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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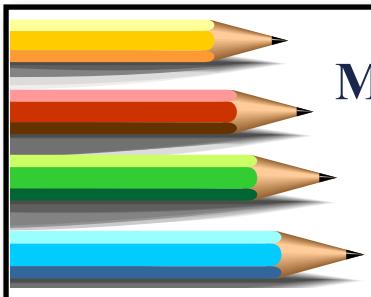
Your comments and suggestions are welcome!



MACDL President's Letter

by Brian Gaddy

MACDL serves the vital role of providing a unified voice for criminal defense lawyers throughout Missouri. One important way in which MACDL's voice is heard is through the amicus curiae process before Missouri courts. The MACDL Amicus Committee responds to requests for assistance in appellate cases that involve important questions of criminal justice that are of general interest to the criminal defense bar.

MACDL recently filed an amicus brief in support of the Defendant in *State ex rel. Garcia v. Goldman*, 316 S.W.3d 907 (Mo. 2010). The Missouri Supreme Court held the Defendant's Sixth Amendment right to a speedy trial was violated and ordered the circuit court to dismiss the indictment. John Davidson wrote the amicus brief on behalf of MACDL. Our organization also filed an amicus brief before the Missouri Supreme Court in *Smith v. Pace*, 313 S.W.3d 124 (Mo. 2010). Smith was a criminal defense lawyer who was convicted of criminal contempt for written comments he made in court pleadings that criticized a trial judge. Smith was ordered to serve 120 days in jail for the contempt conviction. On a writ of habeas corpus, the Missouri Supreme Court ordered Smith's contempt conviction to be discharged, finding that the judgment did not contain the necessary factual findings for criminal contempt. *Smith* is an important decision for all criminal defense lawyers, as the very concept of jailing defense counsel for comments made in pleadings is chilling. Talmage Newton wrote the amicus brief for MACDL.

More recently, MACDL submitted an amicus brief in support of adequate funding by the legislature for the Missouri State Public Defender System in *State ex rel. Missouri Public Defender Comm'n. v. Waters*, now pending before the Missouri Supreme Court. Professor Sarah J. Foreman, who also serves as a MACDL Board member, led the amicus brief effort. She received significant assistance from third year law student Kevin Roberts, who recently graduated from Washington University and was selected as an Equal Justice Works Public Defender Corps Fellow to practice indigent defense in New Orleans. Professor Foreman also received assistance on the brief from MACDL Board members Bruce Galloway and John Simon.

Please visit www.macdl.net to learn more about the amicus brief process and to learn more about the MACDL Strike Force that is available to consult with members who may fall under attack for providing representation to the citizen accused. Our thanks go out to Grant Shostak who chairs the Amicus Committee, as well as all of the volunteers who have researched, written and revised amicus briefs for MACDL. Our amicus brief practice is just one example of how this organization impacts and shapes criminal law issues in Missouri.

MACDL

Missouri Association of Criminal Defense Lawyers

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Thanks!

MACDL thanks our 2011 Spring CLE Sponsors:

The Bar Plan

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MACDL Calendar of Events

MACDL Fall CLE
October 21, 2011
Holiday Inn Executive Center • Columbia, MO

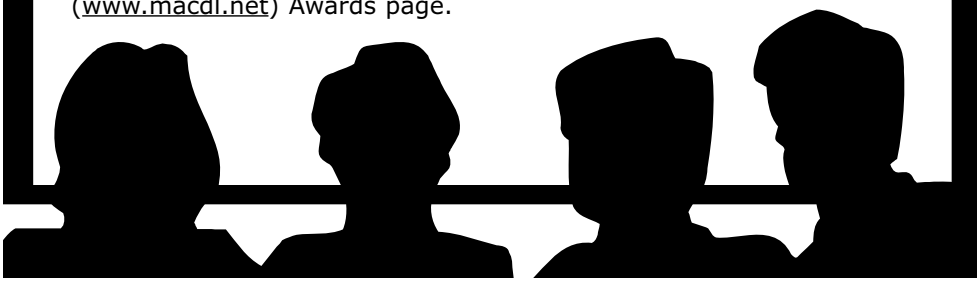
MACDL Annual Meeting & Spring CLE
April 20 – 21, 2012
Hilton St. Louis Ballpark • St. Louis, MO

Bernard Edelman DWI Conference
July 13-14, 2012
Tan-Tar-A • Lake Ozark, MO

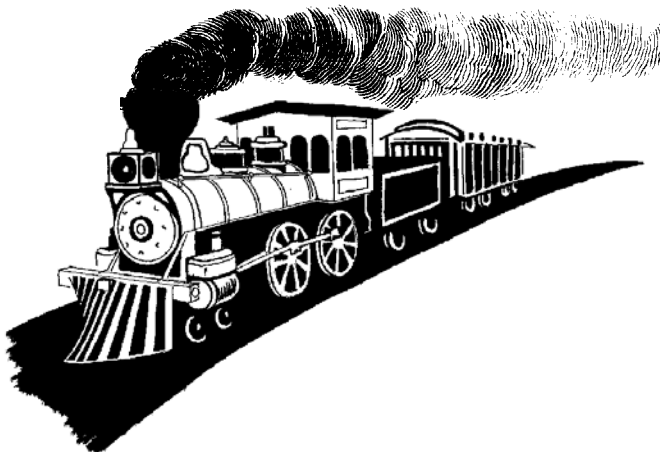
MACLD Awards!

The Missouri Association of Criminal Defense Lawyers (MACD) 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.



Welcome Aboard!



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

We'd like to welcome the following new members!

Rebecca Kurz • *Olathe, KS*

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On the Horizon

by Brian Bernskoetter, MACDL Office

Officials from the Missouri General Assembly, Governor's office and Judiciary are meeting in an effort to revamp Missouri's criminal sentencing practices with the hopes of diverting more nonviolent offenders to less expensive treatment programs instead of prisons.

The Pew Center on the States is assisting the working group to analyze Missouri's current sentencing laws, prison populations, probation programs and recidivism rates. This effort has taken place in other states which resulted in many states enacting laws that directed more nonviolent offenders to enhanced probation and drug treatment programs. Such programs are less expensive than prison and leave more space in Missouri's already crowded prisons for the most serious and violent offenders.

Sen. Jack Goodman, Chairman of the Senate Judiciary Committee and Co-Chair of the working group had this to say, "All too often, legislators legislate to the press release of the day – the biggest crime that comes about in the media usually brings about a swifter, tougher penalty, for whatever that conduct may be, and we have a piecemeal criminal code. What we are doing today, and through the coming months, is working toward a holistic, data-driven, evidence-based approach."

The group's goal is to have a non-partisan plan in place for action during the 2012 legislative session.

Lawyer Assistance Strike Force

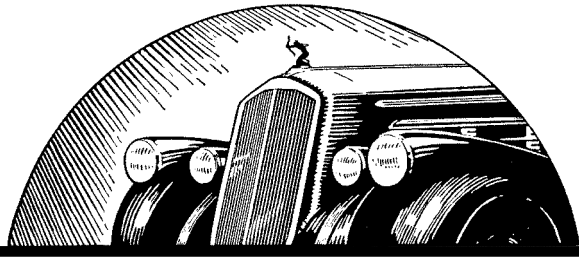
As a benefit of membership, members have the opportunity to consult with MACDL`s Strike Force if they are threatened in any way for providing legal representation to a client in a criminal proceeding and are subpoenaed to provide information, cited for contempt, being disqualified from the representation,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

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)

DWI and Traffic Law Update

by Jeff Eastman



DENOVO

Schneider v. Director

339 S.W.3d 533 (Mo. App. E.D. 2011)

Driver challenged admission of breath test result in trial de novo proceeding. Driver argued that Governor Blunt's Executive Order 07-05 transferred Missouri's breath alcohol testing program from MDHSS to MoDOT. Since the testing of driver's breath was performed under a permit issued by MDHSS on a device approved by MDHSS and maintained by one authorized by MDHSS via regulations adopted by MDHSS subsequent to the transfer, Driver argued the results were inadmissible. The trial court agreed and vacated the license sanction.

On appeal, the Eastern District reversed. The appellate court held that the Governor's Executive Order merely required that MDHSS and MoDOT "to cooperate to transfer." In the Eastern District's opinion, there was no evidence that the transfer had actually occurred. Thus the trial court erred in excluding the test results.

REFUSAL

Bess v. Director

SD30805
July 28, 2011

In this refusal proceeding, the trial court vacated Director's refusal sanction finding in part that MODOT had failed to adopt the necessary rules and regulations to carry out its duties under the breath alcohol program in compliance with Governor Blunt's Executive Order of 2007. The Director appealed and the Southern District reversed. In its opinion, the Southern District first relies upon the *Schneider* decision which had held that the language of the 2007 Executive Order described what was to be transferred to the new department or division, *not when* the transfer was to occur. Absent evidence as to when the transfer occurred, responsibility for the breath testing program remained with the Department of Health and Senior Services and not MODOT. Additionally, the Southern District noted that unlike *Schneider*, where the driver submitted to a breath test, here the driver did not submit to such testing. Under existing case law, courts have repeatedly held that in a refusal case, the Director need not prove that the results of a breath test would have been otherwise admissible had the driver submitted to a test. The trial court thus misapplied the law in rendering this judgment in favor of the driver and against the Director.

