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 Grant Shostak

All of us would agree that a jury trial is the most basic protection for a criminal defendant and to remain so, the right to a jury trial must be exercised regularly. In 2007, there were roughly twenty (20) criminal trials in the U. S. District Court for the Eastern District of Missouri. From the anecdotal evidence, it appears that this right is being exercised infrequently, especially in our federal courts. Of course there are many reasons why people aren't exercising their right to jury trial. Mandatory sentences as well as lengthy sentences recommended by the United States Sentencing Guidelines, of course, come to mind.

Last week I learned that Scott Rosenblum won what the prosecution viewed as a "slam dunk" gun and drug case with an extremely high guideline sentence (such as life) in a federal court where, at least according to court personnel, a defendant had not been acquitted in the last nineteen (19) years in such a case. A prosecutor's case against a defendant almost always looks better on paper. Sometimes the prosecutor's evidence, however, does not follow at trial. The trial is the place where witness and police misconduct can be exposed. Trials let the public see what is being done in the name of criminal justice. When too few cases go to trial, we lose those benefits.

Our job includes defending the adversary system that protects our client's rights. To that end, MACDL has assembled an all star cast to teach us what we need to know to win at trial at our upcoming April seminar. **"Making the Courtroom your Stage;"** this program will include presentations by Rafe Foreman, Rick Kammen, Milton Grimes, and Cyndy Short. All of whom are on staff at the Trial Lawyers College founded by renowned trial lawyer, Gerry Spence. In addition we will have presentations from Milton Hirsch, Jeff Eastman, Travis Noble, Carl Ward, and Tom Fleener.

Please make every possible effort to attend the **MACDL Annual Meeting and Spring CLE April 18-19, 2008 at Hilton Branson Convention Center, Branson, Missouri.**

Very truly yours,
Grant J. Shostak
MACDL President

Amicus Curiae Committee

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

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Missouri Association of Criminal Defense Lawyers

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Legislative Update

by Brian Bernskoetter

The 2008 session opened on January 9th and has been marked by the abrupt and unexpected announcement that Governor Matt Blunt will not be seeking a second term in office. This news has changed the landscape of the Missouri General Assembly and it is still unclear what the full effect of the Governor's decision will be until after the filing for office deadline passes in late March.

MACDL is currently tracking 110 pieces of legislation for this session. The legislature appears to be focusing their efforts on strengthening Missouri's immigration laws, providing property tax relief, and promoting a number of different bills dealing with education. There has also been some push to increase the use of ignition interlock devices for DWI offenders and legislation to change Missouri's Non-Partisan Court Plan for the selection of judges. MACDL will provide the members with further information as the session progresses.

Below is the list of several key pieces of legislation and the position that the MACDL Board has taken on these bills (some bills were filed after the January Board meeting so no official position has been taken by the Board). If you would like to read any of these bills in their entirety go to www.moga.mo.gov and click on "Joint Bill Tracking".

Bill Number	Sponsor	Bill Description
HB 1323	Sater	Requires the State Highway Patrol to create, maintain, and make available for public inquiry on the Internet a registry of persons convicted of certain drug offenses. **OPPOSE**
HB 1423	St. Onge	Changes the laws regarding ignition interlock devices. **OPPOSE**
HB 1436	Wildberger	Expands the DNA profiling system by requiring any person 18 years of age or older who is arrested for a felony to provide a biological sample for the purpose of DNA profiling analysis. **OPPOSE**
HB 1468	Pratt	Changes the laws regarding the crime of endangering the welfare of a child in the first degree and adds an increased penalty for possession of a controlled substance in the presence of a minor. **OPPOSE**
HB 1473	Cunningham-86	Changes the laws regarding stealing-related offenses. stealing offense can be enhanced to a felony. **OPPOSE**
HB 1502	Bruns	Expands the crime of resisting or interfering with arrest, detention, or stop to include arrests on probation or parole warrants and capias or bench warrants issued by federal, state, or municipal judges. **OPPOSE**
HB 1505	Smith-14	Creates the crime of cyber harassment and increases the penalty for the crimes of harassment and stalking when committed by an adult against a child. **OPPOSE**
HB 1514	Bruns	Expands the authority of a peace officer as designated by the Division of Alcohol and Tobacco Control to make arrests, searches, and seizures. **OPPOSE**
HB 1540	Jones-89	Changes the time restrictions for service of a summons for a proceeding before an associate circuit judge. **SUPPORT**

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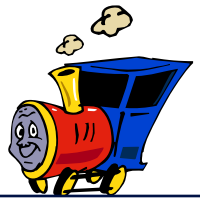
Legislative Update *(from page 2)*

