APPELLATE UPDATE

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CRIMINAL

Gorman v. State: **[sufficiency of the evidence; driving with suspended license]** There was sufficient evidence to support the appellant's misdemeanor conviction for driving with a suspended license. **[*Miranda* warnings; traffic stop]** The appellant was not subject to custodial interrogation because the statement was given during a routine traffic stop. *Miranda* warnings were not required, and the trial court did not err in denying the appellant's motion to suppress. (Clinger, D.; SCCR 05-793; 4-6-06; Gunter)

Ellis v. State: The appellant was convicted of first degree murder and sentenced to life imprisonment. **[issue preservation]** Neither of the appellant's points on appeal (sufficiency of the evidence, and motion for mistrial) were preserved for review, and the appellant's conviction was affirmed. (Thomas, J.; SCCR 05-1116; 4-6-06; Hannah)

$15,956 in U.S. Currency, Wells & Martin v. State: **[forfeiture; sufficiency of the evidence; money in "close proximity" to controlled substances]** Under the circumstances, the trial court's determination that the money was "in close proximity" to the marijuana was not clearly erroneous, and the forfeiture was affirmed. (Moody, J.; SCCR 05-671; 4-6-06; Gunter)

Travis v. State: **[search and seizure; traffic stop; standing]** Where the appellant was driving a car rented to a third party who was not present, and where the appellant was not listed as an authorized driver, the appellant failed in his burden to establish standing to challenge the search. (Cottrell, G.; CACR 05-999; 4-12-06; Robbins)

State v. Townsend: **[rape shield]** The previous sexual assault of the minor victim by a person other than the defendant was not relevant to the allegations against the defendant except under certain limited circumstances. The trial court's decision to allow some evidence of the previous sexual assault was reversed and remanded for a new rape-shield hearing. (Keith, T.; SCCR 05-1263; 4-13-06; Dickey)

Armstrong v. State: The appellant was convicted of two counts of capital murder and sentenced

to life imprisonment without parole. **[*Batson*]** The circuit court did not err in denying the appellant's *Batson* challenge to the prosecution's use of peremptory challenges to strike a black male and a black female. **[mistrial]** The trial court did not err in refusing to grant a mistrial in response to an officer's testimony regarding a substance (possibly blood) which was found on a tissue at the crime scene. **[evidence; child support arrearage]** Evidence of an acrimonious divorce and evidence that the appellant owed the victim, his estranged wife, back child support could provide a motive for his wife's killing, and the circuit court did not abuse its discretion in admitting this evidence. **[third party death threat]** Because the evidence of third party guilt pointed to by the appellant did no more than create a suspicion or conjecture that the third parties may have played a role in the victim's death, the circuit court did not abuse its discretion in rejecting the evidence. **[prosecutor's comment on defendant's nonverbal conduct]** The prosecutor's reference to the appellant's reaction to pictures of his dead wife and her dead fetus were not a direct or even a veiled reference to the appellant's failure to testify. There was no reversible error. (Proctor, W.; SCCR 05-1028; 4-13-06; Brown)

Simmons v. State: The appellant was convicted of five counts of rape and one count of producing, promoting, or directing a sexual performance, and was sentenced to 210 years in prison. **[evidence; pornographic books, videos, photographs]** Although the pornographic books introduced as evidence were only marginally relevant to the case, any error was harmless in light of the wealth of other evidence. The introduction of five pornographic videos was not error. The trial court did not err in admitting pornographic photographs where the photographs corroborated the minor male victims' testimony. **[former deposition testimony]** The deposition testimony of a minor victim/witness (who committed suicide prior to trial) was properly admitted at trial. The deposition was taken in anticipation of a future civil trial, the declarant was unavailable at the criminal trial (due to his suicide), and the appellant had a prior opportunity to cross examine the declarant. **[length of sentence; cruel and unusual punishment]** The appellant's 210 year sentence was not unduly harsh. (Kemp, J.; CACR 04-1279; 4-19-06; Vaught)

Henley v. State: **[warrantless home search; condition of probation; consent in advance]** The officers made an understandable, but serious error by assuming that the appellant's probation agreement contained a typical consent-in-advance provision. The State failed to carry its required burden of proof (clear and convincing evidence) that the appellant consented to the search of his home. **[search subsequent to arrest]** Where the officers' initial intent in their contact with the appellant was to interrogate him about a burglary, the arrest of the appellant on a misdemeanor warrant was merely a pretext, and the evidence discovered pursuant to the search incident to arrest should have been suppressed. (Maggio, M.; CACR 05-1152; 4-19-06; Vaught)

