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!

MACDL President's Letter

by Scott C. Hamilton

It is with great honor I take over as President of the Missouri Association of Criminal Defense Lawyers. The Association has grown by nearly one hundred (100) members in the past year and we are now approaching four hundred (400) members.

With many thanks to the great leadership of Joe Passanise, the state of our organization is strong and poised to be even stronger in the future.

The key to this organization is for it to continue to provide services for its membership. In particular, we hope to continue to sponsor outstanding educational programs for these members that will bring in experienced voices from this State and from around the country to share with us how we can continue to represent our clients vigorously and effectively against wrongful and/or obsessive prosecution.

We will continue to provide a voice in the Legislature. With thanks to Randy Scherr's office, we are able to do this in an effective manner. In the past, this organization has been reactive to proposed legislation by picking a position after the fact!

This year, we plan on moving to the next step, become proactive and actively sponsor legislation. At our last Board meeting, we discussed the possibility of drafting legislation for an expungement law in Missouri that would go beyond just DWIs. Citizens in other states around our country have been able to have their criminal record expunged through various mechanisms of that state's statutes.

Hopefully, in this coming legislative session, we will be able to get behind a statute that we support and push through to finally become the law in the State of Missouri. I am looking forward to this challenge and becoming proactive in the legislative process.

Finally, our web site continues to be a link to each other. The web site must be further developed to become a better tool for our membership. I hope to continue working on our web site to make it a focal point of our organization.

I know that Past President Joe Passanise continues to beat the drum about the necessity to develop a list server so that we can share ideas with each other so that we, as defense attorneys, are not out there fighting each case on our own. This would focus our organization as one giant law firm to attack the power of the state.

I look forward to seeing all of you at the seminar at Harrah's Casino in Kansas City on October 27th. Please tell your friends and pass the information on. Bring someone to the seminar to see all of the good information that will be presented to our membership. I'll look forward to serving the membership for the next year. Keep up the good fight!

Respectfully,

Scott C. Hamilton

MACDL President

MACDL

Missouri Association of Criminal Defense Lawyers

2006-2007 Officers & Board

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The Public Defender Corner

by J. Marty Robinson

There are roughly 135,000 American service-members in Iraq.

They are generally young, dedicated, hard-working individuals, doing amazingly good work under less than ideal conditions. The debate rages, whether or not they should be in Iraq at all. But, the American public (for the most part) supports their troops. Perhaps it's a lesson learned from past wars. Not one of the 135,000 had a hand in the National policy that put them in harm's way. They are simply doing their job, the best they can, with the resources they have.

Of course, real support is more Girl Scout cookies and toilet paper in care packages.

Parades and political speeches give folks a warm and fuzzy feeling, and the public and military's morale is certainly important. The best support however, and that most likely to lead to success, is insuring those dedicated individuals have what they need to do their job.

The Nation has tasked its sons and daughters to get a job done. Success is only indirectly related to flag-waving. It is directly related to having the manpower and hard assets needed to accomplish the mission assigned.

Missouri's Public Defender System has been assigned a mission, as well. Its task is not new. The mission has been, and continues to be, providing effective legal representation to eligible persons. What is new (and growing) is the size of that mission.

Mission Creep is a cancer that eats away the effectiveness of any organization. It doesn't happen over-night, but it occurs when mission is added without corresponding resources. In the military, it's often referred to as a *Mission-Means Mismatch*. For Missouri's Public Defender System, it's more cases without more staff. The same could be said of Missouri's Judiciary, more cases without more judges or clerks.

It's a systemic problem: *Someone is writing caseload checks that others cannot cash*.

Like any systemic problem, a systemic approach must be employed to fashion solutions.

The Missouri Bar's Committee on the Public Defender System has wide membership, including representatives of MACDL, Judiciary, MOPS, Attorney General, Legislature, and the Governor's office. Their work was instrumental in getting targeted pay increases for PDs in high turnover categories. In turn, the Missouri Senate has established an Interim Committee to further study the *Mission-Means Mismatch*. Their meetings are scheduled for August and September, with plans to report back to the full Senate next session.

These actions are welcomed.

There are roughly 560 employees of the Missouri State Public Defender System, the same number as six years ago. They do an incredible job with resources that become more and more diluted as caseload rises. They are heroes. They've faced classic *Mission Creep* for six years. However, it's not simply Missouri's Public Defenders that pay the price of bounced caseload checks. It is the entire criminal justice system.

Missouri's Public Defenders, and all parties to Missouri's criminal justice system, have a monumental task. They are to insure justice is served to all, fairly, without regard to economic status. Equal Justice for All, more than a fundamental right of our citizenry, is a core value of our Nation.

All tasked with securing justice, at home or abroad, must have the resources to do so.

J. Marty Robinson is the Director of the Missouri State Public Defender System, also a Colonel in the Missouri Army National Guard. He is on a military leave of absence from MSPD and currently on active duty stationed at Camp Victory, Baghdad, Iraq.

Welcome Aboard!

