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Volume I

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2012 Cumulative Supplement

Preface

The Missouri Bar wishes to acknowledge the valuable assistance of the lawyers who reviewed the various chapters for the purpose of supplementation. The name or names of lawyers who prepared a particular chapter supplement are shown on the first page of the chapter supplement.

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Preface

MISSOURI CRIMINAL PRACTICE

Fourth Edition

In 1977, The Missouri Bar published the first edition of *Missouri Criminal Practice*. This was the first two-volume set of MoBarCLE deskbooks. Since then there have been continual, tremendous changes in both the substantive and procedural criminal law and the tactics and tools of law enforcement. These changes brought about a supplementation of the first edition of this deskbook in 1978. In 1984, a second edition of *Missouri Criminal Practice* was published. The second edition was supplemented in 1986, 1989, and 1992. The third edition was a three-volume set and was published in 1996 with supplements in 1998, 2001, and 2003.

This fourth edition strives to build on the work of the previous editions and continue the tradition of deskbooks written by experienced Missouri lawyers for Missouri lawyers. The book is loaded with practical advice and covers criminal practice from arrest through post-conviction remedies. It provides an overview of the criminal law in Missouri and helpful practice tips, checklists, suggested voir dire questions, and forms to guide attorneys through the practical considerations of criminal cases. The fourth edition adds an important new chapter on Drug Courts and Mental Health Courts. A full-text, searchable CD-Rom that also contains nearly 100 word-processing forms is included with the book. This three-volume set is indispensable both for attorneys who regularly practice criminal law and for those who need a quick overview for the occasional criminal case. This publication is an important research tool, a quick reference, and a vital addition to any Missouri legal library.

This deskbook is not a complete thesis on the law, nor is it all inclusive. Any view of the appropriateness of any law or strategy or other opinion by the author of the particular chapter is not necessarily the view of The Missouri Bar or of the other authors or reviewers of this deskbook. This deskbook is a research tool, a good place to start, a quick reference, and an "idea" book. The strategies discussed here are not foolproof, nor are they the only ones available. The forms contained

here are merely examples, and a motion or pleading filed in any particular case should be prepared to fit that particular case.

The authors of this edition are listed in the table of contents and on the first page of the chapter they wrote. The reviewers are listed in the front pages. The Missouri Bar thanks all of the authors, reviewers, and other volunteers who have worked on the various editions and supplements of *Missouri Criminal Practice*. We especially thank the authors and reviewers for this fourth edition.

Gregory F. Hoffmann, Chair
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Jefferson City, Missouri
June 2005

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Matthew J. O'Connor*

Chapter 1

ARREST AND CUSTODIAL DETENTION

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Mr. O'Connor gives special thanks to Ms. Shelly Hinson for her assistance, research, and editing of this material. Ms. Hinson received her J.D., 2005, from the University of Missouri-Kansas City.

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I. (§1.1) Introduction

The decision to arrest is the most critical moment of the criminal accusation process for both the prosecutor and the defense. The notion of custody sets the stage for the admissibility of every part of the case for the prosecutor as well as the strategy for the defense. An officer acting within the scope of the officer's duties is privileged to arrest another person without a warrant. But limitations and procedures that apply to matters of custody must be followed to ensure the arrest is made lawfully. This chapter sets out the various aspects of arrest and custodial detention and explains the significance of this process in the criminal law.

II. Basic Concepts

A. (§1.2) Arrest

According to § 544.180, RSMo 2000, "[a]n arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer, under authority of a warrant or otherwise." Mere detention by the police is not considered being placed under arrest. The defendant must be under the control and custody of the officer before the defendant is sufficiently under arrest. The mere verbal expression to a defendant that the defendant is under arrest is not sufficient to deem a person under arrest. *Cal. v. Hodari D.*, 499 U.S. 621 (1991).

A seizure occurs only when a reasonable person would believe that they are not free to leave. *Mich. v. Chesternut*, 486 U.S. 567 (1988). There must be actual physical contact with the defendant, including restraint and control of the defendant's movements, by the arresting officer. *Hodari D.*, 499 U.S. 621; *see also State v. Nicholson*, 839 S.W.2d 593, 596–97 (Mo. App. W.D. 1992). Section 544.180 does not specify any particular words to be uttered by the officer when placing a person under arrest; it only requires the officer to inform the defendant of the authority under which the officer is acting. Section 544.180; *see State v. Woods*, 620 S.W.2d 443, 444 (Mo. App. S.D. 1981); *State v. Jones*, 865 S.W.2d 658 (Mo. banc 1993).

The seizure of a person may be considered an arrest if, as in *Hayes v. Florida*, 470 U.S. 811, 815 (1985), the person is removed forcibly from their home in order to be detained, fingerprinted, and interrogated. Because such action is like an arrest, it may only be taken when probable cause exists.

B. (§1.3) Probable Cause

An arrest must be based on probable cause. *Beck v. Ohio*, 379 U.S. 89, 91 (1964), sets out the constitutional requirements for probable cause. Satisfaction of the requirements is determined by whether the officers have probable cause at the time of the arrest, meaning "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

An officer generally does not need to obtain a warrant before arresting a person in a public place, even if the officer actually had time to get a warrant. *United States v. Watson*, 423 U.S. 411 (1976). An officer making an arrest without a warrant must have probable cause showing the officer is acting with the belief that the suspect committed or was in the process of committing a crime. Probable cause for a warrantless arrest exists when an officer has facts that not only justify a person of reasonable caution in believing that a crime was committed or was being committed but that also show that the arrestee has committed the crime. *State v. Purnell*, 621 S.W.2d 277 (Mo. 1981). Courts may consider the information possessed by the officer before the arrest, and the reasonable inferences drawn from that information, in determining whether probable cause existed to make an arrest. *Id.*

While mere suspicion is not sufficient to establish probable cause, absolute certainty is not required. Probable cause requires only the probability of criminal activity, not a prima facie showing of criminal activity. *Tokar v. Bowersox*, 198 F.3d 1039 (8th Cir. 1999) (citing *United States v. Everroad*, 704 F.2d 403 (8th Cir. 1983)). Probable cause for a warrantless arrest depends on the facts and circumstances that exist at the moment the arrest was made. *United States v. Tovar-Valdivia*, 193 F.3d 1025 (8th Cir. 1999). A court may not use information acquired after the fact in making a probable cause determination.

Probable cause to believe criminal activity is present must be based on the totality of the circumstances, not on isolated facts. *Tokar*, 198 F.3d 1039. Evidence that tends to show the arrestee did not commit the crime is relevant to the probable cause determination. *Womack v. City of Bellefontaine Neighbors*, 193 F.3d 1028 (8th Cir. 1999). Therefore, even if there is enough inculpatory evidence to justify an arrest, the existence of exculpatory evidence that would negate an arrestee's guilt cannot be ignored. *Id.*

An officer may rely on information from another officer in developing probable cause as long as the state demonstrates that the officer who communicated the information had probable cause that would have allowed that officer to make the arrest. *State v. Kinkead*, 983 S.W.2d 518 (Mo. banc 1998). In addition to this reliance, the origin of the information must be identifiable and reliable. *Id.*

Courts apply the reasonable officer standard in ascertaining the existence of probable cause i.e., an officer's determination of probable cause must be made in relation to circumstances as they appear to a prudent, cautious, and trained police officer. *United States v. Hernandez*, 55 F.3d 443 (9th Cir. 1995). In applying the reasonable officer standard, courts must base their probable cause determinations on practical considerations of everyday life in which reasonable people act, rather than the hindsight of legal technicians. *State v. Ard*, 11 S.W.3d 820 (Mo. App. S.D. 2000). The notion that there should be a distinction drawn between the probable cause analysis of a reasonable officer and that of a legal technician can be traced to *Brinegar v. United States*, 338 U.S. 160 (1949). In *Brinegar* the Court explained that room for mistakes by officers must be allowed as long as the mistakes are those of reasonable people acting on facts that lead sensibly to their conclusions.

Arrests must only occur when there are "facts sufficient for a prudent person to believe [the] defendant had committed or was committing an offense." *State v. Mayweather*, 865 S.W.2d 672, 675 (Mo. App. E.D. 1993). If a prudent person would reasonably believe that the suspect had violated some law, even though the officer acting in the arrest may be misguided as to the specific crime being committed, the arrest may ultimately be upheld. *United States v. Kalter*, 5 F.3d 1166 (8th Cir. 1993).

C. (§1.4) Arrest From the Defense's Perspective

The criminal law process begins for defense counsel upon an arrest or apprehension of an alleged wrongdoer. Defense counsel generally does not participate in gathering evidence until after the arrest or apprehension occurs. But this should be distinguished from pre-indictment investigation and preparation conducted after the arrest. Often, critical evidence and information is gathered after an individual's arrest but before a formal charge is made.

At the outset of reviewing the arrest, the facts and circumstances of the matter must be closely examined to avoid any error that may invalidate the procedures that follow. Defense counsel must first examine the procedures and circumstances surrounding the arrest or apprehension.

The arrest or apprehension normally takes place before defense counsel is notified. Counsel, therefore, has two present concerns for the client. The first concern is whether the client will make any incriminating statements; the second concern is the release of the client from custody. If counsel is contacted before the arrest, the goals are, in essence, the same. Counsel can now begin preparing pretrial motions. If the arrest is in any sense questionable, counsel can make a motion on the arrest.

To make a motion on an arrest, counsel would typically file a motion to suppress the evidence. Therefore, if it is determined that the arrest was made without probable cause, any evidence relating to that arrest would be suppressed from use in the criminal proceedings. *State v. Trenter*, 85 S.W.3d 662, 666 (Mo. App. W.D. 2002). Evidence is not admissible if it is obtained because of a pretextual arrest. *State v. Sullivan*, 49 S.W.3d 800, 811 (Mo. App. W.D. 2001) (citing *State v. Mease*, 842 S.W.2d 98, 105 (Mo. banc 1992)). A pretextual arrest occurs when the basis of the arrest is something other than that for which the warrant was issued. *Sullivan*, 49 S.W.3d at 811. But if the

police make the arrest legally and do not exceed the legal boundaries, the motives behind the arrest are irrelevant. *State v. Ramsey*, 864 S.W.2d 320, 329 (Mo. banc 1993). The state may appeal an order suppressing evidence or one that will quash the warrant. Section 547.200, RSMo 2000. The state may also appeal an order that will make a determination of the ability to proceed, suppress physical evidence, or suppress oral evidence. *Id*.

An unlawful arrest, alone, has no impact on a subsequent criminal prosecution. Therefore, if an improper arrest is made by the police, the individual may be detained if the police have probable cause, and the invalid arrest will not be a defense to the offense charged. *Frisbie v. Collins*, 342 U.S. 519 (1952). When an arrest is illegally made, a court's jurisdiction will generally not be affected. In other words, a court can still try a case even though an illegal arrest was made. *See Collins v. State*, 454 S.W.2d 917, 919 (Mo. 1970). The arrest will not affect the jurisdiction of the court under Rule 29.15 for post-conviction relief.

D. (§1.5) Investigatory Detention

The police have the right to briefly detain a person for investigative purposes even if there is no probable cause to arrest that person. To detain such a person, the police must have a reasonable suspicion supported by articulable facts of criminal activity or involvement in a completed crime. *Terry v. Ohio*, 392 U.S. 1 (1968). Therefore, the standard for making a valid *Terry* stop is lower than the standard for making a warrantless arrest. To make a warrantless arrest, an officer needs to have probable cause. To conduct the less intrusive "stop and frisk" or "investigative stop" allowed under *Terry*, an officer merely needs to have reasonable and articulable suspicion of criminal activity. *Terry*, 392 U.S. 1.

Once a valid investigatory stop has been made, an officer may pat a suspect's outer clothing if the officer has reasonable, particularized suspicion that the suspect is armed. *Id*. The purpose of this limited search is to allow the officer to continue the investigation without fear of violence—not to discover evidence of a crime. *Id*. An officer's investigation may include "request[ing] a driver's license and vehicle registration, run[ning] a computer check, and issu[ing] a citation." *State v. Bradshaw*, 99 S.W.3d 73, 77 (Mo. App. E.D. 2003). The *Terry* stop may include a pat-down search, which reasonably may include a search of a vehicle's glove compartment. *State v. Deck*, 994 S.W.2d 527, 534 (Mo. banc 1999) (citing *Mich. v. Long*, 463 U.S. 1032 (1983)).

During a *Terry* stop, officers may check for weapons and may take additional steps "reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." *United States v. Hensley*, 469 U.S. 221, 235 (1985). But the officers must employ the least intrusive means of detention reasonably necessary to achieve the purpose of the *Terry* stop. *See Fla. v. Royer*, 460 U.S. 491, 500 (1983).

It is also permissible to order a traffic violator out of the vehicle. But some jurisdictions, such as Massachusetts, have found this inconsistent with their state Declaration of Rights and do not allow the ordering of a violator out of the vehicle unless the officers "have a reasonable belief that their safety, or the safety of others, is in danger." *Commonwealth v. Torres*, 745 N.E.2d 945 (Mass. 2001). Missouri follows the rule allowing an officer to order a traffic violator out of the vehicle. But unless there is reasonable suspicion, demonstrated by the state of criminal activity, the suspect must be allowed to continue on the way. *Bradshaw*, 99 S.W.3d at 77. Further detention by the officer without reasonable suspicion has the potential to become an unlawful seizure. *Id.*

1. (§1.6) Reasonable Suspicion

There is no precisely established definition of reasonable suspicion. It requires more than a vague suspicion but not as much as full probable cause. Whether reasonable suspicion has been established is based on the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Woolfolk*, 3 S.W.3d 823 (Mo. App. W.D. 1999); *State v. Day*, 87 S.W.3d 51, 55 (Mo. App. S.D. 2002).

Reasonable suspicion, like probable cause, does not need to arise from a police officer's personal knowledge; it can be based on things such as a flier, a report from an informant, or a police bulletin. *United States v. Hensley*, 469 U.S. 221 (1985). Factors, even innocent factors, may be combined to form "reasonable suspicion of criminal activity." *State v. Davalos*, 128 S.W.3d 143 (Mo. App. S.D. 2004) (citing *Day*, 87 S.W.3d at 55). Nervousness alone is insufficient to create reasonable suspicion justifying continued detention during a *Terry v. Ohio*, 392 U.S. 1 (1968), stop. *Davalos*, 128 S.W.3d 143. Nervousness can, however, be considered as a factor under the totality of the circumstances. *Id.* Officers' actions are assessed objectively; the officer's state of mind is not used to assess the situation at the time of the stop. *Id.*

(citing *State v. Slavin*, 944 S.W.2d 314, 318 (Mo. App. W.D. 1997)).

Reasonable suspicion based on information received from an informant must be sufficiently reliable. "[G]enerally, a known informant who has provided reliable information in the past, and who provides information that is immediately verifiable at the scene carries 'enough indicia of reliability to justify a forcible stop . . . .'" *State v. Pfleiderer*, 8 S.W.3d 249, 254 (Mo. App. W.D. 1999) (quoting *State v. Stillman*, 938 S.W.2d 287, 290 (Mo. App. W.D. 1997)).

Tips from known informants are inherently more reliable because the informant's reputation is assessed from this information. The informant may also be held responsible if the allegations are fabricated. *Fla. v. J.L.*, 529 U.S. 266 (2000). An anonymous tip alone seldom demonstrates the informant's knowledge or veracity. But when there is suitable corroboration, an anonymous tip may exhibit sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop. *Id*. In fact, to constitute suitable corroboration, the information must exhibit sufficient indicia of reliability for the anonymous tip to provide a reasonable suspicion of criminal activity, not merely a tendency to identify a determinate person. *United States v. Wells*, 223 F.3d 835 (8th Cir. 2000). The information obtained from an anonymous tipster must be corroborated before forming the basis of reasonable suspicion, and the authorities who use the information must demonstrate its reliability. *Reeves v. Singleton*, 994 S.W.2d 586, 592 (Mo. App. W.D. 1999).

Like probable cause, reasonable suspicion may be based on information received by another officer who is shown to have had reasonable suspicion to make the stop. *State v. Miller*, 894 S.W.2d 649 (Mo. banc 1995). The communication must objectively support the actions of the detaining officer, and the detention must be no more intrusive than would have been permitted if the communicating officer had conducted it. *Id*.

The state's mere showing that the detaining officers were reasonable in relying on information provided through police channels is not sufficient to justify a *Terry*, 392 U.S. 1, stop. *State v. Kinkead*, 983 S.W.2d 518, 519 (Mo. banc 1998). Instead, the state should offer evidence regarding the origin of the information on which the officer relied. In the alternative, the state should

offer evidence of an independent basis, personally observed by the officers, that gave them reasonable suspicion sufficient to justify the stop. *Id.*

The investigatory stop must be relatively brief to be valid under *Terry*. The detention must not be longer than is reasonably necessary to conduct the limited investigation to verify or deny the officer's suspicions. Detention turns into an arrest when the officer develops probable cause or discovers that the person may have a criminal charge, which is the purpose for their detention. An investigative stop may also become an arrest if it lasts for an unreasonably long time or the officer uses unreasonable force in executing it. *See Dunaway v. N.Y.*, 442 U.S. 200, 212 (1979). The officer may then proceed and can conduct a full search incident to that arrest.

2. (§1.7) Automobile Stops

When an officer stops a car, it is generally considered a seizure under the Fourth Amendment. Therefore, a car may not be stopped by police unless there is reasonable suspicion to believe that a law has been violated. There are certain circumstances when the police are allowed to set up road blocks, which allow the police to stop cars without the need for individualized suspicion of the vehicles. For the road blocks to be lawful, they must meet certain criteria. The road blocks must stop the cars based on some standard that is readily identifiable and non-biased. The road block must also serve purposes closely related to a particular problem related to automobiles and their mobility. *See Del. v. Prouse*, 440 U.S. 648 (1979); *see also City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). According to *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), because of the large problem with drunk drivers and the state's valuable interest in removing such drivers from the roads, police officers are allowed to set up roadblocks to check drivers' sobriety. But in *Edmond,* it was established that police may not set up roadblocks to check cars for illegal drugs. This is because the nature of the checkpoint is not related to the use of cars or highway safety; it is to detect evidence of ordinary criminal wrongdoing. *Edmond*, 531 U.S. 32.

3. (§1.8) Traffic Checkpoints

As stated in §1.7 above, the Supreme Court has held that drug interdiction checkpoints (using drug-sniffing dogs) in Indianapolis

violated the Fourth Amendment because their primary purpose was general crime control. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (Rehnquist, J., and Thomas, J., dissenting; Scalia, J., dissenting in part). "We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends." *Id*. at 43.

The Court acknowledged that suspicionless stops at checkpoints remain constitutionally justified but only after a balancing of the competing interests at stake and a consideration of their effectiveness. *Id*. Properly tailored driving while intoxicated (DWI) checkpoints, border stops, and airport detentions continue to be justified because of their tendency to promote the safety of the general public. *Id*. Because the City of Indianapolis acknowledged that crime control, rather than motorist safety, was the primary motivation behind the checkpoints, the Court declined to consider the issue of whether drug-sniffing dogs could be used in conjunction with a DWI checkpoint when the primary purpose would be motorist safety. *Id*. The key distinction between DWI checkpoints and drug checkpoints is that the former serves the purpose of protecting the public on the roadways.

In light of *Edmond*, 531 U.S. 32, the Eighth Circuit has held that traffic checkpoints in which officers stop every vehicle that makes efforts to avoid the checkpoint violate the Fourth Amendment. *United States v. Yousif*, 308 F.3d 820 (8th Cir. 2002). While the checkpoint at issue in *Yousif* was also a drug interdiction checkpoint, it differed from the *Edmond* checkpoint. *Id*. at 827. The difference between the two cases was that, in *Yousif*, the Missouri Highway Patrol used signs suggesting to drivers that taking the exit was a way to avoid the checkpoint. *Id*. The court did not find the mere fact that some drivers took the exit sufficient to create individualized suspicion. *Id*. When officers are not acting for a special purpose, such as patrolling the borders or roadway safety, it is unreasonable to stop a vehicle and detain its driver to check for license and registration unless the officers have at least articulable and reasonable suspicion that the driver is not licensed, that the automobile is not registered, or that the automobile or one of its occupants is otherwise subject to seizure for a violation of the law. *Id*. at 828.

After the Supreme Court's decision in *Edmond*, 531 U.S. 32, there continues to be no uniform test applied to determine the

constitutionality of traffic checkpoints under the Fourth Amendment. General crime control objectives by themselves, however, are insufficient. Missouri courts will continue to evaluate the effectiveness of each checkpoint, examining factors such as the following:

- The likelihood that the checkpoint will lead to the discovery of criminal activity
- The average detention length of a vehicle
- The minimization of traffic congestion
- The elimination of discretionary stopping
- The alleviation of motorists fears

State v. Damask, 936 S.W.2d 565 (Mo. banc 1996). A checkpoint will be deemed reasonable under the Fourth Amendment when the state can show that the checkpoint in question was substantially similar to other checkpoints that effectively advanced the state's interests. *State v. Heyer*, 962 S.W.2d 401, 405 (Mo. App. E.D. 1998).

Following *Edmond*, 531 U.S. 32, the Supreme Court of Missouri also considered the issue of whether drug checkpoints violate the Fourth Amendment. In *State v. Mack*, 66 S.W.3d 706 (Mo. banc 2002), the City of Troy Police Department set up a drug checkpoint under the belief that a sign indicating that the checkpoint was ahead would cause drug carriers to take the exit before the checkpoint. Individuals that took the exit before the checkpoint were scrutinized for signs of possible drug trafficking, and officers were allowed to interview the driver and the passengers if they deemed it necessary. *Id*. But if the officers believed there was nothing suspicious, the individual was allowed to leave. *Id*. Alternatively, if the officers developed reasonable suspicion, the driver was asked to grant consent for a search of the vehicle. *Id*. If the driver declined, a drug dog was used to search the vehicle. *Id*.

The majority opinion in *Mack* distinguished its facts from *Edmond* because the drug checkpoint in *Mack* required a "quantum of individualized suspicion." *Mack*, 66 S.W.3d 706. In contrast, the *Edmond* checkpoint stopped random vehicles and did not require individualized suspicion. In a lengthy dissent, the minority opinion noted that the fact that Mr. Mack swerved to take the exit before the checkpoint was an "after the fact rationalization" and, even assuming that this provided a

secondary reason for the stop, the *Edmond* holding is violated when the purpose of the stop is generalized criminal activity. *Id.*

E. (§1.9) Arrest and Detention Compared

While there is no bright-line test for distinguishing between investigatory stops and arrests, it is clear that an arrest involves a more intrusive and lengthy search or detention and is justified only by the existence of probable cause. *See United States v. Sharpe*, 470 U.S. 675, 685–86 (1985); *United States v. Jones*, 759 F.2d 633, 636 (8th Cir. 1985); *State v. Pfleiderer*, 8 S.W.3d 249 (Mo. App. W.D. 1999). Suspicion alone is not enough to show probable cause. When multiple police officers are working together to effect an arrest or engage in an investigatory stop, the Fourth Amendment is satisfied if the information known by all the officers collectively amounts to probable cause or reasonable suspicion. *Id.* at 254.

When a detaining officer's conduct during an investigative stop is more intrusive than necessary to investigate the officer's suspicions underlying the stop, a de facto arrest occurs. *State v. Wickerham*, 28 S.W.3d 401 (Mo. App. E.D. 2000). In considering whether a de facto arrest has occurred, the court considers:

- the length of the stop;
- whether the suspect was handcuffed or confined in a police car;
- whether the suspect was transported or isolated; and
- the degree of fear and humiliation caused.

Id. at 403.

Detention during an investigative stop must not last longer than is necessary to meet the purpose of the stop. *State v. Weddle*, 18 S.W.3d 389, 393 (Mo. App. E.D. 2000). Once the initial purpose of the stop has been effectuated, further prolonged detention will be unlawful unless during the course of the seizure a new factual predicate for reasonable suspicion is found. *Id.* After the purpose of the *Terry v. Ohio*, 392 U.S. 1 (1968), stop is effectuated, further questioning may continue only if the person consents. Consent is defined considering whether a reasonable person in the defendant's position would feel free to leave. *Weddle*, 18 S.W.3d at 395.

There is no test for determining when the bounds of an investigative stop have been exceeded. *Pfleiderer*, 8 S.W.3d at 255. But courts

continue to ask whether the detention was the least intrusive means of effectuating the purpose of the stop. *United States v. Dixon*, 51 F.3d 1376 (8th Cir. 1995). Under the least-intrusive-means standard, the allowable length of a detention will vary considerably with the circumstances. For example, in *United States v. Taylor*, 162 F.3d 12, 20 (1st Cir. 1998), a three-to-four-minute detention was justified when the detainees were suspected to be armed and engaged in a drug sale. In *United States v. Onumonu*, 967 F.2d 782, 789–90 (2nd Cir. 1992), a four-day detention was justified when the detainee was suspected of hiding contraband in his alimentary canal.

In addition to the length of detention, the location of the stop is a factor in determining reasonableness. For example, it has been determined that Drug Enforcement Administration agents cannot lawfully stop and detain a suspect three to five miles from the suspect's home while, unbeknownst to the suspect, other agents are searching the suspect's residence. *United States v. Hogan*, 25 F.3d 690 (8th Cir. 1994). It has also been determined that the mere presence of an individual in a high-crime area at night, without more, is insufficient to justify reasonable suspicion. *United States v. Gray*, 213 F.3d 998 (8th Cir. 2000).

III. After Arrest

A. (§1.10) In General

Constitutional rights play an important role in an arrest. Several key constitutional rights applicable to an arrestee are found in the Fourth, Fifth, and Sixth Amendments. The Fourth Amendment involves the proscriptions against unreasonable searches and seizures, the Fifth Amendment involves a person's right to be protected against self-incrimination, and the Sixth Amendment involves a person's right to counsel. In article I of the Missouri Constitution, §§ 10 and 18(a) deal with due process, § 15 deals with search and seizure, and § 19 deals with self-incrimination.

As discussed in the various sections of this chapter, the Fourth Amendment establishes the prohibition against unreasonable searches and seizures, and the exclusionary rule requires that the result of a violation of this prohibition not be used as evidence against the defendant.

The Fifth Amendment establishes the privilege against compulsory self-incrimination and the prohibition against double jeopardy. This

includes the right to remain silent. The Fifth Amendment guarantees against federal infringement "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty" for the silence. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). In accordance with the Fifth Amendment's privilege against self-incrimination, "the State may not use post-arrest silence as affirmative proof of the defendant's guilt." *State v. Graves*, 27 S.W.3d 806, 810 (Mo. App. W.D. 2000) (citing *State v. Rogers*, 973 S.W.2d 495, 497 (Mo. App. S.D. 1998)). But a suspect's instant post-arrest silence can be used against the suspect for purposes of impeachment. *Graves*, 27 S.W.3d at 810. Therefore, in any type of arrest situation, whether consensual, investigatory, or full custodial arrest, the accused always have the right to remain silent so as to not incriminate themselves.

The Sixth Amendment establishes, among other things, the right to assistance of counsel. In felony cases, the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." This means, "in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived." *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963). "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Argersinger v. Hamlin*, 407 U.S. 25, 31–32 (1972). It is also established that:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Id. at 32. Therefore, in a consensual encounter, an investigatory detention, or a full custodial arrest, if the defendant cannot financially afford to hire counsel, counsel will be assigned by the government.

B. (§1.11) *Miranda* Warnings

Relevant to each arrest and interrogation is whether the police must provide the suspect with warnings concerning basic constitutional rights, called the *Miranda* warnings. *Miranda v. Ariz.*, 384 U.S. 436 (1966). The *Miranda* rights include the arrestee's right to:

- remain silent because anything the arrestee says can be used against them;
- talk to an attorney before and during questioning;
- have an attorney provided free of charge if the arrestee cannot afford an attorney; and
- stop answering at any time after questioning has commenced.

But unless the arrestee makes incriminating statements, the failure to give the *Miranda* rights is of no avail. *Id.*

The *Miranda* rights are necessary when interrogation takes place while the individual is already "in custody." *Id.* at 445. An "in-custody interrogation" occurs when the officers interrogate a person who may have actually been placed in custody or have been deprived of their freedom in a significant way. *State v. Copeland*, 928 S.W.2d 828, 852 (Mo. banc 1996), *cert. denied,* 519 U.S. 1126 (1997). The custodial interrogation occurs when the police subject an individual to a formal arrest or "arrest-like constraints." *State v. Johnson*, 988 S.W.2d 115 (Mo. App. W.D. 1999).

Whether an individual is "in custody" for *Miranda* analysis depends on the circumstances. When the circumstances are such that a reasonable person believes that they are not free to break from the officer's interrogation and leave, an "in custody" interrogation is at hand. *Id.* But an "in custody" interrogation does not occur when an individual voluntarily accompanies an officer to their office or when the individual agrees to meet the police there. *Id.* The central inquiry focuses on whether the circumstances surrounding the interrogation, as viewed from the perspective of a "reasonable man in the suspect's position," could be fairly characterized as the functional equivalent of a formal arrest. *Id.* at 119.

Ultimately, the central question remains whether a specific individual believes they are free to leave. Another factor for determining whether *Miranda* analysis is triggered includes the officer's subjective belief. The court must also review the objective circumstances surrounding the interrogation. *Id.* In *State v. Hosto-Worthy*, 877 S.W.2d 150 (Mo. App. E.D. 1994), the court upheld the trial court's suppression of an accused's statement and found that the defendant was entitled to her *Miranda* warnings before being questioned about child abuse allegations by a police officer who accompanied a social worker to the defendant's home.

In *Hosto-Worthy* the court held that the evidence supported the trial court's determination that the suspect's *Miranda* rights had attached and that *Miranda* warnings were required because the interviews had escalated to a custodial interrogation. *Id.* In reaching this conclusion, the court noted that the central inquiry is not whether the individual has become the focus of the investigation. *Id.* Rather, the primary issue is whether the suspect is in custody. *Id.* In *Hosto-Worthy* there was also testimony that the police continued questioning despite a denial until the defendant confessed and that the defendant reasonably believed that she was not free to leave or terminate the interrogation. *Id.*

The law in the area of custody has, however, been changing rapidly over the last few years. In *State v. Werner*, 9 S.W.3d 590, 593 (Mo. banc 2000), a mentally handicapped 16-year-old boy was removed from his high school class by detectives, transported to a police station, and questioned concerning the suffocation death of the boy's 22-month-old nephew. In holding unanimously that the boy was subjected to un-Mirandized custodial interrogation, the Court noted generally that the reasonableness of a suspect's belief that the suspect is in custody is determined by considering the "totality of the circumstances" in view of the suspect's "freedom to leave the scene," as well as the "purpose, place, and length" of any interrogation that occurs while the suspect allegedly is in custody. *Id.* at 595. *Werner* established six factors to be considered when determining custody:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced with official requests to answer questions; (4) whether strong-arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of questioning.

State v. Taylor, 109 S.W.3d 190, 192–93 (Mo. App. E.D. 2003) (citing *Werner*, 9 S.W.3d at 595); *see also State v. Sullivan*, 49 S.W.3d 800 (Mo. App. W.D. 2001).

However helpful, this list is not exhaustive. In "examining the totality of the circumstances, courts may also consider an individual's personal background, experience, familiarity with police questioning, maturity, education, and intelligence." *Werner*, 9 S.W.3d at 595–96.

C. Remedies for Improper Police Conduct

1. (§1.12) Exclusionary Rule Generally

The *exclusionary rule* is used to deter the police from violating a person's constitutional rights. This rule prohibits the introduction, at a criminal trial, of evidence obtained in violation of a defendant's Fourth, Fifth, or Sixth Amendment rights. The rule's main rationale is that, if the police cannot use evidence obtained in violation of a person's rights, they will be less likely to act in a way that violates those rights. This rule provides one remedy for the deprivation of constitutional rights; other remedies may include civil suits or injunctions.

The exclusionary rule, with some exceptions, excludes illegally obtained evidence and also all evidence obtained or derived from the exploitation of that evidence. *Nardone v. United States*, 308 U.S. 338 (1939). An individual violated under this rule may file a motion to suppress, which is a motion for the refusal to produce the evidence that was obtained wrongly. This motion will allow a defendant the opportunity to exclude the evidence that violated the defendant's constitutional rights.

2. (§1.13) Fruit of the Poisonous Tree

The scope of the exclusionary rule encompasses what is referred to as "the fruit of the poisonous tree" analysis. This essentially means that evidence obtained illegally must be excluded, but additionally, all evidence obtained or derived from the exploitation of that evidence must be excluded. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 308 U.S. 338 (1939). In *Taylor v. Alabama*, 457 U.S. 687 (1982), the defendant was arrested without probable cause and was subsequently brought to the police station and read his *Miranda* rights. The defendant spent six hours at the police station and eventually confessed to the police. *Id*. But it was held that the confession must be excluded because it was the direct result of the unlawful arrest. *Id*. In other words, the defendant would not have confessed had he not been in custody because of the illegal arrest. This is a prime example of the "fruit of the poisonous tree." The "poisonous tree" in this case is the illegal arrest, and anything revealed because of the illegal arrest—in this case the confession—is the "fruit" of the illegal arrest and therefore must be excluded from evidence.

IV. Methods of Arrest

A. (§1.14) Summons

A summons is regarded as "a notice or an invitation to a defendant to come to court at a certain time in answer to a certain charge so that he may not be subjected to the inconvenience and embarrassment of an arrest." *State ex rel. DeGraffenreid v. Keet*, 619 S.W.2d 873, 876 (Mo. App. S.D. 1981) (citing *Mormon v. Baran*, 35 N.Y.S.2d 906, 909 (N.Y. Sup. Ct. 1942)). Summonses are issued in misdemeanor cases, ordinance violations, and traffic offenses according to the Rules. *See* Rules 21.03, 37.43. Issuing a summons is discretionary in a felony case unless the defendant is a corporation, in which case a summons "shall" be issued. Rule 22.04. A defendant's counsel, aware of a potential charge against the defendant, can request the prosecutor or judge to proceed upon a summons rather than make the arrest and subject the defendant to the issuance of bond.

B. (§1.15) With Warrant

There is often the misconception that without the presentation of an arrest warrant, the arresting officers taking a suspect into custody have not made a valid arrest. This belief is incorrect because arresting officers acting in accordance with a warrant are not required to have the warrant in their possession at the time of the arrest.

Rule 21.08 states that, "[i]f the defendant fails to appear in response to a summons and upon a finding of probable cause that the defendant has committed a misdemeanor, the court may issue an arrest warrant." An issuance of a warrant can be for the search and seizure of a person with an outstanding warrant for the commission of a felony. Section 542.271.3, RSMo 2000. Rule 21.08 establishes the rules for executing a warrant for a misdemeanor, and Rule 22.05 establishes the procedure for executing a warrant for a felony. Rule 21.08 states:

> A warrant may be executed anywhere in the state by any peace officer. The peace officer need not possess the warrant at the time of the arrest, but upon request the officer shall show the warrant to the defendant as soon as possible.
>
> If the peace officer does not possess the warrant at the time of the arrest, the officer shall inform the defendant of the misdemeanor charged and the fact that a warrant has been issued.

When a defendant is indicted, Rule 22.04 states that a warrant for that person's arrest shall be issued unless a summons is issued in its place. A custom and practice that is followed in St. Louis City and in Jackson County allows an indicted person on bond the ability to have the previous bond transferred to the circuit court. *State v. Eyermann*, 72 S.W. 539 (Mo. 1903). In other jurisdictions, the defendant, once indicted, may not be able to transfer the bond to the circuit court but may be rearrested and required to post a new bond.

The Fourth Amendment does not allow the police to enter a suspect's home without a warrant. The Fourth Amendment also requires consent when making a routine felony arrest, even if there is probable cause. In other words, without the existence of demanding circumstances or consent, a dwelling may not be entered without a warrant. *State v. Corpier*, 793 S.W.2d 430, 436 (Mo. App. W.D. 1990) (citing *Payton v. N.Y.*, 445 U.S. 573 (1980)).

C. (§1.16) Without Warrant

The power of an arresting officer to arrest a suspect without a warrant, merely on the suspicion that the person is violating a law of the state, is established generally in § 544.216, RSMo 2000. Under § 544.216, any officer, subject to certain restrictions based on the number of persons in their subdivision and their elections under other Missouri statutes, is authorized to arrest without a warrant any person they see violating any law of the state. *Id*.

Section 544.120, RSMo 2000, allows all officers or assistants of officers to arrest a felon if the felon attempts to escape. In *State v. Campbell*, 262 S.W.2d 5 (Mo. 1953), highway patrol officers, as officers of the state, were given the right to arrest suspects without warrant when they had probable cause to believe the suspects were guilty of a felony. This right is established under § 43.190, RSMo 2000, which states: "The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by [them] in the act of violating any law of this state." The right of highway patrol officers to arrest suspects without a warrant and upon probable cause also extends to traffic violations. Section 43.195, RSMo 2000.

The ability to make a warrantless arrest depends on the class of the city. Officers in third- and fourth-class cities have power to make arrests without a warrant only when an offense is committed in their presence. Sections 85.561, 85.610, RSMo 2000. Officers in these cities

are also authorized to serve and execute processes subject to "limits of the county or counties within which the city is located" or "in areas leased or owned by the municipality outside of the boundaries of such municipality." Section 85.561.3. In *City of Fredericktown v. Bell*, 761 S.W.2d 715 (Mo. App. E.D. 1988), an officer was not allowed to arrest a suspect who traveled outside of the officer's jurisdiction during the pursuit because it was a fourth-class city. But in *State v. Faulhaber*, 782 S.W.2d 687 (Mo. App. E.D. 1989), the officer was allowed to arrest a suspect who traveled out of the officer's jurisdiction during the pursuit because it was a first-class city, and such an arrest was allowed under § 544.157, now RSMo 2000.

If a Missouri law enforcement officer has probable cause to believe that a person has committed domestic abuse or assault, the officer may arrest the offending party without process regardless of whether the violation occurred in the officer's presence. Section 455.085, RSMo 2000. The existence of probable cause to effect a warrantless arrest is evaluated objectively without regard to whether the arresting officers actually believed there was probable cause to make the arrest. *United States v. Sherrill*, 27 F.3d 344 (8th Cir. 1994); *see also United States v. Davis*, 174 F.3d 941 (8th Cir. 1999).

In cases of public safety offenses, § 577.039, RSMo 2000, establishes that an officer, including a uniformed highway patrol officer, has the power to arrest a suspected intoxicated driver without a warrant even if the offense did not occur in the officer's presence. But the arrest must occur within one and one-half hours after the violation is alleged. Section 577.039; *see also Woods v. State*, 861 S.W.2d 577 (Mo. App. W.D. 1993). This rule does not specify its applicability to jurisdictional requirements or restraints.

According to Missouri and federal caselaw, arresting officers can make warrantless arrests as long as there is probable cause. The presence of probable cause is established when "'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *State v. McCann*, 543 S.W.2d 504, 506 (Mo. App. E.D. 1976).

The Supreme Court has held that an officer can make a warrantless felony arrest of a suspect in a public place as long as there is probable cause. *United States v. Watson*, 423 U.S. 411 (1976). It was further established in *United States v. Santana,* 427 U.S. 38 (1976), that a

person standing in their own doorway is considered to be "in public" as long as they are "exposed to public view, speech, hearing, and touch as if [they] had been standing completely outside [their] house." *Id*. at 42.

Baris v. State, 846 S.W.2d 764 (Mo. App. W.D. 1993), was overruled by the Supreme Court of Missouri to the extent that it stands for the proposition that allowing a police officer's testimony about the officer's certification to prove the certification would violate the best evidence rule. *Cooley v. Dir. of Revenue*, 896 S.W.2d 468, 471 (Mo. banc 1995) (best evidence rule not implicated to require written documentation of officer's certification to operate breathalyzer machine; certificate and permit merely recorded facts of essentially unwritten transactions); *see also Wildflower Cmty. Ass'n, Inc. v. Rinderknecht*, 25 S.W.3d 530, 537 (Mo. App. W.D. 2000).

D. (§1.17) Citizen's Arrest

Missouri recognizes and adopts the doctrine of citizen's arrest. *Montgomery v. United States*, 403 F.2d 605, 609 (8th Cir. 1968). Missouri cases hold "that a private citizen knowing that a felony has been or is being committed has a right to arrest the offender without a warrant." *Id*. at 609. After a citizen's arrest has transpired, a search by officers is lawful. *Id*.

Private citizens making an arrest are not governed by the Fourth Amendment. Both federal law and state law "can be relevant in determining what is reasonable under the Fourth Amendment." *Bissonette v. Haig*, 800 F.2d 812, 815 (8th Cir. 1986). An arrest made by a private citizen may be upheld as a citizen's arrest under that state's common law or statute. *Id*. at 816. The courts can use the evidence retained from a citizen's arrest even if the arrest was made illegally. *Montgomery*, 403 F.2d at 609. The court can also retain jurisdiction in these cases. *Id. Manson v. Wabash Railroad Co.,* 338 S.W.2d 54 (Mo. banc 1960), established that an officer has a right to rely on the presumption of the constitutionality of a statute or city ordinance even if the ordinance or statute is subsequently declared void. Accordingly, the validity of the ordinance under which the arrest was made would not be decided by the court in an action for false imprisonment. *Id*.

1. (§1.18) Felony

Under Missouri statute, a private citizen may make an arrest based on the commission of a felony and reasonable grounds to suspect the party. Section 544.180, RSMo 2000; *see Richardson v. United States*, 217 F.2d 696 (8th Cir. 1954); *State v. Fritz*, 490 S.W.2d 30 (Mo. 1973).

2. (§1.19) Misdemeanor

In the case of certain misdemeanors—such as shoplifting, breaches of peace, and petit larceny—committed in a person's presence, that person may perform a citizen's arrest and lawfully detain the suspect. Section 537.125, RSMo 2000; *State v. Parker*, 378 S.W.2d 274 (Mo. App. S.D. 1964). The citizen making the arrest should take precautions, being sure of both the crime and the person they are attempting to arrest. *Id*. at 282.

3. (§1.20) Use of Force

Private citizens are allowed to use force when making a citizen's arrest. Section 563.051, RSMo 2000. If a private citizen is instructed by a person reasonably believed to be an officer, the private citizen may use reasonably necessary physical force to detain a suspect. Section 563.051.1. A private citizen may act on their own account without instruction from an officer to prevent the escape of a person reasonably suspected to have committed a crime. Section 563.051.2.

In certain circumstances, it may become necessary for a private citizen to use deadly force to arrest and detain a suspect. Section 563.051.3. Deadly force can only be used if directed by an officer or if necessary because of the nature of the crime suspected to have been committed. *Id*. Certain restrictions must be met in cases involving the use of deadly force. Not only must the private citizen making the arrest reasonably believe that the suspect committed the crime, but the suspect must be the specific person who did in fact commit the crime. *State v. Brown*, 824 S.W.2d 924, 928 (Mo. App. W.D. 1992).

V. (§1.21) Force Permitted in Making Arrest

In reviewing excessive force claims concerning arrest, the constitutionality of the use of force is to be determined by a fact-specific analysis of its reasonableness, judged from the perspective of a reasonable officer as if the officer were on the scene. Factors include the severity of the alleged crime, the immediate threat posed by the suspect to the officers or others, and whether the suspect resisted arrest or attempted to flee. *Abbott v. City of Crocker*, 30 F.3d 994 (8th Cir. 1994).

Officers may use force in making an arrest. Section 563.046, RSMo 2000. The use of force may be employed in circumstances in which the officer reasonably deems the force necessary. Section 563.046.1. In certain instances, the use of deadly force may be allowed. Section 563.046.3. Deadly force can only be used if the arresting officer reasonably believes that the suspect has committed or attempted to commit a felony or is trying to escape by the use of a deadly weapon or other dangerous act that may cause serious physical injury. Section 563.046.3(2). A seizure-by-shooting is objectively reasonable when "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tenn. v. Garner*, 471 U.S. 1, 3 (1985). In *Jones v. City of St. Louis*, 92 F. Supp. 2d 949 (E.D. Mo. 2000), shooting at individuals by police officers was objectively reasonable under the Fourth Amendment—not constituting excessive force—when the officers observed men in an alley firing weapons, the officers announced their presence and ordered the men not to move, and the men responded by firing at the officers and running away.

If officers in Missouri state their office and purpose but are still refused entry into a suspect's dwelling, those officers are allowed to break doors and windows as necessary to make an arrest. Section 544.200, RSMo 2000.

In *Healy v. City of Brentwood*, 649 S.W.2d 916 (Mo. App. E.D. 1983), the court determined that handcuffing a suspect, even in a routine traffic violation, is not an excessive use of force.

VI. (§1.22) Resistance of Arrest

The crime of resisting an arrest applies to "arrests, stops or detentions with or without warrants and to arrests, stops or detentions for any crime, infraction or ordinance violation." Section 575.150.2, RSMo Supp. 2004. Resisting arrest may be either a class D felony or a misdemeanor. Section 575.150.5. In *State v. Shipp*, 125 S.W.3d 358 (Mo. App. S.D. 2004), evidence was sufficient to convict the defendant of resisting arrest when the defendant used "physical force."

There are three elements to resisting an arrest: "(1) knowledge that a law enforcement officer is making an arrest, (2) purpose on the part of the defendant to prevent the officer from effecting the arrest, and (3) resisting the arrest by fleeing from the arresting officer." *State v. Shanks*, 809 S.W.2d 413, 418 (Mo. App. E.D. 1991). Resisting arrest will not be a valid claim unless the arrest is in progress when the actual resistance occurs. *Id*. In *State v. Bickings*, 910 S.W.2d 370 (Mo. App. S.D. 1995), the accused physically fought with the arresting officers and used other types of force to deter the officers from taking him into custody; had the accused simply run away, he would have been subject to the misdemeanor charge.

Accused individuals can legally defend themselves against excessive force used by an arresting officer. *Carverton v. J.C. Penney Co.*, 651 S.W.2d 608, 610 (Mo. App. E.D. 1983). This right of self-defense must only be used as a last resort. Accused persons must first do all they can do to prevent the necessity of using self-defense against the officer. *State v. Thomas*, 625 S.W.2d 115, 122 (Mo. 1981). "[T]he arrestee forfeits his right to self-defense if he knows that if he desists from physical resistance and submits to arrest, the excessive force will cease." *Id*. at 122. In summary, accused individuals are liable if they attempt to resist arrest by either flight or force, but they may defend against any excessive force that is used against them. By choosing to use self-defense in such a situation, the accused is open to a potential charge of assault or possibly homicide. If the accused is charged with such an offense, "he may be entitled to a self-defense instruction if the evidence warrants it." *State v. Hernandez*, 651 S.W.2d 187, 190 (Mo. App. W.D. 1983). But a "self-defense instruction" may not be required if the accused is only charged with resisting arrest. *Id*.

VII. Effects of Custody

A. (§1.23) 24-Hour Rule

If an officer arrests a suspect without a warrant, the arrestee must be released within 20 hours unless charges are filed and a warrant to answer the charges is issued. Section 544.170, RSMo Supp. 2004. But a suspect who is being held for investigation of any of the following crimes may be detained for 24 hours without being charged:

(1) First degree murder pursuant to section 565.020, RSMo;
(2) Second degree murder pursuant to section 565.021, RSMo;
(3) First degree assault pursuant to section 565.050, RSMo;
(4) Forcible rape pursuant to section 566.030, RSMo;
(5) Forcible sodomy pursuant to section 566.060, RSMo;
(6) First degree robbery pursuant to section 569.020, RSMo; or
(7) Distribution of drugs pursuant to section 195.211, RSMo.

Section 544.170.2.

Anyone who refuses to release a suspect entitled to release, refuses to allow the suspect to consult with counsel or other persons, or falsely charges a suspect to avoid the provisions of § 544.170 is guilty of a class A misdemeanor. Section 544.170.4.

While it is a violation of the law to detain a person beyond the 20- or 24-hour period (depending on the alleged misconduct), a suspect's confession is not per se invalid based solely on confinement beyond the applicable time period. *See Roberts v. State*, 476 S.W.2d 490 (Mo. 1972).

B. (§1.24) Racial Profiling

Section 590.650, RSMo Supp. 2004, requires that all Missouri peace officers report specific information for each traffic stop made in Missouri. The information reported includes items such as the driver's race. This data is then sent to the Missouri Attorney General, who is required to compile the data and report to the Governor by June 1 of each year.

The last formal report submitted by the Attorney General indicates a continuing disparity between the proportion of stops and the proportion of the population for some minorities. *See* 2003 Annual Report, Missouri Traffic Stops, MISSOURI ATTORNEY GENERAL'S REPORT, *available at*

www.ago.mo.gov/racialprofiling/racialprofiling.htm. The statistics indicate that African-Americans and Hispanics are stopped and searched at a disproportionate rate as compared to Caucasians. Even more broadly stated, minorities are detained and searched more often than Caucasians. The statistics clearly indicate that, when Caucasians are stopped and searched, the "[c]ontraband hit rate" is higher than when minorities are stopped and searched. In other words, minorities are stopped and searched proportionately more often than Caucasians, but when Caucasians are stopped, they are more likely to have contraband.

C. (§1.25) Breathalyzer Tests

The Sixth Amendment's right to counsel gives the accused a means by which they can ensure the protection of their rights by acquiring the assistance of counsel. Section 544.170.3, RSMo Supp. 2004; *Spradling v. Deimeke*, 528 S.W.2d 759 (Mo. 1975). In *McMurray v. Director of Revenue*, 800 S.W.2d 820, 821 (Mo. App. E.D. 1990), the defendant was refused an opportunity to speak with his lawyer before taking a breathalyzer test, and his license was subsequently revoked after his refusal to take the test. It was determined that his license could not be revoked; it was not truly a refusal because the defendant was denied his right to consult with counsel. *Id*. It was also determined that a breathalyzer has to be administered within a certain timeframe for it to be effective in such a case. Therefore, it is sufficient if the person is given a reasonable opportunity to consult with counsel. *Spradling*, 528 S.W.2d at 764.

Section 577.041, RSMo Supp. 2004, deals with a motorist's refusal to take a breathalyzer test. After being stopped and asked to submit to a breathalyzer test, a person who asks to consult with an attorney has 20 minutes to contact an attorney. Section 577.041.1. If the individual cannot contact an attorney during that 20 minutes and has still refused to take the test, it will be considered a valid refusal. *Id.* If a person requests an opportunity to contact counsel before submitting to a breathalyzer test and is denied that opportunity, the license revocation cannot be upheld. The officers must reasonably try to fulfill the suspect's request to contact an attorney. There is, however, a developing body of law that does not require the officer to inform the accused driver of the right to consult with an attorney before taking the breathalyzer.

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Chapter 2

RELEASE FROM CUSTODY

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I. Background

A. (§2.1) Constitutional Basis

The Missouri Constitution establishes the right to bail in article I, § 20, which provides "[t]hat all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great." Article I, § 21, adds "[t]hat excessive bail shall not be required . . . ." The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Before November 3, 1992, the leading Missouri case on the denial of bail before trial was *State v. Dodson*, 556 S.W.2d 938 (Mo. App. E.D. 1977). In *Dodson* the court held that "[d]enial of bail prior to trial to inflict punishment on the accused would not only hamper the preparation of his case, but would render meaningless the presumption of innocence." *Id.* at 944. Bail is to be denied only under the "most compelling circumstances." *Id.* With the passage and adoption at the general election of November 3, 1992, of the Crime Victim's Bill of Rights, however, article I, § 32, of the Missouri Constitution has curtailed the holding in *Dodson* and the provisions of article I, § 20, of the Missouri Constitution. Article I, § 32.2, of the Missouri Constitution provides: "Notwithstanding section 20 of article I of this Constitution, upon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may deny bail or may impose special conditions which the defendant and surety must guarantee."

This constitutional provision has been codified in § 544.457, RSMo 2000, which reads as follows:

> Notwithstanding the provisions of section 20 of article I of the Missouri Constitution to the contrary, upon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may use such information in determining the appropriate amount of bail, to increase the amount of bail, to deny bail entirely or impose any special conditions which the defendant and surety shall guarantee.

These provisions of the Missouri Constitution and the revised statutes, as a practical matter, have refocused the attention of the constitutional basis for bail from ensuring the accused's appearance to protecting the community from harm at the hands of dangerous or repeat offenders. Therefore, with the enactment of these provisions, it is arguable that bail could be denied to an individual charged with the most minor of offenses when the court's denial is based on a crime victim's concern, the community's concern, or any other person's concern.

B. (§2.2) Ensuring Defendant's Appearance

Traditionally, the only legitimate legal purpose in setting bail was to ensure the defendant's appearance at trial, and any amount in addition to that figure would be considered excessive. *State v. Dodson*, 556 S.W.2d 938, 944 (Mo. App. E.D. 1977); *State v. Thompkins*, 515 S.W.2d 808, 810 (Mo. App. W.D. 1974); *Ex parte Chandler*, 297 S.W.2d 616, 617 (Mo. App. S.D. 1957). In spite of article I, § 32, and § 544.457, RSMo

2000, in determining the amount and manner of bail, the court will consider, on the basis of available information:

- the nature and circumstances of the offense charged;
- the weight of the evidence against the accused;
- the accused's family ties, employment, financial resources, character, and mental condition;
- the length of the accused's residence in the community;
- the accused's record of conviction; and
- the accused's record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings.

Rule 33.01(e); § 544.455.2, RSMo 2000. These criteria are weighed and analyzed to determine what conditions of release will reasonably ensure the defendant's appearance in court:

> Any person charged with a bailable offense shall be entitled to be released pending trial. Any person convicted of an offense entitled to be released upon appeal shall be released upon appeal until adoption by the court of an opinion affirming the judgment of conviction. The affirming court may, by special order, permit the defendant to remain on bond after affirmance pending determination of after-affirmance motions or applications.

Rule 33.01(a). Subsection (a) differs from the previous subsection (a) by separating the right of release pending trial from the right of release upon conviction and appeal. It would appear that the Supreme Court wanted to clarify the language of previous Rule 33.01(a) because the previous language seemed to entitle release throughout the pendency of both the trial and appeal without the necessity of posting additional security.

Although the language of both the statutes and the rules has remained the same by entitling a person charged with a bailable offense to release, the term "bailable offense" has never really been defined. By implication, it means any non-capital offense; any individual charged with capital murder or appealing a conviction for capital murder would not be an individual charged with a bailable offense and, therefore, would not be entitled to release pending trial or release upon conviction and pending the appeal.

The Supreme Court adopted a new Rule 30.16 in 1994. The previous Rule 30.16 read that "[a] convicted defendant shall be entitled to a conditional release pending an appeal, in all cases except those in which the defendant has been sentenced to suffer death or

imprisonment in the penitentiary for life." Current Rule 30.16 now reads, *inter alia*, that "[i]f a convicted defendant is entitled to a conditional release pending an appeal, the conditions shall be determined by the trial court pursuant to Rule 33."

It is the authors' opinion that current Rule 30.16 and Rule 33.01 reconcile the constitutional provision that all persons charged with a bailable offense are entitled to release and, if convicted, are entitled to a conditional release pending an appeal. With the exception of a capital offense, the decision as to whether a defendant convicted or otherwise is entitled to bail and release is left within the discretion of the court.

But see § 544.671, RSMo 2000, which states:

> Notwithstanding any supreme court rule or judicial ruling to the contrary, no defendant under a sentence of death or imprisonment in the penitentiary for life, or a sentence of imprisonment for a violation of section 195.222, 565.021, or 565.050, RSMo, or subsection 1 of section 566.030, RSMo, shall be entitled to bail pending appeal after June 29, 1994. Pursuant to the prerogative of the general assembly to declare the public policy of this state in matters regarding criminal liability of persons and to enact laws relating to judicial procedure, the general assembly declares that subsequent to June 29, 1994, no person shall be entitled to bail or continuation of bail pursuant to section 547.170, RSMo, if that person is under a sentence of death or imprisonment in the penitentiary for life, or a sentence of imprisonment for a violation of section 195.222, 565.021, or 565.050, RSMo, or subsection 1 of section 566.030, RSMo.

C. (§2.3) Community and Witness Protection

While the traditional purpose of bail was to ensure the accused's appearance, there is little doubt now that the setting of bail—and, indeed, the granting of bail—are based in large part on ensuring the protection of the community, witnesses, and crime victims. The law, in effect, has come full circle from the time the decision was handed down in *State v. Dodson*, 556 S.W.2d 938 (Mo. App. E.D. 1977). As stated in *Dodson,* 556 S.W.2d at 945–46:

> [C]ourts have an inherent power to deny or revoke bail to protect its processes and the community. *Carbo v. United States*, 82 S.Ct. 662, 7 L.Ed.2d 769 (1962); *Fernandez v. United States*, 81 S.Ct. 642, 5 L.Ed.2d 683 (1961); *United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976); *United States v. Gilbert*, 138 U.S.App.D.C. 59, 425 F.2d 490 (1969). "While bail is favored and is granted in the ordinary course of events, an accused by his actions can forfeit his right to bail and the court is under a duty to protect its processes and to protect prospective witnesses." *United States v. Smith*, 444 F.2d 61, 62 (8th Cir. 1971), cert. den., 405 U.S. 977, 92 S.Ct. 1205, 31 L.Ed.2d 253 (1972).

> In this case there was reliable, direct evidence that defendant, if he were released, would be a threat to prospective witnesses against him. Moreover, his past conduct indicated that his freedom would be potentially harmful to the safety of the community, as these murders were allegedly committed within a few hours after he had been released on bail on another murder charge. Under a protection of processes theory defendant could lawfully be denied bail.
>
> . . . .
>
> We believe it proper and lawful to preserve the integrity of the administration of criminal justice to deny bail in exceptional and high risk cases. And we find here that there was sufficient evidence to support a denial of bail to defendant; that such denial of bail was necessary to preserve the integrity of the criminal justice system.

In spite of *Dodson*, until 1994 the Supreme Court of Missouri Rules regulating pretrial release stated that a court's setting conditions of release was solely to reasonably ensure the appearance of the accused. With the passage of article I, § 32, of the Missouri Constitution, however, as well as Senate Bills 763 and 554 in 1994, the legal theory behind setting bail has drastically changed, and the focus has shifted to witness and community protection.

Section 544.671, RSMo 2000, prohibits entitlement to bail for a defendant convicted and under sentence of death, imprisonment in the penitentiary for life, or imprisonment for a violation of:

- § 195.222, RSMo Supp. 2004 (trafficking drugs, first degree);
- § 565.021, RSMo 2000 (murder, second);
- § 565.050, RSMo 2000 (assault, first); or
- § 566.030.1, RSMo 2000 (forcible rape).

There is no entitlement to bail after conviction of these offenses. "[S]ubsequent to June 29, 1994, no person shall be entitled to bail or continuation of bail pursuant to section 547.170, RSMo [Supp. 2004], if that person is under a sentence of death or imprisonment in the penitentiary for life, or a sentence of imprisonment for a violation of" any of the aforementioned sections. Section 544.671.

Before trial, a defendant may be denied bail because the defendant poses a danger to a crime victim, to a witness, or to the community. Section 544.676.1, RSMo 2000. A defendant who is denied bail because of these reasons, upon written request filed at arraignment, *shall* be entitled to a trial within 120 days of the arraignment or within 120 days of an order granting a change of venue, whichever occurs later. Section 544.676.3. A defendant waives the right to trial within the time

periods if the defendant requests and receives a continuance or if bail is set for the defendant. *Id.*

D. (§2.4) Pretrial Release Options

With the enactment of § 544.455, RSMo 2000, and the adoption of Rules 33.01–33.20 in 1980, Missouri revised its manner and method of bail practice. Before those changes, professional bail bond agents had been the traditional method for posting bond, resulting in the poor remaining in jail pending trial while wealthier individuals who could afford the bond agent's fee went free on bond. Missouri's reform of the bail system was designed to make additional methods, not dependent on the defendant's wealth, available for securing the presence of the accused. The options for pretrial release are set out in § 544.455 and Rule 33.01 and include the following:

1. Personal recognizance

2. Custody of a third party or organization agreeing to supervise the accused (sponsored recognizance)

3. Restrictions of the accused's travel, association, or place of abode

4. Surety bond (property or professional bond or the deposit of cash)

5. Regular reporting to some officer of the court or pretrial release office

6. Deposit of up to ten percent in cash of the bond with the court

7. Any other condition deemed reasonably necessary to ensure the appearance of the accused as required, including a condition requiring that the person return to custody after specified hours

Both the statute and the Rule imply an intention that courts use the least restrictive reasonable means of pretrial release available under the circumstances. For example, a summons instead of a warrant is to be used in all misdemeanor cases unless the court has reasonable grounds to believe that the defendant will not appear. *See* Rule 21.03. When a warrant is issued, the defendant is to be released on personal recognizance unless the associate circuit judge determines, in the

exercise of the judge's discretion, that such a release will not reasonably ensure the appearance of the person as required. *See* Rule 33.01(d).

II. Personal Recognizance

A. (§2.5) Generally

The least restrictive of the statutory conditions for pretrial release is personal recognizance, which requires only that the defendant execute a written promise to appear in court.

B. (§2.6) Recognizance-Type Releases

After the pretrial investigation is completed, a prisoner may be released on one of the four types of recognizance:

1. Personal recognizance, which is a release of an individual on the individual's own promise to appear in court.

2. Sponsor recognizance, which is a release of an individual to a parent, guardian, community organization, or other suitable sponsor, who agrees to supervise the defendant in accordance with the conditions of release. No financial surety is required.

3. Sponsor judgment recognizance, which requires a suitable surety qualified by Rule 33.17 to sign for the full amount of the bond

4. Cash deposit recognizance, which requires a suitable surety qualified under Rule 33.17 to post a percent of the bond amount, typically ten percent. The requirements and responsibilities are the same for this type of bond as for sponsor judgment recognizance.

C. (§2.7) Secured Bond

A secured bond denotes that a prisoner has not been recommended for one of the forms of recognizance release discussed in §2.6 above. A secured bond requires a prisoner to make a property bond, to post the full amount of the bond in cash, or to have a bail bond agent make the bond.

D. St. Louis City

1. (§2.8) Pretrial Release Office

In the City of St. Louis, there is a pretrial release program that was ordered in effect by the Supreme Court of Missouri in October of 1974. Operations of the program began in January of 1975. The program operates under the provisions of § 544.455, RSMo 2000, and Rule 33.01. The program also operates under Local Rule 67.1 and is under the direct supervision of the Chief Presiding Judge, who is responsible for the operations of the program.

The Pretrial Release Commissioner's office works in conjunction with the State Board of Probation and Parole and provides pretrial release investigators who are assigned to work in the police holdover 24 hours every day; these investigators work in conjunction with the pretrial commissioners. The Pretrial Release Commissioner's office works toward the release of defendants accused of a felony or misdemeanor in the City of St. Louis by conducting interviews and brief investigations relevant to the probability of the defendant's appearance in court and safety of the community. The Commissioner's main office is located in the Mel Carnahan Courts building at 1114 Market Street.

2. (§2.9) Initial Interview

Anyone arrested on a criminal charge in the City of St. Louis is delivered to the city holdover, which is the central holdover located at the City Justice Center at 200 S. Tucker. Persons arrested are interviewed within 4 to 12 hours of their arrival at the holdover. Initially, the investigator will gain most of the information from the accused and will seek information that the court will consider in determining the conditions of the defendant's release. After the interview with the prisoner, the Pretrial Release Commissioner's office will attempt to verify the information supplied by the accused. This verification, in part, is supplied by the circuit attorney's office, which will indicate whether the accused is charged by way of complaint, information, or indictment. In addition, information can be gained from any police reports prepared; typically, those can be supplied by the circuit attorney's office as well. All of this information is then assimilated into a report and reviewed by one of the supervisors in the Pretrial Release Commissioner's office. The end result is a determination as to whether the office will recommend a secured or unsecured bond.

Counsel should note that the information gathered from the arrested individual could be used against the accused if any statements are made regarding the actual offense. Typically, the interview focuses on the personal background of the accused, not on the accused's version of events surrounding the arrest. If counsel represents an accused before arrest and commitment, the client should be cautioned not to discuss the facts or circumstances of the alleged crime.

E. St. Louis County

1. (§2.10) Recognizance Office

In St. Louis County, the procedure for pretrial release on recognizance differs somewhat from the procedure in the City of St. Louis. In St. Louis County, the office that conducts the investigation is run by the Department of Justice Services of St. Louis County, 100 S. Central Avenue. This office is staffed by in-take social workers, who are responsible for interviewing and investigating the prisoners. After an accused is booked in the St. Louis County in-take department, an interview takes place between the social worker and the accused. Typically, the social worker will make a recommendation to the court as to whether the accused qualifies for one of the recognizance bonds. In past practice, Department of Justice Services personnel were authorized by the presiding judge of St. Louis County to approve a recognizance-type bond if the face amount of the bond was $5,000 or less. This practice, however, has been curtailed, if not entirely eliminated, since 1994. Unless an accused has already retained counsel, the approval of a recognizance-type bond or of a bond reduction will most likely not occur until the accused has been brought before the judge and an arraignment has occurred. Of course, if the accused has already retained counsel, counsel should immediately appear before the associate circuit judge and request an appropriate method of release as well as an appropriate amount of bond. An attorney will be required to enter an appearance on behalf of the accused before the court will entertain alternative bond considerations. In St. Louis County, the prosecuting attorney's office may have to be consulted before approaching the court regarding any bond reduction or recognizance approval because of statutory and constitutional provisions regarding crime victims' rights (e.g., notice to the victim of a bond reduction request).

After regular court business hours, on weekends, and on holidays, if an accused is arrested and confined in the St. Louis County jail, requests for bond reduction or recognizance-type releases must be made through the bonding desk. Attorneys will have to notify the bonding desk that they are representing the prisoner, and the bonding desk will then be responsible to contact the duty judge, who will typically telephone the interested attorney directly. Counsel should be prepared to supply the duty judge with all relevant information regarding the accused, such as family ties to the community, employment, and the nature of the offenses charged, so that the judge can make an informed decision regarding the bond.

2. (§2.11) Surrendering a Wanted Defendant

An accused defendant may know there is a warrant for their arrest before the defendant is actually arrested. The St. Louis County Fugitive Affairs Unit, located at 100 S. Central, Clayton, Missouri, sometimes notifies a wanted defendant by way of a postcard that a warrant for the defendant's arrest is active and that, to avoid the embarrassment of being arrested at work or at home, the defendant should contact the Fugitive Affairs Unit immediately and make arrangements to surrender. Another method of finding out whether a warrant has been issued would be for the attorney to call the Fugitive Affairs Unit and give specific information regarding the accused, such as date of birth, Social Security number, and full name, to determine whether a warrant is active.

Counsel can discover over the phone which court issued the warrant, the charge, and the amount of the bond. Counsel may then seek to contact the issuing judge during court business hours or contact the duty judge after business hours, weekends, or holidays to seek a bond reduction or recognizance bond. If the contact is during court business hours, a formal entry of appearance will be required; in most instances, counsel will have to make a personal appearance before the court. If a bond reduction or recognizance-type bond is approved by the court, an order bearing the court's seal must be delivered to the county jail bonding office; that office should be notified that the defendant's surrender is forthcoming.

The preferable method is to accompany the accused to the Fugitive Affairs Unit with the sealed bond memorandum. The fugitive officer will process the defendant and deliver the court's

memorandum to the bonding desk. After the defendant is booked and processed and the appropriate bond posted or recognizance executed, the defendant will be released. Defendants who voluntarily surrender may do so, without counsel, provided they are given a copy of the bond order bearing the official court seal. If they are posting a cash bond, they will be allowed to keep the money with them and should notify Fugitive Affairs that they are posting the cash themselves. Otherwise, a third party (such as a family member) will have to post bond at the bonding window and will have to wait until the defendant is processed. Counsel should note that, before any release on bond in St. Louis County or any other jurisdiction, the jail will run a computer inquiry of the defendant to determine whether any other jurisdictions have a hold order, whether the defendant is wanted, or whether there is a warrant for that particular individual.

Counsel should inquire of the client whether there are any outstanding warrants of which the client is aware. Typically, this involves unpaid traffic fines or failures-to-appear in municipal court. If there are unpaid traffic tickets, the St. Louis County bonding desk officer will often accept cash bonds on behalf of local municipalities in lieu of having the defendant transferred to each one of those municipalities, which typically do not have the space to detain such individuals.

F. (§2.12) Other Jurisdictions

In other jurisdictions, release from custody differs from the procedures outlined for St. Louis City and St. Louis County. Counsel should check with the court clerk and the sheriff's department to discover local customs, rules, and procedures.

III. Surety Bond, Property Bond, or Deposit of Cash

A. (§2.13) Monetary Bond Generally

If the pretrial release office representative or the recognizance office recommends against recognizance, or if the bond commissioner or judge determines that a more restrictive form of bond is necessary in a given case, a monetary bond may be set. A monetary bond can be posted in the full amount of cash, money order, or cashier's check, or it may be posted by a professional bail bond agent. Any negotiable bond of the

United States, the State of Missouri, or any political subdivision may also be accepted. Rule 33.01(d)(3). No personal checks will be accepted at any time. The bond is generally posted with the sheriff or jail authority holding the accused, and the record of release is then transferred to the clerk of the court in which the defendant is to appear. The money posted with the sheriff is deposited in the registry of the court. Rules 33.04, 33.10, 33.11. According to Rule 33.04, the sheriff may also accept the conditions of the bond and order the accused released.

B. Sureties

1. (§2.14) Generally

To post a surety bond, the person must qualify as a surety under Rule 33.17. To be a surety, the person:

- must be reputable and at least 21 years of age;
- must have net assets with a value in excess of exemptions at least equal to the amount of the bond that are subject to execution in the State of Missouri;
- must not have been convicted of any felony under the laws of any state or of the United States;
- must not be a lawyer, except that this disqualification does not apply if the principal (the accused) is the spouse, child, or family member of the surety/lawyer;
- must not be "an elected or appointed official or employee of the State of Missouri or any county or other political subdivision thereof, except that this disqualification shall not apply if the principal [the accused] is the spouse, child or family member of the surety;" and
- must not have any outstanding forfeiture or unsatisfied judgment entered upon any bail bond in any court of Missouri or of the United States.

It should be noted that these surety qualifications are strictly followed by the pretrial bond commissioners in the City of St. Louis. If a family member or friend is posting a ten percent cash bond, they must qualify as a surety under Rule 33.17. They must

present a W-2, a paycheck stub, or some other form of proof of income. They must present a picture identification, must be at least 21 years old, and cannot be a convicted felon. They will have to execute an affidavit, and as a surety they will be responsible for the full face amount of the bond if the bond is ultimately forfeited by the court. In St. Louis County, anyone can post the ten percent cash bond at the bonding window.

2. (§2.15) Bail Bond Agents

Professional bonds were the traditional method of posting bond. This method, however, resulted in the less fortunate remaining in jail pending trial while the more wealthy, who could afford the bond agent's fee and had collateral, went free on bond. When Missouri revised bail practice, the result was a decrease in the use of professional bond agents in most localities.

There are still many situations when the use of a bail bond agent may be the most desirable form of pretrial release. A good example is when a speedy release is desired because it is feared that a defendant may make an incriminating statement without counsel present or be identified in a lineup. The speed with which a bond agent can arrange a release should never be overlooked. Also, when it is clear that the defendant would not qualify for a recognizance, pretrial release through a bond agent is a viable alternative.

If the full amount of bond is pledged by a professional bond agent, the accused will generally have to pay the agent a minimum of ten percent of the face amount of the bond as a fee. This fee is not returned to the accused at the conclusion of the trial—unlike a ten percent cash bond. The bond agent may require additional security or collateral, such as a deed to property or a higher percentage of the bond, up front. The agent will often consult with counsel regarding the background of the accused and counsel's opinion as to whether the accused poses a flight risk.

Most jails keep a list of bail bond agents in the community. These lists are readily available to the accused, and, in some jurisdictions, the police may directly give the accused a phone number or numbers of the available bond agents. In addition, attorneys should know of qualified bond agents to contact and how to reach them during inconvenient hours.

A professional bail bond agent that charges or receives compensation for signing a bond must execute an affidavit that the surety possesses the qualifications as specified in Rule 33.17. The affidavit regarding qualifications must contain specific information regarding the net worth of the professional bond agent, including:

- accurate legal descriptions and the latest assessed value of real estate;
- an accurate description of personal property that the surety proposes to justify the surety's sufficiency;
- a list of all bail bonds upon which the surety is obligated; and
- a statement regarding whether the surety has been promised or has received any consideration or security for the suretyship.

Rule 33.18.

C. Cash Deposit

1. (§2.16) Generally

With judicial approval, a bond may be satisfied by posting cash amounting to ten percent or less of the face amount of the bond. The cash is deposited with the court and remains in the court registry until the case is concluded. The cash deposit will be returned to the individual released from custody upon the individual's appearance in the pending legal proceedings, at the conclusion of those proceedings.

Counsel should not post a cash bond for a defendant unless, of course, the defendant is counsel's spouse, child, or family member. Additionally, in some jurisdictions in Missouri, a defendant is not permitted to post their own cash bond, so a client should be told to have a third party, such as a friend or relative, available if necessary to post the cash bond on behalf of the defendant. In most locations, there is no fee for the ten percent bond posted with the court, but in some locations a one percent fee may be charged against the cash deposit. The Supreme Court has upheld the imposition of a one percent charge for those released in accordance with the ten percent court deposit bond system. *Schilb v. Kuebel*, 404 U.S. 357 (1971), *reh'g denied*, 405 U.S. 948 (1972).

The ten percent cash bond must be approved by a judge, and a percentage less than ten percent, if requested, can also be approved by the court.

The advantage of a ten percent cash bond posted with the court is that the money is deposited in the court registry and returned to the defendant, whereas a professional surety bond does not allow for the money to be returned to the defendant. The accused is required to pay a minimum of ten percent to the bail bond agent for the agent's fee, and the agent, of course, keeps that fee; in addition, the agent may require the defendant to show proof of ownership of some sufficient collateral. Another advantage of the ten percent cash bond is that the deposit with the court is placed in the defendant's name, regardless of whether another individual (such as a family member) put up the money. The placing of a cash bond in the name of the accused has been approved by the Supreme Court of Missouri in *State v. Echols*, 850 S.W.2d 344 (Mo. banc 1993).

Currently in St. Louis County, for those defendants charged with C or D felonies, absent an objection from the prosecutor, a ten percent cash bond will automatically be approved. The Department of Justice Services personnel at the bonding window are, therefore, authorized to accept ten percent, even though an attorney may not have obtained a specific order.

2. (§2.17) Bond Assignment for Attorney Fees; Form

The advantage of a cash deposit to counsel is that, with the defendant's consent, the cash deposit in the name of the defendant can be assigned to counsel and be considered as payment toward all or part of any attorney fees. Such an assignment should specifically state the amount of cash, the date it was posted with the court, and the case number, and that the money is being assigned for legal services to be rendered or already rendered. The following is a typical cash bond assignment form, and it can be altered if a third party posts the cash and the court lists that individual as the owner of the bond rather than the defendant.

Counsel should note that the assignment requires the accused's signature and that the signature should be notarized because most jurisdictions require notarization.

State of Missouri)
) ss.
County of _____)

Bond Assignment

My name is _____. I reside at _____.

In consideration of legal services rendered and to be rendered by attorney, _____, and other good and valuable consideration, I hereby assign to [attorney's name] all right, title, and interest I may have in the following-described items of personal property, to-wit:

[Insert the amount of bond, where posted, date posted, and cause number of case.]

I hereby release the custodian of this property from any liability; it is, therefore, my order that the custodian of this property deliver the sum of $_____ to _____, Attorney at Law. I further state on my oath that I am the owner of the above-described property.

_____
Defendant

Subscribed and sworn to before me this ____ day of _____, 20____.

_____
Notary Public

My Commission Expires:

_____

A cash deposit will not be returned to counsel any sooner than it would have been returned to the defendant, i.e., not until after the entire proceedings have been closed. Court costs, as well as any crime victim's compensation judgment and, in some circumstances, even restitution, will be deducted from the bond before it is paid out of the court registry. To avoid the deduction of these costs, counsel must have the court delete this language from the bond payout order.

Once the assignment has been executed, it should be filed immediately with the proper court. The original bond receipt should be kept in counsel's file or attached to the bond assignment, which is filed with the court. If ten percent in cash is not approved by the court, perhaps a higher percentage would be approved, and counsel should explore this option.

D. Property Bond

1. (§2.18) Generally

Surety bonds can also be posted by proof of real estate ownership in a sufficient amount by a person or persons other than the accused. The person posting the property must qualify as a surety under Rule 33.17. If one owner of the property is disqualified for some reason from posting the bond, the property as a whole is considered disqualified. While the Missouri Rules do not specifically require that real estate be used to satisfy property bonds, Missouri courts have not in recent years accepted property other than real estate to satisfy a property bond. In addition to the requirements of Rule 33.17, if the surety is a compensated surety, Rule 33.18 sets forth the requirements for having a real estate bond approved, which include a description of any personal property that a surety proposes to justify the sufficiency and a statement of the personal property's reasonable market value. Rule 33.18(c).

In some instances, the sheriff or jailer will not approve a real estate bond or may find that the bond is insufficient based on the equity in the property. In that circumstance, counsel can get court approval of the real estate bond regardless of the equity in the property. With such a court approval, the sheriff will accept that bond. In some jurisdictions, a property bond cannot automatically be posted without prior court approval, which means that, unless the entire face amount of the bond is secured with cash, the court must enter an order authorizing that the property is an acceptable alternative; the sheriff will then have to review the qualifications of that property.

2. (§2.19) Evaluation of Property

Each jurisdiction in Missouri should be consulted concerning the method and formula of arriving at the value of the real estate for the purpose of pledging property as security. Generally speaking, a current tax receipt must be shown to the officer at the jail to show

that real estate taxes have been paid to date. All persons listed as owners of the property must appear for the signing of the property bond and must qualify as sureties under Rule 33.17. If one of the owners is deceased, a death certificate must be presented. If the property is owned by the defendant, either solely or jointly, the property cannot be used to post the bond.

A common formula used in arriving at the valuation of the property for purposes of the bond is to divide the total evaluation figure on the tax receipt by .19. In some courts in Missouri, a homestead allowance is then subtracted from that figure. A homestead allowance can vary from $1,500 to $8,000, and, in some jurisdictions, no homestead allowance is used at all. The remaining figure is the figure used in determining the value of the property, from which the remaining balance on the mortgage is subtracted, resulting in the amount of the value of the property for property bond purposes.

If the property is free and clear, a deed of trust or warranty deed should be brought along with the tax receipt. If not, a statement from the bank showing how much is owed on the mortgage should be brought along. Some jurisdictions in Missouri may require no proof concerning the outstanding mortgage balance. All information is sworn to by the persons pledging the property. Those individuals then execute the bond as sureties and agree to be bound by the conditions of the bond. Of course, if those conditions are violated, the property is subjected to forfeiture. The defendant, as well, must sign the property bond and agree to be held bound by the conditions of that bond.

3. (§2.20) Illustration

To illustrate the valuation of property described in §2.19 above, if a property bond was being posted in St. Louis County, the total valuation amount of the property as indicated on the real estate tax receipt would be divided by .19. The homestead allowance of $8,000 is then subtracted from this amount. The homestead allowance amount, however, may not be subtracted if the surety does not live on the property being posted. The amount owed on the mortgage is then subtracted from this amount to arrive at the available equity to post for bond. More than one piece of property may be used to reach the total figure necessary to post bond and typically, depending on the jurisdiction, the real estate must be located within that jurisdiction. At the very least, the real estate must be located in Missouri.

