MACDL
Missouri Association of Criminal Defense Lawyers

Newsletter

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FROM THE DESK OF

By Timothy R. Cisar
MACDL President

Fall, 2004

As I write this column, I am preparing to leave for a funeral of a dear friend. Judge Mary Dickerson, Circuit Judge of the 26th Judicial Circuit died on July 16, 2004, at the age of 52 after a lengthy battle with cancer. She was the finest example of a public servant I have ever met. She served our circuit as a Judge, both as an Associate and Circuit Judge, since 1981. Judge Dickerson did not always rule in your favor; however, she always listened with an open mind to everything you had to say. She would then make a decision after careful deliberation. She always tried to be fair and compassionate in her rulings. Our community, circuit and state have lost a bright star in the judiciary.

In contemplating the death of a friend, my next duty as President of MACDL is to tell each of you to go hug your children. If you have no children, go hug your significant other and your secretary, in that order. Family is important. It keeps us grounded in reality and helps us prioritize our lives. Do not work yourselves to death or to the death of your families. Take more vacations or at least more long weekends.

People often ask me why they should join MACDL. The best reason is what MACDL does in the state legislature. Every year, the MACDL Board reviews the proposed laws and sets forth a schedule, with the help of our Executive Director Randy Scherr, as to which hearings on which bills we should be present to testify for or against. In easier words, we show either support or opposition to many of the bills submitted and work hard to compromise some of these for the good of Missourians.

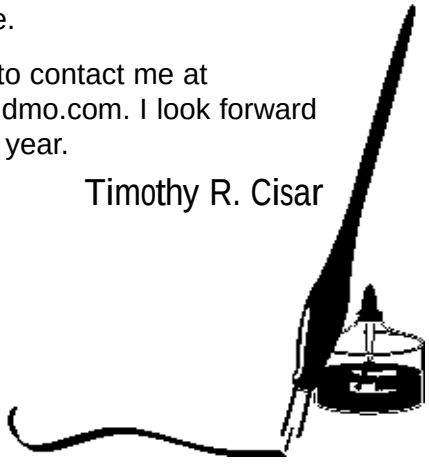
Did you know that last year (2003) there was a move to take away depositions in criminal cases? This is what we fight. MACDL cannot fight the good fight without a strong membership and contributions to our PAC (Political Action Committee). So the biggest reason to join MACDL is to help preserve our civil and constitutional rights.

My favorite reason to join is the camaraderie. Your brothers and sisters across this state who take up the fight in defense of the accused are a great source of wisdom, ideas, motions, pleadings and counsel. I have benefited from amicus briefs, motions I would never have thought of, deposition and trial techniques, and so on. We have an outstanding defense bar in Missouri. A lot of these people are members of MACDL. These members have made me a better lawyer.

Another reason to join is the education we try to put forth. In addition to this newsletter, MACDL sponsors and co-sponsors a number of seminars every year. These are of the highest quality. Our CLE committee, headed by Joe Passinese, puts out a quality product every time.

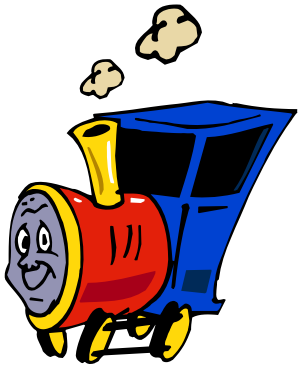
Feel free to contact me at tcisar@midmo.com. I look forward to a great year.

Timothy R. Cisar



Welcome Aboard!

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



David Taylor
Branson

Bryan Keller
Cape Girardeau

Tracy Carney
Clayton

Lew Kollias
Columbia

Scott McBride
Columbia

Josh Oxenhandler
Columbia

Colby Smith-Hynes
Festus

Robert L. Knapp
Independence

Steve Burmeister
Independence

Lance D. Sandage
Independence

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Jefferson City

Susan Hunt
Kansas City

Richard "Jake" Jacoby
Kansas City

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Lake Ozark

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Liberty

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Ozark

Melissa Galloway
Springfield

Debbie Gretlein
Springfield

Penny Speake
Springfield

Gary Wilson
Springfield

Christopher Desilets
St. Louis

Richard Fredman
St. Louis

Charles James
St. Peters

Frank Carlson
Union

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Thank You!

MACDL would like to thank the following sponsors of our 2004 Annual Meeting:

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Missouri Association of Criminal Defense Lawyers

The MACDL Newsletter is a semi-annual publication of the Missouri Association of Criminal Defense Lawyers; P.O. Box 1543; Jefferson City, Missouri 65102
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Your comments and suggestions are welcome!

Amicus Curiae Committee

Don't forget that MACDL has an Amicus Curiae Committee that 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. Currently, we are awaiting an argument setting from our Supreme Court in State of Missouri v. Michael Crawford, SC85765, dealing with when the right to counsel attaches. In addition, the Committee is considering a request dealing with the forced medication of a defendant to render him competent for trial.

To request MACDL to appear as amicus curiae, please 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, as well as include copies of the order or opinion appealed from and any other helpful materials.

Committee Chair:

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Favorable Ruling By Lower Court

By Lew Kollias

The Department of Corrections (DOC) refuses to adhere to the mandate of Section 559.115, which now states that an offender's first incarceration for 120 days for participation in a DOC program prior to release on probation shall not be considered a previous prison commitment for the purpose of determining a minimum prison term under the provisions of Section 558.019.

Yet, despite this language, DOC says it only applies to anyone placed on shock probation under 559.115 after the effective date of Senate Bill 5, June 27, 2003.

An inmate was placed on shock in 1999, and who was later revoked and sent to DOC, sought to have the 40% restriction on consideration for eligibility of parole removed, and filed a declaratory judgment action in Cole County, before the Honorable Rich Callahan.

He granted relief, correctly (in my opinion) noting that "elimination of an existing limitation on the Parole Board's general authority is procedural in nature and therefore does apply to inmates who were sentenced prior to the effective date of the amendment. It is clear that the legislature intended to remove one of the statutory restrictions placed on the Board of Probation and Parole in considering inmates for parole who have only served a 120-day commitment under Section 559.115, RSMo. The change in the law does not mandate the granting of parole or even the granting of a parole hearing. However, the change is effective with its passage and applies to all inmates affected, regardless of whether they were sentenced before or after the effective date of the amendment."

Even though the Supreme Court's recent decision in Russell, No. SC85725 would strongly suggest that they will lose since the Court determined the ability to petition the sentencing court for early release under 558.016.8 in SB 5 applies retroactively to those inmates who were originally sentence before the effective date of SB 5, DOC has appealed Judge Callahan's decision to the Western District Court of Appeals, in case No. WD 63858, where it currently resides despite DOC's attempt to transfer it to the Supreme Court.

Supreme Court Update

By Lew Kollias; Public Defender; Columbia, MO

I Certainly the top of the list, if for no other reason than Scalia wrote a favorable defense opinion, is Crawford v. Washington, 124 S.Ct. 1354. This is a very important case, as it greatly limits the use of any hearsay at trial. In doing so, it overruled the reliability test of Ohio v. Roberts, 100 S.Ct. 2531. Any testimonial information that hasn't been subjected to the "crucible of cross-examination" is not admissible unless the informant is available and testifies at trial. However, what is testimonial is not defined, although clearly statements taken by police or law enforcement agencies towards prosecution, like the one here where the wife gave a statement later used at trial when she was "unavailable" to testify due to the marital privilege, are testimonial. Also, there may be some well-recognized common law exceptions to hearsay rule, such as dying declarations, that may still be admissible.

II Missouri v. Seibert, 124 S.Ct. 2601, the court reversed a first degree murder conviction based on a police procedure where officers would question defendant without Miranda warnings, obtain incriminating statements, and then warn the defendant and obtain statements, usually videotaping or otherwise recording them. Such a deliberate two-step type procedure to circumvent Miranda warning requirements is not allowed, and the warned statements obtained by employing such a procedure had to be suppressed along with the unwarned statements.

III In United States v. Patane, 124 S.Ct. 2620, however, the Court made it clear that unwarned but otherwise voluntary statements leading to recovery of physical evidence will not require suppression of such physical evidence. Here, defendant told officers where a gun could be found, which was used against him at trial for being a felon in possession of a firearm.

IV In Groh v. Ramirez, 124 S.Ct. 1284, the Court found that a search warrant that utterly failed to describe the person or things to be seized was invalid on its face, regardless of the fact that the description was provided in the application for the warrant, and that a search of a private residence pursuant to this facially invalid warrant could not be regarded as "reasonable" though items to be seized were described in the warrant application. Even though this was a civil rights action ultimately concluding that the agent who prepared and executed the warrant was not entitled to qualified immunity, this is obviously a good case for suppression based on a facially invalid warrant as well.

