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Your comments and suggestions are welcome!

Lew Kollias ... Thank You for Teaching Us the Meaning of "Public Defender"

Lew taught us so much and led by example. How will we remember him and the lessons we learned?

Where to start? With the client. That is the essence of what Lew taught us. He reminded us that all people are entitled to respect. And that respect meant providing the kind of representation to every person that you would want provided to you. It meant responding to your client's concerns and questions, even if the client was difficult, or the questions asked and tasks requested didn't always make sense.

Lew taught us about quality. He loved and knew the law. And he expected every public defender to know the law, as well. He encouraged us to brainstorm our cases and required that we have others proof -- and sometimes this meant rip to shreds -- our work. Through this process, we learned that the client comes first, our ego comes a distant second.

Lew taught us to redefine success. For Lew, success was not measured merely by the number of cases won (although he did love to win and hated to lose). Success began by treating each client as an individual rather than just the next case. Success meant that, at the end of your representation, your client was thankful for your efforts, knew he received the best defense possible, and was grateful that you accorded him the dignity everyone deserves.

That same success was earned by treating opposing counsel as you wanted to be treated and by always showing respect to the court.

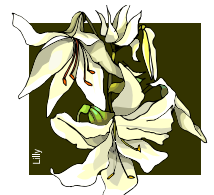
Lew taught us comradeship. He taught us to expect more of ourselves than of anyone else on the defense team. At the same time, he understood the importance of everyone's role, everyone's membership in the team. He encouraged us to work together, to lend a helping hand, not only in our own office, but within the public defender system and the entire criminal defense community.

His door was never closed, his phone never turned off to those in need. He showed us that together we can climb mountains, but alone, we can barely top the hill.

Lew reminded us, by example, that being a Public Defender is a calling, a lifelong process of dedicated service to the clients and, through them, to the Constitution.

Lew was a good lawyer, a good person and a good friend. We mourn his passing.

By Melinda Pendergraph, Nancy McKerrow, and Janet Thompson; on behalf of all Public Defenders, past and present.



MACDL Legislative Update

By Randy Scherr; MACDL Lobbyist



The 2006 Legislative Session began in early January with the Governor and Legislative Leadership vowing action to tighten down on sex offenders.

MACDL is presently tracking over 70 criminal law related bills in the 2006 General Assembly. A comprehensive sex offender bill is working its way through the Senate at this time. The committee considering the bill has combined several bills and has also made some needed changes in the list of crimes that would land a person on the sexual predator list.

MACDL will provide the members further information as the session progresses.

Below is a list of several of the key bills of interest. If you desire to review the text of any bills you may log onto www.moga.state.mo.us and click on the "Joint Bill Tracking" menu.

HB 995 [Dusenberg] - Increases punishment for sexual offenders who offend against children less than twelve and creates new crimes of tampering with electronic monitoring equipment and aiding a sexual offender.

HB 1053 [Jolly] - Revises section 610.105, RSMo, to allow victims of certain offenses access to official case records in cases in which imposition of sentence was suspended.

HB 1056 [Roorda] - Creates new crimes of tampering with electronic monitoring equipment and aiding a sexual offender and increases the punishment for sex offenders who commit crimes against children.

HB 1064 [Yates] - Requires that sex offenders placed on probation and parole for a sex crime against a child under the age of seventeen be electronically monitored while on probation and parole.

HB 1066 [Harris-23] - Denies bail to offenders who have pled guilty to or been found guilty of sex offenses or pornographic offenses committed against children.

HB 1067 [Harris-23] - Requires peace officers to bring persons arrested for certain drug crimes before a judge to consider bond and other conditions of release.

HB 1160 [Wilson-130] - Allows the court to order a person's vehicle impounded for up to one year as part of a penalty for driving while intoxicated.

HB 1183 [Stevenson] - Changes the definition of "adult" and "child" so that a child is a person under eighteen years of age and an adult is a person eighteen years of age or older.

HB 1197 [Cunningham-86] - Removes the requirement that a person must have received at least a ten day jail sentence on a prior offense before a third or subsequent misdemeanor stealing offense can be enhanced to a felony.

HB 1217 [Kraus] - Authorizes judges to order defendants who have pleaded guilty to or been found guilty of felony offenses to pay as part of the costs of the case reimbursement for the costs of prosecution.

HB 1239 [Roorda] - Revises the law on hazardous materials to allow law enforcement to dispose of the materials once they have been documented and makes photographs, tapes, and reports admissible in lieu of the materials.

HB 1309 [Lipke] - Criminal forfeiture reform.

HB 1312 [Lipke] - Revises various laws concerning the DNA profiling system.

HB 1435 [Johnson-61] - Authorizes expungement of certain arrest records and convictions for municipal ordinance violations and certain misdemeanors.

HB 1496 [Deeken] - Creates a commission on the death penalty and places a moratorium on the death penalty for a specified period of time.

HB 1519 [Johnson-61] - Revises post-conviction DNA testing laws by limiting the motion to persons convicted of a certain felonies and requiring the DNA evidence to be retained and preserved for a certain period of time.

HB 1550 [Pearce] - Allows law enforcement officers to use photos or videotape of hazardous materials being seized at the crime scene rather than submitting a sample of the material as evidence.

SB 557 [Gibbons] - Strengthens the laws against sexual offenders.

SB 563 [Loudon] - Strengthens laws against sexual offenders.

SB 587 [Bartle] - Relating to the DNA profiling analysis fund.

SB 588 [Bartle] - Relating to sexual offenders.

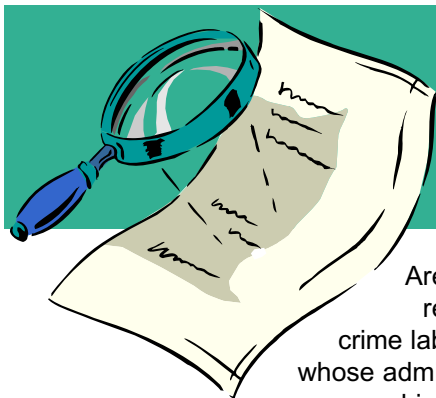
SB 715 [Bray] - Eliminates the death penalty.

SB 760 [Engler] - Allows a law enforcement agency to dispose of hazardous materials that have been seized as evidence once the materials have been documented.

"Legislative Update" >p3

Are Crime Lab Reports “Testimonial” Statements?

By Dee Wampler



Are the notes or laboratory reports of a non-testifying crime lab technician “testimonial” whose admissibility at trial would be subject to the strict limitations established in *Crawford v. Washington*¹?

In a recent Michigan sexual assault case, *People v. Lonsby*², a state crime lab serologist’s notes and reports were offered into evidence. The court held the reports were testimonial and fell squarely within the limits of *Crawford*.

Crawford v. Washington established that the Confrontation Clause bars the admission at trial of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine. Although the U.S. Supreme Court did not define “testimonial,” it did make some reference to statements made under circumstances that would lead an “objective witness reasonably to believe that the statements would be available for use at a later trial.”

At least one other court has held that reports certifying the results of laboratory tests are business records and not testimonial statements for purposes of *Crawford*³.

Other jurisdictions are split regarding whether a lab report itself is testimonial or whether its admission violates the confrontation clause. In *People v. Hernandez*⁴, the Supreme Court of New York County ruled a latent fingerprint to be testimonial even though it is a business record, because the fingerprints “were taken with the ultimate goal of apprehending and successfully prosecuting a defendant.”

In *Las Vegas v. Walsh*⁵, a court ruled that nurse’s affidavit was testimonial and inadmissible to show alcohol in the defendant’s blood because the document was prepared for the prosecution’s use at trial. Similarly, in *People v. Rogers*⁶, the court ruled the admission of a blood test report violated the defendant’s rights in the confrontation clause “because the test was initiated by the prosecution and generated by the desire to discover evidence against defendant.”⁷

An earlier more lenient, pre-*Crawford* standard was established by *Ohio v. Roberts*⁸ which has not been modified.

