MACDL
Missouri Association of Criminal Defense Lawyers

Newsletter

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In This Issue

The MACDL Newsletter is a semi-annual publication of the

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Your comments and suggestions are welcome!

President's Message

By Joseph S. Passanise

It is my honor and privilege to serve this great organization and hope over the next year to lead MACDL, building upon the foundation of my predecessors. A few years ago, the National Association of Criminal Defense Lawyers (NACDL) had a slogan entitled "You are not alone." Looking back, this slogan symbolizes, more than ever, the atmosphere the MACDL Board strives to project in all of its functions.

As all of you know, the environment in which we practice is hostile, frustrating, and sometimes offers very little job satisfaction. Yet, we show up day in and day out representing clients because we love to practice criminal law as each of us have our own personal stories as to what led us into this area of law. "It" gets in your blood and drives you! Every once in a while, in a case when the moon and the stars line up just right, you experience a natural high that is hard to explain in words but you are re-energized to pick up the next file and fight the battle.

Today, TV shows such as Law and Order (all four of them) and others depicting criminal lawyers, do nothing but promote a negative perception of us as members of the criminal defense bar. The only saviors are the government, as they are here to help us. Career prosecutors and judges sometimes make mountains out of mole hills in cases making our jobs even that much harder.

Our own clients can drive us crazy with the phone calling and don't appreciate the context or environment we are working in on their behalf. Members of the public, the media, and sometimes even our own family members look at us with disdain for representing people charged with crimes. You all know the question: How can you represent a guilty person? Or what is wrong with you? For some reason, the perception is that you are in favor of the crime your defendant committed because you represent the defendant.

It is easy to see how we as criminal lawyers, at times, can feel isolated and alone. One of the main purposes of MACDL, I believe, is to let you know that you are not alone in what you do. Our CLE programming gives you the opportunity to meet several times a year to recharge and see others from around the state. I hope to see you at the functions and please know that our organization is only as good as its members. Please help grow this organization and participate.

As President, I have tried to set an aggressive agenda for our organization over the next year focusing on the following areas:

- Expand Membership

  We have around 300 members statewide. There are only a few public defenders in our organization. The goal would be to try and get the ranks to close to 500 members over the next year.

- Redesign and Update MACDL Website

- Quality Newsletter

- Quality CLE Programs

  MACDL has been instrumental in bringing in national speakers, as well as drawing upon top criminal defense lawyers in the state for our seminars.

  This year, in conjunction with the Missouri Bar, we have added a Drug Summit on January 20, 2005, along with our other three seminars which include the fall seminar, annual seminar and the DWI seminar.

- Public Relations Emphasis

  Coordinate with Missouri Lawyers Weekly and local Bar Associations across the state.

"President's Message" >p2

President's Message *(From page 1)*

- More of a Presence in the Legislature

  Randy Scherr, our Executive Director, has done an unbelievable job tracking all of the bills introduced in the legislature.This past session had close to 100 criminal laws passed. We need attorneys to be able to testify and appear in Jefferson City to assist Randy. There will be even more laws this next session.

MACDL is presently involved with the Public Defender Task Force which is re-examining the roles and case load of Public Defenders throughout the state. From this task force, major recommendations will be made involving the future of the Public Defender's System in this state.

Marty Robinson, Director of Missouri Public Defenders system, is in a crisis mode and needs help. The Missouri Bar has created a task force and hired a consultant to re-examine the Missouri Public Defender System and to develop recommendations. Various options that are being discussed include the following:

- Increase resources either through general appropriations or alternative funding sources.
- Decrease case responsibilities for the Public Defenders through reclassifying minor offenses that could lead to the loss of liberty.
- Examine the efficiencies of the Public Defenders system – indigence screening process and collection's process with suggestions from the Attorney General.
- The number and location of regional local Public Defender's offices.
- Examine representation of indigent Defendants or all Defendants who receive representation qualified to receive such services.
- Other options include looking at rule 17 issues, expanding the time frame on certain types of case in which a case has to be resolved if an individual can get legal.

The last time the Public Defender's system was re-examined to the extent that his task force is taking a look at it is when it was formed. Please feel free to forward any suggestions that you may have regarding the Public Defender's system to MACDL.

Please remember, you are the only one to remind the Judge and the Prosecutor that a file with a case number is an actual human being and not a piece of paper to simply be shelved, locked up and or forgotten. Take pride in what you do and remember that you are not alone. Keep up the good work and remember you are fighting for a worthy cause. Do not be hesitant to share with your colleagues what is going on in your practice, as well as you personal life.

Thanks again for all your efforts.

Joseph S. Passanise

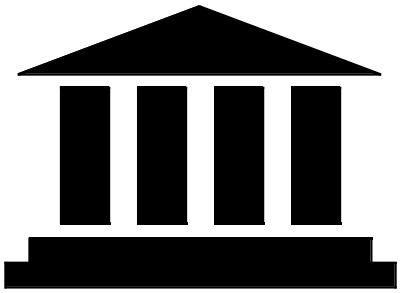
MACDL President

Top Federal Decisions

By Bruce C. Houdek

- Roper v. Simmons, 125 S. Ct. 1183 (2005). Execution of juveniles, ages 16-17 violates the United States Constitution Eighth Amendment prohibition against cruel and unusual punishment.
- Illinois v. Caballes, 125 S. Ct. 834 (2004). The Fourth Amendment prohibition against unreasonable search and seizures does not require a reasonable articulable suspicion to authorize use of a drug dog to sniff a vehicle during a legitimate traffic stop as use of a drug dog is not a search.
- Muehler v. Mena, 125 S. Ct. 1465 (2004). Police may detain and handcuff a person who is not suspected of any crime, but happens to be in someone's house that is being searched. The Fourth Amendment is not violated by additional questioning of the individual beyond the scope of the search.
- Rompilla v. Beard, 125 S. Ct. 2456 (2005). The failure of defense counsel to read and review the files of the defendant's prior conviction and failure to investigate abuse of the defendant and retardation was ineffective assistance of counsel.
- Deck v. Missouri, 125 S. Ct. 2007 (2005). Defendant's right to a fair trial during the sentencing phase of a capital case is violated by his appearance before the jury in shackles.
- Batson Update, See Johnson v. California 125 S. Ct. 2410 (2005). Defendant satisfied the first step of Batson's requirements by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. Miller-El v. Dretke, 125 S. Ct. 2317 (2005). Knowing that the prosecutor's office had a policy of striking black persons when there was a black defendant and blacks were struck when whites with similar circumstances were not struck and that blacks were asked different questions than whites proved that's in violation.
- Ashcroft v. Reich, 125 S. Ct. 491 (2005). Congress has authority under the Commerce Clause to criminalize the growing and distribution of marijuana in a state for personal medicinal use.
- USA v. Fox, 127 Fed. App. 906 (8th Cir. 2005). A pretrial motion to sever counts does not preserve any error for appeal unless it is renewed during or after trial.
- Arthur Anderson, LLP v. U.S., 125 S. Ct. 2129 (2005). Jury Instructions failed to require a finding of corrupt persuasion in a prosecution for corruptly persuading another to withhold or alter documents.
- U.S. v. Mendoza-Larios, ____ F.3d _____ (8th Cir. 2005), 2005 WL1704860. Evidence of knowledge of the presence of drugs is insufficient by itself to support convictions of possession with intent to distribute and conspiracy to distribute.
- U.S.A. v. Holmes, 413 F.3d 770 (8th Cir. 2005). Prejudicial argument by the prosecution which characterized the defense as "smoke and mirrors," "a red herring," "he's got to get his story straight," accusing defense counsel of conspiring with the defendant to fabricate testimony merits a new trial.

"Decisions" >p3



New Missouri Statutes

By Lew Kollias and David Suroff

This isn't by any means intended to be an exhaustive list. But here are some new laws that were effective August 28, 2005 [unless otherwise noted] that we've seen, in no particular order of importance:

1) **Harming a service dog** is a class A misdemeanor under 209.202.1. Harass or chase the dog, class B misdemeanor, as is harboring a dog and not knowingly or intentionally failing to control that dog which in turn harasses a service dog, class B misdemeanor. Faking the use of a service dog, class C misdemeanor, except for second and subsequent offenses, class B misdemeanor.

2) **Pseudoepherine**: Already effective due to emergency clause, any product containing detectable quantity of pseudoepherine, etc., has to be sold in the pharmacy behind the counter, with limits on amounts, and detailed logs of who purchased when and how much, etc., class A misdemeanor to violate this. Section 195.017 and 195.417.

3) **Sexually-oriented business** defined, section 67.2540, and various offenses attributed to those business, including, *inter alia*, allowing minors on the premises, touching others, nude persons present, etc., under 67.2546, & 2552. Class A misdemeanors for violations.

4) 217.735 and 559.106, **permanent supervision on parole** for anyone who violates chapter 566 offenses (listed in the statute) against someone less than 14, and where the person is a prior sex offender, by being found guilty of an offense under chapter 566 and some 568 offenses (of course, there are crimes here that aren't sexually related, like abuse of a child by cruel and inhumane punishment). 217.735.4 includes a condition that the person be electronically monitored for life (although subsection 5 gives the board or prob & par discretion to terminate supervision when the offender reaches 65). And Section 575.205 & 206 makes it a C felony to tamper with the electronic monitoring, or violating condition of lifetime supervision/parole. [Yikes!].

5) Don't let anyone under 21 **drink or possess booze on your property**, unless you're the folks of that person, or you may be found guilty of a class A misdemeanor under 311.310.2.

6) In response to State v. Beine, the legislature cleans up the language for **sexual misconduct**, now you commit it by

   knowingly exposing genitals in front of young 'uns "under circumstances in which he or she knows that his or her conduct is likely to cause affront or alarm to the child."

7) **Involuntary manslaughter** in the first degree, by causing death while operating motor vehicle while in an intoxicated condition, can occur if 1) person killed is not passenger in defendant's car; 2) two or more people are killed; or 3) defendant has blood alcohol content of .18 or more, and this is now a class B felony, with required 85% service of sentence. For second or subsequent violations, it's a class A felony with again, 85% minimum.

8) **Second degree child endangerment** adds operating vehicle while intoxicated with a kid less than 17 years old in the car.

9) 577.023 amended now to differentiate between **"aggravated offender"** who is found guilty or pleaded guilty to three or more intoxication related offenses, or one intoxication related offense and found guilty of involuntary manslaughter by use of vehicle while intoxicated, or second degree assault on same grounds; and "chronic offender" which is pleaded guilty to or found guilty of four or more intoxication related offenses, or two or more (separate occasions) vehicular manslaughter while intoxicated condition or second degree assault same way, etc., or pled or found guilty of the intoxicated-vehicular-involuntary manslaughter or second degree assault and two or more intoxicated related offenses. If you're an aggravated offender, it's now a class C felony; if you're a chronic offender, class B felony. 60 days minimum prison term before prob or par. for aggravated, and 2 years minimum for chronic. Also doesn't appear municipal judge has to be an attorney any more.