Bill Number	Sponsor	Bill Description
HB 1550	Stevenson	Expands the jurisdiction of juvenile courts to include individuals who are over 17 but under 18 for the sole purpose of status offenses by redefining the terms "child," "adult," and "status offense". **OPPOSE** – Contact Charlie Rogers
HB 1552	Stevenson	Changes the laws regarding the prosecution of certain traffic-related offenses. **OPPOS**E – Contact Mike McIntosh, Dan Viets, and Tim Cisar
HB 1567	Parson	Creates the crime of murder of a criminal justice official and revises the crime of assault of a law enforcement officer in all degrees to include corrections officers. **OPPOSE** – Contact Charlie Rogers
HB 1593	Lipke	Lowers the blood-alcohol content to .08 of one percent for the crime of operating a vessel with excessive blood-alcohol content. **OPPOSE**
HB 1611	Dixon	Establishes a children's bill of courtroom rights that applies to all children testifying in court. **OPPOSE** – Contact Joe Passanise
HB 1642	Lipke	Changes the laws regarding crime prevention. **OPPOSE**
HB 1703	Bruns	Revises laws concerning the eligibility of prior, persistent, aggravated, and chronic intoxication-related traffic offenders for parole or probation. **OPPOS**E – Contact Jeff Eastman
HB 1870	Deeken	Establishes the Commission on the Death Penalty and places a moratorium on all executions until January 1, 2012. **SUPPORT**
HB 1997	Jones-117	Creates the "Law Enforcement Safety Act" which allows the identifying information on law enforcement officers to be removed from criminal case records.
HB 2031	Nasheed	Authorizes the sealing of certain criminal records.
HJR 49	Cox	Proposes a constitutional amendment increasing the number of Governor-appointed citizens serving on the Appellate Judicial Commission. **OPPOSE**
HJR 51	Lembke	Proposes a constitutional amendment repealing the Commission on Retirement, Removal, and Discipline of judges. **OPPOSE**
HJR 52	Lembke	Proposes a constitutional amendment creating a Bi-Partisan Judicial Merit Selection Commission for appointment of judges.
SB 733	Champion	Requires crime laboratories providing reports or testimony to a state court to be accredited.
SB 754	Mayer	Modifies provisions relating to the DNA profiling system. **OPPOSE**
SB 757	Engler	Provides for nonpartisan elections of judicial candidates and forbids such candidates from being affiliated with any political party. **SUPPORT**
SB 761	Stouffer	Modifies various laws relating to transportation and the regulation of motor vehicles. **OPPOSE**
SB 767	Goodman	Modifies provisions relating to the public defender system. **OPPOSE**
SB 784	Coleman	Eliminates mandatory minimum sentencing for certain felons. **SUPPORT**
SB 790	Champion	Creates a "Crime Laboratory Review Commission" to independently review the operations of crime laboratories in the state of Missouri that receive state-administered funding. **SUPPORT**
SB 795	Bartle	Modifies the time when a search may be conducted pursuant to a warrant. **OPPOSE**
SB 818	Rupp	Modifies various provisions relating to stalking and harassment, including creating the crimes of cyber harassment and cyber stalking. **OPPOSE**
SB 861	Shoemyer	Redefines the term "intoxication-related traffic offense" **OPPOSE**
SB 968	Shields	Provides that nonpartisan commissions that select judges for gubernatorial appointment shall be subject to the Missouri Sunshine Act and shall not close meetings, records or votes relating to personnel matters. **OPPOSE**
SJR 30	Coleman	Creates an exception to the prohibition against laws retrospective in operation by allowing the sexual offender registry laws to be applied retrospectively.

Welcome Aboard!

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



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Total Hits	531,233
Average Hits per Day	804
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Total Page Views	63,844
Average Page Views per Day	96
Average Page Views per Visitor	1.83
Visitors	
Total Visitors	34,847
Average Visitors per Day	52
Total Unique Visitors	5,798

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Top Ten Federal Decisions

by Bruce C. Houdek

Gall v. U.S., 128 S.Ct. 586 (2007).

The District Court may not presume that the guideline range is reasonable. On review of a District Court's sentence below the guideline the Court of Appeals must give deference to the District Court's determination and the standard of review is abuse of discretion.

Kimbrough v. U.S., 128 S.Ct. 558 (2007).

A District Court may vary from the guideline range based upon its determination that the 100-to-1 ratio for crack and powder cocaine quantities results in a greater punishment then necessary for a crack defendant.

U.S. v. Lehmann, ___ F.3d ____, 2008 WL 150667.

This is the first 8th Circuit case to apply the Supreme Court decision in Gall v. United States 128 S. Ct. 586 (2007) and provides a primer for the Court and counsel illustrating how to make a record to justify a downward variance from a low guideline of 37 months to probation. This probation would never have been approved by the 8th Circuit prior to the Courts decision in Gall.

U.S. v. Boyce, 507 F.3d 1101 (8th Cir 2007).

Where a defendant objected to evidence contained in the Presentence Report relating to defendants criminal history the Government has the burden of offering evidence to prove the defendant's criminal history.

U.S. v. Grooms, 506 F.3d 1088 (8th Cir. 2007).

A search of a vehicle previously occupied by the arrestee can be incident to a custodial arrest and is constitutionally permissible as incident to the arrest of a "recent occupant". No proof of a threat to officers safety or evidence of destruction of evidence is required.

