS objected to the custody of the children. On March 28th DHHS filed a motion requesting the court to "set forth separate written findings of fact and conclusions of law." Within an hour of the motion's filing, the trial court set forth 14 specific findings in an order. On May 11, 2005, DHHS filed a notice of appeal of the adjudication order, stating that its motion for findings of fact was deemed denied on April 27, 2005.

The Court of Appeals held that the time to appeal was not tolled by the Rule 52 motion made on March 28. The court distinguished a Rule 52(a) motion from a Rule 52(b) motion and found that DHHS' motion was made under Rule 52(a). Ark. R. Civ. P. 52 was amended in 2004 to specifically provide that motions for findings of facts and conclusions of law made before the entry of judgment are made under Rule 52(a), while Rule 52(b) is reserved for motions or

requests, made not later than ten days after entry of judgment, requesting amended or additional findings of fact. The appellate court also noted that it disagreed with DHHS assertion that the 52(a) motion was "deemed denied" on April 27. Instead of denying the motion, the trial court entered 14 written findings of fact and conclusions of law; the relief DHHS requested. If DHHS was dissatisfied with findings made by the trial court it was incumbent upon them to move for additional findings or amended findings within 10 days as provided in Rule 52(b). (Hewett, M.; 05-875; 2-8-2006; Robbins)

Neves Da Rocha v. Arkansas Dept. of Human Servs.: **[TPR – res judicata & collateral estoppel]** Infant was adjudicated dependent-neglected as a result of multiple broken bones of varying ages. At the time of the adjudication all bone tests were normal, but one test on brittle bone disease was not back in time for the adjudication hearing. Appellant's attorney objected and requested a continuance at the adjudication hearing, claiming that the statute mandating that the adjudication hearing be held within 60 days was unconstitutional and violated his client's procedural due process. The Supreme Court had ruled in *Hatchock*, that time constraints in the juvenile code control over the Arkansas Rules of Civil Procedure because it serves a specific purpose of expediting hearings involving children in out-of-home placements.

The trial court adjudicated the child dependent-neglected finding that the injuries were not accidental; that one or both parents were the likely ones who caused the injuries despite their denial; the X-rays indicated that the fractures were from varying ages and were of the type consistent with child abuse, and the radiologist findings were suspicious of trauma. The court also found that the observation of medical personnel did not reveal symptoms of brittle bone disease, but the test that would determine this disease had not been returned. The adjudication order was not appealed. On April 7th , trial court found the goal should be adoption at the disposition hearing and on May 13th the court entered a no reunification order finding that the child had been subjected to extreme and repeated cruelty, that the injuries were not accidental, that one or both parents caused, and that the brittle bone test had come back with no abnormal findings. At this hearing the trial court denied appellant's motion to call an expert witness to testify as to alternative theories for the infant's injuries. The court ruled that it was res judicata and not relevant to this stage of the proceedings. Appellants filed a notice of appeal after the no-reunification order and the TPR order handed down on November 16, 2004.

Appellants' issues on appeal all related to the trial court's denial of the expert testimony at the no-reunification hearing to refute a finding of child abuse by the parents. The appellate court noted that the time to present that testimony was prior to the adjudication. The appellate court found that it is not necessary to address appellant's res judicata argument because appellant failed to appeal the adjudication order. The Supreme Court has made it clear in *Jefferson* and *Lewis* that the appellate court will not will not re-litigate the adjudication hearing at the termination of parental rights hearing.

The denial of the continuance at the termination hearing and the denial to let the expert examine the infant only to refute the injuries of the finding of the adjudication are not permitted under *Jefferson*. (Williams Warren, J.; 04-915; 12-7-2005; Glover)

Smith v. Arkansas Dept. of Human Servs.: **[motion to withdraw & No-Merit TPR]** This is no-merit brief pursuant to *Linker-Flores* and a motion to withdraw as counsel. The children came into foster care as a result of a methamphetamine lab raid in a closet in an adjacent room in which the children sleep. At the time of the termination hearing the mother was incarcerated. Appellant's attorney filed for a continuance at the TPR hearing due to her failure to have her client transported from prison to the hearing; however, the appellant's testimony was taken via telephone.

Linker-Flores sets forth the no-merit procedure in termination of parental right appeals. The attorney may petition to withdraw only after a conscientious review of the record, counsel can find no issue of arguable merit for appeal. Counsel's petition must be accompanied by a brief discussing any arguably meritorious issue for appeal. The Court of Appeals cited *Linker-Flores II* and *Lewis* and stated that "a conscientious review of the record requires the appellate court to review all pleadings and testimony in the case on the question of sufficiency of the evidence supporting the decision to termination when the trial court has taken the prior record into consideration in its decision. The Supreme Court further held that only adverse rulings arising at the TPR hearing need be addressed because the prior orders are consider final appealable orders pursuant to Ark. R. App. P. – Civil (2)(c)(3)."