10) **Several nice things for defendants are now gone**: 1.160 giving defendant the benefit of a sentence reduction law before the defendant is sentenced; 558.016.8, allowing the defendant to petition the court for early release or other alternative sentence for a C or D felony; 558.019.5, board no longer can convert consecutive sentences to concurrent sentences for parole purposes under certain conditions.

11) 559.016.3 gives **court ability to add an additional year** to probation if violation of probation is found. And subsection .5 now gives prosecutor authority to file a motion to revoke probation. 559.105 adds condition of restitution in court's discretion for tampering or stealing motor vehicles. If found guilty of tampering with vehicle first degree, restitution may include not only payment for repairs and replacement of vehicle, but also towing and storage fees and any reasonable expenses for participating in the prosecution. (Quite ambiguous!!)

"New Law" >p4

Decisions *(From page 2)*

- U.S. v. Ray, 411 F.3d 900 (2005). The Court considers and explains that the defense of estoppel by entrapment can be a valid defense where the government assured the defendant that certain conduct was legal and that he initiated or continued that conduct because he reasonably relied on the government's statement which affirmatively misled him. The Eighth Circuit found that an incomplete explanation of the law does not qualify and the defendant's conviction is affirmed.

New Law *(From page 3)*

Also, if serving a sentence for tampering with vehicle first degree, parole condition can now include restitution and parole board not allowed to release someone from parole (not on parole, but an early release from parole) until restitution completed.

12) **Adds probation and parole officers** to assault of law enforcement officer provisions under 565.081, .082, etc.

13) **New Mary Kay LeTourneau act**, 566.086 class D felony for teacher to have sexual contact with student on school property.

14) Makes it a class D felony for **clients of international marriage brokers** to fail to provide their criminal history, etc., or for broker to fail to get it and transmit it to other clients.

15) **First degree child endangerment** adds manufacturing meth where child under 17 resides, whether present or not at the time of manufacture.

16) **First degree arson** now includes starting fire or explosion damaging property while manufacturing or attempting to manufacture meth.

17) 569.080.3 is a **propensity statute** that allows the court to admit into evidence on the issue of defendant's knowledge that he or she unlawfully operated motor vehicle, etc., on other occasions, or acquired one previously for amount he or she knew was far less than reasonable value.

18) Makes 569.090 **tampering** second a class C felony from class A misdemeanor if person had prior stealing of vehicle or first degree tampering conviction.

19) Alters 570.040 to **leave out requirement of 10 days** service in jail on prior stealing offenses, and also elevates crime to class B felony if prior was for stealing motor vehicle or boat under 570.030.3(a).

20) 570.080.2(4) new section **broadening evidentiary scope** to show person knew property was stolen by obtaining control under circumstances which would reasonable induce one to believe it was stolen.

21) 570.120 broadens passing **bad check laws**, and increases punishment for no account check to class C from D felony. There is also an increase in most fees associated with bad checks.

22) 570.145 makes it an A felony to misappropriate property of the elderly or disabled in excess of 50 grand.

23) 570.223 broadens punishment for **identity theft**, as now only excess of 50 grand instead of 100 grand for class A felony, and 5K instead of 10K for class B.

23) **Cable theft** broadened in 570.300.1(5) -new section.

24) 577.625 is new, and prohibits anyone under 18 from **distribution of prescription medication** to anyone who doesn't have a prescription for it on school property, first offense is class B misdemeanor, second and more are A misdemeanors. 577.628 makes it a crime to possess it without valid prescription under 18 years, etc., class C misdemeanor first time, elevates to B after that.

25) 578.500 new, addresses **piracy of movies**, and prevents operating recording devices while movie is being shown in theatre. First offense A misdemeanor, second and subsequent are D felonies.

26) §304.022: failing to **yield to an emergency vehicle**, or unauthorized sounding of siren or flashing of emergency lights, or improper purchase of emergency lights used to be a C misdemeanor, but are now B misdemeanors.

27) §542.276: no longer requires **photographing of objects** seized when executing a search warrant and no longer requires the photographs or copies of documents to be filed with the clerk or the court.

28) **BIG ONE**- §544.170: law enforcement was allowed to **hold someone for investigation** for 20 hours, but now 24 hours.

29) **BIG ONE** - §556.036: **statute of limitations on arson** first degree, arson second degree, and knowingly burning or exploding was 3 years like all other felonies, but now 5 years.

30) **BIG ONE** - §575.150: before, if one was charged with **resisting/interfering** with a detention or a stop, it could only be a misdemeanor charge. If resisting/ interfering with an arrest for a misdemeanor, it was a misdemeanor charge. If resisting/interfering with an arrest for a felony, it was a felony charge. If resisting/interfering with an arrest for misdemeanor or felony "in such a manner that the person fleeing creates a substantial risk of serious physical injury or death to any person," then it could be a felony charge. Now, the same conduct of (fleeing--substantial risk--etc.) for a detention or a stop can also be a felony charge.

31) §576.050: crime of **misuse of official information** now specifically includes knowingly obtaining, or recklessly disclosing, information from MULES or NCIC for private or personal use or any purpose other than that in connection with official duties or in performance of job (probably doesn't apply to public defender staff, since we are probably not considered "public servants" -- not that we would do this anyway!!)

32) **BIG ONE** - §577.023: taking away the requirement that the judge was an attorney, in order to be an eligible prior **DWI** for purposes of enhancing a current DWI charge; also taking away the same requirement in order for DOR to revoke or suspend a driver's license for a certain period of time (§577.500)

33) §595.209: **victim's rights** extended to include right to be notified at least 30 days in advance of a §217.362 hearing (hearing on whether to release someone from prison and place on probation after completing the long-term drug treatment program), and right to be informed of the decision from that hearing.

Again, these are from our browsing of the General Assembly's website. If you or your attorneys find anything else, please share. Thanks.

Welcome Aboard!

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

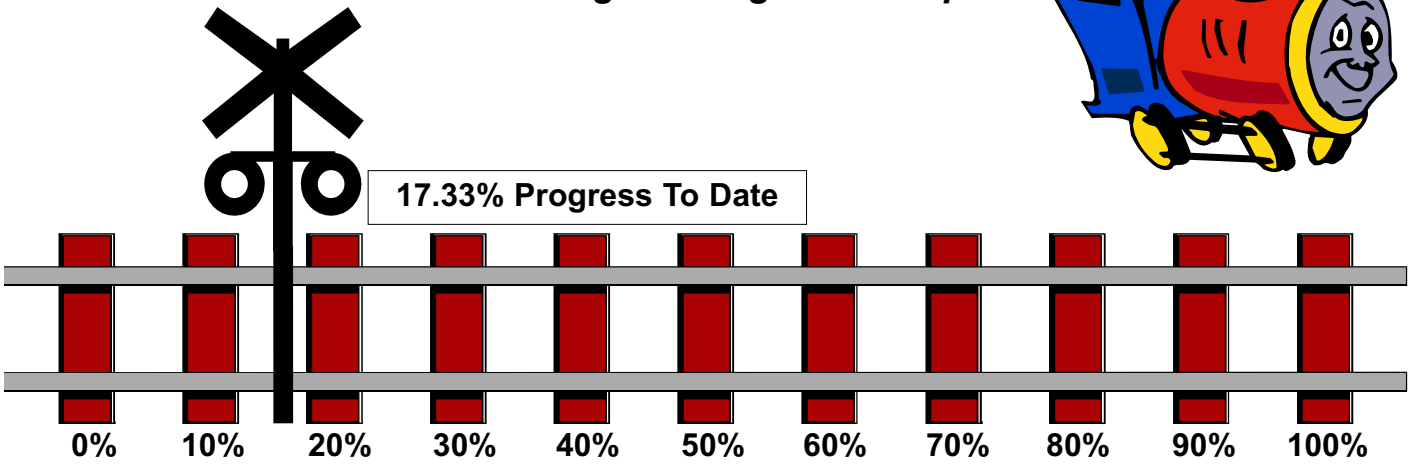
Chris Wade, Ava, MO
Mel Gilbert, Buffalo, MO
George Shaffer, Buffalo, MO
Susan Burns, Caruthersville, MO
John M. Lynch, Clayton, MO
Stephanie Howlett, Clayton, MO
Gary Brotherton, Columbia, MO
Andrew Popplewell, Columbia, MO
Steve Isaacs, Columbia, MO
Jonathan Marks, Creve Coeur, MO
Jeffrey Mullins, Independence, MO
T. Christian Cox, Kansas City, MO
Lindsey Severson, Kansas City, MO
Nathan Owings, Kansas City, MO
Jason Henry, Poplar Bluff, MO
Matthew Edmundson, Poplar Bluff, MO
Dan Birdsong, Rolla, MO
Robert Russell, Sedalia, MO
John D. Kail, Springfield, MO
Carol Hutcheson, Springfield, MO
Chad Gaddie, St. Joseph, MO
Robert Lewis, St. Louis, MO
Matthew Radefeld, St. Louis, MO
Stephen R. Welby, St. Louis, MO
Lawrence E. Wines, St. Peters, MO
James Kjar, Warsaw, MO
George Fisher, West Plains, MO
Michael Curtis, West Plains, MO
Raymond Williams, West Plains, MO

All Aboard ...

The 2005-2006 MACDL Membership Drive

The April 2006 New Member Goal	150 New Members
Our Progress To Date	26 New Members (17.33%)

Call a Colleague ... Sign Them Up!



Congratulations!

The following awards were presented at the MACDL 2005 Annual Meeting and Spring Conference, April 21-23; Embassy Suites; Kansas City, MO:

Atticus Finch Award

Elizabeth Carlyle
Tim Cisar
Dan Viets

Charles Shaw Award

Bernie Edelman
Pat Eng

Robert Duncan Award

Tom Carver

Traffic Report For MACDL Webpage

Page	Visits
Home Page	8,482
Register For Upcoming CLE	1,544
MACDL PAC	30
Secure Home	256
Registration Form	472
Officers and Directors	2,059
Legislators	1,120
Join Us	1,083
Contact Us	1,407
Newsletter	1,325
Missouri CLE Hours	888
Links	793
Lawyer Referrals	664

MACDL would like to thank the following sponsors of our 2005 Spring Conference:

Assisted Recovery Center
The Bar Plan
Imprimatur Press
LexisNexis
Robson Forensic, Inc.
Wyrsch Hobbs & Marikian, P.C.

