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 Mike McIntosh

What return on my investment do I receive by being a member of MACDL?

Foremost, by choice, you are a member of the most dynamic group of lawyers in the State. There is no more energetic or committed group than the Criminal Defense Bar.

The Criminal Defense Bar has more than money or principle at stake with each client. Deprivation of life, liberty and the pursuit of happiness is the core of each of our cases. At every level, the government seeks more and more power in an attempt to further infringe upon these basic, fundamental rights.

MACDL's opposition to the death penalty is one example of a return on your investment. In the Fall of 2009, MACDL made a $1,500.00 contribution to a nationally recognized death penalty workshop at UMKC School of Law. Among the honored speakers was a past president of MACDL, Sean O'Brien, Professor at the Law School. Recently, MACDL has made a like $1,500.00 contribution to an advisory group seeking experts on the impact of the death penalty to the families of the Defendant. MACDL has a committee monitoring death penalty issues and your participation as a member is encouraged. Can there be no better place to state professionally your opposition to the ultimate punishment (death) than with this group of dedicated defense lawyers committed to that single cause?

MACDL's support of appropriations to the Missouri State Public Defender (MSPD) is another return on your investment. On July 13, 2009, Governor Nixon vetoed SB 37 which would have provided much needed relief to the

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Missouri Association of Criminal Defense Lawyers

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President's Message *(from page 1)*

dockets of MSPD. Since that date, MACDL's indigent defense committee has unified in adopting a mission statement which encourages each member of our group (500+ strong) to approach local state representatives personally (not by e-mail, phone or otherwise but in person if possible) to encourage them to find appropriations to help the overloaded MSPD. Please let this serve as a request (really a demand) each of us take the time and effort to contact our representative and declare as unacceptable the present situation that lack of funding has placed on our brothers and sisters at MSPD. At minimum, the Governor's 2011 proposed budget has asked the legislature for $2 million in funding for MSPD. This should start as a talking point for each of us when we approach our State Representative. Go get em!

Third, your investment is returned by MACDL's active monitoring of new Bills and MACDL member participation in going to Jefferson City to testify in opposition/support of pending legislation. These proposals impact the life and liberty of our clients both now and in the future. Presently, there is a massive revision in the works regarding DWI laws. This legislation proposes more criminalization and sanctions against the accused drug/alcohol violator. These sanctions result in hardships to families in Missouri caught up in this non-violent categorization of crime.

A must read on the correct mindset to these concerns, outlined above, can be found in Chief Justice William Price's speech on the "State of the Judiciary" given February 3, 2010. His remarks reflect recognition by our highest court of the crisis concerning MSPD and the failure of present punitive measures to address non-violent crimes such as those dealing with drugs and alcohol.

Where can you get such up-to-date and practical exposure to these types of issues? Perhaps your local Bar Association, your local Criminal Law Committee, NACDL Publications? Maybe … partially … but you cannot get as fully immersed in the details as you can through your active MACDL membership.

Don't forget, you and you alone can decide how much to invest in time and money on this pursuit. The rate of return will follow accordingly.

Sincerely,
Michael C. McIntosh

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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.

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 (http://www.macdl.net/newsletter.aspx) located at the bottom of the page.

Amicus Curiae Committee

Don't forget that MACDL has an Amicus Curiae Committee which receives and reviews all requests for MACDL to appear as amicus curiae in cases where the legal issues will be of substantial interest to MACDL and its members. To request MACDL to appear as amicus curiae, you may fill out the amicus request on the MACDL website (www.MACDL.net) or send a short letter to Grant J. Shostak, Amicus Curiae Committee Chair, briefly explaining the nature of the case, the legal issues involved, and a statement of why MACDL should be interested in appearing as amicus curiae in the case. Please set out any pertinent filing deadline dates, copies of the order of opinion appealed from and any other helpful materials.

Committee Chair: Grant J. Shostak
Shostak & Shostak, LLC
8015 Forsyth Boulevard
St. Louis, MO 63105
Telephone: (314) 725-3200
Facsimile: (314) 725-3275
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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.

Welcome Aboard!

We'd like to welcome the following new members to MACDL!

Carl E. Smith • *Ava*
Nancy Pew • *St. Louis*
Scott Campbell • *Platte City*
Stephen Vighi • *Hillsboro*
Heather Highland • *St. Louis*
Joseph Green • *St. Louis*
Talmage Newton IV • *St. Louis*
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Chris Gahagan • *Liberty*
Lisa Udofia • *St. Louis*
Michael James Francis Byrne • *Columbia*
Joan K. Miller • *St. Louis*
Charles Billings • *St. Louis*

MACDL Web Traffic Report

Activity Summary *(3/4/09 - 2/15/10)*	
Total Hits	271,360
Total Unique IPs	8,274
Total Page Views	76,513
Average Hits per Day	777
Average Page Views per Day	219
Average Visitors per Day	128

MACDL'S Partial Tuition Scholarship

Gerry Spence Trial Lawyers College Death Penalty Seminar 2010

During June 12-19, 2010, the Trial Lawyers College will be presenting a unique seminar designed specifically for criminal defense lawyers who handle death penalty cases.

