MACDL
Missouri Association of Criminal Defense Lawyers

Fall, 2014

# President's Letter

*Kevin Curran*
*MACDL 2014-15 President*

The 2014 Bernie Edelman DWI Seminar co-sponsored by MACDL and MoBar exemplifies the best of this organization. Bernie Edelman, after whom the program is named, is a past president and was active in MACDL from its inception until his death. Bernie and a number of other criminal defense lawyers in the pre-MACDL days realized the need for a statewide organization that would serve the criminal defense bar. While the organization began as an alliance between the defense bars of Kansas City and St. Louis, over the years through Bernie's and others' efforts it expanded into a true statewide organization. MACDL still benefits from Bernie's hard work.

While Bernie was never aligned with any law school or CLE programs, his impact on young lawyers is significant. Many attorneys who Bernie mentored mention that after law school what they learned from Bernie was the most significant learning experience of their legal career. He took young lawyers under his wing. He taught them how to properly prepare and defend a case. Probably most importantly, he taught them the practical aspects of criminal practice - anything from how to find the courtroom to what one should know about the habits of the prosecutors and judges with whom they were dealing. Bernie never stopped being involved in MACDL and the education and training of young lawyers.

In the years before he passed away, he was still pushing and prodding the organization to bring younger and more diverse membership to the organization. His memory and his work live on.

What Bernie realized, as do many of us, is that the struggle to properly represent someone charged in the State of Missouri is a war fought on many fronts. As we know, the prosecutors are very well organized. They have a formal organization that has a strong presence in Jefferson City. They lobby for laws, rules and instructions in their interest. The prosecutors entered the battle for resources and have consistently opposed needed improvements to the Missouri State Public Defender funding system. MACDL engages the prosecutors and other political entities that do not always represent the best interests of our clients or our citizens. We actively lobby and review all proposed laws every year. We have a PAC that makes contributions to legislators who we think will understand and appreciate our basic rights.

The Bernie Edelman DWI Seminar exemplifies the best of MACDL's training. It is put together by our members, most of whom learned skills from Bernie. The presenters are by and large home grown. Learning does not only take place in the lecture hall. At the social events planned by MACDL and informal gatherings of lawyers throughout the state, information is exchanged, war stories are told and knowledge is shared by all MACDL members.

The most common question MACDL members hear from non-members is "What will MACDL do for me?" The quick answer is that we lobby, provide quality legal education, provide a forum for lawyers to engage and exchange ideas, and in times of need represent our members when they themselves are in trouble.

However, on the horizon there are many battles. The criminal code has been overhauled. The Missouri State Public Defender is inadequately funded. On the positive side, the system is beginning to understand that incarceration is not the answer for all of those convicted, so MACDL must help lead the way in providing alternatives to incarceration and enlightened sentencing. There is plenty to do. MACDL members may sometimes struggle to answer the question what will MACDL do for me. I feel the problem is not with the answer, but rather with the question. If we were to ask what does MACDL do for us, the answer is clear.

MACDL
Missouri Association of Criminal Defense Lawyers

## 2014-2015 Officers & Board

### Officers

**President**
Kevin Curran • *St. Louis, MO*

**Vice President**
Carl Ward • *St. Louis, MO*

**Secretary**
Michelle Monahan • *St. Louis, MO*

**Treasurer**
Marilyn Keller • Kansas City*, MO*

**Past President**
Kim Benjamin • *Belton, MO*

### Board Members

Don Cooley • *Springfield, MO*
Adam Dowling • *Columbia, MO*
Joel Elmer • *Kansas City, MO*
William Fleischaker • *Joplin, MO*
Herman Guetersloh • *Rolla, MO*
David Healy • *Ozark, MO*
Travis Jacobs • *Columbia, MO*
Levell Littleton • *St. Louis, MO*
Matthew D. Lowe • *Clinton, MO*
John Lynch • *Clayton, MO*
Dana Martin • *Lake Ozark, MO*
Talmage Newton IV • *St. Louis, MO*
Laura O'Sullivan • *Kansas City, MO*
John Simon • *St. Louis, MO*
Eric Vernon • *Liberty, MO*
Adam Woody • *Springfield, MO*

### Executive Director

Randy J. Scherr • *Jefferson City*

### Lifetime Members

Dan Dodson
Carol Hutcheson
Matthew Lowe
Travis Noble
Joseph S. Passanise

# Welcome New MACDL Members

*MACDL sincerely appreciates your support. We can't function without you! Your dues pay for postage, printing, MACDL's interactive website, this newsletter, travel expenses of CLE speakers, and lobbying efforts in the Missouri General Assembly, among other things.*

Branden Twibell • *Springfield, MO*
Kirk McCabe • *Liberty, MO*
Evan Michael Porter • *Osage Beach, MO*
Jeffrey Sowash • *Bolivar, MO*
Timothy Brown • *Christian, MO*
David Back • *Springfield, MO*
Tara Crane • *St. Charles, MO*
Robyn Goldberg • *Liberty, MO*
Bethany Hanson • *West Plains, MO*
Rebecca Hester • *Warrensburg, MO*
Steven Lynxwiler • *Poplar Bluff, MO*
Leslie Maxwell • *Sedalia, MO*
Ruthie Russell • *Harrisonville, MO*
James Rynard • *Maryville, MO*
Mary Joe Smith • *Fulton, MO*
Pamela Musgrave • *Monett, MO*
Mary Fox • *St. Louis, MO*
Lisa Preddy • *Union, MO*
Lawrence Catt • *Springfield, MO*
Jordan Lowther Paul • *Pineville, MO*
Nick Dudley • *Blue Springs, MO*
Brooke A Christy • *Sunrise Beach, MO*
Paul Eric Bond • *Palmyra, MO*
Paemon Aramjoo • *Kansas City, MO*
Stacey Schwartz • *Leslie, MO*
Christine Archer • *St. Louis, MO*
John Atwood • *Edwardsville IL*
Brett Baker • *St. Louis, MO*
Aaron Banks • *St. Louis, MO*
Brittany Berosky • *St. Louis, MO*
James Bickerton • *Pevely, MO*
Paige Blumenshine • *St. Louis, MO*
Sarah Boyce • *St. Louis, MO*
J.D. Brandmeyer • *New Baden, IL*
Kara Burke • *Smithton, IL*
Lee Camp • *St. Louis, MO*
Justin Chmielewski • *St. Louis, MO*
Avvennett Czezahan • *Dallas, TX*
Alex Daris • *St. Louis, MO*
Nathan Davis • *St. Louis, MO*
Shalini Devabhaktun • *St. Louis, MO*
Jacqueline Duvall • *O'Fallon, MO*
Mike Eberlc • *St. Louis, MO*
Alexander Flynn • *Troy, MO*
Phelan Galligan • *Chesterfield, MO*
Jenna Hueneger • *Cottage Hills,IL*
Christopher Jump • *Canton, IL*
Jocelyn Kissell • *St. Louis, MO*
Sabrina Lampley • *Webster Groves, MO*
Elizabeth Larsen • *St. Louis, MO*
Jon Lerman • *Bentwood, MO*
Nicholas Lograsso • *Florissant, MO*
T.J. Matthes • *St. Louis, MO*
Benjamin Mattingly • *St. Louis, MO*
Ryan Mayfield • *Moro, IL*
Jessica McMullen • *St. Louis, MO*
Lucas Null • *St. Louis, MO*
Geoff Ogden • *St. Louis, MO*
Quinton Osborne • *St. Louis, MO*
Steve Payne • *St. Louis, MO*
Andrew Pettijohn • *Definance, MO*
Nicole Pleasant • *Black Jack, MO*
Erika Prazma • *St. Louis, MO*
Megan Rettig • *St. Louis, MO*
Alexandra Ricci • *Wildwood, MO*
Sara Robertson • *St. Louis, MO*
William Schofield • *St. Louis, MO*
Scott Schrum • *Irondale, MO*
Phil Sconlon • *St. Louis, MO*
Andrea Sokolich • *St. Louis, MO*
Suzanne Sullivan • *St. Louis, MO*
Kristin Swain • *St. Louis, MO*
Jessica Toledano • *St. Louis, MO*
Samantha Vazquez • *St. Louis, MO*
Michael Vosseller • *St. Louis, MO*
Joseph Welling • *St. Louis, MO*
Kayla Williams • *St. Louis, MO*
Tyler Winn • *St. Louis, MO*
Xinzhe Zhang • *St. Louis, MO*
Cora Clampitt • *Mexico, MO*
Joseph Welch • *St. Louis, MO*
Steven Ohrt • *St. Louis, MO*
Gina Simone • *Kansas City, MO*
Ben Janssen • *Kansas City, MO*
J. Denise Carter • *Lee's Summit, MO*
Tamara Putnam • *Lee's Summit, MO*
Thomas Benson • *Springfield, MO*
James Cooksey • *Moberly, MO*
Eric Boehmer • *St. Charles, MO*
Andrew Talge • *Kansas City, MO*
Marvin Opie • *Versailles, MO*
Karie Pennington • *St. Charles, MO*
Michael Boyd • *St. Peters, MO*
Joseph Harvath • *St. Charles, MO*
Mark Webb • *Osage Beach, MO*
James Pettit • *Aurora, MO*
Robert Wolfrum • *St. Louis, MO*
Michael Carter • *St. Charles, MO*

# Thank You!

***MACDL would like to thank our Sponsors/Exhibitors at our 2014 Spring CLE***

Appleby Healy

Carver, Cantin & Grantham

Findlaw

Law Offices of Dee Wampler and Joseph Passanise

S. Dean Price

The Bar Plan

The Law Offices of Adam Woody

## *Amicus Curiae Committee*

Don't forget that MACDL has an Amicus Curiae Committee which receives and reviews all requests for MACDL to appear as amicus curiae in cases where the legal issues will be of substantial interest to MACDL and its members.