Following is an example utilized in St. Louis County:

Assessed value		$12,000
Divide by .19	÷	.19
		$63,158
Homestead exemption	–	8,000
		$55,158
Indebtedness (mortgage)	–	13,000
Equity		$42,158

Counsel should note that this or any other formula is not binding on the court; in some jurisdictions, a current appraisal is required, without regard to the property tax valuation.

IV. (§2.21) Combination of Various Forms of Release

It is permissible to combine the various forms of pretrial release. Defense counsel should consider recommending to the court recognizance with or without various conditions and whatever combination fits the needs of the individual situation. These conditions might include placing the person in the custody of a designated person or organization or placing restrictions on the person's travel, association, residence, etc. *See* Rule 33.01(d); § 544.455, RSMo 2000.

Additionally, electronic shackling is becoming more popular as a form of pretrial release supervision. The accused has an electronic shackle or bracelet placed on the accused's ankle, and this shackle is pre-programmed through a central location, typically at the pretrial services office of the jail or a private supervision organization. The individual is only allowed to leave the individual's place of residence for employment or other pre-approved purposes. The monitor will warn of any possible tampering and also will warn if the person makes any unauthorized trips. This electronic shackling system is hooked through the individual's telephone line at the residence and is an effective way of controlling a person's movements. Counsel should note that the defendant will have to pay a part of the cost of this monitoring service, typically 10 to 25% of take-home pay.

Most courts are receptive to the combinations of various forms of pretrial release as long as the total combination will reasonably ensure the appearance of the defendant and the safety of the community.

V. Miscellaneous

A. (§2.22) Appearance Bond

The police can hold a person in custody for up to 20 hours after a warrantless arrest (or 24 hours for certain offenses) pending the issuance of an arrest warrant by the court, upon application of the prosecuting attorney. Section 544.170, RSMo Supp. 2004. *See also* Rules 22.06 (felonies) and 37.17 (ordinance and traffic violations where the police officer may set the conditions for release or accept bond in accordance with the bail schedule furnished by the court having jurisdiction). If no warrant is issued after 20 hours, the accused must be released; if not, a writ of habeas corpus is an appropriate measure to secure the person's release. During that 20-hour period, however, an accused might seek release on bail. This type of release, called an appearance bond, permits the accused to be released from custody pending issuance of an arrest warrant. The accused is given a time to appear in court so that, if a warrant is issued, the accused can be formally arrested. In jurisdictions such as St. Louis County, a person on a so-called 20-hour hold who is released pending application of warrant can, and most likely will, be re-arrested and required to post a bond. If the individual secures an appearance bond and returns to court in St. Louis County and a formal charge and warrant have been issued by that time, the individual will be re-arrested and will have to re-post bond. If counsel, however, enters an appearance before or on that court date, with the court's approval the appearance bond can be transferred and applied to the case charged without the necessity of another arrest.

In the City of St. Louis, if a person is released on any form of bond before a formal charge is made by the circuit attorney's office, unless a higher bond is recommended or set by the court and a formal complaint is then filed by the circuit attorney's office, the accused will not have to be re-arrested as long as the accused appears in court at the appointed time. No matter what type of bond is posted before the issuance of a formal charge, in St. Louis City the accused remains free on that bond until the case is concluded. If no formal charges are brought, the bond is released, and the accused is free to go without any further appearances being required.

For example, an individual might be arrested for an offense, brought to the central police station, booked and processed, interviewed by a pretrial release commissioner, and post bond in one of the manners previously discussed. That individual will then be given a court date and must appear on that date. The sheriff or the clerk will have a list indicating whether the charges have been issued by the circuit attorney's office, refused, or taken under advisement. In any event, the accused must make a bond appearance at the appointed date and time.

B. (§2.23) Obtaining an Appearance Bond

When a person has been arrested and is in custody pending warrant application, it is recommended that counsel representing the accused contact a judge, clerk, or appropriate personnel such as the duty judge, the pretrial release office, or the recognizance office, to determine if an appearance bond can be set. This method applies to jurisdictions similar to St. Louis County. In the City of St. Louis, counsel should contact a pretrial release commissioner in the city holdover to ensure that the client is interviewed immediately and that a recommendation as to the bond is made immediately.

The appearance bond can be a recognizance bond or it can be any form of a surety bond. After hours, on holidays, and on weekends the only judge available will be the duty judge. Generally, it is recommended that the duty judge or clerk be contacted for purposes of gaining an appearance bond, but most jurisdictions do not supply the duty judge's home phone number or the clerk's home phone number. Counsel, therefore, will have to go through the bonding desk or appropriate sheriff's department and have them contact the judge or clerk. As with any cash bond, the speed with which a professional bail bond agent can get an appearance bond set should not be overlooked. This equally applies in jurisdictions such as the City of St. Louis, where the bond agent can appear personally at the central holdover and assist the Pretrial Release Commissioner's office in getting a bond set and having the bond posted immediately.

C. (§2.24) Summons Instead of Bond

Under Rule 21.03, upon the filing of an information or the return of an indictment charging the commission of a misdemeanor, a summons *shall* be issued unless there is reasonable grounds for the court to believe that the defendant will not appear on the summons, in which event a warrant for the arrest of the defendant will be issued. When a summons is issued, the defendant does not need to be processed at the

jail and does not need to post bond. A summons in lieu of a warrant may be sent to the accused via certified mail; if unclaimed, a warrant will subsequently issue. In some jurisdictions, such as Jefferson County and St. Charles County, a sheriff will personally serve the accused with the summons and file a return of that service with the court. In this manner, the court can be assured that the defendant received actual notice of the summons. If the defendant fails to appear in court at the appointed time, a warrant will then issue for the defendant's failure to appear.

With the advent of Administrative Rule 17 regarding time standards, jurisdictions such as St. Louis County have found that the delay between a summons being sent via certified mail and the accused appearing in court is too long. In addition, if the summons is claimed and then the defendant fails to appear in court, a warrant will have to be issued. The success rate for summonses in lieu of warrants securing the defendants' appearance in court was at such a level in 1994 in St. Louis County that the issuing courts have resorted to issuing warrants in almost all circumstances.

Counsel should not be discouraged, however, because upon the entry of counsel's appearance and before the accused has been arrested, a warrant may be recalled and a summons issued in lieu of the warrant; a Supreme Court Rule and local rule provide for that process.

Rule 22.03 applies to felony cases when an indictment or complaint showing probable cause to warrant charging the defendant with a felony is filed. The judge *shall* issue an arrest warrant unless the court orders the issuance of a summons. Thus, there is authority for the court to issue a summons instead of an arrest warrant to a defendant on a felony charge. Summonses are considered in many jurisdictions for nonviolent felonies or when the defendant has already been arrested, booked, processed, and released pending application of the warrant. If a warrant is issued upon the filing of an information, whether on an ordinance violation, misdemeanor, or felony, the charging document must contain a probable cause statement. This probable cause statement must be sworn to by the prosecutor or a police officer, must establish that sufficient evidence exists for the issuance of the charge, and must assert that reasonable grounds exist to believe that the defendant will not appear on a summons or will pose a danger to a crime victim, the community, or any other person. Rules 21.03, 22.04, 37.43.

If the defendant in a felony case is a corporation, a summons instead of a warrant *must* be issued in accordance with Rule 22.03.

D. (§2.25) Re-Signing the Bond

Typically, all charges commenced by the filing of a complaint or affidavit are at the associate circuit level. For felony charges, however, after a preliminary hearing is held or after a grand jury indictment is returned, the defendant will be bound over to answer to the charge at the circuit court level. When this happens, the cause of action in the associate circuit division is considered dismissed. A question exists, therefore, as to what happens to the bond that was posted at the associate circuit level to ensure the defendant's appearance.

It used to be that, when indicted or bound over to the circuit court level after preliminary hearing, a defendant had to be reprocessed at the jail and had to re-post bond at the new cause. In fact, a new cause number would be assigned to the case wholly different from the original cause number. This is no longer the case in every jurisdiction familiar to the authors. Unless the bond amount is raised or the conditions set for the bond have changed, a defendant does not need to be reprocessed or re-sign the bond once the case is transferred to the circuit court. In most circumstances, as long as the defendant has made all required court appearances, the bond used at the associate circuit level will be carried over to the circuit level.

It is quite possible that, when a grand jury returns an indictment charging a different and more serious offense than that originally complained of, the judge presiding over the grand jury will raise the bond, which will require the re-arrest of the accused and the posting and signing of a new bond. Likewise, following a preliminary hearing and upon the finding of probable cause that a felony was committed, the associate circuit judge has the authority to raise the bond amount or to change the conditions of release before transferring the case to the circuit court. Typically, though, the bond amount remains the same, and the defendant does not need to be re-arrested and reprocessed.

VI. Bond Reduction and Appeal

A. (§2.26) Review of Conditions of Release

If a defendant on a warrant is in custody for 24 hours because of the inability to meet a set of conditions of release, upon application, the defendant is automatically entitled to have the conditions reviewed by

the imposing court. Rule 33.05. Rule 33.05 applies equally to individuals charged with misdemeanors or felonies.

Further, upon application of the defendant or on the court's own motion and after reasonable notice to the prosecuting attorney, the court may reduce the amount of bond previously set. Rule 33.06. If the requirements for release are increased by the court or new requirements are set, the accused *shall* be remanded to the custody of the sheriff or other officer until compliance with the modified conditions. If the accused is not in custody, the court may order that a warrant for the accused's arrest be issued. Rule 33.06(b). An oral request for bond reduction can be made, however; if it is denied, a written motion should be filed setting out the reasons for the request. The request may be filed in the circuit court, and a hearing should be requested. Witnesses may be presented, and evidence should be recorded by the court reporter. If an appeal is necessary, a transcript should be prepared. Counsel should note, however, that the proceedings are informal, and technical rules of evidence will not apply. Rule 33.07.

In determining what type of evidence to present to the court in the hearing for bond reduction, the following matters may be considered:

- Prior record of the accused
- Employment
- Marital status
- Residency
- Prior record for court appearances
- Ability to make bond in any certain amount
- Nature of the charge in surrounding circumstances

The amount of bail to be set is within broad limits at the discretion of the courts, and all evidence relevant to the question of bond should be presented at this hearing in case an appeal is necessary. Counsel should remember that the court of appeals will have no record to review if a court reporter does not record the evidence and a transcript is not subsequently prepared.

B. (§2.27) Appeal From Bond Proceedings

Rule 33.09 provides that an accused can apply to a higher court if excessive conditions for pretrial release have been set. The application should set out the reasons why the conditions are excessive and what conditions could be met. The application should stress that modified

conditions would be sufficient to ensure the appearance of the accused. If the matter is presently pending in the associate circuit court division, the appeal could be to the circuit court, the Missouri court of appeals, or the Supreme Court of Missouri. All of these courts are empowered to enter orders modifying conditions for release of the accused. It is recommended that, in the first instance, the application be filed in the next higher court to the one within which bond was set so as to maximize the opportunities to present the application. Of course, before appealing to a higher court, the request for bond reduction should be made with the court that originally set the bond. Rule 33.05 provides that, if the conditions of the bond are excessive, the defendant can re-apply after 24 hours for relief from those conditions.

It should be noted that Rule 33.06 may also be used by a prosecuting attorney to seek stricter conditions for release when the prosecutor believes that the conditions set are inadequate to ensure the defendant's appearance or the community's safety or that the defendant has violated one or more conditions of bond. Equally, Rule 33.09 allows for the state to appeal to a higher court if a prosecuting attorney feels that the conditions of bond are inadequate.

C. (§2.28) Use of Habeas Corpus

The correct procedure for challenging excessive bail is provided for by the Missouri Rules. A motion to modify bail, an application to a higher court on the grounds of excessive conditions, or habeas corpus proceedings, if all other methods are unsuccessful, are the procedures that should be followed in criminal cases. *State v. Dodson*, 556 S.W.2d 938 (Mo. App. E.D. 1977); *State v. Thompkins*, 515 S.W.2d 808 (Mo. App. W.D. 1974); *Dabbs v. State*, 489 S.W.2d 745 (Mo. App. S.D. 1972). If the person applying for writ of habeas corpus is charged with a bailable offense, the court in which the answers are to be filed is to set conditions for release in accordance with Rule 33. *See* Rule 91.14.

VII. Violation of Conditions of Release and Failure to Appear

A. (§2.29) Violation of Conditions of Release

Upon a breach of the conditions of release, if it appears to the issuing court that new conditions of release are necessary, the court may order the re-arrest of the accused. Rule 33.08. The accused is entitled to a hearing to consider the reasons for the issuance of the re-arrest order.

B. (§2.30) Failure to Appear—Criminal Penalties

It is a criminal offense for any person to willfully fail to appear before any court or judicial officer. Section 544.665, RSMo 2000. If the accused was previously arrested for or charged with a felony, the punishment for failing to appear under § 544.665 would be a fine of up to $5,000 or imprisonment for up to five years. If the accused was arrested for or charged with a misdemeanor, the range of punishment would be a fine of up to $1,000 or confinement in the county jail for up to one year. If the accused was arrested for a violation of municipal ordinance, the range of punishment would be a fine of up to $500, "provided that the sentence imposed shall not exceed the maximum fine or maximum period of imprisonment which could be imposed for the offense for which the accused was arrested." Section 544.665.1(4). In addition, if the offense or ordinance violation was punishable only by a fine, the individual could not be sentenced to a period of confinement.

Section 544.665 does not preclude the court from exercising its contempt powers. Thus, if the defendant does not appear for a court date, the court may declare a bond forfeiture and issue a warrant without any further hearing. Additionally, when a bond forfeiture is declared, not only does the accused or the surety forfeit the property or money previously pledged, but the accused will also face an additional criminal charge for willful failure to appear on a bond. *See* §§ 544.040–544.665, RSMo 2000 and Supp. 2004; Rule 33.14.

C. (§2.31) Surety's Authority to Arrest and Surrender Defendant

The law has always permitted, and Rule 33.13 provides for, the arrest and surrender of a defendant by a surety who believes that the defendant is about to disappear or otherwise to violate the conditions of the bond, which would lead to a forfeiture of that bond. A surety who desires to surrender the defendant may procure from the clerk a certified copy of the bond, which authorizes the surety to take the principal (the defendant) into custody. Rule 33.13.

If a bond is forfeited for the defendant's failure to appear and the surety produces the defendant before the entry of a judgment upon the forfeiture and pays all costs and expenses caused by the defendant's failure to appear, the surety is discharged from further liability.

"When surrendering the principal to the sheriff the surety must deliver a certified copy of the bond and the sheriff *shall* take the principal into

custody and acknowledge acceptance of the principal in writing." *Id.* (emphasis added). The defendant, under these circumstances, may still be released conditionally in accordance with Rule 33.01.

D. (§2.32) Incarceration as Defense to Forfeiture

If the defendant does not appear in court because of incarceration elsewhere in Missouri and this is called to the court's attention by counsel or by the surety, a bond forfeiture should not be entered because of the failure to appear. Forfeiture may be entered, however, if the defendant is incarcerated other than by the State of Missouri. *State v. Jones*, 491 S.W.2d 241 (Mo. 1973); *State v. Patterson*, 508 S.W.2d 304 (Mo. App. E.D. 1974).

E. (§2.33) Practice Tips

To avoid a client's inadvertent violation of a condition of bond, defense counsel should become familiar with local court procedures and customs for each individual court. Even in multi-court districts, the procedure from court to court may vary. Some courts permit counsel to appear for the client on general docket calls. Other courts demand that the defendant appear at each court setting, and failure of the defendant to appear will result in a violation of the conditions of bond. Counsel with a good history of appearing timely and being efficient with the court's time and resources will more likely be able to appear on behalf of the client than counsel who regularly fails to appear at court and regularly fails to notify the court as to whether counsel will be making an appearance. When in doubt, counsel should have the client appear in court even if counsel cannot make it because of conflicts or other reasons; at least the defendant has appeared on the defendant's bond, and the court cannot then find that the defendant has violated conditions of release.

VIII. (§2.34) Conclusion

Counsel's involvement in obtaining a client's release can be vital to the preservation of the defendant's case. When the right to counsel is invoked by an accused at the time of arrest, this could be the opportunity for counsel to secure the defendant's release from further police interrogation, participation in post-arrest identification, etc. Generally, counsel should not attempt to gain the release of an individual unless counsel has been retained. Discretion should be used when counsel has not been retained; counsel may consider who referred the client, what relationship the client has with the law firm, and the

immediacy of the situation. With the exception of an appearance bond, counsel must enter an appearance as attorney of record with the court before approaching the court regarding bond reduction or the approval of a ten percent bond or other recognizance-type bond. Once entered into the case, it will be difficult to withdraw, and the court will not be sympathetic to the attorney who has not been retained. If counsel is contacted by family members or parents of the accused, counsel should confer with the defendant first before making a decision as to whether to represent that individual. This is true even if the parents or family members are paying the attorney fees. No services should be rendered until counsel has been retained, even if it is a minimal amount.

Counsel should also be careful about the representations counsel makes when seeking a defendant's release. Counsel should ensure that there is a factual basis for informing the court or the pretrial services personnel about any aspect of the defendant's background, prior arrests, family, community ties, and residence because it is counsel's credibility that is at stake; counsel will be blamed for any misstatements or misrepresentations. Because the technical rules of evidence do not apply to hearings on bond conditions or bond reductions, the representations that counsel makes to the court must be accurate.

James H. Worthington*

Chapter 3

INVESTIGATION AND MARSHALLING THE FACTS OTHER THAN FORMAL DISCOVERY

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This chapter includes material prepared by Robert C. Welch from the Second Edition and James D. Worthington (deceased).

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I. (§3.1) Client Contact

The initial client contact frequently occurs at a jail or prison facility. The sooner counsel becomes involved, the better to explain the myriad constitutional rights and labyrinth court procedures and to obtain the true facts before they are lost by the passage of time. At that first contact, counsel should advise the defendant (or potential defendant) as follows:

- To respectfully decline to speak with *any* person and certainly to avoid writing or signing *anything*!

- To inform the police or investigating personnel that an attorney is involved in the representation and that the attorney has instructed the client to remain silent until counsel can be present.

- To enter into no discussion of facts even with a seemingly harmless cellmate. A cellmate can become the proverbial professional witness with very little pressure, leverage, or quid pro quo (usually a "deal" offered by the prosecuting attorney). Do not, under any circumstances, take any chances!

- To discuss no fact over the telephone.

- To inform even friends and family that "on advice of counsel, I am instructed not to talk with any person, even you, without my lawyer present."

Counsel should also accomplish the following at the first contact:

- Go over the charging document and its various claims and allegations specifically, including place, date, time, and circumstances.

- Discuss the next court date coming up and what will happen there. Explain the court's procedures as well as constitutional privileges.

- Discuss making bond. Talk about the differences between a cash and a surety bond and the advantages, disadvantages, and possibilities of a motion for either bond reduction, a recognizance bond, or a ten percent cash posting under Chapter 544, RSMo (if a ten percent cash bond is posted, the bond assignment form (§3.36, *infra*) can be used to secure payment of attorney fees or a portion of them).

- Remind clients one more time about the importance of the right to be free from self-incrimination, i.e., not to be a witness against themselves; the right to remain silent is non-negotiable. That is, any further discussion should be avoided, and the rule on when to waive the right to silence for the client who is inexperienced is "no how, no way, no time!" Counsel

should make sure that any change in that is done only under advice of counsel. The client has a right to remain silent under both the United States Constitution (Fifth Amendment) and the Constitution of Missouri (art. I, § 19). Further, these rights mean that defendants/accuseds may not be compelled to be witnesses against themselves or be compelled or required to incriminate themselves. The author always advises defendants or people "in custody" to observe and honor these important rights by silence. The author has seen many more defendants sent to prison because of what they *said* than by what they *did*.

A. (§3.2) Initial Interview

The initial interview is critical to the process of establishing a lawyer-client relationship of trust and confidence. Most clients are both fearful and bewildered. They want an attorney who understands court procedures, who understands the law, and who has the experience to guide them through the mine field without any explosions. Counsel should take the time to do the following:

- Obtain as many details and facts as the client can give.
- Obtain the name, address, and phone number of every conceivable witness.
- Review the charge.
- Make copies for the client of the substantive statutes regarding the crime. This is a good time to also review MISSOURI APPROVED INSTRUCTIONS—CRIMINAL to find out whether all of the necessary elements of the charge have been included by the prosecution in order to determine whether a bill of particulars should be used.
- Explain the logical progression of court procedures.
- Explain prosecution strategy.
- Explain defense strategy.
- Explain your office procedures and use a specific written form or letter such as the one included in §3.40 below.
- Discuss fees and costs.
- Discuss options of handling the case and their various costs, advantages, and disadvantages.

B. (§3.3) Procedure for Initial Interview

Counsel should do the following:

- Ask to speak to the client *alone* and explain to friends and family who have come the precise nature of the lawyer's professional privilege and confidential relationship. Explain that they could be forced to be witnesses by being subpoenaed if they are privy to those discussions and conferences and that counsel does not want to put them in that position. It is a logical privilege that the law provides to allow people to provide openly full information to their medical doctor or dentist to preserve and protect their physical and mental health, to their minister, rabbi, or priest to protect their moral health, and to their lawyer to protect their legal health. Generally, none of those privileged professionals can be used as a witness against the defendant. To that extent, the initial conference should be held without third parties present.

- Start with the client's name, address, phone number, date of birth, age, and Social Security number. A good form for covering all issues in the initial interview is included at §3.32 below.

- Review the charge and the specific claims, allegations, and dates shown.

- Let the defendant tell the entire story. Keep the defendant on track but pay attention. Do not interrupt! Take only those notes necessary in order to ask questions and get a fair skeleton of the story. A successful initial interview will give counsel a fresh, unretouched view of potential clients and their version of the facts. Allow the client to speak without interruptions, and give no indication as to which direction or approach should be followed in telling the story.

- After the client has told the whole story, ask questions and record the responses.

- Have the story retold and recorded by either audiotape, videotape, or copious notes.

- Do not be afraid to ask hard questions; do not worry about offending the client. Clients need realism, including the types of curiosity and cross-examination that point up weaknesses in their position. Clients will understand if counsel is tactful, probing, and caring in the way the questions are presented.

- Be direct and honest with the client.

- Deal with financial issues. More dissatisfaction arises from financial issues than from any other. Be sure the client understands everything so that these touchy issues cannot be bones of contention later.

- Have the client sign a written contract. If family members are helping to provide moral and financial support, have them sign affidavits of guarantee that explain in detail not only their financial obligations but also the fact that counsel must take full and complete direction from the client to avoid a conflict of interest. This should be done in a careful and caring fashion so as not to offend, while at the same time making sure that the family members understand counsel's exact legal relationship. See the affidavit of guarantee in §3.35 below.

- Give the client a copy of your firm's general form letter explaining the following:

    - Your office procedures
    - The orderly and logical progression of court proceedings and procedures
    - Constitutional rights
    - The range of punishment

- Establish a mutually agreed and realistic "goal" for the case.

- Explain and agree on a general battle plan or strategy in order to try to achieve that goal.

- If necessary, make the clear distinction between professional, zealous defense (which will be done) and improprieties, illegalities, or professional misconduct (which will not be condoned in any form, fashion, or manner). The purpose is to relieve any misconceptions or unreasonable expectations at the very inception. This will promote longer and happier client relations.

- Conclude by reviewing the written contract and the specific procedures that the client has employed counsel to do and that the client will expect to be done.

The next day, after the initial conference, counsel should be sure that a letter is sent to the new client with a copy of the written contract and a list of the things that the client and counsel have agreed will be done by counsel so that there is no confusion.

C. (§3.4) Specific Problems

To avoid certain kinds of recurring and expected problems, counsel should review §§3.5–3.17 below.

1. (§3.5) "Get Me Off"

Some defendants come to the office with views and opinions based on myth, rumors, public perception, television shows, or media coverage, which are at best unrealistic and at worst untrue or even fraudulent. Any client, no matter how rare, who expresses a desire that counsel "get me off no matter how" should be politely declined unless counsel has been sure to relieve that misconception.

2. (§3.6) Loss Leaders

There is no such thing as a good case to defend at no fee or at a reduced fee in order to "build a reputation" in the community, i.e., to get other cases to come in the door. Good defense work is time consuming, and office overhead is substantial. Counsel should cover expenses—all of them! Counsel should also make some (profit) money to take home. It is the only way to be in business tomorrow. Young attorneys are often beset with "professional" clients and shoppers trying to get an attorney at a lower figure than a neighbor. Counsel should resist the temptation. Once established, however, counsel should be ever vigilant to hear the cry of affliction and should be of service to humanity, the public, and the judicial system as a pro bono publico advocate. It is part and parcel of every attorney's *raison d'etre*.

3. (§3.7) Retainers

Counsel should ask for a sufficient retainer to cover all expected time, expense, and effort of the case. Subsequent payments are infrequent at best. It is axiomatic that cases, at times, get out of

hand and additional time and effort are needed, but the written contract should handle that situation.

4. (§3.8) Shoppers

Some defendants have been looking for the cheapest lawyer—either by telephone or in person. Counsel should decline the opportunity to "low ball" the competition. Counsel should set the fee and stay with it based on overhead, expenses, and the time that will be involved in the case using all of the factors permitted by the Supreme Court of Missouri, such as:

- reputation;
- origination;
- amount of time and effort;
- difficulty of the case; and
- potential result.

Plenty of business, clients, and cases exist for all attorneys.

5. (§3.9) Referrals

Having other attorneys who know and appreciate the quality of work done by a defense lawyer is gratifying. Counsel should not inhale the essence of flattery too deeply. Counsel should follow all procedures in evaluating and accepting any case and get a written contract with a sufficient retainer. Counsel should beware of the client who is "good for it." Additionally, counsel should get the client's permission to advise the forwarding attorney that counsel has accepted or rejected the case and the general basis or reasons for the decision. Counsel should not provide to the forwarding attorney any information that might be used against the defendant at any time in the future.

6. (§3.10) Family and Friends

Family and friends are a source of important moral support to any defendant and should be encouraged to lend that support. They may also be a valuable source of financial support and, if so, counsel should be sure to record who the money comes from and the financial obligations of those family members as discussed in §3.3 above. Counsel should make sure that family and friends understand that counsel is solely obligated to "the client." A separate conference should be held with family and friends in order

to do everything that counsel has done with the defendant except listen to the defendant talk about the defendant's version of the facts. When meeting with family and friends, counsel should get full statements from them as to what testimonial facts they know. This allows them to know, trust, and confide in an intelligent and caring defense lawyer. Also, they may well be the source for bond money. They may also be a source for obtaining other witnesses' identities or locations.

Friends and family are subject to subpoena and can be forced to testify. This is the reason that counsel does not allow them to be put in a position of listening to the defendant's version of the case.

7. (§3.11) Offense Charged

It does not matter whether the client is in jail or has come to counsel's office to visit either before or after the charge is filed. Counsel still must determine precisely what charge is alleged and claimed against the defendant. There are four general things that need to be done in every case:

1. Obtain a copy of the complaint or information.
2. Look up the MAI-CR to determine that the charge is thorough and complete as to the necessary and indispensable elements.
3. Pull out a copy of the substantive statute.
4. Look up the caselaw decisions under that general statute.

These four sources of information will provide invaluable background as to the claims made against the defendant.

If the client is in jail, counsel can obtain the exact nature of the charge from the booking desk personnel. If the interview is at counsel's office, however, and the appointment is made in advance, counsel should ask the client to bring a copy of the complaint or information, or counsel should call the court and get the exact charge as well as the name of the complainant. Counsel should try either to obtain copies from the court or to get full information over the telephone. It is very important to be aware not only of the nature of the charge but also of the exact specifics before any discussion with the client. It is best to know the exact charge even though it is not always possible. The next best thing is to obtain the nature of the charge. A primary reason for obtaining either the charge or the nature of the charge is that most clients are incapable

of relating either the exact charge or precise facts. Clients often remain confused, incoherent, or incapable of comprehension. Even clients who have those abilities sometimes lack the communication skills necessary to articulate what it is that they saw and observed. For these and other reasons, clients' versions might be misleading in the initial discussion or analysis if they wander and are not focused. If clients are told counsel's conclusion or analysis based on their version and then the charge is different, counsel has to backtrack and start over again. That may cause the client to lose faith, and counsel may have lost some control over future events.

In most cases, and certainly until all of the facts are available, including the names of all witnesses and what they will testify about—allowing for an analysis of the strengths and weaknesses of the prosecution case and the defense position—it is best not to make any predictions as to the anticipated outcome. It can be difficult at times to set a fee when counsel is unable to predict, with any accuracy, an outcome. Counsel should always assure clients that they will be defended with the same degree of vigor that they would enlist to defend themselves given the same law school training, education, and years of experience.

Although counsel will seek full information in formal discovery, it should be noted that often the files maintained by law enforcement agencies investigating a case are more complete than those of the prosecuting attorney. Counsel can often obtain information from various prosecutors or investigating officers by simply taking the time to ask. Defense counsel should make a habit of checking police files, especially in serious cases. Section 600.096, RSMo 2000, requires that state law enforcement agencies provide public defenders access to and copies of such law enforcement files.

8. (§3.12) Obtaining the Facts

Armed with the knowledge of the charge, counsel can focus on the client's knowledge of the facts. Counsel should not be alarmed if the police version of the facts varies substantially from the facts as related by the defendant and independent witnesses. The police have gone to school to learn how to "clean up" the facts and have learned from every court-related experience. Meanwhile, inexperienced lay witnesses are unskilled, frightened, unsure, and untrained; they never seem to understand the goal as do professional witnesses. Further, the police have been trained to make notes, reports, and records, which may be used to bolster

their testimony as either a present recollection refreshed or a past recollection recorded. Therefore, counsel should always attempt to get the police report (all of it) every time. In the same way, counsel can seek to aid the client's and witnesses' recollections by making written audio or video statements early.

9. (§3.13) Details of Arrest

In most cases, the first time counsel sees the client, the client will have been arrested, and it will be necessary to obtain a full account of facts and details of the circumstances that occurred before, during, and after the arrest, up to the time of the first interview. Counsel should get the names and addresses of all persons present during the arrest, including police officers, if the client knows; if unknown, counsel should try to obtain details such as how many officers were present and the names of any other persons who may have had a significant part in any of the matters.

What were the circumstances of the arrest? Where and what had the client been doing immediately before the police arrived? What facts first indicated the presence of the police? The client should describe in detail the first contact by police, including their *exact words*. Counsel should determine whether an arrest was immediately effected. Did the client say or do anything? Was there a warrant shown to the client? Was the client advised of what is commonly called the "*Miranda* Warning," *Miranda v. Ariz.*, 384 U.S. 436 (1966)?:

- The right to remain silent
- That anything the client says can and will be used against the client
- The right to have a lawyer present
- That if the client cannot afford a lawyer, the court will appoint one

Did these warnings precede any questioning or statement, written or oral, made by the client? Did the client sign anything? Who else was present? Who else was arrested, if anyone? Did any of them say anything? *See* Chapter 1, Arrest and Custodial Detention, of this deskbook. Was any physical evidence taken from the client or any persons arrested or from the immediate surroundings? Was a lineup held? What were the facts of the lineup, how many lineups were there, and was the client asked to speak or walk? If so, counsel should insist that the client be exact in describing what the

client did in as much detail as possible. Additional information concerning lineups and procedures on what to do are discussed more fully in §3.26 below. *See also* Chapter 10, Identification, of this deskbook.

Counsel should determine whether any photographs were taken at the arrest scene of persons, places, or physical objects or of any lineup.

If the client is still in jail, counsel should determine whether there were any discussions with cellmates.

10. (§3.14) The Fee

In most cases, counsel will not be running off to the jail at 2:00 a.m. just because a client calls unless some preliminary fee arrangement or a retainer has been paid or unless it is an old client and counsel knows the fee can be worked out. Very few lawyers can say they have not experienced a call to the jail or police station in the wee hours of the morning to meet with and discuss the caller's circumstances, only to find out the accused did not intend to pay and thought counsel would be ecstatic to see the accused's plight and of what help counsel could be without charge.

For additional problems relating to telephone interviews, see James R. Devine, *Minnesota's Togstad Decision: Expanding the Ethical Responsibilities of All Lawyers,* 38 J. MOBAR 40 (1982).

When called to come to the jail by someone counsel does not know, counsel should explain the fee for coming and talking with the defendant and ask if the defendant has the fee then or who among relatives or friends can be called first to make suitable arrangements. It is best to meet with those friends and family at counsel's office to arrange payment, security, and "guarantees" before departing to the "Bastille." Counsel should remember that the retainer must be sufficient to cover the hours, skill, and effort of checking the court record, the client interview, the investigation, the depositions, and the preliminary hearing.

If the client interview is in the office, at some point during the initial interview counsel should discuss the fee and any expenses for which the client will be responsible. Most lawyers have come to recognize the necessity of a formal contract, spelling out in detail the representation, the fee, and expenses.

If at the initial interview counsel is unable to determine a total fee, a retainer should be set and some written evidence made showing that this is only a retainer and what the retainer includes (and excludes) as far as services are concerned. Counsel should keep in mind that, generally, counsel who accepts a partial payment and enters an appearance cannot ethically withdraw from the case solely for reasons of nonpayment. *See* Rule 4–1.16. If counsel has a question in this area, Rule 4–1.16 should be read closely because it is possible to withdraw for nonpayment of fees under some circumstances.

Therefore, if the retainer receipt provides that counsel will not enter an appearance on any docket but will investigate or research and the fee will be set later, counsel may avoid being faced with the judge forcing counsel to trial without payment of a fee.

Counsel should be aware that contingent fee arrangements for doing criminal defense work are in violation of the Rules of Professional Conduct. *See* Rule 4–1.5(d)(2).

Some lawyers feel it is desirable to send a retainer letter to the client explaining the total fee, setting out in the letter how and when the fee is to be paid and what services will be performed and whether an appeal is included in the fee. The letter should say who is to pay for the expenses and what categories of expenses might be expected. Clarity and thoroughness in the beginning will avoid misunderstandings later. One of the biggest and most frequent problems is failing to come to a clear understanding concerning fees and expenses right up front.

11. (§3.15) Initial Interview Notes (How)

Taking the proper time and patience with the client at the initial interview to get detailed facts will save time and money later by not having to go back over immaterial facts and circumstances to get details that should have been gotten at the first meeting. Time, patience, and questions should help counsel develop a rapport with the client and allow counsel to display interest, competence, and knowledge of the law.

Some lawyers tape record all interviews with clients and have them transcribed and copies placed in the file. This is expensive and is only recommended on very serious and complicated matters. Most defense lawyers rely on their own detailed note taking, which

they may or may not have typed. The advantage of note taking is that it provides an immediate reference to read back to the client at the conclusion of the interview, and counsel can then ask questions to see if anything was omitted or left out. In addition, this procedure allows the client to review their version as the client would have counsel—and possibly a jury—believe the facts occurred.

In addition to counsel's notes, the client should write down their version and return it at the earliest time convenient. If the client is allowed to do this at home, away from the pressures of the lawyer's office, the client may remember an important fact overlooked at the initial interview. Counsel can compare the client's version with the one counsel prepared and use both as a basis from which to work. This method also affords a tool to refresh the client's memory at a later time, and it may avoid any suggestion of recent fabrication. It further gives the client a sense of participation, thus helping the overall relationship between the lawyer and the client.

12. (§3.16) Explaining the Charge

Counsel should discuss:

- the difference between indictment, information, and complaint and how they are used in law;
- the grand jury system and its purpose;
- the court system use of *informations* and *complaints*, and which is applicable in the client's case; and
- the mechanics of criminal prosecution and how they will be employed by the government.

Counsel should include an explanation, in all cases, of the arraignment and its five parts:

1. Reading the charge
2. Plea of not guilty
3. Making sure the defendant has, or is getting, a lawyer
4. Setting a bond by which the defendant, while presumed innocent, can secure freedom and guarantee future appearance at all necessary court hearings
5. Setting a hearing date (trial of misdemeanor charges; preliminary hearing of felony charges)

Further, counsel should explain to the defendant that at a preliminary hearing the prosecution will use the simplest, most concise and succinct method possible to establish that there is probable cause to believe that:

- a crime probably occurred; and
- the defendant probably committed it.

Ninety-nine percent of all felony cases result in the defendant being bound over to the circuit court for arraignment (within 40 days of the preliminary hearing); ultimately, if there is no earlier resolution, there would be a final trial before a jury in which the state (government) must prove the defendant is guilty beyond a reasonable doubt. The preliminary hearing is really an opportunity for the defendant to see *who* the prosecution witnesses (or some of them) are and to measure the content, believability, and credibility of their testimony, i.e., *what* they will say and *how* they look when saying it. If the preliminary hearing is to be waived, counsel should advise the defendant that these same functions may be carried out by deposition. If the preliminary hearing is to be held, it should be worth preserving by employment of a private stenographer or reporter or by taping the entire process. Counsel should be aware which jurisdiction the case is pending in because some counties use the grand jury system as opposed to actually having a preliminary hearing. The client should be advised of the differences in the two proceedings and the positives and negatives of requesting either the grand jury or the preliminary hearing.

In addition, the client should be told what needs to be done and what will be done at each stage of the proceedings. Again, this should be done early in the discussion with the client because it affords another opportunity to display knowledge of the law and to build the needed rapport and confidence of the client. Also, explaining the dos and don'ts of the case provides a great opportunity to justify a retainer up front so counsel's staff can get busy trying to help the defendant and to protect the client with all available speed and dedication. Time is not divided between collection of fees and defense of the client. Counsel should also explain the maximum possible penalties and sentencing alternatives.

The author recommends that a standard advice letter (§3.40, *infra*) be sent to every new client to advise the client of:

- some of the law firm's office policies and procedures;
- the defendant's constitutional rights; and
- a detailed explanation of many of the orderly and logical events and procedures that will be happening in a frightening, whirlwind fashion.

13. (§3.17) Do You Ask Client About "Guilt"?

Every attorney will want *all* of the facts, details, witnesses, dates, times, and places, and every single scintilla of information from the client.

It is the author's belief, after talking with a number of criminal defense lawyers, that counsel should purposely avoid asking or allowing the client to voice the ultimate legal conclusion of "guilt." This can present a later ethical, as well as tactical, problem.

Counsel's avoidance of this ultimate fact may well be questioned, at least in the mind of the public. Why doesn't the lawyer want to know this ultimate fact? *See* ABA Standards for Criminal Justice, Defense Function Standard 4-7.5(a), Presentation of Evidence (3rd ed. 1993):

> Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.

Counsel may nevertheless be faced with a client who insists on taking the stand to testify falsely and a court that will not allow a withdrawal without an explanation, which could violate attorney-client confidentiality. The author suggests that, to avoid such a paradox, counsel should do the following: While in the initial interview stage, counsel should communicate to the client that:

- the attorney's function is not to judge, and no attorney should base legal representation on guilt or innocence—quality legal care does not have to be earned any more than quality medical care by any member of the human race; and

- counsel needs to be aware of the facts to perform the proper defense function, but if a defendant communicated guilt and later wanted to take the stand, counsel has a particular duty as an officer of the court to protect against false testimony.

Any client should readily see the problem and, in most cases, will immediately express innocence and facts short of the ultimate issue. This may not be the best solution available under the circumstances, but in light of the problem, it is at least a viable alternative. Most defense attorneys believe that clients may very well, and often do, "shade" the truth and "gild the lily" in discussions with the lawyer regardless of the facts or charges.

Even if clients believe themselves to be guilty, it is a complicated legal conclusion; competent counsel should investigate sufficiently to be satisfied that evidence required to prove the necessary and essential elements of the offense is pleaded and admissible, and that the elements are able to be proven, with no reasonable affirmative defense.

It makes little difference whether counsel asks the client outright whether the alleged crime was committed or merely gets a statement. Counsel will still have this knotty issue to face. It is obvious that the "false evidence" or "perjury" problem does not disappear because of the above-suggested approach.

The American Bar Association has spent a number of years struggling with the present "Rules of Professional Conduct" and is still trying to perfect this dilemma. In August 1983, the American Bar Association passed the Model Rules of Professional Conduct. At that time, the Model Rules had proposed three resolutions to this dilemma, and they are set out in the Comment, *Perjury by a Criminal Defendant*, to Rule 3.3:

1. Have the defendant give narrative testimony without questions from defense counsel.
2. Excuse defense counsel from the duty to reveal a client's perjury.
3. Require defense counsel to reveal a client's perjury if it is necessary to correct the situation.

Id.

In 2002, the American Bar Association modified the Model Rules of Professional Conduct and specifically Rule 3.3. The purpose of the change was to strengthen the Rule's goal, which is to protect the integrity of the judicial system. There are two significant changes that should be noted. First, the Rule itself removed paragraph Rule 3.3(a)(2) and added a new paragraph, Rule 3.3(b). *See* Rule 3.3(a) and (b), *available at* www.abanet.org/cpr/mrpc/rule_3_3.html. Rule 3.3(a)(2) required a lawyer to disclose material facts to the court when it was necessary to avoid assisting the client in committing crime or fraud. *See id.* New Rule 3.3(b) encompasses the spirit of the former Rule 3.3(a)(2) but adds the nuance that the conduct must be "related to the proceeding." *See id.*

Second, Comment, Offering Evidence, *available at* www.abanet.org/cpr/mrpc/rule_3_3_comm.html, states:

- A lawyer may not offer false evidence, but the lawyer does not violate this rule "if the lawyer offers the evidence for the purpose of establishing its falsity."
- If a lawyer knows that the client plans to offer false testimony or wants the lawyer to offer false evidence, the lawyer should try to talk the client out of it. If only part of a witness's testimony will be false, the lawyer may call the witness but may not elicit or allow the witness to present the knowingly false testimony.
- In jurisdictions where courts require counsel to allow the defendant to testify or give a statement, "even if counsel knows that the testimony or statement will be false," the lawyer's obligation under the Rules of Professional Conduct is subordinate to those requirements.
- "The prohibition against offering false evidence only applies if the lawyer *knows* that the evidence is false" (emphasis added). This knowledge can be inferred from the circumstances.
- The Rule allows "the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false." But it does not allow a lawyer to refuse to offer the testimony of "a client where the lawyer reasonably believes but does not know that the testimony will be false."

See id.

A careful study of this updated Rule is recommended to anyone handling or anticipating handling criminal defense cases. The comments regarding remedial measures, withdrawal, duration of obligation, etc. are somewhat helpful.

There still does not seem to be a satisfactory solution to the problem, but perhaps after reviewing some of the suggested material the reader will find an acceptable solution for the reader's practice.

For additional insight, see Chapter 32, Ethical Considerations, of this deskbook.

It should be noted that the Supreme Court of the United States has held that the Sixth Amendment right to effective assistance of counsel is not violated by a defense attorney's refusal to aid the client in presenting perjured testimony at trial. *Nix v. Whiteside*, 475 U.S. 157 (1986).

II. (§3.18) Investigation and Marshalling of Facts

Clearly, the investigation process and gathering of facts begins with the first news of the client and the initial contact with the client. Many of the facts needed will be provided through the client. But rarely will the client be able to provide all of the facts necessary to defend the case, and investigation or gathering of facts will be required.

It is the defense counsel's responsibility to investigate the facts and witnesses necessary to the defense, and the next question is "how?" Does counsel do it, or should a professional investigator be hired?

Whether to hire an investigator may depend on such facts as:

- the expense involved;
- the complexity of the case;
- the facts and witnesses to be investigated; and
- counsel's time and ability compared to that of a trained professional.

Few lawyers have the time, ability, or contacts to do much of a job of investigation. Some fortunate lawyers and law firms may employ an investigator full time. Counsel can still assist or take part in the

investigation, but for the most part, counsel's time can be used more effectively on other aspects of the case. One important argument in favor of using an investigator arises when, in the course of the investigation, physical evidence is discovered or a witness gives a statement (oral). How can the trial lawyer/investigator take the stand? In most cases, the trial lawyer/investigator cannot take the witness stand. Then how can counsel rebut a witness who told the trial lawyer/investigator a different story? This is no problem when an investigator obtains such evidence.

It is standard policy for the author to ask the investigator to do the following:

- Take a picture of each witness interviewed.

- Get a written, signed statement from the witness showing the witness's name, address, age, date of birth, Social Security number, and phone number, as well as the location of the interview, the date and time of the interview, and a list of other persons present at the interview.

- Give the author the investigator's own separate evaluation of the witness, including believability of content, believability of the person, and whether this witness will help or hurt the defendant's case.

Investigators' reports should not include case strategy. While the investigators' reports may be subject to discovery, *see Foote v. Hart,* 728 S.W.2d 295 (Mo. App. E.D. 1987), the author would be willing to argue for the confidentiality of such employee and work product reports under the Fourth, Fifth, and Sixth Amendments to the United States Constitution, rather than to sacrifice full, complete, exhaustive preparation.

If an investigator is employed, whether on a partial, specific job, or full-time basis, counsel should discuss all of the facts (as they are known) with the investigator, including:

- the client's version of the salient issues and facts;
- the possible theories of defense;
- any key matters that the investigator will need to look for or discover; and
- specifically what evidence to attempt to obtain from each witness.

It should be noted, at least, that the investigator should keep in mind two objectives—first, the trial and second, if unlucky, the sentencing.

A. (§3.19) Witnesses

One of the more frequent challenges of investigation involves locating the witnesses, which the trained investigator can accomplish very well, probably better than a lawyer. Once located, witnesses should be interviewed by the investigator. Then, if the evidence, testimony, and information are of sufficient import, there should be an attempt to have counsel meet with witnesses, whether it is in the office or at some outside location. In many instances, the client will have some familiarity or friendship with the witnesses and will be able to have the witnesses come to counsel's office to make a specific written statement. This affords a better opportunity to get a statement in a businesslike atmosphere than a meeting at a home or other outside location. Counsel should be mindful of the rules of discovery and the duties to disclose any statements of witnesses under the Supreme Court of Missouri Rules of Criminal Procedure as enumerated in Rule 25. *See* Rules 25.05, 25.06, 25.07, 25.08, 25.09, and 25.10. See Chapter 7, Discovery by Right or Through Court Action, of this deskbook regarding the duty to disclose as the Rules apply to rebuttal witnesses by the state and defense.

B. (§3.20) Alibi and State's Witnesses

There are some cases that indicate that the failure to interview the alibi witness can constitute "ineffective assistance of counsel." *See Thomas v. State*, 516 S.W.2d 761 (Mo. App. W.D. 1974). *Thomas* has been cited and approved in *Perkins-Bey v. State*, 735 S.W.2d 170, 171–72 (Mo. App. E.D. 1987), and *State v. Hayes*, 785 S.W.2d 661, 664 (Mo. App. W.D. 1990). But there have been several distinctions made to *Thomas*. In *Owens v. State*, 610 S.W.2d 706 (Mo. App. E.D. 1981), an attorney spoke with a witness and determined that witness testimony would not amount to a defense. In *Pogue v. State*, 750 S.W.2d 497 (Mo. App. W.D. 1988), the failure to produce or interview was a matter of trial strategy and not negligence, inactivity, or ineffective assistance of counsel.

The failure to interview state's witnesses can also amount to "ineffective assistance of counsel." *See Thomas v. Wyrick*, 535 F.2d 407 (8th Cir. 1976); *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974).

See *Eldridge v. Atkins*, 665 F.2d 228, 235–36 (8th Cir. 1981), which stated:

> A competent lawyer's duty is to utilize every voluntary effort to persuade a witness who possesses material facts and knowledge of an event to testify and then, if unsuccessful, to subpoena him to court in order to allow the judge to use his power to persuade the witness to present material evidence. We cannot accept trial counsel's excuse that he *thought* Taylor would not cooperate.
>
> . . . .
>
> [T]rial counsel in this case owed a duty (1) to investigate and interview all eyewitnesses to the robbery, (2) to pursue the substantial defense of mistaken identification, and (3) to solicit the testimony of all witnesses who allegedly possessed material facts and knowledge concerning the defendant's guilt or innocence.

But see *Langston v. Wyrick*, 698 F.2d 926, 931 (8th Cir. 1982), in which the court stated: "[W]e have not adopted a rule that counsel's failure to interview the state's endorsed witnesses amounts to a *per se* breach of trial counsel's duty to render effective assistance."

In *Plant v. Wyrick*, 636 F.2d 188 (8th Cir. 1980), it appears that cases such as *Thomas*, 535 F.2d 407, and *McQueen,* 498 F.2d 207, are rare unless counsel fails to interview witnesses as a matter of policy.

Prosecution witnesses who have refused to discuss the case with a defense lawyer have left themselves wide open for impeachment by the defense at trial as being biased and prejudiced.

Again, counsel should be mindful of the fact that, as an attorney, counsel cannot testify, and it is advisable to have a third person along when witnesses are interviewed.

By interviewing prosecution witnesses before trial, counsel might be surprised to learn that a witness is blind, deaf, or otherwise disabled, which, if known in advance, might be exploited or maybe neutralized in some other way. Additionally, counsel might find the witness to be totally unbelievable or impeachable. Or, counsel might find out the witness has disappeared, all of which may be helpful in obtaining a dismissal or a negotiated plea.

Whether counsel takes a formal statement becomes a trial tactic. Counsel may not want the statement written or recorded because of its discoverability. *See* Chapter 7, Discovery by Right or Through Court

Action, of this deskbook. On the other hand, such a formal statement, if helpful, may be useful in plea negotiations.

It should be academic that counsel's best possible effort on the client's behalf includes interviews, if possible, of all state and defense witnesses. Most defense lawyers consider this to be basic preparation.

Defense counsel should ascertain how alibi witnesses remember the date and time in question. If the witness remembers the date in relation to someone's birthday, counsel should independently verify the birth date. Often, witnesses set the time by television programming. Television stations maintain records of their broadcasts, which can be subpoenaed to support the alibi testimony.

The Eastern District of the Missouri Court of Appeals, in *Foote v. Hart*, 728 S.W.2d 295 (Mo. App. E.D. 1987), held that a court, in its discretion, may order disclosure of notes taken by defense counsel and defense investigators during interviews of the state's witnesses. The interviews were conducted to prepare for cross-examination of those witnesses and possible rebuttal testimony by the investigator. The court rejected the argument that these notes were defense work product; therefore, they were subject to discovery over timely defense objections.

C. (§3.21) Facts

Certainly a fact witness is just as important as the facts themselves, and, if necessary, the crime scene may need canvassing to detect the existence of fact witnesses. Also, it is important to personally visit the crime scene and to have photographs taken to preserve and reflect the circumstances for the trial when applicable.

A search of the area, after the client interview, may also be revealing and rewarding as to facts and physical evidence, particularly if the client is present. The client will be able to direct counsel's efforts more effectively than police personnel by knowing what to look for; certain physical facts, otherwise, may go unnoticed.

In addition, if it is stipulated that the function of a trial attorney is to re-create a real life occurrence, i.e., the alleged crime, in the artificial atmosphere of a courtroom, there can be no doubt that firsthand observation will assist in the re-creation.

The thorough defense attorney will want to see all reports or evidence at the earliest opportunity. This often can be done by merely asking the custodian of records or reports or by requesting the prosecutor to direct the custodian to allow inspection, even before the preliminary hearing stage, thus allowing the defense to better prepare and anticipate appropriate action. This also provides the opportunity to detect errors or omissions in any reports or documents, and this can be done with more concentration and without the strain and tension of the courtroom at hearing or motion time.

It should be noted that, in *State v. Gray*, 741 S.W.2d 35 (Mo. App. E.D. 1987), the prosecuting attorney was allowed to gain discovery of a copy of a tape recording of a 911 call obtained by the defense, which was intended to be used to impeach a state's witness. The court reasoned that the tape was a public record available to both parties, not work product in the exclusive domain of the defense. *Id*. at 38.

D. (§3.22) Investigation of Client

A background check of the client—family, employment, medical, military—and of friends, witnesses, and codefendants may help form an interim or final opinion of the case.

A view of the client from the criminal record background is also important.

Present rules of discovery usually make this information available. In federal cases, this information is usually forthcoming at the "omnibus hearing," regardless of whether the government is going to rely on prior convictions.

In any event, this information can be helpful in evaluating the client and the case and whether the client can take the witness stand at trial without fear of impeachment on this point.

This client's driving or prior criminal record, or lack of it, may also be important as it applies to what the client is charged with, e.g., persistent or prior offender, and whether a prior offense is an element of this present offense. Rap sheets are helpful because sometimes patterns of behavior can be detected that may shed some light on or even reveal a possible defense to a case. For example, a prior drug conviction may indicate personal usage or addiction. If substantiated, this might permit a defense of diminished responsibility or, in some cases, inability to form the legally required mental intent.

E. Other Areas of Investigation to Consider

1. (§3.23) Experts

Will the subject matter involved require the state to use experts? If so, will counsel have an expert to counteract or have one regardless of the state's posture? At what point does counsel contact an expert? The answer is probably only after it is determined that the case cannot be worked out without trial.

Sometimes the use of the so-called experts can backfire on the unsuspecting defense counsel. *See State v. Carter*, 641 S.W.2d 54 (Mo. banc 1982). In *Carter* the defense employed a private medical expert to examine the defendant for a possible mental defense. The state was allowed, over objection by the defense, to put the defendant's doctor on the stand to testify adversely to the defense on the issue of mental illness or defect.

It is, therefore, apparent that counsel must consider the discoverability of the expert and the expert's findings.

Carter, 641 S.W.2d 54*,* has been followed and approved in *Foote v. Hart,* 728 S.W.2d 295, 297[4] (Mo. App. E.D. 1987). The Eastern District Court of Appeals wrote, in *State v. Barnes*, 740 S.W.2d 340, 344 (Mo. App. E.D. 1987):

> In . . . *Carter,* . . . the Supreme Court of Missouri, with no mention of *McGautha*, reaffirmed *Swinburne, Cochran, Sapp* and *Speedy* and stated "a defendant who pleads insanity waives all other privileges [in addition to physician-patient privilege,] including the attorney-client privilege and the privilege against self-incrimination." [Citation omitted.]

In *Barnes* the prosecution's state-paid psychologist was allowed to recite his claims of what he alleged the defendant said in his mandatory psychological interview.

In *State ex rel. Richardson v. Randall*, 660 S.W.2d 699 (Mo. banc 1983), defense counsel was not required to disclose the name or report of a handwriting expert whom the defense did not intend to call as a witness at trial. The Court found the prosecutor's request for disclosure to be unreasonable. The issues of attorney-client privilege and work product exception to discovery were not addressed.

2. (§3.24) Fingerprints, Blood Samples, Hair, or Other Micro- or Spectrographic Analysis Required

In Missouri, many crime labs use neutron activators for fingerprints, blood samples, hair, or other micro- or spectrographic analysis.

3. (§3.25) Polygraph

Use of the polygraph can still be an effective tool for defense counsel, if approached properly. Before *State v. Biddle*, 599 S.W.2d 182, 188 (Mo. banc 1980), under certain circumstances, results of a polygraph test could be used against the defendant in trial. Results had been held admissible when the defendant may have stipulated to the admissibility of the examination results. *Biddle* seems to have put this issue to rest because the Court held that "stipulation cannot make admissible evidence which would otherwise be held inadmissible for lack of scientific reliability."

Because defense counsel no longer has to fear a negative result from such a test and risk its admission, if not favorable, it seems that a client who has passed the test might receive favorable disposition from the prosecution on a request for dismissal of charges based on examination results. Even if a dismissal is not achieved, it still may be a useful tool for plea negotiation. See Chapter 12, Miscellaneous Motions (Other Than to Suppress), Proceedings, and Writs, of this deskbook for additional information. Most defense attorneys agree that a defendant rarely should be subjected to polygraphs conducted by police or Missouri Highway Patrol authorities. If the defendant is so examined, it should only be within specific agreed-on rules and guidelines:

- Establish precisely what will happen with the charge if the defendant "passes."
- Counsel will be present to observe the test (usually in an adjoining room through a two-way mirror).
- No false conclusion of "inconclusive" will be accepted.
- The client will be told precisely how a polygraph operates and what three automatic human systems are measured and in what way.
- Agree on the control questions to be used on the front and back end.
- Agree on the target questions to be used in the middle.
- Allow attorney input into the drafting of those questions.

- If the defendant cannot be measured on the machine, the test is to stop immediately.
- Agree on the number of times the test will be run for corroboration/verification.
- Get curriculum vitae of the examiner.

Counsel should make sure to have a private polygraph with a favorable result already in hand before submitting the defendant to examination by the Missouri State Highway Patrol.

4. (§3.26) Lineup

If a lineup was held, counsel should get all of the details about the lineup, including the following:

- Were photos taken? If so, how many and when?
- How many lineups were there?
- How many were in the lineup?
- Were participants in the lineups required to say or do anything? If so, what?
- Who was present at the lineups?
- Who conducted the lineups?

See Chapter 10, Identification, of this deskbook.

Regarding the right to counsel at identification, see *United States v. Wade*, 388 U.S. 218 (1967); regarding the Sixth Amendment right to counsel generally, see *Estelle v. Smith*, 451 U.S. 454 (1981).

Counsel is required at any post-indictment lineup. The right to counsel is not retroactive. *See Stovall v. Denno*, 388 U.S. 293 (1967). Unless the lineup is unnecessarily suggestive, counsel is not constitutionally required at the pre-charge lineup. *Kirby v. Ill.*, 406 U.S. 682 (1972).

In *United States v. Hadley*, 671 F.2d 1112, 1116 (8th Cir. 1982), the showup occurred before charges were filed and before the government committed itself to prosecute. Therefore, there was no violation of the Sixth Amendment according to *Kirby,* 406 U.S. 682.

Regarding the duty of counsel at a lineup, see *United States v. Allen*, 408 F.2d 1287 (D.C. Cir. 1969). Counsel should let the client know what a lineup entails. Counsel should also get a copy, if possible, of the description of the suspect given by the witness; if

none exists, counsel should attempt to get the authorities to require the following (this attempt should be made in writing and counsel should retain a copy):

- Get as many people in the lineup as possible.
- The physical characteristic should be approximately the same—height, weight, race, beard, glasses, mustache, etc.
- Clothing should not be overly suggestive.
- Hide or cover distinguishing physical characteristics, if possible.
- A repeat lineup should have the same persons.
- Members of the lineup should change places before viewing by each new witness.
- Police should be kept out of the lineup.
- Use a blank lineup first with the suspect not in it.
- Record the lineup with a photograph.

Counsel should try to interview the witnesses after reviewing the lineup. Some attorneys take stenographers to the lineup for this purpose, to record statements, and to show and record interviews of police while trying to take the statement of the witness. See Chapter 10, Identification, of this deskbook for more complete information.

5. (§3.27) Photographic Identification

If the court finds that the use of photographs was required in the investigative stage to identify and apprehend, such an identification procedure is approved. *See United States v. Butler*, 405 F.2d 395 (4th Cir. 1968); *Simmons v. United States*, 390 U.S. 377 (1968).

The courts will not approve a photographic identification at the custody stage but usually will not say that due process has been violated by it. *United States v. Fitzpatrick*, 437 F.2d 19 (2nd Cir. 1970).

Notwithstanding the above, due process can be violated if photographic identification is prima facie suggestive. *See Manson v. Brathwaite*, 432 U.S. 98 (1977); *United States ex rel. Rivera v. McKendrick*, 448 F.2d 30 (2nd Cir. 1971); *United States v. Henderson*, 719 F.2d 934 (8th Cir. 1983).

III. Driving While Intoxicated Cases

A. (§3.28) Client Interview

It seems appropriate to include driving while intoxicated (DWI) as a separate category because of the many changes that are occurring in the Missouri legislature attempting to discourage all citizens from drinking and driving and increasing the penalties. *See generally* MISSOURI DWI LAW AND PRACTICE (MoBar 2004). Often, the initial client-attorney contact will occur by phone in the late evening or early morning hours when a client has been arrested for DWI and has been asked by the arresting officer to submit to some form of blood alcohol test under the implied consent law.

This form of client interview takes on an entirely different perspective from the usual interview. The time for advice is relatively short and the variables are myriad. Further, there is a limitation on the accuracy of the information that can be obtained from an impaired client regardless of whether that client is violating the law. *See Stenzel v. State, Dep't of Revenue*, 536 S.W.2d 163 (Mo. App. E.D. 1976). Counsel's advice to the caller/defendant is critical as to whether the defendant will be allowed to keep the driving privilege or license that has previously been issued by the Missouri Department of Revenue, and the results of the test, if given, may be used later against the defendant in criminal or quasi-criminal (administrative) proceedings.

Because the caller may be drunk and is likely, at the very least, impaired to some degree, the reliability of the information given to counsel is at least suspect. That is why counsel should always ask to speak to the officer on duty and get as much information as possible in that more reliable fashion. Counsel should always ask the officer on the telephone whether there is any person who is injured or deceased. It may make all the difference in the world as to what advice is given.

Counsel should make a record of any such request for inclusion in the file should it be needed at a later date. Specifically, the time, the date, the person to whom the request is made, and the information received, if any, should be noted.

If there has been a death or serious physical injury, it would seem far better for the client to refuse the test and suffer the loss of the client's license for a year than to take the test and be faced with the problem of attempting to keep the test results out of evidence in a later criminal trial or having to live with the test results before the jury.

Section 577.023.1(2), RSMo Supp. 2004, holds that two prior DWI convictions may render the charge a felony instead of a misdemeanor. Counsel should attempt to obtain this information in the limited time available.

Cases in which the defendant's actions constituted refusal to take the test include *Walker v. Goldberg*, 588 S.W.2d 83 (Mo. App. E.D. 1979), and *Sell v. Goldberg,* 601 S.W.2d 665 (Mo. App. S.D. 1980). Cases in which the defendant's actions did not constitute refusal of the test include *Hester v. Spradling*, 508 S.W.2d 194 (Mo. App. S.D. 1974), and *Lowery v. Spradling*, 554 S.W.2d 555 (Mo. App. E.D. 1977).

No universal reply to the question, "Should I take the test?" would be applicable in all cases. But, if counsel practices law, civil or criminal, the question will surely come up, and counsel must know the facts as well as the law.

B. (§3.29) Right to Counsel

As to questions on the "right to counsel," see *Baldasar v. Illinois*, 446 U.S. 222 (1980), and *Gooch v. Spradling*, 523 S.W.2d 861 (Mo. App. W.D. 1975).

Gooch was upheld and cited as good law in *Dorrell v. Director of Revenue*, 717 S.W.2d 559 (Mo. App. W.D. 1986). *Gooch* holds that persons under arrest for traffic offenses have the right to representation and advice of counsel at all times after arrest.

Yet, the Court in *Spradling v. Deimeke*, 528 S.W.2d 759 (Mo. 1975), held that, notwithstanding the arrested person's right to counsel, that person does not have the constitutional right to consult with or to have an attorney present before deciding whether to submit to a breath test or to condition the consent to that test on an attorney being present. *See also Stenzel v. State, Dep't of Revenue*, 536 S.W.2d 163 (Mo. App. E.D. 1976); *McMurray v. Dir. of Revenue*, 800 S.W.2d 820, 821–22[4, 5] (Mo. App. E.D. 1990), *limited by Albrecht v. Dir. of Revenue*, 833 S.W.2d 40 (Mo. App. E.D. 1992).

On the other hand, the defendant has a Sixth Amendment right to counsel at any stage of prosecution, formal or informal, in court or out, when counsel's absence might derogate from the accused's right to a fair trial. In *Estelle v. Smith*, 451 U.S. 454, 470 (1981), psychiatric examination of a defendant while in jail to determine future dangerousness was a "'critical stage' of the . . . proceedings." The

defendant was denied assistance of an attorney in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings would be employed. Using this as an analogy, there would seem to be an argument that the right to counsel was denied when the client submitted to a blood alcohol test, without assistance of counsel, and later was charged with a felony. A pretrial motion to exclude this evidence might be appropriate.

The Supreme Court of the United States has addressed the timing of the *Miranda* warning requirements, *Miranda v. Ariz.*, 384 U.S. 436 (1966). In *Berkemer v. McCarty*, 468 U.S. 420 (1984), an officer pulled a motorist over and asked him if he had been drinking. The officer did not warn the motorist of his *Miranda* rights. The motorist was then taken to jail and was questioned further without *Miranda* warnings. The Court held that *Miranda* warnings were not required before an officer initiates roadside questioning in a routine traffic stop. Once the motorist is formally placed under arrest, however, *Miranda* warnings must be given. The Court reiterated in *Pennsylvania v. Bruder*, 488 U.S. 9 (1988), that *Miranda* warnings are not required before questioning motorists in routine traffic stops. In *Bruder* a police officer stopped a motorist who was driving erratically, administered a field sobriety test, and questioned the motorist concerning his alcohol consumption. The Court stressed that the circumstances of the publicly visible roadside stop were not sufficiently coercive to require *Miranda* warnings.

C. (§3.30) Advising the DWI Client

When counsel has the opportunity to meet the client in the more businesslike atmosphere of the office, a special initial interview form (DWI cases—§3.37, *infra*) should be used to get full information about the client, in the client's own handwriting if possible. The following information should be obtained:

- Full name
- Address
- Length of time at that address
- Phone number
- Age
- Date of birth
- Place of birth
- Social Security number
- Marital status
- Date of marriage

- Number of dependents
- Prior addresses
- Job information and history
- Expected result
- Names of any referring persons

Counsel should make a copy of the client's driver's license so counsel can write to the Missouri Department of Revenue and get a certified copy of the client's driving record (all traffic cases—not just DWI).

Counsel should get the client's recollection of prior traffic stops, arrests, charges, pleas, and trials (dates and convictions are most important).

Counsel should find out the kind of car the defendant was driving and the defendant's familiarity with its operation. The kind of transmission should be recorded. Operating a manual stick shift requires more manual dexterity and motor skills than operating an automatic transmission.
Counsel should find out:

- what the defendant ate;
- the amount of rest the defendant received; and
- the defendant's height and weight.

Counsel should list everything ingested during the preceding 12 hours and focus particularly on the last 2 hours. Counsel should ask for the defendant's version of the arrest and get specific conversation, questions, and answers between the defendant and the officer(s).

The defendant should tell counsel all the people (potential witnesses) that the defendant talked with in the time preceding the arrest—in the bar, at the party, at the social gathering, at the business meeting, or even the clerk and fellow customers at the package liquor store, who can testify that the defendant:

- walked straight;
- picked out the product;
- placed it on the counter;
- talked clearly and lucidly;
- got the money out without fumbling it (or wrote a clearly legible check);
- made change;

- got the car keys out to leave without fumbling them; and
- did *not* stumble while crossing the threshold to exit the business.

Counsel should also inquire about fellow passengers or friends who observed the defendant doing the following, all indications of good motor skills and manual dexterity and, thus, by inference, a lack of impairment or influence:

- Got the keys out without fumbling but also deftly unlocked the car
- Got in the vehicle without bumping the defendant's head
- Got the keys in the ignition
- Started the car
- Turned on the lights
- Turned on the radio
- Changed the volume and station of the radio
- Put the car in reverse to back out of the parking space
- Put the car in gear
- Drove off

Counsel should ask the defendant to describe the field test in detail. Many parts of the alleged test are false tests that do not have any scientific or physiological validity. For example, the Western District has held that permitting the state to use the "results" of a "horizontal gaze nystagmus test" to establish intoxication is error. *State v. Wheeler*, 764 S.W.2d 523 (Mo. App. W.D. 1989). But the Eastern District reached the opposite conclusion in *Nuyt v. Director of Revenue*, 814 S.W.2d 690 (Mo. App. E.D. 1991). *See also Hedrick v. Dir. of Revenue*, 839 S.W.2d 300, 302 (Mo. App. W.D. 1992).

Other tests are so difficult or tricky that they would take a skilled athlete many repetitive practices to master, e.g., the one-leg-stand test, the finger-to-nose test, or the heel-to-toe test. Those field sobriety tests are specifically designed to promote failure.

Counsel should be sure to find out as much as the defendant can recall about the specific detention, the alcohol-influence questions, and the breathalyzer and precisely *how* it was operated. Generally, the client will not have a lot of information because of natural fears, lack of knowledge and sophistication as to what is happening, and perhaps even the client's impairment from the alcohol consumed. Some police departments use a very effective tool to divert the defendant's ability to observe and recollect by using two officers to divide the defendant's

attention, one to ask alcohol-influence questions and one to operate the breathalyzer at the same time.

The attorney fee arrangement should be discussed in detail at the first interview/conference, no matter where or when it takes place. Counsel should always use a form written contract signed by the defendant. Counsel should make sure a clear distinction is shown between the amounts of:

- the retainer;
- the hourly rate; and
- the out-of-pocket expenses to be advanced for the defendant but to be reimbursed by the defendant.

Counsel should also distinguish between a lump-sum contract and a periodic payment contract.

Guarantee forms should be provided for the defendant's family and friends to sign. These forms should:

- obligate those signing them to pay the defendant's fee; and
- clearly advise, in a gracious way, that the defendant is counsel's client/boss and that in any instance of disagreement, the defendant's wishes are mandatory and final and will not be altered or compromised.

A bond assignment form should also be available for use. *See* §3.36, *infra*.

D. (§3.31) Bibliography Regarding DWI

- MISSOURI DWI LAW AND PRACTICE (MoBar 2004)

- REESE JOYE & JIM D. LOVETT, DRUNK DRIVING (Kluwer Law Book Publishers, Inc., 1985), 3-Volume Set—1. The Trial Notebook, 2. The Trial Workbook, 3. The Trial Source Book

- JOHN A. TARANTINO, DEFENDING DRINKING DRIVERS (with forms and checklists on CD-ROM) (James Publishing Co., 2005), *available at* www.jamespublishing.com/books/ddd.htm

- DWI JOURNAL, a monthly newsletter of law and science

- Criminal Law Reporter (BNA) Washington, D.C.

- Jonathan D. Cowan, *Proof and Disproof of Alcohol-Induced Driving Impairment Through Evidence of Observable Intoxication and Coordination Testing,* 9 AM. JUR. PROOF OF FACTS 3D, p. 459 (1990)

- Course materials from the 1998 seminar, *The Ultimate in DUI Defense*: *Mastering Science*, *Maximizing Success,* National Association of Criminal Defense Lawyers, 1150 18th St. NW, Suite 950, Washington, D.C. 20036, telephone 202/872-8600; fax 202/872-8690, *available at* www.nacdl.org/meetings

Manuals

- DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING—STUDENT MANUAL (National Technical Information Service, Pub. No. AVA21135BB00, 2002)

- DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING—INSTRUCTOR MANUAL (2002 Revision) (National Technical Information Service, Pub. No. AVA21134BB00, 2002)

It is error to fail to admit the manual into evidence. *United States v. Van Griffin*, 874 F.2d 634 (9th Cir. 1989).

Studies

- MARCELLINE BURNS & HERBERT MOSKOWITZ, PSYCHOPHYSICAL TESTS FOR DWI ARREST (National Technical Information Service, Pub. No. PB269309LL, 1977)

- V. THARP ET AL., DEVELOPMENT AND FIELD TEST OF PSYCHOPHYSICAL TESTS FOR DWI ARREST (National Technical Information Service, Pub. No. PB81-203721LL, 1981)

- THEODORE E. ANDERSON ET AL., FIELD EVALUATION OF A BEHAVIORAL TEST BATTERY FOR DWI (DRIVING WHILE INTOXICATED) (National Technical Information Service Pub. No. PB84-121169LL, 1983)

May be ordered from:

National Technical Information Service (NTIS)
5285 Port Royal Road
Springfield, VA 22161
Telephone: 800/553-6847
Facsimile: 703/605-6900
Website: www.ntis.gov

IV. Forms

A. (§3.32) Client Interview

Client Interview

Client's Name _____
Charges _____
Time and place of interview _____

Name _____ SSN _____
All Aliases _____ FBI # _____
Address _____ Prison # _____
Phone _____
Date of birth _____
Place of birth _____
Prior places of residence:
from (date) to (date)

Education:
Elementary:
High school:
College:
Trade school:
Other:

Armed Forces:
Branch of service:
Date of beginning of active duty:
Date of discharge:
Type of discharge:
Rank at time of discharge:
Any honors or medals:
Combat service:
Time overseas (places and dates):
Any court-martial charges:
Charge:
Finding:
Sentence:

Present Employment:
Name of employer:
Address:
Type of business:

Client's immediate supervisor:
Client's job designation:
Client's type of work:
Pay (starting): (present):
Employed since (date):

If presently unemployed, check ( )
Since (date):
Receiving unemployment compensation? Amount:
Other means of support:

Prior Employment:
Name of employer:
Address:
Type of business:
Client's immediate supervisor:
Client's type of work:
Pay (starting): (at termination):
Employed from (dates):
Indicate season if seasonal:
Reason for leaving:

Marital Status:
( ) Single
( ) Divorced
( ) Married ceremonial ( ) common-law ( )

Wife/Husband:
Name:
Address:
Phone:
Employed?
Type of work:
Employer's name:
Address:

Children:
Name: Age:
Name: Age:
Name: Age:
Name: Age:

Client's Father:
Name: Type of work:
Living ( ) or Deceased ( )
If living
Address:
Phone:

Client's Mother:
Name: Type of work:
Living ( ) or Deceased ( )
If living
Address:
Phone:

By whom was client raised? Indicate if parents were separated during childhood. If client was raised by persons other than a parent, get data on those persons as for parents, above.

Does client use narcotics?
Type:
Since (date):
Frequency of use:

Does client use alcohol?
Volume of use:
If heavy drinker, since (date):

Physical and mental condition:
Present physical disabilities:
Present physical illnesses:
Presently under medical care?
Doctor's name:
Address:
Phone:
Serious physical injuries:
Type:
Cause:
Date:

If hospitalized, name, address, and city of hospital, and dates of hospitalization:

If client has ever been in a mental hospital or institution set forth the name and address of hospital and period of admission:

If client has ever been treated by a psychiatrist set forth the name and address of the psychiatrist and period of treatment:

If client has ever undergone psychiatric or psychological evaluation set forth the circumstances and the names and addresses of the evaluators:

Prior criminal record (all arrests, from latest to earliest, including pending charges and juvenile arrests in all jurisdictions):

Date of arrest:
Jurisdiction:
Charge(s):
Disposition if not by court:
Plea (guilty or not guilty):
Trial by judge or jury?
Name of judge:
Disposition (guilty or not guilty):
Sentence:
Name of attorney:
Time served:
Institution: Prison number:
Time on probation or parole:
Name of probation or parole officer:
Re-arrest for probation or parole violation:
Date of re-arrest:
Violation charges:
Disposition:
If client was on probation or parole at the time of this arrest:
Probation or parole?
Indicate which of the above prior charges:
Was client under any pending charges at the time of this arrest?
If so, indicate which of the above charges was pending:
Present custodial status:
Jail (name and address):
Prison (name and address):
Prison number:

Bail:
Where posted:
When posted:
Amount:
Form (cash, property, professional surety):
If bonding company, name:
Who paid for the bail?

Arrest:

Set forth the circumstances:
Who was with client when he was arrested? Were they arrested?
Was client drunk when arrested or had he consumed alcohol recently?
Was he under the influence of narcotics or had he taken narcotics recently?
Was client ill when arrested?
Was client struck or roughly handled in arrest or thereafter? (Describe injuries):
Date and time of arrest:
Exact location of arrest:
Names of arresting officers:
Did they have a warrant?
What did they say the charge was?
What questions did they ask the client?
What did the client tell them?

Did the police take any property from the client's person, home, place of work, automobile, or place where the client was or from the home or place of any other person?

Kind of property:
Did the police have a search warrant?
Describe the circumstances under which property was taken:

Interrogation:

Where did it take place?
When and how long?
Interrogating officers:
Other persons present:
Was a lie detector test given?
Did the police confront the client with any evidence against him?
Did the police tell the client that any person had incriminated him, or that any codefendant had confessed?
Did any codefendant confess or incriminate the defendant in his presence?
Did client tell the police anything?
What? (in detail)
Did client make a written statement?
Was his oral statement taken down?
Did he sign anything?
Were there any recording devices around?
Other circumstances at the time of the client's statement, in detail:

Was client previously warned:
That he had a right to remain silent?
That anything he said could be used against him?
That he had a right to a lawyer before making a statement?
That if he could not afford a lawyer, one would be appointed for him before making any statement?
What did client say to these warnings?

Was the client given any physical examination? Was a blood sample taken? Was hair taken or combed? Was a narcotics or alcohol test administered, or body inspection of any sort made? Was the client examined by a doctor or psychiatrist?
Where?
When?
Describe the examination, test, or inspection:
All persons present:
Did anyone say anything about what the examination, test, or inspection showed?
Was client asked for permission to make the examination, test, or inspection?
Was he told that he had a right to refuse, or to have an attorney present?

Was the client exhibited in a lineup or brought before any person under any circumstances for identification?
Where?
When?
Describe the situation:
List persons present:
What did the police say to the identifying witness?
Was the client asked to say anything?
Was the client asked for permission to put him in the lineup or to exhibit him for identification?
Was he told that he had a right to refuse or to have an attorney present?
Was he asked to do anything (move, walk around, speak)?
Was he told that he had a right not to do these things?
What did he say or do?
Was the client asked to reenact anything (same subquestions as for the lineup)?

Prior judicial proceedings: Has client appeared in court?
When?
What court?
What judge?
Nature of proceedings:
Were any charges read or shown to the client?
What were they?
Did he plead to the charge?
Who testified?
Did the client testify?
Was he represented by a lawyer? If so, set forth the lawyer's name and the circumstances of the representation:

Are there any codefendants?

B. (§3.33) Contract (Traffic Cases)

Contract for Legal Services

_____
Attorneys at Law

(Criminal Defense Traffic Cases Only)

Client: _____

List Prior Arrests: _____

List Prior Charges: _____

List Prior Pleas of Guilty: _____
Date: _____
Court: _____
Charge: _____

List Prior Convictions: _____
Date: _____
Court: _____
Charge: _____

Pending Charges: _____

County: _____

I herewith employ the above law firm to represent me only in these specific traffic charges pending before the courts as listed. I understand that you will represent me and will diligently defend this case to the best of your ability until the case is complete. I agree that you may withdraw as my attorneys at any time after reasonable notice to me, and I agree to keep you advised of my whereabouts at all times and to cooperate at all times in the preparation and trial of my case(s), to appear upon reasonable notice for court appearances, and to comply with all reasonable requests made to me in connection with the preparation and the presentation of my case and defense. I hereby give you my power of attorney to execute all contracts, checks, drafts, releases, verifications, dismissals, deposits, and orders as I could myself. It is expressly understood that settlement of my case(s) will not be effected without my knowledge and consent.

For your services as attorneys, it is agreed that you will receive the listed retainer and $ _____ per hour with specific records to be kept as to the date of each item of service, the amount of time spent, the amount or length of service, the specific expense item and its amount, and the type of service involved for each day or part of a day worked on my case, and you will provide any itemization of those times and charges at any stage as so requested by me. I agree that I will pay, in addition to the hourly charges listed above for your services, all of the costs, fees, and expenses that are part of the investigation and preparation of my case including, but not limited to, witness fees, jury fees, appeal fees, court costs, notary fees, and other costs in order to bring this case to a conclusion; such costs and fees include other out-of-pocket expenses for your handling of the case including, but not limited to, duplication of documents, long distance telephone calls, postage, mileage expenses, and processing.

I understand that various members of my family may have executed certain documents of guarantee in order to pay my attorneys; however, it is *my* case and all determinations about the case shall be solely my decisions with the advice of my attorneys.

All accounts are due and payable within ten (10) days from the date of billing. A rebilling charge of $7.50 will be made on any account not paid in full within 30 days of the date of the statement.

I acknowledge and understand that, while the law firm accepts this employment and promises to render professional legal services to the best of its ability during the continuance of this employment, the law firm makes NO WARRANTIES, REPRESENTATIONS, OR GUARANTEES regarding the favorable outcome, results, or successful termination of the case whether by plea negotiation or by trial. I agree to cooperate fully with the attorneys and not to do anything that would compromise the attorneys' professional ethics.

