MACDL
Missouri Association of Criminal Defense Lawyers

Newsletter

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In This Issue

The MACDL Newsletter is a semi-annual publication of the

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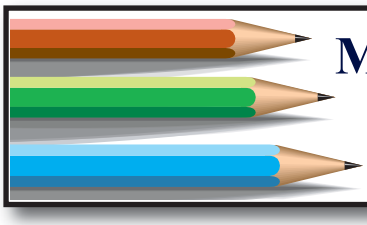
Your comments and suggestions are welcome!



MACDL President's Letter

by Travis Noble

This year we have experienced significant progress both within MACDL itself and in the legal community.

We are continuously being exposed to developments in current DWI regulations. In turn, defense attorneys must adapt their means of working the criminal justice system accordingly.

The new legislation provides harsher punishments for offenders with breath tests at .15% or higher, prior offenders, and/or persistent offenders. This legislation provides the authority to establish DWI/DUI courts for offenders that meet this criteria. This will mimic the drug courts which are currently in effect. It has become apparent that jail time may be ineffective in some instances, the DUI court will focus on factors such as treatment for alcoholism as well as other substance abuse, in order to reduce the recidivism of persistent offenders. This division would specialize in alcohol monitoring, judicial supervision, substance abuse testing, and community service among other requirements.

Aside from the DWI/DUI courts, mandatory jail time has been increased and the standard SIS given will be limited. Also, the new legislation has added some restrictions to the expungement policy of a DWI/DUI offenses.

In an effort to keep repeat drunk drivers off the road, the new legislation will require counties and municipalities to maintain a constant distribution of information in regards to prior offenses. A database system will serve as a cross-referencing tool for officials to employ while investigating offenders. This database goal is an effort to establish consistency in penalties and punishments given for drunk drivers across the state.

The 2010 April Annual Conference proved to be successful this year. The seminar honed in on "Eyewitness Identification," making the topic its theme. A range of speakers addressed topical issues regarding judicial variances. The sessions were quite informative.

MACDL appeared at the 2010 Small Firm and Solo Practitioner Conference again this year. Thank you to all who stopped by the booth. Sarah was able to provide information about MACDL and had applications on hand.

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Missouri Association of Criminal Defense Lawyers

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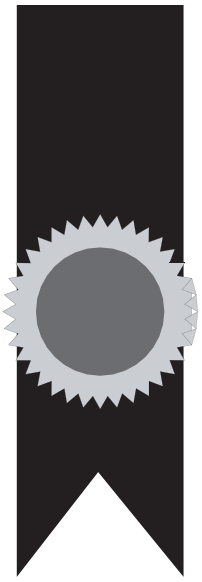
President's Letter *(from page 1)*

Please get applications from Sarah and have them available for interested attorneys. We are on a membership drive.

The 3rd Annual Bernard Edelman DWI conference took place on July 24th and July 25th at the Lake of the Ozarks. This seminar was a huge success as always thanks to Carl and Jeff.

Please join us on October 22, 2010 at Harrah's in St. Louis for the Annual MACDL Fall Seminar. I look forward to seeing you all in October.



MACLD Awards!

The Missouri Association of Criminal Defense Lawyers (MACDL) recognizes outstanding service and performance by dedicated criminal defense attorneys.

Some of our awards are divided into the various areas of the state. Not all awards are given each year. The award ceremony takes place at MACDL`s Annual Meeting typically held in April of each year.

Please take the time to make a nomination for outstanding criminal defense attorneys that you know, see and work with throughout the state. For more information on MACDL's awards including how to nominate an attorney please visit our website's (www.macdl.net) Awards page.

Thank You!

MACDL would like to thank our 2010 Spring CLE Sponsors:

Metropolitan Court Reporters

Law Offices of Dee Wampler & Joseph Passanise

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Southern Missouri Judicial Services

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Welcome Aboard!

We'd like to welcome the following new 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, lobbying efforts in the Missouri General Assembly, among other things.

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Member Services

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 Grant J. Shostak, 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: Grant J. Shostak
Shostak & Shostak, LLC
8015 Forsyth Boulevard
St. Louis, MO 63105
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E-mail: gshostak@shostaklawfirm.com

MACDL ListServ

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 (www.macdl.net), enter the member's only page, and follow the listserv link.

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 (www.macdl.net) for guidelines.

Case Law Update

For up-to-date Case Law Updates, please visit the MACDL website's "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 Elections Update

by Brian Bernskoetter

Missouri's mid-term elections are in full swing and, with the primaries recently completed, the General Election looms in November. The race that will garner the most attention statewide and one of the top races nationwide is the race for Missouri's U.S. Senate seat being vacated by Sen. Kit Bond. This race pits two of Missouri's most politically influential families against each other … the Carnahans and the Blunts.

Secretary of State Robin Carnahan is running against Congressman Roy Blunt for this Senate seat and it promises to be one of the most hotly contested races in the country. The only other statewide race up this year is for State Auditor. Current Missouri State Auditor Susan Montee is running for re-election against former U.S. Ambassador Tom Schweich.

In the Missouri Legislature, there will be a large turnover this year because of term limits. Of the 17 Missouri Senate seats up for election this year, 10 will be open seats and in the Missouri House there are 64 open seats out of 163.

Polling indicates that this should be a good year for Republicans and it is anticipated that the Republicans will maintain control of the Missouri House and Senate.

MACDL Successful in Defense of Member

by Randy Scherr

The MACDL Strike Force was activated in the defense of Carl Smith, a MACDL member held in Contempt for comments made in court in the defense of a client.

