MACDL
Missouri Association of Criminal Defense Lawyers

Newsletter

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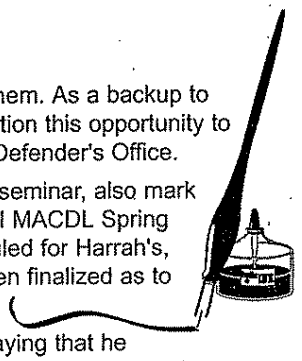
September, 2002

President's Letter



I recall many years ago when one of my fellow MACDL members asked me if I would be willing to serve on the Board of Directors. I reluctantly agreed stating, "Okay, as long as I don't have to do very much." He, of course, assured me that I would not and within just a few months I found myself speaking at a seminar where the audience included six or seven lawyers who were the best around and whom I had looked upon as idols in the practice.

Already scared to death about speaking as any kind of an expert on anything, I almost had a heart attack when I saw these faces in the crowd while thinking, "What in the world am I going to be teaching these people? They already know it all."

Of course, none of us ever know it all and there is always something that we can learn from our fellow brothers and sisters who are out in the trenches fighting for the CITIZENS ACCUSED.

One of the main things this organization has to offer is what has consistently over the years been high quality seminars. Since this newsletter is being sent not only to our members but to prospective and past members, I bring your attention to, and please mark your calendar for FRIDAY, OCTOBER 25, 2002, the next upcoming seminar which will be in CLAYTON, Missouri. It looks to be excellent and features three nationally known speakers including GEOFFREY FIEGER, best known for his defense of the infamous Dr. Kavorkian. His presentation alone I believe will be worth the price of admission.

We have all been to seminars where it is extremely hard to stay awake, but I can honestly say that I have never been to one of our seminars where I did not come away with at least a couple of things that I was able to use in my practice at the moment.

Notice that we are offering the seminar to those in the Public Defender's Office at a less-than-break-even cost basis. We are going to try to get word out to all of them. As a backup to that, I would ask all members to mention this opportunity to your colleagues at your local Public Defender's Office.

While marking your calendar for this seminar, also mark April 24th through 26th for the annual MACDL Spring Seminar, which at this time is scheduled for Harrah's, but those arrangements have not been finalized as to the place.

Remembering Groucho Marx's old saying that he never wanted to be part of any group that would have him as a member, I am thinking that I certainly wouldn't want to be any part of a group that would have me as President.

I am, however, very, very proud to be President of MACDL. I urge all of you to be as active as you possibly can in this organization. I promise that any of you who want to be included in the many things that we do will be given an opportunity. Just let me or anyone on the Board of Directors know and we can find a committee that you can work on.

As most of you know, we have a website and together with our Directory of Membership, this organization is a tremendous networking tool that all of us can use to benefit ourselves and therefore our clients.

I hope that you find this newsletter interesting and informative and look forward to seeing as many of you all again on FRIDAY, OCTOBER 25, 2002 IN CLAYTON, MISSOURI.

Very truly yours,
Patrick J. Eng
MACDL President

MACDL Legislative Report

By: Randy Scherr, MACDL Lobbyist

With the May 17 adjournment of the 2002 Legislative Session, we saw the conclusion of one of the most contentious legislative sessions in recent history, as well as, the conclusion of the legislative careers for nearly 90 legislators in both the House and Senate as a result of term limits.

The fact that it is an election year, coupled with the post-September 11 sentiment, we saw an usually high number of criminal law bills being considered and passed by the General Assembly. MACDL tracked over130 bills during the 2002 session. Below is a summary of several of the bills of interest.

HB 1037 and SB 650 – These bills eliminated the statute of limitations for forcible rape, attempted forcible rape and forcible sodomy. This was the top priority of the Governor and the legislature and was the second bill passed by the General Assembly and signed by the Governor during this legislative session.

HB 1076 – This bill by Representative Cathy Jolly would have permitted law enforcement officials to detain a person for up to thirty-two (32) hours without charging a crime if the person has been arrested for any felony offense. Although there was little support in the House Judiciary Committee because of our strong opposition, a watered down version was reported "Do Pass" which would have restricted the scope to the seven deadly sins. However, the bill was not reported to the floor and subsequently did not pass.

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Significant Missouri Cases

By: Bernard Edelman

State v. Mack, 66 S.W.3rd 706 (Mo.banc. 2002).

TRIAL COURT: Defendant was arrested at a drug check point in Lincoln County. A sign was on the highway stating that there was a drug check point one mile ahead with drug dogs, but the sign was placed closer to an earlier exit and anyone getting off the highway at this earlier exit found the police there to inquire about their travels. Mack was stopped and consented to a search and drugs were found. In State v. Damask, 936 S.W. 2d 565 (Mo.banc. 1996), the Missouri Supreme Court approved this type of trickery. However, the United States Supreme Court in Indianapolis v. Edmond, 531 U.S. 32 (2000) disallowed evidence obtained through the use of drug check points absent "individualized suspicion" of wrong doing. Defendant appealed his conviction contending that the check point violated the principles set down in Edmond.

