MACDL
Missouri Association of Criminal Defense Lawyers

Newsletter

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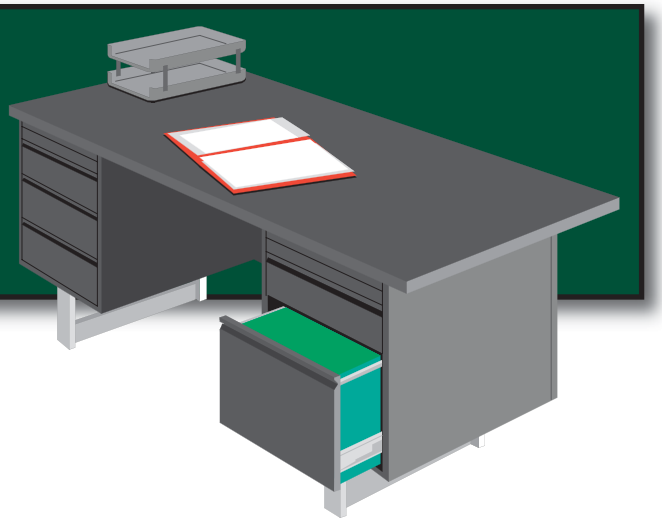
Winter, 2012

From the Desk of the MACDL President

by Brian Gaddy



Our organization provides a unified voice for all criminal defense lawyers in Missouri. MACDL's amicus brief practice is one important way our voice is heard in the judiciary. Over the last several years, MACDL has filed amicus briefs in several prominent appellate cases involving general questions of criminal law and procedure. I am proud to report that MACDL continues to provide a criminal defense lawyer perspective to Missouri courts through our amicus practice.

MACDL filed an amicus brief in support of adequate funding for Missouri public defenders in *State ex rel. Missouri Public Defender Comm'n. v. Waters*. Oral arguments were heard last month and the case remains pending before the Missouri Supreme Court. MACDL also wrote an amicus brief in *State v. McNeely*, 2012 WL 135417 (Mo., Jan. 17, 2012). In this case, the Missouri Supreme Court held the mere fact that blood alcohol dissipates over time is not a *per se* exigency that would allow a police officer to obtain a blood test from a driver suspected of driving while intoxicated without obtaining a search warrant from a neutral judge. MACDL member Stephen Wilson represented the defendant. MACDL member Talmage Newton authored the amicus brief on behalf of MACDL. Past MACDL President Grant Shostak chairs our Amicus Committee and coordinates the amicus brief practice. If you have an appeal that involves a general and important question of criminal law or procedure in Missouri, please visit our website, www.macdl.net, or contact Grant Shostak to discuss the possibility of an amicus brief.

MACDL also joined other organizations including NACDL, the Arizona Attorneys for Criminal Justice and the Southern Center for Human Rights as amicus on a brief filed by the Arizona Capital Representation Project in the Arizona Supreme Court. The successful amicus brief was filed in support of William Miller, accused of murder and facing the death penalty, in a case which held that Arizona's crime victims' rights provisions did not entitle the victims to be present at an ex parte hearing concerning the mitigation investigation.

MACDL provides a unified voice for criminal defense lawyers in the Missouri Legislature. Each year, through the hard work of our Executive Director Randy Scherr and his team, MACDL tracks and monitors all bills filed in the Missouri Legislature that involve criminal law matters. In many instances, MACDL will take a position to either support or oppose proposed criminal law legislation. MACDL members frequently testify before legislative committees to advance MACDL's position. In light of our current political climate, MACDL's annual presence and participation in the legislative process provides a much-needed criminal defense lawyer perspective to the Missouri Legislature.

MACDL also continues its tradition of presenting outstanding CLE seminars for criminal defense practitioners. Our next CLE is scheduled for April 20 and 21 in St. Louis. The seminar coincides with MACDL's Annual Meeting. We will discuss at the Annual Meeting how MACDL can continue to provide a unified voice for the Missouri criminal defense lawyer in the future. Thank you for your continued support of MACDL and I hope to see you in St. Louis in April.

MACDL
Missouri Association of Criminal Defense Lawyers

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In Session

by Brian Bernskoetter, MACDL Office

The Missouri 96th General Assembly is well under way this session and faces any daunting challenges. Current estimates place the state budget about $500 million short of last year and $1.4 billion less than four years ago, combined with the fact that the state economy is suffering from 9% unemployment.

The budget issues will largely be solved by cutting funding for higher education and reducing state programs. While the economic outlook is bleak, Missouri is still regarded as a very business-friendly state but the legislature will attempt to pass some automotive parts manufacturers' incentives and revisions to Missouri's workers compensation laws to hopefully spur job growth.

This summer and fall, a group lead by the Pew Charitable Trust studied Missouri's sentencing and corrections laws. This group was comprised of legislators, judges, officials from the Dept. of Corrections, criminal defense lawyers, prosecutors, and law enforcement officials.

This group's focus was on reducing the cost of corrections to the state and recidivism. A bill was filed compromising some of the consensus suggestions that resulted. The bill is House Bill 1525, the Justice Re-investment Act.

The list below is a few of the other bills we are tracking and the positions the MACDL Board has taken. This list is not comprehensive.

House Bill 1067 – **Support** - Requires the Board of Probation and Parole to review the case history of certain convicted offenders serving sentences of more than 15 years or life without parole.

House Bill 1102 & Senate Bill 457 – **Oppose** - Modifies provisions of mandatory reporting of child sexual abuse.

House Bill 1110 – **Support** – This bill removes the requirement that criminal defendants accepted by a drug court be nonviolent offenders and creates a Veterans Treatment Court.

House Bill 1142 – **Oppose** - Changes the requirements for the use of private probation services.

House Bill 1175 – **Support** - Requires certain offenders 60 years of age or older serving a sentence of life without parole for a minimum of 50 years to receive a parole hearing.

House Bill 1252 – **Oppose** - Increases the penalty for making a false report if the crime which was falsely reported was a felony.

House Bill 1253 – **Oppose** - Requires any person who pleads guilty to or is found guilty of certain misdemeanor or felony offenses or who has his or her probation revoked to be liable for specified costs involved in the program.