Make Time To Attend

October 28, 2005

MACDL Fall Conference
Mayfair Hotel
St. Louis, MO

January 20th, 2006

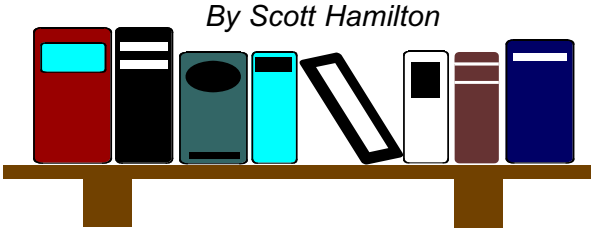
MACDL / MO Bar
Drug Seminar
Harrah's Hotel & Casino
Maryland Heights, MO

April 21-22, 2006

MACDL Annual Meeting
and Spring CLE
Harrah's Hotel & Casino
Maryland Heights , MO
Featuring Larry Pozner

Book Review

By Scott Hamilton



The Shadow of Justice

Author: Milton Hirsch

Miami criminal defense attorney Milton Hirsch's first novel is a tasty little snack. The 205-page novel is an easy read from beginning to end. Nothing too deep or complicated, just a little murder. The characters are well developed and many of them may remind you of someone that you may have run across at the courthouse.

Milton does an interesting job describing the legal system bumping up against what is moral and what the legal system allows. His story is told mostly through the eyes of his fictional Judge Addison but his best character is defense lawyer Blackjack Sheridan.

My favorite part of the book is the discussion of whether a defendant should testify and, as we all know, it ain't easy. Blackjack shares his wisdom "if you put his client's brain in a jay bird's head, the dam bird would fly backward," but he puts his client on the witness stand anyway.

It was painful to read the next two pages, as I relived a witness getting punished by a prosecutor who began with the simple statement that this will take just a minute, your Honor.

Milton is always entertaining in person and his little novel is, as well.

An interesting sidebar ... this book is the first work of fiction published by the American Bar Association. So if you're an aspiring novelist, pay your ABA dues.

Federal Firearm Pitfalls and Advice to Clients to Avoid Them

By Lew Kollias

It's common knowledge that one who has been convicted of a felony, and who then later is in possession of a firearm is subject to federal prosecution under 18 USC §922(g)(1), felon in possession of firearm. However, this statute includes fugitives from justice, drug addicts, those adjudicated mentally ill, illegal aliens, and those dishonorably discharged from the military to "ship or transport in interstate or foreign commence, or possess in or affecting commerce, and firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Keep in mind that possession of ammunition alone is enough for conviction here and the jurisdictional requirement is easy to reach since I suspect, without really knowing, that most firearms and ammunition is manufactured outside of Missouri.

However, the statute's reach is much broader and this is where it may impact certain clients of ours, as well: the client is currently subject to a domestic abuse restraining order, or they have been convicted of a misdemeanor domestic violence offense. See 18 USC §922(g)(8)(A)-(C).

There is no requirement that the person subject to the restraining order have any notice that his or her right to possess a firearm has been proscribed, nor that they have any prior criminal history. Further, 922(g) also includes the provision that anyone convicted in court of a misdemeanor crime of domestic violence may not possess a firearm, and 18 USC §921(33) defines this crime as a misdemeanor under state or federal law, which has "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situation to a spouse, parent, or guardian of the victim."

The person must have been represented by counsel of knowingly and intelligently waived counsel to qualify as a conviction.

The moral: advise all clients of the collateral consequences of conviction, because clearly under Missouri law, the judge has no duty and routinely does not advise clients of collateral consequences of the conviction -- that is our job as their advocate. For any case involving a domestic relations component, or when a defendant with no criminal history is accused of a crime against an individual who has obtained a restraining order, tell your clients to get rid of their guns during the period of time that the restraining order is in effect. And be sure to tell all clients convicted of a misdemeanor crime of domestic violence that they risk federal prosecution if they ever possess a firearm.

Looking For A Solution

By J. Martin Robinson

The Missouri State Public Defender System has been getting a lot of attention lately.

Recognizing the System is in trouble, Missouri Bar President Joe Whisler has created a Special Task Force to begin addressing the situation. In short, the System has too many cases. Or, put another way, not enough resources to handle its cases. Chaired by Missouri Bar President-elect Doug Copeland, the task force is exploring ways by which the Bar can help in the short term, while seeking a long term fix.

Mr. Whisler writes, “The crisis within Missouri’s Public Defender System can have far-reaching effects.” In noting the Constitutional guarantee of the right to counsel, Joe continues, “Should that guarantee ever become an empty promise, the ramifications are extremely serious and could undermine our entire justice system”.

Missouri’s Public Defenders are doing all they can to ensure the right to counsel means something and is not the empty promise the Bar President warns against. However, the PD System is stretched too far. The State Public Defender caseload expanded from 73,728 cases in 1999 to 88,916 in 2004, without any increase in staff. Time, the most valuable commodity any lawyer has to offer, cannot expand. The staffing problem is compounded by high attorney turnover. PD salaries, already too low, have remain near stagnant.

With far too many cases, with too few Public Defenders, and without help soon, the dreaded “empty promise” will quickly become reality. In an effort to head off the crisis, the Missouri Bar has stepped forward.

Answering the Bar’s call for volunteers, over 250 lawyers have signed up to take some of the caseload off Missouri’s Public Defenders. Private lawyers are agreeing to take traffic cases (RSMo. Chapters 300-301) as a temporary measure to give the System some relief. In exchange, the Missouri Bar will make educational materials available to the volunteers at no cost. Also, upon conclusion of the volunteer cases, the Bar will give volunteers coupons for discounts on selected MOBAR CLE programs. Information is available from the Bar and on their web page.

Obviously, a more permanent solution is needed, and the Task Force has already met to begin that work.

MACDL’s own, President Joe Passanise, is a member of the task force and was at the first meeting in St. Louis. Also present was Mr. Bob Spangenberg, President of the Spangenberg Group, an independent non-profit organization that studies and reports on indigent defense systems throughout the country. The Spangenberg Group will begin an on-site review and study of Missouri’s PD System later this month. Their report will be used by the task force and, hopefully, the legislature until a more permanent solution is found. The solution to this problem will not be easily found. But then, if it were, it really wouldn’t be a problem.

Dual Jurisdictional Program: A Sentencing Option for Youthful Offenders

By Timothy Cisar and Ryan Bridges (2nd year law student at UMKC)

Each year thousands of minors commit crimes in the State of Missouri.Once a crime is committed the question arises whether to try the youth as an adult or transfer him or her to Juvenile Court.Both options present problems:First, if you try the minor as an adult and sentence him/her to the Department of Corrections it is unlikely he/she will be able to be rehabilitated and upon release will be likely to commit more crimes.Second, if you sentence him/her in Juvenile Court, justice might not be served to the victims of the crimes because you could just as likely be letting an already hardened criminal off easy merely because of his/her age.

Now, however, there is a third option for prosecuting youthful offenders which gives the Court the authority to sentence the youthful offender under the criminal and juvenile codes.Pursuant to section 211.073 of the Missouri Revised Statutes, if an offender is under the age of seventeen and he/she has been certified to a court of general jurisdiction pursuant to section 211.071 and the prosecution has ended in conviction or a plea of guilty, the Court may invoke dual jurisdiction of both criminal and juvenile codes.Once sentenced the youthful offender is given over to the Division of Youth Services to complete a treatment program.If the youthful offender successfully completes the program he/she can be released on probation.If the youthful offender fails the program the criminal sentenced is imposed and he/she can be immediately transferred to the Department of Corrections to serve his/her remaining sentence.

To determine if a youthful offender is appropriate for the program the Court allows the Division of Youth Services to screen the youthful offender convicted in a general jurisdictional court.This screening by the Division of Youth Services includes a face-to-face interview, consultation with the Missouri Board of Probation and Parole if a pre-sentence investigation has been ordered, application of a risk assessment tool, and a complete review of all other pertinent information.If the Division of Youth Services agrees to the placement they will notify the Court and then the Court may invoke section 211.073 of the Missouri Revised Statutes' "dual sentencing option".

Once invoked the youthful offender is given over to the Division of Youth Services and if he/she completes the program successfully the adult sentence is suspended and he/she can be released on probation.If at any time the youthful offender fails to complete the treatment program provided through his/her commitment to the Division of Youth Services or he/she commits another crime, the Court will have the option of continuing the youthful offender's enrollment in the program or the Court can activate the adult sentence immediately and send him to the Department of Corrections.If the youth is transferred to the Department of Corrections to serve the adult sentence imposed by the Court all time he/she spent at the Division of Youth Services will be credited as time served.

At any time during the youth's incarceration, the Division of Youth Services may petition for a change of custody stating the youth is beyond the scope of their treatment.If this occurs the Court will hold a hearing and it will determine whether the youth should be sent to Department of Corrections or released on probation.

At the time when the youthful offender reaches the age of 17 there is a mandatory hearing where the Court will determine if the offender is ready to be released.If, based on the Division of Youth Services' recommendation, the determination is made that the offender is fit to be released, he can be placed on probation and sent home.If the Court finds reason to believe that further incarceration is necessary for the offender he will be sent to the Department of Correction or, with the consent of both the Court and the Division of Youth Services, remain in custody of the Division of Youth Services.

If the offender is sent back to the Division of Youth Services after his 17th birthday he may remain at the Division of Youth Services until his 21st birthday.At that time the Division of Youth Services is required to petition the Court for a hearing to decide what to do with the offender.The Court will determine whether the offender should be released on probation or should serve his remaining time in the custody of the Department of Corrections.By statute, The offender will not be allowed to remain in the custody of the Division of Youth Services after his 21st birthday.

While in the custody of the Division of Youth Services the youthful offender will be given an opportunity to become a productive member of society.The treatment programs offered through the Division of Youth Services' facility include:group and individual counseling, academic training (up to and including high school graduation and college correspondence courses), vocational preparation, sex-offender counseling, restorative justice activities, and victim empathy.Youths learn to develop proper communication and problem solving skills, learn to recognize and work on patterns of poor decision making as well as how to identify elements associated with negative behaviors.

This program offers the offender an opportunity for rehabilitation and treatment in lieu of incarceration.It provides the youth with a greater incentive to become a productive member of society and to recognize and correct the decisions that led him or her to be incarcerated in the first place.The program attempts to solve the two problems associated with sentencing youthful offenders discussed above:One, if the youthful offender is capable of rehabilitation then he/she will be admitted to the Division of Youth Services' facility and given a chance to succeed in life.Second, if the youth demonstrates himself/herself as being a hardened criminal either by failing the screening process or failing the program he/she will be sent to Department of Corrections and justice to the victims of the crimes is maintained.

