MACDL
Missouri Association of Criminal Defense Lawyers

Newsletter

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In This Issue

The MACDL Newsletter is a semi-annual publication of the

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Your comments and suggestions are welcome!

MACDL President's Letter

by Scott C. Hamilton

On Monday, February 26, 2007, MACDL signed on to support the John R. Justice Prosecutor and Defenders Incentive Act (S.442). This Act is an educational debt forgiveness measure to support public defenders across the United States and Puerto Rico. Our statement in support of the Act should be delivered to the United States Senate Judiciary Committee in early March. If you would like to support this measure further, contact your Senators.

On behalf of MACDL, I participated with the Missouri Bar, as well as many other Bar organizations, in defeating the effort to stop the pay raises recommended by the Citizens Commission, especially those for the judiciary. I attended the State of the Judiciary Address which was given by Chief Justice Michael Wolff. The Missouri Bar did an excellent job educating all on how far our public servant salaries have fallen behind those of surrounding states.

The MACDL Board met after our last seminar in St. Louis and reviewed all pending Legislation. It was a long Saturday. I would like to thank all who participated for your thoughts and efforts. It will be very important for us to keep letting our Legislators know where the Criminal Defense Bar stands, as more and more Legislation gets presented that attempts to erode our citizens' rights.

Our organization is in the best shape, both financially and from a participation standpoint ,that it has ever been. We will continue to bring outstanding seminars to educate our members and will look forward to seeing you at our next Seminar in April at the Harrah's Casino in Kansas City.

Sincerely,

Scott C. Hamilton

MACDL

Missouri Association of Criminal Defense Lawyers

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Membership and Board Updates

We have some exciting MACDL membership and Board updates to pass along.

First, we would like to congratulate Bruce Galloway for being elected as the newest MACDL board member. Bruce was elected to fill a vacant term set to expire in April of this year.

Bruce Galloway practices criminal defense and family law in Southwest Missouri. His office is located on the historic town square of Ozark, MO. He practices law with his wife Melissa Galloway.

Bruce graduated *magna cum laude* from Drury University. He studied philosophy and communication, receiving the Outstanding Student of Philosophy and Religion award. He attended Washington University Law School in St. Louis. He served on the academic committee and his peers elected him to student government all three years.

After graduating law school, he represented poor people in the Missouri State Public Defender System. During his five years as a public defender, he defended cases throughout much of southern Missouri. He left for private practice in 1996. His wife joined the practice in 2003.

Bruce is an active member of the community. He is President of the Ozark Main Street board, joined the Ozark Chamber of Commerce, volunteered his time to the Ozark Board of Alderman and assists the city attorney in some matters.

Bruce has successfully jury tried a wide array of felony cases, most recently attaining an acquittal in a felony child molestation jury trial. He focuses his criminal practice on serious criminal matters.

As well as sending congratulations out to Bruce, we would also like to congratulate Dan Dobson for signing up to be MACDL's first "Lifetime Member".

Dan is a graduate of the University of Missouri School of Journalism and attainted this Juris Doctorate from the University of Illinois – Champaign. He is a member of the Board of Directors for NACDL, MACDL, and on Legislative Committee for MACDL.

Amicus Curiae Committee

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

Committee Chair:
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8015 Forsyth Boulevard • St. Louis, MO 63105
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Legislative Update

by Brian Bernskoetter, MACDL Staff

The 2007 session opened on January 3rd with the major focus of the Governor and the Legislature on MOHELA and Medicaid. This is one of the longest legislative sessions allowed by statute and to date there have been over 1800 bills filed.

MACDL is currently tracking over 110 pieces of legislation for this session. The legislature is focusing its efforts on passing civil immunity for defensive use of force and to increase the penalties for distributing drugs near public parks. MACDL will provide the members with further information as the session progresses.

Below is a list of several key pieces of legislation. If you would like to read the bill in its entirety go to www.moga.mo.gov and click on "Joint Bill Tracking."

Bill Number	Sponsor	Summary
HB 27	Cunningham-86	Removes the requirement that a person must have received at least a 10-day jail sentence on a prior offense before a third or subsequent misdemeanor stealing offense can be enhanced to a felony. OPPOSE
HB 59	Sater	Requires the State Highway Patrol to create, maintain, and make available for public inquiry on the Internet a registry of persons convicted of methamphetamine offenses. OPPOSE
HB 60	Ruestman	Changes the laws regarding defensive use of force. MONITOR
HB 83	Kraus	Authorizes judges to order defendants who have pled guilty to or been found guilty of felony offenses to pay expenses related to the cost of the prosecution. OPPOSE
HB 85	Kraus	Creates the felony crime of employing an illegal alien. MONITOR
HB 92	Pollock	Creates the crime of endangering the welfare of an unborn child and allows for physician referral and documentation to be used in criminal prosecutions. OPPOSE
HB 122	Nance	Reduces the amount of excess revenues generated by fines for moving traffic violations that municipalities must send to the Department of Revenue. MONITOR
HB 170	Cooper-158	Imposes a minimum term of imprisonment for offenders who have pled guilty or been found guilty of a crime of violence against a child or an elderly person. OPPOSE
HB 175	Dusenberg	Requires the Department of Revenue to put a unique code or identifier on the driver's license, nondriver's license, or driver's permit of anyone who is required to register as a sex offender. OPPOSE
HB 189	Jones-117	Creates a presumption in certain circumstances that a person using deadly force has a reasonable fear of death or harm and allows that person immunity in certain circumstances for use of defensive force. MONITOR
HB 207	Franz	Allows counties and sheriffs to establish restorative justice programs. VAGUE – NEEDS CLARIFICATION
HB 215	Stevenson	Changes the definition of "adult" to a person 18 years of age or older and "child" to a person under 18 years of age in Chapter 211. SUPPORT
HB 236	Burnett	Requires the director of revenue to return noncommercial drivers' licenses and remove suspensions from driving records when licensees provide proof of disposition of charges. SUPPORT
HB 254	Bringer	Creates the crime of obstruction of justice. OPPOSE – Contact Joe Passanise and Bruce Galloway
HB 258	Hubbard	Repeals the death penalty. SUPPORT – Contact Charlie Rogers
HB 263	Nieves	Makes English the language of all official proceedings in the state. MONITOR
HB 281	Roorda	Changes the laws on the disposition of evidence by allowing law enforcement to collect hazardous samples without court approval, document and then destroy them, and makes them admissible. OPPOSE

