MACDL
Missouri Association of Criminal Defense Lawyers

Spring, 2013

# MACDL 2013 Spring CLE

## *Protecting Our Clients From Prosecution Tactics: What We Should Do and What They Shouldn`t*

## April 12-13, 2013

**Ameristar Hotel & Casino ♦ St. Charles, Missouri**

The Board of Directors of the Missouri Association of Criminal Defense Lawyers (MACDL) is pleased to present the 2013 Spring CLE - *Protecting Our Clients From Prosecution Tactics: What We Should Do and What They Shouldn`t*, to be held April 12-13, 2013, at Ameristar Hotel & Casino, St. Charles, Missouri.

The program will include presentations by:

| | |
|---|---|
| Mark Arnold | Kimberly Benjamin |
| Kevin Curran | Brian Gaddy |
| Ameer Gado | Daniel Harvath |
| George Jones | John Lynch |
| Michelle Monahan | Laura O'Sullivan |
| Melinda Pendergraph | Rodney Uphoff |

This program is conveniently located, offering you the opportunity to participate in not only the CLE programming, but also extracurricular activities and entertainment during your stay.

The program currently will provide 10.4 hours of Missouri Continuing Legal Education, including 2.0 hour of ethics.

Reservations for hotel rooms may be made by calling Ameristar at 1-636-940-4301.

*Make plans today to attend!*

*The MACDL Spring CLE Conference has been approved for 10.4 Hours of Missouri CLE, including 2.0 Hours of Ethics.*

**Hot Deal!**

**Register for Conference and become a 2013 MACDL Member for the low rate of $475.00**

**New Members Only**

MACDL
Missouri Association of Criminal Defense Lawyers

## 2012-2013 Officers & Board

### Officers

**President**
Jeff Eastman ⬩ *Gladstone, MO*

**Vice President**
Kim Benjamin ⬩ *Belton, MO*

**Secretary**
Kevin Curran ⬩ *St. Louis, MO*

**Treasurer**
Carl Ward ⬩ *St. Louis, MO*

**Past President**
Brian Gaddy ⬩ *Kansas City, MO*

### Board Members

Robert Childress ⬩ *Springfield, MO*
Don Cooley ⬩ *Springfield, MO*
Paul D'Agrosa ⬩ *St. Louis, MO*
Adam Dowling ⬩ *Columbia, MO*
William Fleischaker ⬩ *Joplin, MO*
Sarah Jane Foreman ⬩ *St. Louis, MO*
Herman Guetersloh ⬩ *Rolla, MO*
Carol Hutcheson ⬩ *Springfield, MO*
Marilyn Keller ⬩ *Kansas City, MO*
Cathy Kelly ⬩ *Jefferson City, MO*
Matthew D. Lowe ⬩ *Clinton, MO*
Dana Martin ⬩ *Osage Beach, MO*
Steve Meier ⬩ *Nixa, MO*
Michelle Monahan ⬩ *St. Louis, MO*
Talmage Newton IV ⬩ *St. Louis, MO*
John Simon ⬩ *St. Louis, MO*

### Executive Director

Randy J. Scherr ⬩ *Jefferson City*

### Lifetime Members

Dan Dodson
Carol Hutcheson
Travis Noble
Joseph S. Passanise

# Spring CLE Agenda

## Friday, April 12, 2013

**8:30 a.m. - 9:00 a.m.** — **Registration**

**9:00 a.m. - 9:50 a.m.** — ***"The Physical Evidence Dilemma: What Are a Criminal Defense Attorney's Ethical Obligations"***
Presented by Rodney Uphoff; Professor, MU School of Law; Columbia, MO

**9:50 a.m. - 10:00 a.m.** — **Break**

**10:00 a.m. - 10:50 a.m.** — ***"Ethically Protecting Clients From Themselves: Is Your Client Lying?"***
Presented by Michelle Monahan; Criminal Defense Trial Counsel, The Law Offices of Michelle L. Monahan, LLC; St. Louis, MO

**10:50 a.m. - 11:35 a.m.** — ***"Achievements in Aggressive Discovery Practice: The George Allen Case"***
Presented by Ameer Gado and Daniel Harvath, Counsel to Mr. Allen; Bryan Cave, LLP; St. Louis, MO

**11:35 a.m. - 1:00 p.m.** — **Awards Luncheon**

**1:00 p.m. - 2:00 p.m.** — ***"Addressing Prosecutorial Misconduct: Protecting Your Client from Unethical Prosecutions"***
Presented by Laura O'Sullivan, Legal Director; Midwest Innocence Project; Kansas City, MO

**2:00 p.m. - 2:10 p.m.** — **Break**

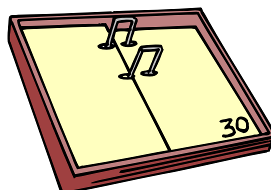
**2:10 p.m. - 3:40 p.m.** — ***"When Prosecutors Cause Reversals: Case Studies"***
Presented by Melinda Pendergraph, Training Division Director; MSPD; Columbia, MO and Kevin Curran, First Assistant Federal PD; Eastern District of MO; St. Louis, MO

**3:40 p.m. - 4:40 p.p.** — ***"Interrogating the Interrogators: Confronting Law Enforcement Confession Tactics"***
Presented by John Lynch, Criminal Defense Lawyer; The Law Offices of John M. Lynch, LLC; Clayton, MO

**4:45 p.m. - 6:00 p.m.** — **Reception**

**6:00 p.m.** — **Dinner on Your Own**

**"Spring CLE Agenda" >p3**




# Mark Your Calendars Now!

Bernard Edelman DWI CLE
July 19-20, 2013
Tan-Tar-A; Lake Ozark, MO

# Spring CLE Agenda *(from pg 2)*

## Saturday, April 13, 2013

**8:00 a.m. - 9:00 a.m.** **Breakfast**

**8:30 a.m. - 9:00 a.m.** **MACDL Annual Membership Meeting**

**9:00 a.m. - 10:00 a.m.** ***"Case Law Update"***

Presented by Brian Gaddy, Criminal Defense Lawyer; Gaddy Weis, LLC; Adjunct Professor UMKC School of Law; Kansas City, MO