Bland v. Director of Revenue

324 S.W.3d 451 (Mo. App. S.D. 2010)

In this Section 577.041 proceeding, the trial court found all three issues to be in the affirmative yet set aside the Director's revocation. The trial court ruled that the basis for the stop, speeding, was not an indicium of intoxication. On appeal, the Southern District reversed. The appellate court found the trial court was correct in finding all issues to be in the affirmative from the certified records submitted as evidence but misapplied the law when considering the basis which prompted the initial stop. Trial court's decision reversed.

Cardenas v. Director

339 S.W.3d 608 (Mo. App. S.D. 2011)

In this refusal proceeding, driver did not offer any evidence at hearing but rather engaged in cross examination of the arresting officer and objected to the receipt into evidence of a copy of the Director's certified file. The trial court ruled in favor of the driver and against the Director. The trial court's judgment read in part "upon the evidence offered ... adjudged, the [trial] court finds [the Director] failed to show by competent and admissible evidence the time of the accident, the elapsed time between [the] accident and [LEO's] encounter with [driver], whether or not [driver] consumed alcohol after the accident and whether or not [LEO] had reasonable grounds to believe [driver] was driving a motor vehicle while in an intoxicated condition." In her appeal, Director asserted the trial court erred in reinstatement by erroneously declaring and applying the law arguing that the her evidence was "competent, admissible and sufficient" to show that LEO had reasonable grounds to believe driver was driving while intoxicated.

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On appeal, the Southern District first notes that the trial court never expressly ruled upon driver's objections but inferred from the judgment that the court considered the exhibit since it took the matter with the case but rejected such evidence as not being "competent" and therefore inadmissible. The appellate court also noted that from their review of the judgment, the trial court had determined that LEO's testimony was not competent and therefore not admissible.

In reversing the trial court's judgment, the appellate court held that the trial court erred as a matter of law in that Missouri presumes that a witness is competent to testify except for a few statutory exceptions. Here, the trial court abused its discretion in finding the officer's testimony was not "competent" and not admissible, as well as when it inferentially determined the records submitted by the Director were not competent and therefore not admissible. The judgment of the trial court was reversed and the matter was remanded for further proceedings.

Chamberlain v. Director

SD30567
April 25, 2011

In this refusal proceeding, the trial court sustained the driver's hearsay, foundational and non-responsive objections. Since the Director failed to make any offer of proof as to the excluded evidence, the points were not preserved for appellate review.

The Southern District also rejected the Director's claim that the trial court lacked subject matter jurisdiction because the action was filed in the wrong county. Because circuit courts have original jurisdiction over all cases and matters, civil and criminal, the appellate court held the circuit court had subject-matter jurisdiction over this civil proceeding. The court found the Director confused the concept of the trial court's jurisdiction - a matter determined under Missouri's Constitution - with the separate issue of the circuit court's statutory authority to grant relief. The court framed the Director's claim of error as one of improper venue based on Section 577.041.4. Since the Director failed to timely object, the same was waived.

Coble v. Director

323 S.W.3d 74 (Mo. App. S.D. 2010)

In this Section 577.041 proceeding, the Southern District, following the Supreme Court's opinion in *Ross v. Director of Revenue*, holds that the 90-minute arrest rule as found in Section 577.039 is inapplicable in a refusal proceeding.

The appellate court also reaffirms existing case law that the legality of an arrest is not an issue in a refusal proceeding. Thus, even though LEO arrested driver for an offense which occurred outside the boundaries of his municipality, the civil refusal sanction was upheld and the trial court's judgment reversed.

Covert v. Department of Revenue

ED95862
June 21, 2011

Driver arrested for DWI. Driver refused breath test and was served with notice of revocation. LEO then requested and received search warrant to draw blood. Test results showed drivers BAC between 0.144 & 0.123. MDOR sends driver notice of suspension under 302.505 & 302.525 which sanction was affirmed after administrative hearing. Refusal and de novo consolidated.

Trial court found 1) MDOR had legal right to revoke for refusing and 2) under Section 577.041, if a person refuses testing, none shall be given and thus the results obtained were not admissible for purposes of the suspension action. Trial court set aside the order of suspension because of the lack of BAC evidence but sustained the order of revocation.

MDOR appealed the trial court's order setting aside suspension, arguing that the court misinterpreted Section 577.037 and 577.041 in that it found these sections required exclusion of blood alcohol evidence obtained pursuant to court issued warrant. The Eastern District first addresses the propriety of MDOR's actions in both suspending and revoking license. Driver argues sanctions are exclusive such that driver cannot receive double sanction for a single incident. The appellate court disagrees, quoting *Brown v. Director of Revenue* where appellate court said it was permissible to sanction for both a refusal and points assessed because of DWI criminal conviction as these were separate transgressions occurring at separate times and places allowing for separate penalties. Thus, two separate transgressions allow for separate sanctions.

Next, the court considered whether the proper procedures were followed to allow for separate sanctions. Court finds analogous situation in *State v. Smith*, 134 SW3d 35, 38 (ED 2003). In *Smith*, appellate court held "none shall be given" language did not prohibit admission of results obtained pursuant to a warrant as "none shall be given" language applies only to law enforcement. Court rejects driver's argument that *Smith's* holding only applied to criminal cases stating "We see no reason to bar the admission of evidence obtained through a search warrant in compliance with Section 577.041 from an admin proceeding."

Court, relying on *Smith*, says results were properly administered after LEO obtained warrant. Because tests were properly administered results were admissible in license case and court erred by misinterpreting 577.037 and 577.041 so as to exclude results.

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Comment/Observation - *Smith* held that in a criminal case the "none shall be given" clause was restricted in application to law enforcement officers and did not defeat a court's ability to issue a search warrant to acquire the evidence - not withstanding the refusal. *Smith* did not say the search/seizure was in accordance with 577.041 but rather 577.041's prohibition did not deprive a court of its ability to issue a warrant to seize the evidence. Simply stated, the *Smith* case held that a warrant could be issued to capture the evidence. This case ignores the fact that the blood was not acquired as provided in Section 577.041 - the warrant had nothing to do with 577.041 but for the driver's initial refusal.

Davis v. Director

ED95538
June 28, 2011

In this refusal proceeding, driver argued that he was not given the required 20 minutes to attempt to contact a lawyer after being given the implied consent warning. The trial court disagreed and affirmed the revocation. On appeal to the Eastern District, the trial court's judgment is affirmed.

In its opinion, the Eastern District noted that the arresting officer testified that appellant was given an opportunity to call his attorney after the implied consent warning. Specifically, the officer testified "at 01:15 he was given an opportunity to contact his attorney. I read the implied consent. He refused. I checked the box. At the same time he stated he did not want to take the test he wanted to talk to his attorney and at that point and time I stopped everything, checked it at 01:15, and then gave him an opportunity to contact his lawyer."

The trial court concluded that driver was given an opportunity to contact an attorney after the implied consent advisory.

The Eastern District recognized that the resolution of contested facts is a task for the trial court and that an appellate court must defer to the ability of the trial court to judge the credibility of a witness and ascertain the facts. The court noted that it was apparent from the judgment that the trial court found the officer's testimony most credible and that as the court of review, it must defer to that finding. Judgment affirmed.

Wei v. Director

335 S.W.3d 558 (Mo. App. S.D. 2011)

In this refusal proceeding, the Director's evidence consisted of a copy of her certified file. Driver introduced the deposition testimony of the arresting officer, as well as a video. The driver did not testify. The trial court sustained the Director's position and driver appealed. The appellate court rejected each point advanced by driver.

In point I, driver argued that there was not substantial evidence to support the trial court's finding that there were reasonable grounds to believe driver had been operating a motor vehicle while in an intoxicated condition. Rejecting the point, the appellate court found that the alleged inconsistencies or mistakes referenced by driver were "non-material" to the issues set forth in Section 577.041. The court stated that its standard of review required that it defer to the trial court's view of the evidence such that the appellate court would not second guess the trial court on issues of contested facts.

In point II, driver claimed the trial court erred in overruling her motion to reconsider arguing that the judgment "condoned and sanctioned the use of false and untrue statements and compromised the integrity of administration of justice." Driver argued that her evidence revealed specific false and untrue statements advanced by the Director. Again, in rejecting driver's arguments, the appellate court observed that the trial court's reliance on the Alcohol Influence Report, as well as the deposition testimony of LEO, did not constitute the use of condoning, false and untrue statements nor did it compromise the integrity of the administration of justice. Again, the appellate court noted that its standard of review required it to defer to the trial court's analysis of contested evidence.

In point III, driver argued that the judgment was against the weight of the evidence in that the video of the incident demonstrated that LEO lacked reasonable grounds to believe that driver had operated a motor vehicle in an intoxicated condition. The appellate court likewise rejected this point again acknowledging that it was to defer to the trial court's findings on contested issues of fact. The appellate court also observed that in its independence review of the video, evidence of the allegations was inconclusive.

In her fourth point, driver claimed that the judgment was not supported by substantial evidence in that the Director had presented no credible evidence that LEO properly deemed driver to have refused the chemical test. In its review of the testimony, the appellate court rejected said assertion noting that LEO had testified as to the insufficiency of the efforts made by driver to provide a valid sample.

Finally, driver alleged that the trial court erred in entering judgment in favor of the Director because the judgment violated driver's constitutional right to due process in that it denied her the right to confront and cross examine the arresting officer. Again, the appellate court rejected driver's argument, first noting that the facts necessary to establish the driver's prima facie case could be proven through the use of an Alcohol Influence Report and its narrative. The court also observed that the driver had every opportunity to cross examine LEO during the course of its deposition and could have subpoenaed him to testify at trial, as well. Judgment of the trial court was affirmed.