This option allows the Court to recognize the problems inherent with sentencing youthful offenders and gives the Court the ability to solve the problem by putting the responsibility on the offender to show where they should be sent:Division of Youth Services or Department of Corrections.It should be further noted, the intention of the statute is not to encourage more youth certifications.In fact, it is quite the contrary, it is designed to allow youth an opportunity for rehabilitation even after certification.

For questions, contact Missouri Division of Youth Services; Dual Jurisdiction Program; P.O. Box 447; Jefferson City, MO 65102-3324; Telephone:(573)-751-3324; Website: www.dss.state.mo.us.

Missouri Post-Conviction Update

This article summarizes favorable post-conviction cases decided since the August 7, 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. Because of the large number of cases covered in this article, some of them have been grouped for the sake of brevity.

Post-Conviction (RULES 29.15 AND 24.035) Cases: Relief Granted

Spier v. State, 2005 WL 1668077 (E.D. July 19, 2005) NOT YET FINAL. Mr. Spiers was entitled to post-conviction relief because his guilty plea was entered to an information which did not state the essential elements of kidnapping. A person cannot be convicted of kidnapping predicated on "interfering with the performance of a governmental function" when the "governmental function" is violation of a custody order; child custody is not a governmental function.

Congratulations to Ellen Flottman, Mr. Spiers' attorney.

Hutchison v. State, 150 S.W.3d 292 (Mo. banc 2004) The case was remanded for a new penalty phase. The failure of trial counsel to investigate Mr. Hutchinson's life history and present evidence of his impaired intellectual functioning during the penalty phase of his capital murder trial was ineffective assistance of counsel.

Congratulations to Melinda Pendergraph, Mr. Hutchison's attorney.

Peterson v. State, 149 S.W.3d 583 (Mo. App. W.D. 2004) Mr. Peterson was denied effective assistance of counsel when trial counsel failed to object to impermissible prosecution argument. Since the argument was not supported by the evidence, the failure to object was not reasonable trial strategy. The argument was prejudicial because of the great weight the jury is apt to give the prosecution's characterizations of the evidence. Reversed for new trial.

Congratulations to Susan Hogan, Mr. Peterson's attorney.

Black v. State, 151 S.W.2d 49 (Mo. banc 2004) Mr. Black was denied effective assistance of counsel when trial counsel failed to impeach prosecution witnesses with prior inconsistent statements reflecting that the victim had been drinking heavily, and that Mr. Black did not act deliberately. These were contested issues at trial, and the failure to impeach was therefore prejudicial to Mr. Black.

Congratulations to Melinda Pendergraph (again!), Mr. Black's attorney.

Dorsey v. State, 156 S.W.3d 825 (Mo. App. 2005) Mr. Dorsey was denied effective assistance of counsel when trial counsel failed to file a timely motion for new trial alleging jury misconduct (a juror went to the crime scene during the deliberations) and conceded the defendant's guilt in argument.

Congratulations to Elizabeth Carlyle, Mr. Dorsey's attorney.

Post-Conviction (RULES 29.15 AND 24.035) Cases: Procedures

Nicholson v. State, 151 S.W.3d 369 (Mo. banc 2004) Mo. Rev. Stat. §476.410, which permits a circuit court in which an action is improperly filed to transfer it to the proper court, and requires the court to which the action is transferred to treat the action as filed on the date of the erroneous filing, applies to Rule 29.15 and 24.035 motions. Thus, Mr. Nicholson's motion was timely when he filed it in the wrong county within the time limits of Rule 29.15.

Congratulations to Kristina Starke and Lew Kollias, Mr. Nicholson's attorneys.

Bantle v. State, 165 S.W.3d 233 (Mo. App. S.D. 2005) Because Mr. Bantle's appointed post-conviction counsel failed to file an amended motion, he was entitled to remand for a hearing on abandonment.

Congratulations to Irene Karns, Mr. Bantle's attorney.

Day v. State, 143 S.W.3d 690 (Mo. App. W.D. 2004)
Burris v. State, 164 S.W.3d 533 (Mo. App. S.D. 2005) In both of these cases, the motion court dismissed the post-conviction motion; in Day for untimeliness and in Burris for failure to prosecute. Remand was required for entry of findings of fact and conclusions of law supporting the order of dismissal.

Congratulations to Craig Johnston, Mr. Day's attorney, and Jessica Hathaway, Mr. Burris' attorney.

Roberson v. State, 140 S.W.3d 634 (Mo. App. W.D. 2004) Neither the Missouri Prisoner Litigation Reform Act nor any other statute permits the motion court to assess costs for an unsuccessful post-conviction motion against the movant. Remanded for refund of any costs paid.

Congratulations to Susan Hogan (again!), Mr. Roberson's attorney.

Barnes v. State, 160 S.W.3d 837 (Mo. App. S.D. 2005)
Sammons v. State, 155 S.W.3d 772 (Mo. App. E.D. 2005) These cases were remanded for the issuance of findings of fact and conclusions of law. In Barnes, no evidentiary hearing was held. In Sammons, the motion court failed to make findings as to an issue which was raised in the post-conviction motion and as to which evidence was presented at the evidentiary hearing. Findings of fact and conclusions of law are required as to all issues.

Congratulations to Ellen Flottman (again!), Mr. Barnes' attorney, and Nancy McKerrow, Mr. Sammons' attorney.

Thompson v. State, 2005 WL 1668560 (W.D. July 19, 2005) NOT YET FINAL
Wainwright v. State, 143 S.W.3d 681 (Mo. App. W.D. 2004) Both of these cases were remanded for evidentiary hearings because the post-conviction motion adequately alleged the requirements for ineffective assistance of counsel because of failure to call a witness: That counsel knew or should have known of the witness, that the witness could have been located with reasonable investigation, the substance of the witness' testimony, and that the witness' testimony would have been helpful to the defense.

Congratulations to Andrew Schroeder, who represented both Mr. Thompson and Mr. Wainwright.

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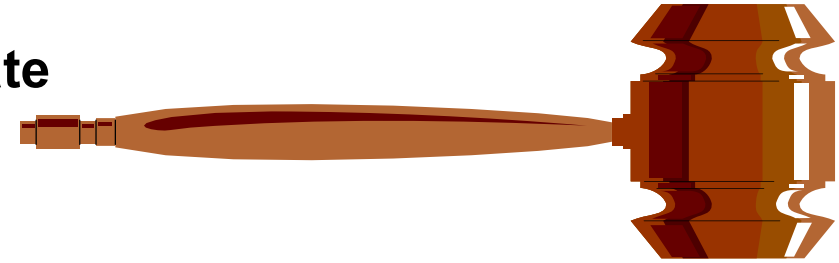
Criminal Law Update

By Bernard Edelman



1) **RW V. SANDERS**, #SC 85652 (MO BANC 1/11/2005)

Appellant attacked the Missouri Sex Offender Registration Law, Sect. 589.400 ET.SEQ. as unconstitutional. He had received a suspended imposition of Sentence and felt that when his probation ended, he no longer had to register. He appealed the trial court's findings.

Supreme Court: All 50 states, the District of Columbia, and the federal government have adopted some form of sex offender registration and community notification statutes. Missouri 's law became effective on January 1, 1995. Appellant in this case committed his crime prior to the enactment of the registration requirements. If the registration statutes are intended to establish a punishment, they might be ex post facto to this appellant and thus unconstitutional. However, if the enactment is intended to establish a non-punitive, civil regulatory system, a determination must be made whether the registration statutes are sufficiently punitive so as to negate the legislature's intent to establish a non punitive civil sex offender registration program.

Registration has not been traditionally viewed as punishment. Registration is traditionally a government method of making relevant and necessary information available to law enforcement. Registration requirements do not physically confine or regulate the movement of a registrant. Moreover, the registrant is not intentionally subjected to public shaming or humiliation. Dissemination of truthful information in furtherance of legitimate governmental objective is generally not regarded as punishment. Further the registration process does not violate appellant's due process rights. Even though appellant's crime occurred prior to the enactment of the registration requirements and even though he received a suspended imposition of sentence, he was required to register under Missouri's sex registration laws. **AFFIRMED.**

2) **STATE V. JACO**, 156 SW3D 775, (MO BANC 2005)

Appellant asked the trial court to declare section 557.036 RSMO, which requires a bifurcated trial in some criminal and after conviction, appellant appealed as to the constitutionality of the statute.

Supreme Court: If the jury at the first stage finds the defendant guilty, a second stage is required for the jury to determine the appropriate punishment. Evidence supporting or mitigating punishment may be presented. Such evidence may include, within the discretion of the court, evidence concerning the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the offense, and the history and character of the defendant. Rebuttal and surrebuttal evidence may be presented. The court shall instruct the jury as to the range of punishment authorized by statute. The attorneys may argue the issue of punishment to the jury. The jury shall then assess and declare their verdict as to punishment.

Prior case law does not require the jury to find sentencing facts beyond a reasonable doubt to determine punishment. Further, Supreme Court rule 25 does not require the state to give notice to the defendant of witnesses it intends to call in the punishment stage, nor is the defendant required to give the state notice of the witnesses they intend to call in mitigation of punishment. The state and defendant may introduce evidence in the penalty phase of the defendant's good or bad character in order for the jury to assess punishment. Lastly, this section was a procedural change and to a substantive one, and could be applied retroactively to crimes committed prior the enactment of the statute. **AFFIRMED.**

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Post-Conviction Update *(From page 9)*

Bequette v. State, 161 S.W.3d 905 (Mo. App. E.D. 2005)
Lomax v. State, 163 S.W.3d 561 (Mo. App. E.D. 2005)
Bisher v. State, 157 S.W.3d 404 (Mo. App. W.D. 2005) These defendants entitled to evidentiary hearings on their Rule 24.035 motions. Their statements at the guilty plea did not refute their claims, and the record did not resolve the issues raised in the post-conviction motions.

Congratulations to Michelle Rivera, who represented both Mr. Bequette and Mr. Lomax, and to Andrew Schroeder (again!), who represented Mr. Bisher.

Motion To Recall Mandate Case

State v. Chapman, 2005 WL 1669004 (E.D. July 19, 2005) NOT YET FINAL Mr. Chapman was denied effective assistance of appellate counsel when appellate counsel in his consolidated appeal failed to challenge his life sentences for rape and sodomy. The sentences violated the ex post facto clause because at the time of the offenses, the maximum sentence was 15 years. Remanded for new punishment hearing only.

Congratulations to Gary Brotherton and Nancy McKerrow (again!), Mr. Chapman's attorneys.

Post-Conviction DNA Testing Case

Clayton v. State, 164 S.W.3d 111 (Mo. App. E.D. 2005) Mr. Clayton was entitled to remand on his post-conviction motion for DNA testing. The motion was properly pleaded, and the trial court failed to issue findings of fact and conclusions of law supporting the denial of testing. Remanded for findings and conclusions.

