MACDL
Missouri Association of Criminal Defense Lawyers

Newsletter

P.O. Box 1543
Jefferson City, MO 65102
Ph: 573-636-2822
Web page: www.macdl.net
April, 2003

MACDL Legislative Report

By: Randy Scherr, MACDL Lobbyist

As the 2003 Legislative sessions passes the halfway mark, the General Assembly has over 1400 pieces of legislation under consideration. While the Senate has a record 700 bills filed, the House has what appears to be a 20-year low with only 700 hundred bills filed in that body. MACDL is tracking nearly 100 bills and joint resolutions.

The change in leadership in the House from Democrat to Republican has brought not only a reduction in the number of committees, but also a restructuring of new committees, along with all new committee chairs. Most of the MACDL legislation of interest has been referred to either the House Crime Prevention and Public Safety Committee or the House Judiciary Committee. Most of the Legislation of primary interest falls into several general categories.

Hold Times

Several Bills have been filed to change the holding time for suspects. Several of these Bills change the hold time to either 32 or 36 hours. The primary bill under consideration, HB 198, has past the House and is under consideration in the Senate. Presently the maximum hold time is 20 hours, except for what is considered the seven deadly's, which is 24 hours. HB 198 changes all hold times to 30 hours.

Crime Reduction Funds

Two Bills would authorize the establishment of Crime Reduction Funds and allow judges to seek contributions to the crime reduction fund in exchange for reduced sentences or suspended imposition of sentences. MACDL is strongly opposed to this concept. SB 222 was stalled in the Senate Local Government Committee following MACDL testimony. HB 91 passed the House and is waiting committee assignment in the Senate.

Jury Age

Several Bills have been filed to lower the minimum jury age from 21 to 18. The Missouri Legislature has attempted this change for the last 15 years. It doesn't appear that any of the bills making this change are moving forward this session.

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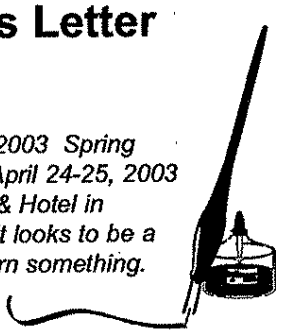
President's Letter



Brothers and Sisters:

MARK YOUR CALENDAR!" 2003 Spring Conference" will be held on April 24-25, 2003 at Harrah's St. Louis Casino & Hotel in Maryland Heights, Missouri. It looks to be a dandy and you might just learn something. If not, it is an excellent opportunity to shmooze with old friends and meet some new ones and maybe drum up a little bit of business besides an opportunity to have some fun and maybe win big money.

This time of year, we are busy with our most important activity, legislative lobbying in Jefferson City. Randy Scherr, our Executive Director, is doing a great job, as always. I would urge all of you with any particular interest or expertise regarding any of the pending legislation going on down there to contact Randy with any ideas or any assistance that you might have to offer.

There will be a Board of Directors meeting in connection with the Spring Conference and all MACDL members are invited to that meeting. We welcome any ideas that you might have as to things that we are doing or should be doing or how things can be done better. Let us hear from you. Hope to see you in the big city on April 24.

Very truly yours,
Patrick J. Eng
MACDL President

The MACDL newsletter is a semi-annual publication of the Missouri Association of Criminal Defense Lawyers; P.O. Box 1543; Jefferson City, Missouri 65102; Phone: 573-636-2822; Website: www.macdl.net. Your comments and suggestions are welcome!

The Federal Safety Valve

By Steven C. Edelman

In an effort to get tough on drug crimes, Congress has established mandatory minimum sentences for certain federal drug offenses. Most of these mandatory minimums are driven by the amount/weight of drugs attributable to a defendant. They begin with a mandatory 5-year or 10-year minimum sentence, then increase based on whether a defendant has prior felony drug convictions. While many defendants do have priors, woe is the defendant whose first foray into the drug trade nets him a possible mandatory minimum sentence of 5 or 10 years.To effectively represent this defendant, the lawyer needs to explore avenues around the mandatory minimum. One way is through cooperation with the Government, but the better way is through the "safety valve."