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

United States Supreme Court has granted certiorari to review the 8th Circuit decision which added 180 months to the defendant's sentence in the abstinence of any appeal by the Government.

U.S. v. Zackery, 494 F.3d 644 (8th Cir. 2007).

A defendant can be convicted of violating 18 U.S.C. § 924 (c) use of a firearm in a bank robbery under rule of Pinkerton v. U.S. 328 U.S. 64 (1946) even though no conspiracy is charged where the Court found it was reasonably foreseeable that his follow robber would possess a weapon during the commission of the robbery.

U.S. v. Miguel Angel Rolon-Ramos, 502 F.3d 750 (8th Cir. 2007).

Defendant was convicted of conspiracy to distribute 500 grams or more of methamphetamine. The 8th Circuit reversed finding that the proof of the amount of methamphetamine was insufficient while sustaining the conviction. The case is remanded for re-sentencing based on less than 500 grams.

U.S. v. Mosley, 505 F. 3d 804 (8th Cir. 2007).

The Court of Appeals found a breach of the Plea Agreement by the Government when it failed to comply with its agreement to recommend a downward adjustment for acceptance of responsibility. The case is remanded for re-sentencing before a different district judge.

U.S. v. Kattaria, 503 F.3rd 703 (8th Cir. 2007).

Reasonable suspicion only and not probable cause is required to obtain and investigative warrant to conduct a limited thermal imaging search from outside a residence.

MISSOURI POST-CONVICTION UPDATE

This article summarizes favorable post-conviction cases decided since July 26, 2007.
As noted, some of the opinions discussed below are not yet final; please check the current status of the decision before citing.
The reader will notice that this article is shorter than usual. Not much good news!

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

Buchli v. State, 2007 WL 3340923 (Mo. App. W.D. Nov. 13, 2007)

The movant was entitled to a new trial where the state failed to disclose a potentially exculpatory security videotape that would have assisted him in impeaching the state's evidence and show that he did not have time to commit the crime. The motion was adequate to allege this claim although some facts supporting it were not alleged in the motion: "[T]he State cites no authority — nor do we find any — that Buchli was obligated to recite in his motion every fact underlying his claim." The movant adequately established the materiality of the suppressed evidence and prejudice.

Congratulations to Robert E. Gould and Richard W. Johnson, Mr. Buchli's lawyers.

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

Smith v. State, 2007 WL 4339876 (Mo. App. S.D. Dec. 13, 2007) NOT YET FINAL

Remand was required to determine whether the movant was abandoned by post-conviction counsel. After the pro se motion was filed and counsel was appointed, counsel filed a motion for extension of time to file an amended motion, but did not file one. This created a presumption of abandonment requiring a hearing.

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

Griffith v. State, 233 S.W.3d 774 (Mo. App. E.D. 2007)

Remand was required for trial court to enter specific findings of fact and conclusions of law on defendant's claim in his motion for postconviction relief that defense counsel was ineffective at trial for sex offenses against children for failing to object to the state's closing argument that they should convict and imprison the defendant because of his admission of a prior sex offense. The trial court neither granted a hearing nor made findings of fact and conclusions of law based on the record, and the allegation was properly pleaded in the motion.

Congratulations to Gwenda R. Robinson, Mr. Griffith's lawyer.

Coke v. State, 229 S.W.3d 638 (Mo. App. W.D. 2007)

The movant was entitled to an evidentiary hearing on his allegation that trial counsel assured him he would serve only 17 months in prison before parole, and that movant relied on this assurance in pleading guilty. While a defendant need not be advised by counsel about parole eligibility, if he is "grossly misinformed" about parole eligibility, he may have a meritorious post-conviction claim. The fact that he acknowledged at the plea hearing that no promises had been made to him did not refute the claim where the issue of parole was not addressed.

Congratulations to Rosalynn Koch, Mr. Coke's attorney.

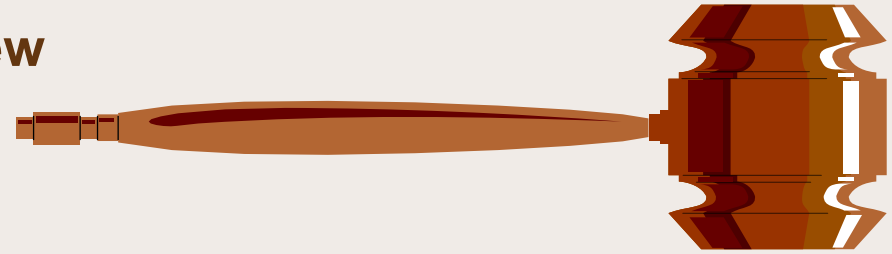
Elverum v. State, 232 S.W.3d 710 (Mo. App. E.D. 2007)

The movant was entitled to an evidentiary hearing on his allegation that his pleas of guilty were not knowingly and voluntarily entered because he was unaware of the minimum and maximum punishments and that the sentences could run consecutive. The plea hearing record did not reflect that the movant was fully informed on these issues.

Congratulations to Alexandra Johnson, Mr. Elverum's lawyer.