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

Tracy Ambs, *St. Charles*
Matthew Archibald, *Chillicothe*
David Bell, *Kansas City*
Peter Bender, *Springfield*
Kathleen Brown, *Sedalia*
Rebecca Burke, *Kennett*
Michelle Burriel, *St. Louis*
James E. Carmichael, *St. Charles*
Michelle Carpenter, *St. Joseph*
Dawn Clayton, *Vienna*
Jason Clough, *Springfield*
Cheri Cobb, *Strafford*
Bill Comfort, *Hillsboro*
Karie Comstock, *Lebanon*
Thomas Crocco, *Union*
Michelle Davidson, *St. Joseph*
Chris Davis, *Jackson*
Brett Day, *Neosho*
Philip DeMoss, *Lebanon*
Heather Donovan, *St. Charles*
Anjali Dooley, *Hannibal*
Christopher Dorrance, *Odessa*
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John Ferrara, *Union*
Rick French, *Jefferson City*
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Darryl Garner, *Joplin*
Susan Gentle, *St. Louis*
David Goring, *Centralia*
Chris Goulet, *St. Charles*
Teresa Grantham, *Springfield*
Nancy Gray, *Harrisonville*
Charles R. Green, *Kansas City*
Scott Hamblin, *Jefferson City*
Joyce Harris, *Burlington Jct.*
Chris Hatley, *Springfield*
Daniel Hobart, *Raymore*
Jessica Hoskins, *Washington*
Stuart Huffman, *Springfield*
R. Travis Jacobs, *Columbia*
Cathy Kelly, *St. Louis*
Brendan Kelley, *Farmington*
John Krehmeyer, *Clayton*
William David Langston, *Olathe*
Schuyler Laverentz, *West Plains*
Michael Lutke, *Springfield*
Dana Martin, *Sunrise Beach*
Nanci McCarthy, *Clayton*
David Miller, *Chillicothe*
Kelly Miller, *Chillicothe*
Charles Moreland, *Columbia*
Brady Musgrave, *Springfield*
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Lisa Preddy, *Union*
Kristy Ridings, *St. Louis*
John P. Ryan, Jr., *Grandview*
Michael Selby, *Columbia*
Mary Joe Smith, *Fulton*
S Kristina Starke, *St. Louis*
John Tomlin, *Jefferson City*
Stacy Tomlin, *Springfield*
Kristen Tuohy, *Carthage*
Merele Turner, *St. Joseph*
Courtney Wachal, *Ava*
Alice Wasson, *Sedalia*

Call a Colleague ... Sign Them Up, TODAY!

Top Federal Decisions

by Bruce C. Houdek

Georgia v. Randolph, 126 S.Ct.1515 (2005). A warrantless search of a residence by officers where a co-occupant of the house was present and refused permission for such a search is constitutionally unreasonable as to him even though a co-occupant of the residence consented.

Zedner v. U.S., 126 S.Ct. 1976. Defendants prospective waiver respective "for all time" of his rights under the Speedy Trial Act was ineffective and the district court must make specific statutory findings to justify a continuance which will legitimately exclude the resulting period of delay. Defendant's Motion to Dismiss will be granted, but the district court has discretion to do so with or without prejudice.

Brigham City, Utah v. Stewart, 126 S.Ct. 1943. Police officers responding to a complaint concerning a loud party observed adults restraining a juvenile. The Court approved the warrantless entry into the residence where the officers had an objectively reasonable basis for believing that an occupant of the house was seriously injured or imminently threatened with such injury.

Holmes v. South Carolina, 126 S. Ct. 1727. The Defendant in a death penalty prosecution was prohibited by the state court from introducing evidence of a third party guilt. The prosecution produced technical evidence that strongly supported a verdict of guilty. The Supreme Court reversed, holding that the Constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense.

US v. Grubbs, 126 S.Ct. 1494. A defendant's home was searched by federal officers pursuant to an "anticipatory warrant" which was only valid after "trigger events" had taken place. The warrant did not mention or describe the trigger events but the Search Warrant Affidavit referenced the receipt of a pornographic video at the defendant's residence as the triggering event. The Supreme Court held that anticipatory warrants are not categorically unconstitutional since the Fourth Amendment only requires a showing of probable cause that contraband or evidence of crime will be found and that the particularity requirement of the Fourth Amendment only extends to the description of the place to be searched and the persons or things to be seized.

Davis v. Washington and Hammond v. Indiana, 126 S.Ct. 2266 . In Davis, the defendant was on trial for a violation of domestic no contact order and the Court admitted a 911 call recording over Davis's objection. The Supreme Court held that its decision in Crawford v. Washington, 541 U.S. 36, 53-54, only excluded hearsay evidence of testimonial statements made by non-testifying witnesses and held that the 911 call was not "testimonial". In Hammond, police officers answering a domestic disturbance call took the complaining wife to another area of the house while holding the husband in the kitchen. The officers obtained an Affidavit from the wife who did not appear as a witness at trial. The Court held that the officers' interview statement from the complaining wife was in fact testimonial hearsay and could not be admitted against the husband.

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With Deepest Sympathy

David Eblen, 1964-2006

David Mark Eblen, 42, of Columbia died Monday, Aug. 7, 2006, at his home. He was born April 9, 1964, in Columbia, a son of David S. and Jane Ann Pilley Eblen.

He graduated from high school in Branson. Dave played four years for his beloved Branson Pirate football team and was a two-time first-team all-conference defensive back for the Pirates. He never spoke of his individual awards but instead focused on team achievements, a trait that followed him throughout his life. He also lettered four years in track; running the most grueling of races, the 400- and 800-meter dashes. He routinely broke two minutes in the latter, the mark of a true tracksman.

Dave graduated with honors from the University of Missouri School of Journalism in 1986. While at MU, he was a member of Beta Theta Pi Fraternity, where he forged strong friendships that endured for the rest of his life. He later freely dedicated hundreds of hours of his time in his capacity as chapter advisor, selflessly giving back to the fraternity that he held so dear.

He received his juris doctorate from the University of Missouri-Kansas City in 1989. While still in law school, Dave showed his mettle by trying seven jury trials, a feat unheard of for a law student. These trials fostered Dave's love of trial-room competition, and he continued to successfully litigate for his entire career.

He practiced law in Kansas City for several years before coming to Columbia, where he served as assistant prosecutor for Boone County from 1994 to 1996. He joined Eng & Woods in September 1996, where he was later made partner. Dave always considered his return to Columbia a return to home. He was never more happy than when he was among his friends on the golf course, at Mizzou tailgates or at Shiloh. When he did venture from Boone County, his destinations of choice were epic, including a Yosemite summit of rugged Mount Hoffman, wading the waters of the Canadian wilderness in hunt of big fish and trekking the backcountry of Glacier National Park in the heart of grizzly country. In all of these disparate places under extreme conditions, Dave once again showed his mettle.