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House Bill 1256 – **Oppose** - 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 1292 - **Oppose** - Lowers the population requirement of a Department of Corrections center in the county in determining the procedure to obtain a change of venue for a misdemeanor or felony.

House Bill 1330 – **Oppose** - Lowers the population requirement of a Department of Corrections center in the county in determining the procedure to obtain a change of venue for a misdemeanor or felony.

House Bill 1344 – **Support** - Authorizes a person to apply to a court for the expungement of certain criminal records.

House Bill 1368 & Senate Bill 646 – **Oppose** - Allows certain types of field tests for controlled substances to be admissible as evidence in certain preliminary hearings and in an application for an arrest warrant.

House Bill 1382 – **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 1416 – **Support** - Exempts attorneys who present a current valid Missouri Bar membership car to court security from participating in any security measures at the St. Louis County courthouse.

House Bill 1420 – **Support** - Establishes a commission on the death penalty and places a moratorium on all executions until January 1, 2015.

House Bill 1422 – **Support** - Revises laws regarding DNA profiling analysis.

House Bill 1473 - **Support** - Provides that filing a petition for trial de novo results in the stay of the driver's license suspension or revocation order and the issuance of a temporary license until a final order is issued.

House Bill 1496 – **Support** - Prohibits the imposition of the death penalty, halts pending executions, provides for resentencing of offenders sentenced to death, and revises various laws dealing with the death penalty.

House Bill 1520 – **Support** - Repeals the death penalty.

House Bill 1525 – **Support** - Establishes the Justice Reinvestment Act and changes the laws regarding criminal offenders under the supervision of the Department of Corrections.

House Bill 1553 – **Support** - Authorizes a one-time expungement of certain criminal records including a conviction for any nonviolent crime, misdemeanor, or nonviolent drug violation.

House Joint Resolution 44 – **Oppose** - Proposes a constitutional amendment changing the composition of nonpartisan judicial commissions and increasing the number of candidates nominated to the Governor for certain judicial vacancies.

Senate Bill 446 – **Support** - Specifies that drug courts may be funded by the county law enforcement restitution fund.

Senate Bill 497 – **Oppose** - Increases the penalties for the crimes of trespassing and false impersonation and creates the crime of impersonating a public servant.

Senate Bill 525 – **Support** - Provides for nonpartisan elections of judicial candidates and forbids certain judges and candidates from engaging in political activities.

Senate Bill 556 – **Support** - Allows courts to suspend imposition of an adult criminal sentence for certain juvenile offenders.

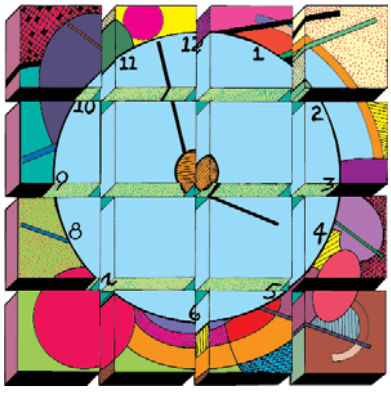
Senate Bill 559 – **Support** - Allows petitions for expungement of certain criminal records.

Senate Bill 628 – **Oppose** - 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 Joint Resolution 40 – **Oppose** - Amends the constitution to repeal the ban on retrospective laws and allow propensity evidence in certain cases.

Senate Joint Resolution 41 – **Oppose** - Provides for election of certain judges and appointment by Governor of a Supreme Court judge.

Senate Joint Resolution 42 – **Oppose** - Provides for appointment by the Governor of certain judges with Senate approval.



MACDL Calendar of Events

MACDL Annual Meeting & Spring CLE

April 20 – 21, 2012 • Hilton St. Louis Ballpark • St. Louis, MO

Bernard Edelman DWI Conference

July 12-14, 2012 • Tan-Tar-A • Lake Ozark, MO

MACDL Fall CLE

October 26, 2012 • Harrah's • Kansas City, MO

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Missouri Public Defender News

by Dan Gralike, MSPD Deputy Director

Caseload Litigation:

The Missouri State Public Defender System began the New Year with cautious optimism. Last December 13, 2011, the Missouri Supreme Court heard oral arguments in *State ex rel. Missouri Public Defender System v. The Honorable John Waters*, No. SC9115. After years of increasing caseloads without a corresponding increase in staff to handle the caseload, the Public Defender Commission promulgated a caseload rule in the Missouri Code of State Regulations establishing the maximum caseload each area (district) office can be assigned without compromising effective, competent, and ethical representation. **Steve Hanlon**, attorney from Holland & Knight in Washington D.C. argued the case on behalf of the Public Defender System. Steve has a long history of handling public interest and civil rights cases. He manages Holland & Knight's Community Services Team, which provides legal representation to people and groups that otherwise could not afford it. *The American Lawyer* has described Holland and Knight as a "Pro Bono Champion." The Public Defender System eagerly awaits the decision of the court. MSPD is currently staffed to handle just 73% of its current caseload. Given the current state budget gap (estimates are that it's around a $500 million hole), it is unlikely that funding to either increase staff or expand our panel attorney contract program sufficiently to handle that excess is likely to be forthcoming this legislative session, but we are hopeful that some steps can be made in that direction.

