MACDL
Missouri Association of Criminal Defense Lawyers

Newsletter

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In This Issue

The MACDL Newsletter is a semi-annual publication of the

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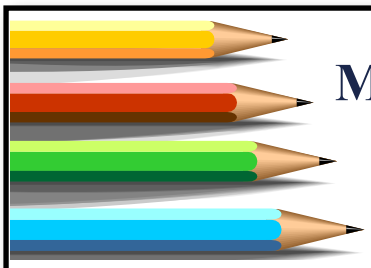
Your comments and suggestions are welcome!



MACDL President's Letter

by Travis Noble

2011 is shaping up to be both an exciting and challenging year in the area of criminal law. With the economy in such a precarious state, we find ourselves having to do more with less. Prosecutors find themselves in the same economic situation. We can seize on this situation to come to a consensus with prosecutors to forge legislation to relieve the budget crunch being placed on the state by over incarceration. There will always be battle lines over which we will not be able to come together, but this should not deter us from working together when we can agree. Two recent bills show where these lines are drawn.

House Bill 159 is an example where we can come together. The Missouri Prosecutors Association and MACDL recently testified in support of House Bill 159 to allow courts to sentence offenders to house arrest in lieu of incarceration. Courts have been reluctant to use home detention instead of incarceration. Allowing judges to use home detention enables the court to consider a particular defendant's age, family responsibility, and employment, relieving the cost of incarceration on the State.

There are also areas that we differ with the Missouri Association of Prosecutors. House Bill 257 attempts to eliminate the sentencing commission and the sentencing guidelines. The Missouri Association of Prosecutors' position at the Judiciary Hearing on House Bill 257 was that judges are mislead by the "lenient" recommended sentences in the Missouri sentencing guidelines. MACDL's position was that the sentencing commission provides relevant, up-to-date, information on sentencing practices, risk assessments, and the overall fairness and equality of sentences throughout the state to both courts and probation and parol. One of the benefits of the sentencing guidelines is to provide to the court risk analysis to help judges decide which persons should go to prison and which can be safely diverted to community based programs, saving the state valuable resources as proposed in House Bill 159.

I would like to thank Randy Scherr, Brian Bernskoetter, and Sarah Goldman for their support and assistance in preparing MACDL's position on pending legislation.

The 2011 Annual Conference will be held April 15-16, 2011 at Chateau on the Lake in Branson, MO. We look forward to seeing everyone at the upcoming Conference.

MACDL

Missouri Association of Criminal Defense Lawyers

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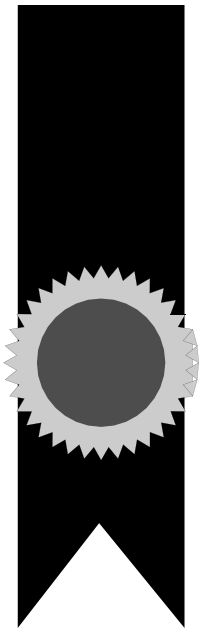


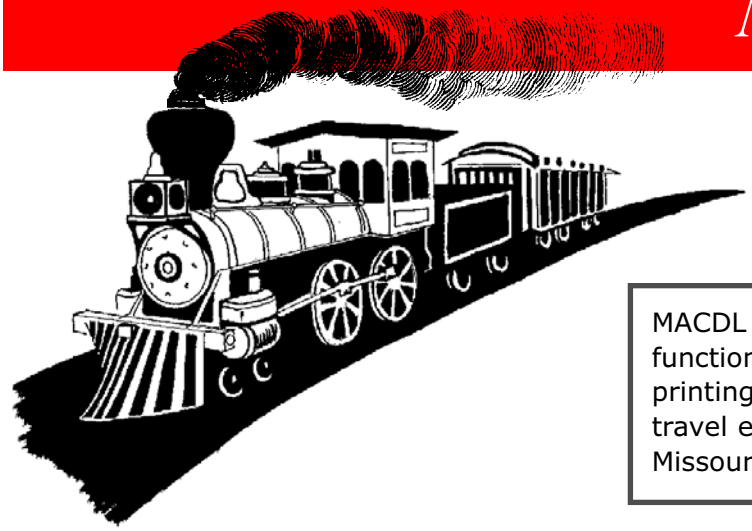
MACLD Awards!

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

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

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

MACDL On The Move!



Welcome Aboard!

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

We'd like to welcome the following new members!

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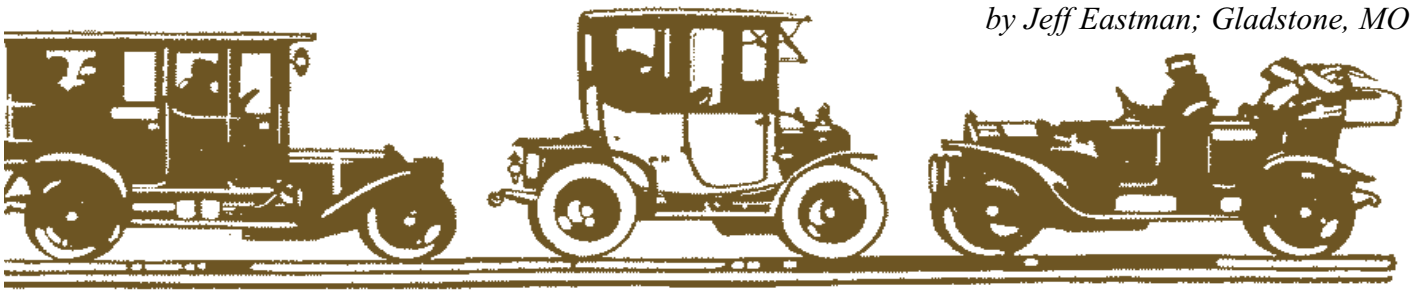
DWI and Traffic Law Update

by Jeff Eastman; Gladstone, MO



REFUSAL

Bender v. DOR

320 s.w.3D 167 (Mo.App. E.D. 2010)

Driver arrested for DWI and requested to submit to a blood test. When he refused, LEO obtained search warrant and two draws were subsequently performed. Driver challenged the revocation of his license occasioned by reason of his alleged refusal, arguing that he ultimately did submit to a chemical analysis of his blood which allowed LEO to obtain his BAC. The trial court disagreed and the Eastern District affirms.

