MACDL
Missouri Association of Criminal Defense Lawyers

Newsletter

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President's Letter ... Are We Having Fun Yet?

Haven't we all been there? A group of lawyers chatting at some bar-related social event seems to always include at least one curmudgeon (person even older and grouchier than me) who talks about how the practice of law used to be so much fun. Of course, continues the curmudgeonly soliloquy, these days everyone's too aggressive, too stubborn, too zealous and just too darned busy to enjoy the practice of law.

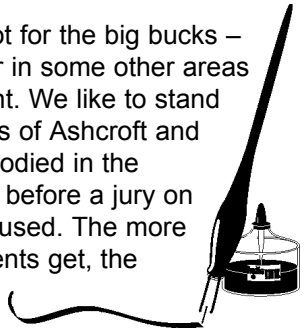
Not so, at least in the criminal defense business. Of course, we're busy. Crime may be on the decrease, but criminal prosecution is a growth industry, and therefore so is criminal defense. Of course we're aggressive, stubborn and zealous. We have to be – we are fighting for the freedom and sometimes the very lives of our clients. But we have fun fighting.

But what about our opponents, the prosecutors? Even though they don't generally seem to be all that busy – after all, there are zillions of them in the big city offices – aren't they too aggressive, too stubborn, too zealous? Well, yeah, they are. And there are the true believers, called by God to be the scourge of meth cooks, drunk drivers, domestic abusers or whichever species of offender will gain them the best headlines this week. Doesn't dealing with these folks day in and day out spoil the fun? No, it doesn't. It makes it more fun.

The biggest prosecutor in the country, Attorney General John Ashcroft, is the prototypical over-zealous true believer – his cause *celebre* is the federal death penalty. He wants the whole country to mimic the killing fields of Texas. But what happened when he forced a federal capital prosecution in Puerto Rico, where history, culture, tradition, the predominant religion ***and the commonwealth constitution*** are all fundamentally opposed to the death penalty? The death-qualified jury acquitted the defendants on all counts! Now, that's fun.

On a smaller scale, Missouri Attorney General Jay Nixon displays many of the same traits as General Ashcroft, including creating a cadre of assistants who zealously espouse the office line. So an Assistant Attorney General told the Missouri Supreme Court that they had to kill Joe Amrine even if they knew he was innocent. Sean O'Brien sure had fun at that oral argument, and even more fun the day he walked Joe out of prison and drove him home to Kansas City to be reunited with his family and friends.

We chose this area of practice not for the big bucks – the bucks are substantially bigger in some other areas – but because we like a good fight. We like to stand up against the jackbooted minions of Ashcroft and Nixon for the precious rights embodied in the Constitution and we like standing before a jury on behalf of an individual citizen accused. The more zealous and hard line our opponents get, the more we like beating them. And with this current crop of prosecutors, yes, we are having fun.



Very truly yours,
Charles M. Rogers
MACDL President

Celia, A Slave ... A True Story

Melton A. McLaurin; AVON BOOKS
www.avonbooks.com

On October 9th 1855, Celia walked into the Callaway County Courthouse with three lawyers. She was charged with murder. Her victim was her owner Robert Newsom. Newsom was her rapist and more than likely the father of her children.

McLaurin tells her extraordinary story in eight chapters and 175 pages. There are more twists and turns than the Missouri River. The one knock on this book is at times it reads like a text book. McLaurin spends significant time explaining his conclusion by referring to the government census to lay the social economic background.

The real story is the work of her lawyers. The Judge William Augustus Hall selected three attorneys to represent Celia. He selected John Jameson, a prominent Missourian, to act as her lead attorney. He was a three-term member of the U.S. Congress, former Speaker of the Missouri state legislature and had practiced law for three decades with an excellent reputation as a trial lawyer. The second attorney, Nathan Chapman Kouns, was young and aggressive. The third attorney, Isaac M. Boulware, was well educated but inexperienced. This dream team shows brilliance in their strategy and determination.

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MACDL Legislative Report

By: Randy Scherr, MACDL Lobbyist

Some Old, Some New Issues Considered During 2003 Legislative Session

Although the Missouri General Assembly, during the 2003 Legislative Session, introduced fewer bills than past years, the number of bills passed [255] was higher than average.

Missouri Association of Criminal Defense Lawyers (MACDL) tracked nearly 120 bills this legislative session. Although many of the issues tracked by MACDL were carryovers from past sessions, the one receiving the most interest and concern was a new issue never before seen in the Missouri Legislature. Representative Scott Lipke introduced legislation to repeal the right to take depositions in criminal cases. Supporters claim that it would save money while MACDL and other opponents claimed that it would clog the courts, bog down the system and actually cost money. The bill was given initial approval by the House Crime Prevention and Public Safety Committee but because of strong opposition it never was placed on the calendar for further consideration. It is likely that the bill will be re-filed during the 2004 Legislative Session.

One of the annual issues under consideration is a change in the hold times. Several bills were filed to change the present law on maximum hold times from 20 hours and 24 hours for the seven deadlies to 32 or 48 hours. The House initially passed the bill with a split time of 24 and 32 hours; however, the Senate changed the proposal to provide for 24-hour hold time for both misdemeanors and felonies. The bill eventually died on the Senate Floor after being filibustered.

Another perennial issue is the creation of the county crime reduction fund. The bill would authorize a $1,000.00 contribution to the fund in exchange for a suspended imposition of sentence (the so-called buy your way out of jail).

The bill had passed once before but was vetoed. During the 2002 Legislative Session, we were successful in killing the issue on the Floor of the Senate four different times. This year, it was added to a county government revision bill only after being reduced to a cap of $250.00. This didn't change the Governor's mind on the constitutionality, so the bill was subsequently vetoed by Governor Holden for that reason.

Senate Bill 5, sponsored by Senator Harold Caskey, amended portions of the sentencing statutes. This bill was designed to save approximately $29 million per year in prison costs. The bill was eventually passed and signed by the Governor. (Editor's Note: See "One Step Forward" by Dan Viets on page 4 of this newsletter.)