V In Banks v. Dretke, 124 S.Ct. 1256, the Court reversed denial of sentencing relief, finding, contrary to the federal circuit court, that petitioner had done enough to seek Brady material, and was reasonable in relying on the state's assertion that it had disclosed all Brady matters even though it held back on a material witness's status as an informant. Further, the prosecution took no steps to correct this witness's false testimony at trial about his relationship with the authorities. Such a rule that prosecutors may hide and defendant must seek information has no place in the criminal justice system. Further, the non-disclosed information was clearly material as the witness hurt petitioner substantially in the penalty phase as the jury could conclude, based on the witness's testimony, that petitioner was a highly dangerous individual who merited the death penalty.

VI In Tennard v. Dretke, 124 S.Ct. 2562, the Court rejected the fifth circuit's gloss on mitigation evidence of defendant's mental condition, where the circuit court held only if petitioner presented "constitutionally relevant mitigating evidence" which is defined as evidence of a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, can such Penry v. Lynaugh evidence be admitted. The fifth circuit said it was proper not to admit petitioner's low IQ evidence here, since this alone was not a uniquely severe condition, nor was there a showing the crime was attributable to his low IQ. The Supreme Court reversed, and criticized the 5th circuit for coming up with such a test. Such evidence is usually broadly admitted as for the jury to determine relevance, and nothing in the High Court's prior decisions every suggested the existence of such a "nexis" test as the 5th circuit attempted to implement.

VII In Blakely v. Washington, 124 S.Ct. 2531, the Court invalidated a sentence where the defendant pleaded guilty to kidnapping his wife. However, at sentencing, the court extended the maximum sentence over what defendant could normally have received by finding the "sentencing factor" that the offense involved deliberate cruelty, a fact neither admitted by the defendant at his plea, nor obviously found by a jury. Again, Justice Scalia comes to the rescue (weird saying that) and finds this violates Apprendi v. New Jersey, 120 S.Ct. 2348, by allowing a judge to find a fact that increases the maximum punishment. This decision has spawned a bevy of confusion and differing opinions in the federal circuits as to whether the federal sentencing guidelines are valid. This matter will no doubt be taken up by the High Court soon.

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Cases From Missouri's Supreme Court

By Lew Kollias

In State v. Williams, 126 SW3d 377 (Mo. banc 2004), the Supreme Court overruled State v. Cruz, 71 SW3d 612 (Mo. App. W.D. 2001, and clarifies that armed criminal action may only be charged with an underlying or predicate felony that in turn requires the mental element of purpose or knowledge. In Cruz, the appellate court determined that the mental element for armed criminal action would be that of the predicate felony, even if the predicate felony had a mental element of recklessly. Therefore, Cruz sanctioned the conviction of both involuntary manslaughter by recklessly causing the death of another, and armed criminal action based on the predicate felony of involuntary manslaughter. This is no longer permissible, under Williams, as the Supreme Court clarifies that only those predicate offenses with an intentional mental element of purpose or knowledge may be used to support an armed criminal action charge and conviction, as armed criminal action itself requires at least a mental state of knowledge.

Also of note is the recent decision of State ex rel. Green v. Moore, No. SC85234 (April 13, 2004). This case granted habeas relief for a prisoner who had been convicted of both felony murder and armed criminal action, as the armed criminal action sentence was void, since the felony murder conviction was in turn based on unlawful use of a weapon by exhibiting in a threatening manner, and 571.015.4 specifically prohibits a conviction for both armed criminal action and unlawful use of a weapon by exhibiting a deadly weapon in a rude or threatening manner. As the Supreme Court noted, "merely insulating the unlawful use of a weapon predicate by inserting a murder conviction between it and the armed criminal action conviction is insufficient to avoid the statutory proscription."

Finally, in State v. Pond, No. SC85500 (April 13, 2004), the court reversed a conviction for statutory sodomy, finding it was error to refuse a lesser included offense instruction of child molestation, since the victim had been impeached with several out-of-court statements she had made to other people, indicating that the defendant had touched her but not penetrated her, while at trial she said he penetrated her. Overruling cases indicating that there must be some affirmative evidence by the defense to justify the giving of a lesser offense instruction, the Court clarifies that the standard to determine if a lesser offense instruction must be given is as follows:

> *A judge is not required to instruct on a lesser included offense charge unless there is a basis in the evidence for the jury to acquit of the greater offense, and convict of the lesser. Any prior case that may require*

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Federal Update (*Cont. from page 4*)

VIII

In Iowa v. Tovar, 124 S.Ct. 1379, the Court restricts the admonitions required to an accused pleading guilty without counsel, and finds that the 6th amendment does not require a judge, before accepting a defendant's waiver of counsel at a plea hearing, to give a rigid and detailed admonition of the usefulness of an attorney, including that an attorney could advise if it is wise to plead guilty and if the defendant may be overlooking a valid defense by entering a plea of guilty.

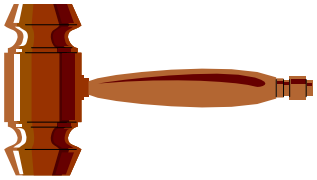
IX & X

These are important because they underscore the terrible effects of Teague v. Lane, and the need to preserve issues, even though they may appear to be kind of far out there, since Teague will bar virtually all new principles of law and virtually no principle, other than perhaps a Gideon-type right of counsel matter, will ever rise to the "watershed exception" allowing retroactive application of a case.

In Beard v. Banks, 124 S.Ct. 2504, the Court refused to apply Mills retroactively, finding that reasonable jurists could disagree whether Mills (jury instructions that lead jurors to believe they could not individually find mitigation but must be unanimous as to mitigation are bad) was mandated by Lockett (that a sentence must be allowed to consider any mitigating evidence), and therefore no retroactive application. Mills does not fall under the watershed exception for rules of criminal procedure. So to is the situation with Ring v. Arizona, that applied Apprendi to prevent a judge, rather than a jury, finding that death is warranted. Schriro v. Summerlin, 124 S.Ct. 2519, makes it clear that Ring is not retroactive, does not implicate a watershed rule such that it is not Teague-barred, as it does not implicate the fairness and accuracy of a trial since a judge can come to a fair conclusion about aggravators supporting the death penalty.

Criminal Law Update

By Bernard Edelman



State v. Hamilton #25625 (MoApp S.D. 3/3/04)

Defendant was convicted of tampering with a judicial officer, a violation of Section 565.084 RSMo. While on parole after serving time, his female parole officer had him arrested as a parole violator. As he was being escorted from the parole office, he stated, in his parole officer's presence to her supervisor that, "You better make sure she's not my officer when I come out." As he was being placed in a jail cell, he stated to the police he "was gonna kill that bitch when he got out," and was "going to smack her and f— that bitch up."

Defendant appealed his conviction, contending there was no evidence he was guilty of tampering with a judicial officer since the threats were neither made in her presence, nor could it be assumed that the threats were intended to be conveyed to her.

APPEALS COURT: The evidence that defendant was cursing and declaring, in her presence, that his parole officer had better not be assigned his case in the future, and then, later, outside her presence, stating he would physically harm or kill her, was sufficient for a reasonable juror to find defendant guilty of tampering with a judicial officer. When defendant made threatening statements in the presence of police officers, he could logically have expected the threats to be communicated to the parole officer in order that she could take reasonable steps to protect herself. For a police officer to do otherwise would, arguably, have been dereliction of duty. The conveyance of such threats to her would be the natural and probable consequences of defendant's acts. CONVICTION AFFIRMED.

State v. Barks, #SC85735 (Mo. banc 3/9/04)

Defendant was stopped for speeding and later drugs were found in defendant's possession. Defendant was convicted of drug possession and appealed, contending his motion to suppress should have been sustained and the evidence of his drug possession was illegally obtained.

SUPREME COURT: Under the Fourth Amendment, law enforcement officers who make a routine traffic stop may detain a person only for as long as necessary to conduct a reasonable investigation of the traffic violation. This investigation may include asking for a driver's license and vehicle registration, and insurance information, asking the driver to sit in the patrol car, and asking the driver about his or her destination and purpose. Absent reasonable suspicion that the driver is involved in criminal activity based on specific, articulable facts, the police do not have authority to detain a suspect after giving him the traffic citation. Appearing nervous does not give rise to reasonable suspicion. The drugs were obtained after exploiting the illegality of defendant's detention and should have been suppressed. CONVICTION REVERSED.

State v. McKelvey, #SD25664 (Mo App 3/25/04)

Defendant was found guilty of Possession of a Controlled Substance consisting of an immeasurable amount of methamphetamine found on a piece of cotton in a container in his pocket. Defendant had pulled the container from his pocket and when the police asked for it, tried to conceal the evidence by emptying the contents and throwing it to the ground. Defendant objected to the sufficiency of the evidence arguing that he should not have been convicted of Possession when the quantity of drug is invisible and immeasurable.