The Supreme Court discharged Carl Smith, reversing his conviction for criminal contempt. In so doing, the court clarified the law of criminal indirect contempt by requiring a jury be instructed that: "The effect of the statements constituted an actual or imminent impediment or threat to the administration of justice" and requires the double protection of the judge making that finding as well. The case is a victory for the First Amendment by applying "the imminent impediment or threat standard," the decision makes clear that the First Amendment protects "lawyer's speech!" All attorneys should be grateful for MACDL's and the ACLU's support of attorney speech.

MACDL would like to thank Board Member Bruce Galloway, MACDL Member, Talmage Newton for drafting the brief and all those involved for the success in the Supreme Court.

It appears as though the court has laid out some good law for future cases. The elements are set out below. For those of you who haven't read it, here is the Conclusion:

Conclusion

In a prosecution for indirect criminal contempt of court, initiated by a judge who cites a lawyer for contempt for the lawyer's statements, the essential elements are:

(1) The lawyer's statements were false;

(2) The lawyer knew the statements were false or acted with reckless disregard for whether the statements were true or false;

(3) The effect of the statements constituted an actual or imminent impediment or threat to the administration of justice.

Limiting cases of indirect criminal contempt to those where these elements are proved will satisfy constitutional protections for lawyer speech and will help to ensure that the courts of this state will use contempt powers "sparingly, wisely, temperately and with judicial self-restraint." In re Estate of Dothage, 727 S.W.2d at 928.

In addition to the deficient jury instruction and the lack of evidence as to the essential elements of indirect criminal contempt, the trial court's judgment fails to recite any findings of fact as to the three essential elements listed above. In contempt proceedings "the facts and circumstances constituting the offense, not mere legal conclusions, must be recited in both the judgment of contempt and the order of commitment." Ex parte Brown, 530 S.W.2d 228, 230 (Mo. banc 1975); see section 21, 476.140, RSMo 2000. Neither the judgment of contempt nor the order of commitment contained the necessary factual findings.

Smith is ordered discharged.

Michael A. Wolff, Judge

In the
Circuit Court of Cass County, Missouri
Seventeenth Judicial Circuit

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	Case No.
vs.	)	
	)	
xxxx,	)	
	)	
Defendant.	)	

Motion to Dismiss Second Degree Murder and the Class D Felony of Driving While Intoxicated

COMES NOW XX, defendant, through counsel and pursuant to the Fifth & Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Missouri Constitution, §577.010, RSMo, and State v. Pike, 162 S.W.3d 464 (Mo.banc 2005), moves this Court to dismiss Count I of the indictment, which alleges second degree (felony) murder, and Count II which alleges the class D felony of driving while intoxicated. In support of this motion,

1. On February 20, 2009, the Grand Jurors returned an indictment charging XX, in Count I, with second degree (felony) murder, citing § 565.021, RSMo. Specifically, the Grand Jurors alleged that XX caused the death of YY during the commission of the class D felony of driving while intoxicated, which offense was separately charged in Count II, citing § 577.010, RSMo.

2. Under § 565.021.1(2), a person is guilty of second degree murder if he "[c]ommits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony … another person is killed as a result …." This is referred to as felony murder. The felony murder rule derives from common law and permits a homicide to be classified as murder, even though committed unintentionally, if it occurred during the pursuit of a felony. State v. Clark, 652 S.W.2d 123, 125-26 (Mo. banc 1983). "'The felony murder rule permits the felonious intent necessary to a murder conviction to be shown by the perpetration of or attempt to perpetrate a felony.'" *Id*. at 126 (citation omitted). As such, "'the rule does not make the underlying felony an element of the felony murder; it merely provides an additional means of proving the requisite felonious intent for murder.'" *Id*. (citations omitted). "It is the intent to commit the underlying felony, not the intent to kill, that is the gravamen of the felony murder offense." State v. Coleman, 949 S.W.2d 137, 142 (Mo. App. [W.D.] 1997). State v. Williams, 24 S.W.3d 101, 110 (Mo.App., W.D. 2000) (emphasis added).

3. Here, the charge purporting to provide the "felonious intent for murder" is not, itself, a felony. Driving while intoxicated is a misdemeanor. § 577.010. While persistent offenders of § 577.010 may be sentenced within the range for a class D felony, that enhancement does not transform driving while intoxicated into a felony offense. *See* State v. Pike, 162 S.W.3d 464 (Mo.banc 2005). Letting the State transform the offense here would violate XX's right to due process of law. *See* U.S. Const., Amends. 5 & 14; Mo.Const., Art. I, § 10.

4. In Pike, the defendant argued that § 577.023 transformed a misdemeanor into a felony, but the Missouri Supreme Court flatly rejected that, holding, an enhanced sentence under § 577.023.3 is not a new offense. *See* Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219 (1998). Rather, proof of prior convictions under § 577.023 "merely serves to authorize enhanced punishment for the underlying offense charged, if the defendant is found guilty." State v. Cullen, 39 S.W.3d 899, 904 (Mo.App. [E.D.] 2001) … Section 577.023 creates no new offense. *Id*. at 470 (emphasis added). Driving while intoxicated is a misdemeanor offense, which, under certain circumstances, may be sentenced under a felony range of punishment. Pike, however, makes clear that that enhancement does not transform the misdemeanor into a new felony offense. *Accord* Goodloe v. Parratt, 605 F.2d 1041, 1047 (8th Cir. 1979) (a statute that enhances a misdemeanor to a felony upon repetition cannot create a "true" felony because it does not define an offense, but merely increases punishment upon a second or subsequent conviction of the same offense).

5. Driving while intoxicated is created by § 577.010, and it is a misdemeanor offense. Its repetition can only subject an offender to an enhanced penalty for that offense; the repetition does not, itself, create a new offense. Pike, *supra* at 470. Consequently, driving while intoxicated cannot provide the "felonious intent" required for second degree (felony) murder, and this Court must dismiss Count I of the indictment.