_____
Client/Defendant

Dated: _____

[Law Firm Name]

Accepted by: _____

Bond Amount: _____ Bond Assignment: _____

Non-Refundable Retainer: _____

C. (§3.34) Contract (All Criminal Cases)

Contract for Legal Services

_____
Attorneys at Law

(Criminal Defense Only)

Client: _____

Charge: _____

County: _____

Re: _____
_____

I herewith employ the Law Firm of _____ to represent me in a charge presently pending before the _____ Court of the State of Missouri.

I understand that you will represent me in all stages of this proceeding as specifically set out in this contract and will diligently defend this case to the best of your ability until settlement is reached or judgment results.

I agree that you may withdraw as my attorneys at any time after reasonable notice to me. I agree to keep you advised of my whereabouts at all times, to cooperate at all times in the preparation and trial of my case or cases, to appear upon reasonable notice to me for depositions and court appearances, and to comply with all reasonable requests made of me in connection with the preparation of the presentation of my case.

I hereby give you my power of attorney to execute all contracts, checks, drafts, releases, verifications, dismissals, deposits, and orders as I could myself. It is expressly understood that settlement of my case(s) will not be effected without my knowledge and consent.

For your services as attorneys, it is agreed that you will receive $ _____ per hour with specific records to be kept as to the date of each item of service, the amount of time spent, the amount or length of service, the specific expense item and its amount, and the type of

service involved for each day or part of a day worked on my case, and you shall provide any itemization of those times and charges at any stage as so requested by me. I agree that I will pay, in addition to the hourly charges listed above for your services, all of the costs, fees, and expenses that are part of the investigation and preparation of my case including, but not limited to, investigation, clerk's fees, filing fees, court reporters, depositions, stenographers, transcripts, witness fees, jury fees, appeal fees, court costs, notary fees, and other costs in order to bring this case to an appropriate conclusion; such costs and fees include other out-of-pocket expenses for your handling of the case including, but not limited to, duplication of documents, long distance telephone calls, postage, mileage expenses, and processing.

I understand that various members of my family may have executed certain documents of guarantee in order to pay my attorneys, and it is my full understanding that it is my case with all decisions about the case to be solely in my hands with my attorneys.

The contract may be extended for further representation beyond the preliminary hearing at the option of the client/defendant taking the matter through the final trial before either a judge or a jury within the _____ Circuit Court of Missouri. The representation will automatically cease at that point according to the dictates and requirements of Rules 24 and 29 of the Supreme Court of Missouri. Thereafter, a separate contract would need to be entered between the parties in order to ensure new service based on the client's satisfaction and effectiveness of the attorneys' representation.

If I fail to keep all attorney fees and costs current with the Law Firm, I acknowledge that the Law Firm may withdraw from representing me, and I hereby approve of the withdrawal based on any future failure to keep my attorney fees and costs current. In the event of withdrawal, I understand that I will be advised of the attempt to withdraw by my attorney before the withdrawal occurs.

<u>All accounts are due and payable within ten (10) days from the date of billing. A rebilling charge of $7.50 will be made on any account not paid in full within 30 days of the date of the statement.</u>

<u>ALL FEES MUST BE PAID IN FULL 15 DAYS BEFORE THE DAY OF TRIAL.</u>

I acknowledge that all litigation is expensive, and criminal charge litigation is a very significant event, in terms of legal expense, outcome,

and time as well as the emotional anguish. Law Firm policy is to attempt a reasonable settlement of my case as expeditiously as possible and under my specific directions as to negotiations with the Prosecuting Attorney. However, the Law Firm cannot control the settlement position taken by the Prosecutor. The decision to go to trial or to enter negotiations is entirely mine.

I acknowledge and understand that, while the Law Firm accepts this employment and promises to render professional legal services to the best of its ability during the continuance of this employment, the Law Firm makes NO WARRANTIES, REPRESENTATIONS, OR GUARANTEES regarding the favorable outcome, results, or successful termination of the case whether by plea negotiation or by trial. I agree to cooperate fully with the attorneys and not to do anything that would compromise the attorneys' professional ethics.

_____
Client/Defendant

Dated: _____

[Law Firm Name]

Accepted by: _____

Bond Amount: _____ Bond Assignment: _____

Non-Refundable Retainer: _____

D. (§3.35) Affidavit of Guarantee

Affidavit of Guarantee

State of Missouri)
) ss.
County of _____)

We guarantee the payment of attorney fees to the Law Firm of _____ for their representation of the client listed below. We have read and understand the attached employment contract. The Law Firm will act as attorneys in this matter. We will have no control over any of the litigation, case decisions, or determinations as to procedures or methods, all of which are left to the sole discretion and determination of the client/defendant in consultation with these attorneys. The attorneys are solely responsible to the client/defendant for all work done. We are paying retainers, assigning bonds, and guaranteeing the remainder of the fees in order to provide good legal representation for the defendant, who has requested that we retain this firm and specifically _____.

_____ _____

_____ _____

_____ _____

Subscribed and sworn to before me this _____ day of _____, 20___.

_____
Notary Public

My Commission Expires:

_____

Defendant's Name: _____

Defendant's Address: _____

Charges: _____

Court: _____

Amount of Retainer: _____

Amount of Bond Assigned: _____

Other Payment Arrangement: _____

Other Relationship to Defendant: _____

Approved this _____ day of _____, 20____.

[Law Firm Name]

By: _____

E. (§3.36) Bond Assignment

Bond Assignment

State of Missouri)
) ss. Case No. _____
County of _____)

Court: ( ) Circuit
( ) Associate
( ) Felony
( ) Misdemeanor

State of Missouri _____,
Plaintiff
vs. County _____

_____,
Defendant

Charges: _____
_____
_____
_____
_____

We, the undersigned, have posted a sufficient sum of money on behalf of the above-named Defendant to secure his release from jail by bond. We have signed the reverse side of the bond receipt in order to irrevocably transfer those moneys to the law firm of _____, for their attorney fees in representing the Defendant. We transfer, assign, grant, and convey this money and the intangible rights to it to the law firm for good, fair, and valuable considerations (the receipt and sufficiency of which are acknowledged).

_____

_____

_____

_____

Subscribed and sworn to before me this _____ day of _____, 20___.

_____
Notary Public

My Commission Expires:

_____

F. (§3.37) Initial Interview (DWI Cases)

First Conference Questionnaire

[1] Basic Information

Name _____ Age _____
Birthdate _____ Birth Place _____
Address _____
Town _____ State _____
Apartment/Condo/House (circle) Rent/Own (circle)
Home Phone _____ Social Security No. _____

[2] License

Driver's License No. _____ State _____
Restrictions _____
Date of issue _____ Expiration _____

[3] Employment

Employer _____
Job title _____ How long _____
Duties _____
Annual salary _____ Work phone _____
Prior employment _____
How long _____
Any problems with employment? _____
_____
Use car in employment? Yes/No (circle)
How many miles driven to/from work _____
How many miles driven at work each week _____
Comments; To Be Done: _____
_____
_____

[4] Education—Highest grade completed: _____

High School _____ Year graduated _____
College _____ Year graduated _____
Major _____
Special training _____
Honors _____
_____
Comments; To Be Done: _____
_____
_____

[5] Family

Married/Single/Divorced/Widowed (circle)
Spouse name _____
Spouse employment _____
Date of marriage _____ How many times married? _____
Do you spend time with your spouse each day? Yes/No (circle)
If so, how much? _____
What activities do you and your spouse enjoy doing together?
_____
_____
_____
Does your spouse drink? Yes/No (circle) How much? _____
Any family member have a problem with alcohol (which one[s])?
_____
_____
Did your parents drink? Yes/No (circle) Which? _____
Mother's name _____ Living? Yes/No
Where? _____
Employed by _____
Father's name _____ Living? Yes/No
Where? _____
Employed by _____
Child's name: _____
Age _____School _____
Occupation _____
Residence _____
Marital Status _____
Child's name: _____
Age _____School _____
Occupation _____
Residence _____
Marital Status _____
Child's name: _____
Age _____School _____
Occupation _____
Residence _____
Marital Status _____
Child's name: _____
Age _____School _____
Occupation _____
Residence _____
Marital Status _____
Do you spend time with your children? Yes/No How much? _____

What activities do you and your children like to do together?

_____

_____

Do your children drink? _____

Brothers and Sisters:

Name _____

Address _____

Employer _____

Spouse _____

Name _____

Address _____

Employer _____

Spouse _____

Name _____

Address _____

Employer _____

Spouse _____

Comments; To Be Done: _____

_____

_____

[6] Health

Weight _____ Height _____

General health condition _____

_____

Any physical disabilities? _____

Particular Items (Think about these; any problems at all?):

Hearing _____

Vertigo _____

Dizziness _____

Eyes _____

Glasses _____ Contact lenses _____

Allergies _____

False teeth _____

Gum surgery _____

Gum problem _____

Walking _____

Legs _____

Knees _____

Feet _____

Arthritis _____

Arms _____

Stomach _____

Lungs/Breathing _____

Liver _____
Bladder/Kidney _____
Take medication now? Yes/No
What? _____
Doctor _____
How long been taking? _____
How affects you _____
_____
Taking medicine when arrested? Yes/No
What? _____
Why? _____
Doctor _____
How long been taking? _____
How affects you _____
_____
Any surgery? If so: what, when, where, and doctor:
_____
_____
_____
Do you have large, medium, or small bladder? _____
How often do you normally urinate? _____
While drinking, do you urinate more frequently? _____
Do you smoke? Yes/No If yes, how much? _____
Do you have shortness of breath or any lung problem? _____
_____
History of mental illness or disorders? Yes/No
Ever seen a psychiatrist? Yes/No
Who? _____
Where? _____
When? _____
Result _____
_____
Ever been advised to see a psychiatrist? Yes/No
Why? _____
_____
Comments; To Be Done: _____
_____
_____

[7] Military

Service? Yes/No Branch _____
Date entered _____ Discharge Date _____
Type of discharge _____ Rate/Rank _____

Honors, Recommendations _____

_____

Special training _____

_____

When served _____

_____

Comments; To Be Done: _____

_____

_____

[8] Habits/hobbies

Favorite form of relaxation _____

_____

Regular form of hobby _____

_____

How often _____

Comments; To Be Done: _____

_____

_____

[9] Awards/recognition/honors

Describe any _____

_____

_____

_____

Comments; To Be Done: _____

_____

_____

[10] Membership

Religious preference _____

Church membership _____

Attend regularly? Yes/No How often? _____

Offices held _____

Civic clubs _____

_____

When a member? _____

Comments; To Be Done: _____

_____

_____

[11] Alcohol

Age when initial contact with alcohol _____
Favorite alcoholic beverage _____
Do you switch around, depending on mood? Yes/No
Is there a particular alcoholic beverage you do not drink? Yes/No
What? _____
Who do you drink with? _____
_____
How much does it take for you to feel effects? _____
_____
How does it affect you? _____
_____
How much is "too much" for you? _____
_____
Ever been drunk? Yes/No When? _____
How often do you get drunk? _____
Alcoholics Anonymous? Yes/No
Problem with alcohol? _____
_____
How do you know when you're "drunk"? _____
_____
Can you "hold your liquor"? Yes/No
How often do you consume alcohol? _____
_____
How much do you normally drink when you're drinking? _____
_____
How does that quantity usually affect you? _____
_____
_____

Comments; To Be Done: _____
_____
_____

[12] Conviction

What effect will a conviction have on you personally? _____
_____
_____
Will a conviction affect your employment? Yes/No
How? _____
_____
_____

Comments; To Be Done: _____
_____
_____

[13] Events of day of arrest

Date _____ Day of week _____
Sleep the night before? Yes/No How long? _____
How many hours do you normally sleep? _____
Food intake:
Breakfast: What? _____
When? _____
Where? _____
Lunch: What? _____
When? _____
Where? _____
Dinner: What? _____
When? _____
Where? _____
Activities that day: (work) _____
What time start? _____
What time stop? _____
Driving? _____
What duties? _____
After work, describe activities until arrest: (chronological)
_____
_____
_____
_____
_____
_____

On day of arrest, describe <u>what</u> alcohol you had to drink and <u>when</u> (including size and percentage of alcohol):

1st _____
2nd _____
3rd _____
4th _____
5th _____
6th _____
7th _____

Where did you intend to go before arrested? _____
_____
Where had you just left? _____
Describe actions and conversations upon leaving the place where you were: _____
_____
_____
_____
_____

Where were your keys? _____
Was the car door locked? Yes/No
Difficulty putting key in lock? Yes/No
Different key other than ignition to unlock door? Yes/No
Where parked? _____
Parking brake on? Yes/No
Difficulty putting key in ignition? Yes/No
Take two hands to engage ignition? Yes/No
Drive in reverse before you went forward? Yes/No
Light? On/Off Which way did you turn? Right/Left
Who did you last talk to before arrest? _____
Address _____ Phone # _____
What about? _____
_____
Who did you talk to the last 3 hours before arrest? _____

Name: _____
Address: _____
Friend? Yes/No Relationship with _____

Name: _____
Address: _____
Friend? Yes/No Relationship with _____

Name: _____
Address: _____
Friend? Yes/No Relationship with _____

Name: _____
Address: _____
Friend? Yes/No Relationship with _____

Was anyone with you when you were arrested? _____
_____
What was their condition? _____
Did anyone witness the arrest? Yes/No
  Name: _____
  Address: _____
Will they be willing to testify? Yes/No
Comments; To Be Done: _____
_____
_____

[14] Route driven

What route did you drive to the last place you were at before the arrest?

_____

_____

What route did you take before arrest (include details of where the stop lights and stop signs were located; how many turns and stops were made)? _____

_____

_____

Traffic conditions _____

Stop lights? Yes/No How many? _____

Working? Yes/No Caution signs or lights? Yes/No

Weather _____

Comments; To Be Done: _____

_____

_____

[15] Roadblocks

Was arrest at roadblock? Yes/No

Were you given any advance notice? Yes/No

How far ahead did you see it? _____

How many cars were there ahead of you? _____

How long did you wait in line? _____

How many police cars did you see? _____

How many police officers did you see? _____

Were any sobriety tests given? Yes/No

What? _____

_____

Were others there who had been arrested? Yes/No

How long did you stay there before being transported? _____

_____

Comments; To Be Done: _____

_____

_____

[16] Automobile

Make _____ Model _____ 2Dr/4Dr

Year _____ Transmission: Manual/Automatic Color _____

Radio: On/Off Windows: Up/Down

Lights: Brake—On/Off Tail—On/Off Head—On/Off

Mechanical condition:

Ball joints—Good/Bad Steering—Tight/Loose

Tire balance—Good/Bad Windshield wipers—Good/Bad

Brakes—Good/Bad
Comments; To Be Done: _____
_____
_____

[17] Police emergency flash (cherries)
Did you see officer before red light? _____
When did you first notice red light? _____
What were you thinking immediately before you saw the red light?
_____
Where was the officer? Meeting/Following/Side of Road
What speed were you traveling? _____
What lane were you in? _____
Siren used? Yes/No
Immediately after red light, what was first thing you did?
_____
_____
What did you think you had done wrong to attract the officer's attention? _____
Where did you stop the car? _____
Where did officer park police car? _____
Diagram relative location of cars after parking:

Describe first thing you did after stopping car _____
_____
Did you turn off ignition? Yes/No
Did you turn off lights? Yes/No
Did you turn off radio? Yes/No
Did you roll down window? Yes/No
Did you get out of car? Yes/No
Did you have any difficulty doing any of these? Yes/No
Comments; To Be Done: _____
_____
_____

[18] Driver's license
Any restrictions on license? _____
Were they complied with? _____
Where was your license? _____
Did you get it ready before the officer asked for it? Yes/No
Did you have to "fumble through your wallet" to find it? Yes/No
What did you say? _____

_____
Were there any witnesses? Yes/No
Who? _____
_____
Comments; To Be Done: _____
_____
_____

[19] Registration
Did you get registration before officer asked for it? Yes/No
Where was registration? _____
Were there any other papers where you kept registration? Yes/No
Did you fumble through things looking for registration? Yes/No
Did officer ask for registration? Yes/No
Comments; To Be Done: _____
_____
_____

[20] Conversation <u>before</u> arrest
What was the first thing said to you? _____
_____
Your response _____
_____
Next (etc.) _____
_____
_____
_____
Comments; To Be Done: _____
_____
_____

[21] Arrest
Were you told you were "under arrest"? Yes/No
Were you told what for? Yes/No
What was the last thing you said (or did) before the officer told you that you were under arrest? _____
_____
_____
What did the officer say to you about being placed under arrest?
_____
Comments; To Be Done: _____
_____
_____

[22] *Miranda* warnings

Were you given your *Miranda* warnings (i.e., did the officer say anything to you about your rights)? Yes/No

Was this immediately after you were placed under arrest? Yes/No

Where? _____

Witnesses? _____

What did officer say? _____

_____

Did he read it? Yes/No From what? _____

_____

Comments; To Be Done: _____

_____

_____

[23] Conversation after arrest

What did the officer say first after you were arrested? _____

_____

_____

What was said next and by whom? _____

_____

Next: _____

_____

_____

Next: _____

_____

_____

Next: _____

_____

_____

Next: _____

_____

_____

Comments; To Be Done: _____

_____

_____

[24] Field sobriety test[s]

Did the officer ask you to perform any coordination or sobriety tests? Yes/No

Wearing shoes? _____

Were there any street lights? Yes/No

Describe the lighting in the area _____

_____

Where in relation to tests? (diagram)

Road or shoulder conditions where tests were given?

Level/Sloping	Smooth/Rocky	Wet/Dry
Holes/Ruts	Wide/Narrow	Grassy/Dirt

Weather conditions? Windy/Calm

Distractions? Yes/No What? _____

_____

People gather? Yes/No How many? _____

Temperature _____ Moonlight? Yes/No

What were the sobriety tests in order given, and how do you recall you did?

(1) _____

(2) _____

(3) _____

(4) _____

(5) _____

(6) _____

When was the last time you said your ABCs before the night/day of arrest? _____

Were you nervous when you were given the tests? Yes/No

How did you feel? _____

What were you thinking? _____

_____

Did the officer demonstrate each field sobriety test before you started to do them? _____

Did the officer say the ABCs through Z? Yes/No

Did the officer advise you what you had to do on each test to pass it? Yes/No

What did he say, if anything? _____

_____

Did the officer advise you whether you passed or failed each test as you did it? Yes/No

What, if anything, did the officer say? _____

_____

_____

Comments; To Be Done: _____

_____

_____

[25]Actions after arrest

Were you handcuffed? Yes/No Front/Back (circle)
Did that make you mad? Yes/No
Did the handcuffs hurt? Yes/No
Were you handcuffed in the presence of other people? Yes/No
Did you suffer any numbness in your hands or arms? Yes/No
Bruises? Yes/No
Have you sought medical aid? Yes/No
Describe: _____
_____
_____

Comments; To Be Done: _____
_____
_____

[26] Other people present

Were other people present? Yes/No
Who? _____
_____
_____

If names are not known, describe them: _____
_____
_____

Did any of them talk to you? Yes/No
Who? _____
_____
_____

What about? _____
_____

Did any of them talk to the officer? Yes/No
Who? _____
_____

What about? _____
_____

Was anyone with you in the car? Yes/No
Who? _____
_____

Comments; To Be Done: _____
_____
_____

[27] Car towing

What happened to your car? _____
Was it towed away? Yes/No
By whom? _____
Were you present when it was taken from scene? Yes/No
Did you get a copy of the tow operator's report? Yes/No
Did you have to sign a permission form? Yes/No
Was your car searched? Yes/No Were you present? Yes/No
Was anything removed from your car? Yes/No
Comments; To Be Done: _____
_____
_____

[28] Transportation to station/jail

Describe everything that took place en route to the police station or jail:
Conversation (who said what, when): _____
_____
_____
Next: _____
_____
Next: _____
_____
Next: _____
_____
Radio transmissions: Yes/No What? _____
_____
_____
_____
Route taken: _____
_____
_____
Speed: _____
Complain of pain from handcuffs? Yes/No
Ask to go to a restroom? Yes/No
What did officer do during time? (whistle, hum, etc.): _____
_____
_____
Comments; To Be Done: _____
_____
_____

[29] At station/jail

Clock? Yes/No Time: _____

How many officers? _____ Conversation with anyone? Yes/No

Who? _____

_____

Searched? Yes/No Fingerprinted? Yes/No

Sign any papers? Yes/No What? _____

_____

Other officers make comments to arresting officer? Yes/No

What? _____

_____

Were you able to go to restroom? Yes/No When? _____

_____

Telephone call? Yes/No

Comments; To Be Done: _____

_____

_____

[30] Chemical/breath test

Operator's name: _____

Operator's agency: _____

Operator present when you arrived? Yes/No

Did operator arrive afterward? Yes/No When? _____

Time observation commenced: _____

Time simulator test run: _____ Reading: _____

Time of test: _____ Reading: _____

Time simulator test run (if after test): _____

Reading: _____

Time of second test: _____ Reading: _____

Time of third test: _____ Reading: _____

Type of machine: _____ Serial No. _____

Breath sample saved? Yes/No Where is it? _____

Test ampoule saved? Yes/No Where is it? _____

Hear any radio transmission? Yes/No

Blood test offered? Yes/No When? _____

By whom? _____

Witnesses? Yes/No Who? _____

Simulator machine on? Yes/No

Room temperature: _____

Check mouth? Yes/No False teeth? Yes/No

Restroom? Yes/No

Smoker? Yes/No Smoke in transit to breath test? Yes/No

Smoke during observation period? Yes/No

Comments; To Be Done: _____
_____
_____

[31] Right to counsel

Were you ever advised you had the right to consult with an attorney? Yes/No
By whom? _____
When? _____
Did you ask to contact an attorney? Yes/No Know number? Yes/No
Were you allowed or denied the opportunity to make a phone call? Yes/No
Given a phone book? Yes/No Able to read? Yes/No
Did anyone assist you in doing so? Yes/No Who? _____
_____
Describe the details regarding this matter: _____
_____
_____
_____
Where was the phone? _____
Where was the officer? _____
Where was the operator? _____
Were you able to talk privately? Yes/No
Comments; To Be Done: _____
_____
_____

[32] Sobriety tests

Were any administered <u>after</u> arrest? Yes/No
By whom? _____
When? _____ Where? _____
Were you advised you did <u>not</u> have to perform them? Yes/No
What was said? _____
_____

What tests were administered?	How did you do?
(a) _____	_____
(b) _____	_____
(c) _____	_____
(d) _____	_____

Why did you take them? _____
_____
_____

Comments; To Be Done: _____

_____

_____

[33] Forms signed

Did you ever sign your name? Yes/No

When was the first time? _____

_____

Next? _____

_____

Next? _____

_____

Did you ever refuse to sign your name on any document? Yes/No

What? _____

Why? _____

Comments; To Be Done: _____

_____

_____

[34] Video

Was a videotape made? Yes/No

Did you know it was being made when it was being made? Yes/No

Did anyone advise you a videotape was being made? Yes/No

Did you see the camera? Yes/No

Did you ask that it be turned off? Yes/No

What did you think when you learned a videotape was being made?

_____

_____

_____

Comments; To Be Done: _____

_____

_____

[35] Conversation with operator/technician

Did the operator/technician ask you any questions? Yes/No

What? _____

_____

Next? _____

_____

Next? _____

_____

Did the operator/technician give you any instructions? Yes/No

What? _____

_____

Next? _____

_____

Next? _____

_____

Was the question asked, "Do you feel any effects of the alcohol at present?" Yes/No
What was your response? _____

_____

Was the question asked, "Are you under the influence at present?" (Or, "Are you intoxicated?") Yes/No
What was your response? _____

_____

Comments; To Be Done: _____

_____

_____

[36] Testing room layout

Diagram the layout (show room dimensions, door location, chairs, table, breath testing machine, phone, restroom, booking area, exhaust fan):

Comments; To Be Done: _____

_____

_____

[37] Other people present

Were other people there? Yes/No Who? _____

_____

_____

Conversations with anyone? Yes/No Who? _____

_____

_____

What about? _____

_____

_____

Comments; To Be Done: _____

_____

_____

[38] Jail confinement

Confined alone or with others? Alone/With others
Who? _____

What were they arrested for? _____

_____

Could they be witnesses for you? Yes/No
Did you have a conversation with them? Yes/No
What about? _____

_____

_____

Comments; To Be Done: _____

_____

_____

[39] Bond hearing

What time? _____ Where? _____
Hearing officer? _____
Comments by hearing officer? _____

_____

Comments; To Be Done: _____

_____

_____

[40] Release

What time released? _____
Released alone? Yes/No To someone? Yes/No
Who? _____
Address _____
How did that person know to get you? _____

_____

Any conversations with that person? Yes/No What about? _____

_____

Comments; To Be Done: _____

_____

_____

[41] Accident

Did you receive prompt medical attention? Yes/No
Where? _____
Treated by whom? _____
Injuries suffered _____

_____

Reaction of police officer _____

_____

Did injuries affect or interfere with your ability to take breath test?

_____

Did injuries affect or interfere with your ability to adequately complete the field sobriety tests? _____

_____

Comments; To Be Done: _____

_____

_____

[42] Spouse attitude

Ascertain client's relationship with spouse: _____

_____

Good? _____ Bad? _____

Was spouse with client at time of arrest? _____

_____

What is spouse's perception of client's drinking habits? _____

_____

What is client's perception of spouse's attitude toward the drinking?

_____

Comments; To Be Done: _____

_____

_____

[43] Driving record

Prior DWI? Yes/No When? _____

Arresting officer? _____ Agency? _____

Circumstances? _____

_____

_____

Attorney? _____

Trial? Yes/No Result? _____

Habitual offender threat? Yes/No

[44] Goal in case (concerns)

(a) Settle—work out a plea
(b) Lower points
(c) Trial—not guilty
(d) Insurance premiums
(e) Jail
(f) Probation

Comments; To Be Done: _____

_____

_____

G. (§3.38) General Affidavit of Authorization

TO: _____
_____
_____

General Affidavit of Authorization

State of Missouri)
) ss.
County of _____)

I, the undersigned, specifically authorize you to provide to the Law Firm of _____, or its designated representatives, agents, or employees, any personal records or information of mine and to allow them to make photocopies of these records, the same as if I could be personally present.

_____
Signature

_____
Typed Name

_____
Address

_____
State and Zip

_____
Phone Number

_____
Social Security Number

_____
Date of Birth

Subscribed and sworn to before me this _____ day of _____, 20___.

_____
Notary Public

My Commission Expires:

_____

H. (§3.39) Entry of Appearance

In the Circuit Court of _____, County Missouri
At _____
Division _____

State of Missouri_____,
Plaintiff
vs. Case No. _____

_____,
Defendant

Entry of Appearance

Comes now _____ of the Law Firm of _____ and enters [his/her] appearance of record for Defendant.

Respectfully Submitted,

_____
Attorney name, bar number, address, and telephone number

Approved:

_____
Defendant

I. (§3.40) Office Procedure Form Letter

Date: _____

In re: Criminal Charge
Felony/Misdemeanor/Traffic

This letter is to give you some general advice to help you during and after the pendency of the criminal charge case presently rendered against you. Please read this carefully and keep it!

Office Hours

Our office is normally open from 8:30 a.m. until 5:00 p.m. Monday through Friday, and often on Saturday mornings.

Telephone Calls

Please call us when you have a question or need advice regarding your case. Don't ask your friends or relatives. Each case is different and what they know about, or have heard about, may be completely different under the facts in your case. They may know "something" about these kinds of charges and criminal cases in general, but they are not your lawyer. Call us for your advice. When I am not available, please consult with my secretary, _____.

All time spent on your case, including phone calls, must be billed to you. Please remember that Abraham Lincoln said: "A lawyer's only stock in trade is his time and advice." Therefore, because calls take time and because it is important for you to call, it is important for us to take a sufficient amount of time to try to answer those questions and to help you, all of which creates billable time.

Appointments

The only sure way to see your attorney is to call and make an appointment before you come to the office because an appointment is the only way to make sure that your attorney will be in the office and available to see you at a given time.

Trouble

Being charged with violating the law does not give any person, including law enforcement officers, the legal right to harass you. Nor

does it give you the right to harass or improperly contact any other person, including the complaining witness or other witnesses who are endorsed by the prosecution on the information/complaint. If the complaining witness or any other witness or person contacts you, refuse to talk with them and send me a note of the date, time, and content of their contact. Also direct them to please get in touch with me in order to talk about your case. You should also send these people directly to me.

If you feel that there is any information that should be obtained, you must give that information to me and allow either me or the people who work with and for me and all of us working for you to do the necessary background work, including investigation and the taking of statements and information from witnesses.

Procedure

There will first be an arraignment where five things generally happen as I have previously explained to you:

1. The charge will be read.
2. Your plea of not guilty will be entered.
3. The Court will make certain that you have an attorney or are getting one.
4. The Court will make sure that a bond has been set by which you can secure your freedom because you are presumed to be innocent.
5. The Court will set a date for the preliminary hearing in the case of a felony or for the actual trial of the case on the merits in the case of a misdemeanor.

In the case of misdemeanors, the prosecution must prove you guilty beyond a reasonable doubt upon each and every element of the crime necessary to obtain a conviction and, further, must do so against a presumption of innocence.

In felony cases, the next step will be a preliminary hearing, which I have described to you as being a probable cause hearing where the burden is on the State to show that two things probably occurred as follows:

1. That a crime probably occurred
2. That you probably committed it

As I have explained to you, we deem the preliminary hearing to be an important part of the discovery procedures for and on behalf of the defense.

If the State is successful, you will be bound over to the Circuit Court, Division I, for further arraignment within 40 days.

Upon your arraignment in the Circuit Court, the same five things will happen again. The last item is that the Court will set the date for your final trial in front of a jury where the State must prove you guilty on each and every element of the crime—but this time "beyond a reasonable doubt."

Constitutional Rights

You have numerous rights under the Federal and Missouri State Constitutions. I will now simply list a few of those rights, which we have previously discussed. The reason I list them is to make sure that you understand those rights and are aware that I will be seeking to protect and preserve all of your constitutional rights including, but not limited, to the following:

- The right to be free from any unreasonable search and seizure
- The right to a trial either before the Court or a jury
- The right to summons witnesses and compel their attendance to testify on your behalf
- The right to confront and cross-examine any witness the State may call to testify against you
- The right to speedy trial
- The presumption that you are innocent unless and until the State has carried its burden of proof beyond a reasonable doubt on each and every element of the crime
- The right to be represented by an attorney
- The right to have an attorney appointed by the Court to represent you, without charge, if you are unable to employ one, although you must establish indigence to qualify for a public defender in Missouri
- The right to consult with your attorney, members of your family, and friends before entering any pleas of guilty or not guilty before the Court

Silence/Fifth Amendment

Chief among your rights, in my opinion, is your Fifth Amendment right to remain silent and not be compelled to be a witness against yourself; this is also sometimes referred to as the right to not incriminate yourself. It is because of this right that I warn you that you should NOT talk to anyone about your case because that person may be subpoenaed to testify against you. Your lawyer cannot! You should be very candid in sharing all information with your lawyer. If you have questions about who else you can consult with, please ask me.

Agency

This is your case, and I will follow your directions and instructions and will attempt to keep you fully advised at all stages as to the legal and factual proceedings and how they may affect your case and its outcome. Please ask if you have questions and, at the same time, please give me your guidance, authority, and direction on each and every point. If at any time you feel that I am proceeding in a way that you do not desire, please contact me immediately. Otherwise, I will assume that, by sending you copies of all documents, you are satisfied that we are proceeding on your behalf and accurately.

Miscellaneous

Please call at any time we can help you. This is a difficult time in your life, and it is our desire to assist you. Call when you are worried, when you have a question, or if we can help in any way. We will do everything legally possible to bring about a quick and good result for you, as you direct.

Conferences

Please note that in our initial conference we were NOT interrupted by telephone calls. It is my policy to devote my concentration and energy to one matter at a time. If you call and we are temporarily "in conference" or "in court" taking care of other good people, please leave the number and time when you can best be reached.

Appearance at Court

According to the Missouri Courts, you may forfeit your right to an appeal if you fail to timely appear at all court proceedings. Do not, under any circumstances, fail to appear for any court matter, hearing, or issue. If you have questions, call me.

Respectfully Submitted,

_____

Attorney name, bar number, address,
and telephone number

J. (§3.41) Waiver of Preliminary Hearing

In the Circuit Court of _____, County Missouri
At _____
Division _____

State of Missouri_____,
Plaintiff

vs. Case No. _____

_____,
Defendant

Waiver of Preliminary Hearing

I, the undersigned, being the defendant in a case presently pending before the Associate Division of Circuit Court of _____, County, Division _____, wherein I am the defendant in a felony charge or charges, do affirmatively state that I am represented by the Law Firm of _____ and that after full conference with them in which they have explained the legal purposes and requirements of a preliminary hearing, which is a probable cause hearing at which the prosecution must prove that there is probable cause to believe:

- that a crime probably occurred; and
- that I probably committed that crime

and in which I would have certain constitutional rights, I do herewith knowingly and intelligently, with full knowledge of the consequences, waive the requirement of the prosecution putting on or presenting any witnesses or evidence at the preliminary hearing to establish probable cause and ask that by my waiver the Associate Division of the Circuit Court transfer my cause by binding me over to the Circuit Court of _____ County, Division _____, for arraignment and trial setting at a date convenient to the Court.

Specifically, I fully acknowledge that I have been advised of my right to:

- have a preliminary hearing;
- require the prosecution witnesses to confront me;
- be personally present for their testimony;

- compel attendance of witnesses on my behalf; and
- have my attorney cross-examine any witnesses the State may call to testify against me including the right to cross-examine them upon the accuracy and believability of their testimony.

I have consulted with my attorney, members of my family, and friends before entering this waiver, and I have been advised that, if there is a witness who is not going to come forward now by reason of this waiver, we still have the right to subpoena those witnesses and require their testimony in sworn depositions before trial.

Based on all of the above, I specifically waive the requirement of the preliminary hearing on this date.

_____
Defendant

Dated: _____

K. (§3.42) Petition to Enter Guilty Plea

In the Circuit Court of _____, County Missouri

State of Missouri _____,
Plaintiff

vs. Case No. _____

_____,
Defendant

Petition to Enter Plea of Guilty

The defendant represents to the Court:

1. My full name is _____. I am _____ years of age. I have ____ years of education. I understand that I have the right to remain silent and not speak or execute any written instrument, including this document, and that anything I say can be used against me.
2. I am represented by a lawyer. [His/Her] name is _____.
3. I received a copy of the Information and I understand that I am charged with the crime of _____. I read the charge against me and have discussed it with my lawyer. I fully understand every charge made against me.
4. I told my lawyer all the facts and circumstances known to me about the charges made against me in the Information. I believe that my lawyer is fully informed on all such matters.
5. I know that the Court must be satisfied that there is a factual basis for a plea of guilty before my plea can be accepted.
   I represent to the Court that I did the following acts in connection with the charge made against me: _____
   _____
   _____
   [In the above space defendant must set out in detail what he did. If more space is needed add a separate page.]
6. My lawyer has counseled and advised with me on the nature of each charge, on all lesser-included charges, if any, and on all possible defenses that I might have in this case.
7. I know that I may plead not guilty to any offense charged against me. If I plead not guilty, the Constitution guarantees me, among other possible rights:

a. the right to a speedy and public trial by jury and, if I am not satisfied with the verdict, to appeal;
b. the right to confront and cross-examine all witnesses against me;
c. the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor;
d. the right to have the assistance of a lawyer at all stages of the proceedings; and
e. the right to remain silent and not to incriminate myself; and, if I do remain silent, no inference of guilt may be drawn from the failure.

If I plead guilty, I waive (give up) all these rights. I also understand that I am presumed innocent throughout the entire proceedings and until such time as the jury should find me guilty. I further understand that the State has the burden of proving my guilt beyond a reasonable doubt, and if the State fails to prove each and every element of the offense beyond a reasonable doubt, I would be entitled to go free.

8. I know that if I plead guilty I forever waive my right to trial either before a Court or a jury, and the Court may impose any punishment within the lawful range of punishment.
9. I know that in Missouri the State must prove my guilt beyond a reasonable doubt and that all twelve jurors must vote unanimously to convict me for me to be found guilty.
10. I know that I may be entitled to take this case out of this County and have it tried before a jury in some other county. I also know that I am entitled to disqualify the regular Judge of this Court and have another Judge hear my case or accept my plea.
11. My lawyer informed me that the range of punishment that the law provides in this case is _____
_____
_____.
12. If I am on probation or parole in this or any other Court, I know that, by pleading guilty, my probation or parole may be revoked, and I may be required to serve time in that case, which may be consecutive, that is, in addition to any sentence imposed on me in this case.
13. I declare that no officer or agent of any branch of government (federal, state, or local) has promised or suggested that I will receive a particular sentence, or probation, or any other form of leniency if I plead guilty.

The prosecuting attorney promised that, if I plead guilty, [he/she] will do the following:

_____

_____.

[Here insert any promises or concessions made to the defendant or to the defense attorney. If none, insert: [No promises or concessions have been made to me or to my attorney].]

If anyone else made any promises or suggestions, except as noted in the previous sentences, I know that person had no authority to do so. I know that the sentence I will receive is solely a matter within the control of the Judge. I hope to receive leniency, but I am prepared to accept any punishment permitted by law that the Court sees fit to impose.

14. I understand that, in a trial by jury, the jury may assess the punishment, but that on a plea of guilty, the judge will assess the punishment.
15. Neither I, nor any of my friends or loved ones, has been mistreated, threatened, coerced, or forced in any manner by anyone to get me to plead guilty, nor were there any promises, inducements, or representations made except as set forth in Paragraph 13 above.
16. I believe that my lawyer has done all that anyone could do to counsel and assist me, and I am satisfied with the advice and help [he/she] has given me. I have been given ample time to talk with my lawyer, family members, and friends and ask the Court to accept my plea without further delay.
17. I know that the Court will not permit anyone to plead guilty who is innocent, and with that in mind and because I am guilty, I wish to plead guilty and respectfully request the Court to accept my plea of guilty.
18. I have not in the past suffered from any mental disease or illness and have never been treated by a doctor or psychiatrist for a mental or emotional condition other than: _____

    _____

    _____

    _____.

    [Please list date, place, diagnosis, treatment, and doctor if known.]

    My mind is clear, and I am not mentally ill. I am not under the influence of alcohol or drugs, and I am not under a doctor's care. The only drugs, alcohol, or medicines that I have taken within the past three days are: _____

    _____

_____.
_____.
[If none, so state.]

19. I do not have any complaints against any law enforcement official concerning my treatment while in jail. I had sufficient food, water, medical care, and bedding, and I was not mistreated by any inmate while in jail. There are no exceptions to any of these statements except: _____
_____.
_____.
[If none, so state.]
20. No one has told or promised me I would receive probation or parole, and I understand that I do not have a right to receive probation or parole and whether I receive probation or parole is solely in the Court's discretion.
21. My willingness to plead guilty [resulted/did not result] from prior discussions that I or my attorney had with members of the prosecuting attorney's office.
22. I offer my plea of guilty freely and voluntarily and of my own accord and with full understanding of all the matters set forth in the Information and in this Petition.
23. I have read, and my attorney has explained to me, this Petition to Enter Plea of Guilty, this _____ day of _____, 20____.

_____ _____
Attorney Defendant

Gregory W. Vleisides*
Catherine A. Donnelly**

Chapter 4

INDICTMENTS, INFORMATIONS, AND GRAND JURY PROCEEDINGS

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This chapter includes material written by the Honorable Charles Atwell, Dennis E. Davidson, and Thomas E. Allen.

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I. (§4.1) History and Purposes of Grand Juries

All felony cases in Missouri are begun either by indictment or information. An information is produced by the use of a preliminary hearing system; an indictment is a product of the grand jury. The English common law created the grand jury system that eventually became embodied in the Fifth Amendment of the United States Constitution: "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." U.S. CONST. amend. V.

The purpose of the Fifth Amendment is to ensure that serious crimes are not pursued against an individual unless an independent objective body—the grand jury—considers the evidence and makes a decision as to whether a charge should be brought. As is frequently noted in caselaw, the initial purpose of the grand jury was to serve as a protection to the community, rather than as a sword for the prosecutor. As well-meaning as this grand jury system was, it was not readily incorporated by the states. *See Hurtado v. Cal.*, 110 U.S. 516, 538 (1884); *see also Alexander v. La.*, 405 U.S. 625 (1972). By treaty, however, the territory of Missouri recognized the concept of the grand jury even before statehood. It became part of early Missouri statutes. *See Lindell v. McNair*, 4 Mo. 380, 382 (1836). The grand jury system has since been codified by Missouri in a series of statutes contained in Chapter 540, RSMo. Those statutes discuss the composition, duties, and terms of the grand jury as well as how grand jurors are summoned, rules of secrecy, and similar items. Missouri law basically embodies the federal concept that a grand jury is meant to be a secret proceeding both to serve as an effective sword for the prosecutor to bring needed criminal charges and to protect the innocent when alleged crimes are being investigated. Today the grand jury serves two purposes:

1. It is a vehicle for the prosecutor to bring charges (in some jurisdictions the grand jury may be the main vehicle for bringing charges).
2. It is a method by which investigations can be conducted and by which information can be gathered.

The use of the grand jury system has its detractors—for good reason. Frequently, the grand jury system is used as a political tool by prosecutors when evidence is weak but there is a public outcry to charge. If the grand jury does not indict, the prosecutor uses that fact to deflect public criticism. This is one reason why the system has been under attack for many years, and that attack is becoming more widespread and gaining more support. The denial of counsel during grand jury testimony is another area of criticism.

The citizens of Missouri are entitled to have a grand jury convene and proceed under appropriate statutes. *See State ex rel. Woods v. Connett*, 525 S.W.2d 326 (Mo. banc 1975). Although the grand jury is a vehicle for the prosecutor to bring charges, it is supervised completely by the court when impaneled. Grand juries are often a valuable component of the criminal justice system in many of the larger cities of Missouri, and, in some jurisdictions, they are the primary method prosecuting attorneys use to bring criminal charges.

II. Qualifications and Selection of Grand Jurors

A. (§4.2) General Statutory Provisions

Chapter 540, RSMo, provides a statutory scheme in which a presiding judge of the circuit court, with the concurrence of the Board of Jury Commissioners, compiles a list of prospective grand jurors. Section 540.021.1, RSMo Supp. 2004. To ensure a representative grand jury, the master jury list shall be the result of a random selection of citizens gleaned from *at least* two government records sources, "including, but not limited to, [the] personal property tax list, voter's registration list, and driver's license records." Section 494.410.2, RSMo Supp. 2004. The master list must contain at least 400 names. Section 494.410.1. The statutes were amended in 2003 to expand the pool from which prospective grand jurors may be called so as to more accurately reflect the ethnic diversity of the Missouri citizenry. The expanded pool helps ensure minority representation on grand juries.

Section 540.021 describes the selection and qualification of people to serve on the grand jury. Twelve people shall hear cases and complete the statutory duties of the grand jury. Section 540.021.4.

The presiding judge of the circuit court supervises those persons selected for grand jury duty. Section 540.021.4. The judge has the ability to select alternate grand jurors and the ability to convene, recess, or adjourn the grand jury at the judge's discretion. Section 540.021.4, .5.

Qualifications for grand jurors are the same as those for petit jurors. *See* Chapter 494, RSMo; § 540.045.1, RSMo 2000. Those statutes make eligible any person over 21 years of age who is a citizen of the United States and a resident of the city or county where the court issuing the summons is located. A prospective juror must also:

- be free from felony conviction (or restored to civil rights);
- be able to read;
- be able to speak and understand English; and
- not be on active duty in the military.

Section 404.425, RSMo Supp. 2004.

Judges of courts of record are ineligible. Section 494.425(7). Also ineligible is any person the court believes to be mentally or physically

ill or infirm to the extent that the person could not perform the duties of a juror. Section 494.425(8). In 2004, licensed attorneys were removed from the list of those disqualified, and they may now serve as jurors.

Chapter 540 provides for a foreperson and a clerk of the grand jury. The foreperson has powers and duties, including administering the oath. Section 540.110, RSMo 2000. The foreperson shall place every witness under oath and advise the witness that matters occurring before the grand jury are to be kept secret. *Id*. This procedure is vastly different from that of federal courts, where a witness generally can disclose matters that occur before the grand jury. *See In re Grand Jury Subpoenas Duces Tecum*, 904 F.2d 466 (8th Cir. 1990); *Senate of Commonwealth of P.R. ex rel. Judiciary Comm. v. United States Dep't of Justice*, 823 F.2d 574 (D.C. Cir. 1987); *United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987). It should be noted that this provision of Missouri law may run afoul of constitutional provisions embodied in the First Amendment. *See, e.g., Butterworth v. Smith*, 494 U.S. 624 (1990); *see also* §4.15, *infra*.

The statutory scheme also provides for the prosecuting attorney to appear and present cases before the grand jury. *See* § 540.140, RSMo 2000; *see also* FED. R. CRIM. P. 6. The grand jury has the ability to enter a true bill or a charge. A concurrence of at least 9 of the 12 grand jurors is required for a true bill. *See* § 540.250, RSMo 2000.

B. (§4.3) Requirements, Strict Adherence

As indicated in *State ex rel. Woods v. Connett*, 525 S.W.2d 326 (Mo. banc 1975), and § 494.425, RSMo Supp. 2004, strict adherence to the statutory requirements for the selection of grand jurors is required.

C. (§4.4) Challenges to Grand Jury Selection

In *State v. Ringo*, 30 S.W.3d 811 (Mo. banc 2000), *cert. denied,* 532 U.S. 932 (2001), the Supreme Court of Missouri discussed the steps that must be taken to challenge the selection of a grand jury. *Id*. at 818–20. After noting that the defense had obtained the jury procedures manual for the circuit and the transcription of the presiding judge's questioning of the panel regarding their service and questioning of the prosecutor under oath, the Court noted that the request for depositions might have been directed at the circuit clerk, presiding judge, or others present during the grand jury selection process. Because the defense failed to "take advantage of discovery

and other opportunities," the Court ruled that "the claims that he was improperly denied access to names and addresses of those on the master list and denied depositions of grand jurors are without merit." *Id.* at 819–20. The 2003 revision to § 540.021, RSMo Supp. 2004, does not address disclosure of the names and addresses of the individuals on the grand jury panel, but the 2003 revision to § 494.410.4, RSMo Supp. 2004, states that only the names on the master jury list "shall be considered a public record."

The *Ringo*, 30 S.W.3d 811, Court also noted that Ringo's claim of underrepresentation of a particular race or gender on the grand jury was without merit because he did not seek information regarding the race or gender of any previous grand jury or any previous grand jury list. The failure to attempt to obtain this information was significant because "[a] single panel that fails to mirror the make-up of the community is insufficient to establish a *prima facie* case of systematic exclusion," and "[o]rdinarily, an extended period of under-representation is required to raise an inference of systematic exclusion." *Ringo*, 30 S.W.3d at 820; *see also Campbell v. La.*, 523 U.S. 392 (1998) (a white defendant has third-party standing to raise the issue of an equal protection violation alleging improper exclusion of African-Americans on the grand jury panel). To establish a claim of discrimination, a defendant must show the following:

- There is an underrepresentation of a recognizable group in the community.
- The excluded group is distinctive.
- The representation of the group is not fair or reasonable.
- The underrepresentation of the group is a result of a systematic exclusion in the jury selection process.

The *Ringo*, 30 S.W.3d 811, Court also noted that Ringo's failure to object to the filing of a substitute information in lieu of indictment barred his challenge to the indictment. The procedural bar was explained by the Court as follows:

> The cases have uniformly held that where a defendant is tried by information substituted for an indictment, the defendant must first challenge the validity of Missouri's practice of permitting a substitute information in lieu of indictment before reaching the question of whether the composition of the grand jury was racially tainted.

Id. at 820.

Because Ringo only objected to the substitute on the grounds that it was untimely and that it contained an allegation charging a new offense, the validity of § 545.300, RSMo 2000, allowing the substitution of an information for an indictment, was not preserved for appellate review. The Court found no plain error. *Id.*

As the *Ringo*, 30 S.W.3d 811, Court's discussion illustrates, the practice in Missouri of not recording grand jury proceedings may limit the ability of the litigants to challenge the indictment. Ringo complained of the failure to record the grand jury proceedings, but the Court rejected that complaint of error and holding as follows: "Neither statute nor the state constitution mandate that grand jury proceedings be transcribed. *State v. Greer*, 605 S.W.2d 93, 96 (Mo. 1980), *vacated on other grounds*, 451 U.S. 1013 (1981). Moreover, sec. 540.105 grants circuit courts the discretion not to transcribe grand jury proceedings. This point is denied." *Id.* at 820.

III. (§4.5) Indictments and Informations

Indictments and informations must meet the same basic standards. Indictments have certain requirements in addition to these general rules.

A. (§4.6) The Indictment

An indictment is the written accusation of a crime proffered under oath by a grand jury. At least nine grand jurors are required to return a true bill. Section 540.250, RSMo 2000; *State v. Connors*, 135 S.W. 444 (Mo. 1911). When nine of the grand jurors concur that an indictment should issue, the foreperson endorses the indictment as a true bill. Section 540.250. If nine grand jurors do not concur, the foreperson must certify that the indictment is not a true bill. Section 540.260, RSMo 2000.

A foreperson is required for the grand jury to legally act. Only the foreperson may administer oaths to witnesses, and no indictment is valid unless endorsed a true bill over the foreperson's signature as foreperson. *State v. Vaughn*, 112 S.W. 728 (Mo. App. E.D. 1908). All indictments found by the grand jury must be presented by the foreperson to the court in the presence of other members of the grand jury. Section 540.270, RSMo 2000. If the record is silent as to the appointment of a foreperson of the grand jury, there is presumption that a foreperson was appointed. *Vaughn,* 112 S.W. 728.

The grand jury is the sole judge of the sufficiency of the evidence it hears. *State v. Selle*, 367 S.W.2d 522 (Mo. 1963); *State v. Ivey*, 442 S.W.2d 506 (Mo. 1969). An indictment based entirely on hearsay *is* valid. *United States v. Neff*, 525 F.2d 361 (8th Cir. 1975). *See also Costello v. United States*, 350 U.S. 359 (1956); *State v. Tressler*, 503 S.W.2d 13 (Mo. 1973), *cert. denied*, 416 U.S. 973 (1974); *State v. Pierson*, 85 S.W.2d 48 (Mo. 1935). In *Williams v. United States*, 344 F.2d 264 (8th Cir. 1965), *cert. denied*, 382 U.S. 857 (1965), the court stated that an indictment can be based wholly on hearsay. *Costello,* 350 U.S. 359.

According to *State v. Corlew*, 463 S.W.2d 836 (Mo. 1971), actions of the grand jury are not rendered void by later application of the exclusionary rule to some portion of the evidence. Furthermore, the exclusionary rule does not apply to grand jury proceedings. *United States v. Calandra*, 414 U.S. 338 (1974).

Once the grand jury acts and an indictment is returned, all previous actions of the associate circuit division are superseded, and the criminal action proceeds on the indictment. *Collins v. Swenson*, 443 F.2d 329 (8th Cir. 1971). The prosecution has discretion to proceed by indictment or information. *State v. McGee*, 757 S.W.2d 321 (Mo. App. W.D. 1988). Frequently, in larger metropolitan areas, prosecutors prefer to proceed by indictment to avoid the preliminary hearing, which is mandated if the charge is by information or complaint. Missouri courts have continuously held that the test for sufficiency of an indictment is whether the charge pleads all of the essential elements of the offense, thus giving the proper notice to the defendant so that the defendant may defend against the charge and barring further prosecution of the charged offense as prohibited by the double jeopardy clause. *See generally State v. Henderson*, 750 S.W.2d 507 (Mo. App. W.D. 1988).

Often, defendants are tried and convicted on a theory of aiding and abetting or acting in concert. It should be noted that the state is not required to plead aiding and abetting to proceed on that theory. *See State v. Turner-Bey*, 812 S.W.2d 799 (Mo. App. W.D. 1991); *State v. Watson*, 716 S.W.2d 398 (Mo. App. E.D. 1986). Compare *United States v. DeLuna*, 763 F.2d 897 (8th Cir. 1985), *cert. denied*, 474 U.S. 980 (1985). In *DeLuna,* not only did the government not have to plead aiding and abetting to proceed on that theory, but the government was also allowed to proceed on a Pinkerton conspiracy theory.

Rule 23.01 and MACH-CR 2.10 require the prosecutor to sign the indictment along with the foreperson. But § 545.060, RSMo 2000, states that the failure of the prosecutor to sign an indictment shall not invalidate it if the endorsement is made before disposition of the motion to quash. Furthermore no judgment shall be arrested or the trial discontinued after it has begun because of the prosecutor's failure to endorse. Section 545.060. An assistant prosecuting attorney may endorse the indictment. *State v. Elgin*, 391 S.W.2d 341 (Mo. 1965).

B. (§4.7) Prosecution by Indictment Not Required—The Information

The prosecutor may decide to proceed by affidavit or complaint in felony cases or by information in misdemeanor cases. When a criminal case is proceeding by information, complaint, or affidavit, the defendant must be afforded a right to a preliminary hearing before an associate circuit judge in the county where the offense is alleged to have occurred. When a defendant has been charged by a grand jury indictment, a preliminary examination is not required. *State v. Blackmon*, 664 S.W.2d 644 (Mo. App. S.D. 1984); *State v. Day*, 506 S.W.2d 497 (Mo. App. E.D. 1974).

An information filed by the prosecuting attorney must comply with Rule 23 and § 545.240, RSMo 2000. It should also be noted that the law allows an information to be substituted for an indictment. When this occurs, there is no necessity for preliminary hearing because probable cause was determined by the grand jury that returned the indictment. *See State v. Turner-Bey*, 812 S.W.2d 799, 807 (Mo. App. W.D. 1991).

Rule 22.09 requires a preliminary hearing only "[a]fter the filing of a felony complaint." A preliminary hearing on a homicide case must be recorded and transcribed if requested by either party. Rule 22.10; *State v. Ringo*, 30 S.W.3d 811 (Mo. banc 2000), *cert. denied,* 532 U.S. 932 (2001).

C. (§4.8) Form and Purpose of the Indictment or Information

The form and purpose of the indictment are found in Rule 23.01. Missouri appellate opinions hold that the purposes of an indictment or information are to inform the accused of the charges so that the accused can prepare an adequate defense and to prevent retrial on

the same charge in case of an acquittal. *See State v. Andrich*, 943 S.W.2d 841 (Mo. App. E.D. 1997); *State v. Glaese*, 956 S.W.2d 926 (Mo. App. S.D. 1997); *State v. Rotter*, 958 S.W.2d 59 (Mo. App. W.D. 1997). Since the implementation of the Criminal Code in Missouri in 1979, the Supreme Court of Missouri has approved various forms for criminal charges, which are contained in Missouri Approved Charges–Criminal, known by its acronym as MACH-CR. Each form is followed by Notes on Use and is the approved, but not mandated, wording of the instructions. *State v. Mitchell,* 611 S.W.2d 223 (Mo. banc 1981). For the most part, the forms authorized in MACH-CR are in the language of the applicable statute. When confronting a question as to the sufficiency of the charge, counsel should examine the relevant statutory authority, compare it to the appropriate MACH-CR form, and review caselaw relating to the specificity of pleading required in the offense charged.

A properly written charging instrument that conforms to MACH-CR must allege essential elements of the crime charged. *See Andrich*, 943 S.W.2d 841; *State v. Logan*, 941 S.W.2d 728 (Mo. App. E.D. 1997). The circumstance in which a charging instrument would conform with the approved Supreme Court form and not state the essential elements is rare and unusual. Federal law indicates that indictments that merely track statutory language are not necessarily sufficient. *United States v. Foley*, 73 F.3d 484 (2nd Cir. 1996); *United States v. Yefsky*, 994 F.2d 885 (1st Cir. 1993).

A properly pled indictment or information gives notice regarding the charged offense and all lesser-included offenses. *State v. Hibler*, 5 S.W.3d 147 (Mo. banc 1999).

The 2002 revision to Rule 23.01, Misdemeanors or Felonies—Indictment or Information—Form of, addresses multiple counts and refers to the MACH-CR. As amended, Rule 23.01(b)(3) and (4) reads as follows:

> (b) The indictment or information shall:
>
> . . . .
>
> (3) State the date and place of the offense charged as definitely as can be done. If multiple counts charge the same offense on the same date or during the same time period, additional facts or details to distinguish the counts shall be stated;
>
> (4) Cite the statute alleged to have been violated and the statutes that fix the penalty or punishment therefor; . . . .

Requiring that the defendant be given notice of the facts necessary for an enhanced punishment and the statutory reference for fixing punishment is consistent with the holding of *Apprendi v. N.J.*, 530 U.S. 466 (2000).

In sex abuse cases, counsel should note *State v. Sprinkle*, 122 S.W.3d 652 (Mo. App. W.D. 2003), in which the court held that the indictment does not need to state the exact date on which a sex offense occurred. The indictment will survive a challenge if it indicates a broad time period of several months during which the offense(s) occurred because time is not of the essence in sex cases. The case discusses the accused's ability to provide an alibi or claim lack of access when a broad time period is alleged. The court held that these defenses were not hindered by the inexact wording of the indictment in a sex case.

D. (§4.9) Amended Informations and Substitute Informations for Indictments

Technically, an indictment, unlike an information, cannot be amended. The proper procedure is to substitute an information for the indictment. An information may be amended or substituted at any time before the jury is sworn. Section 545.300, RSMo 2000. Thereafter, the court may permit an information to be amended or substituted for an indictment at any time before verdict if no additional or different offense is charged and if substantial rights of the accused are not prejudiced. No amendment or substitution shall cause delay of a trial unless the court finds that an accused needs further time to prepare a defense because of the amendment or substitution. Rule 23.08. Permission to amend rests in the sound discretion of the trial court. An amendment that invokes the persistent offender act does not charge a different offense from the original charge. *See Lamb v. State*, 817 S.W.2d 642 (Mo. App. S.D. 1991).

The test for prejudice regarding an amendment of an information is whether the accused's evidence would have been equally applicable and the defense equally available after the amendment. *See generally State v. Simpson*, 846 S.W.2d 724 (Mo. banc 1993); *State v. Moton*, 733 S.W.2d 449 (Mo. App. E.D. 1986); *State v. Cooper*, 660 S.W.2d 184 (Mo. App. W.D. 1983). It should be noted that an amended information or an information in lieu of indictment serves as a substitute for the charge and has the effect of quashing the first charging instrument. *See In re Fenlon*, 775 S.W.2d 134 (Mo. banc

1989); *State v. Reichenbacher*, 673 S.W.2d 837 (Mo. App. E.D. 1984); § 545.110, RSMo 2000.

It is not permissible to amend an information if the amendment charges an offense different from the original charge. *Bass v. State*, 807 S.W.2d 523 (Mo. App. S.D. 1991); *State v. Amerson*, 661 S.W.2d 852 (Mo. App. S.D. 1983). In such a situation, the prosecution will need to dismiss and re-charge the defendant.

Sometimes prosecutors present a case to the grand jury to obtain a superseding indictment rather than file a substitute information. Rule 23.10(b) provides that, "If there are two or more indictments . . . pending against the defendant for the same offense in the same county, the indictment or information last filed shall supersede all indictments or informations previously filed."

E. (§4.10) Motions to Dismiss and Sufficiency of the Accusation

Any defense or objection that is capable of determination without trial of the general issue may and should be raised before trial by motion. It is best to raise these issues when there is an attack on the nature or pleading of an indictment or information. The charging document must state the essential elements of the offense with sufficient particularity for the accused to prepare a defense and to bar multiple prosecutions for the same offense. *See State v. Voyles*, 691 S.W.2d 452 (Mo. App. S.D. 1985). In *Voyles* a stealing-by-deceit charge was reversed because the charging instrument failed to properly allege reliance by the victim in regard to the charged misrepresentations. If the charge clearly fails to allege an essential element contained in the statute, it is not a proper charge and does not vest the court with *any* jurisdiction. *See State v. Owens*, 740 S.W.2d 269 (Mo. App. W.D. 1987); *State v. Redpath*, 668 S.W.2d 99 (Mo. App. W.D. 1984).

A charging instrument that fails to contain an essential allegation of the offense can be held insufficient even after the verdict. *State v. Bridges*, 412 S.W.2d 455 (Mo. 1967); *Shive v. State*, 780 S.W.2d 359 (Mo. App. S.D. 1989). As a matter of law, omissions can be of such a fundamental character as to make an information or indictment wholly insufficient and invalid. Insufficiency is not waived by the defendant's failure to raise the issue at the early stages of the proceedings. *See, e.g., State v. Kesterson*, 403 S.W.2d 606 (Mo. 1966);

State v. Williams, 847 S.W.2d 111 (Mo. App. W.D. 1992); *City of Grandview v. Winters*, 768 S.W.2d 162 (Mo. App. W.D. 1989).

An information or indictment that charges multi-counts must be read together. Essential elements may be incorporated by reference or read as part of the entire original charging instrument. *See Fults v. State*, 779 S.W.2d 688 (Mo. App. E.D. 1989).

The courts are not always so particular about the pleading of detail, especially in sexual abuse cases. *See*:

- *State v. Sprinkle,* 122 S.W.3d 652 (Mo. App. W.D. 2003);
- *State v. Meyers*, 770 S.W.2d 312 (Mo. App. W.D. 1989);
- *State v. Burch*, 740 S.W.2d 293 (Mo. App. E.D. 1987);
- *State v. Fults*, 719 S.W.2d 46 (Mo. App. E.D. 1986), *aff'd*, 779 S.W.2d 688.

The cure for a lack of definiteness is a bill of particulars. It is frequently suggested that the confusion created by a lack of a specific pleading can be cured this way. *See State v. Urban*, 798 S.W.2d 507 (Mo. App. W.D. 1990); *State v. Stark*, 728 S.W.2d 301 (Mo. App. S.D. 1987).

The Supreme Court of Missouri has held that, in a postverdict situation, an indictment or information that fails to contain an essential element does not divest the court of jurisdiction to try the case unless actual prejudice is shown. *State v. Parkhurst*, 845 S.W.2d 31 (Mo. banc 1992); *State v. Briscoe*, 847 S.W.2d 792 (Mo. banc 1993). This is similar to what is required when a jury instruction varies from the charging instrument. *See generally State v. Fowler*, 938 S.W.2d 894 (Mo. banc 1997). It may be argued that *Parkhurst* does not change the law but merely engages in the exercise of word choice. One analysis of *Parkhurst* suggests that, in a postverdict context, an insufficient indictment will not require reversal unless actual prejudice is shown. Another way to state the logic in *Parkhurst* is that an indictment or information that adequately informs the defendant of the charges is deemed sufficient even if it omits an essential element. There is a question as to whether the *Parkhurst* decision conforms with a body of federal law regarding the sufficiency of indictments under the United States Constitution and with the Federal Rules of Criminal Procedure. *See generally* Carol S. Steiker, *Twenty-Sixth Annual Review of Criminal Procedure: Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 1025–42 (1997).

Rule 23.01(b)(3) directs that, "If multiple counts charge the same offense on the same date or during the same time period, additional facts or details to distinguish the counts shall be stated." See also the discussion about instructing the jury on the time of the offense in MAI-CR 3d 304.02, Notes on Use 4. In *State v. Williams*, 126 S.W.3d 377 (Mo. banc 2004), the accused was entitled only to a narrow review of his challenge to the sufficiency of an amended information that allegedly failed to state an element when he waited until after his conviction to make the challenge.

F. (§4.11) Bill of Particulars

A bill of particulars may be filed when it appears that the indictment or information fails to inform the accused of the particulars of the offense sufficiently to enable the accused to prepare a defense. A bill of particulars may be made before or within ten days after the arraignment. Thereafter, the timeliness of the motion for a bill of particulars is subject to the trial court's discretion. Rule 23.04.

The bill of particulars can be amended as justice requires. A motion for bill of particulars is subject to the discretion of the trial court. *United States v. Gray*, 464 F.2d 632 (8th Cir. 1972); *Ross v. United States*, 374 F.2d 97 (8th Cir. 1967). When an indictment or information alleges the essential facts constituting the offense charged but fails to inform the accused of the particulars of the offense sufficiently to prepare a defense, the court may direct or permit the filing of a bill of particulars.

The ability to challenge the inadequacy of an indictment or information may be waived by failure to request a bill of particulars. Rule 23.04; *State v. Frankum*, 425 S.W.2d 183 (Mo. 1968). In *State v. Hasler*, 449 S.W.2d 881 (Mo. App. E.D. 1969), the court ruled that an indictment was not saved by a bill of particulars that set out facts sufficient to describe the offense when the indictment was insufficient to describe the offense. *See also* Chapters 7 and 12 of this deskbook. If there is a problem of pleading, the defendant may be considered to have waived those issues if the defendant does not file a motion for bill of particulars. *State v. Urban*, 798 S.W.2d 507 (Mo. App. W.D. 1990); *State v. Stark*, 728 S.W.2d 301 (Mo. App. S.D. 1987). A motion for bill of particulars should be filed even after the ten-day period provided by the Rule. Rule 23.04. If the court does not grant such relief, the court's discretion is at least reviewable on appeal, whereas the failure to move for a bill of particulars may waive the point altogether.

Objections as to the form of the indictment are waived if they are not presented before trial. *United States v. Lawson*, 523 F.2d 15 (8th Cir. 1975). Formal deficiencies in an information may be waived, and the information will be treated as valid unless attacked by timely motion. *Walster v. State*, 438 S.W.2d 1 (Mo. 1969).

Rule 23.04 was revised in 2002 without significant changes. Discovery, including depositions, may supply the facts of the crime to the accused. *See State v. Raines*, 748 S.W.2d 865 (Mo. App. S.D. 1988).

A sample form bill of particulars is provided in §4.23 below.

G. (§4.12) Variance and Constructive Amendments

A variance occurs when the evidence at trial proves facts other than those alleged in the charging instrument. The problem with a variance is that the defendant may be deprived of constitutional rights to notice of the charges and the variance may impact on the defendant's ability to assert double jeopardy protection against successive prosecution. In a variance situation, the defendant must demonstrate actual prejudice for the variance to be considered fatal and warrant reversal. *See generally*:

- *State v. Fowler*, 938 S.W.2d 894 (Mo. banc 1997);
- *State v. Levesque*, 871 S.W.2d 87 (Mo. App. E.D. 1994);
- *United States v. Jenkins*, 779 F.2d 606, 617 (11th Cir. 1986);
- *United States v. Begnaud*, 783 F.2d 144, 148 (8th Cir. 1986);
- *State v. King*, 747 S.W.2d 264 (Mo. App. E.D. 1988).

With open file discovery, pattern instructions, and pattern charges, prejudicial variance rarely occurs, and then only in the most complex of situations. The circumstances of the fatal variance have, however, arisen on occasion, especially in federal conspiracy cases. A variance of proof from the indictment can create a situation where a unitary single conspiracy is pleaded or charged by the prosecution, yet multiple conspiracies are proven. Under these circumstances, the variance is fatal and results in reversal. *See Kotteakos v. United States,* 328 U.S. 750 (1946); *United States v. Snider*, 720 F.2d 985 (8th Cir. 1983), *cert. denied*, 465 U.S. 1107 (1984); *United States v. Jackson*, 696 F.2d 578 (8th Cir. 1982), *cert. denied*, 460 U.S. 1073 (1983). *Snider* involved charges of conspiracy to distribute marijuana, and *Jackson* involved a conspiracy to perform arsons for profit. The Eighth Circuit in both of these circumstances indicated that the

evidence at trial showed not a unitary conspiracy but more than one unrelated conspiracy. Under these circumstances, some defendants in both cases did receive relief. Whether relief is granted in the multiple conspiracy situation will be determined on the circumstances of the case with careful review of the jury instructions that were given. It should be noted that failure to properly instruct the jury on multiple conspiracies is a very important consideration in deciding whether relief should be granted. *Jackson,* 696 F.2d 578. But a failure to instruct in multiple conspiracies is not per se prejudicial. *See United States v. Nevils*, 897 F.2d 300 (8th Cir. 1990), *cert. denied*, 498 U.S. 844 (1990).

The law has evolved in that a variance is usually treated as instructional error rather than as fatal. *See Levesque*, 871 S.W.2d 87; *see also Jenkins*, 779 F.2d 606; *Begnaud*, 783 F.2d 144; *United States v. Johnson*, 934 F.2d 936 (8th Cir. 1991). The question of multiple conspiracy is one of fact, and the only issue is whether there is sufficient evidence for the jury to be instructed on a multiple conspiracy theory. If the jury is instructed on the multiple conspiracy theory, rarely does reversible error occur. *United States v. Haren*, 952 F.2d 190 (8th Cir. 1991); *United States v. Watts*, 950 F.2d 508 (8th Cir. 1991). With the appellate trend in this area, the concept of fatal variance is more and more uncommon. *State v. Lee*, 841 S.W.2d 648 (Mo. banc 1992), 222 F.3d 441 (8th Cir. 2000); *State v. Hubbard*, 698 S.W.2d 908 (Mo. App. W.D. 1985).

In addition to a variance problem, there may be a sufficiency-of-the-evidence problem. See *State v. Dudley*, 51 S.W.3d 44, 50–52 (Mo. App. W.D. 2001), in which a conviction for armed criminal action was reversed because the crime was charged as unlawfully entering rather than unlawfully remaining. *Compare* MAI-CR 3d 319.12 (the form instructions for assault in the second degree; submission of mental state and conduct) *with* MAI-CR 3d 320.01 (the submission of the aggravating circumstances for forcible rape; deadly weapon or dangerous instrument in a threatening manner).

Constructive amendment occurs when the court or the prosecution alters the terms of the indictment. This can occur when the evidence at trial proves a different crime than that charged in the indictment or when the jury instructions impermissibly broaden or alter the scope of the charging instrument. *See generally Johnson*, 934 F.2d 936; *State v. Price*, 684 S.W.2d 566 (Mo. App. E.D. 1984); *Begnaud*, 783 F.2d 144; *Stirone v. United States*, 361 U.S. 212 (1960); *Gov't of*

V.I. v. Joseph, 765 F.2d 394, 397–99 (3rd Cir. 1985). A constructive amendment arises in one of two circumstances:

1. The evidence at trial is so different from the allegation in the indictment that it creates a situation in which the defendant is being tried on a crime other than the one charged (almost indistinguishable from what is known as a fatal variance)
2. The jury instructions differ from the statutory elements alleged in the indictment, in effect creating a different charge than originally contained in the charging instrument

Either way, a constructive amendment is reversible error per se. *See Begnaud,* 783 F.2d at 147 n.4; *see also United States v. Yeo*, 739 F.2d 385, 387 (8th Cir. 1984); *United States v. Johnson*, 713 F.2d 633, 643 (11th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984). A classic example of a constructive amendment occurred in *Yeo*. In *Yeo* the defendant was charged with using extortionate means to collect a debt, i.e., loan sharking. He was charged in three separate counts in which he was alleged to have used force against three different individuals. There was also evidence at trial of the defendant using extortionate means to collect debts from victims that were not named in the indictment. The defendant was convicted of one of the three charges and acquitted of the other two. That conviction arose from alleged use of force against an individual named Jim Crouch. The verdict-directing instruction in that cause stated as follows: "That on or about May 5, 1982, the defendant knowingly participated in the use of extortionate means to collect or attempt to collect from Jim Crouch *or another* . . . ." *Yeo*, 739 F.2d at 386.

Under these circumstances, the instruction allowed the defendant to be charged with using force against Jim Crouch or anyone else to collect a debt; this was broader than the indictment returned by the grand jury. Thus, a constructive amendment had occurred, and the case was reversed.

Missouri cases do not use the terminology "constructive amendment." The cases speak of situations in which the instructions vary from the indictment or cite well-established law that the verdict-directing instruction must appropriately set forth the essential elements of the offense as alleged in the charging instrument. *See, e.g.*:

- *State v. Garrette*, 699 S.W.2d 468, 507 (Mo. App. S.D. 1985);
- *State v. Terry*, 625 S.W.2d 189, 191 (Mo. App. E.D. 1981);
- *State v. Scott*, 534 S.W.2d 537 (Mo. App. W.D. 1976);
- *State v. Lassley*, 174 S.W.2d 795 (Mo. 1943).

There are some decisions in Missouri that do appear to be constructive amendment cases despite the lack of the specific term. *See, e.g., Garrette,* 699 S.W.2d 468; *State v. Moseley*, 735 S.W.2d 46 (Mo. App. W.D. 1987); *State v. Redpath*, 668 S.W.2d 99 (Mo. App. W.D. 1984). In all of these cases, the problem addressed by the appellate court was a charge that was improperly altered or broadened by the improper use of jury instructions. The circumstances addressed in these cases seem analogous to the circumstances invoking the constructive amendment doctrine in federal law. *See also State v. Jelks*, 672 S.W.2d 722, 724 (Mo. App. E.D. 1984); *State v. Coleman*, 660 S.W.2d 201, 218 (Mo. App. W.D. 1983); *State v. Singleton*, 602 S.W.2d 3, 8 (Mo. App. W.D. 1980).

Variance under Missouri law generally arises when there is a difference between the charging instrument and the jury instructions. When a charging instrument charges but one crime and a different offense is submitted to the jury, it is called a "fatal variance." *See Levesque,* 871 S.W.2d 87; *State v. Powell*, 783 S.W.2d 489 (Mo. App. W.D. 1990). *But see United States v. McIntosh*, 23 F.3d 1454 (8th Cir. 1994). Under Missouri law, issues of constructive amendment and variance almost always arise in circumstances when the jury is improperly instructed upon the offense charged.

Powell, 783 S.W.2d 489, is a classic example. In *Powell* the defendant was charged with selling marijuana to a particular person and was convicted on evidence of selling marijuana to another person. The information stated that the defendant sold marijuana to Eric Protzman; the jury was instructed at the conclusion of the evidence that they could find the defendant guilty if they concluded that he sold marijuana to another person, John Kessler. The appellate court ruled that there was a fatal variance, and the case was remanded for a new trial. Interestingly, the state did not resist this result. The problem arose, however, as to whether double jeopardy would prevent re-prosecution of the defendant. The appellate court held that this circumstance was a setting aside of the conviction; thus, double jeopardy did not prevent retrial with a new and different charge. It should be noted, however, that if the difference between the charge and the instructions does not create a separate offense or does not prejudice the defendant in the defense, many courts have found that this is not a fatal variance. *See*:

- *McIntosh,* 23 F.3d 1454;
- *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994);
- *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991);

- *United States v. Rivera-Santiago*, 872 F.2d 1073 (1st Cir. 1989);
- *Begnaud,* 783 F.2d 144.

If a constructive amendment or variance arises when the scope of the charge is not actually enlarged but is narrowed by the evidence or the instruction and creates a situation in which the court will suggest that the defendant has not been prejudiced, no relief is merited. *See, e.g., United States v. Miller*, 471 U.S. 130 (1985); *United States v. Sutera*, 933 F.2d 641 (8th Cir. 1991); *United States v. Jones*, 880 F.2d 55 (8th Cir. 1989).

There is a line of cases dealing with a charging instrument being alleged conjunctively and verdict-directing instructions being submitted at trial disjunctively. If a single offense capable of being committed in various ways is pleaded conjunctively, it may be instructed upon disjunctively. *See State v. Johnstone*, 335 S.W.2d 199, 203 (Mo. 1960), *cert. denied*, 364 U.S. 842 (1960); *State v. Marks*, 721 S.W.2d 51 (Mo. App. W.D. 1986); *State v. Church*, 636 S.W.2d 703 (Mo. App. S.D. 1982). It appears that, if a charging instrument pleaded conjunctively required finding all the conjunctive elements, the instruction of the disjunctive would lessen the burden of proof by the state and thus be a constructive amendment of the indictment. This was the issue addressed in *Marks*. In *Marks* the defendant was a Gypsy fortune teller. The evidence at trial indicated that on multiple occasions she made a variety of representations that caused money to be paid to her from the victims in that case. The state charged Marks in a one-count information, conjunctively alleging multiple acts of fraud. At trial, however, the state was allowed to instruct disjunctively. Marks suggested on appeal that this circumstance created a constructive amendment of the indictment. Further, Marks argued that, because of the manner in which the case was pleaded and then instructed upon, the defendant could not be assured of having been tried on the charge that was returned by the grand jury.

Another issue was whether this variance caused a non-unanimous jury verdict. Although the subject of discussion in the opinion, both of these arguments were rejected. The court found that there were separate circumstances in which there were frauds and moneys paid, that the basic gravamen of the offense was the appropriation of money, and, therefore, that the state could plead conjunctively and then instruct disjunctively.

Interesting corollaries to the opinion in *Marks,* 721 S.W.2d 51, are the pleading doctrines of duplicity and multiplicity. Duplicitous indictment occurs when multiple offenses are charged in a single count. *United States v. Hixon*, 987 F.2d 1261 (6th Cir. 1993); *United States v. Hammen*, 977 F.2d 379 (7th Cir. 1992); *United States v. Huguenin*, 950 F.2d 23 (1st Cir. 1991). Multiplicity occurs when a single offense is charged in different counts. *United States v. George*, 986 F.2d 1176 (8th Cir. 1993), *cert. denied*, 510 U.S. 899 (1993); *United States v. Langford*, 946 F.2d 798 (11th Cir. 1991), *cert. denied*, 503 U.S. 960 (1992). In the *Marks* situation, there is not only a theoretical problem of constructive amendment, but also the problem of whether the indictment in that case was duplicitous. If the indictment was not duplicitous, i.e., all the conjunctively pleaded acts of fraud were essential elements to the case, then how could the verdict director properly be submitted conjunctively?

In *Lee*, 841 S.W.2d 648, and its underlying Western District opinion, 1991 Mo. App. LEXIS 1740 (Mo. App. W.D. Nov. 26, 1991), there are substantial discussions regarding constructive amendment and variance, especially as they relate to circumstances created by jury instructions. Of special note in that case are the dissents by Judge Breckenridge of the Western District and Judge Thomas of the Supreme Court, in which they suggest that a difference between the instruction and the charging instrument should be looked at very carefully; in that particular case, they suggest that reversal was warranted. If, in fact, the instructions improperly broaden or change the charge, it is grounds for relief under Missouri law.

The most recent Missouri decision on the issue of variance is *State v. Glass,* 136 S.W.3d 496 (Mo. banc 2004), which held that variance between information and jury instructions is not fatal and will not require reversal unless it submits a new and distinct offense from the offense charged.

IV. Powers and Duties of Grand Juries

A. (§4.13) General Investigative and Indictment Powers

The general investigative and indictment powers of grand juries are set forth in article I, § 16, of the Missouri Constitution and § 540.031, RSMo 2000. Section 540.031 sets forth what is commonly called the court's charge to the grand jury: "A grand jury may make inquiry into and return indictments for all grades of crimes and shall make inquiry into all possible violations of the criminal laws as the court

may direct. The grand jury shall examine public buildings and report on their conditions." The grand jury has unrestricted authority to inquire into public officers' willful misconduct in office.

See John W. Oliver, *The Grand Jury: An Effort to Get a Dragon Out of His Cave*, 1962 WASH. U. L.Q. 166, 169; John Oliver, *Inquiry Into the Power of a Missouri Grand Jury*, 30 UNIV. KAN. CITY L. REV. 200 (1962).

A Missouri grand jury does not have authority to issue a written report of its investigations other than those pertaining to public buildings as directed by § 540.031. The long-standing controversy over a grand jury's power to issue a report on matters other than public buildings was finally resolved by the Supreme Court of Missouri in *In re Interim Report of Grand Jury*, 553 S.W.2d 479 (Mo. banc 1977). The Court held that, under the existing statutes, a grand jury may not report the result of its investigation when there are no sufficient grounds for indictment.

