APPELLATE UPDATE

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ANNOUNCEMENTS

On October 26th, the Supreme Court published two *per curiam* orders for comment**:**

Report of the Legislative Task Force on District Courts, a copy was included in the weekly mailout, and the comment period ends December 15th;

Filing Fee for Supreme Court and Court of Appeals, comment period ends December 1st, advises Bar current fee is not providing sufficient revenues for Supreme Court Library and seeks ideas on possible solutions.

CRIMINAL

Haley v. State: **[revocation/probation]** An uncounseled plea in district court did not form the sole basis for the revocation of probation. The circuit court did not rely solely on the judgment in district court but made its own findings based upon the evidence introduced before it.(Weaver, T.; CACR 06-20; 10-4-06; Gladwin)

Morris v. State: **[evidence rules 403 and 404]** Based upon the degree of similarity between the two rapes, the court properly admitted the evidence of another rape in the prosecution of the pending case. (Humphrey, M.; SCCR 06-287; 10-5-06; Imber)

McKeever v. State: **[firearm enhancement]** Defendant was sentenced for multiple firearm offenses based upon the commission of three separate offenses during the same incident. Each terroristic act was a separate offense, each of which could have been committed with or without a firearm. Since each was committed with a firearm, defendant could be sentenced for multiple firearm enhancements. (Proctor, W.; SCCR 06-464; 10-5-06; Hannah)

Hull v. State: **[access to DHS records]** Defendant was properly refused permission to access

Children's Reporting and Information records. Court's review in camera showed that records did not contain any exculpatory evidence. (Reynolds, D.; CACR 05-442; 10-11-06; Hart)

Williams v. State: **[evidence of substantial danger of death or serious injury]** Evidence of engaging in a rampage and intentionally attempting to strike the victims with a vehicle met this standard. (Proctor, W.; CACR 06-429; 10-11-06; Pittman)

Burroughs v. State: **[evidence suppression]** As required by the decision in *State v. Brown*, for the search in this case to have been consensual, it must have been preceded by notice of the right to refuse consent, which was not given; therefore, the evidence should have been suppressed. (Wright, J.; CACR 05-1169; 10-11-06; Glover)

Reynolds v. State: **[dwi]** DWI breathalyser results were admissible over challenge that defendant was not fully notified of right to have her own test conducted. Under facts of case, notice that was given did not preclude her from requesting another test. (Storey, W.; CACR 06-403; 10-25-06; Baker)

Walker v. State: **[rule 37]** Ineffective assistance of counsel was not established; the trial court did not err in denying the petition without a hearing; and court did not err in denying a request to compel production of counsel's file. (Gibson, B.; SC CR 05-1322; 10-26-06; Per Curiam)

Montgomery v. State: **[venue]** Defendant failed to establish that a black defendant could not get a fair trial in Greene County. **[suppression]** Defendant's statement was voluntary and there was no showing that it was induced by a threat or promise of leniency. **[telephone conversation recording]** Telephone conversation was introduced even though neither party (defendant and another) to the conversation testified. Defendant contended that admission violated Omnibus Control and Safe Streets Act. Officer testified that one of the parties to the conversation consented. Officer testified that person agreed to cooperate and initiate the call, but the person could not be located at time of trial. Consent does not have to be shown by direct testimony of one of the parties to the call, where the call was made in the presence of officers while the call were being recorded. (Goodson, D.; SCCR 06-62; 10-26-06; Hannah)

Bruce v. State: **[suppression/child pornography]** Defendant's wife found photos and other evidence in home, called the police and officer viewed the items. Defendant was convicted of rape. Wife was not a state actor when she searched her husband's things. Police did not exceed the scope of wife's search by viewing films, tapes and disks because wife had common authority over the items which she discovered in a part of the house to which she had joint access and control; therefore, she could turn the items over to the police. (Laser, D.; SCCR 06-496; 10-26-06; Corbin)

CIVIL

BKD v. Yates: **[attorneys' fees]** Court upheld the forum-selection clause and dismissed action filed in Arkansas and enforced the selected forum of Missouri. In order to be a prevailing party under Arkansas law, there must be a resolution of the underlying merits of the claims at issue,

which was not the case, regardless of the fact that the action was dismissed with prejudice as to litigation in Arkansas. (Proctor, W.; SC 06-276; 10-5-06; Corbin)