The "safety valve" provision is found in Section 5C1.2 of the United States Sentencing Guidelines, and it tracks the language of Title 18 Section 3553(f) of the United States Code. The safety valve authorizes a District Court Judge to sentence a defendant without regard to any mandatory minimum sentences that would ordinarily apply, but only if the defendant meets five criteria.

First, the defendant must not have more than 1 criminal history point. Criminal history points accumulate based on a defendant's prior criminal record. Second, the defendant must not have threatened or used violence in the commission of the instant offense, and must not have possessed a firearm in connection with the offense. Third, the offense must not have resulted in a death or serious bodily injury. Fourth, the defendant must not have been an organizer, leader, manager, or supervisor of the criminal activity. Finally, the defendant, prior to sentencing, must provide full and truthful information to the Government concerning his/her own involvement in the offense (they need not talk about other defendants or crimes, and it is not necessary to provide new information to the government).

Part 2D of the Sentencing Guidelines contains the guidelines applicable to drug offenses. A defendant who meets all five of the above-listed "safety valve" criteria not only is entitled to be sentenced without regard to a mandatory minimum, but if the offense calls for application of §2D1.1, they are also entitled to a 2-level reduction in their base offense level [§2D1.1(b)(6)]. This 2-level reduction is available to a defendant regardless of whether there is a mandatory minimum applicable to the offense of conviction. No other guideline in section 2D appears to offer this 2-level reduction. Note that section 5C1.2(b) states that if there was at least a 5-year mandatory minimum, the final offense level cannot be lower than a 17.

Common issues that arise in the context of safety valve litigation deal with the criminal history computation, whether a firearm was possessed "in connection" with the underlying offense, and whether the defendant took on a supervisory/managerial role in the offense. Most litigation in the federal criminal realm takes place at sentencing, consequently, federal defense lawyers must familiarize themselves with the 8th Circuit's law related to these issues. The defense lawyer also needs to know that the safety valve only applies to certain offenses under Title 21 of the United States Code. Section 5C1.2(a) specifies that the safety valve is applicable if the Defendant is charged under Title 21 U.S.C. §841(main drug statute), §844(simple possession), §846(attempt or conspiracy to commit drug offense), §960(importing or exporting drugs/possession on vessel, aircraft, or vehicle) or §963(attempt or conspiracy).

Overlooking the "safety valve" benefits to your client has dire consequences, and certainly would support a claim of ineffective assistance. Effective advocacy on behalf of your client requires you to explore this issue with them at an early stage of the representation, and if you think it may be applicable, to advance it to the Assistant U.S. Attorney and Probation Officer in a timely fashion.

Legislative Report *(Contined from page 1)*

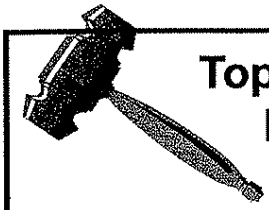
Death Penalty

HB 223 would repeal the death penalty on Missouri Law. HB 255 would increase the minimum age from 16 to 18 for which the death penalty could be imposed for first-degree murder. Also several bills establish a death penalty study commission. HB 200 and SB 256 would eliminate the judge's discretion for imposing the death penalty where a jury fails to reach a decision.

Criminal Depositions

Representative Scott Lipke has filled HB 586 prohibiting the taking of depositions by defense counsel in criminal cases. The Bill has been assigned to the House Crime Prevention-Public Safety Committee. This bill has caused quite a controversy among the members of MACDL. At the time of this printing the bill has not been scheduled for a hearing, but is expected to be sometime in early April.

We would like to thank all of the MACDL members who have taken time to travel to Jefferson City to testify on bills of interest. It is extremely important that we have witnesses to express the position of MACDL before the various committees. If you are interested in reading the text or checking the updated status of any of the legislation, you may log on to www.moga.state.mo.us.



Top Ten Federal Decisions

By: Bruce Houdek

Hane v. Mullin, WL167986, January 27, 2003.

The Supreme Court denied Certiorari, thus permitting the 10th Circuit decision to stand sub nom Hane v. Gibson, 287 F.3d 1224 (Ct. App.10 2002) finding that imposition of a death sentence on a person who was a minor at the time of offense, did not violate United States Constitution.

