MACDL
Missouri Association of Criminal Defense Lawyers

Newsletter

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Spring, 2004

President's Message

By Charlie Rogers

"May you live in interesting times." Whatever its origin, this phrase is portrayed as a curse.[1] We in the criminal defense bar are certainly living in interesting times these days.

Consider the courts. We have watched the U.S. Supreme Court eat away at the rights of the accused for more than twenty years. The makeup of the Court has not changed since the appointment of Justice Breyer, which did not shift the balance from the conservative majority. However, in the last few years the Court has announced several landmark decisions favoring the accused, including some in capital cases. Some of these decisions are authored by Justices Scalia and Thomas, generally considered the least "defendant-friendly" justices on the Court. *Apprendi v. New Jersey*, *Ring v. Arizona* and, most recently, *Crawford v. Washington* spring to mind. Interesting, to say the least.

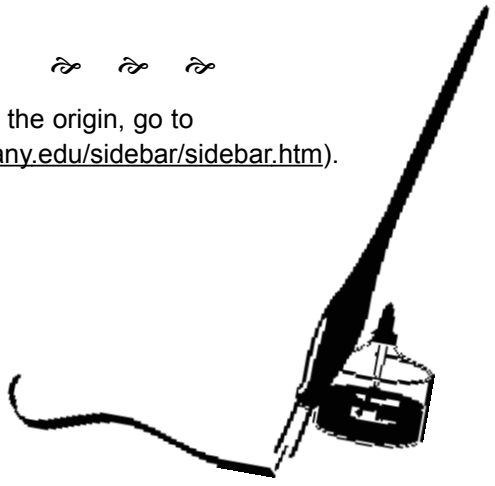
Here in Missouri, the makeup of our Supreme Court has changed significantly. The opinions rendered seem more detailed, more deliberative, better researched and reasoned than those issued a few years ago. Where the Missouri Supreme Court formerly avoided ruling on significant issues on procedural grounds, the Court now seems to seek procedural mechanisms to correct injustices brought to its attention. The cases of Joe Whitfield and Joseph Amrine are instances where the Missouri Supreme Court used extraordinary remedies to correct an unconstitutional death sentence and to free an innocent man who had been wrongfully condemned.

As propitious as these developments in the courts may seem, however, they may well be overshadowed by ominous developments in the powers and attitudes of the prosecution, fueled by hasty and ill-considered legislation, which smacks of demagoguery. The infamous and inaptly titled "USA Patriot Act" is a ready example. How is it patriotic to obliterate the Bill of Rights for which the original American patriots fought and died? But the Department of Justice was determined to overreach, bully, intimidate, imprison and kill vast numbers of citizens even without that legislative weapon of mass destruction.

Street crime has been "federalized" by the Ashcroft DOJ, and U.S. Attorneys have become increasingly creative in finding ways to make a federal case out of what used to be seen as a run-of-the-mill state offense. The death penalty is a national DOJ priority, and routine murders in Iowa, Michigan and other non-death states are being federally prosecuted so that death sentences are possible outcomes.

Despite the burgeoning deficit, the cost of prosecution is of no concern to the feds. I just finished a six-month long, three-defendant federal capital murder trial in the Southern District of Illinois. While this was obviously a proper federal case – it happened at the federal prison at Marion – it should never have been prosecuted as a capital case. The jury hung as to all three defendants on the counts of murder and conspiracy to murder; the only conviction was of one defendant who possessed a knife in prison. They could have achieved that result in a two-day trial. The total cost to the taxpayers for our trial must have been over fifteen million dollars, and the prosecutor is talking retrial!

So how do we respond to these interesting times? The same way we always have – we represent our clients, the citizens accused. We file motions. We litigate constitutional issues. We go to trial in the appropriate cases, and we win far more than our share. That's what being a criminal defense lawyer is all about. That's why I'm proud to be a criminal defense lawyer.



[1] (For more on the origin, go to hawk.fab2.albany.edu/sidebar/sidebar.htm).

MACDL Legislative Report

By Randy Scherr, MACDL Lobbyist

The Missouri Association of Criminal Defense Lawyers is monitoring nearly 90 pieces of legislation during this 2004 legislative session. The dominant theme in many of these bills seems to be sex based crimes; however, many other annually filed bills are also on the docket.

This year we have been actively lobby the modification of hold time for people under arrest. Two bills seek to modify that hold time for all arrest. HB 1065 by Rep. Stevens would increase the hold time to 36 hours, while HB 1530 by Rep. Bringer would raise the time from 20 to 24 hours.

MACDL has, for the last three years, opposed the creation of the County Law Enforcement Restitution Fund, which would be funded by a restorative justice fee to be paid for a suspended imposition of sentence or as a condition of probation. This provision is strongly supported by the Missouri Sheriff's Association and has passed on two previous occasions and vetoed each time. The current language and fee level has been negotiated with the Governor's office and they appear to be in support of the legislation as it is presently drafted. The previous limit of $1,000.00 has been lowered to $300.00. Those provisions are presently included in HB 1183 which has been passed by the House and awaiting consideration in the Senate. The same provisions are also included in SB 715, the Ominous County Revision bill.