**10:00 a.m. - 10:40 a.m.** ***"The Effects of Prosecutorial Misconduct: The Reginald Clemmons Case"***

Presented by Mark Arnold, Counsel to Mr. Clemmons; Partner, Husch Blackwell LLP; St. Louis, MO

**10:40 a.m. - 11:45 a.m.** ***"Discovering Your Way to a Dismissal: Using Discovery in Complex Sex Abuse Cases to Win for Your Client"***

Presented by Kimberly Benjamin, Trial Lawyer; The Benjamin Law Firm; Belton, MO and George Jones, Trial Lawyer; Lamoni Office; Lamoni, IA

# Spring CLE Registration

## Registration Fees:

- $475 Conference Registration and **First Time** MACDL Membership ($580.00 Value)
- $385 MACDL Member
- $415 Non-MACDL Member
- $225 Public Defenders
- $ 75 Printed Course Materials only

Fee includes access to meetings, vendors, two meals and three break functions.

**Make checks payable to MACDL.**
**NO Refunds after April 2, 2013.**

To make your lodging arrangements, contact:

Ameristar Hotel & Casino
One Ameristar Blvd.
St. Charles, MO
Ph: 1-636-940-4301

Name: ____________________

Firm: ____________________

Address: ____________________

City / State / Zip: ____________________

Phone: ____________________

E-mail: ____________________

Name as it should appear on badge:

____________________

MACDL Accepts VISA. MasterCard, or Discover. If you wish to pay by credit card please provide the following:

Charge Card No: ____________________

Verification Value (last set of digits on back of card) ______

Expiration Date: ____________________

Member News

# Case Law Update

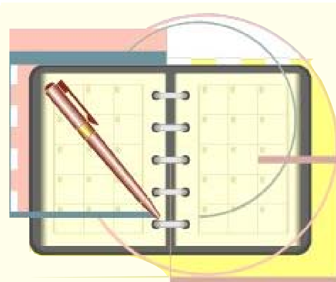
For up-to-date Case Law Updates, please visit the MACDL website's "Newsletter" page and check out the link to Greg Mermelstein's Reports located at the bottom of the page. (http://www.macdl.net/newsletter. aspx)

# 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)



# MACDL Calendar of Events

**MACDL Annual Meeting & Spring CLE**
April 12-13, 2013
Ameristar Hotel & Casino ⬩ St. Charles, MO

**Bernard Edelman DWI CLE Conference**
July 19-20, 2013
Tan-Tar-A ⬩ Osage Beach, MO

**MACDL Fall CLE**
~ TBD ~

# Welcome New MACDL Members

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

John Schleiffarth ⬩ *St. Louis, MO*
Paul McMahon ⬩ *Rolla, MO*
Nathan Kelsaw ⬩ *Rolla, MO*
Michael Palazola ⬩ *St. Louis, MO*
Will Worsham ⬩ *Springfield, MO*
Kristina Starke Olson ⬩ *St. Charles, MO*
Nathan Swanson ⬩ *St. Louis, MO*
Jeffrey Stacey ⬩ *Jefferson City, MO*
Kristin Jones ⬩ *Springfield, MO*
Tania Aldaddah ⬩ *Clayton, MO*
Emily Bauman ⬩ *Independence, MO*
Joshua Fay ⬩ *Brookfield, MO*

# 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 Shostak
Shostak & Shostak, LLC
400 North Kingshighway
St. Charles, MO 63301
Phone: (314) 477-3367
E-mail: shostakgrant@gmail.com

# Missouri Public Defender News

*by Joel Elmer, MSPD Division Director*

As we celebrate the 50th anniversary of Gideon, it's tragically ironic that pending House Bill 215, filed by House Judiciary Chair, Rep. Stanley Cox (Sedalia), would turn back the clock on Missouri's indigent defense system, mirroring the Missouri Association of Prosecuting Attorney's proposal to radically alter indigent defense to the detriment of the indigent accused.

But on the bright side, Senate Bill 414, filed by Senate Judiciary Chair, Sen. Bob Dixon (Springfield), proposes reasonable attempts to solve Public Defender case overload.

Thank you to MACDL for its opposition to HB 215 and to the Missouri Bar's Executive Committee for its opposition to HB 215's bulk bidding out of contracts for representation. Thank you also to those many witnesses who testified at the House Judiciary Committee hearing, including MACDL Board Member, Michelle Monahan.

While unfortunately HB 215 has been voted out of both the House Judiciary and House Rules Committees, as of this writing it so far has not been placed on a House Calendar to go to the House floor for debate.

Meanwhile, SB 414 has been referred to the Senate Judiciary Committee for hearing, but no hearing date has yet been set.

HB 215 would:

- Prohibit Public Defender representation in non-sex class C and D felonies and all misdemeanors, appeals from convictions in those cases, and probation violations. Instead, the Office of Administration would, through bulk contracts, contract out legal services in those cases to the "lowest and best bidder."
- Eliminate the right to appointed counsel, either by MSPD or by contract counsel, in Rule 24.035 and Rule 29.15 post-conviction proceedings, even in death penalty cases.

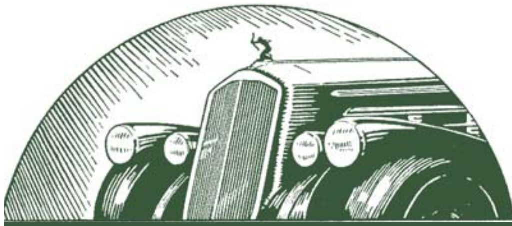
An estimated 61,000 of MSPD's 84,000 cases that we are assigned annually would be contracted. Approximately 230 trial and appellate public defender positions and 94 support staff positions would be eliminated. While that workforce reduction would free up $20 million, an additional $10 million on top of that $20 million would be required to contract those 61,000 cases. This bulk contract system would be similar to the system Missouri used prior to 1989 when Governor Ashcroft eliminated the costly contracting and moved to a far less expensive statewide public defender system.