It is not possible to describe what Dave meant to those he touched, for Dave had the singular gift of giving to each person he met exactly what that person needed at that very moment. Typically, what Dave gave was the heartiest of laughs to lighten the heart. It is his broad perspective on life, his gift of joy-giving to others, that will be missed the most.

2006 Spring CLE Award Winners

Atticus Finch Award	Jennifer Herndon
Robert Duncan Award	Michael Gross Public Interest Litigation Clinic
Charles Shaw Award	Joe Green John O'Gara Charlie Rogers Daniel Schattnik Burton Shostak Rick Sindel
Woodward/ Burnstein Award	Karen Dillon
Lew Kollias Award	Melinda Pendergraph
President's Award	Joseph Passanise

Federal Decisions *(from page 3)*

Samson v. California, 126 S.Ct. 2193. The Court held a parolee's statutory required agreement to be subject to search or seizure by a parole officer or other peace officer without a Search Warrant and without probable cause based solely on Petitioner's parolee status to be valid.

Hudson v. Michigan, 126 S.Ct. 2159. Police officers violation of the Fourth Amendment, Knock and Announce Rule did not justify the harsh remedy of suppression of the evidence seized. The Court relegates the defendant to a civil rights civil suit for violation of his constitutional rights. The Court has now demonstrated its willingness to back away from the Exclusionary Rule.

U.S. v. Lopez, 443 F.3d, (8th Cir. 2006). The Eighth Circuit examined and rejects its long standing "slight evidence" rule in measuring the sufficiency of evidence to support a conviction for conspiracy. The Court restates the Rule that the conviction will be affirmed if the record viewed most favorably to the government contains substantial evidence supporting the jury's verdict sufficient to prove the elements beyond a reasonable doubt without reference to the slight evidence standard.

United States v. Meyer, ____ F.3d. ____, 2006 WL 1889309 (CA 2006). The defendant pled guilty to the production of a sexually explicit video tape and was sentenced to 270 months imprisonment. This sentence constituted an upward variance from the defendant's advisory guideline maximum of 180 months. The Court affirmed the sentence as reasonable. The case is noteworthy for Judge Haney's review of 8th Circuit decisions concerning variances above and below the recommended guideline range finding that the Circuit had affirmed 92.3 percent of upward variances while reversing downward variances in 84.2 percent of the cases.

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

United States of America,)
Plaintiff,)
v.) Case No. 05-20532-Cr-Cooke
Jean Marc Yves Brun,)
Defendant.)

Motion to Permit Witness to Wear Hat in Court

Defendant Jean Marc Brun, by and through undersigned counsel, makes this, his Motion to Permit Witness to Wear Hat in Court; and would show:

Facts

Defendant Jean Marc Brun is set for sentencing on May 17. At the sentencing hearing Mr. Brun seeks to adduce the testimony of Jose Eber.

Undersigned counsel (who is a bottomless pit of ignorance where such things are concerned) is given to understand that Defendant Brun is one of the preeminent figures in the world of hairstyling, particularly celebrity hairstyling.[1] Undersigned counsel is further given to understand that Mr. Brun's employer and mentor, Jose Eber, is *the* preeminent figure in the world of celebrity hairstyling. Mr. Eber's customers include Farah Fawcett, Cher,[2] and Elizabeth Taylor. He has appeared on *Oprah*, *Entertainment Tonight*, ABC's *Good Morning America*, and NBC's *The Today Show*. He is the author of two books on hair care and styling, entitled Shake Your Head, Darling and Beyond Hair, the Ultimate Makeover Book.

Appended hereto as Exhibit A is a letter authored by Mr. Eber in support of Mr. Brun. In addition, however, Mr. Eber wishes to appear in person at Mr. Brun's sentencing to express his support and testify to Mr. Brun's good character. There is, however, one small logistical problem anent Mr. Eber's appearance in court. As reflected in the letter appended hereto as Exhibit B, Mr. Eber's "trademark image as a celebrity hairstylist is a cowboy hat; [Mr. Eber] would like permission to wear it during court."

We seek by this motion an order granting Mr. Eber leave to wear his hat in the courthouse, and even in the courtroom during sentencing proceedings.

Argument

Although the Federal Rules of Criminal Procedure and the Local Rules for the Southern District of Florida appear to be silent on the point, it is, we recognize, the custom and practice of courts in this jurisdiction to oblige all persons entering the courthouse, and particular those persons entering and seeking to remain in a courtroom while court is in session, to remove their hats.

For some, perhaps, this is no inconvenience. "Lightly I toss my hat away," said Cyrano de Bergerac. Edmond Rostand, Cyrano de Bergerac Act I, stanza I. For others the matter is very different. "When the Lord sent me forth into the world," wrote George Fox, founder of the Quaker religion, in his journal, "He forbade me to put off my hat to any, high or low." For still others, it is a matter of whether the hat is fashionable or not:

Have a good hat; the secret of your looks

> Lives with the beaver in Canadian brooks;
> Virtue may flourish in a old cravat,
> But man and nature scorn the shocking hat.
>
> – Oliver Wendell Holmes, "A Rhymed Lesson"[3]

For Jose Eber, the wearing of a trademark hat is a very serious business indeed. He is a recognized figure in the world of style and fashion, and his hat is a recognized and recognizable feature of his own style and fashion. It is no answer to say that to the fashion-unconscious Boeotians of this world – undersigned counsel, say – this preoccupation with a hat seems a lot of nonsense. There is nothing more American than the notion that one man's nonsense is another man's cachet.[4] Can we imagine Charlie Chaplin's lovable tramp without his bowler? Sherlock Holmes without his deerstalker? Humphrey Bogart as Richard Blaine in Casablanca without his fedora?