MACDL President Charlie Rogers testified in support of SB 838 by Senator Goode limiting the discretion for sentencing where a jury was unable to unanimously agree on the death penalty. MACDL also presented statements in opposition to SB 802 authorizing search warrants by telephone. Although this bill has been voted 'do pass' by the Senate Judiciary Committee and was poised to be a priority, it has been slowed by material that MACDL provided to the committee regarding the problems that it may face under the Missouri Constitution.

One area of significant interest to the Criminal Defense Bar was legislation filed during the 2003 session eliminating depositions in criminal cases. Because of strong opposition by MACDL, the sponsors have declined to reintroduce that legislation during the 2004 session.

Listed below are issues of priority interest that are being tracked by MACDL during this session. You may access both the text and status of this legislation by logging on to www.moga.state.mo.us and clicking on joint bill tracking. If you have any comments or questions regarding legislation, please don't hesitate to contact the MACDL office.

HB 786 (Rep. Jolly) Requires certain sexual offenders ordered to participate in treatment to successfully complete that treatment and to follow all directives of the treatment program provider.

HB 787 (Rep. Jolly) Eliminates probation and paroles right to convert consecutive sentences to concurrent sentences in certain circumstances and prisoners right to have sentence reduced due to change in law.

HB 819 (Rep. Thompson) Allows court to partially seal records for a first offense traffic violation.

HB 820 (Rep. Thompson) Authorizes civil suit for damages for wrongful imprisonment.

HB 890 Rep. Bland Establishes a death penalty commission and places a moratorium on executions.

HB 1075 (Rep. Stevenson) Allows a thirty-six hour hold for persons arrested without at warrant.

HB 1094 (Rep. Mayer) Revises laws on the DNA profiling system.

"Legislation" >p5

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Your comments and suggestions are welcome!

Criminal Law Update

By Bernard Edelman

State v. Bergmann,113 S.W.3d 284 (MoApp 2003)

The police got an anonymous call to respond to a disturbance at a motel. The caller said one of the cars was a dark SUV. The police pulled onto the lot and saw defendant's auto and pulled it over. In the car, the police found a quantity of drugs. Defendant was charged with drug possession. Her motion to suppress was overruled and after conviction for drug possession, she appealed.

APPEALS COURT: Police are allowed to conduct Terry stops of moving vehicles upon a reasonable suspicion that the occupants are involved in criminal activity. An anonymous tip, without more, seldom demonstrates the reliability of the information provided; but if the police corroborate the tip, it may exhibit sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop. Here the police did not corroborate that the driver had been involved in criminal activity. Because the officer lacked reasonable suspicion to stop defendant's vehicle, the stop was illegal and the evidence seized should have been suppressed. **CONVICTION REVERSED.**

Harper v. Director Of Revenue, 118 S.W.3d 195 (MoApp 2003)

Harper, while intoxicated, was in a car accident which injured five people. He pled guilty to all five counts of felony assault. After conviction, the DOR notified Harper that he was being denied a driver's license for ten years pursuant to Sect. 302.060(9) RSMo as according to the DOR, he was convicted more than twice of offenses relating to DWI. Harper appealed the ten-year denial, alleging that the convictions arose out of a single incident, transaction or occurrence and did not constitute multiple convictions. The trial court upheld the ten-year denial.

APPEALS COURT: In Clare v. DOR, 64 SW3d 877(Mo App ED 2002) and Timko v. DOR, 86 SW3d 132 (MoApp ED 2002), the Eastern District Court of Appeals decided this identical issue against the driver and upheld the ten-year denial of a license by the DOR.

Looking at the definition of the word "conviction", this court concludes that Harper only has one conviction for purposes of Sect. 302.060 because the prosecution resulted in one judgment of conviction. If the purpose of the statute was to protect the public from repeat offenders, then the director's interpretation exceeds that purpose as Harper was a one-time offender.

This court declines to follow Clare and Timko and the court erred in upholding the ten-year denial. **JUDGMENT REVERSED**.

Reed v. State, 114 S.W.3d 871 (MoApp 2003)

Defendant pled guilty to sale of a controlled substance. The plea agreement was for a seven-year sentence pursuant to the regimented discipline (boot camp) program, Sect. 217.378 RSMo. This is a program for youthful offenders with no prior felony convictions. Unlike the 120-day program under Section 559.115 RSMo where the judge has the discretion to deny probation after successful completion, the boot camp statute provides that probation shall be granted upon successful completion of the program and the defendant can not be considered for probation if he fails to complete the program. Reed was not put into the boot camp program because of overcrowding and the fact that he had a detainer. The court denied his release. When Reed petitioned the court under Sect. 24.035 RSMo to set aside his plea, that also was denied.

APPEALS COURT: When Reed was unable to enter the program through no fault of his own, he lost the opportunity to perform his part of the plea agreement, to successfully complete the program and ensure his early release. The trial court has two options, release Reed on probation or allow him to withdraw his plea. Once the plea bargain is accepted by the trial court, its terms must be honored. **REMANDED FOR WITHDRAWAL OF PLEA.**

State Ex Rel. Ballenger v. Franklin, 114 S.W.3d 883 (MoApp 2003)

Defendant was charged with numerous drug violations and reached a plea agreement with the prosecutor where he would waive a preliminary hearing and plead guilty to one charge, the other charges being dismissed, in exchange for a recommendation of probation. Defendant waived the PH and tried to enter a plea of guilty, but the trial judge would not accept the plea because Ballenger refused to answer some of the judge's questions. Defendant tried to set aside his waiver of the PH and when the judge refused, sought a writ of prohibition.