Bill Number	Sponsor	Summary *(Continued from page 3)*
HB 304	Bruns	Prohibits the court from granting unsupervised visitation to a sex offender. OPPOSE – Contact John Simon
HB 309	Kraus	Prohibits certain sexual offenders from being present in or loitering within five hundred feet of any public park or swimming pool and from serving as a coach, manager, or trainer for certain teams. OPPOSE
HB 315	Pratt	Allows attorneys who are public officials or employees to provide legal services to the needy without compensation. SUPPORT
HB 335	Lipke	Lowers the blood-alcohol content to .08 of 1% for the crime of operating a vessel with excessive blood-alcohol content. OPPOSE
HB 336	Lipke	Creates the crime of driving with a controlled substance in a person's body. OPPOSE – Contact Travis Noble and Jeff Eastman
HB 366	Ervin	Creates the crime of distribution of a controlled substance near a park. OPPOSE
HB 406	Schad	Changes the laws regarding operation of a watercraft while under the influence of alcohol. OPPOSE
HB 445	Deeken	Establishes the Commission on the Death Penalty and places a moratorium on all executions until January 1, 2011. SUPPORT – Contact John Simon and Charlie Rogers
HB 820	Moore	Provides criminal penalties for anyone disclosing identity of persons administering the death penalty. OPPOSE – Contact John Simon and Charlie Rogers
HB 945	Parson	Creates the crime of murder of a criminal justice official and modifies the elements of the crime of assault of a law enforcement officer, emergency personnel, or corrections personnel.
HB 955	Guest	Establishes the Work for Restitution Program in the Department of Corrections and the Work Restitution Fund.
HB 972	Deeken	Allows persons who have been convicted more than twice of driving while intoxicated to obtain an ignition interlock restricted license for a one-year period if the person meets certain requirements.
SB 107	Wilson	Creates the crime of distribution of a controlled substance near a park. OPPOSE
SB 216	Crowell	Creates the crime of driving with any controlled substance in the body. OPPOSE
SB 258	Engler	Requires the selection of an execution team and creates legal protections for the team members. OPPOSE – Contact John Simon and Charlie Rogers
SB 261	Koster	Modifies provisions limiting what qualifies as a previous prison commitment. OPPOSE
SB 278	Koster	Requires certain sex offenders to serve a mandatory minimum prison term of at least three years. OPPOSE
SB 439	Days	Creates a commission to study the death penalty in Missouri and prohibits use of the death penalty for a time period.
SB 457	Purgason	Modifies provisions relating to the transfer of concealable weapons and removes the permitting requirements for such weapons.
SB 685	Engler	Creates the crime of murder of a criminal justice official and expands the crime of assault of a law enforcement officer, emergency personnel, or probation or parole officer to include corrections personnel.
SJR 17	Coleman	Creates an exception to the prohibition against laws retrospective in operation by allowing the sexual offender registry laws to be applied retrospectively.

Super Lawyers!

Recently, Dee Wampler and Joseph Passanise were selected as "Missouri and Kansas Super Lawyers" in the magazine's 2007 Edition. This selection procedure for a "Super Lawyer" honor includes peer nomination of more than 23,000 ballots to Missouri and Kansas lawyers, a blue ribbon panel review process and independent research on candidates.

Only five (5) percent of Missouri lawyers receive this honor out of the 24,000 lawyers in Missouri.

Welcome Aboard!

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

Tim Beard, Centralia
Lawrence Catt, Springfield
C. Ryan Cole, Springfield
Adam Dowling, Columbia
Sarah Jane Forman, Clayton
Reidar Hammond, Springfield
J. Wesley Harden, Springfield
Jeffrey Hilbrenner, Columbia
Joseph Hogan, Clayton
Richard Johnson, Kansas City
Horton Lance, Kansas City
Ray Legg, Moberly
Eric Mitchell, Clinton
Pamela Musgrave, Poplar Bluff
Justin Nelson, West Plains
Patrick O'Connor, Kansas City
Martina Peterson, Kansas City
John Russo, Gainesville
Dorothy Savory, Liberty
Doug Shull, Columbia
Grant Smith, Lake Ozark
Christopher Swatosh, Ava
Corey M. Swischer, Nevada
Lynn M Tobin, Springfield
Kyle E. Walsh, Clayton
Tim L Warren, St. Joseph
Frank Yankoviz, Monett

New Associate Members:

Assisted Recovery Centers of America LLC
Imprimatur Press

Top Federal Decisions

by Bruce C. Houdek

Cunningham v. California, 127 S. Ct. 856 (2007)

United States Supreme Court in a 6-3 decision held unconstitutional, the California State mandatory sentencing scheme, which permitted judges to make factual determinations which would result in increases or decreases in the defendants' sentences without a jury.

U.S. v. Grubbs, 126 U.S. 1494 (2006).