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Missouri Supreme Court

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> *the defendant to present affirmative evidence to obtain a lesser offense instruction is overruled. There is no such requirement. Rather, a defendant is entitled to an instruction on any theory the evidence establishes. The appellate court leaves to the jury the determination of witness's credibility, and to resolve conflicts in testimony. A jury may accept part of a witness's testimony, but disbelieve other parts. If the evidence supports differing conclusions, the judge must instruct on each. A judge should also err on the side of caution in giving the instruction.*

Motion to recall the mandate? If you had a former client who was convicted of armed criminal action based on a predicate felony which in turn had a mental element of recklessly, or if you had a client convicted of armed criminal action based on second degree murder, which in turn was based on the predicate felony of unlawful use of a weapon by exhibiting in a rude or threatening manner, file a motion to recall the mandate in the appropriate appellate court which affirmed the conviction, citing State v. Whitfield, 107 SW3d 253, and the Linkletter-Stovall analysis employed therein for retroactivity of constitutional issues. Convicting and sentencing on less that the requisite elements is undoubtedly a constitutional violation, and there will be a minimal impact on administration of justice since this will affect very few convictions.

APPEALS COURT: The issue is whether the defendant intentionally and knowingly possessed meth and was aware of the presence and nature of the substance. Case law exists that invisible and immeasurable amounts of a drug might not be sufficient to support a verdict; see State v. Polk, 529 SW2d 490 (Mo App 1975 and State v Baker, 912 SW2d 541 (Mo App 1995). The Court felt there was ample evidence that defendant possessed the drug including the fact that he initially ran from the police, and tried to conceal and destroy the evidence. There is no threshold amount that must be proven to convict a person of Possession. The test is not whether the drug is visible or measurable, although those facts can be used to show a defendant did not intentionally, knowingly and consciously possess the substance. The test is whether the substance can be identified by chemical analysis as a controlled substance regardless of quantity. CONVICTION AFFIRMED.

State ex rel Nixon v. Russell, #SC85725 (Mo banc 3/30/04)

Defendant was convicted in 1999 of unlawful merchandising practices and was sentenced to 10 years confinement. In June of 2003, Senate Bill 5 codified partially into Sect. 558.016.8 RSMO, allowed an offender convicted of a Class C or D felony, after 120 days of confinement, to petition the trial court for release, to serve the balance of his sentence on probation, parole or other court-approved sentence. Once a petition has been filed, the Court requests the Dept. of Corrections to provide the Court with a recommendation report, which evaluates the conduct of the offender while in custody, alternative custodial methods available to the offender, and shall recommend whether the defendant be released or remain in custody. If the report is favorable and recommends probation, parole or other alternative sentence, the court shall follow the recommendation if the court deems it appropriate. The Attorney General challenged the "retroactive" application of the statute.

SUPREME COURT: The State argues that once defendant's conviction became final in 1999, the trial court lost jurisdiction to alter the sentence and that the new section could not be applied retroactively. The Supreme Court held that applying the new section to defendant did not shorten his sentence nor did it alter the law that created the offense. Granting defendant probation or parole did not reduce the sentence imposed, but merely changed the location or circumstances under which the sentence is served. While the trial judge acted before the Dept. of Corrections report was received, as contemplated by the statute, the State did not complain. The Judge acted within his authority and the preliminary writ of prohibition previously issued is QUASHED.

Herr v Director of Revenue, #ED83059 (Mo App 3/30/04)

The trial court upheld Herr's administrative suspension of his driver's license. Herr appealed, contending that because his vehicle was out of fuel it was inoperable and, therefore, there was insufficient evidence to support the conclusion he was driving or operating. The Trooper saw the vehicle traveling down a hill at a rate of speed below the posted speed limit. The vehicle came to rest, pulled over to the shoulder, and the Trooper saw Herr exit the driver's side door. When the Trooper approached the vehicle, Herr told the Trooper the car was out of gas and that they had been pushing the vehicle.

APPEALS COURT: Missouri's statutory scheme prohibiting DWI aims to protect people from the danger presented by intoxicated persons attempting to guide a vehicle along the road. This danger is not obviated by the fact the moving vehicle is out of gas. Since the vehicle was in motion when the Trooper first saw it, and the Trooper saw Herr exit the vehicle, the Trooper could reasonably believe that Herr had steered the vehicle down the hill. Steering a vehicle while in motion fits the definition of "driving"and Herr was arrested upon probable cause to believe he was "driving" the motor vehicle. SUSPENSION SUSTAINED.

State v. Lynch, #WD62085 (Mo App 4/13/04)

Defendant was found guilty of Felony DWI and was sentenced to the maximum of 5 years imprisonment and a $5000 fine by the trial court. Among defendant's arguments was that the sentence exceeded the Missouri sentencing guidelines.

APPEALS COURT: In 1994, the Missouri Legislature created the Missouri Sentencing Advisory Commission to study sentencing practices and disparities among the circuit courts in Missouri and to establish a system of recommended sentences within the statutory minimum and maximum sentences provided by law for each felony committed under the laws of this state. The sentence guidelines are guidelines or recommendations, and a trial court is not mandated to follow the recommendations, but must stay within the statutory range of punishment. Since the maximum 5-year sentence was within the statutory range of a Class D felony (now a 4-year max), no error occurred. Defendant argued that the appellate courts should adopt mandatory sentencing guidelines like those in federal court in order to stop disparate and inconsistent sentences. The court declined the opportunity to "judicially legislate." SENTENCE AFFIRMED.

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REMEMBER ... Our voice gets louder, as our numbers grow larger. Sign up a new member today!

Criminal Law (*Cont. from page 7*)

State v, Love, #SD25655 (Mo App 4/22/04)

Defendant was a 71-year-old retiree who professionally played Santa Claus in a Springfield shopping mall. He was charged with a number of Class A misdemeanor counts of Sexual Misconduct in the First Degree for improperly touching children who sat on his lap. Among the elements needed to convict defendant was that the conduct or contact occurs for the purpose of arousing or gratifying sexual desire of any person. This language is to exclude innocent contacts from being deemed criminal conduct. In assessing whether a touching is for the purpose of arousing or gratifying sexual desire rather than being an innocent touching, a fact-finder looks at the circumstances of the particular case. Intent is inferred from those circumstances in that direct evidence of a mental condition is seldom available. In the instant case, the prosecutor asked the investigating officer "Do you have an opinion as to why he was touching the girls the way that he was?" Over defendant's objection the officer stated "A grown adult does not touch a child inappropriately in that manner, other than what I perceive as being a perverted act in a sexual manner." Defendant objected on appeal to this opinion evidence.

APPEALS COURT: The state argued that the defendant "opened the door" to this opinion evidence by its questioning of the witness. Seeming to indicate that the opinion evidence was improper, the court affirmed the conviction of three of the counts finding that the opinion evidence did not play a critical role in the trial court's decision nor in the appellate court's review of the sufficiency of the evidence. The admission of the opinion evidence was not outcome-determinative. CONVICTION AFFIRMED.

Jones v. St. Louis County Police Department, #ED83637 (Mo App 4/27/04)

In 1994, Jones was charged with a misdemeanor of Unlawful Use of a Weapon. Jones pleaded guilty and received a Suspended Imposition of Sentence and 6 months probation. In 2003, Jones filed a Petition to Expunge his record, telling the trial court he would lose his job with the US Office of Homeland Security unless the record was expunged. The Court found that the record should be equitably expunged and the County appealed.

APPEALS COURT: Section 610.122 RSMo sets forth the grounds for expunging arrest records. An arrest record may be expunged if the court determines that the arrest was based on false information and the following conditions exist: 1) There is no probable cause, at the time of the action to expunge, to believe the individual committed the offense 2) No charges will be pursued as a result of the arrest 3)The subject of the arrest has no prior or subsequent misdemeanor or felony convictions 4) The subject of the arrest did not receive a suspended imposition of sentence for the offense for which the arrest was made or for any offense relating to the arrest, and 5) No civil action is pending relating to the arrest or the records sought to be expunged. Section 610.126(2) RSMo further states that the courts of this state shall have no legal or equitable authority to close or expunge an arrest record. The Missouri legislature eliminated the inherent equitable power of the courts to expunge records, and established a statutory scheme to do so. Missouri courts have limited powers to equitably expunge records to cases involving illegal prosecutions, acquittals or extraordinary circumstances. See Buckler v. Johnson County Sheriff's Department, 798 SW2d 155,157 (Mo App W.D. 1989). Jones did not meet the statutory requirements of Section 610 and the expungement was improper. JUDGMENT REVERSED.

State v Young, #WD 62516 (Mo App 6/29/04)

The Livingston County Sheriff's Office was conducting undercover investigations over the Internet with one of the deputies posing as a 14-year-old girl. Through e-mail communications, Young told the 14-year-old girl that he wanted to come to Chillicothe and meet her for a sexual encounter. Young indicated he would bring condoms, alcohol and lubricant. When Young showed up in Chillicothe to meet the girl, he was arrested, and in his car were the condoms, four wine coolers and lubricant. He was charged with attempted statutory rape. He was convicted after a bench trial and was sentenced to 5 years MDC and to pay a fine of $5,000. He appealed questioning the sufficiency of the evidence as to whether he had taken a substantial step towards the commission of the crime.

APPEALS COURT: An attempt to commit a crime has two elements: 1) the defendant has the purpose to commit the underlying offense and 2) the doing of an act which is a substantial step toward the commission of the act. See Sect. 564.011.1 RSMo.