Sattavahen v. Pennsylvania, 23 S.Ct. 732 (2003).

The State is not precluded by the double jeopardy clause from seeking the death penalty on re-trial after the grant of a motion for new trial wherein the Defendant had received a sentence of life. The due process clause does not provide a greater double jeopardy protection than does the double jeopardy clause itself and double jeopardy was not triggered when the jury deadlocked at the Defendant's first trial.

U.S. v. Fitz, ___ F.3d _____(8th Cir.) 2003, WL173829.

Jury verdicts finding the Defendant guilty of conspiracy to distribute and possession with intent to distribute methamphetamine were set aside by the 8th Circuit for insufficiency of evidence to support the convictions. The only evidence was that the Defendant was present when ther co-conspirators arranged and carried out a methamphetamine sale. The Defendant was present during monitored conversations, but never spoke and the meth was not found in the car he was driving. The government did not call as witnesses the confidential informant or the other co-conspirators who pled guilty. This is a truly remarkable result in the Eighth Circuit. There was a verdict of guilty by the jury, a denial of a motion for judgment of acquittal by the district court and a reversal for lack of evidence by the 8th Circuit.

U.S. v. Bach, 310 F.3d 1063 (8th Cir. 2002).

Execution of a search warrant obtained by state authorities and seizure of e-mail by Yahoo personnel from Yahoo's servers does not violate 18 U.S.C. § 3105 Persons Authorized to Serve Search Warrants or the Fourth Amendment to the United States Constitution. Yahoo technicians performed the search without the presence of officers. The Court noted that many searches are performed outside the presence of officers including dental x-rays, bank records and body cavity searches.

U.S. v. Workcuff, U.S. District Court for the Western District of Missouri, 02-CR-00189

Judge Ortrie Smith has ordered drug evidence suppressed finding that the Kansas City police illegally searched a defendant's residence using a "no-knock" search warrant. Judge Smith held that the warrant affidavit did not contain sufficient evidence to justify the "no-knock" provision. The Court found that the Missouri law required the police to provide specific reasons to justify a "no-knock" warrant such as the suspect's violent past.

United States v. Byess, S.D.W.Va. CR no.2:99-00012-01

In this case, the entire U.S. Attorneys office was disqualified. The defendants were convicted of several drug offenses and while the case was on appeal, the government disclosed that police officers who were involved in the case may have stolen drug proceeds, suborned perjury, lied under oath and tampered with witnesses. The case was remanded to the district court for determination of the appropriateness and legality of the sentence imposed. The district court disqualified the entire U.S. Attorneys office for the Southern District of West Virginia finding that various of its staff would be required to be witnesses and that the office had continuing and ongoing relationships with various of the offending officers.

United States v. Jimenez Cresio, 123 S.Ct. 819 (2003).

The Supreme Court held that a conspiracy does not automatically terminate simply because the government has defeated its object. The defendants were the subject of a government sting and the police had stopped and seized a truck carrying illegal drugs. The truck driver assisted the police in setting up the defendant who came to the truck's location and drove it away. The 9th Circuit reversed holding that the defendants were not shown to have joined the conspiracy prior to the police seizure which terminated its object, the distribution of the drug. The Supreme Court separated the substantiative criminal offense of drug distribution from the offense of conspiracy to violate the drug laws holding that the agreement itself is a "distinct evil" constitutes a "threat to the public" and can lead to commission of other additional crimes.

United States v. Thomas, 315 F.3d 190 (3rd Cir. 2002).

The Third Circuit has adopted a narrower interpretation of the bank fraud statute. The Court held that government must prove that the defendant intended to steal from the bank and/or subject the bank to possible liability, not just fraudulently obtained funds in the bank's custody.

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Significant Missouri Cases

By: Bernie Edelman

State v. Tamera Smith, 81 SW3d 657 (MoApp June 11, 2002)

The jury found defendant guilty of the Class C felony of failing to return rental property, a Ford Taurus, defendant had rented for one week. Defendant claimed that another individual had taken the car from her and she did not know of the car's whereabouts. After the jury verdict and before sentencing, the judge set aside the verdict finding that no reasonable jury could have found the defendant guilty beyond a reasonable doubt. From that judgment the State appealed.