There is, unsurprisingly, a paucity of decisional law on point. Most instructive, we respectfully submit, is the opinion of Judge Easterbrook for a unanimous Seventh Circuit panel that also included Judge Posner. Confronted with a trial judge who enforced too unbendingly the rule that hats must be removed in court, Judge Easterbrook wrote:

> Tolerance usually is the best course in a pluralistic nation. ... The best way for the judiciary to receive the public's respect is to earn that respect by showing a wise appreciation of cultural and religious diversity. Obeisance differs from respect; to demand the former in the name of the latter is self-defeating. It is difficult

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1 Undersigned counsel, whose nescience in these matters cannot be overstated, immediately and erroneously assumed that someone named Jose Eber was probably a rookie phenom for the Lansing Lugnuts in the Midwest AA League.

2 Cher has written a letter of support for Mr. Brun in connection with the sentencing proceedings herein.

3 Oliver Wendell Holmes *Sr.*, the physician and polymath, and father of the great Supreme Court justice.

4 "[T]he wearing of hats had considerable meaning to the [Founding Fathers], recalling William Penn's trial for disturbing the peace. Upon entering the courtroom bareheaded, Penn was directed by a court officer to don his hat, after which he was fined by the court for not doffing his hat." *Richards v. Thurston*, 424 F.2d 1281, 1285 n.12 (1st Cir. 1970) (Coffin, J.) (*citing* Irving Brant, The Bill of Rights, 53-67 (1965)).

Motion for Hat *(from page 5)*

> for us to see any reason why a Jew may not wear his *yarmulke* in court, a Sikh his turban, a Muslim woman her chador, or a Moor his fez. Most spectators will continue to doff their caps as a sign of respect for the judiciary; those who keep heads covered as a sign of respect for (or obedience to) a power higher than the state should not be cast out of court or threatened with penalties.

United States v. James, 328 F.3d 953, 957-8 (7th Cir. 2003). To be sure, the case before Judge Easterbrook involved a religious objection to removing a hat, not an objection grounded in fashion considerations. But it is not for courts to pick and choose among sincerely - and deeply-held convictions, deciding which ones are valid and which ones frivolous. Judge Easterbrook's admonition – that "[t]olerance usually is the best course in a pluralistic nation" – is of wide application. Jose Eber has nothing but the highest respect for this Honorable Court, and is prepared to show that respect in any and every reasonable way. Surely this Court, in its capacious majesty, can afford a small indulgence to an artist.

Conclusion

Legend has it that Abraham Lincoln, while sitting in a public theater, removed his trademark stovepipe hat and set it, open end up, on the chair next to him. Moments later a woman wearing a very large bustle came down the row of seats and, her attention on the stage and not on where she was going, sat down in the seat occupied by Lincoln's hat. There was a very audible squashing noise, and the very embarrassed woman was the object of a good laugh by all seated nearby. Lincoln, ever calm in the face of disaster, turned to the lady and said in his taciturn way, "Ma'am, I would have told you that my hat wouldn't fit you if you had asked me."

> Moral: Sometimes more harm is done by taking a hat off than by leaving it on.

The undersigned has conferred with AUSA Andrea Hoffman who has read the instant motion and has no objection to the relief sought herein.

WHEREFORE, Defendant Jean Marc Brun respectfully prays that this Honorable Court enter its Order granting the within Motion, and permitting the witness Jose Eber to wear his hat in court as more fully prayed hereinabove; and granting such other and further relief as to this Honorable Court shall seem just.

Respectfully submitted,

MILTON HIRSCH, PLLC

_____

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. mail this 24th day of April, 2006, to: AUSA Andrea G. Hoffman, Office of the U.S. Attorney, 99 NE 4th Street, Miami, FL 33132.

_____

MILTON HIRSCH

2006 Election Preview

by Randy Scherr
MACDL Executive Director

As Missouri moves toward the 2006 General Election, candidates for both the House and the Senate are gearing up for what is expected to be a very interesting election.

Contrary to the general perception of an anti-incumbent sentiment crossing the country, no incumbent legislators lost in the August Primary Elections.

The Missouri Senate is assured of having at least four new members-- all are the result of term limits. Three other incumbent Senators face strong challenges. The Missouri Senate is also likely to gain one lawyer-- Jolie Justus, the democratic primary winner in the 10th district, in Jackson County, who is the heavy favorite to be elected in November. Jolie is Director of Pro Bono Services at Shook Hardy & Bacon, Kansas City. She outlasted a strong field of four candidates in the democratic primary. In two of the Senate races where non-lawyer incumbents face strong challenges, the challengers are lawyers. In the 30th Senatorial District in Greene County, Senator Norma Champion is being opposed by lawyer Doug Harpool, a former member of the House of Representatives. In the 24th Senatorial District in St. Louis County, incumbent Joan Bray is challenged by lawyer John Maupin.

On the House side of the Capitol, few things are expected to change. The Republicans are expected to retain control of both the House and the Senate and the House and Senate leadership are both expected to be re-elected for another two years.

The MACDL PAC is presently supporting six Senate candidates and fifteen House candidates. MACDL will be providing election updates, as well as reports on PAC activity, as we proceed through the general election. If you have any questions on any of the races this fall, please contact the MACDL office.

MISSOURI POST-CONVICTION UPDATE

This article summarizes favorable post-conviction cases decided since the January 17, 2006, the period covered by the last newsletter article. As noted, some of the opinions discussed below are not yet final; please check the current status of the decision before citing.

Post-Conviction (Rules 29.15 and 24.035) Cases: Relief Granted

Anderson v. State, 2006 WL 1883128 (Mo. Sup. Ct. June 30, 2006) NOT YET FINAL

Mr. Anderson's death sentence was vacated, and the case was remanded for a new penalty phase hearing, because trial counsel, as a result of a note-taking error, failed to challenge for cause a juror who stated during jury selection that he would vote for death unless the defense persuaded him otherwise. This was structural error, and no specific prejudice had to be shown for reversal.

Congratulations to Bill Swift, Mr. Anderson's attorney.

Dobbins v. State, 187 S.W.3d 865 (Mo. banc 2006)

Mr. Dobbins was entitled to have his open plea of guilty set aside where his trial counsel erroneously informed him that, if he were sentenced to a term of imprisonment, he could petition for early release if he successfully completed a treatment program. Because Mr. Dobbins had a prior conviction, he was not eligible for early release, and he sufficiently established that he would not have entered an open plea absent the erroneous advice.