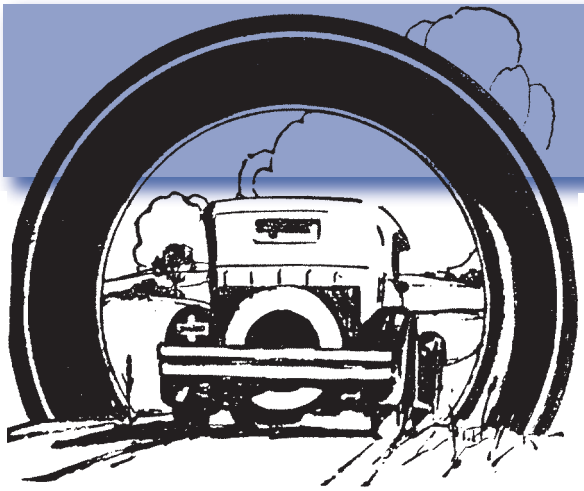
Panel Attorney Contracting:

Speaking of our new panel attorney program for the contracting of conflict cases to members of the private bar, the initial phases of the new program seem to be working well. Every identified conflict is assigned to a panel attorney within 48 hours. This is a vast improvement precipitated principally by the adoption of panel rotations in every judicial circuit similar to the way assignments are made in the federal court. In January, MSPD put on three PCR training events for panel attorneys. Attendance at these workshops was mandatory for all panel attorneys desiring PCR case assignments and in total exceeded 60 attendees. Special thanks go out to **Greg Mermelstein**, **Cinda Eichler**, and our new training director **Melinda Pendergraph** for pulling together and presenting the training. *We encourage members of MACDL* to consider signing up signing up to become panel attorneys, especially those of you practicing in rural areas of the state where our need for contract attorneys is the greatest. Applications can be found on our website: (www.publicdefender.mo.gov).

Personnel News:

In the last year, MSPD has hired or promoted four new District Defenders: **David Wallis** in our Columbia office; **Kevin Babcock** in our Ava office; **Tom Crocco** in our Troy office; and **Max Mitchell** in our Sedalia office. If you practice in any of these areas, please make a point of introducing yourself to our new District Defenders. We are pleased to have each of them join MSPD's management team.

Finally, last December the Public Defender Commission recognized all system employees who have served the noble purpose of defending the indigent in criminal prosecutions for 20 years or more. Congratulations to all of them for their dedication and hard work as we strive for justice in our courts. Foremost among them was our own **Peter Sterling** with 35 years of continual service to indigent defense. Peter has and continues to wear many hats and currently serves as our General Counsel.



DWI and Traffic Law Update

by Jeff Eastman

CRIMINAL

State v. Drury

ED96754
November 29, 2011
____S.W.3d____ (Mo. App. E.D. 2011)

In this criminal proceeding, the trial court sustained defendant's motion to suppress evidence relating to defendant's arrest for driving while intoxicated. Trial court found that driver was detained in violation of the Fourth Amendment, ordered the evidence suppressed and thereafter dismissed the charges against her. The State appealed and the Eastern District reversed.

The underlying facts were not in dispute. LEO #1 observed a Ranger speeding. He also observed an Escape traveling near the Ranger but not breaking any traffic laws. LEO #1 decided to traffic stop the Ranger for speeding. The driver of the Ranger continued some distance before stopping in his driveway. When he stopped, the driver of the Escape pulled into the same driveway next to the Ranger.

LEO #1 began his investigation of the driver of the Ranger at which time Drury, the driver of the Escape started to exit her vehicle. She was ordered back in her vehicle as LEO #1 continued his investigation. Shortly thereafter, LEO #2 arrived. In his contact with Drury, he smelled alcohol on her breath and noted that she had slurred speech. He reported to LEO #1 these signs of intoxication. Once LEO #1 had concluded his investigation and arrested the driver of the Ranger, he proceeded to investigate and then subsequently arrested Drury, driver of the Escape.

In its appeal, the State argued that the trial court erred in granting Drury's motion to suppress and thereafter entering an order of dismissal. On appeal, the Eastern District held that the facts of the case presented two separate and distinct seizures of defendant under the Fourth Amendment. The first seizure occurred when LEO #1 ordered Drury to remain in her car until another officer arrived at the scene. The second seizure occurred after LEO #2 reported to LEO #1 that he believed Drury was intoxicated and LEO #1 had LEO #2 detained her for purposes of investigating whether she had driven while intoxicated.

The court first considered whether an officer may reasonably detain a bystander for a limited duration in response to officer safety concerns during the investigation of a crime to which the bystander is not a subject. After reviewing the decision of various sister states, the court felt such conduct to be reasonable and within the permissible ambit of the Fourth Amendment.

The relevant constitutional inquiry is whether the governmental interest in briefly detaining an individual is reasonable when balanced against an individual's right to be free from government intrusion. Protective detention is reasonable when it is for a limited duration, and when the individual's presence could create a risk of harm to the officer, the individual detained, or the public at large, even if the officer had no reason to believe the individual would intentionally cause harm. In the present case, the detention was reasonable given the nexus between the drivers and LEO's presence alone with them at an isolated location. Drury's argument that the seizure was unreasonable due to lack of probable cause was rejected.

Secondly, the Eastern District considered the constitutionality of Drury's subsequent seizure which occurred when the officers no longer detained her out of concerns for officer safety, but for the purposes of investigating whether she had operated her vehicle while intoxicated. Such investigatory seizure requires reasonable suspicion of criminal activity. The appellate court found that LEO #2's detection of the strong odor of alcohol on Drury's breath and the slur in her speech were sufficient to create a reasonable suspicion that she had driven while intoxicated. They thus provided probable cause for LEO to detain her to conduct a field sobriety test. The trial court's judgment was reversed and the matter remanded.

State v. Wessel

SD31009
December 6, 2011
____S.W.3d _____ (Mo. App. S.D. 2011)

In this jury trial proceeding, defendant was convicted of driving while intoxicated. In a single point relied upon, defendant asserted that the evidence was insufficient to establish beyond a reasonable doubt that he had "operated the vehicle he was in." Evidence at trial included testimony from a neighbor who initially saw an area vacant but fifteen to twenty minutes later observed a truck parked there. He called the police. Five minutes later LEO arrived finding defendant seated in the driver's seat with the driver's seat reclined and a large amount of steam was emitting from the engine compartment. LEO determined that the engine was running but acknowledged there may have been mechanical problems precluding the vehicle's movement. When defendant exited the vehicle, he took the keys out of the ignition, moving the ignition back from the forward position. He then handed the keys to the vehicle to LEO.

