MACDL
Missouri Association of Criminal Defense Lawyers

Newsletter

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FROM THE DESK OF

By Timothy R. Cisar
MACDL President

Winter, 2005

The new state legislature term has convened. Your MACDL Board met on January 22, 2005, and went over with our lobbyist all pending bills pertaining to criminal law. After discussion about each bill, the Board decided which one to support or oppose. The Board then decided on each bill whether an attorney should show up and testify at the committee hearings. This process is time consuming. The level of expertise and professionalism, which is displayed by your Board both at the Annual Meeting to discuss these bills and in committee meetings at the state capital, is overwhelming. The amount of time, which is volunteered by your Board, always makes me proud to be associated with this group.

If anyone is interested in becoming a part of this process, please let us know at 573-636-2822 or at www.macdl.net. There is always a need for help at the committee level. Appearing before a state legislature committee is both an honor and fun. I ask all of you to call and offer to do so. We will help with the content of the testimony.

On another subject, it appears the federal sentencing guidelines are in the process of becoming advisory. United States vs. Booker, 04-104 and United States vs. Fanfan, 04-105 (2005 W L 50108). For those of us who stayed away from the federal system because of these guidelines (and our lack of understanding thereof), I hope this affords us an opportunity to get into the federal arena. Before doing so, I urge you to contact any number of our colleagues who regularly practice in the federal courts and seek their help. It is refreshing to see some shedding of "constitutional light" upon our system.

Another aside, if you have not yet digested Crawford vs. Washington, US, 124 S. Ct. 1354 (2004), from our U.S. Supreme Court from last year, do so. It is monumental in certain areas regarding the direct or indirect testimony of witnesses.

Keep up the good work. Do not be resistant to sharing with your colleagues what is going on in your practice and your personal life. It may help keep you sane.

Thank you

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MACDL would like to thank our sponsors at our 2004 Fall Conference held in October:

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Thank You!

Notes On Calculating The Statute Of Limitations For Filing Federal Habeas Corpus Petitions Challenging State Convictions

By Lew Kollias and Elizabeth Unger Carlyle

There is a one-year period of limitation for filing a federal habeas corpus petition challenging a state conviction. This article will briefly discuss the calculation of the due date of the petition under various scenarios common in Missouri. **THIS IS A CRITICAL CALCULATION, BECAUSE VIOLATIONS OF THE STATUTE OF LIMITATION ARE SELDOM EXCUSED**. It is important for state practitioners to advise their clients correctly of the deadline.

1. When the year starts to run after direct appeal:

The statute provides that the year begins to run when the state court conviction becomes final. For the purpose of the statute, the decision is final:

1) the date of the appellate court decision if no after-opinion motions are filed, plus 90 days for expiration of the time to file a petition for certiorari to the United States Supreme Court; or

2) the date certiorari is denied if a certiorari petition is filed; or

3) the date of the appellate court decision denying rehearing if transfer is not sought, plus the 90 days noted above to file for certiorari; or

4) the date of the Missouri Supreme Court decision denying transfer, if sought there, plus the 90 days noted above to file for certiorari.

The important thing to remember here is that ***the mandate*** is irrelevant in this analysis. The U.S. Supreme Court rules specifically provide that the time for seeking certiorari runs from the decision date, not the date the court issues its mandates. The mandate is always later than the decision date. In contrast to the U.S. Supreme Court rules, Missouri Rule 29.15 provides that the trigger for the filing deadline is the date of the issuance of the appellate court's mandate. The filing of a "properly filed" state post-conviction proceeding stops the running of the one-year federal limitation period while the proceeding is "actually pending" in a Missouri court. But, if the client waits the entire 90 days from the mandate to file his initial Form 40, there will be a period that must be deducted from the one-year federal limitation period.

Example: The client's case was decided by the appellate court on June 1, 2005. No post-opinion motions were filed. The mandate issued on August 31, 2005. The client filed his timely 29.15 motion on November 29, 2005. His PCR was denied, and the denial was affirmed on appeal on June 1, 2006.

Any federal habeas corpus petition would be due March 1, 2007, rather than May 31, 2007. The 90 days between the date when the case became final for federal habeas purposes [June 1 plus 90 days to file certiorari] and the time the 29.15 motion was actually filed count against the limitation period.

2. When the time begins to run again after the 29.15 Appeal.

The federal time will begin to run on the day after the last decision by the state court, which is either from the date of the decision of the appellate court if no post-opinion motions are filed, or the denial of rehearing if no transfer motion is filed, or denial of transfer by the Mo. S.Ct. The time to file for certiorari does not toll the statute, because the statute provides that only periods when the PCR is "actually pending" in *state* court are excluded. While some have argued that the 15 day period for filing post-opinion motions should be excluded even if no motion is filed, there is no case law supporting this position. Therefore, to be on the safe side, clients should be advised to count this 15 day period as part of the one-year limitation period.

3. When the time begins to run in guilty plea cases.

All of the time between sentencing and the filing of a Rule 24.035 motion counts against the year. When the 24.035 motion is filed, the time stops running. It begins to run again at the end of the Rule 24.035 proceeding, either in the circuit court if the case is not appealed, or in the appellate court.

Example: Client is sentenced on May 15, 2005, and delivered to DOC on June 1, 2005. Client files timely 24.035 on November 27, 2005, it is denied, client appeals, appeal is denied on June 1, 2006, and no post-opinion motions are pursued. Client must file a habeas corpus petition by November 16, 2006, which deducts from the year the 196 days from sentencing to filing 24.035 in state court.

References:

Federal statute of limitations: 28 U.S.C. §2244(d)(1)

U.S. Supreme Court Rule on when the 90-day period starts: U.S. Sup. Ct. R. 13.3

"Finality" for limitation purposes: Smith v. Bowersox, 159 F.3d 345, 347-348 (8th Cir. 1998), cert. denied, 119 S.Ct. 1133 (1999)

"Actually pending" for tolling purposes: Mills v. Norris, 187 F.3d 881, 884 (8th Cir. 1999)

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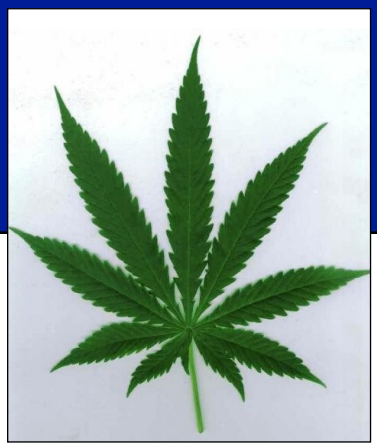

Columbia Reforms Its Marijuana Laws

By Dan Viets

On November 2, 2004 61% of the voters in the City of Columbia, Missouri voted to decriminalize misdemeanor marijuana possession and 70% of them voted to allow the use of small amounts of marijuana for medical purposes with no penalty. These reforms were the result of proposals placed on the ballot through the initiative process.

The Medical Marijuana ordinance, Proposition 1, states that if a defendant's doctor supports his or her need for marijuana for treatment of a serious medical condition, charges of possession of up to one and one quarter ounces (35 grams) shall be dismissed by the Municipal prosecuting attorney. All such cases are required to be referred by police only to the Municipal prosecutor. The law further states that if this is held to be invalid for any reason, the maximum fine imposed shall be $50.

Proposition 2, the Smart Sentencing ordinance, likewise requires that all cases in which a defendant is accused of possession of up to 35 grams of marijuana or possession of marijuana-related paraphernalia be referred only to the Municipal prosecuting attorney. The new ordinance eliminates any possibility of a jail sentence for that offense and limits the maximum fine to $250. Further, it creates a "strong presumption" that the proper disposition of such cases is to defer prosecution or to suspend imposition of sentence and the Court is encouraged to make greater use of alternatives including community service work and drug counseling. The police are explicitly prohibited from making an arrest for marijuana possession and are required to only issue a summons. Further, Missouri's Municipal Courts are not criminal courts. Therefore, one does not receive a criminal conviction there.

One of the most important reasons for requiring such cases to go to Municipal Court is the fact that one does not lose eligibility for federal student aid in a Municipal Court. Under an amendment to the Higher Education Act passed by the U.S. Congress several years ago, if one is convicted under state law or a federal law of marijuana or other prohibited substance possession or sale, one loses eligibility for any form of federal education aid, including loans, grants and work-study money, for at least one year and repeat offenses may bring lifetime disqualification. That is not a consequence of a conviction under Municipal ordinances. (Strangely, this penalty does not apply to any other crimes including murder, rape or robbery, nor does it apply to drug manufacturing or paraphernalia charges.)

The effort to persuade Columbia voters to support these reforms was greatly aided by pointing out the absurdity and counter-productivity of forcing a person who possesses a small amount of marijuana to also drop out of college. There is certainly no advantage to society in preventing an individual from furthering his or her education. The campaign also had the advantage of an endorsement from the Columbia League of Women Voters.

Since November 3, the Municipal prosecuting attorney (who did not support passage of the ordinances) has made a good-faith attempt to abide by their provisions. She is now routinely deferring prosecution on all first-time marijuana possession charges.

A second charge may be prosecuted, but the prosecutor is no longer opposing suspended imposition of sentence as she did previously.

One of the great advantages of a deferred prosecution is the fact that one does not lose one's driver's license when there is no prosecution. Under Missouri statutes, a person under 21 loses his or her license for 90 days if he or she pleads guilty or is found guilty of marijuana possession, even in Municipal Court. A person over the age of 21 who is found to be in possession while operating a motor vehicle is in jeopardy of losing his or her driver's license for one year.

Approximately 50 such cases have been referred to the Municipal prosecutor each month since November 2. The passage of these ordinances has allowed the Court and the police to focus their efforts on more important crimes. Since the prosecutor has chosen to defer prosecution in the great majority of such cases, her workload has actually decreased, as has the caseload of the Court. There is no evidence that there has been any increase in marijuana use during this time.

Amicus Curiae Committee

Don't forget that MACDL has an Amicus Curiae Committee that 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, and include copies of the order or opinion appealed from and any other helpful materials.

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Patriot Act

By Dee Wampler

Recent newspaper editorials continue to regularly criticize Attorney General John Ashcroft and the Patriot Act.

The Patriot Act has many good features and assists law enforcement in stopping terrorist attacks before they occur. Traditionally, American people have recognized the distinction between the religious liberties they enjoy in time of peace and restrictions they must necessarily expect in time of war.

The Patriot Act was unanimously and widely supported in the emotional post 9/11 environment by an overwhelming majority of the U.S. House and Senate, Republicans and Democrats.

The chief criticism is that library records can be seized, not that they ever have been, but that they could be. So? Few Missourians (and some attorneys) actually know about our State law, RSMo. 56.085, which is now 10 years old. Listen up!