WHEREFORE XX, defendant, respectfully prays that this Court dismiss Count I of the indictment charging him with second degree (felony) murder and Count II charging him with the class D felony of driving while intoxicated.

Respectfully submitted,

_____

Kimberly Benjamin
Attorney for Defendant
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100 S. Independence St.
Harrisonville, Missouri 64701
(816) 380-8008 – Voice
(816) 380-8007 – Fax

Certificate of Service

I, Kimberly Benjamin, hereby certify that on this ___day of _____, 2010, a true and correct copy of the foregoing was mailed, first class, postage pre-paid to, _____ County Prosecutor, _____..

_____
Kimberly Benjamin

Bruce's Top 10 Federal Cases

by Brian Gaddy

Padilla v. Kentucky

130 S. Ct. 1473 (2010)

Advising Clients of Collateral Consequences to Their Guilty Plea

The Petitioner was a lawful permanent resident who was prosecuted for drug distribution. After pleading guilty, the defendant faced deportation. In postconviction proceedings, the defendant claimed his counsel did not advise him about possible deportation, and even said that he should not worry about it because he had lived in the United States for over 40 years.

The Supreme Court held that counsel must inform a client whether his plea carries a risk of deportation. When this advice is not rendered, counsel's performance may be constitutionally defective. Changes to immigration laws have dramatically raised the stakes of a non-citizen's criminal conviction. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of non-citizens, the importance of accurate legal advice has never been more important. As a matter of federal law, deportation is an integral part of the penalty that may be imposed on non-citizens who plead guilty to specified crimes. The Court has never distinguished between direct and collateral consequences in defining the scope of constitutionally required "reasonable professional assistance." The weight of prevailing professional norms supports the view that counsel must advise his/her client regarding the deportation risk. If the deportation risk is clear, the duty to give correct advice is equally clear. If the deportation risk is unclear, the attorney must advise the client that pending criminal charges may carry adverse immigration consequences.

Maryland v. Shatzer

130 S. Ct. 1213 (2010)

Invocation of *Miranda* Right to Counsel

Shatzer became a suspect in a sexual assault while he was serving a prison sentence for another crime. A detective visited the prison attempting to interview Shatzer, but Shatzer invoked his Miranda rights. Several years later, the investigation was reopened and another detective attempted to interview Shatzer. At this point, Shatzer waived his Miranda rights and confessed to the crime. The lower courts held that Shatzer's statements were not admissible as the passage of time does not end Edwards protections once invoked.

The Supreme Court held that because Shatzer experienced a break in Miranda custody lasting more than two weeks between the first and second attempts at interrogations, Edwards does not mandate suppression of the confession. The Court observed that Edwards created a presumption that once a suspect invokes his Miranda rights, any waiver of that right in response to a subsequent attempt at interrogation is involuntary. The Court said that it was easy to believe that a suspect's later waiver may have been coerced or badgered when he has been held in uninterrupted custody since his first refusal to waive. But where a suspect has been released from custody and returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart has been coerced. Because the Edwards presumption was created by the Court, the Court can also specify the period of release from custody that will terminate its applicability. The Court concluded that 14 days constitutes a break, as that

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period provides ample time for a suspect to get reacclimated to his normal life, consult with friends and counsel, and shake off any residual coercive effects of the prior custody.

With respect to Shatzer, his release back into general population of prison constitutes a break in Miranda custody. Lawful imprisonment does not create the coercive pressures produced by investigative custody. An inmate released back to general population returns to their accustomed surroundings and daily routines. They live among other inmates, guards and workers, and often can receive visitors and communicate with people on the outside by mail or telephone. The inmates can visit the library each week, have regular exercise and recreation periods, and can participate in basic adult education. Thus, the inherently compelling pressures of custodial interrogation ended when Shatzer returned to his normal life.

Berghuis v. Thompkins

130 S. Ct. 2250 (2010)

Fifth Amendment and *Miranda*

The defendant was interrogated about a shooting. The officers advised the defendant of his rights in full compliance with Miranda and presented a Miranda waiver form. Although the defendant read out loud a portion of the form, the defendant refused to verbally waive or invoke his rights, refused to sign the written waiver form, and sat almost completely silent for close to 3 hours. The interview was described by police as "one-sided" and nearly a "monologue." At the 2 hour and 45 minute mark, one of the officers asked Thompkins if he believed in God to which he answered yes. The officer asked him if he prayed to God and he answered yes. The officer then asked if he prayed for forgiveness for the shooting and the defendant answered yes. The defendant sought to suppress his statements claiming that he had invoked his right to remain silent previously during the interview and that he had not waived his rights.

The Supreme Court held that the defendant's silence during the interrogation did not invoke his right to remain silent. Although the defendant remained silent for nearly 2 hours and 45 minutes, that silence is not sufficient to invoke Miranda, which must be invoked "unambiguously." If an accused makes an ambiguous or equivocal statement or no statement at all, the police are not required to end the interrogation or ask questions to clarify the defendant's intent. According to the Court, an unambiguous invocation of rights results in an objective inquiry that avoids difficulties of proof and provides clear guidance to police officers. If an ambiguous act, omission or statement is allowed, police would be required to make difficult decisions about the accused's unclear intent and face the consequences of suppression if they guess wrong.

The Court next addressed whether it had been shown that the defendant had voluntarily waived his rights. A Miranda waiver must be a knowing and voluntary waiver. The Court held that waivers can be established even absent a formal or express written waiver form or a clear verbal statement. The prosecution does not need to show an express waiver. An implied waiver is sufficient if the prosecution shows that the accused understood his rights. Miranda does not require a formalistic waiver procedure. In this case, the defendant waived his rights. There was no contention that he did not understand his rights, as he was presented a waiver form, the officer read the form out loud, and the defendant read out loud a portion of the form. The defendant's response to the questions regarding God is a course of conduct indicating a waiver. If he wanted to remain silent, he could have invoked or said nothing in response to those questions. The 2 hour and 45 minute time frame is irrelevant. There was also no evidence the statement was the product of any police coercion. The police are not required to obtain a waiver first before they question a suspect. The police may interrogate a suspect who has neither invoked nor waived his rights. The police are not required to obtain a written Miranda waiver form.