APPEALS COURT: In refusing to make the writ absolute, the court stated that they did not detect any bad faith and that the prosecuting attorney did what he promised in exchange for the waiver and plea, to dismiss four

"Criminal Law Update" > p6

Traffic/DWI Update: *Synopsis on Christensen v. Director of Revenue*

By Tim Cisar

On May 25, 2002, Calvin Christensen was arrested for a DWI and transported to the Sheriff's Department where he was read the implied consent notification and asked to submit to a breath test by Trooper Gisselbeck. He was notified that if he refused to take the test, his driver's license would automatically be revoked for one year. Christensen indicated he would take the test again but requested to speak to an attorney.

Trooper Gisselbeck continued to complete the paperwork he was working on, while Christensen requested to then use the restroom. Gisselbeck escorted Christensen to the lavatory where he proceeded to urinate. It was at this point that Christensen realized he needed to defecate as well, which he proceeded to do. Under the impression that Trooper Gisselbeck had accused him of stalling, Christensen showed him some toilet paper with feces on it. Christensen had used ten of the required twenty minutes for contacting an attorney to defecate.

After using the restroom, Christensen noticed becoming sick to his stomach and attempted to splash some water on his face from the drinking fountain. Trooper Gisselbeck, who had been standing behind Christensen, then notified Christensen that he had effectively refused the test and so Christensen proceeded to take an actual drink of water from the fountain.

Consequently, the circuit court held that Christensen had not been afforded a reasonable opportunity to contact an attorney during the allotted twenty minutes, and the Court found that the "State's case goes down the toilet on this issue".

The Director appealed. After oral arguments in the Southern District Court of Appeals, the case was reversed and remanded.

Christensen relied upon authority stating that a person cannot be deemed to have refused such testing where that person is not afforded a reasonable opportunity to speak to an attorney after having requested to do so. *See, e.g.,* **McMaster** v. Lohman, 941 S.W.2d 813, 817 (Mo.App. W.D. 1997). Christensen argued that "by designating the time Christensen spent in the restroom as his 'reasonable opportunity' to seek legal assistance, ... Gisselbeck failed [to satisfy] the intended purpose of the statute."

The Court of Appeals found that "Christensen ... engaged in a "cat-and-mouse" game with Gisselbeck in an effort to avoid chemical testing". "[A]n arrested person has no constitutional right to speak to an attorney prior to deciding whether … to submit to a breathalyzer test[.]" **Witeka v. Director of Revenue**, 913 S.W.2d 438, 440 (Mo.App. E.D. 1996) (citing **Albrecht v. Director of Revenue**, 833 S.W.2d 40, 41 (Mo.App. E.D. 1992)). Thus, the court held, that there is no constitutional or statutory right to actually speak to an attorney, only that twenty minutes be granted to attempt to contact an attorney. See **Witeka** at 440.

The court further held that there is not a *statutory* provision for extending the opportunity to contact an attorney in order for it to be "reasonable", and the statutory twenty minute requirement has been deemed by the courts to be the definition of "reasonable opportunity." **Wall v. Holman**, 902 S.W.2d 329, 331 (Mo.App. W.D. 1995)

Consequently, Christensen's driving privileges were flushed down the toilet.

Welcome Aboard!

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

Lance Riddle
Warrensburg

John Wiley
Crane

Richard Rodemyer
Clayton

Michael Maguire
Cape Girardeau

MaryAnn Schwartz
St. Louis

Christine Hutson
Lebanon

Daniel Mohs
St. Louis

Renee Murphy
Farmington

Bevy Beimdiek
St. Louis

Andrea Conley
Clayton

Robert Goldson
St. Louis

H. Marvin Gilmore
Sikeston

Michael Skrien
Caruthersville

George Johnson
St. Louis

Bill Powell,
Overland Park

Kenneth McManaman
Cape Girardeau

Curtis Poore
Cape Girardeau

Leecia Carnes
Hannibal

Phillip Kavanaugh
East St. Louis

David Stokely
St. Louis

Jacob Garrett
West Plains

Traffic Report For MACDL Webpage

Page	Visits
Notes	0
Registration Form	1
MACDL PAC	2
Secure Home	103
Spring Seminar	116
Officers and Directors	157
Legislators	158
Join Us	180
Contact Us	256
Home Page	1591

MACDL To Take Proactive Approach To Legislative Issues

The MACDL Board of Directors at it's recent board meeting discussed becoming more proactive in it's approach to legislative issues. Incoming Vice President Joe Passanise has expressed an interest in coordinating a proactive approach to legislative issues of interest to the membership. If any member has any suggestions relating to: investigative subpoenas, DNA, Department of Revenue issues, expungement, motions to suppress, interlocutory appeals for defense, or any other issues that are important to them and their practice, please contact either the MACDL office or Joe Passanise at joe@entrapped.com.

Legislation *(Continued from page 2)*

HB 1183 (Rep. Mayer) Authorizes the creation of county law enforcement restitution funds and revises statute on probation conditions to include restitution to that fund and restorative justice methods.