Congratulations to Edward Thompson, Mr. Clayton's attorney.

Criminal Law Update *(From page 10)*

3) **STATE V. SMITH**, 154 SW3D 461 (MO APP WD 2005)

Defendant was convicted of robbery and armed criminal action and was sentenced to life imprisonment. The judge allowed the jury to take notes during the trial, but did not properly instruct them regarding their note taking. After conviction, defendant appealed.

Appellate Court: Defendant did not object at trial to the defective instructions, so appeal was for "plain error" to reverse, this court must find that the instructional error resulted in manifest injustice or a miscarriage of justice. It must be apparent to the appellate court that the instructional error affected the jury's verdict. In this case, instruction 1, as read to the jury, did not contain any language as to note taking, as required in MAI-CR 302.01. After opening statements, the court gave some oral instructions, as to note taking.

Without proper instruction from MAI-CR, there was a concern the jurors would abdicate their responsibility to listen to and observe the evidence, and to remember the evidence individually they were not told, among other things, that the notes taken during trial weren't evidence, or that they weren't to assume that their notes were more accurate than their recollections. The trial court's failure to properly instruct the jury as to proper note taking was significant and resulted in the jury not receiving sufficient guidance regarding the proper role in note-taking. **CONVICTION REVERSED.**

4) **STATE V MADORIE**, 156 SW3D 351 (MO BANC 2005)

Defendant was convicted of felony driving while intoxicated and sentenced to three years imprisonment. On appeal, he contended that his extrajudicial statements should not have been admitted as the state failed to establish sufficient proof of the Corpus Dilecti of the offense of DWI. After his arrest, defendant told the police office that he knew he was driving while intoxicated, but because the officer had not seen him with the keys in the ignition, he knew he could get out of it with a lawyer.

Supreme Court: Corpus Dilecti means "body of the crime". Black's law dictionary defines Corpus Dilecti as the prosecutors burden of proving the crime was committed by somebody, independent of the defendant's extrajudicial statements. Extrajudicial admissions or statements of the defendant are not admissible in the absence of independent proof of the commission of an offense, i.e. the Corpus Dilecti. All that is required is evidence of circumstances tending to prove the Corpus Dilecti corresponding with the confession. Slight corroborating facts are sufficient to establish the Corpus Dilecti. The determination of whether there is sufficient independent evidence of the Corpus Dilecti of an offense is fact specific and requires a case by case evaluation. The Corpus of DWI is that someone operated a motor vehicle while intoxicated. Appellant's vehicle was in a ditch when the police got there, with appellant standing by the vehicle. He immediately approached the police. The vehicle was registered to appellant. Appellant was unsteady and stumbling and smelled of alcohol. His eyes were bloodshot and watery he failed three field sobriety tests. The cumulative independent evidence corroborates appellant's statement that he was driving the vehicle while intoxicated. **AFFIRMED.**

5) **STATE V BEINE**, #SC 86190 (MO BANC 4/2/05)

Defendant was a counselor at an elementary school in St. Louis. He went into the male bathroom and while using the urinal, allegedly exposed himself to four students under 14 years of age. He was charged and convicted of sexual misconduct involving a child by indecent exposure (sect. 556.083.1 (1) RSMO). After conviction, appellant appealed, contending the criminal statue was unconstitutionally vague.

Supreme Court: A person commits the crime of sexual misconduct involving a child by indecent exposure if he knowingly exposes the person's genitals to a child under 14 in a manner that would cause a reasonable adult to believe that the conduct is likely to cause affront or alarm to a child less than 14 years of age. There was no evidence offered by the state as to how a reasonable adult would react to appellant's behavior. No accused should be required to guess what a hypothetical reasonable adult might believe as to the effect on children witnessing the event. The state did not prove criminal conduct and the conviction must be reversed.

In addition, the statue is unconstitutionally over-broad. It prohibits conduct to which a person is constitutionally entitled, as well as conduct he has no right to engage in. Individuals using public bathrooms would be at risk for criminal charges. The purpose of the over-breadth doctrine is to ensure that a statute does not punish innocent conduct. **CONVICTION REVERSED.**

6) **STATE EX. REL. SANDERS V. KRAMER**, #WD64732 (MO APP 4/26/05)

As a 14 year old juvenile, Arzola was certified as an adult, and sentenced to 25 years in prison for murder 2D and 3 years for armed criminal action. The court suspended execution of the sentence and under the dual jurisdiction of sect. 211.073 transferred custody of Arzola to the division of youth services for treatment. When Arzola turned 21, the state sought revocation of Arzola's suspended prison term. The plea court ordered Arzola's release from his commitment and order Arzola placed on probation, finding that he had made significant progress in rehabilitating himself and that a prison term would serve no benefit to society. The state filed a writ of mandamus challenging the plea court's order.

Appeals Court: A Writ of Mandamus is used to prevent the exercise of powers exceeding judicial discretion or to correct an abuse of judicial discretion. The writ's use is to compel a court to do what is required by law or to undo what is prohibited by law. Section 211.073 gives a court the authority to invoke dual jurisdiction of both the criminal and juvenile codes, in cases involving an offender under 17 who is transferred to a circuit court of general jurisdiction (certified) and whose prosecution results in a conviction. The circuit court may impose a juvenile disposition and simultaneously impose an adult criminal sentence, the execution of which shall be suspended.

The state's position in this writ application was that the trial court lost jurisdiction over Arzola after imposing its original sentence, and had no jurisdiction to place Arzola on probation after his juvenile commitment was completed. However, this court finds that the language of sect. 211.073 authorizes the trial court to take action upon the end of the juvenile commitment, and thus the court had the jurisdiction to take further action, including placing Arzola on probation. **WRIT QUASHED.**

7) **PATY V. DIRECTOR of REVENUE**, #ED84646 (MO APP 5/31/05)

Paty was involved in a single vehicle accident and after investigation by the highway patrol was arrested for DWI. The Department of Revenue moved to revoke his driving privileges under sect. 302.500 ET Seq. after a hearing, the trial court ordered the reinstatement of Paty's driving privileges upon a finding that there was not probable cause to arrest Paty. The state appealed.

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Criminal Law Update *(From page 11)*

Appellate Court: The trial court concluded that Paty's speech was not slurred, he did not have any difficulty with his balance, his eyes were not bloodshot, glassy or watery, his breath did not smell of alcohol and that no indicators of intoxication existed. The state contended that Paty's admission that he had drunk three beers was sufficient to establish probable cause to arrest him, but there was a disagreement from the testimony whether that admission came before or after his arrest. The trial court found that the field sobriety tests were not properly administered and would not consider improperly administered field sobriety tests to establish probable cause, as stated in Brown v. DOR, 85 SW3D 1 (MO Banc 2002), because the facts supporting a revocation were contradicted by the driver and the trial court found those facts in favor of the driver. Agreeing there was no probable cause to arrest Paty, the order reinstating Paty's driving privileges is **AFFIRMED.**

8) **MURPHY V. DOR**, #WD64266 (MO APP 6/21/05)

Murphy was involved in an injury accident and after investigation by the highway patrol, was arrested for two counts of assault 2nd degree. He was advised of the implied consent law and refused to give a breath or blood sample to the police. The arresting officer directed a paramedic to take a sample of Murphy's blood which, after lab analysis, showed a blood alcohol concentration of .134%. Pursuant to section 302.505.1, the DOR revoked Murphy's driving privileges for one year since his blood alcohol content was in excess of .08%. A trial De Novo was held in the circuit court, the trial court upheld the revocation and Murphy appealed.

Appellate Court: The issue before this court is whether the trial court erred in admitting the results of a blood test on blood taken from Murphy after Murphy had refused to give a blood sample. This issue is viewed solely in terms of consent under the statutory scheme established in sect. 577.041, once an arrested driver explicitly negates or withdraws his implied consent to a blood test, none shall be given. Once the driver refuses consent, the law enforcement officer lacks authority to authorize the withdrawal of blood to test for blood alcohol content. The blood draw was improper and the blood alcohol result was improperly admitted. Order of revocation is **REVERSED.**

2) **STATE EX REL JOHNSTON V BERKEMEYER**, #ED86191 (MO APP 6/21/2005)

Johnston was sentenced to 30 days confinement on 2/11/04 for misdemeanor property damage. A week later, the sentencing judge held a hearing, and ordered Johnston released from jail and ordered him placed on probation for two years. The sentencing judge moved to revoke Johnston's probation for violations and Johnston sought a writ of prohibition, contending the judge did not have the jurisdiction to revoke his probation.

Appellate Court: Sect. 559.026 authorizes a court to impose a jail term as a condition of probation. Sect. 559.115 authorizes a court to commit a defendant to the Missouri Department of Corrections for 120 days and then to release him on probation. Unless sentenced under one of those provisions, no Missouri statute authorizes the sentencing court to place a defendant on probation after commitment to jail. Moreover, in a criminal proceeding, once judgement and sentencing occur, the trial court has exhausted its jurisdiction, and subsequent proceedings to change the sentence will be considered a nullity. The trial court can take no further action. The sentencing judge could not place defendant on probation after ordering a 30 day sentence and his commitment to serve that sentence. The proceeding placing defendant on probation was a nullity.

What occurred here was parole, as defendant was released from his jail term by the sentencing judge. The 30 day sentence expired on March 12, 2004, and defendant served his sentence through a combination of jail and parole. Respondent is without authority and is prohibited from any further proceedings in this matter. **WRIT MADE ABSOLUTE.**

3) **STATE V ROWAN**, #ED84449 (MO APP 6/28/05)

Defendant appeared for sentencing, having been found guilty of murder 2D (Felony Murder). The penalty range was 10-30 years or life. Defendant was required to serve 85% of his sentence pursuant to sect. 558.019.3, for a conviction of a dangerous felony as defined in Sect. 556.061.8. The trial judge sentenced defendant to life imprisonment, telling defendant there is no 85% of life and he thought this sentence gave him the best chance for parole consideration as opposed to a 50 or 60 years term which he would have to serve 85% and probably die in prison. He told defendant's attorney "by giving him a life sentence, we're actually giving him a better shot at early release than if we had him down an extended number of years." Defendant appealed his sentence.