SUPREME COURT: The issue here is whether the deceptive drug check point scheme does indeed generate the necessary quantum of individualized suspicion. It is reasonable to assume that drivers with drugs will "take the bait" and get off the highway in an attempt to avoid the non-existent check point. The check point was set up in an isolated and sparsely populated area offering no services. The conduct of the defendant could also be considered in determining the issue of individualized suspicion as the defendant suddenly veered off the highway onto the exit and almost missed the turn, as if he made the decision to exit only upon concluding that a drug check point was ahead. Under the totality of circumstances, the check point passes constitutional scrutiny and defendant's conviction is AFFIRMED.

State ex rel. Jackson County Prosecutors v. Moorhouse, #59632 (Mo.App. 2002).

TRIAL COURT: Defendant was charged with murder and armed criminal action. Two witnesses were endorsed by the state and when defendant's lawyer tried to depose them, they refused to answer any questions even after the judge ordered them to do so. The judge then entered an order striking their endorsement.

APPELLATE COURT: The trial court's discovery ruling should be fair to both parties. Generally, if a witness refuses to be deposed, the trial court has discretion to strike some or all of that witness' trial testimony. However, once the court bars the witness from being endorsed by the state, the court essentially precludes the witness from later testifying at trial if the witness changes his mind. No attempt was made by the trial court to see if the witness was claiming a Fifth Amendment privilege in refusing to testify or whether the witness was refusing on some other grounds. The court acted prematurely and excessively to remedy the denial of discovery since the court would have remedies available if the witness later agreed to testify. The court foreclosed the state from any alternatives or responses to the witness' refusal. If the witness decided to testify at trial, the court could then order a continuance, limit the testimony, allow an interview of the witness, again allow a deposition of the witness, could declare a mistrial or grant a recess to give additional time to investigate the statements. The court precluded all of these actions by its ruling. It was error to strike the endorsement.

Gresham v. State, 68 S.W.3rd 591 (Mo.App. SD 2002).

TRIAL COURT: Defendant pled guilty to Assault Second and at the plea, the court inquired if there was a plea agreement and the defendant answered "yes." The prosecuting attorney told the court that the state was requesting a presentence investigation but at sentencing the state would recommend a seven year term, the maximum, under Section 559.115 RSMo., which allowed the court to release the defendant from the penitentiary after 120 days confinement. Defendant's lawyer advised the court that this was the "plea agreement." However, at the end of the plea, the judge told Defendant that "you understand however, I do not have to accept, as a judge, any recommendation by the state or defense counsel." Defendant said "yes." The PSI was very unfavorable to defendant and the defendant's lawyer moved to withdraw the plea when advised by the judge that he was not going to sentence defendant under section 559.115 RSMo. Defendant's attorney stated that the court was not following the plea agreement. This request was denied and the court sentenced the defendant to seven years in the Missouri Department of Corrections and denied him sentencing under section 559.115 RSMo.

APPELLATE COURT: Whether a circuit judge will grant or consider granting probation under Section 559.115 RSMo. is not subject to negotiation between the state and defendant in a criminal case because the language in Section 559.115 states that this decision is only upon its own motion and not that of the state or the defendant. Paragraph 13 of the petition to enter a plea of guilty advised the defendant that the sentence to be imposed was completely within the control of the judge and that the defendant was prepared to accept any punishment permitted by law which the court saw fit to impose. The recommendation by the prosecuting attorney was not binding on the court. SENTENCE AFFIRMED.

Comstock v. State, 68 S.W.3rd 561 (Mo.App. WD 2001)

TRIAL COURT: Defendant pled guilty to two counts of statutory rape first degree and also had a probation revocation proceeding. The state agreed to recommend seven years concurrent on the sex charges, concurrent with five years on his probation violation. At the plea, defendant acknowledged that the court did not have to follow this recommendation. At sentencing the court sentenced defendant to concurrent seven year sentences on the sex charges with a consecutive five years on the probation violation. A guilty plea form, which the defendant signed, stated that the court did not have to honor the "plea bargain" and that the "plea bargain" was only a recommendation to the court and that the defendant could nc withdraw his plea.

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Legislative Report *(Cont. from page 1)*

HB 1489 – This bill would have created a county crime reduction fund and allow the courts to order misdemeanor defendants to pay up to $1,000 into the fund as a condition of probation. This was strongly supported by the Missouri Sheriff's Association. We strongly opposed this bill and defeated it on the Senate floor this session on three separate occasions. The Legislative Committee of the Missouri Judicial Conference has since taken a position in opposition to this legislation.