Some courts have held that *Crawford* applies retroactively to cases pending on direct review.⁹

Any new rule regarding the conduct of criminal prosecution grounded in the Constitution does apply retroactively to all cases, state or federal, pending on direct review or not yet final.¹⁰

SUMMARY

The functional equivalence of testimony such as affidavits, custodial interrogations, prior testimony, or similar pre-trial statements that a declarant would reasonably expect to be used prosecutorially may now be forbidden.

If government officers are involved in the production of the testimony with an eye towards trial, it would be prosecutorial abuse.

This would cover (1) child hearsay statements under RSMo. 541.075¹¹, (2) 911 calls¹², (3) statements to doctors¹³, and (4) statements of confidential informants¹⁴.

1 541 U.S.36 (2004)
2 78 Cr. L. 127 (MI App. 2005)
3 *Commonwealth v. Verde*, 827 N.E. 2d, 701 (MA 2005)
4 794 NYS 2d, 788 (NY 2005)
5 91 P 3d 591, 595, mod. 100 P3d 658 (NE 2004)
6 780 NYS2d 393 (NY 2004)
7 Other cases in accord, see *Commonwealth v. Carter*, 861 A2d 957 (PA 2004); *People v. Durio*, 794 NYS2d 863 (NY 2005); *State v. Carter*, 114 P3d 1001 (MN 2005)
8 448 U.S. 56 (1980)
9 *People v. Bell*, 689 N.W. 2d 732 (MI App. 2004)
10 *Powell v. Nevada*, 511 U.S. 79 (1994); *People v. Sexton*, 580 N.W.2d 404 (1998)
11 *U.S. v. Bordeaux*, 411 F3d, 548 (8th Cir. 2005)
12 *U.S. v. Arnold*, 410 F3d 895 (6th Cir. 2005)
13 *A.G.G. v. Commonwealth*, ___ S.W.3d ___, 2005 WL 1703599, (KY App. 2005)
14 *U.S. v. Cromer*, 389 F3d 62 (6th Cir. 2004)

Legislative Update *(From page 2)*

SB 770 [Mayer] - Allows the court to order a person to pay into the county law enforcement restitution fund for a moving violation.

SB 815 [Coleman] - Eliminates mandatory minimum sentencing for certain felons.

SB 890 [Bartle] - Requires sexual offenders who fail to register for a third time to be electronically monitored for 10 years.

SB 1023 [Gibbons] - Allows persons wrongfully found guilty of a felony, who are later exonerated by DNA profiling analysis, to receive restitution.

SB 1024 [Koster] - Establishes the Criminal Forfeiture Reform Act.



Top Federal Decisions

By Bruce C. Houdek

- *USA v. Sanders*, 474 F.3d 768, (8th Cir. 2005). Sanders initially agreed to a search of his person and when the officer attempted to search his pockets, he moved his hands down on five different occasions, preventing the officers from searching his pockets. The Court held that such action was a unequivocal withdrawal of Sander's consent to search his person which he was entitled to withdraw and the officer was bound by the withdrawal. The subsequent handcuffing of Sanders and the discovery of crack cocaine in his pockets was in violation of his rights, the consent having been withdrawn and the evidence was suppressed.
- *American Boat v. Unknown Sunken Barge*, 418 F.3d 910, (8th Cir. 2005). Documents sent by way of Electronic Court Filing presumed to be delivered, but the presumption is subject to rebuttal.
- *US v. Mickleson*, ____ F.3d ____ (8th Cir. 2006), 2006 WL27681. A sentence within the advisory guideline range can be reviewed for reasonableness under 18 U.S.C. § 3553 (a).
- *US v. Hawk Wing*, 2006 WL 27681. A statement in a pre-sentence report under the heading "aggravating or mitigating circumstances" that the defendant has an extensive criminal history for which no criminal history points were assigned is sufficient to comply with the notice requirement for an upward imposition of a departure from the sentencing guideline range, pursuant to Federal Rule of Criminal Procedure 32 (h). The opinion contains a full and extensive discussion of post-*Booker* sentencing procedures and the nature and extent of review on appeal.
- *US. v. Va Lerie*, 424 F.3d 694, (8th Cir. 2005). The removal of a chucked bag from the luggage compartment of a bus does not constitute an unjustified seizure and a later consent to search from the owner of the bag is valid.
- *US v. Wattree*, 431 F.3d 618, (8th Cir. 2005). Defendant plead guilty to two drug counts, but maintained a not guilty plea to a firearm use count. He was convicted on that count after a trial and is not entitled to the 2-level reduction for acceptance of responsibility. The Court may not order the government to file the necessary motions to obtain the third level reduction for acceptance of responsibility without a showing of bad faith or unconstitutional motive by the government.
- *US. v. Urbina*, 413 F.3d 305, (8th Cir. 2005). Testimony by a government agent, as an expert on drug dealers' habits and practices, does not violate federal rule of evidence 704 (b) which prohibits an expert from testifying as to the defendant's guilty, state of mind. The defendant was arrested driving a vehicle which had drugs concealed in the vehicle's auxiliary gas tank but claimed that he was unaware of the presence of the cocaine. The Court held that Rule 704 (b) was not violated and a DEA agent could testify that drug dealers do not entrust large quantities of drugs to persons who are unaware of their presence in the vehicle.
- *US v. Sanchez*, 429 F.3d 753, (8th Cir. 2005). The government has an obligation to disclose the identity of a confidential informant under the *Roviaro v. US* 353 U.S. 53 (1957) where the identity is helpful to the defense or is essential to a fair trial. The government provided the name and last known address of the informant who could not be found. The government could be required at a hearing to make proof of a reasonable effort to locate the informant.
- *US v. Waldner*, 425 F.3d 514, (8th Cir. 2005). A protective sweep by arresting officers is not permitted to extend into a room which the arrested defendant would not be permitted to enter and for which there was no evidence that any other person was present in the room. Defendant's motion to suppress a fire arm was granted.
- *US v. Brun*, 416 F3d. 703 (8th Cir. 2005). 911 call is an excited utterance and not testimonial hearsay excluded by *Crawford v. Washington* 4136 US. (2004).
- *US v. Simms*, 424 F.3d 691, (8th Cir. 2005). An inventory search of an automobile which is to be towed pursuant to regularly established police procedure is valid.
- *US v. Reynolds* ____ F.3d ____ (8th Cir. 2005), 2005 WL 3501336. To justify an order of restitution, the loss must result from the offense of conviction and not dismissed counts and relevant conduct.

Leave Footprints In The Sand ...

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or someone else's - to

MACDL
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Disclosure of Police Personnel Records

By Dee Wampler

A recent Missouri Appellate case of State of Missouri ex rel City of Springfield vs. Brown¹ concerned a discovery order by Greene County Associate Circuit Court Judge Jason Brown that required the City of Springfield to provide copies of citizen complaints alleging violence or excessive force by three police officers.

The City of Springfield appealed. The Defendant had been provided copies of the results of the internal affairs investigation, but was not provided with the officers' statements concerning the event nor provided with other citizen complaints about the three officers.

The city claimed that the working files of the Internal Affairs Division should be closed records under RSMo. 610.021(3)(Missouri Sunshine Law).²

The City of Springfield relied upon *Wolfskill vs. Henderson*³ but that decision was overruled in *Guyer vs. City of Kirkwood*⁴ in which the court disallowed any privilege from public disclosure and allowed discovery.

I.

