MACDL
Missouri Association of Criminal Defense Lawyers

# Newsletter

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*Fall, 2008*

## In This Issue



*The MACDL Newsletter is a semi-annual publication of the*

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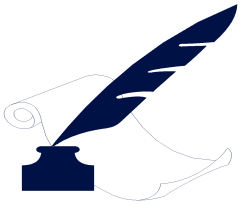
*Your comments and suggestions are welcome!*



## MACDL President's Letter

***by S. Dean Price***

*"A man that rejoices lives in Peace. A man that celebrates success will never know defeat"* -- part of a Persian Proverb

This is my first stab at addressing the membership of MACDL. It seemed easy to dip into the well of sturm und drang of impending societal doom at the hands of overreaching Prosecutors and harsh, injurious penalties. The hard part, I think, is that we need to celebrate. As an organization, as lawyers, as parents, spouses, children and loved ones. Celebrate. Together.

Why is it that we do what we do? Perhaps, in Mr. Cisar's book review (included in this newsletter) we can glean some intellectual reason. The answer that I receive the most often at gatherings of criminal defense lawyers small and large is nearly unanimous: it makes us feel good. When I was a young Public Defender, I enjoyed the adrenaline rush of a trial and the fight for the sake of the fight. To a small extent, I suppose I still do. Now that I am losing my hair and my beard is graying, I enjoy the satisfaction of being meaningful to something larger and more important, be it a client, his family, a witness or even, Gads!, the "system." Whatever it is that trips your trigger about defending the innocent accused, celebrate it.

Celebrate when a judge actually releases your client on his own recognizance when he is not a risk to flee and of harm to no one. Smile with him when you walk him out of the Courtroom and look at "your" bondsman and whisper: "maybe next time." Celebrate with him.

Celebrate when your client's grandmother, raised in a time when it was known as being courteous instead of cursed as being "politically correct," takes a moment to take your hand, look you in the eye and thank you for doing your best. Celebrate with her.

Celebrate when the Judge overrules your meritorious motion on the wrong grounds. Clearly you were the only one in the courtroom that took the time and effort do research and advocate a point, and were the only one prepared to see that justice was done. Your client knows it. He sees it, and so should you. Celebrate with your colleagues instead of railing against an unjust result.

Celebrate when you tell a client to get a haircut and to wear a long-sleeved shirt to court to cover all his tattoos, except for the one on his neck, and he does it. Maybe, even though you wear your hair long or sandals with your suit, your message to your client that the little things make the first impression is a lesson he will take with him the rest of his life. Go home. Celebrate with your family or friends. This is the kind of thing that makes our job worth doing. We can, and do, make permanent differences in the way people think, feel and behave. It is an awesome responsibility, but it is not one that should be feared or shirked. It is one that should be celebrated.

Celebrate with each other. The most important discussions are the ones where we should laugh the most. Celebrate your foibles: it makes you human. Celebrate your defeats: it makes you humble. Celebrate your triumphs: it makes you happy. Celebrate your blessings: it makes you wise.

This year our organization will meet in St. Charles to study voir dire. We will meet in Kansas City. We will meet in Branson, and I intend to issue a personal invitation to every Past President of MACDL to attend. While we must lead by looking forward, we must celebrate the past.

As a favor to yourself, come celebrate with us.

MACDL

Missouri Association of Criminal Defense Lawyers

# 2008-2009 Officers & Board

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# 2008 Legislative Update

*by Brian Bernskoetter*

The Second Regular Session of the 94th General Assembly drew to a close with138 bills being Truly Agreed and Finally Passed; of those only one was vetoed by the Governor. This session was marked by a number of important pieces of legislation, a term limited Speaker and President Pro Tem, and the shocking announcement by the Governor to not seek a second term in office.

Some of the more substantive bills passed this year were: property tax reform, stricter penalties to curb illegal immigration, new laws to address cyber bullying, alternative certification for teachers, a repeal of campaign contribution limits, and a funding package to encourage airplane manufacturer Bombardier to locate a new plant in Kansas City.

There were also a large number of priorities outlined at the beginning of the year that did not pass, such as: an overhaul to Missouri's Non-Partisan Court Plan, expanded eligibility for Insure Missouri, a voter ID requirement, and school vouchers for students in failing schools and students with autism.

The upcoming fall elections will feature races in 17 Senate seats and all 163 House seats, with 21 of those races for open seats. We will also have spirited Governor and Treasurer races, since those office holders are not running for re-election.

In terms of MACDL's legislative interest, there were some bills passed that will have an impact.