APPEALS COURT: A person commits the crime of failing to return leased property if, with the intent to deprive the owner thereof, he purposely fails to return leased property to the place and within the time specified in an agreement in writing. Section 578.150.2 RSMo states it shall be prima facie evidence of the crime if the person who has rented the property willfully fails to return or make arrangements acceptable with the lessor to return the property to its owner at the owner's place of business within 10 days of proper notice following the expiration of the lease agreement except if the property is an automobile.

If the motor vehicle has not been returned within 72 hours after the expiration of the lease agreement, such failure to return the property shall be prima facie evidence of the intent of the crime of failing to return leased property. No demand is necessary to prove the crime. Establishing a prima facie case allows the state to shift the burden of going forward to the criminal defendant but does not shift the burden of proof, which remains with the State. Since the State made a prima facie showing, the jury did not have to accept defendant's version of the circumstances surrounding the missing vehicle. The trial court erred in granting defendant's motion. JUDGMENT OF ACQUITTAL REVERSED.

Hinnah v. Director of Revenue, 77 SW3d 616 (Mo banc June 25, 2002)

Hinnah was arrested for DWI and allegedly refused a chemical test after being requested to do so pursuant to Section 577.041 RSMo. The officer testified that he found Hinnah in his truck, which was parked on the shoulder of Highway 40. The keys were in the ignition, the engine was on and Hinnah was sleeping on the passenger side of the cab. At the hearing, Hinnah introduced evidence that someone else was driving the vehicle and had left him asleep in the truck. The Court determined that the officer lacked probable cause to believe Hinnah was driving while intoxicated and the Director appealed.

SUPREME COURT: Only three issues are relevant at a refusal hearing: 1) whether or not the person was arrested or stopped 2) whether the officer had reasonable grounds to believe the person was driving a motor vehicle while intoxicated or drugged 3) whether or not the person refused to submit to the test. The inquiry ends once these three questions have been answered. A showing by the defendant as to who was actually driving is not part of the inquiry and is largely irrelevant. The question is not whether the person was actually driving, but whether the officer had reasonable grounds to believe he was. Evidence to show that the licensee was not driving may be relevant to show the unreasonableness of the officer's belief that the licensee was driving. To the extent Kinsman v. Director, 58 SW3d 27 (MoApp 2001) holds that the Director must prove the licensee was actually driving, it is overruled

While the trial court had evidence to support a finding of probable cause, the court was free to draw the conclusion that there was not probable cause. Either conclusion was sustainable under the record, depending on the court's assessment of the credibility of the arresting officer as to driving or intoxication. JUDGMENT AFFIRMED

State ex rel Boyle v. Sutherland, 77 SW3d 736 (MoApp June 25, 2002)

Boyle had pled guilty to misdemeanor stealing, and was sentenced to a year in jail, but the execution of the sentence was suspended and he was placed on probation for two years. The state later moved to revoke his probation, and Boyle appeared in court without an attorney. Boyle contended his probation had expired, and that he could not afford an attorney. The judge, believing that Boyle had waived his right to counsel, conducted the hearing, revoked his probation and ordered Boyle to serve his one year sentence. Boyle filed a writ of prohibition to prevent the enforcement of the order.

APPELLATE COURT: There is no per se right to counsel at a probation revocation hearing. In Gagnon v. Scarpelli, 411 US 778 (1973), the US Supreme Court said there are certain cases where fundamental fairness requires the state to provide counsel for indigent probationers.

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Significant Missouri Cases *(Contined from page 4)*

Missouri had followed the Supreme Court's opinion in Abel v. Wyrick, 574 SW2d 411 (Mo banc 1978) The Court stated the following procedure is mandated in probation revocation proceedings: First an indigent probationer will be informed of his right to request that counsel be appointed; Second, presumptively counsel should be appointed; Third, the court should consider the ability of the probationer to speak effectively for himself; Fourth, if the request for counsel is refused, the grounds for the refusal shall be on the record; and Finally, the judge shall be allowed considerable discretion.