Telephonic search warrants were once again taken up for consideration. The bill received lukewarm support in committee, but the provision was added to an Omnibus House Crime Bill in the Senate Judiciary Committee then died under its own weight as a result of all the miscellaneous issues that were added to the substitute bill.

If you are interested in checking the status of any legislation or in receiving summaries or copies of any of the bills, you may log on to www.moga.state.mo.us and go to joint bill tracking site and search for the specific bills.

We would like to thank all of the members who traveled to Jefferson City during the Legislative Session to testify before the various committees.

The 2004 Legislative Session will begin on January 7.

Celia, A Slave ... *(Cont'd. from page 1)*

Like today, the issues of self defense, justification and jury instructions all played a huge role in the case. The outcome is never in doubt to everyone except the attorneys. It seems the attorneys engineer the most amazing method of getting a stay of execution so her appeal can be heard by the Missouri Supreme Court.

On December 21st 1855, Celia was put to death by hanging in Fulton, Missouri. The story of her life and trial should take less than an afternoon to read, but you will not forget it.

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Your comments and suggestions are welcome!

Courts To Criminal Defense Lawyers: "Shape Up!"

By Dee Wampler

Every criminal defense lawyer knows the feeling of having a post-conviction remedy (PCR) filed in which you are accused of being incompetent, lazy, misinformed and dishonest. It is especially tough after you've worked hard to defend a client, giving it every ounce of your energy. The disappointment of losing a jury verdict is now surpassed by hearing a client (or former client) calling you names and seeking to have you declared "ineffective," in legal history books.

Recently, more and more courts are considering the criminal defense lawyer's trial performance as to whether they conform to the degree of skill, care, and diligence of a reasonable, competent attorney.

To demonstrate prejudice, the defendant must show but for the attorney's poor performance, there is a reasonable probability that the outcome of the court proceeding would have been different[1]. The older standard was known as the "farce and mockery" test.[2]

The defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice.[3] The question is whether the deficiency undermined confidence in the outcome of the trial.[4]

In one recent case,[5] some human hairs were found in a murder case but there had been no testing on the hairs. Counsel did not have the hair tested or push the prosecutor to do so but made a vague argument at trial that the hair did not belong to his client. The court said this entire speculative argument could have been proved by a criminalist that the hair did not belong to the defendant. The attorney could have easily arranged for a scientific comparison, which would have cast doubt on an eyewitness to the murder who implicated his client. The eyewitness received full immunity from the prosecutor. The evidence would have indicated that the eyewitness was lying, that her involvement in the crimes was much greater than her testimony and knowledge, and would have provided valuable cross-examination material for the jury to consider. The court found trial counsel's conduct to be deficient.

In another case,[6] the defense attorney failed to investigate and subpoena the chief of a burn unit in a children's hospital to testify in a second degree murder case. The court noted the witness was easy to locate since he was the treating physician and his stamped signature was on the victim's death certificate.

The famous U.S. Supreme Court decision of *Strickland v. Washington* requires a dual finding the attorney (1) failed to exercise the level of skill and diligence that a reasonably competent attorney would use in a similar situation, and (2) that defendant was prejudiced by the failure. In one formulation or another it is known as the "reasonable effective assistance standard."[7]

A lawyer has a duty to make a proper investigation to surface any inconsistencies in witnesses, determine potential witnesses, pursue substantial defense of mistaken identifications,[8] and make a "prompt investigation of circumstances" to explore avenues leading to facts relevant to guilt or punishment.[9] There is a duty to "check out leads."[10] If a witness could be reasonably located and the defense would have "benefited" from the witness,[11] then the testimony might have provided a viable defense.[12] A decision to call or not call a witness is generally considered to be trial strategy.[13] A decision to not interview a prosecution witness is "absurd and dangerous" and an abdication of good judgment.[14]

A defense lawyer has a duty to make a reasonable investigation of possible mitigating evidence or to make reasonable (professional)[15] decisions that such investigation is unnecessary.[16] There must be some meaningful factual indication, for instance, as to whether trial counsel intends to pursue a mental disease or defect.

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[1] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

[2] *Garton v. Swenson*, 497 F.2d 1137 (8th Cir. 1974).

[3] *Nicks v. Whiteside*, 475 U.S. 157, 106 S. Ct. 988, 89 L.Ed.2d 123 (1986).

[4] *Kyles v. Whitley* 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995); *U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 131 L.Ed.2d 490 (1995).

[5] *Wolfe v. State* 96 S.W.3d 90 (Mo. banc 2003).

[6] *Gennetten v. State*, 96 S.W.3d 143 (Mo. App. 2003).

[7] *Trapnell v. U.S.*, 725 F.2d 149, 151 (2nd Cir. 1983); *Rose v. Lundy*, 455 U.S. 509 (1982).

[8] *Eldridge v. Atkins*, 665 F.2d 228 (8th Cir. 1981).

[9] *Thomas v. Wyrick*, 535 F.2d 407 (8th Cir. 1976).

[10] *Blankenship v. State*, 23 S.W.2d 848 (Mo. App. 2000).

[11] *State v. Davis*, 814 S.W.2d 593 (Mo. banc 1991).

[12] *Williams v. State*, 8 S.W.3d 217 (Mo. App. 1999).

[13] *Bucklew v. State*, 38 S.W.3d 395, 398 (Mo. banc 2001).

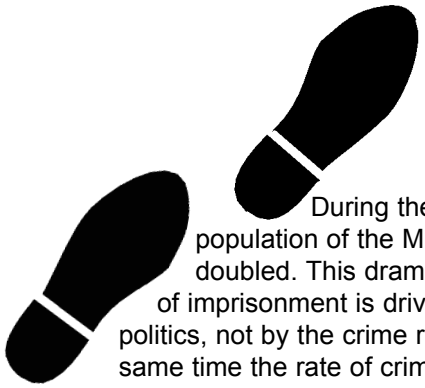
[14] *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974); Thomas v. Wyrick, 535 F.2d 497 (8th Cir. 1976).

[15] *Moore v. State*, 827 S.W.2d 213 (Mo. banc 1992).

