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

Missouri Association of Criminal Defense Lawyers
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Your comments and suggestions are welcome!

MACDL President's Letter

by Grant Shostak

It's football season – time to think about what it takes to win in the Southeastern Conference and at trial. A good friend of mine is a graduate of South Carolina and a trial lawyer. Last Sunday night, he asked "if your schedule in the next ten weeks featured trials against Georgia, LSU, Arkansas, Tennessee, Florida, Clemson, and Alabama or Auburn, could you compete?"

We discussed the skills or qualities necessary to compete both on the football field and in the courtroom, which included:

1. Conditioning
2. Attitude
3. Energy and motivation
4. Strategy
5. Tactics/Blocking and Tackling

No lawyer in America has more of these skills than Vince Bugliosi. Recognized as outstanding at preparation, opening and closing argument, and cross examination, his record both as a prosecuting and defense attorney are unsurpassed.

Mr. Bugliosi, besides being arguably one of the best trial lawyers in the country, is also an accomplished author. His works include:

- Helter Skelter (with Curt Gentry) (1974) (Edgar Award, 1975, Best Fact Crime book)
- Till Death Us Do Part: A True Murder Mystery (with Ken Hurwitz) (1978) (Edgar Award, 1979 Best Fact Crime book)
- And the Sea Will Tell (with Bruce B. Henderson) (1991)
- Outrage: The Five Reasons Why O.J. Simpson Got Away with Murder (1996)
- The Phoenix Solution: Getting Serious About Winning America's Drug War (1996)
- No Island of Sanity: Paula Jones v. Bill Clinton – The Supreme Court on Trial (1998)
- The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President (2001)
- Reclaiming History: The Assassination of President John F. Kennedy (2007)

On October 26, 2007 in St. Louis, all of you are invited to join Mr. Bugliosi to learn from him how to try a criminal case. This is sure to be an outstanding seminar that should not be missed.

In addition to Mr. Bugliosi, we are honored to have Hugo Rodriguez of Miami, Florida. Mr. Rodriguez, a former DEA Agent now turned criminal defense lawyer, is one the most skilled criminal defense lawyers in the United States and has graciously agreed to teach us how to win our cases before trial. Also, we are fortunate to have two of our members, Stephanie Howlett and Kim Benjamin present at our seminar, as well.

As a criminal defense lawyer, and as President of MACDL, I hope that we can join together and continue to fight for our clients' rights to a fair trial. Never have so many people given so much for such a fundamental right that sometimes is overlooked. Please join us on October 26, 2007 in St. Louis for a seminar that is sure to have no equal.

Grant Shostak

MACDL

Missouri Association of Criminal Defense Lawyers

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Sentencing Options in DWI

by Michael C. McIntosh

In DWI cases, Section 577.023 RSMo uses redundantly the word "imprisonment" in setting forth minimum sentences before one's eligibility for "parole or probation". The statutory categories for offenders are "prior (five days) ... persistent (ten days) ... aggravated (sixty days) ... and chronic (two years) ..." Section 577.023.6 RSMo.

A court which imposes more than a one year sentence in a Class D or C Felony or any sentence under a B Felony is required to "commit the person to the custody of The Department of Corrections." RSMo 558.011.2 and 3.1 (RSMo)

However, the court may also grant probation under 559.012 RSMo. Both the Board of Probation and Parole and the court have the authority to determine conditions of probation. See Department of Corrections, Rules and Regulations Governing the Conditions of Probation, Parole and Conditional Release, MBPP-258 (March 2007); and Section 559.021.1 RSMo, which reads:

"The conditions of probation shall be such as the court in its discretion deems reasonably necessary to insure that the defendant will not again violate the law."

The question arises as to whether or not the court has the authority to order "house arrest" as imprisonment thereby satisfying those minimum sentencing requirements referenced above.

As a general proposition, time served on house arrest while free on bond cannot be credited toward any sentence. Section 558.031 RSMo; State v. Decker, 194 SW 3d 879 (Mo. App. ED 2006); Bates v. DOC, 986 SW 2d 486, 489 (Mo. App. WD 1999). In Bates, the opinion of Judge Smith dismissed the prisoner's claim house arrest was more or less equivalent to incarceration. However, it should be noted 558.031 RSMo specifically deals in terms of "credit for jail time awaiting trial." Further, under the Department of Corrections (217.541.1 RSMo), house arrest does count as time served against any term of imprisonment.

Bates and Decker, et al, do not address time when a defendant is on house arrest as constituting "imprisonment" when the sentence is by order of the trial court. If the court can count as "imprisonment" time in the County Jail under "prior and persistent" sentences, there is no reason to categorize imprisonment as different if it is an aggravated or chronic offense.