HB 1188 (Rep. Lipke) Revises various statutes relating to fees and costs in criminal cases.

HB 1240 (Rep. Dougherty, Curt) Lowers the minimum age for jury service from 21 to 18.

HB 1243 (Rep. Lipke) Revises law on the role of the court and jury in sentencing to eliminate the bifurcated system for juries.

HB 1491 (Rep. Burnett) Revises statute on search warrants.

HB 1530 (Rep. Bringer) Increases the time of detention for a warrantless arrest for any crime from twenty hours to twenty-four hours.

HB 1542 (Rep. Dixon) Creates a cause of action for wrongful imprisonment.

HB 1544 (Rep. Dixon) Crates a two dollar surcharge in criminal cases to be paid to the sheriff where the violation occurred to offset expenses for housing prisoners in the county jail.

SB 704 (Sen. Caskey) Allows certain DWI offenders to receive hardship licenses after serving 90 days of the revocation period.

SB 713 (Sen. Quick) Eliminates the death penalty

SB 726 (Sen. Bland) Creates a commission to study the death penalty and imposes a temporary moratorium on executions.

SB 781 (Sen. Caskey) Modifies judge disqualification in witness immunity applications.

SB 793 (Sen. Jacob) Revises provisions for sealing and closing of court records.

SB 802 (Sen. Gross) Sets out requirements for obtaining a warrant by telephone.

SB 838 (Sen. Goode) Limits judicial discretion where jury is unable to unanimously agree on the death penalty.

SB 1000 (Sen. Bartle) Make changes to provisions on DNA profiling, including DNA testing of all felony and sexual offenders.

SB 1026 (Sen. Mathewson) Requires the DNA testing of all felons entering the Dept. of Corrections and other felons leaving a county jail.

SB 1167 (Sen. Caskey) Limits bifurcated trials to class A and B felonies.

SB 1256 (Sen. Caskey) Establishes a District Attorney System.

SB 1326 (Sen. Dolan) Prohibits some offenders from receiving suspended imposition of sentence in state, county, or municipal court.

SB 1348 (Sen. Coleman) Eliminates mandatory minimum sentencing for certain felons.

Criminal Law Update

(Continued from page 3)

charges and to recommend probation. Since there is no absolute right to have the guilty plea accepted by the court after the parties have reached an agreement, and since there was no agreement that defendant could have a PH if the court refused to accept the plea, an extreme necessity did not exist for the appellate court to take preventative action, the standard for the issuance of a writ. Defendant's claims that he lost an important discovery tool and the opportunity to find out what the prosecutor had as evidence were not compelling as defendant had the traditional methods of discovery available to him. **WRIT DENIED**.

State v. Garrett, #SD25108 (MoApp 9/29/2003)

Defendant was convicted of drug possession. The police had executed a search warrant at Garrett's home based on the affidavit of a confidential informant who advised the police that defendant was selling drugs from his home. In the opening statement, the prosecutor told the jury that the search warrant was based in part on information given to the police by a CI that defendant was dealing drugs from his home. Defendant's objection that this was hearsay was overruled as the prosecutor told the judge that this was not offered for the truth but to explain the officer's subsequent conduct. When the officer testified, he was allowed to testify what the CI had told him about Garrett's activities, over defendant's objection, and referenced the CI's statements in closing argument, again over defendant's objection. After conviction, defendant appealed.

APPEALS COURT: The state argued that there is a longstanding exception to the rule excluding hearsay, namely that statements made by out of court declarants that explain subsequent police conduct are admissible, supplying relevant background and continuity. However, it would have been adequate to explain their conduct by stating they went to defendant's residence because of drug sales, not by any particular person, and not to identify the defendant as the seller. The use of this testimony in opening statements, as testimony from the officer and in closing argument eviscerated the state's claim that this testimony was only to explain subsequent conduct and it was error to admit the hearsay testimony. **CONVICTION REVERSED**.

CAUSE TRANSFERRED TO MISSOURI SUPREME COURT, DECEMBER 9, 2003.

Dorsey v. State, 115 S.W.3d 842 (Mo banc 2003)

In 2002, the Mo legislature amended Sect. 302.321 RSMo, making it a felony to drive while revoked under certain circumstances.

The last sentence of the statute states that "driving while revoked is a class D felony on the second or subsequent conviction pursuant to Sect. 577.010 RSMo (DWI), or a fourth or subsequent conviction for any other offense." Dorsey pled guilty to driving while revoked which was enhanced from a class A misdemeanor to a class D felony because Dorsey had four prior felony convictions. Dorsey was sentenced to five years in prison and after sentencing, sought post conviction relief, which was denied by the trial court.

SUPREME COURT: The trial court correctly applied the statute in enhancing the DWR to a felony. Defendant's claim that the statute is void for vagueness fails as the term "any offense" certainly includes felony convictions. There was no arbitrary application rendering the statute void for vagueness.

[**Editors Note:** *The term "fourth or subsequent conviction for any other offense" will probably include misdemeanors or any combination of misdemeanor and felony convictions. This editor predicts an increase in felony DWR prosecutions as a result of this opinion.*]

State v. Grubb, 120 S.W.3d 737 (Mo banc 0303)

In February 2003, the WD Ct. of Appeals upheld Grubb's conviction for assault with court sentencing as Grubb had pled guilty in a military court martial proceeding to assault which was pled by the state as a "prior" conviction. The WD upheld the conviction, but transferred the case to the Supreme Court.