Incident reports and arrest reports are open records⁵ and once an ensuing investigation becomes inactive then all "investigative reports" become open records.⁶

All public governmental bodies records are "presumed" to be open records with a few statutory exceptions. If it is a "tie breaker" then the law favors disclosure.

S. Ct. Rule 25.03 provides for disclosure of "all written and recorded statements of persons" whom the state intends to call as witnesses. The jury instructions on the issue of justification and the use of force in "self-defense" as to exactly who is the victim, the defendant or the police officers was considered in *State vs. Gonzales*⁷ and therefore any previous citizen complaints against the officers and any of the police investigation of the Internal Affairs Division regarding the officers are not protected by any privilege.



Defense attorneys should request police personnel files to establish a particular officer's practice of obtaining confessions by the use of force, violence or threats or other officer misconduct.⁸

Discovery may always be compelled by demonstrating that the requested information will facilitate ascertainment of the facts and a fair trial.⁹ It must be more than a "mere desire for the benefit of all information"¹⁰ and of course the argument can always be made to look at the records in camera ¹¹

If the prosecutor knows of the existence of information that might be material to the defense, no privilege can be invoked to deny the defendant access.¹²

The bias or prejudice of a witness is never irrelevant and cross-examination, in the interest of substantial justice "seeking to illicit relevant truths" should not be narrowly curtailed.¹³ Any privilege that "derogates the search for truth" could cut deeply into the guarantee of due process.¹⁴

SUMMARY

A defense lawyer should be bold in filing motions for discovery of internal affairs files of police departments and must be as specific as possible in identifying the information requested so as to avoid the typical prosecutor's claims of a "mere fishing expedition."



¹ Missouri Court App. Southern District, Case No. 27027 (105)
² *State ex rel White vs. Gray*, 141 SW 3d 460, 463 (Mo. App. 2004).
³ 823 SW 2d 111 (Mo. App. 1991)
⁴ 38 SW 3d 412 (Mo. Banc 2001)
⁵ RSMo. 320.083
⁶ *Ibid* at p. 414
⁷ 153 SW 3d 311 (Mo. Banc 2005)

⁸ *U.S. vs. Beras*, 51 F3d 1365 (7th Cir. 1995); *U.S. vs. Garrett*, 542 F2d 23 (6th Cir. 1976).
⁹ *Pitchless vs. Superior Court*, 11 Cal. 3d 531 (Cal. 1974).
¹⁰ *People vs. Cooper*, 53 Cal 2d 755 (Cal. 1960).
¹¹ *Pennsylvania vs. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987).
¹² *State vs. Reynolds*, 422 SW 2d 278 (Mo. 1978).
¹³ *Spaeth vs. U.S.* 232 F2d 776 (6th Cir. 1956).
¹⁴ *State ex rel Fusselman vs. Belt*, 893 SW 2d 898 (Mo. App. 1975); *State ex rel Slattery vs. Burditt*, 909 SW 2d 762 (Mo. App. 1975).



Searching for Search and Seizure Law? Look No Further!

By Lew Kollias

*The following article was the last submission by Lew Kollias before his death on January 1, 2006.
His invaluable guidance will be sorely missed.*

There are 22 relevant cases, which I broke out into five general categories: 1) affidavit/warrant; 2) inventory; 3) consent; 4) probable cause/reasonable suspicion; and by far and away the most prolific category, 5) traffic stops. Craig Johnston was instrumental in identifying these cases for me, and his assistance in this project was extremely helpful.

Affidavit/Warrant:

1) State v. Rush, 160 SW3d 844 (Mo. App. S.D. 2005)

An associate judge issued a warrant based on an officer's affidavit, which in turn was based on information obtained from two informants who, in the past, had provided information that led to warrants, arrests and convictions for drug offenses. Further, the officer verified that information provided by one informant, that the owner of the residence used ends of matches to cook methamphetamine via the red phosphorus method, by finding out that the owner of the residence bought a case of matches recently. The informant's intricate directions took the police directly to the owner's residence, where the defendant was also located, and when the warrant was executed and drugs were found, defendant admitted joint ownership. The circuit court granted the motion to suppress, finding that the hearsay from the informants was not sufficient to establish probable cause for issuance of the warrant, and the State filed an interlocutory appeal. The appellate court reversed. First, it noted that the issuing judge's determination, not the circuit judge's order suppressing the evidence, must be provided great deference, and reversed only if clearly erroneous. Here, the issuance of the warrant was not clearly erroneous. An affidavit in support of a warrant can be based on hearsay. Further, the informants were shown to be reliable in the past, gave detailed information about drug activity, and the use of red matches to cook methamphetamine was also supported by the large purchase of matches by the residence to be searched.

2) State v. Kirby, 128 SW3d 619 (Mo. App. E.D. 2004)

Contrasted with *Rush*, the court found the affidavit did not establish probable cause to issue the warrant. The affidavit here only said that a "cooperating individual" informed the detective that they observed a large amount of marijuana, scale, safe, and some other items in defendant's home. Nothing more was indicated in the affidavit as to steps taken by the officer to corroborate what this person told him. The officer did testify at the suppression hearing as to steps taken to corroborate the unnamed informant's information, but this

didn't matter since probable cause must be established from the "four corners" of the affidavit. The information here by an unnamed informant with no indicia of corroboration of this information lacked probable cause for issuance of the warrant, and the items had to be suppressed.

Inventory:

1) State v. Ramires, 152 sw3d 385 (Mo. App. W.D. 2004)

The court noted that evidence of bag of methamphetamine seized pursuant to inventory search and then opened to determine that it was in fact controlled substance, was invalid under inventory search exception since the State, while presenting evidence of a policy by the police department requiring inventory searches of all impounded vehicles, did not present any evidence of standardized criteria or established routine governing opening of closed containers (here bag) found during inventory search. The case is remanded for a determination of whether the defendant had standing to challenge the search of the bag, since he did not own the car where the bag was found pursuant to the inventory search. The defendant bears the initial burden of showing standing. If standing is shown on remand, then the evidence must be suppressed since it was not seized pursuant to a lawful inventory exception for the reasons noted above.

Consent:

1) State v. Howes, 150 SW3d 139 (Mo. App. E.D. 2004)

Defendant, who owned a boat, was riding in the boat which was stopped by water patrol for safety violations as passengers were not secured in the boat. As the officer was preparing to write a ticket, defendant interjected, said she should get the ticket because it was her boat. Defendant started crying, and talking about losing her son. The officer noticed beer on the boat, and both defendant and the driver of the boat had been drinking. The officer then asked if defendant had anything illegal in her purse, and when she said no, he asked to look through it. She initially consented, but then pulled back her purse and walked away from the officer. He then seized the purse, found a tin of candy, asked her if there was candy inside, and when she didn't respond, he opened it and found marijuana. An intensive search of the purse uncovered more marijuana. The court reversed, rejecting three of the State's grounds to justify the search.

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Searching (From page 6)

First, consent was lacking. While defendant originally gave consent to search the purse, it was conditional, and it was clearly withdrawn when the defendant closed her purse and walked away from the officer. He lacked justification to then grab the purse and search it. Second, exigency, by throwing the purse in the lake and potentially destroying contraband, could not justify the seizure of the purse and search. There was absolutely no probable cause to believe the purse contained any contraband, and while the officer testified that he thought defendant might be under the influence of controlled substances because she started crying and talking about losing her son, this was hardly sufficient to justify that unwarranted belief.

Finally, the opening of the candy tin could not be justified as a protective search, since there was no basis for the officer to believe the small candy tin contained any sort of weapon.

2) *State v. Earl*, 140 SW3d 639 (Mo. App. W.D. 2004)

An officer responded to a domestic dispute call, and defendant smelled of alcohol, so the officer tested him for sobriety but he passed. The officer then asked to search defendant, defendant responded "why," and the officer said "because I have probable cause." The defendant then said "if you've got that, then go ahead." A small amount of drugs were found on defendant's person. Because the consent was conditional on the officer having probable cause, which the officer did not have and knew he did not have, the consent was not valid. Further, it was coerced by the officer's deceitfulness.