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On appeal, defendant argued the evidence failed to establish that the vehicle worked and was thus capable of moving. The appellate court disagreed. The court distinguished the case from *State v. Chambers*, 207 S.W.3d 194 (Mo. App. S.D. 2006) in that in *Chambers* the car's engine was not running. In cases where the accused engine is not running at the time in question, the state must present "significant additional evidence of driving and the connection of driving in an intoxicated state ... to sustain a criminal conviction." *Chambers* differed from the present case in that here there was evidence of the engine running. Instead the court found persuasive *State v. Wilson*, 343 S.W.3d 747 (Mo. App. E.D. 2011) where a witness had observed a vehicle in front of her house about thirty minutes before the police arrived. In that thirty minute time frame, no one got out of the truck. When LEO arrived the truck was running and the defendant was behind the wheel, as in the present case.

The court also rejected defendant's argument that even if the engine was running, the evidence was insufficient to prove that he was in a position capable of affecting its movements. The appellate court held that from the evidence presented, the jury could reasonably conclude that the defendant was positioned as necessary to operate the vehicle. Judgment of conviction affirmed.

State v. Downing

WD73103
October 25, 2011
___S.W.3d____ (Mo. App. W.D. 2011)

In this criminal proceeding, defendant alleged the trial court erred in denying his motion to strike his persistent offender status. In a prior case, defendant was convicted of driving while intoxicated and was sentenced to ninety days in jail with execution of said sentence suspended subject to defendant completing two years of probation and paying a $500 fine. Defendant argued that the current Section 577.023 did not permit admission of evidence of this prior predicate for purposes of enhancement.

At the time of his current prosecution, Section 577.023.16 provided in part "a conviction of a violation of a municipal county ordinance in a county or municipal court for driving while intoxicated or a conviction or a plea of guilty or finding of guilty followed by a suspended imposition of sentence, suspended execution of sentence, probation or parole or any combination thereof in a state court shall be treated as a prior conviction." This provision describes when the disposition of an intoxication-related traffic offense qualifies as a "prior conviction" for purposes of admitting evidence of the conviction to determine "persistent offender" status.

In finding the language unambiguous, the Western District held that Section 577.023.16 supports the conclusion that the challenged offense was properly treated as a prior conviction for enhancement purposes because it was disposed of by a suspended execution of sentence and probation. "Section 577.023.16 envisions that a combination of listed dispositions will qualify a conviction as a 'prior conviction' for enhancement purposes." The court rejected defendant's argument that the phrase "or in any combination thereof" could be reasonably construed to suggest that if an unlisted means of punishment (for example a fine, treatment or community service) was imposed in combination with one or more listed means of punishment, the conviction could not qualify as a prior conviction for enhancement purposes.

State v. Triplett

WD73486
December 20, 2011
____S.W.3d _____ (Mo. App. W.D. 2011)

Defendant filed a motion to suppress. In his motion, he sought an evidentiary hearing and requested the court enter one or more of the following orders to wit: "(1) grant his motion to suppress, and to dismiss the charge of driving while intoxicated on the grounds that there is insufficient evidence for the State of Missouri to proceed to trial; (2) enter a finding that there was not probable cause to believe that defendant was driving while intoxicated, that as a result, there is insufficient evidence for the State of Missouri to proceed to trial ... and to dismiss the charge against him; and (3) enter an order for such other and further relief as the court deems proper in the circumstances."

After an evidentiary hearing, the trial court sustained the defendant's motion to suppress and ordered that the case dismissed without prejudice. From the order of dismissal, the state appealed. Defendant moved to dismiss the appeal arguing that a dismissal without prejudice is not a final appealable judgment. As the state did not seek interlocutory review of the court's order on the suppression of evidence, there was nothing for appellate review. The Western District agreed and dismissed the appeal.

The appellate court rejected the state's request that the matter be remanded to the trial court for entry of findings of fact and conclusions of law so as to permit it an opportunity to evaluate the merits of an appeal of the interlocutory order. The Western District found no authority to require the trial court to enter findings of fact or conclusions of law subsequent to its entry of a written judgment sustaining the defendant's motion to suppress.

As to the finality of the judgment, the court distinguished the present case from *State v. Smothers*, 297 S.W.3d 626 (Mo. App. 2009) in that in *Smothers*, the trial court found that under the facts admitted, the defendant could never be found guilty of the charge alleged as the state's felony information was deficient because the elements of the crime could not be established even with proof of the facts pleaded. This ruling, the appellate court found, placed a substantial cloud on the state's right to further litigate an issue or claim. In the present proceeding, there was no such cloud. It has the right to re-file the allegation should it see so fit.

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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)

State v. Murphy

SD31067
November 17, 2011
___ S.W.3d____ (Mo. App. S.D. 2011)

Defendant appeals the trial court's judgment convicting him of speeding in violation of Section 301.010. He claims the conviction cannot stand because 1) the park ranger who issued the ticket acted outside his authority in issuing the ticket, 2) the state failed to prove the offense because there was no evidence that the 35 mph speed zone extended up to the sign for the 55 mph speeding zone and 3) the uniform traffic citation filed with the court was an insufficient charging document. In a split decision, the majority affirmed the trial court's judgment. As to point one, the defendant claimed that the trial court erred in finding that he was in the park. He asserted that Section 253.065.1 only gave the ranger jurisdiction over state highways located within the boundaries of the state park and that there was no evidence submitted to support that the Big Creek Bridge was within a state park.

To determine whether convictions supported by sufficient evidence, the appellate court examined the record for substantial evidence from which a reasonable fact finder might have found the defendant guilty beyond a reasonable doubt. Conflicts in the evidence, determination of credibility of witnesses and the weight to be given their testimony are all within the peculiar province of the fact-finder. Here, ranger testified that the highway at all points relevant to the case were within the park. Although defendant attempted to discredit his testimony through documentary evidence, in a court tried criminal case, determination of credibility of witnesses is exclusively a matter for the trial court.