[16] *State v. Harris*, 870 S.W.2d 798 (Mo. banc 1994); *Clemmons v. State*, 785 S.W.2d 524 (Mo. banc 1990).

One Step Forward and Two Steps Back

By Dan Viets



During the past decade, the population of the Missouri's prisons has doubled. This dramatic increase in the rate of imprisonment is driven almost purely by politics, not by the crime rate. In fact, during that same time the rate of crime has diminished considerably.

Senator Harold Caskey and his staff have prepared an excellent analysis of why this is titled "Arresting the Overflow." This report indicates that drug possession offenses have been the most frequent reason why Missouri citizens have been put behind bars in recent years. Senator Caskey's latest attempt to reverse this disturbing trend was Senate Bill 5 in the 2003 Session of the Missouri General Assembly.

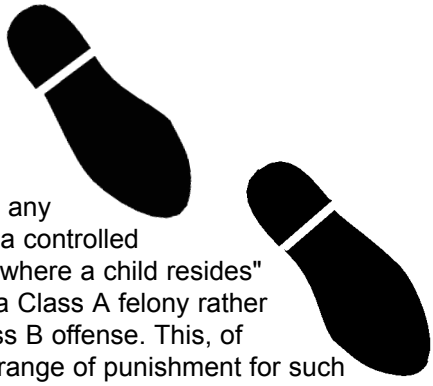
Senate Bill 5 took some small steps in the right direction. It increased the opportunity for judges to release prisoners on probation after a relatively short period of incarceration and it reduced the range of punishment for Class D offenses from a maximum of 5 years down to four years.

While this may help in a small way to reduce the prison population, primarily by reducing the punishment for prior and persistent DWI offenders, it does little to address the primary causes of the prison population increase. The Associated Press reported repeatedly that, among other offenses for which the range of punishment was reduced, were drug possession crimes. Unfortunately, that is not the case.

Virtually all drug possession offenses that do not involve the allegation of intent to sell or distribute are Class C offenses. They are almost never charged as Class D felonies.

However, the fact that it has been so widely reported that the legislature has reduced the punishment for drug possession has presented an interesting opportunity to assess what the reaction of the public would be if the penalties for the offense which is the greatest single cause of prison crowding actually were reduced. Senator Caskey recently stated that he was not aware of any particularly negative response from the press or the public to the widespread report that the range of punishment for drug possession had been reduced. Nonetheless, he said that he still believed it would be difficult to persuade a majority of the members of Missouri's legislature to take such a step.

While Senate Bill 5 took small steps in the right direction, Senate Bill 39 did not. It was widely described in the press and by the politicians who promoted it as a response to the "scourge of methamphetamine". This bill places limits on how many pseudoephedrine-containing cold pills can be purchased at one time and how such products are to be displayed.



It also establishes that any crime of production of a controlled substance in a home "where a child resides" is now chargeable as a Class A felony rather than the standard Class B offense. This, of course, increases the range of punishment for such offenses from 5-15 years up to 10-30 or life in prison.

While virtually all of the discussion about this bill referred to methamphetamine, the fact is that the bill is written in the typical comprehensive manner of the legislature to include the production of any controlled substance. Therefore, the effect of this legislation is to dramatically increase the range of punishment for the cultivation of even a single marijuana plant in a home where a child resides.

While the press is fixated on methamphetamine problems, it is still the case that there are many times more Missourians who use and produce marijuana than have ever used methamphetamine. Under this bill, the production of what is almost certainly the most benign and relatively harmless prohibited substance is now punished in the same manner as the production of a truly dangerous and addictive substance.

To top it off, Senate Bill 39 also adds to the list of enhancing factors for any illegal substance sale or distribution. Under the old statute, such actions within two thousand feet of any real estate on which a school or public housing are located resulted in enhancement to the Class A range of punishment. Now, the legislature, in its wisdom, has added to that list certain sale or distribution of illegal substances within two thousand feet of a school bus!

Obviously, it would be rather difficult, if not impossible, to know whether a school bus might be within two-fifths of a mile at any given time. The Appellate Courts of Missouri have held that there must be some showing that the defendant knew or should have known that he was within two thousand feet of the property of a school or public housing. Therefore, this particular provision is likely to be seldom invoked. But its passage shows that the legislature is still willing to vote for almost any bill which allegedly gets "tough on crime" without consideration of the real consequences.

At a time when our state is facing a major fiscal crisis and cannot find the money to pay for education, roads or prescription medicines, we continue to splurge on prisons. When Senate Bill 39 was considered by the legislature, like all such bills, a "fiscal note" was prepared to advise the legislature what the financial impact of the legislation might be if it were passed. In this instance, the estimate made by the Oversight Division, which prepares such estimates, was

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Traffic/DWI Update: *Synopsis on Cox v. Director of Revenue*

By Tim Cisar

On August 15, 1998, at 10:20 p.m., a police office discovered Steven Cox sleeping or unconscious, sitting in the driver's seat behind the wheel of his vehicle, in the parking lot of a gas station. He was the only individual in the vehicle or around it. The keys were in the ignition and the motor was running. When the police officer knocked on the window, Cox lowered it. A strong odor of alcohol on his breath was observed, as well as bloodshot and watery eyes. He appeared disoriented. The officer, after also noticing a glass of brown liquid between his legs, requested Cox turn off the ignition and exit the vehicle to perform some field sobriety tests. After failing to pass the tests, Cox was arrested for driving while intoxicated.

A subsequent breath test indicated a blood alcohol content of 0.18 of one percent. Consequently, the Director of Revenue suspended Cox's driving privileges pursuant to section 302.505, RSMo. Cox requested a trial de novo in circuit court, where he argued that the officer did not observe him "operating" or "driving" the vehicle. Consequently, the circuit court held that the Director improperly suspended Cox's driving privileges.

The Director appealed. After opinion by the Court of Appeals, this Court granted transfer. ***Mo. Const. art. V, sect. 10***. Reversed and remanded.