Probable Cause/Reasonable Suspicion

1) *State v. Johnson*, 148 SW3d 338 (Mo. App. W.D. 2004)

Defendant pulled away from a curb without signaling, causing officers to pull him over for a traffic violation under 304.019.1, which requires signaling before moving from right to left on a roadway. The question is whether pulling away from the curb meets this statute, and if not, the officers lacked probable cause to pull over defendant, and drugs found subsequent to this traffic stop and later search had to be suppressed. The court finds that merely pulling away from a curb where there is no affected traffic by the movement does not violate this statute, as it is not a turn to the right or left on a roadway as contemplated by the statute, and therefore the evidence was suppressed.

2) *State v. Abeln*, 136 SW3d 803 (Mo. App. W.D. 2004)

Trial court was free to disbelieve trooper's stipulated testimony, if uncontradicted, especially considering the facts here, that the trooper could see the defendant was wearing a tan carhart coat as he passed the trooper on the opposite side of the highway, and the trooper, despite having another vehicle between his and defendant's car, could see the passenger side tires of defendant's vehicle slightly cross the fog lines. Probable cause to stop the defendant's car for traffic violation was lacking. Further, trooper lacked reasonable suspicion that defendant was involved in criminal activity, as there was no evidence of

any corroboration that defendant was involved in the local drug trade, and defendant's purchase of some starter fluid, funnels and hoses were materials of legitimate use.

3) *State v. Bergmann*, 113 SW3d 284 (Mo. App. E.D. 2003)

Officers responded to a call of a disturbance at a motel, involving a person driving a dark colored SUV. On arriving, officers saw defendant driving a gray Jeep Cherokee and stopped her. She said she had caught her boyfriend with another woman and the officers saw marijuana in an open purse lying on the front seat. Defendant was arrested and a search of the car produced more drugs. The evidence was suppressed. The officers lacked probable cause to stop the defendant based on an anonymous tip here. The officer only observed the car and did not corroborate any indication that the driver of the car may have been actually involved in some criminal activity. Further, the tip itself failed to provide police with any information supportive of criminal activity. While it was true that after the officer talked with defendant she acknowledged some involvement in a dispute, this doesn't show that before the stop, the officer corroborated the tip or otherwise had information defendant was actually involved in any illegal activity. Since the stop was bad, so was the search and seizure of drugs.

4) *State v. Matchell*, 106 SW3d 553 (Mo. App. E.D. 2003)

Defendant was upstairs when arrested after a controlled drug buy took place between confidential informants and another person in the driveway of the residence. Defendant was arrested and searched and paraphernalia was found. However, the trial court granted a motion to suppress since defendant was subject to a warrantless search, which could only be justified on a showing of probable cause, which the trial court found lacking. The appellate court, granting deference to the lower court's ruling and credibility determinations, agrees.

5) *State v. Schmutz*, 100 SW3d 876 (Mo. App. S.D. 2003)

Officer observed truck parked in front of some closed business, with driver just waiting there. Officer, thinking this was suspicious, continued to observe, and followed as the truck pulled out, "a little bit in a hurry" as the officer testified, but no violations of any traffic laws occurred. Officer pulled over defendant to get his name in case a crime was committed, smelled alcohol, ultimately leading to defendant's arrest and conviction for DWI. The officer clearly lacked probable cause to stop the defendant, and therefore evidence of DWI produced from that unlawful stop was invalidly obtained, causing the appellate court to reverse defendant's conviction, and discharge him from custody.

6) *State v. Moore*, 99 SW3d 579 (Mo. App. S.D. 2003)

Defendant was stopped after fleeing a building that was about to be searched pursuant to warrant. When asked why he was running, he didn't answer. Fearing for safety, officers conducted a pat-down search and feeling something small in his sock, removed a bag that contained a rock substance,

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Searching *(From page 7)*

later shown to be crack cocaine. However, the officer who seized this item did not testify at the suppression hearing. As such, while there was a basis under *Terry v. Ohio* to conduct a limited pat-down search for the officers' safety, there was no basis to conclude, under a plain feel doctrine, that the item in the sock, by nature of its mass or otherwise, could readily be identified as contraband to justify its seizure.

Traffic Cases

1) *State v. Granado*, (Mo. banc 2004)

After a traffic stop was completed, officer continued to ask defendant questions, and when getting some suspect answers, conducted a dog search, which led to discovery and seizure of drugs in defendant's car. Suppression was required since nothing occurred during the parameters of the traffic stop itself that created reasonable suspicion that defendant was involved in criminal activity (suspect answers to questions occurred after the purpose of the traffic stop was completed), and even though defendant was told he was free to leave after the stop was completed, a reasonable person in defendant's circumstance would not have felt that was true, considering the officer said the car could not be moved, and defendant was free to wait in the officer's patrol car while the dog sniff was conducted.

2) *State v. Dickerson*, ___ SW3d ___, (Mo. App. E.D. 2005)

Very similar to *Granado*. Traffic stop was concluded, driver and passenger were issued warning for speeding and told they could go, officer then asked if anything illegal in car and they denied it, but then told to wait for dog sniff, and dog alerted and search uncovered large amounts of controlled substance. Since the purpose of the traffic stop had concluded, the officer lacked probable cause to detain them for a dog sniff and subsequent search.

3) *State v. Wilson*, 169 SW3d 870 (Mo. App. W.D. 2005)

Drugs seized after traffic stop were suppressed by trial court, and affirmed on appeal, due to trial court's ability, as fact-finder, to reject trooper's testimony that he smelled marijuana coming from car when he approached it for a traffic stop. If the court believed the trooper, probable cause to search the duffel bags inside would be shown, but conversely, where the court here did not believe the trooper, probable cause was lacking.

4) *State v. King*, 157 SW3d 656 (Mo. App. W.D. 2004)

Officer stopped defendant for speeding. Prior to the stop, the officer received information over the radio from another officer that defendant was seen leaving a house known for drug activity earlier in the day and might have drugs in his car. Once stopped, the officer noticed defendant's leg was "twitching," and defendant appeared nervous, and his pupils were dilated. Defendant was issued the summons, but the officer further detained him, questioned him, and when denied consent to search his vehicle, had his dog conduct a sniff, and after an alert, found drugs in the car. The drugs were suppressed, because the officer lacked probable cause for the continued detention and subsequent search after the

traffic stop was concluded. The twitching of the leg and failure of defendant to look the officer in the eye were easily signs of nervousness as much as they might be of drug use. Further, the information received from another officer over the radio, especially where that officer never testified at trial or the suppression hearing, formed no basis for probable cause because there was no basis for this other officer's conclusion that defendant might have drugs in his car.

5) *State v. Maginnis*, 150 SW3d 117 (Mo. App. W.D. 2004)

Again, officer's continued detention passed the time necessary to conclude the traffic stop was not supported by probable cause to detain defendant to engage a dog sniff, and subsequent seizure of drugs was illegal. Defendant was cooperative throughout the stop, did not appear nervous, and officer's many questions during the stop that were unrelated completely to the purpose of the stop but to fish for answers of criminal activity was proper only if there was an objectively reasonable suspicion of criminal activity, which was lacking here.