HB 215 also would:

- Require restitution be paid through office of the prosecuting attorney, allow interest on restitution, and impose various costs to be paid to the prosecutor.
- Allow restitution to be ordered for those found guilty of any offense even if going to prison.
- Require that the boundaries of public defender offices be aligned with those of judicial circuits.
- Prohibit public defenders from representing crime victims or witnesses.
- Nullify MSPD's rule for limiting excessive caseload and require judicial approval before refusing representation.
- Grant a 20% collection fee to the prosecuting attorney for the collection of public defender liens.

On the other hand SB 414, consistent with the Recommendations of the Missouri Bar's Criminal Justice Task Force, which was chaired by former Judge Charles Atwell and also included among others MACDL President, Jeff Eastman, would not mandate any expanded contracting of MSPD's caseload and instead would:

- Limit Public Defender presentation in misdemeanors to those in which the prosecuting attorney has requested a jail sentence.
- Limit Public Defender representation in probation violation cases to where judicially determined to be required by due process.
- Prohibit MSPD from unilaterally refusing to accept cases due to case overload and instead create a judicial process for doing so and for providing other types of caseload relief.
- Establish safeguards in appointment of private counsel.



# DWI Traffic Law Update

*by Jeff Eastman*

## *Brewer v. Director*

SD31433
October 12, 2012
___S.W.3d____ (Mo. App. S.D. 2012)

Federal park ranger observes driver commit several driving transgressions. Driver pulled to the side of the road with park ranger parking behind him. Ranger then engages his emergency equipment and advises driver that he would be detained until a state officer arrives.

Trooper arrives approximately forty-five minutes later, notices indicia of intoxication and eventually arrests driver for driving while intoxicated. Thereafter, driver refuses to submit to a chemical analysis of his breath. Driver served with notice of revocation and judicially challenges the same.

In the collateral criminal proceeding, trial court sustains motion to suppress. Relying upon its ruling in the criminal proceeding, trial court found that any evidence of driver's intoxication could not be considered in the civil proceeding to demonstrate that LEO had reasonable grounds to believe that driver was driving while intoxicated under Section 577.041. Refusal revocation set aside.

On appeal, the Southern District reverses. Reaffirming prior case law, Court holds that the exclusionary rule is inapplicable in a civil license proceeding such that the trial court erred as a matter of law in excluding evidence relating to driver's intoxication. Southern District remands so as to allow director an opportunity to present excluded evidence consistent with appellate court's opinion.

## *Phillips v. Director*

SD 31635
September 19, 2012
____S.W.3d _____ (Mo. App. S.D. 2012)

In this contested refusal proceeding, the trial court found in favor of driver and stated from the bench, "from the evidence, the court does find that there was an arrest; the court does find that there was a refusal. However, the court finds that there was not probable cause for the traffic stop that lead to the accumulation of the evidence or indications, at least, to the officer that there may have been impairment." Shortly thereafter, in its written judgment, the court stated in part, "from the evidence the court finds that there was an arrest and that the test was refused. The court further finds the arresting officer's testimony to be truthful but insufficient to establish reasonable grounds to believe that petitioner was driving a motor vehicle while in an intoxicated condition on the date in question."

The director appealed contending that the trial court misapplied the law in finding that the arresting officer did not have reasonable grounds to believe that driver was driving while intoxicated because there was not probable cause supporting the initial traffic stop. The Southern District agreed and thereafter reversed.

Whether the arresting officer had reasonable grounds for a lawful stop is irrelevant in a civil driver's license proceeding. Here, the trial court expressly found that petitioner had been arrested and that he had refused to submit to a chemical test of his breath leaving only a determination as to whether the officer had reasonable grounds to believe that he was driving while intoxicated. The trial court expressly found that the officer's testimony was credible, the appellate court deferred to that determination. This evidence was found more than sufficient to establish that the officer had reasonable grounds to believe that petitioner was driving while intoxicated. Judgment reversed.

## *Velluto v. Director*

383 S.W.3d 14 (Mo. App. E.D. 2012)

In a trial *de novo* proceeding, the director offered and the trial court received into evidence the Alcohol Influence Report, the arresting officer's report, the results of a chemical analysis of the driver's breath, as well as a video of the arrest. There were no objections.

Driver then testified. he acknowledged having advised the arresting officer that he had been to a restaurant, nightclub and bar, consuming three mixed drinks and one shot at the nightclub. He denied committing the traffic offenses alleged in the director's evidence. Driver agreed that he attempted but did not properly recite the alphabet. He did not recall trying to perform it on the number of occasions alleged and did not know what the video would indicate.

Driver told the officer that he would blow over if given a preliminary breath test because he was a CDL holder and the alcohol is ".4". Driver agreed that the officer advised him that the legal limit was .080%. Driver took

**"DWI Traffic Law Update" >p7**

## DWI Traffic Law Update *(from pg 6)*

the test and afterward said, "I know I failed". The director asked the driver the following question: "After you said 'I failed' [the officer] says to you 'if you know so much about it then you know you were not suppose to be driving, isn't that right,' and your response [was] 'that's right;' do you remember that?" To which driver responded, "Yes". Driver also presented testimony of a field sobriety instructor. The instructor viewed the video and testified that the officer had improperly administered the field sobriety tests. He further testified that driver did not seem "uncertain" on the video nor did his speech appear to be "slow" in any way as alleged in the officer's report.

The trial court found that testimony of driver and the instructor credible and, that driver did not have "uncertain" balance or "slow" speech.