Appellate Court: Section 558.019.4 provides that a sentence of life imprisonment shall be calculated to be 30 years, requiring defendant to serve 25.5 years before being eligible for parole consideration. This would be more time than if the trial court had chosen to sentence defendant to a term of less than 30 years, an authorized sentence for murder 2D. The trial court's statements that there is no 85% of life or that its better than a 50 or 60 year prison term, sentences not authorized for murder 2D, were erroneous statements of the law. The trial court's mistaken belief about parole eligibility resulted in the imposition of the maximum sentence, a result the trial judge may not have intended. A sentence passed on the basis of a materially false foundation lacks due process of law and entitles the defendant to a reconsideration of the appropriate sentence. **CAUSE REMANDED FOR RESENTENCING.**

Motion: Require Use of Court Reporter

By Lew Kollias

IN THE
CIRCUIT COURT OF _____ COUNTY
STATE OF MISSOURI

_____,	)	
	)	
Movant,	)	
	)	Case No. _____
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Motion to require the use of a certified court reporter, in lieu of sound recording devices, to insure an adequate record is made of this trial for the court of appeals, in the event that an appeal is necessitated by the jury's verdict in this case

Comes now [ ], defendant in the above cause, by and through counsel, and moves this Court to employ the services of a certified court reporter to insure that an adequate and complete record of the proceedings are made for review by the court of appeals in the event the defendant is convicted and exercises his/her right of appeal in this cause. In support of this motion, defendant submits as follows.

1. This case involves the offense(s) of [ ], very serious felony offense(s) punishable by [ ].

2. The case is set for a trial, and therefore a full and complete record of the proceedings will be required in the event that defendant is convicted and exercises his/her right to appeal this case to the court of appeals [or the Missouri Supreme Court-if this is the court where the appeal will be taken due to a matter of interpretation of a statute or law of this state, this can be alleged as a further basis for the importance of a complete and adequate record for review].

3. The trial will involve numerous witnesses, [expert witnesses offering complex and technical jargon], and other items of evidence, and all of the matters may not be sufficiently recorded by a sound recording device, whereas a certified court reporter will advise the parties and court when something is unclear and was not recorded by the court reporter in a completely accurate manner;

4. If a complete record of the proceedings is not obtained, this could lead to a retrial of these proceedings since the appellate court will be deprived of the record necessary for full review of the issues raised by the defendant on appeal. *See, e.g*. State v. Brown, 690 S.W.2d 161 (Mo. App., E.D. 1985).

5. A recent decision of the Southern District Court of Appeals warns trial courts of the dangers of use of sound recording in lieu of certified reporters. In State v. Bakaridorsey, No. 85267, ____S.W.3d ____, (February 22, 2005), slip opinion at pages 5-6, the Court, citing State v. Koenig, 115 S.W.3d 408, 418 (Mo. App., S.D. 2003), noted as follows: "Magnetic tape recording devices cannot make known an inability to record sounds they do not register. Court reporters can make known an inability to hear testimony and other matters so that statements that would otherwise be "inaudible" may be restated. The 141 "inaudibles" in this record suggest that there are types of cases in which magnetic tape recording devices should not be used. Many jury trials, due to the number of participants and the manner in which testimony may be presented, do not lend themselves to a record made by machine that cannot make known the shortcomings of lawyers or witnesses (or even judge) who may not speak in a manner that can be recorded. Fortunately, the shortcomings identified in the majority opinion do not require a new trial in this case. Future cases with such omissions may not be so fortunate. The type of record used at trials should be adequate for the circumstances of the case being tried. "While the Bakaridorsey Court concluded the type of record, also replete with inaudibles due to the use of a recording device, was "not adequate for the circumstances of the case being tried," it found reversal was not required since the complained of testimony and portion of the record with regard to that testimony was cumulative to other testimony that came into evidence without objection. *Id*.

6. To be certain that a complete and adequate record is made for review on appeal if necessary by a jury verdict adverse to defendant, recording device should not be used, but instead a certified court reporter should be employed at this trial.

WHEREFORE, for the foregoing reasons, defendant requests that a certified court reporter be used at defendant's trial, and that magnetic recording devices not be employed, so as to insure that an adequate record on appeal is made in this case.

Respectfully submitted,

_____

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of [ ], 2005, a true and correct copy of the foregoing was mailed to

_____

Motion: Jury Determine Crime

By Lew Kollias

IN THE
CIRCUIT COURT OF _____ COUNTY
STATE OF MISSOURI

_____,	)	
	)	
Movant,	)	
	)	Case No. _____
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Motion to require jury, not judge, to determine whether crime is a "serious assaultive conviction" for purposes of being found a statutory aggravating factor under§565.032.2(1), RSMo.

Comes now [ ], defendant in the above cause, by and through counsel, and moves this court to require the jury to decide whether the prior crimes that the state is relying on the prove the existence of statutory aggravating factor under §565.032.2(1), that the offense was "committed by a person who has one or more serious assaultive criminal convictions," are in fact "serious assaultive convictions" that qualify for a statutory aggravating factor that in turn qualifies the defendant for the death penalty. In support of this motion, defendant submits as follows.

1. The state has charged defendant with the statutory aggravating factor pursuant to §565.032.2(1), that defendant has a history of one or more "serious assaultive criminal convictions," in particular the convictions for [ ];
2. Under the current state of the law of Missouri, this court, not the jury, makes the threshold determination whether the past crimes are in fact "serious assaultive convictions" that should qualify defendant for considerations for the death penalty. *See*, State v. Kinder, 942 S.W.2d 313, 332 (Mo. banc 1996). *See also*, State v. Whitfield, 939 S.W.2d 361, 366 (Mo. banc 1997).
3. This analysis underlying the holdings of these two Missouri decisions, which were rendered before the United States Supreme Court decision of Apprendi v. New Jersey, 530 U.S. 466 (2000), is seriously flawed and is no longer good law. Under Apprendi, any sentencing factor that may increase punishment, such as death sentence as opposed to life imprisonment, must be found by the jury, not the court. The only exception noted in Apprendi is a very "narrow one," provided in Almendarez-Torres v. United States, 523 U.S. 224 (1998), for prior convictions.
4. In fact, following the reasoning of Apprendi, the United States Supreme Court, in Ring v. Arizona, 536 U.S. 584 (2002), held that a jury, not a judge, must find that death is an appropriate sentence based on aggravating versus mitigating factors. Missouri has followed this holding, even providing retroactive application to cases affirmed prior to Ring and Apprendi where a jury was unable to assess punishment of death, and the trial judge made that assessment. *See*, State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003). Virtually every case since Apprendi decided by the United States Supreme Court has carefully scrutinized whether there are sentencing factors, rather than prior convictions, and if the former, has without exception reversed the sentences. *See*, Blakely v. Washington,____U.S.____, 123 S.Ct. 2531 (2004), judge may not find existence of factor that crime was committed in a cruel manner so as to increase range of punishment; United States v. Booker,____U.S.____, 125 S.Ct. 738 (2005), invalidating mandatory nature of federal sentencing guidelines where court increases punishment range based on finding of certain sentencing factors; and most recently, Shepard v. United States, No. 03-9168, ____U.S.____, (March 7, 2005), holding trial court could not make finding that burglary was "generic" for purposes of armed career criminal act, meaning it was committed in a building or enclosed structure, unless past judicial record clearly displayed that defendant in fact had a prior generic burglary conviction, and the court could not rely on police reports and complaints to expand the evidentiary net that the sentencing judge could rely on before enhancing sentence.
5. The holding is Kinder, *Id.*,and Whitfield, 939 S.W.2d at 366, that an aggravating factor that makes the defendant eligible for death is a "serious assaultive conviction" is to be made only by the judge, not the jury, is improper. This is not a question of law, as it could be if the general assembly had clearly defined what exactly is a "serious assaultive conviction. "To the contrary, a trial judge will decide if the defendant is subject to death penalty by use of the statutory aggravating factor under section 565.032.2(1), and the jury under Kinder will only then decide the "fact" of whether that conviction occurred. However, there is little dispute that the conviction occurred, the only real factual question should be whether the defendant's past conviction qualifies as a "serious assaultive" one. This fact question should, under Blakely and Shepard, be decided only by the jury, not the trial judge.
6. The holdings of Apprendi and its progeny noted above should not be so neatly finessed by the semantics of "for purposes of evaluating a statutory aggravator, the determination of whether a prior conviction is a serious assault is a matter of law for the court,

"Jury Determine Crime" >p15

Jury Determine Crime *(From page 14)*

and the jury only finds as a matter of fact that a prior conviction actually occurred. " Kinder, 942 S.W.2d at 332. There is little question, in absence of a clear statutory definition of what is a "serious assaultive conviction," that such a statutory aggravating factor is a question of fact for the jury as to whether the defendant's past conviction qualifies as such a statutory aggravating factor that in turn will qualify the defendant for the ultimate punishment, the forfeiture of his or her life.

7. In making this argument, defendant is aware that the Missouri Supreme Court, relying on Kinder and Whitfield, has rejected an Apprendi analysis as it relates to this issue, most recently in State v. Williams, 97 SW3d 462, 474 (Mo. banc 2003). In Williams, the Court stood Apprendi on its head, in holding: "In Apprendi, the Court held that, 'other than the fact of a prior conviction, any

   fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [citation omitted]. Allowing the court to determine, as a matter of law, whether prior convictions are 'serious assaultive criminal convictions' does not interfere with the jury's mandate to find the facts. Once the court made the determination that the prior convictions were serious and assaultive, the jury is left to determine as a matter of fact whether the defendant indeed had the prior convictions. This procedure does not run afoul of Apprendi. [citation omitted]." *Id*. With due respect, the jury must find the fact whether the conviction was a serious assaultive conviction. To the contrary, that a prior conviction existed, at least under Almendarez-Torres v. United States, 523 U.S. 224 (1998), is an exception to Apprendi of those facts that must normally be found by a jury.

8. Especially in light of the United States Supreme Court's most recent decision in Shepard v. United States, supra, the jury must make a determination as to whether a conviction is a serious assaultive crime so as to increase the punishment from life to death. In Shepard, the defendant was charged as a felon in possession of a firearm. However, to be eligible for prosecution and sentencing under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e), so as to increase punishment from a maximum of 37 months to a minimum of 15 years, the government had to plead and prove defendant had three prior convictions for violent felonies. A generic burglary, to qualify as a violent felony, is one that is committed in a building or enclosed space. Defendant had burglary convictions from Massachusetts, but the burglary statute from that state was more broadly defined so as to encompass acts outside of just a building or enclosed space, and in fact including boats and automobiles. The government sought to prove its case by asking the district court to consider police reports and complaint applications to show the Massachusetts burglary convictions were in fact qualifying "generic burglary convictions" for purposes of the ACCA. The District Court refused, and on appeal, the First Circuit Court of Appeals remanded with instructions for the District Court to use these documents to make this determination. The United States Supreme Court granted certiorari, and reversed the First Circuit, holding that unless the plea record clearly displays that the defendant admitted to all of the elements that would qualify the burglary conviction from the state court to fit the definition of "generic burglary" so as to meet the violent felony definition under the ACCA, the court could not find, under the limited Almendarez-Torres prior crimes exception to Apprendi requirements, that defendant in fact had prior generic burglary convictions.