A substantial step is conduct that is "strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense." The e-mail communication over the Internet would not have been sufficient to support the conviction. The specific act of driving to meet the alleged 14-year-old is the corroborative action necessary to support the substantial step criteria. Such conduct goes beyond remote preparatory activity and unequivocally confirms a criminal design. Under the totality of circumstances, the court finds that Young took a substantial step towards the commission of the crime of statutory rape. This finding is in line with the majority of courts that have similarly concluded that arranging a meeting place for a sexual encounter and arriving there at the prearranged time are sufficient to constitute a substantial step in furtherance of a sex crime against a minor. CONVICTION AFFIRMED.

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Criminal Law (*Cont. from page 8*)

State v. Long, #SC85620 (Mo banc 7/1/04)

Long allegedly sexually assaulted the victim at his apartment. While the victim had physical signs of an assault, no evidence linked the assault to Long's apartment or to Long, other than her testimony. In order to rebut the victim's allegations, Long attempted to introduce evidence from three witnesses via offers of proof. In the first offer, an individual, Wilson, testified that this victim had falsely accused him of assaulting and threatening her. In the second offer, a police detective testified that this victim had accused Wilson of threatening her and then later called and said Wilson did not assault her. In the final offer, a property manager testified that this victim told him that Wilson had sexually assaulted her and two weeks later, she called and recanted her story. The trial court excluded all three offers of proof, concluding the testimony was irrelevant and not proper character evidence. Defendant appealed his conviction, contending the evidence was relevant and central to his defense that the victim had falsely accused him of assaulting her.

SUPREME COURT: Missouri law allows a party to attack the credibility of a witness by demonstrating the witnesses' bad character for truth and veracity. Under Missouri law, while a party may cross-examine the witness regarding specific acts of misconduct relating to credibility, these prior acts may not be proven by extrinsic evidence. The defendant is bound by the answer and cannot offer evidence to the contrary unless the character of the witness had been put in issue on direct exam. In some cases, the rule excluding extrinsic evidence of prior false allegations shields the fact finder from crucial issues in the case, like credibility.

An evidentiary rule rendering non-collateral, highly relevant evidence inadmissible must yield to the defendant's constitutional right to present a full defense. The current Missouri rule prohibiting extrinsic evidence of prior false allegations does not strike a balance between avoiding a focus on collateral issues and allowing the accused to fully defend himself. Therefore, a criminal defendant in Missouri may, in some cases, introduce evidence of prior false allegations, said evidence not being limited to just assault or rape cases.

The fundamental requirement for admitting extrinsic evidence of a prior false allegation should be a showing of legal relevance in which the trial court must balance the probative value of the knowingly made false statement with the potential prejudice. Similarities between the prior false allegations and the charged offense, as well as circumstances under which the allegations were made, all factor into the relevance analysis. As with any other relevancy ruling, trial courts retain wide discretion in determining the legal relevance of prior false allegations. Most states require the trial court to make a determination outside the presence of the jury as to the circumstances of the false statements.

The preponderance of the evidence standard is the applicable standard for determining whether a defendant has established that the witness previously made knowingly false allegations. In the instant case, Long was denied the opportunity to present this type evidence to the jury to attempt to establish that the witness was fabricating the present allegations against him. CONVICTION REVERSED.

State v. Sturdevant, #ED84323 (Mo App 7/13/04)

Defendant, serving 12 years for second degree statutory rape and incest, filed a Petition for Release pursuant to Senate Bill 5, Section 558.016.8 RSMo Supp, which was denied by the trial court. Defendant appealed.

APPEALS COURT: There is no right to appeal without statutory authority to do so. Sect. 547.070 RSMo 2000, provides for an appeal in criminal cases in all cases from a "final judgment". A final judgment in a criminal case occurs only when a sentence is entered. A post-judgment order denying a petition for release is not a "final judgment" for purpose of appeal. There is no law permitting an appeal from an order denying a petition for release. Therefore, there is no final appealable judgment. Defendant's remedy, if any, is an extraordinary writ. APPEAL DISMISSED.

State v. Houston, #WD61827 (Mo App 7/27/04)

Defendant performed oral sex on a 13-year-old boy and was indicted for statutory sodomy in the first degree. At trial, defendant waived appointed counsel and chose to represent himself. While defendant presented no evidence on his behalf, he attempted to use cross-examination to support his defense. His cross-examination included badgering the witnesses, repeatedly asking the same questions over and over and often disobeying the express instructions of the trial court. As a result the trial judge became increasingly frustrated with defendant, making the following comments in the presence of the jury: "Just stop this area of inquiry. It's absolutely meaningless ... You have cross-examined, at length, everybody. And most of what you've asked has been immaterial and irrelevant." In addition, the trial court consistently ruled against defendant on non-existent objections, several times declaring that the defendant's questions were "immaterial and irrelevant." Defendant was found guilty and at that time the trial judge recused himself. A new judge sentenced defendant to a 30-year prison term, as a prior offender, and defendant appealed.

APPEALS COURT: The appellant has an absolute right to have an impartial judge preside over his case. Concern for the import on the jury of remarks by the trial judge as a result of questions or conduct of either party dictates restraint. The trial court clearly communicated to the jury a disbelief in the appellant's defense, thereby abandoning its duty of neutrality. The trial court essentially told the jury that appellant's defense was "immaterial and irrelevant." Even if appellant's defense was tenuous, he was entitled to have it

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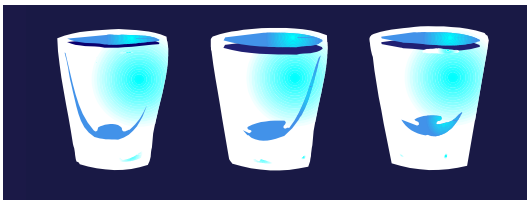

Traffic/DWI Update:
Refuse or Not Refuse, That is the Question

By Michael C. McIntosh

It is 2:30 a.m. and the bedroom phone rings waking you up from a comfortable sleep. Your spouse answers the phone and hands it to you with a sarcastic "can't they call the office?"

You find on the other end your favorite client, Ima Sobriety. She is inquiring from the police station whether or not she should "blow into the breath machine?"

Your mind races (as fast as it can at this hour in the morning). The answer you give could have life changing consequences to Ms. Sobriety. "Refuse or not refuse, that is the question!"

The First Step

You need to attempt a quick calculation of what Ima's estimated BAC is as you are speaking with her on the phone. To do this, you need to know the basic premise of the Widmark Formula for calculating a BAC result. The average person can be considered to increase their blood-alcohol concentration (BAC) by roughly .02 per standard alcoholic drink. Of course, the body never puts immediately into the bloodstream the entire content of an alcoholic beverage, but for purposes of this early morning calculation assume every drink raises the BAC by a level of .02. Your initial sequence of questions of Ima's sobriety would be as follows:

1. Where is the officer presently as we are speaking?
2. Is he in a position where he can hear your answers but not my questions?
3. I am going to ask you questions which will simply permit you to answer yes, no or give me a number. Your answers are to be very brief in response to these questions.
4. Have you been drinking alcohol?
5. Approximately what time did you begin drinking?
6. Approximately what time did you stop drinking?
7. What is the total number of alcoholic drinks you had this evening?

Once you have established the number of drinks and the time over which they were consumed, multiply this number by .02 and you are in a position to arrive at a gross calculation of what Ima's BAC is at the time you are speaking with her.

In this example, assume Ms. Sobriety has told you she consumed seven (7) beers from 8:00 p.m. until midnight and you are speaking with her at 1:00 a.m. These seven beers x .02 per drink total an estimated BAC of .14 if you are able to immediately put all seven drinks into her bloodstream.

The next step is to compute an elimination rate. In studies by Dubowsky, etc., a consensus exists as to a mean of .015 per hour as the elimination rate for most persons. See, The Rate and Kinetic Order of Ethanol Elimination, 25 Forensic Science International 159-166 (1984). If Ms. Sobriety is calling at 1:00 a.m., you can quantify an elimination rate of five (5) hours from 8:00 p.m. to 1:00 a.m. x .015 for a total elimination calculation of .075.

You are in a position to now make a rough estimation of Ms. Sobriety's BAC by taking the difference between .140 and .075 to arrive at an estimated BAC as she is speaking to you of .065.

What is the importance of this number, given the fact it has been done in the early morning hours while you are half asleep and without the benefit of paper, pen or calculator? It empowers you with an ability to determine in a general sense whether or not she is near the legal limit in making a determination whether she could safely blow and register below .08.

The Second Step

The next series of questions is designed to determine her past alcohol contact history. The importance of this series of questions is determined whether or not advice to refuse the test will cause her a lifetime prohibition from qualifying for a hardship driver's license.

Remember, if you advise Ima to refuse this test and she has a prior refusal revocation on her record, she will be forever precluded from obtaining a hardship license. This can be very important if Ms. Sobriety is subject to a five- or ten-year denial as she will have to ride out the entire five- or ten-year period instead of qualifying for a hardship after serving two or three years, whichever the case may be.