However, on this record, the judge exceeded his jurisdiction in conducting the hearing without informing Boyle of his right to appointed counsel and without Boyle waiving counsel. PRELIMINARY WRIT MADE ABSOLUTE

Sumpter v. Director of Revenue, #WD60257 (MoApp June 28, 2002)

Sumpter was convicted in July, 1999 of felony offenses involving a motor vehicle which led to the accumulation of 24 points against Sumpter's license. In March, 2001 the Director notified Sumpter his license would be revoked for these offenses. Sumpter appealed that decision and the Bates County judge set aside the revocation because of the unreasonable delay between conviction and revocation. The Director appealed.

APPEALS COURT: Points against a driver's license accumulate on the date of conviction. However, a person cannot lose their driving privileges until the Director receives notice of their convictions and assesses points against their license. The distinction between "accumulation" and "assessment" of points means that a significant time lapse may occur between conviction and loss of driving privilege. Missouri statutes do not give the Director discretion from revoking the driving privileges where the accumulation of points meets the statutory amount. The trial court erred in imposing a timeliness requirement nd the revocation should be reinstated. REVERSED

State v. Kelley, 83 SW3d 36 (MoApp June 28, 2002)

Defendant was convicted of statutory sodomy of a five year old girl, the crime occurring in 1991, but not reported to authorities until 1998. The State filed a Motion in Limine to prevent the defendant, pursuant to the Rape Shield Statute (Sect. 491.015 RSMo), from questioning any witnesses about the victim's allegations of sex abuse against persons other than defendant. Defendant opposed this Motion and filed a Motion to Allow Evidence of Pattern of Conduct of Victim. After a hearing, the Court sustained the State's Motion and denied the defendant's Motion.

APPEALS COURT: The rape shield statute creates a presumption that evidence of a victim's prior sexual conduct is irrelevant to prosecutions for sex crimes. In an offer of proof outside the jury's hearing, the victim testified she had been sodomized by four men other than defendant. Her half brother molested her when she was five or six which she related to authorities, but no charges were brought. She testified she was sodomized by another at age twelve and charges were filed and later dropped against this individual. She stated she was also abused by a man whom she did not know and a few months before this trial, she was sodomized by another and charges against him were pending at the time of this defendant's trial. She denied recanting any of the accusations and testified that all of the reported acts of abuse had occurred. Defendant argued this testimony should have been admissible to show a "pattern of conduct" in making sex abuse allegations, arguing that the victim's history is relevant evidence of her credibility, motive and possible fabrication of the allegations against defendant.

The Court's grant of the motion in limine was proper because the testimony did not fall under any exception of the rape shield statute. Defendant failed to show the relevance of these claims to his defense of fabrication as there was no evidence of fabrication and the victim testified the claims were all true. The testimony, if admitted, would have shown the acts of sexual conduct occurred, and is presumptively inadmissible. CONVICTIOM AFFIRMED

State v. Scott, 78 SW3d 806 (MoApp July 12, 2002)

Defendant was convicted of multiple counts of statutory rape and statutory sodomy. At trial he wanted to introduce the testimony of one of the victims that she had made prior allegations of sex abuse that had not occurred. The court conducted a hearing and denied defendant's request, citing the rape shield statute as the basis for precluding this testimony. Defendant contended this ruling was error because he was not trying to the victim's prior sexual conduct, but her false allegations.

APPEALS COURT: State v. Montgomery, 901 SW2d 255 (MoApp 1995) established the principle that a sex abuse victim's credibility could be challenged through cross examination as to other allegations of abuse made against others. The rape shield statute does not preclude introduction of evidence of prior allegations by an alleged victim of sexual abuse if that evidence is offered to impeach the credibility of the victim as a witness. Evidence of a victim's prior complaints, as opposed to prior sexual conduct, does not fall within the ambit of the

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Significant Missouri Cases *(Contined from page 5)*

rape shield statute and it was error for the court to exclude that testimony. However, since the evidence of defendant's guilt was strong the error was not prejudicial. CONVICTION AFFIRMED

AUTHOR'S COMMENT: Can these two opinions, one from the Southern District (Scott) and one from the Western District (Kelley) be reconciled? Does the Missouri Supreme Court have to clarify this issue? The issue seems to depend on how the issue is addressed. If the impeachment is as to prior complaints, the evidence seems to be admissible. If the impeachment is as to sexual conduct, the evidence seems to be inadmissible.

