

MACDL

Missouri Association of Criminal Defense Lawyers



Spring, 2015



Kevin Curran
MACDL 2014-15 President

President's Letter

The MACDL Board has regular meetings in conjunction with its annual CLE's with one exception. In January of each year the Board, which includes the Executive Committee, members of the Board and past Presidents, meet to review proposed legislation in anticipation of the

legislative session. This review has been going on for years. At that meeting, with the able guidance of Randy Scherr and his group, we discuss each bill relating to proposed new or changes to existing laws to decide, first, whether MACDL will oppose or support them. The next decision made is whether we will testify on those bills before the legislature. Not only has MACDL had a long history of doing this, we are the only organization that is actively involved in the legislative process regarding laws and issues that relate to the practice of criminal defense law and our clients.

Legislatively, 2015 looks to be a very interesting year. While the new Criminal Code has already been passed and awaits implementation in 2017 the aftermath of the events in Ferguson have spawned a number of bills related to police oversight. MACDL has reviewed them and will keep an eye on their progress. The proposed expungement laws are the other significant legislative issue. MACDL has long been a proponent of expungement. In fact, Past-President Dan Viets has worked for many years both drafting and encouraging our members of the legislature to take up the cause of expungement. Dan and Joel Elmer are

on the Bar Committee that drafted proposed expungement legislation. In our last legislative meeting the MACDL voted to fully support bringing expungement to Missouri.

Besides the legislative session, Spring also brings our annual meeting. This year it is scheduled for April 9th and 10th in St. Charles, Missouri. The CLE Committee has put together an excellent program that is relevant to all criminal law practitioners. The CLE is coupled with our annual meeting where the membership will vote elect Board members. We hope to see you there.

Speaking of Board members, past Board member Cathy Kelly has announced that she will not seek another term as Director of the Missouri State Public Defender System. As part of the Public Defender System Cathy has been an active member of our Board for a number of years. Cathy began her legal career in the City of St. Louis Public Defender Office. She was a skilled advocate and excellent trial attorney. After trying cases she moved up to management, from District Defender to Training Director, to Deputy Director, to Director of the System succeeding Marty Robinson. As a MACDL member she was fully engaged. Her commitment to the cause and her understanding of how the legislative process worked was invaluable in our planning sessions. I am sure MSPD will miss her. I know MACDL will.

Lastly, Kim Benjamin and the Website social media Committee have been working hard on an upgrade to our home page. The plan is to have it up and running before the annual meeting. Please be on the lookout for an e-mail announcing its debut.

As always, please e-mail or contact us if you would like to get more involved in MACDL if you are a member. If you are not a member, please contact us to join.

www.MACDL.net



2014-2015 Officers & Board

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Joseph S. Passanise
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Member News

Welcome New 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.

Ben Faber ♦ *Columbia, MO*
Robert Ramshur ♦ *Piedmont, MO*
Brandi Morris ♦ *Lee's Summit, MO*
Bevy Beimdiek ♦ *St. Louis, MO*
Bert Godding ♦ *Kansas City, MO*
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Amicus 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 Talmage Newton IV, 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:

Talmage E. Newton IV
NewtonWright LLP
7515 Delmar Blvd.
St. Louis MO 63130
Phone: 314-272-4490
Email: tnewton@newtonwrightlaw.com

MACDL List Serve

The MACDL ListServe 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 ListServe link. (www.macdl.net)

Case Law Update

For up-to-date Case Law Updates please visit the MACDL website/ Newsletter page and check out the link to Greg Mermelstein's Reports located at the bottom of the page.



Mark Your Calendar!

MACDL Spring CLE

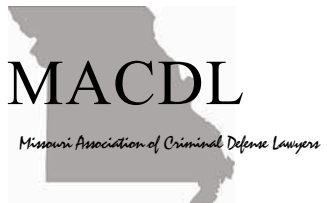
April 9-10, 2015
Ameristar Casino
St. Charles, MO

Bernard Edelman DWI Conference

July 17-18, 2015
Tan-Tar-A
Osage Beach, MO

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)



This newsletter is a semi-annual publication of the Missouri Association of Criminal Defense Lawyers (MACDL).

Your comments are welcome.

MACDL
c/o RJ Scherr & Associates
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Jefferson City, MO 65102

Legislative Update

by Brian Bernskoetter

This session we expect to see many bills filed to address problems and issues that were brought to light this summer in Ferguson. Also on the priority list is getting a legislative compromise in place to address the Supreme Court decision regarding LWOP for those under the age of eighteen.