Baptist Health v. Haynes: **[class certification/rule 52]** Court's order on certification was insufficient. The court was required to enter specific findings of fact and conclusions of law in response to request pursuant to Rule 52 of the Rules of Civil Procedure. (Fox, T.; SC 06-435; 10-5-06; Glaze)

Council of Co-Owners for Lakeshore Resort v. Glyneu: **[stare decisis]** Trial court properly dismissed action based on *stare decisis* – not *res judicata*. Court had previously considered same issue and although party now before the court is not the same, present party was aware of decision prior to purchase of property and no manifest injustice is present. (Cook. V.; SC 06-354; 10-5-06; Brown)

Bell v. Jefferson Hospital Assoc.: **[amended complaint/relation back]** The requirements of Rule 15 (c) were met and the amended complaint (naming the correct party) related back to the filing of the original complaint and thus was within the limitations period. (Dennis, J.; CA 06-249; 10-11-06; Robbins)

Continental Carbonic Products v. Cohen: **[contract]** Although material breach by one party excuses the performance of the other party, evidence in this case justified jury in finding that party's breach was not material so as to excuse performance by the other. (Moody, J.; CA 05-1091; 10-11-06; Crabtree)

Morgan v. Chandler: **[attorney lien]** Attorney filed lien against former associate with respect to fee paid to associate in case begun when associate was still in practice with the attorney. Attorney lien statute does not apply in this situation. There was no attorney client relationship between the attorneys which is an express prerequisite of the statute. (Wright, J.; SC 06-310; 10-12-06; Brown)

Byme, Inc. v. Ivy: **[contracts]** Evidence supported verdict that contract between homeowners and realty company was for the realty company to purchase the house and not merely an agency agreement to list the house for sale. (Laser, D.; SC 06-147; 10-12-06; Gunter)

Cincinnati Ins. Co. v. Johnson: **[new trial/time]** Court did not have jurisdiction to grant a new trial pursuant to Rule 59 when it did so beyond the thirty day period specified in the order. The motion had been deemed denied prior to the entry of the order (Hill, V.; SC 06-355; 10-12-06; Gunter)

Pakay v. Davis: **[usury]** Party's defense to claim of usury was that Amendment 60 keyed the calculation of the lawful interest rate to the Federal Reserve Discount Rate and that rate has since been abolished. However at the time of its abolishment, the Federal Reserve Board adopted other rates which apply in place of the Discount Rate. (Sutterfield, D.; SC 06-360; 10-12-06; Glaze)

Watson Chapel Sch. Dist. v. Russell: **[teacher fair dismissal act]** In order for a court to make a

determination of whether the school district substantially complied with the Act, it must examine not only the notice itself but also any record of the school-board hearing made pursuant to the Act. (Jones, B.; SC 06-60; 10-12-06; Imber)

Mountain Pure v. Affiliated Foods: **[contract/summary judgment]** Case over complex supply contract case which was terminated for alleged defective packaging issues and cure rights could not be disposed of via summary judgment but trial of issues was necessary. (Sims, B.; CA 05-837; 10-25-06; Vaught)

Robbins v. Johnson: **[medical malpractice]** Medical Malpractice action was filed without affidavit of an expert as required by statute because the plaintiff alleged that an affidavit was not necessary because damages would be clear and unmistakable to a layperson. Trial court properly concluded that such was not the case and expert testimony was required; consequently, it was proper to dismiss the case with prejudice. (Wilkinson, N.; SC 06- 163; 10-26-06; Brown)

DOMESTIC RELATIONS

Mark Simmons v. Angie Dixon: **[domestic abuse; order of protection]** The trial court's granting an order of protection based upon appellee's allegations that the appellant had threatened her and her dog was affirmed. The Court of Appeals found that the evidence was sufficient to show that appellant sent threatening text messages to appellee and that appellee claimed she was afraid after receiving the messages. That was sufficient to show the infliction of fear of "imminent" physical harm under the domestic abuse statutes. (Honeycutt, P.; No. CA05-1398; 10-4-06; Bird)