- **HB 1550** – This bill expands the jurisdiction of Juvenile Courts to include individuals who are 17 years of age for the purpose of status offenses.
- **HB 1715** – This bill lowers the BAC level from .1 to .08 for BWI offenses.
- **SB 930** – This bill would require more DWI offenders to use ignition interlock devices, as well as a change to allow for municipal court DWI offenses to be used for enhancement purposes.
- **SB 932** – There was an amendment added to this bill to allow a search and any subsequent searches of the contents of any property, article, material, or substance seized and removed from the location of the execution of any search warrant during its execution may be conducted at any time during or after the execution of the warrant, subject to the continued existence of probable cause to search. This is same language that Sen. Bartle had in another bill earlier in the year.

Of the issues that we tracked that didn't pass were –

- **SB 767** - Changes to the PD to reduce their workload
- **HB 1611** - The Children's Courtroom Bill of Rights
- **SB 761** - Special plates for DWI offenders
- **HB 1870** – Death Penalty Moratorium
- **SB 790** – Creates the "Crime Lab Review Commission"
- **SJR 34** – Retroactively register as a sex offender
- **HB 1493** – An Omnibus Crime bill

To read the full text of these or any bills filled this year go to www.moga.mo.gov and click on the link that says "Joint Bill Tracking."

# Member Services

## MACDL ListServ

The MACDL Listserv helps facilitate, via e-mail, all sorts of criminal defense law discussions, including recommendations for expert witnesses, advice on trial practices, etc. Subscription is free and limited to active MACDL members. To subscribe please visit our website (www.macdl.net); enter the "Members Only" page and follow the Listserv link.

## Case Law Update

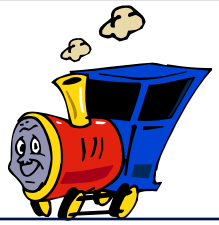
For up to date Case Law Updates, please visit the MACDL website's "Newsletter" page and check out the link to Greg Mermelstein's Reports located at the bottom of the page.

## 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
E-mail: gshostak@shostaklawfirm.com

# Welcome Aboard!



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

Tyson J. Martin • *Springfield*
Sue McGraugh • *St. Louis*
Allen Moss • *Cape Girardeau*
Ardie A. Bland • *Kansas City*
Eric O. Chavez • *Branson West*
Chris Dulle • *Normandy*
Daniel E. Hunt • *Jefferson City*
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Laura West • *Butler*
Justin Carver • *Fulton*
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Tracy Coyle • *Clayton*
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Stacey Lett • *Kansas City*
David Blake Pearson • *Sikeston*
Eric Vernon • *Liberty*
Kevin Baldwin • *Liberty*
David James • *St. Peters*
Michael Jones • *St. Louis*
Bogdan A. Susan • *Columbia*

# Congratulations to Our Award Winners!!


**Charles Shaw Awards**

James L. Eisenbrandt
Daniel T. Moore
Travis L Noble, Jr.

**Lew Kollias Award**

Mary Joe Smith

**Robert Duncan Award**

Jeffrey S. Eastman

**Benjamin N. Cardozo Award**

Hon. Sandra C. Midkiff

**Atticus Finch Award**

John William Simon

For more information on MACDL's awards, including how to nominate an attorney, please visit our website's (www.macdl.net) Awards page.

# MISSOURI POST-CONVICTION UPDATE



*This article summarizes favorable post-conviction cases decided since December 15, 2007. Like the last article, this article is not very long. This is either because there is not much good news on the post-conviction front, or because my Westlaw search is missing cases. If you know of a good case that I haven't included, please let me know!*

## POST-CONVICTION (RULES 29.15 AND 24.035): RELIEF GRANTED

***Coleman v. State*, 256 S.W.3d 151 (Mo. App. W.D. 2008)**

Mr. Coleman was denied effective assistance of counsel when trial counsel failed to offer evidence that he had a previous leg injury which impaired his ability to run from the scene of the charged burglary. Where the state argued that he could not run because he had hurt his leg kicking the door of the premises, there was no reasonable trial strategy to justify the failure to present this evidence. Where the evidence against Mr. Coleman was "not overwhelming," there was a reasonable probability of a different outcome absent this error.