Supreme Court approves issuance of anticipatory search warrant for defendant's residence be executed upon delivery of pornographic materials ordered by defendant. Anticipatory warrants are no different in principle from ordinary ones and are valid so long as the contraband property is present at the location described to be searched before the time of execution.

United States v. Rouillard, ____ F.3d ____, (8th Cir. 2007) 2000 WL 188308.

The Eighth Circuit determined that sua sponte upward departure in sentencing of a defendant convicted for possession of a firearm by a felon from a guideline sentencing range of 30-37 months to 120 months was unreasonable.

U.S. v. Walker, 470 F.3d 1271, (8th Cir. 2006).

The Court held that an 18 year-old armed robbery conviction was admissible under Federal Rules of Evidence 404(b) as substantive evidence of guilt in the trial of a defendant charged with being a felon in possession of a firearm.

U.S. v. Gilmore, 471 F.3d 64, (2d Cir. 2006).

Failure of the District Court to provide notice of its intent to depart above the guideline range is plain error and reversible without objection in the District Court.

U.S. v. McCourt, 468 F.3d 1088, (8th Cir. 2006).

Even though the defendant charged with possession of child phonography stipulated to the pornographic character of the pictures involved, the government is entitled to show the pictures and tapes to the jury as substantive evidence. See also U.S. v. Sewell, 457 F.3d 841 (8th Cir. 2006).

U.S. v. Zatcher, 465 F.3d 336, (8th Cir. 2006).

Officers had probable cause to obtain a search warrant for a FedEx package where a drug detention dog alerted to the package while it was in FedEx custody. The Court held that no seizure occurred until there was a meaningful interference with the individual's possessory interest in

"Federal Decisions" >p6

Federal Decision *(from page 5)*

the property or that a defendant's travel had been significantly impacted and delayed.

U.S. v. Carpenter, 462 F.3d 981, (8th Cir. 2006).

Use of a fake drug stop and detention of a driver who exited the highway after seeing the signs for a short period to obtain examination of the vehicle by a drug detection dog did not violate the defendant's rights and was justified by reasonable suspicion.

U.S. v. Richardson, 439 F.2d 421, (8th Cir. 2006).

Defendant cannot be convicted and punished for both being a felon in possession of a firearm and being a drug user in possession of a firearm based upon a single act of possession.

U.S. v. Mitchell, ___ F.3d ___, (8th Cir. 2007) 2007 WL 328585.

The Eighth Circuit holds that the charge of bankruptcy fraud requires proof of intent to defraud and that pre-petition income is not the property of the estate because the bankruptcy estate is only formed after the filing of the petition.

MACDL 2007 Award Winners

Congratulations to the Winners!

The Missouri Association of Criminal Defense Lawyers is proud to announce the recipients of the Charles Shaw Trial Advocacy Award, the Robert Duncan Appellate Excellence Award, the Atticus Finch Award and the President's Award for 2007.

These awards recognize the outstanding service and performance by criminal defense attorneys in Missouri. All the winners were nominated and ballots were sent out to MACDL members to decide who would receive these awards.

The **Charles Shaw Trial Advocacy Award** is named for our late brother from St. Louis. This award is meant to honor those who exhibit outstanding trial skills and a passion for trying cases involving the innocent accused. This award is given to three worthy attorneys from various parts of the state.

This year's Awardees are:

From the St. Louis area - **Kevin Curran**
From the Kansas City area - **David Bell**
From out-state Missouri - **Rodney Hackathorn**

The **Robert Duncan Appellate Excellence Award** is named for our late brother from Kansas City. This award honors those who exhibit outstanding appellate skills and an unyielding desire to insure fair trail processes for the innocent accused. This award is given to three worthy attorneys from various parts of the state.

This year's Awardees are:

From the St. Louis area - **Michael Gorla**
From the Kansas City area - **Susan Hogan**
From out-state Missouri - **Patrick Eng**

The **Atticus Finch Award** is given to an attorney who serves unflinchingly, while defending unpopular clients or taking up unpopular causes.

This year's Awardee of the Atticus Finch Award is **Kevin Locke**.

The **President's Award** is awarded to **Scott Hamilton** for serving his fellow attorneys with honor and distinction during the 2006-2007 year.

Congratulations to all of you.

MISSOURI POST-CONVICTION UPDATE

This article summarizes favorable post-conviction cases decided since August 10, 2006.
As noted, some of the opinions discussed below are not yet final; please check the current status of the decision before citing.

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

Gant v. State, 2007 WL 144011 (Mo. App. W.D. Jan. 23, 2007) NOT YET FINAL

The defendant was denied effective assistance of counsel when defense counsel, on cross-examination at a suppression hearing, elicited from the arresting officer the facts required for probable cause. The State had not established probable cause on direct examination, and the evidence would have been suppressed but for the improper cross.

Congratulations to Frederick J. Ernst, Mr. Gant's attorney.

Eckhoff v. State, 201 S.W.3d 52 (Mo. App. E.D. 2006)

Where the defendant's plea agreement called for seven year sentences on each of two counts, with the state free to argue for consecutive sentences and the defense for concurrent, there was a breach of the agreement when the state argued for concurrent fourteen year sentences. (The state relied on an error on the statutory minimum in making the first offer.) Because the defendant should have been afforded an opportunity to withdraw his plea, the conviction was reversed.

Congratulations to Jo Ann Rotermund, Mr. Eckhoff's attorney.