A refusal is the volitional failure to do what is necessary in order that a test can be performed. Obtaining evidence of a driver's blood alcohol content under the Missouri Implied Consent Law is distinct from obtaining evidence by a search warrant. The Implied Consent law is directed to warrantless testing by consent which provides administrative and procedural remedies for a refusal to comply. Submitting to a court-ordered search warrant for one's blood is not the same as consenting or making a volitional choice to submit.

Bland v. Director of Revenue

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

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

REFUSAL *(Continued)*

Southards v. Director

321 S.W.3d 458 (Mo.App. S.D. 2010)

In this Section 577.041 proceeding, the trial court determined that there was not probable cause to arrest driver because LEO lacked "sufficient indicia of intoxication to determine it was more likely than not [driver] was intoxicated." In its judgment, however, the trial court found that LEO's observations were sufficient to provide the arresting officer with "reasonable suspicion" that driver was intoxicated.

The appellate court first noted that the Director failed to properly preserve in her brief its allegation that the trial court erroneously stated the law as to what constituted probable cause. Not withstanding the same, the Southern District found that the trial court misapplied the probable cause standard and thus reversed the trial court's decision.

The Southern District held that probable cause is a "fluid concept" with no exact definition. Probable cause turns on the assessment of probabilities in a particular factual context. "Although there must be a 'fair probability' that a particular offense has been committed, probable cause 'does not demand any showing that such a belief be correct or more likely true than false.'"

The appellate court held that "more likely than not" is an inaccurate rendering of the probable cause standard. Rather, there "simply must be a fair probability - from the perspective of a prudent and cautious law enforcement officer - that a particular offense has been committed based on the totality of the circumstances." The facts, as found by the trial court, were sufficient for LEO to have had reasonable grounds to believe driver was driving while intoxicated. Refusal sanction affirmed.

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REFUSAL *(Continued)*

Mason v. DOR

321 S.W.3d 426 (Mo.App S.D. 2010)

In this Section 577.041 action, the driver argued the illegality of his arrest alleging that a fourth class city officer initiated pursuit within his own jurisdiction but did not effect the stop until inside a neighboring jurisdiction. Driver argued that his arrest was illegal and thus could not provide the requisite predicate for the administrative revocation of his license when he refused to submit to a chemical analysis of his breath. The trial court agreed and affirmed the sanction.

On appeal, the Southern District reversed. Relying upon *Ross v. Director of Revenue*, the Southern District held that the lawfulness of the driver's arrest does not affect whether the driver was arrested for purposes of Section 577.041.

Bieker v. Director

SD30466
December 23, 2010

The Director claimed the trial court erred in finding that driver was not legally arrested. As to such issue, the Southern District agreed, reaffirming that the lawfulness of a DUI arrest has no impact the civil Section 577.041 proceeding.

The Director also claimed that the trial court erred because the arresting officer had probable cause to believe driver was driving while intoxicated. The Director argued that the trial court had erroneously found that the undisputed evidence was insufficient to establish probable cause. The Southern District disagreed, noting that the Director relied upon the wrong standard of review.

A trial court's probable cause determination involves a two step analysis: 1) determination of the historical facts; and 2) the application of the law to those facts. An appellate court reviews the determination of the historical facts under an abuse of discretion standard, giving deference to the inferences the trial court makes, including credibility determinations.

In the present proceeding, the Director relied upon her certified records whereas the driver testified. The appellate court found that the trial court chose to believe driver's version of events which implicitly casted doubt upon the officer's credibility, including the indicators of intoxication the officer claimed to observe. As the evidence as to whether the officer had reasonable grounds to believe driver was driving while intoxicated was contested, the trial court was free to believe driver's version of events. Judgment affirmed.

REFUSAL *(Continued)*

Coble v. Director

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

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

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

Holloway v. Director

324 S.W.3d 768 (Mo. App. S.D. 2010)

The sole issue for review in this Section 577.041 appeal was whether the trial court was persuaded the officer had reasonable grounds to believe driver was driving while intoxicated. Citing *White v. Director of Revenue*, the Southern District recognized that the trial court's probable cause determination is reviewed in a two-step analysis: 1) a determination of the historical facts; and 2) the application of the law to those facts. In the first part of the analysis, appellate court reviews the probable cause determination under an abuse of discretion standard and gives deference to the inferences the trial court makes from historical facts, including credibility determinations. In the second step, the appellate court must determine, under *de novo* review, if those historical facts satisfy the relevant statutory standard.

In the present proceeding, the appellate court found that the trial court did not believe the officers' testimony enough, or enough of their testimony, to find that the Director had carried her burden. The appellate court found the trial court's judgment in view of the evidence plausible and affirmed the same extending the *White v. Director* rationale to Section 577.041 proceedings.

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MISCELLANEOUS

Linhardt v. DOR

320 S.W.3d 202 (Mo.App. E.D. 2010)

Driver's license was sanctioned as a consequence of her refusal to maintain financial responsibility pursuant to Section 303.025. Eastern District holds in a sua sponte review of jurisdiction, that driver failed to first exhaust her administrative remedies by timely requesting a hearing as mandated by Section 303.041.2. Since she failed to exhaust this remedy, she waived her judicial challenge. Sanction affirmed.

Prins v. Director

WD71833
November 16, 2010

The Director appealed the trial court's judgment which disallowed the arresting officer's report and testimony as a sanction for an alleged destruction of a video capturing the incident. On appeal, the Western District held the trial court erroneously applied the spoilation doctrine.

This spoilation doctrine provides that if a party intentionally spoliates evidence, the party is subject to an adverse evidentiary inference. The standard for the application of this doctrine requires that there be evidence of an intentional destruction of the evidence indicating fraud and a desire to suppress the truth. The court noted that, although in some circumstances the destruction of evidence without a satisfactory explanation may give rise to an unfavorable inference against the spoilator, the party seeking the benefit of the doctrine must still show that the spoilator destroyed the evidence "under circumstances manifesting fraud, deceit or bad faith."

In the present case, the appellate court found that the record indicated that the trial court did not believe that the officer intentionally destroyed the video under circumstances indicating fraud, deceit or bad faith. Rather, the court's judgment was based upon a belief that where drivers are held to strict adherence to the law, a law enforcement officer should likewise be held to their procedures. This finding of the trial court negated any finding of fraud, deceit or bad faith, rendering the spoilation doctrine inapplicable.