B. (§4.14) Specifically Designated Powers and Responsibilities of Grand Juries

A variety of other laws scattered throughout the Revised Statutes of Missouri address issues that are to be included in the charge given by the judge who convenes the grand jury. These specifically designated powers and responsibilities of the grand jury include the following:

- To indict an assessor for acceptance of unsworn property assessment lists as correct, § 137.150, RSMo 2000
- To be advised of the identity of persons refusing to take out or renew merchants' licenses, § 150.110, RSMo 2000
- To inquire into violation of laws regulating levies and levy districts, § 245.545, RSMo 2000
- To inquire into violation of statutes regulating railroad switches, § 389.790, RSMo 2000

C. (§4.15) Grand Jury Subpoena Powers

The grand jury is entitled to issue service of process to compel witnesses and to produce documents. *See* §§ 540.160, 540.170, 540.180, and 540.200, RSMo 2000. The procedure for issuing grand jury subpoenas is set forth in § 540.170. It has long been set forth in both statute and common law that it is improper to issue grand jury subpoenas once an indictment is returned if the subpoena relates to

that particular investigation. If a witness duly summoned fails to appear before the grand jury, the court can issue compulsory process to force the attendance.

The courts of Missouri have held that there is no immunity or ability to compel testimony before the grand jury. *Brown v. City of North Kansas City*, 779 S.W.2d 596 (Mo. App. W.D. 1989); §§ 540.180 and 540.200. There are certain situations, however, in which the courts have addressed whether the Fifth Amendment has been properly invoked. *See In re Presta v. Owsley*, 345 S.W.2d 649 (Mo. App. W.D. 1961); *Mannon v. Frick*, 295 S.W.2d 158 (Mo. 1956). Those cases provide that, if a court determines that a witness is inappropriately taking the Fifth Amendment privilege, that witness can face contempt. Similar to immunity proceedings in federal court, a witness who is cited for contempt can be punished until the expiration of the grand jury. Unlike federal court, however, there is no basis to compel testimony through the use of a properly claimed Fifth Amendment or other privilege. *See* 18 U.S.C. §§ 6001, *et seq*.

The Supreme Court commented on the breadth of federal grand jury subpoenas in *United States v. Dionisio*, 410 U.S. 1 (1973). Dionisio and other witnesses subpoenaed before the grand jury refused to provide voice exemplars on the theory that it compelled self-incrimination before the grand jury. The Court held that there was no Fourth or Fifth Amendment violation in the subpoena. The Court concluded that the grand jury subpoena is not the same as an arrest or other investigative stop, and therefore, the same rights do not attach. It seems safe to assume that the same degree of breadth would also apply in a state court setting. There are very few limits on the breadth of a grand jury subpoena.

In *State v. Eisenhouer*, 40 S.W.3d 916 (Mo. banc 2001), the Supreme Court of Missouri limited investigative subpoenas to the function of compelling production of documents or tangible things, not oral testimony. Such subpoenas would also appear to be subject to the same limitations as grand jury subpoenas in general, i.e., they must not be unreasonable, oppressive, or unrelated to the matter being investigated. *Cf. State ex rel. McGuire v. Cundiff*, 9 S.W.3d 28 (Mo. App. E.D. 1999).

The subpoena power of the grand jury is so broad it has allowed grand juries, on occasion, to subpoena information from lawyers regarding their own clients as long as that information is not deemed privileged or non-produceable. *See generally In re Grand Jury*

Subpoena Duces Tecum Served Upon Shargel v. United States, 742 F.2d 61 (2nd Cir. 1984); *see also United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2nd Cir. 1991); *United States v. Leventhal*, 961 F.2d 936 (11th Cir. 1992); *United States v. Ritchie*, 15 F.3d 592 (6th Cir. 1994). Some federal prosecutors have been able to obtain information from criminal defense lawyers as to the identity of their clients and the amount of their fees. This is frequently done in the investigation of conspiracy cases in the federal courts. This information has been generally held not to be privileged except in limited circumstances. *See, e.g.*:

- *Baird v. Koerner,* 279 F.2d 623 (9th Cir. 1960);
- *In re Grand Jury Proceedings United States v. Jones,* 517 F.2d 666 (5th Cir. 1975);
- *United States v. Strahl,* 590 F.2d 10, 11–12 (1st Cir. 1978);
- *In re Grand Jury Proceedings Rabin v. United States*, 896 F.2d 1267 (11th Cir. 1990).

See also In re Grand Jury Subpoena for Attorney Representing Reyes-Requena, 913 F.2d 1118 (5th Cir. 1990); *In re Grand Jury Subpoena for Attorney Representing Reyes-Requena*, 926 F.2d 1423 (5th Cir. 1991).

An interesting corollary to this body of law regarding grand jury subpoenas of lawyers has arisen in the context of what is known as "Form 8300" litigation. This litigation involves 26 U.S.C. § 6050I, which creates a currency reporting requirement for all individuals who receive cash payments of more than $10,000 in trade or business. Under 26 U.S.C. § 6050I, a person who receives $10,000 in trade or business is required to fill out a form that discloses various information, including the payor of the fee and for whose benefit the fee was paid. Beginning in the early 1990s, lawyers challenged this regulation, suggesting that it put them in the position of informing on their clients and that it involved serious ethical and attorney-client issues. Initially, in many of these cases, the appellate courts have followed the general doctrine that fee and client information is not privileged. *See Goldberger & Dubin,* 935 F.2d 501; *Ritchie*, 15 F.3d 592; *Leventhal*, 961 F.2d 963. But in two interesting cases, the courts have held otherwise. *See United States v. Gertner*, 65 F.3d 963 (1st Cir. 1995); *United States v. Sindel,* 53 F.3d 874 (8th Cir. 1995); *see also* § 574.105, RSMo Supp. 2004.

In *Gertner*, 65 F.3d 963, the government brought an action against a sitting federal judge, asking her to disclose information regarding

clients she represented before her appointment to the federal bench. She refused to produce the information, and her legal position was affirmed by the First Circuit Court of Appeals. Similarly, in *Sindel*, 53 F.3d 874, a Missouri lawyer resisted the production of Form 8300 information regarding his client and was, in part, affirmed by the Eighth Circuit. Both *Sindel* and *Gertner* are very fact-specific cases. For a thorough and thoughtful analysis of the Form 8300 litigation as well as the ethical and professional considerations it creates, see *Form 8300: The Demise of Law as a Profession*, 5 GEO. J. LEGAL ETHICS 485 (1992). This article was written by Professor Ellen S. Podgor of Georgia State University.

A form for a motion to quash a grand jury subpoena is available in §4.24 below.

V. Secrecy of Proceedings

A. (§4.16) Modified by Statute

The common-law rule of secrecy surrounding grand jury proceedings has been modified both by statutes and by later court decisions. *See* §§ 540.105, 540.110, 540.120, 540.190, 540.200, 540.210, 540.300, 540.310, and 540.320, RSMo 2000; *Mannon v. Frick*, 295 S.W.2d 158 (Mo. 1956); *State v. McDonald*, 119 S.W.2d 286 (Mo. 1938). In *Mannon* the Supreme Court of Missouri stated that the reasons for secrecy of grand jury proceedings are to:

- protect the jurors;
- promote freedom of disclosure;
- prevent the subordination of perjury; and
- protect the reputation of persons against whom no indictment may be found.

Grand jury proceedings are not to be disclosed unless by order of the court or by statute specifically authorizing disclosure. This applies in both state and federal court to the grand jurors, the prosecutor, and law enforcement personnel who become aware of matters occurring before the grand jury in the course of their work. In Missouri state court, it also applies to grand jury witnesses. Federal Rule of Criminal Procedure 6 deals with the grand jury and Federal Rule of Criminal Procedure 6(e) deals specifically with "matter[s] occurring before the grand jury." These matters cannot be disclosed without a

proper showing and subsequent court order. Different courts have interpreted the breadth of this term differently. *See, e.g.*:

- *Larson v. United States*, 833 F.2d 758 (8th Cir. 1987);
- *United States v. Medic House, Inc.*, 736 F. Supp. 1531 (W.D. Mo. 1989);
- *United States v. Conley*, 186 F.3d 7 (1st Cir. 1999);
- *In re Motions of Dow Jones & Co.*, 142 F.3d 496 (D.C. Cir. 1998);
- *Davies v. Comm'r*, 68 F.3d 1129 (9th Cir. 1995);
- *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078 (7th Cir. 1992);
- *In re Grand Jury Subpoena v. Under Seal*, 920 F.2d 235 (4th Cir. 1990).

The United States Court of Appeals for the District of Columbia provides the broadest definition of the phrase "matters occurring before the grand jury." In *Dow Jones*, 142 F.3d 496, the court defined "matters occurring before the grand jury" to include any matter that has occurred and any that is presently occurring but also matters that *are likely* to occur.

This area of grand jury law became the focus of much attention and *in camera* litigation regarding Kenneth Starr's investigation of President Clinton. The public affairs spokesman for the independent counsel's office, Charles Bakaly, III, was charged with criminal contempt for leaking matters occurring before the grand jury. After a six-day bench trial, the defendant was acquitted. *See Starr Spokesman Acquitted of Leaking Info, available at* http://abcnews.go.com/US/story?id=95474&page=1.

There is a variety of related litigation, much of which is under seal, that deals with the accusation of grand jury leaks and the desire for media access to that sealed litigation. *See*, *e.g.*, *In re Sealed Case,* 199 F.3d 522 (D.C. Cir. 2000). Under a Sunshine Law request under Chapter 610, RSMo, the circuit court in *Crane v. Kohler*, No. 03CV167348 (Boone County Cir. Ct. Aug. 25, 2003), ordered the prosecutor to disclose material obtained under a grand jury subpoena after the defendant pled guilty. *Cf.* Op. Att'y Gen. 78-90 (1990) (the circuit clerk, prosecuting attorney, and circuit judge are not required to release to the media and public the names of grand jury members).

B. (§4.17) Oaths of Secrecy Required

To ensure the secrecy of grand jury proceedings, various oaths are required by statute. Section 540.080, RSMo 2000, mandates that the grand jurors be sworn to secrecy. But a court may later require members of the grand jury to testify as to whether the testimony of a witness before that grand jury is consistent with the evidence given by that witness in the later court proceeding. Additionally, grand jurors may be required to disclose the testimony given before them by any person upon a complaint relating to perjury or upon the person's trial for the offense of perjury. Section 540.300, RSMo 2000.

Witnesses before the grand jury must also take an oath of secrecy. Section 540.110, RSMo 2000. A court reporter who is present during any session of the grand jury must also take an oath of secrecy. Section 540.105, RSMo 2000. Any violation of the various oaths constitutes a misdemeanor. Sections 540.120 and 540.320, RSMo 2000.

C. (§4.18) Persons Who May Be Present During Grand Jury Proceedings

A court reporter may be present during a grand jury proceeding if directed by the judge convening the grand jury. Section 540.105, RSMo 2000; *State v. McGee*, 757 S.W.2d 321 (Mo. App. W.D. 1988). The prosecuting attorney or the prosecuting attorney's designated assistants may also be present during grand jury proceedings. Sections 540.130 and 540.140, RSMo 2000; *State v. Krutz*, 826 S.W.2d 7 (Mo. App. W.D. 1991). Likewise, if the services of an interpreter are required, the interpreter may be present during the grand jury proceedings. Section 540.150, RSMo 2000; *State v. Isa*, 850 S.W.2d 876 (Mo. banc 1993). But only the grand jurors are permitted to be present during deliberations or voting. Section 540.140. *See also United States v. Schell*, 775 F.2d 559 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986); *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980).

D. (§4.19) Notes and Records of the Grand Jurors

In *State v. Ringo*, 30 S.W.3d 811, 820 (Mo. banc 2000), the Supreme Court of Missouri ruled that there is no constitutional or legal requirement that grand jury proceedings be recorded.

Transcripts or minutes of the grand jury cannot be disclosed. *State ex rel. Clagett v. James*, 327 S.W.2d 278 (Mo. banc 1959). Subject to any protective orders the court may make (Rule 25.11), those portions of any existing transcript of grand jury proceedings that relate to the offense with which the defendant is charged and that contain testimony of the defendant or the testimony of those persons whom the state intends to call as witnesses are discoverable by the defendant. Rule 25.03. Requests or motions for discovery must be made within 20 days following arraignment in the court having jurisdiction to try the offense. The request for discovery must be answered within 10 days after service of the request. The court, in its discretion, may enlarge or shorten the time. Rule 25.02. Sample form motions dealing with various aspects of grand jury information are available in §§4.25–4.27 below.

Missouri courts, like their federal court counterparts, prohibit disclosure of grand jury materials unless required by a rule or statute or upon the showing of a "particularized need." *See generally State v. McGee*, 757 S.W.2d 321 (Mo. App. W.D. 1988); *see also Ill. v. Abbott & Assocs., Inc.*, 460 U.S. 557 (1983); *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211 (1979). Many venues in Missouri, often intentionally, do not transcribe grand jury proceedings. *See, e.g., State ex rel. Dunlap v. Hanna*, 561 S.W.2d 411 (Mo. App. W.D. 1977). This prevents defendants from receiving certain grand jury materials that are available to them as a matter of right in accordance with court rule. *See* Rule 25.03(A)(3). The fact that the grand jury proceedings are not recorded, however, appears to not be grounds for dismissal in Missouri. *See State v. Greer*, 605 S.W.2d 93 (Mo. 1980), *vacated on other grounds*, 451 U.S. 1013 (1981); *see also State v. Garcia*, 682 S.W.2d 12 (Mo. App. W.D. 1984); *State v. Turner-Bey*, 812 S.W.2d 799 (Mo. App. W.D. 1991). It should be noted that both *Garcia* and *Turner-Bey* support the same proposition as *Greer*, i.e., that recording grand jury proceedings is not required. The court in *Turner-Bey*, however, favorably cites federal cases suggesting that recording grand jury proceedings is a preferable practice and allows the courts to ensure that abuse of grand jury proceedings cannot occur. *See United States v. John*, 508 F.2d 1134, 1142 (8th Cir. 1975); *see also Turner-Bey,* 812 S.W.2d at 808.

E. (§4.20) Right to Counsel Before the Grand Jury

A witness called before the grand jury does not have the right to have counsel present before the grand jury. *United States v. Williams*, 504 U.S. 36 (1992); *State v. Tressler*, 503 S.W.2d 13 (Mo. 1973). In *State v.*

Thomas, 529 S.W.2d 379 (Mo. 1975), the defendant unsuccessfully contended that the procedure was unconstitutional because it did not afford the defendant the right to be represented at a critical stage in the criminal prosecution. The ruling indicates that the absence of counsel before a grand jury does not violate constitutional rights. But a witness who is called to testify before the grand jury may wish to have an attorney available for consultation. The attorney may wait outside the grand jury room while the client testifies; if the client desires to consult with the attorney, the client may ask to be excused, step outside the grand jury room, discuss the particular matter with counsel, and return to the grand jury room for further questioning.

Interestingly, when President Clinton gave his grand jury testimony, he was allowed to testify at the White House and with his counsel present. This was, however, a negotiated agreement and is only likely to occur when someone of the stature of the President of the United States is called before a grand jury. In the more routine instance, counsel for the witness cannot enter the grand jury room during the questioning.

Although a witness does not have the right to have counsel present during the grand jury testimony, the failure to advise the witness of *Miranda* rights, *Miranda v. Arizona*, 384 U.S. 436 (1966), requires the suppression of the witness's statements to the grand jury. *State v. Eyman*, 828 S.W.2d 883 (Mo. App. W.D. 1992).

For more particular guidance, counsel should refer to Michael G. Heitz, *The Rights of a Witness Before the Grand Jury*, 43 MO. L. REV. 714 (1978). *See also* Chapter 5 of this deskbook.

VI. (§4.21) Immunity

In 1997, the Missouri General Assembly passed an immunity statute, § 491.205, RSMo 2000, which permits a prosecuting attorney to seek a grant of immunity and a compulsion order from a circuit judge. Section 491.205.2 states that the circuit judge who hears the immunity request cannot be the same judge who supervises the grand jury that is involved or the same judge who presides over a proceeding, such as a jury trial, in which the grant of immunity is applicable. This statute also states that, in considering the application, the court should consider the following:

- The likelihood that the individual would refuse to testify based on the privilege against self-incrimination
- Whether the information is necessary to the investigation or prosecution and is otherwise unobtainable
- Whether the testimony is needed by the prosecutor to prove a particular defendant's guilt beyond a reasonable doubt

The actual grant of immunity appears to be discretionary with the judicial officer from whom the application is sought.

In *State v. Pride*, 1 S.W.3d 494, 508–09 (Mo. App. W.D. 1999), the defendant suggested that a prosecutor who entered into an agreement with a cooperating witness violated public policy under the particular facts of that case. The theory was that the state was somehow "buying" testimony. The defendant further argued that it would be unlawful for the defendant to engage in that kind of conduct, and thus the law should similarly prohibit the state from engaging in the conduct. That argument was found wanting by the Western District, and the court pointed, in part, to the legislature's passing of the immunity statute. The language seemed to implicitly give approval of that statute.

A drug defendant in the District Court of Kansas made a similar argument referencing the federal bribery statute, 18 U.S.C. § 201. A panel of the Tenth Circuit found the argument compelling and suggested that the testimony should have been suppressed. *See United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998). The Tenth Circuit, en banc, reversed the panel and found the testimony to be appropriate. *See United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999). Clearly, the courts do not favorably consider arguments that tend to limit the right of the state to confer immunity on certain witnesses.

VII. (§4.22) Misconduct Before the Grand Jury

There are more federal than state decisions regarding grand juries—probably as a result of the fact that the grand jury process evolves from the Sixth Amendment to the United States Constitution. Prosecutors have broad discretion regarding the conduct of grand jury proceedings. *See, e.g., United States v. Talbot*, 825 F.2d 991 (6th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988). This discretion allows the presentation of hearsay evidence or even evidence that is otherwise

inadmissible at trial. *United States v. Calandra*, 414 U.S. 338 (1974); *Costello v. United States*, 350 U.S. 359 (1956). Only in the most egregious circumstances have indictments been dismissed for grand jury misconduct. *See generally*:

- *United States v. Kouba*, 822 F.2d 768, 773–74 (8th Cir. 1987);
- *United States v. Martino*, 825 F.2d 754, 762 (3rd Cir. 1987);
- *United States v. Azad*, 809 F.2d 291, 294 (6th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987);
- *Porcaro v. United States*, 784 F.2d 38, 44 (1st Cir. 1986).

There is, however, a small body of law that contains at least the suggestion of relief regarding misconduct before the grand jury. Some of these reasons include the following:

1. Prosecutorial vindictiveness and conflict of interest. *See United States v. Grabinski*, 727 F.2d 681 (8th Cir. 1984); *United States v. Groves*, 571 F.2d 450 (9th Cir. 1978); *United States v. DeMarco*, 550 F.2d 1224 (9th Cir. 1977).

2. Misleading the grand jury or failing to present appropriate exculpatory evidence. *United States v. Benjamin*, 852 F.2d 413 (9th Cir. 1988); *United States v. Hogan*, 712 F.2d 757, 761–62 (2nd Cir. 1983); *United States v. Estepa*, 471 F.2d 1132, 1134–37 (2nd Cir. 1972).

3. Inappropriate comments or testimony by a prosecutor or the use of a pre-signed indictment. *See United States v. McKie*, 831 F.2d 819 (8th Cir. 1987); *United States v. Frantze*, 655 F.2d 128, 138 (8th Cir. 1981); *United States v. Birdman*, 602 F.2d 547 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979).

4. Use of unauthorized personnel having access to grand jury material. *See United States v. Tager*, 638 F.2d 167 (10th Cir. 1980).

5. Use of multiple grand juries as harassment. *See United States v. Am. Honda Motor Co.,* 273 F. Supp. 810 (N.D. Ill. 1967).

6. Failure to properly instruct the grand jury. *See United States v. Alter*, 482 F.2d 1016, 1029 (9th Cir. 1973).

7. Unauthorized persons before the grand jury. *See United States v. Phillips Petroleum Co.*, 435 F. Supp. 610, 618 (N.D. Okla. 1977).

8. Use of a grand jury proceeding to foster civil litigation. *United States v. Procter & Gamble Co.*, 187 F. Supp. 55, 64 (D.N.J. 1960); *In re Special March 1974 Grand Jury Possible Violations of Title 18 and 26, United States Code*, 541 F.2d 166, 170 (7th Cir. 1976) (see in particular 170 n.3).

Two Supreme Court decisions have come close to shutting the door on any relief based on allegations of grand jury abuse. *See United States v. Mechanik*, 475 U.S. 66 (1986); *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). For a good discussion of these issues, see Anne B. Poulin, *Supervision of the Grand Jury: Who Watches the Guardian?*, 68 WASH. U. L.Q. 885 (1990).

In *Mechanik,* 475 U.S. 66, two witnesses appeared before the grand jury in violation of Federal Rule of Criminal Procedure 6(d) because they were unauthorized to be present before the grand jury. Following the defendant's conviction, this issue was raised in the Supreme Court of the United States, which rejected the defendant's argument. The Court ruled that this circumstance constituted harmless error because the conviction evidenced that this violation had no effect on the outcome of the trial or the grand jury's determination of probable cause. In response to *Mechanik*, some appellate courts have indicated that certain grand jury issues may well be the subject of interlocutory appeal. *See, e.g., United States v. Dederich*, 825 F.2d 1317 (9th Cir. 1987); *but see United States v. Taylor*, 798 F.2d 1337 (10th Cir. 1986).

The *Mechanik* Court spent much time discussing notions of prejudice and its effect on the rights of the defendant. *Mechanik* was brought to bear in *Bank of Nova Scotia,* 487 U.S. 250, when the judge in the District of Colorado dismissed an indictment based on its supervisory powers because of the variety of government misconduct before the grand jury. In reversing that case, the Supreme Court of the United States held that a trial court does not have the ability to dismiss an indictment purely because of grand jury misconduct based on its supervisory powers. The Court further held, consistent with *Mechanik*, that only upon a showing of prejudice affecting the probable cause determination of the grand jury may the Court intervene and dismiss the indictment. The language in *Nova Scotia* indicated that misconduct must have substantially influenced the

grand jury's decision to indict or that grave doubt exists that the charging decision was free from substantial influence flowing from the misconduct.

Both *Mechanik*, 475 U.S. 66, and *Nova Scotia*, 487 U.S. 250, demonstrate that courts may not use their supervisory powers to fashion remedies calculated to deter misconduct. *See, e.g., Talbot,* 825 F.2d 991. Dismissal because of misconduct requires some kind of actual prejudice to the defendant.

Common sense would indicate that the cases that have evolved in the grand jury area in federal court do have some applicability to state court practices. For the most part, the issue of misconduct in grand proceedings has not been litigated in the Missouri state courts. In many areas, grand juries are seldom used, and even in the urban areas they are generally used to bring charges and not for lengthy investigations. The charging process does not create the same potential for abuse that a long investigative use of the grand jury would, as often occurs in long federal investigations.

As stated in §4.19 above, Missouri courts have long held that the recording of grand jury proceedings is not necessary. In *State v. Eyman*, 828 S.W.2d 883 (Mo. App. W.D. 1992), a grand jury was convened in Atchison County, Missouri, to investigate the use and sale of narcotics. The defendant was a senior at Tarkio High School when he was served with a subpoena to appear before the Atchison grand jury. Upon service of that subpoena, he was arrested by law enforcement officers, handcuffed, and taken to the grand jury to testify. It was clear that he was the target of the grand jury investigation, and when he testified before the grand jury, the prosecuting attorney, his secretary, a court reporter, the sheriff, and a deputy sheriff were all present in the grand jury room. From the appellate opinion, these facts were undisputed. The defendant was never given any kind of *Miranda* warnings or cautionary instructions, *see Miranda v. Ariz.*, 384 U.S. 436 (1966), but was interrogated by the grand jury; during the interrogation he made a series of admissions eventually leading to his being charged and convicted of a drug charge.

The Missouri Court of Appeals for the Western District reversed that conviction, holding that it was improper to use the admissions made before the grand jury and that this interrogation violated the *Miranda* rule. Judge Ulrich, however, also went on to discuss the nature of grand jury proceedings and how important it is that they be

held in secret. Judge Ulrich stated, "The facts presented here are repugnant to Americans, who, when they observe similar events in other, less democratic societies, call them anathema and condemn the authorities and systems that permit their occurrence." *Eyman*, 828 S.W.2d at 886. Certainly, *Eyman* is a case demonstrating grand jury abuse. Even without the *Miranda* violations, the grand jury misconduct may well have been a basis for relief. Judge Ulrich wrote the opinions in both *Eyman* and *State v. Turner-Bey*, 812 S.W.2d 799 (Mo. App. W.D. 1991), in which the conviction was affirmed, but the court commented that it would be preferable to have had the grand jury proceedings recorded. Certainly, situations such as those occurring in *Eyman* will go undetected as long as Missouri courts continue to refuse to require the recording of all grand jury proceedings.

VIII. Forms

A. (§4.23) Motion for Bill of Particulars

In the Circuit Court of the County of St. Louis
State of Missouri

State of Missouri	)	
	)	
vs.	)	Cause No. _____
	)	
_____	)	Division
Defendant.	)	

Motion for Bill of Particulars

Comes now Defendant and moves this Court for an order requiring the prosecuting attorney to file and serve a bill of particulars for the following reasons:

1. Rule 23.04 provides for the filing and serving of a bill of particulars.

2. The indictment or information filed fails to inform Defendant of the particulars of the offense sufficiently for [him/her] to prepare [his/her] defense or to plead a judgment in this case as a bar to a subsequent prosecution.

Defendant requests that the prosecuting attorney set forth in writing the following particulars:

1. State the acts alleged in the information that constitute the offense charged.

2. State the dates and times of the acts alleged.

3. State the place where the acts are alleged to have occurred.

4. State the precise manner in which the crime charged is alleged to have been committed.

Suggestions in Support

As grounds for the foregoing motion, Defendant states that the information fails to state with precision the location and time of the alleged crimes charged. The information merely charges that the alleged crimes took place in the County of St. Louis, State of Missouri.

Defendant is without sufficient knowledge of the facts concerning the alleged criminal act to enable [him/her] to prepare [his/her] defense. Moreover, a bill of particulars is necessary to inform Defendant of the exact nature of the charges against [him/her] so as to safeguard [him/her] from further prosecution for the act or acts alleged.

Wherefore, Defendant prays for an order of this Court compelling the prosecuting attorney to file and serve a bill of particulars setting forth the information set out and for such other and further relief as the Court may deem just and proper.

_____
Attorney for Defendant

B. (§4.24) Motion to Quash Grand Jury Subpoena

In the Circuit Court of the County of St. Louis
State of Missouri

State of Missouri	)	
	)	
vs.	)	Cause No. _____
	)	
_____	)	Division
Defendant.	)	

Motion to Quash Investigating Grand Jury
Subpoena Duces Tecum

Defendant, _____, by [his/her] attorney, _____, moves this Court to quash the subpoena served on [him/her] to appear as a witness before the Investigating Grand Jury of _____ County, and states:

1. Defendant was served with subpoena number _____ dated _____, to appear before the _____ County Investigating Grand Jury of _____, 20___, on _____, 20___. A copy of the subpoena is attached as Exhibit A.

2. The subpoena included a subpoena duces tecum that ordered Defendant to bring with [him/her] _____.

3. The subpoena commands the production of records relating to business clients and to various business records.

4. The production of these records by Defendant would require an excessive amount of time and financial expense.

5. The records described in the subpoena duces tecum are not reasonably related to any lawful purpose of the investigating grand jury, and their production would be unduly burdensome and oppressive.

6. The subpoena duces tecum violates Defendant's rights against unreasonable searches and seizures and against self-incrimination under the United States and Missouri Constitutions.

7. The records requested do not relate to any offenses against the criminal laws of Missouri occurring within _____ County.

8. The investigating grand jury's inquiry is not a necessary or proper investigation under the laws of Missouri.

9. The State of Missouri can adequately investigate any matters related to the records Defendant is commanded to produce without an investigating grand jury.

Wherefore, Defendant submits that subpoena number _____ should be quashed or, alternatively, modified so as to require only the production of such documents as are reasonably related to a valid purpose of the instant investigation.

_____
Attorney for Defendant

C. (§4.25) Motion for Inspection of Grand Jury Lists

In the Circuit Court of the County of St. Louis
State of Missouri

State of Missouri	)	
	)	
vs.	)	Cause No. _____
	)	
_____	)	Division
Defendant.	)	

Motion for Inspection of Grand Jury Lists
With Incorporated Suggestions in Support

Comes now Defendant, by and through [his/her] attorneys of record, [attorney's name], and in accordance with the Missouri Rules of Criminal Procedure, moves this Court for an Order directing the Clerk of the Court to allow counsel for Defendant to inspect and copy all records or papers used during selection and empanelment of the Grand Jury that returned this indictment and in selection of the panel of the prospective members of the Petit Jury to be selected in this case for the reasons set forth in the Suggestions in Support below.

Suggestions in Support

Defendant is entitled to a Grand and Petit Jury composed of persons selected in accordance with the laws and Constitution of the United States and the laws and Constitution of the State of Missouri and that fairly represent a random cross-section of the community. The inspection of these records will permit Defendant to determine whether the Grand Jury and jury panel described above have been selected and treated in accordance with the law.

An unqualified right to this inspection is required by the plain text of 28 U.S.C. §§ 1861 and 1867(f). *Test v. United States*, 420 U.S. 28 (1975).

Wherefore, Defendant moves for an Order allowing inspection and copying of the material described and for such further and other relief as the Court may deem just and proper.

_____
Attorney for Defendant

D. (§4.26) Motion for Discovery of Grand Jury Procedures

In the Circuit Court of the County of St. Louis
State of Missouri

State of Missouri	)	
	)	
vs.	)	Cause No. _____
	)	
_____	)	Division
Defendant.	)	

Motion for Discovery of Procedures Followed by Investigating and Indicting Grand Jury

Separate Defendant [name], by and through [his/her] attorneys, moves the Court for an Order directing the Independent Counsel to produce the following information regarding procedures followed by the investigating and indicting grand jury in this case:

1. Each date (day, month, and year) that testimony was presented to any grand jury investigating matters for which this Defendant has been indicted, including, but not limited to, the grand jury that considered and voted for the instant Indictment.

2. The records of attendance of each member of any grand jury that participated in the investigation or matters involving this Defendant, including, but not limited to, the indicting grand jury in the instant case, specifying the exact dates upon which each grand jury member attended a session of the grand jury.

3. The voting record of each grand juror as to the instant Indictment and the voting record, if any exists, of any other grand jurors who were members of any grand juries investigating incidents that led to the instant Indictment, and particularly:

    a. The dates that votes were taken on the instant Indictment and any other voting that took place among other grand juries;

b. On the date referred to in Paragraph 3a above, the votes of each individual grand juror on count 3 of the Indictment as to Separate Defendant.

4. The manner in which the Indictment was presented to the indicting grand jury for approval, including:

   a. The date(s) the instant Indictment was presented to the indicting grand jury.

   b. Who was responsible for drafting the instant Indictment, i.e., the grand jurors, the Independent Counsel's attorneys, or others.

   c. How the instant Indictment was presented to the grand jury for approval, e.g., was it read to the grand jurors before each vote or were copies of the proposed Indictment given to each individual grand juror to read before each vote? Was it signed by the Independent Counsel before the Indictment being returned?

   d. Who was the representative of the Independent Counsel's office that presented the Indictment to the grand jury and in what manner did that person present the Indictment?

5. What procedures, if any, were taken to refresh grand jurors' recollections as to testimony given at previous sessions of the grand jury?

6. What procedures, if any, were taken to inform grand jurors absent from a particular session about testimony previously given by witnesses called before the grand jury?

7. What jury instructions, if any, were given to the grand jury before voting on the instant Indictment, and when were the instructions given?

8. What pledge, if any, were the grand jurors returning the instant Indictment in this case required to make regarding what they would base their decision on in determining whether the Indictment should be returned?

9. Was any "hearsay" evidence presented to the grand jury regarding the instant Indictment? If so, state:

a. If the grand jury was informed that the evidence that they were receiving was hearsay.

b. If the grand jury was informed that they could disregard the "hearsay" evidence and require the presence of the "declarant."

10. A transcript of the opening and closing statements made by the Independent Counsel attorneys to the grand jury returning the instant Indictment and to any investigating grand juries concerning the instant Indictment.

11. A transcript of any colloquy between Independent Counsel attorneys and members of the grand jury that took place before, during, or after the testimony of any witnesses.

12. A transcript of any colloquy or conversations that took place between Independent Counsel attorneys and members of the grand jury with respect to instructions that were given to the grand jury or explanations of either law or fact made to the grand jury or inquired about by any members of the grand jury.

13. What procedures, if any, were taken to inform grand jurors of the grand jury that voted for the instant Indictment about testimony previously given to the first grand jury that investigated this matter but did not vote for the instant Indictment?

14. Copies of all lists filed with the Circuit Court disclosing the identity of individuals who have been given access to grand jury material.

15. The Court's initial instructions given to the grand jury.

16. A transcript of the voir dire conducted with respect to the grand jury.

Wherefore, this Defendant prays for an Order of this Court granting [his/her] Motion in all respects and for any other proper relief.

Respectfully submitted,

_____

Attorney for Defendant

E. (§4.27) Motion for Disclosure of Grand Jury Minutes and Records

In the Circuit Court of the County of St. Louis
State of Missouri

State of Missouri	)	
	)	
vs.	)	Cause No. _____
	)	
_____	)	Division
Defendant.	)	

Motion for Disclosure of Grand Jury Minutes and Records, Including Records of Prior Presentments, Attendance Records, Instructions to Grand Jury, and Colloquies Between Prosecutors and Grand Juries

Comes now Defendant, _____, by and through [his/her] undersigned Attorney, _____, and respectfully moves this Court, in accordance with the Missouri Rules of Criminal Procedure, to Order the state to produce for inspection by defense counsel the minutes and records, including voting procedures of, and instructions to, the grand jury returning the Instant indictment as well as the minutes and records of any other grand jury sitting in this District or any other District that has investigated or considered the information and allegations contained in the Indictment. This Motion includes, but is not limited to, the records of any prior grand jury presentments regarding the general matters set out in the Indictment, return of any no-true bills, instructions, and prosecutor colloquies with grand juries.

Unless Defendant is provided the records and information requested, [he/she] will be deprived of the rights of due process, equal protection of the law, and effective assistance of counsel, all guaranteed by the United States Constitution and the laws and Constitution of the State of Missouri.

This Motion is made and based on all of the records and pleadings on file and on the Memorandum of Law attached.

_____
Attorney for Defendant

F. (§4.28) Motion to Dismiss Indictment, or in the Alternative, for a Bill of Particulars

In the Circuit Court of the County of St. Louis
State of Missouri

State of Missouri	)	
	)	
vs.	)	Cause No. _____
	)	
_____	)	Division
Defendant.	)	

Motion to Dismiss the Indictment, or in the Alternative, for a Bill of Particulars

Comes now Defendant, by and through counsel, and requests that the Court enter an order dismissing the Indictment in this cause because:

1. The Indictment fails to state an offense as required by Rule 23.01(b)(2)–(3);

2. Section 570.080, RSMo Supp. 2004, is unconstitutional in that it, in effect, creates an irrefutable presumption about the admission of other acts or other crimes evidence;

3. The grand jury proceedings in this case were not transcribed, and further, the use of the grand jury in this cause denied Defendant the right to preliminary examination, thus violating [his/her] rights to due process of law and equal protection of law.

Without waiving [his/her] request for dismissal, Defendant prays in the alternative for a bill of particulars.

Suggestions in Support of Motion

1. Upon counsel's belief and knowledge, it is stated to the Court that beginning in April of 1984, a specially impaneled grand jury in _____ County, Missouri, began hearing evidence with regard to allegations of auto theft, receiving stolen property, and other associated matters touching on the alleged trafficking in stolen automobiles and parts. As a result of the grand jury proceedings, multiple indictments

were handed down, including the three-count indictment that involves Defendant and is the subject of this cause now before the Court.

2. It is Defendant's belief that the grand jury proceedings in this cause were not transcribed and that this nontranscription was done intentionally as is the practice throughout the State of Missouri. *See generally State ex rel. Dunlap v. Hanna*, 561 S.W.2d 411 (Mo. App. W.D. 1977). Because there are no transcripts of this proceeding, Defendant is prevented from challenging the grand jury indictment based on any irregularities connected with the grand jury process,[1] and this violates Defendant's right to due process of law as granted by article I, § 10, of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Further, because the failure to record the grand jury proceeding in this cause effectively thwarts Defendant's

---

[1]Defendant suggests respectfully, without undue case citation, the grand jury proceedings can be challenged for a variety of reasons, including:

- misleading of the grand jury;
- excessive use of hearsay before the grand jury;
- use of summaries before the grand jury;
- use of unauthorized personnel being before the grand jury;
- use of grand jury proceedings as an alternative to civil remedies, and the like; and
- dissemination of grand jury information to unauthorized parties.

Further, counsel suggests to the Court that much of the basis for these challenges of the grand jury will be the subject of discussion in federal caselaw authority. Defendant recognizes that this matter is a matter pending in the Circuit Court of _____ County, Missouri, and that the Court will be governed by the laws of the State of Missouri. Defendant suggests to the Court that it is the law in the State of Missouri that, when matters arise as to which there is a lack of state precedent and which are the subject of federal law, the Missouri courts will often defer to federal law and find it persuasive. *See, e.g., Kansas City v. Mo. Comm'n on Human Rights*, 632 S.W.2d 488, 490 (Mo. banc 1982) (touching upon allegations of sexual and racial discrimination). *See also State v. Prier*, 561 S.W.2d 437, 439 (Mo. App. S.D. 1978) (touching on issues of severance of counts and defendants); § 416.141, RSMo 2000 (which by law incorporates federal caselaw authority in the context of state antitrust violations). Further, Defendant has cited in this motion certain matters of federal law regarding the motion for a bill of particulars, and also for insufficiency of the indictment. In this regard, it is again Defendant's contention that the state law of Missouri would indicate that federal precedent should be considered and be persuasive. Rule 23.04 indicates that the bulk of that Rule is an exact duplication of Federal Rule of Criminal Procedure 7(f) regarding bill of particulars. Further, it is Defendant's contention that federal precedent would be persuasive and should be considered within the confines of this motion regarding the sufficiency of pleading in that the pleading is relevant to the notice requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

discovery as is required by Rule 25.03(A)(3), the same failure to transcribe violates Defendant's rights to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, § 18(a), of the Missouri Constitution. Finally, it is Defendant's contention that the grand jury proceedings in this cause prevented Defendant from having the benefit of a preliminary examination, thus violating [his/her] rights to equal protection of law and due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, article I, § 10, of the Missouri Constitution, and article I, § 2, of the Missouri Constitution.

3. Because the grand jury proceedings in this cause were not transcribed, it would be impossible to tell if the grand jury was in any way misled. Further, it is Defendant's contention that, with the multiple defendants involved in this case and the massive investigation, the confusion involved could amount to misleading of the grand jury, thus requiring dismissal of the Indictment. *See generally United States v. Estepa*, 471 F.2d 1132, 1134–37 (2nd Cir. 1972); *see also United States v. Hogan*, 712 F.2d 757 (2nd Cir. 1983); *United States v. Leibowitz*, 420 F.2d 39 (2nd Cir. 1969).

4. It is jurisdictional prerequisite that any judgment or sentence in a criminal case be based on a valid indictment or information setting out all the necessary elements of the offense. *See generally State v. Chambers*, 550 S.W.2d 846 (Mo. App. W.D. 1977); *State v. Clark*, 546 S.W.2d 455 (Mo. App. W.D. 1976). *See also* Missouri Constitution, article I, § 17 (*see also* article I, § 19, of the Missouri Constitution in regard to Defendant's right to be protected against double jeopardy), and the Fifth and Sixth Amendments to the United States Constitution. For the indictment to be sufficient, it must, therefore:

    a. inform Defendant of the nature of the accusation;

    b. be sufficient and definite enough to enable Defendant to prepare [his/her] defense; and

    c. be definite enough to serve as a bar to double jeopardy.

See generally State v. Tandy, 401 S.W.2d 409 (Mo. 1966); *State v. Ballard*, 394 S.W.2d 336 (Mo. 1965); *see also Sanabria v. United States*, 437 U.S. 54 (1978); *United States v. Thomas*, 610 F.2d 1166 (3rd Cir. 1979). A defective indictment will not be saved by the fact that it mirrors a statute or a form. *See generally State v. Kesterson*, 403 S.W.2d 606, 609 (Mo. 1966); *Goodloe v. Parratt*, 605 F.2d 1041 (8th Cir. 1979); *United States v. Cecil*, 608 F.2d 1294 (9th Cir. 1979). The Indictment in this cause is defective because it does not specifically state what particular vehicles, as opposed to any like vehicles, Defendant is alleged to have received knowing them to be stolen. This infirmity is found similarly in all three counts of the Indictment. Further, all three counts of the Indictment fail to state whether Defendant actually received the vehicle or parts of it, and this fails to adequately inform Defendant of the charge against [him/her]. Further, the lack of specificity in terms of what was received and what particular vehicle was received obviously prevents Defendant from using the Indictment in this cause as a bar to double jeopardy beyond these proceedings.

5. An indictment that suffers from duplicity is defective and fails to inform the defendant of the charge or protect the defendant against double jeopardy. *See* 69 GEO. L.J. 215, 323–34 (1980); *see generally United States v. Murray*, 618 F.2d 892 (2nd Cir. 1980); *United States v. Avila-Dominguez*, 610 F.2d 1266 (5th Cir. 1980). A duplicitous indictment is one in which more than one act is charged within a single count. In a sense, there is a duplication of acts within the counts. In a duplicity situation, the defendant cannot be sure what to defend against, or what subsequent charges would be barred in terms of double jeopardy. By the very nature of the pleading in this cause, Defendant is not only not informed what particular vehicle [he/she] is alleged to have received, but [he/she] further is not informed of whether or not [he/she] received the vehicle or parts of it. Thus, if Defendant is being charged in one count with both receiving a stolen car and receiving parts of a stolen car, both felonies, allegedly because [he/she] is in the business of buying and selling vehicles and vehicle parts, as stated in § 570.080, RSMo Supp. 2004, the use of this charge is duplicitous and must fail.

6. The Indictment does not allege specifically enough the time and place of the alleged offense as definitely as can be done as required by Rule 23.01(b)(3), and it does not otherwise comply with all the requirements of Rule 23.01. The Indictment does not allege the ownership of the property or that the property belonged to another. Further, the Indictment is unclear as to dates and location of the alleged reception of stolen property, thus making it impossible to defend against the charges. It does appear from the Indictment in this cause that the prosecutors attempted to follow the MAI forms in pleading this Indictment. Yet, following a provided-for form or the statute involved does not necessarily equate to sufficient pleading. *See Kesterson,* 403 S.W.2d 606; *Cecil,* 608 F.2d 1294; *Goodloe,* 605 F.2d 1041. In this regard, the Supreme Court of Missouri in *Kesterson* stated as follows:

> Generally, it is permissible and sufficient for an indictment . . . to charge the offense in the language of the statute alleged to be violated if the statute sets forth all the constituent elements of the offense. However, there are qualifications of this rule. . . . "Such is not the case if the statute creating the offense uses generic terms in defining the offense and does not individuate the offense with such particularity as to notify the defendant of what he or she is to defend against."

Kesterson, 403 S.W.2d at 609 (citations omitted). Defendant specifically states that the Indictment in this case is deficient in that:

a. it denies Defendant proper notice;

b. it does not provide Defendant with adequate information to build a defense;

c. it does not provide Defendant with adequate notice to create a bar for double jeopardy to future charges; and

d. it is so indefinite that Defendant cannot tell what is a charged act and what are uncharged acts within the discovery provided to Defendant.

7. The Indictment in this cause should be dismissed because § 570.080.3 is unconstitutional in that it denies Defendant equal protection of the law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution,

and article I, § 2, of the Missouri Constitution because the statute provides a different penalty for an unreasonably selected class of persons, i.e., persons who deal in goods of the type in question are always guilty of a felony while other persons may be guilty only of a misdemeanor if the value of the property is less than $150. *See generally Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Defendant contended that a special classification was enacted because dealers present a special problem by virtue of the fact they presumably have a regular clientele and perhaps a legitimate business to facilitate their illegal trade. Defendant contended that this reasoning was preposterous and unfounded in fact and experience. Further, Defendant urged the Court that § 570.080.2 is unconstitutional. That subsection provides as follows:

> 2. Evidence of the following is admissible in any criminal prosecution pursuant to this section to prove the requisite knowledge or belief of the alleged receiver:
>
> (1) That he was found in possession or control of other property stolen on separate occasions from two or more persons;
>
> (2) That he received other stolen property in another transaction within the year preceding the transaction charged;
>
> (3) That he acquired the stolen property for a consideration which he knew was far below its reasonable value.

Thus, by legislative fiat, this law creates a nonrebuttable presumption that other act evidence, evidence that under common law is presumptively inadmissible, is admissible. This provision of the statute not only creates a nonrebuttable presumption, *see Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Engle v. Koehler*, 707 F.2d 241 (6th Cir. 1983), *aff'd*, 466 U.S. 1 (1984), but also shifts the burden of proof, *Sandstrom v. Mont.*, 442 U.S. 510 (1979); *see also Conn. v. Johnson*, 460 U.S. 73 (1983), thus denying Defendant due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and article I, § 10, of the Missouri Constitution. Further, the admissibility of other act evidence in this cause would be so prejudicial and outweigh any probative value as to violate due process of law.

8. None of the counts has alleged what interest in the allegedly stolen items Defendant intended to deprive the owner of, whether it was an ownership interest, a possessory interest, a license interest, the interest of an invitee, or merely the general interest of the public.

9. Defendant urges the Court that the issues raised in this motion are constitutional in nature. The procedure against Defendant in terms of this Indictment violates [his/her] rights under the spirit of article I, §§ 2, 10, 16, 17, 18, and 19, of the Missouri Constitution and the Fifth and Sixth Amendments to the United States Constitution, as incorporated to the states through the Fourteenth Amendment to the United States Constitution.

10. Defendant also takes the position that the defects described in this Indictment are not subject to amendment by information in lieu of indictment because it would create an additional different offense that is charged and would prejudice the substantial rights of Defendant. *See generally State v. Cobb*, 444 S.W.2d 408 (Mo. banc 1969); *see also State v. Warfield*, 507 S.W.2d 428 (Mo. App. E.D. 1974). Defendant, while recognizing the proposition in Missouri law that in limited situations an amended information may be filed in lieu of indictment, takes the position that an indictment cannot be amended other than to delete surplusage because allowing amendment of an indictment or information in lieu of indictment involves invading the province of the grand jury. Further, if amendment is allowed, Defendant would not be ensured that [he/she] is being charged on the same offense for which the grand jury indicted [him/her]. *See generally Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Glassman*, 562 F.2d 954 (5th Cir. 1977); *Indictment Sufficiency*, 70 COLUM. L. REV. 876 (1970).

11. Rule 23.04 allows Defendant to move for a bill of particulars if the indictment or information alleges essential facts to state an offense but fails to provide Defendant with sufficient information to prepare a defense. The Rule provides that the motion is to be made within ten days of arraignment, or at such a later date as the court may permit. Defendant's counsel in this cause was not officially retained in this matter until on or about August 17, 1984. And Defendant did not have an opportunity to travel to _____, Missouri, and be apprised of any discovery in this case until on or about September 10, 1984. As the Court is aware, this matter involves an investigation in which there have been multiple indictments and touches on a discovery file that includes _____ pages and includes video and audiotapes of potential witnesses now in the possession of the Federal Bureau of

Investigation and local authorities. Even with the good faith and cooperative efforts of the _____ County Prosecutor's Office, it was impossible for Defendant to be in a position to move for dismissal in this cause or to file for a bill of particulars within the ten-day time frame as defined by the Rule. For these reasons, Defendant specifically asks leave of Court to file the bill of particulars in this cause and asks the Court to consider Defendant's alternative request for a bill of particulars.

12. Specifically, Defendant, in this alternative request for a bill of particulars, asks the following:

    a. The actual automobiles or vehicles alleged in each count of the indictment, with specificity

    b. Whether the State is alleging Defendant received the automobile or parts of it

    c. What parts, if any, the State alleges Defendant received

    d. Where in _____ County these offenses occurred

    e. Any other participants involved in the allegations contained in the Indictment

    f. The owners, with complete addresses, of any of the vehicles alleged to be stolen in the Indictment

    g. The value of the property alleged in the Indictment, or the value of the parts of automobiles alleged in the Indictment

Wherefore, based on the foregoing, Defendant requests an order of this Court dismissing this Indictment, or, alternatively, without waiving Defendant's request for dismissal, Defendant requests that this Court order the State to provide a bill of particulars as requested and Defendant requests that the Court enter any other relief deemed just and proper.

Respectfully submitted,

Law Firm
By _____
Name
Address
Phone Number
Missouri Bar Number
Attorney for the Defendant

Thomas M. Bradshaw*
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Chapter 5

REPRESENTING CLIENTS BEFORE INVESTIGATIVE BODIES

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II. Grand Jury Investigations

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I. (§5.1) Introduction

With the continuing emphasis on the prosecution of white-collar crime cases, attorneys are faced more and more frequently with representing clients in criminal and civil investigations conducted by federal and state agencies. These investigations often have criminal law overtones and frequently lead to both criminal prosecutions and companion civil actions. The purpose of this chapter is to focus the defense attorney's awareness on the importance of the investigative stage of the proceedings and to point out pitfalls where strategy decisions and procedural steps can have long-term repercussions for the client in future litigation.

II. Grand Jury Investigations

A. (§5.2) Introduction

Because state prosecutions in Missouri generally proceed by information without presentation to a grand jury, this portion of the chapter necessarily deals primarily with federal grand jury proceedings. The scope of this material does not include discussion of the history of federal grand juries or constitutional challenges to the composition of the grand jury. Rather, it will treat the practical aspects of representing witnesses who have been subpoenaed to provide grand jury testimony or to produce tangible evidence.

B. (§5.3) Consideration Before Accepting Representation

When the focus of a grand jury investigation is a business crime, an attorney will frequently be faced with a proposal to represent several employees of a company who have been subpoenaed to give testimony or produce business records. Often the employer agrees to pay the cost of representation. These witnesses generally fall into one of three categories:

1. Principal target defendants (prosecutor or grand jury has substantial evidence linking them to the commission of a crime; in the judgment of the prosecutor, they are putative defendants)

2. Suspect or secondary target defendants (person whose conduct falls within the scope of the grand jury's investigation)

3. Fact witnesses who are not potential defendants

UNITED STATES ATTORNEYS' MANUAL § 9-11.151 (USDOJ 2002), *available at*:

www.usdoj.gov/usao/eousa/foia_reading_room/usam/

Decisions as to whether a particular witness should:

- assert the Fifth Amendment privilege against self-incrimination;
- seek immunity in exchange for cooperation with the government; or
- testify without any immunity

naturally depend on the classification into which the witness falls.

Because a particular witness's decision as to which of the above options are in that witness's best interest impacts on other witnesses and target defendants, an attorney representing several witnesses in different classifications is faced with a dilemma. The respective interests of the clients in approaching strategy decisions pertaining to their grand jury appearance may be conflicting. It is the recommendation of these authors that counsel represent only one witness if that person is a target defendant or suspect. It may be possible to represent several fact witnesses before the same grand jury and thereby reduce their legal fees. But a target defendant is entitled to counsel's undivided loyalty, and a fact witness has a right to the advice of counsel unencumbered by considerations emanating from simultaneous representation of a target defendant. For an understanding of the ethical considerations involved in multiple witness representations, see:

- Rule 4-1.6, Confidentiality of Information
- Rule 4-1.7, Conflict of Interest: General Rule
- Rule 4-1.8(g), Conflict of Interest: Prohibited Transactions
- *Holloway v. Arkansas*, 435 U.S. 475, 482–83 (1978)

C. Conducting One's Own Investigation

1. (§5.4) Information to Be Obtained From Clerk of Court

By contacting the clerk of the United States District Court from which a client's grand jury subpoena was issued, counsel can obtain information as to the identity of the judge who convened this particular grand jury and who will be responsible for ruling on all applications or motions in connection with proceedings before the grand jury. The clerk can also provide the date when this particular grand jury was impaneled and the date when its term will expire. Inquiry should be made as to whether this is a regular grand jury or a special grand jury authorized by 18 U.S.C. §§ 3331 *et seq*. If a client is to appear before a special grand jury, counsel should determine whether its term has been extended by the court. Federal law applicable to special grand juries requires the prosecutor to file a statement with the clerk of the court specifying the crime under investigation. Unless the statement is filed under seal for unusual security reasons, this statement should be available to counsel.

A grand jury serves until discharged by the district court; the term of the grand jury generally may not be longer than 18 months. But a court may extend the service of a grand jury for up to 6 additional months. FED. R. CRIM. P. 6(g). This term begins on the date of impanelment. *United States v. Armored Trans., Inc.*, 629 F.2d 1313 (9th Cir. 1980), *cert. denied,* 450 U.S. 965 (1981). A witness who refuses to testify after being ordered to do so by the district court can be held in civil contempt under 28 U.S.C. § 1826 and imprisoned for the balance of the grand jury's term or charged with criminal contempt. By determining the date of impanelment, counsel can advise the client about the anticipated length of confinement for civil contempt if the client refuses to testify. But counsel must keep in mind that, upon the expiration of the first grand jury's term, the witness may be subpoenaed to testify before a second grand jury, and contempt proceedings may be reinstituted.

In the Western and Eastern Districts of Missouri, as in most federal judicial districts, the subpoena will often contain an attachment that will state the nature of the criminal violations

being investigated or at least the criminal statute that is the subject of the investigation.

2. (§5.5) Information to Be Obtained From Prosecuting Attorney

The witness subpoena should indicate the name of the prosecuting attorney who is responsible for presentation of the investigation to the grand jury. The extent to which a prosecuting attorney is willing to disclose information to counsel in advance of the client's appearance before the grand jury will vary depending on the nature of the case, the extent of the witness's suspected involvement, and whether counsel is representing multiple witnesses in the same case. While a prosecutor may adopt an "open file" policy and freely exchange information with an attorney representing a fact witness or a suspect, the prosecutor may be extremely reluctant to disclose information to an attorney who represents both a minor party and a target defendant.

Counsel should try to obtain the following from the prosecutor:

- A more specific description of the criminal violations being investigated by the grand jury regardless of whether the client is a target defendant
- What information the prosecutor has already obtained regarding the client
- Whether the client has been a participant in conversations that have been electronically recorded by the government
- The nature of the testimony that the prosecutor intends to elicit from the client

If the subpoena is for documents only, rather than testimony, it is advisable to work out an agreement with the prosecutor whereby the documents can be produced informally to the prosecutor or case agent by counsel rather than requiring the custodian to appear with the records before the grand jury.

Early contact with the prosecuting attorney can also lead to fruitful discussions regarding the likelihood that counsel's client will refuse to testify on the basis of the Fifth Amendment privilege against self-incrimination and the possibility of the prosecutor's responding with a grant of immunity. As will be discussed later in this chapter, substantial economies of time can

be realized by attempting to work out these matters with the prosecutor in advance.

3. (§5.6) Other Sources

While FED. R. CRIM. P. 6(e) provides for strict protection of the secrecy of grand jury proceedings, this requirement does not apply to federal grand jury witnesses themselves. Note: This prohibition on releasing grand jury testimony has been lifted in certain circumstances under the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272. See §5.37 below for a more detailed discussion of this issue.

Witnesses are free to disclose the nature and content of their testimony before the federal grand jury. *In re Grand Jury Investigation* (*Lance*), 610 F.2d 202, 217 (5th Cir. 1980); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983).

During a lengthy federal grand jury investigation, the identity of witnesses who have already been subpoenaed to testify before the grand jury often becomes known. If possible, these witnesses should be interviewed so that counsel will be able to learn:

- the focus of the grand jury investigation;
- the types of questions likely to be asked of the client; and
- the information that has already been provided to the grand jury.

It is improper for a prosecuting attorney to instruct witnesses not to discuss their testimony. *United States v. Radetsky*, 535 F.2d 556, 569 (10th Cir. 1976) (admonition not supported by FED. R. CRIM. P. 6(e)), *abrogated on other grounds by United States v. Daily,* 921 F.2d 994 (10th Cir. 1990). An exception to this rule exists if the government can show with particularity that a need for secrecy exists that outweighs the policy of nonsecrecy. In such a case, the court can order the "grand jury witness to keep secret from targets of investigation the existence of [the] subpoena, the nature of documents subpoenaed, or testimony before the grand jury, for an appropriate period of time." *In re Grand Jury Subpoena Duces Tecum,* 797 F.2d 676, 680 (8th Cir. 1986), *cert. dismissed, Merchs. Nat'l Bank of Fort Smith v. United States*, 479 U.S. 1013 (1986).

State grand jury witnesses are sworn to secrecy when they testify, § 540.110, RSMo 2000, and it is a misdemeanor for a witness to willfully violate that oath by disclosing testimony, § 540.120, RSMo 2000.

4. (§5.7) Secrecy of Grand Jury Subpoenas

It has become common practice in many U.S. Attorney offices to type a legend on the face of the subpoena urging secrecy, in the following language:

> "You are requested not to disclose the existence of this subpoena nor that your company has given information to the Grand Jury. Such a disclosure could impede the proper enforcement of the criminal laws of the United States."

In some situations the recipient of the subpoena may have a duty to notify a client about the subpoena. For example, when the subject of the investigation is a law firm or accounting firm, the recipient of the subpoena may have a duty to notify the company so that a claim of privilege can properly be asserted.

When the recipient of the subpoena is not a financial institution and in the absence of knowledge that notifying a third party about the issuance of a grand jury subpoena will necessarily lead to destruction of relevant documents, absconding, or other acts of obstruction of justice, there is no known legal prohibition against such notice to a third party. If counsel is considering providing such notice to a third party, one approach may be to write to the federal prosecutor who issued the subpoena and ask that the prosecutor share the information indicating that such notice would lead to obstruction of justice.

5. (§5.8) Subpoenas Relating to Financial Institutions

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, amended 18 U.S.C. § 1510 (obstruction of criminal investigations), making it a criminal offense for an officer, director, partner, employee, or attorney of a financial institution to knowingly notify any person that a grand jury has subpoenaed the records of a customer in connection with an investigation of ten banking law violations. *See* 18 U.S.C. § 1510(b). Notification

of any person "with the intent to obstruct a judicial proceeding" is a felony offense carrying with it a fine, a maximum five-year prison term, or both. 18 U.S.C. § 1510(b)(1). A disclosure of the existence of a subpoena without the intent to obstruct justice would subject the violator to a misdemeanor conviction with a fine, a maximum one-year prison sentence, or both. 18 U.S.C. § 1510(b)(2).

6. (§5.9) Grand Jury Witness Tampering

It is important to keep in mind when investigating a grand jury subpoena that 18 U.S.C. § 1512(b) makes it a crime for anyone to attempt to or knowingly intimidate, threaten, or corruptly persuade another person with the intent to influence, delay, or prevent the testimony of any person before a grand jury. Knowingly causing or inducing anyone to withhold grand jury testimony or a document or record requested by the grand jury is also a federal crime. Conviction can result in a term of imprisonment of up to ten years.

D. Motion to Quash *Subpoena Duces Tecum*

1. (§5.10) Scope of Subpoena

A grand jury subpoena has been held to be a search and seizure within the meaning of the Fourth Amendment to the United States Constitution. *Hale v. Henkel*, 201 U.S. 43 (1906). A grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden is on the recipient to show otherwise. *United States v. R. Enters., Inc.*, 498 U.S. 292 (1991). Under both the Fourth Amendment prohibition against unreasonable search and seizures and FED. R. CRIM. P. 17(c), a *subpoena duces tecum* may be unreasonable and oppressive and, therefore, vulnerable to a motion to quash unless it meets the following three requirements:

1. The subpoena may only require the production of documents or things relevant to the investigation being pursued.

2. The subpoena must specify the things to be produced with a reasonable particularity.

3. The subpoena can require the production of records covering only a reasonable period of time.

United States v. Gurule, 437 F.2d 239, 241 (10th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971); *see also United States v. Kalter*, 5 F.3d 1166 (8th Cir. 1993).

The government is not held to the strict trial evidence standard of relevancy in determining the proper scope of a grand jury subpoena. *Schwimmer v. United States*, 232 F.2d 855, 862 (8th Cir. 1956). When a subpoena is challenged on relevancy grounds, the motion to quash will be denied unless the moving party has made an initial showing that no reasonable possibility exists that the materials sought will produce information relevant to the general subject of the grand jury's investigation. *R. Enters., Inc.,* 498 U.S. 292.

In connection with this relevancy determination, the court may require the government to reveal to the subpoenaed party the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion. *Id*. The government's burden of proof on the relevancy issue may be met by filing an affidavit setting forth the nature of the investigation and the general relevancy of the subpoenaed documents.

The test for determining specificity has generally been held to be twofold:

1. Does the subpoena sufficiently describe the documents requested so that the recipient may, in good faith, know what the recipient is being asked to produce?

2. Is the subpoena so broad that a person complying in good faith would be harassed or oppressed to the point that the person experiences an unreasonable business detriment?

In re Corrado Bros., Inc., 367 F. Supp. 1126, 1132 (D. Del. 1973); *In re Grand Jury Subpoenas Duces Tecum,* 391 F. Supp. 991, 999 (D.R.I. 1975).

Lastly, the period of time covered by the subpoena should be reasonably related to the nature and scope of the grand jury investigation. *Schwimmer,* 232 F.2d 855; *see also In re Corrado Bros.,* 367 F. Supp. 1126.

2. (§5.11) Personal Versus Business Documents and the Privilege Against Self-Incrimination

The protection accorded personal records by the Fifth Amendment has been the subject of dispute and controversy. A witness's personal records were generally deemed to be within the protection of the Fifth Amendment privilege against self-incrimination. *United States v. Beattie*, 522 F.2d 267, 270 (2nd Cir. 1975), *modified on other grounds*, 541 F.2d 329 (2nd Cir. 1976), *cert. denied*, 425 U.S. 970 (1976); *In re Grand Jury Subpoena Duces Tecum* (*John Doe*), 466 F. Supp. 325 (S.D.N.Y. 1979). *But see United States v. Doe,* 465 U.S. 605 (1984) (O'Connor, J., concurring) ("the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind.").

In *Doe,* the Supreme Court held that the owner of a sole proprietorship subpoenaed to produce the business's records could not assert his Fifth Amendment privilege to the contents of the records because preparation of the records was voluntary and therefore not compelled. On the particular facts of the case, however, the "act of production" in complying with the subpoena tacitly involved compelled testimony to the extent that the sole proprietor, in producing the records, thereby authenticated those documents, confirmed their existence, and indicated his belief that the documents were responsive to the subpoena. Therefore, the Fifth Amendment protected the proprietor from the act of producing the records. *Doe,* 466 F. Supp. 325.

The Eighth Circuit has held that the owner of a sole proprietorship who is subpoenaed to produce documents that the owner is required to keep by law cannot use the "act of production" doctrine to claim Fifth Amendment privilege. This is so even if the act of production involves compelled testimonial self-incrimination. *In re Grand Jury Subpoena*, 21 F.3d 226, 230 (8th Cir. 1994).

Compare *In re Grand Jury Subpoena Duces Tecum Dated May 9, 1990*, 741 F. Supp. 1059 (S.D.N.Y. 1990), holding that personal, nonbusiness records protected by the Fifth Amendment as private papers are merely "an extension of one's thoughts," and compelling their production is testimonial and no different from compelling oral confession. The United States District Court for the Southern District of New York, relying on the early Supreme Court case of *Boyd v. United States*, 116 U.S. 616 (1886)

(declaring that Fifth Amendment privilege protects personal, non-business documents), determined that the Supreme Court holdings of *Doe,* 466 F. Supp. 325, and *Fisher v. United States*, 425 U.S. 391 (1976), finding no Fifth Amendment privilege for business records, should not be mechanically applied to private papers. *In re Grand Jury,* 741 F. Supp. at 1067. Rather, the *Boyd* privilege for private papers should be retained or, in the alternative, the privilege should be subject to a balancing test. *Id.* at 1069–70.

The Supreme Court has held that, under the collective-entity rule, a corporate officer, director, or employee holds corporate records in a representative capacity and may not resist a subpoena for corporate records on Fifth Amendment grounds. *Braswell v. United States*, 487 U.S. 99 (1988). But because the corporate custodian acts as a representative, the act of production is deemed to be that of the corporation and not the individual. As a result, the government may not make evidentiary use of the "individual act" of production against the individual. *Id.* at 117–18.

The Eighth Circuit, following *Braswell*, has held that:

- individuals still may assert their Fifth Amendment privilege as to private papers;
- as to corporate records, the grand jury or trial jury may not be informed of the identity of the individual who produced the records if to do so would incriminate the producing individual; and
- the issue of whether, and to what extent, a custodian may be compelled, without use immunity, to authenticate corporate documents remains an open question to be decided on a case-by-case basis.

In re Grand Jury Witnesses, 92 F.3d 710 (8th Cir. 1996).

It is important to note that several circuits have recognized *Braswell*'s inapplicability to former employees who are subpoenaed to produce corporate documents. When a former employee produces corporate records in the employee's possession "he cannot be acting in anything other than his personal capacity"; as a result, the former employee's Fifth Amendment

privilege attaches. *In re Three Grand Jury Subpoenas Duces Tecum*, 191 F.3d 173, 181 (2nd Cir. 1999); *see also United States v. McLaughlin*, 126 F.3d 130, 133 (3rd Cir. 1997) (a former employee who would be required to produce purloined corporate documents can assert a Fifth Amendment privilege against self-incrimination), *new trial granted on other grounds*, 89 F. Supp. 2d 617 (E.D. Pa. 2000); *In re Grand Jury Proceedings,* 71 F.3d 723, 724 (9th Cir. 1995) (the collective entity rule, which recognizes that corporations and other collective entities are treated differently from individuals for Fifth Amendment purposes, does not apply to a former employee of a collective entity who is no longer acting on behalf of the collective entity).

In *In re Grand Jury Empaneled on April 6, 1993*, 369 F. Supp. 298 (D.N.J. 1994), the government sought to compel a corporation's custodian of records to not only produce and identify the corporate documents in his possession but also to provide oral testimony that would bring the documents within the business records exception to the hearsay rule. The court held that such testimony may require a custodian to divulge personal knowledge of the type of business conducted and the routine practices of the corporation and is, therefore, not "implicit in and auxiliary to" the act of production. "Compelling respondent to provide oral testimony about how the documents were created, maintained, and circulated by officers and employees is different in kind, and potentially independently incriminating, from producing the documents and testifying that they are those records called for by the subpoena." *Id*. at 306.

A grand jury witness generally may not immediately appeal a denial of the motion to quash. The witness must either obey the subpoena's command or refuse to do so and contest the validity of the subpoena after a subsequent citation for contempt. *United States v. Ryan*, 402 U.S. 530, 532 (1971); *Cobbledick v. United States*, 309 U.S. 323 (1940). *Ryan* indicates that, in a limited class of cases when denial of immediate review would render impossible any review whatsoever, appellate review by interlocutory appeal may be appropriate. For example, immediate appellate review may be granted when documents in the possession of a third party are subpoenaed and the movant contends that a confidential privilege may be violated if those documents are turned over to the grand jury or prosecuting attorney.

3. Common Law Privileges

a. (§5.12) Attorney-Client Privilege

As the government's investigative and prosecutorial resources have been brought to bear on white collar crime with more intensity and frequency in recent years, a greater number of *subpoenas duces tecum* are being served on professionals through whom the target businesses have been conducting their commercial affairs. The limits of the application of the attorney-client privilege to business documents have been narrowly defined by the Supreme Court in *Fisher v. United States*, 425 U.S. 391, 403 (1976), in which the privilege was held to protect "only those disclosures—necessary to obtain informed legal advice." Business records that are not protected by the Fifth Amendment privilege against self-incrimination while in the hands of the client will likewise not be protected by either the privilege against self-incrimination or the attorney-client privilege when those records are in the hands of the attorney. *See also Couch v. United States*, 409 U.S. 322, 335 (1973).

b. (§5.13) Work Product Privilege

The work product privilege applies if the materials were prepared or collected in anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495 (1947); FED. R. CIV. P. 26(b)(3). The privilege has been held to extend to criminal and grand jury investigations. *United States v. Nobles*, 422 U.S. 225, 236 (1975); *In re Grand Jury Proceedings* (*Duffy*), 473 F.2d 840 (8th Cir. 1973); *cf. In re John Doe Corp.*, 675 F.2d 482, 488 (2nd Cir. 1982). When a business has authorized counsel to conduct an "in-house" investigation in preparation for possible future lawsuits (including criminal charges), the protection covers statements obtained from all employees who possess information obtained within the scope of their employment. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Therefore, a *subpoena duces tecum* for these documents, which would include such material as investigative reports, notes of employee interviews, or statements of employees, may be successfully resisted on the basis of the work product privilege.

c. (§5.14) Accountant-Client Privilege

The accountant-client privilege is not recognized in federal grand jury or criminal proceedings. *Couch v. United States*, 409 U.S. 322, 335 (1973); *Fisher v. United States*, 425 U.S. 391, 409–10 (1976). Furthermore, although this privilege formerly existed by statute under Missouri law, that statute, § 326.151, was repealed in 2001. Therefore, documents in possession of the accountant are not privileged unless they can be brought within the protection of the attorney-client or work product privilege. *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (an accountant is acting as the attorney's agent and his "services are a necessary aid to the rendering of effective legal services to the client"); *see also United States v. Kovel*, 296 F.2d 918 (2nd Cir. 1961) (brings communications to an accountant within the ambit of the attorney-client privilege if the accountant is functioning as an agent of the attorney and the communication is made with the purpose of enabling the attorney to give legal advice).

It is important to note that, in 1998, Congress established a limited privilege for accountant-client communications. With respect to tax advice, the same common law protections of confidentiality that apply to a communication between a taxpayer and an attorney also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent that the communication would be considered privileged if it were between the taxpayer and an attorney. *See* 26 U.S.C. § 7525. But this privilege only applies in any noncriminal tax matter before the Internal Revenue Service or any noncriminal tax proceeding in federal court brought by or against the United States.

d. (§5.15) Marital Privilege

Confidential communications made from one spouse to another in the confidence of the marital relationship are privileged. *Blau v. United States*, 340 U.S. 332 (1951); *United States v. Long*, 468 F.2d 755 (8th Cir. 1972) (the burden rests on the government to rebut presumption that communications between a husband and wife are intended to be confidential). This privilege extends to grand jury proceedings. FED. R. EVID. 1101(d). But a spouse may testify as to observations of conduct and non-confidential marital

communications. In addition to the marital communication privilege that allows one spouse to prevent the other from testifying about statements confidentially communicated, there is a second marital privilege: the adverse spousal testimony privilege. This broader privilege may be invoked only by the witness spouse, who may be neither compelled to testify nor foreclosed from testifying. *Trammel v. United States*, 445 U.S. 40, 53 (1980); *United States v. Dowdy*, 738 F. Supp. 1283 (W.D. Mo. 1990).

e. (§5.16) Physician-Patient Privilege

Under FED. R. EVID. 501, the physician-patient privilege will generally not be recognized by federal courts in criminal proceedings. *United States v. Bercier*, 848 F.2d 917, 920 (8th Cir. 1988) (physician-patient privilege, non-existent in common law, is not recognized in federal criminal proceedings). But the Supreme Court of the United States recognized a psychotherapist-patient privilege in *Jaffee v. Redmond*, 518 U.S. 1 (1996). The Court held that a psychotherapist-patient privilege promotes sufficiently important interests to outweigh the need for probative evidence. In so holding, the Court found that, because of the sensitive relationship between psychotherapists and patients, the "mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Id.* at 10.

f. (§5.17) Clergy-Communicant Privilege

Federal common law recognizes the clergy-communicant privilege. *In re Grand Jury Investigation*, 918 F.2d 374 (3rd Cir. 1990). In addition, the state of Missouri, by statute, specifically recognizes the clergy-communicant privilege. Section 491.060(4), RSMo 2000.

4. (§5.18) Demands for Samples of Handwriting, Hair, or Voice, or Presentation in Lineup

The Supreme Court has held that the Fifth Amendment privilege against self-incrimination does not apply to non-testimonial physical evidence, e.g., handwriting samples. *United States v. Mara*, 410 U.S. 19, 21–22 (1973). In addition, the Eighth Circuit has held that the Fifth Amendment does not protect compelled

production of physical evidence such as fingerprints, photographs, measurements, writing or speaking for identification, appearing in court, standing, walking, or making a particular gesture. *United States v. Montgomery*, 100 F.3d 1404 (8th Cir. 1996).

E. (§5.19) Prior Illegal Electronic Surveillance

Occasionally a witness subpoenaed to testify before a grand jury may have a reasonable basis for believing that the witness has been the subject of an illegal wiretap. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968), which authorizes court-approved electronic surveillance, prohibits the use of evidence obtained through illegal wiretaps before courts, grand juries, or any agencies or regulatory bodies. 18 U.S.C. §§ 2515 and 3504. Relying on these statutes, the Supreme Court has held that a grand jury witness is justified in refusing to answer questions that are based on information obtained by the government from illegal interception of the witness's communications. *Gelbard v. United States*, 408 U.S. 41, 47 (1972). The procedure to be followed to assert the illegal wiretap basis for a refusal to answer grand jury interrogation involves a three-step process, as outlined below in §§5.20–5.22.

1. (§5.20) Motion to Disclose

Counsel for the witness should first file a motion with the United States district judge responsible for hearing matters involving this particular grand jury. The motion should ask the court to enter an order requiring the government to disclose whether counsel's client has been the subject of electronic surveillance. Counsel should attach a list of all addresses and telephone numbers that may have been the subject of surveillance. The government is required to respond by affirming or denying that the surveillance has taken place. 18 U.S.C. § 3504(a)(1).

2. (§5.21) Hearing on Legality

If the government confirms that the witness has been a subject of electronic surveillance, the district court may be required to conduct a hearing on the legality of that surveillance and the interception of the witness's communications. *Alderman v. United States*, 394 U.S. 165, 183–85 (1969); *United States v. Williams*, 580 F.2d 578, 583–85 (D.C. Cir. 1978), *cert. denied*, 429 U.S. 832 (1978).

3. (§5.22) Fruit of Poisonous Tree

If the district court determines that the government's electronic surveillance was illegal, the hearing should be broadened to determine whether any question or subpoena involving this witness is the product of the illegally obtained information (fruit of the poisonous tree doctrine). *Alderman v. United States*, 394 U.S. 165 (1969). The test for legality of a court-authorized wiretap is set forth in *United States v. Daly*, 535 F.2d 434 (8th Cir. 1976).

F. (§5.23) Witness Preparation

If there is any reasonable possibility that counsel's client may be charged with a criminal violation, whether this status is referred to as "target," "putative," or "potential defendant," the client should refuse to testify before the grand jury unless and until granted immunity. In white collar crime cases, target defendants are often anxious to testify before grand juries in the belief that they can explain away or rationalize their conduct and convince the grand jury not to return an indictment against them. A simple analysis of the function and use of a grand jury leads to the inescapable conclusion that this belief is nothing more than wishful thinking. The appearance of a target defendant before the grand jury to give testimony serves no purpose other than to:

- educate the prosecutor as to the defenses that may be raised at trial;
- provide a preview as to what type of witness this individual will make before a trial jury; and
- afford the prosecutor an opportunity to obtain damaging admissions.

Assuming that the target defendant chooses to testify in spite of an attorney's advice, or assuming that the client is a mere fact witness, the same painstaking care should be given to preparation of the witness for the grand jury appearance as would be given to prepare that witness for trial testimony.

1. (§5.24) Document Review

If the subpoena calls on the client to produce documents as well as testify or if there are unsubpoenaed documents relevant to the transactions being investigated by the grand jury, all of these

records must be organized by subject matter or chronologically and reviewed in depth with the client before the client testifies. In the process of organizing these documents, a table of contents should be prepared by author, subject matter, or both, so that the attorney and client will have a ready reference to those records that may be inquired into during the client's testimony. Counsel should always overestimate counsel's opponent and assume that the prosecutor and the grand jury have possession of all of the pertinent documents.

2. (§5.25) Nature of Grand Jury Proceedings

The witness appearing before a grand jury for the first time should be given a preview of what to expect. The grand jury proceeding will be like nothing that the witness has observed from watching televised or live jury trials. The subpoena will direct the witness whether to report to the grand jury room or to the U.S. Attorney's office on the date that the witness is required to appear. The witness should realize that these proceedings will not be conducted in a courtroom. There will be no judge present. The witness will not be entitled to have an attorney present in the grand jury room, though the attorney may be available outside the room. *United States v. Mandujano*, 425 U.S. 564, 581 (1976) (Brennan, J., concurring). The public is excluded from grand jury proceedings, so the witness will not be able to bring a friend or relative for "moral support." The only persons present other than the witness and the grand jurors will be the prosecuting attorney and the court reporter. FED. R. CRIM. P. 6(d). The prosecutor generally conducts the interrogation, but the witness should not be surprised to be questioned by the grand jury foreperson or other jurors.

3. (§5.26) Conduct of Witness

The grand jury witness should be given the same basic advice as a trial witness:

- Be polite and respectful.
- Listen carefully to the question.
- Do not guess at the answer, volunteer information not called for, or give opinions.

The witness should not take notes or documents into the grand jury room unless the witness is prepared to have the prosecutor

mark them as an exhibit and place them in the record. Although a client may not be a target of the grand jury investigation, even a fact witness is subject to being charged with perjury. Therefore, the witness should be truthful but testify only to information of which the witness has personal knowledge. If a witness recants testimony during the grand jury proceeding in which the declaration was made, a subsequent prosecution for perjury is barred if the declaration has not substantially affected the proceeding. 18 U.S.C. § 1623(d).

Prosecutor misconduct in grand jury proceedings is subject to judicial review, and grand jury abuse may justify dismissal of an indictment. *United States v. Serubo*, 604 F.2d 807 (3rd Cir. 1979).

Harassment should not be tolerated. No witness should be sent to appear before a grand jury without the witness's attorney being available for consultation outside the room. If the witness does not understand a question, if the interrogation is taking a turn that neither the witness nor the witness's attorney anticipated, or if the witness would like to consult with counsel for any reason, the witness should ask for permission to withdraw from the grand jury room to talk with the attorney. Prosecutors are often upset with repeated requests by the witness to leave the grand jury room to consult with counsel. At least one court has held that this right can be limited to avoid unreasonable disruption of grand jury proceedings. *In re Tierney*, 465 F.2d 806, 810 (5th Cir. 1972), *cert. denied*, 410 U.S. 914 (1973). *But see United States v. Mandujano*, 425 U.S. 564, 606 (1976) (may consult with attorney at will). It may even be appropriate to advise the witness to take a note pad into the grand jury room and try to make notes of questions being asked so that the witness can intelligently seek the advice of counsel as to how to respond to a particular question when the situation arises. *But see In re Grand Jury Proceedings of John Doe v. United States*, 842 F.2d 244, 248 (10th Cir. 1988) (a witness was not allowed to write down each question and consult with his attorney before answering).

Although this right should not be abused, a witness should insist on consulting with counsel when the witness feels a need to do so. It is better to withdraw from the grand jury room even without the prosecutor's or grand jury foreperson's permission than to risk testifying in areas that may involve unanticipated self-incrimination. Contrary to the assurance from prosecutors that the witness can choose to assert a Fifth Amendment privilege

against self-incrimination at any time, answering preliminary questions pertaining to a subject matter may waive the privilege as to all subsequent interrogation on that subject. *Rogers v. United States*, 340 U.S. 367 (1951).