***Hudson v. State*, 248 S.W.3d 56 (Mo. App. W.D. 2008)**

Mr. Hudson was entitled to relief on his claim that the jury selection in his case violated his constitutional right to a randomly selected jury as well as Missouri law. The jurors were seated by order of age, with the oldest first. Trial counsel did not discover this until after the trial, but failed to include a claim about it in the motion for new trial. However, under Rule 29.15 jurisprudence, trial counsel's failure to preserve an issue for appeal is not a "cognizable" claim of ineffective assistance, so he cannot be granted relief for ineffective assistance of trial counsel. Mr. Hudson cannot obtain relief for ineffective assistance of appellate counsel, either, because appellate counsel could not be faulted for not presenting a claim unless that claim "required reversal." The claim here, since it was not properly preserved below, did not meet that requirement. However, because the record reveals the error, Mr. Hudson can obtain relief under Rule 29.15 because he has no other avenue for relief. Reversed and remanded for new trial. *Note:* This case demonstrates why Missouri's rule that failure to preserve a ground for review cannot be the basis for Rule 29.15 relief makes no sense, but fortunately, the court found a way for Mr. Hudson to win.



## POST-CONVICTION (RULES 29.15 AND 24.035): REMAND GRANTED

***McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008)**

After the mandate was issued on his direct appeal, a public defender initiated contact with Mr. McFadden and directed him to send her his *pro se* post-conviction motion, representing to him that she would file it for him. He sent the motion in time, but the public defender filed it on the 91st day after the mandate issued, which was one day late. The court held that since an attorney-client relationship existed between Mr. McFadden and the public defender at the time his *pro se* motion was due, the abandonment rule applied. Remanded for reopening of post-conviction proceeding.

***Schafer v. State*, 256 S.W.3d 140 (Mo. App. W.D. 2008)**

The post-conviction motion adequately alleged that Mr. Schafer entered his plea of guilty involuntarily after his trial counsel failed to retain a handwriting expert to support his defense that he had received the stolen checks from another person. The handwriting on the checks was similar to that on the handwritten statement given by that person. The fact that Mr. Schafer was able to pay part of an attorney's fee and to post bond did not establish that he was able to hire an expert, and there was no showing that Mr. Schafer (as opposed to his attorney) knew about the similarities in handwriting at the time of his plea. Therefore, the record did not conclusively show he was entitled to no relief, and remand for a hearing is required.

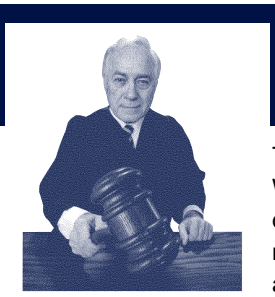
## POST-CONVICTION APPEAL — A CAUTIONARY TALE

***Carter v. State*, 253 S.W.3d 580 (Mo. App. S.D. 2008)**

This post-conviction appeal was ***dismissed*** because the appellant did not provide the appellate court with the transcript of the underlying trial, which was in evidence before the motion court. The transcript was necessary so that the appellate court could review the motion court's conclusion that there was no prejudice because of overwhelming evidence of guilt. Even if the motion court takes judicial notice of the transcript of the underlying criminal trial, it is necessary, on appeal, to get that document before the court of appeals. Otherwise, the court of appeals will not be able to review the motion court's findings.

# Motion of the Month

*by Dan Viets*



The great actress and playwright, Mae West, frequently found herself in court defending against charges of obscenity regarding the plays and films she wrote and appeared in. On one such occasion her comments caused the Judge to ask, "Are you trying to show contempt for this Court?" to which Ms. West replied, "No, Your Honor, I'm doing my best to conceal it."

A Motion for Contempt can be a useful tool in the process of negotiating a resolution to a criminal case in certain circumstances. In most counties in this state, search warrants that are issued by our Courts, routinely contain language which says "NOW THEREFORE, these are to command that you search the above-described premises and if any of the above-referenced items be found there, that you seize them, photograph them and make a complete and accurate inventory of them in the presence of the person from whose possession they are taken, if that be possible . . ."

It is often the case that police officers ignore and violate this Order of the Court in the majority of cases in which a defendant's home is ransacked by law enforcement officers pursuant to the authority of a search warrant. The officers remove the defendant from the scene long before the search, let alone the inventory, has been completed. Police officers generally seem to prefer that the defendant not be present to actually witness the invasion of his or her home and the examination by government agents of its contents.

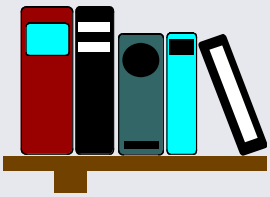
Although such language is not mandated by statute or other authority, the admonition that a search be carried out in the presence of the person whose property is the subject of the search is reasonably inferred to be for the purpose of permitting a citizen to at least monitor the invasion of his or her most private personal possessions. One can also reasonably infer that the Court means every word of its Orders. Were we or our clients to violate the provisions of a Court Order, we could anticipate that the magistrate who issued the Order would inflict consequences upon us. So should it be when the violation is committed by an officer of the state.