Williams v. Director of Revenue

335 S.W.3d 70 (Mo. App. W.D. 2011)

In this refusal proceeding, the Director relied solely upon her certified records. According to those records, at the police station, LEO read driver his Implied Consent. Thereafter, driver refused to take a breath and a blood

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test. LEO then began a 15-minute observation period and read driver his Miranda rights. Approximately 15 minutes after the initial refusal, LEO asked driver if he was still refusing to take the test to which driver replied, "What test?" LEO then printed an evidence ticket indicating "Refused" from the DataMaster machine.

The trial court vacated the refusal sanction focusing on the ambiguity of the events subsequent to the initial refusal. On appeal, the Western District reversed noting that the trial court had focused on the driver's conduct subsequent to his alleged initial refusal. In so doing, the trial court erroneously declared that the burden was on LEO to make it clear that he was asking driver to take the test again and asking him if he was still refusing to provide a breath or blood sample. Since all of the ambiguity surrounding LEO's second request occurred after driver's alleged initial refusal, the trial court erred in rescinding the revocation.

Because the trial court ruled at the close of the Director's case, the matter was remanded to afford driver the opportunity to present evidence, should he so choose.

CRIMINAL

Bowers v. State of Missouri

330 S.W.3d 832 (Mo. App. W.D. 2011)

In this proceeding, the appellate court distinguishes a suspended imposition from a suspended execution of sentence and discusses the power of the court in probation revocation proceedings. Most noteworthy, the court emphasizes that the validity of a judgment for purposes of a probation violation proceeding is separate and distinct from the format required to prosecute an appeal from a final judgment.

State v. Acevedo

339 S.W. 3d 612 (Mo. App. S.D. 2011)

In a bench trial, Defendant was convicted of driving while revoked with punishment enhanced to class D felony status. Defendant challenged the sufficiencies of the prior predicates to enhance. On appeal, Southern District affirms. In a plain error review, the appellate court identified the prior predicate findings as follows: (1) a November 7, 2006 Lawrence County Judgment wherein Defendant plead guilty to the class A misdemeanor of driving while suspended in violation of Section 302.321; (2) a January 26, 2004 Lawrence County Judgment wherein Defendant plead guilty to the class A misdemeanor of driving while revoked in violation of Section 302.321; (3) a January 26, 2004 Lawrence County docket entry Judgment wherein Defendant plead guilty to the class B misdemeanor of driving while suspended in violation of Section 303.370 [driving while suspended after ... operating privilege was suspended for financial responsibility]; and (4) a July 17, 2003 Judgment finding Defendant guilty of driving while suspended after his operator's privilege was suspended for financial responsibility.

Section 302.321 provides that any person with no prior alcohol related enforcement contacts convicted a fourth or subsequent time of driving while revoked and where the three prior driving while revoked offenses occurred within ten years of the date of the present offense is guilty of a class D felony.

The Southern District notes that for purposes of enhancement, Section 302.321 defines the act of driving while revoked as driving while one's privilege is suspended, revoked or cancelled. The act of driving while suspended is the commission of driving while revoked irrespective as to why one's privilege is suspended. The appellate court rejects Defendant's argument that predicate suspension must have arisen under Section 302.321, as said statutory section does not limit enhancement to only prior driving while revoked charges brought pursuant to or arising under Section 302.321. Thus, offenses arising under Chapter 303 are properly included as prior predicates.

Note that the appellate court did not address Defendant's argument that since the legislature used the words "driving while suspended or revoked" in connection with county or municipal ordinance violations, as opposed to simply "driving while revoked" for state violations, it was the legislature's intention that only driving while suspended convictions for county or municipal ordinance violations are available for enhancement.

State v. Beam

334 S.W.3d 699 (Mo. App. E.D. 2011)

Defendant found guilty after bench trial of class D felony of leaving the scene of a vehicular accident and misdemeanor charges of failing to maintain financial responsibility and improper turn on a divided highway. On appeal, Defendant challenges each conviction.

As to the felony charge of leaving the scene of an accident, Defendant alleged that the record did not demonstrate with unmistakable clarity that she knowingly, intelligently and voluntarily waived her right to trial by jury. The Eastern District agreed noting that a criminal Defendant has both a federal and state constitutional right to have a jury decide his guilt or innocense. In felony cases, under both the Missouri Constitution and Rule 27.01(b), a waiver [of a trial by jury] by the accused and assent of the court must appear from the record with unmistakable clarity. In the absence of such an unmistakable clear waiver in a felony case, a Defendant is entitled to remand for a new trial under plain error review. In the instant proceeding, the record lacked a written or oral waiver by Defendant of a right to trial by jury. Indeed, the record did not reflect that Defendant, or counsel or the court even mentioned Defendant's right to trial by jury or her decision to waive that right. Accordingly, Defendant's conviction and sentence for leaving the scene of a vehicular accident was reversed and the case remanded for new trial as to that count.

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In her second point, Defendant claimed the trial court erred in overruling a motion for judgment of acquittal at the close of all the evidence and entering judgment finding her guilty of failing to maintain financial responsibility. Specifically, Defendant alleged that the state failed to show that she acted knowingly or with knowledge. The court found the evidence sufficient to support a finding of guilt noting the circumstantial evidence presented.

Finally, Defendant claimed the trial court erred in overruling her motion for judgment of acquittal at the close of all the evidence and entering judgment and sentence for improper turn on a divided highway under Section 304.015. Defendant alleged that she was charged with turning "right not at an intersection, interchange, or designated location" whereas Section 304.015 prohibits "any left turn or semi-circular or u-turn" at such location.

The Eastern District agreed and reversed and remanded on that charge. The Eastern District agreed that the wording of the charged offense did not effectively plead a violation of Section 304.015. Her conviction was therefore reversed. The State's request for remand was an opportunity to amend the information to properly charge a violation of Section 304.015 was granted.

State v. Brown

332 S.W.3d 282 (Mo. App. S.D. 2011)

Defendant filed a motion to suppress, challenging the validity of the stop. The appellate court found that weaving within one's lane and twice driving on the center line within a four-mile stretch provided sufficient grounds for the stop, affirming the trial court's denial. The Southern District distinguishes *State v. Abeln*, 136 S.W.3d 810 because in *Abeln*, the trial court had rejected LEO's testimony as to the basis for the stop for erratic driving. The Southern District also distinguished *Mendoza,* where there was a rational factual basis for the lane transgression. Noteworthy, the Southern District recognized the Supreme Court's recent reference to the legitimate "community care-taking" function of law enforcement. The Southern District found that the trial court properly denied the Defendant's motion to suppress and the conviction thereafter entered was affirmed.

State v. Burns

339 S.W.3d 570 (Mo. App. W.D. 2011)

Pre-trial, State filed a "Notice of Filing Business Records Pursuant to Section 490.692" wherein the State expressed its intent to introduce Defendant's medical records at trial. In response, Defendant filed a "Motion to Suppress or in the Alternative Motion in Limine." The State filed its objections to Defendant's motion. In its order overruling the State's objections, the trial court held that it would "require the State to introduce the foundation required by the Code of State Regulations for any lab tests concerning levels of alcohol or the presence of drugs in a sample to be admissible."

The State filed an interlocutory appeal pursuant to Section 547.200.1(3). Defendant filed a motion to dismiss the State's appeal, arguing that Section 547.200.1(3) permits an interlocutory appeal where the trial court has ordered the suppression of illegally seized evidence. Defendant argued that the trial court's order was merely a pre-trial in limine ruling with respect to the admissibility of evidence pursuant to an evidentiary rule or principle.

The Western District agreed and dismissed the appeal noting the suppression of evidence is not the same thing as the exclusion of evidence on the basis of some rule of evidence. Suppression is a term used for evidence which is not objectionable as violating any rule of evidence, but which has been illegally obtained. Case law has circumscribed the State's right to appeal to those cases where illegally obtained evidence is at issue. Since the trial court's order was based upon the application of a rule of evidence Section 542.296.5 was not implicated. It necessarily follows that the State is afforded no right to seek an interlocutory appeal from the trial court's order pursuant to Section 547.200.1(3).

The Western District also noted that the trial court's docket and the transcript reflected that Defendant's trial was continued to permit the State to pursue a writ of prohibition, which the State did not seek. The court observed that a remedial writ is the proper route to review interlocutory orders in a criminal case and the State remained free to seek a review of the trial court's order by way of a remedial writ.

State v. Collins

328 S.W.3d 705 (Mo. 2011)

Defendant challenged the sufficiency of the evidence offered to prove he was a chronic offender. In the trial court proceeding, the State relied upon a certified copy of the Defendant's driving history as evidence of his prior convictions. That certified record failed to reflect whether Defendant had been represented by counsel or waived his right to counsel. The State conceded error. The sole issue was the appropriate remedy with the State arguing that it should be permitted to present additional evidence to prove that Defendant was a chronic offender. The state argued that *State v. Emory*, 95 S.W.3d 98 (Mo. banc 2003), *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009) and *State v. Severe*, 303 S.W.3d 640 (Mo. banc 2010) were not controlling because those findings were made in jury trials.

The Supreme Court rejected the State's argument and, citing *State v. Craig*, 287 S.W.3d 676 (Mo. banc 2009) held that the appropriate remedy is to vacate the judgment and remand the case for re-sentencing on the record previously made noting "precedent persuades that, on remand, the State does not receive a second opportunity to prove its case."