4 (§5.27) Motion for Continuance

Under no circumstances should a witness be allowed to testify before a grand jury until the witness is adequately prepared. While the district court is not likely to tolerate unreasonable delays, an effort should be made to obtain additional time for preparation if necessary. Counsel should first try to obtain the agreement of the prosecuting attorney informally to allow the witness to appear on a different date than set out in the subpoena. Failing such an agreement, a motion for continuance should be filed with the district court stating specific grounds for the request.

G. Asserting the Fifth Amendment Privilege Against Self-Incrimination

1. (§5.28) Application to Grand Jury Proceedings

The constitutional privilege against self-incrimination applies to grand jury proceedings under FED. R. EVID. 1101(c) and (d)(2). This privilege extends to any compelled communications that lead to an incriminating inference. *Andresen v. Md.*, 427 U.S. 463, 473–74 (1976) (active production of subpoenaed personal records may constitute compulsory authentication of incriminating information). The grand jury witness must be advised of Fifth Amendment rights. The government, however, is not required to inform the witness that the witness is the target of the grand jury investigation. *United States v. Pacheco-Ortiz*, 889 F.2d 301, 309–10 (1st Cir. 1989); *see also United States v. Myers*, 123 F.3d 350 (6th Cir. 1997). In *Myers*, the defendant was called to testify before the grand jury. Although he was considered a suspect by the government, he was not given a "target" letter before his grand jury appearance. The *Myers* court noted that it is Department of Justice policy to provide a target letter and an Advice of Rights form to "targets" of grand jury investigation before they testify. The court found that the government had violated the mandate in the Department of Justice Manual, §§ 9-11.150 and 11.151 (1992-1 Supp.). But the court went on to state that "any interest a target or subject may

have in receiving an Advice of Rights form does not, on its own, rise to the level of a liberty interest protected by the Due Process Clause." *Myers,* 123 F.3d at 356. While the court admitted it was "troubled" by the government's failure to follow procedure, it held that, because Myers had not produced evidence of bad faith on the part of the government or any other exceptional circumstances, his grand jury testimony could not be suppressed. *Id.* at 357. *But see United States v. Jacobs*, 547 F.2d 772, 774–75 (2nd Cir. 1976).

2. (§5.29) When to Assert Privilege

The privilege should be claimed by a grand jury witness any time there is a reasonable possibility that the witness may be charged with a crime. The Supreme Court has held that a person may invoke this privilege when that person has reasonable cause to believe that a direct, truthful answer would either furnish evidence or lead to the discovery of evidence needed to prosecute that person for a crime. *Hoffman v. United States*, 341 U.S. 479, 486–87 (1951). When in doubt, the privilege should be asserted, and once it is claimed the witness should not deviate from the refusal to answer.

3. (§5.30) Procedure for Asserting Privilege

If the client determines, before an appearance before the grand jury, that the client will assert the Fifth Amendment privilege against self-incrimination but will testify if granted immunity, counsel should notify the prosecuting attorney in writing. This will allow the prosecutor to make a decision in advance of the witness's appearance as to whether to recommend the granting of immunity or whether to simply withdraw the subpoena. If the prosecutor refuses to grant immunity and insists, counsel should ask that counsel's written notice of intention to assert the privilege be made a part of the grand jury record. Upon being sworn to testify before the grand jury, the witness should respond only to questions as to the witness's identity, name, address, spouse's name, and possibly place of employment. Beyond these questions, the client should state that the client respectfully declines to answer on the advice of counsel and on the grounds that the client's answer may tend to be self-incriminating. If the prosecutor persists in challenging the witness as to why the witness believes that a specific answer would tend to be self-incriminating, a request should be made to withdraw from the grand jury room and consult with counsel. Generally, the

prosecutor will be satisfied with making a record that the witness will refuse to answer all questions dealing with a certain subject matter on the basis of the witness's Fifth Amendment privilege.

4. (§5.31) Waiver of Privilege

Counsel should not be misled into believing that the privilege against self-incrimination can be selectively asserted as to some, but not all, questions pertaining to a subject matter. On the contrary, it has been held that once a witness "opens the door" by answering some questions in a given area, the privilege is waived as to that subject and cannot thereafter be validly asserted. *Rogers v. United States*, 340 U.S. 367 (1951). For this reason, counsel should forcefully instruct the witness that under no circumstances is the witness to respond to a question beyond the witness's identity without first consulting with counsel. Because of the difficulty in determining where a certain line of interrogation is leading, the better practice is to remain steadfast in refusing to answer all questions beyond identification.

5. (§5.32) Immunity

In Missouri, when a witness before the grand jury is compelled to testify by court order and must waive the privilege against self-incrimination, the witness cannot subsequently be criminally prosecuted or subjected to any criminal penalty for or on account of any act, transaction, matter, or thing that was the subject matter of the inquiry in which the witness testified, except a prosecution for perjury, giving false or misleading testimony, or contempt. Section 491.205, RSMo 2000.

Federal prosecutors are authorized to request the district court to grant a witness use immunity in order to eliminate the Fifth Amendment privilege as a basis for a refusal to testify. 18 U.S.C. §§ 6002 and 6003. A witness granted use immunity who is subsequently prosecuted only needs to show that the witness testified under a grant of immunity to shift to the government the burden of proving that all the evidence it proposes to use was derived from legitimate independent sources. *United States v. Garrett*, 797 F.2d 656, 660 (8th Cir. 1986) (quoting *Kastigar v. United States*, 406 U.S. 441, 461–62 (1972)). Justice Department policy requires that a prosecutor seeking permission to prosecute an immunized witness must first seek permission from the

Attorney General. U.S. ATTORNEY'S MANUAL § 9-11.151 (USDOJ 2002), *available at*:

www.usdoj.gov/usao/eousa/foia_reading_room/usam/

A prosecutor also may suggest to counsel that the witness be given informal "pocket" or "letter" immunity. This informal immunity is accomplished by the prosecutor notifying counsel or the witness in writing that the witness's testimony will not be used against that witness in any future criminal proceedings. At best, this type of immunity may only be enforceable to the extent that any contract or agreement with a prosecutor is enforceable. It does not have the force of a statute behind it. Because of the uncertainty of the binding effect of such immunity on the government and the scope of protection, the authors recommend insisting on a formal immunity order in most cases. *See United States v. D'Apice*, 664 F.2d 75, 77–78 (5th Cir. 1981) (a federal prosecutor lacks authority to bind counterpart in another district).

a. (§5.33) Procedure for Granting Immunity

The United States Attorney's Manual recommends that target defendants be notified of their target status at the time they are subpoenaed to provide grand jury testimony. U.S. ATTORNEY'S MANUAL § 9-11.151 (USDOJ 2002), *available at*:

www.usdoj.gov/usao/eousa/foia_reading_room/usam/

Upon receiving such notice, counsel should advise the prosecuting attorney that counsel's client intends to invoke the Fifth Amendment privilege against self-incrimination and will answer no questions beyond the client's identity. Of course, it may also be appropriate in a given case for a witness who is not a target defendant to assert this privilege. If the Assistant United States Attorney decides to grant immunity, the approval of the local United States Attorney and the Assistant Attorney General in the Department of Justice who has general supervision over the particular offense under investigation must be obtained. The Assistant United States Attorney obtains this approval by completing a Request for Authorization to Apply for a Compulsion Order, which is sent, along with a memorandum containing a narrative summary of the case, to the local United States

Attorney. After the United States Attorney personally signs the request, it is forwarded to the Witness Records Unit of the Criminal Division of the Department of Justice, which will forward the request to the appropriate authority. This approval process usually takes several weeks, although there are procedures for emergency requests. If the request is approved by the Justice Department, an authorization letter will be signed and sent to the Assistant United States Attorney. Upon receipt of the authorization, a motion for an order to compel testimony is filed with the district court. After the district judge signs the order formally granting immunity, the witness is brought before the court and advised on the record that the witness has been granted immunity and is now required to testify in response to the questions previously asked. The limited effect of this immunity should be explained to the client. Counsel should place on the record any objections to this extension of immunity or to the scope of the immunity granted.

b. (§5.34) Refusal to Answer After Grant of Immunity

It has been held that, absent the valid assertion of a privilege, the grand jury has the right to every person's testimony. *United States v. Mandujano*, 425 U.S. 564, 580 (1976); *United States v. Wong*, 431 U.S. 174 (1977). A witness who has been granted statutory use immunity must answer the questions of the grand jury or face contempt proceedings. *Kastigar v. United States*, 406 U.S. 441, 462 (1972); 18 U.S.C. §§ 6002 and 6003. When use immunity is granted, the immunized testimony and any evidence derived from it may not be used against the witness in a subsequent criminal proceeding except in a prosecution for perjury. *United States v. Apfelbaum*, 445 U.S. 115, 130 (1980). Truthful testimony given under a grant of immunity cannot be used to show that the witness committed perjury on previous occasions. *United States v. Berardelli*, 565 F.2d 24, 28 (2nd Cir. 1977). If a witness continues to refuse to testify after being granted immunity, the district judge may direct that the witness be incarcerated for civil contempt and be confined until that witness is purged of the contempt by complying with the court's order or until the grand jury before which the witness has refused to furnish evidence is discharged. Incarceration cannot exceed 18 months under 28 U.S.C. § 1826. *See also United States v. Mitchell*, 556 F.2d 371, 384 (6th Cir. 1977),

cert. denied, 434 U.S. 925 (1977); *Shillitani v. United States*, 384 U.S. 364 (1966).

Although civil contempt proceedings brought under 28 U.S.C. § 1826 do not give rise to a constitutional right to a jury trial, courts have held that FED. R. CRIM. P. 42(b) does apply to such procedures, so that a recalcitrant witness is entitled to notice and a reasonable opportunity to prepare a defense. *In re Weeks*, 570 F.2d 244, 246 (8th Cir. 1978); *In re Di Bella*, 518 F.2d 955 (2nd Cir. 1975); *United States v. Hawkins*, 501 F.2d 1029 (9th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974). This opportunity to be heard is provided by the prosecutor filing a motion to show cause why the witness should be held in contempt and conducting a contempt hearing before the district court.

6. (§5.35) Right of Witness to Transcript of Own Grand Jury Testimony

Federal grand jury proceedings are routinely recorded, although there is no constitutional or statutory requirement for recording. *United States v. John*, 508 F.2d 1134, 1142 (8th Cir. 1975). State grand jury proceedings in Missouri are frequently not recorded, and failure to record proceedings or keep minutes is not a basis for challenging a conviction. *State v. Shives*, 601 S.W.2d 22, 25 (Mo. App. W.D. 1980).

Even if the proceedings are recorded, a witness has no inherent right to a transcript of grand jury testimony. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959). A court has discretion to provide a witness with such a transcript upon a demonstration of "particularized need." *Douglas Oil Co. of Cal. v. Petrol Stops N.W.*, 441 U.S. 211 (1979); FED. R. CRIM. P. 6(e).

Counsel should always request a transcript of a client's grand jury testimony if the client is subpoenaed to testify before the grand jury for a second time. The availability of this transcript obviously avoids the possibility of inadvertent inconsistencies in testimony; this has been held to be a basis for requiring that a witness be provided with a transcript. *Bursey v. United States*, 466 F.2d 1059, 1079–80 (9th Cir. 1972), *reversed on other grounds*, 863 F.2d 667 (9th Cir. 1988).

Of course, a defendant must be given copies of the defendant's own grand jury testimony after indictment. FED. R. CRIM. P. 16(a)(l)(A). A corporate defendant also may obtain copies of the grand jury testimony of an employee or officer if:

- at the time of the testimony in the person's capacity as an employee or officer, that person legally could bind the corporate defendant with respect to the conduct constituting the offense; or

- at the time of the offense that person was personally involved in the conduct constituting the offense and able to legally bind the corporate defendant with respect to that conduct.

FED. R. CRIM. P. 16(a)(1)(C); *see also In re United States*, 918 F.2d 138, 140 (11th Cir. 1990).

III. Investigations by Administrative Bodies

A. (§5.36) Introduction

It is not unusual for a substantial white collar crime case to begin with an apparently innocent subpoena from an administrative agency for a client's testimony or records or a notice of administrative hearing. Counsel should realize that even the most innocuous subpoena or notice may be the first step in a long and tortuous road that will lead ultimately to the trial of a criminal case. NEIL A. KAPLAN ET AL., PARALLEL GRAND JURY AND ADMINISTRATIVE AGENCY INVESTIGATIONS (Am. Bar Ass'n Press 1981). Misguided steps taken by the officers or directors of a corporate client at the administrative investigation stage may result in long-term damage to the business and to the ability of individual officers and directors to defend themselves in subsequent criminal proceedings.

Conduct that may bring a business within the regulatory authority of the Securities Exchange Commission or federal and state banking, labor, environmental, antitrust, or alcohol control regulations may also constitute violations of federal penal statutes pertaining to the following:

- False statements to a governmental agency, 18 U.S.C. § 1001
- Computer fraud, 18 U.S.C. § 1030

- Mail fraud, 18 U.S.C. § 1341
- Wire fraud, 18 U.S.C. § 1343
- Conspiracy to defraud any federal agency, 18 U.S.C. § 371
- Perjury (applicable to statements contained in any deposition, affidavit, or other proceeding involving the administration of an oath), 18 U.S.C. § 1621
- False declaration in or ancillary to any court or grand jury proceedings, 18 U.S.C. § 1623
- Obstruction of justice, 18 U.S.C. § 1503
- Interstate or foreign travel or transportation in aid of racketeering, 18 U.S.C. § 1952
- The broad provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68
- Comparable state statutes

Routine civil agency investigations may uncover potential criminal liability leading to an agency referral to law enforcement authorities to commence a criminal investigation, or information received by the government may dictate parallel criminal and civil proceedings from the very beginning, with the civil case being used for the advantage of the broader relief available in the form of removal of officers or directors, forfeiture of illegally obtained property, money damages for victims, etc. The case that proceeds along parallel criminal and civil paths from the very beginning, perhaps, is easier for counsel because the potential criminal liability is obvious and apparent from the inception of the case. The more subtle, and therefore more dangerous, situation is the innocent-appearing civil investigation, which makes it difficult to convince clients of criminal exposure. Sections 5.37–5.46 below will attempt to offer suggestions for guiding the client through either situation—an initial civil investigation only or a parallel civil and criminal investigation.

B. Problem of Parallel Civil and Criminal Investigations

1. (§5.37) Shared Information

While civil proceedings may be brought by governmental agencies or private litigants, the United States Department of Justice represents the federal government in all criminal proceedings, unless otherwise specifically provided. 28 U.S.C. §§ 516–19. The state of Missouri may be represented in criminal actions by either the local county prosecuting attorney or the state attorney general. Federal agencies may refer criminal cases directly to the local United States attorney in their district or to the Department

of Justice. Of course, income tax violations are referred to the Tax Division of the Department of Justice. Securities violations are referred initially to the Securities Unit, Fraud Section of the Justice Department's Criminal Division but later are sent to the local United States Attorney's office for actual prosecution. Missouri state agencies generally refer matters to the Attorney General for criminal investigation.

When the flow of information is in the other direction, that is, from the prosecutor to the governmental agency, the old rule was that any sharing of information based on evidence presented to a federal grand jury was prohibited by the secrecy provisions of FED. R. CRIM. P. 6. But with the passage of the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272, the restrictions on information sharing were loosened. Under § 203 of the Act, federal law enforcement agencies are now permitted to share with other federal officials information regarding foreign intelligence and counterintelligence obtained in a grand jury proceeding. Section 203 does contain important safeguards to U.S. citizens identified in the information disclosed. The Act requires that all information identifying a U.S. citizen be labeled by law enforcement agents before disclosure to intelligence agencies. Upon receipt of the information, intelligence agencies must handle that information in accordance with specific protocols designed to prevent inappropriate use of the information. For example, information identifying a U.S. citizen must be deleted from intelligence information except in specified circumstances. This authority to share information revealed in grand jury proceedings will not sunset under the USA Patriot Act.

Federal Rule of Criminal Procedure 6(e)(3)(C)(iv) allows disclosure to appropriate state officials of grand jury information upon a proper showing that it may disclose violations of state criminal law.

2. Stay of Civil Proceedings

a. (§5.38) Pre-Indictment

Defending against parallel civil and criminal proceedings simultaneously presents unique problems because of the unequal scope of discovery in civil versus criminal cases and because of the very real concerns that the Fifth Amendment privilege against self-incrimination of the individual officers,

directors, or employees of the target business be fully protected. Governmental agencies generally have broad discovery powers applicable to both the investigatory and litigation stages of the civil proceedings, whereas the prosecutor's right to discovery in criminal proceedings is extremely circumscribed by statute and the Fifth Amendment. *See* FED. R. CRIM. P. 16. Unless court protection is obtained, the government may be able to obtain information through discovery in the civil proceedings that is otherwise unobtainable under the criminal rules and subsequently use the information in the prosecution of its criminal case. Additionally, a party may be faced with the inability to testify or present evidence in defense of a government agency's civil action because of the possibility that the testimony might tend to incriminate the offeror in a subsequent criminal case. The only avenues open to counsel for avoiding this dilemma are to negotiate with the government for a resolution of the entire matter, both civil and criminal, or to seek a stay of the civil proceedings until disposition of the criminal case.

The application for a stay of the civil proceedings, in the first instance, should be made to the governmental agency by formal written motion. The grounds for seeking a stay include the following:

- Response or testimony before the administrative agency might incriminate the party or constitute a waiver of the party's Fifth Amendment privilege against self-incrimination in a related criminal prosecution.
- Disclosure of information to the agency affords the government discovery to which it would not be entitled in the related criminal action.
- Preparation of a defense on two fronts hampers the defendant's ability to effectively defend the criminal case and thereby denies the individual a fair trial guaranteed by the Sixth Amendment.
- Publicity generated by the civil proceeding will deny the defendant the defendant's Sixth Amendment right to a fair trial by impartial jury.

See generally United States v. Kordel, 397 U.S. 1 (1970).

Even if counsel believes that the effort to convince the administrative agency to stay its own proceedings will be fruitless, such an application for a stay is a necessary first step so that the client's administrative remedies will be exhausted. The client will then have standing to initiate a separate civil action seeking a stay. If the agency denies the request for a stay, an action should be filed in the appropriate trial court requesting that the civil proceedings be stayed on the above grounds until disposition of the criminal proceedings. If the action is against a federal agency, jurisdiction may be based on § 10(c) of the Administrative Procedure Act (APA); 5 U.S.C. § 704; and 29 U.S.C. § 1331, 1337, 1361, or 1651. *See Gellis v. Casey*, 338 F. Supp. 651 (S.D.N.Y. 1972); *Kordel*, 397 U.S. 1. In state agency proceedings, court review may be sought under §§ 536.100 and 536.150, RSMo 2000. *See generally State ex rel. Schneider v. Stewart*, 575 S.W.2d 904 (Mo. App. W.D. 1978).

b. (§5.39) Post-Indictment

If the effort to stay civil proceedings is being made following the filing of a formal criminal charge, the motion for stay should be filed with the judge assigned to the criminal case. This is less cumbersome than filing a separate civil action and has the additional advantage of the request for stay being heard by a judge who is intimately familiar with the nature of the criminal proceedings and thus better able to evaluate the impact the civil case may have on the constitutional rights of the accused. Of course, the judge assigned to the criminal case is required to weigh the interests of the agency or private litigant in a prompt disposition of the civil case against the interest of the defendant in obtaining a fair trial in the criminal action. The court may grant a temporary stay, *Gordon v. Fed. Deposit Ins. Corp.*, 427 F.2d 578 (D.C. Cir. 1970), or may stay all proceedings in the civil action until the criminal case has been fully and finally completed, *Texaco, Inc. v. Borda*, 383 F.2d 607 (3rd Cir. 1967). But see *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974), in which the Eighth Circuit refused to stay civil proceedings while the criminal conviction was being appealed. A motion for stay is likely to be more successful if it is made for a limited period of time, rather than indefinitely. Failing the granting of a stay, protection against the accused being subjected to civil

discovery by deposition, interrogatories, request for production of documents, etc., may be obtained through a motion for protective order in the civil case citing grounds similar to those on which a request for a stay is based.

Counsel should note that a request for a stay based on the Fifth Amendment privilege against self-incrimination may be premature if it is made in advance of actual questioning through civil discovery. *In re Penn Cent. Sec. Litg.* (*Robinson*), 347 F. Supp. 1347 (E.D. Pa. 1972).

C. Administrative Procedure

1. (§5.40) Statutory Law

The procedural rights accorded a defendant in federal administrative proceedings are codified in the Administrative Procedure Act, 5 U.S.C. §§ 500–59 and 704–06. For Missouri procedural guarantees, see the Missouri administrative procedural law, §§ 536.010–536.320, RSMo 2000 and Supp. 2004. The Missouri law is one of the most progressive in the United States and provides for discovery to the same extent as in civil actions in circuit court. Section 536.073, RSMo 2000. Subpoenas for witnesses may be issued by the Administrative Hearing Commission at the request of any party. Section 536.077, RSMo Supp. 2004.

2. (§5.41) Procedural Due Process

In the absence of statutory authority, a defendant in an administrative proceeding is entitled to minimum due process. In *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970), the Supreme Court has held these minimum requirements to include:

- timely and adequate notice to the defendant;
- an effective opportunity to defend by confronting adverse witnesses and presenting defendant's own evidence and argument orally;
- the right to retain counsel;

- at least informal findings of fact and conclusions of law entered by the hearing officer as the basis for the ultimate decision; and

- an impartial hearing officer.

D. Preparation for Hearing

1. (§5.42) Background of Hearing Officer

Because the formalities observed and the procedural rights extended, within the dictates of statutory and caselaw, may vary from one hearing officer to another, it is essential that counsel become familiar with the particular hearing officer and that officer's "track record." Opinions of federal administrative hearing officers are set forth in a variety of reporter services, including CCH's Tax Court Reporter, Labor Law Reporter, Federal Securities Reporter, NLRB Decisions, and Trade Regulation Reporter. If the hearing officer's decisions are unreported, counsel may contact other attorneys who have practiced before this officer or hearing panel to obtain information on prior rulings and perceived tendencies.

2. (§5.43) Related Litigation

Next, an outline must be made of all of the regulatory agencies with which counsel's business client must deal. Copies of all recent filings by the client with these agencies should be obtained and reviewed. A list of existing or potential litigation must be made. Counsel for the client in each of those cases should be contacted to become familiar with the nature of those proceedings. This background information is essential in order to understand how a particular approach to the instant administrative proceeding may impact on other legal matters involving this client. Only after this background information is acquired and digested should counsel sit down with the client to discuss the evidence that will be presented. The individual client or key officers and directors of the corporation/client must be persuaded to be candid in disclosing all information to counsel that may even remotely touch on the issues involved in the administrative proceeding. Only through this frank exchange of information can the attorney intelligently advise the client on strategy against the ever-present backdrop of related criminal or civil litigation.

3. (§5.44) Informal Discovery

In preparation for the hearing, all potential witnesses should be interviewed and an effort made to learn what information the opposing party possesses. The Freedom of Information Act (FOIA), 5 U.S.C. § 552, is a tremendous boon to counsel in discovering information in the possession of governmental agencies. Upon receipt of a subpoena or notice of hearing, an FOIA request should be made by letter immediately to the appropriate agency. It is generally advisable to avoid a shotgun approach to this request because the breadth of the inquiry will determine the length of time required by the agency to respond. Counsel should anticipate a delay of at least six weeks in obtaining a response even to a specific request.

4. (§5.45) Privilege Against Self-Incrimination

The Fifth Amendment privilege against self-incrimination is applicable to all proceedings, including hearings before administrative agencies. *See Quinn v. United States*, 349 U.S. 155 (1955) (congressional investigations); *Blau v. United States*, 340 U.S. 159 (1950) (grand jury proceedings); *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (civil proceedings). Although the Supreme Court has held that waiver of the privilege in one proceeding does not constitute a waiver for the purposes of all subsequent proceedings, *United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir. 1978), under *Hoffman v. United States*, 341 U.S. 479 (1951), a court could hold that an individual who had fully testified in an administrative proceeding regarding that individual's involvement in a particular transaction could not later assert the Fifth Amendment privilege with respect to the same transaction because the person no longer possessed a reasonable concern about incrimination beyond the incrimination that had already taken place. While it is unlikely that a court would construe the privilege so narrowly, it is essential that an individual be frank with the attorney about any involvement in the subject matter of the administrative agency's investigation before testifying before the agency so that counsel can advise the individual as to whether the privilege against self-incrimination should be asserted at the administrative stage.

5. (§5.46) Hearing

The basic approach in representing a client in an administrative hearing is the same as that which would be used for a court-tried cause. The absence of certain formalities and trappings that are associated with court appearances should be no excuse for shortcuts by counsel in the administrative hearing. Because appellate review of administrative decisions is generally limited to a determination of whether the hearing officer abused discretion, the initial hearing, for all practical purposes, may determine the outcome of the entire case. Administrative procedures often do not provide for the defendant to file a formal answer to the complaint or notice of hearing. Therefore, counsel should take full advantage of the opportunity for an opening statement or closing argument at the hearing because these may be among the few opportunities to educate the hearing officer as to the defendant's side of the case. Regardless of whether the particular rules applicable to the administrative hearing so provide, counsel should strongly consider filing a memorandum or brief in advance of the hearing setting forth the client's position, including the applicable law and anticipated evidence. If proposed findings of fact and conclusions of law are called for, these should be prepared with great care and in such a form that the pleading is factual, objective, and ready for the hearing officer's signature. Because of heavy caseloads, these hearing officers are often anxious to adopt at least a substantial part of one of the party's proposed findings rather than take the time to prepare a completely original document.

The Rules of Evidence are generally relaxed in administrative hearings. Although hearsay and opinion evidence, for example, may be admitted, counsel should never fail to make the same appropriate objections that counsel would at trial. These objections should not be made with respect to collateral issues, and needless dragging out of the hearing by spurious objections should be avoided. But pointed objections made in a timely fashion to material evidence are extremely important to the hearing officer at the conclusion of the case in determining whether the opponent's evidence is of sufficient quality to meet its burden of proof. If the hearing is recorded, such objections may also serve as a guidepost to the reviewing court on appeal in determining whether the administrative officer abused discretion in finding against counsel's client.

E. (§5.47) Conclusion

Dealing with parallel criminal and civil investigations requires complete knowledge of the history of the client's dealings and transactions. Thorough preparation is essential, but that preparation must be conducted against the backdrop of the real possibility that a criminal action may be initiated.

Robert L. Fleming*

Chapter 6

PRELIMINARY HEARINGS

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I. Background

A. (§6.1) Preliminary Hearing Distinguished From Probable Cause Hearing

A preliminary hearing, as it is referred to in Rule 22.09, or preliminary examination, as it is called in § 544.250, RSMo 2000, is a proceeding in which a judge makes a legal determination as to whether sufficient evidence has been presented by the State of Missouri to hold the defendant over for trial on a felony complaint. The preliminary hearing is not the probable cause hearing referred to in the statutes and Rules for issuance of a warrant for an *arrest*. *See* Rule 22.04(a)(1); § 544.020, RSMo Supp. 2004. The determination of probable cause for an arrest is made either before the arrest warrant has been issued or when the accused is brought before a judge after an arrest without a warrant. *Gerstein v. Pugh*, 420 U.S. 103 (1975). For time limits on detention without a charge or warrant, see

§ 544.170, RSMo Supp. 2004. Hearings for probable cause to arrest are very informal, and there is no right of cross-examination or right to counsel. In other words, hearings on probable cause to arrest are not adversarial in nature. The preliminary hearing, however, is an adversarial proceeding that is held to determine sufficiency of evidence to hold the defendant for trial; thus, it occurs later in the criminal proceedings.

The right to a preliminary hearing or examination is established in § 544.250 and Rule 22.09. A preliminary hearing is a means to prevent abuse of power by the prosecuting attorney while at the same time permitting arrest and detention of accused persons by means of limited inquiry into whether probable cause exists to believe that a felony was committed and that the accused is the offender. *State v. Menteer*, 845 S.W.2d 581 (Mo. App. E.D. 1992); *State v. McKinley*, 111 S.W.2d 115 (Mo. 1937). Preliminary hearings are further discussed in 5 AM. JUR. TRIALS *Pretrial Procedures and Motions in Criminal Cases* 27, 33 (1966).

B. (§6.2) Initiation of Felony Proceedings

Felony prosecutions are instituted either by filing a complaint in the associate circuit division or by presenting a case directly to the grand jury for purposes of obtaining an indictment. Rules 22, 23; § 544.020, RSMo Supp. 2004; Chapter 545, RSMo. In either event, probable cause must be established before a defendant charged with a felony offense can be brought to trial in the circuit division. If indicted by a grand jury, a defendant is not entitled to a preliminary hearing because probable cause will have been determined by the grand jury, and a defendant does not have a right to choose the method of determination of probable cause. *State v. McGee*, 757 S.W.2d 321 (Mo. App. W.D. 1988).

A prosecutor may take a case to the grand jury at any time, even after filing the complaint in the associate circuit division. A prosecutor who files the complaint and intends to bring the offense charged before the grand jury for indictment must do so after the arraignment is held on the complaint in the associate circuit division. It is unclear whether there are any time limits within which the prosecutor must elect to present the complaint before the grand jury or have a preliminary hearing conducted before the court. It has been held that due process rights were not violated by a delay of almost 20 months between the date of the alleged offense and the date of an indictment. *State v. Thomas*, 529 S.W.2d 379 (Mo. 1975). Whether

due process rights have been violated by a lapse of time between the offense and the arrest based on a grand jury indictment will be resolved on a case-by-case basis. *United States v. Marion*, 404 U.S. 307 (1971). In *Thomas* the delay was caused by the fact that the defendant was not arrested for almost a year after the original warrant was issued on the complaint, and the case was further delayed some five months before a preliminary hearing was held. Thomas was discharged for want of probable cause following the preliminary hearing. About a month later, the state obtained a grand jury indictment, and almost two months after that Thomas was arrested in accordance with the indictment. What is clear from *Thomas* is that, unless the defendant can show that the delay was caused by the state and the delay resulted in actual prejudice to the defendant, the indictment and subsequent conviction will not be overturned.

In urban areas of Missouri, the prosecuting attorney's office will generally indicate at counsel's initial appearance on a complaint whether they intend to present the matter before the grand jury. In St. Louis, a designation of this intent is obvious because it appears on the face of the complaint, and those cases are docketed separately from the cases proceeding to preliminary hearing. As a practical matter, it is left to the court's discretion how long the prosecuting attorney has to present the case before the grand jury and procure an indictment or risk the complaint being dismissed. Typically, the court will allow the prosecuting attorney 30 to 60 days to procure an indictment after the arrest warrant has been executed. With the enactment of Supreme Court of Missouri Operating Rule (or Administrative Rule) 17 regarding time standards, prosecuting attorneys are required to procure indictments and present cases for preliminary hearing at a much quicker pace because Administrative Rule 17 time limits begin to run from the time the complaint is filed. Rule 17.29. When the prosecution fails to present a case to the grand jury in a timely manner, the case may be at risk for dismissal at the time set for the preliminary hearing.

In the many counties not utilizing grand juries, either at all or at least not on a regular basis, the option to proceed by presentment of the case before the grand jury is not available to the prosecutor; therefore, a preliminary hearing must be held. The test is the same whether the felony is presented to the grand jury or a preliminary hearing is held before an associate circuit judge—to determine whether probable cause exists to bind the defendant over for trial on a felony charge. MO. CONST. art. I, § 16; Rules 22.09(b), 23;

§§ 544.410, 544.420, 544.250, RSMo 2000; §§ 540.031, 540.240, RSMo 2000.

C. (§6.3) Legal Purpose of Hearing

The sole *legal* purpose of a preliminary hearing is the probable cause determination. If from the evidence presented it appears to the judge that there is "probable cause to believe that a felony has been committed and that the defendant has committed it, the judge shall order the defendant to appear" in the court having jurisdiction over the offense; otherwise, the judge shall discharge the defendant. Rule 22.09(b); *State v. Woods*, 723 S.W.2d 488 (Mo. App. S.D. 1986); *Nero v. State*, 579 S.W.2d 638 (Mo. App. E.D. 1979). There is no general constitutional right to a preliminary hearing. *Lem Woon v. Oregon,* 229 U.S. 586 (1913) (a preliminary hearing or examination did not exist under the common law).

When originally proposed, what is now Rule 22.09(b) provided for the contingency (when there was a finding of probable cause) that *the* felony complained of had been committed. Before the Rule became effective, however, the present language requiring only a finding that "a felony" had been committed was substituted. *See State ex rel. Thomas v. Crouch*, 603 S.W.2d 532 (Mo. banc 1980); *State v. Hadley*, 736 S.W.2d 580 (Mo. App. S.D. 1987).

Missouri appellate courts have reiterated the purpose of a preliminary hearing, which is fully set out in *State v. Clark*, 546 S.W.2d 455 (Mo. App. W.D. 1976). In *State v. Menteer*, 845 S.W.2d 581 (Mo. App. E.D. 1992), the Eastern District Court of Appeals basically repeated what had earlier been stated in *Clark, State v. Hester*, 331 S.W.2d 535 (Mo. 1960)*, Nero,* 579 S.W.2d 638, and *State v. Turner*, 353 S.W.2d 602 (Mo. 1962):

> [A] preliminary examination is in no sense a trial and does not finally adjudicate the guilt or innocence of an accused. It is simply a means to prevent abuse of power by the prosecution, while at the same time to permit arrest and detention of an accused by means of a limited inquiry into whether there is probable cause that a felony was committed and that the accused was the offender.

Menteer, 845 S.W.2d at 583.

The associate circuit judge is the sole judge as to the sufficiency of the evidence presented at the preliminary hearing, and the judge's decision is not reviewable on the merits. *State v. Gardner*, 600 S.W.2d

614 (Mo. App. S.D. 1980), *cert. denied*, 449 U.S. 1020 (1980); *State v. Stufflebean*, 604 S.W.2d 737 (Mo. App. W.D. 1980); *Hester*, 331 S.W.2d 535. In the absence of fraud or arbitrary conduct, there will be no relief granted to the defendant bound over for trial. If the court refuses to bind the defendant over for trial, thereby discharging the defendant, the state may seek an indictment, but it cannot appeal the decision. *Gardner,* 600 S.W.2d 614; *State v. Thomas*, 529 S.W.2d 379 (Mo. 1975); *Turner,* 353 S.W.2d 602. If a defendant is discharged following the preliminary hearing, the state may also elect to re-file the complaint, present the matter before a different associate judge, and hope that the new judge will bind the defendant over for trial. In fact, the general rule allowing the re-filing of a complaint after a finding of no probable cause does not contemplate the presentation of evidence to the same judge a second time. *State ex rel. Brown v. Duggins*, 601 S.W.2d 11 (Mo. banc 1980). In addition, a discharge after a preliminary hearing is not a bar to indictment by the grand jury on the same charge, in the same way it is not a bar to the prosecutor from re-filing the complaint before a different associate judge, because the accused was not placed in jeopardy. *Thomas,* 529 S.W.2d 379. Absent a claim of prosecutorial harassment or abuse of discretion based on successive re-filings, there would seem to be no limit on the number of times a prosecutor can re-file a complaint after it has been discharged at preliminary hearing. *State ex rel. Brown v. Duggins,* 601 S.W.2d at 12.

D. (§6.4) Right to Counsel

The United States Supreme Court has stated that a preliminary examination is a "critical stage" in the criminal process; therefore, indigent defendants must have appointed counsel. *Coleman v. Alabama*, 399 U.S. 1 (1970). The initial appearance of the defendant and proceedings before a judge, after a previous *ex parte* probable cause determination and the defendant's arrest, are provided for in Rule 22.08.

Advisement by the court of the nature of the charges and rights of the accused to counsel, retained or appointed, and to remain silent also takes place at this time. The right to counsel in preliminary proceedings is further discussed in *State v. Barnard*, 820 S.W.2d 674 (Mo. App. W.D. 1991). The right to counsel, however, is not an unbridled right in regard to what counsel can do at a preliminary hearing. While a preliminary hearing is an excellent opportunity to elicit testimony from witnesses for the purpose of impeaching them at trial and also to provide initial discovery in a criminal case, this is

not the purpose of a preliminary hearing, and these opportunities can be limited by the court. *State v. Woods*, 723 S.W.2d 488 (Mo. App. S.D. 1986).

An accused does have the right to be physically present at a preliminary hearing and to cross-examine witnesses. *State ex rel. Turner v. Kinder*, 740 S.W.2d 654 (Mo. banc 1987). In response to *Kinder*, the General Assembly passed what ultimately became § 561.031, now RSMo 2000, which allows for certain proceedings to occur via closed circuit television when they involve prisoners and the physical presence of the individual in court is not required by statute or Rule. Section 561.031 does not affect a prisoner's right to be physically present at a preliminary hearing (which can be held within the Department of Corrections), but instead allows for less consequential proceedings, including initial appearance after arrest on complaint, bond hearings, and the waiver of a preliminary hearing, to occur via closed circuit television. The validity of § 561.031 was upheld in *Guinan v. State*, 769 S.W.2d 427 (Mo. banc 1989). Although not dealing with a preliminary hearing, the Court's analysis was instructive in finding that the use of a two-way closed circuit television in a post-conviction hearing did not deny the defendant his right to a fair hearing. The defendant was able to confer privately with counsel and had a clear view of witnesses, examiners, and others present during the proceedings. Because of the quality of the cameras being utilized, the Court concluded that the text, content, and demeanor of the testimony and those testifying were clear and effective.

The prisoner's right to be present at a preliminary hearing may be waived by the accused under § 561.031.2. A sample form for waiver of personal appearance is in §6.28 below.

II. Procedure

A. (§6.5) Generally

The associate circuit judge shall proceed with the preliminary hearing as soon as possible, and witnesses will be produced in support of the prosecution on oath in the presence of the accused. The accused may cross-examine witnesses and may also introduce evidence. If from the evidence it appears to the judge that there is probable cause to believe that a felony was committed and that the defendant committed it, the judge shall order the defendant to appear in the court having jurisdiction of the offense, i.e., the circuit court.

Rule 22.09(b). Otherwise, the associate circuit judge shall order that the defendant be discharged. Transmittal of the associate court file to the appropriate circuit court division must be accomplished within 5 days after conclusion of proceedings along with any bail posted by the defendant, and the defendant's appearance at the appropriate division of the circuit court must be ordered "on a day certain as soon as practicable, but not more than 40 days after completion of the preliminary hearing." Rule 22.09(c). Contemporaneously with ordering a defendant bound over to the circuit court for arraignment and further proceedings, the associate circuit judge may review bond and decide whether the present bond is sufficient. Bond can either be increased or decreased at this time, but any change in bond must be made before the associate circuit division loses jurisdiction over the cause. Rule 33.06.

If the defendant is currently committed to the Department of Corrections, the preliminary hearing, in the discretion of the judge, may be heard within a facility of the Department of Corrections. Sections 544.275, 561.031, RSMo 2000; *Guinan v. State*, 769 S.W.2d 427 (Mo. banc 1989).

B. (§6.6) Change of Judge

An associate circuit judge may generally be disqualified from conducting a preliminary hearing upon the filing of a written application for a change of judge at least ten days before the initial date set for hearing or within ten days of the designation of the judge, whichever is later. Rule 32.06(a). Thus, the change of judge request must be filed at least ten days before the hearing is scheduled to occur; if the designation of a judge does not precede the date set for the hearing by at least ten days, the application for change of judge must be made before the commencement of the preliminary hearing. *Id*. The application:

- does not need to allege or prove any reason for the change;
- does not need to be verified; and
- may be signed by any party or any attorney for any party.

Id.

"A copy of the application and a notice of the time when it will be presented to the court shall be served on all parties." Rule 32.06(b). "If the application is timely filed, the judge shall promptly sustain the application and notify the presiding judge who shall assign a judge

within the circuit or request [the Supreme Court of Missouri] to transfer a judge." Rule 32.06(c).

Counsel should note that the judge who conducted the preliminary hearing cannot be designated by the presiding judge (over objections by the accused) to hear the trial of the felony in that same case. Section 478.240.2(2), RSMo 2000. Some judicial circuits, however, provide by local rule that, when the preliminary hearing is waived, the associate circuit judge who heard the waiver can be assigned as the trial judge. Normally, counsel is entitled to a change of judge at the preliminary hearing stage and another change of judge at the circuit level. Rule 32.09(a). Therefore, when the associate circuit judge remains on the case after waiver, counsel would only get one change of judge. If this change is exhausted, a circuit judge could be assigned who, in counsel's view, is not a desirable choice, and no recourse would be available. To avoid this possibility, counsel should ask the associate circuit judge either to make a finding based on the record as submitted in the probable cause statement attached to the complaint or to have a very limited hearing, thus disqualifying that judge from being assigned to hear the case at trial and preserving a change of judge to be exercised by the accused with counsel's advice.

It has been held that the defendant can waive the right under § 478.240.2(2) to have a different judge than the preliminary hearing judge preside over pretrial motions or the trial of the case. *Hammon v. State*, 841 S.W.2d 276, 277 (Mo. App. S.D. 1992). A defendant may also waive any objection to a preliminary hearing by a judge with knowledge of the facts of the case by failing to object, although arguably the judge should recuse in such a situation. *See State v. Blackmon*, 664 S.W.2d 644 (Mo. App. S.D. 1984). Counsel may want to consider any search warrant applications, affidavits, and orders connected to the defendant's case in this regard, and who issued the latter, before any change of judge *or* waiver by acquiescence in the assigned preliminary judge.

C. (§6.7) Conduct of Hearing

The basic procedure for a preliminary hearing is that the defendant is present with counsel and the prosecuting attorney is present and calls witnesses to the stand. Those witnesses are sworn by oath or affirmation and will testify in open court subject to cross-examination by defense counsel. Defendants are also afforded the opportunity to present witnesses on their own behalf, and subject to the discretion of the court, counsel can argue their case after the evidence is

submitted. This basic procedure differs greatly from that of a case presented to the grand jury by the prosecuting attorney for an indictment. Before the grand jury, neither the accused nor the attorney for the accused is present when witnesses for the prosecution appear and give testimony. Witnesses are not subject to cross-examination by defense counsel, there is no judge presiding (except the presiding judge of the circuit court, or their designee, and then only to convene, recess, and adjourn the grand jury, *see* § 540.021.5, RSMo Supp. 2004), and there is usually no opportunity for the defendant to present evidence. When grand juries are an available alternative, the prosecuting attorney decides which cases to present to the grand jury and which are to proceed to preliminary hearing. The typical cases presented to the grand jury are:

- political investigations;
- undercover drug cases;
- rape and other sex offenses;
- child molestations;
- homicide cases; and
- other complicated cases involving numerous witnesses and the need for documentary evidence.

There is no requirement that the grand jury proceedings be recorded in any manner, and typically they are not unless the defendant or defense witnesses are called to testify. While not the subject matter of this chapter, whether the defendant or witnesses on behalf of the defendant should testify at the grand jury will be a matter of defense strategy and may or may not be beneficial depending on the circumstances.

The defendant has no right to a preliminary hearing, and when a prosecuting attorney elects to dismiss a complaint or information and proceed on an indictment, there is no dual prosecution and the defendant has no right to insist that a complaint and following information be filed to the exclusion of the indictment. If a prosecuting attorney exercises this discretion in charging by way of indictment rather than complaint and information, a subsequent trial on that indictment is not improper. *State v. McGee*, 757 S.W.2d 321 (Mo. App. W.D. 1988). When a prosecutor substitutes an information that does not charge any additional crimes for an existing true bill of indictment, a preliminary hearing is not required with respect to that substituted information. The underlying grand jury indictment remains susceptible to appellate court review for any alleged error even though the prosecuting attorney elects to substitute an

information in lieu of the original indictment. *State v. Turner-Bey*, 812 S.W.2d 799 (Mo. App. W.D. 1991), *overruled on other grounds by State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997).

When an amended information charges a different offense and is, in effect, a new information, a preliminary hearing is required. *State v. Simpson*, 846 S.W.2d 724 (Mo. banc 1993); *State v. Berry,* 916 S.W.2d 389 (Mo. App. S.D. 1996); *State v. Schaeffer*, 782 S.W.2d 68 (Mo. App. E.D. 1989). It is important to note that, when an amended information charges an offense different from that charged in the original information, in violation of Rule 23.08 and § 545.300, RSMo 2000, the trial court maintains jurisdiction over the proceedings. Therefore, the accused must request a continuance and object to the absence of a second preliminary hearing or, at the very least, move to dismiss the amended information. Absent any of these actions on the part of the accused, the appellate courts conclude that the accused has waived any right to a second preliminary hearing on the amended information and, therefore, will not overturn any subsequent conviction based on the absence of that preliminary hearing. *Simpson,* 846 S.W.2d 724.

It should be noted that a judge at a preliminary hearing does not make specific findings regarding or determine the degree of the offense to be charged. *State ex rel. Thomas v. Crouch*, 603 S.W.2d 532 (Mo. banc 1980).

III. (§6.8) Preliminary Hearing as a Discovery Tool: Pretrial Discovery

While the sole legal purpose of a preliminary hearing is the judicial determination of probable cause to hold the defendant over for trial as to a felony offense, it also presents the defendant with an easy and inexpensive form of discovery. The preliminary hearing judge and defense counsel both learn the strength and nature of the case against the accused at this hearing. In most jurisdictions, the hearing is conducted in much the same manner as a trial, and the basic rules of evidence are followed "as far as practicable." *See* § 544.280, RSMo 2000. What is "practicable" will vary from one jurisdiction to another, based on local practice, and over time. It should be noted that § 595.209.1(1), RSMo Supp. 2004, allows for victims of certain crimes "to be present at all criminal justice proceedings" (including preliminary hearing) "even if the victim is called to testify . . . as a witness in the case." Therefore, a court may refuse to exclude these

witnesses at a preliminary hearing, the court being the fact-finder on the issue of probable cause and there being no jury present or due process issues related to the truth-finding process of a jury trial. *See* §6.16, *infra*.

Some jurisdictions allow wide latitude during preliminary hearings and an almost unlimited opportunity for defense counsel to elicit testimony during cross-examination. Counsel should go as far as possible, and if the prosecuting attorney does not object, the judge usually will not limit counsel's inquiry.

Unless counsel strongly believes there is a substantial likelihood that the merits of a hearing will result in a discharge of the defendant, defense counsel's strategy should be geared toward discovering as much of the state's case as possible. To this end, technical objections to evidence are not advisable. In most jurisdictions, hearsay and other technical rules of evidence are minimally applied by the court; objections, therefore, may be impractical.

When *only* hearsay evidence is proffered at the preliminary hearing by the state—e.g., when a Children's Division worker testifies by recital from a report about what the child victim has told the worker and other interviewers—defense counsel should object on due process grounds. Counsel should refer to § 544.280, which requires the court to follow basic rules of evidence, including the barring of hearsay as the sole evidence before the court, and submit that to do otherwise and admit the evidence would be an arbitrary decision of the court, opening any finding of probable cause to challenge under that standard of review. *State v. Clark*, 546 S.W.2d 455, 462 (Mo. App. W.D. 1976). This procedure also negatively impacts on the Sixth Amendment right of the accused to confront accusers. *Crawford v. Washington*, 541 U.S. 36 (2004); *Coleman v. Alabama,* 399 U.S. 1 (1970); *State v. Barnard*, 820 S.W.2d 674, 679 (Mo. App. W.D. 1991); *cf. State v. Menteer*, 845 S.W.2d 581, 584 (Mo. App. E.D. 1992) (decided after *Barnard*, but before *Crawford*, and stating that a "defendant's substantive rights are not affected by a preliminary hearing, and such a hearing is not even a part of the constitutional right to due process" when an indictment is a viable alternative, but endorsing a defendant's right to confront witnesses at preliminary hearing when held).

Additionally, depending on the jurisdiction, prosecuting attorneys may be willing to provide partial, if not complete, discovery before the preliminary hearing. While this early disclosure is not technically

required by the rules of discovery, some prosecuting attorneys will provide police reports and other discovery to defense counsel in the hope that the preliminary hearing will be waived and the prosecuting attorney, therefore, will be relieved of the necessity of subpoenaing witnesses and conducting numerous and lengthy hearings.

Early discovery agreements between prosecutors and defense counsel have other salutary effects, besides avoiding the expenditure of time and energy in preparing for and presenting preliminary hearing witnesses and evidence. Scrutiny of discovery materials by experienced defense counsel often highlights latent or patent problems with the state's case before the even greater expense in time, energy, and scarce resources required for trial.

It is usually in counsel's best interest to ask open-ended questions in cross-examination of the state's witnesses, allowing them to ramble in their answers and reveal as much as possible. In this way, counsel may show the prosecutor weaknesses in the case. Additionally, counsel may wish to note at the onset of the hearing what witnesses the state has caused to be present. If the prosecution elects to rest its case without presenting all of the witnesses who have appeared, defense counsel may wish to call these witnesses in their portion of the hearing. Rule 22.09(b) clearly allows defendants to introduce evidence on their own behalf, and this evidence is not restricted to the party who subpoenaed the witnesses to appear. Unless counsel is prepared to serve the state's witnesses with a subpoena the day of the hearing, the prosecutor may excuse the witnesses (not called to testify) before counsel can put them on the stand.

When possible, a tape recording or a record of the testimony should be made. It is becoming more and more difficult to utilize a micro-cassette recorder (or new digital recorders) to record preliminary hearings because prosecuting attorneys are frequently and increasingly objecting to that manner of recording. The typical objection is either that defense counsel does not share the recording with the prosecuting attorney or that the manner of transcribing the testimony and verifying its accuracy is objectionable. The most acceptable method, but unfortunately the most expensive, is to obtain the services of a certified court reporter and have that reporter present to take down the testimony. Counsel should note that the courts are not required to provide at their expense, and will not provide, a court reporter for preliminary hearings or a tape recording machine to record testimony. The only exception is for preliminary hearings conducted in homicide cases. Rule 22.10 provides for a

verbatim record of the preliminary hearing testimony in all homicide cases to be transcribed at the request of either party. See §6.19 below regarding the right to a transcript of the preliminary hearing and methods of recording.

IV. Continuance

A. (§6.9) General Rule

Rule 22.09(a) provides that the judge must hear evidence at a preliminary hearing within a reasonable time. Failure to hold a preliminary hearing within the time specified in the Rule or failure to comply with § 544.320, RSMo 2000 (see the discussion in the paragraph below) does not oust the court of jurisdiction. *State ex rel. Wagner v. Blersch*, 660 S.W.2d 479 (Mo. App. S.D. 1983). And if the state's motion for continuance is denied, it may always dismiss the charge and re-file the case. There is, therefore, no statutory time limit regarding when a preliminary hearing must be held, how many continuances are allowed, or how long the continuances may be. But undue delay in the scheduling of a preliminary hearing may be a denial of due process if the delay is such that it denies the defendant a fair trial because a defendant's constitutional right to a speedy trial attaches when, *inter alia*, actual restraints are imposed on a defendant by arrest and detention to answer to a criminal charge. *State v. Farris*, 877 S.W.2d 657 (Mo. App. S.D. 1994); *State v. Bolin*, 643 S.W.2d 806 (Mo. banc 1983); *Barker v. Wingo*, 407 U.S. 514 (1972).

The analysis in *Bolin* indicates that a defendant's right to a speedy trial attaches at the time of arrest and not at the time a preliminary hearing is held and probable cause established. Under § 544.320, a continuance of a preliminary hearing involving a prisoner is limited to 21 days at a time. It should be noted that, under the concluding clause of § 544.320, courts can still continue prisoner cases in excess of 21 days at the request of defense counsel who is also a member of the Missouri General Assembly. Section 510.120, RSMo Supp. 2004. With continuing emphasis on the need for lawyers in the legislature, this provision may see more recitation in the future. *But cf. Lardinois v. Lardinois*, 827 S.W.2d 284 (Mo. App. E.D. 1992) (the court, in a civil case, found that the court had discretion to grant or deny a motion for "legislative continuance").

The general speedy trial right and the incarcerated prisoner's right to disposition of detainers (within 180 days per § 217.460, RSMo 2000)

are often confused by incarcerated prisoners. *See* U.S. CONST. amend. VI; §§ 217.450–217.520, RSMo 2000 (uniform mandatory disposition of detainers). Due process may require that these provisions be examined closely by defense counsel and the courts. U.S. CONST. amends. V, XIV; MO. CONST. art. I, §§ 10, 22(a); *see, e.g., State v. Allen*, 954 S.W.2d 414 (Mo. App. E.D. 1997).

Obviously, requests for continuance by defense counsel may impact these rights. *See* §6.11, *infra*.

B. (§6.10) When to Request a Continuance

Although a continuance of a trial date may be to a date for setting purposes (i.e., a setting docket), a court must continue a criminal preliminary hearing or other "criminal proceeding" to a fixed date. Section 544.320, RSMo 2000; Rule 24.08. This applies regardless of the party requesting the continuance. In most jurisdictions, a defense request for a continuance of a preliminary hearing setting will normally be granted if valid reasons are given. In many jurisdictions where a grand jury is sitting, such a "fixed date" is within 21 days, but generally after the grand jury next meets. Because of the prosecution's need to subpoena or call witnesses for the hearing, counsel should first notify the prosecution of an intent to request a continuance from the court and then notify the court before the date of the hearing. It will be very difficult to get a continuance granted on the day of the scheduled hearing when the prosecutor is ready to proceed with all witnesses present.

More often than not, it is the prosecution that requests a continuance of a preliminary hearing for various reasons. Typical reasons are witness unavailability or a prosecutor's desire to present the case before the grand jury. Courts generally will grant each side one continuance, but this varies from jurisdiction to jurisdiction. The court may order the cause dismissed for failure to prosecute if the prosecution requests more than one continuance. Counsel will have better success at gaining a dismissal if the defendant is confined. In lieu of seeking dismissal, counsel may want to consider the following options:

- Not moving for dismissal, but rather moving for a bond reduction
- In lieu of requesting a certain dismissal, negotiating a disposition with the prosecution

- Consenting to the continuance with the stipulation that, if the prosecution is not ready for the next setting and the case dismissed, the prosecution will agree not to re-issue the complaint

Counsel should note that the time standards of Administrative Rule 17 are creating pressures in certain jurisdictions such as St. Louis and Kansas City, making continuances fairly difficult to obtain.

C. (§6.11) When Not to Request a Continuance

Because the state has the right to re-file charges, counsel may want to consult with the client before automatically requesting a dismissal for failure to prosecute. If the case is dismissed and the charges re-filed, the defendant is re-arrested and re-processed at the jail, and a new, and perhaps higher, bond must be posted. Counsel should weigh the options with the client because the client may want to avoid the inconvenience and embarrassment of a new arrest and booking procedure if the re-issuance of the complaint is a certainty. If the prosecution announces that it is not ready at the hearing, counsel would be wise to speak with the prosecutor to determine the reasons, e.g., witnesses' failure to appear, etc. It may be that the victim or some other essential witness is refusing to cooperate and, therefore, requesting a dismissal would be warranted because the likelihood of the case being re-filed is minimal. If the continuance is requested for some technical reason or because of scheduling conflicts, or even because a police officer is on vacation, counsel should discuss with the client the option (and wisdom) of requesting dismissal of the case or consenting to the state's request for continuance. Obviously, if a client is confined and unable to post bond, a dismissal of the charge will lead to the release of the defendant from confinement (albeit potentially short-lived). Other and potentially better options, however, may present themselves; it may be possible to procure a bond reduction, thereby allowing the release of the client from jail, yet avoiding the re-arrest of the client if the charges were dismissed and re-filed. And it may also be possible to come to some sort of plea agreement with the prosecution (if the client has expressed a willingness to accept a plea offer).

Clearly, if the state is unable to proceed at the preliminary hearing and counsel is sure that the case will be dismissed upon the motion of the defendant, the defendant has an advantage. In this circumstance, counsel should weigh and discuss all options with the client before announcing counsel's intention to the court.

Again, defense counsel will want to examine the following:

- The situation of the accused, including other pending charges, probations, or paroles
- Whether the accused is incarcerated on this charge or others
- If incarcerated, for how long and under what other detainers or holds
- Whether to pursue speedy trial or disposition of detainers rights and remedies before requesting or joining in a continuance request (acquiescence in a request may be as problematic as making the request in the first place in some instances)

Section 217.460, RSMo 2000; *State v. Morehouse*, 851 S.W.2d 714 (Mo. App. W.D. 1993); *State v. Allen*, 954 S.W.2d 414 (Mo. App. E.D. 1997).

V. Discovery

A. (§6.12) No Entitlement to Discovery

Rules 25.01–25.18 apply to all criminal cases and provide that discovery may commence upon the filing of the indictment or information and after arraignment in the court having jurisdiction to try the offense charged. Therefore, discovery does not have to be provided to the defendant until after arraignment in circuit court. In some jurisdictions, the prosecution will provide some or all of the discovery before the preliminary hearing; when this is done, a request for discovery may be filed in the associate circuit division and probably should be to acknowledge this process and the continuing duty to disclose. This discovery request, of course, is not enforceable because Rule 25.01 does not apply at this stage of the proceedings. The prosecution may want to provide discovery voluntarily, before the preliminary hearing, to convince the defendant that sufficient evidence exists to bind the defendant over, thereby obtaining a waiver of the preliminary hearing. If the defendant chooses not to waive the right to a preliminary hearing, the court may constrain counsel from utilizing the discovery to much effect during the hearing, such as confronting a witness with a prior inconsistent statement contained in a report.

Rule 22.09(b) provides for the defense cross-examination of witnesses. When limitations on that right are imposed by the court—e.g., when it finds probable cause has been shown by the prosecutor through

direct examination of the state's witnesses—defense counsel may wish to note their objection to the restrictions as arbitrary, *State v. Clark*, 546 S.W.2d 455, 462 (Mo. App. W.D. 1976), or to argue that imposing restrictions on cross-examination indicates that the court has unfairly prejudged the ultimate issue of probable cause before hearing all the evidence or is denying the defendant due process in the conduct of the hearing "unlike" the procedures typically used at trial, contrary to § 544.280, RSMo 2000. In any event, other than calling on the court's own better judgment or reconsideration of what is appropriate in *any* judicial proceeding, there is no review of the court's thought process or ultimate findings of probable cause unless they are clearly arbitrary or fraudulent. *Clark*, 546 S.W.2d 455.

B. (§6.13) Laboratory Analysis

Section 544.376, RSMo 2000, allows for laboratory reports to be entered into evidence at preliminary hearings to prove the results of scientific tests. The only limit is that these reports must have been prepared by a crime laboratory in the state or a federal crime laboratory, and the reports must be certified under the seal of that laboratory. The accused or the attorney of record must be provided a copy of the report at least ten days before the preliminary hearing and must be given the opportunity before the hearing to interview any person who conducted the tests. Section 544.376. Notice must be given to the prosecution of the time and place of the interview, and the interview can be recorded. *Id*. This provision allows the prosecution to show probable cause in drug cases without the necessity of calling the lab personnel to testify as to the test results. This provision does not apply to police reports; it has been utilized, however, by the prosecution to introduce drug test results, DNA analysis, ballistics, and other forensic reports. When possible, counsel should take the opportunity to interview the laboratory personnel before the preliminary hearing. Typically, the prosecution does not appear for the interview. Criminal laboratory personnel tend to be more cooperative if they are not subpoenaed, and counsel should not wait until the time of trial to interview laboratory personnel or to obtain a tape-recorded statement. Section 544.376 does not prevent the defendant from subpoenaing the lab person even if the prosecution elects to present the results by written reports only. Rule 22.09(b). Although autopsy reports are not "laboratory reports" within the ambit of § 544.376, toxicology reports regarding laboratory findings are often appended to an autopsy. These toxicology reports would appear to be covered by § 544.376 if they are prepared by a "crime laboratory" in Missouri or a federal crime laboratory and certified under the lab's seal.

VI. Motions Filed in Preliminary Hearing

A. (§6.14) When to File Motions

Motions may be filed in preliminary hearings, and in some cases they should be filed in the same manner as for circuit court cases. *See* § 542.296, RSMo 2000. To be safe, motions should be filed in writing, and in some cases they must be filed in writing. Section 542.296.2. In some jurisdictions, oral motions to suppress are allowed, and counsel should make an announcement before the commencement of the evidence that the hearing is subject to oral motions to suppress. If the motions are filed and denied in the preliminary hearing, counsel is not barred from filing those motions again in the circuit court and having those motions heard before the circuit court. If a motion to suppress is sustained at a preliminary hearing by the associate circuit judge, the circuit court is not bound by that ruling regarding the admissibility of the evidence that is the subject of the motion. *Harroald v. State*, 438 S.W.2d 202 (Mo. 1969); *State v. Crouch*, 353 S.W.2d 597 (Mo. 1962). If a motion to suppress is sustained at preliminary hearing by the associate circuit judge, the court may or may not order the defendant discharged. If the defendant is discharged, the prosecution can re-file the complaint and present it before a different associate circuit judge. *State ex rel. Brown v. Duggins*, 601 S.W.2d 11 (Mo. banc 1980).

Depending on the nature of the charge, motions to suppress evidence (whether regarding statements, physical evidence, or identification of the defendant) should generally be filed before the preliminary hearing. In drug cases, a motion to suppress evidence in accordance with an unlawful search and seizure should automatically be filed. The language in the motion should be general in nature if discovery has not been provided to counsel. This will allow counsel wide latitude in arguing the motion following the evidence. If a written motion is not filed and the testimony would seem to support such a motion, counsel may be barred from seeking suppression of the evidence for lack of filing a written motion. Section 542.296.2. It will be within the discretion of the associate circuit judge, however, whether to allow the hearing to proceed based on an oral motion to suppress or whether to require a written motion to suppress. Counsel should check with the judge well before the hearing date.

Most associate circuit judges prefer written legal memoranda on the issues involved in a motion. When possible, these memoranda should be prepared in advance of the hearing and provided to opposing

counsel at the hearing. The court may then allow opposing counsel to prepare a response to the memoranda submitted by defense counsel and delay a ruling. If the basis for the suppression arises during the course of the hearing for the first time, counsel may want to request that the judge delay ruling on any motions until after post-hearing memoranda are submitted by counsel. Certain considerations may impact the timing of filing of motions. With regard to "automatic" motions to suppress before a preliminary hearing, if there is not going to be a preliminary hearing in the jurisdiction—i.e., when requests for a preliminary hearing are met with prosecutor determination to take the case to the grand jury—a motion to suppress filed in the associate division may be a waste of time, necessitating a re-filing in another case-numbered file in circuit court after the indictment. Consideration of the local prosecutor's habits in this connection may save unnecessary and duplicative work. At the close of the state's evidence at the preliminary hearing, in appropriate circumstances, a motion should be made to:

- dismiss the complaint as being too vague and indefinite;
- dismiss for failure of proof; or
- reduce the original charge to a lesser degree of offense. It should be noted, however, that Rule 22.09(b) refers to a finding that "a felony has been committed"; hence, most judges called upon to "adjust" the offense charged in state court in Missouri will refuse to do so.

B. (§6.15) Incompetence to Proceed

Chapter 552, RSMo, applies at the associate circuit level before and during the preliminary hearing stage of the proceedings. An associate circuit judge has jurisdiction to inquire into the defendant's mental fitness to proceed under § 552.020, RSMo 2000. *State ex rel. Vaughn v. Morgett*, 526 S.W.2d 434 (Mo. App. W.D. 1975). This does not translate into unfettered discretion to order a mental evaluation. A court lacks jurisdiction to order a mental evaluation under Chapter 552 when mental disease or defect is not raised by the defense and there was no basis for the court to believe that the defendant may have lacked capacity to proceed to trial. *State ex rel. Proctor v. Bryson*, 100 S.W.3d 775 (Mo. banc 2003). In *Bryson* the defendant's behavior at arrest was held to be an insufficient basis to give the court probable cause to believe the accused suffered from incapacity in this regard.

VII. Sequestration and Exclusion of Witnesses

A. (§6.16) "The Rule"

Although there is no codified rule governing sequestration or exclusion of witnesses, it continues to be standard practice to exclude witnesses from the preliminary hearing until they have testified. The associate circuit judge *may* exclude witnesses—for or against the prisoner—who have not testified and *may* cause the witnesses to be kept separate and prevented from speaking with one another. Section 544.360, RSMo 2000. Defense counsel should request the exclusion of witnesses while a witness is testifying and might also consider requesting that the judge order the witnesses to be kept separate to prevent them from conversing with each other. The authority relevant to these requests, in addition to § 544.360, is § 544.280, RSMo 2000, which provides that the order of conducting the hearing shall be the same as in the trial of criminal cases before circuit judges.

As discussed in §6.8 above, § 595.209.1(1), RSMo Supp. 2004, allows for victims of certain crimes "to be present at all criminal justice proceedings" (including preliminary hearing) "even if the victim is called to testify . . . as a witness in the case." Therefore, a court may refuse to exclude these witnesses at the preliminary hearing. But counsel may wish to ask the court to require the prosecutor to present the victim first in such a case to minimize the adverse impact on the accused of the victim hearing evidence in court before testifying. When the victim hears other evidence before testifying, it would also seem fair to allow comment on this during cross-examination, much as the prosecution is allowed to comment on the defendant's ability to hear all the witnesses' evidence in the case before the defendant's testimony. *See Portuondo v. Agard,* 529 U.S. 61 (2000); *State v. Francis*, 997 S.W.2d 74 (Mo. App. W.D. 1999). The victim's right to be present (by statute) is surely no greater than the defendant's constitutional rights to be present, cross-examine, and testify on the defendant's own defense. *Cf. Crawford v. Washington,* 541 U.S. 36 (2004) (when testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the Sixth Amendment right to confront accusers).

B. (§6.17) Defense Witnesses

The preliminary hearing is conducted in much the same manner as the trial of a criminal case in circuit court, including the right to call witnesses on behalf of the defendant. Rule 22.09(b). Only in rare instances is it recommended that the accused call a witness in a preliminary hearing. It may be useful to call a witness to preserve their testimony, provided counsel has a certified court reporter on hand. As stated in §6.8 above, defense counsel may want to make note of the available witnesses for the state and call any of those witnesses not already called by the prosecutor. In addition, if there is a favorable witness counsel feels may not be available at the time the case proceeds to trial, counsel may want to call the witness for the preliminary hearing to preserve testimony. If the witness becomes unavailable for trial, counsel will have preserved the testimony (under oath and duly recorded) and may introduce that testimony in lieu of the appearance of the unavailable witness. Rule 25.13; § 492.400, RSMo 2000.

In addition to concerns with subsequently unavailable witnesses, there may be instances when counsel wishes to give a sympathetic court a basis to consider dismissal—see §6.14 above regarding motions to be filed at the preliminary hearing—or early notice and evidentiary support for an obvious and dispositive affirmative defense (i.e., claim of right) to avoid claims that the defense is only of recent manufacture. Doing so is not an election of defenses preventing the accused from raising other consistent defenses later. *State v. Ussery*, 452 S.W.2d 146 (Mo. 1970). Counsel intending to preserve the testimony of such a favorable witness should make arrangements to record the preliminary hearing, as discussed in §6.19 below. Notice to opposing counsel and familiarity with Rules 25.12–25.15 and 57, regarding the taking of depositions and use of previously recorded testimony, is recommended.

C. (§6.18) Should Defendant Testify?

Under no circumstances should the defendant be called to the witness stand and examined during a preliminary hearing. There is no advantage to subjecting the defendant to examination at this stage in the proceedings or in giving the prosecution an opportunity to discover the defendant's case. If the issue of probable cause to hold the defendant for the charge rests solely on a question of credibility, the associate circuit judge will almost always bind the case over to the circuit court anyway; therefore, there is no reason to subject the

defendant to cross-examination at this time. Counsel should remember that the judge is not acting as the ultimate fact-finder necessarily, but is instead deciding the legal question of probable cause. Once the defendant is called to testify and subjected to cross-examination by the prosecution, the testimony may be recorded and preserved, thereby limiting the defendant at trial as to testimonial issues. Should the defendant testify at trial, any prior inconsistent statements made at the preliminary hearing could be used as substantive evidence. Section 491.074, RSMo 2000. The concerns with defendant testimony at the preliminary hearing exist regardless of whether a recording or verbatim transcript is made of the preliminary hearing. Statements made by a defendant fall within a clear exception to the hearsay rule; witnesses can be called at trial as to their memory of the defendant's statements, whether admissions of ultimate issues or prior inconsistent statements.

VIII. (§6.19) Recording a Preliminary Hearing: The Right to a Transcript

There is no constitutional requirement that a verbatim record and transcript be made of the testimony at a preliminary hearing. *State v. Eaton*, 504 S.W.2d 12 (Mo. 1973). In fact, a defendant's substantive rights are not affected by a preliminary hearing, and a preliminary hearing is not even a part of the constitutional right to due process. *State v. Menteer*, 845 S.W.2d 581 (Mo. App. E.D. 1992). The only exception to the requirement of a verbatim record, mentioned in §6.8 above, is in the case of a homicide, and that is in accordance with Rule 22.10 and § 544.370, RSMo 2000. *State v. Clark*, 546 S.W.2d 455 (Mo. App. W.D. 1976). In these cases, the verbatim record can be transcribed at the request of either party. In all other cases, there is no requirement that a record and transcript be prepared, but a record and transcript may be made of the hearing at the expense of the accused, if not prohibited by local court rule and the parties agree to (1) the method and verification of accuracy and (2) equal access to the transcript. Absent this agreement beforehand, counsel invites objection.

Most courts will permit counsel to tape record the preliminary hearing; counsel would be wise, however, to check with the local rules of each court in advance of the preliminary hearing. To determine whether a certified court reporter will have to be supplied by the defendant or a tape or digital recorder will instead suffice, counsel

should speak to the prosecutor before the hearing. Although more expensive, a certified court reporter is preferable to an amateur tape-recorded effort of marginal quality.

No matter how testimony is recorded, counsel should remember that any record or transcript must be provided to the prosecutor under the rules of discovery. Rule 25.05. If the preliminary hearing was electronically recorded and the recording is not transcribed, counsel must make the recording available to the prosecution to listen to or copy. Likewise, if the prosecution obtains a record of the hearing, it must be provided to defense counsel under the discovery provisions of Rule 25.03. Again, a preliminary hearing transcript is useful as impeachment evidence at trial if a witness's testimony differs from that given at the preliminary hearing. Additionally, there is the possibility that the testimony of a witness at a preliminary hearing might be used as evidence in a trial if the witness becomes unavailable. *State v. Barnes*, 204 S.W. 267 (Mo. 1918); *State v. Butler*, 153 S.W. 1042 (Mo. 1913). It should be noted that, if a prosecution witness testifies at the preliminary hearing and is unavailable at trial, the defendant has been given confrontation rights if the hearing testimony is read at the trial. The defendant's inability to complete pre-hearing discovery as an aid to cross-examination at the hearing is not a factor. *State v. Griffin*, 848 S.W.2d 464, 470 (Mo. banc 1993). If the testimony is to be recorded, greater care and preparation is strongly recommended before and during the preliminary hearing. Comments made at the end of §6.17 above regarding familiarity with applicable rules are equally applicable here.

IX. Waiver of Preliminary Hearing

A. (§6.20) Waiver Generally Not Advisable

An accused may waive the preliminary hearing after having been given an opportunity to consult with counsel. Rule 22.09(a). It is a personal privilege of the accused. The waiver of preliminary hearing must be free of duress and knowingly and voluntarily made. As a general rule, assuming that preliminary hearings are actually available in the jurisdiction, preliminary hearings should never be waived by the accused. If, upon examination of the evidence presented in a preliminary hearing, the associate circuit judge determines that there is no probable cause to believe that a felony has been committed or that the defendant committed it, the judge shall discharge the accused. Rule 22.09(b). Counsel, therefore, should treat the preliminary hearing as a trial on these two issues. If the

prosecutor cannot establish that there is both probable cause to believe a felony was committed and probable cause to believe it was committed by the accused, the charge will be dismissed. Additionally, as discussed in §6.8 above, there is the utility of the preliminary hearing as a discovery tool to consider. There are times, however, when waiver may be advised or useful. An example of a form waiver of preliminary hearing is provided in §6.27 below.

As a practical matter, in a jurisdiction where the prosecutor chooses to use a grand jury exclusively for probable cause determinations, defense counsel may never be given the opportunity for a preliminary hearing. A preliminary hearing is not required when a grand jury has indicted the accused. *State v. McGee*, 757 S.W.2d 321 (Mo. App. W.D. 1988). In these cases, whether to waive may be a question of timing and logistics concerning the client's best interests, bail concessions, plea negotiations, etc. It should be noted that, by proceeding to trial or by entering a guilty plea without objecting to defects in a preliminary hearing or to the lack of a preliminary hearing, a defendant waives these objections. *State v. Brinkley*, 189 S.W.2d 314 (Mo. 1945); *Davis v. State*, 651 S.W.2d 497 (Mo. App. E.D. 1982).

B. (§6.21) Waiver When Grand Jury Will Be Called

When it is known that the case is definitely going to be presented to a grand jury, it may be advisable to consider waiver because there is nothing to lose. Waiver might prevent a higher bail bond being required by the court after indictment by the grand jury. Some lawyers also prefer not to try a felony case after indictment because of the possible inference given the trial jurors that a grand jury has already heard the evidence and found the defendant guilty. In certain cases, however, it may be to counsel's advantage to present the defendant to the grand jury in order to proffer testimony, thereby possibly convincing the grand jury not to indict. In these cases, and for the practitioner who has utilized this process successfully, waiving the preliminary hearing when the case is to be presented to the grand jury would not be advisable.

Again, the timing of proceedings may affect a course of action concerning the wisdom of waiver of the preliminary hearing. Often, a preliminary hearing is set for a future date some time off, knowing that the prosecutor will seek indictment on a date before then. Clients who waive the preliminary hearing may appear in circuit court before that time, potentially lessening the delay in disposition of the case. There are, of course, concessions that may be obtained

from the prosecution in return for waiver—e.g., easing of bail restrictions, plea negotiations, etc.

Defendants who are in all probability going to the Department of Corrections may or may not seek to expedite the process because of the following:

- Reasons related to pending probation or parole violation proceedings
- Concerns with concurrent versus consecutive time or prior commitments and service time factors
- Reasons known only to them

Those likely to be afforded probation, however, may be able to take advantage of eased bail requirements, etc., in light of the prosecution's decision in plea negotiations. A person to be granted the opportunity of probation may be a better potential pre-sentencing release candidate.

C. (§6.22) Waiver to Avoid Identification Reinforcement

In some cases, the identification of the defendant by the victim will be a major issue. It is suggested that in these cases counsel request in advance that the judge allow the defendant to remain seated in the courtroom with other persons during the hearing (i.e., in some other location than sitting at counsel table next to the defendant's attorney after the case is called in open court—the obvious identifier). Counsel may even want to go so far as to request that the judge allow someone other than the defendant to sit at the counsel table. It is imperative, however, if counsel intends to substitute another individual for the defendant at the counsel table, that counsel notify the prosecutor in advance and obtain the judge's permission. If the judge refuses to allow the substitution, counsel must comply with that decision. See *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981), in which the court upheld an attorney's conviction for criminal contempt for placing someone other than the defendant at the counsel table throughout the trial without previously notifying the prosecutor or obtaining the judge's permission.

If the court is going to require the defendant to sit at the counsel table for the hearing, it may be wise to discuss with the defendant in advance the possibility of waiving the preliminary hearing so a witness does not get an opportunity to identify the defendant with the case (possibly for the first time) or to strengthen a previous

dubious identification. Counsel should remember that the state may not call all available witnesses at a preliminary hearing. Identifications, or reinforcement of identifications, good or bad, do not have to be made from the witness stand; a witness who gets to see the accused sitting next to counsel, in the dock with prisoners, in the hallway, in the conference room, or otherwise can be influenced by that experience.

Waiver may also be considered when adverse publicity about the hearing might further contaminate potential jurors in the community.

Preliminary hearings are presumptively open to the public and can be closed only to protect the defendant's right to a fair trial. Before ordering closure, the court must make specific findings that there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and that reasonable alternatives to closure are not available to adequately protect the defendant's right to a fair trial. *Press-Enter. Co. v. Superior Court of Cal. for County of Riverside*, 478 U.S. 1 (1986).

A careful balance of considerations may be required when considering publicity issues. Counsel may recognize in those areas where the prosecutor typically takes cases to the grand jury that a decision to have a preliminary hearing instead may be motivated by a desire to obtain pretrial publicity on the case; alternatively, it may be to more fully and fairly evaluate the strength of the prosecution witnesses, e.g., to determine the victim's ability to identify the accused, to subject the victim's story to cross-examination, etc. In a given case, therefore, the defendant's position may or may not be detrimentally affected by a hearing. Discussion with the prosecutor is critical in these cases to attempt to determine the reason for the departure from practice and whether concessions may be obtained or negative consequences avoided or imposed for either having the hearing or waiving it.

D. (§6.23) Waiver as Tool of Plea Bargaining

It is increasingly common in rural practice for prosecuting attorneys to make an initial plea offer before the time for a preliminary hearing. Plea offers are thus conveyed to the defendant to entice the defendant to waive preliminary hearing. Obviously, prosecuting attorneys will thereby avoid presenting numerous cases on an already overcrowded grand jury docket and will also ensure that

dispositions are possible and encouraged when the cases are bound over to circuit court. Consistent with plea offers being made at or before the time of preliminary hearing, early discovery is being supplied to defense counsel by prosecuting attorneys more and more often. Counsel is cautioned to weigh the advantages and disadvantages of conducting the preliminary hearing against obtaining a plea offer that later may be withdrawn or modified. Typically, the plea offer is contingent on waiver of the preliminary hearing and often on waiver of any pretrial motions. Counsel should never waive the preliminary hearing without benefit of discovery first. Ultimately, however, it is the client's choice, and some clients may want to accept the agreement and waive the preliminary hearing, being comfortable with the certainty of their sentence in circuit court.

"Discovery" is often not a "total picture" package. It often takes time for reports and evidence to be developed and disclosed. Often, subsequently developed evidence is even more harmful or detrimental to the accused. In the context of drug prosecutions, it is also increasingly common for laboratory examinations of suspected controlled substances to be delayed for months by backlogged, understaffed, and overworked crime labs.

In practice, field test results and law enforcement opinions (see §6.13 above regarding crime lab reports) regarding the presence or identity of a controlled substance are arguably enough to meet a probable cause standard, at least before most grand juries. Even when the evidence will be scrutinized by a careful preliminary hearing judge, those clients who are certain of the suspected substance's offending nature are often well advised to not wait for a much-delayed lab report that may not only confirm the *quality* of the substance but also provide the prosecution new and often more serious information regarding *quantity* that, for example, may elevate a simple C felony possession charge, § 195.202, RSMo 2000, to an A or B felony trafficking (by weight) offense, § 195.223, RSMo Supp. 2004. Thus, an accused who "wants to wait for the lab report" may be rewarded by a timely finding of "no controlled substance present"; the accused (and defense counsel) may also be surprised by the quantitative or qualitative results and more serious charges, or the threat of those charges, from the prosecution in leveraging a plea bargain. A preliminary hearing that allows the prosecutor to hear evidence that alerts the prosecutor to the possibility of more serious charges is something to be avoided, if possible.

In the city, counsel may not be provided either early discovery or a plea offer before a preliminary hearing; often, the prosecutor to be ultimately assigned to the case may not be identified until after the preliminary hearing is complete and the defendant is bound over. All or none of the foregoing considerations may play into a decision regarding waiver in these jurisdictions.