6) *State v. Barks*, 128 SW3d 513 (Mo. banc 2004)

Defendant was stopped for speeding. The officer testified that his suspicions were aroused by defendant's extreme nervousness during the stop. After the traffic portion of the stop was concluded, the officer continued to inquire if defendant had anything illegal in his car or weapons, and eventually the defendant said he had a gun, which he allowed the officer to retrieve from the car. The gun came back registered. When the officer asked defendant to empty his pockets, he did except for his shirt pocket, which contained a pack of cigarettes, but tin foil was inside, which the officer testified was, in his experience, indicia of drugs. Defendant was arrested, and more items were then seized from his car. The officer had no probable cause to continue to detain the defendant after the purpose of the traffic stop was concluded. Further, someone in defendant's position would not have felt free to leave, or refuse to answer the officer's questions. Items seized without probable cause for continued detention after the purpose of the traffic stop expired had to be suppressed.

7) *State v. Manley*, 115 SW3d 398 (Mo. App. S.D. 2003)

A trooper followed defendant who he believed exited the highway to avoid him, and when defendant, whose tires touched the yellow line once, a traffic violation according to the trooper, pulled into a restaurant, the trooper also pulled in and engaged defendant in a conversation. He ultimately had defendant sit in his patrol car, and after determining defendant appeared to be growing more and more nervous and that he had a prior drug conviction, conducted a dog sniff of defendant's car, and when an alert occurred, found drugs in the car. The trial court properly suppressed the evidence since there was no basis for the trooper to stop defendant, and detain or seize defendant's person by making him sit in his patrol car to conduct the dog sniff search.

“Searching” >p9

Searching (From page 8)

8) *State v. Haldiman*, 106 SW3d 529 (Mo. App. W.D. 2003)

A trooper received an anonymous tip that defendant's vehicle contained drugs. The trooper followed defendant's car and when it veered off the highway twice, the trooper stopped it for the traffic violations. At the conclusion of the traffic stop, the trooper asked for permission to search the vehicle and the defendant gave it. The trooper called for back up. When the back up arrived, and before searching the vehicle, the trooper said he needed to pat down defendant for his safety, as he does not turn his back on anyone before searching a vehicle. As the trooper attempted to look down into defendant's cowboy boots with a flashlight, the defendant tried to position his leg so as to stiffen the boot to prevent this. Ultimately, drugs were found in the boot. They had to be suppressed, since the trooper had no reasonable suspicion that the defendant was armed or dangerous to justify the search of his person. Further, another trooper was present to watch defendant while the search of the vehicle occurred.

9) *State v. Courtney*, 102 SW3d 81 (Mo. App. W.D. 2003)

Sheriffs were looking for defendant and when they saw him driving, they stopped him. As defendant got out of his car pursuant to their request, a hollowed-out bolt fell out of the car. Without asking permission, the sheriff picked it up, and noticed it was light for a large metal bolt, and again without permission, opened it. There were drugs inside. This was an unlawful search. Defendant had an expectation of privacy in the contents of the bolt, which was used as a closed container. Further, while the bolt dropped to the ground in plain view, the contents of the bolt were not in plain view, and the sheriff opened the bolt to find out what was inside, as his curiosity was aroused by the light-weight nature of the bolt.

Finally, while the investigatory stop of defendant was reasonable, there was no reason for the sheriff to open the bolt, as he could not believe there was a weapon inside of so small an item that threatened his safety.

10) *State v. Bradshaw*, 99 SW3d 73 (Mo. App. E.D. 2003)

Defendant was driving a vehicle which had a passenger that police were looking for. At the time the vehicle was approached by police, defendant had committed no traffic violations or any other wrongdoing.

The passenger was placed into custody and then the police told defendant they were searching defendant's vehicle pursuant to the lawful arrest of the passenger. They did not obtain defendant's consent to search. Drugs were found in a tube in the car and formed the basis for defendant's arrest for possession of controlled substance. The trial court suppressed the drugs and the state appealed, but the appellate court agreed that the search was unlawful. There was no basis to search defendant's car without his consent once the police took into custody the passenger who they were looking for on an outstanding warrant for DWI. Defendant had committed no wrongdoing, and there was no reason to conduct a warrantless search of his car.

11) *State v. Richmond*, 133 SW3d 576 (Mo. App. S.D. 2004)

Defendant was stopped by a trooper on I-44 for an improper lane change. Defendant was very nervous when questioned by the trooper, had food wrappers in the car, and an atlas. Defendant said he was driving his girlfriend's car from California to Michigan. After the traffic stop was concluded, defendant refused repeated requests for consent to search the car. Suspicions aroused, the trooper told defendant he was calling in for a dog sniff. He said defendant could leave, but the car would remain until the sniff, even if it meant being towed if defendant locked the car and walked away. Drugs were found in the car. They had to be suppressed. Defendant could not be detained after the purpose of the traffic stop was completed. Further, there was nothing inherently suspicious in defendant's nervousness during a traffic stop, food wrappers, and atlas in the car, and a route from California to Michigan through Missouri. There was no basis for the continued detention, and suppression of drugs found after the dog alerted was proper.

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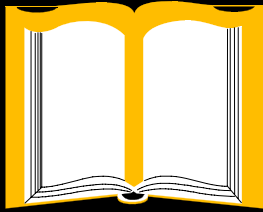
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This article summarizes favorable post-conviction cases decided since the August 8, 2005, the period covered by the last newsletter article. As noted, some of the opinions discussed below are not yet final; please check the current status of the decision before citing.

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

***Woods v. State*, 176 S.W.3d 711 (Mo. banc 2005)**

Mr. Woods was entitled to relief because he was improperly sentenced under Mo. Rev. Stat. §570.040 to a felony. His prior stealing convictions occurred on the same day before the same judge. They were not convictions received “on two separate occasions” as required by §570.040.

Mr. Woods was represented by the late Lew Kollias, to whom we all owe a great debt of gratitude for his untiring work for justice.

***Fainter v. State*, 174 S.W.3d 718 (Mo. App. W.D. 2005)**

Mr. Fainter’s guilty plea was vacated because of the lack of a factual basis. A riding lawn mower is not a “motor vehicle” under Mo. Rev. Stat. §570.030. Theft of this item is not, therefore, a felony under that section.

Congratulations to Melinda Pendergraph, Mr. Fainter’s attorney.

***Bolden v. State*, 171 S.W.3d 785 (Mo. App. W.D. 2005)**

Mr. Bolden was denied effective assistance of counsel when trial counsel, who was aware of expert opinions indicating a need for an inpatient evaluation of Mr. Bolden’s extremely bizarre statements and behavior, allowed him to “waive” his mental health issues and proceed to trial. N.B. The procedural history of this case is unique; anyone interested in what can go wrong in a post-conviction case should take a look.

Congratulations to Rosemary Percival, Mr. Bolden’s attorney.

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

***Carter v. State*, 2006 WL 45239 (Mo. Sup. Ct., Jan. 10, 2006) NOT YET FINAL**

Mr. Carter’s original 29.15 motion was unsigned and was filed in the wrong county. It was transferred to the correct county after the deadline. When the lack of signature was brought to the movant’s attention, he promptly cured it.

Under *Nicholson* and *Wallingford*, the defects have been properly cured and the movant is permitted to proceed.

Congratulations to Scott Thompson, Mr. Carter’s attorney.

***Thomas v. State*, 2005 WL 3470366 (S.D. Dec. 20, 2005) NOT YET FINAL**

Mr. Thomas’s notice of appeal was timely; it was filed within 40 days of judgment as required by Rules 75.01 and 81.05(a). For the purposes of appeal rules, post-conviction proceedings are civil in nature. N.B. Mr. Thomas lost on the merits, however. This holding about the deadline for notice of appeal is no surprise, but it is nice to have it clarified.

Congratulations to Ellen Flottman, Mr. Thomas’s attorney.

***Reliford v. State*, 2005 WL 3285929 (E.D. Dec. 6, 2005) NOT YET FINAL**

Mr. Reliford was entitled to an evidentiary hearing on his claim that he was denied effective assistance of counsel when counsel failed to request an alibi instruction, which was supported by the evidence.