Based on the number of inconsistencies and contradictions in the report as compared to the video, the trial court found the remaining observations of the officer not credible. The results of the field sobriety tests were excluded based upon the instructor's testimony. Then, based on the totality of the evidence, the court found there was not probable cause to arrest driver for driving while intoxicated. There being no basis to request driver to submit to a breath test, the court excluded the results of such test as unwarranted and improper. On appeal, the Eastern District reversed.

In its decision, the Eastern District recognized that it was to give deference to the trial court's credibility determinations. However, probable cause is a legal question which the appellate court reviewed without deference to the trial court's judgment. In the present case, driver acknowledged to the officer that he consumed four alcoholic drinks that evening. This admission was deemed sufficient probable cause for the officer to request the breath test. In addition, the appellate court noted that driver did not properly recite the alphabet test and he could not perform some of the field sobriety tests. The court noted that such tests are offered to show probable cause.

The Eastern District held that driver's admissions at trial that he should not have been driving, had three drinks and a shot and failed the breath analysis test were uncontested admissions supportive of the director's case.

In assessing the facts, the appellate court noted that it must view the facts as they appeared to a prudent, cautious and trained police officer. From the facts presented, the appellate court held that the officer had "legal probable cause" to believe that driver had been driving while intoxicated and thus the trial court had erroneously applied the law. Judgment for driver reversed.

### *Riley v. Director*

378 S.W.3d 432 (Mo. App. W.D. 2012)

Driver appeals trial court's judgment affirming revenue's license sanction claiming the blood test was procured in violation of Section 577.041 in that driver requested but was denied the opportunity to consult with counsel prior to submitting to the chemical test of her blood. The Western District found that driver's BAC test result would have been inadmissible if a proper objection had been made. However, driver did not object to admission and thus the trial court was authorized to consider and rely upon the result received into evidence.

Factually, LEO observed indicia of intoxication and eventually arrested driver for driving while intoxicated. Post arrest, driver complained that her chest hurt. LEO drover her directly to the emergency room. Inside the emergency room, driver told LEO she wanted to contact her attorney. LEO advised that she was not allowed to contact counsel at that time because she was receiving medical treatment. Despite making several requests to speak with counsel, she was never afforded the opportunity.

Post implied consent advisory, driver did not specifically reassert her request for counsel and thereafter acquiesced in the testing with a result in excess of .080%.

In the trial court proceeding, the parties stipulated as to the admission of both the Alcohol Influence Report [containing the results of her BAC testing] as well as the toxicology report containing her BAC result.

The Western District framed the issues as: 1) Was the evidence of driver's BAC obtained in violation of her statutory right to consult with counsel prior to submitting to a BAC test and thus inadmissible? and 2) Even if this evidence was properly excludable, once admitted without objection, may the evidence be considered by the trial court in arriving at its judgment?

In a very detailed analysis of the implied consent law and cases interpreting the same, the Western District recognized that the Supreme Court has placed emphasis on the driver's ability, during the statutorily authorized abatement period, to reach an informed decision to either: 1) refuse to submit to a blood test; or 2) expressly consent to a blood test. If either decision is "uninformed" it is non-consensual. Cases suggesting to the contrary only held so in dictum and in each of those cases  the facts demonstrated that the 20-minute consultation abatement period was complied with or the driver actually had the opportunity to speak with counsel prior to making a decision.

**"DWI Traffic Law Update" >p8**

The court found "the focus of the guidance from our Supreme Court relates to the driver having the opportunity to consult with an attorney to make an informed 'decision' not an informed 'refusal.'"

In the present case, because driver's BAC was not procured in compliance with the foundational requirements of Section 577.020 to 577.041 in that she was denied her statutory right to consult with counsel, it was inadmissible.

However, since driver stipulated to the admission of the results, it may be used for any purpose.

The court recognized that while the parties tended to agree that driver had always argued that the trial court should not be entitled to consider the competency of the BAC evidence, at no point in time *in the record, was there any suggestion that driver ever objected to the admission of this evidence or made a record of any continuing objection to the competency of this evidence or even that driver agreed that the BAC evidence was admissible on a chain of custody grounds, but not for the substantive content thereof.* In summary, the record was silent on the topic of any objection to the admission of evidence of driver's BAC. Despite acknowledging the existence of the off-the-record discussions, a failure to include such discussion on the record precluded appellate review.

As nothing in the record suggested that the trial court found the contents of the Alcohol Influence Report or the toxicology report to be not credible and reliable evidence of driver's BAC at the time she was driving, the director satisfied her burden of proof and therefore the judgment was affirmed.

## *State v. Besendorfer*

372 S.W.3d 914 (Mo. App. W.D. 2012)

Defendant appealed trial court's judgment convicting him of driving while intoxicated arguing the evidence was insufficient to support the conviction. Upon review, the Western District dismisses defendant's appeal as premature despite appellant's request that his claim be reviewed on the merits.

Defendant conceded that contrary to Rule 29.11, the trial court sentenced him although he had not waived his right to move for a new trial and 15 days had not yet elapsed since his finding of guilt. The Western District rejected defendant's argument that in the interest of judicial economy, he should be allowed to waive his right to a new trial on appeal. At the time of his sentencing, 15 days had not elapsed and defendant did not exercise or expressly waive his right to move for a new trial in the trial court proceeding. Finding no authority to hear his case prematurely, his appeal was dismissed.

## *State v. Brightman*

WD74299

October 2, 2012

___S.W.3d ____ (Mo. App. W.D. 2012)

Defendant found guilty after jury trial of driving while intoxicated. On appeal, defendant raised several points only two of which were analyzed at length. In the first analyzed point, the court found the trial court did not error in overruling defendant's motion to suppress as there was sufficient probable cause to have arrested defendant for driving while intoxicated. Defendant admitted to consuming alcohol prior to the stop coupled with the officer's observation of a strong odor of intoxicants on his breath, blood shot and glassy eyes, his failure of the one leg stand test and the presence of all six clues on the HGN test were sufficient for purpose of probable cause to arrest. The court also rejected defendant's argument that the trial court was bound by the findings of the trial court judge in the license sanction case.