This program will focus on and address techniques the trial lawyer can use to successfully and adequately represent and understand a defendant facing the death penalty and to defeat death. You will be exposed to and become familiar with the method developed over the years and taught at the Trial Lawyers College.

You will learn to:

→ help the jury crawl into the hide of the client;
→ know and understand the jury;
→ discover the story and win;
→ empower the jury to stand up against the injustice of the death penalty

In addition, you will be taught valuable skills in how to personally survive the emotional intensity of a death penalty case and to deal with your own issues while fulfilling your obligations as an attorney.

If you have any questions, do not hesitate to contact the Trial Lawyers College at (800) 688-1611, or by email at info@triallawyerscollege.com.

Two lucky MACDL Members could receive 1/2 of the TLC tuition.

To apply for tuition, visit our website (www.macdl.net) for more information and an application.

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MACDL Legislative Report

by Brian Bernskoetter

The Second Session of the 94th General Assembly will be marked by how the Legislature and the Governor deal with the current and looming budget crisis the state faces. This year, the state is projected to use up all the remaining funds from last year's Federal Stimulus bill, so the real budget pain is projected to occur in 2012. Aside from the budget, it is expected that the Legislature will try to work on ethics reform, mandatory insurance coverage for autism, and DWI reforms.

This summer, there was quite a bit of press coverage on issues involving DWI's and repeat offenders. The Governor highlighted this issue in his State of the State Address and the members of the General Assembly have filed a number of different proposals on this issue. The current legislative proposals vary greatly and it is unclear what measure will gain consensus, but at this point some of the measures put forward would: charge points to your license or criminalize refusing to take a breath test, revising the definition of "driving while intoxicated," automatic license suspension for first-time offenders, and require all municipalities and counties to input DWI arrests into the Highway Patrol's database.

The list below is a few of the bills we are tracking and the positions we have taken. This list is not comprehensive.

Support

HB 1313 – Requires the Department of Corrections to establish the Shock Time for Felony Probationers Program to give courts an alternative to imposing a sentence for nonviolent offenders who have violated their probation

HB 1413 – Limits the amount of aid the Attorney General may give in death penalty cases and establishes the Death Increment Fiscal Accountability Committee

HB1415 – Changes the law regarding clemency in death penalty cases

HB 1478 & HB 1809 – Authorizes the expungement of certain criminal records

HB 1549 – Changes the laws regarding the recording of certain custodial interrogations by law enforcement agencies

HB 1702 – Allows for a separate DWI docket under the drug treatment court enabling statute and modifies laws relating to alcohol-related offenses

HB 1815 – Allows challenges to death sentences based on racial disparities anywhere in the state and permits the use of statistical evidence in certain criminal and post-conviction relief proceedings

SB 591 – This act repeals the death penalty and makes the crime of first degree murder punishable by life imprisonment without probation or parole

Oppose

HB 1451 – Requires certain restitution to be paid through the office of the prosecuting or circuit attorney and requires the assessment of an administrative handling cost and an installment cost

HB 1540 – Requires that judicial procedures for an infraction be the same as for a misdemeanor and requires motorists to obey reasonable signals and directions given by law enforcement in the enforcement of infractions

HB 1666 & HB 1674 – Requires all law enforcement agencies and the prosecutor to report all alcohol-related traffic arrests and court actions to the State Highway Patrol's DWI Tracking System

HB 1695 – Changes the laws regarding driving while intoxicated

SB 780 – This act makes refusing to submit to chemical testing a separate criminal offense equivalent to a first-time DWI, with the penalty being a Class B misdemeanor

SB 797 – District attorneys shall be elected during the 2014 general election in each judicial circuit for counties that elect to be part of the system

SJR 27 & HJR 58 – Changes the selection of judges under the Missouri Non-Partisan Court Plan

Public Defender's Corner

by Cathy Kelly

Missouri Supreme Court Ruling A Mixed Bag For Public Defender Caseload Relief

Governor Recommends Additional $ 2 Million For Public Defender Budget

In December, the Missouri Supreme Court handed down rulings in three writ cases testing the validity of the MO Public Defender Commission's administrative rules. State ex. rel. Public Defender Commission, et. al. v. Pratte invalidated a commission rule re-defining indigency to exclude a defendant who had previously retained private counsel in the same case. This ruling will undoubtedly come as welcome news to those private attorneys around the state who had Motions to Withdraw denied because of the unavailability of the public defender to pick up the case due to this rule.