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State v. Dowdy

332 S.W.3d 868 (Mo. App. S.D. 2011)

Defendant was charged with unlawful use of a weapon for possessing a firearm while intoxicated. He moved to suppress the results of a warantless breath test of his blood alcohol content alleging that such search and seizure violated his federal and state constitutional rights.

In this proceeding, a residential altercation culminated in the Defendant fatally shooting a relative. Officers were dispatched, with the Captain arriving approximately 30 minutes later. When the Captain arrived, Defendant was already under arrest and in the back seat of the patrol car. The Captain ordered the Defendant be transported to the jail and requested a breath test of his blood alcohol concentration.

Defendant arrived at the jail approximately 45 minutes later where he was booked and advised that his blood alcohol level was needed to ensure that medical treatment was not necessary. Defendant testified at the suppression hearing that he was told and not asked to blow into the Breathalyzer. Defendant was not read Miranda warnings before the test or given an option about submitting and the officers never sought a warrant.

The trial court suppressed the breath alcohol concentration results. The State appealed and the Southern District, in a split decision, reversed. The majority found that *Schmerber v. California*, 384 U.S. 757 (1966) supported the general principal that the warrantless extraction of a blood sample without consent but incident to a lawful arrest was not an unconstitutional search and seizure in that the results of a blood test so performed are admissible in evidence. In conclusion, the majority found that *Schmerber* "has established controlling constitutional standards for determining the admissibility of the results of a similar sobriety test as evidence in a criminal case."

In her dissent, Judge Rahmeyer found that no exception to the warrant requirement applied in the present proceeding. First, she found that Defendant did not voluntarily consent to providing the breath sample, as he was hand-cuffed and arrested, taken to jail, booked, where he was stripped of his clothes and required to put on jail uniform and was then told he had to provide a breath sample to determine whether he needed medical treatment. As such, there was no consent. Rather, there was evidence that LEO admitted that Defendant had no choice but to take the breath test.

Judge Rahmeyer likewise rejected any suggestion that the search was incident to an arrest. The Court first noted that the present proceeding was not an allegation that the Defendant had been operating a motor vehicle while in an intoxicating condition. Secondly, in distinguishing the present case from *State v. Setter*, 721 S.W.2d 11 (Mo. App. 1986), she noted that Defendant was not Mirandized nor given an option about submitting to the test. Such was in contrast to the *Setter* decision because in *Setter*, there was no showing that Setter was denied the right to consult with counsel. Furthermore, here the Defendant was already under arrest when the Captain arrived. He was told to take a breath test two hours after his arrest which made this search too remote in time to be incidental to the arrest and there was no valid reason for the delay offered.

Finally, Judge Rahmeyer rejected the exigent circumstances exception. Exigent circumstances exist when there is a compelling need for official action and no time to secure a warrant. Exigent circumstances are situations where real immediate and serious consequences will certainly occur if a police officer postpones action to obtain a warrant. Where there are exigent circumstances in which police action literally must be now or never to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation. The government bears the burden of proving the existence of an exigent circumstance to justify a warrantless search. In the present case, in a light most favorable to the trial court's ruling, the State had two hours to obtain a search warrant. The State failed to show any real immediate and serious consequences would certainly occur if they postponed action to obtain a warrant and failed to secure a breath test from the Defendant without obtaining a warrant. The facts as the trial court found them did not present a literal "now or never" preservation of evidence issue. Finally, the dissent noted that the case law cited by the majority all involved the operation of a motor vehicle while intoxicated.

State v. Loyd

338 S.W.3d 863 (Mo. App. W.D. 2011)

Defendant was charged with the misdemeanor offense of driving while revoked. Defendant filed a motion to suppress, arguing that LEO did not have reasonable suspicion or probable cause to initiate a computer check of the license plate of the vehicle he was operating. He further alleged that even if such check was proper, the State failed to present evidence demonstrating that LEO had specific aritcuable facts to indicate that Defendant was in the vehicle.

On appeal, the Western District affirms. In a precedential opinion, the court first finds that a computer license plate check is not a search relying upon unanimous federal precedent.

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Federal case law has established that there is no reasonable expectation of privacy in a license plate as they are in plain view and intended to convey information, such check is not intrusive, and is consistent with Supreme Court rulings that individuals have no reasonable expectation of privacy in their vehicle identification numbers.

The court also rejected Defendant's argument regarding the possible physiological invasion occasion by reason of such checks and that the possibility of database error or officer abuse do not create legitimate expectations of privacy where none previously existed.

The court held that LEO, seeing a license plate in plain view, may perform a computer check of that number to access non-private information about the car and its owner in law enforcement databases.

The court also rejected Defendant's argument as to a lack of reasonable suspicion to justify stopping the vehicle because there was no indication that the vehicle was owned by or registered to Defendant. The court noted evidence that in the MULES database, warrants are assigned to the license plate numbers of vehicles in which an individual for whom a warrant has been issued has been previously stopped and ticketed or arrested. In the instant proceeding, Defendant's name and warrant information appeared in MULES because the warrant was issued on that license plate number based on Defendant's having been stopped in the same vehicle previously. Thus, "under these circumstances, a law enforcement officer receiving MULES computer information that there was an arrest warrant associated with that license plate has a reasonable suspicion to justify an investigatory stop of the vehicle to see if the person for whom the warrant was issued is present therein."

State v. McNelly

ED96402
June 21, 2011

In this criminal proceeding, the trial court suppressed the blood sample seized from the Defendant's person after he was arrested for driving while intoxicated. The sample was obtained without the Defendant's consent and without a search warrant. The trial court found the case did not involve exigent circumstances and thus distinguished the situation from that presented in *Schmerber v. California*, 384 U.S. 757 (1966). The court noted that *Schmerber* was limited to the "special facts" of that case which include a delay of two hours while the officer investigated the accident scene before delivering the Defendant to the hospital and the court's specific finding that there was insufficient time to seek out a magistrate to secure a warrant. In the present proceeding, no such evidence was presented.

In response, the State argued the trial court erred in sustaining Defendant's motion because the legislature eliminated the "none shall be given" language from Section 577.041. Since said provision was the only prohibition under Missouri law barring law enforcement from obtaining a non-consensual and warrantless sample, the State argued that the trial court erred in suppressing the evidence.

The Eastern District adopted the State's argument. However, the panel transferred the case to the Supreme Court in light of the general interest and importance of the issue involved.

State v. Pfleiderer

WD73407
June 14, 2011

Defendant involved in single vehicle accident. Transported to hospital for treatment during which time blood was drawn and analyzed for medical purposes to determine BAC. Defendant subsequently charged with DWI. At some point thereafter, the State obtained the results from the blood alcohol analysis. Defendant moved to suppress the blood test results alleging (1) hospital did not comply with Chapter 577, (2) the State's taking and use of sample violated the physician-patient privilege - Section 491.060(5), (3) the Defendant was "searched" without probable cause.

Trial court had a hearing on motion without the introduction of evidence and granted the motion solely on the basis that "[t]he specimen was not seized pursuant to requirements of Section 577 or CSR. The State took interlocutory appeal.

WD dismisses appeal for reasons in *State v. Burns*, WD 73127 - as the trial court's order excluded rather than suppressed the evidence.

State v. Robertson

328 S.W.3d 745 (Mo. App. W.D. 2010)

State files interlocutory appeal challenging the trial court's judgment sustaining a motion to suppress. The trial court found that the evidence did not establish that the PBT had been calibrated prior to Defendant's arrest and, therefore, no probable cause existed for the arrest.

During the suppression hearing, defense counsel objected to the admission of the results of the PBT citing a lack of foundation. Counsel specifically referenced the lack of any evidence relating to the unit's calibration and the scientific principle upon which it operated.

The appellate court agreed with the State that proof of calibration is not required for admission of the results of the PBT under Section 577.021. However, in the present case, *admissibility* was not the issue because the court had admitted the results in to evidence for purposes of the motion to suppress. As the Western District observed, "the State's real complaint is that the circuit court did not accept and rely on the results of the PBT."

In its opinion, the court referenced the Supreme Court's recognition in a driver's license case that the lack of calibration of a portable breathalyzer machine may impact the circuit court's finding as to whether the results obtained from the same were credible. See *York v. Director of Revenue*, 186 S.W.3d 267. In the *York* case, the trial court had found that the officer lacked the

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proper training to administer the portable breathalyzer machine and that no evidence existed to establish that the device was properly calibrated, maintained or even working at the time it was used. The court also referenced the Eastern District's decision in *Paty v. Director of Revenue*, 168 S.W.3d 625, where the court found that a trial court could disregard the results of a preliminary breath test as unreliable. In the present case, the appellate court inferred that the trial court questioned the reliability of the "portable breath analyzer machine" and concluded the same was not credible. The trial court's ruling on the motion to suppress was sustained.

State v. Schroeder

330 S.W.3d 468 (Mo. 2011)

Defendant appeals conviction for failure to dim headlights, DWI and DWR challenging the sufficiency evidence to find Defendant guilty. Supreme Court holds that taking the evidence in the light most favorable to the State and granting the State all reasonable inferences from the evidence stash a reasonable fact finder could conclude that Defendant's headlights glared into the eyes of the passing LEO when LEO was within three hundred feet of Defendant's vehicle.

Supreme Court rejects Defendant's challenge to the trial court's ruling on Defendant's motion to suppress first noting that Defendant was already stopped alongside of the roadway when LEO passed. "Under the Fourth Amendment, a law enforcement officer may approach a vehicle for safety reasons or if a motorist needs assistance, so long as the officer can point to reasonable, articuable facts, upon which to base his actions." The court recognizes that LEO has a community care-taking function. Here, the court found the roadside situation "dangerous" making the initial encounter lawful.