Congratulations to Gwenda Robinson, Mr. Reliford’s attorney.

***Broom v. State*, 173 S.W.3d 681 (Mo. App. W.D. 2005)**

Yet another case holding that the motion court’s failure to issue complete findings of fact and conclusions of law requires reversal. N.B. This is an appeal after a previous remand for an evidentiary hearing.

Congratulations to Ruth Sanders, Mr. Broom’s attorney.

***Price v. State*, 171 S.W.3d 154 (Mo. App. E.D. 2005)**

Mr. Price was entitled to an evidentiary hearing on his claim that he was denied effective assistance of counsel when his counsel told him that he would not take Mr. Price’s case to trial unless he was paid his full fee, which Mr. Price was unable to do. Mr. Price’s routine and general responses at the plea hearing did not conclusively refute this allegation.

Congratulations to Timothy J. Fomeris, Mr. Price’s attorney.



The Public Defender Corner

By Marty Robinson

When *Woods v. State* (SC87028) was handed down on Dec. 6, 2005, few would have suggested it was the capstone of Lew Kollias' legal career. After all, Lew's quarter century of contributions to the legal profession included many victories, large and small. Mr. Woods' case was simply the most recent.

Woods must have seemed pretty straight forward to Lew. He argued, and the Supreme Court of Missouri agreed, RSMo 570.040 means exactly what it says. Before an otherwise misdemeanor stealing can be enhanced to felony stealing, the defendant must have pled or been found guilty to stealing **on two separate occasions**. Mr. Woods had entered two pleas on the same date, in the same court, before the same judge, and with the same lawyer.

Lew saw the obvious. That's one occasion. Mr. Woods is free.

No one imagined *Woods* would be Lew's finale. At fifty-two years young, Lew surely had many more briefs to write and cases to argue. He did not. On January 1, 2006, Lew was called to the highest of Courts.

The contributions and achievements of the founding father of the Public Defender Appellate Division are too numerous to mention here. Lew served as the Division's Director since its inception. Certainly, he was the boss, but he was even more a valued friend, colleague and mentor, and sadly missed by all who knew him.

The Public Defender System has been getting considerable press across the state of late. This is due in large part to the work of the Missouri Bar's Public Defender Task force, chaired by Bar President Doug Copeland. An October 26 report commissioned by the Task Force indicates the Missouri Public Defender System "is struggling to survive."

The findings of the report by the Spangenberg Group are even drawing the attention of some Missouri prosecutors. One, calling for more money and staff for the public defenders, was recently quoted, "It makes our job as prosecutors that much more difficult when you're dealing with a defense that hasn't had time to prepare cases."

Caseload, and the time to adequately prepare a case, is certainly one element of the crisis in the Missouri Public Defender System. Staffing has not increased in five years, but cases are up nearly 30% statewide, and more in some areas. The already stressed system is even more so as the number of cases increase. The PDs simply cannot keep up.

Another element of the crisis is funding. The Spangenberg report concludes funding for Missouri's program is the lowest for any public defender program in the nation. It goes on to conclude PD salaries are "pathetic," especially when contrasted with prosecuting attorney salaries.

Caseload and low salaries have combined for a cumulative PD turnover rate of nearly 100% over the past five years which, "exceeds that of any other public defender system in our experience," according to Spangenberg.

Yet, even in these dire straits, Missouri's Public Defenders answer the call the best they can. Their dedication and devotion to duty is an inspiration to any lawyer anywhere who truly believes justice for all must never be an empty promise. But, they need help beyond the welcomed efforts of the Missouri Bar. They need the public, and especially the legislature, to not only recognize how serious this crisis is; they must be committed to do something about it.

Lew Kollias started a new project shortly after the *Woods* case. He initiated a review of past cases, looking for clients eligible to seek habeas relief and benefit from the *Woods* decision. That review continues today.

Public Defenders; trained, coached and mentored by Lew Kollias; will find those cases. They will seek the relief. They will carry on the work Lew started.

As it turns out, *Woods* wasn't Lew's finale after all.

Post-Conviction (From page 10)

RULE 91 STATE HABEAS CORPUS CASES

***Saunders v. Bowersox*, 2005 WL 3047214
(S.D. Nov. 15, 2005) NOT YET FINAL**

The court was without jurisdiction to revoke Mr. Saunders' probation because the revocation occurred after the probation period expired. In order to stop the probation clock, the court must order the probation suspended when a violation notice is filed. Because the trial court failed to do this here, the revocation was improper.

Congratulations to Mr. Saunders, who appeared pro se.

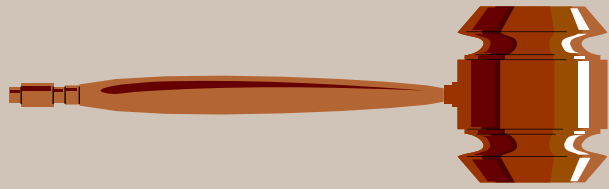
***State ex rel. White v. Davis*, 174 S.W.3d 543
(W.D. Aug. 2, 2005)**

The circuit court of Clay County had authority to grant a writ of habeas corpus ordering the release from jail of a person confined pursuant to a probation violation warrant which was issued after the probation had expired. The fact that the warrant was issued by another judge in the same circuit did not deprive the issuing judge of jurisdiction, nor did the fact that the probationer could also have filed for prohibition

Congratulations to Ruth Smalley, who represented the probationer and successfully defended the judge's order.

Criminal Law Update

By Bernard Edelman



1) *State v. Sardeson* #SD 26220 (Mo App 8/17/05)

The circuit clerk inadvertently created a jury list where the first members of the venire were the oldest and the last were the youngest; therefore, the seating was not random, but according to age. After conviction, defendant appealed, contending the jury selection process failed to comply with Chapter 494.

Appeals Court: Seventy-one people, seated in reverse chronological age, made up the venire panel from which the petit jury was to be selected. The selection process commenced with potential juror no. 1, who was the oldest member of the panel, and proceeded until 12 jurors plus two alternates were chosen. After strikes for cause and each party's peremptory challenges, only the members of the venire panel through Number 45 remained eligible for selection as a potential juror. The jury that was seated to try defendant, who was 22 years of age, ranged in age from 73 years to 45 years of age. In other words, because the seating was not in random order, there was no possibility that anyone in the venire panel who ranged in age from 23 to 42 could have been selected for the petit jury because they were seated at the end of the panel.

Pursuant to chapter 494, the circuit clerk had no discretion to seat the jury in the courtroom in any fashion other than random order. This case involves violations of the statutory jury selection requirements which amount to a 'substantial' failure to comply with the statutes, entitling the defendant to relief, even in the absence of a clear showing of actual prejudice or constitutional violation. The legislature has seen fit to prescribe the manner of selecting juries. The officers charged with this duty must at least substantially comply with the procedure prescribed. Courts are not authorized to ignore, emasculate, or set aside the statutory provisions.

Conviction Reversed.

2) *Kotar v. Director of Revenue*, #WD 64159 (Mo App 9/6/05)

Kotar was stopped at a sobriety checkpoint and, after allegedly failing field sobriety tests and based on the officer's observations, was arrested for DWI. Kotar was advised of the implied consent law and stated he wanted to speak to a lawyer before deciding whether to submit to a breath test. Kotar gave the officer the name of a lawyer and the officer, using a cell phone provided by the Highway Patrol, attempted to call the lawyer for 20-25 minutes, unsuccessfully. After again being asked to take a breath test, Kotar refused. The trial court upheld Kotar's revocation and he appealed.