The court went on to note that, even if there was evidence of fraud, deceit or bad faith, there was no evidence that the officer acted at the direction or encouragement of the Director. Where a third person or agent of a party destroys evidence, there must be evidence that the "party" in bad faith directed, encouraged or in any other way took part in the destruction. In the present case, there was no evidence that the officer acted in response to the direction or encouragement of the Director. The trial court's judgment was vacated and the matter was remanded for further proceedings. See also *Douglas v. Director of Revenue*, (SD30207, November 19, 2010), likewise holding the spoilation doctrine inapplicable in a license sanction proceeding.

MISCELLANEOUS *(Continued)*

Rohlman v. Director

323 S.W.3d 459 (Mo. App. E.D. 2010)

Director appeals trial court's decision which set aside a sixty-day suspension for points. On appeal, the Eastern District reversed. On April 14, 2009, the Director advised driver that he would experience a thirty-day, point-based suspension effective May 15, 2009. On May 4, 2009, driver was convicted of another speeding violation in Iowa. On May 22nd, after the initial thirty-day suspension had commenced, the Director received notification of the driver's second Iowa conviction and, thereafter, assessed an additional three points against driver's license. On June 2, 2009, the Director advised driver that his license would be suspended for sixty days as a consequence of the additional point accumulation.

A commissioner found and the trial court affirmed that the points from the driver's second Iowa speeding conviction were improperly assessed as to date of occurrence and the number of suspensions and, as a consequence, ordered the second (sixty-day suspension) to be removed from driver's record.

On review, the Eastern District found that the trial court misapplied the law. The court reviewed both Section 302.304.2 and 302.160. The court noted that under Section 302.160, the Director is not authorized to assess points until she receives notice of the conviction from another state or from a federal court. In the present circumstance, the Director could not assess points for the second Iowa conviction until she received notification from the State of Iowa. Hence, the timing of the assessment was correct and the trial court erred in setting aside the point-based sanction.

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MISCELLANEOUS *(Continued)*

State v. Shelton

320 S.W.3d 186 (Mo.App. E. D. 2010)

Driver sought to expunge records of his prior alcohol-related arrest and administrative sanction under Section 577.054. On the date of the hearing of his expungement petition, the court found that a pending administrative suspension was an alcohol-related enforcement contact, which disqualified driver from the requested relief. The Eastern District disagreed. In the instant proceeding, the court found that driver had timely requested a hearing under Section 302.525 such that the administrative sanction was stayed pending the results of said hearing. The Eastern District distinguished both *Fowler v. Director* and *Russell v. Director* from the present situation. The court noted in *Fowler*, the defendant had petitioned for an expungement for a prior DWI conviction one day after his administrative hearing during which the DOR made a final determination to suspend his license. In *Fowler*, the court held that the alcohol-related enforcement contact occurred when the DOR took formal action - by way of a final determination - to withdraw a person's license, not on the future date when the suspension was to take effect.

In *Russell*, the driver petitioned for expungement of a prior DWI sanction following an administrative hearing during which the agency found there was no probable cause to believe that driver had committed an alcohol-related traffic offense and made a final determination not to suspend his driving privilege.

Here, the administrative action remained pending without final determination at the time of the hearing on the petition for expungement and thus driver was not disqualified.

CRIMINAL

State v. Pesce

325 S.W.3d 565 (Mo.App W.D. 2010)

The State relied upon Iowa aggravated misdemeanor conviction to enhance defendant to persistent offender status, arguing that her two-year Iowa sentence qualified the offense as a felony under Section 556.016 RSMo. Defendant appealed and the Western District reversed as to classification enhancement. Appellate court observes that Section 556.016 defines the terms "felony" and "misdemeanor" as follows: "2. A crime is a 'felony' if it is so designated or if persons convicted thereof may be sentenced to death or imprisonment for a term which is in excess of one year. 3. A crime is a 'misdemeanor' if it is so designated or if persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is one year or less."

CRIMINAL *(Continued)*

In the present situation, the Iowa offense qualified as both a misdemeanor and a felony under Missouri law. The ambiguity could not be resolved by resort to other cannons of construction such that the rule of lenity applied. The statute must be interpreted in favor of the defendant such that he was improperly sentenced as a persistent felony offender.

State v. Collins

SC90839
January 11, 2011

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

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

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CRIMINAL *(Continued)*

State v. Robertson

WD72529
December 14, 2010

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

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

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

In its opinion, the court referenced the Supreme Court's recognition in a driver's license case that the lack of calibration of a portable breathalyzer machine may impact the circuit court's finding as to whether the results obtained from the same were credible. See *York v. Director of Revenue*, 186 S.W.3d 267. In the *York* case, the trial court had found that the officer lacked the proper training to administer the portable breathalyzer machine and that no evidence existed to establish that the device was properly calibrated, maintained or even working at the time it was used. The court also referenced the Eastern District's decision in *Paty v. Director of Revenue*, 168 S.W.3d 625, where the court found that a trial court could disregard the results of a preliminary breath test as unreliable. In the present case, the appellate court inferred that the trial court questioned the reliability of the "portable breath analyzer machine" and concluded the same was not credible. The trial court's ruling on the motion to suppress was sustained.

CRIMINAL *(Continued)*

State v. Schroeder

SC90738
January 11, 2011

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

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

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

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

State v. Loyd

WD71692
December 21, 2010

Defendant convicted of driving while intoxicated and driving while revoked. Defendant argues that the trial court erred in overruling his motion to suppress because LEO did not have reasonable suspicion or probable cause for the traffic stop. Defendant concedes appellate review is for plain error in that he failed to preserve his claim at trial through

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CRIMINAL *(Continued)*

appropriate objections. Rule 30.20 authorizes an appellate court to review, in their discretion, "plain errors effecting substantial rights ... when the court finds that manifest injustice or miscarriage of justice has resulted therefrom."

During the suppression hearing, the state argued that defendant had committed three different traffic violations. First, the state alleged that defendant failed to signal when turning onto a public thoroughfare from a private parking lot. The appellate court first observed that LEO admitted he was not in a position to see either the front or rear right hand turn signal of defendant's car either before or during the car's turn. Rather, LEO assumed that defendant had not used his signal solely on the basis that he believed that the signal would not have automatically turned off by the time he could see the right turn signal light. The court observed that such belief "is based solely on the assumption that Loyd was using a turn signal with an automatic shut off that the automatic shut off would not have engaged by the time Loyd finished the turn so the office could see the rear turn signal and that Loyd did not override the automatic shut off and turn the signal off at some point during the turn." The appellate court also observed that the state had not charged defendant with the crime of failing to signal and that, from the dash cam video, it was clear that there was no evidence to support such a charge. Finally, the court noted that even if there was evidence to support defendant's failure to signal, neither state law (Section 302.019) nor the City's ordinance (KCMO Section 70-454) were applicable in that they only applied to motorists on a "roadway." A private parking lot is not within the statutory definition of roadway.