Supreme Court also rejects Defendant's arguments that his Miranda rights were violated when he was questioned and field tested at roadside holding that LEO's questions were limited and simply asked to confirm LEO's suspicions. Defendant's participation in the field testing process was voluntary and in furtherance of LEO's investigation.

Finally, the Supreme Court rejects Defendant's void for vagueness challenge to Section 577.001 and 577.010.

State v. Wilson

ED95423
July 12, 2011

Defendant found guilty of felony driving while intoxicated after jury trial. In plain error review, Defendant argued the trial court erred in sentencing him as a chronic offender in that the trial court failed to find facts establishing his chronic offender status prior to the submission of the case to the jury. The Eastern District agreed. Although the State introduced exhibits showing prior convictions before the case was submitted to the jury, the trial court made no finding as to whether Defendant was a chronic offender as required by Section 577.023.7(3) and Sections 577.023.8. The trial court's actions were thus deficient requiring remand for re-sentencing Defendant without any enhancement.

In his second point, Defendant argued the evidence was insufficient to prove he was operating a vehicle as required by Sections 577.001 and 577.010. The Southern District disagreed. Here, the Defendant claimed the evidence did not show that he was "physically driving or operating a motor vehicle." Rather, he contended that he was merely sleeping in a parked vehicle.

In rejecting his argument, the court noted that both direct testimonial evidence and circumstantial evidence showed that he had operated his vehicle shortly before officers had found him semi-conscious in his parked truck. The State's evidence had Defendant pulling up and parking his truck approximately 30 minutes before the police arrived. There was no evidence that anyone got out of the vehicle thereafter. When LEO arrived, they found Defendant still sitting behind the wheel with the engine running. Such was sufficient to sustain the State's burden. Case remanded for re-sentencing.

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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.

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State v. Yarbrough

332 S.W.3d 882 (Mo. App. S.D. 2011)

Defendant convicted after jury trial of first degree involuntary manslaughter and second degree assault. In a plain error review challenge, Defendant first argued that the trial court erred in permitting a police officer to testify as to the results of a portable breath test. In rejecting Defendant's argument, the Southern District holds that Defendant had no constitutional or statutory right to consult with an attorney before submitting to a PBT. The implied consent provisions of Section 577.020 were inapplicable pursuant to Section 577.021 which expressly recognized the ability of an officer, prior to arrest, to administer a chemical test to a person suspected of driving while intoxicated. Additionally, Defendant need not be given an implied consent warning before a PBT test is administered as such warning is to be provided an arrestee who has been requested to submit to a chemical test pursuant to Section 577.020, not 577.021.

Defendant also complained his due process rights were violated when the med tech was allowed to testify as to the results of blood and urine tests administered for the purposes of determining Defendant's diagnosis and treatment. Defendant argued that Section 577.020 to 577.041 provide the exclusive method of admitting evidence of chemical testing to prove intoxication. Citing *State v. Todd, 395 S.W.2d 55* (Mo. App. E.D. 1996), the Southern District holds that according to the plain language of the statute and regulations, the requirements and protections provided by the implied consent law do not apply to *all* blood tests offered as evidence but only those offered pursuant to Chapter 577. The implied consent provisions were enacted to codify the procedures for obtaining bodily fluids for testing by consent without a search warrant and they are "directed only to warrantless tests authorized by law enforcement officers." Chapter 577 is not the exclusive means to obtain chemical test results for use as evidence in a criminal trial.

Since the sampling and testing was not done at the request and direction of a law enforcement officer, the restrictions of 577.020 to 577.041 are inapplicable. Further, Section 577.037.3 provides that the implied consent law shall not be construed as limiting the introduction of any other competent evidence bearing on the question of whether the person was intoxicated. The judgement of the trial court is affirmed.

MISCELLANEOUS

Bowers v. Director

338 S.W.3d 876 (Mo. App. S.D. 2011)

Driver challenged Director's 60-day CDL disqualification predicated upon convictions for two serious traffic violations arising from incidents occurring within a three-year time frame. Trial court vacated sanction and Director appealed. On appeal, the Southern District reverses. Appellate court notes that if one is found guilty of an offense, placed on probation and receives a suspended imposition of sentence, Missouri law, in general, does not consider the same a conviction. However, the term conviction as used in the Uniform Commercial Driver's License Act, is specifically defined so as to include unvacated adjudications of guilt regardless of whether the penalty is suspended.

Driver's unvacated adjudication of guilt on the driving of a commercial motor vehicle without a license charge for which he received a suspended imposition of sentence constitutes a conviction for purposes of a CDL revocation. Since such conduct constitutes a serious traffic violation as that term is defined in Section 302.700.2(30)(a) and (d), the Director was authorized and required to disqualify driver's commercial drivers license privileges for a period of 60 days.

Mayfield v. Director

335 S.W.2d 572 (Mo. App. E.D. 2011)

After suffering a ten-year denial of his driving privilege, driver sought reinstatement pursuant to Section 302.060.1(9). The Director challenged petitioner's request arguing that his conviction for possession of paraphernalia rendered him ineligible. The trial court disagreed and ordered reinstatement. The Director appealed.

The Eastern District reversed. The court noted that as a condition precedent to reinstatement, a trial court must find that a petitioner has not been convicted of any offense related to alcohol, controlled substances or drugs during the ten years immediately preceding the action for reinstatement and that the driver's habits and conduct show that he no longer poses a threat to the public safety of this State. The court found that a conviction for possession of paraphernalia is an offense related to controlled substances or drugs under Section 302.060.1(9). Hence, the trial court erred in ordering reinstatement as such drug paraphernalia conviction occurred within the ten years immediately preceding the filing of the petition.

Morse v. Director

SD30653
April 18, 2011

Driver, at 19 years of age, was arrested for violating Section 577.010. She suffered an administrative suspension under Section 302.505. After serving her period of administrative sanction, she satisfied the reinstatement requirements of Section 302.304.15 and was reinstated. At age 21, the Director expunged the record of driver's administrative suspension pursuant to Section 302.545.

Driver was also criminally prosecuted. She received a suspended imposition of sentence with probation. Driver later violated her probation, had her probation revoked and was subsequently convicted of driving while intoxicated in April, 2008.

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DWI and Traffic Law Update *(from page 12)*

Upon receipt of notification of this conviction, Director advised driver that, based upon the eight points assessed to her record, her privilege would again be suspended for 30 days pursuant to Section 302.304. The Director advised driver that she had to again complete SATOP, file an SR-22 and pay a reinstatement fee so as to secure reinstatement of her privilege. Driver challenged the Director's action in a proceeding pursuant to Section 302.311.

In the trial court proceeding, the Director conceded that driver must be given credit for her previous time of suspension pursuant to Section 302.525.4. The Director contended, however, that driver was not entitled to reinstatement unless and until she paid additional reinstatement fees, filed SR-22 and completed SATOP. The trial court disagreed finding that such requirement would violate Section 302.525 as said requirements would not give driver credit for her previous period of suspension and all the requirements following that period of suspension.

On appeal, the Southern District affirms. The Southern District rejects the Director's argument that Section 302.525.4 applied only to the "period of suspension" and not to any associated reinstatement requirements which, the Director argued, were specified in separate statutes.

The Director argued that these reinstatement requirements were "additional checks on the persons ability to safely operate a motor vehicle on Missouri's highways."

In rejecting the Director's argument, the Southern District noted that if the Director's assessment of legislative intent were valid, one would expect the legislative scheme to prohibit driver from receiving credit for her prior completion of a SATOP. Indeed, the legislature has done just the opposite in Section 302.540 by providing that court ordered participation in SATOP shall satisfy the reinstatement requirements of Section 302 if the court action arose out of the same occurrence that resulted in the administrative license sanction. The Southern District concluded that the legislature intended that the reinstatement requirements need only be satisfied once where the per occurrence credit mandated by Section 302.525.4 is equal to the length of suspension time required by Section 302.340.

Note - Supreme Court has accepted transfer.

Missouri's 96th General Assembly Legislative Update

by Brian Bernskoetter, MACDL Office

Governor Jay Nixon called the Legislature into a Special Session which began September 6th to address a number of issues in the hopes of stimulating Missouri's economy and creating jobs.