Margaret Lillette Smith v. Robert McCracken, et al.: **[adoption; child custody; jurisdiction]** The case began as a contested adoption in which two great-aunts of the child had both filed petitions of adoption. Both adoption petitions were dismissed on procedural grounds and the trial court expressly elected to treat the case as a custody matter. Custody was granted to the appellees, great-aunt and her husband, and visitation was awarded the appellant great-aunt. The sole issue on appeal was whether the trial court had jurisdiction to enter a custody order once it dismissed the adoption petitions. The Court of Appeals said it did have jurisdiction based upon the express terms of Amendment 80, Administrative Order No. 14, and *Moore v. Sipes*, 85 Ark. App. 15, 146 S.W.3d 903 (2004). (Vittitow, R.; CA06-139; 10-4-06; Griffen)

OCSE, et al. v. Robert W. Gauvey: **[spousal support order]** The issue in the case is whether OCSE can enforce a spousal support order in a foreign divorce decree from Germany. The support order provided for the appellee noncustodial father to pay monthly child support and monthly spousal support. The appellant mother, through OCSE, filed a petition to register her German order under UIFSA and the Act for the Recovery of Maintenance in Relations with Foreign States German Foreign Maintenance Act of December 19, 1986. The trial court found that it could not register the judgment for spousal support because OCSE was not authorized to enforce the payment of spousal support. The trial court granted judgment to the appellant mother

for past due child support and ordered the appellee to pay monthly on the judgment in addition to his monthly support payment. The Court of Appeals held that OCSE does have the authority to collect spousal support in conjunction with child support and set out statutory support for the decision. (Clawson, C.; CA06-103; 10-25-06; Glover)

Sharon J. Sturdivant v. Timothy L. Sturdivant: **[Arkansas Rules of Professional Conduct, Rule 1.18 (2006)]** Case of first impression involving the interpretation of Rule 1.18 of the Arkansas Rules of Professional Conduct. The issue on appeal is whether the circuit court erred in disqualifying attorney James L. Tripcony and his law firm from representing the appellant Sharon Sturdivant in post-decree custody proceedings against the appellee, based upon the fact that the appellee had previously consulted with another lawyer in that firm concerning the same custody matter. In affirming the trial court, the Supreme Court reviewed Rules 1.18 and 1.9 of the Rules of Professional Conduct. Rule 1.18 specifies the duties to a prospective client. Rule 1.9, which is specifically referenced in Rule 1.18, deals with duties to former clients. In affirming the circuit court's disqualification of Mr. Tripcony to represent the appellant, the Supreme Court said that it could not say that the circuit court clearly erred in finding that harmful information would have been forthcoming during appellee's conference with another attorney from the Tripcony Law Firm about the change-of-custody proceeding. Appellee testified that he gave her a copy of his journal, told her about facts that were not in the journal, and disclosed everything he knew, as well as his concerns about his children and his former wife. He acted upon advice she gave him during the consultation. The Court agreed with the circuit court that a lawyer who consults with a prospective client about a change-of-custody proceeding will necessarily become privy to information that could be used to the disadvantage of that person in the same proceeding. Similarly, the circuit court could reasonably conclude that a prospective client would not know whether the information disclosed during the consultation "could be significantly harmful." (Pierce, M.; SC05-1305; 10-26-06; Imber)

JUVENILE

Flannery v. Arkansas Dept. of Human Servs.; **[Supreme Court Per Curiam]** The Supreme Court granted an incarcerated parent's motion for a belated appeal and temporary stay. He claimed that his attorney did not inform him that his rights had been terminated and that he had a right to appeal. The Supreme Court remanded it to the Circuit Court to determine two factual questions, did the appellant receive notice and did he receive notice of his right to appeal the termination of parental rights order. (06-1081; 11-12-2006)