HB 1577 – This simple bill by Representative Marsha Campbell, dealing with the crime of tampering with pharmaceuticals, became the omnibus crime bill on the House floor after receiving nearly forty (40) amendments. By the time it reached the Senate, it included everything from DNA evidence, assault crimes, invasion of privacy, human cloning, terrorism, crime victims compensation funds and some traffic offense revisions. The bill did receive a hearing in the Senate Judiciary Committee, but died there.

HB 2062 – This bill redefines restricted driving privileges and makes several technical corrections to that statute. The bill was sponsored by Representative Hosmer and was signed into law by the Governor on June 12.

SB 712 – This bill initially began as the CDC model bill on state terrorism and passed the Senate in a relatively clean manner. However, the House added numerous provisions including an expansion of the wire tapping law. The Senate, in an earlier version, expanded the wire tapping law to include terrorist acts. The House, in a last minute maneuver, expanded that authority to other felonies. The bill was signed by the Governor on July 1.

SB 758 – This bill added the crimes of felonious restraint to the list of offenses required to be registered on the sexual offender registry. The bill was signed by the Governor on July 10.

SB 969 – This bill contained numerous changes including the establishment of the Missouri Regional Computer Forensics Laboratory, changes to Megan's Law allowing parole boards to consider information listed on the juvenile sex offenders registry, adding first degree statutory rape and forcible sodomy to the list of crimes that are ineligible for bail post conviction and creating the crime of bestiality. This bill was signed by the Governor on July 10.

You can access both the summaries and text of these bills by going to www.house.state.mo.us/jointsearch.asp. Simply type in the bill number (i.e. HB1037 with no space).

MACDL Monitors Key Elections

The MACDL PAC has made its first round of contributions in key races for the upcoming November elections. The PAC is in the process of soliciting additional funds for the upcoming General Election and will be holding a PAC fundraiser on October 24 in St. Louis. Additional details will be sent to the membership.

There are numerous key legislative races this fall. Please become familiar with the candidates in your area.

The MACDL newsletter is a semi-annual publication of the Missouri Association of Criminal Defense Lawyers; P.O. Box 1543; Jefferson City, Missouri 65102; Phone: 573-636-2822; Website: www.macdl.net.
Your comments and suggestions are welcome!

Recent Federal Decisions

By: Bruce Houdek

Atkins v. Virginia, 122 S. Ct. 2242 (2002) The Supreme Court held that execution of mentally retarded defendants constitutes cruel and unusual punishment prohibited by the Eighth Amendment. The Court held that the punishment is deemed excessive under the Amendment if it is not graduated and portioned to the offense.

The United States v. Drayton, 122 S. Ct. 2105 (2002). The Court held that drug enforcement officers who conducted a routine suspicionless drug search did not need to inform bus passengers that they had the right to refuse to cooperate with the search or refuse consent when approached by officers at random asking questions. No request for consent to search their possessions was required so long as a reasonable person would understand that he was free to leave.

United States v. Arvizu, 122 S. Ct. 744 (2002). The Court applied a totality of the circumstances test to a stop of a vehicle by a border patrol agent on a public road. The Court noted that the area was one frequently used by smugglers and illegal aliens and indicated that unusual actions of the motorist and his passengers, although not criminal, could be considered.

Kelly v. South Carolina, 534 U.S. 246 (2002). In a death penalty case, the Court held that a defendant for whom parole would be impossible is entitled to a jury instruction on ineligibility for parole, if the prosecution introduces any evidence or makes any argument concerning dangerousness.

Ring v. Arizona, 122 S. Ct. 2448 (2002). The aggravating factor in a death penalty case must be found by a jury and judges are not qualified to make such findings.

United States v. Knights, 122 S. Ct. 587 (2001). A probationer, who agreed in advance to a condition of probation requiring him to submit to searches of his person and property at any time, may not object to a warrantless search.

Board of Education v. Earls, 122 S. Ct. 2559 (2002). School officials may require random drug testing as a condition precedent for participation in competitive interscholastic activities. The Court majority emphasized that the School District had special needs to alleviate the "nationwide epidemic of drug use" by school children and that the school had a system "custodial responsibility regarding the students."

Kirk v. Louisiana, 122 S. Ct. 2458 (2002). The Court reaffirmed its decision in *Payton v. New York*, 455 U.S. 573, 590 (1980) distinguishing searches in public places from an invasion of privacy in the home finding that the police need either a warrant or probable cause plus exigent circumstances to enter a residence.

Hope v. Pelzer, 122 S. Ct. 2508 (2002). The Supreme Court held that qualified immunity does not protect prison personnel who used a hitching post to inflict punishment on an inmate.