Criminal Law Review

by Bernard Edelman



1) State v. Rushing, SD#27749, (Mo. App. 9/10/07)

Defendant was convicted of sexually abusing his daughter. Six days before trial, the daughter told the prosecutor about a new act of abuse that she had never reported. The prosecutor advised the defense lawyer of this new allegation which caused the lawyer to seek a continuance of the trial setting to take a deposition as to this new allegation. The defense lawyer filed a notice of deposition, which was quashed by the Court on motion of the prosecutor. Trial commenced and the daughter testified about this new allegation.

Appeals Court: A violation of discovery rules is reversible error if it results in fundamental unfairness or prejudice to a defendant's substantial rights. The protective order was improperly granted because the State's Motion did not articulate any appropriate grounds constituting "good cause", no evidence was presented on that issue, and the trial judge did not make any written or oral finding that there was "good cause" for the issuance of the protective order. The trial court's decision to prohibit the victim from being deposed as to this new allegation rendered defendant's trial fundamentally unfair. CONVICTION REVERSED.

2) State v. Wade, #WD67363 (Mo. App. 9/1107)

The State appealed the dismissal of a Child Endangerment charge. The defendant had used marijuana and methamphetamine while pregnant. When the child was born, he testified positive for both drugs and the State charged defendant with child endangerment.

Appeals Court: A person violates the Child Endangerment statute, Sect. 568.045 RSMo, by knowingly acting in a manner that creates a substantial risk to the life and body and health of a child less than 17 years of age. The plain language of the statute does not proscribe conduct harmful to a fetus and the defendant could not be prosecuted for her pregnancy-related conduct. JUDGMENT OF DISMISSAL AFFIRMED.

3) State v. Ezell, #WD67206 (Mo. App. 9/25/07)

Appellant was convicted of Child Molestation. During voir dire the prosecutor asked potential jurors whether they would automatically disbelieve the victim's testimony because she waited several months to report the abuse. Appellant's attorney objected to this line of questioning because the state was improperly seeking a commitment from the jurors.

Appeals Court: The inquiry was to seek bias or predisposition of the potential jurors. The phrasing of voir dire questions, in a manner which pre-conditions the juror's minds to react even subconsciously in a particular way to anticipated evidence, is an abuse of counsel's privilege to examine prospective jurors. The test of the questioning is its relationship to a critical fact of the case and whether the questioning is phrased in such a way as to uncover rather than inject bias or prejudice. The State was as entitled to ask whether any potential juror would dismiss the child's testimony because of a delay in disclosure as the defense was allowed to (and did) ask whether any juror believed that a child would never lie about sex abuse. CONVICTION AFFIRMED.

4) State v. Wrice, #ED88727 (Mo. App. 10/16/07).

Defendant was charged with Robbery and ACA, and at arraignment, the State filed its normal Request for Disclosure Motion asking for alibi information. No such information was disclosed to the State by the defendant. When defendant's attorney met with defendant, the day before trial, she learned defendant had a significant alibi defense, never disclosed to the

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State. The attorney could not make contact with the witness until the State had concluded its case, and then brought the matter to the attention of the trial court. Defendant made an offer of proof through the alibi witness. The trial judge was concerned that the late disclosure was prejudicial to the State, and pondered its options. The judge proposed a continuance to allow the State to investigate the alibi defense, but the State asked for a mistrial, which the defense lawyer did not consent to. The trial court reviewed State v. Stevenson, 589 SW2d 44 (Mo. App. E.D. 1979), identical to the situation on hand, which suggested double jeopardy would attach unless the defendant consented to the mistrial. The trial judge concluded that the witness was critical to the defense, but that the State would be prejudiced without an opportunity to investigate the alibi defense, and on grounds of manifest injustice ordered a mistrial. When the second trial was about to begin, defendant moved for dismissal on Double Jeopardy grounds. The trial court reviewed its earlier decision and determined the appropriate remedy, upon surprise to the State, was to order a continuance, and not to declare a mistrial. The Court sustained the Motion to Dismiss and the State appeals.

Appeals Court: Double jeopardy attaches when a jury is impaneled and sworn. A defendant has a fundamental right to have his case heard to completion by a particular tribunal. Double jeopardy does not attach if the defendant requests or consents to the mistrial. If the defendant does not consent, we must review the trial court's decision to grant a mistrial for an abuse of discretion. Double jeopardy will bar a mistrial unless there was manifest necessity to declare it. Manifest necessity exists where a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. The mistrial was sought by the State and ordered by the Court to remedy the surprise to the State. The surprise could have been tempered by a continuance, rather than a mistrial. Instead of postponing the case to allow the State the time to attempt to determine the accuracy and truthfulness of the alibi witness's testimony, the Court chose to grant the State's request for a mistrial. Because a less drastic remedy was available to the Court, a continuance, there was no manifest necessity to grant the mistrial and the trial court's decision to do so was an abuse of discretion. JUDGMENT OF DISMISSAL AFFIRMED.