Until 1996, the statutory definition was "physically driving or operating or being in actual physical control of a motor vehicle." ***Section 577.001.1 RSMo 1994***. In 1996, an amendment to this statute occurred when the General Assembly removed the phrase "or being in actual physical control of." ***1996 Mo. Laws 593, 617***. Thus, a person need not be in "actual physical control" of a motor vehicle to be subject to section 302.505.

The words "driving" or "operating" in section 577.001 emphasizes that both words have distinct meanings. These words are not further defined in chapters 302 or 577; thus the Court ascertains the Legislature's intent in light of the plain and ordinary meaning of the words. Lacking a definition in the statute, this plain and ordinary meaning is derived from the dictionary. ***Hadlock v. Director of Revenue***. 860 S.W.2d 335, 337 (Mo. Banc 1993). The word ***drive*** is defined as "guide a vehicle along or through." ***Webster's Third New International Dictionary*** 692 (1993). In this case, the Supreme Court held, Cox was not driving, as the vehicle was motionless.

The dictionary defines ***operate*** as "to cause to function usually by direct personal effort; work (~ a car)." Id. at 1581. The Supreme Court held that Cox does meet this definition of operating a vehicle as he caused the motor to function.

"Once the key is in the ignition, and the engine is running, an officer may have probable cause to believe that the person sitting behind the steering wheel is operating the vehicle." ***Stewart v. Director of Revenue***, 702 S.W.2d 472, 475-76 (Mo. Banc 1986); ***State v. Mitchell***, 77 S.W.3d 637, 640 (Mo. App. 2002); ***Mayberry vb. Department of Revenue***, 983 S.W.2d 628, 632 (Mo.App.1999). This holds true even if that person is sleeping or unconscious. ***State v. Wiles***, 26 S.W.3d 436, 441 (Mo. App.2000); ***Delzell v. Lohman***, 983 S.W.2d 633, 634-35 (Mo. App. 1999); ***Weiland v. Director of Revenue***, 73 S.W.2d 60, 63 (Mo. App. 2002).

Consequently, the judgment of the circuit court is reversed and the case remanded.

[The Court further held that ***State v. Cross***, 34 S.W.3d 174 [3[, [5], [8], (Mo. App. 2000) and ***Hoyt v. Director of Revenue***, 37 S.W.3d 356 [5] (Mo. App. 2000) are overruled as they hold that the act of turning off the ignition is "operating", which in fact causes a car not to function. Moreover, cases interpreting the pre-1996 law should not be depended on to define "operating" because they do not separately define that term.]

I personally agree with the dissent and believe that the arguments presented in the dissent are the more reasoned.

Missouri Post-Conviction Update:
The Top Eleven Cases From The Last Year

The Missouri courts have been active in the post-conviction area in the last year. The Missouri Supreme Court has clarified and relaxed the rules under which a person who has failed to meet the deadlines imposed by Rules 24.035 and 29.15 can obtain relief in a habeas corpus action. The Court has also held, for the first time, that the execution of an innocent person violates due process of law. The following cases are positive developments for post-conviction litigators, even though not all of the petitioners/movants obtained relief. All of the decisions have become final.

Habeas corpus relief granted

State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. banc 2003)

In this case of first impression, the Court held that a claim of actual innocence may be raised in a petition for writ of habeas corpus under the Missouri Constitution and Sup. Ct. R. 91. The court went on to hold that clear and convincing evidence of Mr. Amrine's innocence of the prison killing for which he was placed on death row in 1984 undermined the court's confidence in the fairness of the proceedings. The court remanded for retrial, but the state has subsequently dismissed all charges and Mr. Amrine has been released from custody.

Congratulations to Mr. Amrine's lawyers, Sean D. O'Brien and Kent Gipson.

Mandate recalled and relief granted

State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003)

The Missouri Supreme Court reversed Mr. Whitfield's death sentence and resentenced him to life imprisonment without parole. The Court held that the imposition of the death sentence by the trial judge after the jury deadlocked violated *Ring v. Arizona*, 536 U.S. 584 (2002) (which requires a jury determination for a death sentence). The Court further held that the Ring holding was retroactive, and that it had jurisdiction to recall its mandate to correct the Ring error.

Congratulations to Mr. Whitfield's lawyers, Charles Rogers, Cheryl Pilate, and C. John Pleban.

Post-conviction relief granted

Johnson v. State, 102 S.W.3d 535 (Mo. banc. 2003)

Mr. Johnson was granted resentencing in this capital case because, in his trial and post-conviction proceeding, he presented evidence suggesting mental retardation. Although Mr. Johnson's trial proceedings were complete before the U.S. Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), that case is retroactive. Because Mr. Johnson's death sentence would be excessive and in violation of the constitution if he is mentally retarded, but the evidence on the issue was insufficiently presented, he is entitled to a new penalty phase.

Congratulations to Mr. Johnson's lawyer, Rosemary Percival.

Wolfe v. State, 96 S.W.3d 90 (Mo. banc 2003)

Mr. Wolfe was granted a new trial based on his trial counsel's ineffectiveness for failing to obtain tests of hair samples found in the victim's car. Postconviction investigation showed that the hair belonged to a prosecution witness who testified at trial that she had not been in the victim's car. Because the evidence of Mr. Wolfe's guilt was not overwhelming, there is a reasonable probability that this evidence would have affected the outcome of the trial.

Congratulations to Mr. Wolfe's lawyer, Melinda K. Pendergraph.

Butler v. State, 108 S.W.3d 18 (Mo. App. W.D. 2003)

Mr. Butler was deprived of effective assistance of trial counsel when his attorney failed to object to scientific testimony concerning hair matching. The expert testified that identification through hair matching was not generally accepted in the scientific community, but nonetheless expressed her belief that the hair found at the scene belonged to Mr. Butler. Other than the identification by the complaining witness, who gave a description at the time of the offense which did not match Mr. Butler and who identified him over a year later, there was no evidence connecting Mr. Butler with the offense. Although trial counsel testified at the post-conviction hearing that his failure to object was strategic, he admitted that he had consulted reference works and had determined that there was no scientific basis for the admission of the expert opinion. The court held that his "strategy" "was formed on the basis of either erroneous interpretations of the law or a failure to sufficiently review the relevant case law."