Justice Sotomayor authored a strong dissenting opinion, indicating that the case was "troubling." Citing to Miranda and other opinions, she noted that whether someone waives Miranda cannot be presumed from silence of the accused or because the accused eventually gave a statement. Miranda itself indicates that a lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not

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validly waive his rights. Miranda also holds that a valid waiver will not be presumed simply from the fact that a confession was ultimately obtained. According to Justice Sotomayor, the Thompkins decision "turns Miranda upside down. Criminal suspects must now unambiguously invoke their right to remain silent–which, counterintuitively, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so. Those results, in my view, find no basis in Miranda or our subsequent cases and are inconsistent with the fair-trial principles on which those precedents are grounded."

Michigan v. Fisher

130 S. Ct. 546 (2009)

Fourth Amendment – Warrantless Search of Home

The police were called to investigate a neighborhood disturbance and were directed to a house where a man "was going crazy." The officers observed a pickup truck with the front end smashed, damaged fenceposts, three broken house windows, and blood on the pickup truck and on the front door of the house. The officers observed the defendant inside the house screaming and throwing things. The defendant refused to answer the door. The officers observed that the defendant had a cut on his hand. One of the officers attempted to enter the house, but observed the defendant pointing a long gun at the door upon his entry. The defendant was charged with assault with a dangerous weapon based on the officer's observations from the entryway of the home.

The Court held the officer's entry into the house was reasonable under the Fourth Amendment. The ultimate touchstone is reasonableness. Although warrantless searches and seizures inside a home are presumptively unreasonable, the presumption can be overcome. An example is the exigency of the circumstances which may make the needs of law enforcement so compelling that a warrantless search is objectively reasonable. One such exigency is the need to assist persons who are seriously injured or threatened with such injury. Law enforcement may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. Since the officers saw signs of a recent injury outside the house, and they observed the defendant screaming and throwing things, it would be objectively reasonable to believe that the defendant's projectiles might have a human target or that the defendant would hurt himself in the course of his rage. Officers do not need "ironclad" proof of a likely serious, life-threatening injury to invoke the emergency aid exception.

Florida v. Powell

130 S. Ct. 1195 (2010)

Scope of *Miranda* Warnings

The Tampa Florida Police Department uses Miranda warnings where the suspect is informed that he has the right to talk to a lawyer *before* answering any of the questions and that he has the right to use any of these rights at any time during the interview. The defendant sought to suppress his confession by claiming that Tampa's warnings did not adequately convey his right to the presence of counsel during the interrogation.

The Court held that advising a suspect that he has the right to talk to a lawyer before answering questions and that he can invoke that right at any time is sufficient to satisfy Miranda. The Miranda decision requires that a suspect be warned prior to questioning that he has the right to the presence of an attorney. While the warnings prescribed by Miranda are invariable, the Court has not dictated the precise words in which the essential information must be conveyed. In determining whether police warnings were satisfactory, reviewing courts are not required "to examine [them] as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his rights ...." The warnings in this case satisfy the standard. Because the defendant was warned that he could invoke his rights any time during the interview, this confirmed he could exercise his right to consult an attorney while the interrogation was underway.

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Ontario v. Quon

130 S. Ct. 2619 (2010)

Right to Privacy – Text Messages

The City of Ontario, California, issued text pagers to its police officers. When the officers exceeded their character limits for texting, the department researched the transcripts of the text messages. It was discovered that many of the text messages were not work related and that some were sexually explicit. With regard to Officer Quon, few of his texts sent during business hours related to official police business. Quon was disciplined by the department. Quon filed suit, alleging that the police department violated his Fourth Amendment rights to privacy.

The Supreme Court held that the department's search of the text messages was reasonable under the Fourth Amendment. The Court refused to answer whether Quon had a reasonable expectation of privacy in the text messages. The opinion assumed that he had a reasonable privacy expectation, that the review of the text transcripts were a search and that the principles applicable to a government employer's search of an employee's physical office equally apply in the electronic sphere. The warrantless search of the text transcripts was reasonable because it was motivated by a legitimate, work-related purpose and because it was not excessive in scope. There were reasonable grounds to conduct the search as the police department was auditing whether the text character limits were not sufficient to meet the city's needs.

Graham v. Florida

130 S. Ct. 2011 (2010)

Imposition of Life Without Parole Sentences for Juveniles

Petitioner was convicted of armed burglary when he was 16 years old. He was tried as an adult and entered a plea of guilty that involved a deferred adjudication of guilt. He received 3 years probation and one year in the county jail. While on probation, Petitioner was arrested for a home invasion robbery with two accomplices. The evidence also established that the Petitioner and his accomplices attempted a second robbery that night where one of the accomplices was shot. After finding a probation violation, the range of punishment was 5 years to life imprisonment. The defense requested a 5 year sentence, a presentence report recommended a 4 year sentence, and the State requested a total sentence of 45 years. The court sentenced him to life imprisonment. Since Florida law abolished the parole system, a life sentence gives no possibility of release except for executive clemency.