In a more lengthy analysis, the court considered defendant's challenge to Instruction No. 5 and his proffered instruction A. In proffered instruction A, defendant asked the court to define the phrase "under the influence of alcohol" as meaning "so affected by alcohol as to have one's ability to operate a motor vehicle impaired to a depreciable degree." Although rejecting defendant's challenges, the court suggested "if the Missouri Supreme Court believes that a driver is in 'an intoxicated condition' when 'his use of alcohol impairs his ability to operate a motor vehicle', would it not make sense for the instruction to expressly state this in unambiguous language?"

In the second point analyzed in detail, defendant argued that the prosecutor made an improper argument during his closing which was objected to and therefore overruled. He argued that the error was exasterbated when he was not permitted during his closing argument to properly address the same issue after the state's objection to his argument was sustained. On this claim of error, the Western District found merit and reversed.

An improper argument does not require reversal unless it is shown to constitute prejudicial error. The defendant has the burden to show he was prejudiced by the improper argument and prejudice is present only if the complained of comment had decisive affect on the jury's decision. In order for a prosecutor's statements to have such a decisive effect, there must be a

**"DWI Traffic Law Update" >p9**

## DWI Traffic Law Update *(from pg 8)*

reasonable probability that the verdict would have been different had the error not been committed.

In the state's closing, the state argued "so let me tell you what we didn't set out to prove today and that was that the defendant was drunk. In fact, the only people who have used the word 'drunk' trying to paint a picture of Otis from Andy Griffith, is the defendant and his attorney. We never proved/tried to go out and prove he was drunk. We came here to prove beyond a reasonable doubt that he was intoxicated. We also didn't come here to try and prove the defendant is a bad person or a bad guy. We are trying to prove beyond a reasonable doubt that he was driving and was intoxicated. So what does that mean with the instructions? You are going to get verdict director five. It lays out the elements. It also provides what some believe is a very vague definition of 'intoxicated condition' which means under the influence of alcohol. There is a reason for that. The reason is that you can decide what that means."

Defendant's objection was overruled wherein the state then argued "You can decide, with what the instruction No. 4 asked you to do, with your reason and common sense, what driving under the-or 'under the influence of alcohol' means."

The Western District recognized that instructing the jury as to the law is a prerogative of the court which may not be usurped by counsel in argument. The present case, the trial court erroneously overruled defense counsel's objections to the state's misstatement of law. In the present case, the state refused to acknowledge that being intoxicated and being drunk are generally synonymous, and attempted to say the two were different concepts. The confusion was augmented because the state, after saying the two terms were different, declined to clarify the errant argument. The prejudice of the trial court's overruling of defendant's objection was exasterbated by the trial court's ruling on the state's objection to defendant's closing argument wherein he attempted to define intoxication.

In the present case, while there was sufficient evidence of guilt to support a conviction, there was also reasonable probability that the jury's verdict would have been different had the state's misstatement of the law not been condoned by the trial court's combined rulings. Therefore, the trial court's judgment is reversed and the cause was remanded for a new trial.

www.MACDL.net

### *State v. Honsinger*

SD31628
October 4, 2012
_____S.W.3d ____ (Mo. App. S.D. 2012)

Defendant convicted after bench trial of driving while intoxicated. On appeal he argues there was insufficient evidence to establish beyond a reasonable doubt the requisite elements of DWI. He also argues plain error in the admission of the officer's testimony regarding the HGN test in that there was no proper foundation.

As to Point I, the Southern District held that intoxication consists of three components: impaired ability, presence of a proscribed substance in the defendant's body at the time of the offense, and a causal connection between the proscribed substance and the defendant's impaired ability. In the present case, the arresting officer observed appellant had difficulty keeping his eyes open and that they were glassy and watery. He was unable to maintain his balance and had trouble following directions. His speech was slurred, mumbled and difficult to understand.

Although there was no odor of alcohol, the arresting officer did smell an odor of marijuana coming from defendant. Defendant admitted to having consumed gin as well taking Zanex. He acknowledged using "very little" marijuana three weeks before. He admitted "I have been taking what [medication] I got." The arresting officer testified in his opinion, appellant was "very much impaired."

The Southern District found the evidence sufficient as to each element rejecting the argument set forth in Point I.

In Point II, appellant argued trial court committed plain error in admitting the testimony of the police officer relating to the HGN because the state failed to lay the requisite foundation showing the officer was sufficiently trained and that he administered the test in an appropriate manner. Appellant made no objection at trial and thus review was for plain error.

The Southern District held that a post trial claim challenging the foundation of an expert's opinion is not a subject for plain error review. If a question exists as to whether the proffered opinion testimony of an expert is supported by a sufficient factual scientific foundation, the question is one of admissibility. Any challenge to the expert's opinion must be raised by a timely objection or a motion to strike. Once opinion testimony has been admitted, it may be relied upon for purposes of determining the submissibility of the case. The

**"DWI Traffic Law Update" >p10**

## DWI Traffic Law Update *(from pg 9)*

probative effect of the testimony is a consideration for the fact finder.

There being no timely objection, the evidence was properly admitted.

---

## *State v. Seals*

377 S.W.3d 629 (Mo. App. W.D. 2012)

Defendant appeals his conviction for driving while revoked arguing trial court error in that the state failed to prove that the van he was driving constituted a motor vehicle. In affirming his conviction, the Western District held "a motor vehicle is defined as any self propelled vehicle not operated exclusively upon tracts except motorized bicycles.

A vehicle is defined as any mechanical device on wheels, designed primarily for use, or used on highways, except motorized bicycles, vehicles propelled or drawn by horses or human power, or vehicles used exclusively on rails or tracks, or cotton trailers or motorized wheelchairs operated by handicapped persons.

It is therefore reasonable to infer that the van was in fact a motor vehicle. Judgment of conviction confirmed.