On no probable cause whatsoever, and without any burden of proof required, any unelected assistant prosecutor can simply state that a citizen is "under investigation" and they can get any judge to attest (not approve) an investigative subpoena to be issued for your telephone records, utility records, stock purchases, bank accounts, medical and psychiatric counseling records, drug test records, video rental records and, yes, library records, and any other record imaginable. The law allows "any witness who may have information … to require the productions of books, papers, records or other material of any other evidentiary nature …"

The witness is directed to not reveal or disclose to anyone that they have been subpoenaed. It is all secret and, in fact, goes on every single day in our state.

The truth is that Missouri's Prosecuting Attorney's Investigative Subpoena Law is much broader than the Patriot Act ever thought about.

So the next time we are inclined to beat up on Brother John, if we are really concerned about privacy, remember that Missouri has a law that is much worse, more immediate, broader, and just as secretive. You are not safe in possessing records whatsoever.

If we sincerely want to profess to protect privacy rights, then defense attorneys should work to repeal or limit the Prosecuting Attorney's Investigative Subpoena Law.

Keep Crawford in Mind, and Some Preservation Tips

Submitted by Lew Kollias

Keep the excellent case of Crawford v. Washington, 124 S.Ct. 1354 in mind during trial, for anything that is testimonial, or prepared towards testimony in a criminal case. For instance, Missouri law currently allows for a criminalist's report, which obviously is prepared for prosecution and thereby is testimonial in nature, to be introduced into evidence and results/manner of preparation of tests, etc., may be testified to by another criminalist who did not prepare the report, under the business records exception to hearsay rule. §490.680, see State v. Mahan, 971 SW2d 307 [but compare State v. Watt, 884 SW2d 413] Nevertheless, after *Crawford*, this is questionable law.

When a business record is prepared specifically in anticipation of litigation and for criminal prosecution, it is testimonial, and arguably within *Crawford's* aegis. Therefore, unless the technician who actually prepared/conducted the testing and the report, is thereby available for cross-examination about manner of conducting the testing, conclusions drawn from testing, etc., an objection can be lodged under the confrontation clause of the 6th amendment, based on *Crawford*.

In State v. Brown, 140 SW3d 51, the Missouri Supreme Court upheld the mandatory reporting statute for suspected child abuse under a void for vagueness challenge as to the language "reasonable cause to suspect." This case is good reading for anyone confronted with a statute that they believe may be unconstitutionally vague.

A couple of preservation matters to keep in mind, noted first in State v. Roberts, No. ED83697 (8/31), the Court flatly refused to consider a *Batson* challenge because the new trial motion did not specifically point to the error. While a *Batson* challenge was made during trial, the new trial motion said "without reiterating all argument previously made to the Court in open court or by way of pre-trial motions, the defendant renews all prior objections and motions denied of record, to include, but not limited to, all evidentiary objections of record during the jury trial." It is best to reiterate with specificity the objections made during trial, because as the appellate court noted here, "this [general] allegation of error does not state that defendant made a *Batson* challenge at trial and that the trial court's denial of that challenge was erroneous."

By the way, on the subject of preservation, don't forget that you must be specific in challenging jury instructions now before they are given, and also the reasons for lesser-included offenses to be given.

Finally, keep in mind §562.021.3, general principles of liability, that if a statute does not specify a mental state, at least knowledge is required.

A View From The Bench: Judge Larry Kendrick, Division 17, St. Louis County Circuit Court

Interviewed by: Grant J. Shostak

WHEN I FIRST BECAME A JUDGE … I learned that while I may receive some respect at the Courthouse, I am Rodney Dangerfield at home. From my five year old daughter, as I was at home using colored markers, cutting and pasting a document for my clerk to type, "Dad, being a Judge is really not much different from being in kindergarten." From my ten year old son as I was bringing my judicial robe home from the dry cleaners, "Dad, it is really tough for a guy to get much respect at school when his Dad wears a black dress at work every day." From my wife of thirty-seven years, "That overruled and denied may work at the Courthouse but …"

THE LAW IS THE GREATEST … means by which human beings resolve their disagreements and conflicts without resorting to violence on the streets.

TO BUILD A SUCCESSFUL CRIMINAL LAW PRACTICE … be a good criminal trial lawyer and word-of-mouth will pretty much take care of the rest.

THE LAW HAS TAUGHT ME … that there are two sides to every story and every case. There generally is a precedent somewhere for almost any position you want to take. No matter how good or bad your case is, to a certain extent when you place twelve jurors in the box, you are rolling the dice.

YOUNG CRIMINAL LAWYERS ... should know and remember that once upon a time, every opposing counsel and every judge was handling their very first case. They were nervous, unsure and made mistakes. Do not be shy or embarrassed about your inexperience. Acknowledge it, and you will be amazed as to the amount of help that comes your way from judges and other lawyers. Also know and remember that Court Clerks can be your best friend or worst enemy. Likewise, know and remember that you take your clients as you find them. You may be Clarence Darrow, F. Lee Bailey, "Race Horse" Haynes and Johnnie Cochran all rolled up into one, but if you have a client that is terminally stupid, that client will manage to find some way to undo virtually everything you do. Expect to walk into courtrooms and frequently have your clients whisper to you, "Oh by the way, I probably should have told you that …"

OLD CRIMINAL LAWYERS … generally are good criminal lawyers or they would not be old criminal lawyers. They would be old used car salesman.

AN EFFECTIVE TRIAL LAWYER … is completely prepared and pragmatic about the case. They openly and honestly communicate with the Court and opposing counsel. Credibility is priceless.

WHEN I THINK ABOUT MY TIME ON THE BENCH … I always think about my Dad and his love, wisdom and back-breaking labor that made my education possible. Dad was a structural steel fabricator. At family gatherings when I complained about anything at the Courthouse, Dad would inquire, "Son, do you get to work inside? Do you have to lift anything heavy? Do you have carpet under your feet most of the time during the day?" After my affirmative response to each of these questions and with a twinkle in his eyes and a slight grin, my Dad would say, "Frankly Son, I am not sure I see your problem." This loving memory continues to be a marvelous reality check.

THE BIGGEST MISTAKE CRIMINAL DEFENSE LAWYERS MAKE … is not effectively advising their clients as to the possible long-term effects of a plea bargain. A suspended imposition of sentence and five years probation on a class A felony is not wise for a client who is extremely unlikely to successfully complete probation. It makes the lawyer appear to be a hero in the short term, but can have disastrous consequences in the long term. The same applies to avoiding in-custody drug and alcohol treatment early in a case.

NEVER WASTE … a jury's time. Even after a lengthy trial, if the jury feels you have efficiently presented your case, they will have a positive attitude about you and will be truly listening to your closing argument.

I WAS IN THE NAVY … Reserves as a Hospital Corpsman with the Marine Corps for five years and on active duty as an officer in the Submarine Service for four years. I made two patrols in the North Atlantic and two patrols in the Mediterranean Sea. I learned three things. First, there are two types of ships – submarines and targets. Second, ninety days is a long time to be without fresh air, sunshine, alcohol and women – not necessarily in that order. Third, lost time with your family is like lost sleep. Once you have lost it, no matter how hard you try, you cannot replace it.

IN SOME WAYS THE CRIMINAL JUSTICE SYSTEM TODAY … is just not doing a good job of preventing individuals from coming into the system in the first place, and then preventing the individuals from returning into the system once they have left.

AT THE END OF THE DAY … regardless of the type of day it was, I am blessed to have a wonderful, understanding wife and family to return home to. With each day that passes, this fact becomes more evident to me and more of a priority.

ANYBODY CAN … ask a lot of questions. The wise trial lawyer knows when to say, "No more questions, your Honor," and sit down.

THE MOST EMBARRASSING THING I'VE SEEN IN MY COURTROOM … was when I spoke with a Defendant standing in front of the bench and made a mistake when referring to the Defendant's gender. Given the Defendant's physical appearance and gender neutral first name, I had a fifty-fifty chance, and I made the wrong choice. The more I tried to correct and explain the mistake the worse it became. I learned that once you have made that mistake, there is absolutely no graceful way to recover or correct the mistake. You just move on. I also brought the house down when after a guilty plea, I invited the Defendant's mother to join the very young Defendant and me at the bench. I launched into a long speech that was designed to bring tears to the young Defendant's eyes. Among many other things, I told the Defendant his mother was the very best friend he had in the world and that if he listened to her, I probably would never see him again.

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Top Ten Federal Decisions

By Bruce C. Houdek

U.S. v. Booker and U.S. v. Fanfan, 543 U.S. _____, 2005 WL 50108 (January 12, 2005). The Supreme Court has held that the federal mandatory guideline scheme is unconstitutional and the guidelines are "effectively advisory". Defendants with pending appeals who have preserved the issue are entitled to new sentencing procedures. Federal sentences are subject to review for "reasonableness".

U.S. v. Parsons, ___ F.3d ____, (04-2246, 8th Cir. 2005). A defendant who stipulated to being sentenced under the guidelines and to the various offense levels and enhancements and was sentenced within the agreed upon range was not entitled to re-sentencing under *U.S. v. Booker* where the issue had not been preserved in the district court.

U.S. v. Frazier, _____ F.3d _____, (8th Cir. 2005) 2005 WL 30486. The prosecution may use as substantive evidence in its case in chief, the fact of defendant's silence after he had been arrested before he had been given *Miranda* warnings. The Court in a case of first impression in the circuit determined that the defendant's silence upon the officer's discovery of drug precursors could be construed against him in light of his failure to express surprise and anger.

Whitfield v. United States, 125 S. Ct. 687, ____ U.S. ____ (U.S. 2005). Proof of an overt act in furtherance of a conspiracy to launder money is not required for conviction.

Hiibel 6th Judicial District, 125 S. Ct. 18 (U.S. 2004). A state may criminalize the refusal of an individual detained on the basis of reasonable suspicion to provide personal identification.

Maryland v. Pringle, 540 U.S. 366 (U.S. 2003). Police officers may validly arrest all persons in a vehicle, which was lawfully stopped and searched where they found baggies of crack cocaine and cash in the glove compartment.

Groh v. Ramirez, 540 U.S. 551 (U.S. 2004). A search warrant was invalid where it did not particularly describe the items to be seized and where the affidavit in support of the search warrant was not attached or incorporated by reference.

Missouri v. Seibert, 124 S. Ct. 2601 (U.S. 2004). The Court held that a *Miranda* warning was not valid where the police officers adopted a two-step interrogation technique in which the officers questioned a subject before providing a *Miranda* warning and after obtaining incriminating statements gave a *Miranda* warning and had the suspect repeat the incriminating statements obtained earlier.

Crawford v. Washington, 541 U.S. 36 (U.S. 2004). The testimonial hearsay statements of a non-testifying declarant may not be admitted under the confrontation clause of the United States Constitution. Exceptions to the hearsay rule, such as excited utterance, present sense impression and other indicia of reliability are rejected.

United States of America v. Cash, 378 F.3d 745, (8th Cir. 2004). Arresting officers are entitled to make a protective sweep of a residence where the arrested defendant made "furtive" acts and the officers had reports of drug sales in the residence.