SUPREME COURT: Whether military court-martial convictions qualify as felonies depends on the sentence that may be imposed. A crime is a felony if the person can be sentenced to death or to imprisonment in excess of one year. Sect. 556.016.2 RSMo. Because Grubb was sentenced to 18 months incarceration on his military plea, this sentence satisfies the felony test.

Defendant relies on State v. Mitchell, 659 SW2d 4 (MoApp ED 1983) which held that military court martial convictions should not be used for sentence enhancements for reason there is no right to trial by jury at a military court martial. Grubb's reliance on Mitchell is misplaced since his conviction was the result of a plea while represented by counsel, and none of the due process concerns in Mitchell are present. The court found their decision in accord with the majority of states that have addressed the issue. **CONVICTION AFFIRMED**.

"Criminal Law Update" >p7

Criminal Law Update

(Continued from page 6)

State v. Thomas, 118 S.W.3d 686 (Mo App 2003)

Defendant was charged and convicted of Murder 2d Degree. Pursuant to the State's Motion in limine, defendant was not allowed to cross examine two state's witnesses about their pending criminal charges in the same jurisdiction. Defendant appealed contending that this restriction on cross-examination precluded him from presenting evidence of the witnesses' motive to lie, which denied him a fair trial.

APPEALS COURT: A criminal defendant has the right to cross examine a witness to expose to the jury any motivation, including potential bias or prejudice, which may influence his testimony. As a general rule, a witness's credibility may not be impeached by evidence of character shown by pending charges that have not resulted in a conviction. However, a defendant must be able to show potential bias or interest in the outcome of a case where:

1) The witness has a specific interest;
2) The witness has a possible motivation to testify favorably for the state; or
3) The testimony of the witness was given with the expectation of leniency.

Even though neither witness had a "deal" with the State, the witness could perceive a benefit from his testimony. The relevant issue is whether the witness might have a perception that he will receive favorable treatment if he furthers the State's case or his basis to fear harsh treatment if his testimony is unfavorable.

For defendant to receive a fair trial, he should have been allowed to confront the witnesses as to their possible motivation to testify favorably for the prosecutor whose office had filed pending charges against them. **CONVICTION REVERSED**.

State v. Wright, 120 S.W.3d 792 (Mo App 2003)

Defendant was arrested for DWI and during a search of his vehicle, a small quantity of cocaine was found in the auto. Defendant was offered a plea bargain, that if he pled guilty and agreed to accept 15 days confinement as part of his probation, the drug charge would not be filed. After pleading guilty and serving the 15 days, it was learned that another prosecutor had filed the drug charge before the plea. Defendant filed a motion to dismiss the drug charge, which the court sustained, finding that filing the charge breached the plea agreement. The State appealed.

APPEALS COURT: In formulating a plea agreement, the prosecuting attorney and the defendant should act fairly so that the reasonable expectations of both sides are met. Where a plea bargain is based to a significant degree on a promise by a prosecutor, to the extent that it is part of the inducement or consideration for entering the plea, the promise must be fulfilled. If the promise is not fulfilled, the defendant must get relief.

The defendant may get either specific performance of the plea agreement or an opportunity to withdraw his guilty plea, as determined by the court's discretion. While the State argued that the remedy should be to allow defendant to withdraw his plea, the fact that he already served the 15 days in jail would not put defendant in the same position he was in prior to the plea. The remedy was specific performance of the plea bargain and the judgment of dismissal is **AFFIRMED**.

State v Watkins, #WD 62508 (Mo App 1/13/2004)

Defendant was convicted of felony criminal non-support. While not paying the full amount ordered in the dissolution proceeding, he was paying about 60% of the court-ordered amount. At the time of his prosecution, defendant was $34,000 in arrears. Defendant appealed arguing the sufficiency of the evidence to convict him.

APPEALS COURT: The fact that a parent is not paying what the circuit court ordered him to pay in a dissolution decree, while relevant, does not conclusively establish criminal non-support. A support order is not even a requirement to criminal liability as a parent can be prosecuted for non-support absent a court order. The crime of non-support is to "knowingly fail to provide, without good cause, adequate support which such parent is legally obligated to provide." Whether defendant provided adequate support by his partial payments was a question of fact. The prosecution had the burden of submitting sufficient evidence from which a reasonable trier of fact could find each element of the offense. The State's evidence established only that defendant paid less than the amount ordered in the dissolution proceeding and did not seek to show that what defendant paid was not enough to provide for the children's basic needs. The State did not meet its burden of proving beyond a reasonable doubt that defendant was in violation of the non-support statute, Sect. 568.040 RSMO. The State's position that "adequate support" in the criminal context is the amount of support ordered by the dissolution court is rejected. Some of the expenses which go into a Form 14 child support award were not contemplated by the general assembly to be included as adequate support in Sect. 568.040 RSMO. **CONVICTION REVERSED**.

