The MACDL News

Missouri Association of Criminal Defense Lawyers
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Fall, 2016

In this issue ...

Save the Date!

Benard M. Edelman DWI Seminar

July 20-22, 2017

Lodge of Four Seasons
Lake Ozark

MACDL needs YOU!

MACDL is looking to broaden our base of witnesses who may testify before the General Assembly on MACDL's behalf. If you are interested please email Brian Bernskoetter at brianb@swllc.us.com.

President's Message

Michelle Monahan
2016-17 MACDL President

Criminal defense attorneys stand in the forefront of social change. Historically, movements for social change, drawing attention to the persecution of select groups of individuals are only successful once criminal defense attorneys legally challenge the unconstitutional acts. There is no question; societal change is on the horizon. Whether the issues are prejudice, poverty or political, it is criminal defense attorneys who will protect the rights of the most vulnerable members of our community. It has become all too easy to strip away the constitutional rights of "criminals".

I am proud to be a criminal defense attorney and grateful to be a member of MACDL. My respect for the tireless MACDL members at work protecting the rights of the accused has not diminished in the many years I have been associated with this organization. Criminal defense clients have more at stake than money or principals. At the center of each of our cases is the infringement of life, liberty and the pursuit of happiness. Our most fundamental Constitutional rights.

The discourse in the criminal justice system calls for leadership by MACDL members and a moral imperative to prevent the further erosion of constitutional protections for the accused. Martin Luther King, Jr. asserted, "The arc of the moral universe is long, but it bends towards justice." Those of us in the trenches know the arc will not bend on its own. MACDL members are vigilant and know the slightest violation of a right must be exposed and attacked. I have seen these attorneys go against the grain and commit with uncompromising conviction to the protection of our clients' humanity.

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President's Message *(from page 1)*

Whether the system abuses we fight against are: forfeiture driven prosecution, racism, criminalization of poverty, politically motivated selective investigations, evaporation of the Fourth Amendment, incarceration of addicts and the mentally ill or the resistance to expungements, we are more powerful collectively.

While the judiciary begins to see mass incarceration is not a solution, attacks on individuals' rights run rampant. Too often the abuse of power by law enforcement goes unchecked. In addition, our law makers find the tough on crime stance the safest platform. Often these same law makers propose legislation restricting the rights of the accused without understanding the legal ramifications.

I offer a thank you to Randy Scherr, Brian Bernskoetter and Sarah Goldman for their support and experience in representing MACDL's position to the legislature. These professionals have identified law makers who understand the importance of the preservation of rights and cultivated productive relationships.

MACDL is made up of public defenders, firm attorneys and sole practitioners. There is no reason to feel isolated in the fight. A MACDL member is there to put a fresh eye to your legal issue, share their research and motions, or take the panicked trial phone call and should expect the same in return. We are the last bastion for the constitutional rights of the accused. In short, we are all members of "The Dream Team".

MACDL Stays in Touch

MACDL disseminates information on many platforms. For example:

Welcome

MACDL wants to welcome the following new members and sincerely appreciates their support. We can't function without you! Your dues pay for postage, printing, MACDL's interactive website, travel expenses for CLE speakers, and lobbying efforts in the Missouri General Assembly, among other things.

Traci Fann • *Kansas City*
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News You Can Use

MACDL ListServ

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

Are You A Writer?

If you have an article of interest relating to the practice of criminal defense, why not submit it for publication in the MACDL newsletter? Submit them electronically to info@macdl.net with "MACDL Newsletter" in subject or mail to MACDL.

Lawyer Assistance Strike Force

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

Lifetime Members

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THANK YOU!

MACDL would like to thank our 2016 Spring CLE Exhibitors:

The Bar Plan

Midwest Council of Nurse Consultants

Amicus Committee

Please join me in welcoming Kay Parish as co-chair of the committee. She joins myself, Denise Childress, Nathan Swanson, W. Scott Rose, and John Simon. We are always in search of talented researchers and drafters. If you have the ability and opportunity to assist us in addressing amicus issues as they arise, your help would be much appreciated. One such opportunity is around the corner here in the Eastern District dealing with State discovery practices. If you can spare a few hours to help out that would be great.

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Case Law

For Case Law Updates, please visit the MACDL website/Newsletter page and check out the link to Greg Mermelstein's Reports located at the bottom of the page.
http://www.macdl.net/newsletter.aspx

Post-Conviction Review

by Elizabeth Unger Carlyle

Below are the "good news" cases since the last newsletter, as well as some practice pointers. Of course you should do your own history check before citing anything here. Still more timeliness issues have emerged.