If she has a prior refusal, it is probably in her best interest to take the test irrespective of what you predict her BAC to be. If she has a prior administrative suspension for a BAC exceeding the legal limit within the preceding five (5) years, then it is more likely the proper advice is for her not to blow

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Criminal Law (*Cont. from page 9*)

presented to the jury free of the stamp of disapproval placed there by the trial court. The trial court crossed the line of neutrality and improperly assumed the role of prosecutor, which inevitably leads the jury to believe that the judge favors the State over the defense. CONVICTION REVERSED.

(assuming she has no prior refusal) in that even though she is subject to a one year revocation, she will qualify for a hardship after 90 days if she is "otherwise qualified" under the statute. If she blows over the legal limit a second time within five (5) years of a prior administrative suspension, then she loses her license for one year without a hardship.

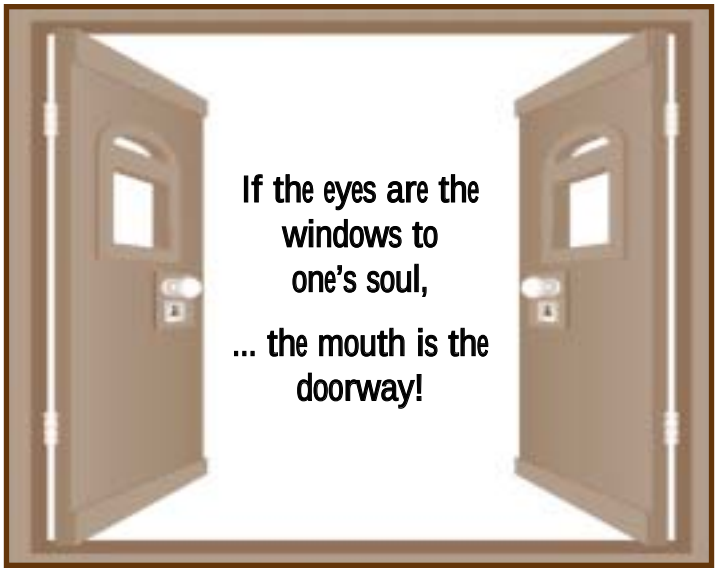
When Is A Refusal Not A Refusal?

A refusal is the "volitional failure to do what is necessary in order that the test can be performed." Spradling v Deimeke, 528 S.W. 2d 759, 766 (Mo. 1975), cited in Honeyfield v. DOR, #SD25887 (6/18/04).

In Honeyfield, the Trial Court decision restoring driver's license was affirmed on appeal. After two attempts to blow (the first indicating "subject sample incomplete" and second "invalid), driver was written a refusal for not blowing hard enough (version on the police report). At trial, the officer testified the refusal was due to driver not providing a "complete seal around the mouthpiece." The question of whether driver's failure to provide a sufficient sample was volitional and was found to be a fact question to be decided by the Trial Court. Honeyfield, Id. at 3 of 3.

In Yarsulik v. DOR, 118 SW 3D 279 (Mo. App. 2003), driver twice attempted to take the breath test. The machine's digital display reported a .17% the first time and .20% the second but failed to produce a written printout. The arresting officer, in a supplemental report, identified the digital readings but characterized the test result as "incomplete" and wrote driver a refusal purportedly because she failed to do that necessary to have the machine produce the evidentiary breath ticket.

Director argued driver's volitional failure to provide a sufficient breath sample was the sole reason for the machine's failure to print a result. However, Director's only evidence in support of this position was arresting officer's report describing driver as having "stopped blowing."



In holding for the driver, the Western District stated "a bald assertion (stopped blowing) without establishing driver did so wrongfully is not enough to establish ... she intentionally thwarted the test." Yarsulik, Id.

A Hispanic driver requested an attorney and after given 20 minutes was written for refusal. Driver claimed he did not understand the Implied Consent Warning as defense to the one-year revocation. In finding for the Director, the Court stated the driver must "objectively and unequivocally show he does not understand his rights and the warning concerning the consequences of refusal and, thereafter, he was denied clarification ... a lack of understanding not made apparent to the officer as a no consequence" Gonzalez v. DOR, 107 SW3d 491 (Mo. App. 2003).

Driver's belief she had complied with the officer's request under the implied consent law was rejected by the Appeals Court in Winston v. DOR, ED#83426 (6/29/04). The Court held evidence offered by driver in support of her belief the hospital "blood draw" was enough to comply with the Implied Consent Law was insufficient to rebut Director's case. Winston, Id.

Driver who provided the breath sample of .137 percent by officer's use of "the sample control override" then failed to provide a sufficient sample to register a result on a second attempt to blow and thereafter refusing to submit blood was found to be a refusal in Smock v. DOR, 128 SW 3d 643 (Mo. App. 2004).

The Court felt the two breath tests referenced therein constituted "more than one attempt to complete a requested breath test and constituted one test" in finding refusal of blood justified revocation. Id.

SUMMARY

It is hopeful this brief synopsis gives you adequate ammunition to answer correctly the late night question about whether or not to blow and provides you a foundation for cases to support a defensive position to challenging a one-year refusal revocation.

Petition For Early Release

By Lew Kollias

Under a provision contained in Senate Bill 5, passed last year effective June 27, 2003, a client may seek consideration for early release on probation, parole, or other alternative sentence by the sentencing court under section 558.016.8. If you have a client who may qualify for such possible release (no prior remands, non-violent C or D felony, and service of at least 120 days of his or her sentence), you can consider using or sending to the client if you do not want to represent them further, a copy of the attached petition for his/her use in attempting to seek early release. The Department of Corrections took the position that no prisoner was entitled to seek release under this statute unless they were sentenced after the effective date of the statute, or after June 27, 2003. The DOC also took the position that they were not required to provide a report to the sentencing court unless the court requested a report. Both contentions were soundly rejected by the Supreme Court in State ex rel. Nixon v. Russell, No. SC 85725 (3/30/04), which is cited in the proposed motion.

IN THE

CIRCUIT COURT OF _____ COUNTY, MISSOURI

STATE OF MISSOURI,)
)
Respondent,)
)
vs.) Case No. _____
) [Insert criminal cause]
_____,)
)
Petitioner.)

PETITION FOR RELEASE UNDER §558.016.8, RSMo Cum Supp. 2003

Comes now Petitioner, and hereby moves this Court for release from incarceration and to be placed instead on court ordered probation, parole, or other court-approved alternative sentence under §558.016.8, RSMo Cum Supp. 2003, in the above-captioned cause, stating as follows:

1. Petitioner was convicted in the above-captioned cause of a nonviolent class C or D felony, specifically the following crime(s): _____.
2. Petitioner has no prior prison commitments.
3. Petitioner has now served at least one hundred twenty days of his/her sentence in the Department of Corrections; specifically, Petitioner was delivered to the Department of Corrections on the following date: _____.
4. Petitioner was not sentenced pursuant to §559.115, RSMo.
5. Upon receipt of Petitioner's motion under §558.016.8, RSMo Cum Supp. 2003, the Department of Corrections shall submit a report to the sentencing court which evaluates the conduct of Petitioner while in custody, advises of alternative custodial methods available, and recommends whether Petitioner be released or remain in custody. As recently noted by the Missouri Supreme Court in State ex rel. Nixon v. Russell, No. SC 85725 (March 30, 2004), the report from the Department of Corrections is mandatory, and must be used by the sentencing court in considering any petition filed pursuant to §558.016.8, which section "contemplates that the sentencing judge's discretion is to be based upon the report as to the offender's conduct during incarceration following the initial sentencing and as to the alternatives to imprisonment that are available." Slip opinion at page 4.

WHEREFORE, Petitioner requests that the Court send a copy of this petition with an order for an assessment under §558.016.8, RSMo Cum Supp. 2003 to the Probation & Parole Central Office, 1511 Christy Dr., Jefferson City, MO 65109, and upon the Court's receipt of a favorable report from the Department of Corrections recommending probation, parole or other alternative sentence for Petitioner, that the Court enter an order consistent with such recommendation.

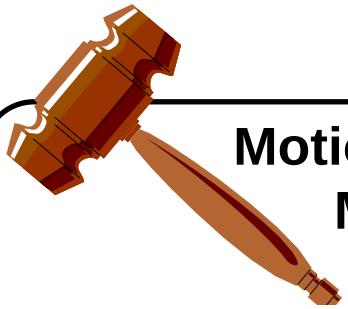
Respectfully submitted,

_____
Petitioner
Print name: _____
Inmate ID No.: _____
Address: _____
_____
_____

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of _____, 2004, the foregoing original petition was mailed to:
_____ County Circuit Clerk
and a true and correct copy of the foregoing was mailed to:
_____ County Prosecuting Attorney
and
Probation & Parole Central Office, 1511 Christy Dr., Jefferson City, MO 65109.

_____
Petitioner



Motion Of The Month

By Susan Kister
Submitted by Grant Shostak

IN THE MISSOURI SUPREME COURT

MARQUES MORRIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. SC 85848
	)	
MIKE KEMNA,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO SUPREME COURT RULE 91

COMES NOW Petitioner Marques Morris, by and through counsel and seeks immediate relief pursuant to Supreme Court Rule 91, et seq. In support of his petition Morris states:

1. Marques Morris, the Petitioner in this action, is an inmate held in custody at Crossroads Correctional Center in DeKalb County, Missouri.