"Criminal Law Update:" >p8

Criminal Law Update

(Continued from page 7)

State v. Eckelkamp, #ED83609 (Mo App 1/20/04)

An assistant public defender in Franklin County filed a motion before an associate circuit judge, asking her to appoint a special prosecutor and alleging the Franklin County Prosecuting Attorney's Office was not treating him like other lawyers in that "charges will not be amended nor will counts be dismissed in exchange for a plea of guilty" as to his clients. Respondent Judge granted the motion and appointed a special prosecutor because of the specific position taken by the prosecuting attorney's office of singling out the assistant public defender for different treatment from that of all other attorneys in Franklin County, which treatment is perceived as being adverse to the assistant public defender's clients. The prosecutor sought a Writ of Prohibition to prevent the appointment of a special prosecutor.

APPEALS COURT: Sect. 56.110 RSMo provides the standards for appointment of a special prosecutor. However, the power to appoint a special prosecutor is not limited to that statute, rather, it is a power inherent in the court, to be exercised in the court's sound discretion.

Plea discussions, while permitted by Supreme Court Rule, are not mandatory. Refusing to participate in plea discussions is not a valid reason to disqualify the regular prosecutor. Since Supreme Court Rule 24.02(d) prohibits the court from participating in plea agreement discussions, mandating the regular prosecutor or a special prosecutor to do so violates that rule. The prosecutor's actions cannot be considered unfair because defendants are not entitled to plea agreements. The judge abused her discretion in appointing a special prosecutor and the Writ of Prohibition is **made absolute**.

MOTION FOR REHEARING FILED.

State v Davis, #WD61884 (Mo App 1/27/2004)

Defendant was convicted of three counts of robbery and three counts of ACA. In the first portion of closing argument, the prosecutor told the jury her fellow assistant would discuss punishment in the rebuttal portion of closing argument. Defense counsel did not mention punishment during closing argument. The second prosecuting attorney then addressed the jury and, over a timely objection by defense counsel, was allowed to argue for a 30-year sentence.

APPEALS COURT: The purpose of rebuttal argument is to give the State an opportunity to reiterate matters it raised in opening argument and to respond to arguments made by the defense. Here, the State made no argument about sentencing in the opening portion of its closing argument, and then argued for a specific punishment in rebuttal. Allowing the State to argue for a specific punishment in rebuttal when only a mere mention of an intent to do so was made in the first portion of closing argument would, absent a waiver by defendant, undermine the rule's purpose by taking away defense counsel's opportunity to respond to the State's argument. The courts must evaluate what was said in the final portion of closing argument by looking at how it relates to what was said in the first portion by the State and in the closing argument of the defense. The relationship between what was said in each stage of closing argument should be the focus of any analysis of the closing argument rule. Because the State said nothing about its position as to punishment in its opening part of argument, the defendant had no way of knowing what the State's position would be in rebuttal, and had no way to respond to punishment in its portion of closing argument.

In considering the issue of prejudice, the State was improperly allowed to argue for a specific term of imprisonment for the first time in rebuttal, and the inherent prejudice in allowing that argument has not been overcome. **CONVICTION REVERSED**.

Congratulations, Joe!

Congratulations to MACDL Secretary Joe Passanise for being named by *Missouri Lawyers Weekly* as one of their top five up and coming young lawyers. *Missouri Lawyers Weekly* recognizes attorneys under the age of 40 who have already made a name for themselves in their field.

Missouri Post-Conviction Update:

This article summarizes favorable post-conviction cases decided since early August, 2003, 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

Wallingford v. State, 2004 WL 615419 (Mo. banc March 30, 2004) (NOT YET FINAL) Although the movant did not sign the "declaration" part of his original post-conviction motion, he did sign the in forma pauperis affidavit and corrected his omission as soon as his attorney brought it to his attention. This complied with Sup. Ct. R. 55.03(a), which provides that the omission of a signature on an otherwise properly filed document may be corrected. The failure to sign the original motion within the 90-day period for filing did not require dismissal. Reversed and remanded for consideration of movant's claims.

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

Roberson v. State, 2004 WL 330105 (Mo. App. W.D. Feb. 24, 2004) (NOT YET FINAL) Although the denial of post-conviction relief was affirmed, the court of appeals rejected the trial court's application of the PLRA (Mo. Rev. Stat. §§506.360-506.390) to a Rule 29.15 case, and required reimbursement of any court costs paid by the movant. (The case refers to another case involving this issue, *Wallingford v. State*, which was transferred to the Missouri Supreme Court. However, the opinion in that case did not resolve this issue.)

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

Ritter v. State, 119 S.W.3d 603 (Mo. App. E.D. 2003) The motion court's refusal to consider the movant's untimely amended motion was clearly erroneous. The facts before the motion court indicated that the failure to timely file the amended motion was exclusively the fault of post-conviction counsel. The court of appeals reiterated its earlier holding in *Hammond v. State*, 93 S.W.3d 823, 826 (Mo. App. 2002) that: "Limiting review to the movant's *pro se* claims is a penalty that should be imposed only when the movant is at fault, not when counsel is at fault."

Congratulations to Gwenda Robinson and Lisa Stroup, Mr. Ritter's attorneys.