But the biggest news came in State ex. rel. Public Defender Commission, et. al. v. Oxenhandler. There, the issue was the Public Defender Commission's ability to set maximum allowable caseloads for Missouri's public defender offices and turn cases away once those maximums were exceeded. While the Court ruled that the Public Defender Commission cannot deny cases based upon category of offense (e.g. all probation revocations or all traffic offenses), it did affirm that the Commission does have the authority to set maximum caseloads and to turn away cases if necessary in order to manage the system and ensure constitutional representation. They just can't pick and choose which cases to turn away. Instead, the Court says that the proper remedy – if attempts at informal cooperation with the courts and prosecutors to reduce public defender caseloads do not succeed – is to refuse any additional cases until caseloads fall below the maximums allowed under the rule.

Needless to say, this creates a very different ballgame. Triage is out. First come, first served is in – regardless of seriousness of offense or confinement status. And when the doors close, they close to everything and everyone. How this will play out in real life is still to be determined, because the combination of the rule provisions and the Supreme Court's ruling give rise to some unexpected quirks:

> Under the rule, an office exceeds its maximum allowable caseload if the new cases coming through the door exceed the attorney hours available to handle them. If that happens for three months in a row, the office can be certified to turn away cases. First step after that is a "meet & confer" with the courts and prosecutors to see if informal agreements can be worked out to remove cases from the public defender caseload. If those are not successful or fail to fully fix the problem, the office is now to simply close the doors and turn away all comers.
>
> For two months. And then we'll re-open the doors and once again take all eligible defendants.
>
> Under the rule, a certified office is to start taking cases again after it has fallen below its maximum allowable caseload for two consecutive months. This is where it gets tricky. The rule was designed to function in a situation where discrete categories of cases were being turned away but other cases were continuing to come into the office. If those other cases coming in weren't enough to exceed the max, then the office would begin re-accepting those categories previously turned away. NOW – if an office is certified and closes its doors to ALL cases, there will be zero cases coming in the door. And since the rule measures cases coming in the door, rather than cases open on any given day, that means every certified office will immediately drop to zero in assigned cases and in two months' time will always be reopening their doors to accept new cases. In other words, the rule has been changed from a valve that slows or speeds up the flow of cases to an on/off switch. Taking all cases for three months, taking none for two. On three months, off two.

The Public Defender Commission has instructed the system leadership to proceed with certification under the court's new opinion, so we will be forging ahead and working out the kinks as we go. Springfield, Carthage, Hillsboro, Jackson, Liberty, Lebanon, Maryville, Harrisonville, and Kirksville will be our first offices up for certification. Once those are sorted out and operating under the rule in some semblance of order, we will roll out the next group of offices. As I write this, all but three district offices are eligible for certification – and those three

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have all exceeded maximum caseloads for part of the last three-month period we measured, but dipped barely below it one or two of those months. So while they are not eligible at this time, they are far from out of the woods for future certification.

But there is a bit of GOOD news worth sharing. The Governor has released his budget recommendations for the Missouri Public Defender System for FY2011, and is recommending $2 million in new money to help the PD system manage its caseload increase. Exactly how that money will be spent if it passes the legislature is still to be determined, but we expect a significant portion of it would go towards hiring more support staff to free up lawyers from doing clerical and investigative responsibilities and concentrate on doing the things only a lawyer can do. In an economy when many state departments are being hit with core cuts, this is very good news indeed. Our task now is to keep that money in the budget as it wends its way through the legislative process. Your letters of support to your legislators would be a helpful boost in that effort!

Some not-so-fun facts you might want to include in such a letter could include:

- Missouri is 14th in the nation in number of prisoners in the Department of Corrections and 49th in *per capita* expenditure on public defense.
- Last year, Missouri's average cost per PD case was just under $355 -- $45 LESS than we were paying per case *thirty* years ago in 1981.
- If you take out capital and appellate cases, the average cost per case drops to $289 per case.
- Missouri's PD system has one investigator for every 1745 cases; one secretary for every 1318 cases; one legal assistant for every 2336 cases; and one paralegal for every 19,856 cases -- meaning our lawyers are spending significant amounts of time doing work that could much more cost-effectively and efficiently be done by support staff

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Top Favorable Post-Conviction Cases of 2009

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Since there haven't been any post-conviction summaries for 2009, this article will attempt to cover all the notable cases for the last year. As usual, all citations should be checked for currency.

POST-CONVICTION (RULES 29.15 AND 24.035) CASES: RELIEF GRANTED

Gill v. State, 2009 WL 4277248 (Mo. Dec. 1, 2009) NOT YET FINAL, MOTION FOR REHEARING PENDING

Mr. Gill, who was sentenced to death, was denied effective assistance of counsel when his trial counsel failed to discover and utilize evidence that the victim's computer contained child pornography. Reasonable trial counsel would either have found this evidence on the computer, or learned of it from the investigating officer who was aware of it. This was relevant evidence at the penalty phase, because the state introduced evidence of the victim's good character and the undiscovered information could have been used to refute that evidence. The defense had the option of objecting to the state's evidence, and had the objection been made, it should have been sustained, but no such objection was made. Had this evidence been presented, there is a reasonable probability of a different outcome, since the co-defendant's jury, which knew about this, recommended life for the co-defendant. Reversed for new penalty phase hearing.