McKune v. Lile, 122 S. Ct. 2017 (2002). Prison officials may withhold an inmate's privileges regarding housing and visitation if he refuses to disclose prior sexual history during a sex treatment program.

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Missouri Significant Cases *(Cont. from page 2)*

APPELLATE COURT: Missouri Supreme Court 24.02 gives the defendant the right to withdraw his plea if there is a binding plea agreement which the court is not going to follow. However, in this case, there was a not a "plea agreement" but a "non-binding recommendation" by the state. The record is clear that the defendant knew the state's recommendation was not binding on the court. SENTENCE AFFIRMED.

State ex rel Williams v. Wilson, 63 S.W.3rd 650 (Mo.banc. 2002).

TRIAL COURT: Defendant had two drug charges pending and was a prior and persistent drug offender. The state waived proving defendant to be a persistent drug offender in exchange for a plea of guilty to concurrent sentences of ten and seven years. Had defendant been proved to be a persistent drug offender he would have faced a sentence of ten years without probation or parole. The state expected the court to sentence defendant per their recommendation. On March 6, 2001, at the plea, the court advised defendant and the state that he did not have to follow the state's recommendations. The court then ordered sentences of ten and seven years concurrent, but placed defendant in the long term drug program per section 217.362 RSMo., making him eligible for probation upon completion of the program. After sentencing, the state immediately moved to set aside the plea on the grounds it had only waived persistent offender status on reliance on a straight ten year sentence. The state then sought to prove the persistent offender status but was not permitted to do so by the trial court. The trial judge said "I am not setting the plea aside. This matter is over." Two days later, on its own motion, the court issued an order setting aside the plea. Defendant sought a writ of prohibition to prevent the trial court from setting aside the plea and sentence.

APPELLATE COURT: Once judgment and sentence occurs in a criminal proceeding, the trial court has exhausted its jurisdiction and can take no further action unless authorized by statute or rule. When the court made its statement to defendant that the recommendation was not binding on the court, it applied to the defendant and the state, as well. Having accepted the plea and entered sentence and judgment, the jurisdiction of the court was exhausted. The writ of prohibition is made absolute and the plea and sentence stands.

EDITORIAL COMMENT: *Should the bells and whistles begin going off in the heads of criminal defense lawyers as a result of these opinions? When is a plea bargain a plea bargain to be followed and not a non-binding recommendation?*

Most trial judges are extremely consistent in following a plea agreement between the state and defendant or allowing the defendant to withdraw his plea if they will not follow the plea agreement. However, the judges at pleas ask our clients if they understand the plea agreement is not binding on them and that they do not have to follow the agreement. Does that vitiate the plea bargain? We tell our clients to agree with this statement, believing that the judge will honor the plea agreement. Not all judges tell the defendant at the plea that if they will not follow the recommendation then the defendant can withdraw his plea of guilty.

We need to make better records at our pleas so there is no question that this is a "plea bargain" as opposed to a "blind plea". We need to make it clear that it is understood that Supreme Court Rule 24.02 applies and that the defendant can withdraw his plea if the court will not follow the agreement. If the judge tells you that is not his understanding of the plea, then you better make sure that your client understands it is a "blind plea" and that the court does not have to follow the recommendation and the defendant is subject to sentencing at the trial court's discretion. Be careful that a "non-binding recommendation" does not create an ineffective assistance claim against you.

State v. Thompson, 83875 (Mo.banc. 2002)

TRIAL COURT: On motion from the prosecutor, defendant's attorney was precluded from making an opening statement because the evidence he intended to introduce was going to come from the cross-examination of the defendant's witnesses.

SUPREME COURT: In a comprehensive review of the law in Missouri on this subject, it was error to preclude the defendant from making an opening statement, in this case, on this record, but the error was not prejudicial enough to warrant a reversal. The basis to deny defendant the opportunity to make an opening statement based on the cross-examination of the state's witnesses is that this evidence is considered to be an attack on the credibility of the state's witnesses and to discuss that evidence in opening statement is considered argument rather than "informing the judge and jury in the general way of the nature of the action so as to enable them to understand the case and to appreciate the significance of the evidence as it is presented." However, when the defendant has endorsed some or all of the state's witnesses as his witnesses, merely because the state has the opportunity to call the witnesses first, should not alone be enough to preclude a defendant's opening statement. In that situation, the defendant is denied the opportunity to inform the jury of the nature of the defense so as to enable the jury to appreciate the significance of the evidence as it is presented. Thus, rather than a blanket rule that a defendant could not make an opening statement based on the evidence he intends to elicit on cross-examination, the trial judge's focus should be whether the defendant will be eliciting on cross-examination "factual evidence that tends to prove the defendant's theory of the case" which is appropriate for an opening statement.