Jones v. State, 117 S.W.3d 209 (Mo. App. S.D. 2003) The movant was entitled to have his plea of guilty set aside where the record lacked a factual basis for the plea. The transcript reflected only the fact that the defendant, being informed of the charge, answered affirmatively when asked if he was guilty. The motion court denied relief noting that the underlying complaint in this case and a presentence report prepared for another case against Mr. Jones included a factual basis. However, because these documents were not part of the record of the guilty plea, it was improper for the motion court to rely on them. "The factual basis for the plea of guilty must be gleaned from the record of the guilty plea hearing." (117 S.W.3d at 213).

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

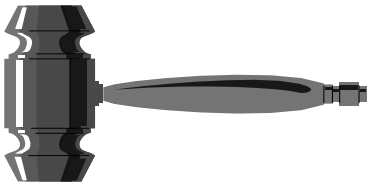
Reed v. State, 114 S.W.3d 871 (Mo. App. W.D. 2003) The defendant's plea agreement was breached, and he was entitled to relief from his plea. At the plea proceeding, the court promised Mr. Reed that he would be placed in the Regimented Discipline Program (boot camp) and would be released on probation if he successfully completed that program. He was not placed in the program, and the court refused to grant probation under Mo. Rev. Stat. §559.115. In light of the trial court's clear promise of the boot camp program, Mr. Reed was entitled to relief.

Habeas Corpus (Rule 91) Cases

Simmons v. Roper, 112 S.W.3d 297 (Mo. banc 2003) (CERT. GRANTED) The execution of persons who committed the crime for which the death penalty was imposed before they were eighteen years of age is unconstitutional under the Eighth Amendment to the United States Constitution. In a carefully reasoned opinion, the court discussed prior U.S. Supreme Court precedent and subsequent developments, and concluded that a national consensus now exists that the execution of persons who committed their crimes as juveniles is cruel and unusual punishment. The United States Supreme Court has accepted this case for review, and a decision will be rendered next term

Congratulations to Jennifer Brewer Herndon and Patrick Berrigan, Mr. Simmons's attorneys, who represented Mr. Simmons before the Missouri Supreme Court *pro bono*.

"Missouri Post-Conviction Update" > p10



Top Ten Federal Decisions

By Bruce C. Houdek

Illinois v. Lidster, 124 S. Ct. 885 (2004). The Supreme Court has narrowed its decision in *Indianapolis v. Edmond*, 531 U.S. 32 (2000) which barred traffic checkpoints designed for general crime control in the absence of individualized suspicion. The Court held that a checkpoint established to seek information concerning a fatal hit and run accident a week earlier was constitutional.

Fellers v. United States, 124 S. Ct. 1019 (2004). Law enforcement officers' interaction with an indicted defendant in the absence of his lawyer or a waiver violated the Defendant's Sixth Amendment Right to counsel where the officers deliberately elicited incriminating information from him. The Court draws a distinction between Sixth Amendment counsel rights and the Fifth Amendment incrimination rules.

U.S. v. Camacho, 348 F3d. 696 (8th Cir. 2003). In determining the loss amount for federal sentencing guideline purposes, the district court erred in relying on the Presentence Report where the Defendant put the Court on notice that the PSR did not properly calculate the loss where counsel raised the issue at sentencing. The Court held that the Defendant had not waived the issue and the government must provide evidence in addition to the conclusion in the PSR. See also, *U.S. v. Quintana*, 340 F3d. 700 (8th Cir. 2003).

U.S. v. Rowland, 341 F3d. 774 (8th Cir. 2003). The Sheriff's officers conducted an illegal pre-textual inventory search where they did not follow their own department's rules and regulations regarding such searches by not recording all items found in the vehicle.

U.S.A. v. Buffalo. ___ F3d. ___ 2004WL235202 (8th Cir. 2004). A prior inconsistent statement could be admissible to impeach a witness called by the impeaching party. Under certain circumstances a party may impeach his own witness.

U.S.A. v. Mar James, 353 F3d. 606 (8th Cir. 2003). A Search Warrant is necessary to seize a computer disk left with a third party for storage.

U.S. v. King, 351 F3d. 859 (8th Cir. 2003). Federal Rule of Evidence 801(d)(2)(E) permits admission of a co-conspirator's statement even though one of the co-conspirators has commenced cooperation with the government as his cooperation had no effect on the continuing conspiracy of his former conspirators who remain at large.

U.S. v. Collins, 350 F3d. 733 (8th Cir. 2003). An erroneous instruction can constitute a constructive amendment of the Indictment which is reversible error *per se* requiring a new trial.

U.S. v. Malik, 345 F3d. 999 (8th Cir. 2003). Hearsay evidence may be admitted to justify and support a police officer's actions and veracity when they have been challenged.

U.S. v. Chapman, 345 F3d. 360 (8th Cir. 2003). A co-defendant's statements to a DEA agent are inadmissible as hearsay and in violation of the defendant's right to confrontation under the Sixth Amendment, but the admission was harmless error beyond a reasonable doubt due to the overwhelming evidence of the defendant's guilt.

Missouri Post-Conviction Update *(Continued from page 9)*

State ex rel. Gater v. Burgess, 2004 WL 556583 (Mo. App. W.D. March 24, 2004) (NOT YET FINAL) The defendant was entitled to credit against his new sentence for the time he served in prison after his parole was revoked on a prior sentence but before sentencing for a new offense. The new case was a part of the reason for parole revocation, and therefore the time served following the parole revocation was "related to" the new sentence within the meaning of Mo. Rev. Stat. §558.031.