CRIMINAL *(Continued)*

The Western District acknowledged its opinion differed from that in the Southern District Case of *State v. Moore*, 271 S.W.3d 641 (Mo. App. S.D. 2008).

The state also alleged that the stop was lawful in that the defendant failed to turn into the nearest turn lane when completing his turn. The court first observed that LEO testified at the suppression hearing that he was unaware of this alleged traffic violation until after he had reviewed the dash cam video of the incident which was after LEO had detained and arrested defendant. Since this information was not in LEO's possession prior to the arrest, it could not provide the predicate basis upon which to justify the arrest. In addition, the court noted that the state referenced no statute or ordinance which made defendant's actions in turning into the far lane rather than the lane closest to the intersection, a criminal violation.

Finally, the state alleged that the stop was justified because defendant's vehicle's tires touched the center line prior to the stop. During the suppression hearing, LEO testified that prior to the stop, he observed defendant's car driving "with its right wheels on the center line as it went around the corner." The dash cam video confirms that defendant's tires touched, but did not cross the white stripes dividing the lanes. All defendant did was drive with his tires touching the center line which, alone, is an insufficient basis to conduct the traffic stop.

In conclusion, the Western District held that the trial court plainly erred in failing to grant defendant's motion to suppress. The judgment of conviction was reversed and the case remanded for further proceedings.

Lawyer Assistance Strike Force

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

MACDL ListServe

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

Missouri's Drug Laws May Need to Change

by Timothy Hogan
St. Louis, MO

Developments in technologies often spur innovation. Recent technological developments in how we count money and how we do chemical analyses need to spur innovation in Missouri's laws governing possession, sale and distribution of controlled substances. Missouri's laws make it a crime of varying degrees to possess, distribute, and sell controlled substances. However, many, many Missouri citizens apparently commit controlled substance crimes nearly every day.

A recent study by the University of Massachusetts and Dartmouth College shows that over 90% of US currency is contaminated with cocaine.

http://www.msnbc.msn.com/id/21134540/vp/32446512

http://news.nationalgeographic.com/news/2009/08/090816-cocaine-money.html

http://www.nydailynews.com/money/2009/08/17/2009-08-17_new_study_finds_that_90_of_us_currency_has_cocaine_residue_on_it.html

The study supplants a prior study by the US Comptroller of the Currency which had fixed the percentage in the high 70's. To the degree which one may be aware of the contamination of the currency by drugs, the contaminated currency may be the nexus of crimes by ordinary Missourians carrying out their ordinary daily lives. As we strive to make our "daily bread," more and more of the US money supply is contaminated with measurable amounts of cocaine which under Missouri law are punishable with fines and/or imprisonment. How would this be so?

Let's say one gives their children cocaine contaminated dollars for lunch money at school or even just before they get on the school bus. Have they committed a Class A felony?

A person commits the offense of distribution of a controlled substance near schools if such person violates section 195.211 by unlawfully distributing or delivering any controlled substance to a person in or on, or within two thousand feet of, the real property comprising a public or private elementary or secondary school, public vocational school, or a public or private community college, college or university or on any school bus. *Section 195.211.2 RSMo*.

Distribution of a controlled substance near schools is a class A felony. Punishment for a class A felony is a minimum of 10 years imprisonment up to 30 years or life imprisonment. *Sections 195.211.2; 558.011.1(1) RSMo*.

Those gifts of contaminated cash at holidays, birthdays and other celebrations could be a problem, too! The "barter, exchange, or gift, or offer therefor," of the same contaminated cash exposes one to prosecution for sale of a controlled substance, a class B felony with punishment of a minimum of 5 and up to 15 (or more, depending upon the location of your home, the age of the recipients and any criminal history!) years in prison. *Sections 195.010(38); 195.211.3; 558.011.1 (2) RSMo*.

To "Deliver" or the "delivery" of cash contaminated by a controlled substance under Missouri law is "the actual, constructive, or attempted transfer from one person to another of drug paraphernalia or of a controlled substance, or an imitation controlled

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substance, whether or not there is an agency relationship, and includes a sale;" delivery is also a class B felony, the same as a sale. *Section 195.010(8); 195.211.3; 558.011.1(2) RSMo*.

The crime of possession of a controlled substance occurs when one knowingly and intentionally possesses any (or we assert, cash contaminated by any) quantity of any controlled substance, knowing of its presence and illegal nature. *State v. Smith*, 849 SW2d 677, 679 (Mo. App. E.D. 1993); *State v. Spraggins*, 839 SW2d 599, 603 (Mo. App. E. D. 1992).

Possession of a controlled substance is a class C felony, punishable by imprisonment of up to 7 years. Sections 195.202.2; 558.011.1(3) RSMo.

Possession of cocaine contaminated cash is a crime and occurs when "a person, with the knowledge of the presence and nature of a substance, has actual or constructive possession of the substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it. Possession may also be sole or joint. If one person alone has possession of a substance possession is sole. If two or more persons share possession of a substance, possession is joint." *Section 195.010(34) RSMo*.

How would this be so?

"It is unlawful for any person to manufacture, possess, have under his control, *** any narcotic drug, except as authorized by law ... a modicum of an illegal drug is sufficient to bring the defendant within the purview of the statute." *State v. Young*, 427 SW2d 510, 512 (Mo. 1963).

There has been much litigation in Missouri on the issue of the import of the amount of drug found in any given situation where a crime has been charged but, courts continue to favorably cite this part of the decision in *Young, supra*. Some courts have looked to the decision where it noted that "so small a quantity of a narcotic might be present as to telltale or indicate only that thee had been a prior possession of a narcotic but which could not be said to be reasonably to constitute the object of possession." *Id.*; *State v. Baker*, 912 SW2d 541, 544 (Mo. App. W. D. 1996).