A View (*Continued from page 5*)

To my disappointment, the young Defendant's only response to my speech was somewhat of a quizzical look. It was only later that I learned I was the only one in the packed courtroom that did not notice the electronic monitoring ankle bracelet his mother was wearing.

To make matters worse, she was wearing the ankle bracelet because she was supplying the drugs that my young Defendant was selling.

IF YOU ARE GOING TO BE A CRIMINAL DEFENSE LAWYER … , come up with an eloquent answer to the inevitable and constant question from almost everyone: "How can you possibly defend a person who did that?"

AS A TRIAL JUDGE … I have learned that trial judges are like the referees in the black and white striped shirts on the field Sunday afternoon, and appellate judges are like the officials in the instant replay booth. As a trial judge, you have to pay attention and immediately call them like you see them. If trial judges were not making mistakes, appellate judges would be out of work.

JURIES … never cease to amaze me. We yank them away from their families, homes and jobs while paying them between $1.25 to $2.25 per hour. Yet they almost always pay close attention during the trial and are extremely conscientious in reaching their decisions – often to the point of being reduced to tears. While we may have reached a different decision, we have to accept and remember that the jury's decision is the correct decision, because it is their decision.

THE DIFFERENCE BETWEEN CIVIL AND CRIMINAL LAWYERS … is not much other than civil lawyers generally would not mind bringing most of their clients home for dinner.

IF YOU ARE IN MY COURTROOM ... you are our guest. My staff and I always want you to feel at home and welcome.

Fourth Amendment is Alive and Well

By Lew Kollias

To paraphrase an old high school cheer: "What's the good word? Suppression!" The appellate courts of this state have been obviously very concerned recently with the officers of this state"s cavalier intrusion on the rights of citizens, providing reasons that would apply to virtually all of us confronted with a stop by a flashing-light cruiser and a uniformed, weapon-toting officer, i.e., the suspect looked "nervous," was "fidgety," "stuttered or stammered," you name the variety of silly reasons given for reasonable suspicion to believe criminal activity was involved to try to justify a search.

A **detailed** motion to suppress just might carry the day in one of your cases. [Remember the holding of *State v. Goff*, 129 SW3d 857 (Mo. banc), where the court found a motion to suppress that asserted police lacked probable cause for arrest and detention of defendant, his arrest and subsequent search of defendant's person and vehicle was illegal, and that items searched for and seized violated the 4th amendment and article I, section 15 of the Mo. Const., failed to preserve the issue that defendant was subject to an improper Terry stop since it was not based on reasonable suspicion defendant was involved in criminal activity]. Below is a recap of some recent important search and seizure decisions.

- In State v. Granado, No. SC86192 (11/09/04), the Supreme Court held that evidence seized from the defendant's truck had to be suppressed when the truck was searched after the purpose of the original stop, a traffic violation, was completed. Here, defendant's truck was weaving outside of its lane of traffic, so an officer stopped him. The cop noticed that defendant's breathing was labored, and he was "extremely nervous," shaking and stuttering, voice cracking, and he fidgeted a great deal. The officer took him to his cruiser, and defendant said he rented the truck in Michigan, and he and his cousin, the passenger in the truck, were traveling from Texas to Memphis, Michigan, to work on a house owned by his father, and then defendant would drive back to Texas by himself.

  Defendant told the cop that the registration was in the truck's glove compartment, so the cop went to the truck, and asked the cousin for the paperwork, and the cousin said that they were traveling to Capac, Michigan and both would return to Texas later in the week. After giving defendant a warning and returning the paperwork, defendant left the cruiser and was walking to his truck when the officer asked for permission to search due to the discrepancies with the stories told to him by defendant and his cousin. Permission was denied, so the officer indicated that while defendant was free to go, his truck had to remain while a dog was summoned to the scene and could conduct a bouser-sniff. The dog alerted, and 36 pounds of marijuana were found. The search was invalid. While defendant's initial seizure was justified due to the traffic infraction, once the purpose of the stop was conducted, defendant should have been free to leave without further questioning unless specific, articulable facts existed creating an objectively reasonable suspicion that defendant was involved in criminal activity.

  The basis for the reasonable suspicion must arise within the perimeters of the traffic stop itself; suspicions based upon answers to questions asked after the stop is completed are irrelevant to the determination of whether specific, articulable facts supported a reasonable suspicion of criminal activity and provided a justification for further questioning once the traffic stop was completed. Had the trooper requested to search prior to completed the traffic stop, the result could be different based upon the inconsistent answers defendant and his cousin provided to the officer. Nervousness alone will not support a reasonable belief of criminal activity. And while defendant was told he was free to leave, a reasonable person wouldn't have felt that way, especially since it was a cold night, neither defendant nor his cousin were wearing jackets, and it was a rural area and their truck was being detained.

- In State v. Maginnis, No. WD62896 (9/28/04), the highway patrol trooper was on "routine traffic patrol," and so that he wouldn't get lonely apparently, he had along for company his drug-sniffing dog, Cijos. The trooper stopped Maginnis, who was traveling in an older car with Nebraska plates, and who was accompanied by a passenger, for minor traffic violations, including going 73 in a 70 mph zone. Maginnis was taken back to the patrol car, and asked a series of questions that had nothing to do with the violations, such as where he was headed (Florida), if and how long he would be in Florida, what was his employment, does the passenger work with you, etc. When told the registration was in the glove box, the trooper went up there, and engaged the passenger in conversation, and the passenger said he wasn't sure where they were headed, and after refusing the officer's attempts to engage in more conversation, the officer returned to Maginnis in the patrol car.

  He engaged in more conversation, told him the insurance card was not his and Maginnis said he must have switched it with his wife, and when Maginnis said he felt stupid for doing that and to give him a ticket, the officer said he is "not interested in just handing out tickets and handing out tickets." When Maginnis refused consent to search his vehicle, old Cijos did a sniff, alerted, and drugs were found in a safe in the trunk.

  On appeal, the court held the evidence had to be suppressed. Only after over four minutes of conversation unrelated to the traffic stop, did the officer finally asked for registration and insurance. While the initial stop was ostensibly for traffic violations, the questioning was unrelated to traffic infractions. In fact, it was a fishing expedition for evidence of drug activity. As the court notes, while the unrelated questioning may have seemed reasonable to the officer based on his hunch, which turned out to be accurate, at the time the officer launched into the questioning, it was still a routine traffic stop with no articulable ground for suspicion. Therefore, the officer's questions delayed the resolution of the traffic violation and impermissibly detained Maggins beyond what was reasonable in view of the nature of the stop, and suppression is required.

- In State v. Howes, No. ED84127 (11/16/04), defendant was the owner-passenger in a boat driven by a friend, when stopped by water patrol as it entered the dock. When told of a violation of allowing passengers to sit on top of the seatback,

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defendant stated she should get the ticket, not her friend, since defendant was the owner of the boat, and while talking with the officer, defendant started crying and said she lost her son. The officer noted open containers of alcohol. The officer asked if defendant had anything illegal in her purse, and she said no. The officer asked to look inside, and while defendant initially consented, she then changed her mind and turned and walked away from the officer.

He grabbed the purse, found an altoid tin of candy, which contained some drugs. Suppression was denied by the trial court, but reversed on appeal. When consent to search is withdrawn, as it was here when defendant turned and walked away from the officer, the officer may only search on probable cause. While defendant could have thrown her purse into the water and possibly destroyed any evidence, and this could be an exigent circumstance to justify seizing the purse, it would only be so if the officer had probable cause to believe the purse contained contraband. He did not. He stated he did because defendant appeared nervous, talked about things like her son's death and became emotional and crying, but these factors were not sufficient to give probable cause. Nor can withdrawing consent to search the purse serve as a factor in probable cause analysis. Open containers of alcohol couldn't give cause to believe illegal narcotics were present. There was no probable cause to invoke exigent circumstance search and seizure.

Finally, the officer wasn't justified in searching the purse as a protective search for his safety. The critical inquiry is whether circumstances existed for a reasonably prudent

person in the officer's position to believe his safety or safety of others was invoked. Defendant never said anything threatening to the officer, or made any threatening gestures or movements. When he did grab the purse and search it, he found no weapons, only a small tin of candy, that couldn't reasonably be deemed to carry weapons. He had no basis to open the tin.

- In State v. Johnson, No. WD63756 (11/16/04), the officer saw defendant, who he knew was a convicted felon, let a passenger out of his car and then pull away from the curb without signaling, which the officer believed was a violation of section 304.019.1 as no signal was given before defendant pulled away from the curb, even though there was no traffic affected by defendant's movement. Ultimately, after the stop, defendant supposedly consented to the search that uncovered drugs. The trial court granted defendant's motion to suppress finding that traffic must be affected by the defendant's movement under the statute before he is required to signal to pull away from a curb. The state appealed, and the appellate agreed with the trial court and upheld the suppression of evidence. Since the statute relied on by the officer to stop defendant did not, in fact, authorize the stop as defendant was not guilty of any infraction under the statute, and the state could offer no other justification for stopping defendant and the officer therefore lacked probable cause or reasonable suspicion to stop defendant, consent to search the vehicle is vitiated as improperly obtained, and the exclusionary rule requires suppression of the evidence.

- In State v. King, No. WD63467 (11/30/04), an detaining officer received a call from another officer that defendant was seen leaving a residence known for narcotic activity, and defendant might have meth on his person. The detaining officer then observed defendant exceeding the speed limit, so he stopped him for the traffic violation. Defendant avoided "eye contact" with the trooper, and his leg "twitched." The trooper took defendant back to his cruiser, and again noticed defendant avoiding eye contact, and leg constantly twitching. The trooper gave defendant a ticket, and returned his license to him. He then engaged defendant in further conversation, did a nystagmus test but noticed no nystagmus, and asked if defendant had drugs on him or in his car which defendant denied, and then asked if he could search his car, and defendant said no, he was in a hurry to get home.

  The trooper said he was going to have his dog sniff, and the dog alerted, and marijuana and meth were found in the car. Defendant was placed under arrest, given warnings, and then made some incriminating statements. He took the officer to a place where other meth was located, and the officer took that, as well. Defendant was released on his own recognizance, and the next day, contacted the officer and gave him some more substance purporting it to be meth. The court denied the motion to suppress, which was reversed on appeal.

  The arresting officer's information received from the first officer by radio that defendant might have meth could not provide a basis for probable cause, since that officer did not testify, and provided no facts upon which to base that conclusion. The question remains then whether the arresting officer could detain defendant beyond the traffic stop, and the answer was no. The fact that defendant appeared nervous, avoided eye-contact and leg twitched, did not provide that probable cause. The officer's testimony that leg-twitching was evidence of meth use is rejected, especially where the officer nor anyone else testified that such leg twitching is exclusively a sign of drug use, or rarely observed in absence of drug use.