Congratulations to Ruth Sanders, Mr. Gater's attorney.

Miscellaneous Post-Conviction Case

State ex rel. Nixon v. Russell, 2004 WL 615335 (Mo. banc March 30, 2004) (NOT YET FINAL). This case presents two interesting issues concerning release from prison by a court. First, it holds that Mo. Rev. Stat. §558.016.8, which provides for the release on probation or parole of a defendant who has been convicted of a Class C or D felony after the defendant has served 120 days upon petition to the court, applies to cases which became final before the law was enacted. The law contains a minimum time which must be served before release (120 days) but no maximum. Second, the opinion affirms the trial court's order of "judicial parole," stating that under Mo. Rev. Stat. §§217.650(4) and 559.221, the court has the power, concurrent with the Board of Probation and Parole, to grant parole.

Congratulations to Michael Gunter, the attorney for Mr. Estes, who was released by order of the Hon. David Russell.

A View From The Bench

By Mike Gorla

Judge Sherri Sullivan is currently the Chief Judge of the Missouri Court of Appeals for the Eastern District of Missouri. Judge Sullivan has been on the Missouri Court of Appeals since 1999. Prior to that, she served as an associate circuit judge and circuit judge in the Twenty-Second Judicial Circuit, holding each position for five years. Recently, I had a chance to visit with Judge Sullivan and discuss her views on a number of aspects of appellate practice. The following is a summary of our discussion:

Judge Sullivan and I discussed some of the common errors that occur during appellate practice. The most common mistake made in brief writing is in not following the rules, especially the rule about framing the points relied on. The court's policy is that an appeal will not be dismissed unless the judges are unable to decipher what the brief writer is trying to convey. But, there are times when the court has no clue as to what an attorney is trying to argue and ends up dismissing the appeal. The Eastern District of the Court of Appeals has published a pamphlet - *The ABC's of Appellate Practice* - that may be of some help to attorneys in preparing their briefs. The manual contains a brief synopsis of the applicable Supreme Court Rules and the Eastern District Special Rules, as well as a guide to preparing the record on appeal and the briefs. The manual can be found at the court's website: www.osca.state.mo.us.

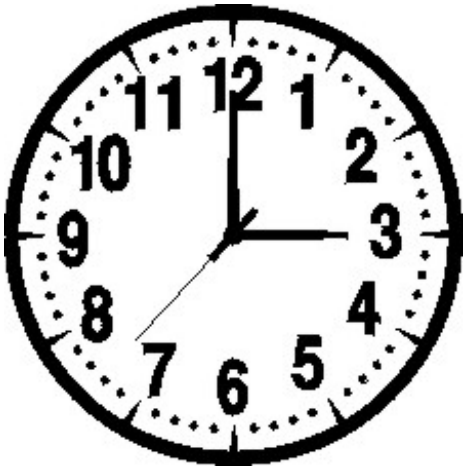
Another common appellate problem is that lawyers have a tendency to brief too many points on appeal. Excluding death penalty cases, the typical criminal case should have, at most, six to eight points. The longer brief is not necessarily the better brief.

We spent quite a bit of time talking about oral argument. I asked Judge Sullivan if she thought a lawyer should waive oral argument. In most cases, a lawyer should take advantage of oral argument since this is the only opportunity for the panel to ask questions and clarify any concerns that it may have about the case. Regarding oral argument itself, Judge Sullivan said that the better arguments are usually short, concise, and directly to the point. The better lawyers have the relevant cases, both theirs and their opponent's, fresh in their minds and are prepared to adequately discuss them with the judges. Prepared lawyers also have a good grasp of the trial court record. Judge Sullivan stressed that you want to argue your strongest points and not necessarily every point. Many lawyers spend too much time talking about the general facts of the case instead of limiting themselves to the facts that are material to the issues. These lawyers have a tendency to deplete their oral argument time without fully addressing the real heart of the case. Good lawyers realize that the judges have read their briefs, are familiar with the general facts and relevant law. These lawyers make a short statement about the facts, get right into the issues, and start discussing why the court should rule in their favor.

Another problem that the appellate court sometimes sees is that lawyers forget that the evidence is to be taken by the court of appeals in the light most favorable to the verdict. These lawyers have a tendency to try to distort the facts developed in the trial record. Good lawyers deal directly with the bad facts and proceed to explain why, despite the unfavorable facts, they are entitled to win on appeal.

We closed our discussion by talking about lawyers' general demeanor and attitude before the appellate court during oral argument. While it is certainly acceptable to disagree with an appellate judge, lawyers need to remember that this is not closing argument before a jury. Judge Sullivan has seen lawyers get so caught up in arguing with a particular judge that they end up not focusing on the important aspects of their case.

Don’t Let Time Run Out!
Make Plans To Attend !



April 15-17	MACDL Spring Conference Harrah’s, St. Louis
June 24	MOBAR/MACDL DWI Program Westin Crown Center Kansas City
June 25	MOBAR/MACDL DWI Program The Ritz, St. Louis
October 29	MACDL Fall Conference Embassy Suites, Kansas City

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