The current state of technology has allowed miniscule amounts of drugs, narcotics or controlled substances in amounts previously too small to test or detect to be used now to find the presence of such on currencies in the US and abroad. Developments in gas chromatography-mass spectrometers now allow for testing of amounts of cocaine and other drugs or controlled substances as fine as four grains of sand on a dollar.

http://news.nationalgeographic.com/news/2009/08/090816-cocaine-money.html

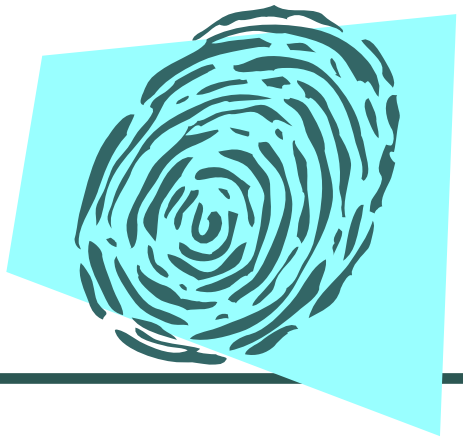
http://www.nydailynews.com/money/2009/08/17/2009-08-17_new_study_finds_that_90_of_us_currency_has_cocaine_residue_on_it.html

http://en.wikipedia.org/wiki/Gas_chromatography-mass_spectrometry

http://www.youtube.com/watch?v=08YWhLTjlfo

If the presence of cocaine in trace amounts is so ubiquitous that nearly every member of the Missouri public could be said to know of such presence, even in trace amounts, one may find themselves subject to arrest, prosecution and conviction for a felony. Some Missouri courts have found trace amounts of cocaine sufficient for sustaining a conviction of the possession of such controlled substance where the state proved directly or indirectly that the defendant knew or was aware of the presence of the drug and its illegal nature. *State v. Smith*, 808 SW2d 24, 26 (Mo. App. E. D. 1991).(*But see, State v. James Lee Kopp*, SW3d SD29987, decided September 17, 2010, *slip opinion*, p.12 (Mo. App. S.D. 2010)for the most recent analysis of case law and a reversal and discharge of the defendant).

If the mere knowing possession of US currency which is contaminated with residue of cocaine may form the basis for a criminal offense where such knowing possession is in the ordinary course of an ordinary law abiding citizen's life, the drug laws in Missouri may be in need of immediate change.



Identification Instructions in Missouri Criminal Cases

by Timothy Hogan; St. Louis, MO

A recurring issue in some criminal cases may mandate a change in the approved instructions given in criminal cases where the identity of the offender is the chief issue and there is third party testimony as to an out-of-court identification made by a complaining witness. The Missouri Supreme Court addressed the issue to the contrary in *State v. Quinn*, 584 SW2d 599, 604-5 (Mo. banc 1980). (*But see*, Quinn, supra., at 606, Seiler, J. dissenting).

In criminal cases where a third party witness to an out-of-court identification by a complaining witness is allowed to testify to the fact of the identification, Missouri's Constitution Article I, Section 18(a) and what is commonly known as the "Confrontation Clause" of the Sixth Amendment to the US Constitution may trump such a prohibition against a not in MAI criminal instruction on the issue of identification.

The issue of such third party identification testimony came to the forefront in the case of *State v. DeGraffenreid*, 477 SW2d 57 (Mo. banc 1972). In *DeGraffenreid*, *supra*. a bright line prohibition against such third party testimony was established and the violation of such was reversible error.

> "We therefore hold that the admission into evidence of the testimony of Officer Smith concerning the extrajudicial identification of defendant was, on the record before us, error."
>
> *Id.*, at 64.

Over time, the rule articulated in *DeGraffenreid* has been undermined by a series of decisions which make much of the assertion that the evidence of the guilt of the defendant was strong or very strong and that any such error as may have been caused by such improper evidence was harmless error. In nearly all of these cases, appellate counsel did not otherwise challenge the sufficiency of the evidence and left this door open to the reviewing courts. Also, some of these cases prompted strong concurring and dissenting opinions which argued for a stricter standard of what constitutes "harmless error" under Missouri law. (*See, State v. Cook*, 628 SW 2d 657, 661 (Mo. banc 1982), Seiler, J., concurring. *See also*, *Id*., at 665, Donnelly, C.J., dissenting).

It is also curious to note that certain lower appellate court judges so disliked the decision in *DeGraffenreid*, *supra*. that some appellate courts have taken the extraordinary step of simply declaring the actual holding in *DeGraffenreid* "is no longer to be followed" and making the claim that mere cross-examination of the testifying witnesses is sufficient to remove the taint of hearsay from the third party testimony as to the out of court identification. *State v. Kidd*, 990 Sw2d 175, 180 (Mo. App. W.D. 1999); Calvin v. State, 768 SW2d 155, 158 (Mo. App. E.D. 1989).

Eventually, a case made its way to the Missouri Supreme Court where the Court made an attempt to overrule *DeGraffenreid*, *supra*.

In *State v. Harris*, the Supreme Court held that where there was vigorous cross examination of the third party witness, and where a curative instruction was declined, it was not reversible error to allow a third party witness to testify to the out-of-court identification of the defendant as the person who had committed the offense charged.

> "Defense counsel in this case conducted vigorous cross examination of both the eyewitness and the policeman. He chose *not* (my emphasis) to have the judge issue a curative instruction with regard to the evidence in dispute. Thus we determine it was not error to have allowed the challenged testimony but caution that this type of evidence, while corroborative, must stand the test of cumulative evidence, accordingly the extent of such testimony and the number of such witnesses

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should be carefully confined." *Id*., at 885.

In *DeGraffenreid, supra*., defense counsel cross-examined vigorously but declined a curative instruction. *What is a curative instruction?*

A curative instruction in such a case is one where the issue of the identity of the defendant as the perpetrator of the offense is in dispute. In any case where the prosecutor has put on a witness, usually a police officer, to bolster through hearsay statements the identification of the defendant by the complaining witness, you are entitled to either a mistrial or a curative instruction on the issue of the identity of the person who had actually committed the offense charged. But, what does such a curative instruction look like? In the *Harris* case, *supra*. the Court decided the proffered testimony was not strictly hearsay based upon precedents from the US 9th Circuit Court of Appeals. *Harris, supra*. at 884-5.

When such an issue is before any District Court in the 9th Circuit, the following instruction is mandatory where the trial court declines to allow expert testimony on the deficiencies of eyewitness testimony:

Ninth Circuit Model Criminal Jury Instructions

4.11 EYEWITNESS IDENTIFICATION

You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses.

In addition to those factors, in evaluating eyewitness identification testimony, you may also consider:

(1) the capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation, including lighting and distance;

(2) whether the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness;

(3) any inconsistent identifications made by the eyewitness;

(4) the witness's familiarity with the subject identified;

(5) the strength of earlier and later identifications;

(6) lapses of time between the event and the identification[s]; and

(7) the totality of circumstances surrounding the eyewitness's identification.