Mr. Dobbins represented himself in the Missouri Supreme Court; his attorney in the court of appeals and motion court was Elizabeth Carlyle.

Calvin v. State, 2006 WL 2128794 (Mo. App. W.D. Aug. 1, 2006) NOT YET FINAL

Mr. Calvin's conviction for criminal non-support was reversed because the factual basis for his plea did not establish an element of the offense. Failure to pay "without good cause" is an element of criminal non-support, and Mr. Calvin's testimony at the plea hearing not only did not establish this element, it was inconsistent with it.

Congratulations to Jeannie Willibey, Mr. Calvin's attorney.

Smiley v. State, 2006 WL 2089129 (Mo. App. S.D. July 28, 2006) NOT YET FINAL

Mr. Smiley represented himself at trial after he had a conflict with his public defender. He requested counsel on appeal. The trial court told him that he would only get counsel after he perfected the appeal, and Mr. Smiley failed to do so. In the post-conviction action, the court held that Mr. Smiley was denied his right to counsel due to the trial court's failure to appoint counsel to assist him in properly filing notice of appeal.

Congratulations to Kent Denzel, Mr. Smiley's attorney.

Eskridge v. State, 193 S.W.3d 849 (Mo. App. E.D. 2006)

Ms. Eskridge was denied effective assistance of counsel, and her pleas of guilty and consecutive sentences were set aside. Trial counsel failed to insure that the sentencing court was aware that the negotiated plea bargain included concurrent sentences, and the sentences were imposed consecutively in violation of the plea agreement.

Congratulations to Ellen Flottman, Ms. Eskridge's attorney.

Hall v. State, 190 S.W.3d 533 (E.D. 2006)

Mr. Hall was entitled to relief on his post-conviction motion claim that the written sentence in his case, which found he was a persistent sexual offender, contradicted the oral sentence, which found that he was a predatory sexual offender. The significance is that predatory sexual offenders are eligible for parole, while persistent sexual offenders are not. The case was remanded for correction of the written judgment and sentence.

Congratulations to Margaret Johnston, Mr. Hall's attorney.

Norfolk v. State, 2006 WL 850658 (Mo. App. W.D. April 30, 2006) NOT YET FINAL

The trial court entered an order terminating Mr. Norfolk's probation. Three weeks later, based on an allegation that fraudulent representations had been made concerning the payment of restitution, the court entered an order rescinding its earlier order and reinstating the probation. Subsequently, Mr. Norfolk's probation was revoked, his sentence was ordered executed, and he filed a timely motion under Rule 24.035. The court of appeals held that, by entering its order terminating Mr. Norfolk's probation, the trial court lost jurisdiction of the case, and could not thereafter reinstate and revoke the probation. As a matter of procedure, the court held that because this was a jurisdictional claim, the usual rule that revocations of probation could only be challenged in a habeas corpus action did not apply, and Mr. Norfolk was entitled to relief under Rule 24.035.

Congratulations to Amy Bartholow, Mr. Norfolk's attorney.

Post-Conviction (Rules 29.15 and 24.035) Cases: Procedures

Members v. State, 2006 WL 1982941 (Mo. App. W.D. July 18, 2006) NOT YET FINAL

Mr. Members's amended post-conviction motion alleged that he was denied effective assistance of counsel because trial counsel failed to convey a plea offer to him. The trial court record was silent as to whether a plea offer had been made. Therefore, the record does not refute the claim, and Mr. Manners is entitled to an evidentiary hearing.

Congratulations to Rebecca Kurz, Mr. Members's attorney.

"Post-Conviction Update" >p8

Post Conviction Updates *(Continued from page 7)*

Whited v. State, 2006 WL 1982942 (Mo. App. E.D. July 18, 2006) NOT YET FINAL

Mr. Whited was entitled to an evidentiary hearing on his post-conviction motion allegation that he was denied effective assistance of counsel when trial counsel failed to call a witness who would have testified that the complaining witness told him that she, rather than the defendant, had caused the injuries resulting in the charged offense of domestic assault. Although this testimony in part impeached the complaining witness, and failure to call impeaching witnesses is not ordinarily grounds for reversal, the witness's testimony also established that Mr. Whited did not commit the offense.

Congratulations to Scott Thompson, Mr. Whited's attorney.

Fenton v. State, 2006 WL 1735120 (Mo. App. W.D. June 27, 2006) NOT YET FINAL

Mr. Fenton was entitled to a hearing to determine whether his post-conviction counsel, whom he alleged failed to file notice of appeal from the denial of post-conviction relief in the motion court, abandoned him so as to entitle him to reopen his post-conviction proceeding. Note that Mr. Fenton filed his post-conviction motion under former Rule 27.26, but it appears that the court's holding would apply to a similar fail to appeal the denial of a motion under Rule 29.15 or 24.035.

Congratulations to Gary Brotherton, Mr. Fenton's attorney.

Fisher v. State, 192 S.W.3d 551 (Mo. App. S.D. 2006)

Mr. Fisher was entitled to an evidentiary hearing on his post-conviction motion claim that his trial counsel was ineffective in failing to conduct an adequate investigation which would have uncovered the fact that the victim had recanted her statement to police that Mr. Fisher assaulted her. The motion alleged that trial counsel failed to interview the victim. Note that the court denied a hearing on the additional allegation that the prosecution withheld exculpatory evidence; this ruling appears to be erroneous.

Congratulations to Ellen Flottman, Mr. Fisher's attorney.

Reid v. State, 192 S.W.3d 727 (Mo. App. E.D. 2006)

Mr. Reid was entitled to an evidentiary hearing on his post-conviction motion allegation that his trial counsel was ineffective for erroneously informing him, before he entered his plea of guilty, that he would be eligible for parole after serving 18 months of his nine year sentence. The applicable statutes required that he serve 40% of the sentence before parole. The general questioning of Mr. Reid at the plea hearing was insufficient to refute this allegation.