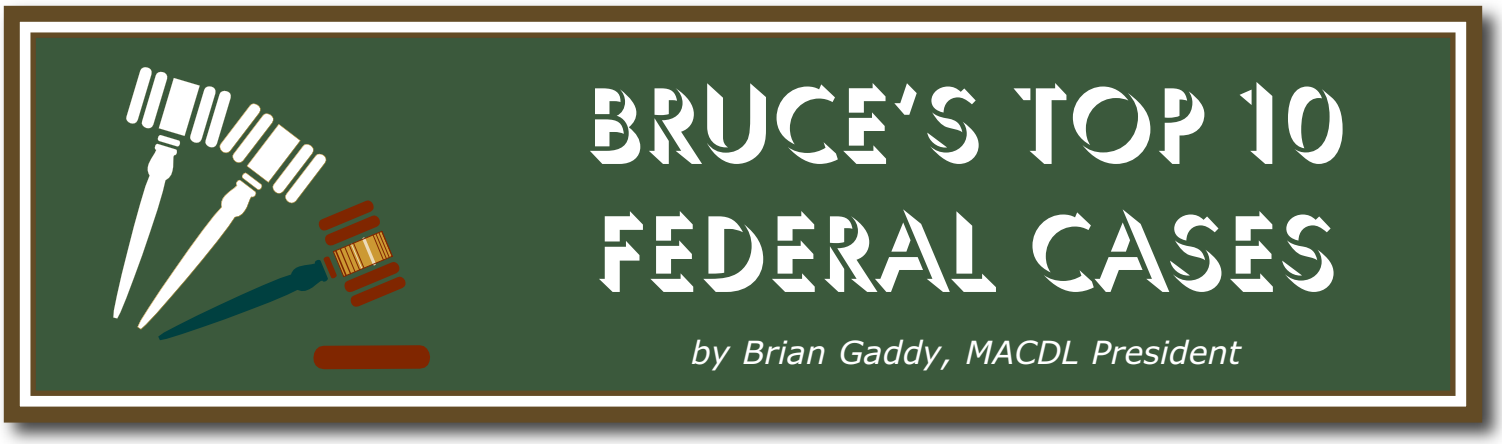
The centerpiece of the legislative call is the creation of an Aerotropolis tax credit program to incentivize the Chinese to make Lambert Airport a major distribution hub in the United States. Along with the Aerotropolis tax credit, the Governor has asked the Legislature to enact comprehensive tax credit reforms to scale back, cap or eliminate many of these programs.

Other features of the Special Session Call aimed at economic development include: the creation of the Missouri Sciences and Innovation Reinvestment Act, consolidating current business incentive programs in the Dept. of Economic Development, tax incentives for development of certain data centers, and the creation of a tax credit program to attract large sporting events.

The Governor has also included a few other items in the Special Session Call that do not directly relate to job creation or economic development. Those include: returning control of the St. Louis Police to the Mayor of St. Louis, creating a tax amnesty program for the Dept. of Revenue, and moving Missouri's Presidential Primary from February to March.

The session will coincide with the Veto Session that is scheduled for September 14th.

On other legislative fronts, MACDL is working with leaders in the Missouri Senate to lay the groundwork for a push to enact a comprehensive expungement bill next session. Along with researching other states' statutes on the subject, we are soliciting our members for real-life examples of the need for an expungement law. If any of your clients would like to offer their stories (if the bill is heard - in person during testimony or written accounts) that would be very helpful as we build a coalition and justify the need for this type of law.



Kentucky v. King

131 S. Ct. 1849 (2011)
Warrantless Entry – Exigent Circumstances

The police followed a suspected drug dealer to an apartment complex. They smelled marijuana outside an apartment door, knocked loudly, and announced their presence. The police were knocking on the wrong apartment door, as the suspected drug dealer entered another apartment across the hall. After the knock, the officers heard "noises" coming from the apartment consistent with the destruction of evidence. The officers kicked in the door. They observed drugs in plain view during a protective sweep.

The Supreme Court affirmed the warrantless search under the exigent circumstances exception to the warrant requirement. This rule applies when the police do not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment. Although warrantless searches of a home are presumptively unreasonable, the presumption may be overcome when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable. One such exigency is the need to prevent the imminent destruction of evidence. A warrantless search based on exigent circumstances is reasonable when the police do not create the exigency or threaten to engage in conduct that violates the Fourth Amendment. Here, there was no evidence that the officers violated the Fourth Amendment or threatened to do so, as the knock and announce were lawful. The case was remanded for the lower courts to determine whether an exigency actually existed due to the "sounds" consistent with the destruction of evidence.

Davis v. United States

131 S. Ct. 2419 (2011)
Fourth Amendment Exclusionary Rule

The Defendant was arrested during a traffic stop for providing a false name. After Defendant was handcuffed and the scene was secure, the police searched the car and found a gun, which supplied the basis for a felon in possession of firearm charge. The search and the suppression hearings occurred prior to the Supreme Court decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), which held that a search of a vehicle incident to lawful arrest can only occur where the arrestee is unsecured and within reaching distance of the passenger compartment of the vehicle at the time of the search. Prior to *Gant*, courts had generally ruled that automobile searches incident to arrests could occur regardless of whether the arrestee was within reaching distance of the car at the time of the search and regardless of whether the arrestee was handcuffed or secured.

The Supreme Court concluded that the gun should not be suppressed. Searches conducted by the police in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. The exclusionary rule's sole purpose is to deter future Fourth Amendment violations. When considering the applicability of the rule, the courts should weigh the deterrence benefits of suppression against the "heavy costs" of the rule. The analysis turns on the flagrancy of the police misconduct at issue. If the police exhibit deliberate, reckless, or grossly negligent disregard for the Fourth Amendment, the benefits of exclusion outweigh the costs. According to the Court, when police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct only involves simple, isolated negligence, the deterrent value of suppression is diminished and exclusion cannot "pay its way." Although the search in this case was unconstitutional under *Gant*, the Supreme Court held that the evidence will not be suppressed because the police were following binding precedent at the time. The remedy of exclusion does not automatically flow from a Fourth Amendment violation.

Michigan v. Bryant

131 S. Ct. 1143 (2011)
Confrontation Clause

A gunshot victim told police that he had been shot by the Defendant outside the Defendant's house and then drove himself to a gas station. He identified and described the shooter. The victim later died, but the victim's statements were offered through police officer testimony. The Defendant was convicted of second degree murder. The lower appellate courts reversed the conviction, holding that the victim's statements violated the Confrontation Clause.

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The Supreme Court held that there was no Confrontation Clause violation. The victim's identification and description of the shooter were not "testimonial" because they had a primary purpose to enable police to meet an ongoing emergency. In *Crawford v. Washington*, the Court held that "testimonial" evidence is only admissible if the witness is unavailable and there was a prior opportunity for cross examination. After *Crawford*, the analysis often turns on whether a statement is "testimonial." Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the statement is to enable the police to meet an ongoing emergency. A statement is testimonial if made when there is no ongoing emergency and the primary purpose of the statement is to establish or prove past events potentially relevant to later criminal prosecution. To make the primary purpose determination, the Court must objectively evaluate the circumstances of the encounter between the parties and the parties' statements and actions. The determination is an objective test. The existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's primary purpose. In this case, there was an ongoing threat to the police and to the public at large. The victim may want the threat to end but may not envision a future prosecution. According to the Court, the statement's primary purpose was to enable police to meet an ongoing emergency which is non-testimonial. The statement was admissible without violating the Confrontation Clause.

Bullcoming v. New Mexico

131 S. Ct. 2705 (2011)
Confrontation Clause

The Defendant was charged with driving while intoxicated. A forensic laboratory report certifying that his blood alcohol content was above the threshold was offered into evidence. The lab analyst did not testify, but signed the report and certified that the report and the test results were accurate. The report was validated and offered through another lab analyst who was familiar with the testing device and procedures, but did not participate in the particular testing. In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that a forensic laboratory report was testimonial for purposes of the Sixth Amendment and could only be admissible either by stipulation or if the witness (lab analyst) is unavailable and the accused had a prior opportunity to cross examine the witness. The lower courts held that despite *Melendez-Diaz*, the report in this case is still admissible because the analyst was a mere scrivener who simply transcribed the machine-generated test results and because the analyst who testified at trial could describe how the machine operates and what procedures are used in the lab.

The Supreme Court reversed, holding that the admission of the report without the testimony of the analyst who prepared the report violates the Confrontation Clause. The accused has the right to be confronted with the analyst who signed the certification and made the report. The signed certification is not an adequate substitute for testimony. The certification reported more than a machine generated result. The certification also represented that the analyst received the blood sample intact with the seal unbroken, that the analyst checked to make sure the forensic report number and the sample number corresponded, that he performed a particular test on the sample, that he adhered to protocols, and that he left the report's remarks section blank indicating that no circumstances or conditions affected the sample's integrity or the validity of the test. These representations are not revealed in machine-produced data. Also, the testifying lab analyst who did not perform any of the testing was not an adequate substitute because he could not convey what the examining analyst observed or knew about the reported events.

Turner v. Rogers

131 S. Ct. 2507 (2011)
Right to Counsel–Civil Contempt

Turner was ordered to pay child support. Turner missed repeated support payments and was the subject of several contempt hearings. Due to an arrearage, the family court issued a show cause order for another contempt hearing. Turner was not represented by counsel. The court found Turner in willful contempt and sentenced him to 12 months in jail. The court did not make any findings whether Turner was able to pay. Turner appealed arguing that the federal constitution provided him a right to counsel at the contempt hearing. The South Carolina Supreme Court rejected the argument, declaring that civil contempt does not require all of the constitutional safeguards that a criminal contempt proceeding does. At time of the lower court decision, Turner had completed his 12-month sentence.

The United States Supreme Court first held that its review of the case was not "moot." Although Turner had completed the 12-month sentence and there were no alleged collateral consequences, the case is not moot because 1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration and 2) there is a reasonable expectation that the same complaining party may be subjected to the same action again. Because the 12-month sentence does not allow meaningful review through the Supreme Court, and because Turner may be subject of future contempt hearings, the dispute is kept alive and not "moot."

The Court observed that the Fourteenth Amendment Due Process Clause does not automatically require a state to provide counsel at a civil contempt proceeding even if the individual faces incarceration. The Sixth Amendment right to counsel governs criminal proceedings but does not apply to civil cases. The Court also observed that civil contempt is different from

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criminal contempt, in that a court may not impose punishment in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order. The Court has previously adopted specific factors to determine what specific safeguards are required to make a civil proceeding fundamentally fair under due process. The factors are 1) the nature of the private interest that will be affected; 2) the comparative risk of an erroneous deprivation of that interest with and without additional or substitute procedural safeguards; and 3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural safeguards.