Appellate Court: Section 577.041.1 provides that the arrested driver, if requested, has 20 minutes to speak to an attorney for advice on the taking of the breath test. If upon completion of the 20 minute period he continues to refuse to submit to the test, it shall be deemed to be a refusal. However, if the driver is not given a reasonable opportunity to speak to an attorney, he is not deemed to have refused the test. The purpose of the 20 minute requirement is to give the arrested driver a reasonable opportunity to contact an attorney.

In setting up the sobriety checkpoint, it should have been obvious that it was inevitable that a driver would request the opportunity to talk to a lawyer, and it was necessary to have available the means by which the driver could exercise that right. In unilaterally choosing to call the attorney for Kotar, rather than allowing Kotar to personally make the call, the 20 minute provision was violated. The officer notified Kotar at the end of the 20 minutes of his unsuccessful attempts to contact the lawyer, but had Kotar been calling himself, he might have called another lawyer during his statutory time to do so. **License Ordered reinstated.**

3) *State v. Daniels*, #WD 63642 (Mo App 10/25/05)

Defendant was convicted of murder 2nd. Part of the evidence against defendant was the use of "luminol," which detects the presence of iron and is used by law enforcement authorities as a precursor test to determine the presence of blood. Luminol tests were performed on locations in defendant's house and on portions of the victim's and defendant's cars. Positive reactions to luminol were detected on the floor mats of defendant's car, the back rear seat of the victim's car, and in different locations throughout defendant's house, including the carpeting in the den, the sofa in the den, the carpet in the dining room and in the kitchen. Laboratory tests to scientifically prove the presence of blood were performed on some of the samples seized by the police that had reacted to the luminol. The untested samples were inadvertently destroyed by the police and were thus never tested. No blood was detected. "Defendant contended that it was error to admit the luminol testing, none of which was corroborated by scientific laboratory testing for the presence of blood, because it effectively represented that the positive tests proved that blood was present in the areas tested.

Appeals Court: Defendant had requested a *Frye* hearing pretrial, to determine whether the evidence of the positive luminol tests, without subsequent conclusive scientific

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Update *(From page 12)*

laboratory testing, were not scientific evidence proving the presence of blood and thus would have made the luminol evidence inadmissible. Defendant contended that when the trial court denied him a *Frye* hearing, yet permitted the evidence of positive luminol testing despite the lack of confirming scientific test evidence that blood was present, the *Frye* standard was violated, and his right to a fair trial was prejudiced.

One State's witness testified that "luminol is a chemical that responds to blood ... if blood is there, luminol will find it." However, the witness further said that luminol is a "presumptive test" for blood and that scientific testing in a laboratory is required to confirm the presence of blood. A second witness testified that positive luminol results were found in defendant's home, on the carpeting and on the sofa, chair and footstool in defendant's home.

Luminol's value is that it shows investigators where blood may be. Other tests are required to verify that the substance is blood and that the blood is human blood. A positive luminol test indicates that blood may be present, however additional testing is required. While a positive luminol test result may satisfy *Frye* if offered only for the limited purpose of being a preliminary test for the presence of blood, certainly a *Frye* hearing is necessary to determine whether a positive luminol test reaction conclusively proves the presence of blood, without scientifically accepted corroborative evidence. The evidence offered by the State implied to the jury that blood was present in defendant's home and that it was the victim's. The trial court abused its discretion in failing to conduct a *Frye* hearing and in permitting the introduction of the positive luminol test results, effectively as proof for the presence of human blood in defendant's house, and in his and the victim's cars. **Conviction Reversed.**

4) *State v. Kemp*, #WD 64501 (Mo App 11/8/05)

Defendant was convicted of unlawful use of a weapon and felonious restraint. Defendant's complaints of error related to the admission of statements of the victim, Jackie Washington, who did not testify at defendant's trial. The victim contacted two witnesses, screaming, frantic, crying, shaking, and in a state of undress. The victim stated her boyfriend had been holding her hostage in her apartment at gunpoint and wouldn't let her leave. The witnesses called 911 and, while the victim did not talk directly to the 911 operator, the victim was heard on the 911 tape telling the witness what to tell the 911 operator in response to the 911 operator's questions. When defendant was arrested, three guns were found in and around his house. The State was unable to subpoena the victim and introduced her statements without her presence. Defendant objected to the introduction of the statements as a violation of the confrontation clause and in violation of the principle's of *Crawford v. Washington*, 541 us 36 (2004).

Appeals Court: Defendant's first complaint is that the victim's statements to the witnesses were testimonial in nature and violated the confrontation clause. The statements to the witnesses were made right after the victim was running the street half naked and in a hysterical state. The statements to the 911 operator were made for the purpose of obtaining help and police assistance, not for the purpose of aiding a police investigation and prosecution. They were not made as part of a police interrogation. Most state and federal courts have held that 911 calls were not testimonial within the meaning of *Crawford*. Defendant's second complaint was that the victim's statements did not fall within the excited utterance exception to the hearsay rule. The statements to the witnesses were in their house to people she barely knew, while she was poorly clothed and had obviously been extremely stressed by the past few hours of her life. The declarations were not the result of reflective thought. The statements were clearly excited utterances and were admissible at trial as an exception to the hearsay rule. **Conviction Affirmed.**

5) *State v. Potts*, #SD 26531 (Mo App 11/23/05)

Defendant was convicted of the Class B felony of Possession with Intent to Distribute a Controlled Substance, methamphetamine. Defendant was initially charged with a C felony of Simple Possession, but a mistrial was granted during *voir dire* as a result of an improper question by the prosecutor.

Immediately thereafter, the prosecutor informed the court he was going to dismiss the Class C felony charge and charge defendant with a B felony. Defendant requested the trial court to bar the prosecutor from filing the greater charge, arguing that it would be a violation of due process because the prosecutor's action amounted to punishment for defendant's exercise of his right to seek a mistrial based on the prosecutor's remarks during *voir dire*. The request was overruled by the trial court and the prosecutor filed a new complaint containing the enhanced charge. Prior to retrial, defendant again moved to dismiss the new charge, on due process grounds, which was overruled. On retrial, he was convicted and sentenced to 15 years in prison.

Appeals Court: Appellant alleges that the prosecutor acted vindictively when he raised the charge from possession to possession with intent to distribute after the trial court sustained his motion for a mistrial during *voir dire*. He also argues that the prosecutor deliberately induced the mistrial in order to file the greater charge and as a result, double jeopardy bars further prosecution on either charge.

When the State has probable cause to believe a crime has been committed, the decision whether or not to prosecute and what charges to file generally rests entirely within the prosecutor's discretion. This decision is rarely subject to

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judicial review. Not all charges that can be, must be filed in the initial complaint. Prosecutors can hold some charges in abeyance for strategic use. However, when such a decision comes after an accused has exercised a constitutional or statutory right, those principles conflict with the premise that to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.

Searching the record, no plausible, non-vindictive reason for filing the new charge is found. This case presents the rare circumstances in which the only rational explanation for the prosecutor's action is one of vindictiveness. Since the mistrial was granted during jury selection, the defendant was never in jeopardy, and a subsequent prosecution is not barred. **Conviction Reversed.**

6) *Woods v. State*, #SC 87028 (Mo banc 12/6/05)

This charge would ordinarily have been a misdemeanor, but defendant was charged and convicted under section 570.040, a Class C felony, for a defendant who previously had pleaded guilty to or been found guilty on two separate occasions of stealing. Defendant pled guilty to the stealing charge and to prove the elements of the prior crimes, the State introduced evidence that Woods previously entered two guilty pleas on the same date in the same court before the same judge, with the same attorney. After sentencing, defendant sought post conviction relief.