In his second point, defendant claimed the trial court erred in not finding that the ranger was outside of the park boundaries and could not lawfully pursue the defendant. He claimed the ranger was outside the park at the time he observed the alleged offense when he stopped the defendant to issue him the citation. On review, the Southern District majority held that even assuming the ranger lacked authority to affect a stop, that does not relieve defendant of his criminal culpability. Generally, claims regarding the authority of an officer to make an arrest or stop are presented in a motion to suppress evidence or in the context of a claim for damages against the arresting officer. Courts have uniformly rejected arguments that because an arrest or detention was in some manner allegedly illegal, the convicting court either (1) lacked jurisdiction to try or convict the defendant or (2) should have dismissed the charging document all together. Thus, LEO's location when he made his observations is irrelevant in determining the sufficiency of the evidence to support the conviction. LEO's testimony that he observed defendant driving in excess of the posted speed limit within the park was sufficient to support the trial court's verdict. Indeed, whether LEO was inside or outside the park, he can testify to his observations regarding defendant's actions, which constituted speeding under Section 304.010. LEO's measurement of defendant's speed with his radar unit occurred before the stop and such evidence would not be suppressed even if the stop was invalid.

Finally, defendant argued there was insufficient evidence to sustain his conviction because the state presented no evidence that the 55 mph speed limit zone started at the speed limit sign. In rejecting this argument as well, the court considered LEO's testimony, without objection, that the speed limit was 35 mph where he observed defendant operate his vehicle and that the limit did not change until several hundred feet to the north where the sign marking the start of the 55 mph speed zone was located. The majority affirmed the trial court's decision.

In her dissent, Judge Rahmeyer agreed with defendant's argument that the ranger who stopped him and issued the citation was outside his territorial jurisdiction and was thus without authority to issue the citation. Pursuant to Section 253.065.1, "each park ranger employed by the Director of the Department of Natural Resources ... shall ... preserve the peace and make arrest for violations of law on all lands under the jurisdiction and control of the Director and on all state and county highways within the boundaries of the park." Officers enjoy greater powers of arrest than do private citizens, but an officer may make an arrest only within his territorial jurisdiction, unless otherwise authorized by statute. When an officer makes an arrest outside his territorial jurisdiction, his power to do so is no greater than that of a private citizen. She found that LEO testified that he was parked outside of the park on private property at the time he observed defendant coming across the bridge. He further testified that his radar did not lock onto defendant's speed until after defendant had exited the northern end of the bridge which was outside the park boundary. Under such facts, LEO was a private citizen and therefore could not affect the stop or arrest of defendant.

State v. Moore

352 S.W.3d 392 (Mo. App. E.D. 2011)

In this criminal appeal, defendant challenged the admission of his full driving record which spanned more than 20 years and showed some 22 prior convictions for driving while revoked or suspended, including a notice of revocation occurring several months after the events charged in the present proceeding. He argued that the admission and publication of his complete driving record to the jury without first redacting portions that identified other crimes was not legally relevant since the record's prejudicial effect outweighed any marginal probative value. Defendant offered to stipulate to the elements of the offense of driving while revoked. The State refused the stipulation and insisted on entering into evidence the defendant's 56-page driving record reaching back to 1986 arguing it was critical to prove that he knew his driving privilege was revoked on February 4, 2009.

The Eastern District found the same to be error. First, the court held that even if it were to assume that the defendant's entire driving record covering the last 20 years was somehow logically and legally relevant, the criteria of logical and legal relevance are not intended to serve as a

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loophole for evading the general ban on propensity evidence. A finding of logical and legal relevance will never provide a basis for the admission of evidence of prior crimes for purposes of demonstrating a defendant's propensity. Propensity evidence, although legally relevant, is unconstitutional because it violates the defendant's right to be tried for the offense for which he is indicted.

Secondly, in order for either intent or absence of mistake to serve as a basis for the admission of evidence of similar crimes, it is necessary that those be legitiment issues in the case. Here, defendant never asserted that he did not know that his driving privilege was revoked. In fact he stipulated that his driver's license was revoked. Therefore, his knowledge or intent was not an issue and evidence of his prior convictions were not admissible to show his intent or knowledge.

Admission of the defendant's entire driving record under the circumstances of this case constituted an abuse of discretion. However admission does not constitute reversible error unless the defendant can show that he was prejudiced or that a reasonable probability exists that the verdict would have been different absent the court's error. The test for prejudice involving improper admission of evidence is whether the improper admission was outcome-determative. A finding of outcome-determative prejudice expresses a judicial conclusion that the erroneously admitted evidence so influenced the jury that when considered with and balanced against all evidence properly admitted, there is a reasonable probability that the jury would have acquitted but for the erroneously admitted evidence.

Here, the court found that defendant suffered prejudice While the State made a submissible case on each of its counts, the evidence of assault on a law enforcement officer and possession of a controlled substance was far from overwhelming. Writing for the majority, Judge Mooney held, "The defendant urges us to follow the reasoning of *State v. Perry*, where the court held that 'when the State, as here, insists on walking the precipice of reversible error, it must be prepared to suffer the consequences of stepping over the edge - reversal and remand for new trial.'" In the present case, the court needed no urging. "Further we do not find that the prosecutor drifted a bit too close to the cliff's edge. Rather, we conclude that the prosecutor flung himself head first in the abyss." The trial court's judgment and remaining counts were reversed and the case was remanded for a new trial.

DE NOVO

Sostman v. Director

ED95557
December 13, 2011
_____ S.W.3d _____ (Mo. App. E.D. 2011)

In this Section 302.500 proceeding, the Director appealed the trial court's decision reinstating driver's operating privilege. At the conclusion of the hearing, the trial court found the arresting officer's testimony credible but determined that the evidence "did not quite rise to the appropriate burden of proof to establish probable cause to believe driver committed an alcohol-related traffic offense." On appellate review, the Eastern District disagreed.

The appellate court held that driver did not contest the Director's evidence supporting probable cause for arrest. Driver admitted that he smelled faintly of alcohol, his eyes were glassy and that he failed portions of the three field sobriety tests administered. Driver then argued that these indications of intoxication did not, in aggregate, amount to probable cause.

The appellate court held that since the trial court found LEO's testimony credible, the Director's uncontested evidence was sufficient to give a prudent, cautious and trained police officer reasonable grounds to believe that driver was driving a motor vehicle with a BAC above the legal limit. Whether LEO had probable cause to believe driver was operating his vehicle while intoxicated is a legal question which the appellate court reviewed without deference to the conclusions reached by the trial court. Judgment reversed.