State v. Bess, ED 79377 (MoApp 3/19/02)

Defendant pled guilty to two counts of sodomy, assault and kidnaping and was sentenced to prison. He attempted to withdraw his plea to the kidnaping charge, which the trial court refused to do. Defendant had attacked the victim in a park and dragged her to a rest room where he assaulted her.

APPELLATE COURT: Kidnaping is "removing another without her consent from the place where she is found for the purpose of facilitating the commission of any felony." Kidnaping should not be charged where the movement is merely incident to another offense. To determine this issue, the court must look to see if there was any increased risk of harm or danger to the victim from the movement that was not present as a result of the other offense. Increased risk may arise from the movement itself or from the potential of more serious criminal activity because of the remoteness or privacy of the area where the victim was moved. By taking the victim to the bathroom where he assaulted her, the defendant increased his ability to prolong the assault and make it more violent and decreased the chances that anyone would witness the incident, both of which increased the risk to the victim. CONVICTION AFFIRMED.

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Missouri Significant Cases *(Cont. from page 4)*

State v. Mullenix, #WD60052 (MoApp 4/16/02)

Defendant was arrested for DWI on the campus of Northwest Missouri State University and, in addition to the ticket requiring him to face criminal charges in the state associate circuit court in Nodaway County, he was also to appear before the student faculty discipline committee to face student discipline as a result of his violation of school policy. He appeared before the committee, pled guilty to violating school policy by the commission of the DWI offense on campus grounds, and was placed on probation for the remainder of the school year, was ordered to attend an alcohol program, was ordered to do community service and was fined $150.00. He then appeared in the associate circuit court and moved to dismiss the criminal charge on Double Jeopardy grounds, which was sustained by the trial court and the State appealed.

APPELLATE COURT: The issue on appeal is whether there would be multiple **criminal** punishments for the same offense which is what the Constitution prohibits. The question is to determine whether the campus discipline is criminal or civil in nature. The school rules and regulations would establish whether the defendant was subjected to punitive measures so as to make the disciplinary proceeding criminal in nature. However, the rules and regulations were not introduced into evidence at the hearing and were not before the trial court. Consequently, the defendant did not sustain his burden of proof to establish the criminal nature of the discipline in order to sustain his double jeopardy claim and the DISMISSAL IS REVERSED.

State v. White, #WD 58462 (MoApp 4/30/02)

Defendant was convicted of 12 counts of rape, molestation sodomy and other sex charges involving his minor child. Defendant was found guilty after a jury trial; however,two significant events occurred before sentencing. First, a phone call was made to defendant's attorney advising that defendant's wife was having an affair with the police officer in charge of the investigation which had been ongoing for almost a year prior to the trial and which was known to the prosecutor. The prosecutor had an office meeting prior to trial where it was decided by the prosecutor's office that the information of the relationship was not relevant or material to the case and need not be disclosed to the defendant. Secondly, prior to sentencing, the defendant fled to Costa Rica where, after a nationwide manhunt, he was arrested and returned to the US for sentencing some 11 months later. After sentencing he appealed.

APPELLATE COURT: Under normal circumstances, the "escape rule" would have barred defendant's appeal, as the appellate courts will deny the right of appeal to a defendant who flees in an attempt to escape justice. This judicially created rule's rationale is to protect the orderly and efficient use of the court's resources and because such conduct adversely affects the criminal justice system. However, because of the relationship between the police officer and defendant's wife which came to light before defendant fled, the appellate court exercised its discretion not to invoke the "escape rule" and denied the state's motion to dismiss the appeal.

The issue on appeal was whether defendant's Due Process Rights were violated by the failure of the prosecutor's office to advise defendant of the relationship as exculpatory evidence and whether that helped to mislead the jury. Did defendant receive a fair trial in the absence of the evidence and was the verdict then worthy of being received in confidence? Did the suppression of the evidence undermine confidence in the outcome of the trial? Since the police officer denied in a pretrial deposition that he had any interest in the outcome of the criminal proceedings, which the prosecutor knew was untrue, and since there was trial strategy available to the defendant if they had this information pretrial, it was error not to disclose the information under Brady v. Maryland and the CONVICTION IS REVERSED

State v. Bass, #WD59447 (MoApp 5/21/02)

Defendant was convicted of two counts of murder, child abuse and armed criminal conduct. Among her complaints, defendant argued that Section 491.075 RSMo, which allows for hearsay statements of child victims to be admissible under certain circumstances, did not apply to child witnesses and it was error to admit such testimony. The child victims' brother, who was eight years old, had made statements to individuals who were allowed to testify as to what the witness had told them about the victims' death.