2. Mike Kemna, the Respondent in this action, is the superintendent of the prison known as Crossroads Correctional Center.

3. Petitioner is in restraint of liberty, in that he is actually innocent of the crimes for which he was convicted, to wit, first degree murder and armed criminal action, as more fully set forth below.

   a. On April 19, 1995, a jury in the Circuit Court of St. Louis County, Missouri, found Petitioner guilty of Murder First Degree and Armed Criminal Action, in case number 94CR-1608, the Honorable John F. Kintz presiding. Petitioner was sentenced to a term of life imprisonment without eligibility for probation or parole and a concurrent term of life imprisonment, respectively. Petitioner filed a motion for post-conviction relief pursuant to Missouri Supreme Court Rule 29.15 in case number CC680992, which was denied after an evidentiary hearing. On January 13, 1998, the Missouri Court of Appeals affirmed Petitioner's conviction and sentence as well as the denial of Petitioner's motion for post-conviction relief, in consolidated appeal number ED 68460. Petitioner is currently confined at Crossroads Correctional Center.

   b. After exhausting his state remedies for relief, Petitioner filed a Petition for Writ of Habeas Corpus in the federal court pursuant to 28 U.S.C. 2254. Morris' petition was based on newly discovered evidence and he asserted a claim of actual innocence. On March 19, 2002, the Hon. Steven N. Limbaugh denied relief in Case No. 4:99CV63SNL, finding that a free-standing claim of actual innocence, unconnected to any claim of a constitutional violation occurring in the underlying state criminal proceeding, is not cognizable of federal habeas relief under Herrera v. Collins, 506 U.S. 390 (1993). Morris' Application for a Certificate of Appealability was denied by both the district and the circuit courts. Consequently, there was no appeal.

   c. On April 29, 2003, the Missouri Supreme Court issued its decision in State ex rel. Joseph Amrine v. Roper, 102 S.W.3d 541 (Mo. 2003). In a case of first impression, the Court held that, in those rare situations in which a petitioner sets forth a compelling case of actual innocence independent of any constitutional violation at trial, a writ of habeas corpus is the appropriate means to assert this claim. Amrine v. Roper, 102 S.W.3d at 547.

   d. Since the filing of Petitioner's Rule 29.15 motion, one of two witnesses to the killing, Adrian Swearenger, has come forward, recanting his identification of Morris as the perpetrator. (Williams did likewise at Petitioner's PCR proceeding.) Moreover, two other persons present at the killing, Eddie Cornell and Eddie Nichols, have stated that the perpetrator, while unknown to them, was not the Petitioner, Marques Morris. See all attached affidavits, Exhibits A, B, C and D, respectively, incorporated into this petition by reference. Based on this newly discovered evidence, and in reliance on Amrine vs. Roper, supra, Petitioner filed a Petition for Writ of Habeas Corpus in DeKalb County Circuit Court. (The Petition was filed there because Petitioner is an inmate in a facility located in DeKalb County.) That Petition was denied on December 22, 2003. See Exhibit E, attached hereto and incorporated herein by reference. Thereafter, Petitioner filed his Rule 91 claim in the Missouri Court of Appeals for the Western District of Missouri. His petition was denied there on January 26, 2004. See Exhibit F, attached hereto and incorporated herein by reference.

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e. The evidence at trial in this case consisted of the identification testimony by two witnesses, Willoid Williams and Adrian Swearenger. Williams, then 16, and Swearenger, 19, were both members of a Bloods-affiliated street gang named the "Five Sevens." They testified at trial that they witnessed the shooting (Tr. 215, 224, 226). Both were close friends of Banks, the deceased, who was shot and killed around 11:30 p.m. on March 17, 1994, as he sat in his car on the parking lot of the Boaz Apartment Complex in St. Louis, County (Tr. 144, 265, 155-156).

Swearenger had previously been convicted of Carrying a Concealed Weapon and Tampering, and was on probation for the weapons charge at the time of trial (Tr. 114, 151, 153, 185). Swearenger testified that if his probation was revoked, he would have to serve a three year term of imprisonment, but he had received a sentence of time served for the Tampering charge (Tr. 148, 186).

He testified that he made no deal with the prosecution in exchange for his testimony and had been locked up twice for violating the terms of his probation prior to trial (Tr. 148, 180, 204). His probation was revoked twice, but he was given two more years of probation rather than being sent to prison (Tr. 183, 203, 206). As far as Swearenger knew, the prosecutor in this case had done nothing to help him out on his case, although he had asked her to get him out of jail when he was locked up for violating his probation (Tr. 183, 199, 204, 408).

The prosecutor cosigned the court order continuing Swearenger on probation (Tr. 405). The prosecutor had told him once that she would try to help him out (Tr. 205). He denied having talked to her about getting "shock" time of in prison, but the prosecutor, via stipulation, admitted that they discussed him getting "shock" incarceration and that any jail time he had from his violations would be deducted from the time of his "shock" incarceration (Tr. 205, 408-409). His probation officer had allowed him to move to Virginia to serve out his probation (Tr. 190).

Swearenger's probation officer testified that he and Swearenger discussed his status as a witness in Morris' case (Tr. 401-402). He had recommended that Swearenger's probation be revoked, and told him that he was lucky that it was not revoked (Tr. 402).

On the night of March 17, 1994, Swearenger and Williams were standing in the parking lot talking to Banks when they saw two men approaching from a vacant lot across the street (Tr. 160-161, 230).[1] Banks told Williams and Swearenger that he thought the men meant to cause trouble (Tr. 163, 236). Williams ran around the side of the apartment building, and Swearenger remained with Banks (Tr. 163, 236).

Both of the men had their hands in their pockets as they approached (Tr. 166).[2] Banks walked over to his car and got in (Tr. 167)[3]. Swearenger ran to the side of another car and crouched down behind it (Tr. 166). He then heard sixteen or seventeen shots, so he remained behind the car, only looking up to see the two men leave 9Tr. 169-171). Williams also heard gunfire (Tr. 239).

Swearenger testified he recognized one of the men as Morris, although the man was wearing a hooded sweatshirt (Tr. 163, 164, 165).[4] Swearenger did not recognize the other man (Tr. 165). Williams, although he testified that could only see a "little bit" of the men's faces, identified Morris, "who he knew" (Tr. 237, 239, 268). He testified that Swearenger said as the men approached, "It's Marques" (Tr. 255-256). Swearenger denied making the statement (Tr. 220).

f. No physical evidence linked Morris to the killing and there was never any corroboration for Swearenger's and Williams' testimony. The police earmarked Morris as a suspect from the beginning, because Morris' cousin, Alderrick Visor, had been shot and killed the night before (Tr. 258), and the police thought Banks' murder may have been in retaliation. After Morris' conviction, Willoid Williams made out an affidavit (Exhibit A at the PCR), stating that he identified Morris because his friend Swearenger told him to do so. Swearenger told him to identify Morris because he said it was "probably" Morris who did the shooting, and Swearenger was going to tell the police it was Morris. Williams affirmed that he committed perjury at Morris' trial (Exhibit A at the PCR). At trial, Williams admitted that he and Swearenger had talked about their subsequent identification of Morris (Tr. 257-258).

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[1] Swearenger told the police he saw three men approach and later flee on foot (Tr. 328). Both Williams and Swearenger denied at trial they saw three men or told the police that they saw three men (Tr. 217, 250).

[2] Detective Wild, who later interviewed Swearenger, testified Swearenger told him he saw the men carrying handguns (Tr. 329, 333). At trial, Williams and Swearenger both denied having told the police they saw the men display handguns (Tr. 218, 260).

[3] Williams told the police that he saw Banks get behind the wheel of the car, a fact he denied (Tr. 262, 333).

[4] Swearenger testified that both men were wearing hooded sweatshirts (Tr. 164). Williams testified only one man had a hood (Tr. 234).

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g. Petitioner now possesses four affidavits: Adrian Swearenger's (Exhibit A, attached hereto and incorporated herein by reference) wherein he recants his trial identification, stating that in fact he never saw the face of either individual who approached Banks that night; Willoid Williams (Exhibit B, attached hereto and incorporated herein by reference), wherein he recants, stating now that he also failed to see the faces of the men that night. Two new witnesses have come forward: Eddie Nichols (Exhibit C, attached hereto and incorporated herein by reference), states that he witnessed the murder and saw the man with the gun as he walked past him, and that this man was not Marques Morris. Eddie Cornell (Exhibit D, attached hereto and incorporated herein by reference) attests also, that he witnessed the shooting, and that the man who shot Demetrius Banks was not Marques Morris.

h. Petitioner submits that, based of these affidavits, there is a clear and convincing showing that he is actually innocent of the murder for which he has been convicted and for the accompanying charge of armed criminal action. In the alternative, Petitioner submits that he is entitled to a hearing on the matter as the affidavits undermine the confidence and correctness of the judgment, such that it is incumbent upon the Court to intervene to assure justice, fairness, and accountability in the rule of law.