During the previous Legislative Session there was a great deal of debate regarding the need for a more comprehensive expungement statute. During the interim, the Missouri Bar convened a group to discuss and propose legislation on the topic. While the draft of that bill is complete the bill hasn't been filed at the time this report was submitted. MACDL has a long standing policy of supporting any bills that provide more opportunities for expunging criminal records.

Below is a list of bills MACDL is tracking and the positions adopted at the Board Meeting in January.

House Bill 58 - Allows community service in lieu of a fine for certain traffic offenses. **SUPPORT**

House Bill 237 - Prohibits law enforcement agencies from considering the number of citations the officer has issued in the officer's employment evaluation. **SUPPORT**

House Bill 293 - Requires the Missouri Supreme Court to conduct a review of all death penalty cases within 30 days and to set a date for execution to occur within 60 days of its review being completed. **OPPOSE**

House Bill 300 - Changes the definition of "adult" to a person 18 years of age or older and "child" to a person under 18 years of age for purposes of juvenile court jurisdiction. **SUPPORT**

House Bill 355 - Allows a court pleading or paper to be filed in paper format rather than electronic submission if the party is in the court clerk's office or courthouse at the time of the filing. **SUPPORT**

House Bill 525 - Specifies that drug courts must be established by every circuit court. **SUPPORT**

House Bill 657 - Requires first-time offenders of certain dangerous felonies to serve a minimum of 50% of their sentence. **SUPPORT**

House Joint Resolution 17 - Proposes a constitutional amendment repealing the authorization for convening of grand juries. **SUPPORT**



Senate Bill 21 - Modifies and enacts provisions relating to law enforcement officers. **SUPPORT w/ modifications to police mounted camera language**

Senate Bill 31 - Modifies provisions relating to controlled substances and requires probation and parole officers to arrest people suspected of violating their conditions of release. **OPPOSE**

Senate Bill 200 - This act modifies provisions relating to sentencing for first degree murder (Miller Fix). **OPPOSE**

Senate Bill 235 - This act repeals a provision of law which states that courts which require mandatory electronic filing shall accept in criminal cases notice of entry of appearance that was sent to the court by fax or regular mail. **OPPOSE**

Senate Bill 240 - This act requires the State Auditor to make a one-time report on the costs of administering the death penalty. **SUPPORT**

Senate Bill 280 - This act modifies provisions relating to sentencing for first degree murder (Miller Fix). **SUPPORT**

Senate Bill 303 - Requires each law enforcement agency that uses eyewitness identification procedures to adopt written policies governing the procedures by January 1, 2018. **SUPPORT**

Senate Bill 304 - Changes the laws regarding custodial interrogations. **SUPPORT**

Senate Bill 382 - This act modifies provisions relating to procedures in criminal proceedings including requiring the party taking depositions to provide a transcript to the other party. **OPPOSE**

This legislative session lasts until May 15, 2015.



Cat Kelly Stepping Down

Cat Kelly has announced that she will be stepping down from her position as Director of the Missouri State Public Defender, effective June 1, 2015. The Public Defender Commission's job announcement seeking applicants to replace her is shown below.

Cat is leaving public defense after a mere 31 years with the Missouri Public Defender System. She served as a trial attorney, team leader, and District Defender for the St. Louis City Trial Office, as well as Regional Defender overseeing the greater St. Louis area trial offices, before being named Director of Training for the statewide system in 1995. When Cat took over public defender training, the only formal public defender training offered was the annual Trial Skills Workshop for new public defenders. By the time she passed that

responsibility to her successor 13 years later, Missouri's Public Defender System was nationally recognized for its training programs and remains so to this day.

In 2006, Cat was tagged by the Commission to serve as Acting Director when then-Director Marty Robinson was deployed to active duty in Afghanistan. Upon his return, she continued as Deputy Director, devoting first part of her time and eventually her full attention to working with the legislature and media to raise awareness of the excessive workloads in Missouri's PD system. When Marty Robinson retired in 2011, Cat was tapped by the Public Defender Commission to be the next Director, becoming the fourth Missouri State Public Defender and the first woman to hold the position.

State Public Defender Director - Job Announcement

The Missouri State Public Defender System (MSPD) is seeking a Department Director responsible for the overall operation and administration of the system. The Director is appointed by a seven-member Commission to a four-year term. Work requires exercising oversight of a statewide indigent defense system to ensure quality legal representation of eligible persons.