Congratulations (again!) to Ellen Flottman, Mr. Reid's attorney.

Mitchell v. State, 192 S.W.3d 507 (Mo. App. E.D. 2006)

Mr. Mitchell's post-conviction case was remanded because the motion court failed to issue findings of fact and conclusions of law.

Congratulations to Scott Rosenblum and Mark Lyons, Mr. Mitchell's attorneys.

Crowder v. State, 191 S.W.3d 99 (Mo. App. S.D. 2006)

Where Mr. Crowder filed an unsigned pro se motion on time, and promptly submitted a signed motion after being notified by the clerk of the deficiency, the motion court erred in dismissing the motion as untimely without considering whether Mr. Crowder had met the requirements of Wallingford v. State.

Congratulations to Mark Grothoff, Mr. Crowder's attorney.

Rule 91 State Habeas Corpus Cases

There were no state habeas corpus cases of interest for this period.

Thank You!

MACDL would like to thank the sponsor of our 2006 Annual Meeting held in April at Harrah's Casino & Hotel in Maryland Heights.

Assisted Recovery Centers of America

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Imprimatur Press

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The Bar Plan

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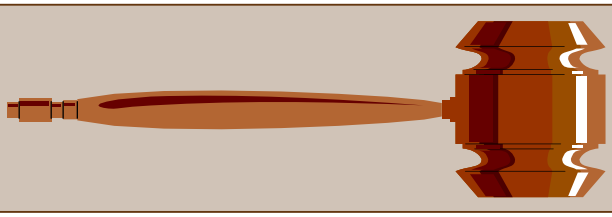
Amicus Curiae Committee

Don't forget that MACDL has an Amicus Curiae Committee which receives and reviews all requests for MACDL to appear as amicus curiae in cases where the legal issues will be of substantial interest to MACDL and its members. To request MACDL to appear as amicus curiae, please send a short letter to Grant J. Shostak, Amicus Curiae Committee Chair, briefly explaining the nature of the case, the legal issues involved, and a statement of why MACDL should be interested in appearing as amicus curiae in the case. Please set out any pertinent filing deadline dates, copies of the order of 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) 725-3275
E-mail: gshostak@msmattorneys.com

Criminal Law Review

by Bernard Edelman



1) State v. Davis, #WD64128 (Mo App 2005).

   It was error for trial court to refuse to review, in camera, sexual assault victim's psychological records for relevance. It was also error for trial court to prohibit cross-examination of victim as to prior false allegations of rape, as rape shield law was inapplicable.

2) State v. Cromer, #WD64674 (Mo App 12/27/05).

   When the scope of consent of authority to search is exceeded by police, the evidence seized will be suppressed. The concept of "knock and talk" is a permissible police tactic which allows them, when they do not have sufficient evidence to obtain a search warrant, to go to a residence, knock on the door, try to identify who is there, and then try to obtain the resident's consent to search.

3) Rogers v DOR, #WD65039 (Mo App 2/21/06).

   Rogers was arrested for DWI. At the station, when asked to take a breath test, he stated he would if he could use the bathroom first as he had drunk a lot of liquid and could not take a deep breath without first using the bathroom. The police deemed this a refusal to consent to a breath test. The appellate court agreed holding that a conditional consent is a refusal, the only exception being to speak to an attorney during the 20 minute statutory period.

4) State v Simmons, #SD27089 (Mo App 2/22/06)

   Defendant took two breath tests after his DWI arrest, but both tests were invalid as the equipment malfunctioned. The officer then took defendant to the hospital where a blood sample was drawn. Defendant claimed the blood test was inadmissible as it was his third test, when only two are authorized. The appellate court held that the two invalid breath tests did not preclude a second statutory test, and that Sect. 577.020.2 RSMo authorized a second blood test.

5) State v McCleod, #WD64945 (Mo App 3/21/06)

   Defendant was found in possession of 7 ½ ounces of marijuana. At his trial for the B felony of Possession with Intent to Distribute, a police officer was allowed to testify that this quantity was not for personal use, but was a distribution amount. The appellate court reversed, finding the officer's opinion evidence, without other corroborating evidence (i.e. separate packages, scales, packaging materials, money, drug records) did not support the conviction.

6) State v. Bristow, #SD26825 (Mo App 3/31/06).

   Error to give jury instruction, at State's request, that voluntary intoxication is not a defense to crime when record lacks evidence of intoxication, and no level of impairment was established by the evidence.

   The instruction improperly suggested that defendant was trying to avoid liability because of drinking and that defendant was intoxicated, affecting his credibility as a witness.

7) Kimbrell v. DOR, #WD65510 (Mo App 4/18/06).

   After arrest for DWI, Kimbrell initially refused a breath test. After talking to a lawyer, he agreed to take the breath test and the officer gave him one, but still considered it a refusal. By allowing Kimbrell to take a breath test, it is inconsistent to call it a refusal and the one-year revocation was improper.

8) State ex rel Devlin v. Sutherland, #ED87231 (Mo App 5/16/06).

   There is no authority for a trial judge, on his own motion, to change the venue of a criminal case to another county, for fear that a "stealth juror" could impact the trial selection of the jury. Defendant has a constitutional right to be prosecuted in the county where the crime allegedly occurred. (6th Amendment US constitution and Article I, Sect.18(a) Mo. Constitution). If the defendant does not request a change of venue, none can be granted.

   Footnote: this defendant was represented on appeal by Past MACDL President, Pat Eng. Congratulations Pat!

9) State ex rel Kemper v. Vincent, #SC87246 (Mo banc 5/16/06).

   The trial court's declaration of a mistrial, after its concern about the admissibility of polygraph evidence, was not a "manifest necessity" and because jeopardy had attached, a retrial of this murder charge was barred.