The Ninth Circuit has approved the giving of a comprehensive eyewitness jury instruction where the district court has determined that proffered expert witness testimony regarding eyewitness identification should be excluded. *See, e.g., United States v. Hicks*, 103 F.3d 837, 847 (9th Cir.1996) ("The district court may exercise its discretion to exclude expert testimony if it finds that . . . the trier of fact . . . [would] be better served through a . . . comprehensive jury instruction."); *United States v. Rincon*, 28 F.3d 921, 925-26 (9th Cir.1994).

> It is most important to point out here that as Judge Welliver pointed out concurring;
>
> "I concur in the result. I do not believe that the voluntary consideration of and attempted overruling of *State v. DeGraffenreid*, 477 SW2d 57 (Mo. banc 1972) is necessary for the disposition of this case."
>
> *State v. Harris, supra*. at 885.

So, in cases which you may have where a prosecutor puts on evidence which otherwise is inadmissible under *State v. DeGraffenreid*, 477 SW2d 57 (Mo. banc 1972), you are entitled to either a mistrial or a curative instruction on the issue of identification such as used in the Ninth Circuit Court of Appeals.

Finally, in cases where the prosecutor offers the third party hearsay and where expert testimony on the issue of identification is offered and refused by the trial court, I assert such an instruction is mandatory else the Defendant's rights to confront witnesses as against him under Article 1, Section 18(a) of the Missouri Constitution and the Sixth Amendment to the US Constitution will be irreparably harmed. *State v. DeGraffenreid*, 477 SW2d 57, 64 (Mo. banc 1972).

Post Conviction News from 2010

by Elizabeth Unger Carlyle © 2011

Here is the wisdom I've gleaned from successful post-conviction and state habeas corpus cases decided in 2010. Cases without S.W.3d cites are not yet final. Missouri Supreme Court cases are listed at the beginning of each section.

Good News

Cases where post-conviction or habeas corpus relief was granted, and why.

Where the state attempts to prosecute for conduct that occurs in the sole jurisdiction of the federal court, this is a jurisdictional defect warranting habeas corpus relief. *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695 (Mo. banc 2010). The conduct at issue was burglary of a U.S. Post Office.

To render effective assistance of counsel, absent a strategic justification for failing to do so, trial counsel should present available psychological evidence at the sentencing phase of a bifurcated non-capital trial. *Vaca v. State*, 313 S.W.3d 331 (Mo. banc 2010) (Remanded for new sentencing phase).

Where newly discovered *Brady* violations were prejudicial to the petitioner under the *Brady* standard, he was entitled to habeas corpus relief. *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. banc 2010). (Case remanded for new trial.)

Where the oral pronouncement of sentence does not indicate that it is consecutive, the sentence is concurrent. Habeas relief is available because the consecutive sentence exceeded the court's authority. *State ex rel. Zinna v. Steele*, 301 S.W.3d 510 (Mo. banc 2010).

Where, after *Atkins v. Virginia*, a death-sentenced defendant demonstrates that he is mentally retarded, he is entitled to mandamus and commutation to a life sentence. *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523 (Mo. banc 2010).

If a PCR motion is timely filed but in the wrong county, that county must transfer it to the correct county, and it will be deemed timely. *Sabatucci v. State*, 326 S.W.3d 540 (Mo. App. S.D. 2010).

A waiver of the right to file post-conviction motions will not be lightly inferred. In *Chaney v. State*, 323 S.W.3d 836 (Mo. App. E.D. 2010), the state attempted to have a defendant waive his post-conviction rights after the court had already accepted his plea and sentenced him. The record showed that the waiver was not discussed prior to that time. The waiver was not enforced, but relief was denied.

When the court refers to sentencing guidelines for the wrong grade of offense, and defense counsel doesn't object, the defendant is entitled to resentencing. In *Head v. State*, 322 S.W.3d 151 (Mo. App. E.D. 2010), the sentencing court quoted a guideline range for a Class A felony when the offense was actually a Class B felony. Defense counsel agreed that the guidelines were correctly cited. This resulted in a sentence "passed on the basis of a materially false foundation" which "lacks due process of law."

Probation can't be revoked if proceedings don't begin until the probation has expired. *Starry v. State*, 318 S.W.3d 780 (Mo. App. W.D. 2010).

Circuit judges can't let people opt out of jury service by allowing them to pay $50 and do six hours of community service. Where neither trial nor appellate counsel were aware of this practice at the time of his trial or appeal, the defendant was entitled to relief. *Preston v. State*, 325 S.W.3d 420 (Mo. App. E.D. 2010).

Where the defendant was told that he would get jail time credit for the time he spent on bond and entered his plea of guilty based on that understanding, he was entitled to withdraw his plea. (Missouri law forecloses such an agreement.) *Johnson v. State*, 318 S.W.3d 313 (Mo. App. E.D. 2010)

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When a defendant is sentenced to a term of imprisonment, the sentencing court cannot order restitution as a condition of parole. *Zarhouni v. State*, 313 S.W.3d 713 (Mo. App. W.D. 2010).

The statute prohibiting sex offenders from residing within 1000 feet of a school is unconstitutional because it imposes additional punishment on offenders convicted before its effective date. *Brand v. State*, 313 S.W.3d 226 (Mo. App. E.D. 2010), citing F.R. v. St. Charles County Sheriff's Department, 301 S.W.3d 56 (Mo. banc 2010).

Trial counsel must advise clients of plea offers from the state during the time available for accepting them. *Frye v. State*, 311 S.W.3d 350 (Mo. App. W.D. 2010) (Plea vacated, reversed and remanded).

Where the defendant could not have known of a subsequent Missouri Supreme Court case at the time of his appeal and post-conviction proceeding, he was entitled to habeas corpus relief. *State ex rel. Koster v. Jackson*, 301 S.W.3d 586 (Mo. App. W.D. 2010) (The issue was whether the defendant's previous municipal court SIS DWI counted as a prior offense; the subsequent case was *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008).