X. General Comments

A. (§6.24) Using the Hearing to Best Advantage

The preliminary hearing requirement of probable cause is one of the most important safeguards provided to protect against groundless prosecutions. While the preliminary hearing was designed as a safeguard against abuse by the prosecuting attorney, it also presents the defendant with the easiest and most inexpensive form of pretrial discovery. The hearing is conducted in much the same manner as a trial, and the basic rules of evidence are followed. Thus, the hearing can be used to learn and maintain trial skills. Depending on the jurisdiction, preliminary hearings are sometimes conducted as "mini trials."

The prosecutor and defense counsel should each present evidence in a professional and skillful manner. Objections to evidence, when made, should be made in the same manner as in any trial, but because the main objective of the hearing for the defendant may be discovery, it is not always desirable to prevent introduction of evidence. When there is a reasonable possibility that a defendant may be discharged and released at the conclusion of the hearing, the strategy of counsel will be different than if the objective is merely to discover the prosecution's evidence. See §6.20 above regarding general considerations in the use of an afforded preliminary hearing.

B. (§6.25) State's Authority to Amend Information

When a defendant is bound over to circuit court after a preliminary hearing, the prosecution's information does not need to charge exactly what was charged at the preliminary hearing. *See* §§6.3 and 6.7, *supra*. At any time before the trial, the prosecutor may amend any information or file an information in lieu of indictment. No new preliminary hearing needs to be provided under these circumstances unless (1) a totally new offense is added or the new charge is distinct or different from that charged in the original complaint, information, or indictment or (2) a defendant's substantial rights are thereby

prejudiced. Rule 23.08; § 545.300, RSMo 2000; *State v. Simpson*, 846 S.W.2d 724 (Mo. banc 1993); *Johnson v. State*, 485 S.W.2d 73 (Mo. 1972).

C. (§6.26) Value of Preliminary Hearings—Trial Preparation—Plea Bargaining

Preliminary hearings and the negotiations surrounding them may be the most useful procedure in the entire Missouri criminal practice. Strengths and weaknesses of the case that may contribute to effective trial preparation or plea negotiations can be discovered in a preliminary hearing. The hearing conducted in the presence of the defendant reveals to defense counsel (as well as to the accused) the evidence that the prosecution has. Not to be discounted in the benefits of a preliminary hearing, and any concurrent pretrial discovery, including depositions of witnesses, is the impact that the evidence and the process have on the defendant's understanding of the case, the defendant's rights, and the consequences of the defendant's decisions. Client rapport and willingness to heed the advice of counsel is enhanced when the client understands the process, hears and sees the witnesses and evidence firsthand, and observes the assistance that counsel is able and willing to provide. If the evidence is found to be sufficient to overcome the presumption of innocence and burden of proof (albeit only a probable cause standard), defendants, having had in some measure a "day in court" and the opportunity to confront the witnesses and evidence against them, are now better prepared to consider the options of a plea versus a trial. Counsel on both sides are also better prepared to evaluate the case and to plan for trial.

Counsel on either side of a case should not underestimate the value of the preliminary hearing because the final outcome of the case may depend, in large part, on the preparation before the hearing and its result. Prosecutors can be overburdened with voluminous files and therefore fail to properly prepare for the hearing. Witnesses may fail to appear or be unprepared when they do testify, resulting in either dismissal of the case or testimony that may be readily impeached at a later date. Counsel for both sides should prepare for the hearing in advance and, when possible and warranted, should prepare legal memoranda in advance to assist the court concerning evidentiary issues. Counsel should take advantage of the opportunities to aid their case presented by a preliminary hearing; otherwise, the preliminary hearing and its pitfalls may take advantage of counsel and the accused.

XI. Forms

A. (§6.27) Waiver of Preliminary Hearing

In the Circuit Court of _____ County, Missouri
Associate Circuit Judge Division

State of Missouri	)	
	)	
	)	
vs.	)	Cause No. _____
_____	)	Division No. _____
Defendant.	)	

Waiver of Preliminary Hearing

Acknowledging that I have been advised that I am entitled to a preliminary hearing in connection with the charges of _____ _____ filed against me in the above cause on _____, 20___, and that I have been given the right to consult with family, friends, and an attorney, I hereby waive my rights to a preliminary hearing.

_____	_____
Date	Defendant
_____	_____
Witness	Defendant's Attorney

B. (§6.28) Waiver of Appearance at Preliminary Hearing

In the Circuit Court of _____ County, Missouri
Associate Circuit Judge Division

State of Missouri	)	
	)	
	)	
vs.	)	Cause No. _____
_____	)	Division No. _____
Defendant.	)	

Waiver of Appearance by Defendant at Preliminary Hearing

Acknowledging that I have been advised that I am entitled to appear and be present at a preliminary hearing in connection with the charges of _____ filed against me in the above cause on _____, 20___, and that I have been given the right to consult with family, friends, and an attorney, I hereby waive my right to personally appear at my preliminary hearing in accordance with § 561.031.2, RSMo 2000.

_____	_____
Date	Defendant
_____	_____
Witness	Defendant's Attorney

S. Kristina Starke*

Chapter 7

DISCOVERY BY RIGHT OR THROUGH COURT ACTION

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This chapter includes material from the previous chapters and supplements written by Dorothy M. Hirzy, Toby H. Hollander, and James R. Hobbs.

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1. (§7.20) Expert Witnesses and Results of Tests, Examinations, and Experiments
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VI. Forms

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I. (§7.1) Overview

The importance of discovery cannot be overemphasized. Trial preparation is critical to the presentation of the case for the plaintiff and the defendant, both through the discovery and procurement of admissible evidence and the knowledge of the evidence in the possession of counsel's opponent. The thorough use of discovery is also valuable in determining which cases should be negotiated and which should be tried.

II. Constitutional Considerations

A. (§7.2) Federal Constitution

The United States Constitution has little to say directly about criminal discovery. The Due Process Clause of the Fourteenth Amendment, however, requires a fair trial. *United States v. Agurs*, 427 U.S. 97, 107 (1976). In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The prosecution is under no obligation to routinely disclose its entire file, and a defendant will only be entitled to a new trial if the omitted evidence creates a reasonable doubt as to the guilt or sentence. *Agurs*, 427 U.S. at 106; *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (a defendant will be entitled to a new trial if the prosecutor's suppression of material evidence violated the defendant's right to a fair trial, i.e., "a trial resulting in a verdict worthy of confidence").

The concept of fundamental fairness in discovery is especially applicable when the discovery is necessary to assert an underlying statutory or constitutional right. In *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606, 608 (Mo. banc 1980), the Court required disclosure of demographic data maintained by the clerk of the circuit court to enable the defendant to exercise a challenge to the racial and sexual make-up of the grand jury pool. *See Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970) (selection of jurors must be free of racial bias).

In *State v. Brooks*, 513 S.W.2d 168, 175 (Mo. App. E.D. 1973), the court held that fundamental fairness required the state to disclose to the defense any promises made to a witness in return for the witness's testimony and that the failure to do so constituted a denial of due process. *See also Giglio v. United States*, 405 U.S. 150 (1972) (state's failure to disclose promise of witness's immunity from prosecution required a new trial).

In *California v. Trombetta*, 467 U.S. 479, 491 (1984), the Supreme Court held that due process does not require law enforcement agencies to preserve breath samples of a defendant accused of driving while intoxicated for use at trial. The defendants in the underlying

case sought to suppress breath samples seized by arresting officers, arguing that destruction of the samples violated due process.

B. (§7.3) Missouri Constitution

Article I, § 18(b), of the Missouri Constitution permits the state in felony cases to take the deposition of any witness within the state if the court finds that it is necessary to preserve the witness's testimony, provided that the defendant's right of confrontation (art. I, § 18(a)) is preserved. *State v. Granberry*, 491 S.W.2d 528, 531 (Mo. banc 1973).

The Missouri Constitution also contains a due process clause, art. I, § 10, which is identical to the clause contained in the United States Constitution. In addition, both the Sixth Amendment to the United States Constitution and art. I, § 18(a), of the Missouri Constitution require that a defendant be advised of the nature and cause of the accusations.

III. (§7.4) Statutory Provisions

Various Missouri statutes provide for discovery in criminal cases.

Section 491.075, RSMo Supp. 2004, deals with statements of children under 14 years of age who are victims of an offense under Chapters 565, 566, or 568, RSMo. Section 491.680.3, RSMo 2000, provides the circumstances in which the defendant may be excluded from a videotaped deposition of the alleged child victim. These statutes were held to be constitutional in *State v. Naucke*, 829 S.W.2d 445 (Mo. banc 1992). The prosecution must inform the defendant of the intention to use any statement. In deciding admissibility, the trial court must consider the totality of circumstances surrounding the out-of-court statements, such as:

- spontaneity;
- consistent repetition;
- the use of language not expected by a child of a similar age;
- lack of motive to lie; and
- the mental state of the child.

State v. White, 873 S.W.2d 874, 877 (Mo. App. E.D. 1994).

Section 492.303, RSMo 2000, permits the state to take depositions of any person found by the court to be an "essential witness." Under this provision, "[a] person is an **'essential witness'** if he [or she] is an eyewitness to a felony or if . . . the testimony would establish an element of the felony that cannot be proven in any other manner." Section 492.303.1. But the defendant and the defendant's spouse "are not essential witnesses under any circumstances." *Id*. Defense counsel must be given adequate time to prepare for the deposition. Section 492.303.2. The deposition is admissible at trial if permitted under the Missouri Rules of Criminal Procedure or if the witness refuses to testify or fails to appear at trial and the refusal or failure to appear was not caused by the state. Section 492.303.3.

Section 545.380, RSMo 2000, allows the defense, upon application to the court, to depose upon written interrogatories a material witness who is pregnant, ill, bound on a voyage about to leave the state, or confined in prison for a felony. The court may grant the deposition "upon the like proof and on the like terms as provided by law in civil cases." *Id*.

Section 545.400, RSMo 2000, allows a criminal defendant to take depositions of witnesses as long as notice is given to the prosecuting attorney as is provided by the law in civil suits. Efforts should be made to cooperate with the prosecuting attorney's office in setting a date and time for the deposition. This is simply a matter of professional courtesy. Often, the prosecuting attorney will arrange for the appearance of state witnesses for deposition. If the state or witness refuses to cooperate, defense counsel must subpoena the state's witness for a date certain with proper notice to the prosecuting attorney.

Section 545.410, RSMo 2000, requires that the prosecuting attorney attend depositions taken by defendants in criminal cases.

Section 545.800, RSMo 2000, requires that the prosecuting attorney furnish a copy of an indictment or information with all witness endorsements on it to the defendant.

Section 577.020.6, RSMo Supp. 2004, requires the state to provide full information on a breathalyzer test. This section is superseded by Rules 25.03 and 25.04. *State v. Clark*, 723 S.W.2d 17, 20 (Mo. App. E.D. 1986). The state's violation of this subsection does not require exclusion of test results as evidence at trial. *State v. Conz*, 756 S.W.2d 543, 547 (Mo. App. W.D. 1988).

Section 542.406, RSMo Supp. 2004, provides that any investigative officer who has obtained information in compliance with §§ 542.400–542.422, RSMo Supp. 2004, may disclose that information to other law enforcement officers to the extent necessary for the officer's proper performance of official duties.

Section 544.376, RSMo 2000, requires the state to furnish to the defendant or defendant's counsel, ten days before preliminary hearing, a report from any crime laboratory in the state relating to testing, analysis, identification, or comparison of evidence on the results of scientific tests. The defendant, upon proper notice to the state, is also permitted to conduct an oral or recorded interview of any person who conducted the testing. *Id*.

Section 544.370, RSMo 2000, requires that "[i]n all cases of homicide, but in no other, the evidence given by . . . witnesses shall be reduced to writing" and signed by the witnesses respectively. The purpose of this statute gives to the accused a fair preliminary hearing and a basis for the examination of witnesses for trial. *State v. Clark*, 546 S.W.2d 455, 462 (Mo. App. W.D. 1976). In a non-homicide case, there is no statutory or constitutional requirement that the defendant be furnished with a transcript of the testimony at a preliminary hearing. *State v. Eaton*, 504 S.W.2d 12, 20 (Mo. 1973).

IV. (§7.5) Missouri Rules of Criminal Procedure

Rules 25.01–25.18 of the Missouri Rules of Criminal Procedure provide the basis for routine discovery, extraordinary discovery, and sanctions for discovery violations. Rules 25.12–25.18 were amended in December 2003, effective July 1, 2004, and should be examined closely.

The discovery process is not mandated by the federal or state constitutions, but compliance or noncompliance with the rules of discovery can impact the defendant's constitutional rights to due process of law and a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and article I, §§ 10 and 18(a), of the Missouri Constitution. By permitting the defendant "a decent opportunity to prepare in advance for trial and avoid surprise," the rules of discovery ensure that the adversary process of trial is conducted in a fundamentally fair fashion. *State v. Mease*, 842 S.W.2d 98, 108 (Mo. banc 1992). But in the absence of any applicable

statutory provisions or rules of court, discovery is not permitted. *State ex rel. Chaney v. Franklin*, 941 S.W.2d 790, 792 (Mo. App. S.D. 1997).

Both the state and the defendant should keep a record of all discovery requests and responses. Formal discovery motions must be filed in every case. The defendant should request in writing, with a copy to the circuit court file, any information that the state fails to disclose in response to the defendant's formal discovery motion. This provides the trial court with a clear record of what items were requested and what items were received before trial. The "open file" approach contemplated by Rule 25.07(B) where either side announces to the other that their file is "open for inspection" should be avoided. *See, e.g., State v. Moore*, 645 S.W.2d 117, 119 (Mo. App. W.D. 1982) (state's disclosure by opening its file to defendant was inadequate when file contained no list of objects to be introduced at trial).

The obligation to disclose evidence under any of the criminal discovery rules continues throughout trial. Rule 25.08. Therefore, counsel is expected to supplement its prior responses to discovery requests upon discovery of the additional information.

A. (§7.6) Rule 25.01

Rule 25.01 provides that the rules of criminal discovery apply to all criminal cases, including both felonies and misdemeanors. Discovery "may commence" upon the filing of an indictment or information. Rule 25.01. Conceivably, this could occur before the defendant's arrest, preliminary hearing, or arraignment. But because prosecutors in most jurisdictions initially file a "complaint" after the defendant's arrest, the reality is that discovery will not begin until after the preliminary hearing or grand jury indictment. The criminal defendant is not entitled to discovery at the preliminary hearing stage of proceedings. *State v. Uelentrup*, 910 S.W.2d 718, 721 n.6 (Mo. App. E.D. 1995).

B. (§7.7) Rule 25.02

Rule 25.02 repeats the time upon which discovery may commence. In addition, Rule 25.02 requires that all requests or motions for discovery be made within 20 days of the defendant's arraignment. Responses to discovery requests must be made within 10 days after service of the request. The court may enlarge or shorten these times.

"Delay in seeking discovery is ground for denial." *State v. Boyd*, 615 S.W.2d 436, 437 (Mo. App. E.D. 1981).

A discovery motion that is filed outside the time parameters of Rule 25.02 could create "delay, surprise, and confusion." *State v. Gray*, 926 S.W.2d 29, 31 (Mo. App. W.D. 1996). Therefore, a late discovery request is not entitled to enforcement. *State v. Blades*, 928 S.W.2d 371, 374 (Mo. App. S.D. 1996). A prosecutor's "acquiescence" may cure any problem of lateness. *Hayes v. State*, 711 S.W.2d 876, 878 (Mo. banc 1986) (defendant was entitled to a new trial because of state's nondisclosure of plea bargain with prosecution witness despite defendant's untimely discovery request). Nonetheless, to make sure that the defendant's discovery motion will be effective, counsel should file a discovery request upon entering an appearance or at arraignment.

The state's failure to make a timely response to a defendant's discovery request may result in sanctions if the admittance of the evidence results in fundamental unfairness to the defendant. *State v. Estes*, 631 S.W.2d 121, 122 (Mo. App. S.D. 1982). Fundamental unfairness is determined by whether the evidence or its discovery would have affected the outcome of trial. *Id*. The question of remedies for nondisclosure is a matter within the trial court's discretion. *Id*.

In *State v. Blake*, 620 S.W.2d 359, 360–61 (Mo. banc 1981), the Supreme Court held that the defendant, who filed a discovery request nearly five months before trial, was prejudiced when, at 5:00 p.m. on the eve of trial, the state disclosed the defendant's inculpatory statements to a police officer and filed an amended information endorsing two additional witnesses. Although the trial court permitted defense counsel to interview the witnesses the morning of trial, the remedy was insufficient to remove the prejudice, and reversal was required. *Id*.

C. (§7.8) Rule 25.03

Rule 25.03 identifies what material and information the state must disclose to the defendant upon written request. Defense counsel must file the original discovery request in the court having jurisdiction to try the case and must serve a copy upon counsel for the state. The Rule identifies nine specific areas of discoverable materials, but the list is not exhaustive. Defense counsel should be thoroughly familiar with the provisions.

Rule 25.03(C) requires that the state "use diligence and make good faith efforts" to obtain requested and discoverable materials in the possession or control of government personnel. If the state's efforts are unsuccessful, the court, upon request, may issue suitable subpoenas or orders requiring that the material be made available to the state for disclosure to the defendant.

The nine categories of materials discoverable without court order are discussed in §§7.9–7.17 below.

1. (§7.9) Witnesses and Their Statements

Rule 25.03(A)(1) requires the state to furnish to the defendant names and addresses of witnesses it intends to call at trial or at any hearing. The duty to disclose is a continuing one. *State v. Turner-Bey*, 812 S.W.2d 799 (Mo. App. W.D. 1991), *overruled on other grounds by State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997). Initially, the state must list the names of all material witnesses for the prosecution "except rebuttal witnesses and witnesses who will appear upon the trial for the production or identification of public records" in the indictment or information. Rule 23.01(e). "Additional witnesses may be listed at any time after notice to the defendant upon order of the court." *Id.* In addition to the names of witnesses, the state must disclose the witnesses' written or recorded statements and any existing memoranda reporting or summarizing part or all of their oral statements. Rule 25.03(A)(1). Failure to endorse witnesses before trial violates this Rule. *State v. Whitfield*, 837 S.W.2d 503, 507 (Mo. banc 1992).

But the trial court has broad discretion in allowing late endorsement of a state's witness, and the defendant bears the burden of demonstrating an abuse of that discretion. *State v. Jones*, 854 S.W.2d 60, 64 (Mo. App. E.D. 1993). Factors used to determine whether the trial court abused its discretion in permitting the state's late endorsement of a witness include "(1) whether the accused waived the objection; (2) whether the state intended surprise or acted deceptively or in bad faith, intending to damage the accused; (3) whether the accused was surprised and suffered any disadvantage; and (4) whether the type of testimony given might readily have been contemplated." *State v. Hutchison*, 957 S.W.2d 757, 763 (Mo. banc 1997).

In *Hutchison*, 957 S.W.2d at 763–64, the defendant in a murder trial complained that the state's endorsement of a penalty phase witness on the first day of trial prevented him from adequately investigating possible rebuttal evidence. Upon review, the Supreme Court of Missouri found that the trial court had not abused its discretion in permitting the late endorsement because the defendant:

- conceded that the state did not act in bad faith in requesting the late endorsement;
- knew the state was investigating the witness before the late endorsement;
- had the opportunity to interview the witness; and
- did not request a continuance.

Id. at 764.

Likewise, the Court of Appeals, in *State v. Castillo*, 853 S.W.2d 381, 384–85 (Mo. App. E.D. 1993), found that the trial court did not abuse its discretion in failing to impose sanctions for a violation of Rule 25.03 when, four days before trial, the state disclosed a statement that its witness, the defendant's 14-year-old travel companion, made to juvenile authorities concerning the defendant's inculpatory remarks that he "tried to kill" the victim whose car he robbed. Because the state did not discover the statement until four days before trial, immediately phoned defense counsel to tell him about the existence and substance of the statement, and faxed a copy of the statement to defense counsel the next day, it complied with Rule 25.03. *Id*. at 384. Furthermore, because the defendant actually had known the substance of the statement a month before trial, he was unable to demonstrate that he suffered prejudice amounting to fundamental unfairness. *Id*. at 385.

Similarly, in *State v. Lanasa*, 827 S.W.2d 261, 262–63 (Mo. App. E.D. 1992), the Court of Appeals found that the defendant was not prejudiced when the trial court allowed a witness who had earlier invoked the Fifth Amendment privilege against self-incrimination in pretrial proceedings to testify at the defendant's trial because the defendant was aware of the substance of the testimony for more than a year before trial and knew that the state expected the witness to testify. Further, the court gave the defendant an opportunity to depose the witness before he

testified and clearly indicated it would grant the defendant additional time for follow-up investigation if needed.

The defendant in *State v. Harger*, 804 S.W.2d 35, 36–38 (Mo. App. E.D. 1991), sought to obtain records of a sex offense victim's treatment for cocaine abuse to see if she made statements indicating she used cocaine before the rape. Because the defendant claimed that the alleged victim offered him sex in exchange for cocaine and did not accuse him of rape until he failed to keep his end of the bargain, any statements of the victim's prior cocaine abuse would have supported his defense and may have affected the outcome of trial. *Id.* at 37. The court found that Rule 25.03 did not govern the defendant's request because of the confidentiality restrictions placed on disclosure of drug treatment records by the Drug Abuse Prevention, Treatment, and Rehabilitation Act, Pub. L. No. 92-255, 86 Stat. 65. *Id.* But because the records fit within an exception in the Act permitting disclosure in the investigation or prosecution of a serious crime, the court found that the defendant was entitled to an *in camera* examination of records and reversed. *Id.*

2. (§7.10) Statements of the Defendant or Co-Defendant

Rule 25.03(A)(2) requires the state to disclose any statements made by the defendant or co-defendant, whether they are written, recorded, or oral. If the statement is oral, the state must disclose the substance of that statement. *Id.* The state must provide the names and addresses of all witnesses to the making or acknowledgment of the statements. *Id.*

Inculpatory statements made by a defendant are almost always prejudicial, and the defendant is entitled to know before trial, upon proper request, whether the state intends to introduce any evidence of that sort. *State v. Childers*, 852 S.W.2d 390, 391 (Mo. App. E.D. 1993). Thus, in *State v. Kehner*, 776 S.W.2d 396 (Mo. App. E.D. 1989), the court found that the state's failure to endorse a witness it called on rebuttal to testify regarding statements the defendant made to him that refuted his claim of self-defense resulted in fundamental unfairness to the defendant, and the court reversed for a new trial. The court did not find the state's claim that it had no duty to disclose the existence of the rebuttal witness compelling, noting that evidence of inculpatory statements "in the state's case or in rebuttal, must be disclosed, if requested." *Id.* at 399.

3. (§7.11) Grand Jury Transcripts

Rule 25.03(A)(3) requires the state to disclose "[t]hose portions of any existing transcript of grand jury proceedings which relate to the offense with which defendant is charged." But because there is no requirement that grand jury proceedings be recorded or transcribed, this provision does little to help the defendant. *See* Chapter 4 of this deskbook. Nonetheless, defense counsel should include a request for the transcript of the grand jury proceedings in the formal discovery motion.

4. (§7.12) Preliminary Hearing or Prior Trial Transcript

Rule 25.03(A)(4) requires the state to disclose "[a]ny existing transcript of the preliminary hearing and of any prior trial held in the defendant's case" if it is in the state's possession or available to the state. Because there is no requirement that preliminary hearings be recorded or transcribed except as to homicides under § 544.370, RSMo 2000, it is unlikely that there would be a transcript of the preliminary hearing.

If defense counsel records the preliminary hearing by tape or court reporter, it is incumbent upon the defendant to furnish the state a copy of the transcript if properly requested by the prosecuting attorney. Defense counsel should carefully consider in advance whether the best interests of the defendant are served in preserving the testimony of the state's witnesses. Often, transcripts of such a hearing can provide good impeachment material at trial. On the other hand, transcripts can be helpful to the state by refreshing the witness's memory.

In contrast, obtaining a prior trial transcript should not present a problem for defense counsel. There should be a prior trial transcript if defense counsel is handling the retrial of a case that resulted in a mistrial or that was reversed and remanded on appeal. If the case was reversed and remanded on appeal, defense counsel should be able to obtain a copy of the prior trial transcript from the circuit clerk's office. If the case resulted in a mistrial, defense counsel should request a copy of the transcript from the state in the formal discovery motion. But the state's failure to comply with the defendant's request for a prior transcript will not merit sanctions if defense counsel also represented the defendant in the prior trial and had an

opportunity to order a copy of the transcript. *State v. Wengler*, 755 S.W.2d 619, 621 (Mo. App. E.D. 1988).

5. (§7.13) Reports or Statements of Experts

Rule 25.03(A)(5) requires the state to furnish reports and statements of experts made in connection with the particular case. This includes all reports or test results made in connection with the case, not just what the state intends to use at trial. The state has no obligation, however, to provide a summary of the testimony of expert witnesses. *State v. Wolfe*, 793 S.W.2d 580, 587 (Mo. App. E.D. 1990).

In *State v. Sweet*, 796 S.W.2d 607, 612–13 (Mo. banc 1990), *abrogated on other grounds by Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991), the Supreme Court of Missouri held that a reference book written by the state's ballistics expert and the expert's notes regarding the inspection of the defendant's rifle were not covered by the defendant's discovery request for written witness statements and reports or statements of experts and did not have to be disclosed. Likewise, in *State v. Jackson*, 663 S.W.2d 312, 317 (Mo. App. E.D. 1983), the appellate court found no fundamental unfairness resulting from the state's failure to disclose in a gun residue expert's report given to the defendant the fact that lead levels on the defendant's hands significantly exceeded levels found in the general population. As demonstrated by these two cases, formal reports of experts furnished to the defendant through discovery are often conclusory and merit further investigation.

6. (§7.14) Physical Evidence

Rule 25.03(A)(6) requires the state to disclose all physical evidence it plans to introduce into evidence at the trial or a hearing and any items that were obtained from or belong to the defendant, regardless of whether the state plans to use the items as evidence. Items the state uses in cross-examination, but does not intend to introduce into evidence, do not have to be disclosed. *See, e.g.*, *State v. Brooks*, 960 S.W.2d 479, 492–93 (Mo. banc 1997) (state did not have to disclose prison records used in cross-examining defense expert).

The Supreme Court of Missouri found that reversal was required in *State v. Whitfield*, 837 S.W.2d 503, 507–08 (Mo. banc 1992),

when the trial court admitted into evidence the victim's coat, which bore alleged bullet holes, because:

- the state had not disclosed the coat to the defendant during discovery;
- the coat was not newly discovered evidence;
- the introduction of the evidence surprised the defendant;
- the coat supported the credibility of the state's key witness; and
- the trial court did not grant the defendant a continuance to examine the coat.

In contrast, the appellate court, in *State v. Engel*, 859 S.W.2d 822, 828–29 (Mo. App. W.D. 1993), found no error in the trial court's admission of the book *How to Rip Off a Drug Dealer* taken from the defendant's apartment when the state's disclosure of the book was timely and the defendant failed to request a remedy for the allegedly untimely disclosure, such as a continuance.

7. (§7.15) Records of Witnesses' Prior Convictions

Rule 25.03(A)(7) requires the state to furnish to the defendant records of the prior criminal convictions of witnesses the state intends to call at trial or a hearing. It does not require the state to produce its witnesses' arrest records. *State v. Wells*, 752 S.W.2d 396, 399 (Mo. App. E.D. 1988). In *Wells* the court held that the state did not have to disclose its witness's pending criminal charges because the defendant had not specifically requested the information in his discovery motion and there was no evidence that the witness made any agreement with the prosecution in exchange for his testimony. *Id*. Likewise, in *State v. Beatty*, 849 S.W.2d 56, 60 (Mo. App. W.D. 1993), the appellate court found that the defendant suffered no prejudice from the state's refusal to disclose a record of its witness's arrests, including charges pending against the witness in another state, in response to the defendant's discovery request.

Although disclosure of pending charges is not required by the Rule, the defendant's discovery motion should contain a request for any pending criminal charges against state witnesses and whether any deals exist between the witnesses and the prosecution. The defendant may be entitled to this information upon request if nondisclosure of the information would result in fundamental unfairness.

8. (§7.16) Photographic or Electronic Surveillance

Rule 25.03(A)(8) requires the state to disclose in writing whether any photographic, electronic, or wiretapping surveillance exists, relating to the offense with which the defendant is charged, of:

- the defendant;
- conversations to which the defendant was a party; or
- the defendant's premises.

But unless a nondisclosure prejudices the defendant, relief is not required. *See, e.g., State v. White*, 931 S.W.2d 825, 830–32 (Mo. App. W.D. 1996) (defendant not entitled to relief from nondisclosure of videotape of his arrest when defendant was aware that the "COPS" television crew videotaped his arrest, video producers independently destroyed videotape before any obligation to disclose arose, the tape was never in the possession of government personnel, and defendant had no reason to believe the videotape would be exculpatory). *Cf. State v. Bradley*, 882 S.W.2d 302, 306–08 (Mo. App. S.D. 1994) (trial court abused its discretion in admitting videotape recording that state failed to disclose in response to defendant's discovery request when defendant had relied on state's representation of what videotapes it would use at trial).

9. (§7.17) Exculpatory and Mitigating Evidence

Rule 25.03(A)(9) requires the state to disclose in response to a request by the defendant any material or information within the state's possession or control "which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment." But the state must disclose exculpatory and mitigating evidence to the defendant even without a request under the holding in *Brady v. Maryland*, 373 U.S. 83 (1963). *State v. Robinson*, 835 S.W.2d 303, 306 (Mo. banc 1992). This disclosure is mandated by the defendant's constitutional right to due process. *Brady*, 373 U.S. at 87. Although *Brady* does not require the disclosure of material evidence that is not exculpatory, reversal because of the nondisclosure may be required if the state's actions "add[ ] up to a violation of the spirit of the rules of criminal discovery" and have "the effect of denying the defendant a fair trial." *State v. Rodriguez*, 985 S.W.2d 863, 868 (Mo. App. W.D. 1998) (state's failure to disclose that defense witness had recanted prior

deposition testimony required reversal for a new trial). After all, the state's obligation is "not merely to win a case, but to see that justice is done, that guilt shall not escape nor innocence suffer." *State v. Burnfin*, 771 S.W.2d 908, 914 (Mo. App. W.D. 1989).

D. (§7.18) Disclosure to Defendant by Court Order for Good Cause

Under Rule 25.04, the defendant can request that the state disclose materials and information not covered by Rule 25.03. The defendant must make a written motion specifying the material or information sought to be disclosed. If the court finds that the request is reasonable, the court will issue an order to the state to disclose to the defendant information that is relevant and material to the defendant's case. A defendant's request under this Rule is reasonable if it is for evidence "relevant and material to the defendant's case." *State v. Ghan*, 721 S.W.2d 128, 132 (Mo. App. W.D. 1986).

In its order, the court must specify the material and information to be disclosed as well as the time and manner in which the state must make its disclosure. Rule 25.04(B). If the material or information is not within the possession or control of the state, the state is required to make good faith efforts to have the information and material furnished to the defendant. Rule 25.04(C). If the state is unable to procure the material or information, the court may issue subpoenas and orders to other government agencies or personnel under the jurisdiction of the court. *Id*.

E. (§7.19) Disclosure by the Defendant to the State

Rule 25.05 requires the defendant to disclose certain categories of evidence to the state without a court order upon the state's written request. The requirements of this Rule are discussed in §§7.20–7.24 below. "Subject to constitutional limitations, Rule 25.05 mandates defendant disclose to the state requested material within his possession or control which he intends to introduce in evidence at trial." *State v. Richardson*, 838 S.W.2d 122, 124 (Mo. App. E.D. 1992) (emphasis omitted). But, aside from mental disease or defect or alibi, the defendant does not have to furnish the state notice of the defendant's defense before trial. *State v. Harris*, 662 S.W.2d 276, 277 (Mo. App. E.D. 1983).

1. (§7.20) Expert Witnesses and Results of Tests, Examinations, and Experiments

Rule 25.05(A)(1) requires the defendant to furnish to the state reports or statements of experts and the results of tests, examinations, or experiments that the defendant intends to introduce in evidence at trial, except those portions containing statements made by the defendant.

Caution should be exercised by defense counsel if the defense is that the defendant is not guilty by reason of mental disease or defect. In *State v. Carter*, 641 S.W.2d 54 (Mo. banc 1982), the defendant, who claimed a defense of mental disease or defect, was examined by two doctors of his own choosing. One expert found that the defendant was not suffering from mental disease or defect. Obviously, defense counsel did not plan to call this doctor as a witness. The state, however, requested disclosure of the doctor's report, obtained the report, and used this expert as a witness for the state. Therefore, defense counsel should consider requesting that the examiner not make a report or statement unless it will be favorable to the defense. This may not be possible if the defendant is confined because of the provisions of Chapter 552, RSMo.

2. (§7.21) List of Witnesses and Copies of Statements

Rule 25.05(A)(2) requires the defendant to disclose the names and addresses of witnesses the defendant intends to call at trial, their written or recorded statements, and any memoranda reporting or summarizing their oral statements. Whether to permit the late endorsement of a defense witness is a matter within the trial court's sound discretion. As a matter of law, the trial court does not abuse its discretion by refusing to allow late endorsement of a defense witness whose testimony would be cumulative or collateral. *State v. Williams*, 853 S.W.2d 371, 373 (Mo. App. E.D. 1993). Not allowing otherwise admissible testimony of defense witnesses as a sanction for late endorsement, however, is an extreme remedy that should be used with great caution. *State v. Belcher*, 856 S.W.2d 113, 116 (Mo. App. E.D. 1993). The exclusion of a defense witness's testimony for failure to disclose will result in fundamental unfairness to the defendant, requiring reversal if the proposed testimony was relevant and material and its exclusion prejudiced the defendant. *See, e.g., State v. Dethrow*, 674 S.W.2d 546, 549 (Mo. App. E.D. 1984).

3. (§7.22) Physical Evidence

Rule 25.05(A)(3) requires the defendant to disclose to the state any physical evidence such as books, papers, documents, or photographs that the defendant intends to introduce at trial. In *State v. Mack*, 855 S.W.2d 457, 458 (Mo. App. E.D. 1993), the appellate court found that the trial court did not abuse its discretion when it excluded the defendant's photographs of an arrest scene because the defendant had not disclosed them to the state. Similarly, in *State v. Gray*, 741 S.W.2d 35 (Mo. App. E.D. 1987), the appellate court found that the trial court did not err in requiring the defendant to provide the state with a copy of a 911 tape in the defendant's possession. But in *State v. Richardson*, 838 S.W.2d 122, 124–25 (Mo. App. E.D. 1992), the appellate court found that the trial court's exclusion of a videotape of the crime scene required a new trial; defense counsel made the tape the second day of trial in response to testimony of a police officer that he had observed the defendant from the window of a vacant building.

4. (§7.23) Mental Disease or Defect

Under Rule 25.05(A)(4), the defendant must furnish to the state a written statement of the intention to rely on mental disease or defect. The purpose of this notification is to prevent surprise to the state. *State v. Isa*, 850 S.W.2d 876, 886 (Mo. banc 1993). In *Isa* the Court held that changes in the defendant's demeanor and her ability to recall events were not sufficient reasons to permit the defendant to file an untimely notice of her intent to rely on a defense of mental disease or defect.

5. (§7.24) Alibi Defense

Under Rule 25.05(A)(5), disclosure of the defendant's intent to rely on a defense of alibi must be made in writing. The statement must contain specific information regarding where the defendant was at the time of the alleged offense, as well as names and addresses of alibi witnesses.

In *State v. Anderson*, 18 S.W.3d 11, 14–17 (Mo. App. W.D. 2000), the trial court refused to let the defendant testify to an alibi because the defendant did not make the disclosures required under this Rule. Although acknowledging that the sanction was harsh, the court found that it did not result in fundamental

unfairness to the defendant when the alibi did not preclude the possibility that the defendant committed the crime charged and the defendant's statements of his whereabouts still came before the jury. *Id*. at 16–17.

Similarly, in *State v. Harris*, 664 S.W.2d 677, 680–81 (Mo. App. E.D. 1984), the appellate court found no error in the trial court's refusal to permit the late endorsement of three alibi witnesses when the defendant failed to comply with the prosecution's discovery request. Although defense counsel claimed that the defendant had not informed him of the whereabouts of two of the witnesses until the second day of trial, the appellate court found it "inconceivable" that the three alibi witnesses "were undiscovered the three years prior to the second day of the trial" given that two were relatives of the appellant and the third was his girlfriend. *Id*.

F. (§7.25) Rebuttal Witnesses

Generally, there is no requirement that the state endorse its rebuttal witnesses unless they are called to rebut the defense of alibi or mental illness. *State v. Gillis*, 812 S.W.2d 887, 891 (Mo. App. E.D. 1991). The defendant cannot expect the court to grant a continuance because of the state's late endorsement of witnesses called to rebut the defendant's alibi if the late disclosure was a result of the defendant's untimely notice that the defendant would rely on the defense, the state's witnesses did not directly rebut the defendant's alibi, and defense counsel was allowed to interview the state's witnesses. *State v. Menteer*, 845 S.W.2d 581, 585–86 (Mo. App. E.D. 1992). Whether a witness is a proper rebuttal witness is determined by the trial court. *State v. Reese*, 787 S.W.2d 768, 771 (Mo. App. W.D. 1990).

Defense counsel must include a specific request for rebuttal witnesses in its discovery motion if the defense is alibi.

G. (§7.26) Disclosure by Defendant to State Upon Order and for Good Cause

Rule 25.06(B) lists nine different requests to which the defendant must submit upon motion by the state and upon a showing of good cause. These include requests that the defendant:

(1) Appear in a lineup;
(2) Speak for identification;
(3) Be fingerprinted;
(4) Pose for photographs not involving reenactment of a scene;
(5) Try on articles of clothing;
(6) Provide a sample of his handwriting;
(7) Submit to the taking of specimens of material from under defendant's fingernails;
(8) Submit to the taking of samples of the defendant's blood, hair, and other materials of his body, which involve no unreasonable intrusion thereof;
(9) Submit to a reasonable physical or medical inspection of his body.

The state's motion must be in writing in the court having jurisdiction to try the case, and the motion must specify the material or information sought to be disclosed. If the court finds the request to be reasonable, the court can order the defendant to submit to one or more of the activities contemplated by the Rule.

If either party requests a hearing, the court shall hear evidence on the necessity of the discovery. Rule 25.06(C). Failure to hear evidence on the necessity of the state's motion for an inspection of the defendant's body is not error. *State v. Clark*, 711 S.W.2d 885, 888 (Mo. App. E.D. 1986). But because a defendant has the right to have counsel present, the court should appoint an unrepresented defendant counsel before considering a motion under this Rule. *State v. Hill*, 693 S.W.2d 151, 154 (Mo. App. E.D. 1985); Rule 25.06(F). The state's right to have the evidence contemplated by Rule 25.06(C) is "subject to constitutional limitations and any other safeguards deemed appropriate by the court." Rule 25.06(B); *Hill*, 693 S.W.2d at 154.

The court must give its reasons for granting the state's request, Rule 25.06(D), and specify the material and information to be disclosed and the time and manner in which the defendant shall comply with the order, Rule 25.06(E). Defense counsel should be aware that Rule 25.06(B) does not apply to investigative procedures before an indictment or information is filed.

H. (§7.27) Matters Not Subject to Disclosure

Rule 25.10 lists three areas that are not subject to disclosure. Two of these areas are discussed in §§7.28 and 7.29 below.

1. (§7.28) Work Product

Rule 25.10(A) protects "[l]egal research, or records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions" of the defendant, or the counsel or investigative staff of the state or defendant, from disclosure.

The attorney-client privilege protects communications between counsel and the client while work product privilege deals with the "opinions, theories, or conclusions" of counsel. Rule 25.10(A). The work product privilege is obviously separate and distinct from the attorney-client privilege. For example, notes of an interview with a state's witness are not protected from disclosure as work product, except for those portions constituting opinions, theories, or conclusions of the defendant's attorney or communications between the defendant and the defendant's attorney. *Foote v. Hart*, 728 S.W.2d 295, 298 (Mo. App. E.D. 1987).

2. (§7.29) Informants

Generally, the state does not have to reveal the identity or existence of a confidential informant unless the informant is an active participant and in a position to offer testimony relevant and crucial to the defense. *State v. Toler*, 823 S.W.2d 140, 142 (Mo. App. E.D. 1992); *State v. Arbeiter*, 664 S.W.2d 566, 568 (Mo. App. E.D. 1983).

The informant's identity does not need to be disclosed to challenge the basis for probable cause for the defendant's arrest. *State v. Higgins*, 592 S.W.2d 151, 162 (Mo. banc 1979), *overruled on different grounds by Kuyper v. Stone County Comm'n*, 838 S.W.2d 436 (Mo. banc 1992). But if there is a basis to challenge the veracity of a search warrant affidavit under *Franks v. Delaware*, 438 U.S. 154 (1978), there might be a limited right to disclosure of and production of a confidential informant's identity. *United States v. Kiser*, 716 F.2d 1268 (9th Cir. 1983).

I. Depositions

1. (§7.30) By the Defendant

Rule 25.12 allows a defendant in any pending criminal case in any court to take the deposition of any person on oral

examination or written questions. The manner of taking depositions is governed by the Rules of Civil Procedure. *See* Rule 57. The deposition of a person confined in prison should be taken at the place of confinement unless otherwise ordered by the court. Rule 25.12(b). The defendant is not permitted to be physically present at a discovery deposition "except by agreement of the parties or upon court order for good cause shown." Rule 25.12(c). The defendant may depose expert witnesses but will be required to pay the expert a reasonable hourly fee for the expert's time. Rule 25.12(d).

Rule 25.13 allows the defendant to offer into evidence a deposition that is otherwise admissible under the rules of evidence if:

- the witness is dead;
- the witness is out of the state unless the defendant procured the witness's absence;
- the witness is unable to attend or testify because of illness or infirmity;
- the witness is a judge, attorney, or physician engaged in the discharge of an official or professional duty at the time of trial;
- the witness has invoked a testimonial privilege or other refusal to testify not produced by the defendant's action; or
- the defendant, after a good faith effort, has been unable to subpoena the witness.

That the witness is confined in prison is no longer a justification for use of the witness's deposition at trial.

2. (§7.31) By the State

Rule 25.14 provides a limited right of the state to take depositions. The Rule states that the state may file a motion to take a deposition to preserve a witness's testimony subject to the defendant's rights of personal confrontation and cross-examination. The state must serve the application to take the deposition on the defendant and the defendant's attorney. The court shall order the deposition if, after a hearing, it finds that the deposition is necessary to preserve the witness's testimony. Depositions of the defendant and defendant's spouse are not permitted.

Similar to Rule 25.12 governing depositions by the defendant, Rule 25.15 allows a prosecuting attorney in any pending criminal case to take the deposition of any person on oral examination. The manner of taking depositions is governed by the Rules of Civil Procedure. *See* Rule 57. The deposition of a person confined in prison should be taken at the place of confinement unless otherwise ordered by the court. Rule 25.15(b). The defendant is not permitted to be physically present at a discovery deposition "except by agreement of the parties or upon court order for good cause shown." Rule 25.15(c). The state may depose expert witnesses but will be required to pay the expert a reasonable hourly fee for the expert's time. Rule 25.15(d).

Under Rule 25.16, the state may use a deposition at trial only if the defendant was personally present at the deposition and had the right of confrontation and cross-examination, waived the right to be personally present in open court, or failed to attend the deposition after the court ordered the defendant to do so, and the witness is unavailable. A witness is unavailable under this provision if the witness:

- is dead;
- is unable to attend because of sickness or infirmity;
- refuses to testify or invokes a testimonial privilege; or
- is otherwise unavailable despite the state's good faith efforts to procure the witness's presence at trial.

Rule 25.16.

J. (§7.32) Sanctions

Rule 25.18 permits the court to impose sanctions for violation of the discovery rules. The court may:

- order the party to make disclosure of material and information not previously disclosed;
- grant a continuance;
- exclude the evidence; or
- enter such other orders as it deems just under the circumstances.

While compliance with the criminal discovery rules is mandatory, violations do not amount to reversible error unless "they result in fundamental unfairness or prejudice to a defendant's substantial

rights." *State v. Cook*, 5 S.W.3d 572, 575 (Mo. App. W.D. 1999). Willful violations of the discovery rules are regarded more harshly and could result in sanctions to counsel. But "[a] conviction resulting from a fair trial should not be reversed for the purpose of disciplining and deterring prosecutors" if disciplinary mechanisms are available. *State v. Smothers*, 605 S.W.2d 128, 132 (Mo. banc 1980).

Although the circuit court has "latitude" in determining what sanction to impose for a discovery violation, it must "tailor a fundamentally fair remedy." *Cook*, 5 S.W.3d at 575. Thus, the appellate court will intervene only if the defendant demonstrates that the state's failure to make a timely disclosure resulted in fundamental unfairness or that the trial court abused its discretion in refusing to impose a proper sanction. *State v. Johnson*, 615 S.W.2d 534, 542 (Mo. App. E.D. 1981). Fundamental unfairness, for purposes of determining whether the state's violation of discovery rules requires reversal, is determined by whether the evidence would have affected the result of the trial. *State v. Richardson*, 674 S.W.2d 161, 163 (Mo. App. E.D. 1984).

The trial court has broad discretion to impose or not to impose sanctions for discovery violations. *State v. Kinder*, 942 S.W.2d 313, 328 (Mo. banc 1996). For example, the court of appeals, in *State v. Metts*, 829 S.W.2d 585, 589 (Mo. App. E.D. 1992), found that the trial court did not abuse its discretion in permitting a police officer to testify that the co-defendants' mouths were moving when he approached, despite the state's failure to disclose the statements, when the court prohibited the officer from testifying to the actual statements made. And, in *State v. Royal*, 610 S.W.2d 946, 953 (Mo. banc 1981), the Supreme Court of Missouri found that the trial court did not abuse its discretion in refusing to exclude undisclosed statements of the defendant because defense counsel, by not requesting a continuance, failed to show how she was prejudiced. In other words, if counsel does not request relief, the trial court will not likely impose sanctions. *State v. Mansfield*, 793 S.W.2d 609, 614 (Mo. App. S.D. 1990) (trial court did not abuse its discretion in failing to impose sanctions when defense counsel requested none).

V. (§7.33) Conclusion

If discovery is to be effective, it must be aggressive. The procedures under Rule 25 are not the only methods of seeking discovery. Preliminary and bail reduction hearings often require the prosecution to disclose evidence and produce witnesses. Affidavits in support of

search warrants and motions to suppress evidence also may provide discovery without the need to resort to depositions. Counsel should always be creative. The following steps are recommended as a matter of routine:

- File a discovery motion with the entry of appearance or at arraignment. Counsel should make certain that the original is placed in the court file and also have counsel's copy file dated.
- When disclosure is provided, inventory what has been received and acknowledge receipt in writing, with a copy to the court file.
- Determine as soon as possible what materials may have been withheld and make an immediate request in writing for specific materials, with a copy to the court file.
- Ask the prosecutor to request all discoverable materials from the appropriate police officers and agencies, with a copy to counsel. Ask that all disclosures and responses to requests be made in writing.
- Always be persistent. If opposing counsel is not complying with the Rules, file a motion to compel discovery and obtain a court order. Violations of court orders are always viewed more seriously than violations of the Rules.
- If there is a violation of the disclosure rules, take the time to articulate the nature and seriousness of the prejudice to the "best possible defense."
- If opposing counsel seeks to admit evidence that should have been disclosed, object immediately. Untimely objections are waived. Preserve the issue. *See, e.g., State v. Smothers*, 605 S.W.2d 128 (Mo. banc 1980).
- Include the issue in the motion for new trial. Preserve the issue.
- Include the issue in the appellate brief. All discovery motions, letters, orders, etc. should be included in the legal file. Preserve the issue.

Counsel should remember that the failure to adequately investigate a case may result in a finding of ineffective assistance of counsel under Rule 29.15, should the possibility that the failure to investigate might deprive the defendant of a fair trial not be enough of a deterrent.

VI. Forms

A. (§7.34) Basic Discovery Request (Defendant)

[Caption]

Request for Discovery to State

Defendant, in accordance with Supreme Court Rule 25.03, requests the following within ten days and throughout the duration of this cause:

1. The names and last known addresses of persons whom the State intends to call as witnesses at any hearing or at the trial, including rebuttal witnesses, together with their written or recorded statements, and existing memoranda reporting or summarizing part or all of their oral statements
2. Any written or recorded statements and the substance of any oral statements made by the defendant or by a co-defendant, a list of all witnesses to the making, a list of all witnesses to the acknowledgment of the statements, and the last known addresses of the witnesses
3. Those portions of any existing transcript of grand jury proceedings that relate to the offense with which the defendant is charged, containing the testimony of the defendant and testimony of persons whom the State intends to call as witnesses at a hearing or trial
4. Any existing transcript of the preliminary hearing and of any prior trial held in the defendant's case if the State has such transcripts in its possession or if they are available to the State
5. Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons
6. Any books, papers, documents, and photographs of objects that the State intends to introduce into evidence at the hearing or trial or that were obtained from or belong to the defendant
7. Any record of prior criminal convictions, pleas of guilty, or findings of guilt of persons the State intends to call as witnesses at a hearing or the trial

8. Any pending criminal charges against a witness that the State intends to call at a hearing or trial and whether any deal exists between that witness and the prosecution
9. A written statement by counsel for the State setting forth the facts relating to the time, place, and person making any photographic or electronic surveillance relating to the offense of which the defendant is charged
10. Any material or information, within the possession or control of the State, that tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment
11. If the State expects notice of any defense of alibi, the date, time, and place of the alleged offense
12. If the defendant is claiming an alibi defense, any witness the State may call in rebuttal
13. If the defendant is claiming a defense of mental disease or defect, any witness the State may call in rebuttal

Defendant requests that the prosecuting attorney make a diligent effort to obtain any of the above items or information that may be in the possession or control of any other government personnel, under the authority of Rule 25.03(C).

[Certification should always be included with counsel signing and dating all copies of the discovery request.]

B. (§7.35) Basic Discovery Request (State)

[Caption]

The State of Missouri, by and through undersigned counsel, and in accordance with Rule 25.05 of the Missouri Rules of Criminal Procedure, requests disclosure by the defendant of the following information:

1. Any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons, that the defense intends to introduce into evidence at a hearing or trial, except that those portions of any of the above containing statements made by the defendant shall not be disclosed
2. The names and last known addresses of persons, other than the defendant, who the defendant intends to call as witnesses at any hearing or at trial, together with their written or recorded statements, and existing memoranda reporting or summarizing part or all of their oral statements
3. Those parts of any books, papers, documents, photographs, or objects except those that contain statements of the defendant that the defendant intends to introduce in evidence at a hearing or a trial
4. If the defendant intends to rely on the defense of mental disease or defect excluding responsibility, disclosure of this intent in the form of a written statement by counsel for the defendant
5. The names and addresses of witnesses to any alibi defense as well as the location of the alibi defense; the alibi defense is in regard to an alleged incident that occurred:
   [Date]:
   [Time]:
   [Place]:

C. (§7.36) Response to Request for Disclosure

[Caption]

Response to Discovery Request

The [defendant] [state], for its response to the [state's] [defendant's] request for disclosure of information, provides the following information:

1. [Respond specifically to each paragraph. If police reports and other statements are provided, these statements and reports should be listed specifically, identifying the document by name, date, and number of pages.]

D. (§7.37) Receipt of Discovery Materials

[Caption]

Receipt of Discovery Materials

The [defendant] [state] hereby acknowledges receipt of the following information provided in accordance with the [defendant's] [state's] motion for disclosure of information:

1. [Describe with particularity the items received.]

E. (§7.38) Disclosure of Informant

[Caption]

Motion for Disclosure of Informant

The defendant, in accordance with Rules 25.04 and 25.10 of the Missouri Rules of Criminal Procedure, moves the Court for an order requiring the state to disclose to the defendant the identity and location of the confidential informant used by the state in the above-captioned cause, and in support of this motion states to the Court as follows:

1. Defendant is charged with [sale] [possession] of a controlled substance.
2. Police reports provided by the state to the defendant allege that the above-referenced sale occurred [between the defendant and a confidential informant] [in the presence of a confidential informant].
3. The confidential informant has personal knowledge of the alleged offense and will support the defendant's defense to the above-captioned charge.

Wherefore, the defendant prays for an order of this Court requiring the state to disclose to the defendant the identity and location of the informant used by the state in this prosecution.

F. (§7.39) Motion for Disclosure of Grand Jury Data

[Caption]

Motion for Disclosure of Grand Jury Data

The defendant, in accordance with Rule 25.04 of the Missouri Rules of Criminal Procedure, moves the Court for an order requiring the clerk of the circuit court to provide the following demographic data of all persons serving with the grand jury pool from 1970 through 2004: age, race, sex, occupation, and income.

This motion is filed in accordance with the defendant's motion to quash the indictment. *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606 (Mo. banc 1980).

G. (§7.40) Motion for Bill of Particulars

[Caption]

Motion for Bill of Particulars

The defendant, in accordance with Rule 23.04 of the Missouri Rules of Criminal Procedure, moves this Court for an order requiring the state to provide the defendant a bill of particulars to allow the defendant to adequately defend the charges pending:

1. State the date and time of the alleged offense.
2. State the exact location of the alleged offense.
3. State whether the state claims that the defendant was acting alone or with others, and if with others, identify by name and address any other person or persons with whom the state alleges the defendant acted.
4. [Additional requests should be geared to the particulars of a given charge.]

Robert W. Russell*

Chapter 8

JURISDICTION, VENUE, AND DISQUALIFICATION OF JUDGES

I. Jurisdiction

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J. (§8.18) Collateral Review
K. (§8.19) Jurisdiction Under the Criminal Activity Forfeiture Act

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This chapter includes material written by Dean Emeritus Robert Popper, Larry A. Schaffer, and William J. Fleischaker.

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F. (§8.57) Affidavit in Support of Motion to Disqualify Judge
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I. Jurisdiction

A. Jurisdiction in General

1. (§8.1) Definition of Jurisdiction

The term "jurisdiction," as applied to criminal courts, means the power of a court to hear and resolve the case of a criminal offense, to declare the punishment, and to render a valid judgment. 22 C.J.S. *Criminal Law* § 149 (1989).

2. (§8.2) Jurisdiction Distinguished From Venue

While "jurisdiction" means the *power* of the court to hear and determine the case, "venue," as applied to criminal cases, means the particular *locality* or the *place* in which the prosecution must occur. *Wiglesworth v. Wyrick,* 531 S.W.2d 713, 721 (Mo. banc 1976); 22 C.J.S. *Criminal Law* § 177 (1989).

3. (§8.3) Sources of Jurisdiction

The judicial power of Missouri is "vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts." MO. CONST. art. V, § 1. As of January 2, 1979, all magistrate courts, probate courts, courts of common pleas, the St. Louis Court of Criminal Corrections, and municipal corporation courts ceased to exist. These courts became divisions of the circuit courts, and their jurisdiction was transferred to the circuit courts, MO. CONST. art. V, § 27, which now have original jurisdiction "over all cases and matters, civil and criminal." MO. CONST. art. V, § 14.

B. Appellate Jurisdiction

1. Jurisdiction of the Supreme Court

a. (§8.4) Introduction

The Supreme Court is the highest court in Missouri. It is composed of seven judges, and it holds its sessions in Jefferson City. Its jurisdiction, though coextensive geographically with Missouri, is limited as to subject matter. MO. CONST. art. V, §§ 2, 3.

The Supreme Court's exclusive appellate jurisdiction is specifically limited by the constitution. *Sanderson v. Richardson,* 432 S.W.2d 625 (Mo. App. S.D. 1968). The Supreme Court has exclusive appellate jurisdiction in all cases involving:

- the validity of a treaty or statute of the United States or of a statute of Missouri;
- the construction of a provision of the Constitution of Missouri;
- the construction of the revenue laws of Missouri;
- the title to any state office; and
- the death penalty.

MO. CONST. art. V, § 3. For purposes of determining appellate jurisdiction, a distinction is drawn between "construction" and "application." It is only when constitutional provisions are not clear that *construction* is necessary in the Supreme Court. If review of the application of a constitutional provision is required, appellate jurisdiction is vested in the court of appeals. *City of Joplin v. Vill. of Shoal Creek Drive*, 434 S.W.2d 25 (Mo. App. S.D. 1968).

Under § 565.035.7, RSMo 2000, there is a right of direct appeal and sentence review by the Supreme Court of a conviction with death sentence. Detailed provisions relating to death penalty appeals and the procedure to be followed are now set forth in § 565.035. In addition, Rule 30.18 provides that the appeal to the Supreme Court shall be to the Court en banc. Section 547.200.3, RSMo 2000, also provides that, if the state appeals in any pretrial rulings in a capital case, the appeal goes to the Supreme Court.

When a change in a court's jurisdiction is effected by statute or constitutional amendment, in the absence of a contrary intent expressed in the statute or the constitution, the date when the notice of appeal is filed determines whether the old or the new jurisdictional rule applies. *State v. Woods*, 645 S.W.2d 745 (Mo. App. E.D. 1983). In any event, want of jurisdiction is not ground for dismissal of the appeal. Instead, the case is transferred to the appellate court having jurisdiction. MO. CONST. art. V, § 11; § 477.080, RSMo 2000.

b. (§8.5) Transfer From Division to En Banc

A cause in a division of the Supreme Court shall be transferred to the Court en banc:

- when the members of a division are equally divided in opinion;
- when a division orders such a transfer;
- on application of the losing party when a member of the division dissents; or
- in accordance with a Supreme Court rule.

MO. CONST. art. V, § 9.

c. (§8.6) Transfer From Court of Appeals

Cases pending in the court of appeals are transferred to the Supreme Court in the following instances:

- "[W]hen any participating judge dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of the court of appeals, or any district of the court of appeals," MO. CONST. art. V, § 10; Rules 30.27, 83.01

- By order, after opinion, of the majority of the judges of the participating district of the court of appeals either on their own motion or on application of a party, MO. CONST. art. V, § 10; *cf.* Rules 30.27, 83.02

- By order of the Supreme Court before or after opinion on its own motion or on application of a party because of the general interest or importance of a question

involved in the case, or for the purpose of reexamining the existing law, MO. CONST. art. V, § 10; Rules 30.27, 83.04

- In accordance with Supreme Court rule, MO. CONST. art. V, § 10

The Supreme Court may make a final determination of all causes coming to it from the court of appeals, whether by certification, transfer, or certiorari. MO. CONST. art. V, § 10; Rules 30.27, 83.09.

2. (§8.7) Jurisdiction of the Court of Appeals

The court of appeals is organized into three separate districts, MO. CONST. art. V, § 13, sitting in Kansas City (the Western District), St. Louis (the Eastern District), and Springfield (the Southern District). Sections 477.050–477.070, RSMo 2000.

While the Supreme Court is a court of limited appellate jurisdiction, the court of appeals has general appellate jurisdiction. *State ex rel. McNutt v. Northup*, 367 S.W.2d 512 (Mo. 1963). The jurisdiction of the court of appeals over appeals from the circuit courts extends to all cases except those within the exclusive jurisdiction of the Supreme Court. MO. CONST. art. V, § 3.

C. Jurisdiction of the Trial Courts

1. (§8.8) Jurisdiction of the Circuit Courts

Missouri is divided into 45 circuits, each being composed of one county, or two or more contiguous counties, and each having at least one circuit judge and one associate circuit judge. MO. CONST. art. V, §§ 15, 16; §§ 478.073–478.186, RSMo 2000. One circuit (No. 22) consists solely of the City of St. Louis. Section 478.130, RSMo 2000.

The circuit courts have original jurisdiction over all cases and matters, civil and criminal. MO. CONST. art. V, § 14; § 478.070, RSMo 2000. "Except as otherwise provided by law, the circuit courts shall have exclusive original jurisdiction in all cases of felony, misdemeanor and infractions." Section 541.020, RSMo 2000.

The subject matter jurisdiction of a circuit court and the sufficiency of the information or indictment are distinct concepts. *State v. Parkhurst*, 845 S.W.2d 31 (Mo. banc 1992). Insufficiency of the information does not deprive the trial court of jurisdiction. *Wright-El v. State*, 890 S.W.2d 664 (Mo. App. E.D. 1994). The fact that the information lacks an essential element of the offense charged does not affect the trial court's jurisdiction; it affects only the sufficiency of the information. *State v. Briscoe*, 847 S.W.2d 792 (Mo. banc 1993).

Objections to personal jurisdiction are waived by appearing and defending without objection. *Parkhurst,* 845 S.W.2d at 31.

Section 541.191, RSMo 2000, establishes the jurisdictional requisites for crimes not occurring wholly within Missouri and provides that:

> 1. This state has jurisdiction over an offense that a person commits by his own conduct or the conduct of another for which such person is legally accountable if:
>
> (1) Conduct constituting any element of the offense or a result of such conduct occurs within this state; or
>
> (2) The conduct outside this state constitutes an attempt or conspiracy to commit an offense within this state and an act in furtherance of the attempt or conspiracy occurs within this state; or
>
> (3) The conduct within this state constitutes an attempt, solicitation, conspiracy or facilitation to commit or establishes criminal accountability for the commission of an offense in another jurisdiction that is also an offense under the law of this state; or
>
> (4) The offense consists of an omission to perform a duty imposed by the law of this state regardless of the location of the defendant at the time of the offense; and
>
> (5) The offense is a violation of a statute of this state that prohibits conduct outside the state.
>
> 2. When the offense involves a homicide, either the death of the victim or the bodily impact causing death constitutes a result within the meaning of subdivision (1) of subsection 1 of this section. If the body of a homicide victim is found in this state it is presumed that the result occurred in this state.
>
> 3. This state includes the land and water and the air space above the land and water.

In interpreting this statute, in *State v. Drinkard*, 750 S.W.2d 630 (Mo. App. S.D. 1988), the court held that Missouri has jurisdiction to prosecute a charge of conspiracy if the substantive object of conspiracy was committed in Missouri, though a conspiracy agreement was made in another state and one of the conspirators was not in Missouri when the object of conspiracy

was accomplished. In *State v. Harvey,* 730 S.W.2d 271 (Mo. App. E.D. 1987), the court held that the Missouri circuit court lacked jurisdiction, or concurrent jurisdiction with Illinois, over a murder charge when a victim was kidnapped in Missouri and murdered in Illinois even though Missouri argued that the defendant had the requisite intent and premeditation to murder at the time of the kidnapping. In murder cases, the fatal blow must be struck in Missouri or the body must be found in Missouri for Missouri courts to have jurisdiction. Thus, a murder planned in Missouri but executed in another state could not be prosecuted as murder in Missouri for lack of jurisdiction over the murder crime although other crimes, such as conspiracy, may be prosecuted because the elements occurred within Missouri.

For further discussion of § 541.191.1, see *Cummins v. State,* 912 S.W.2d 523 (Mo. App. W.D. 1995), dealing with a second degree drug trafficking charge in which the elements of the offense occurred in both Kansas and Missouri (delivery of the marijuana in Kansas; transfer of the money in Missouri). Missouri had jurisdiction to prosecute the offense because of the transfer of the money and transportation of the drugs in Missouri.

a. (§8.9) Circuit Judges

Except as otherwise provided by law, circuit judges may hear and determine originally all cases of felonies, misdemeanors, and infractions. They may also hear and determine, upon a trial de novo, cases of misdemeanors and infractions originally heard and determined by an associate circuit judge when no record of the original proceeding was kept or when the trial was without a jury and the associate circuit judge was not specially assigned as authorized by § 478.240.2, RSMo 2000. Section 512.180.2, RSMo Supp. 2004; §§ 541.015, 541.020, 543.335, RSMo 2000; Rule 30.33; *State v. Fender,* 600 S.W.2d 683 (Mo. App. W.D. 1980). *See State v. O'Neal,* 626 S.W.2d 693 (Mo. App. S.D. 1981).

As a practical matter, trial de novo in misdemeanor cases tried to an associate circuit judge has been eliminated. Rule 30.33 provides that appeals in criminal proceedings pending before an associate circuit judge in which a record is made are governed by Rules 30.01–30.32, which provide for direct appeal to the court of appeals. Section 543.335 provides that a record *shall* be kept in any misdemeanor or any

ordinance violation case and that the appeal shall be to the appropriate appellate court.

b. (§8.10) Associate Circuit Judges

Each county has at least one resident associate circuit judge. MO. CONST. art. V, § 16. Associate circuit judges may hear and determine all cases or classes of cases as may be provided by law. MO. CONST. art. V, § 17. Associate circuit judges shall hear and determine municipal ordinance violation cases of a municipality with a population of under 400,000 for which a municipal judge is not provided or upon request of the governing body of any municipality with a population of under 400,000 within the circuit. MO. CONST. art. V, § 23. Section 478.220, RSMo 2000, provides that circuit judges *and* associate circuit judges may hear and determine all cases within their jurisdiction with several enumerated exceptions. The statutory scheme excludes circuit judges from hearing municipal ordinance violations, except upon trial de novo, unless specifically transferred or assigned. Section 478.240, RSMo 2000, governs the assignment of circuit and associate circuit judges to particular cases or classes of cases by the presiding judge of a circuit. Section 478.240.2 sets out certain limitations on that assignment power, the most significant of which are as follows:

- A municipal judge may not be assigned to hear any case other than a municipal violation case.
- A judge may not be assigned to hear a felony case when that judge has conducted the preliminary hearing.
- A judge may not be assigned contrary to the Supreme Court Rules or local court rules.

Each circuit may enact local rules designating divisions where particular classes of cases may be filed. Section 478.245, RSMo 2000. Felony proceedings may be initiated by complaint filed in any court that has original jurisdiction to try misdemeanors or by indictment. Rule 22.01. Associate and circuit judges have original jurisdiction to hear misdemeanors. Section 541.015, RSMo 2000. Thus, absent a local rule to the contrary, a prosecutor can file a felony complaint directly in circuit court, although, as a practical matter, it appears that most circuits have provided by local

rule for felony complaints to be filed in associate divisions. Rule 23.01(a) provides that an indictment or information shall be filed in the court having jurisdiction of the offense. Section 541.020, RSMo 2000, provides that the circuit courts shall have *exclusive* original jurisdiction of felonies. Thus, it would appear that the indictment or information in a felony case must be filed in the circuit court as opposed to an associate division, but, of course, a presiding judge may assign an associate circuit judge to hear a felony case, provided that judge has not presided over the preliminary hearing or waiver of it.

Depending on local rules, virtually any circuit or associate circuit judge can have jurisdiction over a misdemeanor or felony case. Counsel should be sure to consult local rules to be sure that the judge hearing a case has jurisdiction to do so.

For a historical explanation and a critical analysis of the Missouri statutory scheme relating to trials de novo, see Robert S. Cohen, *Continuing the Court Reform: Eliminating the Trial De Novo From the Associate Circuit Judge*, 39 J. MOBAR 200 (1983).

2. (§8.11) Jurisdiction of the Municipal Courts

Special rules of practice and procedure govern the municipal courts, which include city courts, police courts, and any other courts that hear and determine cases charging violations of municipal ordinances. Rule 37.05. *See* MO. CONST. art. V, § 23; § 98.030, RSMo 2000; § 479.020, RSMo Supp. 2004. Associate circuit judges shall hear and determine municipal ordinance violations for a municipality of less than 400,000 population for which a municipal judge is not provided or upon request of the governing body of any municipality with a population of under 400,000 within the circuit. MO. CONST. art. V, § 23. The assignment of associate circuit judges to hear municipal ordinance cases when there is no municipal judge is handled by the presiding judge or by local court rules. *See* §§ 478.240, 478.245, RSMo 2000.

Appeal from a judgment of the municipal court is to the circuit court, which then hears, tries, and determines the cause de novo, except that if the case in the municipal court was tried before an associate circuit judge with a jury and a record was made, appeal

may be taken to the court of appeals. Rules 37.71–37.74; *cf.* § 479.200, RSMo 2000.

D. (§8.12) Retention of Jurisdiction

The court in which the prosecution of a criminal offense is commenced retains jurisdiction and control of the cause to the exclusion of any other court as long as the cause is pending and undisposed of. Section 545.010, RSMo 2000; Rule 23.10. If there are two or more indictments or informations pending against the defendant for the same offense that were initially filed or returned in the same court, the indictment last found or the information last filed suspends proceedings on those previously found or filed. Rule 23.10. Section 545.010 and Rule 23.10 are designed to prevent the defendant from being prosecuted for the same crime in more than one court having concurrent jurisdiction. But they do not prevent the legislature from passing statutes having the effect of transferring jurisdiction of a pending case from one court to another. *State ex rel. Keyes v. Collins*, 543 S.W.2d 307, 309 (Mo. App. E.D. 1976).

Even a defendant who obtains a change of venue to another county but who is re-indicted for the same crime in the first county may have to stand trial in the first county. The Supreme Court of Missouri approved of this procedure in *State v. Thomas*, 625 S.W.2d 115, 124-25 (Mo. 1981). Thomas was indicted in Jackson County, but his case was transferred to St. Louis County on his motion for change of venue. The charge against him was dismissed by the state because of technical defects in the indictment, but a second indictment for the same crime was returned in Jackson County. The defendant's second motion for change of venue was denied, and the Supreme Court of Missouri upheld the ruling. Jackson County did not lose jurisdiction over the case, and collateral estoppel was not applicable to bar the denial of the second motion. *Id.*

Once a change of venue has been ordered, the second court has jurisdiction to accept a plea of guilty to an amended information filed in the new venue, even if the amended information charges a different offense. By pleading guilty, the defendant waives all defenses other than failure of the amended information to charge an offense. *Winningham v. State,* 646 S.W.2d 145 (Mo. App. S.D. 1983).

E. (§8.13) Transfer Because of Lack of Jurisdiction

In all proceedings reviewable on appeal by the Supreme Court or court of appeals, an *appeal* going to a court or district not having jurisdiction should not be dismissed; instead, it should be transferred to the appellate court that does have jurisdiction. An *original* action filed in a court lacking jurisdiction or venue should be transferred to the appropriate court. MO. CONST. art. V, § 11. See also § 541.120, RSMo 2000, providing that, if before verdict or judgment it appears that the county in which the prosecution is begun does not have jurisdiction, the court may order the proceedings transferred to the proper court of the proper county.

A circuit court has discretion to certify proceedings and papers relating to an improperly filed indictment to the county and court having jurisdiction, but it is not required to do so; refusal to do so is not an abuse of discretion. *State v. Patterson,* 729 S.W.2d 226 (Mo. App. S.D. 1987). *Patterson* states that a court does not need to transfer the case to the appropriate county (in *Patterson* the circuit court dismissed the indictment) and implies that, when the prosecution is by indictment, a new indictment may be necessary after transfer because of lack of jurisdiction.

F. (§8.14) Concurrent Jurisdiction With the State of Arkansas

Where meanderings of the St. Francis River form the boundary line between Missouri and Arkansas, the two states have concurrent jurisdiction over criminal violations between the meandering lines of the river. Sections 541.160–541.180, RSMo 2000.

G. (§8.15) Jurisdiction Following Change of Venue

In removed cases, the court to which the case is properly transferred by change of venue shall have jurisdiction of the case, even though the cause of action originally would not have been cognizable in that court. Section 508.250, RSMo 2000; Rule 32.14.

H. (§8.16) Federal Jurisdiction

Counsel should be aware that, because criminal trials often involve questions of a federal constitutional nature, the validity of a conviction that was obtained in violation of a federal constitutional right can be tested in the federal courts. There are two ways to obtain federal scrutiny of the state judgment:

1. Direct review
2. Collateral review

Other possibilities for federal intervention exist *before* the state judgment occurs. These include resorting to the federal court for an injunction, declaratory judgment, and removal to federal jurisdiction. *See Younger v. Harris*, 401 U.S. 37 (1971); *Samuels v. Mackell,* 401 U.S. 66 (1971); *Steffel v. Thompson*, 415 U.S. 452 (1974); Romualdo P. Eclavea, Annotation, *Supreme Court's Rule, and Exceptions to Rule, Against Federal Judicial Intervention in Pending or Threatened State Criminal Proceedings,* 44 L.Ed.2d 692 (1976). With respect to removal, see generally 28 U.S.C. §§ 1441–51.

The fact that a defendant could be tried in either state or federal court does not mean that trial in the federal court is improper. *Enriquez v. United States*, 818 F. Supp. 280 (E.D. Mo. 1993). In *Hankins v. Delo*, 977 F.2d 396 (8th Cir. 1992), the court found that Missouri had criminal jurisdiction over a national forest when there was no indication that the United States had accepted jurisdiction.

I. (§8.17) Direct Review by the United States Supreme Court

The United States Supreme Court has jurisdiction to review final judgments or decrees rendered by the highest court of a state in which a decision can be had, and the review may be by appeal or by certiorari. The governing statute, 28 U.S.C. § 1257, sets forth when appeal or certiorari can be resorted to:

- By appeal when the validity of a treaty or statute of the United States is questioned and the decision is against its validity

- By appeal when the validity of a statute of any state is questioned "on the ground of its being repugnant to the Constitution, treaties, or laws of the United States" and the decision is in favor of its validity

- By writ of certiorari when the validity of a treaty or statute of the United States is questioned or when the validity of a state statute is questioned "on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States"

The guide for the Supreme Court's exercise of discretion in granting petitions for certiorari may be found in Supreme Court Rules 10–11. *See generally* ROBERT L. STERNET ET AL., SUPREME COURT PRACTICE (8th ed. 2002).

J. (§8.18) Collateral Review

While United States Supreme Court review from a state court by certiorari or appeal is available to the prosecution and the defense as 28 U.S.C. § 1257 indicates, a collateral attack on a conviction is solely a defense remedy. If there is a federal constitutional defect underlying the conviction, the defendant can seek federal collateral review of the conviction through federal habeas corpus. The writ is filed at the district court level in the federal district where the respondent/custodian is located, but through appeals by either side, the case can be heard in the court of appeals and again reach the United States Supreme Court. 28 U.S.C. §§ 1254, 2253; *see* FED. R. APP. P. 22. The statutory provisions relevant to federal habeas corpus are contained in 28 U.S.C. §§ 2241–55. In addition, there are special governing rules and forms to be used in these cases as provided by Supreme Court order and federal statute. Pub. L. No. 94-426, § 1, 90 Stat. 1334 (Sept. 28, 1976), as amended by Supreme Court order dated April 28, 1982, effective August 1, 1982. There are various prerequisites to federal jurisdiction, including exhaustion of state remedies, 28 U.S.C. § 2254, and the requirement that the defendant be in custody when the habeas petition is filed, 28 U.S.C. § 2241(c). *See* Chapter 31 of this deskbook. *See generally* ROBERT POPPER, POST-CONVICTION REMEDIES IN A NUTSHELL (West Publishing Co. 1978); LARRY W. YACKLE, POSTCONVICTION REMEDIES (Bancroft-Whitney Co. 1981).

K. (§8.19) Jurisdiction Under the Criminal Activity Forfeiture Act

Consistent with traditional property principles, it appears that the circuit courts of Missouri have *in rem* jurisdiction over proceedings brought under the Criminal Activity Forfeiture Act, §§ 513.600–513.653, RSMo 2000 and Supp. 2004, when the property is seized or situated in Missouri. Forfeiture actions also may be brought in Missouri premised on *in personam* jurisdiction. Section 513.607.5, RSMo Supp. 2004. *See* Chapter 33 of this deskbook.

II. Venue

A. (§8.20) Definition of Venue

"Venue" means the place at which an action is tried. *State ex rel. McAllister v. Slate,* 214 S.W. 85 (Mo. banc 1919). In Missouri, the accused is entitled to a trial in the county where the offense was committed. Section 541.033, RSMo Supp. 2004; *State v. Morrison*, 869 S.W.2d 813 (Mo. App. S.D. 1994).

B. (§8.21) Proving Venue

Venue must be proved by the prosecution in a criminal case, but it is not an integral part of the offense, so it does not need to be proved beyond a reasonable doubt or by direct evidence. It is sufficient if the facts and circumstances reasonably support the inference that the offense was committed in the county where the trial occurs. *See, e.g., State v. Valentine*, 506 S.W.2d 406, 410 (Mo. 1974); *State v. Harper*, 855 S.W.2d 474 (Mo. App. W.D. 1993). It is not necessary to state venue in the body of the indictment or information; the county or other jurisdiction named in the caption or margin of the formal charge is taken to be the venue. Section 545.160, RSMo 2000; Rule 23.02(a). In fact, § 545.030.1(8) and (9), RSMo 2000, provides that no information or indictment is invalid "nor shall the trial, judgment or other proceedings . . . be stayed, arrested or in any manner affected" for want of any venue. *See* Rule 23.11. From the cases construing § 545.030.1(8) and (9), however, it appears that it refers not to the requirement of the *existence* of correct venue but only to the *statement* of it through the indictment or information.

Venue is waived by proceeding to trial without objection, even when evidence of venue is inadequate. *Smith v. State*, 837 S.W.2d 25 (Mo. App. W.D. 1992).

C. (§8.22) Venue in General

Section 541.033, RSMo Supp. 2004, provides generally that offenses shall be prosecuted in the county where they were committed. If the offense is committed partly in one county and partly in another county, or elements of the offense occur in more than one county, prosecution may take place in any county where an element of the offense occurred. *See also Smith v. State*, 837 S.W.2d 25 (Mo. App. W.D. 1992).

It is important to distinguish between elements of the offense and evidentiary facts because the occurrence of evidentiary facts in a particular county will not suffice to establish venue in that county unless elements of the offense also occurred in that county. *State v. White,* 720 S.W.2d 27 (Mo. App. S.D. 1986).

Counsel should be aware that special statutes govern venue in Jackson County. Sections 478.461, 478.462, 478.463, 478.465, 478.467, and 478.469, RSMo 2000, divide Jackson County into "eastern" and "western" portions. These sections govern the handling of venue questions in Jackson County, and their provisions have been upheld in *Woodside v. Rizzo*, 772 S.W.2d 20 (Mo. App. W.D. 1989). Local court rules have been promulgated in accordance with the statutes.

Other counties also have special venue provisions. In Lewis County, the circuit court at Canton has original and concurrent jurisdiction in felony cases arising in the eastern part of the county, except that proceedings occurring before the filing of an information or indictment are held in the county seat, Monticello. Section 478.340, RSMo 2000. Marion County is divided into separate geographic districts of the circuit courts with exclusive jurisdiction. District Number 1 is in Palmyra; District Number 2, Mason and Miller townships, is in Hannibal. Section 478.720, RSMo 2000. Counsel should become familiar with local procedures.

D. (§8.23) Venue by Nature of Cause of Action

Various special statutory provisions govern venue for particular crimes, as follows:

- When property is stolen in another state and brought into Missouri, the defendant may be prosecuted as if the property were stolen in any county through which it was brought. Section 541.040, RSMo 2000.

- When property is stolen in one Missouri county and taken into another, the defendant may be prosecuted in any county into which the property was brought. Section 541.070, RSMo 2000.

- When the offense is receipt of stolen or embezzled property, the defendant may be prosecuted in any county where the defendant received or had the property. Section 541.060, RSMo 2000.

- When a victim is wounded in one county and dies in another county, the defendant may be prosecuted in either county. Section 541.080, RSMo 2000.

- When a victim is wounded in Missouri and dies in another state, the defendant may be prosecuted in the county where the wound was inflicted. Section 541.090, RSMo 2000.

- When a victim is wounded in another state and dies in Missouri, the defendant may be prosecuted in the county where the death occurred. Section 541.100, RSMo 2000.

- When the principal offense of a felony is committed in one county and the offense of an accessory to that felony is committed in another county, the accessory shall be prosecuted in the county where the accessory's own offense was committed. Section 541.110, RSMo 2000.