10) State v Bainter, #ED86381 (Mo App 6/6/06) and State v Davis, #ED86313 (Mo App 6/6/06)

    The trial court's failure to swear the petit jury, prior to the beginning of the trial, will result in a new trial without a showing of actual prejudice. The juror's oath is an essential element of the constitutional guarantee to a trial by an "impartial jury".

    Because of the importance of this issue, CAUSE TRANSFERRED TO SUPREME COURT to reexamine existing law.

11) State v. Banks, #WD63647 (Mo App 6/27/06)

    The prosecuting attorney in closing argument, over objection, referred to the defendant as "the Devil". If the reference constitutes a "low order of abuse and denunciation of defendant" intended to inflame the jury to convict the defendant solely on the basis that he's an evil person, it would be prejudicial error. Because the reference was to make a legitimate analogy in response to defense counsel's closing argument, it was not error.

12) State v. Wilson, #SD27014 (Mo App 6/28/06)

    The prosecutor in this case had been a public defender and had previously represented Wilson. This fact was known to Wilson and defense counsel, but no objection was raised. After conviction, new counsel raised the alleged "conflict of interest". The appellate court felt that since defendant and her counsel knew of the "conflict" and failed to object, it was waived. Also, just because he had represented defendant previously, and then prosecuted defendant, without more, there is no prejudice. The various representations that allegedly result in a conflict must be connected by something substantially more than the prosecutor himself.

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Living Up to Gideon's Promise: How is Missouri Doing?

by Cathy R. Kelly
Acting Director, Missouri State Public Defender System

In December, 2004, the ABA issued a report on the state of indigent defense in the United States, entitled: *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*. The report was the result of hearings the ABA conducted in 22 states and the news was not good. Missouri was not among the states studied, but the stories told in the hearings, the obstacles raised, and challenges discussed, nonetheless ring familiar to practitioners of indigent defense here in the show-me state.

Missouri has a statewide public defender system, under which every county in the state is covered by a public defender office staffed with full time public defenders. Contract assignments to private attorneys are relied upon only to handle a small number of conflict cases that cannot easily be transferred to another office and, more recently, to cover miniscule slices of our case overload problem in areas harder hit than most due to excessive turnover. There is no fund or appropriation for covering the costs of contracting cases out on any larger scale and no statutory mechanism for addressing case overload.

The Problems:

As most members of the Missouri Bar and certainly most criminal defense practitioners are aware, Missouri's public defender system is in crisis. There has been no increase in staffing for the last six years, despite the continuous rise in caseload over that time. Last year, Missouri's Public Defenders were assigned over 88,000 cases, over 86,000 of them in the Trial Division. The average Trial Division attorney was assigned 295 cases last year on top of the cases left over from the previous year they were already carrying. This is well above national standards for public defender caseloads and well above the maximum for a healthy, effective public defender system.

For the first time in five years, Missouri's public defenders did see some salary increases last year, but defender salaries still fall far behind what attorneys can make in the private sector and far short of what attorneys carrying $60,000 to $100,000 in student loan debt have to have in order to make ends meet. The combination of low salaries and high workload led to the equivalent of 100% turnover in attorney staff for Missouri's public defender system over the last five years – with the resulting delay of cases in the courts, frustrated clients having to start over with a new attorney, and a never-ending influx of new attorneys needing to be trained and brought up to the point where they can carry their share of the workload by supervisors who are themselves carrying a full, overloaded caseload.

To add insult to injury, many public defender offices are housed in inadequate, overcrowded space, in accommodations over which the Missouri Public Defender System has no control. By statute, it is the responsibility of the counties to provide office space for public defender offices. Some counties take this responsibility seriously and provide excellent facilities for our attorneys. Some wash their hands of the matter entirely and refuse to pay their share of the rent in those jurisdictions where public defender offices cover multiple counties. Others provide inadequate space in existing county facilities where attorneys are required to share offices – making a confidential meeting with a client a logistical impossibility, store file cabinets in public hallways, etc. It is, as my father would say, 'no way to run a railroad.'

The picture is not pretty.

The Path to a Solution

Last fall, the Missouri Bar answered the call for help and established a Public Defender Task Force chaired by Missouri Bar President, Doug Copeland, and made up of a cross section of players in the criminal justice system, legislators, and governor's staff. Their efforts were instrumental in getting the salary increases of the last legislative session through and in raising awareness that justice in Missouri's courts is in jeopardy due to the overload of its public defenders.

The Task Force continues to work on getting caseload relief and additional salary relief through this next legislative session, as well as developing proposals for new types of 'collections' diversion programs or reclassification of offenses to eliminate jail time, as a means of getting public defenders out of those cases and reducing caseload. Offenses currently under discussion for potential reclassification include DWS/DWR; first offense bad check cases, and criminal nonsupport cases. Several legislators have shown some interest in these ideas.

Sen. Michael Gibbons, President Pro Tem of the Senate, has appointed an Interim Senate Committee on the Public Defender which has scheduled three hearings to date, with an eye toward developing legislation for the upcoming legislative session. The committee is chaired by Sen. Jack Goodman, Mt. Vernon; and includes as members Sen. Gibbons, Sen. Luann Ridgeway, Smithville; Sen. Joan Bray, St. Louis; and Sen. Chuck Graham, Columbia. The Committee will be hearing the recommendations of the task force, input from the MO State Public Defender System, testimony from Robert Spangenberg, who conducted an assessment of the system at the behest of the MO Bar Task Force, Prof. Rod Uphoff from MU on the ethical issues and professional responsibility obligations at issue in the caseload crisis, as well as former public defenders, members of the judiciary, and possibly some prosecutors, as well.

There is – at long last – movement in the air. May relief come close upon its heels.

Law Review *(from page 9)*

13) Jane Doe et. al v. Phillips, #SC86573 (Mo banc 6/30/06)

The Supreme Court held that the sex offenders registration legislation, Sect. 589.400 to 589.425 RSMo, did not require sex offenders, who had been convicted or pled guilty prior to the legislative enactment on January 1, 1995, to register, as it violates the constitutional bar on laws retrospective in their operation and the standard set out in Bliss v Hazardous Waste, 702 SW2d 77 (Mo banc 1985).