  Defendant's nervousness during the traffic stop was insufficient to create an objective reasonable suspicion that defendant was involved in drug use, and did not justify his continued detention beyond that necessary to complete the traffic violation, and the subsequent search and seizure of drugs was invalid, and defendant's statements had to be suppressed, as well. Further, while the state argues drugs seized that night may be suppressed but not the drugs given voluntarily by defendant to the trooper the next day, is rejected, since there was no showing that the substance given the next day was ever tested or was in fact drugs, as the evidence relied on by the state all involved that seized on the night in question.

- The federal circuit joins the state courts in proscribing the use of false information to obtain consent to search. In State court, State v. Earl, 140 SW3d 639 (Mo. App., W.D. 2004), and officer obtained consent to search only "if" he had probable cause, according to defendant, and the officer falsely stated that he did. An officer cannot conduct a warrantless search on the basis of consent if he has reason to know that the consent was not voluntarily granted, as was the case here. A recent case from the 8th circuit, United States v. Escobar, 389 F.3d 781, also supports the proposition that defendant cannot be tricked into thinking officers have probable cause to search and thereby voluntarily consent to search. Here, officers looked at the baggage hold of a bus at a stop, and

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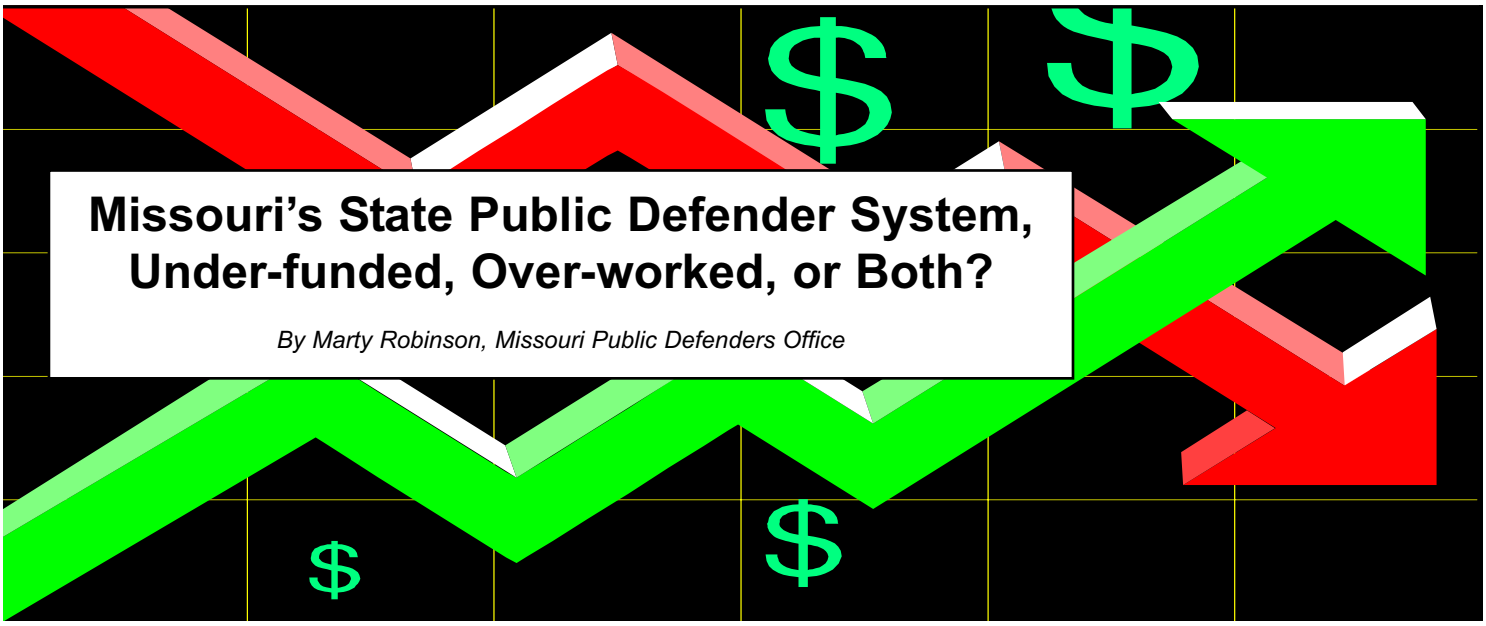


Missouri's State Public Defender System, Under-funded, Over-worked, or Both?

By Marty Robinson, Missouri Public Defenders Office

Missouri's Office of State Public Defender was established April 1, 1982, as an independent Department in the Judicial Branch, to be a "system for providing defense services to every jurisdiction within the state by means of a centrally administered organization having a full-time staff." Previously, the public defender was not a state-wide system, but a program administered by the State Supreme Court. Some areas of the state still had local public defender offices, and many rural areas were operating under a court-appointed system.

Until 1989, public defender services in many parts of the state, usually rural areas, were provided by private attorneys who had contracted with the Office of State Public Defender. In fiscal years 1990 and 1991, the Missouri State Public Defender System was reorganized and the contract system of providing services was eliminated.

During Governor Ashcroft's administration the State Public Defender System was greatly expanded. New local offices were established to provide PD services in every jurisdiction of the state. The system was funded such that the average Public Defender caseload would not exceed 235 cases annually, slightly more than the American Bar Association's standard of 225 cases.

Today, the Public Defender caseloads far exceed both the ABA and Ashcroft standards. The average annual PD caseload last year was 304 cases, and in some parts of the state is closer to 400 cases annually. The average is actually higher when accounting for the vacancies caused by a 22% attorney turnover rate. Once more, caseload is expected to increase another 5-7% this year.

We are facing a crisis in Missouri. The problem is either too few Public Defenders or too many public defender cases. The answer lies in either adding to one end of the equation or subtracting from the other. Let's do some math.

To add Public Defenders is to increase the PD budget. Nay-sayers will say it won't happen, not with this state's budget. But, it happened in 1990. So, we should not rule out the possibility today.

There are two major ways to decrease the number of Public Defender cases. One, decrease the number of criminal cases generally. Nay-sayers will say impossible, given Missouri's tough-on-crime, tougher-on-crime sentiment. (I tend to agree with them.)

A second way to decrease PD caseload is for the private Bar to handle more of the overall criminal caseload. If the State Public Defender is not funded sufficiently to handle the state's criminal caseload, the excess has to fall on Missouri's lawyers. No one wants to return to a court-appointed system, least of all the State Public Defender, but today's system is simply not funded to handle today's caseload.

No matter how you do the math, this is not simply a PD problem. The Missouri Bar, the criminal defense bar in general, and MACDL specifically, have a vested interest in bringing this equation in balance. The State Public Defender stands ready to work with anyone to find a solution.

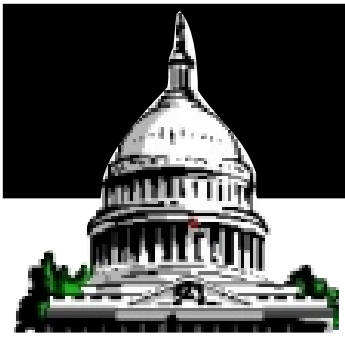
Fourth Amendment (*Cont'd. from page 8*)

noticed defendant's bags, and became suspicious since they were padlocked with an inordinately large padlock, so they took the luggage from the bus to a non-public area of the station.

They then paged the passenger of the luggage, and defendant responded, and immediately was questioned by officers. Officer falsely stated that drug dog had alerted to presence of narcotics in her luggage, and asked for keys to open the luggage. When she couldn't come up with them, he told her to check her purse.

He also asked her to accompany him to the non-public area of the station where the bags were located, and when he began to walk to that section of the station, it appeared she had little choice but to follow.

Once there, the officer asked if he could look in the purse, was told "go ahead," and once the key was found, asked if he could open the bags, and she said "go ahead" again, although at no time did the officer tell her she could leave, or refuse consent. When the officer lied about a drug dog alerting to narcotics in the luggage, he communicated that there was probable cause to search, and there was but no choice other than to permit it. This fact, in addition to the location of where the search occurred, and failure to advise of right to refuse search or to leave, tainted the consent.



MACDL Legislative Review

By Randy Scherr

Missouri's General Assembly convened Wednesday, January 5th with Republican's controlling the Executive and Legislative Branches of government for the first time in 82 years.

Governor-elect Blunt, along with the new House and Senate leadership, have already promised that several issues will be resolved this session: the state's budget, education funding, tort reform and worker's compensation reform.

With an estimated revenue increase for FY 06 at a mere $146.2 million, the new budget chairs, Sen. Chuck Gross and Rep. Brad Lager, will have their hands full trying to reach a balanced budget by the constitutional deadline of May 6th.

Blunt will have to begin with his promise of a more efficient state government to meet the funding needs of education and Medicaid. He has already suggested consolidating some departments and privatization of some state services and is planning to appoint a commission to recommend ideas of shrinking government.

With a price tag of almost $1 billion in new money to fully fund the formula and recent lawsuits challenging the fairness and adequacy of Missouri's education funding system, the legislature will work on revamping the Foundation Formula. There are 524 school districts in Missouri and they will all be vying for a fair piece of the funding puzzle. It promises to be a political and legislative battle.

Medicaid will also have to be reviewed to meet budget shortfalls. The legislature will be looking at eliminating as much abuse and fraud as possible, as part of the solution. It is possible that House leadership will introduce a bill similar to last year that would tighten eligibility requirements with implementing co-payments, eliminating some services, and cutting parents with an income of half the federal poverty level. However, it is possible that Senate leadership will once again halt such drastic cuts and look at other options within the budget for cuts.

Criminal Legislation

During an average legislative session, MACDL will track approximately 135 bills relating to criminal law. Although we expect an average year this session, bill filings appear to be down about 20%. We do expect consideration of some of the same bills as in previous sessions. It is still to early to tell if such controversial bills as the criminal depositions bill will be filed.