Harris v. State: The appellant was convicted of two counts of capital murder and sentenced to life imprisonment without parole. **[sufficiency of the evidence]** The evidence clearly supported the jury's verdict that the appellant or his accomplice committed or attempted to commit robbery and committed the murders. **[pre-trial identification; issue preservation]** Although the appellant did file a motion to suppress the pretrial identification, there was no contemporaneous objection to the in court identification, and the issue was not preserved for appeal. **[evidence]** The trial court did not err in allowing a witness to testify regarding a conversation overheard by the witness two weeks prior to the murders, in which the appellant and a co-

defendant planned the robbery. (Langston, J.; SCCR 05-751; 4-20-06; Imber)

Sullivan v. State: **[sentencing; alternative sentences]** There was no error in the trial court's decision to accept the jury's recommended alternative sentences of probation and suspended sentences, and to impose fines as a condition of those sentences. **[enhancement; domestic battery committed in presence of child]** Once the jury determined that the defendant committed a designated felony in the presence of a child, the jury had no option other than imposing a sentence of not less than one year nor more than ten years' imprisonment. Where the jury elected on the verdict form to take "no action" with respect to the enhanced penalty, the trial court did not err in imposing a one year sentence, with one year suspended. (Epley, A.; SCCR 05-879; 4-20-06; Glaze)

State v. Hayes: **[statute of limitations]** The trial court erred in dismissing the felony information based on a violation of the statute of limitations. Although A.C.A. § 5-14-108 (sexual abuse in the first degree) was expressly repealed, it may be treated as remaining in force with respect to offenses committed prior to repeal. Likewise, the extension of time within which to prosecute a criminal action under 5-14-108 provided in section 5-1-109(h)(8) was part of the statutory scheme for enforcement of section 5-14-108. Because the alleged criminal acts occurred between 1995 and 1997 when section 5-14-108 applied, the criminal action could be filed within three years of the minor victim's 18th birthday. (Hanshaw, L.; SCCR 05-1277; 4-27-06; Hannah)

Gillard v. State: **[sufficiency of the evidence]** There was sufficient evidence to support the appellant's conviction and life sentence for the rape of the thirteen year old victim. (Yeargan, C.; SCCR 05-916; 4-27-06; Brown)

Steinmetz & Steinmetz v. State: **[warrantless home entry; probable cause; exigent circumstances]** Where deputies were responding to a security alarm which had been activated at the appellants' home, and found a door open, there were exigent circumstances for the officer to enter the home. The trial court did not err in refusing to suppress the contraband (controlled substances and paraphernalia) found in plain view in the home and after a search warrant was subsequently executed. (Langston, J.; SCCR 05-455; 4-27-06; Brown)

CIVIL

Ark. Wildlife Federation v. Arkansas Soil and Water Conservation Comm. **[Amend 35]** Amendment 35 does not grant the Game and Fish Commission exclusive authority to control, regulate, and manage all decisions regarding natural resources solely because those decisions might have some collateral impact on the state's wildlife or wildlife resources. (Proctor, W.; SC 05-1009; 4-6-06; Brown)

Wright v. City of Little Rock: **[appeal of administrative decision]** Citizen followed District Court Rule 9 in attempting to appeal a zoning decision, but appeal was dismissed for failure to

serve notice. The rule only required the filing in the circuit clerk's office and the rule does not require service. (Humphrey, M.; SC 05-683; 3-13-06; Hannah)

McLane Southern Inc. v. Davis, Dir., Ark. Tobacco Control Board: **[Unfair Cigarette Sales Act]** Amendments to the Unfair Cigarette Sales Act (Act 627 of 2003) are constitutional. Statute was previously found to be constitutional and the amendments in 2003 do not change that result. (Moody, J.; SC 05-990; 4-13-06; Gunter)

Crisler v. Unum Ins. Co. **[contract/choice of law]** Insurance policy did not have an effective choice of law provision. Under the facts relative to the application for insurance and the subsequent approval, Arkansas has the most significant relationship to the transaction and Arkansas law should apply. Insured died as a result of an allergic reaction to medication injected in her. Case is remanded for determination as to whether the manner of death was an "accidental bodily injury" under the policy and the law of Arkansas. (Fogleman, J.; SC 05-919; 4-13-06; Dickey)