Congratulations to Bill Swift, Mr. Gill's lawyer.

Duley v. State, 2009 WL 4034813 (Mo. App. W.D., Nov. 24, 2009) NOT YET FINAL, MOTION FOR REHEARING OR TRANSFER PENDING

The court first noted that a *Brady* violation can be raised for the first time in post-conviction proceedings if, as was the case here, the violation is not discovered until after trial. The undisclosed evidence, a police report which revealed the existence of a witness who, although he did not like the defendant, stated that the defendant did not commit the crime, was "material" under *Brady*, so the state's failure to disclose it required reversal for a new trial.

Congratulations to Basil North, Mr. Duley's lawyer.

Merriweather v. State, 294 S.W.3d 52 (Mo. 2009)

The defendant was entitled to post-conviction relief as a result of a *Brady* violation where the state did not timely disclose the victim's theft conviction, which could have been used to impeach her testimony. The case is particularly significant because the court specifically held that the fact that the nondisclosure was inadvertent did not save the conviction. Sup. Ct. R. 25.03, which was enacted after *Brady*, specifically requires diligence and good faith on the part of the state to locate records "in the control of other governmental personnel." Because the state failed to show that it diligently sought the victim-witness's criminal history, and there was no criminal history printout in the state's file, the state violated Rule 25.03 and reversal was required.

Congratulations to Nick Zotos, Mr. Merriweather's lawyer.

White v. State, 290 S.W.3d 162 (Mo. App. E.D. 2009)

Mr. White was denied effective assistance of counsel when trial counsel failed to move to strike a venireperson who said that he did not believe he could be fair to the defendant if selected as a juror. Trial counsel provided an affidavit that this was an oversight, but the motion court found that the failure to strike the venireperson was

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reasonable trial strategy and trial counsel's contrary affidavit was "not believable." The appeals court rejected this conclusion, and found that prejudice was presumed

from the fact that the venireman at issue served on the jury. Reversed and remanded.

Congratulations to Mark Grothoff, Mr. White's lawyer.

POST-CONVICTION (RULES 29.15 AND 24.035) CASES: PROCEDURES

INSUFFICIENT FINDINGS

Burgdorf v. State, 2009 WL 4224130 (Mo. App. S.D. Nov. 30, 2009)

Robertson v. State, 287 S.W.3d 719 (Mo. App. S.D. 2009)

Both of these cases were remanded for findings of fact and conclusions of law. In *Burgdorf*, the court's order was: "Having reviewed entire file, ct. finds that, based on [Burgdorf's] motion & transcript of plea, there is no need for an evidentiary hearing & motion is denied." In *Robertson*, the court disposed of the case by docket entry *after an evidentiary hearing*: "MOTION TAKEN FROM ADVISEMENT FROM ADVISEMENT [sic]. THE COURT GRANTS [MOVANT] CREDIT FOR ALL JAIL TIME AWAITING DISPOSITION OF CASE. ALL OTHER RELIEF IS DENIED. COPY TO COUNSEL." Surprise, surprise! This wasn't sufficient to satisfy the requirement for findings of fact and conclusions of law! (As the song goes, "Oh when will they ever learn ...").

Congratulations to Ellen Flottman, Mr. Burgdorf's lawyer.

Congratulations to Emmet Queener, Mr. Robertson's lawyer.

EVIDENTIARY HEARING REQUIRED.

Roberts v. State, 276 S.W.3d 833 (Mo. 2009)

Remand for an evidentiary hearing was required on the issue of the voluntariness of the defendant's plea of guilty. The defendant entered his plea along with seven other defendants in unrelated cases. His lawyer told him that the state would not oppose institutional treatment for him; at the plea hearing, the prosecutor said he would not oppose such treatment *if it was recommended*. It wasn't, and Mr. Roberts received two consecutive seven-year sentences for possession of methamphetamine and diazepam. In granting the hearing, the court commented, "There is no doubt that group plea proceedings like the one in which Movant's plea was entered unnecessarily increase the opportunities for mistakes or confusion. And, in the context of such a group plea proceeding, minor alterations to the terms of a plea agreement might be missed or misunderstood by defendants or counsel. Absent a group plea setting, Movant would have little room to assert confusion about his plea." Remanded for evidentiary hearing.

Congratulations to Jessica Hathaway, Mr. Roberts's lawyer.

Gabaree v. State, 290 S.W.3d 175 (Mo. App W.D. 2009)

Remand for an evidentiary hearing was ordered where the amended motion alleged ineffective assistance of counsel because trial counsel failed to object to the testimony of the state's expert that the child witnesses were credible, and failed to impeach the complaining witness with prior inconsistent statements. The record before the motion court did not establish that the failure to object or use the statements was the result of reasonable trial strategy. Remanded for evidentiary hearing,

Congratulations to Laura Martin, Mr. Gabaree's lawyer.