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It was not "reasonable," and therefore Mr. Butler did not receive effective assistance of counsel. Turning to the prejudice prong of the Strickland test, the court noted that on direct appeal, six of the ten judges of the court of appeals had opined that the evidence was legally insufficient to support conviction without the expert testimony, and found counsel's failure to object was prejudicial.

Congratulations to Mr. Butler's lawyer, Rebecca Kurz.

Roller v. State, 84 S.W.3d 525 (Mo. App. S.D. 2002)

Mr. Roller's case was remanded for resentencing. At his sentencing, his trial counsel argued that his murder and armed criminal action sentences could be concurrent. The trial court erroneously stated that the statute required consecutive sentences. However, appellate counsel did not raise this issue on appeal. On post-conviction review, the appellate court held that Mr. Roller stated a proper claim of ineffective assistance of appellate counsel and that remand for resentencing was required.

Congratulations to Mr. Roller's lawyer, Mark A. Grothoff.

Post-conviction and habeas corpus procedures

Bittick v. State, 105 S.W.3d 498 (Mo. App. W.D. 2003)

Mr. Bittick had a right to proceed pro se in his post-conviction motion and the motion court erred in denying him the right to dismiss his appointed counsel. However, the court also noted that a post-conviction proceeding is a civil proceeding at which the movant has no right to be present. The court stated that a movant proceeding pro se could not compel the motion court to permit him to attend his hearing.

Congratulations to Mr. Bittick's lawyer, Kent Gipson.

Kuehne v. State, 107 F.3d 285 (Mo. App. W.D. 2003)

Mr. Kuehne was entitled to a hearing on his claim that his trial counsel failed to investigate and call witnesses who would have impeached the testimony of the state's witnesses. If the calling of impeachment witnesses would have had a reasonable probability of changing the outcome of the case, then prejudice is shown. This decision clarifies prior decisions holding that failure to call witnesses is only prejudicial if the witnesses would have provided the defendant with "a viable defense."

Congratulations to Mr. Kuehne's lawyer, Susan L. Hogan.

Hammond v. State, 93 S.W.3d 823, (Mo. App. E.D. 2002)

Mr. Hammond filed a timely original post-conviction motion under Rule 24.035. Counsel appeared for him and failed to file a timely amended motion after filing several motions for extension of time stating that he believed there were meritorious grounds for an amended motion. The motion court found that only Hammond's pro se claims could be considered because the failure to file a timely amended motion was not the result of abandonment of post-conviction counsel but was rather the result of a strategic decision by post-conviction counsel to try to extend the time beyond that permitted by Rule 24.035. Accordingly, the motion court declined to apply the rule of Sanders to allow the filing of an amended motion by new counsel. The court of appeals disagreed: "When the movant is not at fault, he should not to be deprived of meaningful review of his post-conviction claims even if the failure to file a timely amended motion results from counsel's trial strategy or conscious attempt to avoid the rules." The case was remanded for the appointment of new counsel who would be entitled to time to file an amended motion.

Congratulations to Mr. Hammond's lawyer, Stacy Franks Sullivan.

Ayres v. State, 93 S.W.2d 827 (Mo. App. E.D. 2002)

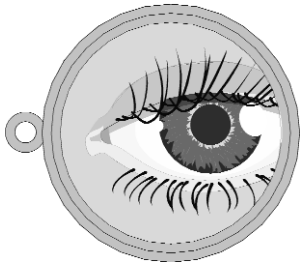
Mr. Ayres was entitled to an evidentiary hearing on his claim that trial counsel told him that if he went to trial, he faced a maximum sentence of five years' imprisonment for first degree assault and that if he had known that there was actually a ten year *minimum* sentence, he would have accepted the state's plea offer of seven years.

Congratulations to Mr. Ayres's lawyer, Kent Denzel.

Pope v. State, 87 S.W.3d 425 (Mo. App. W.D. 2002)

Pope's post-conviction counsel filed an amended motion which consisted of Pope's original motion with minor grammatical editing, in that the amended motion changed "I" to "movant" wherever it occurred. Counsel also waived a hearing and submitted the motion on the record before the court. Mr. Pope contended that the filing of this amended motion did not permit the inference that counsel had reviewed the case to determine whether the motion stated sufficient facts to support the claims and whether other claims should be asserted, as required by Rule 24.035(e). The court of appeals found that the record before it presented the distinct possibility that Mr. Pope had been abandoned by post-conviction counsel and remanded for a determination on the issue by the motion court.

Congratulations to Mr. Pope's lawyer, Craig Johnston.



When Big Brother Is Watching Us ... Who's Watching Big Brother?

By Tom Carver

John Aschroft's latest charm offensive in support of Patriot Act reminds me of the old saw: "I'm from the government and I'm here to help you". Similarly, independent Ozarkers of all stripes should sit up and take notice when the sharp scent of a sweeping expansion of federal power over our personal affairs is in the air. Taken out of rhetorical context and viewed practicably, the USA Patriot Act holds frightening prospects for all Americans.

According to the Atlanta Constitution, Bell South, the phone company serving most of the southern United States, received over 16,000 subpoenas for telephone records from law enforcement over the past year. Under section 215 of the Patriot Act the only limitation placed on the Department of Justice when seeking a subpoena is that the request allege the information is "sought for a foreign intelligence investigation." This is a huge departure from long-held American constitutional guarantees against the issuance of warrants and seizures without a demonstration of probable cause as required by the Fourth Amendment.

More importantly, the person seeking the subpoena makes the call as to whether the subpoena is "sought for a foreign intelligence investigation" and, thus, effectively defeats our system of checks and balance against arbitrary government action by eliminating meaningful review by the judiciary.

And, to make matters worse, the business or library or physician's office from which the information is sought cannot disclose that the government has compelled the production of the information.

As I write, software companies across the country are designing new programs to mine data that will be handed over to the government. If you thought your bank and medical records, and the books you purchased at Barnes & Noble or checked out at the library, were confidential, think again. Likewise, reporters may not be able to protect sources or government whistleblowers from a curious government if the mantra of "sought for a foreign intelligence investigation" is invoked.