Bills of Interest:

HB 41 Requires implementation of a random drug testing program for persons who receive Medicaid

MACDL's Position: OPPOSE

HB 74 Places a moratorium on the use of the death penalty and establishes a commission to study the use of the death penalty

MACDL's Position: SUPPORT
Contact Charlie Rogers & Elizabeth Carlyle

HB 104 Prohibits the government from employing inmates or persons with criminal records in any position where they would have access to personal records containing unique personal identifiers

MACDL's Position: OPPOSE

HB 121 Repeals the persistent offender sentencing enhancements in drug trafficking cases in the second degree

MACDL's Position: SUPPORT

HB 140 Allows law enforcement agencies to hold a suspect arrested without a warrant for up to 24 hours before filing charges

MACDL's Position: MONITOR

HB 156 Creates the crime of committing a terrorist act

MACDL's Position: OPPOSE
Contact Charlie Rogers

HB 201 Prohibits the Department of Revenue from suspending, revoking, or assessing points against a license for any offense committed by a driver operating a vehicle other than a motor vehicle

HB 212 Exempts parents from the wiretapping laws of this state for purposes of intercepting or listening in on their children's telephone conversations in certain circumstances

MACDL's Position: MONITOR

HB 352 Gives prosecuting and circuit attorneys the power to dismiss a case without the consent of the court. The dismissal can be made orally or in writing and can be with or without prejudice

HB 353 Allows the court to suspend the period of probation of a defendant upon issuance of a warrant for arrest for violation the conditions of probation and allows court to extend probationary term one year

HB 358 Revises the role of the court and jury in sentencing and eliminates the bifurcated jury sentencing process

HB 362 Revises laws on expungement by requiring that records and files maintained in any expungement court proceeding are confidential and only available to the parties or by court order for good cause shown

SB 16 Eliminates mandatory minimum sentencing for certain felons

MACDL's Position: SUPPORT

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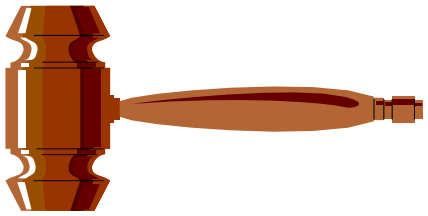
Criminal Law Update

By Bernard Edelman



State v. Brown, SC85582 (Mo banc 8/3/04)

Defendant was a Springfield Nurse who examined an injured child in the emergency room. The child was returned to his foster parents after treatment, but came back into the ER four days later with "abusive head trauma" where he died. The investigators felt the nurse should have reported the initial injuries to DFS who then should have taken action to protect the child. She was later charged with failing to report child abuse to DFS (Sect. 210.115.1 RSMo) and to the physician in charge (Sect. 210.120 RSMo). The statute requires the reporting if the nurse has "reasonable cause to suspect" that a child has been or may be subjected to abuse or neglect. Defendant filed a Motion to Dismiss, contending that the charging statutes were unconstitutionally vague. The trial court agreed and dismissed and the State appealed.

SUPREME COURT: It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protect against arbitrary and discriminatory enforcement. The test for vagueness is "whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Other States have found the phrase "reasonable cause to suspect" constitutional. In addition, the term "reasonable suspicion", similar to the complained of standard, has been part of the search and seizure law, and the term is applied to law enforcement on a daily basis. Applying the vagueness challenge to the facts, the statute is not unconstitutionally vague. REVERSED AND REMANDED.

State v. Angle, WD61936 (MoApp 9/14/04)

Defendant was convicted of four drug charges including possession of sulfuric acid with the intent to manufacture meth and possession of pseudoephedrine with the intent to manufacture meth. She contended on appeal that convicting her on both of those counts was double jeopardy. She alleged that the legislature did not intend to allow multiple prosecutions for each precursor chemical possessed in violation of the statute, and that her possession of both precursor drugs, could only be charged as a single course of conduct and not as separate offenses.

APPELLATE COURT: The legislative intent was to allow separate prosecutions for separate precursor chemical ingredients possessed. It does not violate double jeopardy concepts to allow the prosecution for two precursor drugs possessed at the same time, anymore than it does to allow a dual prosecution for two controlled substances possessed at the same time. AFFIRMED.

State v. Franklin, SD25905 (MoApp 9/28/04)

The Taney County Sheriff developed info that defendant was making and selling meth from his home. Once there he smelled an overwhelming odor of chemicals indicating a meth lab was present. After receiving consent to search, he saw chemicals and glassware he believed were used to manufacture meth and arrested defendant.

He then sought and received a search warrant for the premises. The warrant authorized the seizure of many items including "paraphernalia." During the search the police saw a number of videotapes in "plain view" in the living room. Believing the tapes might contain evidence of how to manufacture meth, or video of the manufacturing process itself, the police began looking at the videos on defendant's VCR. One of the videos had images of a small child having sex with a male adult. The defendant was charged with Possession of Child Pornography, a class

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Capitol Update (*Continued from page 10*)

SB 78 Denies municipal courts from granting suspended imposition of sentences for certain prior/persistent offenders

MACDL's Position: OPPOSE
Contact Tim Cisar & Dan Dodson

SB 184 Imposes a surcharge on certain felony court proceedings to fund certain school-related programs

MACDL's Position: OPPOSE

SB 194 An act relating to rights of crime victims

MACDL's Position: OPPOSE

The following are some of Governor Blunt's early appointments:

Chief of Staff	Ken McClure, Springfield
Communications Director	Spence Jackson, Springfield
Deputy Chief of Staff, Policy	Rob Monsees, Columbia
Deputy Chief of Staff, Admin.	John Russell, Jr., Lebanon
Dir. of Ops. & Constituent Services	Lynne Angle, Jeff. City
Director of Scheduling	Carolyn Loethen, St. Thomas
Director of Legislative Services	Chuck Pryor, Versailles
Dir. of Boards & Commissions	James Harris, Franklin Cnty.
General Counsel	Terry Jarrett, Jefferson City
Deputy General Counsel	Omar Davis

Department Directors:

Dept. of Corrections	Larry Crawford, California
Dept. of Insurance	Dale Finke, St. Louis County
Deputy Dir. & Chief Legal Counsel	Doug Ommen, Jeff. City
Dept. of Revenue	Trish Vincent, Jeff. City
State Emerg. Mgmnt. Agency	Ret. Lt. Col. Ronald, Reynolds

Division Directors:

Division of Worker's Compensation	Pat Secrest, Manchester
Division of Alcohol & Tobacco Control	Keith Fuller, Columbia
Division of Professional Registration	Alison Craighead

A misdemeanor in violation of Sect. 573.037 RSMo. After conviction and a one-year jail sentence, he appealed contending the court erred in admitting the video.

APPELLATE COURT: Defendant's trial counsel did not object to the admission of the video, so the issue was reviewed on "plain error." First, the officers lawfully entered the defendant's home pursuant to a search warrant. Second, once the video was in plain sight, the officers could view it as possible paraphernalia, as defined in Sect. 195.010(17)RSMo; evidence of how to manufacture or manufacturing itself. Third, the incriminating nature of the videotape was immediately apparent to the seizing officers. The tape was properly seized pursuant to the "plain view" doctrine. The trial court committed no error, plain or otherwise. CONVICTION AFFIRMED.

State v Puckett, ED84533 (Mo App 10/5/04)

Puckett was stopped in her car for speeding and driving without lights and the police found a five-gallon propane tank, which they believed contained anhydrous ammonia, a precursor chemical used to manufacture meth. Two field tests were conducted on the tank, which showed a heavy concentration of the chemical. Because the chemical is dangerous to store, the police destroyed the tank and its contents. The police did not get permission to destroy the chemical from a judicial officer and the police did not keep a representative sample of the chemical. Defendant was charged with Possession of Anhydrous Ammonia in a Non-approved Container, in violation of Sect. 578.154 RSMo. Defendant filed a Motion to Suppress, which did not allege the chemical was illegally seized, but which alleged a violation of Sect.490.733 RSMo, dealing with the handling of hazardous materials seized by the police.

That Section requires the police to seek approval of the affected court if destruction is being sought, and authorizes the collection of representative samples of the materials. Defendant complained in her Motion that no judicial approval was sought prior to the destruction of the chemicals and no sample was kept for independent review. The trial court agreed and suppressed the evidence of the chemical and any evidence derived from the chemical, including testimony. The State filed an interlocutory appeal pursuant to Sect. 547.200 RSMo allowing appeals of trial courts which suppress evidence.

APPELLATE COURT: Appeals by the State, pursuant to Sect. 547.200 must be linked or related to the grounds set out in Sect.542.296.5 RSMo, which establishes five bases for a motion to suppress. Since defendants Motion did not claim illegal grounds for the seizure, but claimed illegal grounds for the handling of the chemical, the state did not have the right to appeal pursuant to Sect. 547.200 and their appeal is dismissed. The remedy for the state is to seek review of the trial judge's order by remedial writ. APPEAL DISMISSED.

State v. Bouse, WD62344 (MoApp 10/19/04)

A Livingston County Sheriff's deputy was on the Internet posing as a 13-year old girl in the 7th grade. Defendant began chatting with the "girl" and they exchanged e-mails and spoke via "instant messaging." On different days, defendant's e-mails contained pictures of his 'male organ." He made plans to meet the "girl" at a motel to have sex, but did not show. Defendant was arrested and charged with Attempt to Commit Statutory Rape (two counts), Attempt to Commit Statutory Sodomy (two counts) and three counts of Attempt to Commit Sexual Misconduct With a Child. At a bench trial, he was acquitted of the Attempt Statutory Rape and Attempt Statutory Sodomy charges, but convicted of the Attempt Sexual Misconduct charges and defendant appealed.

APPELLATE COURT: Defendant asserts that the evidence was insufficient to prove he attempted to commit sexual misconduct because the "exposure" of his genitals was not in his presence with the alleged child, but was thru Internet photographs, a circumstance not contemplated by the statute and the term "expose." The legislative intent is to protect children, and defendant took a substantial step towards the commission of the crime when he e-mailed the photos of his genitals to a child he believed to be 13. CONVICTION AFFIRMED.

State v. Oswald, SC85731 (Mo banc 10/26/04)

Defendant was charged with a number of felony sex offenses. Prior to the Preliminary Hearing, defendant requested to have a certified court reporter, at his expense, transcribe the proceedings, and agreed to provide the state a free copy. The court denied that request and defendant sought an extraordinary writ.

SUPREME COURT: A writ of prohibition is appropriate if the trial court abuses its discretion to such an extent that it lacks the power to act as it did and there is no adequate remedy by appeal by the party seeking the writ and the aggrieved party may suffer considerable hardship as a consequence of the erroneous decision. Defendant is facing serious felony charges, and will suffer considerable hardship if the hearing is conducted and not recorded. He will be deprived of a key opportunity to develop his defense at trial and to fully pursue possible avenues of appeal. (Majority Opinion) Further, without a transcript, there would be no record of the events that transpire at the hearing, the evidence admitted, or the testimony of the witnesses. Such a record could be used for purposes of impeachment or for seeking extraordinary review. (Concurring Opinion) It was an abuse of discretion to deny the opportunity to record the PH, and the WRIT is made ABSOLUTE.

City of Springfield v. Gee, SD26209 (Mo App 11/30/04).

In two consolidated actions, the Springfield police seized the automobiles of two drivers arrested for DWI. The City sought forfeiture of the automobiles pursuant to City of Springfield ordinances, which authorized forfeiture for repeat offenders. The trial court entered summary judgment for the auto owners on the forfeiture actions, and the City appealed.

APPELLATE COURT: The Criminal Activity Forfeiture Act (CAFA), Sections 513.600-513.645 RSMo must be read in conjunction with the City's forfeiture ordinances. Under CAFA, before a forfeiture of an automobile may occur, there must be a felony conviction on an offense substantially related to the forfeiture. The City's ordinance allows an aggrieved party to assert a CAFA defense, and since there was no felony conviction, a CAFA defense, in either case, the summary judgment was appropriate. AFFIRMED.

State ex rel Baumruk v. Seigel, SC86040 (Mo banc 12/7/04).

The trial judge granted a change of venue to St. Charles County, but over defendant's objection, announced that he would follow the case to St. Charles. He also overruled defendant's motion to recuse him. Baumruk sought an extraordinary writ.