5) State v. Salazar, #SC88438 (Mo. banc 10/30/07).

A default administrative order issued by the Division of Child Support Enforcement determined that Salazar was the father of a child born to his wife during their marriage. The couple had separated 13 months before the birth of the child. When Salazar's wife sought public assistance, DCSE served Salazar with pleadings indicating he had a duty to support the child born during his marriage. Salazar and his wife both advised DCSE that Salazar was not the father, but Salazar did not appear at the hearing and a default order was entered declaring Salazar to be the father and requiring him to pay child support. Salazar was charged with Criminal Nonsupport and both testified at Salazar's trial that he was not the father of the child. The trial court found Salazar guilty, not premised on him being the biological father of the child, but premised on its belief that the DCSE order constituted legitimization by legal process. Salazar was sentenced to 28 days in jail and he appealed.

Supreme Court: A man is presumed to be the father of a child born during his marriage to the child's mother. When Salazar failed to appear at the administrative proceeding, a default order was appropriate. The issue is whether a default order constitutes a "legal process", sufficient to support a criminal conviction for nonsupport. Section 454.490 RSMo provides that the default order upon docketing with the Court has all the force, effect and attributes of a docketed order or decree of the circuit court, including but not limited to lien effect and enforceability by supplementary proceedings, contempt of court, execution and garnishment. The State claimed that this statute established "legal process" sufficient to sustain the conviction. Section 568.040.2(1) RSMo states that for purposes of the criminal nonsupport stature, a "child" means any biological or adoptive child, or any child legitimized by legal process. However, Sect. 454.490 does not expressly provide that the docketed order can serve as a predicate for a criminal offense. That the order is subject to enforcement does not definitely establish that the docketed default order constitutes "legal process." The docketed order can be enforced by the circuit court, but cannot be an actual judgment absent judicial review, which did not occur. An executive branch decision by the DCSE is not a final judgment unless determined by the independent power of the circuit court to determine final judgments. Because there was no final judgment, there was no "legal process" that determined Salazar's parentage and the child was not legitimized by "legal process." CONVICTION REVERSED.

6) State v. Taylor, #SC88426 (Mo. banc 11/20/07).

Defendant was convicted of forcible rape in the City of St. Louis. The victim had gone to the St. Louis police more than four years after she claimed the defendant, her stepfather, had raped her. The police drove her around, attempting to find the location of the rape, which she could not recognize, but believed it happened in the City of St. Louis. Defendant filed a pre-trial Motion to Dismiss on the grounds of improper venue arguing that the victim could not identify where in St. Louis the crime occurred, which was overruled. At the close of all the evidence, Defendant filed a Motion for Judgment of Acquittal based on improper venue, which was overruled. The trial court refused to let defendant argue that the state had not proved that the rape occurred in the city of St. Louis, but allowed defendant to argue that her inability to locate the place of the crime affected her credibility. Defendant argued that the victim was lying, because if she were telling the truth she would know where the crime occurred. Defendant's appeal contended that the trial court impermissibly lessened the state's burden of proof to prove as an element of the offense that the crime occurred in the county where the trial was being held.

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Supreme Court: The state has the burden of proof beyond a reasonable doubt of each and every element of the crime. Under the rape statute, location is not a fact necessary to constitute the crime. The state does not have a burden to prove the location of the crime beyond a reasonable doubt. MAI-CR 320.01 does require the state to prove that the crime occurred in the county where the trial is being held. While not an element of the crime, correct venue is an important procedural right of any criminal defendant, as the Mo. Constitution, Article I, section 18(a), provides that a criminal defendant has the right to stand trial in the county he is alleged to have committed the crime. When an Instruction conflicts with a statute, the statute prevails. To the extent that MAI-CR 320.01 makes venue an element of the offense of rape, it is incorrect.

A defendant's objection to venue must be made pre-trial or it is waived. If an objection is made, the trial court must determine the issue. The prosecution must prove by a preponderance of the evidence that the crime occurred in the county where the case was filed. If the state can not prove appropriate venue, then the judge shall transfer the case to the county of the appropriate venue. To the extent that prior cases required the state to prove venue "at" trial, they no longer should be followed. The jury's verdict of guilt reflects its decision, beyond a reasonable doubt, that the crime occurred in St. Louis. CONVICTION AFFIRMED.

7) State v. Ellison, #SC88468 (Mo. banc 12/4/07)

Defendant was charged with Child Molestation. At trial the prosecutor was allowed to prove, pursuant to Sect. 566.025 RSMo, defendant's prior conviction for sexual abuse, to establish defendant's propensity to commit the crime charged. MAI-CR 310.12, read to the jury, stated that they could consider defendant's prior plea to sexual abuse as evidence on the issue of propensity to commit the crime with which he is charged. Defendant was convicted, was sentence to 20 years MDC and appealed. His appeal centered on whether Sect. 566.025 was constitutional.