MACDL Web Traffic Report

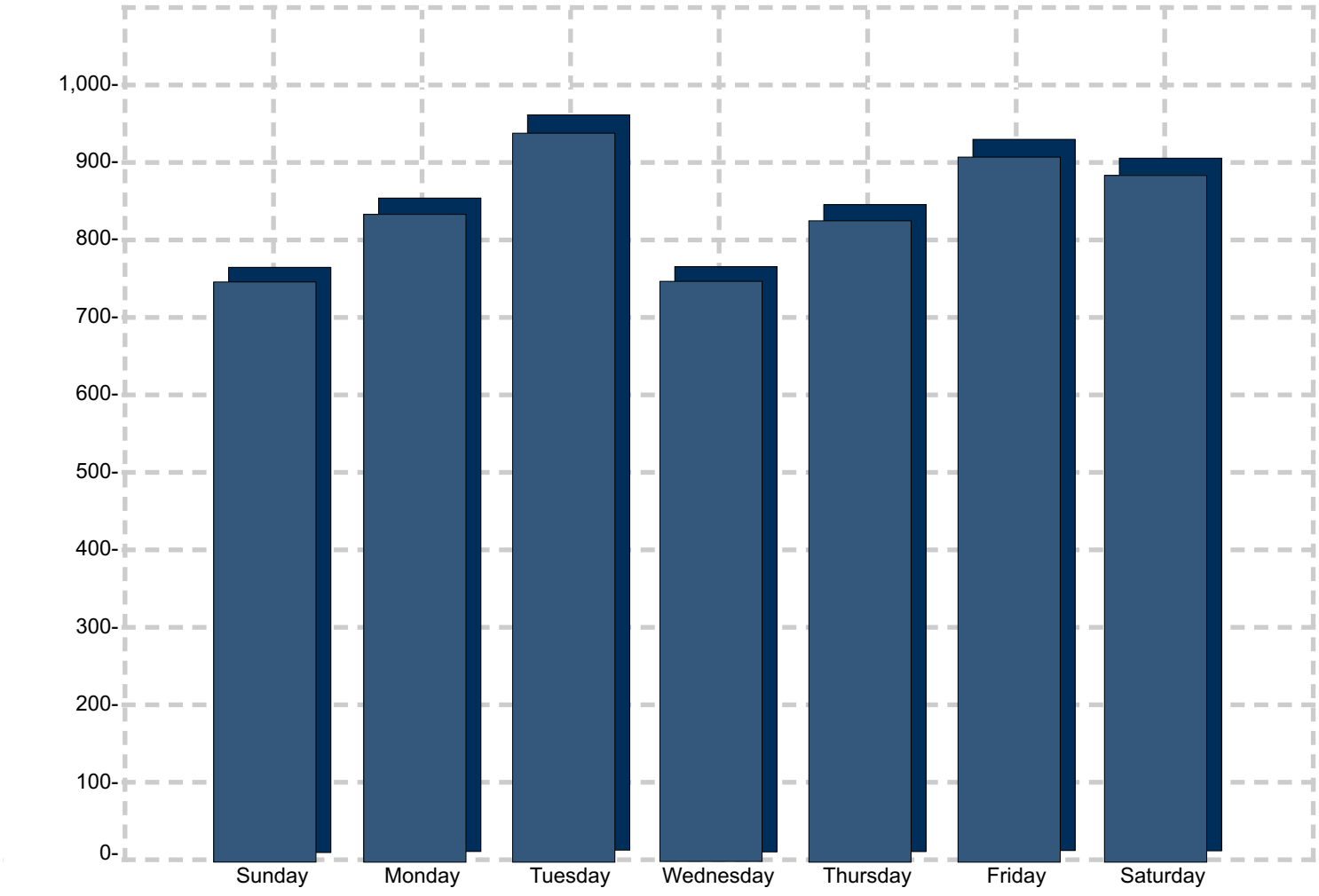
Activity Summary (May - August, 2006)

Hits	
Total Hits	92,366
Average Hits per Day	789
Average Hits per Visitor	15.27
Page Views	
Total Page Views	9,474
Average Page Views per Day	80
Average Page Views per Visitor	1.57
Visitors	
Total Visitors	6,047
Average Visitors per Day	51
Total Unique Visitors	1,161

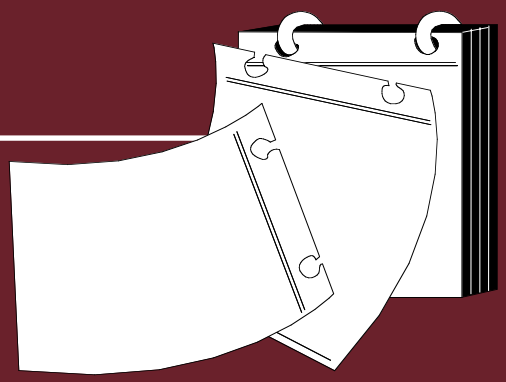
Activity By Week Day (May - August, 2006)

Day	Hits	Visitors
Sunday	3,928	764
Monday	9,641	852
Tuesday	13,366	959
Wednesday	8,368	771
Thursday	30,030	857
Friday	22,738	938
Saturday	4,295	906
Totals	**92,366**	**6,047**

Activity by Day of Week (May - August, 2006)



Mark Your Calendar!



October 27, 2006

MACDL Fall CLE
Harrah's Hotel & Casino
North Kansas City, MO

January 19, 2007

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

April 20-21, 2007

MACDL Annual Meeting
and Spring CLE
Harrah's Hotel & Casino
North Kansas City, MO

July 27-28, 2007

MACDL/ MO Bar DWI Seminar
Lodge of Four Seasons
Lake Ozark, MO

October 26, 2007

MACDL Fall CLE
Location to be determined.
St. Louis, MO

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