To request MACDL to appear as amicus curiae, you may fill out the amicus request on the MACDL website (www.MACDL.net) or send a short letter to Talmage Newton IV, Amicus Curiae Committee Chair, briefly explaining the nature of the case, the legal issues involved, and a statement of why MACDL should be interested in appearing as amicus curiae in the case.

Please set out any pertinent filing deadline dates, copies of the order of opinion appealed from and any other helpful materials.

Committee Chair:
Talmage E. Newton IV
Pleban & Petruska Law LLC
2010 S. Big Bend Blvd.
St. Louis MO 63117
Phone: 314-645-6666
Email: tnewton@plebanlaw.com

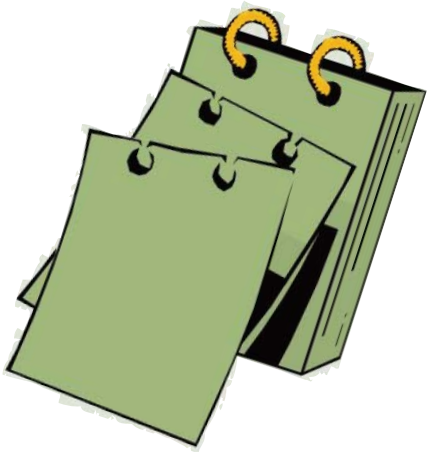
## *Lawyer Assistance Strike Force*

As a benefit of membership, members have the opportunity to consult with MACDL`s Strike Force if they are threatened in any way for providing legal representation to a client in a criminal proceeding and are subpoenaed to provide information, cited for contempt, being disqualified from the representation, or who become the subject of a bar complaint resulting from such representation. Please visit the website for guidelines. (www.macdl.net)

# Calendar of Events

**October 24, 2014**
MACDL Fall CLE
*Camden on the Lake*

**April 9-10, 2015**
MACDL Spring CLE
*Ameristar Casino*
*St. Charles MO*



# Public Defender Leadership Changes

*by Cat Kelly, Director, Missouri State Public Defender*

**Peter Sterling**, who has ably served in a variety of leadership roles within the public defender system retired in June, taking 38 years of public defender experience with him. Peter began his career as a lawyer for the ACLU, then switched to the defender side where he worked in the Kansas City Trial office. In 1981, he left the city in search of woods and rivers (transferring to the Rolla PD office as the means to that end). He became the District Defender in that office and served until his appointment as a Regional Defender in 1989. He went on to serve as the state Trial Division Director, General Counsel, and Chief of Staff to the State Public Defender, respectively – leaving a long legacy of contributions to the cause of indigent defense. In April, he was awarded the MSPD Director's Award in gratitude for his service.

**Michael Barrett** was named by the Commission to replace Peter as the system's General Counsel. A former New York public defender, Michael has a strong record of criminal justice policy work under three Governors (two in New York as well as Jay Nixon in Missouri) and brings a wide portfolio to his new position.

**Dan Gralike**, who has been the Deputy Director for the PD system since 1994, decided he'd served his time in management and wanted to get back to his roots as a capital trial lawyer. He stepped down from his position as Deputy Director the first of August and joined the St. Louis Capital Office as a capital trial attorney once again.

**Joel Elmer** was appointed by the Commission to replace Dan as the system's Deputy Director. Joel has been with the public defender system since 1987, serving in both the Rolla and Jefferson City offices before moving to Kansas City to take over leadership of the system's largest office. He was promoted to Division Director in 2011 and then to Chief of Staff to the Director following Peter's departure – until Dan decided to step down and the Commission chose to consolidate the Chief of Staff and Deputy Director positions. Joel is a member of the Missouri Bar Board of Governors and is serving as the PD System's representative on the MACDL Board.

Some other shuffling of responsibilities took place as part of the above leadership changes. **Karen Kraft** assumed leadership of a newly-created Specialty Practices Division, which encompasses Capital, Juvenile, and the Civil Defense Unit (defending against SVP Commitments), as well as oversight of a new pilot project with the University of Missouri to bring social workers and social work students back into working with MSPD clients on sentencing alternatives and client care issues. **Ellen Blau** has assumed the role of Trial Division Director and **Greg Mermelstein** is adding Ombudsman for Client Services to his role as the system's Appellate/PCR Division Director.

## "The Missouri Project"

The American Bar Association has released a report they're dubbing "The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards, with a National Blueprint." This study, funded by a grant from the ABA's Standing Committee on Legal Aid and Indigent Defense, was conducted over the last year by RubinBrown, a national accounting and business analytics firm based in St. Louis. It was funded with the twin goals of (1) determining a Missouri-specific, evidence-based workload standard for Missouri's public defenders, and (2) developing a 'national blueprint' that other public defender systems around the country could use as a template to develop a workload standard particular to their own areas of practice. A number of MACDL's members – both public defenders and private criminal defense attorneys – participated in the study and contributed to the results thereof. MSPD wants to express its appreciation for their time and involvement. While it is no surprise that the study confirmed Missouri's defenders have too many cases and not enough lawyers, it does add a layer of objectivity and credence to the anecdotal evidence already known. A special thanks goes out to St. Louis lawyer Stephen Hanlon, formerly of the Washington, D.C. firm of *Holland & Knight*, who was instrumental in the ABA's selection of Missouri as the site for the pilot study.

# Case Law Update

For the latest Case Law Updates, please visit the MACDL website/Newsletter page and check out the link to Greg Mermelstein's Reports located at the bottom of the page.

http://www.macdl.net/newsletter.aspx

# *Missouri Legislature Reduces Marijuana Penalties*

*by Dan Viets*

The Missouri General Assembly this year enacted several reductions in the penalties for marijuana offenses. An amazing consensus developed among members of the GOP-dominated legislature that marijuana penalties are clearly too harsh.

Several changes in marijuana laws were enacted through the passage of the Criminal Code revisions which passed in each house. When the revised Criminal Code takes effect in January of 2017, all drug-related offenses will be grouped under Chapter 579.

I joined several other MACDL members who served on the Missouri Bar Criminal Law Subcommittee on the Criminal Code which drafted what was originally the largest bill ever filed in Missouri, a 1,000-page reordering of all state statutes relating to criminal offenses.

Beginning in 2017, the first-time possession of small amounts of marijuana will be punishable by a fine only and no jail time. While these offenses have generally not resulted in jail time in most courts in our state, there are some definite exceptions to that rule. Moreover, those who received SIS probation faced the possibility of serving up to one year in jail if their probation was revoked. That will no longer be a possibility.

In addition, the penalty for the sale of small amounts of marijuana and the penalty for cultivation of relatively few marijuana plants will have a maximum punishment of ten years rather than the current fifteen years.

Perhaps the most amazing change in the marijuana laws was the enactment of House Bill 2238 sponsored by Columbia attorney, Republican Representative Caleb Jones. This bill provides for the Missouri Department of Agriculture to approve two not-for-profit entities to cultivate marijuana for the purpose of extracting cannabidiol (CBD) for the treatment of severe epilepsy. CBD has proven to be remarkably effective in treating certain forms of epilepsy which tend to be found most often in very young children and babies. CBD is generally regarded as not having any of the euphoric effects of THC, but is effective in the treatment of such seizures.

The law, which contained an emergency clause, went into effect upon the signing by the Governor, which occurred on July 14. The bill was passed by 90% of the members of the Missouri House and passed unanimously in the Missouri Senate! No one would have predicted in January of this year that the Missouri General Assembly would be passing a bill to allow marijuana extracts to be provided to babies, but that is exactly what took place this year.