- When the offense is the failure to file a report, the offense shall be prosecuted in the county of the defendant's residence; if the defendant is not a resident of Missouri, the offense shall be prosecuted in the county where the report should have been filed. Section 541.035, RSMo 2000.

- When an indictment is brought against a judge, the case shall be prosecuted in a circuit other than the one in which the judge is sitting. Section 545.420, RSMo 2000.

- When the offense is a violation of the antitrust laws, the defendant may be prosecuted in the county where the defendant resides, engages in business, or has an agent, unless otherwise specifically provided by statute. Section 416.131.1, RSMo 2000.

- When the offense is willful failure to return rented property, venue lies in the county where the personal property was originally rented or leased. Section 578.150, RSMo 2000.

- Prosecutions under the financial interest statements law, §§ 105.483–105.492, RSMo 2000, shall be in the county where the defendant resides. *See* § 105.492.4, RSMo 2000.

- When the children reside outside Missouri, criminal nonsupport charges may be brought within Missouri in the county where the alleged nonsupporting parent resides. *State v. Johnson*, 782 S.W.2d 827 (Mo. App. W.D. 1990).

Section 513.607, RSMo Supp. 2004, of the Criminal Activity Forfeiture Act, §§ 513.600–513.653, RSMo 2000 and Supp. 2004, provides that venue for *in rem* forfeitures lies in the county where the property is located or seized. *See* § 513.607.4.

E. (§8.24) Forum *Non Conveniens*

The common law doctrine that a case should not be tried in an inconvenient forum is "available in appropriate cases." *Anglim v. Mo. Pac. R.R. Co.*, 832 S.W.2d 298, 305 (Mo. banc 1992). *Anglim* stated that the doctrine "is neither abandoned nor modified" and "has no intrastate application."

F. (§8.25) Change of Venue—General Standard

If a fair trial cannot take place because of the prejudice of the inhabitants forming the pool from which a jury is to be selected, a criminal case can be removed to a place where a fair trial can be had. Depending on the extent of the prejudice and the available courts in the county, the case may be removed to another court within the county, to another county within the circuit, or to another circuit. The court to which the case is transferred has jurisdiction to hear and determine the cause just as if it had originated there.

In counties where court is held at more than one place, a case may be removed to another court within the county (where this provision has been made by law) under the same rules applying to changes of venue from one county or circuit to another. Section 545.440, RSMo 2000. See *State ex rel. Lafferty v. Landon,* 289 S.W. 661 (Mo. App. W.D. 1926), a case in which a change of venue, based on the rules of the circuit court of Jackson County, Missouri, resulted in a transfer between divisions. When prejudice is confined to the inhabitants of one county, the case is removed to another county in the same circuit. Section 545.430, RSMo 2000; *State ex rel. Johnson v. Green,* 452 S.W.2d 814 (Mo. banc 1970). If the entire circuit is prejudiced, the court may order the trial removed to another circuit. Section 545.450, RSMo 2000. These rules pertain to defendants in both felony and misdemeanor cases. Rule 32.04.

Once the transfer is completed, it is as though the case originated in the transferee court, and any action taken by the transferring court is a nullity, including an order of *nolle prosequi*. *Maxwell v. State,* 726 S.W.2d 482 (Mo. App. E.D. 1987).

G. (§8.26) What Constitutes Prejudice

If the defendant cannot receive a fair trial because the minds of the inhabitants of the county where the cause is to be tried are so prejudiced against the defendant or the state has an undue influence over the inhabitants of the county, a change of venue may be granted. Section 545.430, RSMo 2000; Rule 32.04. It is not sufficient that the members of the community are prejudiced against the cause of the applicant; the prejudice must be against *the defendant*. *Charlotte v. Chouteau,* 33 Mo. 194 (1862); *see also State v. Holt*, 603 S.W.2d 698, 704 (Mo. App. S.D. 1980).

Whether to grant a change of venue based on pretrial publicity is within the trial court's discretion. *Wilhite v. State*, 845 S.W.2d 592 (Mo. App. E.D. 1992). Prejudice must direct itself to the defendant specifically and not just to the type of crime. *State v. Frederickson,* 739 S.W.2d 708 (Mo. banc 1987). Widespread and even adverse publicity is not in itself grounds to grant a change of venue. *State v. Hayes*, 624 S.W.2d 16, 19 (Mo. 1981); *United States v. McNally*, 485 F.2d 398, 403 (8th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974). Prejudice will not be presumed from widespread and adverse pretrial publicity. *State v. Schneider,* 736 S.W.2d 392 (Mo. banc 1987), *cert. denied*, 484 U.S. 1047 (1988); *State v. Leisure,* 749 S.W.2d 366 (Mo. banc 1988). But if publicity has so inflamed people that the defendant cannot get a fair trial, the defendant is entitled to a change of venue. *State v. Coleman*, 460 S.W.2d 719, 728 (Mo. banc 1970). In fact, the entitlement is guaranteed by the state and federal constitutions. MO. CONST. art. I, § 18(a); U.S. CONST. amends. VI, XIV; *Groppi v. Wis.*, 400 U.S. 505 (1971); *Rideau v. La.*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *see also Neb. Press Ass'n v. Stuart,* 427 U.S. 539 (1976); *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Estes v. Tex.,* 381 U.S. 532 (1965).

H. (§8.27) Proving Prejudice

The defendant must comply with the governing rules in proving prejudice. Rules 32.02–32.04, 32.08, 32.09, 32.13; *State v. Euge*, 349 S.W.2d 502 (Mo. App. E.D. 1961); *State v. Holt*, 603 S.W.2d 698, 704 (Mo. App. S.D. 1980). *See* §8.29, *infra*. There is no absolute right to a change of venue premised on community prejudice. *Felker v. State*, 750 S.W.2d 719 (Mo. App. E.D. 1988).

1. (§8.28) In Counties Having More Than 75,000 Inhabitants

The propriety of granting a change of venue is within the discretion of the trial court. *State v. Hayes*, 624 S.W.2d 16, 19 (Mo. 1981); *State v. Smith,* 281 S.W. 35 (Mo. 1926). Despite § 545.490, RSMo 2000, Rule 32.04 does not require that the application for a venue change be accompanied by supporting affidavits, and article V, § 5, of the Missouri Constitution provides that Supreme Court Rules "shall have the force and effect of law." *See Ostermueller v. Potter*, 868 S.W.2d 110, 111 (Mo. banc 1993) ("Supreme Court rules govern over contradictory statutes in procedural matters unless the General Assembly specifically annuls or amends the rules in a bill limited to that purpose."). The application only needs to be signed by the defendant or the defendant's attorney, and it does not need to be verified. But as the moving party, the defendant has the burden of proving the allegations of prejudice in the defendant's motion by legal and competent evidence, *Hayes*, 624 S.W.2d at 19, unless the judge knows the facts alleged by the defendant, in which case the judge can order removal of the cause without requiring proof of the allegations. Section 545.490. If the judge does not have knowledge of the facts, the truth of the allegations must be proved and may be rebutted by the prosecution. *Id.*; Rule 32.04(e).

2. (§8.29) In Counties Having 75,000 or Fewer Inhabitants

Under Rule 32.03, a change of venue shall be ordered as a matter of right upon the filing of a written application in any criminal proceeding pending in a county having 75,000 or fewer inhabitants. The defendant does not need to allege or prove any reason for the change of venue. The application does not need to be verified, but it must be signed by the defendant or the defendant's attorney. Rule 32.03. Section 545.490, RSMo 2000, provides that, if the application is supported by the affidavits of five or more credible, disinterested citizens residing in different neighborhoods of the county, the judge shall grant the change of venue without additional proof. *See State ex rel. Johnson v. Green,* 452 S.W.2d 814 (Mo. banc 1970). The affidavits must state facts, not mere conclusions. *State v. Martin,* 395 S.W.2d 97, 101 (Mo. 1965).

The Committee Note to the 1982 revision of Rule 32.03 indicates that the following application would be sufficient:

> "(Caption)
> Defendant requests a change of venue.
> (Signature and address of attorney or defendant.)"

Section 545.473, RSMo 2000, provides that, notwithstanding Rule 32.03, in counties with department of corrections facilities having an average inmate population in excess of 2,000, a defendant must follow a procedure similar to that in Rule 32.04, notwithstanding that there may be fewer than 75,000 inhabitants in the county. Under § 545.473.3, the application for change of venue must be received within 30 days after arraignment. In misdemeanors, the application must be filed at least 10 days before the trial date. The state has 5 days to file a denial in either case.

I. (§8.30) Application for Change of Venue

The defendant must be diligent in pressing for a change of venue. It is not the duty of the court to send a case to another court on its own motion, and a defendant who has not applied for a change of venue may be barred from asserting the right. *State v. Gillespie*, 336 S.W.2d 677 (Mo. 1960). Change of venue is a privilege and may be waived. *State v. Brookshire*, 353 S.W.2d 681 (Mo. 1962), *cert. denied,* 371 U.S. 67 (1962).

The application for change of venue is made on behalf of the defendant and is signed by the defendant or the defendant's attorney. Rules 32.03, 32.04. If the defendant is under 16 years of age, the application may be signed by the defendant's parent or guardian, or by any respectable citizen of the county where the cause is at issue. Section 545.460, RSMo 2000. The application must be filed within 10 days after the initial plea is entered. Rules 32.03, 32.04. *But see* § 545.473, RSMo 2000; §8.29, *supra*.

If there is any conflict between the procedures outlined in the statutes and those set out in Supreme Court Rules, the procedure in the Rules prevails unless the statute specifically annuls or amends the Rule. *Ostermueller v. Potter*, 868 S.W.2d 110 (Mo. banc 1993).

J. (§8.31) Venue Change by Stipulation

If the parties file a stipulation agreeing on the transfer of a criminal proceeding to a designated court of competent jurisdiction, the court shall order the criminal proceeding transferred to that court. This stipulation must be filed within ten days after the initial plea is entered, and it may be signed by the defendant or the defendant's attorney. Rule 32.02.

K. (§8.32) Notice to the State

A copy of the defendant's application and notice of the time when it will be presented to the court shall be served on all parties. Rules 32.03(b), 32.04(c). When the application is based on cause (Rule 32.04) rather than as a matter of right (Rule 32.03), the state, within ten days of the filing of the application, may file a denial of the existence of the reasons alleged by the defendant for the change. Rule 32.04(e). If § 545.473, RSMo 2000, applies, the state has only five days to file a denial.

If the state does not deny the existence of the grounds for change of venue within the time specified, the court must grant an application and transfer the case to a county where the conditions do not exist or import a jury from such a county. *See* Rule 32.04.

The defendant's failure to serve a copy of the application and notice of time when it will be presented to the trial court can be fatal to the defendant's absolute right to change of venue. *State v. Williams,* 747 S.W.2d 635 (Mo. App. W.D. 1988); *State v. Bowling,* 734 S.W.2d 565 (Mo. App. S.D. 1987).

L. (§8.33) Order for Removal

A change of venue in a criminal case pending in a county having 75,000 or fewer inhabitants is granted as a matter of right. In these cases, if a timely application is filed, the court simply orders the matter transferred to some other county convenient to the parties, giving all parties the opportunity to make suggestions as to where the case should be sent. Rule 32.03.

If the application is one for cause, as required in a county of over 75,000 population, or with department of corrections centers with an average offender population in excess of 2,000, the court's decision and order may be based on a more complex procedure. If the

prosecution denies the existence of the reasons given by the defendant for the change of venue, the court will hear evidence. If the issues are determined in favor of the defendant, if the truth of the grounds alleged by the defendant is within the knowledge of the court, or if no denial is filed, a change of venue shall be ordered to some other county convenient to the parties where the reasons for the venue change do not exist. Rule 32.04(e); § 545.473.6, RSMo 2000. The order must state the grounds relied on justifying the removal and designate the county to which the case is removed. Section 545.500, RSMo 2000; s*ee* § 545.510, RSMo 2000.

No order for the removal of a case is effective unless the defendant has been either placed in custody or released with sufficient sureties to ensure the defendant's appearance. Sections 545.520–545.540, RSMo 2000. A defendant who is in custody shall be transferred "without unnecessary delay" to the jail of the county to which the case is removed. Sections 545.550, 545.560, RSMo 2000; Rule 32.12.

A full transcript of the prior proceedings shall be transferred to, and filed by, the court to which the cause is removed. Sections 545.570, 545.580, RSMo 2000. *Cf.* Rule 32.11. The order for removal "made in term" of the court is deemed to be notice to witnesses who have entered into a recognizance for appearance. Other witnesses must be notified in writing. Sections 545.600, 545.610, RSMo 2000. Sections 545.500–545.620, RSMo 2000, and § 550.120, RSMo Supp. 2004, detail the responsibilities of the parties, the county, the court, the court clerk, the sheriff, and the witnesses in regard to a change of venue. *See generally* Rule 32.

If there is more than one defendant in the case and the court grants a change of venue to one or more but not all of them, the order does not affect the venue of the proceedings against the remaining defendants. Section 545.640, RSMo 2000; Rule 32.05.

An order changing venue can be annulled with the consent of the parties at any time before the transcript or papers are filed in the court to which the venue was changed. Rule 32.13.

In general, when the right to a change of venue is derived from a statute or is based on a rule of court, the accused must comply with its terms. *See State v. Elsea,* 251 S.W.2d 650, 651–52 (Mo. 1952); *State v. Holt,* 603 S.W.2d 698, 704 (Mo. App. S.D. 1980); *State v. Jackson*, 555 S.W.2d 355, 358 (Mo. App. W.D. 1977). Statutes that fix

the venue of a prosecution should be strictly followed. 22 C.J.S. *Criminal Law* § 189 (1989).

Section 545.540, RSMo 2000, Rule 32.09(b), and *State ex rel. Oswald v. Buford*, 518 S.W.2d 690 (Mo. App. S.D. 1975), forbid a second removal of any cause. Although the question has apparently not yet arisen, this limitation is vulnerable to attack as violative of the right to a trial by an impartial jury. U.S. CONST. amends. VI, XIV. See the cases cited in §8.25 above. Such a constitutional challenge may have been averted by Rule 32.09(c), which states that none of the venue rules "shall prohibit a judge from ordering a change of venue or change of judge when fundamental fairness" requires it.

As a practical matter, any time new facts arise that may provide a basis for change of venue, counsel should renew the motion for change of venue on the basis, as provided in Rule 32.09(c), that fundamental fairness requires it. This is especially true when jury responses in voir dire indicate widespread prejudice. Failure to so move may waive any error on the court's part in denying a motion for change of venue under Rule 32.04.

M. (§8.34) Practical Aspects of Seeking a Change of Venue

There are, of course, obvious disadvantages in trying a case in a distant court. The added difficulties of obtaining witnesses, the inconvenience to the parties and their attorneys, and the extra expenses involved make a change of venue undesirable unless there are very good reasons for requesting the change. In addition, urban defense lawyers often prefer not to try cases before non-urban juries, believing that these juries are less inured to crime and less accepting of variations in lifestyles. As a result, few requests are made for changes of venue from urban areas unless a transfer to another urban area can be agreed to beforehand.

Section 494.505, RSMo 2000, empowers the circuit court to "import" jurors as opposed to transferring the case. "Whenever it shall appear, in the manner provided in section 545.490, RSMo, that the inhabitants of the entire county in which the cause is pending are so prejudiced against the defendant that a fair trial cannot be had," the circuit judge may order jurors summoned from any county or counties in the same judicial circuit or any adjoining judicial circuit. Section 494.505. If the judge deems it necessary to summon jurors from a county outside that geographic area, the judge may request the Chief Justice of the Supreme Court of Missouri to designate a county from

which prospective jurors may be summoned. The number of jurors to be summoned is to be the number that the circuit judge deems necessary to secure a fair and impartial panel.

The jurors summoned in accordance with § 494.505 shall be subject to the same challenges as other jurors, except that they may not be challenged for nonresidence in the county of the trial. The panel selection, in the discretion of the circuit judge, may be held in the county in which the jurors reside.

The consequences of taking a change of venue may be more than just getting away from an unfavorable jury pool. For instance, in the 30th Judicial Circuit (Benton, Dallas, Hickory, Polk, and Webster Counties), local rules provide that a change of venue in a misdemeanor will be assigned to the associate circuit judge of the receiving division for trial. In essence, a change of venue works as a change of judge and venue because in that circuit the associate circuit judges do not travel with the case. 30th Judicial Circuit Local Court Rule XXXVI. Counsel would be well advised to consult local rules and local counsel to get a more complete picture of the consequences of a change of venue request in any circuit in which counsel does not regularly practice.

N. (§8.35) Change of Venue and Change of Judge

A defendant seeking both a change of venue and a change of judge must join both requests in a single application. Rule 32.08(a); *see* §8.47, *infra*.

III. Disqualification of Judges

A. (§8.36) Distinguished From Change of Venue

There is some confusion between the terms "disqualification of judge" and "change of venue" engendered by the indiscriminate reference of one for the other in the Missouri statutes and, in the past, in the rules of court. *See State ex rel. Johnson v. Green,* 452 S.W.2d 814 (Mo. banc 1970). Change of venue involves moving a case to another trial location and, therefore, to another court. In contrast, except when there is more than one division of the court within the same county, disqualification of a judge ordinarily involves bringing another judge into the original court to try the case. Rules 32.06–32.10.

B. (§8.37) Right to an Impartial Judge

Due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution, requires a fair trial before an impartial judge. *See, e.g., Ward v. Vill. of Monroeville, Ohio,* 409 U.S. 57 (1972); *Tumey v. Ohio,* 273 U.S. 510 (1927).

In Missouri, the judge of any civil or criminal court of record is incompetent to sit on a case, without consent of the parties, if the judge is interested (e.g., financially interested) in the suit, is related to either party, or has served as counsel in the case. Section 476.180, RSMo 2000. *See State ex rel. O'Brien v. Murphy,* 592 S.W.2d 194, 195 (Mo. App. E.D. 1979).

In the criminal area, the statute is specific. In any criminal prosecution, the judge is deemed incompetent to hear and try the case:

- when the judge is near kin to the defendant by blood or marriage;
- when the offense was committed against the judge or the judge's near kin;
- if the judge is otherwise interested or prejudiced or has served as counsel in the case; or
- when the defendant's affidavit (supported by affidavits of two reputable persons not kin to or counsel for the defendant) alleges that the judge will not afford the defendant a fair trial.

Section 545.660, RSMo 2000. In a contempt case that involves disrespect to or criticism of a judge, that judge is disqualified from presiding except with the defendant's consent. Rule 36.01(b); *see Mayberry v. Pa.*, 400 U.S. 455 (1971).

C. (§8.38) Disqualification With or Without Cause

In a criminal case, on proper filing, a defendant is entitled to one disqualification of the trial judge. Mere timely filing of the application for disqualification before trial requires that the judge be disqualified even if the judge is neither interested nor prejudiced. Rules 32.06, 32.07; *State v. Vermillion*, 486 S.W.2d 437 (Mo. 1972).

Judges may be disqualified on their own initiative, Rule 32.10, or by application of the defendant or prosecutor, Rules 32.06(a), 32.07(a).

The right to disqualify the trial judge, however, is not unlimited. It is circumscribed by requirements regarding the:

- time of filing;
- notice;
- form of affidavit;
- limitation to one disqualification without cause; and
- judicial selection of the new judge.

Sections 545.660, 545.690, RSMo 2000; Rules 32.06–32.10; *State ex rel. McNary v. Jones*, 472 S.W.2d 637 (Mo. App. E.D. 1971).

The statutes, Rules, and caselaw limit the number of disqualifications. *See* § 545.650, RSMo 2000; Rule 32.09; *State ex rel. Oswald v. Buford*, 518 S.W.2d 690 (Mo. App. S.D. 1975). Neither the state nor any defendant is allowed more than one change of judge in any criminal proceeding—with two exceptions. First, a change of judge before the preliminary examination does not prevent the moving party from filing another application for a change of judge if the defendant is held to answer for the charge. Rule 32.09(a). Second, it is clear under the federal due process clause that a defendant is entitled to a second or subsequent disqualification of the judge if necessary to ensure a fair trial. *Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927). Rule 32.09(c) permits a second or subsequent disqualification of a judge when fundamental fairness so requires. The defendant is entitled to only one change of judge as a matter of right, regardless of how many times the case is tried. *State v. Williams*, 716 S.W.2d 452 (Mo. App. S.D. 1986).

The Committee Note to the 1982 revision to Rule 32.06 indicates that the following application, timely filed in accordance with the Rule, would be sufficient:

> "(Caption)
> _____ requests a change of judge.
> (Signature and address of attorney or party.)"

To be timely filed in accordance with Rule 32.06, the application must be filed at least ten days before preliminary examination.

Even an untimely application for change of judge must be granted if bias and prejudice are actually present. *State v. Owens*, 759 S.W.2d 73 (Mo. App. S.D. 1988). Not every prejudice rises to the level

sufficient to disqualify a judge. *Phelps v. State*, 827 S.W.2d 742 (Mo. App. E.D. 1992). To be disqualifying, bias or prejudice must have an extrajudicial source and must result in an opinion on the merits on some basis other than what the judge learned from participation in the case. *State v. Hunter*, 840 S.W.2d 850 (Mo. banc 1992).

Adverse rulings alone do not form a basis for a claim of bias or prejudice. *State v. Tyler*, 622 S.W.2d 379, 385 (Mo. App. E.D. 1981). Having previously accepted a guilty plea does not itself establish the judge's prejudice, *City of Kansas City v. Wiley,* 697 S.W.2d 240 (Mo. App. W.D. 1985), even if the plea was subsequently set aside by another judge, *Owens,* 759 S.W.2d 73. *See also State v. White*, 873 S.W.2d 590 (Mo. banc 1994) (adopting proposed findings and conclusions did not establish bias); *State v. Reeter*, 848 S.W.2d 560 (Mo. App. W.D. 1993) (prior adverse ruling or previous contact does not necessarily establish bias); *Scruggs v. State*, 839 S.W.2d 51 (Mo. App. E.D. 1992) (calling defendant a liar did not require recusal).

In *State v. Hornbuckle*, 746 S.W.2d 580 (Mo. App. E.D. 1988), the court held that, if a trial judge was disqualified by the defendant as incompetent under Rule 32.10 or for prejudice under § 545.660, the defendant was not entitled to a subsequent peremptory challenge on the basis of prejudice. According to the court, any subsequent disqualification should be granted only for those reasons set forth in Rule 32.10 or when fundamental fairness so requires. The court stated that Rule 32.09(c) is a:

> "[C]atch-all" rule, supplementary and complementary to the other rules, and is a safety net to allow any successor judge to recuse himself, either on his own motion or upon motion of a party when "fundamental fairness" so requires. It is not a device to obtain a second peremptory change of judge . . . .

Hornbuckle, 746 S.W.2d at 585.

The holding in *State v. Sullivan*, 486 S.W.2d 474 (Mo. 1972)—that the defendant was entitled to a disqualification of judge even though he waited until the third retrial to move for a disqualification—may no longer be applicable in light of Rule 32.07, which provides that a motion for change of judge must be made:

- within ten days after the initial plea is entered; or
- if the trial judge is not named within ten days after the initial plea is entered, within ten days after the designation of the trial judge or before any proceeding on the record begins, whichever is earlier.

A party who does not take advantage of the right to a change of judge within the time limits initially granted is deemed to have waived it insofar as that particular judge is concerned and may not be able to re-assert it at some later date in the same proceeding unless a different judge is designated. *See Bland v. State*, 805 S.W.2d 192 (Mo. App. W.D. 1991).

D. (§8.39) Practical Aspects of Disqualifying a Judge

When a bench trial instead of a jury trial is desired and another judge is brought into the original court to hear a case, some of the problems of a change of venue are avoided, such as the difficulties involving distance and the resulting expense and inconvenience. Other problems, however, arise. A request for the disqualification of a judge may involve the casting of at least some aspersions on the judge's judicial character, skill, impartiality, motives, and integrity. Attorneys who regularly practice in front of certain judges may feel uncomfortable in requesting a change of judge for that reason. But counsel should take great care to fully advise the client regarding the rights to a change of judge and the impact on the case. Failure to advise the client or failure to follow through on the client's wishes in seeking a change of judge can result in a claim of ineffective assistance or perhaps even an ethics complaint regarding the attorney's conduct. *See Wilson v. State*, 626 S.W.2d 243 (Mo. banc 1982) (dissenting opinion by Judge Seiler).

Missouri cases hold that a disqualified trial judge may rule on matters the judge has under submission at the time of the disqualification but that the judge has no further authority in a case. *State ex rel. Johnson v. Mehan,* 731 S.W.2d 887, 888 (Mo. App. E.D. 1987). Further, *Mehan* states that after disqualification a judge has no jurisdiction. Some cases have even held that any actions taken after the disqualification are void. *Byrd v. Brown,* 613 S.W.2d 695, 700 (Mo. App. S.D. 1981). But see *State v. Purdy,* 766 S.W.2d 476, 478–79 (Mo. App. E.D. 1989), where the court, although acknowledging that "a judge who disqualifies himself or who has been disqualified by one of the parties has no further right to hear the case," held that "parties can waive the disqualification, expressly or by conduct." When neither counsel objected to trial by the disqualified judge over a year after the disqualification, both parties were held to have waived the disqualification by their conduct.

E. Procedure Governing Change of Judge

1. (§8.40) Judge's Own Initiative

A judge may be disqualified on the judge's own initiative for reasons such as being related to a defendant, having an interest in the case, or having been involved as counsel in the cause. Rule 32.10; §§ 545.660, 545.690, RSMo 2000. In fact, depending on the facts in the case, the judge may be under an ethical duty to recuse or disclose the basis of recusal. Rule 2, Canon 3D and E. When judges disqualify themselves, Rule 32.10 provides the procedure for a new judge to be assigned the case.

A judge is entitled to the presumption that the judge will not undertake to preside at a trial in which the judge could not be impartial. *Wright-El v. State*, 890 S.W.2d 664 (Mo. App. E.D. 1994).

By the same token, trial judges should disqualify themselves if bias or prejudice is present—even if the defendant does not file a request. *State v. Foster*, 854 S.W.2d 1 (Mo. App. W.D. 1993).

2. (§8.41) Change of Judge Upon Application

In a criminal proceeding, both the defendant and the state are entitled to one change of judge before the preliminary examination, and another change after the defendant is held to answer for the charge. Rules 32.06, 32.09. The application for these types of changes does not need to allege or prove any reason for the change. Rules 32.06, 32.07(a). The application does not need to be verified and can be signed by either a party or an attorney for a party. Rule 32.07(a).

If the application is to disqualify the judge for cause, under § 545.660(4), RSMo 2000, the defendant files an affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge will not afford the defendant a fair trial. *But see State v. Hornbuckle,* 746 S.W.2d 580 (Mo. App. E.D. 1988) (affidavits are unnecessary for disqualification sought under Rule 32.07 and judge has no discretion to deny proper request for disqualification).

3. Timeliness of Application

a. (§8.42) Before Preliminary Examination

An application in writing for the one "automatic" change of judge before the preliminary hearing must be filed at least ten days before the preliminary examination. Rule 32.06(a).

b. (§8.43) After Preliminary Examination in Misdemeanor Cases

After the defendant is held to answer the charge, the written application for the "automatic" change of judge "must be filed not later than ten days after the initial plea is entered. If the designation of the . . . judge occurs more than ten days after the initial plea is entered, the application shall be filed within ten days of the designation of the . . . judge or prior to" any proceeding of record, whichever is earlier. Rule 32.07(b).

c. (§8.44) After Preliminary Examination in Felony Cases

In felony cases, the application "must be filed not later than ten days after the initial plea is entered. If the designation of the . . . judge occurs more than ten days after the initial plea is entered, the application shall be filed within ten days of the designation of the . . . judge or prior to" the commencement of any proceeding on the record, whichever is earlier. Rule 32.07(b).

Local rules of court may designate assignments of trial judges, and some assignments may be automatic. In those instances, local rules may control the timeliness of the filing of a motion for change of judge. *See Lowery v. State*, 738 S.W.2d 573 (Mo. App. E.D. 1987).

4. (§8.45) Service

A copy of the application and notice of the time when it will be presented to the court must be served on all parties. Rules 32.06(b), 32.07(c).

Failure of the defendant to serve a copy of the application and notice of time when it would be presented to the trial court can be

fatal to the defendant's absolute right to change of judge. *State v. Williams,* 747 S.W.2d 635 (Mo. App. W.D. 1988); *State v. Bowling,* 734 S.W.2d 565 (Mo. App. S.D. 1987).

5. (§8.46) Substitution of Judge

Rules 32.06(c) and 32.07(d) contain the rules governing the procedure for the assignment of a new judge. *Cf.* § 545.690, RSMo 2000.

See State v. Powell, 728 S.W.2d 622 (Mo. App. E.D. 1987) (transfer of the cause to the Supreme Court of Missouri for selection of a trial judge unnecessary simply because presiding judge of circuit was the judge disqualified).

F. (§8.47) Changes of Judge and Venue

A defendant who desires both a change of venue and a change of judge must join both requests in a single application. Rule 32.08(a). Special provisions are then triggered for determining the new judge and venue. Rule 32.08(c), (d).

G. (§8.48) Motions Under Rules 24.035 and 29.15

Automatic change of judge provisions are not applicable to post-conviction proceedings under Rule 24.035 or 29.15. *State v. Reeter*, 848 S.W.2d 560 (Mo. App. W.D. 1993). A defendant making a post-conviction motion for disqualification of a judge may do so only on due process grounds that the judge is biased or prejudiced against the defendant. *Wright-El v. State*, 890 S.W.2d 664 (Mo. App. E.D. 1994). Neither party may waive the nonavailability of an automatic change of judge in this situation. *State v. Athanasiades*, 857 S.W.2d 337 (Mo. App. E.D. 1993); *see also* Rule 32.09(c).

H. (§8.49) Juvenile Proceedings

A change of judge of the juvenile court is governed by Rule 126.01. The application must be filed within five days after the trial date has been set. Rule 126.01.b. If the judge has not been designated within that time, the application must be filed within five days after the trial judge has been designated. *Id*. If the designation occurs less than five days before trial, the application must be filed before the commencement of any proceedings of record. *Id*.

I. (§8.50) Probation Revocation

The judge at a probation revocation proceeding can be challenged for cause, but ordinarily at this stage of the process it is too late for the defendant to exercise a challenge against the judge without cause. The probation revocation hearing is not separate and independent from the trial or plea of guilty, and the defendant's peremptory challenge against the judge presiding at the probation revocation, therefore, is untimely. *State ex rel. O'Brien v. Murphy,* 592 S.W.2d 194 (Mo. App. E.D. 1979). But if the probation revocation judge is different than the judge who earlier presided over the defendant's case, the defendant retains the right at the probation revocation stage to obtain an automatic change of judge without cause. *State ex rel. Horton v. House*, 646 S.W.2d 91 (Mo. banc 1983).

The general rule is that a defendant is not entitled to a change of judge in a probation violation proceeding unless the judge hearing the probation violation is a different judge than the one who originally took the plea and the defendant has not previously used a change of judge. When the judge who originally took the plea and placed the defendant on probation is still on the bench, the defendant has the right to have that judge hear the case even though the judge may have been assigned to a different division of the court. The state is deemed to have waived its right to disqualify when it did not take a change of judge at the time the judge was first assigned to take a plea. *See State ex rel. Dunn v. Dalton*, 793 S.W.2d 157 (Mo. App. E.D. 1990).

Assuming that the defendant is entitled to a change of judge, the time limit begins when the motion to revoke is filed. *See State ex rel. Cochran v. Andrews*, 799 S.W.2d 919 (Mo. App. W.D. 1990).

J. (§8.51) Change of Judge When Fundamental Fairness so Requires

Even if counsel has exhausted the right to preemptive disqualification of a judge under Rule 32.06 or 32.07 or if counsel has failed to move for change of judge within the time limits of Rule 32.06 or 32.07, counsel should still pursue a change of judge if events occur giving rise to objective facts indicating the trial judge may be biased. Rule 32.09(c) provides that nothing in Rules 32.01–32.09 should prohibit a judge from ordering a change of venue or change of judge when fundamental fairness so requires. A party has a right to have a judge disqualified under this Rule when the judge's impartiality

might reasonably be questioned. See *State v. Lovelady*, 691 S.W.2d 364 (Mo. App. W.D. 1985), in which the judge's statements on the record regarding the lack of merit of the defendant's asserted defense of not guilty by reason of mental disease or defect led the appellate court to conclude that the judge's impartiality might reasonably be questioned and that he should have disqualified himself. Under the circumstances, the issue is not whether the judge is actually biased, but whether an onlooker might, on the basis of objective facts, reasonably question whether the judge was biased. See *Lovelady* in which the appellate court noted that statements made by a judge indicating that he had a fixed prejudgment of an issue pertaining to a defendant's defense constituted the type of objective facts requiring disqualification.

The motion for disqualification under Rule 32.09(c) should set out specific causes that mandate disqualification under Rule 2, Canon 3D of the Code of Judicial Conduct. See *State v. Martin*, 671 S.W.2d 20 (Mo. App. W.D. 1984), in which a letter to the attorney general regarding a ruling the judge intended to make mandated his disqualification.

Prohibition is the proper remedy when trial judges fail to disqualify themselves upon a proper motion alleging facts mandating disqualification. See *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692 (Mo. App. E.D. 1990), which also contains an excellent discussion of the type of bias and the appearance of bias that mandates disqualification.

If a change of judge based on fundamental fairness is mandated by the facts, the motion should be sustained even if it is not in writing and is out of time. *See State v. Garner*, 799 S.W.2d 950 (Mo. App. S.D. 1990). In reviewing whether the motion should have been sustained, the reviewing court looks at the facts as they appeared at the time of the motion, not whether the judge actually exhibited bias during the trial. *See Lovelady,* 691 S.W.2d 364.

Counsel should note *State v. Hornbuckle*, 746 S.W.2d 580 (Mo. App. E.D. 1988), in which the court stated that a party is entitled to only one change of judge based on bias or prejudice. This statement would seem to run contrary to the statements in the above-cited cases, including *Garner,* 799 S.W.2d 950, which postdates *Hornbuckle*. At any rate, it does appear clear that, when a trial judge makes statements on the record that would indicate that the judge has prejudged certain factual issues in the case, counsel must be willing

to make a request in accordance with Rule 32.09(c) that the judge recuse to preserve the point for appeal.

IV. Forms

A. (§8.52) Application for Change of Venue (Counties of More Than 75,000 Inhabitants)

[Caption]

Application for Change of Venue

Under Rule 32.04 of the Rules of Criminal Procedure, the defendant, _____, by counsel, makes application to the Court for a change of venue.

In support thereof, it is alleged that the inhabitants of this county are so prejudiced against the defendant that a fair trial cannot be had in this county.

Specifically, the defendant alleges . . . .

Wherefore, the applicant requests that the Court set a prompt hearing on this application and order the cause removed to another county where the prejudice does not exist.

Respectfully submitted,

_____
(Name)
Counsel for Defendant
(Address and Phone No.)

B. (§8.53) Application for Change of Venue (Counties of 75,000 or Fewer Inhabitants)

[Caption]

Application for Change of Venue

Under Rule 32.03 of the Rules of Criminal Procedure, the defendant, _____, by counsel, makes application to the Court for and specifically requests a change of venue.

In support thereof, it is alleged that the inhabitants of this county are fewer than 75,000 in number.

Wherefore, the applicant prays for an order of the Court removing this cause to another county.

Respectfully submitted,

_____
(Name)
Counsel for Defendant
(Address and Phone No.)

C. (§8.54) Order Granting Change of Venue for Cause

[Caption]

Order

The defendant's motion for change of venue having been filed and heard, after due care and deliberation the Court finds that the following grounds exist justifying the removal of this cause: _____
_____
_____
_____
_____

Therefore it is on this _____ day of _____, 20___, ordered that the defendant is granted a change of venue to _____ County, Missouri, and the defendant is directed to appear there for trial before the Honorable _____ at 9:00 a.m. on the _____ day of _____ 20___, at the courthouse in _____, Missouri. Bond to continue.

_____
Judge

D. (§8.55) Application for Change of Judge Without Cause

[Caption]

Application for Change of Judge

The defendant, _____, under Rule 32.07, requests a change of judge.

Respectfully submitted,

_____
(Name)
Counsel for Defendant
(Address and Phone No.)

E. (§8.56) Motion to Disqualify Judge for Cause

[Caption]

Motion for Order Disqualifying the Honorable _____ and Transferring This Cause to Another Judge of the _____ Judicial Circuit

The defendant, _____, moves the Court, in accordance with Rule 32.09 and § 545.660, RSMo 2000, for its order disqualifying the Honorable _____ in this cause and transferring this cause to another judge of the _____ Judicial Circuit.

As grounds for this motion, the defendant alleges as follows:

1. The Honorable _____ is so prejudiced against the cause of [name of defendant] that [he/she] cannot receive a fair trial.

2. The defendant's affidavit and the supporting affidavits of two reputable persons not of kin to or counsel for the defendant, all of whom agree that the defendant cannot receive a fair trial before the Honorable _____, are attached to this motion.

Wherefore, the defendant prays that the court enter an order disqualifying the Honorable _____ and transferring this cause to another judge of the _____ Judicial Circuit of Missouri.

Respectfully submitted,

_____
(Name)
Counsel for Defendant
(Address and Phone No.)

[Certification of service on separate sheet of paper following affidavits to show service of both motion and affidavits.]

F. (§8.57) Affidavit in Support of Motion to Disqualify Judge

Affidavit

State of Missouri)
) ss.
County of _____)

[Defendant's name], of lawful age and under oath states:

1. [He/She] is the defendant in [style of case].
2. The facts stated in the foregoing motion are true and correct to the best of [his/her] knowledge.
3. The affiant has just cause to believe that [he/she] cannot have a fair and impartial trial because the Honorable _____ is prejudiced against [his/her] cause. More specifically the defendant states that . . . .
4. This motion is made in good faith and not to delay the trial or to vex or harass the State of Missouri.

_____
[Defendant's name], Affiant

[Jurat]

G. (§8.58) Certificate of Service Accompanying Motion to Disqualify Judge

Certificate of Service

Receipt of a copy of the foregoing motion and affidavits is hereby acknowledged this _____ day of _____, 20___.

_____
Assistant Prosecuting Attorney

Ellen Y. Suni*

Chapter 9

SEARCH AND SEIZURE

I. (§9.1) Introduction

II. (§9.2) Sources of Control Over Search and Seizure Activity

III. Concepts and Theories

A. (§9.3) Theories of the Fourth Amendment
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D. (§9.12) Justification for Seizure: Vehicles
E. (§9.13) Pretext

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The author acknowledges the research assistance of Kevin Robinette, Arla Klemp Witte, and Joshua Coffman.

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IX. (§9.47) Conclusion

I. (§9.1) Introduction

Search and seizure issues arise in many criminal cases, especially those involving drug prosecutions. This chapter provides a basic overview of the law of search and seizure in Missouri. It sets out relevant United States Supreme Court and Missouri cases as well as Missouri statutes when applicable. Although the chapter attempts to provide both controlling and recent cases, it cannot be fully comprehensive. Readers should use the material presented for an overview and as a basis for additional research.

This chapter addresses the law of search and seizure, but not all issues are fully covered. For example, arrest, which constitutes a seizure of the person, is more fully covered in Chapter 1 of this deskbook.

II. (§9.2) Sources of Control Over Search and Seizure Activity

The Fourth Amendment to the United States Constitution serves as the primary source of limitation on search and seizure activity undertaken by government law enforcement personnel. The Fourth Amendment applies only to government conduct and does not apply to searches or seizures effectuated by private citizens not acting at the behest of a government entity. *Burdeau v. McDowell*, 256 U.S. 465 (1921); *State v. Charlton*, 114 S.W.3d 378, 383 (Mo. App. S.D. 2003). Whether conduct is attributable to the government depends not on the "primary occupation" of the actor, but on the "capacity in which he acts at the time in question." *Id.* Thus, actions of an off-duty police officer not acting in an official capacity do not implicate the constitution. *Id.*

The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, § 15, of the Missouri Constitution also deals with search and seizure. It states:

> That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation.

The Supreme Court of Missouri has construed Article I, § 15, of the Missouri Constitution to be coextensive with and provide protection identical to that provided by the Fourth Amendment. *State v. Baker,* 103 S.W.3d 711, 717 (Mo. banc 2003); *State v. Rushing,* 935 S.W.2d 30, 34 (Mo. banc 1996); *State v. Jones*, 865 S.W.2d 658, 660 (Mo. banc 1993); *State v. McCrary*, 621 S.W.2d 266, 273 (Mo. banc 1981). Accordingly, most cases cited in this chapter involve construction of the United States, rather than the Missouri, Constitution.

There are other sources of limitation on law enforcement activity in the area of search and seizure. When statutes or court rules are relevant, they are addressed. Lawyers litigating search and seizure issues are encouraged to consult these sources when researching any particular issue.

III. Concepts and Theories

A. (§9.3) Theories of the Fourth Amendment

Fourth Amendment interpretation, to a large extent, has reflected the Supreme Court's view of the balance between the need for effective law enforcement and the protection of individual rights. In the era of the Warren Court, the concern for individual rights was paramount, and the Court recognized the need to use the Fourth Amendment to develop, in effect, a constitutional code of criminal procedure to control law enforcement activity. The Burger and Rehnquist Courts appear less concerned with protecting individual rights and show greater deference to operational choices made by law enforcement officials. *See, e.g., S.D. v. Opperman*, 428 U.S. 364 (1976); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). There are those who argue that this shift in focus is not unique to Fourth Amendment analysis, but is part of a trend in constitutional analysis generally. *See, e.g.*, Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 360–90 (1991).

A key interpretive question in Fourth Amendment analysis relates to the two clauses of the Amendment and whether they create a

constitutional preference for a warrant or merely require that all searches and seizures be reasonable. *See United States v. Rabinowitz*, 339 U.S. 56 (1950) (majority adopts reasonableness approach over strong dissent by Justice Frankfurter). Although the Court eventually adopted the warrant preference, *see Katz v. United States*, 389 U.S. 347, 357 (1967), and still pays lip service to it—*see, e.g.*, *Minn. v. Dickerson*, 508 U.S. 366 (1993)—it has created so many exceptions to the warrant requirement that they overpower the rule. *See Cal. v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) ("warrant requirement" has "become so riddled with exceptions" that it is "basically unrecognizable"); *see also* §§9.22–9.36, *infra*. While some justices are prepared to explicitly reject the warrant preference, *see Robbins v. Cal.*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting); *Acevedo*, 500 U.S. at 581 (Scalia, J., concurring), it is unlikely that a majority of the Court will do so.

The language of the preference and the manner in which it is stated, however, have subtly changed over the years. For example, while the Court frequently begins with the warrant preference and then departs to a reasonableness inquiry, in *Maryland v. Buie*, 494 U.S. 325 (1990), the Court began with a statement of balancing to determine reasonableness and then stated the warrant preference in the following terms: "*a search of the house or office* is generally not reasonable without a warrant issued on probable cause." *Id.* at 331 (emphasis added); *see also Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (searches and seizures "*inside a home* without a warrant are presumptively unreasonable") (emphasis added). In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the Court again began by noting that only unreasonable searches are proscribed by the Fourth Amendment and continued: "*In most criminal cases*, we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment." *Id.* at 619 (emphasis added). These subtle changes in language may reflect less than subtle differences in approach.

While the Court has not explicitly abandoned the warrant preference, it has moved heavily in the direction of upholding searches that are reasonable, at least outside the context of searches of the home. *See Kyllo v. United States*, 533 U.S. 27, 31 (2001) (the home is at the "very core" of the Fourth Amendment and, with few exceptions, "the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no"). This focus on reasonableness has led to an increasing "objectification" of Fourth Amendment analysis. The Court has moved away from looking at

Fourth Amendment issues from the standpoint of the police or the suspect and has focused instead on "objective reasonableness." *Fla. v. Jimeno*, 500 U.S. 248, 251 (1991). *See Ill. v. Rodriguez*, 497 U.S. 177 (1990); *Fla. v. Bostick*, 501 U.S. 429 (1991); *Md. v. Macon*, 472 U.S. 463 (1985). This objectification, which is manifested as well in the Supreme Court's pretext analysis in *Whren v. United States*, 517 U.S. 806 (1996), is arguably one of the most significant developments in Fourth Amendment jurisprudence since the era of the Warren Court.

Another theme that pervades the Court's cases is its ambivalence regarding fact-specific analysis as opposed to bright-line rules. The Court has frequently shown a desire for rules that are clear, *N.Y. v. Belton*, 453 U.S. 454 (1981), and easily understood, *Ill. v. Gates*, 462 U.S. 213 (1983); *Ariz. v. Hicks*, 480 U.S. 321 (1987), with limited "ifs, ands, and buts," *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). But while it has recognized that "responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need," *Atwater*, 532 U.S. at 347, it has frequently rejected "*per se* rules," *see, e.g., United States v. Drayton*, 536 U.S. 194, 201 (2002), and has expressed a concern that the "overlay of a categorical scheme on the general reasonableness analysis threatens to distort the 'totality of the circumstances' principle, by replacing a stress on revealing facts with resort to pigeonholes," *United States v. Banks,* 540 U.S. 31, 42 (2003). Thus, at times the Court stresses the need for clarity, but at other times it has relied on a contextual balancing approach, which prevents any degree of certainty. This ambiguity was recognized by one scholar, who attributed much of the confusion in Fourth Amendment analysis to be "the result of the Court's attempt to pursue a compromise between considering cases flexibly . . . and setting forth clear rules . . . . The Court purports to set forth clear rules while actually adjusting them constantly to accommodate each new fact situation." Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1472 (1985).

Although the Supreme Court of Missouri's choice to tie the interpretation of Article I, § 15, of the Missouri Constitution to the Fourth Amendment has limited the Court's policy analysis of search and seizure issues, Missouri cases reflect similar themes. In *State v. Miller*, 894 S.W.2d 649, 650 (Mo. banc 1995), the Court explicitly acknowledged that:

> Once again we must determine the appropriateness of police and prosecutorial behavior in light of a citizen's right to be free from unreasonable

> searches and seizures and society's need for effective law enforcement. Our safety and freedom are at odds in the field of the Fourth Amendment to the United States Constitution and Article I, Section 15 of the Missouri Constitution. This is a difficult line to draw, and it is not made any easier by the fact that we must again do so in the factual context of an individual who has violated the law.

The majority and dissenting opinions in *Miller* once again demonstrate that counsel's starting point in analysis often has a major impact on the result. These issues have become even more difficult in the wake of September 11th.

B. (§9.4) Interpretive Sources: History and Meaning of the Fourth Amendment

In determining the meaning of the Fourth Amendment, the Court often uses a multi-step analysis. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and *California v. Hodari D.*, 499 U.S. 621 (1991), are good examples of the Court's approach. First, it examines the text of the Fourth Amendment to determine the meaning of the provision involved. *Verdugo-Urquidez,* 494 U.S. at 265; *Hodari D.*, 499 U.S. at 624, 633. The Court's "textual exegesis" is frequently inconclusive, and, in the absence of a clear textual resolution, the Court often looks to history for guidance. *Verdugo-Urquidez*, 494 U.S. at 265–66; *Hodari D.*, 499 U.S. at 624–26, 630–32; *see also Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. N.Y.*, 445 U.S. 573 (1980). As a comparison of the majority and dissent in these cases shows, however, history may be construed in a variety of ways. When, as is frequently the case, history does not resolve the issue, the Court turns to precedent and policy. *Verdugo-Urquidez*, 494 U.S. at 268–75; *Hodari D.*, 499 U.S. at 627.

In recent years, the role of history appears to have changed, but there has not been a consistent direction. There is an indication in some cases that common law decisions from the time of adoption of the Constitution are the most relevant sources of guidance, *see Wilson v. Ark.,* 514 U.S. 927, 931 (1995); *Wyo. v. Houghton*, 526 U.S. 295, 299–300 (1999), but the Court has not always followed this approach, *see Kyllo v. United States,* 533 U.S. 27, 34 (2001); *see generally* David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143, 145–69, 177–201 (2002). Counsel litigating Fourth Amendment cases containing novel issues should look to history for guidance, but should look beyond history as well. This is particularly true when the issue involves emerging technology.

It should be emphasized that, even when text, history, and policy are instructive, they are rarely conclusive. For reasons stated in §9.3 above, the outlook of particular justices plays a major role in how the issues are resolved. Whether in state or federal court, however, counsel litigating search and seizure issues should be prepared with all the analytical tools to effectively present a Fourth Amendment case.

C. (§9.5) Methodology of Analysis

Analysis of Fourth Amendment issues generally requires a three-step process. The first step involves characterization of the conduct involved (e.g., encounter or stop or arrest). The second step involves identifying the justification required for that type of conduct and determining whether this justification exists (e.g., no cause or reasonable suspicion or probable cause). The final step involves determining whether the permissible scope of conduct or justification has been exceeded (e.g., what was a stop has now become an arrest, requiring additional justification). Use of this process helps to keep the issues clear and ordered for analysis and argument.

Because Fourth Amendment issues arise when law enforcement officials engage in conduct that can be characterized as a search or seizure, the first step in any Fourth Amendment analysis is to identify and characterize the police conduct. Once conduct has been characterized, it is necessary to ask whether that conduct was "justified at its inception." *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968). This step requires a determination of whether a warrant and probable cause are required or whether an exception to these requirements exists. Once the level of justification is identified, the facts must be evaluated to determine whether the justification has been established. The final step, assuming the conduct was justified at the inception, is to determine whether the permissible scope of justification has been exceeded. In most cases, the police conduct is limited by the scope of either the warrant or the applicable exception. The facts should be evaluated to make sure all police activity remains within that permissible scope.

This three-step process is complicated by the fact that, frequently, conduct may become more intrusive as it continues. For example, what may begin as a police-citizen encounter may escalate into a stop and then an arrest; a frisk may escalate into a full search once incriminating evidence is found. In such cases, it is imperative that counsel on both sides carefully scrutinize the escalating situation and

apply the three-step analysis to each more intrusive form of police conduct. For an example of how a court recognized and independently analyzed the several steps leading to seizure of the evidence at issue, see *State v. LaFlamme*, 869 S.W.2d 183, 187–88 (Mo. App. W.D. 1993).

IV. Coverage of the Fourth Amendment

A. (§9.6) What Is a Search?

The Fourth Amendment provides protection against unreasonable searches and seizures. Thus, a basic requirement for the Fourth Amendment to be implicated is action by the government that can be characterized as a "search" or "seizure." While some investigative activity undertaken by law enforcement personnel is easily characterized as search and seizure activity, that is not always the case, and this determination is likely to be even more difficult in light of emerging technologies. The threshold question in many cases is whether search and seizure activity has occurred.

This question has great significance given the Court's methodology of analysis in this area. The Court has traditionally used a "monolithic" approach to treatment of searches under the Fourth Amendment. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974). If conduct is characterized as a search, the full panoply of Fourth Amendment protections apply unless an exception exists; if conduct is not a search, no justification at all is required. The Court has been unwilling to depart generally from this "all-or-nothing" approach, *see, e.g.*, *Ariz. v. Hicks*, 480 U.S. 321 (1987) (refusing to adopt the doctrine of "cursory inspection" as a form of search activity less intrusive than a full-scale search), although recent movements toward a reasonableness analysis may indicate a change in approach. Thus, this preliminary question is quite important.

Before 1967, the question whether a search occurred was governed by property concepts. Thus, the issue to be addressed focused on whether a trespass had occurred into a "constitutionally protected area." Although there were occasional departures from this approach, in general Fourth Amendment law was controlled by property concepts.

From a definitional standpoint, the "modern era" of search and seizure law began with *Katz v. United States*, 389 U.S. 347 (1967). In

Katz, the Court acknowledged that the Fourth Amendment protects people, not places, and has a strong privacy base. It thus substituted a "reasonable expectation of privacy" test for determining whether search activity cognizable by the Fourth Amendment has occurred. The two-part analysis developed by Justice Harlan in a concurring opinion has become the basis for current law.

Justice Harlan's formulation of the test is viewed as having both a subjective and an objective component. The subjective component looks to whether the individual has manifested a subjective expectation of privacy. It is clear that this looks beyond a true subjective expectation because, if that were not the case, any subjective expectation could be easily defeated by merely telling the individual that they have no such expectation. *See Smith v. Md.*, 442 U.S. 735, 740, n.5 (1979). More appropriately, this prong has been viewed to ask whether the individual has taken action to demonstrate some expectation of privacy or has sought to preserve something as private. The second, or objective, component asks whether that expectation is reasonable or, perhaps more appropriately, whether the expectation is one society is prepared to recognize as reasonable. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 34 (2001); *United States v. Jacobsen*, 466 U.S. 109 (1984).

Although the "reasonable expectation of privacy" test is easy to state, courts have had difficulty giving it content. Over the years, the focus has changed and developed, moving from what was originally a rights-oriented approach to the current more law-enforcement-oriented perspective. Additionally, the Court has had to deal with emerging technology. Not surprisingly, a variety of concepts have developed to assist courts in applying this test. The remainder of this section looks at some of those concepts.

Both the federal and Missouri courts have refused to find a reasonable expectation of privacy in what a person knowingly exposes to public view. *See, e.g.*, *Fla. v. Riley*, 488 U.S. 445, 449 (1989); *State v. Akers*, 723 S.W.2d 9 (Mo. App. W.D. 1986). The same analysis applies to conversations exposed to public hearing; thus, a person has no reasonable expectation of privacy in a cordless telephone conversation necessarily "broadcast by radio in all directions to be overheard by countless people." *State v. King*, 873 S.W.2d 905, 909 (Mo. App. S.D. 1994).

The concept of "assumption of risk" has also been used by both the federal and Missouri courts to determine whether a reasonable

expectation of privacy exists. The Supreme Court has refused to find a reasonable expectation of privacy when information has been disclosed to another, even for a limited purpose. Thus, disclosure of the following defeats any reasonable expectation of privacy in those items or information:

- Check records to the bank, *United States v. Miller*, 425 U.S. 435 (1976)
- Numbers dialed to the phone company, *Smith*, 442 U.S. 735
- Garbage to the trash collector, *Cal. v. Greenwood*, 486 U.S. 35 (1988)
- Statements to a trusted but untrustworthy confidant, *United States v. White*, 401 U.S. 745 (1971)

Similarly, a defendant who puts a house up for sale assumes the risk that those visiting the property will convey information they observe to the police, *State v. Thompson*, 820 S.W.2d 591 (Mo. App. E.D. 1991), and a person who takes film to be developed assumes the risk that the film developer will convey the pictures developed to law enforcement officials, *State v. Simmons*, 955 S.W.2d 729, 736 (Mo. banc 1997); *State v. Urban*, 798 S.W.2d 507 (Mo. App. W.D. 1990), *overruled on other grounds by State v. Carson*, 941 S.W.2d 518, 523 (Mo. banc 1997). Obviously, the assumption-of-risk theory can be taken so far as to totally defeat any expectation of privacy at all, and ultimately the question is what risks individuals should be forced to assume in society.

The concept of "enhancement of the senses" has also been used to help determine whether a reasonable expectation of privacy exists. When law enforcement officers use "normal" enhancement devices, such as flashlights, *State v. Hawkins*, 482 S.W.2d 477 (Mo. 1972), binoculars, *State v. Spica*, 389 S.W.2d 35 (Mo. 1965), or telescopes, *State v. Speed*, 458 S.W.2d 301 (Mo. 1970), no search will be found to have occurred. This analysis has been extended to low-flying aircraft, *Cal. v. Ciraolo*, 476 U.S. 207 (1986), helicopters, *Riley,* 488 U.S. 445, and high-powered cameras, *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986), as long as the intimate details of private activity are not observed. Use of beepers to monitor movements does not implicate a reasonable expectation of privacy, *United States v. Knotts*, 460 U.S. 276 (1983), as long as what is monitored is only what has been exposed to public view, *United States v. Karo*, 468 U.S. 705 (1984) (monitoring of canister containing beeper once it entered private residence infringed on reasonable expectation of privacy).

Despite the shift from a focus on "constitutionally protected areas" to a focus on privacy, the nature of the area and its intended use are factors that have an impact on the determination of whether a search has occurred. For example, courts have found no reasonable expectation of privacy in open fields, *Oliver v. United States*, 466 U.S. 170 (1984); *State v. Light*, 686 S.W.2d 538 (Mo. App. S.D. 1985), as distinguished from the curtilage of the home, which is protected by the Fourth Amendment, *United States v. Dunn*, 480 U.S. 294 (1987); *State v. Schweitzer*, 879 S.W.2d 594, 596 (Mo. App. E.D. 1994); s*ee also State v. Sweet*, 796 S.W.2d 607, 610–12 (Mo. banc 1990), *cert. denied*, 499 U.S. 932 (1991); *State v. Hunziker*, 799 S.W.2d 610 (Mo. App. W.D. 1990). Although curtilage is protected and outbuildings close or connected to premises are considered part of that curtilage, *State v. Kelly*, 119 S.W.3d 587, 593 (Mo. App. E.D. 2003); *State v. Kriley,* 976 S.W.2d 16, 19–24 (Mo. App. W.D. 1998), driveways, walkways, front porches, or other means of access to premises that are open to the public do not normally possess a sufficient reasonable expectation of privacy such that law enforcement entry onto that property would constitute a search. *State v. Edwards,* 36 S.W.3d 22, 26–28 (Mo. App. W.D. 2000). Moreover, common areas in a building such as a boarding house ordinarily do not give rise to a reasonable expectation of privacy whereas individual rooms or apartments would. *See State v. Kechrid*, 822 S.W.2d 552 (Mo. App. W.D. 1992).

In some instances, whether an area will be viewed as protected under the Fourth Amendment may depend on the context in which the question arises. In *Dow Chemical,* 476 U.S. 227, the Court addressed aerial surveillance of an industrial complex. With regard to outdoor areas within the fenced-in complex, the Court found them to fall between curtilage and open fields. It indicated that this characterization might turn on whether physical entry or aerial surveillance was involved. This distinction between visual and tactile means of obtaining information was reaffirmed by the Court in *Bond v. United States,* 529 U.S. 334 (2000), in which the squeezing by Border Patrol agents of soft-side luggage placed in overhead bins was deemed a search. The Court stated that "[p]hysically invasive inspection is simply more intrusive than purely visual inspection." *Id.* at 337. Even when items are accessible to and may be handled by others, when government manipulation is more intrusive than would be expected from the general public, a search cognizable by the Fourth Amendment may be found to have occurred. *Id.* at 338–39. Thus, it is necessary to look not only at the nature of the area involved but also at the nature of the intrusion because both

contribute to the reasonableness of any expectation of privacy that may exist in the circumstances.

The courts have found other categories of search activity to fall outside the Fourth Amendment. When government action provides no new information or intrusion beyond what has already been disclosed by private parties, no search is deemed to exist. *Jacobsen,* 466 U.S. 109. Government activity that poses no risk of disclosure of information other than the presence of contraband, such as canine sniffs and drug field tests, has also been deemed to be sufficiently unintrusive so as not to compromise any legitimate expectations of privacy. *See, e.g.*, *Ill. v. Caballes*, 125 S. Ct. 834, 837–38 (2005); *United States v. Place*, 462 U.S. 696, 707 (1983); *Jacobsen*, 466 U.S. at 123.

An expectation of privacy once existing can be destroyed through abandonment. *State v. Lingar*, 726 S.W.2d 728, 736 (Mo. banc 1987), *cert. denied*, 484 U.S. 872 (1987). Thus, when an individual throws an item away to avoid seizure, that individual does not continue to have a reasonable expectation of privacy in that item. *State v. Qualls*, 810 S.W.2d 649 (Mo. App. E.D. 1991); *State v. Porter*, 792 S.W.2d 411, 412–13 (Mo. App. S.D. 1990). Abandonment will be found when "an individual has voluntarily given up control of his property." *State v. Looney*, 911 S.W.2d 642, 644 (Mo. App. S.D. 1995). "[T]he test for determining abandonment is primarily a question of intent, which may be inferred from 'words spoken, acts done and other objective facts.'" *Id.* (quoting *Qualls*, 810 S.W.2d at 652). When property is thrown away because of an unlawful act of the police, it is not considered abandoned. *Thompson*, 820 S.W.2d at 594; *Settle v. State*, 679 S.W.2d 310, 321 (Mo. App. W.D. 1984), *cert. denied*, 472 U.S. 1007 (1985).

The question of whether government activity in a particular context constitutes a search cognizable by the Fourth Amendment is likely to become increasingly difficult to answer as law enforcement officers begin to use more sophisticated forms of technology to investigate criminal activity. Pressure will be put on the Fourth Amendment as "citizens armed with eighteenth century rights confront government utilizing twentieth century technology," Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 589 (1990), and these problems may be exacerbated as the 21st century unfolds. Issues such as exposure to public view and assumption of risk may need to be reconsidered in light of developments such as satellite surveillance, sophisticated computers, and infrared, laser, and microwave technology. *See, e.g.,* Michael

Adler, *Cyberspace, General Searches, and Digital Contraband: The Fourth Amendment and the Net-Wide Search*, 105 YALE L.J. 1093 (1996).

The Court's first major effort to address this emerging technology came in *Kyllo*, 533 U.S. 27, in which the Court found that law enforcement use of a thermal imager to measure heat emanating from a home constituted a search. *Id.* at 34–35. The Court held that, when law enforcement officers obtain by sense-enhancing technology information regarding the interior of a home that they could not have otherwise obtained without physical intrusion, a search has occurred, at least when the technology in question is not in general public use. *Id.* at 34. While the Court articulated a fairly clear test to determine when use of technology constitutes a search in the context of the home, it provided little guidance for determining how the use of technology should be assessed in other contexts. Additionally, conditioning the availability of Fourth Amendment protection on how common a device may be likely raises new issues that will need to be resolved. *See* David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143, 202–10 (2002).

Whether the Court will begin to move toward a more graduated analysis that may have the potential to better protect privacy, and particularly informational privacy, in a technological age remains to be seen, but commentators have been addressing the issues and making proposals to deal with these evolving concerns. *See, e.g.*, Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment*, 25 VAL. U. L. REV. 383 (1991); Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583 (1989). See generally Harvey Wingo, *A 2020 Vision of Visual Surveillance and the Fourth Amendment*, 71 OR. L. REV. 1 (1992), for an interesting approach. Counsel confronting law enforcement activity involving new technologies or new applications of existing technologies should be prepared to address these complex issues.

B. What Is a Seizure?

1. (§9.7) Seizure of Property

For Fourth Amendment purposes, a seizure of property "occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). *Accord Soldal v. Cook County*, 506 U.S.

56 (1992); *State v. Figgins*, 839 S.W.2d 630, 640 (Mo. App. W.D. 1992). The Court's shift from a property-based approach to a privacy-based approach in *Katz v. United States*, 389 U.S. 347 (1967), did not "snuff[ ] out the previously recognized protection for property under the Fourth Amendment." *Soldal*, 506 U.S. at 64. Moreover, a seizure may implicate the Fourth Amendment even when no search activity has occurred, *id.* at 68, and even when no interference with privacy is involved. *Id.* at 69. The standards for seizure set out in *Soldal* were adopted in Missouri in *Bezayiff v. City of St. Louis*, 963 S.W.2d 225 (Mo. App. E.D. 1997), in which the court noted that the protection of the Fourth Amendment "fully applies to the seizure of residential property in the civil context." *Id.* at 232.

Detention of property may constitute a seizure under the Fourth Amendment, *United States v. Place*, 462 U.S. 696, 705 (1983); *United States v. Van Leeuwen*, 397 U.S. 249 (1970), although the justification may be less for a brief detention than for a more significant interference with possessory or property rights. The acquisition by law enforcement officials of an item by purchase does not constitute a seizure cognizable under the Fourth Amendment. *Md. v. Macon*, 472 U.S. 463 (1985); *State v. Shouse*, 519 S.W.2d 13 (Mo. 1975).

2. (§9.8) Seizure of Persons

Although arrest is the paradigmatic seizure of the person, courts have recognized that an individual may be seized short of a full-fledged arrest. While a mere police-citizen encounter is not subject to the constraints of the Fourth Amendment, *State v. Talbert*, 873 S.W.2d 321, 323 (Mo. App. S.D. 1994); *State v. Childress*, 828 S.W.2d 935, 945 (Mo. App. S.D. 1992), when the police stop an individual and restrain that person's freedom of movement, conduct cognizable by the Fourth Amendment has occurred.

A seizure of the person occurs, for purposes of the Fourth Amendment, when, because of police conduct, a reasonable innocent person would not feel free to leave or to decline the officer's requests or otherwise terminate the encounter. *Fla. v. Bostick*, 501 U.S. 429 (1991). The "crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and

go about his business.'" *Id.* at 437 (quoting *Mich. v. Chesternut*, 486 U.S. 567, 569 (1988)). In determining whether this test has been met, factors to be considered include:

- a show of force by the police;
- physical touching of the individual;
- police display of weapons;
- retention of travel documents; and
- tone of voice indicating that compliance will be compelled.

See, e.g., United States v. Mendenhall, 446 U.S. 544, 554 (1980) (plurality decision); *Fla. v. Royer*, 460 U.S. 491 (1983); *Brown v. Tex.*, 443 U.S. 47 (1979). The location of the police-citizen contact is relevant but not determinative, *Bostick,* 501 U.S. 429, as is whether the individual has been advised that the individual is free to leave. *See United States v. Drayton*, 536 U.S. 194 (2002).

Although physical force is not necessary to effectuate a seizure, absent such force actual submission to the assertion of authority is required. *Cal. v. Hodari D.*, 499 U.S. 621 (1991); *State v. Shahid*, 813 S.W.2d 38 (Mo. App. E.D. 1991); *State v. McKeehan*, 894 S.W.2d 216, 219–20 (Mo. App. S.D. 1995). Thus, when a suspect flees in response to a police command to stop, that individual is not stopped unless and until there is submission or restraint.

What may begin as a stop can become an arrest when the police exceed the permissible scope of a *Terry* stop. "The scope of the detention must be carefully tailored to its underlying justification." *State v. Weddle,* 18 S.W.3d 389, 394 (Mo. App. E.D. 2000) (quoting *Royer,* 460 U.S. at 500). Although the Court has rejected any *per se* test based on length of time, it has indicated that a stop may continue for a reasonable period of time as long as the police are diligently pursuing the investigation and the investigative technique is likely to confirm or dispel their suspicions. *United States v. Sharpe*, 470 U.S. 675 (1985). The fact that a more efficient investigative technique may have been available will not automatically indicate that a stop has exceeded permissible bounds, although Missouri courts do consider "whether the police used 'the least intrusive means of detention reasonably necessary to achieve their investigative purpose'" as a factor in determining de facto arrest. *State v. Pfleiderer*, 8 S.W.3d 249, 255 (Mo. App. W.D. 1999) (quoting *United States v. Bloomfield*, 40 F.3d 910, 917–18 (8th Cir. 1994)). The United

States Supreme Court has said that "[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *Sharpe,* 470 U.S. at 687. When a stop exceeds the bounds set out in *Sharpe* or when factors such as movement from the scene indicate that the proper scope of a stop has been exceeded, *see, e.g., Hayes v. Fla.*, 470 U.S. 811 (1985), the police conduct will be treated as an arrest, and the justifications for an arrest will be required.

Whether a de facto arrest occurs when a defendant comes to the police station accompanied by the police depends on the circumstances. An involuntary removal of a partially dressed suspect from his home to the police station in the middle of the night has been held to be sufficiently like an arrest to require probable cause despite the suspect's response of "Okay" to the police. *Kaupp v. Tex.,* 538 U.S. 626 (2003). On the other hand, a de facto arrest will not be found when a suspect voluntarily accompanies the police to the station and there is no "show of authority" that would cause a reasonable person to believe they were not free to leave. *State v. Glass*, 136 S.W.3d 496, 509 (Mo. banc 2004).

For a clear and concise statement of the three levels of police-citizen encounters and of the fact that what begins as an encounter can escalate into a stop or arrest, see *State v. Faulkner*, 103 S.W.3d 346, 355 (Mo. App. S.D. 2003), and *State v. Solt,* 48 S.W.3d 677, 680–83 (Mo. App. S.D. 2001).

V. Justification for Searches and Seizures

A. (§9.9) Justification for Searches: In General

As noted, current analysis still adheres to the warrant preference. *See* §9.3, *supra.* Thus, unless an exception exists, search activity cannot constitutionally be undertaken without a warrant and probable cause. Detailed discussion of the standards for issuance of a warrant are found in §§9.14–9.19 below. For current purposes, suffice it to say that a warrant, issued by a detached and neutral magistrate based on a sworn application supported by probable cause, is required in the absence of an exception. When an exception to the warrant requirement is claimed, the government bears the burden of proving that the exception exists and that the police conduct at issue is appropriately within the scope of that exception. *State v.*

Burkhardt, 795 S.W.2d 399 (Mo. banc 1990). Exceptions to the warrant requirement are discussed in §§9.23–9.36 below.

B. (§9.10) Justification for Seizure: Plain View

Law enforcement officers may seize items when they have probable cause to believe that those items are contraband, evidence, or fruits of crime. Although searches and seizures are both thought to be subject to the warrant preference, seizures generally can be made without a warrant based on the doctrine of plain view. An officer who is in a place the officer has a right to be may seize an item that the officer has probable cause to believe is contraband, evidence, or fruits of a crime without a warrant in reliance on this doctrine. *See, e.g.*, *Payton v. N.Y.*, 445 U.S. 573, 587 (1980) ("[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity"); *Horton v. Cal.*, 496 U.S. 128 (1990).

In *Horton,* the Court rejected the requirement discussed in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), that any discovery made under the plain-view doctrine be inadvertent. The Court noted that, because the plain-view doctrine is, in actuality, a seizure doctrine that does not implicate privacy rights, the inadvertence requirement is unnecessary to adequately protect legitimate Fourth Amendment interests. *Horton*, 496 U.S. at 128.

It should be clear that the plain-view doctrine never justifies an entry or intrusion to make a seizure; it merely justifies the seizure. If an entry or intrusion is necessary, that entry or intrusion must be independently justified. "What the 'plain view' cases have in common is . . . each of them had a prior justification for an intrusion in the course of which [the officer] came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification . . . ." *State v. Hutchinson*, 796 S.W.2d 100, 106 (Mo. App. S.D. 1990). Thus, an officer seeing contraband through a closed but uncovered window may not enter the building to seize the contraband under the plain-view doctrine. If, however, the officer is already legitimately inside the premises and sees the contraband in plain view, that doctrine will justify seizure without a warrant. "To establish the plain view exception, the burden is on the State to prove by a preponderance of the evidence that the evidence obtained in the searches was readily visible, plainly or easily seen." *State v. Rutter*, 93 S.W.3d 714, 724 (Mo. banc 2002). For an extremely careful discussion and application of the plain-view

doctrine, see *State v. Johnston*, 957 S.W.2d 734, 742–45 (Mo. banc 1997).

Seizure under the plain-view doctrine is limited to items the officer can identify as subject to seizure based on visual inspection only. *Ariz. v. Hicks*, 480 U.S. 321 (1987). In *Hicks,* the Court refused to recognize a doctrine of "cursory inspection" and indicated that manual handling of an item could not be justified under the theory of plain view. *See also State v. Budgetts*, 771 S.W.2d 902 (Mo. App. W.D. 1989). When, however, an officer has an independent right to handle an item and through the handling determines that the item is contraband, evidence, or fruits of crime, the doctrine of "plain feel" will allow its seizure. *Minn. v. Dickerson*, 508 U.S. 366 (1993). Any manipulation that is not independently justified will defeat application of this doctrine because "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Hutchinson*, 796 S.W.2d at 106. Similarly, when an officer is in a place the officer has a right to be and can determine through smell alone that an item is seizable, the corollary doctrine of plain smell will allow seizure without a warrant. *See Polson v. City of Lee's Summit*, 535 F. Supp. 555, 558–59 (W.D. Mo. 1982).

Missouri specifically adopted the "plain-feel" doctrine in *State v. Rushing*, 935 S.W.2d 30 (Mo. banc 1996). In *Rushing*, during a frisk, an officer felt a type of container that he stated was known to be used by drug traffickers. The Court held that the plain-feel doctrine could justify seizure of an item felt but not seen when that feel, considered in conjunction with information and observations regarding the area, the transaction, and the knowledge and experience of the officer were sufficient to give rise to probable cause. Two judges dissented, believing that the decision was inconsistent with *Hicks*, 480 U.S. 321. The plain-view doctrine has generally been used to justify seizures only and not entries, but the decision in *Rushing* seems less clear on this point. The decision has been criticized for going beyond the boundaries of the Supreme Court's holding in *Dickerson*, 508 U.S. 366, *see* Daniel E. Blegen, Note, *Seizures of Containers Using the Plain Feel Doctrine: Did Missouri Go Too Far? or When Is a Pill Bottle Just a Pill Bottle?*, 63 MO. L. REV. 243 (1998), and for creating confusion for the police, prosecutors, and courts, *see* Cynthia A. Rushefsky, *The "Plain Feel" Doctrine in Missouri: State of Missouri v. Shaun Rushing*, 53 J. MOBAR 215 (1997).

Rushing has been applied in several cases, leading to suppression when there was insufficient evidence that, by virtue of contour or mass, the officer could immediately identify the item seized as contraband, *State v. Moore*, 99 S.W.3d 579, 583–84 (Mo. App. S.D. 2003), and when there was no evidence that the officer knew from experience that criminals commonly use the type of container involved to store contraband, *State v. Courtney,* 102 S.W.3d 81, 89 (Mo. App. W.D. 2003). But, like the *Rushing* Court, some courts do not clearly explain exactly how the doctrine of plain view or plain feel justified the police conduct at issue. *See State v. Gantt,* 87 S.W.3d 330, 333–35 (Mo. App. W.D. 2002). Counsel dealing with this issue should make sure to develop the requisite facts with regard to *Dickerson*, 508 U.S. 366, as well as *Rushing*. *See State v. Hawkins,* 137 S.W.3d 549, 559–61 (Mo. App. W.D. 2004).

C. (§9.11) Justification for Seizure: Persons

The justification required for seizure of the person depends on the intrusiveness of the seizure involved, measured not by what the officers involved say or intend, but by the degree of restraint from the perspective of what a reasonable person in the defendant's situation would perceive. *State v. McKeehan*, 894 S.W.2d 216, 219–20 (Mo. App. S.D. 1995). No justification is required for police to enter into a police-citizen encounter. Because these encounters are consensual and the individual is free to go, officers do not need cause. *State v. Talbert*, 873 S.W.2d 321, 323 (Mo. App. S.D. 1994); *State v. Childress*, 828 S.W.2d 935, 945 (Mo. App. S.D. 1992). "A person may not be detained even momentarily, however, without reasonable, objective grounds for doing so." *Talbert*, 873 S.W.2d at 323; *Fla. v. Royer*, 460 U.S. 491, 498 (1983).

When a defendant has been stopped such that a reasonable person would not feel free to go or to ignore the police, reasonable suspicion that the person was or is involved in criminal activity is required. *State v. Franklin*, 841 S.W.2d 639, 641 (Mo. banc 1992); *Terry v. Ohio*, 392 U.S. 1 (1968). Reasonable suspicion must be based on specific and articulable facts and is determined in a common-sense fashion based on the totality of the circumstances. *Franklin*, 841 S.W.2d at 641; *State v. Duncan*, 879 S.W.2d 749, 751 (Mo. App. W.D. 1994). Knowledge of recent relevant criminal conduct is a permissible component of reasonable suspicion. *State v. Hawkins*, 137 S.W.3d 549, 557 (Mo. App. W.D. 2004).

Although a "'hunch' or 'inchoate and unparticularized suspicion' is insufficient" to establish reasonable suspicion, *Talbert*, 873 S.W.2d at 324, courts have recently expressed concern that officers are relying on no more than such an "inchoate and unparticularized suspicion or hunch" and have refused to find the "requisite minimal level of objective justification" for the stop. *See State v. Copeland*, 949 S.W.2d 227, 230 (Mo. App. S.D. 1997); *see also State v. Schmutz*, 100 S.W.3d 876 (Mo. App. S.D. 2003) (innocent activity coupled with the mere fact of presence in an area where businesses were closed is insufficient to establish reasonable suspicion); *State v. Weddle*, 18 S.W.3d 389, 394 (Mo. App. E.D. 2000) (nervousness alone is not enough for reasonable suspicion); *State v. David*, 13 S.W.3d 308 (Mo. App. W.D. 2000) (a stop was improper when an officer could not articulate any reasonable suspicion that the defendant had committed or was about to commit a crime). Missouri courts appear more willing than in the past to carefully assess the justifications proffered by the police.

Reasonable suspicion may be based on a series of innocent facts. *United States v. Sokolow*, 490 U.S. 1 (1989). In *Sokolow*, the Court stated that the "relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Id.* at 10. The Supreme Court reiterated that innocent facts may provide the basis for reasonable suspicion in *United States v. Arvizu*, 534 U.S. 266 (2002), and emphasized that these facts must be considered in the totality of circumstances, giving due weight to officer experience. *See Hawkins*, 137 S.W.3d at 557–59. For a discussion of the type of facts that warrant reasonable suspicion, see *Franklin*, 841 S.W.2d at 644–45.

Although a series of innocent acts can constitute reasonable suspicion, "a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Fla. v. Bostick*, 501 U.S. 429, 437 (1991). Flight at the approach of the police, in otherwise suspicious circumstances, may contribute to a finding of reasonable suspicion. *See Ill. v. Wardlow,* 528 U.S. 119, 125 (2000); *see also State v. Shahid,* 813 S.W.2d 38 (Mo. App. E.D. 1991); *State v. Lanear*, 805 S.W.2d 713 (Mo. App. W.D. 1991). In *Wardlow,* the Court noted that it had previously recognized that evasive behavior may be a pertinent factor in determining reasonable suspicion and that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Wardlow*, 528 U.S. at 124. The Court acknowledged that a mere

refusal to cooperate does not, without more, furnish the requisite level of suspicion to support a stop but noted that "unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not 'going about one's business'; in fact, it is just the opposite." *Id.* at 125.

While recognizing that flight may be ambiguous and susceptible of an innocent explanation, the Court made clear that it is an appropriate factor to consider in the totality of circumstances. Four justices dissented, believing that, in the circumstances of the case, mere flight from the police in a high-crime area did not satisfy the requirements of reasonable suspicion. *Id.* While the existence of improper influences such as threats of violence or fraud may prevent flight from being considered, the mere presence of officers and use of lights and other lawful authority does not constitute "improper provocation," and flight that results may be considered in determining reasonable suspicion. *State v. Kelly,* 119 S.W.3d 587, 595 n.2 (Mo. App. E.D. 2003).

The Court has also indicated that an anonymous tip can provide the basis for reasonable suspicion when, in the totality of the circumstances, the tip carries sufficient indicia of reliability. *Ala. v. White*, 496 U.S. 325, 326–27 (1990). While an anonymous tip alone will seldom provide reasonable suspicion, corroboration, even of innocent detail, may be sufficient to meet the requirements for a *Terry* stop. *White,* 496 U.S. at 329–31. The Court addressed the limits of reliance on an anonymous tip to establish reasonable suspicion in *Florida v. J.L.*, 529 U.S. 266 (2000). Characterizing *White* as a "close case," the Court found that *J.L.* fell on the other side of the line. Finding that the tip in *J.L.* "lacked the moderate indicia of reliability present in *White* and essential to the Court's decision in that case" and concluding that the anonymous call "provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility," the Court concluded that the bare report of an unknown, unaccountable informant was insufficient to establish reasonable suspicion. *J.L.*, 529 U.S. at 271. *J.L.* was applied in Missouri in *State v. Bergmann,* 113 S.W.3d 284, 286–87 (Mo. App. E.D. 2003).