If counsel has the client in "treatment" pending sentencing and the SARS recommends probation or a treatment program, a valid argument can be made to the sentencing court for "house arrest" to comply with the minimum required sentencing provisions.

Amicus Curiae Committee

Don't forget that MACDL has an Amicus Curiae Committee which receives and reviews all requests for MACDL to appear as amicus curiae in cases where the legal issues will be of substantial interest to MACDL and its members. To request MACDL to appear as amicus curiae, you may fill out the amicus request on the MACDL website (www.MACDL.net) or send a short letter to Grant J. Shostak, Amicus Curiae Committee Chair, briefly explaining the nature of the case, the legal issues involved, and a statement of why MACDL should be interested in appearing as amicus curiae in the case. Please set out any pertinent filing deadline dates, copies of the order of opinion appealed from and any other helpful materials.

Committee Chair: Grant J. Shostak • Shostak & Shostak, LLC
8015 Forsyth Boulevard • St. Louis, MO 63105
Telephone: (314) 725-3200 • Facsimile: (314) 725-3275
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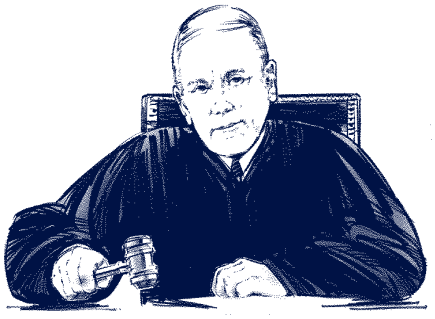


Judicial Selection Process under Attack

by Randy Scherr, MACDL Staff

You have not been able to open up a major newspaper in Missouri over the last sixty days without finding an article or a Letter to the Editor regarding the Missouri Judicial Selection Process. That Process, referred to as the Missouri Non-Partisan Court Plan, has come under attack recently by a small group of Republicans working in conjunction with the Adam Smith Foundation, funded by out of state monies. These attacks peaked with the Appellate Judicial Commission's selection of a three person panel to replace Judge Ronnie White on the Supreme Court.

This all follows legislative efforts during the 2007 session to drastically modify the Missouri Court Plan to provide for gubernatorial appointment of judges with Senate confirmation. Following the legislative session, a group of interested parties met to organize the Missourians for Fair and Impartial Courts (MFIC). Missouri Association of Criminal Defense Lawyers was a founding and contributing member of MFIC. Other founding members include Missouri Association of Trial Attorneys, Missouri Organization of Defense Lawyers, Missouri School Boards Association, as well as several Labor Unions and Teachers groups. Since that time, several other statewide interested groups have signed on to the effort to defend the Missouri Court Plan. It is anticipated that MFIC will roll out its broad-based support group in the very near future. Several local bar associations have likewise agreed to join the group.

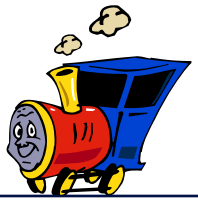
MFIC will serve in an education, media relations and grassroots development roll. You are invited to visit the MFIC website at www.protectjustice.org and to sign on to receive periodic updates on the efforts to protect the Missouri Court Plan. It is expected that efforts will continue through the 2008 legislative session to both dismantle the Missouri Court Plan, as well as restrict courts' jurisdictions in certain types of cases (i.e. tax cases) similar to HJR 1 from the 2007 session.

Anyone wishing to contribute to the MFIC effort may do so either online or by contacting the MACDL office.

Protect the Process
Support MFIC
@
www.protectjustice.org!

Welcome Aboard!

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



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Top Ten Federal Decisions

by Bruce C. Houdek

Brendlin v. California, 127 S.Ct. 2400 (2007)

A passenger in an automobile stopped by police in a traffic stop is seized for Fourth Amendment purposes and may challenge the constitutionality of the stop.

U.S. v. Jennings, (8th Cir. 2007) 2007 WL 2142260

Testimony that officers noticed the odor of burnt marijuana in a car provides probable cause for the officers to search the vehicle including closed compartments. If the District Court finds that officers are credible witnesses, the Court's findings based on their testimony are virtually unreviewable.

Unites States v. Spurlock, ___ F.3d ____ (8th Cir. 2007) 2007 WL 2162998

A defendant who goes to trial may in limited instances obtain a guideline reduction for acceptance of responsibility where he goes to trial to preserve issues that do not relate to factual guilt or to challenge the applicability of a statute to his conduct. In making the determination to reject or grant the downward adjustment, the Court must look primarily to a defendant's pretrial statements and conduct to determine if acceptance is appropriate and to determine the timeliness.