POST-CONVICTION (RULES 29.15 AND 24.035) CASES: PROCEDURES

Stevens v. State, 208 S.W.3d 893 (Mo. banc 2006)

The defendant entered a plea of guilty and then, before sentencing, filed a motion to withdraw her plea. The motion was denied, and she appealed. The conviction was affirmed on appeal. She then filed a Rule 24.035 motion within 90 days of the appeals court mandate. The Supreme Court held the motion was timely, because the appeal, taken after judgment, was proper. The court also noted that, if ineffective assistance of counsel claims are raised on appeal from the denial of a motion to withdraw the guilty plea, res judicata will apply if the defendant attempts to raise the same issues again in a post-conviction motion.

Congratulations to Arthur G. Muegler, Jr., Ms. Stevens's attorney.

Ivory v. State, 2007 WL 90303 (Mo. App. W.D. Jan. 16, 2007) NOT YET FINAL

Bullock v. State, 2006 WL 3734369 (Mo. App. S.D. Dec. 20, 2006) NOT YET FINAL

Watts v. State, 206 S.W.3d 413 (Mo. App. 2006)

Remanded for specific findings of fact and conclusions of law. It is amazing how often this issue is the basis for reversal.

Congratulations to Karen Bourgeois, Mr. Ivory's attorney; Susan K. Roach and Melissa A. Featherston, Mr. Bullock's attorneys; Kent Denzel, Mr. Watts's attorney.

Johnson v. State, 2006 WL 3823754 (Mo. App. S.D. Dec. 29, 2006) NOT YET FINAL

Eventually, the court remands for findings of fact and conclusions of law. On the way, the court finds that a movant has the right to file a second pro se motion before the amended motion is filed. The movant filed one pro se motion with three claims, and a second with four more claims. No amended motion was filed. The court of appeals held that the circuit court was required to enter findings and conclusions as to both sets of claims; because it had failed to do so, remand was ordered.

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

Penn v. State, 2006 WL 3780779 (Mo. App. E.D. Dec. 26, 2006) NOT YET FINAL

The 90 day period for filing a Rule 29.15 motion after appeal runs from the date of the mandate, not the date of the appeals court opinion. Where the motion was timely filed but was unsigned, the movant should have been given the right to sign within a reasonable time.

Congratulations to Matthew Ward, Mr. Penn's attorney.

Ritter v. State, 207 S.W.3d 712 (Mo. App. S.D. 2006)

The movant was entitled to an evidentiary hearing on his allegation that his trial counsel, despite a request from the movant, did not perfect an appeal.

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

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Post Conviction Updates

(Continued from page 7)

Teer v. State, 198 S.W.3d 667 (Mo. App. E.D. 2006)

The movant was entitled to an evidentiary hearing on his claims of ineffective assistance of appellate counsel.

Congratulations to Lisa Stroup, Mr. Teer's attorney.

Taylor v. State, 198 S.W.3d 636 (Mo. App. S.D. 2006)

The movant was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel for failure to call an alibi witness.

Congratulations to Mark A. Grothoff, Mr. Taylor's attorney.

RULE 91 STATE HABEAS CORPUS CASES

State ex rel. Verweire v. Moore, 2007 WL 274832 (Mo. banc Dec. 19, 2006, modified Jan. 30, 2007)

The first sentence says it all: "This case presents the rare situation in which a criminal defendant pled guilty to a crime he did not commit." The court holds that because the evidence showed only that the defendant briefly pointed a gun at another, but never pulled the trigger and then retreated, there is insufficient evidence that the defendant "attempted to cause serious physical injury," his plea of guilty lacked a factual basis, and his conviction for Class B first degree assault must be vacated.

Congratulations to Kent Gipson, Mr. Verweire's lawyer.

State ex rel. Mertens v. Brown, 198 S.W.3d 616 (Mo. banc 2006)

This case holds that where a defendant is improperly denied probation under Mo. Rev. Stat. §559.115 after successfully completing a drug treatment program in prison, the proper remedy is a petition for mandamus in the trial court. The statute mandates release after the completion unless the trial court decides, after a hearing, that release would be an "abuse of discretion." The trial court here failed to hold a hearing within the required time, and therefore the defendant was entitled to release under the statute. However, this result could not be obtained through an order by the circuit court in the county of imprisonment directing the trial court to hold a hearing or release the defendant; circuit courts don't have the power to order other circuit courts to do things. The Supreme Court here achieves the same result through a writ of mandamus.

Congratulations to Douglas Hennon, Mr. Mertens' attorney.

MACDL Web Traffic Report

Activity Summary

Hits	
Total Hits	442,085
Average Hits per Day	795
Average Hits per Visitor	16.02
Page Views	
Total Page Views	24,475
Average Page Views per Day	79
Average Page Views per Visitor	1.61
Visitors	
Total Visitors	15,240
Average Visitors per Day	49
Total Unique Visitors	2,897

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A Trap for the Unwary Prison Inmate

Under Missouri law, the State of Missouri can recover 90% of the eligible assets of a prison inmate to compensate the state for the expense of incarcerating him. The law that permits this recovery is the Missouri Inmate Incarceration Act (MIRA). This draconian little statute can be found at Mo. Rev. Stat. §217.825 et seq. According to a November 17, 2005 news release of Attorney General Jay Nixon, "In 2005 alone, Nixon's office has recovered $626,411 in 219 cases, including 199 judgments and 45 liens on real property. Last year, Nixon's office collected a record $884,000 from Missouri prisoners."

The statute permits the attorney general to file suit "if the attorney general ... has good cause to believe that an offender or former offender has sufficient assets to recover not less than ten percent of the estimated cost of care of the offender ... for two years."[1] The Department of Corrections has a chart showing the costs of incarceration for each institution. The average cost is about $15,000 per year.