A third legislative change relates to the collateral consequences of marijuana and other prohibited substance felony convictions. Under an act of Congress passed in 1996, those who have a conviction for any drug-related law violation are forever barred from eligibility for receiving food stamps, also known as the Supplemental Nutrition Assistance Program (SNAP). Those who have felony convictions for murder, rape, robbery, arson, treason and all other felonies retain eligibility for food stamps.

Congress allowed states to vote to opt out of this foolish law. Forty-one other states had done so since 1996, but despite persistent efforts in the Show-Me State, our legislature continued to maintain that irrational penalty until this year.

Perhaps the fact that millions of our tax dollars were going to Washington and not coming back to Missouri, but rather going to the other 41 states where food stamp eligibility was not impaired by drug convictions, helped to persuade the members of the General Assembly that it was time to undo this misguided legislation. The legislature did opt out of the federal food stamp ban for those with drug felony convictions and our state's economy will benefit from that action.

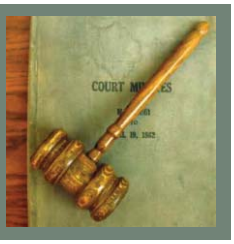
Taken together, the revisions in Missouri's marijuana laws this year were truly amazing. It is hoped that this progress will continue in the 2015 session with the passage of a broader medical marijuana law and legislation permitting marijuana offenses to be expunged just as first offense DWI and MIP charges can be under current law.

## *MACDL ListServe*

The MACDL ListServ helps facilitate, via e-mail, all sorts of criminal defense law discussions, including recommendations for expert witnesses, advice on trial practices, etc. Subscription is free and limited to active MACDL members. To subscribe, please visit our website, enter the member's only page, and follow the listserv link. (www.macdl.net)

# Bruce's Top 10 Federal Cases

**by Brian Gaddy**



## 1 Kansas v. Cheever

134 S. Ct. 596
Use of Defendant's Statements in Mental Health Evaluation

The defendant got into a shootout with the police. One officer was killed and Cheever was charged with murder. While the capital prosecution was pending in federal court, Cheever filed a notice of intent to rely on voluntary intoxication to negate premeditation. The federal court ordered a psychiatric examination by a court-appointed expert. The psychiatrist interviewed Cheever for over 5 hours, which included Cheever making admissions about the shooting. The case was later dismissed in federal court and capital murder charges were filed in state court. At trial, Cheever sought to introduce expert testimony that he had used significant amounts of methamphetamine before the shootings which negated his ability to act with premeditation and deliberation. Defense experts testified that his long-term use of methamphetamine had damaged his brain. The State sought to introduce rebuttal expert testimony from the court-ordered psychiatrist from federal court, who would testify that the defendant had an antisocial personality and that his brain was not impaired. The defense objected on the basis that the Cheever had not agreed to the court ordered examination and his statements made to that expert could not be used under the Fifth Amendment. The Kansas Supreme Court held that using statements made by Cheever to the court-ordered expert violated the Fifth Amendment as he did not initiate the examination and he had not injected his "mental capacity" as an issue (noting that voluntary intoxication is not a mental disease or defect).

The U.S. Supreme Court reversed. Under prior precedence, compelled statements made by a defendant to psychiatrist cannot be used against him where the defendant does not initiate the psychiatric evaluation or attempt to introduce that evidence. In this case, the defendant affirmatively sought to introduce expert testimony concerning his lack of premeditation. Where a defendant introduces psychiatric testimony to negate a mental intent element, the State is entitled to present rebuttal evidence, including evidence from a court-ordered evaluation. It is of no consequence that the defense evidence pertained to voluntary intoxication. The evidence need not be related specifically to a mental disease or defect as narrowly defined under Kansas law.

## 2 Burrage v. United States

134 S. Ct. 881 (2014)
Federal Drug Statutes

Federal law imposes a mandatory minimum of 20 years and a maximum of life if a defendant unlawfully distributes controlled substances and death or serious bodily injury results from the use of the drug. Joseph Banka was a long time drug abuser. He went on a drug binge that involved smoking marijuana, then crushing, cooking and injecting oxycodone pills, and then later injecting on multiple occasions heroin he purchased from the defendant. Banka was later found dead. Burrage was charged with distribution of heroin that resulted in a death. At trial, experts testified that Banka had heroin metabolites, codeine, alprazolam, clonazepam metabolites, and oxycodone in his system. Although the doctors could not answer whether Banka would have lived without shooting the heroin, they found that the heroin was a contributing factor in his death. Burrage moved for a judgment of acquittal, arguing there was no evidence that heroin was the "but for" cause of death. The motion was denied. The trial court gave jury instructions that Burrage should be found guilty only if heroin was a contributing factor to the death. The court rejected defense instructions that the heroin must be the proximate cause of death. The defendant was convicted and the Eighth Circuit affirmed.

The Supreme Court observed that because the "death results" enhancement increased the minimum and the maximum sentences for Burrage, it is a fact that must be submitted to the jury and found beyond a reasonable doubt. The federal drug statute uses the term that death or serious injury "results from" the distribution, but it does not define the phrase "results from." The Court found this phrase requires actual causation, or "but-for" causation. No expert could testify that the heroin usage, standing alone, would have resulted in death. The Court rejected the Government's argument that "results from" can be proven if the drug was a "contributing factor" in the death. This is inconsistent with the statutory phrase "results from." Where the use of the drug distributed by a defendant is not an independent, sufficient cause of death, a defendant cannot be liable under the enhanced penalty provisions.

**"Bruce's Top 10 Federal Cases" >p7**



## 3 Hinton v. Alabama

134 S. Ct. 1081 (2014)

Duties of Defense Counsel

There was a string of robberies and shootings of restaurant managers. One manager was shot to death during a robbery. A few months later, a second manager was shot to death and robbed. Several weeks later, a restaurant manager was robbed and shot but survived. He identified Hinton as the shooter. When police arrested Hinton, they seized a .38 caliber revolver. State forensic analysis showed the same weapon seized from Hinton fired all bullets during the 3 robberies. Hinton was charged with two counts of capital murder but was not charged in connection with the third robbery. The State argued that through the eyewitness testimony, the forensic bullet matches, and the similarity of the crimes, Hinton must have committed the murders. Hinton maintained his innocence and presented alibi witnesses at the time of the third robbery. The only physical evidence was the bullet comparison. Court-appointed defense counsel filed a motion for funding to hire a ballistics expert. The trial court initially approved $1000. The trial court mistakenly thought it had a $500 statutory cap for each of the two murder cases. The trial court was mistaken, as the cap was $1000 per case. The defense lawyer did not correct the mistake. The court also invited defense counsel to seek additional funding if it was needed in the future. Counsel did not seek additional funding. Counsel tried to find an expert who would work on the case for $1,000, but could only find one expert with serious credibility and competency problems, including an admission that he had "difficulties" operating the State crime lab microscope and an admission at trial that he only had one eye, which limited his ability to perform a microscopic bullet analysis. The "problem" expert concluded the bullets from the three crime scenes did not match each other.

After Hinton was convicted of capital murder and sentenced to death, his post-conviction counsel raised the expert funding issue. At the post-conviction hearing, the defendant produced three experts that seriously discredited the state's trial expert, all of whom concluded the same gun could not have fired all 6 bullets. The state did not offer rebuttal evidence in the hearing. The trial court denied relief as the three new experts in essence reached the same conclusion as the troubled trial expert called by the defense.

The Supreme Court held that Hinton received ineffective assistance of counsel. Under Strickland v. Washington, the court must determine whether trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Here, it was unreasonable for trial counsel to fail to seek additional funding for experts, especially under a mistaken belief that he was capped at $1000 and when the trial court invited future requests for additional funding beyond the initial amounts. Trial counsel knew his expert was inadequate. Trial counsel failed to investigate the state funding statute and mechanisms to obtain additional funding for experts. The Court made clear that the ineffective assistance finding was failing to investigate the state funding statutes, as opposed to simply hiring the wrong expert. The selection of an expert is a strategic choice of counsel that is virtually unchallengeable. The Court also observed that prejudice likely occurred from the deficient performance of counsel. Although the troubled expert testified that bullets could not be matched, he was not believable due to his credibility problems. There is a reasonable probability that a qualified expert would have instilled a reasonable doubt with the jury on the ballistics evidence.