U.S. v. Hansen, 2007 WL 1629829

Objections to a guideline increase in a Presentence Report is not sufficient to constitute an objection to the facts stated in the Report and to place the burden on the government to produce proof of the facts relied upon.

U.S. Banker, 489 F.3d 366 (D.C. Cir. 2007)

The musings of a district judge at a pretrial conference in a criminal case where he inquired as to the government's plea offer and then discussed a similar case and the sentence he had imposed stating that judges try to be consistent and that defendant was sentenced to a year and a day. The defendant plead guilty the next morning, but the district court sentenced him to a maximum guideline sentence of 41 months. The defendant raised a violation of Rule 11 for the first time on appeal claiming that the Court had improperly involved itself in plea negotiations. The D.C. Circuit held that the Court had violated Rule 11 and that it was plain error.

U.S. v. Roth, 487 F.3d 1120 (8th Cir. 2007)

The good faith exception will save a defective Search Warrant where the Magistrate acted properly. The court has no authority to suspend sentence and found that a religious awakening is not a relevant sentencing consideration.

U.S. v. Boesen, 491 F.3d 852 (8th Cir. 2007)

The District Court granted the defendant's Motion for Judgment of Acquittal. The government appealed and the Court reversed the District Court's decision reinstating the guilty verdict. The court held that the standard for grant of a judgment of acquittal not withstanding the verdict is very strict and a jury verdict should not be overturned lightly. Judgment of acquittal should be granted only if there is no interpretation of the evidence that would allow a reasonable jury to find a defendant guilty beyond a reasonably doubt. Evidence supporting a conviction is sufficient, if rational trier of fact could have found the elements of the offense beyond a reasonable doubt.

U.S. v. Carter, 481 F.3d 601 (8th Cir. 2007)

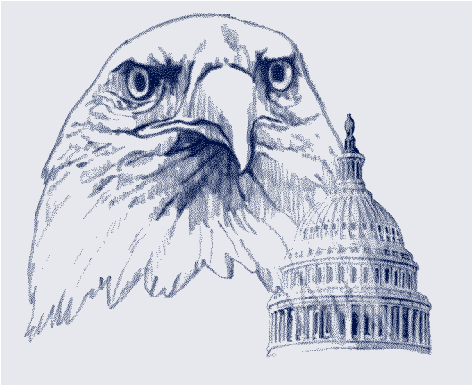
You can pay a heavy price for appealing. The Defendant was originally sentenced to 442 months. The district court had denied the government's contention at sentencing that the Defendant was a career offender, pursuant to 18 U.S.C. § 924(c)(1)(C) and refused to impose a mandatory consecutive sentence on one of the counts of the Indictment. The government did not appeal the district court's refusal. The Court of Appeals on its own motion determined that the district court committed plain error in refusing to assess the consecutive sentence. The Circuit Court affirmed the Defendant's conviction and sentence in all other respects and added 180 months to his 442 month sentence.

U.S. v. Pepper, 486 F.3d 408 (8th Cir. 2007)

The feud between District Judge Mark Bennett of the Northern District of Iowa and the Eighth Circuit continues. Pepper was sentenced to 24 months and the government appealed. The Eighth Circuit reversed the sentence and remanded for re-sentencing. Judge Bennett imposed the same sentence based upon a different theory. The Eighth Circuit again reversed and remanded the case for re-sentencing and at Judge Bennett's request directed the Chief Judge of the District to reassign the case.

In re Grand Jury Proceeding 42 F.3d 976 (8th Cir. 2000)

Attorney-client communications and attorney work product including works by the attorney's agents and witness statements are not subject to discovery by Grand Jury Subpoena. The Court then engaged in a lengthy discussion of the crime fraud exception to the attorney-client privilege. Affirming the district court's finding that a number of documents were producible under that exception.



The PD Corner

by J. Marty Robinson, Director, Missouri State Public Defender System

My fifteen year old son, Neil, is playing high school football this year.

There is a certain amount of paternal pride that comes with watching him perform on the field. He is, of course, my only son. But, I would be proud of anyone performing in the situation he has been given. He's never played before. As you can imagine, he's got a lot of catching up to do.

In addition to learning the fundamentals of a sport that others have played for years, he has to condition himself to perform in the August mid-Missouri heat and humidity. It's not easy. Coach expects him to run sixteen 110-yard sprints in under 16 seconds, with less than a minute between each. New to the sport, and not in the condition it demands, one could say his relative performance was not that of other athletes. But, I can't.

Neil's situational performance could not be better, or more inspiring.