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Criminal Law (*Cont'd. from page 12*)

SUPREME COURT: Respondent Judge points to no statute, court rule or other authority which allows a judge to follow a case out of circuit on a change of venue absent special appointments by this Court. A circuit judge's authority is limited to cases and matters within the jurisdiction of their circuit courts. When the case is transferred to St. Charles County, it is to be assigned to a judge in that circuit, either by local court rule or by that circuit's presiding judge. WRIT MADE ABSOLUTE.

State. V. Murillo, WD62252 (Mo App 12/7/04).

Defendant was charged with first-degree assault, second-degree assault of a law enforcement officer, and armed criminal action. He hired a lawyer, Franco, to represent him. On Oct. 7, 2002, Franco voluntarily surrendered his law license to the Supreme Court. Defendant's trial began on Oct. 15, 2002, Franco was defendant's trial counsel, and he was convicted. The Supreme Court disbarred Franco on October 31, 2002; however, he did not advise defendant or the trial court. Although he was no longer licensed to practice law, he prepared and filed defendant's Motion for New Trial, and appeared at defendant's sentencing hearing. Defendant appealed, claiming his 6th Amendment right to the assistance of counsel was violated.

APPELLATE COURT: Franco's preparation of the Motion for New Trial and his appearance at sentencing, after being disbarred, were critical stages of the criminal proceedings. However, Franco was not disbarred at the time of the trial, even though he had voluntarily surrendered his law license prior to the trial. The Supreme Court had not yet disbarred him at the time of the trial. Thus, defendant's 6th Amendment rights were not violated during trial, but after trial. The judgment is reversed for purposes of affording defendant assistance of counsel to file a Motion for New Trial and any other post conviction matters related to his trial. REVERSED

State v. Bullock, SD26011 (Mo App 12/22/04)

A Newton County Sheriff's deputy created a 13-year-old character, "Ashley", and went on the Internet to see if anyone would "hit on her." Defendant logged on and began engaging in explicit sex talk with "Ashley." They had 17 more conversations, all sexual in nature. Defendant and "Ashley" agreed to meet and defendant was arrested when he attempted to do so. Defendant was convicted of Attempt Statutory Rape and Attempt Sexual Exploitation of a Minor and appealed, claiming error in the sufficiency of the evidence, and the court's failure to give an entrapment instruction.

APPELLATE COURT: Traveling to the place of a meeting set up by the defendant and the "child", is a substantial step towards the commission of the Attempt crimes and will support an Attempt conviction. (***Editor's note: This was discussed last issue in State v. Young 139 SW3d 194, where the appellate court found this identical travel sufficient as a substantial step to support a conviction.***) Defendant's complaint that he did not get an entrapment instruction has no merit. He did not admit committing the crimes and put on no evidence that he was not disposed to commit the crimes, but for the police's actions. Both are requisites for an entrapment defense.

A review of the various Internet conversations establishes that defendant was not entitled to an entrapment instruction. CONVICTION AFFIRMED

Issue Preserved or Not?

Submitted by Lew Kollias

1 Officer sees defendant (hereinafter D) acting suspiciously late at night, in front of a closed store, and vending machines containing sums of money,
and stops him. Terry search leads to incriminating evidence. Suppression motion alleges 1) lack of probable cause for arrest and detention, 2) illegal search and seizure of person, and 3) items searched and seized violated fourth amendment. Q: Propriety of Terry stop preserved for review? A: No. D did not allege initial stop was made on reasonable suspicion based on articulable facts that the person stopped was engaged in criminal activity. State v. Goff, 129 SW3d 857.

2 D allegedly stopped by municipal officer outside officer's jurisdiction. D raises during trial that stop was unlawful as outside cop's jurisdiction, and evidence of field sobriety and Breathalyzer tests had to be suppressed as fruits of poisonous tree. Q: Preserved? A: No. The constitutionality of a search and seizure has to be raised at the earliest opportunity, specifically by filing motion to suppress before trial. State v. Collins, 72 SW3d 188.

3 In sexually violent predator prosecution, D filed pre-trial motion in limine to prevent state's expert from testifying D suffered from narcissistic personality disorder with anti-social features, on the basis such diagnosis did not constitute a "mental abnormality" within meaning of SVP statutes. The issue was only raised again in a detailed motion for new trial. Q: Preserved? A: No. A ruling on a pre-trial motion in limine is interlocutory only, and must be renewed at the time evidence is introduced to be preserved for review. Related Q: was review extended under plain error? A: No, as a civil case, not criminal, no plain error review was extended. *In re Pate*, 137 SW3d 492.

4 Before witness testified to a conversation she overheard shortly before D assaulted and killed victim, which conversation offered motive for killing, D objected on basis of hearsay, but court overruled objection. Issue raised on appeal was 6th amendment confrontation and due process violation. Q: Preserved? A: No. The objection at trial was only hearsay, not constitutional objection. To preserve for appellate review, constitutional claims must be made at the first opportunity, with citations to specific constitutional sections. State v. Chambers, 891 SW2d 93.

5 D wanted to get into evidence extra judicial statements from unavailable witnesses under Chambers v. Mississippi, made to police, by persons named Durley and Lonzel Wilkes, that Durley and Randy Wilkes in fact committed the murders that defendant was charged with. The state stipulated to the authenticity of the police reports containing these statements from the unavailable witnesses, but D's offer included out of court statements from numerous other witnesses that Durley and Randy Wilkes committed the crime. The court prevented the introduction of the extra judicial statements of Wilkes and Durley to police.

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Preserved (*Continued from page 13*)

Q: Was the issue preserved through the offer of proof? A: No. Part of the offer contained the admissible evidence of unavailable witnesses' statements, but other parts of the offer contained items of evidence inadmissible under any circumstances. Thus, the entire offer of proof fails. State v. Nettles, 10 SW3d 521.

6 D made a relevant, detailed offer of proof in response to state's pre-trial motion in limine to exclude certain exculpatory evidence for D. The court granted the state's motion in limine, thereby preventing any reference to the evidence during trial. D renewed the point in a detailed new trial motion. Q: Preserved? A: No. Although D made proper objections before trial and a detailed offer of proof then, a ruling on a motion in limine is interlocutory only, and D must renew attempts to prevent the excluded evidence during trial, and if an objection is sustained then, make the detailed offer of proof again. State v. Boyd, 992 SW2d 213.

7 D became involved in an altercation with guards outside the courtroom. Judge told D's attorney and prosecutor some jurors may have seen it, and asked attorneys if an inquiry of jurors should be made now or possibly later, basically inquiring of any "creative ways" to make inquiry if D desired. Instead, counsel no, making inquiry could by itself prejudice jury by advising them such an altercation occurred, and only way to cure potential prejudice was mistrial. Court denied it. Q: denial of mistrial preserved? A: No. D cannot take advantage of own misconduct generally, such as assaulting guards and then seek a mistrial. Further, counsel declined court's invitation to determine if jurors in fact witnessed altercation and how it affected them if they did. State v. Hatch, 54 SW3d 623.

8 Court indicated intention to give hammer instruction, defense objected, court went ahead anyway, but failed to note on record exact time it gave hammer instruction as required by notes on use. D's counsel advised court of the problem, it was not corrected, and that was only mention of the issue until appeal. Q: Preserved? A: No. D had obligation to follow up claim in new trial motion. State v. Dodd, 10 SW3d 546.

9 D testified, and was impeached with priors. The trial court gave instruction 310.12 pursuant to the state's request, but the court failed to follow applicable notes on use, allowing jury to potentially consider D's priors not only for impeachment, but guilt on the charged offense. Q: Did court have obligation to, *sua sponte*, modify instruction correctly according to notes on use? A: No. D had the obligation to object to the improper instruction, submit to the court a properly modified instruction according to the notes on use, and follow through in the new trial motion if the instruction was refused. State v. Vivone, 63 SW3d 654.

10 D filed a detailed motion to suppress statements, and it was overruled. During trial, D renewed the objection to the statements, and the objection was overruled. D filed a motion for new trial indicating the court erred in overruling D's motion to suppress statements. Q: Preserved? A: No. The new trial motion only referred to the denial of the motion to suppress, which is an interlocutory ruling, but did not complain of error in the overruling of objections to the evidence at trial.

Don't Let Time Run Out On You!!

April 22-23, 2005
MACDL Annual Meeting and Spring Conference
Embassy Suites, Kansas City

MACDL/ MO Bar DWI Seminars
June 3 - UMKC School of Law, Kansas City
June 24 - Washington University, St. Louis

October 28, 2005
MACDL Fall Conference
St. Louis

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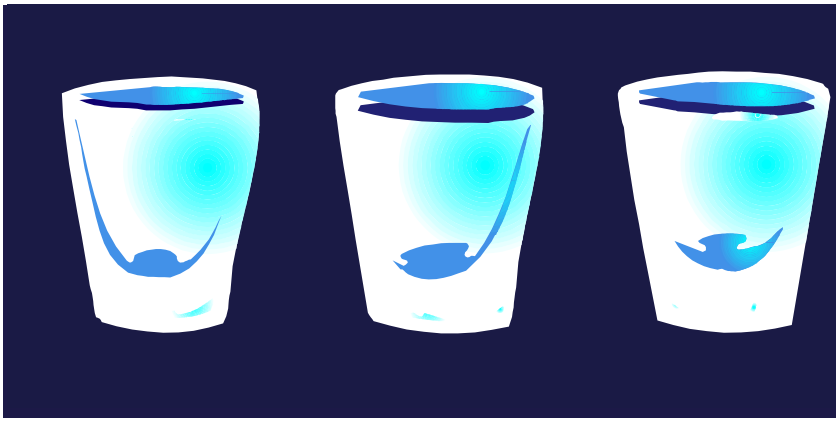

Traffic/DWI Update: "None Shall Be Given

By Michael C. McIntosh

The Implied Consent Law, Section 577.041 RSMo. (Supp. 2002), provides that, after refusal to consent to a chemical test, "none shall be given."

The statute also gives the prosecutor a troublesome advantage by permitting the refusal to be used in a criminal case as an inference of guilt.

In discussion with jurors after a trial where Defendant's refusal was an issue, panelists expressed considerable difficulty setting aside the prosecutor's argument "the Defendant refused the test because he knew he was drunk ... knew he would fail ...", etc. In fact, on more than one occasion, jurors expressed the refusal argument as "definitive" in determining their vote to convict.

This article will discuss mitigating this potentially dangerous issue and suggest methods of procedure to attack the prosecutor's case.

I. EDUCATE THE JURY:

Gary Trichtor of Houston, Texas, has championed a voir dire process of asking open-ended questions to encourage the panel members to make their own argument in favor of a refusal. An example is as follows:

To The Panel:

Q: In general, why would a person not trust a machine to be accurate or reliable?

Q: More specifically, why would a person not trust a machine used and maintained by the government to be accurate and reliable in testing of their breath, blood or urine?