## 4 Fernandez v. California

134 S. Ct. 1126 (2014)

Warrantless Searches under the Fourth Amendment

Fernandez asked the victim what neighborhood he was from. The victim replied Mexico and Fernandez said the victim was in territory ruled by the gang "DFS." Fernandez pulled a knife and cut the victim, but the victim ran away and called 911. Fernandez whistled and four other men from a nearby apartment assaulted and robbed the victim. The police saw a lone man run into an apartment and then heard yelling and screaming within the apartment. The officers knocked on the apartment door, which was answered by Roxanne Rojas. She appeared upset and had a large bump on her nose and blood on her shirt. The police asked Rojas if anyone else was in the apartment – she responded her four year old son. When the police announced they were going to perform a protective sweep, Fernandez showed up at the door wearing boxer shorts only. He told the police he knew his rights and that the officers had no right to enter the apartment. The officers removed Fernandez and placed him under arrest. The robbery victim identified Fernandez as the initial assailant. The police returned to the apartment one hour later, informed Rojas that Fernandez had been arrested and received both oral and written consent from Rojas to search the apartment. The police found gang paraphernalia, a

**"Bruce's Top 10 Federal Cases" >p8**

butterfly knife, clothing worn during the robbery, ammunition and a sawed-off shotgun. Fernandez was charged with multiple offenses including being a felon in possession of firearm and ammunition. He moved to suppress the evidence found in the apartment. The lower courts found that the consent to search was valid and no Fourth Amendment violation occurred.

The Supreme Court observed that a search warrant is generally required for the search of a home. But certain categories of warrantless searches have been recognized, including consent searches. A legal question arises when there are two or more occupants of a home and one of them provides valid consent to search. In general, consent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search. In Georgia v. Randolph, 547 U.S. 103 (2006), the Court recognized a narrow exception to this rule where one of the inhabitants is physically present and refuses consent to search. That refusal is dispositive, regardless of the consent by a fellow occupant. Here, Fernandez was not present when Rojas consented to the search. Fernandez claimed he was not physically present because he had been hauled away by the police. He also claimed that he objected to the initial search at the door, which should remain in effect. The Court rejected both arguments. In Randoph, the Court suggested that the absence of the objector may be a valid consideration if the objecting occupant is removed unreasonably from the scene. But in this case, the removal of the objecting occupant was reasonable. The Court held that an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason. With regard to the argument that Fernandez initially objected to the police entry, the Court noted that attempting to determine the duration of an initial objection is an untenable rule. Randolph requires the objector's presence – that rule is simple to apply and applies in this case.

## 5 Rosemond v. United States

134 S. Ct. 1240 (2014)
Aiding and Abetting Liability

Rosemond and another person drove with Perez to sell a pound of marijuana to two people. One of the purchasers got in the backseat to inspect the marijuana. He then punched the backseat occupant in the face and attempted to flee with the drugs. One of the car's occupants got out of the vehicle and fired several shots at the robbers. It was unclear if Rosemond or the other car occupant fired the shots.

The would-be sellers then got in the car to chase the robbers, but were quickly pulled over by the police. Rosemond was charged in federal court with several offenses, including using a firearm during a drug trafficking offense and aiding and abetting the use of a firearm. The Government prosecuted on two alternative theories – that Rosemond himself fired the gun or that he aided and abetted the other occupant who fired the gun. The court's aiding and abetting jury instruction allowed a conviction if the defendant knew his cohort used a firearm during the drug offense and the defendant knowingly and actively participated in the offense. Rosemond had tendered an instruction that he could only be found guilty of the gun charge if he intentionally took some action to facilitate or encourage the use of the firearm. Rosemond was convicted of aiding and abetting the use of a firearm and the Tenth Circuit affirmed the conviction.

The Supreme Court reversed, finding the trial court erred in instructing the jury on aiding and abetting liability. In essence, aiding and abetting is accomplice liability. It has two general elements – an affirmative act in furtherance of the offense and an intent to facilitate the commission of the offense. Here, the underlying offense is using a firearm during a drug trafficking offense. Rosemond argued that he purposely participated in the drug transaction, but he had nothing to do with bringing or using a weapon. The Court recognized that participation in the underlying drug transaction is sufficient to show the element of an affirmative act. The intent analysis is more problematic. Aiding and abetting liability requires a person to act with the full knowledge of the circumstances constituting the charged offense. In context of a firearm used during a drug offense, the aider and abettor must know that one of his confederates will carry a gun during the transaction. The knowledge of the firearm must be advance knowledge. If the aider and abettor knows nothing about the gun, he cannot act with the requisite intent. If the accomplice chooses to engage in the crime knowing a participant is armed, that intent is sufficient for aiding and abetting liability, irrespective of whether the aider and abettor desired for the gun to be used during the crime. The district court's instruction that required proof that the defendant knew his cohort had a gun was insufficient as it did not require a finding of when that knowledge occurred. The case was remanded back to the Tenth Circuit to determine the consequences of this error.

**"Bruce's Top 10 Federal Cases" >p9**

## 6 Navarette v. California

134 S. Ct. 1683 (2014)

Fourth Amendment – Anonymous Tips

Police received a 911 anonymous tip that a silver pickup had run the caller off the road. The tip was reported to the highway patrol. Officers pulled over a matching truck and reported the odor of marijuana. A search revealed 30 pounds of marijuana in the truckbed. The driver sought to suppress the evidence on the basis of the stop. The lower courts found that the officers had reasonable suspicion to conduct the stop. The tip was from an eyewitness which corroborated the truck description, location, and direction.

The Supreme Court noted that the Fourth Amendment permits brief investigative stops when law enforcement has a particularized and objective basis for suspecting the particular person stopped is involved in criminal activity. The reasonable suspicion is dependent upon both the content of the information possessed by the police and its degree of reliability. Reasonable suspicion is less than proof sufficient to support probable cause or a preponderance of the evidence. An anonymous tip may supply reasonable suspicion in appropriate circumstances. Here, the 911 caller described the truck and provided a license number. The basis of knowledge lends support to the tip's reliability. Also, police confirmed the truck's location which was consistent with the caller's description of the location, the direction of travel, and the time lapse between the call and the stop. Contemporaneous reporting has been treated as reliable. The use of 911 also shows reliability since 911 calls allow for identifying callers. The 911 caller reported being run off the roadway which provides a reasonable suspicion of drunk driving. The Court was not persuaded by the defendant's arguments that the officer observed no other signs of drunk driving or suspicious behavior once the truck was identified and observed for 5 minutes.

## 7 Hall v. Florida

134 S. Ct. 1986 (2014)

Intellectual Disabilities -- Cruel and Unusual Punishment

The Supreme Court in Atkins v. Virginia, 122 S. Ct. 2242 (2002) held the execution of persons with intellectual disabilities violates the Eighth and Fourteenth Amendments to the United States Constitution. The Atkins decision did not specifically define mental retardation but instead left the definition to the states. Under Florida law, intellectual disabilities are defined to require an IQ score of 70 or less. If the person has an IQ score above 70, all further evidence of intellectual disabilities is foreclosed. Hall was convicted of first degree murder and was sentenced to death. His first sentencing proceeding occurred prior to Atkins. After Atkins, Hall filed a motion seeking to prevent his execution on Eighth Amendment grounds based on his intellectual disabilities. He had an IQ test score of 71. Under Florida's rule, this test score prevented any further evidence of intellectual disability.

The Supreme Court held that Florida's rigid rule creates an unacceptable risk that persons with intellectual disabilities will be executed and is thus unconstitutional. The Eighth Amendment prohibits certain punishments as a categorical matter, which includes the execution of those with intellectual disabilities. The Court noted that the medical community defines intellectual disabilities according to three criteria: subaverage intellectual functioning, deficits in adaptive functioning and the onset of the deficits during the developmental period (typically before 18 years of age). The problem with the Florida statute is that it has been interpreted too narrowly. If a person has a test score above 70, even if the score is within a recognized margin of error, the person is barred from presenting further evidence of intellectual disability. The medical community, however, recognizes that a person may suffer from intellectual disability even with an IQ score of 70. The medical experts also indicate that IQ test scores should be read not as a fixed single number but within a range to account for standard measurements of error. Florida's statute disregards the consensus of medical professionals. Because the death penalty is the gravest sentence that can be imposed, a person facing the death penalty must have a fair opportunity to show that the Constitution prohibits their execution.

## 8 Martinez v. Illinois

134 S. Ct. 2070 (2014)

Double Jeopardy

Martinez was indicted on aggravated battery in Illinois. The State sought multiple continuances of previous trial settings on the grounds it could not locate two complaining witnesses. At the final trial setting, the State still could not locate its two witnesses. The trial court overruled another state continuance motion. The court ordered the jury be brought in and sworn. The state prosecutor indicated the State would not be participating in the trial. The court ordered opening statement, and the prosecutor indicated the State was

**"Bruce's Top 10 Federal Cases" >p10**

not participating in this trial. The defendant waived opening. The court next ordered the State to call its first witness. The State again indicated it was not participating in the trial. The defense then moved for a judgment of acquittal. The court directed a finding in favor of the defendant and dismissed the charges.