A lot of Missouri Public Defenders are new to the practice of law. Most take their new licenses and the initial training the system gives them to trial division offices throughout the state. Relatively speaking, they will most likely have more cases and less experience than any other defense lawyer practicing in the same courtroom. Initially.

Situation-wise, they get experience fast. Caseloads see to it. They not only learn to practice criminal law, they learn in the toughest of situations. Public Defender caseloads are high, and they seem to only go higher. Yet, Missouri's Public Defenders do a remarkable job with the situation they are given.

There's been a lot of media coverage about PD caseloads the past several years. While the caseloads rise, staffing remained the same. It's pretty simple math. More cases, same number of lawyers, equals more cases per lawyer. It's also pretty simple physics. More cases per lawyer equals less time per case. Somehow, the simplicity of this indisputable logic has translated into criticism of the performance of the individual Public Defender.

It's not.

The situational performance of Missouri's Public Defenders could not be better. It's also an inspiration to anyone who practices criminal defense. But, as inspiring as the PD's energy, dedication and situational performance is to some, it seems to threaten others.

Some dispute the indisputable, and argue there is no PD caseload problem. Perhaps they fear the next logical facts of math and physics. Fewer cases per PD, equals more time per case. More time per case equals? I suggest it translates into a relative performance that some would just as soon not see.

I suppose when you know how dedicated and hard-working Missouri's Public Defenders are, they're having more time per case is pretty threatening. That is, if you like the status quo. Personally, I don't. And, I don't think anyone who truly understands and cares about justice should either.

As simple as the numbers are, there seems to be no simple way out of the problem. Some say we should just add more PDs. Some say we should contract cases to the private defense bar. Some say simply appoint the private bar. Some say overhaul the entire criminal code. Some say the ethical rules require the PD to turn down cases. Some say caseloads should be capped, either by statute or court rule. All the while, Missouri Public Defenders march on in a difficult situation not of their choosing or making.

By the way, Neil (eventually) met his coach's expectations. He passed the conditioning test yesterday. Like a lot of Public Defenders, he had to work harder than some. I know, because I was on the field timing his sprints at 6AM the day before his test.

I couldn't be more proud of him … and a lot of Public Defenders too.

Looking for CLE Hours? Great Speakers? Fun? MACDL Has it ALL!

Fall 2007 CLE
St. Louis
Oct. 26, 2007

Featured speakers: Vincent Bugliosi, Hugo Rodriguez, Stephanie Howlett, Kim Benjamin, Kevin McClain

Fun: Art Museum (Free!), Zoo (Free!), Science Center (Free!), Missouri History Museum (Free!), Forest Park (Free!), Arch, Missouri Botanical Garden, Magic House, City Museum, Rams Football (10/28; 12:00pm; Rams vs. Browns); St. Louis Blues Hockey (10/27; 7:30 pm; Blues vs. Washington Capitals), Anheuser-Busch Brewery, shopping, Six Flags

Spring 2008 CLE
Branson
April 18-19, 2008

Featured Speakers: Milton Grimes, Richard Kammen. Cyndy Short

Fun: Silver Dollar City, Celebration City, Branson Belle, White Water, Dinner Shows ... and so much more!

MISSOURI POST-CONVICTION UPDATE

This article summarizes favorable post-conviction cases decided since February 2, 2007.
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

Stiers v. State, 2007 WL 1742831 (Mo.App. W.D. June 19, 2007) NOT YET FINAL

The defendant was denied effective assistance of counsel when defense counsel failed to request an instruction on self-defense. Counsel's belief that the evidence did not support such an instruction was wrong. Prejudice was shown where the evidence was not overwhelming and "There were issues here for the jury's resolution under proper instruction.", citing State v. Johnson, 54 S.W.3d 598, 605 (Mo. App. 2001).

Congratulations to Craig Johnston, Mr. Stiers' attorney.

James v. State, 222 S.W.3d 302 (Mo. App. W.D. 2007)

The defendant was denied effective assistance of counsel when trial counsel failed to challenge for cause a prospective juror who indicated difficulty with not considering the defendant's failure to testify. Trial counsel testified that he could not remember why he did not challenge the prospective juror, but the trial court found that since the voir dire continued for several hours and trial counsel had the opportunity to observe the prospective juror, there might have been a plausible strategic reason for not challenging her. The court of appeals rejected this reasoning, holding that the failure to challenge a juror who admits prejudice against a defendant is ineffective absent an "acceptable explanation," and that trial counsel's inability to remember his reasoning not only did not present such an explanation but undermined the existence of a reasonable strategy. Prejudice was shown because the prospective juror served on the jury and therefore the defendant's right to an impartial jury was violated.