Q: Why would someone be confused by a request to submit to a test of their breath to determine the level of alcohol in their blood?

Q: For what reasons would a person refuse to permit the government to use a machine to take a sample of their breath?

Q: What kind of things happen to electronic devices to cause them to be defective, faulty or inaccurate?

Q: Why might an attorney advise a client to refuse to take a breath, blood or urine test at the request of a police officer?

Q: What kind of things can happen to a sample of blood, breath or urine once taken by the government for analysis?

The process of "looping" is used to encourage additional jurors to "add" their opinions to those posed by the initial responding juror. For example,

To The Panel:

"Juror #2, we just heard from Juror #1. Can you tell us your reasons why one would not trust a machine to test ... accurately ..."

This process of using open-ended questions and forcing more than one juror to talk extemporaneously about the "reasons one would refuse" puts on the table for the entire panel's consideration justification why your client refused the test.

II. USE OF MOTIONS AND INSTRUCTIONS:

A motion is used to set the stage for suppression of a refusal and/or the giving of an instruction (not in MAI-CR) explaining reasons for refusing the test. If nothing else, the motion hearing can be used to develop testimony (discovery) for use at trial in cross-examination of the arresting officer. The following is a form which can be used for this purpose:

Motion In Limine

Comes Now Defendant and states:

1. Defendant moves the Court for an Order, in limine, to prohibit the government from offering into evidence, or making any other reference in their opening statement or otherwise, as to Defendant's refusal to submit to any offered test of breath, blood or urine, including any request made to the Defendant to submit to such testing.

2. Defendant further moves the Court for an Order to prohibit the government from commenting on Defendant's refusal by a specific reference or general inference of said refusal constituting an implicit or explicit admission of guilt to the offense charged of DWI.

SUGGESTIONS

Before 1987, the Implied Consent Warning under Section 577.041, RSMo. 1986, stated:

> "If a person under arrest refuses upon the request of the arresting officer to submit to a chemical test, which request shall include the reasons of the officer for requesting the person to submit to a test and which also shall inform the person that his license may be revoked upon his refusal to take the test, then none shall be given."

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DWI Update (*Continued from page 15*)

Effective September 28, 1987, the statute was amended to read:

> "If a person under arrest refuses upon the request of the arresting officer to submit to any test allowed under Section 577.020, then none shall be given and evidence of the refusal shall be admissible in a proceeding under Section 577.010 or 577.012. The request of the arresting officer shall include the reasons of the officer for requesting the person to submit to a test and also shall inform the person that evidence of his refusal to take the test may be used against him and that his license may be revoked upon his refusal to take the test."

The U.S. Supreme Court has examined whether a statutory right to refuse testing is constitutionally protected from the adverse consequences of a refusal in South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed. 2d 748 (1983).

While the South Dakota statute involved in *Neville* allowed for the admissibility of evidence of a refusal to submit to the test procedure, the police officers failed to advise Neville of this possibility.

The *Neville* Court first considered whether the refusal to submit to the test was protected by the Fifth Amendment's privilege against self-incrimination, holding: "(A) refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." Id. at 565, 103 S.Ct. at 923.

The Court in *Neville* further considered a due process claim and held that the admission of evidence of a refusal following the warning that refusal may result in a loss of driving privileges for one year "comported with the fundamental fairness required by due process." Id. at 566, 103 S. Ct. at 924. The *Neville* Court based its holding on the fact that one's right to refuse a blood-alcohol test is not constitutionally protected as is the right to silence underlying the Miranda warnings. Id. at 565, 103 S.Ct. at 923. Further, in Schmerber v. California, 384 U.S. 757 (1966), the U.S. Supreme Court held a state-compelled blood test did not infringe the Fifth Amendment right against self-incrimination since a blood test was "physical or real" evidence rather than testimonial.

I. IT WOULD BE FUNDAMENTALLY UNFAIR IN VIOLATION OF DUE PROCESS TO USE DEFENDANT'S REFUSAL WITHOUT A PROPER SHOWING OF RELEVANCE.

Section 577.041.1 RSMo. states:

"Evidence of refusal may be used." The word "may" in the refusal statute is permissive rather than mandatory. As such, refusals are not automatically admissible. See S.J.V. By Blank v. Voshage, 860 S.W. 2d 802, 804 (Mo. App. 1993); Welch v. Eastwind Care Center, 890 S.W.2d 395, 397 (Mo. App. 1995).

Evidence is admissible as long as it is relevant and non-prejudicial. NA v. Stevens, 83 S.W. 3d 47 (Mo. App. 2002).

The test for "relevancy" is whether the offered fact "Defendant's breath test refusal" tends to prove or disprove a fact in issue (driving while intoxicated). State v. Vance, 633 S.W. 2d 442 (Mo. App. 1982).

The State has no testimonial evidence to infer Defendant had a guilty mind at the time of the refusal. However, the State will attempt to offer his refusal as evidence of guilt, i.e., guilty mind. This is analogous to the State offering "flight" as evidence of a guilty mind. See State v. Rutledge, 524 S.W. 2d 449, 458 (Mo.App. 1975); State v. Hawkins, 582 S.W. 2d 333, 335 (Mo. App. 1979); State v. Triplett, 620 S.W. 2d 398, 399 (Mo. App. 1981); and State v. Wilson, 725 S.W. 2d 932, 934 (Mo. App. 1987).

Defendant's silence in refusing could as likely be a reaction evidencing any of the following:

a. Distrust as to the accuracy and reliability of the machine;

b. Distrust as to the methods of administering a test of Defendant's breath;

c. Distrust as to the training, skill, expertise or fairness of the requesting officer in the administration of the test;

d. Advice of counsel.

Further, Defendant's response to the request to take a breath test could simply have been silence based upon the inherently coercive and unfamiliar atmosphere surrounding his detention or a conscious choice to exercise his right to remain silent under the Fifth Amendment, United States Constitution and/or Article 1, Section 19 of the Missouri Constitution.

At the time of arrest and custodial interrogation, the innocent and guilty (perhaps, particularly the innocent) may find the situation so intimidating they stand mute. Wills v. State, 573 A. 2d 80 (1990).

At best, admission of Defendant's breath test refusal without the proper predicate of relevancy invites a jury to speculate about the Defendant's thought process in refusing.

Where refusal evidence cannot show a fact more or less probable it creates unfair prejudice and has no probative value, i.e., in fact it is not relevant.

The State cannot show Defendant's refusal makes it more probable he believed himself to be intoxicated than not (i.e., relevance defined) and therefore his refusal constitutes irrelevant and inadmissible evidence.

This can be distinguished from South Dakota v. Neville, 459 U.S. 553 (1983) in that the Supreme Court noted in *Neville* the specific nature of Mr. Neville's guilty mind by referring to his statement "I'm too drunk, I won't pass the test." Thus, Neville and its foundation based upon "guilty mind" can be distinguished from the instant case wherein there is no evidence as to Defendant's thought processes in his choice to refuse the offered breath test. State v. Stephens, 757 S.W. 2d 229 (Mo. App. 1988) recognizes Missouri has followed *Neville*, but in utilizing *Neville* based upon "guilty mind" the Courts of Missouri have not been asked to address the issue of using a Defendant's refusal against him where the question of his thought processes remained unanswered and open to speculation on the part of the fact finder.

Universally accepted evidentiary rules require a threshold showing evidence be relevant before it may be considered admissible.

The United States Supreme Court has answered the question as to whether or not admissibility of relevant evidence is a fundamental right in Taylor v. Illinois, 108 S.Ct. 646, 652 (1988), wherein it stated:

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> "The need to develop all relevant facts in the adversary system is ... fundamental ... The very integrity of the judicial system ... and public confidence in the system depend upon ... disclosure ... within the framework of the rules of evidence."

Therefore, admission of a Defendant's breath test refusal without conforming to this accepted principle deprives Defendant of due process and by legislative enactment impedes the administration of justice by depriving the judiciary of its inherent power over admissibility of evidence. Article 2, Section 1, of the Constitution of the State of Missouri.

Further the admission of Defendant's refusal as a tacit admission of guilt causes Defendant to waive his Fifth Amendment right to be free from self-incrimination by forcing him to testify in repudiation of the prosecutor's argument and inference drawn therefrom "Defendant refused because he was drunk ... guilty ..."

"Defendant refused because he was drunk ... guilty ..." Defendant is on the proverbial "horns of a dilemma" by involuntarily testifying in rebuttal of the irrelevant refusal evidence.

The Implied Consent Warning further violates due process because it fails to permit the arrested driver to make informed choices about exercising his or her right because the warning given by the officer does not sufficiently "inform the arrestee of all the consequences of the refusal and misleads the arrestee into believing the consequences of refusal are different than the law actually provides." Teson v. Director of Revenue, 937 S.W. 2d 195 (Mo. banc. 1996). The Warning fails to inform Defendant specifically the test may be used "as evidence of his guilt" (tacit admission) thereby leaving Defendant to guess as to the consequence of the refusal. See, Kidd v. DOR, 50 S.W. 3d 858 (Mo. App. 2001).

Law enforcement has available options to obtain blood, breath or urine for analysis without use of Defendant's refusal against him in violation of self-incrimination or due process.

In the event of refusal, the clause "none shall be given" in the refusal provision of the Implied Consent Law prohibits warrantless tests authorized by law enforcement. State v. Smith, 134 S.W. 3d 35 (Mo. App. 2003).

The statute does not prohibit a Court from issuing a search warrant to obtain samples of a Defendant's blood for chemical testing. Id. Further, a blood sample analysis is admissible in a criminal trial even without consent when the sample is drawn pursuant a valid arrest for an alcohol related traffic offense. *Schmerber*, Id.; State v. Settle, 721 S.W. 2d 11 (Mo. App. 1986).

As the State has other means of securing Defendant's bodily fluid with or without a warrant or consent, due process is violated by permitting Defendant's refusal to be used as evidence of guilt under the Fifth Amendment.

II. DEFENDANT'S RIGHT TO AN ATTORNEY IS IMPERMISSIBLY BURDENED IF THE STATE IS PERMITTED TO USE DEFENDANT'S REFUSAL AS AN INFERENCE OF GUILT.

A constitutional violation may result...when a constitutional right has been impermissibly burdened or impaired by virtue of State action that unnecessarily chills or penalizes the free exercise of the right. North Carolina v. Pearce, 395 U.S. 711, 724; 89 S.Ct. 2072, 23 L. Ed. 2d 656 (1969). It is well-settled it is reversible error to permit a jury to infer an inference adverse to the Defendant due to his/her constitutional right to silence...right to counsel and the right to advice of counsel Fagundes v. United States, 340 F. 2d 673 (1st Circuit 1965). A prosecutor may not treat a Defendant's exercise of a constitutional right as substantive evidence of guilt. State v. Robinson, 485 U.S. 25, 99 L.Ed. 2d 23, 108 S. Ct. 864 (1988). Where a prosecutor is permitted to admit evidence of Defendant's refusal as an inference of guilt when the refusal was upon the advice of counsel, Defendant's reliance upon the advice of his attorney is being utilized as "substantive evidence of guilt" and constitutes a chilling effect on the meaningful right to counsel under U.S. and Missouri law.