The Supreme Court held that the life sentence with no possibility of parole for a non-homicide offense committed by a juvenile violates the Eighth Amendment. The Cruel and Unusual Punishment Clause requires that the punishment for a crime should be graduated and proportioned to the offense. The Court observed that cases involving the proportionality standard fall within two general classifications: 1) whether the length of a term-of-years sentence is unconstitutionally excessive for a particular defendant's crime; and 2) cases where a categorical rule has been applied against the death penalty. The Court has held previously that capital punishment is impermissible for non-homicide crimes against individuals. The Court has also prohibited the death penalty for defendants who commit their crimes before the age of 18, or for defendants who are mentally retarded. In applying the categorical approach, the Court first considers "objective indicia of society's standards." Then the Court will determine in its own judgment whether the practice violates the Eighth Amendment. The inadequacy of a penological theory to justify life without parole sentences for juvenile non-homicide offenders, the limited culpability of such offenders, and the severity of these sentences led the Court to conclude that a life sentence with no possibility of parole for a non-homicide juvenile offense violates the Eighth Amendment.

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United States v. Stevens

130 S. Ct. 1577 (2010)

First Amendment and Federal Criminal Statutes

18 U.S.C. § 48 criminalizes the commercial creation, sale or possession of certain depictions of animal cruelty. The statute only addresses the "portrayal" of harmful acts, not the underlying conduct or acts. The statute applies to any visual or auditory depiction in which a living animal is intentionally maimed, mutilated, tortured, wounded or killed if that conduct violates state or federal law where the creation, sale, or possession of the depictions took place. The defendant was indicted for selling videos of dogfighting.

The Court found the statute was substantially overbroad and therefore invalid under the First Amendment. Depictions of animal cruelty are not, as a class, categorically unprotected by the First Amendment, and any regulation of expression based on content is presumptively invalid. While the prohibition of animal cruelty has a long history under American law, there is no evidence of a similar tradition involving "depictions" of such cruelty. The Court declined the Government's invitation to add "depictions of animal cruelty" to the list of categories of speech that can be permissibly restricted under the First Amendment based on content. Under the First Amendment, a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional. The Court concluded that section 48 creates criminal prohibitions of alarming breadth. Depictions of entirely lawful conduct in one state may run afoul of the federal statute if the depictions are found in another state where the underlying conduct is unlawful. As an example, hunting is illegal in the District of Columbia. Section 48 would apply to any magazine or video depicting lawful hunting that is sold or possessed in D.C. Those seeking to comply with the law face a bewildering maze of regulations from at least 56 jurisdictions. Although the Government pledged to enforce section 48 in only "extreme" cruelty cases, the Court will not uphold an unconstitutional statute because the Government promises to use it responsibly.

Presley v. Georgia

130 S. Ct. 721 (2010)

Sixth Amendment Right to Public Trial

The defendant was tried and convicted of trafficking cocaine. On appeal, the defendant claimed that his Sixth and Fourteenth Amendment right to a public trial was violated when the trial court excluded the public from the voir dire of prospective jurors. The Court observed that the Sixth Amendment directs that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. The Court has also held that public trial rights extend beyond the accused and can be invoked under the First Amendment. The Court concluded that the Sixth Amendment right to a public trial extends to the voir dire of prospective jurors. Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. If a court is concerned about the public's improper communication with potential jurors or other safety risks and closes proceedings to the public, the particular concerns must be articulated in specific findings so that a reviewing court can determine whether the closure of proceedings was proper.

Skilling v. United States

130 S. Ct. 2896 (2010)

Mail Fraud

Jeffrey Skilling was one of the executives involved in the Enron prosecutions. The grand jury indicted Skilling with a number of federal offenses, including a conspiracy count which alleged that the defendants conspired to commit wire and securities fraud and that Skilling had sought to deprive Enron and its shareholders of the "intangible right to his honest services."

18 U.S.C. § 1346 defines a scheme or artifice to defraud under the federal mail and wire fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services."

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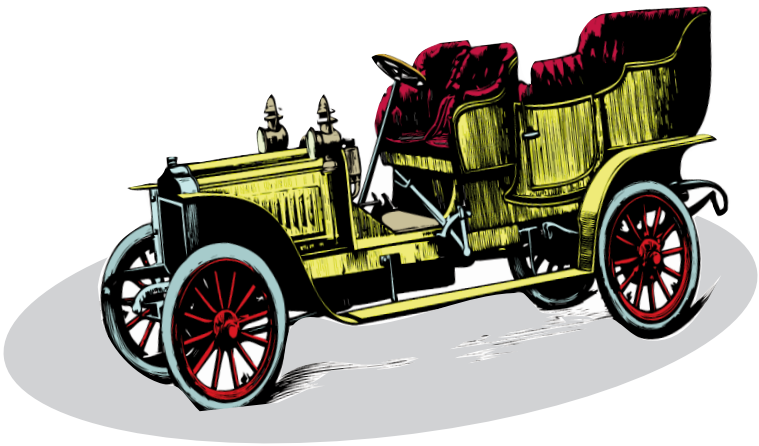
Top 10 Federal Cases *(from page 12)*

Before the enactment of section 1346, the honest services doctrine was developed through a patchwork of federal case law. Some cases involved only corruption of public officials, while other cases applied the doctrine to private sector matters where an employee breached a fiduciary duty or had a conflict of interest. In McNally v. United States, 483 U.S. 350 (1987), the Supreme Court ruled that mail fraud only involves the protection of property rights, not intangible rights. Congress immediately responded by enacting section 1346 the next year.

Twenty-two years later, the Court analyzed whether section 1346 is constitutional. Skilling claimed that the statute did not clearly define honest services and that reported case law was inconsistent and contradictory in attempting to define the parameters of the honest services doctrine. The Supreme Court generally agreed, but refused to strike down the statute as unconstitutional. Instead, it construed section 1346 by looking at the pre-McNally cases, which largely involved bribes or kickback schemes. According to the Court, Congress must have intended to refer and incorporate the pre-McNally case law definition of honest services. To preserve the statute without transgressing constitutional limitations, the Court held that section 1346 only criminalizes bribe and kickback schemes.