Mira Mechanics

A MIRA action typically is triggered by too much money in the inmate's prison account. When an inmate's account balance exceeds roughly $3,000[2] , the attorney general is notified, and MIRA proceedings begin. Prison inmates should be advised to make sure that their prison accounts stay below $2,000.

Sometimes, other events will trigger a MIRA action. For example, the payment of a civil rights settlement into an inmate account will attract the attention of the attorney general. Or, the inmate treasurer may notice that a prisoner is getting regular payments from some source, and call it to the attention of the attorney general. In addition, correspondence received by the inmate is read. If it concerns an inheritance or retirement account, this may be noticed and called to the attention of the inmate treasurer or the attorney general. Monitored telephone calls are another possible source of information, although I have not heard of any inmate having a MIRA action commenced based on a telephone call. Obviously, inmates should avoid attracting the attention of the inmate treasurer and attorney general as much as possible.[3]

Most clients learn that a MIRA action has been filed against them because a freeze is placed on their prison accounts. The statute permits this to be done ex parte. The excuse given is that if the inmate gets the usual notice and opportunity to answer the civil action, he will conceal or dispose of his assets. Once the freeze is in place, the prisoner is permitted to spend only $7.50 per month. This gets their attention quickly!

The attorney general may file the reimbursement action in the county in which a prisoner was sentenced or in Cole County.[4] In practice, all of these suits are filed in Cole County. Once the action is filed and the account frozen[5] , an order is issued requiring the offender to show cause why the state shouldn't get his money. The inmate has no right to court-appointed counsel in this matter. If the state prevails, the court will enter judgment for 90% of the inmate's eligible assets.

The judgment normally will provide for future payments to the state from assets that may be acquired by the inmate in the future. If the inmate has an outside account which is subject to MIRA, but which is larger than the amount currently due to the state, the order sometimes provides that the inmate treasurer take possession of the entire amount and make disbursements out of it as required by the order. No published decisions exist concerning this practice. In some cases, the attorney general has directed the inmate treasurer to remit a portion of the unearned account to an attorney for fees, either for the MIRA action itself or for matters relating to the conviction.

Lawyer's Role in Protecting Assets

What can a lawyer do for an inmate who is the defendant in a MIRA case? First, the lawyer can make certain that the

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1 Mo. Rev. Stat. §217.831.3. If the offender is to be incarcerated less than two years, the triggering amount is the actual cost of incarceration. Also, the attorney general may file suit if the offender has a stream of income which will reach the triggering amount within five years.

2 This figure is based on my experience only; the attorney general will not divulge the actual amount.

3 Mo. Rev. Stat. §217.829 provides that each offender is to be required to list his assets and swear to the truth of the information provided. I am unaware of whether this requirement has been implemented. An offender who fails to comply with the requirement can be denied parole.

4 Mo. Rev. Stat. §217.835.1

5 If the attorney general is aware of any other assets of the prisoner, the freeze order will be directed to the custodian of those assets, too.

money the state is trying to snatch is actually subject to a MIRA judgment. The statutory definition of "assets" of an offender[6] subject to MIRA is very broad:

> property, tangible or intangible, real or personal, belonging to or due an offender or a former offender, including income or payments to such offender from social security, workers' compensation, veterans' compensation, pension benefits, previously earned salary or wages, bonuses, annuities, retirement benefits, or from any other source whatsoever, including any of the following:
>
> a. Money or other tangible assets received by the offender as a result of a settlement of a claim against the state, any agency thereof, or any claim against an employee or independent contractor arising from and in the scope of said employee's or contractor's official duties on behalf of the state or any agency thereof;
>
> b. A money judgment received by the offender from the state as a result of a civil action in which the state, an agency thereof or any state employee or independent contractor where such judgment arose from a claim arising from the conduct of official duties on behalf of the state by said employee or subcontractor or for any agency of the state.[7]

There are a few statutory exclusions. The value of the offender's homestead is excluded up to $50,000.[8] Money which the offender is paid by the Department of Corrections while incarcerated, up to $2,000, is also excluded.[9] The Cole County circuit court typically allows the exclusion of all of this "state pay" up to $2,000 without requiring an analysis of whether the money has been spent and supplanted by other money. Also, it has been held that the portion of a judgment entered in favor of the inmate which is allocated by contract to attorney's fees and expenses of litigation is not subject to MIRA.[10]

The Western District Court of Appeals has recently held that the general exemptions on executions contained in Mo. Rev. Stat. Chap. 513 do not apply in MIRA actions because MIRA's exemptions are more specific and conflict with Chap. 513.[11]

However, in addition to the exclusions in the MIRA statute, federal law insulates certain government benefits, such as veterans' benefits and social security, from judgment.[12] And the Eighth Circuit has held that civil rights judgments or settlements cannot be the subject of a MIRA judgment.[13] Further, if the offender is a beneficiary of a discretionary spendthrift trust, the trustee cannot be required to make payments to the state.[14] (If the trustee makes distributions to the offender, however, those sums are subject to the MIRA.)

One asset that may be subject to MIRA is the savings bonds that can be purchased by prison inmates through the inmate treasurer. This program is presented to inmates as a method of saving for their children. Inmates who use this program should do two things to avoid MIRA problems. First, they should have the savings bonds issued in the name of someone other than themselves. (Either the child or the custodial parent would be appropriate.) Having the bonds issued to the inmate with the name of the child as the beneficiary upon the inmate's death will not satisfy the attorney general. Second, if possible, they should take advantage of the opportunity to have the bonds sent outside the prison to another custodian.