Abandonment/Timeliness Issues

Where the court of appeals cannot determine from the record whether the motion court determined that abandonment had occurred and properly allowed an out of time amended motion, remand was required. ***Pulliam v. State,*** 484 S.W.3d 877 (Mo. App. E.D. 2016).

In order for the record to reflect that the amended motion was timely, it must reflect that the 30 day extension motion permitted under Rule 24.035(g) was not only filed but granted. Remand was therefore required. ***Richard v. State***, 487 S.W.3d 504 (Mo. App. E.D. 2016); ***Adams v. State***, 483 S.W.3d 480 (Mo. App. E.D. 2016); ***Wallace v. State***, 487 S.W.3d 62 (Mo. App. E.D. 2016); ***Johnson v. State***, 2016 WL 1643271 (Mo. App. E.D. 2016); ***Price v. State,*** **489 S.W.3d 358 (Mo. App. S.D. 2016).**

Other Procedural Issues

State ex rel. Costello, 485 S.W.3d 397 (Mo. App. E.D. 2016) - **Mandamus granted**

The trial/motion court incorrectly filed the petitioner's post-conviction motion attacking his murder conviction in the file for his robbery conviction under the same case number, and found the motion untimely. Mandamus was granted because the defendant was tried separately for the two offenses, and therefore had an independent right to file a post-conviction motion on the murder conviction, and to have counsel appointed to represent him. There was, therefore, "no reasonable trial strategy" justifying the failure to object. Because the evidence was conflicting as to some of the incidents, Mr. Hoeber was prejudiced by the omission, and relief was granted.

Now, on to cases where the court actually made a decision.

Post-Conviction Relief Granted

Hoeber v. State,
488 S.W.3d 648 (Mo. banc 2016)

Mr. Hoeber was denied effective assistance of counsel when trial counsel failed to object to a verdict director which did not require jury unanimity as to which of the multiple hand-to-genital incidents as to which evidence was offered at trial was the basis of the conviction. While Mr. Hoeber was tried before the decision in *State v. Celis–Garcia*, 344 S.W.3d 150 (Mo. banc 2011), dealing specifically with the situation here, the law at the time of his trial was clear that a defendant was entitled to a unanimous verdict as to the act which constituted the offense.

Hannon v. State,
2016 WL 1085644 (Mo. App. E.D. 2016)

On appeal from the motion court's grant of relief, the court of appeals affirmed. In language that will be helpful when the state appeals, the court explained, "While we give great deference to trial counsel's strategy in post-conviction proceedings, this deference is counter-balanced by our limited review on appeal and the deference we afford the motion court's findings of fact and credibility determinations." On the merits, the court found that trial counsel's failure to obtain the victim's school attendance records, which contradicted his testimony about the time of the assault, was both deficient performance and prejudicial to the defendant. On the prejudice issue, the court essentially held that the *Strickland* prejudice standard is more lenient than the standard for outcome-determinative error on direct appeal.

Hearing required.

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Post-Conviction Review Message *(from page 5)*

Relief Granted *(Cont.)*

Miller v. State,
2016 WL 2339049 (Mo. App. E.D. 2016)

Continuing its attack on "group plea" procedures, the Eastern District remanded for an evidentiary hearing where trial counsel failed to object to that procedure: "Therefore, we hold that a plea counsel's failure to object to a 'group plea' procedure is sufficient, in and of itself, to warrant an evidentiary hearing under a Rule 24.035 post-conviction relief motion, as the practice of "group pleas" inescapably impacts the voluntariness of a defendant's plea." The motion court may, however, determine upon hearing that no prejudice resulted.