The State Public Defender Director is responsible for oversight of an annual budget of approximately \$39 million and direction of 587 employees in 44 offices across Missouri. The Director testifies before legislative bodies regarding legislation that impacts the system and in accordance with the requirements set forth by the Commission. This position works out of Columbia and Jefferson City, Missouri, and reports to the Public Defender Commission.

QUALIFICATIONS:

The Director must be an attorney licensed to practice law in the state of Missouri or have the qualifications to become a member of the Missouri Bar. Individual must have substantial experience in the area of criminal law; be dedicated to the goals of providing quality legal representation; possess leadership experience within a large, diverse organization staffed with professionals; have strong organizational, analytical, and writing skills; have the

ability to establish and maintain effective working relationships with government officials, judiciary, Commission members, employees, media, and the general public; have the ability to interpret, evaluate, and apply laws and policies relating to MSPD and to adapt existing programs to meet new and changing requirements; and possess the highest degree of integrity. The Director must devote full-time to the duties of the office and may not otherwise engage in the practice of law.

BENEFITS:

Starting salary range \$133,716 - \$145,343/year contingent upon experience. In addition to salary, the State of Missouri offers an excellent benefits package including retirement; health, life, and long-term disability insurance; deferred compensation plan; paid holidays; vacation and sick leave; and excellent training opportunities.

HOW TO APPLY:

Applicants must complete the Director Application to be eligible for employment consideration. Applications must be received no later than February 27, 2015. Visit the MSPD website at www.publicdefender.mo.gov for more information and to obtain an employment application.



Post-Conviction Update

by Elizabeth Unger Carlyle © 2015

There was not a lot of good news in the post-conviction field last year. And the Missouri Supreme Court may take some of it away. What follows is the good news, some of the bad news, and some interesting wrinkles in post-conviction practice. I've indicated cases in which I'm aware that transfer motions are pending or have been granted, but of course you should do your own history check before citing anything here.

THE GOOD - RELIEF GRANTED

Michael Timberlake was sentenced to five years' probation on June 21, 2006. Less than thirty days later, his probation officer filed the first of several probation violation reports. After a hearing on that violation on September 21, 2006, Mr. Timberlake's probation was continued. Probation violation reports were then filed in 2007, 2008, and 2011. In response to the last reports, the court ordered a hearing on July 13, 2011, three weeks after the probation was due to expire. At that hearing, Mr. Timberlake's probation was revoked. Mr. Timberlake then filed a post-conviction motion under Rule 24.035, alleging that the court was without jurisdiction to revoke his probation. In ***Timberlake v. State*, 419 S.W.3d 224 (Mo. App. S.D. 2014)**, the court agreed and set aside the probation revocation, finding that the record did not establish that the trial court "made every reasonable effort to conduct the [probation revocation] hearing prior to the expiration of Timberlake's probation." This case is interesting not only because the court of appeals apparently places the burden on the state to establish that the court could not conduct the hearing in time, but because previous decisions have suggested that challenges to probation revocations should be made via habeas corpus rather than in post-conviction proceedings. See *e.g. State v. Gibbs*, 418 S.W.3d 522 (Mo. App. E.D. 2014); *State v. Gallegos*, 47 S.W.3d 402 (Mo. App. S.D. 2001) ("[E]rrors in revoking probation must be addressed through a writ of habeas corpus.")

The court found the factual basis for the plea insufficient to support the defendant's conviction of money laundering in ***Frantz v. State*, 2014 WL 4547840 (Mo. App. W.D. 2014)** TRANSFER APPLICATION PENDING IN SCOMO. The defendant's admission that the \$3,830 found in his car was from a drug sale in Iowa established that the money came from criminal activity. However, to establish money laundering, the state must also show a subsequent transfer of the ill-gotten gains with the purpose to conceal the illicit nature of the proceeds. No evidence was presented at the plea hearing to support this element. The fact that the

- RELIEF GRANTED (CONT.)

defendant drove from Iowa to Missouri does not, by itself, show that he wanted to conceal the money's origin, and there was no evidence that the money in the vehicle was hidden from view. The fact that the defendant entered a plea of guilty likewise does not establish the factual basis, or that the plea was truly knowing and voluntary.