In addition to making sure that any judgment entered under MIRA is limited to "assets" legally subject to that type of recovery, an attorney should make certain that the attorney general has not previously filed a reimbursement action against the same inmate. Occasionally, if the judgment entered was not sufficiently broad to cover all of the inmate's assets, and the attorney general then discovers new assets, a subsequent action has been filed. However, this has been held barred by *res judicata*.[15]

An attorney can also be of assistance in protecting assets before the filing of a MIRA action. So far as I know, there is no legal prohibition on an inmate (or inmate-to-be) transferring assets out of his ownership before a MIRA action is filed. Moreover, if a family member is contemplating a will containing a bequest to an inmate, there may be alternative ways to preserve any inheritance for the inmate's benefit after release. These issues are a matter of estate planning and beyond the scope of this article.

"MIRA" >p11

6 "Offender" means an inmate confined in a correctional center, camp, community correction center or honor center. County jail inmates are not included. Mo. Rev. Stat. §217.827(a)(5).

7 Mo. Rev. Stat. §217.827(1)(a)

8 Mo. Rev. Stat. §217.827(1)(b) a.

9 Mo. Rev. Stat. §217.827(1)(b) b.

10 State ex rel. Nixon v. Karpierz, 105 S.W.3d 487 (Mo. App. 2003).

11 State ex rel. Nixon v. Overmyer, 189 S.W.3d 711 (Mo. App. 2006)

12 Bennett v. Arkansas, 485 U.S. 395 (1988).

13 In Hankins v. Finnel, 964 F.2d 853 (8th Cir. 1992), the court held that such a recovery is exempt from seizure under MIRA because to allow such a seizure would violate the Supremacy Clause of the United States Constitution. However, the Cole County Circuit court recently held that this holding did not apply in a case where the civil rights recovery was money wrongfully taken by the Highway Patrol without forfeiture proceedings. An appeal is pending.

14 State ex rel. Nixon v. Turpin, 994 S.W.2d 53 (Mo. App. 1999)

15 State ex. rel. Nixon v. Jones, 108 S.W.3d 187 (Mo. App. 2003)

Nominate a MACDL Winner Today!

The Missouri Association of Criminal Defense Lawyers recognizes outstanding service and performance by dedicated criminal defense attorneys. Each year there are three awards, which are considered for award. Some of those are divided into the various areas of the state. Not all awards are given each year. Please take the time to make nomination for outstanding criminal defense attorneys that you know, see and work with throughout the state. For your convenience, we offer these brief explanations of the awards:

Charles Shaw Trial Advocacy Award: Named for our late brother from St. Louis. This award is for those who exhibit outstanding trial skills and a passion for trying cases involving the innocent accused. There are up to three available each year.

Robert Duncan Appellate Excellence Award: Named for our late brother form Kansas City. This award is for those who exhibit outstanding appellate skills and an unyielding desire to insure fair trial processes for the innocent accused. There are up to three available each year.

Atticus Finch Award: Named for the character in " To Kill a Mockingbird" this award is given to those who serve unflinchingly, while defending unpopular clients or taking up unpopular causes. This award is not given every year.

2008 NOMINATION BALLOT

Charles Shaw Trial Advocacy Award

St. Louis: _____

Kansas City: _____

Out-State: _____

Robert Duncan Appellate Excellence Award

St. Louis: _____

Kansas City: _____

Out-State: _____

Atticus Finch Award

Name: _____

Unpopular Cause: _____

MIRA *(from page 10)*

Protecting Dependents

An attorney can help the inmate to provide for his dependents. Before entering an order under MIRA, the statute requires the court to take into consideration any legal obligation to support dependents or any moral obligation to support dependents for whom the offender has provided support.[16] When the assistant attorney general becomes aware of a child support order, or of actual support to dependents, he or she is generally willing to agree that the assets be transferred for the benefit of the dependents rather than forfeited to the state.

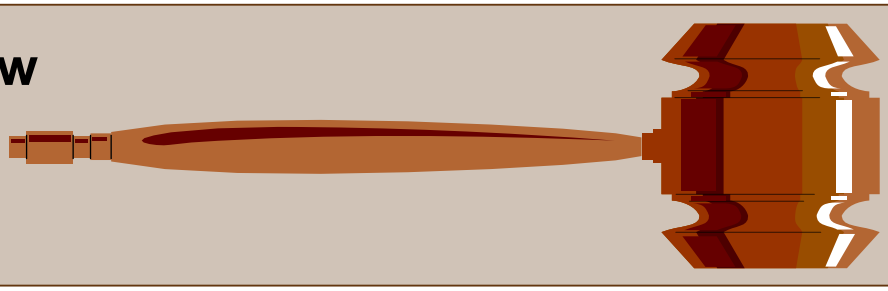
Policy issues

Finally, the policy behind this legislation deserves re-examination. In 2004 — a record year — the Attorney General collected $884,000 from MIRA in 219 suits. This averages to about $4,000 per suit. Given the statute's mandate to collect 90% of the inmate's assets, it would appear that these judgments are not being entered for large sums against the wealthy. Rather, they are the product of a $10,000 life insurance policy on the death of the inmate's mother, or an excess contribution to the inmate's account by his or her significant other. Most of these inmates will eventually be released from the system. If the state gets 90% of their assets, they will be left with nothing. If one of the aims of incarceration is preventing recidivism, the MIRA is short-sighted.

[16] Mo. Rev. Stat. §217.835.4.

Criminal Law Review

by Bernard Edelman



1) Wadas v DOR, #WD 65704 (MO APP 8/1/06)

Appellant, a deaf mute, was pulled over on suspicion of DWI. The arresting officer contacted an interpreter, who was not licensed in Mo. The officer read the Implied Consent warning to Appellant which was interpreted to him. Appellant refused to submit to a chemical test. On appeal, the revocation was set aside because the interpreter was not "qualified" under 476.750 RSMo. All statements Appellant made were inadmissible and could not be considered as evidence. The Appellate Court stated that if the communications had been in writing, the refusal might have been upheld.