Old News

In case you need a recent cite to something judges should all know …

Post-conviction courts still haven't figured out that they are supposed to make findings of fact and conclusions of law on PCR cases. *Hollingshead v. State*, 324 S.W.3d 779 (Mo. App. W.D. 2010); *Merrick v. State*, 324 S.W.3d 469 (Mo. App. S.D. 2010); *Bott v. State*, 307 S.W.3d 223 (Mo. App. S.D. 2010) (findings required even though the defendant had completed his incarceration because his conviction still stood); *Rebstock v. State*, 315 S.W.3d 371 (Mo. App. S.D. 2010); *Howard v. State*, 302 S.W.3d 739 (Mo. App. E.D. 2010) (Along the way, the court rejected a claim that Howard was abandoned by his PCR counsel who filed a Rule 29.15(e) statement instead of an amended motion.)

And they still haven't figured out when they are supposed to grant evidentiary hearings in PCR cases. *Legendre v. State*, 320 S.W.3d 716 (Mo. App. E.D. 2010) (Hearing required on trial counsel's alleged misrepresentations to the defendant); *Hickey v. State*, 2010 WL 2663024 (Mo. App. E.D. 2010) (hearing required on allegation that defense counsel improperly induced the defendant to waive his right to testify at trial); *Lane v. State*, 317 S.W.3d 125 (Mo. App. S.D. 2010) (Hearing required on ineffective assistance of counsel allegation concerning failure to advise the defendant that his guilty plea would waive his right to complain that he was not tried within 180 days of his request under the Uniform Mandatory Disposition of Detainers Law).

Bad News

These cases may be helpful in avoiding PCR pitfalls.

If an issue was not raised in the post-conviction motion, it cannot be reviewed, even for plain error, on appeal from the denial of relief. The express language of Sup. Ct. R. 24.035 trumps the "plain error" language in Sup. Ct. R. 84.13. *Hoskins v. State*, 2010 WL 5123813 (Mo. banc 2010); *Goodwin v. State*, 313 S.W.3d 161 (Mo. banc 2010).

The 180 period for filing a motion if there is no appeal begins to run when the defendant is initially delivered to DOC, rather than the date he is returned to DOC after revocation of his 120 day shock probation. *Bond v. State*, 326 S.W.3d 828 (Mo. App. E.D. 2010).

The time periods for post-conviction motions cannot be waived by the state's failure to object. *Swofford v. State*, 323 S.W.3d 60 (Mo. App. E.D. 2010).

Post-conviction counsel must make certain that the record on post-conviction appeal includes the relevant documents from the direct appeal (in this case the direct appeal legal file and transcript) to avoid dismissal. *Walters v. State*, 306 S.W.3d 208 (Mo. App. W.D. 2010).

Heroes

Congratulations to the successful attorneys in the cases discussed in this article:

John Cozean
Kent Denzel
Frederick Duchardt
Kent Gipson
Mark Grothoff
Loyce Hamilton
Susan Hogan
Alexandra Johnson
Craig Johnston
Margaret Johnston
Nancy McKerrow
Alexa Pearson
Melinda Pendergraph
Emmett Queener
Gwenda Robinson
Scott Thompson
S. Kate Webber

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MSPD Update for Missouri Association of Criminal Defense Lawyers Newsletter

Changes in leadership, along with ongoing caseload litigation, have been the center of focus at the Missouri State Public Defender System.

Director Marty Robinson retired at the end of February. He began his career with MSPD in 1988 as an assistant public defender in the Rolla office. He was promoted to district defender in Rolla in 1989 and then became the MSPD Interim Director in March 1994. He was sworn in as the Director six months later and served as MSPD Director for 16 years.

Starting March 1, Cat Kelly has been chosen to take over the reins.

"Cat brings energy. She is a great communicator," Robinson said. "She leads by example. She has vision. She can see things in the future and work toward them."

She was sworn in at 3p.m. on Feb. 28 at the Missouri Supreme Court.

Congratulations also to MSPD's new district defenders, Tom Crocco and Kevin Babcock. They both assumed their new roles on Jan. 1, and will lead the Troy and Ava offices, respectively. The Troy and Ava offices are two of the eight offices currently placed on limited availability because of excessive caseloads requiring the offices to put clients on a waiting list for services.

MSPD has also announced that Joel Elmer, the district defender in the Kansas City trial office, will be the new Division Director. He has been the district defender in the Kansas City trial office for more than 20 years, is a member of the Missouri Bar's Board of Governors and serves as a representative defender on the Sentencing Advisory Commission. As Division Director, he will supervise about 10 trial offices in the western part of Missouri.

MSPD – along with the rest of the criminal justice system -- has also been waiting on pins and needles for some movement in the ongoing caseload litigation in the Missouri Supreme Court. After a wait of three months, the Special Master filed his report on February 9, but surprisingly, the report did not make many actual findings – other than that MSPD did follow its own regulations in certifying the Springfield office as overloaded and placing it on limited availability. Mostly it reviewed the issues facing the Supreme Court and discussed the evidence presented at the November hearing, without offering any opinions on reasonableness or lack thereof of the caseload standards adopted by the Public Defender Commission. At any rate, the case can now move ahead with a briefing schedule.

Missouri's 96th General Assembly Legislative Update

by Brian Bernskoetter, MACDL Staff

The 96th General Assembly of the Missouri Legislature is well under way and, as always, it will be an interesting session to watch. This session will be marked by two very different circumstances. The first is the huge revenue shortfall the state is experiencing and the second is the huge number of new legislators.

The projected budget shortfall for fiscal year 2012 is projected to be around $500 million. This amount is small compared to other states, but is following a couple of years of overall revenue shrinkage and compounded by the fact that federal aid to states has mostly run out. This shortfall affects all aspects of legislation and is on the forefront of legislators' minds as they consider any new or expanded government role.

This session also marks the second largest freshman class of legislators since term limits were put into place. There are 79 new freshman legislators out of 163 in the Missouri House of Representatives. The Senate has 34 seats and of those 12 are new freshman Senators. This influx of new members has its own inherent challenges and makes the process of crafting reasoned and thoughtful legislation more difficult in the light of the fact that many have little to no legislative experience to draw from.

There are a few bills filed that are of particular interest to the criminal defense community that are highlighted in detail below.

The first bill would allow all restitutions to be paid through the prosecutor's office and for the prosecutors to collect an administrative handling fee for this service. This bill would also allow restitution to be charged for any offense and make the full payment of all restitution owed a condition of an individual's parole. MACDL has taken a position in opposition to this bill.

Two bills have been filled to make changes to the Missouri Non-Partisan Court Plan. House Joint Resolution 18 and Senate Joint Resolution 17 go about changing the court plan differently but the net effect of both is to give the Governor and the Legislature more control of the selection of judges. MACDL has a long-standing policy of opposing bills that inject more politics into the selection of judges under the Missouri Non-Partisan Court Plan.