If you are still interested in giving your trust to the government, consider the following. According to the *St. Louis Post Dispatch*, since September 11th more than 700 people have been jailed without any connection to terrorism, 255 criminal charges were filed and 132 convictions obtained with an average sentence of two months, which is astounding when you consider that federal sentencing guidelines call for significant penitentiary time for almost any felony offense. The bottom line here is that many of the convictions have been for minor league immigration offenses, not threats to national security.

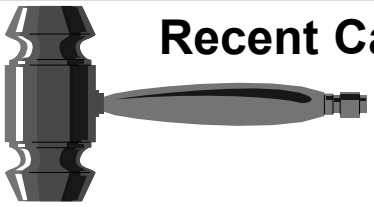
Another dark chapter is the detention of Jose Padilla, an American citizen held without charges in solitary confinement for over a year and denied the right to counsel. The government argues that because he's held but not charged, he has no right to counsel. His detention speaks to a logic that mouths, "There are no innocent people, only the unindicted."

So must we surrender to terrorism if we are to preserve our personal privacy? Hardly; the missing ingredient in the administration's brew is the lack of meaningful judicial involvement. Let judges rely on the time-proven "probable cause" standard employed in the Fourth Amendment to justify search warrants and seizures. Protect our right to read, think and speak independently without fear through the First Amendment. James Madison said it best in the Federalist Papers: "The accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."

One Step ... *(Cont'd. from page 4)*

only that the bill would cost "more than $100,000". This is an incredibly misleading prediction. Given the fact that it costs the taxpayers $13,000 to house a prisoner in Missouri for one year, the projected cost of this bill will obviously be *substantially* more than $100,000.

Quite likely, the true cost will be measured in millions and not thousands of dollars. Despite all the handwringing about lack of money, apparently the legislature is unconcerned about the cost when it comes to appearing "tough on crime."



Recent Case Update

By Bernie Edelman

State v. Honeycutt, 96 S.W.3d 85 (Mo banc 2003)

In 1997, defendant received two tickets; DWI and Failure to Drive on Right Half of the Roadway. The DWI was called to trial in 1998 and a jury acquitted defendant. The other traffic charge was never tried and the case remained inactive until 2001 when a new judge, cleaning up his docket, dismissed the case on its own motion for lack of prosecution. The State appealed.

SUPREME COURT: The ultimate issue was whether, in the absence of a governing statute, a trial judge has the inherent authority to dismiss a criminal case for failure to prosecute. The state argued that to recognize such authority would interfere with the long-recognized discretion of the prosecutor to determine when and whether to bring charges.

In State ex rel Griffin v. Smith, 258 SW2d 590 (Mo 1953), the Supreme Court reversed the trial court which had refused to allow the state to nolle pros a case, demanding that the case proceed to trial. The Supreme Court stated that the judge had no authority to control a prosecutor's decision to nolle pros a case before verdict, stating "we think the discretion vested in him by law places in him the sole power to determine when he should proceed with a prosecution or dismiss it." Id at 594.

A trial judge has knowledge of his own docket and must have the necessary authority to control and move it. It has long been recognized that the court had the inherent authority to control its docket in civil cases by dismissing for failure to prosecute where a case has languished too long. While the judge could not dismiss the case with prejudice, he could dismiss it without prejudice. This Court now expressly holds that the rationale for recognizing the court's inherent authority to dismiss a civil case for failure to prosecute is equally applicable in the criminal setting. To the extent that Griffin can be read to suggest otherwise, it is overruled. A judge could exercise control over his docket by setting a stale case for trial and then forcing the prosecutor to either try it or dismiss it. However, dismissal without prejudice affords the judge an alternate method of controlling his docket that does not require a judge to place cases on a trial docket that are unlikely to be tried.

State v. Grubb, #WD60983 (Mo App 2/18/03)

THIS CASE HAS BEEN TRANSFERRED TO THE MO. SUP. CT. AND THE CASE NUMBER IS SC85195. ALTHOUGH THIS CASE CURRENTLY HAS NO PRECEDENTIAL VALUE, IT MIGHT BE INFORMATIVE TO EXAMINE THE WESTERN DISTRICT FACTS AND OPINION.

Defendant was convicted of two counts of Assault 2d Degree and found defendant to be a prior offender authorizing the Court to sentence, rather than the jury. The defendants "prior" was an assault where he plead guilty before a military general court-martial, had the services of an attorney throughout the proceedings, and received a three year sentence from the military judge. Defendant contended that this military proceeding which was used to establish his prior offender status was contrary to Missouri law.

APPEALS COURT: Appellant relies on State v. Mitchell, 659 SW2d 4 (Mo App ED 1983) which stated that since the military court-martial does not grant a right to trial by jury, that system is sufficiently foreign from our system of criminal justice as to prohibit its use as a threshold predicate of enhanced punishment under Section 558.016, the prior and persistent offender statute. Section 556.016.2 RSMo defines a "felony" as a crime if a person convicted of it may be sentenced to death or imprisonment for a term in excess of one year. Appellant's conviction in the military courts satisfies the legislative definition of a felony and the court in Mitchell erred. Other states have used court martial convictions for proof of prior convictions and we see no error in the use of the court martial proceeding as a prior. CONVICTION AFFIRMED

State v. K.J., 97 S.W.3d 543 (Mo App 2003)

On Jan. 11, 2000, K.J, a juvenile, was certified by the juvenile court to stand trial as an adult for the crime of Distribution of a Controlled Substance near a school. Although certified, the State never filed that charge against K.J. In January of 2001, K.J. was arrested again for possession of cocaine base and relying on the prior certification, the State filed criminal charges against K.J. as an adult, even though he was still a juvenile. K.J. moved to dismiss the criminal charge or to remand the case back to the juvenile court and the Court dismissed the cause for lack of jurisdiction. The State appealed.