2) State v. Clark, #SC87473 (Mo banc 8/8/06)

After being convicted of Assault First, ACA, and Attempted Robbery First, the state introduced evidence during the penalty phase of prior crimes of which appellant had been acquitted. In a case of first impression, the Missouri Supreme Court, following the precedent in US V. Watts, 519 US 148 (1997), upheld the admission of acquitted conduct, reasoning that an acquittal on criminal charges does not mean that the defendant is innocent, it merely proves the existence of a reasonable doubt as to his guilt. The evidence at the penalty phase is subject to a lower standard of proof than the guilt phase.

3) State v. Griffin, #WD63968 (8/22/06)

Appellant was convicted of various sex charges with his daughter the victim. Because of the victim's fragile mental state, the prosecutor sought and was granted the right to depose the child and then to use her deposition testimony at trial in lieu of her live appearance, pursuant to 491.680 RSMo. Also at trial, law enforcement personnel, health care practitioners, social workers and a foster parent were allowed to testify as to what the child victim told them of the sexual abuse, pursuant to 491.075 RSMo. Appellant's objections that this evidence violated his rights to confrontation and cross examination, and that they were testimonial hearsay prohibited by Crawford v. Washington were all over ruled by the trial court. Crawford seemed to prohibit this type testimony if the declarant was unavailable, unless he had a prior opportunity to cross-examine. The appellate court found that appellant's attorney's presence at the video taped deposition, even though appellant was excluded, satisfied the "prior opportunity to cross examine" contemplated by Crawford and the statements were properly admitted.

4) Wolfe v. Mo. Dept. of Corrections,
#WD65886 (8/29/06)

Wolfe was in dispute with the MoDOC over how much time he had to serve before he was eligible for parole on his sentences of life imprisonment on Murder 2nd and a consecutive 10 year sentence for Robbery First Degree, both dangerous felonies requiring he serve 85% of each sentence. The Court of Appeals upheld the trial court's determination that he was eligible for parole after serving 34 years. A life sentence is considered to be a term of 30 years for parole eligibility of which he would have to serve 85% or 25.5 years before eligible for parole on the murder charge. He would have to serve 8.5 years of his 10 year sentence on the robbery charge before eligible for parole. His total time for parole eligibility is 34 years (25.5 plus 8.5).

5) State v. Keeth, #SD27419 (8/30/06)

Appellant represented himself in a misdemeanor jury trial for DWI. After conviction, he was fined $500. He argued on appeal that his conviction should be reversed because he was denied appointed counsel. The appellate court upheld the conviction, finding that because he was fined, and not incarcerated, he did not have a right to appointed counsel. The requirements of Argersinger v. Hamlin, 407 US 335 (1972) and Scott v. Illinois, 440 US 367 (1979) were not implicated because Keeth did not receive a sentence of jail.

6) State ex rel Mertens v. Brown,
#SC87564 (9/8/06)

The trial judge sentence appellant to 120 days institutional treatment pursuant to 559.115 RSMo for involuntary manslaughter and leaving the scene of an accident. The DOC reported to the judge that Mertens had successfully completed the program. Without holding a hearing the judge denied probation and ordered Mertens to complete his sentence. Mertens sought a Writ of Mandamus directing the judge to release Mertens on probation. In granting the writ, the Supreme Court stated that 559.115 RSMo requires the trial judge to hold a hearing within 120 days of the offender's sentence before denying probation to an offender who successfully completes the program. If the offender successfully completes the program, probation shall be ordered unless the sentencing judge, after a hearing, finds the Bd. Of Probation and Parole abused their discretion.

"Review" >p14

Review *(from page 13)*

The trial court failed to timely hold a hearing and the time to order execution of the sentence expired, and Mertens is required to be released on probation.

7) State v. Lewis, #ED86961 (10/31/06)

Lewis was charged with child molestation. He sought a public defender and was turned down because his income was too high (300-400/wk) and he posted a $50,000 professional bond. After 13 months, he went to trial without an attorney, although he was advised several times by the trial court of the perils of self-representation. As a prior and persistent offender, he was sentenced to 30 years in the MoDOC. The appellate court upheld his conviction without an attorney finding the court found him ineligible for public defender services and placed on Lewis the burden of obtaining counsel and was given over a year to do so. Because he did not secure counsel he impliedly waived his right to counsel. However, the matter was transferred to the Missouri Supreme Court because of its general interest and importance. STAY TUNED

8) State v. Steger, #ED86872 (11/14/06)

Steger was questioned at the police station by several different police officers and several times asked to speak to his lawyer. At trial, the police testified, on several occasions, that Steger "wanted to talk to his attorney", "he wanted to talk to his lawyer", "he requested his attorney, requested a lawyer". Steger's lawyer did not object to these statements during trial and the claim of error was not in the motion for new trial. Steger was sentenced to the MoDOC for a 10-year prison term. Seeking "plain error" review, Steger claimed on appeal that his rights under the 6th Amendment were violated, as well as his rights to Due Process and his 5th Amendment right to be _free from compulsory self-incrimination. On plain error review, the appellate court reversed Steger's convictions, finding trial errors prohibited by Doyle v. Ohio, 426 US 610 ((1976) Once a Doyle violation is found, the court may review the whole record for plain error that affects substantial rights and constitute a manifest injustice. Because there were repeated violations, there were no curative instructions by the court, the appellant's exculpatory evidence was not transparently frivolous, and there was not overwhelming evidence of guilt, the conviction can not stand. The inadmissible references to appellant's request for counsel had a decisive effect on the jury by creating an inference of guilt.