Samuel v. State, 284 S.W.3d 616 (Mo. App. W.D. 2009)

The trial court record did not show that Mr. Samuel was asked if he had been promised anything to plead guilty. He contended, in his post-conviction motion, that trial counsel had promised him a five-year sentence if he entered an open plea, and urged him to reject the state's eight-year offer. He got twelve years. In granting the hearing, the court pointed out, "The *credibility* of the movant's claim is not at issue here. The issue is simply whether the claim, if true, amounts to ineffective assistance of counsel and whether the record, absent an evidentiary hearing on this motion, clearly refutes movant's claim." (Emphasis in original.)

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Post Convictions *(from page 9)*

TIMELINESS OF ORIGINAL MOTION

White v. State, 282 S.W.3d 409 (Mo. App. W.D. 2009)

The original motion was timely. The time runs from the date of the appellate court's direct appeal *mandate*, not the date of the opinion affirming the conviction. Remanded with instructions to reinstate the post-conviction motion.

Congratulations (again!) to Mark Grothoff, Mr. White's lawyer.

ABANDONMENT

Tabor v. State, 282 S.W.3d 381 (Mo. App. S.D. 2009)

After the movant filed a 90-page *pro se* motion, and counsel was appointed, *the movant* filed a "statement in lieu of amended motion" which recited that counsel had reviewed the record and found no additional grounds, and that movant wanted to proceed on the original motion. Counsel neither signed this statement nor filed an amended motion. The motion court then entered an order stating, "Court reviews entire file individually, specifically Movant's Motion to Vacate, Set Aside, or Correct Judgment And Sentence. Court finds no valid reason hearing is necessary. Court denies motion in all its parts and as a whole." The court of appeals reversed, finding that the motion court was required to investigate, and make findings, as to whether Mr. Tabor had been abandoned by appointed counsel. Reversed and remanded.

Congratulations to Jeannie Willebey, Mr. Tabor's lawyer.

Carrol v. State, 286 S.W.3d 257 (Mo. App. S.D. 2009)

In this similar case to *Tabor*, above, the amended motion for post-conviction relief in this case was untimely. The motion court denied relief without making a finding as to whether the movant was abandoned by counsel. Remanded for such a finding, and for any hearing necessary to determine the issue.

Congratulations to Nancy McKerrow, Mr. Carrol's lawyer.

Gehlert v. State, 276 S.W.3d 889 (Mo. App. W.D. 2009)

In yet another abandonment case, the court again remanded for a hearing. Here, the movant filed a timely post-conviction motion after revocation of his probation, but made no allegations about the original plea and sentencing. Appointed post-conviction counsel requested transcripts of the plea and sentencing and learned that they were unavailable because the tape had been damaged. However, the record reflects no other activity by counsel for the next *two years*. The court found evidence of abandonment: "[W]hile a record made at the time the plea was entered certainly would aid counsel in reviewing the case, the unavailability of a transcript does not eliminate counsel's duties under Rule 24.035 to ascertain whether the *pro se* motion is supported by sufficient facts and includes all claims known to the movant for attacking the judgment and sentence." Remanded for abandonment hearing.

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

STATE HABEAS CORPUS (Rule 91) PROCEEDINGS

In Re Barr v. Steele, 294 S.W.3d 131 (Mo. App. S.D. 2009)

After the defendant committed his crime (theft), but before he pled guilty and was sentenced, the legislature reduced his crime from a Class B felony to a Class C felony. He was sentenced to 15 years, the maximum sentence for a Class B felony. At the time of his sentence, Mo. Rev. Stat. §1.160 entitled him to the benefit of the amended statute. Remanding for resentencing, the court held that upon remand Mr. Barr was entitled both to the earlier version of §1.160 (which would now deny relief) and the earlier version of the theft statute, (which has now been amended to return the defendant's crime to Class B felony status.) "Simply remanding Petitioner for resentencing pursuant to the law in effect at the time of the original sentencing as the result of an ancillary proceeding attacking the legitimacy of that original sentence does not transform an otherwise final criminal case into a pending matter for purposes of § 1.160."

Congratulations to Mr. Barr, who won his case *pro se*.

Wolf v. Steele, 290 S.W.3d 126 (Mo. App. S.D. 2009)

Mr. Wolf was entitled to habeas corpus relief where his trial counsel failed to file a timely notice of appeal from his conviction. He showed "cause" for failing to raise this issue earlier by showing that his trial counsel assured him that she would perfect an appeal and told him that the appeal would take two years. This excused Mr. Wolf from

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having to correct the mistake within the one-year period provided in Sup. Ct. R. 30.03. "The prejudice, of course, is that Wolf was denied his right to appeal his criminal case." (Note that Mr. Wolf didn't have to show that the appeal had merit.) The conviction and sentence was vacated, and the case was remanded to circuit court with instructions to impose the original sentence, which would restart the time for filing notice of appeal.

Congratulations (again!) to Ellen Flottman, Mr. Wolf's lawyer.