Therefore, when I find that my clients' homes have been invaded by officers who violate such an Order, I file a Motion asking the Court to set a hearing on the question of why the police officers who engaged in that conduct should not be held in contempt of court for doing so.

In crafting such a motion, it is of course useful to cite the language of the warrant itself and to allege that the terms of the Order have been violated willfully and knowingly by the officers charged by the Court with carrying out that Order. Filing such a motion after a suppression hearing at which the officer has acknowledged under oath removing the defendant from the premises prior to the conclusion of the search allows the drafter of the motion to also cite to the Court's own record and recollection of testimony on this point. Police officers will very rarely perceive that they are being set up for such a motion and will generally acknowledge without hesitation that they removed the defendant from the premises prior to the conclusion of the search and the preparation of the inventory.

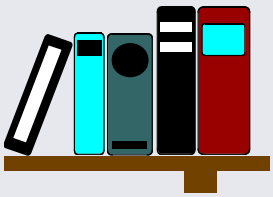
When confronted with the issue, officers will often point to the language which qualifies the command with the words "if that be possible... ." It is then useful to discuss the meaning and understanding of the word possible. Most officers seem to presume

**"Motion" >p6**



# How Can You Defend Those People?

*Author: Mickey Sherman; Review by Timothy R. Cisar*



Rather than being an apology for our profession, Mr. Sherman does a rather good job explaining why he does what he does. His light-hearted war stories and thoughtful insight to the various aspects of representing clients in and out of court actually made me think about how to better my practice.

Mr. Sherman's chapter headings give a glimpse of the book. They include: "Aren't You Afraid to Deal With Those People?," "Are There Cases or Clients That You Won't Take?," "The Jury & Twelve Angry People Who Couldn't Get Out of Jury Duty," "Victory at Any Cost?," "Hello, I'm Satan: Dealing With Victims," etc.

This book is an easy read. You can pick it up, read a few pages, set it down for a while and pick it up later without any problem. The various war stories ring true with my personal experience. Mr. Sherman has been in the trenches and this resonates with any trial lawyer's experiences. His is more flamboyant than I choose to be, but I still admired his chutzpah.

In addition to examples for defense lawyers to ponder, he throws in a few for prosecutors, judges and law enforcement. I actually used one with a room full of cops the other day to get them thinking about an issue.

It is difficult to throw in quotes from the book as they tend to be war stories — I think his final page sums up the book:

"We battle for our clients, an ordeal that is so often a hopeless, uphill battle . . . . We rarely get paid a lot of money to go through this process. We do it because we have been conditioned to stand between our client and whatever misery may await them if their lawyer screws up. Most of us are like idiot savants - this is all we know how to do, and this is all we want to do. Why? Just remember the words of the busboy at the pizza restaurant the night I won an acquittal for a math teacher charged with sexual assault: 'You're Sherman! You saved a man's life today!' End of discussion."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**Law offices of Dee Wampler & Joe Passanise**

**The Bar Plan**

## Motion of the Month *(from page 5)*

that the word "possible" is equivalent to the term "convenient." However, resorting to a common dictionary can be useful in educating those officers as to the distinction between these words.

Whether a violation of the terms of the Court's Order permitting the search is a basis for suppressing evidence seized in the search is apparently an open question. While such a violation is not a constitutional matter, there is some authority for the proposition that the violation of the terms of the Order itself is a sufficient basis for the Court to suppress the fruits of the search.

However, in practical terms, what I have found to be the case is that police officers and prosecutors hate to be placed in the position of admitting under oath that they have violated the clear and unequivocal language of a court order. I have found that a pending Show Cause hearing can be a tremendous help in reaching a negotiated resolution to issues of plea negotiation.

At some point, all circuit courts may realize that the language regarding "... in the presence ..." need not be included in a search warrant and will no doubt remove it. But until that time, I recommend routinely filing a motion for an Order of the Court requiring officers to show cause why they should not be held in contempt for violating the language of the order which authorizes them to perform the search in the first place.



## MACDL Web Traffic Report

### *Activity Summary*

| | |
|---|---|
| **Hits** | |
| Total Hits | 696,647 |
| Average Hits per Day | 823 |
| Average Hits per Visitor | 14.94 |
| **Page Views** | |
| Total Page Views | 90,187 |
| Average Page Views per Day | 106 |
| Average Page Views per Visitor | 1.93 |
| **Visitors** | |
| Total Visitors | 46,616 |
| Average Visitors per Day | 55 |
| Total Unique Visitors | 8,782 |

# Public Defender Update

*by Cat Kelly, MSPD Deputy Director*

All is not exactly quiet on the public defender front, as many of you have been hearing. Two new state regulations went into effect on July 30, 2008 and both are likely to have a far-reaching impact on the criminal justice system and the criminal defense bar, public and private.