Supreme Court: Article I, section 18(a) states that a defendant has "the right to be tried only on the offense charged." Prior case law shields defendants from the perception that a person who has acted criminally once will do it again. While prior criminal acts may be admissible to establish motive, intent, absence of mistake or accident, common scheme or plan, or identity, the Missouri Constitution prohibits the admission of previous criminal acts or convictions as evidence of the defendant's propensity. CONVICTION REVERSED.

8) State v. Smith, #ED89460, (Mo. App. 12/11/07).

Defendant's wife went to a police station, shaking and crying and told police that defendant had grabbed her neck and choked her She said she was afraid that defendant would kill

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her. She testified at defendant's preliminary hearing. The parties reconciled and she would not testify at trial, claiming spousal privilege. Her statements to the police were admitted at trial and defendant was convicted of Domestic Assault and sentenced to four years MDC. Defendant appealed contending that her statements to the police were inadmissible as they violated the Confrontation Clause of the 6th Amendment and violated the holding of Crawford v. Washington, 541 US 36 (2004).

Appellate Court: The wife's statements to the police at the station were testimonial and subject to the Confrontation Clause under Crawford. Defendant's complaint was he had no right to discovery prior to the preliminary hearing. Here, the trial court admitted the hearsay statements of an unavailable witness who testified at a preliminary hearing. Defendant had no right to discovery prior to the preliminary hearing. State v Aaron, 218 SW3d 501, 508-509 (Mo. App. 2007) The lack of discovery before the PH did not render the witness's testimony inadmissible and did not violate defendant's rights under the Confrontation Clause. CONVICTION AFFIRMED.

9) State v. Cox, #WD67832 (Mo. App. 1/2/08).

Defendant was stopped because his windows were improperly tinted. During the traffic stop, the Highway Patrol officer conducted a consent search and found 4.5 pounds of marijuana. Defendant was charged with the Class B felony of Possession With Intent to Distribute. Immediately before trial, defendant notified the court that he intended to claim the defense of necessity, asserting he needed marijuana for his medical problems. The circuit judge ruled that, as a matter of law, the defense was not available to him. The court found the defendant guilty and he appealed.

Appellate Court: Defendant's complaints as to lack of proof of an intention to deliver and of an unlawful search and seizure were overruled. Defendant also claims the trial court erred in excluding evidence regarding his medical need for marijuana to relieve pain and suffering from a spinal cord injury. A necessity defense under Section 563.026 RSMo is limited to circumstances in which: (1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger; (3) there is no legal alternative which will be effective in abating the danger; and (4) the legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue. See State v Stewart, 186 SW3d 832,834 (Mo. App. (2006)

The Circuit Court did not err in excluding Cox's defense. The Missouri Legislature has acted to preclude medical necessity as a defense to a charge of possessing marijuana by classifying marijuana as a Schedule I substance. Schedule I drugs have a high potential for abuse, and have no accepted medical use in treatment in the US or lacks accepted safety for use in treatment under medical supervision. Section 195.017.1 RSMo. The Legislature's classification precluded the circuit court from deeming defendant's use of marijuana as necessary for medical purposes. CONVICTION AFFIRMED.

How to Save Your Client While Saving the Court Time

by Inese A. Neiders, Ph.D., J.D.

Trial courts are afforded great latitude and discretion in structuring the method by which voir dire will be conducted. Jury selection plays a critical function in assuring the criminal defendant that his sixth Amendment right to an impartial jury will be honored. Without adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able to follow the Court's instructions and evaluate the evidence cannot be fulfilled. The entire voir dire should be directed to determine whether, for any reason, a juror has a bias of mind in favor or against either party such that his impartiality as to guilt would be impaired.

The most cost-effective and timesaving approach to jury selection is the questionnaire. Jury questionnaires are increasingly being used in both civil and criminal cases. Most often, questionnaires have been used successfully in death penalty cases, white-collar cases, child rapes cases, police brutality cases, battered women's cases and drug cases.

The major reasons for using the questionnaire are the following:

1. The questionnaire streamlines the jury selection process. Courts, clients and lawyers save time often wasted in unnecessary repetition of questions. The questionnaire can be distributed to jurors and filled out by them before voir dire is conducted in court. Each juror's questionnaire can be photocopied prior to the trial and copies can be provided to each of the parties and one copy to the judge. These copies are to be used by all parties solely for the purpose of jury selection.
2. The questionnaire allows a greater number of questions to be administered to each juror. This results in greater accuracy in the use of challenges. More potential biases may be uncovered; so more competent voir dire can be conducted.
3. The questionnaire permits jurors to consider their answers more carefully. The jurors do not have to respond immediately to questions. Instead, they can think about their answers. This is critical if they are repressing unpleasant memories, such as being victimized.
4. The questionnaire gives the jurors a sense of privacy, as does individual in-court voir dire. Jurors can answer questions without being required to give their answers in a very public and formal setting. This permits more personal responses to the questions. Jurors will not be required to state that they dislike the prosecution or the defendants in open court. They can do so privately.
5. The questionnaire also permits the lawyers and judge to assess the literacy level of the jurors, because they are required to write the answers. This also is a measure of the ability of the jurors to relate to complex ideas that they are not likely to use in their daily lives. These complexities may arise because of legal issues, complex evidence or complex testimony, particularly from expert witnesses.
6. The questionnaire is useful because written, rather than oral, responses assist the lawyers in recalling the responses of the jurors. Recall of oral materials declines very quickly, particularly over the first twenty-four hours.
7. The questionnaire provides better information for jurors not in the box. In many jurisdictions, most of the jurors are almost ignored. The jurors in the box receive most of the attention of the lawyers. In fact, often jurors are ignored when they raise their hands.
8. The questionnaire pivots a more unbiased finding of the juror's responses than the oral voir dire provides, because the lawyer cannot influence the jurors by the way he or she asks the questions. The personality of the lawyer does not influence the respondents.
9. The questionnaire provides a way to measure each juror's own biases and ideas rather than those of the other jurors. When jurors are questioned in a group, they often give the same responses as the other jurors. Since each juror must fill out the questionnaire without the input of the other jurors and does not hear the responses of the other jurors, he or she cannot give the same response that the other jurors do, but must arrive at his or her own answers, measuring the juror's own opinions and biases.
10. The questionnaire reduces the jurors' opportunity to contrive to be seated or excused. A juror who has reasons for being excused must state them without having seen which excuses have (or have not) worked for other jurors.
11. The questionnaire method does not permit the jurors to hear the responses of the other jurors. Thus, the opinions and biases of the other jurors cannot contaminate the jurors. This is critical if some jurors are not only biased but articulate.
12. The questionnaire can incorporate complex and reliable "lie scale" measures. Historically, questionnaires have incorporated these measures. This is critical for such issues as race, sex and money in particular.

"Save Time and Money" >p12

Save Time and Money *(from page 11)*

13. The questionnaire can incorporate open-ended questions, multiple choice or forced-choice questions. Generally, it makes the open-ended questions easier to rate and allows for the greater use of multiple-choice questions that are also easier to rate.
14. The questionnaire approach makes it difficult for the jurors to figure out whether it is the defense attorney or the prosecution who wants to know the answers to the questions. Therefore, they do not know with whom to be upset when they do not like some of the more personal questions such as those related to sex or finances. This is important because some of the most critical questions are sensitive questions and may evoke such feeling and bias among the jurors.
15. The questionnaire approach is less expensive than other jury selection approaches such as surveys and mock juries. Therefore, more criminal defendants will be able to use the method. In situations where courts allocate funds for jury selection, the more expensive methods should be used with this approach.
16. The questionnaire reduces the time and tedium involved in asking questions repeatedly.
17. The questionnaire is helpful in arranging a better plea bargain since the prosecutors are aware the defense attorneys are prepared.
18. Finally, the questionnaire approach is fair to both the defense and the prosecutors. Both have access to the information generated by the instrument.

I do not recommend this procedure for every criminal case. It is critical in cases that involve very high penalties, cases that involve extensive pretrial publicity, cases that are located in areas that are noted for discrimination or volatile ethnic relations or cases involving sensitive issues that may easily evoke prejudice in jurors.

The questionnaire is only one tool to measure beatitudes and does not resolve all jury selection problems. It does provide a cost-effective approach to ensure that jurors who will be seated are competent.

A Sample Set of Juror Questions
-- Mary Winkler Revisited --

The Author's Thanks:

I would like to thank Leslie Ballin, Steve Farese, Sr., Anthony Farese, and Steve Farese, Jr. with special thanks to June Young of Ballin, Ballin & Fishman. Dr. Lynn Zager was the expert witness who tested Mary Winker and presented her work at trial.

Background:

Mary Winkler killed her preacher-husband with a shotgun blast to the back as he lay in bed. The case received much pretrial publicity. Sixty days of her sentence were served in a facility where she received mental-health treatment. Mary Winkler had been abused by her husband verbally and physically. Mr. Winkler was even beginning to abuse the youngest one of the three girls. In her particular situation, her religious beliefs prevented her from obtaining a divorce. After she was apprehended, she made a statement to the police that it was "all her fault." At one point, she told one of the lawyers that being in jail was easier than being married.

Relatively few cases have a battered woman as a defendant. On the following pages are some questions useful in Mary Winkler-type cases. Of course, each case is unique and questions should be tailored to the specific circumstances.

About the Author

Inese A. Neiders, Ph.D., J.D. is a jury consultant who assists lawyers in trial preparation, jury selection and trial presentation. Her Ph.D. is in sociology from Ohio State University and her J.D. is from Case Western Reserve. She has assisted lawyers in jury selection throughout the country. Lawyers with whom she has worked have been successful in defending death penalty cases, white-collar cases, child sex cases, drug cases, police brutality cases, as well as civil cases.