Farmers Ins. v. Snowden: **[class certification]** Suit by insured against his insurer on issue of failing to compensate policy holders for the diminished value of their vehicles was properly certified for class action. (Ward, J.; SC 05-527; 4-13-06; Dickey)

Young v. Barbera: **/reduction of damages]** Court erred in reducing plaintiff's medical costs awarded in a default judgment. Defendant did not contest Plaintiff's medical bills but court thought bills were too much and doctor was not present to testify that they were reasonable and necessary. It is not necessary that doctor must testify that treatment was reasonable and necessary and plaintiff laid the evidentiary foundation. (Marschewski, J.; SC 05-778; 4-13-06; Brown)

Board of Embalmers and Funeral Directors v. Reddick: **[license suspension]** License was properly suspended by board for conduct which violated board's rules. (Vittitow, R.; SC05-952; 4-13-06; Hannah)

Rice v. Welch Motor Co.: **[property]** If a subsequent purchaser has actual notice of a prior unrecorded deed, he takes subject to it. (Switzer, D.; CA05 - 1136; 4-19-06; Neal)

Jayel Corp. v. Cochran: **[res judicata]** Attorney sued land developer on behalf of her client, an adjoining property owner, for damage done to client's property and filed a *lis pendens.* Developer sued attorney for abuse of process related to the *lis pendens*. Developer ultimately settled with the attorney's client but pursued claim against the attorney. Res judicata bars this action against the attorney. The attorney-client relationship is sufficient to satisfy the privity requirement for purposes of res judicata. The developer is attempting to relitigate an issue that has already been settled. (Lineberger, J.; SC 05-1005; 4-20-06; Glaze)

Anderson v. Stewart: **[pierce corporate veil]** Under facts of the case, corporate veil was properly pierced and shareholders in a limited liability company were held individually liable. Evidence

included: business records were not properly maintained; entity assets were removed so that there would not be assets to satisfy the judgment; and individuals closed the entity and set up a similar one under a different name. (Wright, H.; SC 05-886; 4-27-06; Glaze)

DOMESTIC RELATIONS

James Darren Martin v. Kaci Weeks Martin Scharbor: **[child support; visitation]** The parties divorced in 1999, at which time they entered into an Agreement that was approved by the trial court and incorporated by reference into the divorce decree. The Agreement was modified by agreement of the parties in 2000 and in 2002. This appeal arose from a decision after a 2004 hearing on the appellant father's petition to modify the Agreement to decrease child support, to terminate his responsibility to pay medical/health expenses not covered by insurance, to increase visitation, and to modify visitation-related logistical terms. The appellee mother responded with a counter-petition for contempt and modification of visitation. The trial court found that the general terms of the Agreement could not be modified because it was an independent agreement. The trial court did increase the child support obligation, modify appellant's visitation, and award attorney's fees to appellee. The Court of Appeals affirmed in all respects. The Court found that the trial court's finding the Agreement an independent contract was not clearly erroneous; that the appellant father's obligation to pay for specific items was "in the nature of" child support and therefore modifiable; that appellant was not prejudiced by appellee's being allowed to orally amend her petition to modify the Agreement for increased child support; and that the court did not err in finding a change in circumstances pertinent to visitation and that the best interests of the child dictated a change. Finally, the Court affirmed the award of an attorney's fee, noting the Court's recognition that a court of equity has inherent power to award attorney's fees in domestic relations proceedings and has discretion over the award of the fee. (Singleton, H.; No. CA 05-1016; 4-12-06; Gladwin)

Davey Lee v. Patricia Lee and OCSE: **[child support; deviation from the Chart]** The parties divorced in 2000. Appellee mother was awarded custody and appellant father was ordered to pay child support of $58/week. The children were injured in an explosion at their mother's home in 2001; a resulting damages action was settled and a special-needs trust was established for the children with a bank as trustee. OCSE intervened and filed a motion for modification of support and a motion for contempt for failure to pay child support. The trial court found that, because the children received $1,500/month from social security and $6,000/month from the trust, a downward deviation from the child support chart was warranted and would not adversely affect the children. The trial court noted that the appellant had two other biological children who resided with him. The court set support at $40/week, plus $8/week on the arrearage, which appellant admitted was $12,132, and the trial court credited him for $5,000 in payments, although undocumented. Appellant's primary argument on appeal was that the children's monthly social security and trust funds should be credited against his child support obligation, essentially that they should support themselves from their own funds. He also argued that the