The State appealed, claiming the court should have granted its continuance motion. The defense argued that jeopardy had attached and the appeal was improper under the Double Jeopardy Clause. The Illinois courts held that jeopardy never formally attached in this case. The lower courts concluded that the defendant was never really at risk of a conviction and was therefore not placed in jeopardy.

The Supreme Court noted that the rule is clear -- jeopardy attaches once the jury is empaneled and sworn. Martinez was subjected to jeopardy because the jury in his case was sworn in. There must also be an inquiry whether the first jeopardy ended in such a manner that the defendant cannot face retrial. Again, it is a fundamental rule that a verdict of acquittal cannot be reviewed under the Double Jeopardy. An acquittal is any ruling that the prosecution's proof is insufficient to establish criminal liability.

## 9 Riley v. California

134 S. Ct. 2473 (2014)

Fourth Amendment and Cell Phones

This opinion involved two companion cases where cell phones were seized from the defendants during a search incident to a lawful arrest. In both cases, incriminating evidence was found on the phones. The Supreme Court held that police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. A warrantless search is allowed if it is conducted incident to a lawful arrest. There are limits as to this type of warrantless search. In prior cases, the Court has observed that the search incident to an arrest must be limited to the area within the arrestee's immediate control. The Court has also observed that a car can be lawfully searched incident to arrest if the arrestee is unsecured and within reaching distance of the passenger compartment. But in the prior cases, officer safety and the destruction of physical evidence were key factors in creating the exception to the warrant requirement. Here, digital data stored on a cell phone does not present these types of risks. Digital data cannot be used as a weapon to harm the officer. More substantial privacy interests are at stake when digital data is involved. Cell phones differ from other objects that might be carried on an arrestee's person. Modern cell phones have immense storage capacity. Information on a cell phone is not immune from a search – a warrant can still be obtained before the search.

## 10 United States v. Nguyen

2014 WL 3408673

(8th Cir., July 15, 2014)

Caution: Case Not Final and Subject to Re-hearing

The defendant was charged with violating the federal contraband tobacco statute which prohibits a person from knowingly shipping, transporting, receiving, possessing, selling, distributing, or purchasing contraband cigarettes (defined as over 10,000 cigarettes which bear no evidence of the payment of applicable state or local taxes). The defendant's sister arranged for multiple boxes of Vietnamese cigarettes to be shipped to the United States. The defendant received some of the shipments at her home. She was interviewed and indicated she received multiple shipments arranged by her sister and that she was aware some of the shipments involved cigarettes. When the packages arrived, her job was to get the boxes to her sister. She was aware her sister sold the cigarettes on the streets. The defendant's sister, however, never discussed with the defendant that no taxes had been paid on the cigarettes and there was no proof that the defendant ever opened the boxes, inspected the cigarettes or realized the cigarettes did not contain an appropriate tax stamp.

The contraband tobacco statute requires that a defendant acts "knowingly." The panel opinion held that the term knowingly applies to each element of the offense unless special context or background calls for a different reading. Although she clearly knew that cigarettes were being shipped to her house, the government was also required to prove that the defendant knew the cigarettes did not bear evidence that applicable taxes had been paid. Since there was no evidence that the defendant opened any of the packages received at her home and there was no evidence that the defendant engaged in selling or distributed cigarettes to anyone other than delivering the unopened boxes to her sister, the evidence was insufficient to prove that defendant knew the cigarettes did not bear evidence of the payment of applicable taxes. The conviction was reversed and an entry of acquittal was ordered.

# DUI Traffic Law Updates

*by Jeff Eastman*

## Refusal

### Broyles v. DOR

214 Mo. App. LEXIS 92
(Mo. App. S.D. 2014)

A refusal hearing was held before the trial court but no recording was made. On appeal, the parties stipulated that the Alcohol Influence Report, probable cause statement and narrative report comprised the evidence. In addition, the trial court reviewed the video with audio. The evidence was thus stipulated. Therefore, driver's argument was purely legal as the evidence adduced was uncontested.

Whether the admitted facts were sufficient to give LEO reasonable grounds to believe driver had been operating his vehicle while intoxicated is a legal question which the appellate court reviews without deference to the conclusions reached by the trial court.

When LEO observes unusual or illegal operation of a motor vehicle and observes indicia of intoxication upon coming into contact with driver, then probable cause exists. In the present case, there were many facts supporting probable cause including excessive speed, reckless driving, eluding, and ignoring orders to drop to the ground and put his hands up. In addition, there was an "overpowering" and "nauseating odor of intoxicants" on driver. The Southern District held that LEO may develop reasonable grounds to arrest a person for driving while intoxicated even after that individual has been placed under arrest for other acts. As such, there was sufficient evidence to support revocation of the drivers license.

### Anyan v. DOR

424 S.W.3d 502
(Mo. App. S.D. 2014)

Driver stopped for following too closely. As LEO exited his vehicle to approach driver, driver took off at a high rate of speed. While in pursuit, LEO observed the occupants of the vehicle throw a white plastic grocery bag out of the car window. LEO eventually lost sight of the vehicle. When LEO found the vehicle, he noticed a strong odor of marijuana emanating from within. Driver was located nearby. Upon confrontation, driver explained he was not saying anything besides his name and address.

LEO transported driver to the detention facility and asked driver to complete certain field sobriety tests. Driver demonstrated signs of intoxication on each and, as a result, LEO concluded driver was intoxicated and requested that he submit to a chemical test. Driver spoke with his attorney and then refused. Other LEO located the bag which had been discarded from the vehicle during the chase and found that it contained approximately 122 grams of marijuana.

At trial, LEO testified regarding the above referenced circumstances. Driver testified he fled from LEO because he had illegal material in his car but denied that he had been smoking any of that material. Driver admitted that he had been arrested and testified that he refused to submit to a chemical test.

The trial court found that driver's flight from the scene and smell of marijuana were not indicators of intoxication but merely evidence showing defendant had possessed marijuana. The court then noted drivers invocation of his Miranda rights and refused to consider any evidence obtained after the invocation. Thus, the trial court found driver did not refuse to submit to any chemical test.

The Southern District disagreed finding that the trial court erred in excluding the evidence regarding field sobriety tests and drivers refusal to submit to a chemical test because Miranda does not apply in a civil case. Thus, defendant's invocation of his Miranda rights were irrelevant to the admissibility of the evidence in his civil case.

The Director argued that once the appellate court found that the trial court had erred in excluding evidence obtained after invocation of Miranda, the appellate court could determine as a matter of law that LEO had reasonable grounds to believe that driver had operated his motor vehicle while in a drugged condition. The Southern District disagreed. The trial court's probable cause determination was reviewed in a two-step analysis: (1) a determination of the historical facts; and (2) the application of the law to those facts. Because the trial court refused to consider the evidence obtained after defendant's invocation,

**"DUI Traffic Law Updates" >p12**

# DUI Traffic Law Updates (from pg 11)

there was no full determination of historical facts. Consequently, the appellate court did not have the record necessary to review the trial court's determination of this issue.

In its second point, Director argued that the trial court's judgment was not supported by substantial evidence because the driver admitted all of the facts that Director was required to demonstrate. In the present proceeding, the driver at trial and admitted he was arrested and that he refused to submit to a chemical test. This admission removed those factual issues from the trial court's consideration. On remand, the trial court was ordered to consider (1) the evidence obtained after drivers invocation of his Miranda rights and determine its credibility and weight and (2) enter judgment as appropriate in light of that factual determination.

## Clark v. DOR

431 S.W.3d 534
(Mo. App. S.D. 2014)

In this refusal proceeding, the only element in dispute was whether LEO had reasonable grounds to believe driver was driving a motor vehicle while in an intoxicated condition. The Director claimed the trial court erred as a matter of law in finding that LEO had insufficient evidence of reasonable grounds that driver was driving while in an intoxicated condition.

The Director argued that hearsay statements may be used by LEO in the determination as to whether there were reasonable grounds to arrest. While a correct statement of law, it is of no assistance to the Director in the present case because the trial court did not simply find that the officer could not rely on hearsay statements. Rather, the trial court also found that the hearsay evidence presented was neither credible nor corroborated by any direct evidence that driver was operating a motor vehicle thus the Director failed to meet his burden. Judgment affirmed. As the trial court was free to disbelieve the trooper's testimony that he was told that driver was driving the car that had been involved in the accident, the judgment is affirmed.

## Ridge v. DOR

428 S.W.3d 735
(Mo. App. W.D. 2014)

Driver was arrested for driving while intoxicated, advised of his Miranda rights and thereafter read the Implied Consent law. LEO requested a sample of driver's blood. Driver agreed to provide such sample. A short time later, LEO recorded in his report that driver refused after initially agreeing to provide a blood sample. Because of this refusal, LEO did not get a blood sample from driver and Director sought to have drivers license revoked for one year.