Sowell v. Arkansas Dept. of Human Servs.; **[TPR]** TPR affirmed. Appellant first argued that the trial court erred because the petitioner did not provide notice that a TPR hearing would be conducted at the adjudication hearing. However, the appellants did not preserve this issue for appeal because they did not appeal the adjudication order. Appellants then challenged the sufficiency of the evidence. The appellate court noted that the children had been in and out of foster care over the last two years, that the record had abundant proof of environmental neglect, and that despite intensive efforts made by DHHS no appreciable change had occurred. (Collier, L.; 05-1137; 10-25-2006; Pittman)

Arkansas Dept. of Human Servs. v. J.N.: **[Maltreatment Finding]** The Circuit Court was affirmed when it ordered DHS to order an in-person administrative hearing and then remove the appellee's name from the Central Registry. Ark. Code. Ann. §25-15-213(1) requires that every party shall have a right to appear in-person or by counsel. In the minor's hearing the administrative judge (AJ) conducted a phone hearing and the minor objected to the hearing arguing that it was not in-person as required by law. The AJ stated that it was adequate. On May 12, 2005, the Circuit Court ordered the DHHS attorneys to conduct an in-person hearing at the earliest possible convenience, pursuant to the law. This order was entered on June 25, 2005, after approval by the DHHS attorney.

The minor then filed a motion to remove his name from the registry pursuant to Ark. Code Ann. §12-12-512(c)(2) which requires that the Administrative Hearing be held within 180 days from request of the receipt of the hearing or the petitioner's name shall be removed from the Central Registry. The time from the entry of the Circuit Court's order to the date the minor filed his petition for removal totaled 180 days. DHHS argued that it was not the responsibility of the attorneys who appeared in court to notify the DHHS Office of Appeals and Hearing. DHHS had notice of the court's order and it was not the responsibility of the minor to request another hearing. (Smith, K.; 06-286; 10-11-2006; Roaf)

Arkansas Dept. of Human Servs. v. Homan: **[Maltreatment Finding]** The Circuit Court was affirmed in finding that the administrative law judge's opinion was not supported by substantial evidence and in ordering the appellee's name to be stricken from the Central Registry. The appellee was a school teacher who administered corporal punishment to a student, pursuant to the school district's policy, the School Discipline Act, and at the consent of the parents who attended the 3 licks that the child received. The punishment was administered with a paddle that was two and one-half inches wide and two feet in length. The child did not cry out, no one attempted to stop the punishment, and the child went immediately back to class without complaint. In addition, although there was some bruising, a doctor stated that it was not physical abuse. (Epley, A.; 05-1197; 10-4-2006; Pittman)

Yarborough v. Arkansas Dept. of Human Servs.: **[TPR]** TPR affirmed based on aggravated circumstances, that there is little likelihood that the services to the family will result in successful reunification. The trial court made eight specific findings of fact to support the TPR ruling. The only challenge made by the appellants was to the finding that the mother had been in counseling for nine years to no effect, despite direct evidence that supported this finding at the TPR provided by Dr. DeYoub, the caseworker and the mother's older daughter. (Collier, L.; 05-1014; 11-1014; 10-4-2006; Hart)

Kight v. Arkansas Dept. of Human Servs. (Kight II): **[Dissenting opinion on denial of petition to for rehearing]** The opinion states that the majority acknowledges that the trial court is bound by the decision in Kight I, yet the trial court failed to continue reunification services as required by the appellate court mandate. The trial court was not empowered to determine whether reunification services should be provided and the trial court lacked jurisdiction to consider a new

petition for TPR. Any proceedings contrary to the Supreme Court mandate were null and void. (Collier, L; O5-522; 8-30-2006; Bird)

EIGHTH CIRCUIT

Sylvester v. Fogley: **[civil rights/privacy]** Arkansas State Police did not violate plaintiff's constitutional rights to privacy by investigating an allegation that he had sexual relations with a crime victim during the course of the underlying criminal investigation. Applying the strict scrutiny test to the State Police's investigation, the State Police has a compelling interest in investigating whether a criminal investigator has had sexual relations with victims and witnesses as such activities endanger the public trust in the police activities, affect the fair and unbiased administration of justice, and could lead to the improper use of police authority to exploit crime victims. The investigation was narrowly tailored to serve the state's compelling interest in administering a fair and unbiased criminal justice system. (W.D. Ark.; #05-3492; 10-18-06)