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A Sample Set of Juror Questions

1. What is your current marital status? (Mark with X to all that apply)

_____Single
_____Never married
_____ Married _____ years
_____Living with someone
_____Separated
_____Widowed
_____Divorced
_____Divorced and remarried

2. Do you have children?

_____Yes _____No

If so, how many? _____

3. Have you had training in:

_____criminology
_____police science
_____law
_____psychiatry or psychology
_____family
_____child development
_____medicine or nursing
_____social work

If yes, please explain: _____

4. Do you go to a church or temple?

_____Yes _____No

If yes, what is the name of your church or temple? _____

If yes, how frequently? _____

5. Do you think you know a great deal about the law?

_____Yes _____No

If yes, please explain: _____

6. Do you think you know a great deal about family issues?

_____Yes _____No

If yes, please explain: _____

7. Were you ever involved in combat?

_____Yes _____No

If yes, please explain. _____

8. Have you ever had a bad relationship with someone you consider(ed) a significant other?

_____Yes _____No

If yes, please explain.

_____

9. Have you known anyone who stayed in an abusive relationship?

_____Yes _____No

Did the person leave or stay? _____

10. Why do you think someone would stay in a bad relationship? (Mark "X" to all that apply.)

_____ The children
_____ Finances
_____ Poor moral values
_____ Refusing to improve the relationship
_____ Too afraid to leave
_____ I do not believe anyone should leave a marriage no matter how bad it is.
_____Other: _____

11. Think of the most violent act by another family member or close friend that you have experienced. Which describes what you did?

_____Hit back
_____Threw something
_____Cried
_____Yelled or cursed him or her
_____Ran to another room
_____Ran out of the house
_____Called a friend or relative
_____Called the police
_____Other: _____

12. Do you personally believe that laws which say that a person who suffered from "the battered woman syndrome" can use that syndrome to establish they were forced to use self-defense?

_____Yes _____No

13. Do you personally believe that the criminal laws of the United States or any state are too lenient on women defendants?

_____Yes _____No

14. What are the three most serious problems that churches face today?

_____

15. What are the three most important problems that families face today?

_____

16. Please give your opinion as to the honesty of each of the following groups (Rate each of the following occupations from one (1) to ten (10); 1=least honest; 10=most honest)

_____Defendants in criminal trials
_____Judges
_____Criminal defense attorneys
_____Prosecutors
_____Police officers
_____Psychologists testifying for the defense
_____Newspaper and TV reporters
_____Psychologists testifying for the prosecution

17. Have you ever been fearful that a specific person was about to commit a crime against you or another person or property?

_____Yes _____No

If yes, was the person you were worried about committing a crime:

_____A stranger _____Someone you knew _____A member of your family

Please explain briefly. _____

18. Have you ever personally known someone accused of spousal abuse?

_____Yes _____No

If yes, please describe the circumstances. _____

19. Do you think violence in the family has:

_____gone down in recent years. _____gone up in recent years. _____Don't know

20. Have you heard anything about this case that you think is true?

_____Yes _____No

If yes, what did you hear that you think is true? _____

21. Do you feel that you would have to justify your verdict to anyone after the trial or do you feel that your decision as a juror would be respected?

_____Yes _____No

If yes, who might that person be? _____

22. Have you ever discussed this case with anyone?

_____Yes _____No

If yes, whom did you discuss it with? _____

What did you say? _____

What did they say? _____

23. Please rate each question with the number which most clearly expresses your personal belief on a one (1) to ten (10) scale. 1=strongly disagree; 10=strongly agree

_____ I would not look up information on the internet about this case or any battered women's case if the judge told me not to.
_____ I know people who defend family members no matter what the family members do.
_____ I think people who are middle class are just as likely to commit crimes against others.
_____ I would never tell anyone that they are fat.
_____ Men often make statements that they do not mean to their wives.
_____ I support the use of severe penalties for people who commit crimes against family members.
_____ No one really knows what happens between a man and a woman.
_____ I believe a man should be the head of the household.
_____ I believe that only physical evidence can be helpful in deciding the guilt or innocence of a person.
_____ Minister's wives should be held to a higher standard than other people.
_____ A confession should be taken on its face.
_____ Everyone deserves a second chance.
_____ Too many women do not have self-control when with their husbands.
_____ It's too bad that women do not respect their husbands like they used to.
_____ In a family dispute, I tend to believe the man more.
_____ Women's roles have changed too much.
_____ People who put down family members should be more careful of what they say.
_____ Many girls grow up today not having enough respect for their husbands.
_____ Some of my family and close friends often put down their wives.
_____ Women are more likely to be violent than most people think.
_____ I apologize when I make mistakes and sometimes even when the other person is wrong.
_____ It is possible to use psychological evidence to determine if a person is guilty.
_____ Sometimes I have been so upset that I did not know what I was doing.
_____ I do not believe in divorce.

Author's Note:

This last section includes reverse questions. Some of the questions are extreme, but anyone who would agree to the statement, really would have to be removed from the jury. For example, if anyone believed that girls grow up not to have enough respect for their husbands, that jurors should be challenged. These questions were specifically designed for this case although some could be used in other battered-wife cases. It is better to start with many questions and cut down the number, rather than not to have enough questions. In Mary Winkler's case, the questionnaire was not used by the judge, but the lawyers were prepared for trial.

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