Here, the private interest at stake is a loss of liberty through imprisonment, which is at the core of the liberty protected by due process. Turner's incarceration violated due process because he received neither counsel nor the benefit of alternative procedural safeguards, which may include notice to the Defendant that his ability to pay is a critical issue in the contempt proceeding, the use of a financial form to determine financial status, an opportunity to respond at the hearing regarding financial status, and an express finding by the court that the Defendant has an ability to pay. In this case, Turner had no clear notice that ability to pay is the critical question for civil contempt, nor was he provided a financial form designed to determine financial status. Also, the court did not make a specific finding regarding ability to pay. In these circumstances, Turner's incarceration violated due process and his contempt judgment was vacated.

J.D.B. v. North Carolina

131 S. Ct. 2394 (2011)
Miranda Warning – Children

The juvenile petitioner was 13 years old. He was stopped and questioned by the police when he was observed near two home break-ins. Several days later, a digital camera matching the description of the stolen property was found at the juvenile's school and had been seen in his possession. A detective visited the school, where a uniformed police officer escorted the juvenile from his classroom to a conference room. Police and school administrators questioned the juvenile for 30 minutes. They did not read him his Miranda rights before questioning him, and they did not tell him he could call his guardian or that he was free to leave. After the juvenile confessed to the crime, he was told by the detective that he could refuse to answer questions and was free to leave. The juvenile was later charged and moved to suppress his statements. The lower courts all found that the statement was admissible and that the juvenile's age is not relevant to the determination of whether he was in custody.

The Supreme Court held that a child's age is part of the Miranda custody analysis. Custodial police interrogation entails inherently compelling pressures that can induce a "frighteningly high percentage" of people to confess to crimes they never committed. That risk is all the more acute when a juvenile is the subject of the interrogation. Whether a suspect is "in custody" is an objective determination involving the circumstances surrounding the interrogation and whether a reasonable person would have felt free to terminate the interrogation and leave. A child's age may affect how a reasonable person would have perceived his ability to leave. Since children are generally less mature and responsible than adults, they are more vulnerable or susceptible to outside pressures. Because there is a history of laws and judicial recognition that children cannot be viewed as miniature adults, there is no justification for a different approach with the Miranda inquiry. If the child's age was known to the officer at the time of the interview, or would have been objectively apparent to the officer, age should be a factor for making "in custody" determinations. According to the Court, a child's age will not be determinative and may not be significant in every case. But the child's age is a factor that courts cannot ignore. The case was remanded to the lower courts for a determination of whether the juvenile was "in custody," taking into account all relevant circumstances of the interrogation, including the age of the juvenile.

Pepper v. United States

131 S. Ct. 1229 (2011)
Sentencing Remand – Consideration of New Factors

The Defendant was facing an advisory guidelines range of 97 to 121 months. The government filed a 5K1.1 departure motion and argued for a sentence with a 15% reduction from the range due to the Defendant's cooperation. Despite the government's recommendation, the district court sentenced the Defendant to 24 months imprisonment. The government appealed the sentence and the Eighth Circuit remanded for a re-sentencing hearing. At the re-sentencing, the Defendant had already served the 24 month sentence and commenced supervised release. He offered evidence that he was no longer a drug addict, had completed a 500-hour drug program while in custody, was enrolled in community college, achieved good grades, and that he was working part-time. The district court again imposed a 24 month sentence. The government appealed a second time, and the Eighth Circuit reversed and remanded, holding that post-sentencing rehabilitation efforts could not be considered as a factor supporting a variance from the sentencing guidelines range. At a third re-sentencing hearing, the Defendant received a 65-month prison term which was affirmed by the Eighth Circuit.

The Supreme Court held that when a Defendant's sentence has been set aside on appeal, a district court at re-sentencing may properly consider evidence of the Defendant's post-sentencing rehabilitation. This is consistent with the concept that the punishment should fit the offender and not merely the crime. This is also consistent with 18 U.S.C. § 3661, which states that there is no limitation placed on the information a sentencing court may consider concerning the

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Defendant's background, character, and conduct. Post-sentencing rehabilitation evidence may support a downward variance from the advisory guideline range.

DePierre v. United States

131 S. Ct. 2225 (2011)
Definition of cocaine base

Federal law defines cocaine-related drug offense by distinguishing those crimes involving a "mixture or substance containing a detectable amount ... of cocaine, its salts, optical and geometric isomers, and salts of isomers" from those crimes involving "cocaine base." The amount or weight of cocaine base that will trigger mandatory minimum sentences is far less than the weight required when cocaine is involved. The statute does not refer to "crack cocaine" in any provision. The term "cocaine base" has been equated with "crack cocaine" in many instances.

The Supreme Court reviewed whether the term "cocaine base" as used in the federal drug statute referred to cocaine in its chemically basic form or exclusively to "crack cocaine." The Court noted that cocaine is derived from the leaf of a coca plant that is processed with water, kerosene, sodium carbonate and sulphuric acid to produce a paste-like substance.The coca paste when dried can be vaporized and inhaled. Coca paste can also be dissolved in water and hydrochloric acid to produce cocaine hydrochloride which is a salt (not a base) and generally comes in powder form, or "powder cocaine." Cocaine hydrochloride can be converted into cocaine in its base form by combining powder cocaine with water and base (such as sodium bicarbonate), which forms a solid substance that can be cooled and broken into small rock-like pieces and smoked (commonly referred to as "crack cocaine"). Alternatively, powder cocaine can be dissolved in water and ammonia, and with the addition of ether, a solid substance separates and can be smoked (known as "freebase"). Freebase, coca paste, and crack cocaine all are cocaine in its basic form, while powder cocaine in its salt form is different. For purposes of the federal drug laws, "cocaine base" means not just crack cocaine, but any cocaine in its chemically basic form. Cocaine base reaches more broadly than just crack cocaine.

Abbott v. United States

131 S. Ct. 18 (2010)
Federal Firearm Offenses

This case involved two petitioners who were each charged with drug and firearm offenses. One of the charges was for using or carrying a firearm during a drug crime or a crime of violence in violation of 18 U.S.C. § 924(c), which carries a five-year, mandatory minimum sentence that must run consecutive to any other sentence, except to the extent that a greater minimum sentence is otherwise provided by 924(c) or by any other provision of law. One of the petitioners received a mandatory minimum of 15 years on a companion felon in possession of firearm count, the other petitioner received a mandatory minimum of 10 years for his underlying drug offense. Both argued that they should not be subjected to the consecutive minimum sentence under 924(c) since they received higher minimum sentences on companion charges.

The Supreme Court rejected the Petitioners' arguments. The Court held that a Defendant is subject to the highest mandatory minimum specified for his conduct in section 924(c), unless another provision of law directed to conduct proscribed by 924(c) imposes an even greater mandatory minimum. The "except clause" of 924(c) refers only to a greater minimum sentence otherwise provided by section 924(c) or to any other provision of law that proscribes the same conduct that is proscribed in 924(c) – possessing a firearm in connection with a predicate crime. The Court rejected the argument that the "except clause" applies whenever any count of conviction requires a greater minimum sentence than the sentencing provisions of 924(c).

Swarthout v. Cooke

131 S. Ct. 859 (2011)
Parole and Federal Habeas Review

California has a parole statute that requires the parole board to set a release date unless it determines that public safety requires a more lengthy period of incarceration. If parole is denied, the inmate may seek judicial review in a state habeas petition. In this case, the petitioner challenged a denial of parole through the California state courts. He then sought federal habeas relief challenging the parole board's determination. The 9th Circuit reversed, holding that California's parole laws created a liberty interest protected by the Due Process Clause and that the state courts had made an unreasonable determination of the facts in light of the evidence.

The Supreme Court reversed, holding that federal habeas review is not available to review the California state parole board determination. Federal habeas relief does not lie for errors of state law. The federal habeas statute provides for review only if the state prisoner is in custody in violation of the United States Constitution or laws of the United States. As for due process, the liberty interest is a state interest created by California law. There is no right under the federal Constitution to be conditionally released before the expiration of a valid sentence. The state is required to provide fair procedures when it creates a liberty interest in parole determinations, but those procedures are minimal. The federal appellate court should have only reviewed the procedures offered by California – it should not have reviewed the state court decisions on the merits.

Post Conviction Update:

Waivers of Post-Conviction Relief

by Elizabeth Unger Carlyle © 2011

Instead of discussing the most recent set of post-conviction decisions, I want to discuss a live issue in the post-conviction world: The propriety of waivers of post-conviction rights. (I'll pick up the recent substantive post-conviction decisions in the next issue of the newsletter.)

Recently, prosecutors in a number of Missouri jurisdictions have required, as a condition of a plea bargain agreement, that the Defendant waive his right to file a post-conviction motion, which would typically be a motion under Supreme Court Rule 24.035. The matter is now before the Missouri Supreme Court in the cases of *Krupp v. State*, and *Cooper v. State*, discussed below.

One important issue with regard to such waivers is the ethical responsibility of prosecutors and defense counsel. In response to a request by the Missouri Public Defender System, the Advisory Committee of the Missouri Supreme Court issued Formal Opinion 126 on May 19, 2009. That opinion states,

Waiver of Post–Conviction Relief

We have been asked whether it is permissible for defense counsel in a criminal case to advise the Defendant regarding waiver of the right to seek post-conviction relief under Rule 24.035, including claims of ineffective assistance by defense counsel. We understand that some prosecuting attorneys have expressed intent to require such a waiver as part of a plea agreement.