DWI and Traffic Law Update

by Jeff Eastman ♦ Gladstone, MO



White v. Director

SC90400 ♦ August 3, 2010

Supreme Court reverses established precedent which had favored the Director's evidence with a "presumption of validity." The Court recognizes that in a Section 302.535 proceeding the legislature expressly placed the burden of proof on the state to adduce evidence sufficient to sustain its burden. The burden of proof is comprised of a party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder (proof) and a party's duty to convince the fact-finder to view the facts in a way that favors that party (persuasion). The Court also observes that the legislature expressly made the rules of civil procedure applicable to these proceedings.

The Court held in all court-tried cases the trier of fact is free to believe or disbelieve all or any portion of a witnesses testimony; section 302.535 proceedings are no different. A trial judge is free to disbelieve the Director's evidence and need not so expressly find in its judgment to be affirmed on appeal.

Henceforth, an appellate court will review de novo a trial court's probable cause determination under an abuse of discretion standard and will give deference to the inferences the trial court may have made from historical facts, including credibility determinations.

THIS CASE IS A **MUST READ** FOR THE DWI PRACTITIONER!

Strup v. Director of Revenue

311 S.W.3d 793 (Mo. 2010)

The Supreme Court holds that under the commercial driver's license act, a person is disqualified from driving a commercial motor vehicle for a period of not less than one year if "convicted" of a first violation. The act defines conviction as "an unvacated adjudication of guilt, including pleas of guilt and *nolo contendre*, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative proceeding."

A "conviction" which merits disqualification is "driving a motor vehicle under the influence of alcohol." Driving under the influence of alcohol is statutorily defined to include "having any state, county or municipal alcohol-related enforcement contact as defined in Section 302.525." Alcohol-related enforcement contact includes any suspension or revocation under Sections 302.500 to 302.540. Because the alcohol related license suspension of driver's base privilege constituted a conviction of driving under the influence of alcohol as that term is defined in the commercial driver license act, it was a first violation which justified disqualification of driver's commercial driver's privilege for not less than one year.

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Snider v. Director of Revenue

SD 30072 ♦ *July 8, 2010*

Driver was arrested for driving while intoxicated. At the jail she was advised of her rights pursuant to Missouri's Implied Consent law. Driver requested to speak to an attorney, was given a phone book and then called her parents. Ten minutes after requesting to speak with an attorney, LEO again read Missouri's Implied Consent law. When driver refused she was deemed to have refused.

The trial court found that driver had not abandoned her attempt to contact counsel when LEO deemed her to have refused.

The Southern District affirmed. The appellate court found that abandonment of an attempt to contact counsel occurs where the person made all the attempts he or she wanted to make and reached a decision to refuse to submit before twenty minutes has elapsed. It is the Director's burden to show that driver abandoned her attempts to contact counsel prior to the expiration of the twenty minute period. It is also the Director's burden to show that driver did not suffer actual prejudice as a result of being denied her twenty minutes. In the present proceeding, the evidence was insufficient to overcome either of the aforementioned burdens.

Folkedahl v. Director of Revenue

307 S.W.3rd 238 (Mo. App. W.D. 2010)

LEO lists incorrect county as the county of arrest in notice of suspension under Section 302.500 as well as in the alcohol influence report. Administrative hearing held in wrong county and decision adverse to driver rendered. Driver prosecutes appeal under Section 302.311 in proper county of arrest arguing that privilege should be reinstated because director committed procedural error by conducting an administrative hearing in a county other than the county of arrest. Driver contended that due to Director's error, trial de novo was unavailable and that trial court had jurisdiction to review and set aside sanction under 302.311. The trial court agreed and set aside sanction. Director appealed.

On review, the Western District holds that in a challenge under 302.311 to the director's actions, driver bore the burden of proving facts that would authorize the trial court to exercise its jurisdiction pursuant to Section 302.311. That is, driver had to establish that a procedural defect caused by the Department rendered judicial review under 302.535 unavailable.

Examples of procedural error include where the Director failed to properly notify driver's attorney of the hearing officer's decision which caused the driver's petition for trial de novo to be untimely or where the Director wrongfully denied the driver's request for an administrative hearing.

In this proceeding, the Director's error did not produce the same result as the aforementioned procedural defects. Driver was afforded an administrative hearing in which he did not challenge the jurisdiction of the hearing examiner. Driver had a right to trial de novo and indeed filed the same as part of his two count petition for relief. Thus, the statutory prerequisites at both the administrative and trial court level were met. The trial court acted without authority in reinstating driver's privilege.

Wesley v. Director of Revenue

309 S.W.3rd 442 (Mo. App. S.D. 2010)

In this 302.505 proceeding, the Southern District affirmed the trial court's decision finding no probable cause. "As Guhr makes clear, the trial court is free to disbelieve even uncontradicted evidence and testimony, and it is only where the facts are uncontested, and not where the evidence is not contradicted, where no deference is due the trial court. Thus, even where the evidence is not contradicted, unless the facts of the case are not contested in any way, this [appellate] court must give deference to the trial court's determination as to whether the evidence established reasonable cause to believe the individual whose license was revoked was driving while intoxicated."

The appellate court found that the facts in Wesley were contested and that driver did not concede the Director's evidence. Instead, driver discredited Director's evidence through cross examination of the

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Director's witnesses as well as presenting evidence which contradicted the Director's.

Since the facts were contested, the appellate court deferred to the trial court's determination of the facts because it was free to disbelieve any of the contested evidence, even if it was uncontradicted. As the Court observed, simply stated, "the trier of fact has the right to disbelieve evidence, even when it is not contradicted."