9. Similarly, a judge should not be able to find, merely under the guise of "a question of law," that a crime is a serious assaultive conviction[1] so as to qualify the defendant for the death penalty. In absence of clear, specific statutory language that would show, beyond any doubt, that the prior conviction was in fact a serious assaultive conviction, the fact of whether it qualifies as such should be a question of fact for the jury, not a matter of law for the judge. This is particularly so since there is no guidance for trial judges to find what qualifies as a "serious assaultive conviction," and in fact, the Missouri Supreme Court has provided absolutely no guidance, other that to suggest that "the line between serious assaultive offenses is the line between felonies and misdemeanors. [citation omitted]." *See*, State v. Whitfield, supra at 366, which found under that reasoning that "manslaughter, whether voluntary of involuntary, is a felony offense …. and is properly considered a serious assaultive offense for purposes of §565.032.2(1)." Therefore, under the current state of Missouri law, contrary to the holdings of the United States Supreme Court noted above, commencing with Apprendi and recently concluding with Shepard, a jury, even if they fully disagreed with a trial judge that a minor felony offense was, "as a matter of law" as found by that judge (not jury) to be a serious assaultive offense, would have no choice to find this statutory aggravating factor making defendant eligible for death if they found he in fact committed that conviction. This is not the law, and Missouri cases, most recently as espoused in Williams on this issue, must be reconsidered and overturned in light of controlling United States Supreme Court decisions on this issue. To do otherwise, and to follow the current state of Missouri law as enunciated in Williams and Whitfield, et al., clearly violates defendant's 6th amendment right to a jury trial on all issues in the case, due process rights to a fair trial, 8th amendment rights against cruel and unusual punishment since he is subjected to improper sentencing with no limiting guidance for the jury as any individual judge can submit to the jury as an aggravating factor an offense as a serious assaultive conviction, as well as violating counterparts under Missouri Constitutional provisions Article I, §§10, 18(a) and 21.

WHEREFORE, for the foregoing reasons, defendant respectfully requests that the jury be instructed to find that any past convictions of the defendant that the state seeks to submit as a statutory aggravating factor of a "serious assaultive conviction" under section 565.032.2(1), either does or does not, as a question of fact, qualify as a "serious assaultive conviction," and if the conviction qualifies as a "serious assaultive conviction," whether the defendant committed the offense.

Respectfully submitted,

_____

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of [ ], 2005, a true and correct copy of the foregoing was mailed to

_____

[1] *This would clearly be the situation if the legislative defined "serious assaultive convictions" to include the so-called "14 deadly sins" or felonies listed and defined as "dangerous felonies" in §556.061(8), RSMo cum supp. 2004.*

Motion: Require State to Plead Prove (1)

By Lew Kollias

IN THE
CIRCUIT COURT OF _____ COUNTY
STATE OF MISSOURI

_____,	)	
	)	
Movant,	)	
	)	Case No. _____
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Motion to require state to plead and prove, and jury to find beyond a reasonable doubt but only after finding guilt of the charged offense, the existence of prior [convictions] [pleas of guilt and findings of guilt] to support changing nature of offense from misdemeanor to felony offense, subject to prison incarceration.

Comes now_____, defendant in the above cause, and moves this Court to require the state to prove and the jury to find beyond a reasonable doubt that the defendant was subject of [two prior guilty pleas or findings of guilt of stealing to make the instant crime felony stealing-third offense, under §570.040], [two prior intoxication-related traffic offenses to make the instant crime punishable as felony driving while intoxicated under §577.023.3], [one prior conviction under Chapter 566 to make the instant crime of second degree child molestation a felony under §566.068.2], [two prior pleas or findings of guilt to make the instant crime of prostitution under §567.020 or patronizing prostitution under §567.030 a felony offense pursuant to §567.110], [one prior conviction to make the crime of counterfeiting a class D felony pursuant to §570.103.4, or two prior convictions to make the crime of counterfeiting a class C felony under §570.103.5], [two prior findings of guilt or pleas of guilty to domestic assault to make the crime a class D felony under §565.074.3], [a prior guilty plea or finding of guilt to make the crime a class D felony in either possession of child pornography under §573.037, furnishing pornographic materials to minors under §573.040, or public display of explicit sexual materials under §573.060]. In support of this motion, defendant submits as follows.

1. Normally, for the first offense of the crime of [ ], defendant could only be charged and convicted, and punished for a misdemeanor offense, subject to fine and/or relatively minor incarceration in a county facility;

2. However, as the instant offense is alleged to involve repeated findings of guilt or pleas of guilt [or convictions where noted above with child molestation or counterfeiting], the nature of the offense has materially changed from a misdemeanor to a felony offense, with grave consequences of substantial periods of incarceration in a secure facility within the department of corrections;

3. Any fact that increases range of punishment must be found by a jury. *See*, Apprendi v. New Jersey, 530 U.S. 466 (2000). Apprendi noted a very limited exception announced in Almendarez-Torres v. United States, 523 U.S. 224 (1998), that prior convictions do not need to be pleaded and proved to the jury as a sentencing enhancer, but this is a very narrow exception, and in virtually all decisions since Apprendi, the Supreme Court has stricken any statute that allows for increased punishment where a jury does not find the matter which increases punishment, but rather the judge makes that finding. *See, e.g.*, Ring v. Arizona, 536 U.S. 584 (2002), jury, not judge, must find death appropriate based on aggravators versus mitigating factors; Blakely v. Washington, 124 S.Ct. 2531 (2004), judge may not find existence of factor that crime committed in cruel manner to increase range of punishment; United States v. Booker, 125 S.Ct. 738 (2005), invalidating mandatory nature of federal sentencing guidelines where court increases punishment based on finding of certain sentencing factors; and most recently, Shepard v. United States,No. 03-9168, ____U.S. ____, (March 7, 2005), holding trial court could not make finding that burglary was "generic" for purposes of armed career criminal act, meaning it was committed in a building or enclosed structure, unless past judicial records clearly displayed that defendant in fact had a prior generic burglary conviction, and the court could not rely on police reports and complaints to expand the evidentiary net that the sentencing judge could rely on before enhancing sentence.

4. Considering the "narrow" and very limited exception noted in Apprendi to use prior convictions for sentence enhancement, those prior convictions normally are extrinsic to and external from the instant charged offense. In other words, they have no part of the proof necessary to show that the instant offense can be elevated from a misdemeanor to a felony offense.

"Require State to Plead Prove (1)" >p17

Require State to Plead Prove (1) *(From page 16)*

5. The current offense of [ ], is one where the prior [convictions] [pleas or findings of guilt] are required to exist to make the offense a felony as opposed to a misdemeanor, thereby changing the nature of the offense.

6. In United States v. Rodriguez-Gonzales, 358 F.3d 1156 (9th Cir. 2004), the Court noted that Almendarez-Torres exception does not apply when an offense is elevated from a misdemeanor to a felony by virtue of multiple violations of that particular offense. Noting that the "nature of the crime changes" and not merely the sentence when an offense becomes a felony instead of a misdemeanor, the Court stated:

   > A felony versus a misdemeanor conviction has serous 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. [footnote omitted]. Due to the ramifications of a felony conviction, this court will not expand Almendarez-Torres, which the Supreme Court has cautioned us to treat as a "narrow exception" to Apprendi's general rule. [footnote omitted]. 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 because a prior commission affects not merely the defendant's sentence, but the very nature of his crime.
   >
   > Rodriguez-Gonzales, *Id*., at pages 1160-1161.

7. The jury should make the finding of prior [convictions] [findings of guilt or pleas of guilt] to elevate the instant offense from a misdemeanor to a felony, and thereby, as noted in Rodriguez-Gonzales, change "the very nature of his crime." *Id*. These findings can be made only after the jury makes a determination of the defendant's guilt or innocence on the charged offense. Otherwise, to allow the presentation of evidence of the prior offenses *before* the jury finds defendant guilty of the charged offense, would clearly violate defendant's constitutional rights under Article I, §17 and 18(a) to be tried only for the charged offense. *See, e.g*., State v. Burns, 978 SW2d 759, 760-761 (Mo. Banc 1998). Only if the jury finds defendant guilty, can the court then allow the state to present evidence to support the elevation of the crime from a misdemeanor to a felony offense, with the jury to sentence according to the range of punishment submitted by the court [Note: this is true except in felony DWI case, where sentencing is always an issue for the judge and not the jury, §577.023.13, or where the defendant may be properly charged as a prior or persistent offender under §558. 016].

WHEREFORE, for the foregoing reasons, the defendant respectfully requests this Court to have the jury decide whether the defendant in fact has the requisite [prior convictions] [pleas of guilt or findings of guilt] to elevate the instant offense from a misdemeanor to a felony, but only after the jury has made a determination of guilt on the instant, charged offense.

Respectfully submitted,

_____

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of [ ], 2005, a true and correct copy of the foregoing was mailed to

_____

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.

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 as statement of why MACDL should be interested in appearing as amicus curiae in the case. Please set out any pertinent filing deadline dates and include copies of the order or opinion appealed from and any other helpful materials.

COMMITTEE CHAIR:

Grant J. Shostak
Moline, Shostak & Mehan, LLC
8015 Forsyth Boulevard
St. Louis, MO 63105
Telephone: (314) 725-3200
Facsimile: (314) 726-3275
E-mail: gshostak@msmattorneys.com

Motion: Require State to Plead Prove (2)

By Lew Kollias

IN THE
CIRCUIT COURT OF _____ COUNTY
STATE OF MISSOURI

_____,	)	
	)	
Movant,	)	
	)	Case No. _____
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Motion to require predicate offense[s]which is[are] pled by the state as a basis for defendant's sentencing as [ ] to be submitted to and found by the jury, rather than the court, in a post-verdict sentencing phase by proof beyond a reasonable doubt

Comes now defendant, [ ], by and through counsel, and moves this court to require the state to prove, and the jury to find, beyond a reasonable doubt that the defendant has in fact committed other offenses to support a finding that defendant may be charged and sentenced as a [predatory sexual offender] [felony offender for the offense of [ ]. In support of this motion, defendant submits as follows:

1. The instant charged offense involves the crime of [sex crime du jour here]. The state has chosen to charge defendant as a predatory sexual offender pursuant to §558.018.5(2) [(3)], which requires a determination that defendant, previous to the crime charge, committed an act as defined in §558.018.4; **[or]**

1. The instant charged offense involves the crime of [endangering the welfare of a child, §566.045, with the allegation that this is defendant's second such offense, elevated the crime from a Class D to Class C felony] [tampering in the second degree under §569.090.1(4), as a charge of a second violation of such crime, elevating the crime from a Class A misdemeanor to a Class D felony];

2. The statute as written does not necessarily require that the defendant, prior to the charged offense, pleaded guilty or be found guilty of a prior crime, but rather that he committed a requisite predicate offense.