Timothy Cafferty entered a plea of guilty to the offense of failure to pay child support. In his written guilty plea petition, he acknowledged, "I didn't pay my child support." At his plea hearing, asked why he didn't make the required payments, he responded, "Because I couldn't find work." At the time of Mr. Cafferty's offense, the statute under which he was charged provided that it was an offense to fail to support children "without good cause." Because the factual basis for the guilty plea did not establish this element, the court in ***Cafferty v. State*, 2014 WL 5648639 (Mo. App. W.D. 2014)** TRANSFER APPLICATION PENDING IN SCOMO ordered that the judgment of conviction and sentence be vacated and the guilty plea be withdrawn.

THE GOOD - HEARING REQUIRED

The movant was held entitled to a hearing on his DNA testing motion in ***Fields v. State*, 425 S.W.3d 215 (Mo. App. E.D. 2014)**. DNA testing was technically available at the time of the defendant's trial. However, his motion, alleging that evidence was not tested and that, because DNA testing became available very shortly before his trial, the testing was not as a practical matter available to him, was enough to require a hearing. "Any shortcomings in Movant's pleadings can be forgiven "in light of the purpose of 547.035: to provide inmates an opportunity to have potentially exculpatory DNA tests performed on evidence." ***State v. Ruff*, 256 S.W.3d 55 (Mo.2008)**.

"Post-Conviction Update" >7



- HEARING REQUIRED (CONT.)

The movant in ***Kyles v. State*, 417 S.W.3d 873 (Mo. App. E.D. 2014)**, was held entitled to a post-conviction hearing on his allegation that trial counsel failed to strike a juror who was the victim of a crime very similar to that for which Mr. Kyles was being tried. “The record in this case does not conclusively show that defense counsel’s failure to strike Ms. Boyd from the jury was reasonable trial strategy. Because the motion court did not hold an evidentiary hearing on Movant’s Rule 29.15 motion, defense counsel did not have the opportunity to explain whether his failure to strike Ms. Boyd was reasonable trial strategy.”

***Vogl v. State*, 427 S.W.3d 218 (Mo. banc 2014)** is a case which illustrates the tension between the Missouri Public Defender System’s dual role of representing the indigent and determining whether such representation is appropriate. Mr. Vogl filed an original post-conviction motion which, based on the filemark applied by the court, was one day late. MSPDS was appointed. The assigned public defender, without contacting the client or determining the circumstances of filing, requested that the court relieve him of the appointment because of the untimeliness. The motion court then dismissed the motion. Mr. Vogl moved to reopen the proceedings, alleging that the motion was, in fact, timely filed and that his post-conviction counsel abandoned him by failing to investigate the facts before requesting to be relieved of the appointment. Another public defender was assigned to represent him. The Missouri Supreme Court held that in order to prove the timeliness of his motion, counsel could — and should — have filed an amended post-conviction motion alleging facts showing timeliness, but did not do so. The dismissal of the post-conviction motion was reversed, and the cause was remanded to the circuit court. Along the way, the court discusses the practice, in Jasper County, of transferring documents between the Joplin and Carthage courthouses without placing a filemark when the document is first received. This, the court held, was improper.

***Moore v. State*, 2014 WL 1597633 (Mo. App. E.D. April 22, 2014) TRANSFER GRANTED** The court found that Mr. Moore is entitled to an evidentiary hearing as to whether he consented to his trial counsel’s withdrawal of his motion for change of judge as a matter of right. The motion alleged that Mr. Moore believed the trial judge was biased against him because she had previously sentenced him harshly. Because the record does not clearly indicate the movant’s consent, dismissal without a hearing was improper. The court remanded the case with instructions that the hearing be held before another judge, a nice touch.

HALL OF FAME

Congratulations to the lawyers in the cases above:

Ericka R. Eliason (Timberlake)
Ellen Flottman (Frantz)
S. Kate Webber (Cafferty)
Roxana Mason (Fields)
Gwenda R. Robinson (Kyles)
Jeannie Willibey (Vogl)
Jessica Hathaway (Moore)

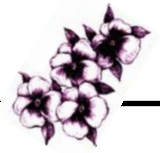
THE UGLY

In general, I try to stick to the good news in these articles. The following three cases, however, illustrate deficiencies in Missouri’s post-conviction procedure that may be worth addressing in future cases.

The disappointing decision in ***Price v. State*, 422 S.W.3d 292 (2014)**, appears to remove any exception for attorney ineffectiveness as a basis to excuse an untimely *original* post-conviction motion. Mr. Price asserted that he retained counsel to file a motion under Rule 29.15, that his counsel misunderstood the deadline in the rule, and as a result, did not file the original motion on time. He cited *McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008), as supporting such attorney ineffectiveness as an excuse for untimely filing. The motion court found that he had established cause for not filing a timely motion, granted an evidentiary hearing, and upon hearing, granted post-conviction relief because of trial counsel’s ineffectiveness. The state appealed.