Congratulations to Rebecca L. Kurz, Mr. James's attorney.

Allen v. State, 219 S.W.3d 273 (Mo. App. S.D. 2007)

As a procedural matter, the court holds that the "escape rule," which generally bars appeal if the defendant escapes, did not bar this post-conviction proceeding which concerned the court's conduct after the defendant was re-arrested. Initially, the defendant was sentenced to a 120-day callback, and told to report to jail at a later date to begin the treatment program. He failed to do so. When the defendant again appeared in court, about one year later, the court rescinded the order for a 120-day callback and imposed a straight incarceration sentence. The court of appeals held that the trial court lacked jurisdiction to change the sentence at that point. Since timely reporting was not expressly made a condition of the plea bargain, the court and the state were bound by the original sentence.

Glass v. State, 2007 WL 1953413 (Mo. banc July 6, 2007) NOT YET FINAL

Penalty phase relief was granted in this death penalty case. The court affirmed the motion court's finding that Mr. Glass was denied effective assistance of counsel when trial counsel failed to call as penalty phase witnesses Mr. Glass's doctor, who had treated him for meningitis as a child; four of his teachers, who could have testified to his difficulties in school and low intellectual functioning; his probation officers, who could have testified that he successfully completed his prior probation; a neuropsychologist, who could have provided evidence about Mr. Glass's impaired temporal lobe functioning; a learning disability expert; and a toxicologist, whose testimony could have supported the mitigating circumstances of substantial impairment and extreme emotional distress. The court also reaffirmed its holding in Hutchison that ineffectiveness can be found for failing to call a particular expert who was unknown to trial counsel.

Congratulations to Melinda Pendergraph, Mr. Glass's lawyer.

RULE 91 STATE HABEAS CORPUS CASE

State ex rel. Lute and Branch, 218 S.W.3d 431 (Mo. banc 2007)

In 2004, then-Gov. Bob Holden commuted the sentences of Lute and Branch, who had been convicted of murdering their abusive husbands. Their sentences were changed from life without parole for 50 years to life with parole. Thereafter, they were both denied parole by the Missouri Board of Probation and Parole on the grounds that release on parole would "depreciate the seriousness of the offense." Gov. Holden provided affidavits in each case saying that he had considered the circumstances of the offenses and nonetheless recommended parole. Although the relief sought was habeas corpus, the court instead issued writs of mandamus directing the parole board to parole Ms. Lute, and to conduct new proceedings concerning Ms. Branch and "examine her conduct in prison and determine her readiness to re-enter society."

Congratulations to Jane H. Aiken, Stephen M. Ryals, Olivia J. Bradbury, Mary W. Beck, Richard Kroeger, and Kelly King, the attorneys for Ms. Lute and Ms. Branch.

"Post-Conviction Updates" >p7

Post Conviction Updates

(Continued from page 6)

MISCELLANEOUS POST-CONVICTION ACTIONS

In the Matter of the Competency of Parkus, 219 S.W.3d 250 (Mo. banc 2007)

In this mandamus action, the court affirmed a lower court determination that Mr. Parkus is mentally retarded, and therefore ineligible for the death penalty, and commuted his sentence to life imprisonment without eligibility for probation or parole. The court found that the state had the right to appeal the lower court ruling, but affirmed it on the evidence.

Congratulations to Sean D. O'Brien, Nancy A. McKerrow, and C. Daniel Gibson, Mr. Parkus' lawyers.

MACDL Web Traffic Report

Activity Summary

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Total Hits	402,787
Average Hits per Day	791
Average Hits per Visitor	14.95
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Total Page Views	46,138
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Visitors	
Total Visitors	26,948
Average Visitors per Day	52
Total Unique Visitors	4,563

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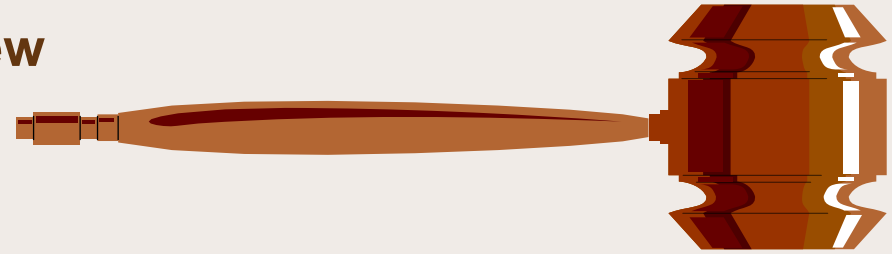
Criminal Law Review

by Bernard Edelman



1) **State of Missouri v. Ward, #ED87599 (Mo App 3/20/07)**

When appellant was to testify, he refused to "swear or affirm" his testimony and the trial judge would not let him testify in his defense. Section 492.030 RSMo authorizes a witness to declare his intention to tell the truth, rather than swear or affirm. Even though the appellate court recognized appellant's "fundamental right to testify in his own defense," they found appellant's refusal sufficient grounds to uphold his conviction, but transferred the appeal to the Supreme Court.