Supreme Court: Section 570.040 requires the previous guilty pleas to be on separate occasions. The statute did have language that every person who was previously convicted of stealing two times was subject to an enhanced sentence. This language was changed in 2000 and effect must be given to the legislature's amendment to this statute. Because the statute is ambiguous as to whether it intends to require that the pleas be on separate occasions or that the crimes be on separate occasions, the rule of lenity gives Woods the benefit of the lesser penalty. **Case Remanded for Resentencing.**

Footnote: *This case was well handled by MACDL member Lew Kollias, head of the Missouri Public Defender's Appellate Division, along with Michelle Rivera. We received news of Lew's untimely death shortly after this case was decided. We'll miss you Lew, along with the tremendous job you did for the public defender system.*

7) *state v. clark*, # ED 84783 (Mo App 12/6/05)

Defendant was convicted of first degree assault, ACA, and attempted robbery. He was sentenced to life imprisonment. He alleges trial court error in allowing the State to introduce evidence of acquitted crimes during the sentencing phase of his trial.

Appeals Court: During the sentencing phase of appellant's trial, the State introduced evidence that appellant had committed four murders, during two separate occurrences. Appellant had been tried and acquitted of these charges by two juries.

Section 557.036.3 RSMO allows the State to introduce, during the punishment phase, the history and character of the defendant. The trial court has discretion during the punishment phase to admit whatever evidence it deems helpful to the jury in assessing punishment. Even evidence of a defendant's prior unadjudicated criminal conduct may be heard by the jury in the punishment phase of a trial. See *State v. Ferguson*, 20 SW3d 485, 500 (Mo banc 2000).

Whether the State can introduce evidence of previous acquittals during the penalty phase is an issue of first impression. The U.S. Supreme Court addressed the issue in *US v. Watts*, 519 US 148 (1997), the court holding the sentencing court could consider conduct underlying the acquitted charge, so long as the conduct has been proved by a preponderance of the evidence. In *Watts*, the court reasoned that an acquittal on a criminal charge does not prove that the defendant is innocent, it merely proves the existence of a reasonable doubt as to his guilt. An acquittal is not a finding of any fact. An acquittal can only be an acknowledgement that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences. The Supreme Court held that the government was not precluded from relitigating an issue when it is presented in a subsequent action, governed by a lower standard of proof.

In *State v. Jaco*, 156 SW3d 775 (Mo banc 2005), the Missouri Supreme Court held the punishment phase of a trial is generally subject to a lower standard of proof than the guilt phase. Facts that would have tended to assess his punishment were not required to be found beyond a reasonable doubt by a jury and the state was not precluded from introducing evidence of acquitted conduct during appellant's punishment phase. **Conviction Affirmed.**

8) *Carlyle v Mo Department of Corrections*, #WD 65441 (Mo App 12/13/05).

On January 5, 2001, appellant was convicted of felony driving while intoxicated, was sentenced to four years MDC, but was placed on probation. He violated his probation and was sent to the penitentiary on January 26, 2004, to serve his sentence. He was advised he would have to serve 40% of his sentence because he had a prior prison commitment, a 120 call back under section 559.115. However, section 559.115 was amended in June, 2003, providing that 120 call backs did not count as a prior prison commitment. The Mo Department of Corrections felt this amendment was not retroactive and appellant filed a declaratory judgment action. The trial court ruled in appellant's favor, and the DOC appealed.

Appeals Court: Existing law permits the retroactive application of sentences pursuant to sect. 559.115.7.

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The new statute is procedural and not substantive. New statutes affecting the minimum time to be served in prison are procedural and can be retroactively applied. **Trial Court Judgment Affirmed.**

9) *State v. Prosser*, #ED 85733 (Mo App 12/20/05).

Appellant was convicted of Trafficking First Degree, possession of a chemical with the intent to create a controlled substance and possession of paraphernalia with the intent to make meth. Appellant requested the trial court advise the jury, during the punishment phase, that any sentence on the trafficking charge would be served without parole. The court declined. Appellant claimed this was error.

Appeals Court: The question presented for our determination is whether, under Missouri's bifurcated trial procedure for non-capital criminal cases, the issue of parole ineligibility is a matter for the jury's consideration. It is well established law in Missouri that it is not error for the trial court to fail or refuse to inform the jury that no parole, probation, suspended sentences, or any other form of judicial clemency would be exercised in the event of a conviction. These issues are considered extraneous to the jury's determination of guilt and punishment. These matters are of no concern to the jury. Appellant argues that when the legislature bifurcated criminal trials, they intended that the jury have a broader range of evidence and information during the penalty phase, allowing an accurate and knowledgeable assessment of the appropriate punishment. However, nothing in the statutory language justifies a departure from the settled law that issues of probation and parole are not for the jury's consideration. If the legislature intended such a significant departure from established practice to be accomplished by the bifurcation statute, surely it would have done so explicitly. **Conviction Affirmed.**

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Review of The Gold of Cape Girardeau by Morley Swingle

By Dave Eblen

In the spirit of James Michener and Thomas Costain, Cape Girardeau County Prosecutor Morley Swingle takes us on a journey from a present day courtroom, back in time, to the turmoil of Civil War Cape Girardeau.

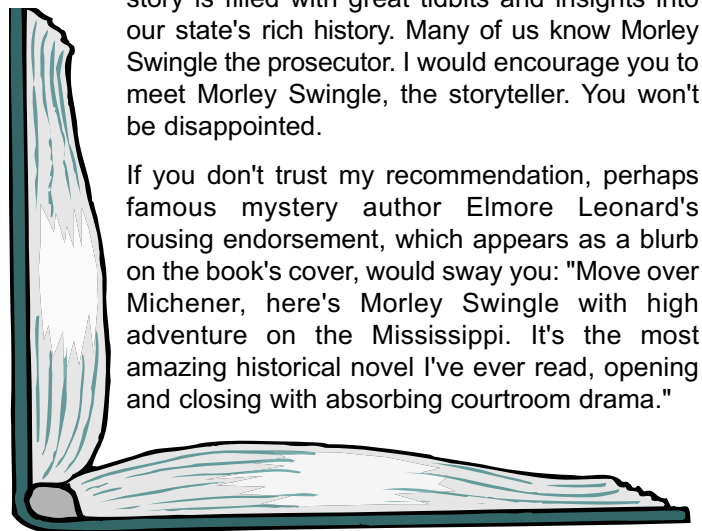
The story begins when a treasure trove of gold is found next to a skeleton with a bullet in its skull in a young couple's basement in modern day Cape Girardeau. A lawsuit ensues over the ownership of the mysterious gold. The search for the true owner takes us on a suspenseful, and sometimes gut-wrenching, adventure through the eyes of two young lovers in the years before and during the Civil War.

Swingle's preparation included scouring more than 20,000 pages of letters and documents at the State Historical Society. His detailed research translates into a page-turning, swift-paced, historical romance. The story, which follows the travails of the young couple, allows the reader to experience a variety of compelling characters in vivid historical settings.

The reader revisits parts of Missouri's rich history, including the romance and danger of the steamboat era, a duel on a Mississippi River island, Mark Twain, Mike Fink, and the Battle of Cape Girardeau. Anybody with an interest in Civil War Missouri will surely enjoy this tale set during our state's most violent era. It is a story interwoven with intrigue, suspense and heartbreak.

This story really hits the mark on a number of planes, especially Swingle's ability and imagination in taking the reader back in time to pre- and Civil War Missouri. The story is filled with great tidbits and insights into our state's rich history. Many of us know Morley Swingle the prosecutor. I would encourage you to meet Morley Swingle, the storyteller. You won't be disappointed.

If you don't trust my recommendation, perhaps famous mystery author Elmore Leonard's rousing endorsement, which appears as a blurb on the book's cover, would sway you: "Move over Michener, here's Morley Swingle with high adventure on the Mississippi. It's the most amazing historical novel I've ever read, opening and closing with absorbing courtroom drama."



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