Scheumbauer v. Director

350 S.W.3d 868 (Mo. App. E.D. 2011)

Driver challenged the validity of the breath test reading alleging that LEO's certification to operate the equipment was invalid in that it had been issued by DHSS rather than MoDOT. The driver argued that the authority over the breath testing program had been transferred from DHSS to MoDOT by Executive Order 07-05. The trial court agreed and rescinded the sanction.

On appeal, the Director claimed the trial court erred in excluding the test result in that it erroneously applied the law. Specifically, Director contended that the reorganization ordered by the 2007 Executive Order did not occur and therefore the DHSS remained the agency in power to manage the breath alcohol program. The appellate court found the trial court's judgment was based upon a legal conclusion that MoDOT became responsible for promulgating rules and regulations to administer the program after Executive Order 07-05 was signed by then Governor Matt Blunt. The appellate court held however that the Executive Order did not result in an immediate transfer of the program to MoDOT. The Order merely authorized the process of transfer which was never fully implemented. Trial court decision reversed and license sanction affirmed.

Morse v. Director

November 15, 2011
SC91777
____S.W.3d____ (Mo. 2011)

Driver was 19 when she was arrested for driving while intoxicated. Her privilege to operate a motor vehicle was administratively sanctioned pursuant to the provisions of 302.505. She eventually satisfied all of her reinstatement requirements and secured full privileges. She was criminally prosecuted for the offense and received a suspended imposition of sentence with probation.

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Driver did not successfully complete her probation and experienced a revocation thereof resulting in the entry of a conviction. Upon notification of the entry of conviction, Revenue assessed eight points against her operating privilege and although giving her credit pursuant to 302.525.4 for the 30-day suspension previously served, required that she complete another SATOP evaluation, remit a second reinstatement fee and file proof of financial responsibility. In a Section 302.311 review, the trial court ordered reinstatement without the requested requirements.

Although the Eastern District affirmed, the Supreme Court accepted transfer and thereafter reversed the trial court's decision. In its analysis, the Supreme Court concluded that driver was still required to file an SR-22 and pay an additional reinstatement fee. Statutorily, she was to be given credit for the 30-day loss of license and pursuant to 302.545, the SATOP which she previously completed.

REFUSAL

Korte v. DOR

352 S.W.3d 610 (Mo. App. S.D. 2011)

In this Section 577.041 proceeding, the Director argued that the trial court misapplied the law in rescinding the Director's efforts to revoke driver's privilege for refusing to submit to a chemical analysis of his breath. In the trial court proceeding, the Director relied exclusively upon her certified records. When offered, driver objected only to the hearsay nature of the evidence and that the records were not received by driver until the morning of trial. No challenge was made to the content of the records. No other evidence was offered by either party.

In challenging the Director's actions, driver argued (1) that the Director could not rely upon the implied consent because driver stated he did not understand his Miranda rights and (2) that LEO's request was invalid in that it was not made within 90 minutes of his arrest. The trial court rescinded the sanction but was silent as the accuracy or the credibility of the evidence.

On appellate review, the Southern District found the evidence to have been uncontested such that the trial court misapplied the law in reinstating driver's license.

Mapes v. Director

WD73303
November 8, 2011
____ S.W.3d____ (Mo. App. W.D. 2011)

In this Section 577.041 proceeding, the only evidence presented was a certified copy of the Director's file. Although the parties disagreed about the quality of the evidence as it related to the issue of probable cause, the facts set forth in the certified documents produced by the Director were not disputed. In its judgment, the trial court found that the Director had failed to establish that LEO had probable cause to believe that driver was driving while intoxicated.

The court noted that driver did not have any problems with his balance, walking or speech and was able to successfully complete the one leg stand test, as well as recite the alphabet. Finding one clue on the one leg stand test, the court declined to give weight to that evidence because the record did not indicate what LEO had instructed driver to do during the test and whether driver had completed the test in accordance with said instructions. Likewise, the trial court acknowledged the results of the HGN test but gave no weight to them because the record failed to establish the procedures that were used during the administration and scoring of the test or suggest how the trial court should interpret the results.

When a case is submitted to the trial court on the basis of the documentary evidence and an appellate court has the same opportunity to review the evidence as to the trial court, the law allocates the function of fact-finder to the trial court. Therefore, even where the trial court's decision was based solely on the records, we defer to the trial court as the finder of fact in determining whether there is substantial evidence to support the judgment and whether the judgment is against the weight of the evidence. Trial court's judgment affirmed.

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
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Stab Your Client with Your Pen and Other Advice on Client Relations

by Grant J. Shostak

After I passed the bar exam, I shadowed a well-known St. Louis attorney for a few days to learn how to be a criminal defense lawyer. As the two of us sat in the St. Louis County Jail waiting for one of his clients, I took a few notes with a Mont Blanc pen that I had received as a graduation present. The older lawyer saw the pen and chuckled. "If you want to practice real criminal law," he said, "you need to get rid of that fancy pen and buy some cheap pens — the kind where the cap comes off." I asked him why, thinking that a lawyer should have a nice pen to impress potential clients. His answer was simple and blunt: "If you need to protect yourself from the client, the cheap pen will make a better 'shank' than the Mont Blanc."

Welcome to life as a criminal lawyer. Although I never had to stab a client, there have been times in my career when I was happy to reach into my pocket and find the cheap pen, just in case.

While learning to defend criminal cases, I accepted many federal appointments. In these cases, the circumstances of the attorney-client relationship are often less than ideal. Most of the time the defendant has, as I like to put it, *a big legal problem*. The conviction rate in a federal criminal case is roughly 99%. The defendant in an appointed case is indigent, often detained in jail pending trial and mistrustful of the criminal justice system. A cold reception at the initial client meeting is not unusual. The client has often had plenty of time to spend with "jailhouse lawyers" — fellow inmates who will claim that the defense lawyer is not working on the client's behalf. Often, the client will want to raise a number of proposed defenses that are flat out ridiculous.[1]

As I defended these cases, I watched many lawyers interact with many clients. Some attorneys argued openly with their clients, while others seemed to enjoy great relationships. How did some lawyers maintain control and amicable relationships with their clients, even when those clients sometimes insisted on raising baseless defenses, while some attorneys fought with their clients through the entire process? The answer is that some lawyers learned to tell clients what they didn't want to hear while maintaining a good working relationship and other lawyers did not.