APPELLATE COURT: Section 491.075 RSMo was created by the legislature as an exception to the hearsay rule and has passed repeated constitutional challenges based on alleged violations of due process and equal protection. The language of Sect. 491.075.1 does not restrict the hearsay statements to child victims while Sect. 491.075.2 does. The court accepted the state's argument that the legislature meant to create different requirements for the admission of hearsay statements of a child (491.075.1) as opposed to the admission of hearsay statements offered to corroborate statements or admissions of a defendant (491.075.2). The legislature is presumed to have acted intentionally when it includes language in one section of a statute but omits it from another. The admission of the child witness' testimony was proper. CONVICTION AFFIRMED

Recent Federal Cases *(Cont. from page 3)*

Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002). The Child Pornography Prevention Act of 1996, criminalizing child pornography prohibiting visual depiction that appears to be or conveys the impression of a minor engaging in sexually explicit conduct is unconstitutional as the government's interest only extends to safeguarding actual children from being used in the production of pornography.

City of Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728 (2002). The City ordinance was held constitutional which prevented multiple adult businesses in the same premises, to prevent undesirable secondary effects based upon a City study showing that such businesses increased crime.

Watch Tower Bible and Tract Society of New York, Inc. v. Village of Stratten, 122 S. Ct. 2080 (2002). The First Amendment is violated by a City ordinance which prohibits solicitation without a permit from the Mayor.

Republican Party of Minnesota v. Kelly, 122 S. Ct. 2528 (2002). Restrictions on the speech of judicial candidates in elections violate the First Amendment.

Motion of the Month

Presented by: Charles M. Rogers and Cheryl A. Pilate; Wyrsch Hobbs Mirakian & Lee, P.C. (Attorneys for Appellant)

In The Supreme Court of Missouri (No. 77067)

Motion To Recall The Mandate

COMES NOW Appellant, Joseph Whitfield, by and through his counsel, and respectfully moves this Court to recall the Mandate this Court issued in *State v. Whitfield*, 939 S.W. 2d 361 (Mo. banc. 1997), and to issue in its stead a Mandate reversing Mr. Whitfield's sentence of death and directing the trial court to impose a sentence of life imprisonment without eligibility of probation for parole, or release except by act of the Governor. As ground for this Motion, Mr. Whitfield states:

Relevant Procedural History

1. At trial, Mr. Whitfield was found guilty of first degree murder[1]. In the penalty phase; the jury was unable to agree on punishment, deadlocking 11-1 in favor of life imprisonment. 39 S.W.2d at 365. Thereafter, the trial court sentenced Mr. Whitfield to death. A timely post-conviction motion under Rule 29.15 was heard by the trial court, which denied relief. *Id.* Since Mr. Whitfield was sentenced prior to January 1, 1996, the appeal from his conviction and sentence was consolidated with the appeal from the denial of his post-conviction motion. This Court affirmed the conviction, the death sentence and the denial of post-conviction relief on January 21, 1997. A timely filed Petition for Rehearing was denied February 25, 1997.

2. Mr. Whitfield sought habeas corpus relief in the Untied States District Court for the Eastern District of Missouri. *Whitfield v. Bowersox*, No. 4:97-CV-1412 CAS. On January 24, 2001, the District Court issued a writ of habeas corpus granting penalty phase relief but denying Mr. Whitfield's guilt phase claims. The State appealed the grant of penalty phase relief, and Mr. Whitfield cross-appealed the denial of guilt phase relief. The appeal and cross-appeal are currently pending before the United States Court of Appeals for the Eighth Circuit, Case Nos. 01-1537/01-1538.

Basis for Recalling the Mandate

3. Joseph Whitfield was sentenced to death although Mr. Whitfield never waived his right to trial by jury or his right to be sentenced by a jury in this case, and although a jury never unanimously found the facts necessary to make Mr. Whitfield eligible for the death penalty under Mo.Rev.Stat. § 565.030. As explicitly stated by the United States Supreme Court in *Ring v. Arizona*, _____, U.S. _____, 122 S. Ct. 2428, 2442 (2002), "The Sixth Amendment requires that [aggravating factors] be found by a jury." As the United States Supreme Court noted, "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact finding necessary to increase a defendant's sentence by two years but not the fact finding necessary to put him to death. We hold that the Sixth Amendment applies to both." 122 S. Ct. at 2243[2]. In this case, the jury did not find the existence of any aggravating factors, did not find that the evidence in aggravation of punishment warranted imposing the death sentence, and did not find that the evidence in mitigation of punishment was not sufficient to outweigh the evidence in aggravation of punishment. All of those findings are required by § 565.030 to make a defendant eligible for the death penalty; therefore, according to *Ring*, there is a Sixth Amendment right to a unanimous jury verdict on each of those issues. The sentence of death imposed upon Mr. Whitfield was clearly imposed in violation of the Sixth Amendment to the United States Constitution.