State ex rel. Peete v. Moore, 283 S.W.3d 818 (Mo. App. 2009)

In a very similar case to *Wolf*, above, Mr. Peete was granted relief upon a showing that his trial attorney assured him that he would file and otherwise prosecute a direct appeal. Because the attorney also told him not to file a post-conviction motion until the appeal was complete, Mr. Peete showed cause and prejudice, amounting to manifest injustice. As in *Wolf*, Mr. Peete's case was remanded for resentencing.

Congratulations to Edward Scott Thompson, Mr. Peete's lawyer.

DNA TESTING PROCEEDINGS (Mo. Rev. Stat. §547.035)

Belcher v. State, 2009 WL 4927364 (Mo. Dec. 22, 2009) NOT YET FINAL

A court which rules on a motion for post-conviction DNA testing must issue findings of fact and conclusions of law which are sufficiently specific to allow for adequate review by a higher court. The order here, which simply recited that "the entire file and records of the case conclusively show that [Belcher] is not entitled to relief," did not meet this requirement, so the case was remanded. The court further held that if, on remand, the motion were dismissed for failure to comply with the statutory verification requirement, an amended or successive motion could be filed.

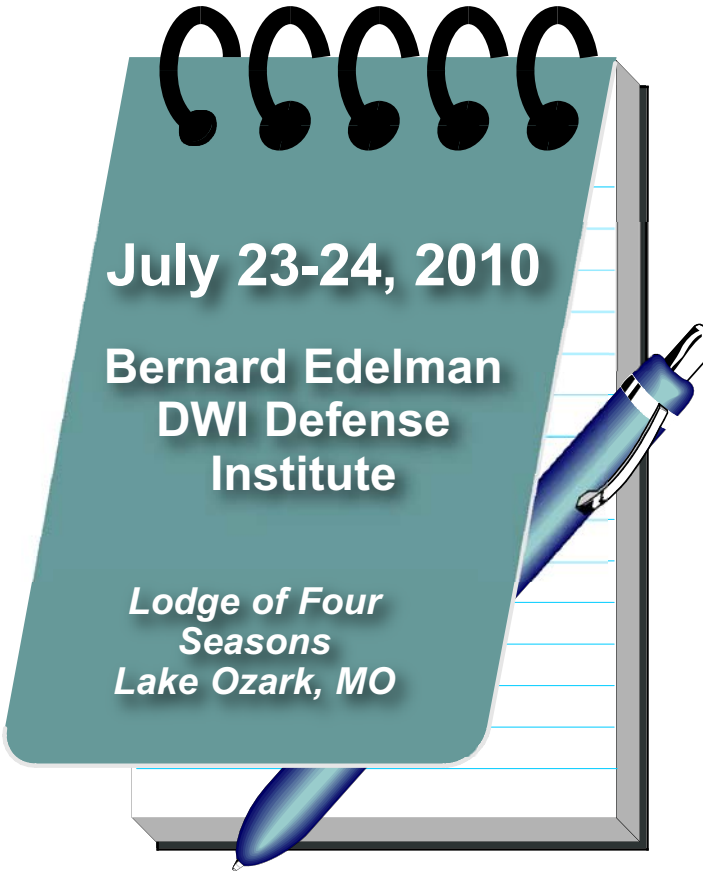
Congratulations to Phil Gibson, Mr. Belcher's lawyer.

MOTION TO RECALL MANDATE

State v. Bohlen, 284 S.W.3d 714 (Mo. App. E.D. 2009)

Mr. Bohlen was granted relief for ineffective assistance of appellate counsel, raised on a motion to recall mandate because he was sentenced before Sup. Ct. R. 29.15 was amended in 1996 to move the filing of post-conviction motions from before direct appeal to 90 days after the issuance of the direct appeal mandate. Appellate counsel failed to raise an issue of double jeopardy when the defendant was convicted of two counts of robbery, one involving theft of the store manager's personal property and the other involving theft of the store property. There was harm because he got consecutive sentences. Judgment and sentence as to the duplicative count vacated.

Congratulations (yet again!) to Ellen Flottman, Mr. Bohlen's lawyer.



DWI and Traffic Law Update

by Jeff Eastman ♦ Gladstone, MO

West v. Director

SD29490 ♦ November 17, 2009

Director appeals trial court's judgment in refusal action where evidence comprised testimony from the arresting officer, his alcohol influence report and medical records of driver. The trial court found "all issues in favor of Respondent" and determined that driver "was medically unable to make a decision under 577.041." In reviewing the record, the Southern District held that the record did not support a finding in favor of driver as to a lack of probable cause or the absence of an arrest. As driver did not file a brief, the Southern District assumed that driver would have argued that the trial court found driver was not capable of refusing the chemical test as a consequence of the injuries sustained. The Southern District found from the uncontradicted record that driver was alert and coherent at the scene with bystanders as well as with the officer at the hospital. Such observations were corroborated by the medical records tendered by driver. Although driver sustained a multitude of injuries including "a head injury resulting from a piece of wood penetrating the orbit of his right eye and extending into the right frontal lobe of his brain" no evidence was introduced to show that such injuries rendered driver incapable of making a decision to refuse a chemical test in the eyes of a reasonable person. The trial court's judgment was vacated and the revocation reinstated.