Habeas relief granted

State ex rel. Koster v. Oxenhandler,
2016 WL 1039446 (Mo. App. W.D. 2016)

This case concerns the Shanon Swickheimer. The Polk County Circuit Court set aside Mr. Swickheimer's NGRI plea and ordered that he be held for trial. Mr. Swickheimer was arrested in January, 2004 for assault. He spent the next two and a half years in mental health facilities under findings that he was not competent to proceed. Once he was found competent, he was evaluated to determine whether he was NGRI under Mo. Rev. Stat. 552.030.1. The evaluator concluded that he met the criteria for NGRI. The court then found him not guilty under §552.030, and committed him to the Department of Mental Health. This happened in 2007. No record was made of this hearing. After several unsuccessful attempts to obtain conditional release, Mr. Swickheimer escaped from a mental health facility in 2011, but was recaptured 43 days later. He then entered a plea of guilty to the offense of escape from a state mental hospital, and was sentenced to four years' imprisonment. After he served that sentence and was returned to Fulton State Hospital, Mr. Swickheimer filed a petition for habeas corpus alleging that his NGRI plea was constitutionally deficient. A hearing was conducted, and Mr. Swickheimer testified as to the events on the day of his NGRI plea, and to his lack of consent to that plea. His counsel at that time also testified, but had no recollection of the events. Relying heavily on the lack of a record of the plea and specifically of Mr. Swickheimer's consent, the habeas court granted relief, remanded Mr. Swickheimer to Polk County for trial, and granted him credit against any sentence for the assault for the time he had spent in confinement since his arrest. On the state's petition for writ of certiorari, the court of appeals affirmed the grant of habeas relief, holding that a liberty interest is implicated when a defendant is acquitted on an NGRI plea. The court also found that the report on which the trial court relied in accepting the NGRI plea was not obtained in accordance with the statute, and also contradicted the assertion that Mr. Swickheimer was relying exclusively on NGRI since it revealed that he claimed that the shooting was accidental. Because of these defects, there was no valid way to accept an NGRI plea without a hearing on the record. The court also rejected the state's contention that the escape rule should bar relief, noting that a habeas proceeding is not an appeal and that the escape rule is discretionary in any event. However, the court held that the habeas court's grant of time credit in advance of a conviction exceeded its jurisdiction. The plight of litigants found NGRI does not get much attention, but such pleas can often result in virtually endless confinement in mental health facilities. This case may be of help where, as here, the NGRI decision seems to have been made without much care.

Hall of Fame

Congratulations to:

Lisa Stroup (*Costello*);

Laura Martin (*Hoeber*);

Gwenda Robinson (*Hannon*);

Amy Faerber (*Miller*); and

Susan Kister and Robert Ramsey (*Swickheimer*)

Recent U.S. Supreme Court Cases Involving Criminal Law

by Brian Gaddy

This past term, the United States Supreme Court issued a number of opinions involving criminal law in late May and June 2016, just before the Court recessed for the summer. Several of these opinions are summarized below.

1. *Betterman v. Montana*

136 S. Ct. 1609 (2016)

Speedy Trial Rights

The defendant was ordered to appear in court on domestic assault charges. When he failed to show up, he was also charged with bail-jumping. He later entered a plea of guilty to the bail-jumping charge and was jailed for 14 months awaiting sentencing on that case. He sought a dismissal of the charge on speedy trial grounds for the delays in holding his sentencing hearing. He ultimately received a seven year sentence, with four years suspended.

The Montana Supreme Court affirmed the conviction and the sentence, holding that the Sixth Amendment's Speedy Trial Clause does not apply to post-conviction, presentencing delays.

The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. The U.S. Supreme Court concluded that the Sixth Amendment protects the accused from the time frame of arrest/indictment through trial. It does not apply once a defendant has been found guilty after trial or has entered a guilty plea. There are generally three phases of criminal proceedings. The first phase is the investigatory phase. The second phase is where an accused is charged and presumed innocent through trial. The third phase is after conviction but before sentence is imposed.

The statute of limitations provides the primary protection against delay in the investigatory stage. The Speedy Trial Clause provides protection during the second phase, after the accused has been arrested or charged but before trial or a plea. During the second stage, the accused is presumed innocent, which is at the heart of the speedy trial protections.

Those rights detach upon conviction, when the second stage ends. Adverse consequences of post-conviction delay are outside the Sixth Amendment's Speedy Trial Clause. Any claims of inordinate delay at the third stage must be brought as a Due Process Clause claim, which was not done in this case. Because Betterman did not advance a due process claim, the Court declined to express an opinion how he would have fared under that standard.

The Supreme Court affirmed the lower court rulings that no speedy trial violations occurred.