3. However, the judge, not jury, under the statutory scheme, makes the determination of the existence of the predicate offense. See for example, State v. Gilyard, 929 S.W.2d 138 (Mo. banc 1998). In Gilyard, the Missouri Supreme Court approved of the court finding that the defendant had committed a sexual offense shortly before the charged offense for which defendant was on trial. However, Gilyard was decided before Apprendi v. New Jersey, 530 U.S. 466 (2000), and Gilyard is no longer good law in light of Apprendi.

4. In fact, in several decisions after Apprendi, the United States Supreme Court has refused to uphold statutes that allow for enhanced sentencing where any facts or factors, other than what Apprendi noted was a "very narrow exception" for prior convictions as noted in Almendarez-Torres v. United States, 523 U.S. 224 (1998), is found by a judge instead of a jury. *See, for example*, Ring v. Arizona, 536 U. S. 584 (2002), where a jury, not a judge, must find death is an appropriate sentence based on aggravating versus mitigating factors; Blakely v. Washington, 124 S.Ct. 2531 (2004), judge may not find existence of factor that crime was committed in a cruel manner so as to increase range of punishment; United States v. Booker,125 S.Ct. 738 (2005), invalidating mandatory nature of federal sentencing guidelines where court increases punishment range based on finding of certain sentencing factors; and most recently, Shepard v. United States, No. 03-9168, ____U.S. ____,(March 7, 2005), holding trial court could not make finding that burglary was "generic" for purposes of armed career criminal act, meaning it was committed in a building or enclosed structure, unless past judicial records clearly displayed that defendant in fact had a prior generic burglary conviction, and the court could not rely on police reports and complaints to expand the evidentiary net that the sentencing judge could rely on before enhancing sentence.

5. Clearly, in the current circumstance, the trial court cannot, in a constitutional manner consonant with the principles of Apprendi and its progeny, find that defendant committed prior offenses so as to subject defendant to the enhanced sentencing providing by the statute as charged by the state.

"Require State to Plead Prove (2)" >p19

Require State to Plead Prove (2) *(From page 18)*

6. If the state wishes to proceed with the enhanced sentencing, it must prove the existence of the prior predicate offenses to the jury, which must find that they occurred beyond a reasonable doubt. However, to do so in a manner that does not violate the Missouri Constitutional provisions under Article I, §§17 and 18(a), to be tried only for the charged offense, *see, e.g.*, State v. Burns, 978 S.W.2d 759, 760-761 (Mo. banc 1998), the presentation of this evidence must take place only after the jury finds that the defendant is guilty of the charged offense.

WHEREFORE, for the foregoing reasons, defendant respectfully requests this Court have the jury decide, in a manner outlined above, whether the defendant in fact has committed the requisite prior predicate offenses to subject the defendant to enhanced sentencing [as a predatory sexual offender] [Class C felony endangering the welfare of a child] [Class D felony tampering in the second degree].

Respectfully submitted,

_____

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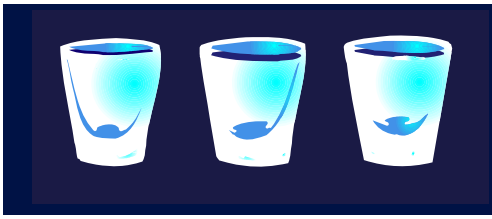
I hereby certify that on this ____ day of [ ], 2005, a true and correct copy of the foregoing was mailed to

_____



Traffic/DWI Update

By Michael C. McIntosh

INTRODUCTION

The statute prohibiting drunk driving (Sec. 577.010 RSMo.) and the instruction related thereto defines the offense in terms of "operating a motor vehicle while in an intoxicated condition ..." and defines an "intoxicated condition" as being "under the influence of alcohol." MAI-CR 3d 331.02.

This article will offer a practical approach to creating reasonable doubt on the issue of "operating under the influence of alcohol ..." by breaking down the training process of the arresting officer as it relates to observations of driving, stopping, personal contact and exit from the vehicle.

I USE P.O.S.T.

Carl Ward, of St. Louis, and Travis Noble, of Clayton, have blazed a trail through prior communications with P.O.S.T. (Sec. 590.010 RSMo a/k/a Peace Officers Standards and Training Commission) in confirming NHSTA Manuals are used in the mandatory basic training curriculum for DUI arresting officers in Missouri.

Generally, a letter to your local P.O.S.T. Agency (there are 19 licensed basic training centers) can establish the curriculum and place of training for the arresting officer. The Office of the Director; Department of Public Safety; P.O. Box 749; Jefferson City, Missouri 65102 is the place where you can inquire about the curriculum/training of the arresting officer. Alternatively, you may write a letter about DUI training to the attention of the Department of Health in care of Chris Silva, identifying with particularity the officer, police agency, badge number and permit number if applicable.

You must be able to establish the place and date of the officer's training to effectively set up your cross examination.

II NHSTA MANUAL

All counsel for the alleged DUI driver should have a NHSTA Training Manual "DWI Detection and Standardized Field Sobriety Testing." This can be ordered from NTIS at 1-800-553-6847. You can obtain a certified copy for $250.00. In the alternative, local P.O.S.T. training facilities such as the Missouri Safety Center (CMSU) under the BAIT (Breath Alcohol Instrument Training Program) will supply you a manual upon written request or pursuant a Subpoena Duces Tecum. Use the manual to cross examine the officer on elements of impaired driving which were not observed based upon his training. Develop a scoring system by which you assign to the defendant's driving a percentage or score based upon freedom from impairment as set forth below.

Driving

The manuals cite twenty different visual cues and probability values to look for in terms of impaired driving. These are described as "best ... for discriminating nighttime drunk drivers from nighttime sober drivers." See, *Guide for Detecting Drunk Drivers at Night*, U.S. Department of Transportation, NHSTA. The cues in descending order of probability that the person observed is driving while intoxicated are as follows:

1. Turning with wide radius;
2. Straddling center of lane marker;
3. Appearing to be drunk;
4. Almost striking object or vehicle;
5. Weaving;
6. Driving on other than designated roadway;
7. Swerving;
8. Speed more than 10 mph below limit;

"DWI Update" >p20

DWI Update *(From page 19)*

9. Stopping without cause in traffic lane;
10. Following too closely;
11. Drifting;
12. Tires on center or lane marker;
13. Braking erratically;
14. Driving into opposing or crossing traffic;
15. Signaling inconsistent with driving actions;
16. Slow response to traffic signals;
17. Stopping inappropriately (other than in lane);
18. Turning abruptly or illegally;
19. Accelerating or decelerating rapidly;
20. Headlights off.

The arresting officer can be examined about each cue not seen on the night of defendant's arrest. For instance, if only "tires on center or lane marker" were described by the arresting officer, simple math says the client exhibited freedom from impairment as it related to 19 of 20 cues. This is a 95% passing grade in favor of sobriety.

The manuals also identify driving as "complex task involving a number of sub tasks..." which include the following:

- Steering;
- Controlling the accelerator;
- Signaling;
- Controlling the break pedal;
- Operating the clutch;
- Operating the gear shift;
- Observing other traffic;
- Observing signal lights, stop lights, or other traffic control devices;
- Making decisions whether to turn, speed up, slow down.

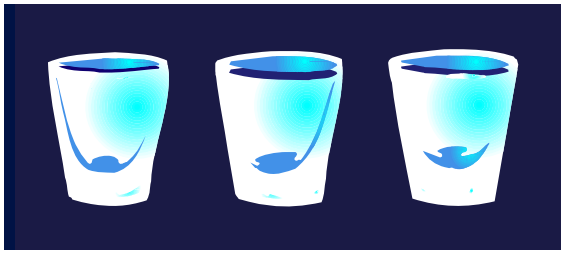
Point out all the items which were done without observation of impairment and correlate the score to get a passing grade of perhaps even 100% under this line of questioning.

The Stop

The officer is trained to look for impairment cues via the stop. The stopping sequence involves these cues taken directly from the manuals:

- An attempt to flee;
- No response;
- Slow response;
- An abrupt swerve;
- Sudden stop; and;
- Striking the curb or another object.

The officer is trained to write these cues in his report. If they aren't in the report, then the inference can be made they weren't observed. If not observed, perhaps a score of 100% can be given the driver as being "free from impairment" as it relates to the stop.



Personal Contact

The officer is trained to use his sight, hearing and smell to make observations of impairment upon initial contact with the driver. From the manuals, sight includes looking for signs of bloodshot eyes, soiled clothing, fumbling fingers, alcohol containers, drugs, drug paraphernalia, bruises, bumps or scratches and unusual actions. Hearing involves clues such as slurred speech, admission of drinking, inconsistent responses, abusive language and unusual statements. Smell includes the presence of alcoholic beverages, marijuana, cover up odors like breath sprays or unusual odors.

By using a scoring system requiring the officer to describe, with particularity, each of these elements he or she "did not see," a high passing score can be given to the driver to show freedom from impairment by alcohol.

Pre-Exit Tests

The officer has been trained to inquire before asking the driver to exit the vehicle in administration of simple divided attention tests. These include asking for two things simultaneously, asking interrupting or distracting questions, and asking unusual questions. The officer is looking for things such as:

- Forgetting to produce both documents;
- Produces documents other than the ones requested;
- Fails to see the license registration or both while searching through wallet or purse;
- Fumbles or drops wallet, purse, license or registration;
- Is unable to retrieve documents using fingertips;
- Ignores the question and concentrates only on license or registration search;
- Forgets to resume the search after answering the question;
- Supplies a grossly incorrect answer to the question.

Establish the officer could or did do some or all of these pre-exit tests. Note how few, if any, of these "failures"are contained in the report. Assign a grade or score to the client's success in "passing" these tests and give them 100% as to sobriety.

The Exit

The officer is trained to make observations of impairment in the manner in which exit is made from the vehicle. Signs of impairment include:

- Showing angry or unusual actions;
- Cannot follow instructions;
- Cannot open the door;
- Leaves the vehicle in gear;
- "Climbs" out of the vehicle;
- Leans against the vehicle;
- Keeps hands on the vehicle for balance.

Using the approach defined as outlined above, counsel can again force the officer to admit he saw only one or perhaps none of these symptoms. You can score your client with a high passing grade of sobriety.

CONCLUSION

Put the aggregate of all the above items together and make a powerful argument the officer's conclusions are erroneous the driving was impaired on the night of the arrest.