The trial court's findings constitute more than clear and convincing evidence to terminate parental rights. The only adverse ruling at the trial court was for the continuance. The granting or denying a continuance is in the sound discretion of the trial court and the court should consider the following factors:

1) the diligence of the movant;
2) the probable effect of the testimony at trial;
3) the likelihood of procuring the witnesses' attendance in the event of the postponement;
4) the filing of an affidavit, stating not only what facts the witness would prove but what the appellant believes to be true;
5) must show prejudice from denial.

The attorney requesting the continuance was not diligent because she did not request the continuance until the day of the trial and her client was not prejudiced because she was able to participate in the hearing via telephone. TPR and counsel's motion to withdraw granted. (Zimmerman, S.; 04-1309; 12-07-05; Roaf)

Causer v. Arkansas Dept. of Human Servs.: **[No-Merit TPR]** Rebriefing ordered to comply with *Linker-FloresII* to address all the adverse rulings at the termination of parental rights hearing. The attorney petitioned the court to reconsider rebriefing and filed an attachment to her petition that specifically addressed all the adverse rulings in the termination hearing indicating that they had no merit. The Court of Appeals treated the attorney's petition as a petition for rehearing. After a review of the record and all adverse rulings, the Court affirmed the TPR without rebriefing and granted the attorney's petition to withdraw. (Isbell, G.; 05-464; 12-14-2005; 1-11-

2006; Roaf)

DISTRICT COURT

State v. Herndon: **[Ark. R. App. - Crim. 3.]** Game and Fish Commission Regulation 01.00-H provides that the maximum penalty for violating an Arkansas Game and Fish Commission regulation is a fine up to $1000 and a term of up to one year in jail. Therefore, violations of AFGC regulations qualify as misdemeanors so as to allow a state appeal under Ark. R. App. P. - Crim 3. However, since *State v. Bickerstaff*, 320 Ark. 641, 899 S.W. 2d 68 (1995) controlled at the time of this appeal by the State and that case held that violations of AFGC regulations are violations under state law, the State's appeal was dismissed. For all future cases, the court overruled *State v. Bickerstaff, supra,* to the extent is stands for the proposition that violations of AFGC regulations do not qualify as misdemeanors. (Yates, J.; CR 05-612; 02-02-06; Imber)

EIGHTH CIRCUIT

United States v. Boyster **[aerial drug surveillance]** Under Arkansas law, the lack of proclamation calling up the National Guard did not make the Guard's involvement in counterdrug surveillance unlawful, particularly when the governor has specifically certified that the counterdrug plan complies with state law. Aerial surveillance had not occurred within the curtilage of defendant's property and was not unlawful. In any event, so long as the aerial surveillance took place in an area where the public could lawfully fly and at an altitude generally used by the public, defendant had no reasonable expectation of privacy, and the overflight did not violate the Fourth Amendment. (E.D. Ark.; # 05-1690; 2-10-06)

Harris v. AR State Highway: **[settlement]** District court did not err in enforcing settlement as plaintiff's attorney had express authority to settle. (E.D. Ark.; # 05-2005; 2-10-06)

Robinson v. Terex Corp.: **[torts]** District court did not err in granting defendant's motion for summary judgment as there was no genuine issue of material fact concerning defendant's liability for the accident which is the subject of this wrongful death action. (E.D. Ark.; # 05-2337; 2-15-06)

Vaughn v. Greene County: **[qualified immunity]** Sheriff was entitled to qualified immunity as there was no evidence he knew plaintiff's decedent had serious medical needs and deliberately disregarded them. (E.D. Ark.; # 04-3916; 2-17-06)

U.S. SUPREME COURT

Oregon v. Guzek: **[resentencing]** At the guilt phase of Guzek's capital murder trial, his mother was one of two witnesses who testified that he had been with her on the night the crime was committed. He was convicted and sentenced to death. Twice, the Oregon Supreme Court vacated the sentence and ordered new sentencing proceedings, but each time Guzek was again sentenced

to death. Upon vacating his sentence for a third time, the State Supreme Court held that the Eighth and Fourteenth Amendments provide Guzek a federal constitutional right to introduce live alibi testimony from his mother at the upcoming resentencing proceeding.

Held: The Supreme Court disagreed. The Constitution does not prohibit a State from limiting the innocence-related evidence a capital defendant can introduce at a sentencing proceeding to the evidence introduced at the original trial. The State may set reasonable limits on the evidence a defendant can submit, and control the manner in which it is submitted. (#04-928; 2-22-06)