State v. Starnes

WD 69573 ♦ *June 15, 2010*

After jury trial, defendant was found guilty of driving while intoxicated. Prior to submission, the State introduced conclusive evidence of defendant's three prior intoxication-related traffic offenses. The State was unsuccessful in its efforts to establish a fourth. Because the evidentiary hearing on the priors took place during the State's case in chief, the trial court ruled that the State would be allowed further time during the course of the trial to rectify the evidentiary deficiencies. After the close of all the evidence and immediately prior to closing arguments, the trial court asked counsel whether there were any other issues that needed to be discussed before the case was submitted. The State reminded the Court of the issue pertaining to the priors. The Court stated such was not a jury issue and allowed the case to be submitted.

After the jury's finding, the Court held five hearings all relating to the issue of the remaining prior. At the conclusion of the last hearing, the Court was "finally and firmly convinced" as to the sufficiency of this prior and thereafter sentenced defendant as a chronic offender, a class B felony.

The Western District reviewed the tortured history of the State's efforts and concluded the trial court erred in sentencing defendant as a chronic offender. The Court noted the specific language of Section 577.023 which required that the facts establishing chronic offender status be pleaded, established and found prior to submission to the jury and outside of its hearing. Case was remanded for re-sentencing as an aggravated offender.

State v. Carson

ED 91955 ♦ *May 25, 2010*

Adopting a Turner type analysis, the Eastern District holds that the use of a prior municipal court blood alcohol concentration conviction to enhance defendant's penalty for a present DWI was in error.

Moore v. State

ED 93295 ♦ *July 6, 2010*

In a Rule 24.035 proceeding movant challenged, amongst other things, his conviction for felony driving while revoked. Specifically, movant argued that the State failed to plead and prove that he was represented by counsel or waived the right to counsel in his prior driving while revoked convictions and failed to prove that he had served ten days on each such conviction. He contended that the State was required to plead and prove these facts in order to charge and sentence him as a felon.

The Eastern District rejected each argument. After reviewing the legislative history of Section 302.321, the court found that the representation or waiver of counsel requirement was only applicable to county or municipal ordinance violations for driving while suspended or revoked. Such was not required of state law violations.

As to the ten day sentence requirement, the Court found that the 2005 amendment removed such requirement for defendants who had no prior alcohol related enforcement contacts. As this particular defendant had no prior alcohol-related enforcement contacts, the ten day sentence requirement was inapplicable.

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State v. Severe

307 S.W.3d 640 (Mo. App. W.D. 2010)

In a follow up to Turner v. State, the Missouri Supreme Court holds that plain error review is available in a direct appeal where an offender alleges that he was sentenced to a punishment greater than the maximum sentence for the offense. In Severe, the defendant was found guilty of the class D felony of driving while intoxicated. While her case was on appeal, the Supreme Court decided Turner v. State. She then challenged use of a municipal finding of guilt to DUI wherein she received a suspended imposition of sentence.

The State argued that under controlling law at the time of her trial, it presented sufficient evidence to support the Court's finding that she was a persistent offender and that both the Court and the State were entitled to rely upon the then controlling law. The Supreme Court held that Turner made no new law; it merely clarified the language of the existing statute. The Court commented "though Sections 577.023.1(3) and 577.023.16 may have been contradictory, the State was on notice that, under Section 577.023.16, Severe's guilty plea and suspended imposition of sentence in municipal court was not to be treated as a prior conviction. Therefore, if the State had evidence of an additional conviction that would have been treated as a prior conviction under the statute, the State should have offered it to the Court before the case was submitted to the jury."

The Supreme Court also rejected the State's request that the matter be remanded for additional evidence. The Court, again emphasizing the statutory scheme for sentencing, noted that the State had the burden of proving up the priors before the case was submitted to the jury and it failed to do so. Giving the State such a privilege would afford it "two bites at the apple" when the statute allows only one bite.

Feldhaus v. State

311 S.W.3d 802 (Mo. 2010)

In a post conviction motion, movant alleged that he was denied due process because Section 577.023 which defined enhanced offender status violated the "void for vagueness doctrine."

The Supreme Court first noted that movant did not raise the claim of void for vagueness argument until his motion for post conviction relief. As the issue was not raised at the earliest opportunity and prior to movant's plea of guilty, it was waived.

In dicta, the Court also rejected movant's constitutional challenge. Movant had argued that the "or more" language set forth in the enhancing provisions of Section 577.023.1 encouraged discriminatory or selective enforcement on an unjustifiable basis. The Court held that the statute clearly defined a "chronic offender" and set forth specific standards necessary for the application of the enhanced penalty sought by the State. The words "or more" were of common knowledge which spoke for themselves and provided a person of ordinary intelligence with sufficient notice of the prohibited conduct and the enhanced penalty.

State v. Daws

SC 90444 ♦ *May 25, 2010*

Defendant plead guilty to the charge of failing to yield to an emergency vehicle in violation of Section 304.022. Thereafter, the State charged defendant with the class D felony of resisting arrest in violation of Section 575.150. The circuit court dismissed the charge of resisting arrest finding that the successive prosecution of defendant violated his right to be free from double jeopardy. On appeal, the Supreme Court reversed.

The Court held that the proper test for assessing whether successive prosecutions violate double jeopardy is the Blockburger test, also known as the "same-elements test." This test asks "whether each offense contains an element not contained in the

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other:" If not, the double jeopardy clause bars a successive prosecution.

A comparison of the elements of the two crimes charged demonstrates that failure to yield is not a lesser included offense of resisting arrest. The crime of failure to yield is premised on the failure to yield to the approach of an emergency vehicle utilizing audible sirens and lights. The elements of the crime of resisting arrest make no mention of emergency vehicles, lights or sirens. Instead, the resisting arrest statute is premised on resistance to a lawful arrest or stop, whether that stop is executed on foot, from a vehicle or in any manner whatsoever. Committing the crime of resisting arrest does not necessarily mean that one also commits the crime of failure to yield. Hence, double jeopardy does not apply.