At trial, LEO testified that while he did not remember the exact words driver used, driver refused after initially agreeing to submit to a blood test. Driver testified that before LEO drove him to the hospital, LEO inquired if driver "really wanted to do this? Because I don't want to get all the way down there and then you not do it." Driver testified that he then told LEO that he did not want to do it.

The trial court found that driver did not "unequivocally refuse" and reinstated driver's license. On appeal, Director argued that trial court erred in reinstatement because driver's statement to LEO that he did not want to take a chemical test constituted a refusal. The Western District disagreed.

Facts relevant to driver's alleged refusal were contested. At trial, LEO testified that driver agreed to take the chemical blood test after he read driver the Implied Consent law. LEO also testified that a few minutes after such agreement, driver stated he did not want to take the test. LEO however could not recall exactly what driver said. Instead, LEO could only remember that driver said he did not want to do it. LEO testified that he did not advise driver of the Implied Consent law after the initial notice.

Driver testified that shortly after agreeing to the chemical test, LEO said "well you really want to go do this? Because I don't want to get all the way down there and then you not do it." Driver then responded that he "didn't want to do it." Driver testified that he did not believe by making this response he was refusing to take the blood test because he did not want to lose his license.

The trial court's judgment concluded that after agreeing to the test, driver did not thereafter unequivocally refuse. Thus, viewing the evidence in the light most favorable to the judgment and deferring to the trial court's assessment of the evidence, the appellate court found that the trial court's judgment was not against the weight of the evidence. Judgment affirmed.

**"DUI Traffic Law Updates" >p13**

# *DUI Traffic Law Updates* *(from pg 12)*

## Jarboe v. DOR

2014 Mo. App. LEXIS 590
(Mo. App. E.D. 2014)

In this refusal proceeding, the Director's evidence comprised LEO's Alcohol Influence Report, his accompanying narrative, driver's signed refusal as well as his driving record. Driver did not testify. The trial court reinstated driver's driving privilege finding that (1) LEO lacked probable cause to arrest driver, (2) driver did not refuse to submit to a breath test and (3) no admissible evidence of driving while intoxicated was presented." The Director appealed asserting the trial court missapplied the law in that Section 577.041 only requires that an officer have reasonable grounds to believe that a person was driving while intoxicated.

On appeal, the Eastern District noted that the record presented as to the issue of probable cause to arrest driver for driving while intoxicated supported either conclusion. However, the appellate court observed that the trial court's second and third findings casted doubt as to whether the trial court actually considered the evidence in the record to arrive at its conclusion. The appellate court noted that the second finding was directly contradicted by driver's own signed refusal as well as LEO's account set forth in his report. The trial court's third finding - that "no admissible evidence of driving while intoxicated was presented" - caused concern as to whether the court deemed LEO's entire report inadmissible. As a result, the appellate court held that the trial court's evidentiary oversight and misapplication of law undermined confidence in its central finding and hence in the judgment. The appellate court reversed the judgment and remanded the case for a determination of the issue of reasonable grounds based upon evidence in the record. LEO's report, including his own observations as well as statements of a witness are properly admitted into evidence and warrant the trial court's consideration under the foregoing standards.

## Hill v. DOR

424 S.W.3d 495
(Mo. App. W.D. 2014)

Driver appealed from the trial court's judgment sustaining the revocation of his drivers license arguing there was insufficient evidence of probable cause to believe he was driving a motor vehicle while in an intoxicated or drugged condition. Specifically, driver complained that the Director did not provide sufficient indicia of intoxication by a prudent, cautious and trained officer.

The Western District found there was substantial evidence to support the trial court's finding. LEO testified that he believed driver's vehicle was the subject of a dispatch regarding erratic driving. LEO followed driver and observed him drive erratically including numerous traffic violations. LEO testified that once he made contact with driver he observed numerous indicia of intoxication. In addition, driver admitted he took generic Zoloft and another unknown drug. These facts and circumstances were sufficient to support a prudent, cautious and trained police officer's belief that driver committed the offense of driving while intoxicated.

Driver argued that LEO was not trained as an expert in detecting drug impairment. The Western District disagreed. Training as DRE is not a prerequisite to supporting a probable cause finding. LEO testified that prior to arresting driver he made numerous observations consistent with intoxication. LEO's request for assistance from a DRE came after he had already formed that opinion. It is no consequence that LEO sought the assistance of a DRE after he arrested driver. The trial court's finding that LEO had reasonable grounds to believe that driver was driving a motor vehicle while in an intoxicated or drugged condition was supported by substantial evidence. Judgment affirmed.

## Henderson v. DOR

2014 Mo. App. LEXIS 689
(Mo. App. E.D. 2014)

Driver arrested for driving while intoxicated. Post implied Consent, driver consented to a breath test resulting in an alcohol concentration of .023%. LEO then requested a urine test which driver refused. Trial court vacated sanction finding that driver did not refuse to a chemical test of his breath. On appeal, judgment reversed. Although a driver successfully completes an initial chemical test, an officer has a right to request driver to submit to an additional, second type of chemical test. If driver then refuses, the Director has the ability to revoke the driver's driving privileges based on the driver's refusal to submit to the second chemical test.

**"DUI Traffic Law Updates" >p14**

# *DUI Traffic Law Updates* *(from pg 13)*

## CRIMINAL

### State v. Long

417 S.W.3d 849
(Mo. App. S.D. 2014)

Defendant's motion to suppress was denied and a conviction eventually entered. The 911 caller who reported defendant's erratic driving was a "citizen informant" rather than an anonymous tipster" and thus inherently reliable. The caller identified herself by name and vehicle and continuously communicated her observation while pursuing defendant. Additionally, she yield the right of way to the officer where asked to do so via dispatch and testified at defendant's trial. Evidence was thus sufficient to support defendant's conviction for driving while intoxicated.

### State v. Avent

432 S.W.3d 249
(Mo. App. W.D. 2014)

The state appealed from an order granting defendant's motion to suppress evidence obtained subsequent to arrest for driving while intoxicated based upon a lack of probable cause to support her arrest. On appeal, the trial court's decision was affirmed. Where a motion to suppress has been filed, the state has the burden of showing by a preponderance of the evidence that the motion to suppress should be denied. This includes both the burden of producing evidence and the risk of non-persuasion. Probable cause exists where the facts and circumstances within LEO's knowledge, and of which they have reliable and trustworthy information, would warrant a person of reasonable caution to believe that the person being arrested had committed the offense.

Where a trial court has granted a motion to suppress, an appellate court reviews the trial court's decision under an abuse of discretion standard. Only if the trial court's judgment is clearly erroneous will an appellate court reverse. Review is limited in determining whether the decision is supported by substantial evidence. In making that determination, the facts and reasonable inferences from such facts are considered favorable to the trial court's ruling and contrary evidence and inferences are disregarded. An appellate court defers to the factual findings and credibility determinations made by the trial court, remembering that the trial court may choose to believe or disbelieve all or any part of the testimony presented by the state, even though it may be uncontradicted, and may find the state failed to meet its burden of proof. The weight of the evidence and credibility of the witnesses are for the trial court's determination.

Where the trial court makes no findings of fact in ruling on the motion to suppress, the trial court is presumed to have found all facts in accordance with its ruling. The trial court will be deemed to have implicitly found not credible, or entitled to no weight, any testimony or other evidence that is not supported thoroughly. If the ruling is plausible, in light of the record reviewed in its entirety, an appellate court will not reverse, even if it would have weighed the evidence differently.

This is not a case where the trial court's decision was based on stipulated facts and the question presented to the trial court was merely an issue of law. The factual issues in this case were clearly contested. Defendant cross examined LEO, challenging his testimony by arguing bias and partiality, pointing out LEO's selective omission of observations favorable to defendant, and by questioning the evidentiary weight of his observations and the reasonableness of inferences drawn therefrom. Defendant obtained admissions from LEO that his various observations were indicative of the fact alcohol had been consumed but were not indicative of the amount consumed. Defendant elicited an abundance of testimony from LEO indicative of her not being intoxicated. Under the applicable standard of review, the issue before the appellate court is not whether the evidence presented would have been sufficient to support a contrary decision. Rather, the issue is whether the trial court clearly erred in concluding the state failed to prove that probable cause existed, deferring trial court's ability to assess the credibility and the weight to be given the evidence.

Under the appropriate standard of review, the trial court must be deemed to have found not credible, or entitled to little weight, LEO's testimony regarding defendant having watery, glassy eyes, her admission to having consumed 4-5 beers in the 4-5 hours proceeding her arrest, her having a strong odor of alcohol on her breath, and her exhibiting six clues of intoxication on the HGN test. The trial court's ruling suppressing all evidence and statements obtained following defendant's arrest was affirmed.