2. *Foster v. Chatman*

136 S. Ct. 1737 (2016)

Batson challenges

The petitioner was tried on charges of capital murder in Georgia. During jury selection, the state used peremptory challenges to strike all four black prospective jurors who were qualified to serve on the jury. The petitioner argued that the state's use of its strikes was racially motivated in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The lower courts rejected the *Batson* claims. In a post-conviction proceeding, the defense received a copy of the State's jury selection file. On each copy of the state's venire list, the black prospective jurors were highlighted with a code that the color of the highlighter represented "blacks." There

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U.S. Supreme Court Decisions *(from page 7)*

were also various written comments on other documents suggesting that if the State "had" to pick a black juror, there was one prospective juror that was recommended over the others. There were six annotations that suggested "definite no's" and five were black prospective jurors.

The U.S. Supreme Court first noted that the Constitution forbids striking even a single prospective juror for a discriminatory purpose. *Batson* provides a three step process for determining when a strike is discriminatory: 1) defendant must first make a prima facie showing that a peremptory challenge has been exercised on the basis of race; 2) the prosecution must offer a racially neutral basis for the strike; and 3) the trial court must determine whether the defendant has shown purposeful discrimination. The third factor was at issue in this case. Although the trial court accepted the race neutral reasons offered by the prosecutor, the record belies much of the prosecution's reasoning in that the file notes listed several of the jurors as "definite no's." Further, proffered reasons related to age and divorce were also present with non-black jurors who were not challenged by the State. One of the race neutral reasons was that the black juror had a son around the same age as the defendant. But other non-black jurors were not excluded with similar circumstances. Evidence that a prosecutor's reasons for striking a black prospective juror apply equally to an otherwise non-black prospective juror who is allowed to serve tends to suggest purposeful discrimination. Such evidence was compelling in this case.

3. Williams v. Pennsylvania

136 S. Ct. 1899 (2016)

Due Process–Biased Tribunal

The petitioner was tried in 1984 on capital murder charges. At that time, District Attorney Ronald Castille approved the trial prosecutor's request to seek the death penalty in this case. The petitioner was convicted and sentenced to death. After a direct appeal, state PCR review and federal habeas review, the petitioner filed a successive state PCR proceeding claiming the trial prosecutor had obtained false testimony from a codefendant and suppressed exculpatory evidence. The state PCR court found *Brady* violations and ordered a stay of execution. The prosecution filed a motion to vacate the stay with the Pennsylvania Supreme Court. Its chief judge was Ronald Castille. The petitioner filed a motion to recuse Castille because of his involvement in this case as district attorney. Without any explanation, Castille denied the motion for recusal and joined in an opinion which vacated the stay of execution.

The United States Supreme Court held that Castille's denial of the recusal motion and his subsequent judicial participation in this case violated the Due Process Clause of the Fourteenth Amendment. Under the Due Process Clause, there is an impermissible risk of actual bias when a judge had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case. The Court employed an objective standard that requires recusal when the likelihood of bias is too high to be constitutionally tolerable. A constitutionally intolerable probability of bias exists when the same person served as both accuser and adjudicator in a case. Neither the involvement of multiple actors in the case nor the passage of time relieves the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process. Castille's authorization to seek the death penalty was a significant, personal involvement in the case. The unconstitutional failure to recuse constitutes structural error that is not amenable to harmless error review regardless of whether the judge's vote was dispositive.

4. *Utah v. Strieff*

136 S. Ct. 2056 (2016)

Fourth Amendment and the Attenuation Doctrine

A detective in Salt Lake City received an anonymous tip that drug activity was occurring at a particular residence. The officer conducted surveillance of the residence and observed

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numerous people making brief visits. Strieff was detained in a nearby parking lot after leaving the residence. He was asked for identification and asked what he was doing at the house. Police dispatch advised that Strieff had an outstanding arrest warrant for a traffic violation. Strieff was arrested and the police found meth and paraphernalia on his person. Strieff sought a motion to suppress claiming the search was the product of an unlawful investigatory stop. The prosecution conceded that the initial stop was unlawful but that the arrest warrant attenuated the connection between the stop and the search incident to arrest. The Utah Supreme Court ordered the suppression of the evidence.

The United States Supreme Court held that the evidence seized is admissible based on the attenuation factor. According to the Court, there was no flagrant police misconduct in conducting the stop. The officer's discovery of a valid, pre-existing and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest on the arrest warrant. The attenuation doctrine is an exception to the exclusionary rule. This exception provides for the admissibility of evidence when the connection between the unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by some intervening circumstance.