State v. Rose, 86 SW3d 90 (MoApp July 30, 2002)

Defendant was arrested for DWI after failing field sobriety tests including the Horizontal Gaze Nystagmus test. This test requires the driver to follow a stimulus, usually a pen or finger, with his eyes while the officer watches the eyes to see whether and when the nystagmus (jerking) of the eyes occurs. The officer scores the nystagmus on the alcohol influence report. At trial, the arresting officer testified that all individuals he arrested who scored 6 on the HGN had a blood alcohol level of at least .10%. Rose claimed it was error for the officer to give that opinion.

APPEALS COURT: Missouri has accepted HGN testimony as long as the officer has the appropriate training to give the test and he properly administers it. State v. Hill, 865 SW2d 702 (MoApp 1993). However, for an officer to equate a specific blood alcohol to the HGN test is beyond his qualifications and competence and it was error to allow this testimony. Trial courts, attorneys, witnesses and other relevant parties in our justice system are on notice that unless a proper foundation is laid that establishes the witness's ability to correlate the HGN score with a BAC level, such testimony is unacceptable and inadmissible. The officer may testify that a score of 6 is indicative of intoxication, but such a score does not create a presumption of intoxication as the trier of fact is free to believe or disbelieve the officer.

Although it was error to admit the testimony, there was considerable other evidence of defendant's guilt and defendant suffered no prejudice by the erroneous admission of evidence. CONVICTION AFFIRMED

State v. Moore, #SC84495 (Mo banc Nov. 12, 2002)

In a conversation in a Springfield restaurant, defendant, affectionately know as "grandpa' to the employees, suggested to a 13 year old female employee that she could give him a lap dance, that she could come to his home and give him oral sex, and threatened that if she told anyone of this offer, he would kill her. The police were called and defendant later admitted having conversations with the girl about sexual activity. Defendant was charged and convicted of third degree sexual misconduct, a class C misdemeanor, which is committed by "soliciting or requesting another person to engage in sexual conduct under circumstances in which he knows that his requests or solicitation is likely to cause affront or alarm". He was placed on probation, but was required to register as a sex offender. Moore appealed contending the statute was unconstitutional under the First Amendment.

SUPREME COURT: This statute is not a mere prohibition of speech, but of words which cause affront or alarm to another. What is prohibited is sexual requests or solicitations. Being impolite or annoying are not enough. An adult is presumed to know that certain behavior is criminal and having oral sex with a 14 year old is a felony-statutory sodomy. An adult is deemed under the law to know that such conduct is likely to cause affront or alarm to the victim. The phrase "likely to cause affront or alarm" is in the statute to distinguish those actions from conduct that is accidental, inadvertent, or done without an intent to do harm. As construed, the challenged section of the statute does not violate the constitutional guarantee of freedom of speech. CONVICTION AFFIRMED

Barmore v. State, #ED80470 (MoApp Nov. 26, 2002)

Pursuant to a plea agreement, defendant pled guilty to Robbery 1st and Robbery 2d charges. The state's recommendation as a plea bargain was 10 years on Robbery 1st, 5 years on Robbery 2d, with the sentences being concurrent and the state not opposing probation. After a pre-sentence investigation, the court suspended imposition of sentence on both charges and placed defendant on probation for 5 years. The judge warned Barmore that if he violated his probation his sentencing exposure was from 30 years to life imprisonment on the charge of Robbery 1st. Fourteen months later, the court revoked defendant's probation and sentenced him to 20 years for Robbery 1st and a concurrent term of 10 years for robbery 2d. Barmore filed a Rule 24.035 motion for post-conviction relief claiming ineffective assistance of counsel for not telling him that if he violated his probation, the court could impose any sentence within the statutory range of punishment, including sentences greater than the state recommended in the plea agreement.

APPEALS COURT: Counsel only has an obligation to inform a defendant of the direct consequences of a guilty plea and not the "collateral" consequences. Direct consequences are those which "definitely, immediately, and largely automatically follow the entry of the plea of guilty".