**"DUI Traffic Law Updates" >p15**

# *DUI Traffic Law Updates* *(from pg 14)*

## State v. Caines

427 S.W.3d 305
(Mo. App. E.D. 2014)

Defendant appeals his conviction for driving while intoxicated challenging the sufficiency of the evidence of intoxication as well as comments made during the state's closing argument. The Eastern District affirms. Viewed in the light most favorable to the verdict, the evidence established that defendant was observed speeding by traveling 77 in a 55 mph zone. LEO observed defendant weaving within his lane and, after LEO activated his emergency lights, defendant took an unusually long period of time to pull over.

When LEO approached the driver's window he saw driver was wearing a Dracula-type costume. When defendant was asked to exit his vehicle, he relied upon his vehicle to guide himself as he walked to the back of his car. Defendant's eyes were glassy and bloodshot and his speech was slurred. There was a strong odor of alcohol on defendant's breath and he admitted to having had a drink.

During the administration of the HGN test, LEO observed four clues of intoxication. Because of a hip problem, defendant did not perform the walk and turn test. Defendant tried but failed to follow the instructions on the one leg stand test. Defendant passed the alphabet test but miscounted during the counting test. LEO attempted to administer a PBT but defendant did not properly blow into the device. Defendant was placed under arrest and transported. In route, he fell asleep.

When asked to submit to a breath test, defendant said "I've done everything you've asked of me." and "You can do whatever you want." LEO said he needed a yes or no answer but defendant ignored him. Defendant never said yes and he never took the test.

During his detention, Defendant again fell asleep. When he was awakened, he was drooling, he staggered while he walked and had to stop to "gag" in the toilet.

In addition to LEO's testimony, the jury watched portions of the video. Defendant put on no evidence. Defendant's motion for judgment of acquittal was denied.

In point I, defendant argued that the trial court erred in overruling his motion for judgment of acquittal because there was insufficient evidence of intoxication. Appellate review of this claim is limited to determining whether sufficient evidence was presented from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt of all the essential elements of the crime. Here there was sufficient evidence to support each element.

In point II, defendant claimed trial court erred in overruling his objection to a portion of the state's closing argument suggesting that he had been at a party drinking the night before. The appellate court disagreed. While the state may not argue facts outside the record, it is allowed to argue the reasonable inferences from the evidence. Here, it was a perfectly reasonable inference from the facts that were in evidence that defendant had been at a party drinking the night before. Judgment affirmed.

## State v. Denzmore

2014 Mo. App. LEXIS 471
(Mo. App. E.D. 2014)

Defendant was charged and eventually convicted of, amongst other things, felony leaving the scene of a motor vehicle accident. On appeal, he challenged the sufficiency of the evidence as to the value of the property damaged. Specifically, he asserted that the state failed to prove beyond a reasonable doubt that the accident resulted in property damage in excess of $1,000. In response, the state contended that defendant waived appellate review of his claim by making an admission at trial that he was guilty of this offense.

During voir dire, defense counsel informed the panel "we are denying his involvement with respect to the robbery, armed criminal action and kidnaping charges; however, we are not denying his involvement in the resisting arrest and leaving the scene of an accident charges."

Thereafter, during his opening statement, defense counsel declared, "my client is guilty of two of the counts he is charged with. He is guilty of ... resisting arrest and leaving the scene of an accident."

At trial, the state presented evidence that defendant was driving a stolen vehicle when LEO attempted to stop him. He then began speeding and disregarding red lights. Defendant made a sharp turn on an icy road hitting a parked car and propelling it through the window of a restaurant. The owner of the vehicle testified that after the accident, her car was "totaled." LEO testified that after the crash, there was a "pretty big explosion" and the car caught fire. The prosecutor did not present evidence of the total cost of the property damage that resulted from the accident.

**"DUI Traffic Law Updates" >p16**

# DUI Traffic Law Updates (from pg 15)

The trial court denied defendant's motion for judgment of acquittal at the close of the state's case and reserved a ruling on said motion at the close of all the evidence. The court did submit on the misdemeanor offense of leaving the scene as well as the felony allegation. The jury found defendant guilty of the felony.

On appeal, the state contended defendant waived appellate review because he repeatedly admitted before the jury that he was guilty of felony leaving the scene. The court held "by admitting that he was guilty to the crime charged - felony leaving the scene of an accident - appellant waived or dispensed with production of evidence relating to that charge." Defendant's admissions were sufficient to meet the state's burden of proof as to each element comprising the felony charge. Judgment affirmed.

## State v. Sutton

427 S.W.3d 359
(Mo. App. W.D. 2014)

The trial court convicted defendant of driving while revoked. On appeal, he argued there was insufficient evidence as he was driving on a highway as he drove in a closed work zone. LEO was dispatched to a motor vehicle accident where he observed a Jeep and a flatbed truck parked in the center lane facing south. The front end of the Jeep was damaged. The flatbed truck was positioned about 20 feet in front of the Jeep. Defendant was the driver of the truck. He told LEO that he had been working with a construction crew painting arrows in the center lane. As he was backing the truck to stay with the work crew as they progressed northward, he struck an SUV which had pulled in the center lane.

LEO, who had been through the area earlier that morning, had observed workers on foot painting arrows in the center lane between defendant's truck and another similar truck at the other end of the work area. Both trucks displayed lighted arrow boards that directed traffic away from the center lane. LEO observed that the painting operation moved slowly but continuously down the center lane. There were no cones or other barriers to prevent traffic from traveling in the center lane. There were signs on the right shoulder announcing a "work zone" or "road work ahead." However, no portion of the road was marked "closed."

Following a bench trial defendant filed a motion for judgment of acquittal at the close of all the evidence arguing there was no evidence that he was driving while revoked on a "highway" as that term is defined in Chapter 302 since the center lane was a "closed work zone." Trial court denied the motion and found defendant guilty. Section 302.010(6) defines highway as "any public thoroughfare for vehicles, including state roads, county roads, public streets, avenues, boulevards, parkways or alleys in any municipality." Defendant conceded that the road was a highway pursuant to this definition but that, "closed work zones" temporarily remove portions of the highway from this statutory definition. The Western District disagreed. In State v. Seeler, 316 S.W.3d 920, 926, the Missouri Supreme Court held that a "closed construction zone [is] still ... part of the highway as defined in Section 301.010. The definition of highway in Section 302.010 is identical to the definition of highway in Section 302.010(6). The judgment of conviction is affirmed.

## State ex rel Strauser v. Martinez

416 S.W.3d 792
(Mo. 2014)

At issue is whether the trial court made every reasonable effort to conduct hearings on a pending probation revocation motion prior to the expiration of defendant's probation so as to have the authority to conduct the hearing after the probation term ended under Section 559.036.8.

Section 559.036 governs the duration of probation terms and the power of a court to revoke a defendant's probation. The term of probation begins the date it is imposed. If a defendant violates his or her probation, the court may revoke it. But the court's authority to do so only extends through the duration of the probation term. When the probation term ends, so does the court's authority to revoke probation.

Section 559.036.8 allows the court to extend this authority if certain conditions are met. It states: the power of the court to revoke probation shall extend for the duration of the term of probation designated by the court and any further period which is reasonably necessary for the adjudication of matters arising before its expiration, provided that some affirmative manifestation of an intent to conduct a revocation hearing occurs prior to the expiration of the period and that every reasonable effort is made to notify the probationer and to conduct the hearing prior to the expiration of the period.

In effect, this section sets out two conditions under which a court may revoke probation after a probation

**"DUI Traffic Law Updates" >p17**

# *DUI Traffic Law Updates* *(from pg 16)*

term has ended. First, the court must have manifested its intent to conduct a revocation hearing during the probation term. Second, it must make every reasonable effort to notify the probationer and hold the hearing before the term ends. Unless the court satisfies both of these conditions, it cannot hold a revocation hearing after probation expires. At issue is whether the trial court made every reasonable effort to conduct a revocation hearing during the defendant's probation term.

Defendant's five year probation, which was imposed on June 4, 2007, ended on June 4, 2012. During this period, the trial court manifested its intent to conduct a revocation hearing by suspending her probation after the state filed a motion to revoke and scheduling a revocation hearing thereafter.

Instead of ruling on the motion, however, the trial court continued the hearing thirty-seven times between when it scheduled the initial revocation hearing and when her probation ended. Defendant always appeared and made the required restitution payments. She also appeared eight more times for case reviews after her probation ended. Because the trial court could have ruled on the revocation motion on any of these numerous occasions, but chose not to, it did not make every reasonable effort to hold the hearing during her probation so as to satisfy Section 559.036.8.