4. No petition for relief is currently pending in any other or higher court.

WHEREFORE, pursuant to Supreme Court Rule 91, Petitioner prays that immediate relief be granted.

/s/ Susan S. Kister
Susan S. Kister, Mo. Bar #37328
Attorney At Law
8015 Forsyth Boulevard
St. Louis, MO 63105
Telephone: (314) 725-3200
Facsimile: (314) 725-3275

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was mailed, faxed and/or hand delivered on this the 25th day of February, 2004 to the following:

Lisa J. Berry, Esq.
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102

/s/ Susan S. Kister

Keep Apprendi In Mind

By Lew Kollias

An important case to consider using is United States v. Rodriguez-Gonzales, 358 F. 3d 1156 (9th Cir.). This case holds that under Apprendi v. New Jersey, 530 U.S. 466, the state must plead, and prove beyond a reasonable doubt, the existence of prior convictions when the prior conviction is not merely a sentencing factor, but elevates the crime from a misdemeanor to a felony offense. By changing the fundamental nature of the crime, the prior conviction exception noted in Almendarez-Torres v. United States, 523 U.S. 224, and incorporated in Apprendi, doesn't apply. As noted by Rodriguez-Gonzales Court:

> A felony versus a misdemeanor conviction has serious ramifications for a defendant. For example, felons, but not misdemeanants, are denied the right to vote, the right to bear arms, and may have significant difficulty in finding gainful employment. Due to the ramifications of a felony conviction, this court will not expand Almendarez-Torres, 523 U.S. 224, which the Supreme Court has cautioned us to treat as a "narrow exception" to Apprendi's general rule. This conclusion comports with the long-standing law that each count charged against a defendant must stand on its own. It is also easily reconciled with Almendarez-Torres, 523 U.S. 224, because a prior commission affects not merely the defendant's sentence, but the very nature of his crime.

This has direct application to several criminal code violations, that are elevated from misdemeanor to felony by repetition of commission of offenses. For instance, stealing third offense, §570.040 cum supp. 2003, where a person has two prior stealing-related offenses within 10 years of the date of the present offense, and each prior requires at least 10 or more days of jail time, may be punished for a third offense as a class D felony without regard to value of property stolen.

Subsection (3) requires the court, not jury, to hear evidence of and find the existence of the prior offenses. I think this section is invalid under Apprendi, and you have a right to require the jury to make the factual findings of prior offenses beyond a reasonable doubt. The same is probably true with regard to driving while intoxicated-third offense. The prior intoxicated-related convictions are in essence elements of the offense that allows the crime to be charged and punished as a felony as opposed to a misdemeanor, and therefore, under the reasoning of Rodriguez-Gonzales, is not just mere sentencing factor, but invokes a series of disadvantages not experienced by the misdemeanant.

That being said, do you want to exercise these rights? Will your client testify? If so, then you probably do, since his/her priors will be exposed to the jury in any event. Even if the client doesn't testify, and you want the jury to make the findings, then request a limiting instruction that the jury may not consider the priors in any manner as to whether the client committed the instant offense, only whether the predicate exists to support the felony for the instant offense.

While you can utilize something more artful than this (the coffee hasn't kicked in yet), you can draft something along the lines of 310.10:

> If you find and believe from the evidence, beyond a reasonable doubt, that defendant (was convicted of) (was found guilty of) (pled guilty to) (pled nolo contendere to) each offense of [specify each offense], then and only then can you consider whether the defendant committed the offense for which he is on trial, and which is charged as a felony offense based on defendant's alleged conviction or guilty plea on the prior crimes. The prior offenses are only used to find the class of felony for the offense defendant is now on trial. Under no circumstances can you consider such prior offenses as any evidence the defendant is actually guilty of any offense for which he is now on trial. You must be guided entirely by the verdict directing instructions for each charged offense in determining guilt for the offense for which the defendant is on trial.

One matter that is related to sentencing, but still should be under Apprendi, is predatory sexual offender, under sections 558.018.5(2) and (3).These sections do not require convictions or guilt, only that the person "previously committed an act" that would constitute an offense listed in the predatory sexual offender provisions. Under Gilyard, our Missouri Supreme Court indicated it is permissible for the sentencing court to find the commission of an act, not a conviction, to punish as a predatory sexual offender.

Gilyard, however predated Apprendi, and its continued vitality is in question. The Western District in Johnson v. State, 103 SW3d 182, didn't directly address Apprendi's effect on Gilyard, but merely rejected a claim that counsel was ineffective in not anticipating Apprendi since Gilyard was the law in effect at the time of the defendant guilty plea, and counsel cannot be held to a clairvoyant standard. I think there's no question that an Apprendi challenge is viable despite Gilyard, and should be made.

Some New Evidence

By Lew Kollias

Law on use of evidence of victim's prior false accusations materially changes with decision of State v. Jeffrey Long, No. SC85620, July 1, 2004. In this case, the defendant was charged with sexually assaulting the victim in his apartment. She reported the assault two days after its alleged occurrence, and while physical evidence of trauma existed, there was no physical evidence in defendant's apartment tying him to the crime, nor were there any other witnesses to the event. Therefore, the victim's credibility was paramount to convict the defendant. To impeach the victim, defendant attempted to bring in extrinsic evidence that the victim falsely accused another person of physically and sexually assaulting her.

The trial court did not allow the evidence, which according to defendant's offer of proof, was testimony from the other falsely accused person, a police officer, and property manager, who would have testified that the victim's claim of assault was false, and she told the officer and property manager she falsely accused the third party. While the trial court followed the existing state of the law in denying the extrinsic evidence of false accusations, the Missouri Supreme Court, in a sweeping opinion, found that the ruling denied defendant his rights to a fair trial by denying him the opportunity to present a defense.

Most states that allow extrinsic evidence of false accusations limit such evidence to similar crimes to those for which the defendant is on trial. However, the Supreme Court noted that this improperly focuses on the nature of the subject matter of the past allegation, rather than on the fact that a false accusation was made by the victim. Now, all that is required is as follows: 1) the victim made a false accusation; 2) the accusation was in fact false (defendant has the burden to show this by a preponderance of the evidence standard); and 3) and the victim knew it was false. The trial court stills retains discretion to admit or deny it, based on factors such as remoteness of the prior false allegation, similarity between the false accusation and the charged offense, etc.

Supreme Court expands prisoner's rights to petition court without costs. A recent opinion makes it clear that the prison litigation reform act, which requires inmates incarcerated in the Department of Corrections to pay filing fees in all civil actions, which was held to include writs as they are civil actions, does not apply to clients of the Missouri Public Defender. State ex rel. Francis v. McElwain, No. SC 85648, August 3, 2004. The State Public Defender is included within the provisions of 515.040.3, which allows any indigent represented by a legal aid society or other nonprofit organized funded in whole or substantial part by the general assembly to provide legal services to the poor to proceed without payment of costs or fees, and as this statute was enacted after the prison litigation reform act, it controls over the filing fee requirements listed in the PLRA.

Recent case holds that officer's deceitfulness in telling defendant he had probable cause to search him when he did not, requires suppression of evidence seized from defendant. In State v. Earl, No. WD63713, August 17, 2004, the state appealed the trial court's grant of a motion to suppress under these circumstances. An officer, who investigated a "suspicious circumstance" determined that defendant, who was sitting in his car with a girl, was not intoxicated. However, he asked defendant for permission to search him, and when defendant said why he wanted to do so, the officer said "because I have probable cause." This of course was not true, and defendant's consent, conditioned on a fact the officer knows to be false, vitiates the consent, and suppression was proper.

DNA testing may be required not only when defendant is convicted after trial, but also after a plea of guilty. In Weeks v. State, No. SC85448, the Supreme Court first noted that the motion court clearly erred in finding that a petitioner for DNA testing under §547.035 may only be filed from a conviction after a jury trial, not guilty plea. Clearly the language of the statute contemplates that anyone convicted after trial or plea who may be actually innocent of the crime and who may be shown innocent by DNA testing, may petition the court for such testing. Here, movant Weeks properly petitioned the court, met the requirements of the statute, there were DNA samples that might exonerate him, and the state withheld exculpatory material, including that the semen was left by a secretor and Weeks was a non-secretor, and DNA testing technology was not reasonably available at the time of Weeks' plea.

If you know of a case or ruling of interest, please share it with your fellow MACDL members by sending your article to:

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Missouri Post-Conviction Update:

This article summarizes favorable post-conviction cases decided since the end of March, 2004, the period covered by the last newsletter article. As noted, some of the opinions discussed below are not yet final; please check the current status of the decision before citing.

POST-CONVICTION (RULES 29.15 AND 24.035) CASES

Gray v. State, 2004 WL 1698041 (Mo. App. W.D. July 30, 2004) (NOT YET FINAL) The movant was entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to call a co-participant as a witness at the movant's trial. The motion alleged specific facts concerning the witness's identity and testimony, and his testimony would have supported the movant's misidentification defense.

Congratulations to Susan L. Hogan, Mr. Gray's attorney.