---

## *State v. Slavens*

375 S.W.3d 915 (Mo. App. S.D. 2012)

Defendant convicted after bench trial of driving while intoxicated. At issue was whether his non legal dirt bike, operated on his property, was a "motor vehicle" within the meaning of Section 577.010.

The appellate court first observed that the term "motor vehicle" was not defined in Section 577.010. As a consequence, the dispute hinged upon whether defendant's dirt bike was considered a motor vehicle for purposes of the DUI statue when it was being operated upon his private property as opposed to a public roadway. Relying upon the Western District rationale in *Fainter v. State*, 174 S.W. 3d 718 (Mo. App. W.D. 2005), the Southern District found that the primary purpose of the dirt bike in the present case was to ride through mud, jump dirt and debris and navigate mountainous road terrain in addition to having the ability to transport people. As such, the present case differed from prior cases which involved non traditional vehicles used on a public roadway.

While the court found there was no ambiguity of the wording of Section 577.010, there was in its potential application. With no definition of "motor vehicle" referenced and no mention of whether operation on public property was a requirement, the statute allowed for more than one interpretation. Therefore, applying the rule of lenity, any ambiguity was to be resolved in favor of the defendant. The court also noted that the DWI statute is a criminal statute and the rule of strict construction required it to construe criminal statutes strictly against the state. "Common sense clearly dictates that in the preset matter, [defendant's] dirt bike was not a motor vehicle under the DWI statute in that it was not designed for use on a public roadway or highway and was not being operated on one at the time of the accident."

The court observed "it is clear in the present matter that a finding that Slavens' operation of his dirt bike on private property exposed him to prosecution under the DWI statute would lead to an illogical result and would open a Pandoras Box of potential locations and situations which subject people to new criminal liability. Under the reading of the statute urged by the state, every citizen who consumes alcoholic beverages while on a golf course, then operates a golf cart upon that private property, would be potentially subjected to DWI sanctions. This goes for every person who imbibes spirits and then mows his own lawn with a riding lawnmower, as well as people who operate motorized wheel chairs. In fact, the state in this case agreed that prosecution of an operator of a motorized wheel chair, within the confines of the operator's home, would be possible if this conviction stands. Such unreasonable and uncertain results could not have been intended in the drafting of the statute by the legislature." Conviction reversed.

---

## *State v. Horn*

ED 97341
_____S.W.3d_____ (Mo. App. E.D. 2012)
September 18, 2012

More than a year after defendant had been arrested for driving while intoxicated, the state charged him with the class B felony of driving while intoxicated, chronic offender status. Defendant moved to dismiss alleging that the state had failed to file its charging document within the one year statute of limitations for misdemeanors. Horn argued that the actual crime was "driving while intoxicated," a misdemeanor. Only if and when he was convicted would his punishment be enhanced to that of a felony. The trial court agreed and the state appealed.

**"DWI Traffic Law Update" >p11**

## DWI Traffic Law Update *(from pg 10)*

(from pg 10)

In reversing the trial court's ruling, the Eastern District held, "The plain language of Sections 577.010 and 577.023 reveal that Section 577.023 changes the classification of the underlying charged offense of driving while intoxicated for repeat driving while intoxicated offenders." Pursuant to Section 577.023.5 "A person who commits an offense of driving while intoxicated who is alleged and proved to be a chronic offender shall be guilty of a class D felony." Upon such basis, the Eastern District reversed and remanded.

*The court did not address the dilemma counsel presented throughout the appellate process: Assuming the charging document is filed 15 months after the date of the incident and the state, during the prosecution of the case, fails to prove up a sufficient number of priors for enhancement, if a fact-finder would find the offender guilty of the current offense, can he be convicted of a misdemeanor when the allegation was filed more than one year after the incident?*

### Doughty v. Director

SC92260/1
_____S.W.3d ______ (Mo. 2013)
January 8, 2013

In a consolidated appeal, drivers challenged the revocation of their privilege to operate a motor vehicle alleging that Section 302.312 violated the 14th Amendment to the United States Constitution and Article 1, Section 10 of the Missouri Constitution in that said statutory section allows Department of Revenue records to be admitted into evidence in violation of drivers' due process rights to confront and cross examine the witnesses against them. In rejecting drivers' challenges, the Supreme Court held that as drivers were free to subpoena and examine the arresting officer in each case, the trial court's admission of the director's records pursuant to statute did not violate the drivers due process rights. The trial court's judgment was affirmed.

### Green v. Director

WD74939
______S.W.3d _____ (Mo. App. W.D. 2012)
November 6, 2012

In this refusal proceeding, driver alleged that he was not afforded the statutory fifteen minutes within which to contact counsel and therefore no informed refusal occurred. Factually, LEO informed driver of the implied consent law and asked driver if he would submit to a chemical test of his breath. Driver responded by asking to speak with an attorney. LEO advised driver that he would have twenty minutes to contact counsel. Driver gave LEO the name and number of an attorney. LEO dialed the number and handed the phone to driver. According to LEO, driver spoke to the person on the other end of the line for several minutes. At the conclusion of the telephone conversation, driver told LEO that he had spoken to an attorney. LEO again asked driver whether he would submit to a chemical test of his breath. Driver stated "I'm not sure." LEO told driver he needed a yes or no answer and driver replied "No." Driver's refusal occurred less than fifteen minutes after his request to contact an attorney. Because of driver's refusal to submit to a chemical test, LEO issued driver a notice revoking his driving privilege.

The appellate court found that driver was given an opportunity to and did speak with counsel and therefore the trial court's decision was affirmed. The court reiterated prior precedent that a driver need not be afforded the entire twenty minutes to speak to counsel and may abandon his efforts by speaking with counsel prior to the expiration of the statutory time frame.