It is not permissible for defense counsel to advise the Defendant regarding waiver of claims of ineffective assistance of counsel by defense counsel. Providing such advice would violate Rule 4–1.7(a)(2) because there is a significant risk that the representation of the client would be materially limited by the personal interest of defense counsel. Defense counsel is not a party to the post-conviction relief proceeding but defense counsel certainly has a personal interest related to the potential for a claim that defense counsel provided ineffective assistance to the Defendant. It is not reasonable to believe that defense counsel will be able to provide competent and diligent representation to the Defendant regarding the effectiveness of defense counsel's representation of the Defendant. Therefore, under Rule 4–1.7(b)(1), this conflict is not waivable.

We have also been asked whether it is permissible for a prosecuting attorney to require waiver of all rights under Rule 24.035 when entering into a plea agreement. We believe that it is inconsistent with the prosecutor's duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice for a prosecutor to seek a waiver of post-conviction rights based on ineffective assistance of counsel or prosecutorial misconduct. See, Rules 4–3.8 and 8.4(d).

We note that at least three other states have issued opinions consistent with our view.

We do not believe the Rules of Professional Conduct prohibit a defense counsel and prosecutor from entering into a plea agreement that involves waiver of other post-conviction rights, unless such a waiver violates the Constitution or other laws. Analysis of whether it would violate the Constitution or other laws is beyond the scope of this opinion.

What Does this Mean for Daily Practice?

Under Supreme Court Rule 5.30(b), formal opinions are binding on attorneys. The final determination about enforcing waivers will be made by the courts, and the current crop of decisions is discussed below. But for those whose eyes will glaze over if they have to read about that, here's my take on what to do when the prosecutor proposes a really good deal that requires a waiver of the right to assert claims of ineffective assistance of counsel and prosecutorial misconduct? The answer isn't simple. We need to be mindful of our ethical responsibilities while preserving our clients' interests. I suggest that if we can maintain a united front on this issue, the problem is likely to be solved. Possible courses of action include:

1. Telling the prosecutor that under Formal Opinion 126, he/she is ethically barred from requiring a waiver as a condition of the plea agreement. (Remember that you have a responsibility to report ethical violations to the disciplinary counsel; you can tell the prosecutor you would HATE to have to do that.)
2. Telling the client that you cannot advise him/her on whether to accept the plea agreement, and assisting him/her to request new counsel from the court.

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3. Asking the judge to enforce the plea agreement without the waiver, suggesting that he/she shouldn't enforce an agreement that has been found to be unethical.
4. Finally, although this hasn't come up in a case as far as I know, direct appeal counsel should not ask clients to waive possible claims of ineffective assistance of appellate counsel so that direct appeal counsel can handle the PCR. According to Formal Opinion 126, the conflict of interest created by asking a client to forego claims concerning the attorney's ineffectiveness is not waivable.

Remember that the MACDL strike force can help you with ethical issues, and that the Amicus Committee can help with briefing. ASK!

Here's the Current Situation in the Courts:

Formal Opinion 126 was cited in a concurring opinion by Judge Wolfe in *Burgess v. State*, 2011 WL 2848393 (Mo. banc July 19, 2011). In *Burgess*, the court of appeals had enforced the waiver. The Supreme Court remanded for findings of fact and conclusions of law by the circuit court, thus punting the issue of enforceability of the waiver. However, the issue is directly before the Court now. The Eastern District Court of Appeals held, in *Krupp v. State*, 2011 WL 795752 (Mo. App. E.D. March 8, 2011), that a waiver of post-conviction rights was proper, and went on to find that Krupp's waiver (made on the recommendation of counsel) was knowing and voluntary. The Court cited its previous decision in *Jackson v. State*, 241 S.W.3d 831 (Mo. App. E.D.2007), and noted that Krupp's plea proceeding occurred before the issuance of Formal Opinion 126. Thus, the Court reasoned, neither trial counsel nor the prosecutor did anything wrong. In light of the fact that the effect of Formal Opinion 126 had not yet been addressed in Missouri case law, the Eastern District ordered the case transferred to the Missouri Supreme Court, where it is now pending, with the final brief filed July 18. (The Eastern District had also upheld a waiver of Rule 24.035 rights in *Cooper v. State*, 2011 WL 532213 (Mo. App. E.D. February 15, 2011.) As in *Krupp*, defense counsel in *Cooper* recommended the waiver, and signed it along with the prosecutor. This case has also been transferred.)

The case of *Dunkin v. State*, 2011 WL 3273474 (Mo. App. W.D. Aug. 2, 2011), presents a slightly different procedural posture. In *Dunkin*, the Defendant was convicted of first degree murder after a jury trial. The state offered to allow the court to sentence her for second degree murder if she waived her rights to direct appeal and to file a motion under Sup. Ct. R. 29.15. The court of appeals noted, "Dunkin's counsel advised the court that while he discussed with Dunkin waiver of her right to direct appeal, which she agreed to do, for ethical reasons he did not discuss with his client waiver of her right to file a Rule 29.15 post-conviction relief motion, especially as it may include ineffective assistance of counsel claims." The trial court then examined Ms. Dunkin in open court concerning her waiver. The court of appeals approved this procedure, and dismissed Ms. Dunkin's Rule 29.15 motion as a result of the waiver. This case is likely also on its way to the Missouri Supreme Court.

An issue none of the opinions appear to address directly is whether the Defendant is entitled to new counsel to advise him/her on the propriety of the waiver. It would appear that if trial counsel cannot ethically advise the client on the propriety of a plea agreement, the client has been deprived of the right to counsel.

As Judge Wolfe noted, this issue has arisen in several other states. In addition to the states cited in his concurrence, the state of Virginia recently issued a similar ethical opinion. Concurrently with the discussion of this issue on the MACDL listserv, a discussion also arose on the same topic on the listserv for capital habeas attorneys maintained by Prof. Eric Freedman of Hofstra University. In federal court, the issue has been percolating for some years. At least some federal plea agreements now provide that the waiver of post-conviction relief does not cover claims of ineffective assistance of counsel and prosecutorial misconduct. If you are in federal court in Missouri, you should remind the prosecutor that he/she is bound by the Missouri canons of ethics.

Watch this space for further developments on this issue.

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Missouri Public Defender Seeks New Panel Attorneys for Case Contracts

The Missouri State Public Defender has significantly changed its private attorney contract program.

On July 1, 2011, the State Public Defender retained five Regional Contract Coordinators, private attorneys, to assist in the assignment of cases to members of the private bar. As many of you are aware, our private contracting function outgrew our ability to timely and effectively assign private counsel without dedicating more staff, which we do not have. We think this new use of Regional Contract Coordinators will help us bridge that gap.

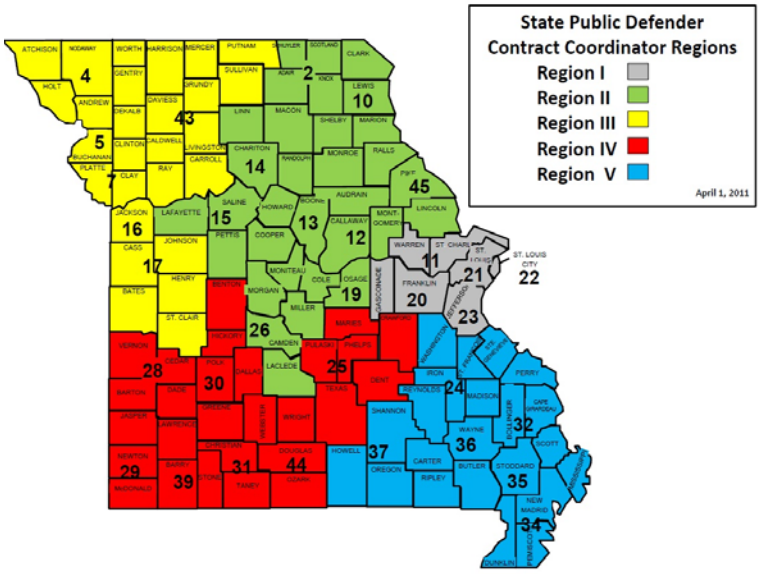
The Contract Coordinators will be actively recruiting and assigning cases to private attorneys who have agreed to serve as panel attorneys for the public defender system. They will also be monitoring the quality of panel attorney representation more than we have been able to do internally. The Contract Coordinator serves as the panel attorney contact for contract case assignments and for any problems that may arise concerning cases assigned to panel attorneys.

We encourage all members of MACDL to consider signing up to become panel attorneys. Applications can be found on our website (www.publicdefender.mo.gov) or obtained by contacting the Contract Coordinator for your region. All panel attorney applicants agree to serve on a case assignment rotation within selected judicial circuits for those case types for which they are qualified. Cases will be assigned as the panel attorney's name rotates on a list of all other panel attorneys who agree to take designated case types within a judicial circuit.

The Contract Coordinators will also be responsible for assigning cases to volunteer attorneys who have indicated a willingness to take one or more public defender cases pro bono. If you or anyone you know has expressed a willingness to take cases pro bono from the public defender system, please direct them to the Contract Coordinator covering your region.

We believe these changes to our private attorney contract program will improve our contracting function and significantly reduce the time it takes to secure private counsel in public defender cases.

Daniel J. Gralike
Deputy Director



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