Cause AFFIRMED, but transferred to the Supreme Court. Oral Argument set 10/3/07.

2) **State v. Banks, #SC87921 (Mo banc 2/27/07)**

The prosecutor's reference to the defendant as the "devil" in closing argument is reversible error. The Court found the prosecutor's argument "wrong, unprofessional and demeaning." The remark was "pure hyperbole and an ad hominem personal attack designed to inflame the jury."

CONVICTION REVERSED

3) **State v. Kemp, #SC 87371 (1/30/07)**

The victim of a felony assault failed to appear at appellant's trial and the State introduced the 911 call and the testimony of witnesses who heard the victim's "excited utterances." In affirming the conviction after a claim of error as to the admission of hearsay testimony, premised on Crawford v. Washington, the Court held the evidence was not the subject of police interrogation or investigation and that her statements were to seek emergency help, not to bear testimony. The statements were thus nontestimonial and the confrontation clause did not bar their admission.

4) **State v. March, #SC87902 (Mo banc 3/20/07)**

Appellant was convicted of Trafficking 2nd Degree and sentenced to 15 years in MDC. The chemist who did the drug analysis had moved to N. Carolina and did not appear at trial. The state, over appellant's hearsay objection, presented the custodian of the lab records to testify about the analyst's report. In reversing the conviction, the Court found the testimony in violation of the Confrontation Clause premised on Crawford v. Washington.

The laboratory report constituted a "core" testimonial statement subject to the requirements of the Confrontation Clause. The report was prepared at the request of law enforcement for appellant's prosecution. It was offered to prove an element of the charged crime, that the seized drug was cocaine base. The report was a sworn and formal statement offered in lieu of testimony by the declarant. The report, prepared solely for prosecution to prove an element of the crime charged is "testimonial". It may not be admitted without the testimony of its preparer unless the witness is unavailable and there was a prior opportunity to cross examine.

CONVICTION REVERSED

5) **State v. Taylor, #ED87634 (Mo App 2/13/07)**

The appellate court reversed appellant's conviction because the State's argument to the jury urged appellant's conviction based on items found in appellant's car and in his wife's purse, items not in the actual or constructive possession of appellant. The verdict director did not particularize which items the appellant was charged with possessing. Instead, it referred only generally to possession of cocaine base. The State was allowed to argue the possession of drugs in the wife's purse to establish appellant's guilt.

CONVICTION REVERSED.

6) **State v. Walkup, #SC87837 (Mo banc 5/1/07)**

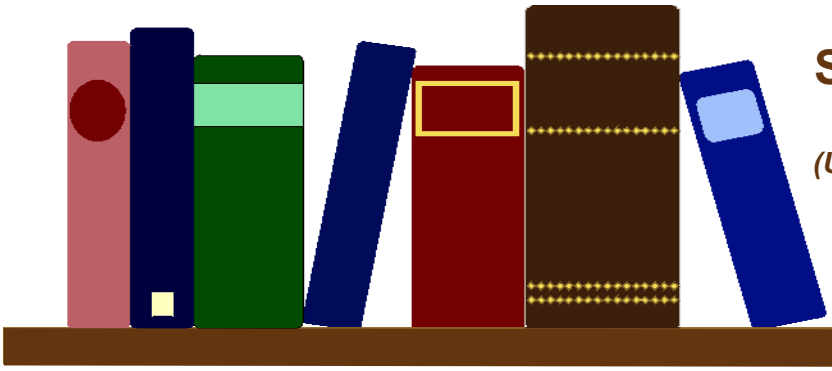
Appellant had endorsed a psychologist to testify as to appellant's diminished capacity defense. The state objected to this witness' testimony because the defense did not file a notice of mental disease or defect as required by Chapter 552. The judge refused to allow the testimony for that reason.

In reversing the conviction, the Court held it is not required to file notice of a defense based on a mental disease or defect, premised on the requirement of Rule 25.05(A)(4), if the defense is diminished capacity.