Director, Dept. of Public Safety v. Christopher Bishop

(WD 70301) ♦ September 29, 2009

LEO was originally charged with third degree assault and subsequently plead guilty to the misdemeanor crime of peace disturbance. LEO received a suspended imposition of sentence and was placed on two years probation. Prior to the expiration of his probationary period, the Director of Public Safety filed a complaint with the Commission to discipline LEO. During a hearing on the allegation, LEO testified that he acted properly and did not commit a crime during the incident. To counter LEO's testimony at the hearing, the Director offered LEO's plea of guilty into evidence.

The Commission found that the Director failed to prove that LEO had committed a crime and consequently did not have cause to discipline LEO. The Director appealed the decision to the trial court which affirmed the judgment of the Commission. The Western District thereafter affirmed. In affirming the Commission's decision, the court rejected the Director's argument that the doctrine of collateral estoppel precluded the Commission's action even when imposition of sentence was suspended. The appellate court noted that for collateral estoppel to apply, four factors must be considered: (1) Whether the issue decided in the prior case was identical; (2) Whether the prior case resulted in a judgment on the merits; (3) Whether the party or parties against whom an estoppel is being asserted was a party, or at least in privity with a party in the prior case; and (4) Whether the party subject to collateral estoppel had a full and fair opportunity to litigate the issue raised in the prior case.

In its review, the Western District found that the second factor precluded application collateral estoppel in that there was no judgment entered in the criminal case because LEO received a "SIS."

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

State v. J.D.L.C.

293 S.W.3d 85 (Mo.App. W.D. 2009)

State charged minor with minor in possession for as a person under the age of twenty-one years, having a detectable BAC of more than .02%. Trial court sustained minor's motion to suppress finding that LEO lacked probable cause to arrest and that the search of minor's breath was not conducted under any exception to the warrant requirement.

Appellate Court notes that LEO testified at suppression hearing the he arrested minor for MIP for being visibly intoxicated. The court finds that the facts and the circumstances were insufficient for LEO to believe that minor was committing such possession in that minor did not own or drive the vehicle involved and was in the back seat whereas the liquor was found in the bed and front seat of the vehicle. While minor had a "faint to mild" odor of alcohol on his breath, he displayed no visible signs of intoxication in that his eyes were not glassy or bloodshot and he was not belligerent. Therefore, LEO did not have probable cause to arrest minor in this case. Motion to suppress confirmed as such sample was obtained in close temporal proximity to the illegal arrest and the likelihood such test result would have been obtained absent the illegal arrest was not substantial.

State v. Anderson

294 S.W.3d 96 (Mo.App. E.D. 2009)

In one of three points of error alleged, defendant argued that the trial court plainly erred by establishing his enhanced offender status after the submission of the case to the jury in violation of Section 558.021.2. Defendant further alleged that the court's failure to follow the statutory mandate occasioned prejudice by subjecting him to an unauthorized extended term of imprisonment for an enhanced offense. The Eastern District disagreed and affirmed the trial court's judgment. In its review, the appellate court observed that the trial court referenced a file showing defendant's prior "pleas of guilty" and that defense's counsel stipulated that defendant had previously plead guilty to the stated offense. The appellate court further noted that prior to the instruction conference, the trial court actually made a finding based upon defendant's stipulation to the prior offense that defendant was proven beyond a reasonable doubt to be a prior offender.

After submission but prior to verdict, the trial court referenced a second file which reflected a plea of guilty to a second charge which it relied upon as a basis for enhancement. When noting the presence of the second file, the court recognized the timeliness of this finding. The trial court noted that it perceived no prejudice to the defendant and further acknowledged defendant's prior testimony as to his priors which the court "infers" was included within his testimony. The court then found defendant to be both a prior and persistent offender. Defendant made no comment regarding the court's finding and did not include any claim of error regarding this action in his motion for new trial. In affirming the trial court's finding, the appellate court held that an announcement of "no objection" amounted to an affirmative waiver of appellate review noting that when there is an affirmative waiver, even plain error is not warranted. Judgment affirmed.

State v. Moad

294 S.W. 3d 83 (Mo.App. W.D. 2009)

Defendant indicted for vehicular manslaughter. Shortly after the incident and months before his indictment, the Highway Patrol released the car involved to the victim's family. Such occurred prior to defendant or his representatives having had an opportunity to inspect the vehicle. On motion of defendant, the trial court excluded all evidence relating to the vehicle. The state filed an interlocutory appeal challenging the trial court's ruling. On review, Western District dismisses the appeal as premature. The appellate court finds that the trial court's order was entered as a discovery sanction and thus was not subject to interlocutory appeal as it was not an order suppressing evidence. The appellate court reiterates that the right of appellate review is statutorily based and absent an appropriate statutory predicate, appellate review is non existent. Appeal dismissed.