It is important to note there is a statutory right under Section 577.041 for detained persons to consult an attorney to assist in the decision whether to submit to a chemical test. *McMaster*, Id.

Assistance must mean "effective" or the right to counsel is meaningless. A Defendant has a right to effective assistance of counsel. State v. Antone, 724 S.W. 2d 267, 273 (Mo. App. 1986); Lehmann v. State, 509 S.W. 2d 791, 793 (Mo. App. 1974).

For the above-stated reasons, Defendant prays the Court for its relief in limine excluding any reference to Defendant's refusal and such other relief as is just in the premises.

III. JURY INSTRUCTION NOT IN MAI-CR 3D

The following is a suggested instruction to permit the Court to follow the argument and outline contained in this article:

> "Evidence has been introduced that the Defendant refused to submit to a breath test. You are instructed that the Defendant's refusal to submit to the taking of a breath test cannot be considered as evidence of his guilt."

CONCLUSION:

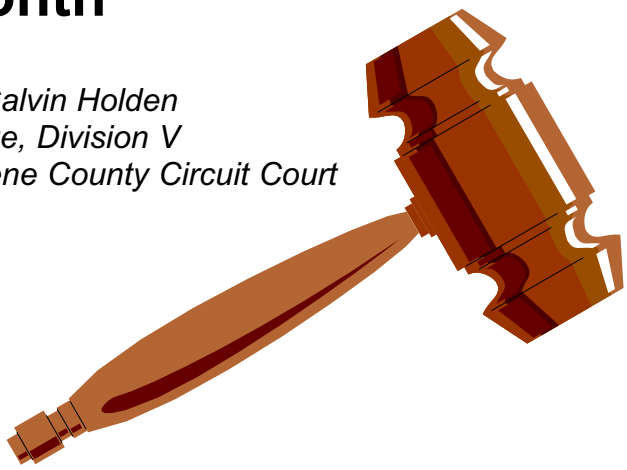
The refusal inference "hurts" the Defendant. It is hoped the above "helps." Good luck!

Don't Get Caught Sleeping ...

Sign up for the MACDL Annual Meeting April 22-23!

Motion Of The Month

By Calvin Holden
Judge, Division V
Greene County Circuit Court



IN THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI DIVISION V

State of Missouri,	)	
	)	
Plaintiff,	)	
	)	
V.	)	
	)	
Larry Creeson,	)	Case No. 301CF 1907
And	)	
Gary L. Smith	)	Case No. 100CF 0033
Defendants		

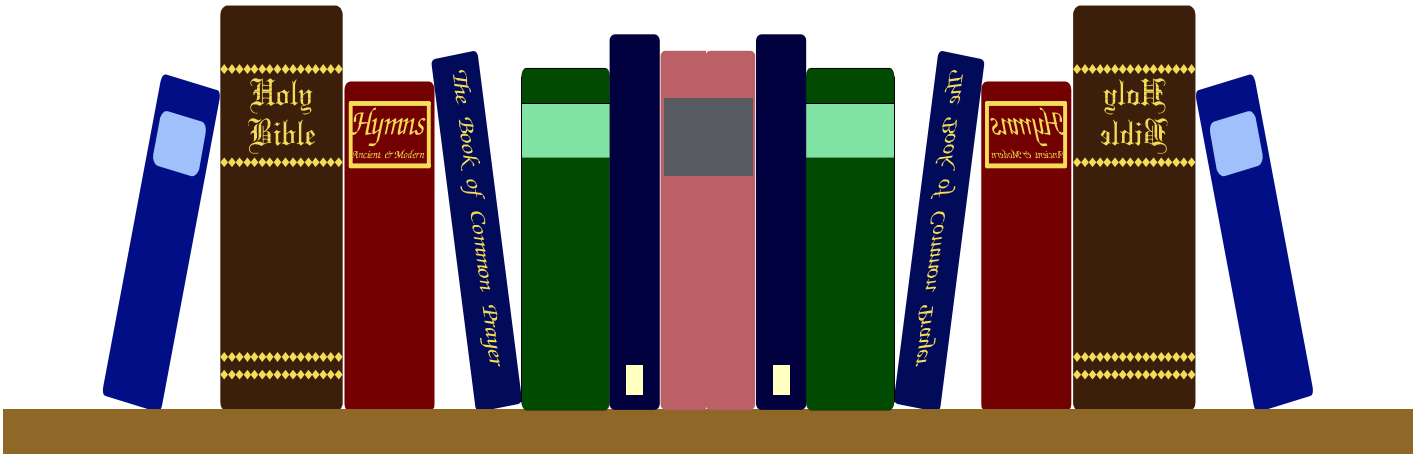
ORDER

Now on this 17th day of November, 2004 after hearing all the evidence presented and in consideration thereof, this Court hereby makes its findings as follows:

1. The Drug Recognition Expert Program (DRE) trains law enforcement officers to recognize the behavioral and physiological symptoms associated with seven categories of primary drugs of abuse; central nervous system depressants, inhalants, PCP, cannabis, central nervous system stimulants, hallucinogens, and narcotic analgesics. The program is not intended to identify a specific drug, but only to narrow the focus to one or more drug categories.
2. This drug categorization system borrows from medicine, psychiatry, toxicology, and associated fields and identifies a pattern of effects, known as signs and symptoms, produced within each category.
3. The program does not use any new technology that has not already been known and or used by many other agencies and organizations.
4. The only thing new about the DRE program is its development of a systematic and standardized 12-step protocol that law enforcement officers use to detect drug influence.
5. The protocol itself is not a new and novel scientific technique.
6. The 12 steps of the protocol do not call for any particular medical or scientific training or skill on the part of the officer.
7. Only the test for horizontal gaze nystagmus, vertical gaze nystagmus, and lack of convergence (hereinafter referred to as HGN for all three observations) is considered scientific. Under State v. Hill, 865 S.W. 2d 702 (W.D. 1993) use of HGN has already gained general acceptance in the scientific community, and there is no need to reapply a Frye analysis since it is no longer a new and novel scientific technique.
8. The law enforcement officer trained in the DRE program does not have special training or knowledge which qualifies him as an expert for the purpose of stating an opinion of whether the defendant was impaired because of some kind of intoxicant.
9. Dr. Marcelline Burns testified that all DRE exams has a final step the taking of blood or urine sample from the suspect. (T636)
10. The first 11 steps are now performed by law enforcement in the state of MO. The last step is performed by law enforcement or health care provider but the lab work is completed by an expert.

The court views the DRE as not any new procedure therefore the protocol is not subject to the *Frye* standard. However, the court does find that the DRE cannot testify and give an opinion as to the cause of impairment if the cause is by drugs. This testimony is required by an expert other than a DRE officer.

WHEREFORE, IT IS ORDERED the opinion of a law enforcement officer trained in the DRE program as to whether a defendant is under the influence of some type of intoxicant and the basis for that opinion, is not admissible in Court as to impairment by drugs.



Two for the Price of One

Reviewed by Charlie Rogers

"Economic and Historical Implications for Capital Punishment Deterrence"
Rudolph J. Gerber, 18 *ND J.L. Ethics & Pub Pol'y* 437 (2004)

"Survival Mechanisms: How America Keeps the Death Penalty Alive"
Rudolph J. Gerber, 15 *Stan L. & Pol'y Review* 363 (2004)

This was going to be easy. I had already ordered Milt Hirsch's murder mystery novel from the ABA Press. Knowing Milt, it would certainly be an entertaining read. I could gush about it for a page or so, and get credit for contributing to the newsletter. Then, shortly before deadline, I came across these two law review articles by former Judge Gerber. (No, I do not spend my time pouring over the *Notre Dame Journal of Law, Ethics and Public Policy* or the *Stanford Law and Policy Review*. These articles were emailed to a listserve I'm on.) I could no longer take the easy way out.

What initially intrigued me was the author's journey. As a new lawyer, Gerber helped draft the Arizona post-*Furman* sentencing scheme. He prosecuted capital cases, presided over them as a trial judge, and considered them during 12 years on the Arizona Court of Appeals. Now in private practice and teaching criminal justice at Arizona State University, he has written two articles generally critical of capital punishment. What changed his mind, and how can others' minds be likewise changed?

The deterrence article is the shortest and simplest. Giving a nod to the statistical research which shows no deterrent effect from executions, Gerber seeks to explain why this is so in terms of traditional criminal justice thinking. As used in the modern United States, the death penalty lacks clerity, certainty, proportional severity and publicity, "the four requirements needed both for deterrence and for rational calculation of disincentives." The solution he proposes is not death by torture on the courthouse steps days after the verdict, but rather, the abandonment of a capital punishment system where deterrence is "not only illusory but beyond recapture."

"Survival Mechanisms" contrasts the careful consideration of rationales for capitol punishment practiced by the legislators who enacted Arizona's post-*Furman* scheme in 1973 with the total absence of such consideration when Arizona enacted its post-*Ring* capital punishment scheme in 2002.

In the early 1970s, Gerber was asked by then-state-Senator Sandra Day O'Connor to "draft a death penalty we can live with." The scheme enacted resulted in the most "per capita death sentences per 1000 homicides," but 79% of the death sentences imposed were eventually overturned before the U.S. Supreme Court invalidated the scheme in *Ring*.

Gerber outlines several reasons against reenactment of the death penalty he says Arizona lawmakers ignored in their desire to appear tough in the aftermath of *Ring*. In doing so, he convincingly rebuts the most persuasive arguments advanced by dealth penalty proponents. Concluding in what seems to be a polemic primarily addressed to Justice O'Connor, he advocates the "contextual" approach to constitutional interpretation over the "textual" approach of Justice Scalia, Thomas and Chief Justice Rehnquist . He concludes that considered in the light of "the data regarding costs, efficiency, moral sentiment, and international norms," capital punishment laws are not laws we can live with.

Not as entertaining as Milt's book, but well worth the read.

If you know of a case or ruling of interest, please share it with your fellow MACDL members by sending your article to:

MACDL
P.O. Box 1543
Jefferson City, Missouri 65102

Missouri's 93rd General Assembly
Dates of Interest

MARCH

17 Spring Break Begins (*Upon Adjournment*)

28 Easter Break

29 Spring & Easter Break Ends (*Reconvene at 4:00 p.m.*)

MAY

6 Appropriations Bills must be Truly Agreed and Finally Passed

13 Session Ends at 6:00p.m

SEPTEMBER

14 Veto Session

Welcome to MACDL!

Please join us in welcoming these new MACDL members ...

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Clinton

David Lee Wells
North Kansas City

Kimberly Benjamin
Harrisonville

Nancy Price
Springfield

Joe Bednar
Jefferson City

Toni Meyer
Troy

Matt Geiger
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