4. It is clear that the United States Supreme Court in *Ring v. Arizona*, supra, has held that the portion of the Missouri capital punishment sentencing scheme (Mo. Rev. Stat.§ 565.030.4) which permits the court to impose a death sentence if the jury is unable to agree upon the punishment violates the Sixth Amendment to the United States Constitution, made applicable to state prosecutions by the Fourteenth Amendment. In effect, *Ring* held that Mr, Whitfield's death sentence is unconstitutional. Mo. Rev. Stat. § 565.040.2 provides, in pertinent part:

> "In the event that any death sentence imposed pursuant to this chapter is held to be unconstitutional, the trial court which previously sentenced the defendant to death shall cause the defendant to be brought before the court and shall sentence the defendant to life imprisonment without eligibility for probation, parole, or release except by act of the governor. . ."

That is the relief to which Mr. Whitfield is entitled, and which Mr. Whitfield seeks through this Motion.

Recalling the mandate is the proper procedural mechanism to vindicate Mr. Whitfield's constitutional rights. " . . .[A] mandate may be recalled in order to remedy a deprivation of the federal constitutional rights of a criminal defendant." *State v. Thompson*, 659 S.W. 2d 766, 769 (Mo. banc 1983) "Such a motion may also be employed when the decision of a lower appellate court directly conflicts with a decision of the United States Supreme Court upholding the rights of the accused." *Id.* Of course, *Ring* sets forth a new rule of law which could not have been previously formulated from either this Court's decisions or those of the Untied States Supreme Court. Indeed, *Ring* explicitly overturned a previous Supreme Court decision on this issue, *Walton v. Arizona*, 497 U.S. 639, 1990. As a new substantive rule of law, *Ring* should be applied retroactively to this case. See *Bousley v. United States*, 523 U.S. 614, 620 (1998) (*Teague v. Lane* rule, restricting retroactive application of new rules of criminal procedure, applies only to procedural rules, not substantive rules of law). It is this Court's right and obligation to vindicate Mr. Whitfield's right to trial by jury secured by the Sixth and Fourteenth Amendments to the United States Constitution by recognizing that his sentence of death is unconstitutional in light of *Ring*, recalling its previously issued Mandate affirming that sentence, and by remanding the case to the trial court with directions to resentence Mr. Whitfield to life without parole.

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Food For Thought

By: Tim Cisar

The purpose of this article is to ask why the teachings of *State v. Hatton*, 918 S.W.2d 790 (Mo. banc 1996) do not apply to the area of driving while intoxicated.

Specifically, *Hatton* is a case where the defendant sold controlled substances within 1000 feet of "public housing" in violation of R.S.Mo. °195.218. This section incorporates Section 195.211, dealing with the sale of controlled substances, into an enhancement statute. The B felony of sale of controlled substance is enhanced to an A felony because of the location of the sale within a 1000 feet of public housing. Judge Robertson states that because Section 195.218 is a punishment enhancement provision it "does not create a separate crime." (emphasis added). Hatton at 794. The legislature adopted and the governor approved a policy enhancing the punishment for sales of controlled substances near public housing. *Id.* "Thus, Section 195.218 expressly incorporates Section 195.211 and requires a violation of the latter statute before a violation of Section 195.218 occurs. Section 195.211 contains a scienter element." *Id.*

What does this have to do with driving while intoxicated? Section 577.010 sets forth the basic driving while intoxicated statute:

577.010 Driving while intoxicated.

1. A person commits the crime of "driving while intoxicated" if he operates a motor vehicle while in an intoxicated or drugged condition.
2. Driving while intoxicated is for the first offense, a class B misdemeanor. No person convicted of or pleading guilty to the offense of driving while intoxicated shall be granted a suspended imposition of sentence for such offense, unless such person shall be placed on probation for a minimum of two years.

Section 577.023 provides for the enhancement of 577.010, the section with the scienter element, to either an A misdemeanor or a D felony, for purposes of punishment:

577.023. Persistent and prior offenders-enhanced penalties-imprisonment requirements, exceptions - procedures ....

2. Any person who pleads guilty to or is found guilty of a violation of section 577.010 or 577.012 who is alleged and proved to be a prior offender shall be guilty of a Class A misdemeanor.
3. Any person who pleads guilty to or is found guilty of a violation of section 577.010 or 577.012 who is alleged and proved to be a persistent offender shall be guilty of a Class D felony....

If *Hatton* is correct, Section 577.023 does not create a separate crime but merely enhances the punishment of a driving while intoxicated to either a class A misdemeanor or a class D felony. The Western District followed this line of thought when evaluating the facts in *State v. Galazin* (WL12653961), (reversed on other grounds 58 SW3d 500 (Mo. 2001)). In footnote 23 of the Western District opinion, the Court states that the crime the Defendant committed was only the misdemeanor of driving while intoxicated, even though the penalty enhancement statute required that he be punished as a felonious persistent offender. Galazin (WL12653961) footnote 23. The opinion uses the reasoning found in *Hatton*. Whether the crime was a misdemeanor or a felony was important because of how the arrest took place. The court, noting the above, said "any argument that the officer effectuated a valid citizen arrest because (the defendant) was committing a felony must fail.: *Id.* In other words, the crime was a misdemeanor, with felony punishment available, and therefore a citizen's arrest could not occur.