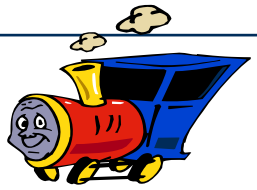
9) State v. Aaron, #WD65362 (1/23/07)

Witness Wiliams was called to testify at the preliminary hearing and was subject to a brief cross-examination by appellant's lawyer. When Williams was unavailable to testify at Aaron's trial, the state, over Aaron's objection, introduced a tape of William's preliminary hearing testimony. Aaron was convicted of voluntary manslaughter and ACA and he appealed, contending it was error to introduce William's PH testimony in light of Crawford v. Washington. In upholding the conviction the appellate court stated that Missouri law, prior to Crawford, allowed the introduction of the PH testimony, because Aaron's attorney had an opportunity of cross-examination. See State v. Holt, 592 SW2d759, 766 (Mo banc 1980) and State v. Griffin, 848 SW2d 464, 470 (Mo banc 1993). The appellate court found it bound by the precedent in Holt and Griffin, and absent a determination by the Missouri Supreme Court that those cases are inconsistent with Crawford, affirmed the convictions.

10) State ex rel Tuller v. Crawford,
#SD28050 (1/25/07)

Crawford was charged in Jasper County with the class B felony of promoting child pornography in the first degree. Seeking discovery, his attorney sought copies of the disc drive from Crawford's computer, as well as copies of digital and magnetic storage media seized from Crawford.

The State objected claiming they would violate federal law by producing these items to Crawford's attorney. The State cited Section 504 of Title 18, Section 3509, the Adam Walsh Child Protection and Safety Act of 2006, which allows a federal court to deny copies of child pornography materials being given to defense counsel, as long as it is reasonably available to the defendant. The trial court agreed that the defense was not entitled to copies, but could inspect the State's materials. The appellate court issued a writ of prohibition, prohibiting the trial judge from limiting the manner of disclosure to the defendant finding that federal procedures do not apply to state court procedures, and that Congress did not attempt to make Section 504 applicable to state court proceedings. The Court did authorize the trial court to enter a protective order to prevent defense counsel to make unauthorized copies or to distribute any of this type evidence.



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

Hitler's Justice: The Courts of the Third Reich

by Ingo Muller, transl. by Deborah Lucas Schneider
(Cambridge, Massachusetts: Harvard University Press, 1991).

Reviewed by S. Dean Price, Attorney at Law

Ingo Muller's book, originally published in 1987 as FURCHT- BARE JURISTEN: DIE UNBEWALTIGTE VERGANGENHEIT UNSERER JUSTIZ (literally, "Dreadful Jurists: The Remorseless Past of Our Judiciary"), describes the moral failure of the German legal profession and its role in expediting the warped ideals of the Nazi regime. Translated by Deborah Lucas Schneider, HITLER'S JUSTICE shows, first, how legal professionals ignored their obligations as lawyers, prosecutors and judges and, second, assesses the extent to which post-war Germany reformed its legal system, removed former Nazis from the judiciary, and re-dedicated itself to the rule of law.

This book is written in a slightly dry manner and is probably meant for an audience of lawyers and legal historians. It is, however, written with dedication and passion.

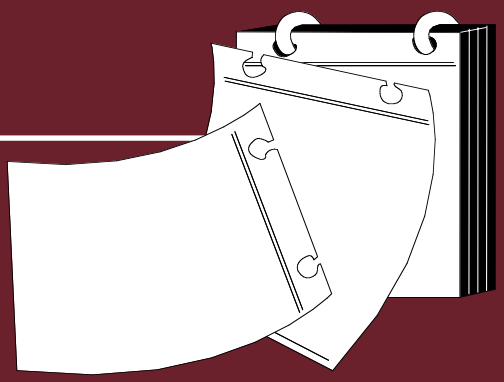
Muller, a former professor of law at Bremen University in Germany who now works in the Bremen justice department, argues that German lawyers and judges willingly cooperated with the Nazi regime and willingly invented the legal regulations that spelled out Nazi policies. The laws and legal policies of the Third Reich did not appear out of nowhere. Nearly all had strong precedents in the statues of the Weimar Republic and earlier. This does not mean, however, that there is a straight and inevitable line leading to the injustices under the Nazis — the connection makes the developments more understandable, but not excusable or justified.

How and why these developments occurred — and, more importantly, what sorts of awful precedents, polices, and injustices the jurists in Nazi Germany created — are all recounted in terrible detail. Muller's basic thesis is simple: lawyers, judges, law professors, and others involved in the criminal justice system were not innocent victims co-opted by a criminal regime; instead, they are morally and intellectually responsible for being willing participants in mass murder, terror, and the creation of a dictatorial state. They helped make the Third Reich possible because they were willing to set aside the principles of legitimacy, fairness, and justice which should have hindered the Nazi agenda.

After the war, some Judges tried to excuse their behavior by suggesting that if they had failed to co-operate with the government they would have faced serious consequences. Muller in fact examined the record of all Judges and found one who refused to impose the Nazi laws. He was simply retired. Muller has convincingly argued that the members of the German Judicial System were enthusiastic supporters of National Socialism.

The lessons found here are cautionary and remind this reviewer of the words of George Santayana: "Those who cannot remember the past are condemned to repeat it."

Mark Your Calendar!



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MACDL/ MO Bar DWI Seminar
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Lake Ozark, MO

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MACDL/ MO Bar Major Crimes CLE

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