**18 CSR 10-3** requires the State Public Defender Commission to maintain "a caseload standards protocol identifying the maximum caseload each district office can be assigned without compromising effective representation." When an office has exceeded that maximum for three consecutive months, the director may, with one month's notice to the court, limit that office's availability to accept additional cases. The PD will then consult with the affected courts and prosecuting attorneys, and eventually designate certain categories of cases that will no longer be accepted by that public defender office for however long its caseload remains above the maximum allowable under the caseload protocol.

On August 1, the presiding judges for the counties covered by the Ava and Jefferson City public defender offices were given the required one-month notice under the rule. This includes Cole County in the 19th Circuit, Osage County in the 20th Circuit, Miller and Moniteau Counties in the 26th Circuit, and all three of the counties in the 44th Circuit. Pursuant to the rule, MSPD is engaged with the bench and state attorneys to find effective measures for mitigating the public defender caseload in these areas.

Of course, the $6 million question is what happens to those indigent clients whose cases cannot be handled by the public defender office? And unfortunately, that is also still to be determined. Under last session's proposed legislation, SB 767, sponsored by Senator Jack Goodman, cases would have gone on a waiting list for public defender services with the court prioritizing the placement of the cases on that list. That legislation passed the Senate and a vote of the House Judiciary Committee, but did not reach the House floor before end of session. Which leaves everything in a bit of a limbo.

Currently every trial and appellate office in the state exceeds its maximum allowable caseload. Given the magnitude of the problem and the upheaval implementation of this rule is likely to cause, the public defender system will be rolling out implementation slowly and as deliberately as possible, beginning with just the two offices named above. Once we all have some experience working with the rule under our belts, implementation will spread to two more, then two more, and so on. PD offices currently in the 'top 10' of most overloaded public defender offices include -- in addition to Ava and Jefferson City – those located in Columbia, Jackson (Cape, not KC), Farmington, Caruthersville, Moberly, Harrisonville, Chillicothe, and Springfield. Those standings could change by the time implementation reaches the far corners of the state, but since that is the question everyone is asking, we thought we'd go ahead and answer it ... for now.

Informal discussions with the presiding judges in the 'top 10' areas concerning how the judges plan to deal with these cases revealed a gamut of proposed responses. Putting all the declined cases on a waiting list for PD services, appointment of private counsel to handle the cases for free *a la Wolff v Ruddy*, and putting pressure on the local prosecutor to waive jail time on minor cases to eliminate the constitutional trigger for a right to counsel were all options under discussion.

**18 CSR 10-2.010** states that the PD will not be available "to assume representation where private [retained] counsel is allowed by the court to withdraw ... ." Once again, judges are mixed as to the manner in which this rule is being enforced around the state. Some will not allow private counsel to withdraw at all – once in, always in – and consider the attorney's recourse for non-payment is to pursue civil relief for contract enforcement, not getting out of the case. Others have indicated a willingness to accept limited entries of appearance and allow attorneys to withdraw if the case moves beyond the agreed-upon scope of representation. This is most often in jurisdictions where the prosecutors provide early discovery and most of the plea bargaining takes place at associate circuit court with pleas at arraignment. If the case does not get worked out by arraignment and the client can't come up with more money to take the case to trial, these limited entries of appearance may offer some relief for some attorneys in some jurisdictions. However, the rule does not address the issue of limited entries of appearance at all and it is certainly possible that different courts will apply it differently.

There are three provisions of this rule worthy of some additional elaboration:

First, the rule does provide a safety valve for special circumstances. The director may approve MSPD acceptance of a case otherwise excluded from PD representation under the rule. This is important e.g., if a conflict arises (unrelated to payment or personalities) that ethically requires an attorney to withdraw. In that situation, the attorney may want to seek the PD Director's approval for the local public defender office to enter on the case, *before* presenting a motion to withdraw to the court. MSPD is still sorting out procedures for these new rules, but for now, your best bet for accomplishing this is simply sending an e-mail or letter to your local District Public Defender explaining the situation and asking them to forward it to the Director.

Secondly, there is some confusion among the defense bar concerning the rule's definition of a case. The rule defines a case as "a criminal proceeding, matter, action **or** appeal ... from the initial

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# Public Defender Update *(from page 7)*

retention ... through sentencing, final judgment **or** completion of the direct appeal." Note the *'or.'* The PD System's interpretation of the rule is that a trial- level case continues only through sentencing and final judgment. A subsequent probation revocation would be treated as a new case (even if it was an SIS disposition). An appeal would be a new case. Obviously, it is the judge's interpretation, not the PD's, that will carry the day in the end, but should you run into a judge using a more expansive interpretation of the rule, we will be happy to let the judge know that is not the PD system's interpretation and we are available and willing to take on a new probation revocation or appeal, despite your entry at Associate Circuit Court, assuming the defendant is otherwise indigent.