APPEALS COURT: The issue of the State taking no action after an original certification and the effect of that certification on later proceedings has not been squarely addressed. The statutory scheme as enacted apparently did not contemplate this situation. Sect. 211.071 RSMo states that when a juvenile petition has been dismissed thereby permitting a child to be prosecuted under the general law, the jurisdiction of the juvenile court over that child is forever terminated, unless the child is found not guilty by a court of general jurisdiction. K.J.'s ability to appeal the original certification is by a Motion to Dismiss, the exclusive remedy to contest the court's jurisdiction of him. Because the original charge was not filed in circuit court, K.J. had no ability to contest the certification that placed him in the court of general jurisdiction in the first instance. Allowing the child to now contest the certification on the new charges a year later is not a viable solution or alternative.

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Recent Case Update

(Cont'd. from page 9)

The judgment remanding the case back to the juvenile court is affirmed and the State may then seek certification of the juvenile on the new drug charge. AFFIRMED

State v. Bristol, 98 S.W.3d 107 (Mo App 2003)

Defendant was convicted of driving while suspended and complained that his entire driving record was admitted into evidence and reviewed by the jury. His defense at trial was that he did not know that he was suspended in March 2000 when he was stopped by the Highway Patrol operating his motor vehicle.

APPEALS COURT: The State had to prove that Bristol had the culpable mental state of driving at a time when he knew his license was revoked or suspended. Defendant placed the issue of his intent in dispute. The driving record was directly relevant as to whether defendant had reason to know his license was suspended or revoked. The driving record showed defendant was issued a license in April 1998. That license was then suspended three different times and the record showed that defendant surrendered his license in Nov. 1999. Most or all of the information in the driving record is related to incidents which led to the suspension or revocation of defendant's license and the information was logically relevant to show his intent and knowledge. No error in the admission of the entire record.

Cox v. DOR, 98 S.W. 3d 548 (Mo.banc 2003)

Defendant was found asleep behind the wheel of his vehicle, with the key in the ignition and the engine running. The car was on a gas station parking lot. Defendant was woken by the police and failed field sobriety tests. After arrest, he failed a breath test and his license was administratively suspended by the DOR. At a hearing, the trial court ordered the license reinstated, finding that the officer did not have probable cause to believe Cox was operating the vehicle as he was asleep.

SUPREME COURT: In 1996, the General Assembly removed the phrase "or being in actual physical control of" from the definition of "driving" in Sect. 577.001.1 RSMo. When the legislature amends a statute, that amendment is presumed to change the existing law. Thus, a person would not be subject to suspension by simply being in actual physical control of a vehicle while intoxicated. Since "driving" in 577.001 means "physically driving or operating a motor vehicle", the meaning of "operating" must be determined. Webster's Dictionary defines "operate" as "to cause to function usually by direct personal effort". Cox meets the bright-line test to operate a car, as he caused the motor to function. Once the key is in the ignition and the engine is running, the officer has probable cause to believe that the person behind the wheel is operating the vehicle, even though asleep or unconscious. The trial court erred in reinstating Cox's driving privileges. REVERSED

State v. Churchill, 98 S.W.3D 546 (Mo banc 2003)

Defendant was charged with first-degree sodomy of his girlfriend's daughter. The child was examined by Dr. Solomon who appeared as a witness for the State at defendant's trial. Dr. Solomon was asked whether mom had reported any changes in the child's behavior that were indicative of abuse. The witness described behavior changes that mom had related to her including bedwetting and nightmares. When the prosecutor asked the significance of these changes, defendant objected but was overruled. The doctor stated that the changes meant " a significant event had occurred in the girl's life". The doctor further testified that the event the girl was describing (the sodomy) "was real" and "had occurred to her". Defendant continued to object to this testimony as invading the province of the jury.

SUPREME COURT: The witness's testimony infringed upon the decision-making function of the jury and prejudiced defendant by bolstering the child's testimony with the credibility of a professional. It was the province of the jury to determine if the child was telling the truth, not the witness. General testimony is the behaviors and other characteristics commonly found in those who have been victims of sex abuse, which is admissible. Particularized testimony is that testimony concerning a specific victim's credibility as to whether they have been abused which is inadmissible. It was error to admit the particularized testimony. REVERSED

State ex rel. Proctor v. Bryson, 100 S.W.3d 775 (Mo banc 2003)

Proctor was charged with harassment and the prosecutor asked the court to order a psychiatric exam of her due to her agitated and nervous state when arrested including being loud and verbally abusive. Defendant asserted that she did not intend to raise a defense of mental disease or defect under Chapter 552, but the trial court ordered the exam. Proctor sought a writ of prohibition preventing the trial court from ordering the exam. A preliminary writ was issued preventing the exam.

SUPREME COURT: Chapter 552 permits a psychiatric evaluation to be conducted under two circumstances: first, when the court has reasonable cause to believe the accused lacks the mental fitness to proceed or second, when the accused has pleaded lack of responsibility due to mental disease or defect. Chapter 552 does not allow the State or the Court to assert a defense of mental disease on behalf of a defendant and the facts alleged about defendant do not give rise to believe there is reasonable cause that defendant lacks the capacity to understand the proceedings or lacks the ability to assist counsel. The Court lacked the authority to enforce his order requiring the exam to determine her mental state on the date of the crime and the order was beyond his authority. PRELIMINARY WRIT MADE ABSOLUTE

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Recent Case Update

(Cont'd. from page 10)

Sooch v. Dir. Of Revenue, 105 S.W.3d 546 (Mo App 2003)

Sooch's license was revoked after refusing a chemical test. A hearing was held in St. Charles County on his Petition for Review and a drug court commissioner heard his case. Sooch appealed alleging that the commissioner was without authority to hear his case and that his case should have been heard by a circuit or associate circuit judge.

APPEALS COURT: The drug court commissioner lacked jurisdiction to hear Sooch's case and the order entered has no legal effect and Sooch's petition remains pending in the circuit court. St. Louis County was granted the power to authorize commissioners to hear these type cases by Sect.479.500 RSMo., if the circuit adopted a local rule to authorize it. St. Louis County authorized commissioners to hear these type cases by adopting Local Rule 62 to grant this power to commissioners. St. Charles County was not authorized by the legislature to allow their appointed commissioners to exercise this jurisdiction and they did not have a local rule to allow it. The judgment was remanded for a new hearing.