Using *Hatton*'s rationale, we surmise that a driving while intoxicated is a misdemeanor with felony punishment available under certain circumstances.

This is important because of two other areas wherein the courts have addressed driving while intoxicated law and the felony consequences of driving while intoxicated. First, the Supreme Court, in *Hagan vs. Director of Revenue*, 968 S.W.2d 704 (Mo. 1998), has instructed us that an individual cannot obtain a hardship driving privilege under Section 302.309 when convicted of a driving while intoxicated with felony punishments, because the provisions of Section 302.309 forbid the granting of such privileges to any one convicted of any felony in the commission of which a motor vehicle was used. Hagan at 706. However, if "felony" driving while intoxicated is not a felony but a misdemeanor with felony punishment available, this line of reasoning fails.

Second, and more problematic, are those cases wherein the defendant has been charged with felony murder where the underlying felony is the driving while intoxicated, e.g. *State vs. Mayer*, 3 S.W.2d 423 (Mo.App.E.D. 1999). If driving while intoxicated is always a misdemeanor with felony punishment possible due to enhancement statutes, and enhancement statutes do not create a separate crime, then a driving while intoxicated is never a felony for the purpose of being the felony upon which felony murder can stand. There are several individuals serving time in the Missouri Department of Corrections for felony murder with the underlying 'felony' being that of felony driving while intoxicated.

I present this article to the defense bar at large to generate some discussion as to how best to present the above as a defense to any pending cases. Any ideas, feel free to contact me at tcisar@midmo.com.

Motion Of The Month *(Cont. from page 6)*

WHEREFORE, Mr. Whitfield respectfully moves this Court to recall the Mandate previously issued herein, to reverse his unconstitutional sentence of death, and to remand this cause to the trial court with directions that Mr. Whitfield be sentenced to imprisonment for life without eligibility for probation, parole, or release except by act of the Governor.

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[1] This was a retrial, an earlier conviction having been reversed by this Court. *State v. Whitfield*, 837 S.W.2d 503 (Mo. banc. 1992).

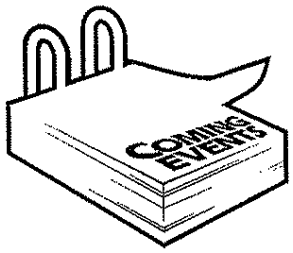
[2] Justice Breyer concurring in the judgement in *Ring*, goes even further: ".. the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." 122 S. Ct. at 2448. (Breyer, J., concurring in the judgement).

MACDL Fall Criminal Law Seminar Agenda

Radisson Hotel Clayton • Clayton, MO
Friday, October 25, 2002

8:00 - 8:30 a.m.	**Registration & Continental Breakfast** Moderator: Elizabeth Unger Carlyle
8:30 - 8:35 a.m.	**Welcoming Remarks** Pat Eng, MACDL President
8:35 - 10:00 a.m.	Ingenious Lawyering, Ingenious Defenses Speaker: James Bell, Law Offices of James A.H. Bell, P.C., Knoxville, TN
10:00 - 10:15 a.m.	**Break**
10:15 - 11:05 a.m.	***Recent Developments In Search & Seizure Law*** Speaker: Morley Swingle, Prosecuting Attorney, Cape Girardeau County
11:05 - 11:55 a.m.	***Defense Lawyers Most Common Mistakes*** Richard Callahan, Prosecuting Attorney, Cole County
12:00 - 1:30 p.m.	**Lunch** ***Ethics of a Criminal Defense Lawyer*** Speaker: The Honorable Michael Wolff, Missouri Supreme Court
1:30 - 2:30 p.m.	***Everything You Wanted To Know About Field Sobriety Tests But Were Afraid To Ask*** Speaker: Steve Oberman, Knoxville, TN
2:30 - 3:45 p.m.	***Juveniles Tried As Adults*** and ***Media In A Criminal Trial*** Speaker: Geoffrey Nels Fieger, Southfield, MI
3:45 - 4:00 p.m.	**Break**
4:00 - 5:00 p.m.	***Trial Tactics And Issues*** Speakers: Rick Sindel, Sindel, Sindel and Noble, Clayton, MO and Scott Rosenblum, Rosenblum, Schwartz & Rogers, Clayton, MO

The MACDL Criminal Law Seminar qualifies for 8.6 MCLE Hours, including one hour of Ethics.



Mark Your Calendar!

MACDL PAC Fundraiser
October 24, 2002
St. Louis, MO

Watch Your Mail For Details!

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