## A Very Special Thank You

A special thanks to **Molly Carney**, **Elizabeth Unger Carlyle**, and **John Simon** for their work in the amicus brief filed in Eastburn v. State, Number SC92927 now pending in the Supreme Court of Missouri. In this case, Eastburn challenges her life without parole sentence after being found guilty as an accomplice when she was under the age of 18.

To request MACDL to appear as an 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 or opinion appealed from and any other helpful information.

Grant J. Shostak
400 North Kingshighway • St. Charles, MO 63301
Phone: (314) 477-3367 • Email: shostakgrant@gmail.com

# Legislative Report

*by Brian Bernskoetter*

The Missouri General Assembly has reached the half way point for the 97th Regular Session. There are a number of bills of interest to the criminal defense attorneys. Foremost, is the criminal code revision bills (HB 210 and SB 253) which aim to streamline and consolidate the current criminal code into a more cogent and easily referenced set of statutes. In large part, these changes are not meant to radically alter punishments but there is a new Class "C" felony to bridge the gap between the current "B" and "C" class felonies.

Other bills of particular interest are bills regarding the public defenders system (HB 215 and SB 12) and changes to the laws regarding the collection of restitution (HB 214).

Below are some of the bills MACDL is tracking with the support, oppose, or monitor positions listed next to them.

| Bill | Sponsor | Description/ MACDL Position |
|---|---|---|
| HB 46 | Guernsey | Establishes the Preserving Freedom from Unwarranted Surveillance Act which prohibits unwarranted intrusion through the use of unmanned aerial vehicles commonly known as drones, and for other purposes. SUPPORT |
| HB 73 | Barnes | Changes who may be accepted by a drug court and allows a circuit court to establish a veterans treatment court to dispose of a case stemming from substance abuse or mental illness of a current military member or a veteran. SUPPORT |
| HB 167 | Hubbard | Repeals the provisions which allow the use of the death penalty and specifies that certain persons sentenced to death must be sentenced to life without eligibility for parole. SUPPORT |
| HB 210 | Cox | Changes the laws regarding the Missouri Criminal Code. **MACDL is working with the interested groups and the legislators to review all changes that are being proposed.** MONITOR |
| HB 213 | Cox | Relating to cost of depositions - OPPOSE |
| HB 214 | Cox | 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. OPPOSE |
| HB 215 | Cox | Requires restitution to be paid through the office of the prosecuting or circuit attorney and allows them to charge various administrative handling costs and changes the laws regarding public defenders. **This bill would require the PD system to contract out most cases to private attorneys.** OPPOSE |
| HB 238 | Ellington | Authorizes a one-time expungement of certain criminal records including a conviction for any nonviolent crime, misdemeanor, or nonviolent drug violation. SUPPORT |

**"Executive Director's Report" >p13**

# Executive Director's Report *(from pg 14)*

| Bill | Sponsor | Description/MACDL Position |
|---|---|---|
| HB 238 | Ellington | Authorizes a one-time expungement of certain criminal records including a conviction for any nonviolent crime, misdemeanor, or nonviolent drug violation. SUPPORT |
| HB 330 | Guernsey | Requires specified crime scene photographs and video recordings to be considered closed records and not subject to disclosure under the Open Meetings and Records Law. MONITOR |
| HB 354 | Cornejo | Allows DWI courts to use private probation and parole services for judicial supervision when the Department of Probation and Parole is unable to provide the services. SUPPORT |
| HB 373 | Cox | Grants the authority to redraw the circuit and appellate judicial districts every 10 years to the Supreme Court. MONITOR |
| HB 374 | Cox | Allows the Missouri Supreme Court to make permanent transfers of a circuit judge or associate circuit judge position from one circuit to another as needed with certain restrictions. MONITOR |
| HB 419 | Hubbard | Requires the Board of Probation and Parole to periodically review the case history of certain convicted offenders serving sentences of more than 15 years or life without parole. SUPPORT |
| SB 12 | Schaefer | Provides immunity from civil liability for court appointed attorneys. **This is one option the Legislature is pursuing to alleviate problems with appointed counsel on indigent cases.** OPPOSE |
| SB 21 | Dixon | Provides the Supreme Court with the ability to transfer circuit and associate judge positions from one circuit to another. MONITOR |
| SB 22 | Dixon | Grants the authority to redraw the circuit and appellate judicial districts to the Supreme Court. MONITOR |
| SB 61 | Keaveny | Requires the state Auditor to compare the costs of death penalty cases and first-degree murder cases in which the death penalty is not sought. SUPPORT |
| SB 113 | Schmitt | Modifies provisions of mandatory reporting of child sexual abuse. OPPOSE |
| SB 162 | Keaveny | Modifies provisions relating to criminal procedure. SUPPORT |
| SB 253 | Justus | Modifies provisions relating to criminal law. T**he Senate companion to the House criminal code re-write bill. This bill continues language to attempt to fix the Miller case.** MONITOR |
| SB 377 | Dixon | Modifies penalties for first degree murder when the person was under the age of 18 at the time of committing the offense. **MACDL is working with the sponsor to change the parameters of the punishment for convicted murders under the age of 18.** SUPPORT W/ CHANGES |

# Post-Conviction Update

by Elizabeth Unger Carlyle © 2013

*This column includes summaries of pertinent cases from August, 2012, forward. As usual, readers are cautioned that they should check the cases cited below for subsequent history.*

## Extraordinary Writs

### *State ex rel. Woodworth v. Denney,*

2103 WL 85427 (Mo. Jan. 8, 2013)

Habeas relief was granted on the basis of newly discovered evidence showing *Brady* violations. The excluded evidence included letters between the trial judge, then-assistant attorney general Kenny Hulshof, and the surviving victim; evidence that an alternate suspect had violated an order of protection against him; and evidence that discredited the alternate suspect's alibi. The evidence was developed at evidentiary hearings conducted by a special master appointed by the Supreme Court. Accepting the master's recommendation that relief be granted, the Court first found that the state's failure to disclose exculpatory information in a timely matter was legal "cause" justifying Mr. Woodworth's failure to raise the issue earlier. Accepting the master's finding that the letters described above were not disclosed to the defense, the Court rejected the state's contention that in order to establish that the letters had not been disclosed, the defense was required to disclose trial counsel's entire file to the state. The Court also found that the letters has sufficient impeachment value to satisfy the *Brady* "reasonable probability" prejudice standard. The Court also found prejudice from the failure to disclose the violations of the order of protection. Moreover, the Court specifically reaffirmed that prejudice from *Brady* violations must be considered cumulatively, "along with the totality of the other evidence uncovered following the prior trial."