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Have you signed up a new MACDL member?

DWI and Traffic Law Update *(from page 13)*

State v. Marrone

SD 92077 ♦ September 15, 2009

Defendant was convicted of driving while intoxicated. On appeal, he alleges that the trial court erred in the admission of the results of a chemical analysis of his breath. Specifically, defendant claimed the trial court violated his Sixth Amendment right of confrontation when it was admitted over his objection, the results of his chemical test without him having had an opportunity to confront the individual who had performed the maintenance check on the particular DataMaster involved. Defendant argued that under Crawford v. Washington, 541 U.S. 36 (2004), he had the right to confront the individual who performed the maintenance check on the DataMaster he was tested on. On appeal, the Southern District affirms holding that contrary to defendant's argument, the maintenance report in this case was not created in preparation of trial and was thus outside the ambit of the protections afforded by the Sixth Amendment. The Court noted that the maintenance check is mandated by state regulations, that the purpose of the regulation is to ensure the DataMaster's accuracy and that such check must be performed every thirty-five days regardless of whether the machine had been used to measure blood alcohol content for a driving while intoxicated prosecution. Judgment of conviction affirmed.

State v. Redifer

WD 67908 ♦ August 14, 2009

In this appeal, Defendant challenges his conviction for resisting arrest in that the testimony at trial merely established that the officer was making an investigatory stop at the time defendant fled the scene. The Western District agrees and vacates the judgment. The appellate court notes that resisting arrest cannot occur unless the arresting officer was in the process of arresting the defendant. The gravamen of the charge is resisting arrest and not fleeing from an officer. Since the instructions submitted to the jury required it to find that LEO was making an arrest at the time defendant fled, the evidence was insufficient to support his conviction for this offense. Judgment of conviction as to this one count vacated.

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Schnitzer v. Director

ED 92638 ♦ October 20, 2009

Driver challenges the sufficiency of the evidence to support the Director's assessment of eight points against his license for an out-of-state driving while intoxicated conviction and the thirty day suspension occasioned by reason thereof. At trial, the Director offered into evidence copies of driver's loss of driving privilege notice from MDOR, the Wyoming DOT's report of drivers conviction for driving while under the influence of alcohol and his Missouri driver record. Driver offered into evidence a copy of the Wyoming driving under the influence statute and the judgment entered against him by the Wyoming Circuit Court. At trial and on appeal driver argued that the Wyoming DUI statute prohibits driving as well as having actual physical control of the vehicle while under the influence of alcohol. The trial court rejected driver's argument and driver appealed. The Eastern District affirms noting that while the Wyoming statute defines two different offenses, the evidence in the instant case was not susceptible to two distinct interpretations because the report of driver's out-of-state conviction from Wyoming clearly indicated that driver was driving under the influence and not in actual physical control. The court observed that where the DOT report expressly stated that driver was "driving under the influence", there was sufficient evidence to establish the statutory element of driving for purposes of a prima facie case supporting driver's license suspension. Judgment affirmed.

Schroeder v. Director

SD 29568 ♦ October 29, 2009

Driver sought review pursuant to 302.311 of Director's decision denying his application for a Missouri license. The Director's denial was predicated upon records revealed during a national driver registry search which found that driver's license had been suspended and had yet to be reinstatement by the State of California as a consequence of his failing to pay child support. The trial court reversed the Director's decision. The Director thereafter appealed. The Southern District affirms. In its opinion, the Southern District reviews the Interstate Compact and finds that the objective of the compact is to promote a driver's compliance with laws, ordinances, rules and regulations relating to the operation of motor vehicles. The court finds that a failure to pay child support is completely unrelated to the operation of motor vehicles. The trial court's judgment is affirmed.

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DWI and Traffic Law Update *(from page 14)*

Campbell v. Director

WD 70266 ♦ November 24, 2009

Driver judicially challenges ten-year denial occasioned by three alcohol related convictions. Prior to and at the commencement of trial, driver seeks disqualification of revenue staff counsel arguing that only the county prosecuting attorney may appear and defend the Director in such actions. Trial court denies both motions and eventually enters judgment in favor of Director and against driver. On appeal, the Western District affirms. Court notes that driver did not articulate any reason why he is aggrieved by the staff attorney's representation of the Director or why he is aggrieved by not having the prosecuting attorney represent the Director. The court holds that a party who has not been aggrieved by a judgment has no right or standing to appeal. Absent evidence of standing or prejudice, the trial court's judgment is affirmed.

State ex rel Director of Revenue v. Hyde

ED 93679 ♦ November 3, 2009

Driver petitions for and trial court issues limited driving privileges to driver during ten-year period of denial. Director seeks remedial relief through writ of prohibition arguing that driver is statutorily ineligible for limited driving privileges as a result of his prior felony conviction for driving while intoxicated (Section 302.309.3(5)(b)) as well as having more than once violated an implied consent law of the State of Missouri or any other state (Section 302.309.3(5)(f)). Eastern District agrees. Writ made permanent.

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