The Missouri Supreme Court rejected this argument, and said that *McFadden* is different. In *McFadden*, the movant, with assistance of counsel, timely prepared and signed an original motion and entrusted it to counsel to file. Counsel failed to do so. The Missouri Supreme Court permitted the untimely filing. In *Price*, the court characterized the events in *McFadden* as “third party interference” rather than ineffective assistance of post-conviction counsel. Not only does this not make any sense, but it is particularly appalling in light of the fact that the motion court found that Mr. Price was entitled to relief on the merits.

In ***Schallon v. State*, 435 S.W.3d 120 (E.D. 2014)**, the court denied a claim of ineffective assistance of appellate counsel because counsel said she couldn’t explain her strategy fully without looking at her notes, and post-conviction counsel did



THE UGLY (CONT.)

not have the notes at the hearing. The court of appeals characterized this as “game-playing” by post-conviction counsel. Without investigating the facts of *this* case, I would note that it’s a bad idea not to give former counsel access to the file if they ask for it. On the other hand, I don’t know of any rule that requires post-conviction counsel to attempt to force former counsel to review anything. As a matter of strategy, it makes sense to offer counsel the opportunity to review the file.

In a case which illustrates the perils of being charged in several jurisdictions at once, the court in ***Kline v. State*, 437 S.W.3d 290 (Mo. App. W.D. 2014)**, found that Mr. Kline was not denied effective assistance of Missouri counsel. At the time his Missouri charge was filed, he also faced charges in federal and state court in California. He entered his pleas in those courts first, and his federal public defender obtained an agreement with the Buchanan County prosecutor that his Missouri sentence would be concurrent with his federal and California sentence. However, Missouri refused to lodge a detainer until after Mr. Kline had completed his other sentences, and the Missouri Public Defender System refused to assign counsel in the absence of a detainer. When Mr. Kline was finally extradited to Missouri after completing his sentence, the court held that his Missouri sentence could not be imposed concurrent to sentences he had already served. Because he was not represented by Missouri counsel until this had happened, he was not denied effective assistance of counsel, and thus the denial of post-conviction relief was required. In light of the fact that there was an actual plea agreement between a Missouri prosecutor and out-of-state counsel, it seems to me that Mr. Kline should have been assigned Missouri counsel. Since there was no detainer, he could not have advanced his case himself through the Interstate Agreement on Detainers act.

GOOD TO KNOW

Just a few tidbits that don’t come up often, but are worth remembering.

The “escape rule” doesn’t bar post-conviction relief for errors that occur after the defendant is once again in custody. ***Davidson v. State*, 435 S.W.3d 96 (Mo. App. S.D. 2014)**. Here, remand was ordered so the motion court could analyze the post-escape claims and determine if they warranted an evidentiary hearing.

When the judgment improperly recited that the defendant was a prior and persistent offender, even though that status had been neither alleged nor proved, a *nunc pro tunc* order to

GOOD TO KNOW (CONT.)

correct the judgment was properly issued as relief on a post-conviction motion. ***Warren v. State*, 429 S.W.3d 480 (Mo. App. E.D. 2014)**.

The requirement that counsel be appointed for an indigent person who files a properly notarized poor person affidavit with the post-conviction motion is mandatory. The motion court erred in denying the post-conviction motion without appointing counsel. (According to the court of appeals, the motion court “opined that it did ‘not believe justice is served by the routine appointment of counsel for a movant who files a pro se motion . . . pursuant to Rule 24.035.’”) ***Whitfield v. State*, 435 S.W.3d 700 (Mo. App. E.D. 2014)**. The court of appeals noted that it was “undisputed” that the pro se motion was timely, but as *Vogl*, above, teaches, even if that was not true, it would be necessary for counsel to be appointed so that any extenuating facts could be developed.



Calling All Writers

If you have an article of interest relating to the practice of criminal defense, why not submit it for publication in the MACDL newsletter?

Submit them electronically to info@macdl.net with “MACDL Newsletter” in subject or mail to MACDL.

MACDL Website Traffic

Item	Counts
Total Hits	2,755,799
Average Hits per Day	1,269
Total Visitors	460,527
Average Page Views per Day	667
Average Page Views per Visitor	3.15
Average Visitors per Day	212

Reporting Period: March 9, 2009 - February, 2015