Section 552.015.2(8) allows evidence of a mental disease or defect to show whether the defendant had a state of mind that is a required element of the offense, which is commonly known as the diminished capacity defense. NGRI and diminished capacity are separate doctrines that lead to distinct results. NGRI is an affirmative defense negating all responsibility for a crime and the defendant bears the burden of proving the defense. If successful, the defendant is absolved of criminal responsibility. Diminished capacity, on the other hand, simply negates the existence of a culpable mental state. The defendant has no burden of production of proof, and if successful,the defendant is not absolved entirely of responsibility, but only is responsible for the crime whose elements the state did prove. A defendant is required to give notice of a NGRI defense, but no notice is required of an intent to rely on a diminished capacity defense, other than to provide the expert's name and written statements. It was error to exclude the witness's testimony.

CONVICTION REVERSED

"Criminal Law Review" >p9



Scoundrels to the Hoosegow

by Morley Swingle

(University of Missouri Press, 2007. 255 pages.)

Reviewed by S. Dean Price

Morley Swingle is a fine man with a keen legal acumen. He is a friend of MACDL and is a frequent contributor to our Continuing Legal Education programs. We all like him and admire him and look forward to grabbing up his Search and Seizure outline every two or three years.

Mr. Swingle also fancies himself as a writer, and by his own admission in the forward of Scoundrels to the Hoosegow, he strives to be a latter-day Twain with humorous stories which teach lessons about life and the human condition, as well as entertain. His novel The Gold of Cape Girardeau was a fast-paced and straightforward mystery that most of us read and enjoyed. This offering, however, is off the mark.

I should have known from the beginning that this book would not be to my liking. On the back cover there is a blurb from Vincent Bugliosi, the author of Helter Skelter which made it known that this book would appeal, "in particular, to members of the prosecutorial profession." While Bugliosi is a fine author in his own right (and, as an aside, is a lecturer at our October meeting in St. Louis, so **do not miss it**) his recommendation really meant to say this: "fans of 'Law and Order,' old folks, prosecutors, retired cops and Ditto-heads will love this book." Sadly, I am missing from that list.

The book includes short descriptions of thirty-three cases handled by Morley Swingle in his decades of service as the Prosecuting Attorney of Cape Girardeau County. A couple of the cases are interesting, and only one — the prosecution of William Nick Pagano — is truly compelling. The only true laughs in the book are from anecdotes of others that Swingle includes as introductory material to the descriptions of his own cases. Most of the chapters are just a few pages, and I found that this format led favorably to using this book as reading material in the little room with the exhaust fan and the basin. In my office we lovingly call it the "law library" so my secretary makes me sound smart to prospective clients when they call during a morning constitutional.

I wanted to like this book, but I just couldn't. It is winking and smarmy and far too cute for its own good. Furthermore, it is about crime in **Cape Girardeau** for goodness' sake. He even devoted one of the chapters to the triumphant and successful prosecution of a young fast food worker who put Ex-Lax in the milk shake of a policeman. Compare this to the case of a retired Chief of Police murdering a man in his garage and expecting the "Good Ol' Boy Network" to cover for him and it is easy to see why much of the small-town crime comes up wanting. The aforementioned former police chief, William Nick Pagano, shot a business associate in cold blood and former employees of the defendant did a cursory investigation to find the shooting was justified. Only one officer, the true hero of the story, worked the case properly, and Swingle was able to use his ability to take the tenuous case and turn it into a conviction against a system that should have been working for him, instead of against him. Truly, this episode was fascinating and well-written and could have stood much deeper treatment.

I did, however, since my last foray into reviewing legal books for you readers, find a gem that I have reviewed in a bonus review. I felt like I had to have one to recommend.

Criminal Law Review *(from page 8)*

7) State ex rel. Wolfrum v. Wiesman, #SC88294 (Mo banc 5/22/07)

Relators were appointed counsel for Johnson, who was charged with capital murder. Johnson filed a speedy trial request, but his attorneys sought a continuance to properly and adequately prepare for Johnson's trial. The trial judge set the matter for trial and the attorneys sought a Writ to Quash that setting.

The Court found that Johnson was guaranteed the right to effective assistance of counsel and the courts should do the utmost to protect that right. Trial counsel's request for additional time to prepare for trial should be granted when good cause is shown. A continuance for trial counsel to adequately prepare for trial is good cause.

WRIT MADE ABSOLUTE

8) State of Missouri v. Morgenroth, #SD27686 (Mo App 6/20/07)

Appellant was convicted of DWI. At his trial, the prosecutor elicited testimony and argued that the appellant had failed a portable breath test.