## State v. Mignone

411 S.W.3d 611
(Mo. App. W.D. 2013)

Defendant was arrested for driving while intoxicated. In compliance with the Implied Consent law he provided two evidential breath samples both of which revealed a breath alcohol concentration of less than .080%. Pre-trial, the defendant moved the trial court to dismiss with prejudice the criminal allegation as filed against him pursuant to Section 577.037.5. This statutory section directs the trial court to dismiss an allegation of driving while intoxicated with prejudice unless the trial court finds said dismissal unwarranted. Dismissal is deemed unwarranted under one or more of three possible exceptions: (1) There is evidence that the chemical analysis is unreliable evidence that the defendant's intoxication at the time of the alleged violation due to the lapse of time between the alleged violation and the obtaining of the specimen; (2) there is evidence that the defendant was under the influence of a controlled substance, or drug, or a combination of either or both with or without alcohol; (3) there is substantial evidence of intoxication from physical observation of witnesses or admissions of the defendant.

In the present proceeding, the trial court found none of the exceptions applicable and dismissed the criminal allegation with prejudice. The state appealed. On appeal, the Western District affirmed.

# Miscellaneous

## Session v. DOR

417 S.W.3d 898
(Mo. App. W.D. 2014)

Director moved to dismiss a drivers financial responsibility challenge arguing that the statute of limitations precluded judicial review. The Western District affirmed. Chapter 303 mandates that any adverse decision be challenged within 30 days of the date of mailing. Any exception set forth in 302.515.2 is inapplicable.

## Amick v. DOR

428 S.W.3d 638
(Mo. 2014)

Driver argued that Section 302.309.3(6)(b) violates the equal protection clause because this statute disqualifies individuals with a felony conviction involving a motor vehicle from obtaining limited driving privileges whereas Section 302.309.3(9) allow graduates of or participates in statutorily authorized DWI court divisions or programs to obtain such privileges. Driver asserted the differential treatment is unconstitutional.

There are two steps to an equal protection analysis. The first step requires a court to identify the classification at issue to ascertain the appropriate level of scrutiny. If there is no suspect classification or fundamental right at issue, a court will apply rational-basis review to determine whether the challenged law is rationally related to some legitimate end.

The second step of the analysis requires the application of the appropriate level of scrutiny to the challenged statute.

Section 302.309.3 does nothing more than regulate those individuals who are eligible for driving privileges without reference to any suspect classification or

**"DUI Traffic Law Updates" >p18**

# *DUI Traffic Law Updates* *(from pg 17)*

limitation on any fundamental right and as such is subject to a rational-basis review. Applying this standard of review, the Supreme Court presumes that a statute has a rational basis and a party challenging the statute must overcome this presumption by a "clear showing of arbitrariness and irrationality." A rational-basis review requires the challenger to "show that the law is wholly irrational."

The state has a legitimate interest in promoting public safety which includes the regulation of drivers licensing. In the present case, there is a rational relationship between the state's legitimate interest in promoting public safety and the decision to permit DWI Court graduates and participants to obtain reinstatement of driving privileges on different terms than non-participants. The legislature could rationally determine that DWI Court participants are less likely to re-offend and, therefore, pose less of a risk to public safety than offenders who do not participate. The legislature could also determine that providing an opportunity for reinstatement could incentivize offenders to obtain treatment and abstain from driving while intoxicated.

Driver's argument that there are alternative means to achieve the state's interest in public safety does not undermine the rationality of allowing graduates and participants in the DWI Court program to obtain limited driving privileges while denying that opportunity to non-participants.

## Lord v. DOR

427 S.W.3d 253
(Mo. App. E.D. 2014)

The Director appealed the trial court's judgment in favor of driver on her review of the revocation of her license pursuant to Section 392.535. The Director argued that the trial court erroneously applied the law in finding that LEO lacked legal probable cause to arrest driver for driving while intoxicated.

At trial, driver testified that she was returning from a Christmas party at the time of the stop. She admitted consuming three glasses of wine that evening. Although she initially testified that she arrived at the party around midnight and left around 1:30 or 2:00 a.m., after being informed that LEO's report indicated the initial stop occurred at 3:39 a.m., she testified that she arrived at the party around 1:30 a.m. and departed an hour and a half to two hours later.

Driver also testified that she performed the walk and turn and one leg stand test barefoot, on rocks at the side of the highway and it was cold and very windy. Driver testified that she had bad knees from playing basketball in college that possibly affected her performance on these tests. Driver also testified that at the time of the arrest she had really bad pink eye which caused her eyes, one in particular, to be bloodshot. Driver also testified that while the officer was administering the HGN test, the spinning lights of the police car were on and she was facing them.

The arresting officer was not present. The Director proceeded on its certified file. The dash cam of the incident was also admitted.

The trial court entered a form judgment that LEO did not have probable cause to arrest driver for driving while intoxicated and ordered the Director to reinstate her privileges.

On appeal, the appellate court found that driver did not contest the Director's evidence. That is, she did not dispute that she had bloodshot eyes, that she failed the HGN, the walk and turn test and the one leg stand test nor that she admitted to the officer that she had been drinking. "She did not point out internal inconsistencies in the evidence or question the arresting officer's credibility." Instead, she admitted as true the facts set forth in the AIR, narrative report and dash cam video, but argued that those facts did not give the officer probable cause to arrest her. The Eastern District considered this a "purely legal argument." Consequently, the issue was a legal one as to whether LEO had probable cause to arrest which is reviewed without deference to the trial court's judgment.

Based upon this evidence, the appellate court held that the arresting officer had legal probable cause to arrest driver for driving while intoxicated. Driver did not contest the evidence. Rather, her testimony merely provided explanations for her performance and LEO's observations. The trial court was free to believe or disbelieve the validity and reliability of the results in light of that testimony. However, even absent the field sobriety evidence, the observations made by LEO constituted sufficient evidence of probable cause to arrest. Thus, LEO had legal probable cause to arrest driver. Judgment of the trial court was reversed.

## Erskine v. DOR

428 S.W.3d 789
(Mo. App. S.D. 2014)

On the day of trial, driver filed a written motion to strike Exhibit A and any evidence stemming from the

**"DUI Traffic Law Updates" >p19**

## *DUI Traffic Updates* *(from pg 18)*

observations, testimony, notes or recollections of LEO, now a former LEO. Exhibit A contained the Director's certified file pursuant to Section 302.312 and comprised the Alcohol Influence Report and supporting documents as well as the maintenance report and witness statements. At trial, the court confirmed that driver was making a due process objection to Exhibit A. The court took the motion under advisement. Thereafter, the trial court found that the arresting officer was unavailable to testify despite driver's attempt to subpoena him. The court sustained driver's motion to strike and enter judgment in favor of driver and against the Director.

On appeal, the Southern District reversed. Exhibit A contained properly certified records which were presented for admission of evidence. Such records were admissible under Section 302.312.1. Therefore, the trial court erred in excluding Exhibit A from evidence. The judgment was reversed and remanded as the trial court erroneously applied the law. On remand, the trial court was directed to proceed with admission of live testimony or other appropriate evidence if so requested by the parties.

# Changes to Missouri's Constitution

by Brian Bernskoetter

On August 5th Missourians took to the polls to make big decisions to change Missouri's Constitution. One notable Amendment among them that received less attention was Constitutional Amendment 9 known as the "Right to Privacy". This amendment passed over-whelming and enshrines into our Constitution the right of Missourians to "shall be secure in their persons, papers, homes, effects, ***and electronic communications and data,*** from unreasonable searches and seizure".

The strong outcome of this vote (75% Yes – 25% No) is a resounding victory for privacy advocates and a signal that Missourians understand that with the growing use of technology there comes a great need to protect the private information that can easily be garnered off our computers and cell phones.

This effort was spearheaded in the General Assembly by Sen. Rob Schaaf (R-St. Joseph) who was responding to news reports about police confiscating cell phones and reviewing their contents without a warrant. Importantly with this measure, the communication and data that is protected extends to not only cell phones, but also all electronic data which would include laptops, computers, or any electronic device capable of such means.

In November there will be another Constitutional Amendment of interest to the criminal defense community. Constitutional Amendment 2 states ***"Shall the Missouri Constitution be amended so that it will be permissible to allow relevant evidence of prior criminal acts to be admissible in prosecutions for crimes of a sexual nature involving a victim under eighteen years of age?"***

While the above is the actual ballot language the amendment also includes a caveat that allows a judge to reject ***"evidence of prior criminal acts if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice."***

This amendment was passed by a joint resolution of the General Assembly during the 2013 legislative session. It was sponsored by Sen. Will Kraus (R-Lee's Summit) and Rep. John McCarthy (R-High Ridge).