Hayes v. State, 2004 WL 1661036 (Mo. App. W.D. July 27, 2004) (NOT YET FINAL) The January 1, 2003 amendment to Rule 24.035 which lengthened the period for filing a post-conviction motion from 90 to 180 days applied to Mr. Hayes, who was sentenced December 3, 2002. Since the 90 days had not yet expired on January 1, 2003, the amended rule applied, and the motion court erred in dismissing the motion as untimely.

Congratulations to Nancy McKerrow, Mr. Hayes's attorney.

Schmedeke v. State, 136 S.W.3d 532 (Mo. App. E.D. 2004) The defendant was entitled to an evidentiary hearing on his claim that his counsel was ineffective for failing to call certain witnesses. Although defense counsel stated during trial that the reason she didn't call witnesses was "trial strategy," this does not end the issue. In order to be effective assistance, trial strategy must be reasonable, and the attorney did not state the basis for her strategy. Therefore, an evidentiary hearing is required.

Congratulations to S. Kristina Starke, Mr. Schmedeke's attorney.

Kramer v. State, 136 S.W.3d 87 (Mo. App. E.D. 2004) The motion court's failure to make findings of fact and conclusions of law concerning the movant's claim that the trial court should have allowed him to withdraw his *Alford* plea because the plea agreement was violated. Findings of fact and conclusions of law are required on all issues.

Congratulations to Edward S. Thompson, Mr. Kramer's attorney.

HABEAS CORPUS (RULE 91) CASES

State ex rel. Francis v. McElwain, 2004 WL 1729457 (Mo. Sup. Ct. August 3, 2004) (NOT YET FINAL) The petitioner, who is represented by the state public defender, petitioned the court to be permitted to file his habeas corpus petition without paying costs. The court held that since the petitioner was represented by the state public defender, no cost deposit was required. The public defender was a "nonprofit" agency funded by the state for the purpose of Mo. Rev. Stat. §514.040.3. Note that the court reserved the question of whether a partial filing fee was required for a habeas petition where the indigent petitioner was not represented by the public defender or another nonprofit organization. In practice, many courts have required the payment of such fees.

Congratulations to Lew Kollias, Mr. Francis's attorney.

State ex rel. Taylor v. Roper, 136 S.W.3d 799 (Mo. banc 2004) After appointing a special master, the Supreme Court vacated Mr. Taylor's conviction. The court found that Mr. Taylor had shown "cause" for failing to include his claim that his guilty plea was involuntary because the agreement that he be sentenced to long-term drug treatment could not be carried out. Mr. Taylor was misled by both the trial judge and his counsel to believe he was eligible for the program, and did not learn otherwise until after the period for filing a post-conviction motion had expired. Because he was denied the benefit of his bargain, his conviction was set aside.

Congratulations to Richard Gray, Mr. Taylor's attorney.

State ex rel. Green v. Moore, 131 S.W.3d 803 (Mo. banc 2004) The petitioner was entitled to relief where his consecutive sentences for second degree murder and armed criminal action were both predicated on the same felony of unlawful use of a weapon. See Mo. Rev. Stat. §571.015. This was a jurisdictional defect which could be raised in a habeas corpus action despite the fact that it was omitted from Mr. Green's post-conviction proceeding. The armed criminal action sentence was vacated, and Mr. Green was remanded to prison to serve his other sentences.

Congratulations to Phebe A. La Mar, Mr. Green's attorney.

Practice Tips: *Specificity Helps Make The Record*

By Lew Kollias

Certainly there are many matters that are required to make a good record, including renewing objections to pre-trial motions when the evidence is actually introduced at trial (pre-trial rulings are interlocutory only and preserve nothing for appeal), renewing objections made at trial in the new trial motions, making objections where appropriate at the earliest opportunity and renewing them when necessary during the course of trial, and so on. However, the Supreme Court has recently reminded, in State v. Goff, No. SC 85564, March 9, 2004, that pre-trial motions, such as motions to suppress evidence, must in turn be very specific to preserve issues for appeal. Form motions or failure to specify the precise objection or basis for suppression/objection, may doom your case.

In Goff, the appellant challenged his stop under Terry v. Ohio, arguing that police lacked a reasonable suspicion supported by articulable facts that appellant was engaged in unlawful activity, so his search and seizure of items from his person and automobile had to be suppressed.

The Supreme Court found this issue was not preserved for appeal: "Here, however, Mr. Goff failed to properly preserve his claim of an improper Terry stop for review. At the motion to suppress hearing and at trial, he claimed only that: 1) the police lacked probable cause for his arrest and detention; 2) his arrest and the subsequent search of his person and vehicle was illegal; and 3) "the items searched for and seized" violated the Fourth Amendment of the United States Constitution and article I, section 15 of the Missouri Constitution. He did not assert that the initial Terry stop was not made based on reasonable suspicion. Because Mr. Goff's illegal stop claim must be raised at the earliest opportunity [citation omitted], he failed to preserve this claim for appellate review."

Offer of proof: These also must be specific, and no irrelevant or inadmissible matters asserted in the offer, or it can doom the entire offer, even as to matters otherwise admissible in evidence. State v. Broussard, 57 SW3d 902. Below is a checklist that can be used as a reminder in making an offer of proof:

Offer Of Proof Checklist

- ❒ Try to introduce evidence at trial; do not merely rely no pre-trial rulings.
- ❒ Make offer at time of objection; don't wait until later in trial.
- ❒ Try to adduce evidence by question/answer of witness; testimony offers are best.
- ❒ If court refuses to let witness testify, then may make narrative summary. If you use a narrative, then you must:
  - ❒ Be specific and detailed
  - ❒ Don't include any non-relevant matters in the offer. Have the narrative outlined and ready to read into the record before the time to admit it.
  - ❒ Keep out conclusions of counsel. Be factual in narrative.
- ❒ Mark as exhibits to offer any affidavits, taped statements (video or audio, etc.), or other matters. Do not merely describe what is in these items in the narrative.
- ❒ Make sure the proper foundation is laid to support the evidence which is the subject of the offer of proof (i.e., business record exception, prior inconsistent statements, etc.).
- ❒ Follow up on the offer and the court's refusal to admit the evidence in the new trial motion.

A View From The Bench

By Michael J. Gorla

Judge Robert Cohen currently presides in Division 1 of the St. Louis County Circuit Court. When I began practicing law as an assistant public defender in St. Louis County, Judge Cohen was a magistrate judge sitting in Division 32. Besides handling a civil docket, Judge Cohen had a criminal day in which he handled felony preliminary hearings and misdemeanor trials. During the late 1970s and 1980s, Judge Cohen was known as a conservative judge. I joke with him today that he has evolved from a conservative to a liberal without having changed any of his viewpoints or attitudes. I recently I had an opportunity to speak with Judge Cohen about some of the changes that have taken place in the criminal defense area over the last 20 years.

Judge Cohen believes that the biggest change that has occurred in the criminal law area is the proliferation of child sexual abuse cases. While the sexual abuse problem certainly existed 15 to 20 years ago, most of those cases were quietly disposed of, most likely via some type of probation. Some of the reasons which drove said dispositions were the fact that said cases were not highlighted in the press and that many of the victims' families did not wish to put their child through the judicial process. As a result, the prosecutors were content with handling these matters quickly and discretely. Today, that thinking has changed.

According to Judge Cohen, the recommendations in child sexual abuse cases involve substantial prison time. Although some recommendations involve the possibility of probation, that possibility is usually conditioned upon the defendant receiving a favorable assessment from the Sexual Offenders Assessment Unit after serving a 120 day stint in the Missouri Department of Corrections. Judge Cohen finds that many defense lawyers are reluctant to agree to such an assessment because very few people who go to the Sexual Offenders Assessment Unit receive a favorable recommendation. Consequently, there has been an increase in jury trials in sexual abuse cases.

I asked Judge Cohen about the advisory state sentencing guidelines and what effect, if any, said guidelines have had on criminal practice in St. Louis County. Judge Cohen said that the sentencing guidelines only come into play when a defendant pleads blind or not pursuant to the state's recommendation.

Judge Cohen has found that the guidelines are used by the lawyers in the Public Defender's Office more often than they are used by private defense counsel. The guidelines are very rarely referenced by the state.

If someone pleads blind, the judge will normally order a presentence investigation. The presentence investigation report will reference the applicable state sentencing guidelines. Said report will list the mitigating range, the presumptive range, and the aggravating range. It will also list the alternative sentencing provisions available to the judge. While the state sentencing guidelines are merely advisory, Judge Cohen believes that the applicable guidelines play an important role in the judge's sentencing determination. The applicable guideline range is one of the relevant factors that Judge Cohen takes into account when fashioning a sentence.

Judge Cohen and I spent some time talking about the increase in the number of lawyers that now practice in the criminal defense area. Judge Cohen said that 15 to 20 years ago, criminal defense was a real specialty. He didn't see a general practitioner getting involved in criminal cases as often as he does today. I asked him if he thought the quality of representation had slipped. Judge Cohen didn't see that. He believes, at least in St. Louis County, that defendants are, for the most part, receiving quality representation.