appellee mother had requested that her child support case be closed and that he had relied to his detriment on her request to stop child support; and that the court erred in setting his child support obligation at $40/week. He also argued discovery and procedural issues. OCSE argued on cross-appeal that the trial court erred in deviating downward from the child-support chart. In affirming, the Court of Appeals noted that a child's receipt of social security benefits will not be considered in determining the basic child-support obligation, but may be considered in deciding whether to deviate from the guidelines. The Court said that a parent has an obligation to support his child and that the appellant clearly is able to work. Secondly, the Court said that nothing was presented to indicate the parties had an agreement that he did not have to pay support, but only evidence that the mother had requested that OCSE close her case. But the Court said the law is settled in Arkansas that the interests of a minor, such as in receiving support, cannot be compromised by a guardian without court approval. The Court noted the discretion a trial court has in determining child support. On the discovery issue, the Court said that a trial court has discretion for discovery matters and that it will not be reversed absent an abuse of discretion that is prejudicial to the appealing party. On a procedural issue, appellant argued that the trial court erred in denying as untimely his motion for findings of fact regarding a motion to quash a subpoena. The Court said that under the Rules of Civil Procedure, findings of fact and conclusions of law are not necessary on decisions involving motions. See Rule 52(a). The Court of Appeals affirmed on both appeal and cross-appeal. (Landers, M.; No. CA 05-1141; 4-12-06; Bird)

Carol Williams v. Mickey Nesbitt: **[child support–proper deduction; medical expenses]** Appellant mother appealed from a denial for an increase in child support and enforcement of a prior order requiring the parties to split the cost of unreimbursed medical expenses for their minor child. The Court of Appeals reversed and remanded on the issue of an increase in child support, pointing out that the case turned on what is meant by a "proper deduction." The issue, the Court said, is the payor's "expendable income," and it is reversible error to look mechanically at tax documents to determine support rather than at actual income a payor has available for support. The record indicated that the appellee father had an excessive amount of his paycheck withheld, ostensibly for federal taxes, and the court erred in simply accepting his assertion that he was simply avoiding having to pay additional money in taxes. The Court remanded for the trial court to further consider the federal-income-tax withholding issue. On the issue of shared medical expenses, the mother attempted to introduce her hand-written summary of medical expenditures, but the records were excluded from evidence on appellee's objection. In affirming on that issue, the Court noted that appellant did not actually challenge the trial court's exclusion of the summary and that, furthermore, she did not proffer either the summary or the actual bills, which she claimed to have in the courtroom. Such a proffer was necessary to preserve a challenge to a ruling excluding evidence. (Whiteaker, P.; No. CA 05-864; 4-19-06; Hart)

James Vincent Valetutti v. Kathleen Susan Valetutti: **[alimony]** Appellant appealed from the trial court's order reducing his monthly alimony obligation, contending that the order that alimony continue indefinitely, although at a reduced rate, was an abuse of discretion. The Court of Appeals said that the trial court's findings indicated that it looked at both appellee's improved financial condition and the appellant's ability to pay. The Court said no prohibition exists against an indefinite award of alimony even for a relatively short-term marriage, and that the

need for flexibility outweighs the corresponding need for relative certainty. The Court said, "Our supreme court has refused to set a bright-line limitation on alimony, and we will not either. (Landers, M.; No. CA 05-976; 4-19-06; Gladwin)

David Weeks v. Kay Wilson: **[alimony]** Appellant appealed from the trial court's order that changed his alimony obligation from $400/month for five years to $500/month for an indefinite period. The trial court found that appellee met her burden of proving a material change in circumstances. In affirming, the Court of Appeals found that the trial court had evidence before it of appellee's deteriorating health, resulting in a significant decrease in her earning capacity–not anticipated at the time of divorce--and that any failure of occupational rehabilitation was beyond her control. She established both the need for an increase in alimony and the appellant's ability to pay. (Pierce, M.; No. CA 05-978; 4-19-06; Robbins)

EIGHTH CIRCUIT

LaTour v. City of Fayetteville: **[signs]** City ordinance forbidding flashing or blinking signs was content-neutral on its face. The ordinance was constitutional because it was narrowly tailored to serve a significant government interest in assuring traffic safety and public esthetics and allowed ample alternative channels for communication of plaintiff's messages. (W.D. Ark.; # 03-2824; 4-6-06)