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Significant Missouri Cases *(Contined from page 6)*

The prison term imposed here did not follow his plea of guilty, but was only imposed after he violated his probation. Defendant's re-sentencing following his probation violation was a collateral, not direct, consequence of his guilty plea. Defendant's counsel had no obligation to inform him about the potential consequences of violating probation.

Defendant also contended that the court should have afforded him the opportunity to withdraw his plea at the initial sentencing when the court told defendant he could get 30 years to life if he violated his probation. First, this warning was advisory, not mandatory, as to a future sentence. Like defendant's attorney, the court has no obligation to warn defendant of the collateral consequences of pleading guilty. Here the sentencing court did not reject the plea agreement, but placed defendant on probation, as contemplated by the plea agreement. Defendant received from the original sentence the benefit of his bargain. SENTENCE AFFIRMED

Schnelle v. State, #WD60406 (MoApp Jan 31, 2002)

Defendant was convicted of Assault 1st Degree, Knowingly Burning, and First Degree Tampering. In this post conviction proceeding, Schnelle contended his trial lawyer was ineffective for failing to object to the striking of his entire trial testimony when he refused to answer a question on cross-examination concerning one of his prior criminal convictions. This issue was addressed in the direct appeal where the appeals court upheld the convictions because trial counsel waived any claim of error by agreeing that striking defendant's entire trial testimony was the proper remedy. See State v. Schnelle, 7 SW3d 447 (MoApp 1999). At trial and during cross-examination, the prosecutor asked Schnelle about his convictions. He admitted to 20 felony or misdemeanor convictions. He admitted to felony convictions in Kansas, but when asked what they were, took the Fifth Amendment. When Schnelle would not answer the question, the judge stuck all of his trial testimony and instructed the jury to disregard it. In closing argument, the prosecutor reminded the jury that they were not to consider anything Schnelle said as his testimony had been struck from the record.

APPEALS COURT: At the Rule 29.15 Motion hearing, Schnelle's trial counsel testified that he did not argue to the trial judge that he could or should impose a lesser sanction than striking Schnelle's entire testimony. It is inconceivable why an advocate would concede the striking of his client's entire testimony, especially when his defense must succeed or fail upon his own testimony. Case law supported the argument that Schnelle's entire testimony should not have been stricken because the question he was refusing to answer was of such a collateral nature that striking his entire testimony would not be the proper remedy. See State v Blair, 638 SW2d 739 (Mo banc 1982) where the Supreme Court suggested that the proper remedy would be for the trial judge to instruct the jury that it could consider the witness's refusal to answer in determining the weight to be given to his testimony. However misguided, wrong or even contemptuous his refusal might have been, it was very limited in scope to a purely collateral matter. A reasonably petent attorney would have, under the circumstances, made some argument that his client's testimony should not be stricken in its entirety. Because Schnelle's theory of defense was self-defense and defense of property, the striking of his testimony was prejudicial and there is a reasonable probability that but for his counsel's unprofessional errors, the result of the trial would have been different. CONVICTION REVERSED

Top Ten Federal Decisions

(Contined from page 3)

Here the -caregiver of a 88 year old woman convinced her to sign checks which the defendant then cashed to feed her drug habit. The employer was present when the money was withdrawn from the bank and assured officials that she had authorized the check. In dismissing the bank fraud charges, the Court found that the bank would not be subject to liability and would not suffer any loss.

Clark v. Murphy, (2003 WL187215) (9th Cir. 2003)

The Ninth Circuit has held in a state habeas corpus case that a defendant who stated during custodial interrogation "I think I would like to talk to a lawyer" does not sufficiently unambiguously invoke his right to counsel, etc. under Miranda.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE - EFFECTIVE 12-1-02

Changes in Rule 5, 10 and 43, authorize initial appearances and arrangements by videoconferencing with the defendant's consent. Amended Rule 5.1 permits a continuance of a preliminary hearing without the consent of the defendant in "extraordinary circumstances." Amended Rule 12.2 permits the Court to require a defendant who has given notice of an insanity defense to submit to a mental examination. These rules also apply to presentation of mental condition at sentencing. Rule 35 is modified to extend the time period for filing of the motion but did not change the provision that only the government may move for reduction of sentence.

MACDL SPRING CONFERENCE

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