The ability to deliver the bad news while maintaining the confidence of the client is crucial to being an effective lawyer in any field. The corporate lawyer, like the criminal defense lawyer, has to be able to tell the client why a deal won't work, while maintaining trust and confidence.

When a client comes to a lawyer with a baseless defense, there are a few ways to deliver the news that the plan will not work. One way, the way that many criminal defense practitioners use, is to flatly say that the client is wrong. This method has the most chance of forcing the attorney to use a cheap pen as a weapon. It is almost a sure way to create conflict between attorney and client.

The client's negative reaction to such advice is not surprising. People don't like to be told what to do. They also want what they can't have. In psychology, this phenomenon is called psychological reactance. Any parent who has attempted to change the behavior of a young child has seen it firsthand. The more a child is told not to do something, the more intent the child becomes on the forbidden act. It is a familiar force to anyone who has tried to stick to a diet, and it is a documented phenomenon in jury trials.

In his bestselling book Influence: The Psychology of Persuasion, Dr. Robert Cialdini discusses a jury research project conducted by the University of Chicago Law School.[2] In the study, jurors were asked to decide a case where a woman was injured by a careless driver. Not surprisingly, the study found that the jurors awarded more money to the victim when they learned that the negligent driver had auto insurance, and less money when they were not told of the driver's insurance. When they were told that the negligent driver had insurance and were subsequently instructed to disregard that information, however, they awarded the most money of all. The study concluded that the jurors put a higher value on information that they could not have. As with the jury in the study, experience has demonstrated that criminal defendants put a higher value on a baseless defense when they are told that it simply won't work.

Instinctively, great lawyers know how to counter this phenomenon. Famed trial attorney Gerry Spence teaches lawyers, among other things, to "step into the hide" of the client and see things from the client's perspective. What does a criminal defendant want from a lawyer? We can all agree that criminal defendants want a lawyer who will work for them, and not against them. How can you, as the defense lawyer, tailor your actions to conform to what the client wants, even when the client is wrong about how to get it?

Simply telling a criminal defendant that a suggested defense won't work will probably not be well received. The right way to deliver the bad news is limited only by the

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attorney's imagination. One approach that worked well for me was to find the cases that have ruled squarely against the baseless issues the client hopes to raise. Then, deliver copies of the cases to the client, along with a note explaining that while the client has raised an important issue, it should be anticipated that the Court and the Prosecutor will know about these cases, too.

What is accomplished with this technique? First, the attorney has given counsel while treating the client with respect. Second, the attorney has shown the client why the proposed defense will not work and simultaneously shown that the attorney is working on the client's behalf. Instead of simply saying no, the attorney has given the client the information needed to pursue better decisions and a more effective defense.

Just because we have a law degree does not mean we know everything. For many clients, an attorney can seem like yet another authority to resist. As a criminal defense attorney, part of your work is to help the client accept your counsel. Spend a few minutes thinking about how to approach your next client meeting and chances are you will only use your pen for writing.

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1 See Bernard J. Sussman, Idiot Legal Arguments: A Casebook for Dealing with Extremist Legal Arguments (1999) available at: http://www.adl.org/MWD/suss1.asp (discussing many such defenses).

2 Robert B. Cialdini, Influence: The Psychology of Persuasion 254 (2007)

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)

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Hear Ye, Hear Ye ...

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Post Conviction Update

by Elizabeth Unger Carlyle © 2012

Because case summaries were not included in the last edition of this column, this column includes summaries of pertinent cases from February, 2011, forward. A discussion of the recent U.S. Supreme Court decision in *Maples v. Thomas* is also included.

Extraordinary Writs

State ex rel. Jackson County Prosecuting Attorney v. Prokes

2011 WL 6997430 (Mo. App. W.D. Dec. 20, 2011) (Buchli)

After the first-degree murder case against Richard Buchli was remanded for a new trial as a result of *Brady violations*, the trial judge excluded all of the State's evidence as a sanction for the State's violation of a discovery order. Affirming this order and denying a writ of prohibition, the court first found that the State could not "take back" its admissions in the court below that it had violated the discovery order. The court then went on to hold that the delay caused by the State's failure to provide discovery was prejudicial: "One manner in which Buchli is particularly prejudiced, and that has resulted in fundamental unfairness to him, is that today he is no closer to receiving a fair trial than he was when he was originally charged over eleven years ago .... Simply put, the State is not entitled to the extraordinary remedy of writ of prohibition because its conduct has clearly created fundamental unfairness and prejudiced Buchli."

State ex rel. Griffin v. Denney

347 S.W.3d 73 (Mo. banc 2011)

In this prison murder case, the State failed to perform its duties under *Brady v. Maryland* when it failed to disclose evidence that an inmate other than Griffin (Smith) was in the prison yard with a sharpened screwdriver shortly after the murder. This was material because it supported "a viable alternative perpetrator defense." The State successfully prosecuted Smith for possessing the screwdriver, yet never disclosed this evidence to Griffin or his counsel. The writ of habeas corpus was issued, and Mr. Griffin was ordered discharged if not tried within 60 days from the issuance of the mandate. At the time this article was written, a certiorari petition was pending, and Mr. Griffin was still in custody.

State ex rel. Koster v. McElwain

340 S.W.3d 221 (Mo. App. W.D. 2011)

In Dale Helmig's case, the court of appeals affirmed the circuit court's grant of habeas corpus relief on several claims of constitutional error. First, the court held that the prosecutors violated Mr. Helmig's right to due process of law when they failed to disclose exculpatory evidence material to Mr. Helmig's innocence. (The evidence included claims by the victim that she had been abused by her husband, and was fearful of him.) Second, the court found that Mr. Helmig was denied due process of law when the jurors, while deliberating, were permitted to view a map that was not in evidence. Such contact with the jury is presumed prejudicial, and the State failed to rebut the presumption. As to these two claims, the court found that Mr. Helmig had established "cause and prejudice" for failing to raise them sooner because the factual and/or legal basis for the claims was not available at the time of the Rule 29.15 proceedings. The court declined to consider other grounds, since these two grounds required relief. Specifically, the court declined to consider Mr. Helmig's freestanding claim of innocence. The court directed that Mr. Helmig be discharged if not retried within 180 days of the issuance of the mandate. The State declined to retry Mr. Helmig, and he has been discharged.