The Court expressly overrules the Western District decision in State v. Clark, 263 S.W.3d. 666 (Mo.App. W.D. 2008).

State v. Reando

WD 70472 ♦ June 29, *2010*

Appellate court rejects defendant's claim of jeopardy that his misdemeanor plea to failure to drive on the right half of the roadway charged under 302.015 was a lesser-included offense of involuntary manslaughter in the second degree.

In its analysis, the Court held that it was to consider the statutory elements of the offense, not the evidence adduced at trial. The misdemeanor offense contains elements - driving on a public roadway and failing to remain on the right half of the roadway - which are not necessary elements of either second degree involuntary manslaughter or second degree assault. The felony offenses require proof of death or serious physical injury while the misdemeanor violation did not. Because the misdemeanor has elements the felony offenses lacked and vise versa, the double jeopardy clause did not bar defendant's felony prosecution.

State v. Dienstbach

ED 93837 ♦ June 15, *2010*

In this interlocutory appeal, the State challenged the trial court's judgment sustaining defendant's motion to suppress. At issue was whether a Missouri State Highway Patrol trooper had jurisdiction and authority to make a traffic stop on a city street after observing a state traffic law violation.

The appellate court held that the trooper was acting within his jurisdiction when patrolling a city street. The trooper was empowered to investigate or arrest any individual he observed violating any law of the state including state laws relating to the operation of a motor vehicle. The Court expressly rejected the defendant's argument that jurisdiction was limited to "highways constructed and maintained by the commission." The Court found it unnecessary for the trooper to seek permission or authorization from any local law enforcement officer before initiating a traffic stop on a city street. The trial court's decision reversed.

State v. Varnell

WD 70957 ♦ June 6, *2010*

In his sufficiency of evidence challenge to his conviction for driving while intoxicated, defendant argued that the State failed to establish that he was under the influence at the time of driving. Specifically, he alleged that the State failed to establish the exact time of his accident and the time his blood was drawn.

In dealing with the issue of remoteness, the Western District reaffirmed that proof of intoxication at the time of arrest, when remote from the time of operation, is insufficient in itself to prove intoxication at the time of driving. Remoteness as used in drunk driving cases has two dimensions, remoteness in time from operating a vehicle and remoteness in distance from the vehicle.

In the present proceeding, defendant was found within the vehicle such that remoteness of distance was not an issue. Hence, the Court focused on remoteness in time from operation.

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Although the time periods when defendant consumed alcohol and actually crashed his vehicle were not specifically determined, the Court found the circumstantial evidence provided the "showing of more" than necessary to support the conviction beyond a reasonable doubt because: 1) when emergency personnel arrived at the scene driver was trapped in his vehicle and required the assistance of an emergency personnel to be extracted; 2) immediately after driver was extracted, law enforcement searched the vehicle and found no evidence of alcohol; 3) driver admitted to drinking prior to the accident; 4) the manner in which the accident occurred was consistent with the court's conclusion that driver was intoxicated at the time of the crash; 5) driver appeared inebriated at the scene and smelled strongly of alcohol; 6) driver's blood alcohol content was almost three times the legal limit; 7) the accident occurred on a frequently traveled thoroughfare; and 8) driver was seriously injured at the crash and his wounds were still bleeding when law enforcement first arrived.

From such, the Court concluded the crash occurred in close proximity to the time of the officer's arrival and thus remoteness of time was not an issue.

The Court also observed that where the driver's blood alcohol content was more than three times the legal limit issues as to absorption and elimination were inapplicable.

State v. Seeler

SC 90583 ♦ July 16, *2010*

Defendant charged with Involuntary Manslaughter, a class B felony in violation of 565.024.1(3)(a) which proscribes acting with criminal negligence to cause "the death of any person not a passenger in the vehicle operated by the defendant, including the death of an individual that results from the defendant's vehicle leaving a highway ... or the highway's right-of-way ..." In its indictment the state alleged that the defendant operated a motor vehicle while under the influence of alcohol causing the death of another by striking him with a motor vehicle with criminal negligence in that defendant was driving in a closed construction zone, thereby leaving the highway's right-of-way.

At trial, defendant's theory was that he never left the highway or highway right-of-way when he drove through construction cones and struck and killed a highway worker. At the close of the State's case, he moved for judgment of acquittal or dismissal. In response and over defendant's objection, the State sought and received leave to file a substitute information charging that defendant was criminally negligent in that he "drove in a lane closed to traffic." Defendant was eventually convicted and appealed.

In 4-3 opinion the Missouri Supreme Court held that when the state was allowed to amend at the close of its case-in-chief, the defendant was prejudiced because the defenses he had prepared for trial - which were relevant to the original charge specified in the indictment - were no longer relevant. The high court observed, the state must specify, and the jury must find, the *particular facts* that lead to the conclusion that a defendant was criminally negligent. In the instant proceeding the state belatedly changed its factual predicate for the criminal negligence allegation to the defendant's prejudice.

The dissent argued that the defense was a technical defense not amounting to prejudice because whether defendant was or was not on the highway or highway right-of-way was not an element of the offense. Since the state need only show that defendant cause the death of a person not a passenger in the vehicle he operated, a change in location where the death occurred could not occasion prejudice.

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MACDL Calendar of Events

October 22, 2010

MACDL Fall CLE
Harrah's Casino
Maryland Heights, MO

April 15-16, 2011

MACDL Annual Meeting & Spring CLE
Chateau on the Lake
Branson, MO

July 22-23, 2011

Bernard M. Edelman DWI Conference
Tan-Tar-A
Lake Ozark, MO

MACDL Web Traffic Report

Activity Summary

(3/4/10 - 9/13/10)

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Average Hits per Day	821
Average Page Views per Day	233
Average Visitors per Day	135