### *State ex rel. Koster v. Green,*

388 S.W.3d 603 (Mo. App. W.D. 2012)

The court of appeals upheld the action of the circuit court in granting habeas relief to Mr. Allen, the petitioner

## Extraordinary Writs *(Cont.'d)*

in this case on the basis of a *Brady* violation. This is a false confession case; Mr. Allen, the petitioner, is mentally ill. The offenses occurred in 1982. The opinion contains a clear and helpful statement of facts. The suppressed evidence involved notations on a lab report that cast doubt on the blood identification of the perpetrator, information that a state's witness had been hypnotized before her testimony, fingerprint evidence that did not match Mr. Allen, investigative notes concerning where evidence was found, and a lab manual that cast doubt on the accuracy of testing that identified Mr. Allen as the perpetrator. Despite the fact that Mr. Allen confessed, the court of appeals upheld the finding of the circuit court that the omitted evidence was material.

## Post-Conviction Cases, Procedural Issues

### *Price v. State,*

2012 WL 6725611 (S.D. Dec. 28, 2012)

Mr. Price hired counsel to file his post-conviction motion. The motion was not filed on time. He filed a motion to recall the mandate on the direct appeal to allow him to file an untimely motion; that motion was denied. He then filed for, and was granted, state habeas corpus relief, but the habeas writ was quashed. Finally, after the decision in *McFadden v. State*, 256 S.W.3d 103, 106 (Mo. banc 2008), he filed an untimely post-conviction motion in the trial court, which was granted. The motion court found that Mr. Price had been denied effective assistance of trial counsel

**Post-Conviction Update >p15**

# Post-Conviction Update *(from pg 14)*

(from pg 14)

## Post-Conviction Cases, Procedural Issues *(Cont.)*

because trial counsel failed to object to a verdict director which did not properly require jury unanimity. Affirming the grant of relief, the court of appeal found that Mr. Price had been abandoned by post-conviction under M*cFadden* because his lawyer had undertaken to file a timely original post-conviction motion and failed to do so.

### *Henley v. State,*

383 S.W.3d 75 (Mo. App. E.D. 2012)

The motion court was required to issue findings of fact and conclusions of law on all issues, including an issue as to which an evidentiary hearing was denied on the basis that the allegation was refuted by the record. *Remanded for new findings.*

### *Miller v. State,*

386 S.W.3d 225 (Mo. App. W.D. 2012)

Remand was required so that the motion court could determine whether Mr. Miller's untimely post-conviction motion fell within one of the recognized exceptions to the time limits of rules 29.15 and 24.035. Here, the movant had written to the circuit clerk explaining that the motion was untimely because of a prison mailroom mishap. This satisfied his burden to allege facts showing why the deadline was not met, and required a hearing to determine timeliness.

### *Vogl v. State,*

2013 WL 173009 (Mo. App. S.D. 2013) (State's application for transfer pending in Missouri Supreme Court)

Mr. Vogl's original Rule 24.035 motion was filed one day past the deadline. The motion court nonetheless appointed counsel for Mr. Vogl as requested in his poor person affidavit. Appointed counsel then filed a motion to rescind the appointment. The motion court granted the motion and dismissed the original Rule 24.035 motion. Mr. Vogl then filed, pro se, a motion to reopen his post-conviction proceedings on the ground that he was abandoned by post-conviction counsel when post-conviction counsel failed to file an amended motion that alleged facts excusing the untimely filing of the original motion. The motion court denied the motion to reopen, and Mr. Vogl, again proceeding pro se, appealed. On appeal, the court remanded for a hearing, holding, "If the facts alleged by Vogl herein are true, then his post-conviction counsel's failure to file an amended motion, as required by the Missouri Rules of Court, deprived Vogl of a meaningful review of his claim that his pro se motion was, in fact, timely. Accordingly, such a failure would constitute abandonment." *Remanded for a hearing on abandonment.*

Post-Conviction Cases, Procedural Issues (Cont.)

### *Stanley v. State,*

2012 WL 6013805 (Mo. App. E.D. 2012)

The court of appeals remanded the case to the motion court for a hearing as to whether a **second** amended post-conviction motion, on which the appeal was based, was untimely due to abandonment and could therefore be considered on appeal. The substantive issue is whether Mr. Stanley was properly informed that the state's plea recommendation was not binding on the court.

### *White v. State,*

383 S.W.3d 58 (Mo. App. E.D. 2012)

Mr. White was entitled to an evidentiary hearing on his claims that he was denied effective assistance of counsel when trial counsel failed to make a record that Mr. White was shackled in the presence of the jury, and his trial counsel failed to call as a witness who would have testified that Mr. White did not possess drugs as charged. In finding that no hearing was required on the shackling claim, the motion court improperly relied on non-record evidence. Mr. White was entitled to make a record at a hearing. The record does not refute the statements in Mr. White's properly pleaded witness claim, and he is also entitled to a hearing on that issue.

## Hall of Fame

Congratulations to the attorneys for the defendants described in this article who obtained relief:

Robert C. Colbert (Price)

Robert B. Ramsey (Woodworth)

Scott Thompson (Henley)

Mark Grothoff (Miller)

Ameer Gado and Daniel F. Harvath (Green/Allen)

Mark Vogl (pro se)

Edward S. Thompson (Stanley)

Mark Dean (White)