Thirdly, the rule does provide an option for a private attorney representing an indigent defendant to request MSPD to cover litigation expenses (depos, experts, etc.) where the attorney would otherwise have to withdraw due to lack of resources to provide effective assistance of counsel. However, this option will only be available for attorneys whose fee – minus litigation expenses already covered by that attorney – does not exceed the MSPD contract rate for comparable cases. In other words, you can't take your full fee (unless you charge very little for cases!) and also have MSPD pick up the cost of the experts and depositions. MSPD is in the process of developing a procedure for this as well and hopes to have that in place within the next few weeks. Until then, feel free to contact me with your situation [cathy.kelly@mspd.mo.gov] and we'll see that it gets to the appropriate person within the system for a decision.

Finally, MSPD is still actively seeking to contract out case overload for as long as the contract money lasts. Check out our website for information on contract rates and opportunities: www.publicdefender.mo.gov.

Those of us in the PD system are well aware of the burden these changes are likely to place upon the private bar, just as the private bar is well aware of the burden public defenders have been carrying with ever-rising caseloads in the face of flat resources. MSPD greatly appreciates the assistance of MACDL and the criminal defense bar – both those who have stepped up to take contract cases at significantly reduced rates just because we needed them to and those who continue to lobby those in office and those running for office about the critical importance of providing the PD the resources necessary to take care of Missouri's indigent defendants -- and allowing the private bar to get on with taking care of the rest!

**Take your mouse for a walk ...**

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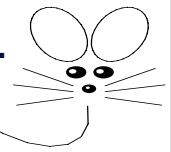

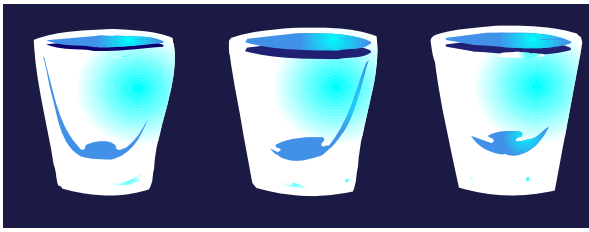

# DWI and Traffic Law Update

*by Jeff Eastman*

## *Turner v. State*, 245 S.W.3d 826 (Mo. 2008)

In a post-conviction proceeding, Movant challenged the enhancement of his DWI to a class D felony arguing that a conflict existed within the provisions §577.023 as to whether or not a municipal court proceeding for driving while intoxicated wherein imposition of sentence was suspended could be used for purposes of enhancement.

In its analysis, the Supreme Court acknowledged the conflict and found no rule of statutory construction sufficient to overcome the impediment. Calling upon the "rule of lenity", the Court concluded that the conflict must be resolved in favor of the defendant holding that a municipal ordinance prosecution for driving while intoxicated wherein the court suspended the imposition of any sentence could not be used to enhance punishment.

Note that on July 3, 2008, the Governor signed H.B 1715 (effective date of July 3, 2008) and S.B. 930 (effective date of July 1, 2009), both of which incorporate language intended to address the situation created by *Turner*.

## *White v. Dir. of Rev.*, SD 28497 ___ S.W.3d ___ (Mo. App. S.D. 2008)

In this chemical refusal revocation proceeding, the director challenged the trial court's decision which had set aside the administrative sanction. At issue was whether driver's refusal was "informed" given his request to speak with counsel.

Under §577.041 a driver has a limited statutory right to speak with counsel prior to making a decision as to whether to submit to a chemical test. During the arresting officer's direct examination he "explicitly testified" that when reading driver the *Miranda* warnings, driver asked to have an attorney present. The officer then read driver the implied consent advisory and inquired as to whether he would so submit. Even though driver said no, he wouldn't take a test, the officer gave driver a phone book and told him he could contact counsel. A second officer then explained the implied consent law to driver and told driver he had twenty minutes to contact counsel. Both officers testified that driver continually accused them of denying him his right to speak with an attorney.

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The Southern District held that the twenty-minutes began running when driver was advised of the implied consent law. The evidence established that the arresting officer recorded White's refusal only seven minutes after driver requested counsel. Therefore, the court held, driver was denied his full twenty-minute period to contact an attorney and thus his refusal was not valid.