The Court looked at Sect. 577.021 RSMo which states positive results on a PBT are inadmissible as evidence of a defendant's blood alcohol content. The jurors were told in closing argument that they could consider appellant's failure of the PBT as proof that he was intoxicated. Failure of a PBT is part of the probable cause to arrest, which is not an element for the jury to consider. Because it was error to argue appellant's intoxication premised on his failure of the PBT, his conviction is REVERSED.

Bonus Book Review

by S. Dean Price

The Lincoln Lawyer; by Michael Connelly (Little, Brown, 2006, 408 pages)

Those of you who read my review of Hitler's Justice understand that I enjoy history and treatments of legal history. When it was suggested that I read and review The Lincoln Lawyer I eagerly anticipated descriptions of our greatest President and how his life as a frontier lawyer prepared him for the bigger stage.

When I read the back cover, I was disappointed that the book was a novel, not a history, that the lawyer was some guy named Michael Haller, not Lincoln, and that the Lincoln in the title was a big black car that Haller operated out of instead of an office. That concludes the end of my disappointments. This is a hard-boiled crime thriller that captures the charm and morality of criminal defense, even as the reader sees the sausage being made.

The novel takes off with the same break-neck acceleration of the souped-up Harleys driven by Haller's clientele. From the very beginning, Mickey, as he is known to his friends, zooms into our lives courtesy of an opening paragraph that is a genre classic. Mickey describes a clean, fresh atmosphere that is totally absent from the way that he practices law. "When it starts blowing in like that," he thinks of the winter breeze off of the Mojave, "I like to keep a window open in my office. There are few people who know this routine of mine, people like Fernando Valenzuela, the bondsman, not the baseball pitcher." We then find out that his office is the back seat of a Lincoln driven by Earl, a former client working off a debt. Valenzuela sends to Mickey a "franchise" client, in the person of Louis Ross Roulet, a wealthy real estate agent accused of beating and threatening the life of a prostitute. Roulet can afford to pay plenty, and Haller seems more satisfied at the prospect of a big payday than he is engaged in the case.

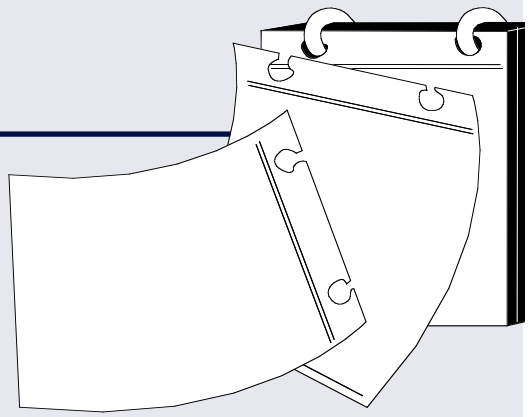
Haller is so obsessed with money, in fact, that he comes off as less-than-likeable in the early going, but that does change. His sensibilities ring true, even in the face of ethically questionable tactics and payment practices, and we grow to admire and root for Mickey as his case, and his world, begin to crumble around him.

It doesn't take long for Haller's world to turn upside down. His perceptions about nearly everyone - including a client serving a life sentence in San Quentin - come into question. A friend involved in the Roulet case is murdered and Haller becomes a suspect in the killing. Instead of pure innocence, we meet pure evil. It very cleverly puts Haller in an iron box from which there seems no escape.

Unlike most of the characters in Grisham's books, and other stuff sent to me by my mom because the criminal defense attorney "reminds me so much of *you*," I found Mickey Haller to think and act like a real defense attorney. It is amazing that novelists who actually are attorneys so often miss the mark, and Connelly, who was never even a cop, can capture the essence of defense lawyers with ease and familiarity.

This is a fun and quick read. I recommend it without reservation and strive to someday practice from the back of a Lincoln, as well.

Mark Your Calendar!



October 26, 2007

MACDL Fall CLE
Hilton - Ballpark
St. Louis, MO

2008 Meeting Dates

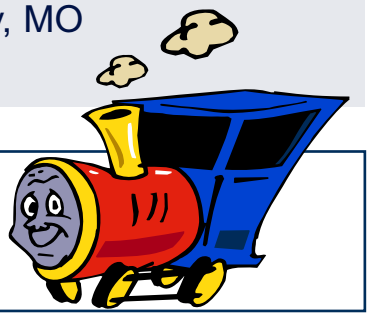
January 18, 2008
MACDL/ MO Bar "How to Cross"
Ameristar
St. Charles, MO

April 18-19, 2008
MACDL Annual Meeting & Spring CLE
Hilton Landing
Branson, MO

July 25-26, 2008
MACDL/ MO Bar DWI Seminar CLE
Lodge of Four Seasons
Lake Ozark, MO

October 24, 2008
Fall CLE
Kansas City, MO

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



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