Bowman v. White: **[university facilities]** District court's rejection of First Amendment challenge to university policy regarding restrictions on use of facilities and space by non-University entities is affirmed as to permit requirement, notice requirement and dead day ban, and reversed as to five-day cap. Five-day cap restriction is not sufficiently narrowly tailored to survive constitutional scrutiny. (W.D. Ark.; # 04- 2299; 4-14-06)

Pediatric Specialty v. AR Dept. of Human : **[qualified immunity/Medicaid]** Under Medicaid Act, Medicaid recipients and providers have privately enforceable procedural due process claim on right to equal access to quality medical care. Denial of summary judgment on the basis of qualified immunity to two state officials for violating Medicaid Act rights is affirmed. Evidence, viewed in the light most favorable to plaintiffs, supported claim of violation by directors who implemented policy to reduce treatment for beneficiaries. State agency is entitled to Eleventh Amendment immunity on claim for damages, but not directors in their official capacity for prospective injunctive relief. (E.D. Ark.; # 05-1668; 4-17-06)

Bostic, et al. v. Goodnight: **[accounting]** District court did not err in limiting accounting to funds defendant diverted from the corporation for his own benefit. (E.D. Ark.; # 05-1981; 4-24-06)

U.S. SUPREME COURT

Jones v. Flowers: **[Arkansas Case/ notice]** Petitioner Jones continued to pay the mortgage on his Arkansas home after separating from his wife and moving elsewhere in the same city. Once the mortgage was paid off, the property taxes—which had been paid by the mortgage company—went unpaid, and the property was certified as delinquent. Respondent Commissioner of State Lands mailed Jones a certified letter at the property's address, stating that unless he redeemed the property, it would be subject to public sale in two years. Nobody was home to sign for the letter and nobody retrieved it from the post office within 15 days, so it was returned to the Commissioner, marked "unclaimed." Two years later, the Commissioner published a notice of public sale in a local newspaper. No bids were submitted, so the State negotiated a private sale to respondent Flowers. Before selling the house, the Commissioner mailed another certified letter to Jones, which was also returned unclaimed. Flowers purchased the house and had an unlawful detainer notice delivered to the property. It was served on Jones' daughter, who notified him of the sale. He filed a state-court suit against respondents, alleging that the Commissioner's failure to provide adequate notice resulted in the taking of his property without due process.

Granting respondent's summary judgment, the trial court concluded that Arkansas' tax sale statute, which sets out the notice procedure used here, complied with due process. The State Supreme Court affirmed.

Held: When mailed notice of a tax sale is returned unclaimed, a State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. This Court has deemed notice constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent, but has never addressed whether due process requires further efforts when the government becomes aware prior to the taking that its notice attempt has failed. Most Courts of Appeals and State Supreme Courts addressing this question have decided that the government must do more in such a case, and many state statutes require more than mailed notice in the first instance. Because additional reasonable steps were available to the State, given the circumstances here, the Commissioner's effort to provide notice to Jones was insufficient to satisfy due process. What is reasonable in response to new information depends on what that information reveals. The certified letter's return "unclaimed" meant either that Jones was not home when the postman called and did not retrieve the letter or that he no longer resided there. One reasonable step addressed to the former possibility would be for the State to re-send the notice by regular mail, which requires no signature. Certified mail makes actual notice more likely only if someone is there to sign for the letter or tell the mail carrier that the address is incorrect. Regular mail can be left until the person returns home, and might increase the chances of actual notice. Other reasonable follow-up measures would have been to post notice on the front door or address otherwise undeliverable mail to "occupant." Either approach would increase the likelihood that any occupants would alert the owner, if only because an ownership change could affect their own occupancy. Contrary to Jones' claim, the Commissioner was not required to search the local phone book and other government records. Such an open-ended search imposes burdens on the State significantly greater than the several relatively easy options outlined here. The Commissioner's complaint

about the burden of even these additional steps is belied by Arkansas' requirement that notice to homestead owners be accomplished by personal service if certified mail is returned and by the fact that the State transfers the cost of notice to the taxpayer or tax sale purchaser.

This Court will not prescribe the form of service that Arkansas should adopt. Arkansas can determine how best to proceed.

(April 26, 2006; #04-1477)