House Bill 159 is a bill that would encourage and expand the use of electronic monitoring in lieu of jail time and save the counties money on the cost of incarceration. MACDL supports the former concept and has drafted a substitute for the bill which was offered by the sponsor at the hearing on HB 159.

The list of bills below is a snapshot of all the bills that MACDL is tracking and the Board's position on these bills if they took one. Some of the bills listed below were filed after the last Board meeting in late January so no official position has been taken.

House Bill 51 – OPPOSE

Authorizes a $2 surcharge to be collected in all criminal cases involving a state traffic law violation to be disbursed equally for law enforcement and fire safety training.

House Bill 65

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.

House Bill 66 – SUPPORT

Allows the court to suspend imposition of an adult sentence in cases where there is dual jurisdiction and the offender has been transferred from juvenile court to a court of general jurisdiction.

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Legislative Update *(from page 17)*

House Bill 75 – SUPPORT

Authorizes expungement of certain criminal records including convictions for nonviolent felonies and misdemeanor, municipal, or traffic offenses.

House Bill 111

Specifies that the public interest exception to the mootness doctrine will apply to an appeal of a full order of protection which has expired but subjects the person to significant collateral consequences.

House Bill 159 – SUPPORT

Allows for house arrest with electronic monitoring or shackling for certain nonviolent offenders and requires the state to provide reimbursement for the total cost of house arrest in certain cases.

House Bill 164

Changes the age when the juvenile court will have jurisdiction over a child involving a state or local traffic violation from a child up to 15 1/2 years of age to a child up to 15 years of age.

House Bill 178 – SUPPORT

Authorizes the expungement of certain criminal records.

House Bill 199

Specifies that a prior or persistent offender of an intoxication-related offense must perform a specified minimum number of hours of community service as an alternative to imprisonment.

House Bill 218

Allows a senior judge or senior commissioner to elect to forgo his or her regular salary and receive only the minimum wage during times of budget stress.

House Bill 247

Creates the crime of false identification to a law enforcement officer.

House Bill 253

Authorizes a prosecuting attorney, upon agreement with an accused or defendant, to divert certain cases to a prosecution diversion program and changes the penalties for various first offense misdemeanors.

House Bill 254 – OPPOSE

Requires restitution to be paid through the office of the prosecuting or circuit attorney and authorizes certain administrative costs to be assessed and restitution to be taken from an inmate's account.

House Bill 255

Establishes the Private Attorney Retention Act which specifies the procedures state agencies or agents must follow when retaining a lawyer or law firm to perform legal services under certain conditions.

House Bill 257 – OPPOSE

Repeals the provisions regarding the Sentencing Advisory Commission.

House Bill 395

Expands the crime of operating a motorized vessel with excessive blood alcohol content when a person operates a motorized vessel on any navigable waterway with a blood alcohol content of .08 of 1% or more.

House Bill 396

Removes the provision specifying that the $4 surcharge assessed in certain criminal cases will not be collected from any person who has pled guilty and paid a fine through the central violations bureau.

House Bill 413

Expands the crime of making a false declaration with the purpose to mislead a public servant in the performance of his or her duty.

House Bill 516

Prohibits any state agent from seeking the death penalty on the basis of race and permits the use of statistical evidence in certain criminal and post-conviction relief proceedings in death penalty case.

House Bill 517

Changes the law regarding clemency in death penalty cases.

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Legislative Update *(from page 18)*

House Bill 589

Increases the penalty for making a false report if the crime which is falsely reported was a felony.

House Bill 623

Changes the penalty for persons with prior DWI convictions who cause an accident in which another person is killed and increases the insurance liability limits for persons with prior DWI convictions.

House Bill 634

Authorizes the court to impose prosecutorial and investigative costs on persons convicted of misdemeanors or felonies or whose probation or parole is revoked.

House Bill 650

Requires the board of probation and parole to make periodic reviews of certain convicted offenders serving sentences of more than fifteen years or life without parole.

House Bill 663

Revises law regarding a $2 surcharge on criminal cases by making it mandatory and allows the money collected to be used for information sharing, as well as biometric verification systems.

House Bill 692

Revises the law concerning the Supreme Court's review of death sentences.

House Joint Resolution 18

Proposes a constitutional amendment changing the composition of nonpartisan judicial commissions and increases the number of candidates it nominates to the Governor for certain judicial vacancies.

Senate Bill 89 – OPPOSE

Abolishes the state public defender system and requires circuit courts to provide legal defense for indigents.

Senate Bill 225

Provides for nonpartisan elections of judicial candidates and forbids certain judges and candidates from engaging in political activities.

Senate Bill 227

Makes the results of certain types of field tests for controlled substances admissible as evidence in certain preliminary hearings and applications for arrest warrants.

Senate Bill 338

Modifies requirements of the Supreme Court to accumulate and review certain types of cases.

Senate Bill 349

Abolishes the sentencing advisory commission.

Senate Joint Resolution 17

Modifies the selection process for certain judgeships and the composition of judicial nominating commissions.

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
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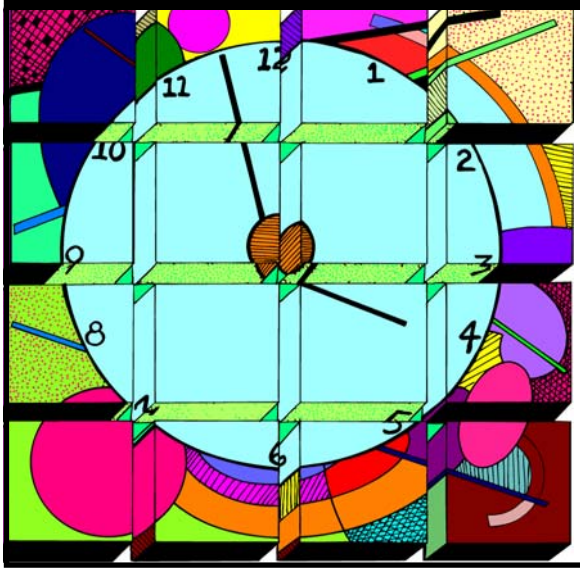
Case Law Update

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

MACDL Meeting Schedule



MACDL Annual Meeting & Spring CLE
April 15 - 16, 2011
Chateau on the Lake; Branson, MO

Bernard Edelman DWI Conference
July 22 - 23, 2011
Tan-Tar-A, Lake Ozark; MO

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