Here, the discovery of a valid arrest warrant attenuated the connection to the initial investigatory stop. There are three factors to consider under the attenuation doctrine. The first factor is "temporal proximity" between the initial unlawful stop and the search. This factor favors suppression as the illegal items were discovered only minutes after the illegal stop. The second factor is the presence of intervening circumstances. This factor favors the State, as the existence of a valid arrest warrant that predated the investigation and was entirely unconnected to the illegal stop favors finding attenuation. The third factor is the purpose and flagrancy of the official misconduct. This favors the State. According to the Court, the officer was at most negligent, and his errors in judgment do not rise to a purposeful or flagrant violation of the Fourth Amendment. The Court observed that after the unlawful stop, the officer's conduct was lawful and there was no indication the stop was part of any systemic or recurrent police misconduct.

5. *Taylor v. United States*

136 S. Ct. 2074 (2016)

Hobbs Act and Commerce Element

The Petitioner was charged with a Hobbs Act violation of affecting commerce by robbery when he invaded the homes of known marijuana dealers and demanded drugs and money. At trial, Taylor attempted to raise as a defense that the targeted drug deals only dealt in home grown marijuana. The trial court excluded this evidence and the Fourth Circuit affirmed, holding that in light of the aggregate effect of drug dealing on interstate commerce, the Government must only show that a drug dealer was robbed of drugs or money to satisfy the commerce element.

The U.S. Supreme Court agreed. It held that the Government satisfied the commerce element in a Hobbs Act robbery if it merely shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds. The language of the Hobbs Act is unmistakably broad and reaches any obstruction, delay or other effect on commerce. Under its commerce power, Congress may regulate activities that have a substantial "aggregate effect" on interstate commerce, which includes purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce. One such class of activities is distribution of drugs. Thus, a robber who affects even the intrastate sale of marijuana affects commerce over which the United States has jurisdiction.

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6. *Birchfield v. North Dakota*

136 S. Ct. 2160 (2016)

Warrantless Blood Draws

In this case, the U.S. Supreme Court held that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving, but the Fourth Amendment does not allow for warrantless blood tests. The Court acknowledged that taking a blood sample or administering a breath test are searches governed by the Fourth Amendment. These searches may be exempt from the requirement of obtaining a search warrant if they fall within the exception for searches incident to a lawful arrest. The mere fact of a lawful arrest justifies a full search of the arrestee. But the Court also considers the degree to which such a search intrudes upon an individual's privacy. According to the Court, breath tests do not implicate significant privacy concerns. The physical intrusion is almost negligible. The breath test does not require the piercing of the skin and leaves no biological sample in the government's possession after the test is completed. The same, however, cannot be said about blood tests. The Court noted that a blood test requires the piercing of the skin and the extraction of a part of the subject's body. A blood test is more intrusive than blowing into a machine. Further, the Court held that motorists may not be criminally punished for refusing to submit to a blood test based on implied consent laws.

7. *McDonnell v. United States*

136 S. Ct. 2355 (2016)

Political Corruption and "Official Act"

Former Virginia governor Robert McDonnell was indicted on federal corruption charges related to his acceptance of $175,000.00 in loans and gifts from a local businessman who was the chief executive officer of a nutritional supplement company. The businessman wanted the Virginia public universities to perform research studies on a new supplement made from a compound found in tobacco. The businessman asked Governor McDonnell for assistance in getting these studies. The Government was required to prove that Governor McDonnell committed an "official act" in exchange for the loans and gifts. The Government's evidence was that McDonnell arranged several meetings with the businessman and state officials to discuss the supplement product, that McDonnell hosted several events for the supplement company at the governor's mansion, and that McDonnell contacted other government officials about the research studies. The district court instructed the jury that an "official act" includes acts that a public official customarily performs including acts in furtherance of longer-term goals or acts in a series of steps to exercise influence or achieve an end. The trial court refused McDonnell's instruction that merely arranging meetings or hosting events are not, standing alone, official acts. McDonnell was convicted of corruption charges.

The U.S. Supreme Court reversed the convictions. An "official act" is a decision or action on a question, matter, cause, suit, proceeding or controversy. The question or matter must involve a formal exercise of governmental power. Setting up a meeting, talking to another official, or organizing an event, without more, does not fit the definition of an official act. The Court observed that public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events "all the time." The Government's position in this case could "cast a pall of potential prosecution" over these types of relationships. The Court found that the district court's instructions were erroneous and were not harmless error. The convictions were reversed.