State ex rel. Taylor v. Steele

341 S.W.3d 634 (Mo. banc 2011)

In this habeas corpus proceeding alleging that Mr. Taylor was improperly deprived of a jury at the penalty phase of his capital murder case, the court denied relief. The Court did note, however, that "Habeas corpus is the last judicial inquiry into the validity of a criminal conviction and serves as 'a bulwark against convictions that violate fundamental fairness,'" *Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. banc 2003) (quoting Engle v. Isaac, 456 U.S. 107, 126 (1982))." The Court went on to hold that habeas corpus jurisdiction attached because the claim was one that the sentence exceeded that which was legally authorized.

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A Tip of the Hat

Hats off to **Talmage E. Newton, IV** for his work in writing MACDL's amicus brief in *State v. McNeely* decided Jan. 17, 2012 by the Missouri Supreme Court.

The Court held that the sole fact that blood-alcohol levels dissipate after a person stops drinking is not a per se exigency to support a warrantless blood test.

Post-Conviction Relief Granted

Reformation of judgment required.

The defendant was entitled to reformation of the judgment where the judge orally said that the sentences were concurrent, but entered a written judgment making them consecutive. The sentence pronounced in the defendant's presence controls. *Shaw v. State*, 347 S.W.3d 142 (Mo. App. S.D. 2011) Where the oral judgment simply referred to shock incarceration, and the written judgment specified a particular program, reformation of sentence was required. *Etenburn v. State*, 341 S.W.3d 737 (Mo. App. S.D. 2011)

Ineffective assistance of counsel in plea bargaining.

Where trial counsel misinforms his client concerning the 85% rule when informing the client concerning a plea bargain offer, he has rendered ineffective assistance of counsel. (Relief was not granted, but an evidentiary hearing was ordered. *Webb v. State*, 334 S.W.3d 126 (Mo. banc 2011)

Failure to challenge sufficiency of evidence on appeal.

Where the defendant was convicted of unlawful use of a weapon, but the gun was not recovered, it appeared that the evidence was insufficient to show that the gun was "readily capable of lethal use" as required by Mo. Rev. Stat. §571.030. Thus, the failure to challenge the conviction was ineffective assistance of appellate counsel. (Remanded for evidentiary hearing) *Williams v. State*, 2011 WL 5541709 (Mo. App. E.,D. Nov. 15, 2011).

Post-Conviction Procedural Rulings

The date the defendant is delivered to the department of corrections does not count in calculating whether the defendant has filed his post-conviction motion within 180 days under Rule 24.035(b). *Phelps v. State*, 351 S.W.3d 269 (Mo. App. W.D. 2011).

Now for the bad news:

The state cannot waive a timeliness objection under Rules 29.15 and 24.035. In this consolidated appeal, two cases were dismissed as untimely. The third case was remanded for an evidentiary hearing because the movant raised the issue that his motion had been timely submitted but had been lost by the court. *Dorris v. State*, 2012 W 135392 (Mo. banc January 17, 2012).

If the defendant waives his post-conviction rights as part of a plea bargain agreement, that waiver is enforceable unless the defendant alleges and proves ineffective assistance of counsel in connection with the decision to plead guilty. The mere fact that the defendant was denied separate counsel on the issue of waiver is insufficient to nullify the waiver, because it presents a potential, rather than an actual, conflict of interest. *Cooper v. State*, 2011 WL 6096504 (Mo. banc Dec. 6, 2011), *Krupp v. State*, 2011 WL 6096499 (Mo. banc Dec. 6, 2011).

In a disturbing decision, the court holds that a claim of ineffective assistance of counsel based on trial counsel's failure to fully explain the terms of a plea agreement, as a result of which the defendant went to trial and got a longer sentence, is not "cognizable" under Rule 29.15. This would appear to make the Missouri standard for ineffective assistance of counsel narrower than the federal standard, a violation of the United States Constitution. *Williams v. State*, 344 S.W. 2d 878 (Mo. App. S.D. 2011)

The time requirements for filing post-conviction motions cannot be waived. *Trice v. State*, 344 S.W.3d 277 (Mo. App. E.D. 2011).

Not new news, but to keep your cites up to date:

The movant is entitled to an evidentiary hearing when the post-conviction motion asserts facts that cannot be ascertained from the record and, if found to be true, require relief. *Brown v. State*, 343 S.W.3d 760 (Mo. App. E.D. 2011); *Collins v. State*, 335 S.W.3d (Mo. App. E.D. 2011); *Conger v. State*, 2011 WL 4943894 (Mo. App. E.D. Oct. 18, 2011).

The post-conviction court is required to make findings adequate for appellate review. *Smith v. State*, 343 S.W.3d 766 (Mo. App. W.D. 2011), *Smith v. State*, 342 S.W.3d 899 (Mo. App. E.D. 2011).

Lagniappe

The United States Supreme Court recently decided that where a defendant had been abandoned by his state post-conviction counsel, his failure to file a state appeal did not constitute a bar to federal habeas corpus review. While the facts of *Maples v. Thomas*, 2012 WL 125438 (Jan. 12, 2012), are unusual, the case presents a chink in the wall of procedural default which previously could never be penetrated by errors of post-conviction counsel. Watch for further developments on this issue.

Hall of Fame

Congratulations to the attorneys for the defendants described in this article who obtained relief: Timothy A. Blackwell (Williams), Ellen Flottman (Webb), Timothy J. Forneris (Conger), Kent Gipson (Griffin), Richard Johnson (Buchli), Craig Johnston (Etenburn), Sean D. O'Brien (Helmig), Patrick Peters (Buchli), Gwenda Robinson (Brown, Collins), Ruth Sanders (Phelps), Lisa Stroup (Smith), Kate Webber (Smith), Matthew M. Ward (Shaw), Bronwyn Werner (Helmig).