### *Paxton v. Dir. of Rev.*, ED89595 ___ S.W.3d ___ (Mo. App. E.D. 2008)

In a §302.535 de novo proceeding, the trial court set aside the administrative sanction finding that driver had not been afforded twenty minutes within which to contact counsel after having been given the §577.041 implied consent advisory. The director appealed and the Eastern District reversed declining to follow the Western District's decision in *Schussler v. Dir. of Rev*., 196 S.W.3d 648 (Mo. App W.D).

In *Schussler*, a §577.041 proceeding, driver was advised of his *Miranda* rights at 12:03 a.m., asked to speak with counsel and was given twenty minutes to do so. At 12:44 a.m., Schussler was read the implied consent advisory. Upon inquiry as to whether he would take a chemical test, he refused and his license was administratively revoked. On appeal the Western District set aside the sanction stating that "whether the request to speak with an attorney comes before or after the Implied Consent Law is read, §577.041.1's twenty minute waiting period begins running immediately after the officer has informed the driver of the Implied Consent Law." Since Schussler was not given twenty minutes after the advisory, the refusal was uninformed such that the sanction was properly challenged.



In this proceeding, relying upon the express language of §577.041, the Eastern District concluded that it is a driver's request to speak with counsel *after* having been asked to submit to a chemical test that triggers a driver's allowance of twenty minutes to reach an attorney. Since Paxton's request preceded receipt of the implied consent advisory and was not renewed post advisory, there was no error in not affording him an opportunity to speak with an attorney. Indeed when asked at the conclusion of the implied consent advisory if he would submit to a chemical test, the Court noted that Paxton said, "Yes", and thereafter blew .081% waiving any right to confer with counsel prior the testing.

### *Smith v. Dir. of Rev.*, WD 68356 ____ S.W.3d ___ (Mo. App. W.D. 2008)

In this §302.535 proceeding, the trial court set aside the director's efforts to administratively sanction driver's operating privilege finding that, "based upon the credible evidence ... the arresting officer did not have probable cause to believe [Smith] had committed an alcohol related traffic offense." The director appealed.

In affirming the trial court's decision, the Western District observed that under the Supreme Court holding in *York v. Dir. of Rev.*, 186 S.W.3d 267 (Mo. 2006) the trial court in its discretion "was free to draw the conclusion that there was no probable cause to arrest based upon its assessment of [the] evidence and the officer's own equivocation of the existence of probable cause," even if evidence regarding the indicia of intoxication was uncontroverted. Continuing, the *Smith* Court held that where the facts are contested, under *Guhr v. Dir. of Rev*., 288 S.W.3d 581 (Mo. 2007), an appellate court must defer to the trial court's determination regarding those facts.

In this instance, Smith aggressively challenged the arresting officer's decision to arrest through cross examination of the arresting officer, Smith's own testimony and the testimony of another witness. In it's opinion, the Western District carefully reviewed and discussed the disparities which existed supportive of the trial court's actions.

The appellate court also rejected the director's argument that the trial court's credibility finding wasn't sufficiently specific to merit deference noting that in *Furne v. Dir. of Rev.*, 238 S.W.3d 177 (Mo. App. 2007) it upheld a similar non-specific credibility finding concluding that the trial court's judgment implicitly found at least some of the officer's testimony not credible.

### *State v. Clark*, WD67827 ___ S.W.3d ___ (Mo. App. W.D. 2008)

Clark was charged in both state and municipal court for events surrounding a ten mile chase. In the municipal court proceeding he pled guilty to operating his motor vehicle in a careless and imprudent manner and failing to yield to an emergency vehicle. In the state court action, he was charged with driving while intoxicated, resisting a lawful detention or stop, and operating his motor vehicle in careless and imprudent manner. On appeal, he challenged his state court convictions for C&I and resisting arguing he was twice put in jeopardy for the same offense.

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As to the C&I allegation, the Western District disagreed. While the elements of the ordinance and the statute were the same, no double jeopardy violation occurred in that he engaged in two distinct offenses which occurred at separate times and in separate locations; the first occurred within the city limits on a city street and the second several minutes and miles away on a state highway. Because Clark presented no evidence that he continuously drove in a careless and imprudent manner, the state's prosecution did not run afoul of the double jeopardy clause.

However, the appellate court reached a different conclusion as to the resisting allegation. To sustain a conviction under §577.150 the Court held that the state must prove that (1) the defendant having knowledge that a law enforcement officer is making an arrest or stop of a person or vehicle, (2) resists or interferes with the arrest by threatening to use violence or force or by fleeing from the officer, which is presumed if the individual continues to operate a motor vehicle after seeing the police officer's lights or signal, and (3) defendant did so with the purpose of preventing the officer from completing the arrest.