EDITORS COMMENT: All cases heard and all decisions by the drug court commissioner on license revocation matters are without legal effect and are still pending. Any aggrieved driver has the right to seek an appropriate hearing in St. Charles County.

State v. Thompson, #WD59840 (MO APP 5/20/03)

Defendant was convicted of murder 1st degree and sentenced to life without parole. The conviction was reversed because of instructional error, but complaint was also made by defendant that the state conducted ex parte communications with the trial judge. The state gave the judge a copy of its exhibit list but refused to give a copy of it to the defendant.

APPELLATE COURT: We discourage counsel in future cases from participating in conduct we perceive as highly unprofessional. The rules of professional conduct are not a ceiling of behavior but the bare minimum that is expected from the legal profession. We also encourage trial judges not to permit or condone such practices. REVERSED

State v. Robinson, #SD 25131 (Mo App 6/19/03)

Defendant was convicted of trafficking in and possession of controlled substances and was sentenced to 15 years in the Mo. Dept. of Corrections. He complained about the admissibility of a statement allegedly made by an unidentified confidential informant that defendant was keeping 14 pounds of marijuana and 6 to 9 ounces of crack cocaine in his girlfriend's home. The prosecutor told the trial court that this hearsay statement was admissible to "explain why he went there" and the trial judge allowed it.

APPELLATE COURT: The witness referred to the hearsay statement at least three times and the prosecutor referred to it in closing argument. Odinarily, a statement offered to explain subsequent conduct by the police and to supply background and continuity is not considered hearsay and is admissible. To explain the officer's conduct, it would have been adequate for the officer to testify that he went to the residence because of information that drugs were there. To allow the officer to testify that defendant was "keeping" drugs at the residence went beyond the scope necessary to show subsequent conduct of law enforcement and was prejudicial. Also a factor was the court's failure to give a limiting instruction to the jury as to the use of that testimony. REVERSED

State v. Mozee, #WD 61663 (Mo App 6/24/03)

Defendant was convicted of delivery of a controlled substance and was sentenced to 10 years in Mo. Dept. of Corrections. He sold the drug to a police officer in the presence of a confidential informant. Later, the informant told the police officer that defendant sold the drugs. At trial, only the officer testified and the defense theory was mistaken identity. The officer was allowed to testify that the informant told the officer that defendant was the drug seller and identified him to the officer from a picture.

APPELLATE COURT: The testimony by the officer as to the informant's identification of the defendant as the seller was inadmissible hearsay. While error, the prejudicial effect must be determined. Through the admission of the officer's hearsay testimony, the state was allowed to admit evidence of a second identification of defendant without the opportunity of confrontation. The sole issue was the identification of the drug seller and the hearsay statement was prejudicial. REVERSED

State v. Smith, #ED82604 (Mo App 7/22/03)

Defendant was arrested for DWI and refused a breath test. The arresting officer obtained a search warrant to seize a sample of defendant's blood, and blood was drawn by a paramedic and analyzed by a police lab. The defendant's motion to suppress was sustained by the trial court under Sect. 577.041 which states that "upon said refusal, none shall be given". The state appealed.

APPELLATE COURT: The phrase "none shall be given" refers to police officers who are prohibited from giving a test once a driver refuses a breath or blood test. This clause does not prohibit courts from issuing search warrants to take blood samples. The state has the authority to seek evidence in criminal cases pursuant to sect. 542.266 RSMo. It was error to suppress the blood test.

Shape Up! ... *(Cont'd. from page 3)*

Although the choice of witnesses is a matter of trial strategy,[17] "strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[18]

A lawyer may be ineffective for failing to locate and call witnesses if the lawyer knew or should have known of the existence of witnesses, that the witness would have testified if called, and that they could have been located through reasonable investigation and that their testimony "would have provided a viable defense."[19] Perfunctory efforts, filing late discovery motions, is no excuse.[20]

The failure to subpoena and present testimony of an alibi witness who was otherwise ready, willing and able to testify is improvident.[21]

If defendant fails to convince the court of either prong, then the court does not need to consider the other.[22]

A defendant must "overcome the presumptions that any challenged action was sound trial strategy and counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment." Was there a reasonable probability sufficient to undermine confidence in the outcome?[23]

Conclusion

Courts are seriously reviewing defense attorneys' investigation and trial techniques.

A lawyer has a duty to make a reasonable professional investigation or to make a reasonable decision that makes particular investigations unnecessary,[24] and when there is a failure to "check out leads" or interview witnesses, post-conviction relief will be granted on the grounds of ineffective assistance of counsel.[25]

To avoid having your name added to the list of "ineffective" attorneys, conduct a thorough and detailed investigation, file necessary pretrial motions, make key trial objections, and maintain honest and constant communications with your client.

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[17] *Sanders v. State*, 738 S.W.2d 856 (Mo. banc 1987).

[18] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *Leisure v. State*, 828 S.W.2d 872 (Mo. banc 1992).

[19] *State v. Vinson*, 800 S.W.2d 444, 448 (Mo. banc 1990); *Williams v. State*, 8 S.W.3d 217 (Mo. App. 1999); *State v. Clay*, 975 S.W.2d 121, 143 (Mo. banc 1998).

[20] *State v. Butler*, 951 S.W.2d 600, 609 (Mo. banc 1997).

[21] *Wilson v. Cowan*, 578 F.2d 166 (6th Cir. 1977); *Merritt v. State*, 650 S.W.2d 21 (Mo. App. 1983).

[22] *State v. Simmons*, 955 S.W.2d 729 (Mo. banc 1997).

[23] *Moore v. State*, 827 S.W.2d 213 (Mo. banc 1992).

[24] *State v. Griffin*, 810 S.W.2d 956 (Mo. App. 1991) (failure to locate, interview and call witnesses is ineffective).

[25] *Perkey v. State*, 68 S.W.3d 547, 552 (Mo. App. 2001); *Blankenship v. State*, 23 S.W.3d 848, 852 (Mo. App. 2000).

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