As to the city ordinance involved, there were two elements: (1) an emergency vehicle or police vehicle, making use of proper visual and audio signals, approaches a person's vehicle, and (2) the driver either fails to immediately pull the vehicle over to the right-hand curb or does so but fails to keep the vehicle pulled over until the emergency vehicle has passed or has instructed the driver to move the vehicle.

The Western District found the city ordinance violation to be a lesser-included offense of the state resisting offense. Both required evidence that (1) the defendant, having knowledge that a law enforcement officer was making an arrest or stop of a person or vehicle, (2) resists or interferes with the arrest by threatening the use of violence or physical force or by fleeing from such officer. The state allegation just adds one element, that the defendant intended to prevent the arrest or stop.

As the guarantee against double jeopardy prevents the government from prosecuting for a greater offense after having prosecuted the person for a lesser-included offense, the trial court erred in entering a judgment against Clark on the resisting allegation.

### *Hack v. Dir. of Rev.*, WD 68408 ___S.W.3d ___ (Mo. App. W.D. 2008)

Director appealed trial court's decision which had set aside an administrative sanction after a trial de novo proceeding arguing that the trial court misapplied the law in finding no probable cause to believe driver was driving a motor vehicle with a blood alcohol concentration greater than .080%

Driver's witness testified that he and driver rode their motorcycles to a bar. After one or two drinks they decided to move their cycles to the back of the bar to be later towed. In the process of moving his cycle, driver started it and then began pushing it. As driver adjusted the idle, the motorcycle jumped forward dragging driver behind. The bike eventually flipped and crashed into a fence. Driver eventually finished moving the cycle and went back inside the bar where he sipped on drink he just ordered. When an officer arrived, driver approached him. The officer observed indicia associated with alcohol impairment and thereafter arrested driver for driving while intoxicated. A subsequent chemical test was in excess of the statutory ceiling.

At trial the officer testified that driver had told him he was racing a bicyclist when the accident occurred. The officer also testified that the owners of the damaged fence identified driver as the man they observed straddling the cycle immediately after the accident. He further related that upon inquiry of the bartender, he was told of the limited alcohol consumed by driver in the hour she had been on duty. Driver's witness testified that driver had not been racing and was not riding the motorcycle when it crashed.

In reversing the trial court's decision, the appellate court observed that if driver was pushing the cycle, there was a legal question whether such qualifies as "operating" for purposes of a license sanction. Here, the court found that driver had turned on the key and that the motor was running. Although driver was pushing the cycle, the motor was engaged to assist him. Thus, he was operating the motorcycle such that the trial court's determination that he was not driving or operating was a misapplication of the law.

The court also noted that when measured, driver's BAC was .16%. All of the witnesses testified that driver consumed little or no alcohol between the time of the accident and the time of his arrest. Given driver's impaired state at the time of his arrest, the strong smell of alcohol present and his admitted limited alcohol consumption immediately prior to the accident, his "extraordinarily high BAC level," this evidence showed his BAC was at least .080% at the time of operation.

### *State ex rel. Poucher v. Vincent*, SC88721 ___ SW.3d ___ (Mo 2008)

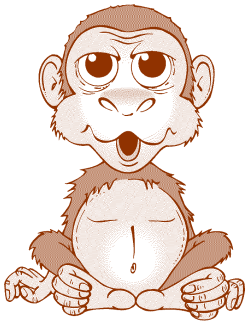
Defendant was convicted of various impaired driving offenses. In its original judgment, the trial court sentenced him to serve consecutive terms on Counts I and II and concurrent one-year terms on the remaining Counts. The court then suspended execution of the sentences and placed defendant in a long-term treatment program. Subsequent to his release therefrom, defendant violated his probation.

At the conclusion of his revocation violation proceeding, the trial court first orally and then in a written judgment stated that defendant's sentences for the first two counts would run concurrent (and not consecutive as originally ordered).

Thirty-nine days after the entry of the written judgment, the court entered a *nunc pro tunc* order which purported to alter the most recent judgment making the sentences run consecutive rather than concurrent.

In a mandamus proceeding, defendant argued that the trial court lacked jurisdiction to enter the *nunc pro tunc* order. The Supreme Court agreed. A *nunc pro tunc* is order is intended to correct a clerical mistake. Here there was no mistake as the trial court both orally and in writing indicated its intent to sentence defendant to serve concurrent rather that consecutive sentences. The trial court was without jurisdiction to enter the challenged order.

The Supreme Court acknowledged that the trial court erred in imposing concurrent rather than consecutive sentences in that in the revocation proceeding it had authority only to execute the sentences previously imposed and not impose a new sentence. However, the state never sought relief from the erroneous order and would not now be heard to complain.



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