When reasonable suspicion is based on a tip that is corroborated by officers, the fact that there may be inconsistencies between what the officers observe and what was stated in the tip does not "obliterate the value of the informant's tip." *State v. Stillman*, 938 S.W.2d 287, 291 (Mo. App. W.D. 1997). Rather, the court must determine

whether, in the totality of the circumstances, the tip, coupled with the police corroboration, is sufficient to support reasonable suspicion of criminal activity. *Id*. "When multiple police officers are working together closely in order to effect an arrest or engage in an investigatory stop, the Fourth Amendment is satisfied if the information known by all of the officers collectively amounts to probable cause or reasonable suspicion." *State v. Hernandez*, 954 S.W.2d 639, 642 (Mo. App. W.D. 1997). Each officer does not need to have all of the facts necessary to find the requisite degree of suspicion required. *State v. Goff*, 129 S.W.3d 857, 862–64 (Mo. banc 2004). *Hernandez* involved a stop that was precipitated by a radio dispatch. The court discussed factors for assessing reasonable suspicion when the police are responding to information received through police channels. *Hernandez*, 954 S.W.2d at 643.

Reasonable suspicion of past criminal activity can support a stop, and officers can rely on a wanted flyer, *United States v. Hensley*, 469 U.S. 221 (1985), or a radio bulletin, *Franklin*, 841 S.W.2d at 641–44, as long as the dispatch is based on reasonable suspicion. *See State v. Miller*, 894 S.W.2d 649, 652–53 (Mo. banc 1995); *Duncan*, 879 S.W.2d at 751. When the dispatch is based on a mere hunch that continues after an unsuccessful initial stop, a subsequent stop based on that dispatch violates the Fourth Amendment. *State v. Rodriguez*, 904 S.W.2d 531 (Mo. App. S.D. 1995).

When the proper scope of a stop has been exceeded or the police conduct is sufficiently intrusive so as to give rise to an arrest, probable cause is required. This requires reasonable grounds to believe that a crime has been committed and that the defendant committed it. *See Childress*, 828 S.W.2d at 945. Arrest is dealt with in Chapter 1 of this deskbook.

D. (§9.12) Justification for Seizure: Vehicles

Stops of vehicles have developed as an important area of Fourth Amendment jurisprudence. Although they are theoretically governed by the same standards as stops of individuals, the unique nature of vehicles has led to the development of a discrete body of law relating to the stop of vehicles. This section addresses some of those unique issues.

Stopping of vehicles poses particular issues because of the breadth of regulation of vehicles. It is clear that an officer who observes a traffic violation may stop the car and detain the driver for a reasonable time

while the officer checks the defendant's license and registration and prepares a citation or warning. *State v. Barks*, 128 S.W.3d 513, 516–17 (Mo. banc 2004). The stop may include asking for a driver's license and registration, requesting the driver to sit in the patrol car, and asking the driver and passenger about their destination and purpose. *Id.*; *see State v. Peterson*, 964 S.W.2d 854 (Mo. App. S.D. 1998). While this investigative procedure should take no more time than reasonably necessary, detentions of 12 to 15 minutes have been upheld as reasonable. *Id.*

A vehicle stop may be permissible even in the absence of an actual violation of law. "[A] 'traffic stop may be justified by observation of conduct which may not itself even constitute a traffic violation but merely an unusual operation.'" *Peterson,* 964 S.W.2d at 856 (quoting *State v. Bunts*, 867 S.W.2d 277, 280 (Mo. App. S.D. 1993)); *State v. Pike*, 162 S.W.3d 464, 473 (Mo. banc 2005); *State v. Huckin*, 847 S.W.2d 951, 955 (Mo. App. S.D. 1993). The ability to stop a vehicle on such a broad basis opens the door to misuse of vehicle stops to investigate criminal activity on a pretextual basis. But while the court in *Peterson* stated that "'[t]he pretextual use of a traffic violation to justify a search is violative of the Fourth Amendment,'" *Peterson,* 964 S.W.2d at 856 (quoting *Bunts*, 867 S.W.2d at 280), that may not be wholly accurate in light of *Whren v. United States*, 517 U.S. 806 (1996). If by this statement the court meant that a stop cannot be used to justify a search that is not otherwise permissible under the Fourth Amendment, the statement is correct. But if the court meant that a pretextual stop is somehow tainted in and of itself, that proposition was flatly rejected in *Whren*. As the court in *State v. Meza*, 941 S.W.2d 779 (Mo. App. W.D. 1997), explained with regard to *Whren*, "so long as an officer is doing no more than he or she is legally permitted and objectively authorized to do," the officer's motives and usual practices simply "do not matter." *Meza*, 941 S.W.2d at 780–81.

When a person has been stopped for a traffic violation, there is no requirement that the officer tell the individual that they are free to go before requesting consent from that person to search the vehicle. The fact that the officer has already decided not to detain the person further does not need to be communicated before seeking consent; the officer's subjective intent is irrelevant. *Ohio v. Robinette*, 519 U.S. 33 (1996). In *State v. Scott*, 926 S.W.2d 864 (Mo. App. S.D. 1996), the court, anticipating the result in *Robinette*, held that such a "'free to go' warning" was not required. The court held that further questioning and a request for consent may follow a detention as long

as the encounter once again becomes consensual. *Id.*; *see also State v. Shoults,* 159 S.W.3d 441, 446–47 (Mo. App. E.D. 2005) (noting that "no litmus test exists for determining whether continued questioning is consensual" and comparing cases leading to opposite conclusions). "This does not mean, however, that an officer is free to involuntarily detain a driver without reasonable suspicion under the guise of simply engaging in a voluntary conversation." *State v. Woolfolk*, 3 S.W.3d 823, 830 (Mo. App. W.D. 1999). "While the officer may not have an obligation to affirmatively tell a driver he is free to go, where . . . he tells the driver that his only two options are to allow a search or to wait for a canine unit, he has effectively told the driver he is not free to go," and the continued detention is improper absent reasonable suspicion. *Id.* at 832; *see State v. Granado*, 148 S.W.3d 309, 310, 312 (Mo. banc 2004). This is true even if the officer has indicated that the driver is "free to go" while the vehicle is detained. *Id*. at 312.

Similarly, when an officer stops a vehicle on a reasonable belief that a traffic violation has occurred but discovers while approaching the vehicle that there is no violation, the government cannot rely on the driver remaining at the scene as the basis for justifying a consensual encounter. Rather, common sense indicates that an individual pulled over by the police would not feel free to leave until allowed to do so by the officer. Thus, when the officer continued to question the defendant after no longer having reasonable suspicion to believe she had violated the law, the fruits of that detention must be suppressed. *State v. Taber,* 73 S.W.3d 699 (Mo. App. W.D. 2002). The same result is necessary when, in similar circumstances, evidence is seized from a passenger, rather than the driver. *State v. Martin,* 79 S.W.3d 912, 916–18 (Mo. App. E.D. 2002).

While it is clear that police activity related to the traffic stop itself is permissible during the stop, questions have arisen regarding what additional police conduct is appropriate. May officers engage in activity during the stop that is designed to ferret out criminal activity unrelated to the purpose of the initial traffic stop? In *Illinois v. Caballes,* 125 S. Ct. 834 (2005), the United States Supreme Court recognized that "[a] seizure that is justified solely by the interest in issuing a warning ticket . . . can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Id.* at 837. The Court then held that allowing a drug-detection dog to walk around the defendant's car during the stop did not violate the Fourth Amendment, since the use of the dog did not itself "rise to the level of a constitutionally cognizable infringement," *id*. at 838, and

since the use of the dog, in that case, did not prolong the time reasonably required to complete the traffic stop. *Id.* at 837. By focusing on duration alone, the Court implicitly rejected any requirement that the police conduct during a traffic stop must be reasonably related in scope to the circumstances that justified the intrusion. *See id.* at 845 (Ginsburg, J., dissenting); *see also Muehler v. Mena,* 125 S. Ct. 1465, 1471 (2005) (characterizing *Caballes* as focusing on the duration of the detention).

It is likely that the same result would apply to questioning unrelated to the traffic stop. The Court has held that questioning itself does not constitute search or seizure activity, *Muehler*, 125 S. Ct. at 1471; *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 124 S. Ct. 2451, 2458 (2004), and therefore it is likely that questioning, even if unrelated to the purpose of the traffic stop, does not implicate the Fourth Amendment unless it prolongs the detention beyond what is necessary to issue a citation or warning.

When, however, police engage in unrelated questioning *before* engaging in activity related to the traffic stop itself, the result may be different. In *State v. Maginnis*, 150 S.W.3d 117 (Mo. App. W.D. 2004), the officer did not ask the driver for registration or run a computer license check until after the unrelated questioning had occurred. For that reason, the court ordered suppression. The conclusion in *Maginnis* is not necessarily inconsistent with *Caballes* (which was decided later), as long as the court concluded that the duration of the stop had been extended by the questioning. There is language in that case that appears much broader, however, suggesting that there is "no authority that approves such unrelated questioning in a routine traffic stop as being within the 'reasonableness' standards of the Fourth Amendment." *Id.* at 122. To the extent that this broad blanket statement focuses on scope rather than merely duration, it may well be inconsistent with *Caballes.*

With regard to investigative stops of vehicles, in the absence of a traffic violation or other traffic-related basis for the stop, reasonable suspicion is required. The court in *State v. Norfolk*, 966 S.W.2d 364 (Mo. App. E.D. 1998), relied on *State v. Franklin*, 841 S.W.2d 639 (Mo. banc 1992), and *State v. Miller*, 894 S.W.2d 649 (Mo. banc 1995), to hold that the government had not met its burden of establishing reasonable suspicion when officers relied on a "hot sheet" listing vehicles reported as stolen to stop the car in which the defendant was riding. In the absence of evidence showing the basis for including the vehicle on the hot sheet, the sheet by itself could not support a

finding of reasonable suspicion. The court reiterated, as it had in the previous cases, that the prosecution's burden of proof is "not a [mere] technicality," but it refused to "hold [that] police officers cannot rely on hot sheets to make traffic stops." *Norfolk,* 966 S.W.2d at 368. Rather, the court held only that, when officers do so rely and a defendant moves to suppress, the government must call "the proper witnesses to testify with respect to the origin of the information about the stolen car." *Id.*; *see also State v. Kinkead*, 983 S.W.2d 518, 519 (Mo. banc 1998) (reiterating the need for the state to produce evidence to provide a basis for showing that a radio dispatch is based on reasonable suspicion or probable cause).

A refusal to consent to search during a traffic stop may not be used to support reasonable suspicion to continue to detain an individual initially stopped for a traffic violation. Moreover, the determination of reasonable suspicion to detain after issuance of a traffic citation or warning must be based only on activity occurring up to that point and not on observations or information acquired after that point. *Granado*, 148 S.W.3d at 312. When the basis for reasonable suspicion is actually nothing more than a hunch coupled with factors that can apply to virtually anyone traveling on the highway, continued detention will not be upheld. *State v. Slavin*, 944 S.W.2d 314 (Mo. App. W.D. 1997); *see also Woolfolk*, 3 S.W.3d at 828–30 (nervousness and the presence of fast food wrappers do not establish reasonable suspicion); *State v. Richmond,* 133 S.W.3d 576, 579–81 (Mo. App. S.D. 2004) (same); *compare State v. Day*, 87 S.W.3d 51, 54–57 (Mo. App. S.D. 2002) (distinguishing *Slavin* and finding the combination of factors sufficient to provide an objective reasonable basis for extending the length of the stop). Missouri courts appear to take seriously the requirement of reasonable suspicion in this context. *See, e.g., State v. King*, 157 S.W.3d 656, 662–65 (Mo. App. W.D. 2004).

E. (§9.13) Pretext

Although a search or seizure may be objectively justified, often the law enforcement action being taken is motivated by other factors. For example, officers may conduct a traffic stop not because their primary motive is to issue a citation, but rather in the hope that they will see contraband in plain view or will obtain consent for a search. Missouri courts had initially permitted inquiry into the subjective motivations of officers in determining whether evidence obtained as a result of an arrest was admissible, *State v. Blair*, 691 S.W.2d 259 (Mo. banc 1985), *cert. dismissed*, 480 U.S. 698 (1987); *State v. Moody*, 443 S.W.2d 802 (Mo. 1969), but the Supreme Court of Missouri overruled

those cases, finding them to be "at odds with the objective analysis required of Fourth Amendment claims" by the United States Supreme Court. *State v. Mease*, 842 S.W.2d 98, 105–06 (Mo. banc 1992), *cert. denied*, 508 U.S. 918 (1993).

As expected, the United States Supreme Court adopted the approach taken by the Supreme Court of Missouri in *Mease* that neither the officer's subjective motivation nor consideration of what a reasonable officer would have done in the circumstances is required in determining compliance with the Fourth Amendment. *Whren v. United States*, 517 U.S. 806 (1996). When conduct is otherwise legally authorized, the subjective motivation of the officer is wholly irrelevant. *See also Ark. v. Sullivan*, 532 U.S. 769 (2001) (*Whren* applicable to arrest). Like the Supreme Court of Missouri's earlier ruling in *Mease*, the Supreme Court's decision in *Whren* essentially obviates any consideration of pretext in determining the legality of the police conduct. But when an apparently pretextual stop actually lacks reasonable suspicion or probable cause, suppression is required. *State v. Mendoza*, 75 S.W.3d 842 (Mo. App. S.D. 2002).

VI. Search Warrant

A. (§9.14) Background and Purpose

"A **search warrant** is a written order of a court commanding the search of a person, place, or thing and the seizure, or photographing or copying, of property found thereon or therein." Section 542.266.1, RSMo 2000. A warrant interposes a judicial officer between the citizen and the police officer or prosecutor engaged in "the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). The warrant requirement serves to protect privacy by ensuring that only those searches that are justified occur and by guaranteeing to citizens that "the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 622 (1989). It "also reflects the sound policy judgment that, absent exceptional circumstances, the decision to invade the privacy of an individual's personal effects should be made by a neutral magistrate, rather than an agent of the Executive." *Cal. v. Acevedo*, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting).

B. (§9.15) Requirements for Obtaining: In General

The Fourth Amendment requires that a warrant be issued by a detached and neutral magistrate based on a sworn showing of probable cause. These standards are implemented in §§ 542.266–542.276, RSMo 2000 and Supp. 2004. The "warrant may be issued by an appellate judge or by any judge of a court having original jurisdiction of criminal offenses within the territorial jurisdiction where the person, place, or . . . thing to be searched is located at the time of the making of the application." Section 542.266.2, RSMo 2000.

Section 542.276, RSMo Supp. 2004, sets out the requirements for warrant applications. It provides that all such applications:

- be in writing;
- state the time and date of the application;
- identify the place to be searched and the items to be seized with particularity;
- be based on probable cause;
- be verified by oath or affirmation;
- be filed in the proper court; and
- be signed by the prosecuting attorney or designated assistant.

Section 542.276.2. The application can be supplemented by a written affidavit that is also verified by oath or affirmation. Section 542.276.3. The application may be submitted by facsimile or other electronic means, but oral testimony is not permitted. *Id.*; *see also State v. Gordon*, 851 S.W.2d 607, 612 (Mo. App. S.D. 1993). Following receipt of the application, the judge shall determine whether sufficient facts have been stated and shall issue the warrant if probable cause is found. Section 542.276.4. A nonadversary hearing is no longer required. Further requirements for the format and execution of the warrant are provided for in § 542.276.5–.9. Although the statute goes beyond constitutional requirements, a warrant issued in conformity with the statute will comply with the Fourth Amendment.

Section 542.276.10 provides that a search warrant shall be deemed invalid if certain conditions are not met. The warrant is invalid if:

- the warrant was not issued by a judge;
- the warrant was issued without probable cause;
- the application was not verified;
- the warrant was issued in an improper county;

- the warrant lacks particularity;
- the warrant was not signed by the judge; or
- the warrant was not executed in the proper time period.

Section 542.276.10. Other defects in the warrant or application do not necessarily render the warrant invalid. *See, e.g., Gordon*, 851 S.W.2d at 611 (search warrant not invalid because not signed by prosecuting attorney); *State v. Miller*, 815 S.W.2d 28, 35 (Mo. App. E.D. 1991); *State v. Macke*, 594 S.W.2d 300, 309 (Mo. App. E.D. 1980).

C. (§9.16) Issued on Probable Cause

The Fourth Amendment states that "no warrants shall issue but upon probable cause . . . ." Thus, probable cause is an essential requisite for issuance of a valid search warrant. The test for determining probable cause is whether, in the totality of the circumstances, *Ill. v. Gates*, 462 U.S. 213, 238 (1983), there exist facts and circumstances that are sufficient to warrant a person of reasonable caution in believing that items subject to seizure are located at a particular place to be searched. *Id. See, e.g., State v. Moiser*, 738 S.W.2d 549, 557 (Mo. App. E.D. 1987).

The Supreme Court has hesitated to reduce probable cause to a mathematical formula or "numerically precise degree of certainty," *Gates*, 462 U.S. at 235, and there is legitimate dispute among courts and commentators regarding just how "probable" probable cause must be. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 9.07 (2002). It is clear, however, that "[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [judge's] decision," *State v. Gordon*, 851 S.W.2d 607, 612 (Mo. App. S.D. 1993) (quoting *Gates*, 462 U.S. at 235), and that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Id.* at 612 (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)). As noted by both the United States Supreme Court and Missouri courts, "[i]n dealing with probable cause, . . . as the very name implies, we deal with probabilities." *State v. Hill*, 854 S.W.2d 814, 817 (Mo. App. S.D. 1993) (quoting *Gates*, 462 U.S. at 231).

The Supreme Court of Missouri reiterated and refocused its articulation of the requirements for probable cause in *State v. Hampton*, 959 S.W.2d 444 (Mo. banc 1997). Relying on the United States Supreme Court's articulation in *Ornelas v. United States*, 517

U.S. 690 (1996), the Court confirmed that probable cause is a "flexible" concept and stated:

> Articulating precisely what . . . "probable cause" mean[s] is not possible. [It is a] commonsense non-technical conception[ ] that deal[s] with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" . . . . [P]robable cause to search . . . exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of crime will be found.

Hampton, 959 S.W.2d at 451.

In light of the standards established by the courts, the task of a judge in deciding whether to issue a warrant:

> [I]s simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Gordon, 851 S.W.2d at 612–13 (quoting *Gates*, 462 U.S. at 238). *Accord State v. Rush,* 160 S.W.3d 844, 849 (Mo. App. S.D. 2005); *State v. Vega*, 875 S.W.2d 216, 218 (Mo. App. E.D. 1994). While certainty or even likelihood are not required, it is equally clear that, when the information presented creates no more than mere suspicion, probable cause has not been established. *See, e.g.*, *State v. Perrone*, 872 S.W.2d 519, 522 (Mo. App. S.D. 1994).

"The concepts of 'veracity,' 'reliability,' and 'basis of knowledge' are relevant considerations [in the probable cause determination] but they are not entirely separate and independent requirements to be rigidly applied in every case." *Hill*, 854 S.W.2d at 817. To that extent, the Court departed from the "rigid, two-pronged" requirements set out in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli*, 393 U.S. 410. *State v. Berry*, 801 S.W.2d 64, 66 (Mo. banc 1990). Under the Court's "totality of the circumstances" test, these concepts provide the basic framework for the judge's decision, but "[t]he affidavit in support of a search warrant should be weighed as understood by those versed in law enforcement and not in terms of library analysis by scholars." *Hill*, 854 S.W.2d at 818 (quoting *Gates*, 462 U.S. at 232). Essentially, the key is whether the application and supplemental affidavit adequately set forth what information is known, how it is known, and why it should be believed in a manner sufficient for the judge to draw the necessary inferences to support a finding of probable cause.

"*Gates* requires that an issuing judge not merely ratify 'the bare conclusions of others.' *Gates*, 462 U.S. at 239 . . . . Rather, '[s]ufficient information must be presented to the [judge] to allow that official to determine probable cause.'" *State v. Hammett*, 784 S.W.2d 293, 296 (Mo. App. E.D. 1989); *see also State v. Brown*, 741 S.W.2d 53 (Mo. App. W.D. 1987). This requires that the affidavit set forth facts sufficient to allow the judge to draw the necessary inferences and conclusions to establish probable cause. Merely setting forth those inferences or conclusions will not suffice.

The affidavit must set out not only what is known but also how it is known. Although hearsay is permissible, *Hill*, 854 S.W.2d at 818, it is necessary to establish how each speaker came in possession of the knowledge the speaker claims. An affidavit that states that the person providing the information is doing so based on direct personal observation will normally be sufficient. *State v. Holland*, 781 S.W.2d 808, 813 (Mo. App. E.D. 1989). When such a statement is absent, an application may still be sufficient when the "detailed information" provided "bears the unmistakable marks of firsthand observation." *Berry*, 801 S.W.2d at 67; *see also Draper v. United States*, 358 U.S. 307, 313 (1959).

In addition to establishing what each speaker knows and how it is known, the affidavit should provide the judge with a basis for believing the information presented. When that information is provided directly by a law enforcement officer, victim, or witness, no independent showing of credibility is normally required. Such speakers are viewed as "inherently reliable," and "[t]he great concerns of reliance on a reckless or prevaricating tale that exists where a mere informant is involved" are lacking. *Plant v. State*, 781 S.W.2d 245, 246–47 (Mo. App. E.D. 1989); *see also State v. Baker,* 103 S.W.3d 711 (Mo. banc 2003). When, however, the information is provided by an informant, a showing of reliability is required. This showing can be made by evidence of prior reliability, *see, e.g., State v. Thomas*, 893 S.W.2d 382, 383–84 (Mo. App. S.D. 1995); *Hill*, 854 S.W.2d at 818; *Hammett*, 784 S.W.2d at 295–96, or through corroboration. *See, e.g., State v. Kirby,* 128 S.W.3d 619, 621–22 (Mo. App. E.D. 2004). Either one will suffice and both are not required. *See Rush,* 160 S.W.3d at 849. Moreover, when the informant "directly serves as the affiant . . ., thereby running the risk of a perjury prosecution, it may be fairly concluded that the information given by the informant under oath is reliable." *State v. Weide*, 812 S.W.2d 866, 871 (Mo. App. W.D. 1991).

Because it is the "[q]uality of information, not quantity," that establishes probable cause, *Hammett*, 784 S.W.2d at 297, particular concerns regarding credibility and reliability of information are posed when hearsay or anonymous information is provided. Hearsay is permissible "if there is a substantial basis for crediting the hearsay." *Hill*, 854 S.W.2d at 818; *State v. Ambrosio*, 632 S.W.2d 262, 265 (Mo. App. E.D. 1982). That basis can normally be provided either by a showing of past reliability or through corroboration. *Hill*, 854 S.W.2d at 818. A warrant based on a combination of first- and second-hand information that has been partially corroborated is permissible. *State v. Byler*, 810 S.W.2d 677 (Mo. App. S.D. 1991). The fact that hearsay reports come from multiple sources but all tend to establish the same thing suggests that each independent source is credible and does not require independent corroboration. *Baker,* 103 S.W.3d 711.

When an affidavit is based on multiple levels of hearsay, however, "sufficient information must be presented so that all levels of hearsay may be properly relied upon." *Hammett*, 784 S.W.2d at 296. For a case demonstrating how multiple layers of hearsay can be properly corroborated so as to give rise to a substantial basis for probable cause, see *State v. Bowen*, 927 S.W.2d 463 (Mo. App. W.D. 1996). Similarly, although anonymous tips are now permitted in reliance on *Gates*, 462 U.S. 213, ordinarily, corroboration will be required to establish the credibility and reliability of the information provided in order to establish probable cause.

Although it is desirable that an affidavit provide information regarding the source of an informant's knowledge, failure to provide that information does not necessarily render an affidavit insufficient. *State v. Mitchell,* 20 S.W.3d 546, 552 (Mo. App. W.D. 2000). When an informant's information is at least partly corroborated, it is not essential that reliability and credibility be independently established. *Id.* at 553. Probable cause is to be "established by looking at the totality of the circumstances surrounding the warrant, not by judging a particular informant's information separately and independently from other information obtained by law enforcement." *Id.* at 552 (citations omitted). For a detailed analysis carefully applying the relevant rules regarding probable cause and issuance of search warrants, see *State v. Williams*, 9 S.W.3d 3, 13–17 (Mo. App. W.D. 1999). For a close case in which the judges disagreed on how the standards applied to the facts, see *State v. Mahsman*, 157 S.W.3d 245, 251–53, 254–55 (Mo. App. E.D. 2004).

It is still not clear whether anticipatory search warrants are permissible in Missouri. The court in *State v. Trenter*, 85 S.W.3d 662, 677–78, n.2 (Mo. App. W.D. 2002), noted that, although it did not need to decide the issue, "many jurisdictions have held that anticipatory search warrants can pass constitutional muster."

D. (§9.17) Supported by Oath or Affirmation

The requirement that all warrants be based on probable cause "supported by oath or affirmation" derives directly from the Fourth Amendment. In Missouri, that requirement is implemented by statute as well. Section 542.276.2 and .3, RSMo Supp. 2004, requires that the application and any accompanying affidavit be in writing and verified by oath or affirmation. When both an application and an affidavit are submitted, it is sufficient that the application be verified; it is not necessary that the affidavit be verified as well. *State v. Wegrzyn*, 751 S.W.2d 796 (Mo. App. S.D. 1988). Oral testimony, even if sworn, is not permitted to supplement the written application. Section 542.276.3; *see also State v. Gordon*, 851 S.W.2d 607, 612 (Mo. App. S.D. 1993).

E. (§9.18) Particularly Describing the Place to Be Searched

Both the Fourth Amendment and the Missouri Constitution require particularity in the description of the premises to be searched. Section 542.276.6(5), RSMo Supp. 2004, provides that the warrant shall identify the place to be searched "in sufficient detail and particularity that the officer executing the warrant can readily ascertain whom or what he or she is to search." Moreover, a search warrant is to be deemed invalid if the place to be searched is not stated "with sufficient certainty." Section 542.276.10(5); *see State v. Cummings*, 714 S.W.2d 877, 880 (Mo. App. S.D. 1986). These provisions protect against "general, exploratory rummaging in a persons belongings," *State v. Holland*, 781 S.W.2d 808, 814 (Mo. App. E.D. 1989) (quoting *Coolidge v. N.H.*, 403 U.S. 443, 467 (1971)), and excess discretion in the hands of law enforcement officers, *Cummings*, 714 S.W.2d at 880.

> The test for determining the sufficiency of the description of the place to be searched is whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and *whether there is any reasonable probability that another premise might be mistakenly searched.*

Cummings, 714 S.W.2d at 880 (quoting *Lyons v. Robinson*, 783 F.2d 737, 738 (8th Cir. 1985)). The degree of certainty required will vary

with the circumstances, and "[p]ractical accuracy rather than technical precision governs" the particularity determination. *Cummings*, 714 S.W.2d at 880. Generally, a street address should be given as well as a description of the building to be searched. When available, a picture or diagram should accompany the affidavit. For a full discussion of considerations relative to various kinds of property and the descriptions that will suffice, see *Cummings*, 714 S.W.2d at 881–84.

Difficulties with particularity arise when the description appears valid on its face but turns out to be broader than expected or incorrect when the warrant is executed. Particularity is met when the address, though incorrect, when read with other information in the warrant is sufficient to describe the premises to be searched and limits the search to that place. *Cummings*, 714 S.W.2d at 880. When a warrant provides a description of premises that turns out to be broader than permitted, the misdescription will render the warrant invalid only if, when the warrant was obtained, the officers knew or should have known that the description was overly broad. Thus, where a warrant described the third floor premises, which later turned out to be two apartments, it was not invalid because officers did not know or have reason to know of the two apartments on that floor even though they were aware that the building contained apartments. *Md. v. Garrison*, 480 U.S. 79 (1987); *see also Cummings,* 714 S.W.2d at 880.

A warrant authorizing search of a particular place generally authorizes the search of sub-areas, such as closets, chests, drawers, and containers in that place, even though they are not specifically mentioned in the warrant. For this reason, a warrant to search premises authorizes search of receptacles located in the curtilage of those premises. *State v. Potter,* 72 S.W.3d 307, 313–15 (Mo. App. S.D. 2002).

When a warrant establishes the necessary probable cause to search a distinct person or place but is insufficient for the search of another person or place contained there, the valid portion of the warrant may be severed, and the evidence obtained in the search of the premises or person contained in the valid portion may be used. This practice of redaction is consistent with the policies underlying the Fourth Amendment and may be used to salvage a partially valid warrant. *State v. Horsey*, 676 S.W.2d 847 (Mo. App. S.D. 1984).

F. (§9.19) Particularly Describing What Is to Be Seized

Section 542.271, RSMo 2004, sets forth what property may be seized in accordance with a warrant. Although the statute sets out specific categories and items, it is generally stated that property to be seized must be contraband, evidence, fruits, or instrumentalities of crime.

"It is elementary that no warrant shall issue unless it particularly describes the things to be seized. U.S. Const. amend. IV; Mo. Const. art. I, § 15." *State v. Holland*, 781 S.W.2d 808, 813 (Mo. App. E.D. 1989) (citing *State v. Johnson*, 677 S.W.2d 330, 331 (Mo. App. E.D. 1984)). These constitutional requirements are reiterated in § 542.276.6(4) and .10(5), RSMo Supp. 2004. The purpose of the particularity requirement is to "prevent a general search and to ensure that the property taken will not be left to the caprice of the officer conducting the search." *State v. Brown*, 708 S.W.2d 140, 143 (Mo. banc 1986). The requirement of a particular warrant also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Groh v. Ramirez*, 540 U.S. 551 (2004) (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977)). "The underlying measure of adequacy in the description is whether given the specificity in the warrant, a violation of personal rights is likely." *Holland*, 781 S.W.2d at 814. "The degree of specificity, however, must vary with the circumstances." *Id.* at 813.

The particularity requirement "is met when the description in the warrant or affidavits enables the searcher to reasonably ascertain and identify the things authorized to be seized." *Id.* at 814. Thus, a warrant authorizing a search for "instrumentalities of the crime of sodomy" does not constitute "a sufficiently particularized description of property subject to seizure" because it "opens the door to the exercise of unfettered discretion on the part of the officers executing the warrant." *State v. Lachterman*, 812 S.W.2d 759, 763–64 (Mo. App. E.D. 1991), *cert. denied*, 503 U.S. 983 (1992). While the same deficiency exists in the term "pornographic material," the term "controlled substances" is sufficiently defined and limited by the statutory definition contained in Chapter 195, RSMo, to prevent a successful particularity challenge. *Id.* at 764; *see also State v. Munson*, 714 S.W.2d 515, 523 (Mo. banc 1986) (same with regard to "drug paraphernalia within the meaning of RSMo 195.010(11)").

Even when the warrant is not sufficiently particular, that defect may be cured by greater specificity in the application and supporting

affidavits as long as they are present on the scene (even if they are not physically attached). *Holland*, 781 S.W.2d at 813–14. The fact that the application adequately describes the thing to be seized, however, does not save a warrant that is facially invalid. The warrant must contain a sufficient description unless the warrant uses appropriate words of incorporation and the supporting documents accompany the warrant. *Groh*, 540 U.S. at 557–58.

When there is sufficient particularity in the warrant, "[a] search is not rendered unlawful with respect to property that is seized within the scope of the search warrant because the officers who executed it exceeded their authority as to other property." *State v. Gordon*, 851 S.W.2d 607, 616 (Mo. App. S.D. 1993). While the additional evidence seized may be suppressed, those items that were described with particularity will be admissible in evidence. *Id*. A warrant that is facially inadequate with regard to particularity is not saved by the good-faith exception. *Groh*, 540 U.S. at 564–65.

G. (§9.20) Manner of Execution and Scope of Search

Once issued, a search warrant must be executed in a reasonable manner. Section 542.276, RSMo Supp. 2004, sets out requirements for execution. The warrant must be executed only by a peace officer in the territorial jurisdiction. Section 542.276.7; § 542.286, RSMo 2000. When officers of that jurisdiction are present during the search, involvement by officers from outside the jurisdiction does not invalidate the search or execution of the warrant. *State v. Elliott*, 845 S.W.2d 115, 117 (Mo. App. S.D. 1993). An officer may summon others to assist in the execution, and these persons will not be liable as a result of any illegality of the search or seizure. Section 542.291.3, RSMo 2000. The police may not constitutionally bring along others who are not needed to execute the search. Thus, "it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant." *Wilson v. Layne*, 526 U.S. 603, 614 (1999).

The warrant must be executed within a reasonable time. Section 542.276.8 requires that it be "as soon as practicable," but in any event no later than ten days after issuance. Within the ten-day period, execution is reasonable as long as probable cause still exists. *State v. Flenoid*, 838 S.W.2d 462, 467 (Mo. App. E.D. 1992); *State v. Jackson*, 821 S.W.2d 908, 910 (Mo. App. W.D. 1992). When drugs are involved,

the probable cause may be for any drugs and not specifically for the drugs that were present at the time the warrant was obtained. *Flenoid*, 838 S.W.2d at 467. *See United States v. Shegog*, 787 F.2d 420, 422 (8th Cir. 1986). The warrant may be executed at night if doing so in the daytime is not practicable. Section 542.291.1.

Officers must knock and announce their arrival and purpose unless exigent circumstances exist to excuse noncompliance. *Wilson v. Ark.*, 514 U.S. 927 (1995); *State v. Parrish*, 852 S.W.2d 426, 429 (Mo. App. W.D. 1993). An officer may forcibly enter if, "after notice of his office and purpose, he be refused admittance." Section 544.200, RSMo 2000. Refusal is not required when there are exigent circumstances, *United States v. Banks,* 540 U.S. 31, 36–37 (2003), and this is true under federal statute (18 U.S.C. § 3109) as well as under the Fourth Amendment, *Banks*, 540 U.S. at 42–43.

Avoiding the "knock and announce" requirement cannot be based on categorical exceptions for certain types of offenses. To justify a "no-knock" entry, the police must have reasonable suspicion that, based on the particular circumstances of the case, knocking and announcing their presence would be dangerous or futile or would lead to the destruction of evidence. *Richards v. Wis.*, 520 U.S. 385 (1997); *State v. Ricketts*, 981 S.W.2d 657, 662 (Mo. App. W.D. 1998). The necessary showing is "not high, but the police should be required to make it" in every case. *State v. Hamilton*, 8 S.W.3d 132, 136 (Mo. App. S.D. 1999) (quoting *Richards*, 520 U.S. at 394–95). Facts that, when viewed in the particular circumstances, can support dispensing with knocking or announcing include specific information that the defendant:

- has a gun;
- has an extensive criminal record, including violent offenses;
- has acted violently and erratically;
- is on parole; and
- is in possession of easily destroyed evidence.

Hamilton, 8 S.W.3d at 136–37; *State v. Baker,* 103 S.W.3d 711, 717–19 (Mo. banc 2003). "[F]acts which become known only after entry cannot justify the decision to force entry." *Ricketts,* 981 S.W.2d at 662.

When officers are required to knock and announce, the amount of time they must wait after knocking depends on what is reasonable in the totality of circumstances. When the risk of destruction of evidence arises upon knocking and announcing, the amount of time they must

wait before entering depends on the degree of risk of destruction. Assessment of what is reasonable should focus on the time necessary for destroying the evidence, not on how long it takes to answer the door. Thus, a wait of 15–20 seconds may well be sufficient when a small quantity of drugs is involved notwithstanding the size of the premises. *Banks*, 540 U.S. at 39–40.

While a showing of reasonable suspicion of danger or destruction of evidence must be made in every case, no higher showing is required when the entry will require damage to or destruction of property. *United States v. Ramirez*, 523 U.S. 65 (1998). As long as the manner of entry is reasonable, the Fourth Amendment is not violated. *Id.*

In executing a warrant, officers may search anywhere in the stated premises that the items that are subject to seizure may be located. Although officers may not automatically search everyone at the scene of a search, *see* §9.36, *infra*, they may search anyone named in the warrant. In addition, when officers have probable cause to believe that a person is in the process of fleeing the scene with evidence, they may conduct a search of that person. *State v. Vega*, 875 S.W.2d 216, 219 (Mo. App. E.D. 1994).

The officer executing the warrant must file a return showing the date and manner of execution, and the return must be accompanied by an itemized receipt for the items taken. Section 542.276.9. Failure to file a return, however, does not render the search invalid. *State v. Mitchell*, 811 S.W.2d 809, 811 (Mo. App. E.D. 1991). If items are omitted from the return, it may be amended later to add those items. *State v. Macke*, 594 S.W.2d 300 (Mo. App. E.D. 1980).

Special issues regarding execution may arise when searches of computers are involved. For an introduction to the difficult issues in this area, see Amy Baron-Evans, *When the Government Seizes and Searches Your Client's Computer*, 27-CHAMPION 18 (June 2003).

H. (§9.21) Specialized Warrants

Section 542.281, RSMo 2000, sets out special requirements for the issuance of search warrants for obscene materials. The statute should be consulted if such a warrant is sought. In *State v. El Dorado Management Corp., Inc.*, 801 S.W.2d 401 (Mo. App. E.D. 1990), the court upheld a search warrant issued under the statute. Noting that an application for a warrant to seize allegedly obscene material is to be governed by the same probable cause standard as used to review

warrant applications generally, *N.Y. v. P.J. Video, Inc.*, 475 U.S. 868, 875 (1986), the court upheld the judge's finding based on statements by the officer who had viewed ten films and attached covers from the videos, which were "quite explicit." *El Dorado*, 801 S.W.2d at 409. The court also found the descriptions of videos to be seized, which referred to particular sexual acts contained in the videos, to be sufficient, noting that the statute, which permits designation "by title, or otherwise," does not require that all films must be specifically referred to by name. *Id.* at 408.

In 1989, the General Assembly enacted the wiretap law, which "allows a prosecuting attorney, under strict requirements, to make application to a circuit court for an order authorizing the interception of a wire communication. § 542.404." *State v. King*, 873 S.W.2d 905, 908 (Mo. App. S.D. 1994). The statutory scheme contains detailed definitions and requirements for such searches. It is suggested that, in dealing with issues under the Missouri wiretap statute, the reader consult the statute and James R. Wyrsch and Anthony P. Nugent, Jr., *Missouri's New Wiretap Law*, 48 J. MOBAR 21 (1992).

VII. Warrant Requirement and Its Exceptions

A. (§9.22) Introduction

As noted in §9.3 above, although the language of the Fourth Amendment is ambiguous in this regard, since the late 1960s the United States Supreme Court has construed the Amendment to require search warrants except in the case of a few well-delineated exceptions. A search conducted without a warrant is presumptively unreasonable unless one of these exceptions is shown to exist.

Although the Court continues to pay lip service to this requirement, the number and scope of exceptions has increased in the ensuing 30 years to the point that few searches beyond those in the home are subject to the warrant requirement. Whole categories of searches have been excluded from the warrant preference, including automobile searches and exigent circumstances. Many additional categories have been exempted not only from the warrant requirement but also from the probable cause requirement. *See Cal. v. Acevedo,* 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (noting that the "'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable," with one commentator cataloging nearly 20 such exceptions).

While the Court has not explicitly adopted the reasonableness approach to the Fourth Amendment, which would measure search and seizure activity solely by its reasonableness and without regard to whether a warrant and probable cause exist, it has, in effect, interpreted the clause and the exceptions to accomplish almost that result. With minor exceptions, *see, e.g., Ariz. v. Hicks*, 480 U.S. 321 (1987), the results of the reasonableness approach and the current warrant preference with its myriad exceptions are virtually the same.

B. (§9.23) Exceptions to Warrant Requirement

The first category of exceptions to the requirements of a warrant and probable cause are those searches that require probable cause but dispense with the requirement of a warrant.

1. (§9.24) Exigent Circumstances

Generally, a warrant is required to interpose a detached and neutral magistrate between the police and the citizen. The magistrate is able to make a more thoughtful, objective determination of whether the facts available to the officer and the inferences from those facts establish probable cause. In some situations, however, the circumstances are such that the time necessary to obtain a warrant would either pose a danger to law enforcement officers or others or would lead to the escape of a suspect or destruction of evidence. In either of these circumstances, the doctrine of exigent circumstances will permit a search without a warrant. *See Minn. v. Olson*, 495 U.S. 91, 100 (1990); *State v. Mahsman*, 157 S.W.3d 245, 249 (Mo. App. E.D. 2004).

Most exceptions to the warrant requirement are based on some sort of exigency. Both search incident to arrest and the automobile exception have exigency as at least part of their justification. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 12.01 (2002). The category of "exigent circumstances" or "emergency" is designated as a catch-all or umbrella to address those situations not otherwise classified under special exceptions. *Id.* There are at least three essential characteristics to this group of "exigent circumstance" searches:

1. There is no opportunity to obtain a warrant.
2. The exigency or emergency determines the scope of the search.

3. The exception is to the warrant only; probable cause (or the equivalent) is still required.

Id.

In Missouri, courts have long recognized the doctrine of exigent circumstances. *See, e.g., State v. Epperson*, 571 S.W.2d 260 (Mo. banc 1978), *cert. denied*, 442 U.S. 909 (1979); *State v. Wiley*, 522 S.W.2d 281 (Mo. banc 1975); *State v. Toney*, 537 S.W.2d 586 (Mo. App. W.D. 1976). More modern cases likewise permit an exception to the warrant requirement in a variety of emergency situations. In general, "[e]xigent circumstances exist if delay to obtain a warrant 'would endanger life, allow a suspect to escape, or risk the destruction of evidence because of an imminent police presence.'" *State v. Hicks*, 853 S.W.2d 955, 956 (Mo. App. E.D. 1993) (quoting *State v. Peters*, 695 S.W.2d 140, 147 (Mo. App. W.D. 1985)).

Although each case involving exigent circumstances must ultimately turn on its own facts, *see Olson*, 495 U.S. at 100, several factors are relevant, *see Mahsman*, 157 S.W.3d at 249, and several themes have emerged. Exigent circumstances will often be found when officers reasonably believe that a victim may be in a house and in need of immediate aid. *State v. Tidwell,* 888 S.W.2d 736, 740 (Mo. App. S.D. 1994); *State v. Butler*, 676 S.W.2d 809 (Mo. banc 1984); *State v. Turner*, 716 S.W.2d 462 (Mo. App. E.D. 1986). See also *State v. Varvil*, 686 S.W.2d 507 (Mo. App. E.D. 1985), for a discussion of the factors supporting such an exception and *State v. Caldwell*, 698 S.W.2d 566 (Mo. App. E.D. 1985), supporting its use. The emergency exception may be available, even if a defendant is present and objects to the entry, if there is a reasonable basis for believing that a medical emergency exists. *State v. Orso*, 789 S.W.2d 177 (Mo. App. E.D. 1990), *cert. denied*, 499 U.S. 951 (1991). Other medical emergencies may give rise to exigent circumstances, *see, e.g., State v. Gilpin*, 836 S.W.2d 49 (Mo. App. W.D. 1992), but the courts construe this exception narrowly to apply only to true emergencies requiring immediate search. *State v. Young*, 991 S.W.2d 173, 176–77 (Mo. App. S.D. 1999). A "check-well-being call" is not sufficient to justify entry under exigent circumstances absent substantiated facts connecting the call to an immediate crisis or emergency threatening life or safety. *State v. Simmons*, 158 S.W.3d 901, 908 (Mo. App. S.D. 2005). Imminent danger to animals may support application of the doctrine. *See, e.g., State v.*

Berry, 92 S.W.3d 823 (Mo. App. S.D. 2003); *State v. Roberts,* 957 S.W.2d 449 (Mo. App. W.D. 1997); *State v. Larson,* 941 S.W.2d 847 (Mo. App. W.D. 1997).

Similarly, when the police are in hot pursuit of a dangerous suspect, entry may be justified without a warrant. *Warden v. Hayden*, 387 U.S. 294 (1967); *State v. Brown*, 867 S.W.2d 530, 537 (Mo. App. W.D. 1993) (entry into hotel room without warrant to apprehend escaped convict who had just shot officer justified under exigent circumstances). In *Welsh v. Wisconsin*, 466 U.S. 740 (1984), the Court indicated that the gravity of the offense is a factor to be considered in determining whether a sufficient exigency exists to make a warrantless entry to effectuate an arrest. *See Hicks*, 853 S.W.2d at 956; *Gilpin*, 836 S.W.2d at 53–54. Thus, an exigent-circumstances home entry rarely will be appropriate when only a minor offense is involved, but it may well be appropriate for a serious offense. *State v. Wright,* 30 S.W.3d 906 (Mo. App. E.D. 2000). Moreover, unless there is a real risk of escape if the suspect is not immediately arrested, a warrantless entry is not permitted. As a result, when officers knew that the suspect had passed out inside the house, entry without a warrant was not constitutionally permissible. *State v. Tettamble*, 720 S.W.2d 741 (Mo. App. E.D. 1986); *see also Olson*, 495 U.S. at 100–01 (although grave crime involved, when defendant was driver, not murderer, posed no danger to those he was with, and would be apprehended if he left the house, exigent circumstances did not justify warrantless entry).

Imminent destruction of evidence may also provide a basis for a warrantless search with probable cause. *See Ker v. Cal.*, 374 U.S. 23 (1963). Thus, when delay caused by having to obtain a warrant threatens "the destruction of evidence," *Schmerber v. Cal.*, 384 U.S. 757 (1966), as with blood alcohol evidence, exigent circumstances will permit the search. *State v. LeRette*, 858 S.W.2d 816, 818 (Mo. App. W.D. 1993).

While exigent circumstances may justify an initial entry or search, a "mere claim of exigency . . . does not suffice" to justify a full search or additional entries. *Gilpin*, 836 S.W.2d at 53. The scope of any exception to the warrant requirement is limited by the need that created it, and with exigent circumstances, that scope is limited by the emergency giving rise to the right to enter or search in the first place. *Id.*; *see also State v. Johnston,* 957 S.W.2d 734, 742–45 (Mo. banc 1997). The warrantless entry or

intrusion may not be a pretext for further search or arrest, "and the search that follows must maintain a reasonable connection between the emergency and the area implicated." *Gilpin,* 836 S.W.2d at 53.

Although exigent circumstances may justify an entry to fight a fire, *Mich. v. Clifford*, 464 U.S. 287 (1984), or when a violent crime has just occurred, *Mincey v. Ariz.*, 437 U.S. 385 (1978), that doctrine does not justify a full search of the premises after the emergency giving rise to the exigency has ceased. *See Flippo v. W. Va.,* 528 U.S. 11 (1999). Because the test for how long officers may remain and continue to engage in search activity is based on reasonableness, the cases vary in what is considered permissible. *See Tidwell*, 888 S.W.2d at 741–43 (comparing *Epperson,* 571 S.W.2d 260, which permitted continued search, with *State v. Rogers*, 573 S.W.2d 710 (Mo. App. W.D. 1978), which did not). *See also State v. Taylor*, 857 S.W.2d 482, 485–87 (Mo. App. S.D. 1993), *cert. denied*, 510 U.S. 1056 (1994), *abrogated on other grounds by State v. Rowland*, 73 S.W.3d 818, 824 n.2 (Mo. App. S.D. 2002); *State v. Apel,* 156 S.W.3d 461, 469 (Mo. App. W.D. 2005) (full search of premises following a consensual entry was reasonable without a warrant because of the potential danger of waiting for a warrant; the court stated that "it is not a good idea to defer the investigation of the site of a chemical laboratory containing volatile chemicals).

2. (§9.25) Automobile Exception

Although the Supreme Court has stated that the "word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears," *Coolidge v. N.H.*, 403 U.S. 443, 461 (1971), it is probably fair to say today that the characterization of something as a "vehicle" or "automobile" brings with it broad authorization to search not only the vehicle but also its contents. *State v. Milliorn*, 794 S.W.2d 181, 183 (Mo. banc 1990) (characterizing the automobile exception as a "broad exception to the warrant requirement"). The exception also permits warrantless seizure of vehicles when there is probable cause to believe they are subject to forfeiture. *Fla. v. White*, 526 U.S. 559 (1999). Although some of this authorization comes from doctrines other than the automobile exception (see the general discussion of vehicle searches in §9.12 above, inventory of vehicles in §9.29 below, and search incident to arrest of occupants of vehicles in §9.33 below), courts have significantly expanded the automobile exception in recent years.

This exception to the warrant requirement originally derived from the exigent circumstances exception and was initially based solely on concerns regarding mobility of the vehicle. *Carroll v. United States*, 267 U.S. 132 (1925). *See Cal. v. Carney*, 471 U.S. 386, 390 (1985). Although *Chambers v. Maroney*, 399 U.S. 42 (1970), and subsequent cases continued to rely on mobility as the justification for the exception, by the middle of the 1970s, it was becoming clear that mobility alone could not justify so large an exception. Thus, in a series of cases beginning with *Cady v. Dombrowski*, 413 U.S. 433 (1973), and continuing with the plurality decision in *Cardwell v. Lewis*, 417 U.S. 583 (1974), the Court adopted a secondary rationale based on the lesser expectation of privacy a person has in a motor vehicle. Today, the courts explicitly recognize and rely on both rationales to uphold searches of vehicles in a variety of contexts. *See, e.g.*, *Carney*, 471 U.S. at 391–92; *State v. Childress*, 828 S.W.2d 935, 939 (Mo. App. S.D. 1992); *State v. Ritter*, 809 S.W.2d 175, 177 (Mo. App. E.D. 1991). In fact, the existence of these dual rationales allows courts to pick and choose the most appropriate, *see, e.g.*, *Carney*, 471 U.S. at 394, leading to extension of the exception well beyond what would have been justified by *Carroll,* 267 U.S. 132.

Courts have frequently indicated that, "[a]s a practical matter, exigent circumstances exist whenever an automobile is involved; the mere possibility that the vehicle can be moved is generally sufficient justification for a warrantless search." *Milliorn*, 794 S.W.2d at 183 (and cases cited). Thus, no independent showing of exigency is required. Despite this, Missouri courts still, at times, appear to require a showing of exigency. *See Ritter*, 809 S.W.2d at 177–79. In *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996), the United States Supreme Court clearly and categorically reiterated that no such showing is required. "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Id.* Thus, when probable cause exists, all that is necessary for the exception to apply is a finding that the thing to be searched is a vehicle in the legal sense. Note that the exception applies not only to automobiles, but to boats and similar conveyances as well. *State v. Howes,* 150 S.W.3d 139, 143 (Mo. App. E.D. 2004); *State v. Sullivan,* 935 S.W.2d 747, 755 (Mo. App. S.D.1996).

To meet that requirement, there must be a showing of "ready mobility" and "presence . . . in a setting that objectively indicates

that the vehicle is being used for transportation." *Carney*, 471 U.S. at 394. This finding is easy to make with automobiles, whether on the highway or parked. Even a car stuck in the mud can be considered readily mobile for purposes of the automobile exception. *State v. Middleton*, 995 S.W.2d 443, 458 (Mo. banc 1999). The issue is more complex when conveyances in which people do more than merely travel are involved. In *Carney,* the Court found a motor home to be a vehicle for purposes of the exception because it was located in a parking lot and could easily have been driven away. The Court commented that not all motor homes would necessarily fit this characterization. The Court pointed to factors that could be used to determine whether the exception should be found to apply. These include whether the vehicle:

- is elevated on blocks;
- is licensed;
- is connected to utilities; and
- has convenient access to a public road.

Carney, 471 U.S. at 395 n.3. Courts have used these factors to apply the exception to recreational vehicles and to other conveyances such as houseboats, *United States v. Hill*, 855 F.2d 664, 667–68 (10th Cir. 1988), and train roomettes. *United States v. Tartaglia*, 864 F.2d 837, 841 (D.C. Cir. 1989); *see also United States v. Little*, 18 F.3d 1499, 1504 (10th Cir. 1994) (discussing cases involving compartments on trains).

The exception applies only if probable cause exists. A warrantless search of an automobile:

> [M]ay be conducted on probable cause to believe that contraband is concealed within, a belief springing from circumstances that would justify issuance of a warrant. Probable cause may arise when the facts and circumstances within the knowledge of the seizing officer are sufficient in themselves to produce in a man of reasonable caution a belief that the contents of the automobile offend the law.

State v. Villa-Perez, 835 S.W.2d 897, 902 (Mo. banc 1992) (quoting *State v. Burkhardt*, 795 S.W.2d 399, 404 (Mo. banc 1990)). *Accord State v. Burket*, 893 S.W.2d 390, 392 (Mo. App. S.D. 1995); *State v. King*, 873 S.W.2d 905, 910 (Mo. App. S.D. 1994). "Reduced to its simplest formulation, probable cause requires no more than a reasonable belief that it is more probable than not that the vehicle contains illegal property." *Milliorn*, 794 S.W.2d at 183.

Many automobile exception cases involve searches of vehicles conducted after they have been stopped on the highway. Many involve seizure of drugs. Courts have found probable cause to search when drivers who have committed a traffic violation appear nervous and anxious when stopped, provide incredible or inconsistent explanations of where they are going to or coming from, and are traveling on highways known to be used by drug traffickers. *See, e.g.*, *Childress*, 828 S.W.2d at 944; *Burkhardt*, 795 S.W.2d at 402–03. The likelihood of such a finding is bolstered by the presence of a small quantity of drugs within the vehicle. *See Burket*, 893 S.W.2d at 392–93. Other courts are less willing to find probable cause on similar facts. *See State v. Smith,* 926 S.W.2d 689, 694 (Mo. App. S.D. 1996) (refusing to find the presence of items "that could well be found in any traveler's car" sufficient to establish probable cause); *State v. Mantle*, 779 S.W.2d 357, 358–60 (Mo. App. S.D. 1989), and 360–63 (Maus, J., dissenting); *State v. Kovach*, 839 S.W.2d 303, 312 (Mo. App. S.D. 1992), and 313–14 (Maus, J., dissenting). Whether nervousness and agitation exhibited by a driver stopped on the highway should be a major factor in the probable cause determination has also been questioned. *See Burket*, 893 S.W.2d at 393 (Shrum, J., dissenting).

A factor that has raised an issue in several cases is the odor of marijuana as probable cause for a vehicle search. Although some courts have upheld searches on this basis, *see Villa-Perez*, 835 S.W.2d at 902 (when "officer . . . detects the odor of marihuana emanating from . . . [a] vehicle, and is by virtue of training or experience able to identify it as marihuana, an ensuing search is based on probable cause" (quoting *United States v. Loucks*, 806 F.2d 208, 209 n.1 (10th Cir. 1986))); *State v. Fuente*, 871 S.W.2d 438, 441 (Mo. banc 1994); *State v. Bunts*, 867 S.W.2d 277, 281 (Mo. App. S.D. 1993), other courts have upheld suppression by trial judges who expressed skepticism of officers' professed abilities to smell marijuana in a closed camper shell or trunk. *Milliorn*, 794 S.W.2d at 184; *Mantle*, 779 S.W.2d at 360.

Another issue to be addressed in vehicle searches involves the scope of these searches. For many years, courts grappled with the proper scope of the vehicle exception, especially with regard to containers found in vehicles. Finally, in *United States v. Ross*, 456 U.S. 798 (1982), the Court overruled its prior decision in *Robbins v. California*, 453 U.S. 420 (1981), and held that the scope of the search of a vehicle under the automobile exception is the same as

what a magistrate could have authorized had it been practicable to obtain a warrant. That scope "is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Ross*, 456 U.S. at 824.

While *Ross* resolved some of the issues raised by searches of containers found in vehicles, it did not resolve a problem created by the parallel line of cases beginning with *United States v. Chadwick*, 433 U.S. 1 (1977), and continuing with *Arkansas v. Sanders*, 442 U.S. 753 (1979). *See State v. Collins*, 816 S.W.2d 257, 262 n.3 (Mo. App. E.D. 1991) (recognizing the "anomaly created by the intersection of two separately developed doctrines"). In those cases, the Court had made clear that individuals have an expectation of privacy in suitcases and other containers greater than that in vehicles. The Court in *Sanders* indicated that, if probable cause focused on a "container" and not on the vehicle itself, the container found in the vehicle could not be opened without a warrant. If, however, the probable cause focused on the vehicle itself and not on the container, all containers in the vehicle that were capable of holding the items to be seized could be opened during the search. This was thought to create confusion and uncertainty, which was resolved in *California v. Acevedo*, 500 U.S. 565 (1991).

In *Acevedo,* the Court, noting the anomalies created by the current rules, held that *Ross*, 456 U.S. 798, applies to the search of all containers in vehicles. The Court noted that it had previously "drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile. The protections of the Fourth Amendment must not turn on such coincidences." *Acevedo*, 500 U.S. at 580. The Court thus made it clear that *Sanders* no longer controls and now there is "one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." *Id.*; *see also Childress*, 828 S.W.2d at 943–44. This search may extend to containers belonging to passengers as long as the containers might contain the items for which the police are searching. *Wyo. v. Houghton*, 526 U.S. 295 (1999).

The final issue with regard to vehicle searches relates to the timing of the searches. It is now clear that a vehicle search does not need to be conducted immediately at the scene. Rather, the search may be made after the vehicle has been impounded. *Fla. v. Meyers*, 466 U.S. 380 (1984); *State v. Shigemura,* 768 S.W.2d 620 (Mo. App. E.D. 1989); *State v. Akers*, 723 S.W.2d 9 (Mo. App. W.D. 1986). The same is true for containers found within the vehicle, which may be searched at a later time even if they are removed from the vehicle and independently secured. *United States v. Johns*, 469 U.S. 478 (1985). The rule permitting warrantless searches of vehicles with probable cause either at the scene or later at the station applies equally when the police allow an owner or passenger to drive the vehicle to the station rather than immediately impounding it. The "release" of the vehicle to the passenger for the limited purpose of driving it to the station does not defeat the right to search once the vehicle arrives. *State v. Lane*, 937 S.W.2d 721 (Mo. banc 1997).

C. Exceptions to Warrant *and* Probable Cause Requirements

1. (§9.26) Introduction

In addition to exceptions that dispense with the warrant requirement yet still require probable cause, the United States Supreme Court has recognized exceptions that dispense with both the warrant and probable cause requirements. Sections 9.27–9.36 below address searches of this type.

2. (§9.27) Consent

One of the most important exceptions to the requirements of a warrant and probable cause is consent, which frequently appears as "an attractive alternative" to police. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.1 (4th ed. 2004). The Court has been less than clear over the years, however, on precisely what the basis for the consent exception is. This ambivalence has led to some confusion and lack of clarity in interpretation.

"Consensual searches conducted without a search warrant do not violate the Fourth Amendment . . . ," *State v. Lacy*, 851 S.W.2d 623, 626 (Mo. App. E.D. 1993), "*even though . . . not otherwise supported by probable cause or reasonable suspicion of criminal activity*." *State v. Cook*, 854 S.W.2d 579, 582 (Mo. App. S.D. 1993) (quoting *State v. Hyland*, 840 S.W.2d 219, 221 (Mo. banc 1992)).

The Fourth Amendment proscribes only those searches that are unreasonable, and "it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Cook*, 854 S.W.2d at 582 (quoting *Fla. v. Jimeno*, 500 U.S. 248, 250–51 (1991)). Warrantless searches based on consent appear to be based, at least in large part, on the concept that it is reasonable to allow the individual to decide to cooperate with the police rather than stand on Fourth Amendment rights.

"A consent to search is valid only if it is freely and voluntarily given." *Hyland*, 840 S.W.2d at 221. "Consent is freely and voluntarily given if, considering 'the totality of all the surrounding circumstances,' . . . the objective observer would conclude that the person giving consent made a free and unconstrained choice to do so." *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). *Accord State v. LaFlamme*, 869 S.W.2d 183, 187 (Mo. App. W.D. 1993). The voluntariness of consent is to be determined from all the circumstances, and the burden is on the government to prove the validity of the consent. *Lacy*, 851 S.W.2d at 627; *see also State v. Riddle*, 843 S.W.2d 385, 387 (Mo. App. E.D. 1992). Although courts frequently use the terms consent and waiver interchangeably, *see, e.g., State v. Engel*, 859 S.W.2d 822, 826 (Mo. App. W.D. 1993) ("[a] party may agree to a search and thereby waive his constitutional right to the display of a warrant"), it is clear that consent is not the equivalent of waiver and, thus, does not require the intentional relinquishment of a known right. *Schneckloth*, 412 U.S. at 235–46.

"In determining whether a consent search is valid and not coerced, several factors must be considered." *Engel*, 859 S.W.2d at 826. These include:

- the defendant's ability to communicate in English, *State v. Garcia*, 930 S.W.2d 469, 472–73 (Mo. App. S.D. 1996);
- the number of officers present;
- the degree to which the officers demonstrate their authority;
- whether officers used or displayed weapons;
- whether the individual was in custody;
- whether there was any fraud or deception on the part of the police;
- factors relevant to the background of the individual; and
- acts and statements of the consenter.

Engel, 859 S.W.2d at 826; *see also State v. Stolzman*, 799 S.W.2d 927, 936 (Mo. App. S.D. 1990). These factors must be viewed in the totality of circumstances, and none is determinative. While the defendant's knowledge regarding a right to refuse is relevant, it is only part of the totality of circumstances and is not controlling. *Schneckloth*, 412 U.S. at 227.

Thus, the mere fact that more than one officer is present is not decisive, *State v. Bunch*, 787 S.W.2d 859, 861 (Mo. App. E.D. 1990), and the fact that the officers are large, armed men and the consenter is a small woman does not demonstrate "implied coercion" sufficient to vitiate consent. Absent evidence of threats, force, or actual intimidation, no coercion will be found. *State v. McGee*, 757 S.W.2d 321, 324 (Mo. App. W.D. 1988). The drawing of weapons by the police does not necessarily render consent given thereafter involuntary. Rather, the show of weapons is just one factor in the totality of circumstances. *State v. Hernandez*, 776 S.W.2d 34, 38–40 (Mo. App. S.D. 1989). *Cf. State v. Corpier*, 793 S.W.2d 430, 438 (Mo. App. W.D. 1990). When the party giving consent generally manifests a voluntary and cooperative attitude, it is unlikely that a finding of coercion will be made. *See State v. Hunziker*, 799 S.W.2d 610, 612 (Mo. App. W.D. 1990). A violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), does not necessarily vitiate consent if it is otherwise voluntary, and, thus, a consent given after a defendant in custody has requested counsel may be constitutional. *State v. White*, 770 S.W.2d 357 (Mo. App. E.D. 1989).

In the past, it was believed that, if officers acted under a claim of authority, that claim by itself vitiated consent. *Bumper v. N.C.*, 391 U.S. 543 (1968). While there remains some authority for the continued viability of this rule, it is more likely that a claim of authority is just one factor, albeit an important one, in determining the totality of the circumstances. 4 WAYNE R. LAFAVE § 8.2(a) at 55–58. Courts continue to reiterate, however, that the state "does not satisfy its burden of showing that consent was voluntary merely by showing a submission to a claim of lawful authority." *State v. Leavitt,* 993 S.W.2d 557, 563 (Mo. App. W.D. 1999) (citing *State v. Talbert,* 873 S.W.2d 321, 324 (Mo. App. S.D. 1994)). When officers make what would appear to be a demand, that will be a significant factor in demonstrating lack of voluntary consent, whereas a mere request will not vitiate a finding of consent. *Leavitt,* 993 S.W.2d at 563; *State v. Middleton,* 43 S.W.3d 881, 886 (Mo. App. S.D. 2001); *State v. Woolfolk*, 3

S.W.3d 823 (Mo. App. W.D. 1999). Repeated requests coupled with threats to take action that officers are not justified to take (e.g., to detain a person to await a canine sniff when no reasonable suspicion exists) may lead to a finding that the defendant's alleged consent was "merely a submission to lawful authority" and, as such, insufficient to justify the search. *Woolfolk,* 3 S.W.3d at 832.

Similarly, deception, by itself, will not generally prevent a finding of voluntariness, nor will failure to disclose all the facts relevant to the choice of whether to cooperate. *See Lacy*, 851 S.W.2d at 627. Although the courts have been far from precise in addressing how much deception is appropriate, several commentators have concluded that the ultimate issue is whether the police deception is fair. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 17.03(c) (2002); 4 WAYNE R. LAFAVE § 8.2(n) at 138–41. Where deception involves a false claim of probable cause to search, such false declaration will be viewed as a claim of authority and consent purportedly obtained thereto will be deemed coerced. *State v. Earl*, 140 S.W.3d 639, 641 (Mo. App. W.D. 2004).

An issue that has not yet been clearly resolved is whether the voluntariness of the consenter is to be measured by an objective or subjective standard. Courts seemingly treat the test as subjective, looking to particular factors about the defendant when relevant (e.g., age, intoxication, mental capacity, etc.). *See, e.g.*, *State v. Smith*, 850 S.W.2d 934, 941 (Mo. App. S.D. 1993). Developments in the areas of third-party consent and scope of consent—see, e.g., *Illinois v. Rodriguez*, 497 U.S. 177 (1990), and *Florida v. Jimeno*, 500 U.S. at 250–51, both discussed below, as well as the Court's decision in *Colorado v. Connelly*, 479 U.S. 157 (1986)—may indicate, however, that an objective standard is more likely to be adopted by the Court. Although Missouri courts have not squarely addressed this issue, several courts have appeared to use an objective test. *Leavitt*, 993 S.W.2d at 563; *State v. Weddle*, 18 S.W.3d 389, 396 (Mo. App. E.D. 2000). Courts in other jurisdictions are split. *Compare Tukes v. Dugger*, 911 F.2d 508, 516–17 and n.13 (11th Cir. 1990), *cert. denied,* 502 U.S. 898 (1991), *with Cook v. Commonwealth of Ky.*, 826 S.W.2d 329, 331–32 (Ky. 1992); *see also* 4 WAYNE R. LAFAVE § 8.2(e).

A consent, once given, may be revoked. When a citizen withdraws consent or limits its scope, absent other cause, the search must

cease or be confined to the stated limits. Moreover, the withdrawal or limitation on consent may not be used to create suspicion of wrongdoing. *State v. Howes*, 150 S.W.3d 139, 144 (Mo. App. E.D. 2004); *State v. Hayes,* 51 S.W.3d 190, 194 (Mo. App. W.D. 2001).

To be valid, consent to search does not need to come directly from the defendant. It is by now well settled that "[t]he consent of one who possesses common authority over premises or effects is valid as against the absent person with whom that authority is shared." *State v. Rollins*, 882 S.W.2d 314, 318 (Mo. App. E.D. 1994) (quoting *Bunch*, 787 S.W.2d at 861). For these purposes, "'[c]ommon authority' rests 'on mutual use of the property by persons generally having joint access or control for most purposes . . . .'" *Rodriguez,* 497 U.S. at 181. This common authority is "not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use . . . ." *State v. White*, 755 S.W.2d 363, 366 (Mo. App. E.D. 1988). When persons have "joint access or control for most purposes, . . . it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right." *Id.* at 366–67. In these circumstances, it is deemed that the others have "assumed the risk" that another might allow a search by the police. *Id.*; *see also Rollins,* 882 S.W.2d at 319.

Thus, spouses who share premises are generally capable of giving valid third-party consent, *see, e.g., Smith*, 850 S.W.2d at 941; *McGee*, 757 S.W.2d at 323–24, as are parents, *Hunziker*, 799 S.W.2d at 611–12, unless the defendant has exclusive rights to particular areas within the house. Children are generally not deemed capable of consenting to the search of their parents' home. *See* 4 WAYNE R. LAFAVE § 8.4(c). While neither a landlord nor a hotel clerk who maintains a limited right of entry may consent on behalf of a tenant, *Chapman v. United States*, 365 U.S. 610 (1961), or guest, *Stoner v. Cal.*, 376 U.S. 483 (1964), the owner of premises may provide valid consent to search with regard to visitors or casual guests, *Bunch*, 787 S.W.2d at 861; *White*, 755 S.W.2d at 366–67, and a co-lessee may provide consent to search the premises that is effective as against the other co-occupant. *Engel*, 859 S.W.2d at 826.

An area that has presented problems for Missouri courts involves searches of personal objects of a defendant located on another's premises. While it is clear that the property owner has the authority to allow the search of the area in which the personal items are found, it is less clear what right the property owner has to consent to the search of the items themselves. It would appear that, unless the property owner had some right of mutual use of or joint access to and control over the items, that person could not validly consent to their search. Cases support this view. *See, e.g., Engel*, 859 S.W.2d at 827 (co-lessee/girlfriend had no authority to consent to opening of defendant's briefcases); *State v. Pinegar*, 583 S.W.2d 217, 220 (Mo. App. W.D. 1979) (parents could not consent to search of defendant's footlocker).

An opposite view was taken, however, in *Rollins,* 882 S.W.2d 314. There, the court, relying on *United States v. Buckles*, 495 F.2d 1377 (8th Cir. 1974), upheld consent given by a woman whose house the defendant was painting to search duffle bags the defendant had stored in her basement. *Rollins*, 882 S.W.2d at 318. The court believed that the defendant had assumed the risk that the woman would turn his belongings over to the police for inspection. Although *Rollins'* limited, and perhaps commercial, relationship with the premises compared to *Engel*, 859 S.W.2d 822, and *Pinegar*, 583 S.W.2d 217, might explain the difference in result, these cases are hard to reconcile. It would seem that, unless personal items are abandoned, the defendant should not assume the risk that they will be opened merely because they are kept somewhere other than at the defendant's own home.

This issue may not be as critical since the Supreme Court's decision in *Rodriguez,* 497 U.S. 177, in which the Court held that actual third-party consent is not required. Rather, all that is necessary is the officer's reasonable belief that the person consenting has authority to do so. In reaching this result, the Court noted that "what is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*." *Rodriguez*, 497 U.S. at 187. Thus, when an officer reasonably concludes that a person has authority to consent, a search undertaken based on the consent will not be deemed unconstitutional even if it is later determined that no such authority existed.

Determination of whether third-party consent is valid has proven to be difficult, especially when an individual appears to have or claims to have access and control that is later shown to be inaccurate. Compare the pre- and post-retrial opinions in *State v. Smith*, 966 S.W.2d 1 (Mo. App. W.D. 1997), *opinion readopted after transfer* (June 2, 1998), and 90 S.W.3d 132, 141–42 (Mo. App. W.D. 2002), *cert. denied,* 538 U.S. 948 (2003), in which the court reached opposite conclusions based on slightly different factual showings. For cases that address factors that can be considered in determining the validity of third-party consent, see *State v. Evenson*, 35 S.W.3d 486, 494 (Mo. App. S.D. 2000), and *State v. Moore*, 972 S.W.2d 658, 661 (Mo. App. S.D. 1998).

Third-party consent raises several issues that have not been fully resolved. For example, although it is clear that consent by a person with common authority is effective against a defendant who is not present on the scene, it is less clear whether that consent is effective if the defendant is there and objects. The original third-party consent cases spoke in terms of the absent defendant. To the extent that third-party consent is based on assumption of the risk, it should not matter whether the defendant is present and objects, but not all courts agree with this approach. *See* DRESSLER § 17.05. When the defendant is present and remains silent while consent is solicited and obtained from a third party, however, the consent so obtained is valid. *White*, 755 S.W.2d at 367.

The final issues that arise with regard to consent relate to the scope of the consent given. In this area as well, the Court has adopted an objective test. In *Jimeno,* 500 U.S. 248, the Court stated that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Jimeno*, 500 U.S. at 251. The Court noted that a "suspect may, of course, delimit as he chooses the scope of the search to which he consents." *Id.* at 252. But if the suspect's consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization. Thus, when the defendant knew the police were looking for drugs, it was reasonable for the officer to believe that the consent extended to a paper bag lying on the floor of the car because "[c]ontraband goods rarely are strewn across the trunk or floor of a car." *Id.* at 251.

Jimeno has led to significant change in analysis by Missouri courts. Although in the past Missouri courts strictly construed requests by the police to "look" or "peek," *see, e.g., State v. Lorenzo*, 743 S.W.2d 529 (Mo. App. W.D. 1987) (consent to "peek" inside van did not authorize full search of van and its contents), more recent decisions refuse to "engage in a semantic exercise focusing on the meaning of the word 'look.'" *State v. Cook*, 854 S.W.2d at 582 (quoting *Hyland*, 840 S.W.2d at 222). Moreover, the courts refuse to require the police to ask for permission to search new or additional containers found during the course of a consent search. Fearing that this would lead to a "game of 'Mother-may-I, in which [the officer] would have to ask for new permission to remove each article from the suitcase to see what lay underneath,'" the court "decline[d] to impose such an unrealistic and unreasonable restriction on law enforcement officials ability to promptly and efficiently do their jobs." *State v. Melville*, 864 S.W.2d 452, 456 (Mo. App. W.D. 1993) (quoting *United States v. Smith*, 901 F.2d 1116, 1118 (D.C. Cir. 1990), *cert. denied,* 498 U.S. 863 (1990)), *overruled on other grounds by State v. Martin*, 892 S.W.2d 348, 351 (Mo. App. W.D. 1995).

While it is clear that *Jimeno*, 500 U.S. 248, authorizes the opening of some containers during a search based on a general consent to look for drugs or other small objects when the defendant is present and could easily object, *see, e.g.*, *State v. Law*, 847 S.W.2d 134, 136–37 (Mo. App. W.D. 1993), Missouri courts have extended *Jimeno* to allow the opening of a taped suitcase based on a qualified consent to "look around" when the defendant was standing some distance from where the search occurred. *See Melville*, 864 S.W.2d at 457 (Berrey, J., dissenting). This may constitute an extension, rather than a mere interpretation, of *Jimeno*. In fact, there is a strong indication in *Jimeno* that a general consent would not extend to the prying open of a locked suitcase because "[i]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk . . . ." *Jimeno*, 500 U.S. at 251–52. Whether *Jimeno* allows a general consent to justify a search that damages the vehicle or its contents is an open question in Missouri, although courts in other jurisdictions are split on this issue. *State v. Garza*, 853 S.W.2d 462, 464 (Mo. App. S.D. 1993).

3. (§9.28) Special Needs: In General

At least in modern times, the Fourth Amendment has been thought to focus primarily on restraint or control of police behavior. The Fourth Amendment speaks in terms of probable cause, and this has been construed to require probable cause that a crime has been committed or that evidence or fruits of crime will be found at a location to be searched. *See* §9.13, *supra*. Exclusionary rule analysis too has focused in recent years almost exclusively on deterrence of police misconduct. *See* §9.38, *infra*. It has been fear of overzealous investigation and prosecution of crime that has motivated much of the Court's Fourth Amendment analysis. Thus, the core of the Fourth Amendment has been control of the police, and the central requirements of the Fourth Amendment, a warrant and probable cause, have been most faithfully required when police investigatory functions have been involved.

Since cases like *Terry v. Ohio*, 392 U.S. 1 (1968), and *Camara v. Municipal Court of City & County of San Francisco*, 387 U.S. 523 (1967), however, the Court has recognized the applicability of the Fourth Amendment to other types of government activity, but it has used a balancing test, rather than strict warrant and probable cause analysis, to determine what degree of protection is required. In these cases, courts have identified "special needs . . . beyond the normal need for law enforcement" that justify intrusion with less than a warrant and probable cause. *Griffin v. Wis.*, 483 U.S. 868, 873 (1987) (quoting *N.J. v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)). Balancing the nature and extent of the government need against the degree of intrusion, the courts fashion a level of cause necessary to justify the search activity. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

The special needs exception has been used to justify searches without a warrant and probable cause in a variety of contexts. For example, the special needs exception justifies the search of public school students without a warrant when the school official conducting the search has reasonable cause to believe that the student has violated the law or school rules and that the search will disclose evidence of the violation as long as the search is not excessively intrusive given the age and sex of the student and the nature of the infraction. *T.L.O.*, 469 U.S. at 342. *T.L.O.* extends to searches of students, their belongings and effects, and, in many

cases, lockers at the school. A policy of random drug testing for student athletes or those participating in competitive extracurricular activities without any individualized suspicion is also permissible on this basis. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls,* 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

Public employees are likewise subject to search on less than probable cause and a warrant under the special needs exception. In *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Court permitted the search of public employee workplaces for noninvestigative, work-related purposes. Supervisors or other workplace officials may conduct a search of an employee's work area when there is reasonable grounds to suspect evidence of work-related misconduct or when there is other work-related need. *Id.* at 720–25. Employees may be subject to certain types of searches on less than probable cause. In *Skinner*, 489 U.S. 602, the Court upheld drug testing without individualized suspicion when special needs for the testing could be established. Thus, railroad employees could be subject to such tests when safety considerations warrant, and employees involved in sensitive jobs, in appropriate circumstances, can also be tested without particularized cause. *See Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). This rationale does not extend to candidates for public office in the absence of a showing of a problem with drug use by public officials because the state cannot rely merely on its desire to foster an image of integrity and confidence in its elected officials to support such testing. *Chandler v. Miller*, 520 U.S. 305 (1997).

Other individuals who have reduced expectations of privacy may also be subject to similar search activity. For example, prisoners, *Hudson v. Palmer*, 468 U.S. 517 (1984), and probationers and parolees, *Griffin,* 483 U.S. 868, may be searched on less than probable cause, as can those entering military installations and boarding airplanes. *See* 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE §§ 10.6 and 10.7(c) (4th ed. 2004). In each of these situations, the noninvestigatory governmental needs justify searches on less than the normal requirements. In the case of probationers subject to probation conditions, searches on reasonable suspicion of criminal activity are permitted regardless of whether the search is conducted for a "probationary" purpose. *United States v. Knights,* 534 U.S. 112 (2001). Blood testing of prisoners for DNA profiling, which serves the significant public interest in

preventing recidivism and accurately determining guilt or innocence in cases of violent and sexual offenders, was found to advance a sufficient noninvestigatory special need and therefore to be constitutional in *In re Cooper v. Gammon*, 943 S.W.2d 699 (Mo. App. W.D. 1997).

The presence of a law enforcement investigative purpose or general interest in crime control will, however, generally prevent a finding of special needs. *See Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000). Thus, the United States Supreme Court struck down as violative of the Fourth Amendment a state hospital's urine testing of pregnant women suspected of drug use to obtain evidence of cocaine use. When a central feature of the government's policy was to use a threat of prosecution to coerce patients into treatment, its purpose was indistinguishable from a general interest in crime control and, thus, was not based on a special need. Accordingly, the taking of the urine specimens, which constituted search activity, was not constitutional absent consent. *Ferguson v. City of Charleston,* 532 U.S. 67 (2001).

In addition, several specific categories of searches have developed under the rubric of special needs, including inventory, administrative searches and inspections, and border and border area searches. These are discussed in §§9.29–9.31 below.

a. (§9.29) Inventory

"Inventory searches are a well-defined exception to the probable cause and warrant requirements of the Fourth Amendment." *State v. Shelton*, 871 S.W.2d 598, 599 (Mo. App. E.D. 1994); *Colo. v. Bertine*, 479 U.S. 367, 371 (1987). *Accord State v. Jones*, 865 S.W.2d 658, 660 (Mo. banc 1993). Several rationales have been advanced for the inventory exception, including protecting the owner's property while it is in police custody; guarding against claims of lost, stolen, or damaged property; and protecting the police from possible danger. *Id.* at 659 (citing *Bertine*, 479 U.S. at 372); *see also S.D. v. Opperman*, 428 U.S. 364, 369 (1976); *Shelton*, 871 S.W.2d at 599. These searches implicate "routine caretaking administrative functions," *State v. Donohoe*, 770 S.W.2d 252, 259 (Mo. App. W.D. 1989), and, thus, are outside the normal requirements of the Fourth Amendment.

Inventory searches may be conducted of vehicles, *Opperman*, 428 U.S. at 369, or individuals who have been arrested, *Ill. v. Lafayette*, 462 U.S. 640 (1983), or detained for detoxification, *State v. Friend*, 711 S.W.2d 508, 510 (Mo. banc 1986). The key is that the decision to impound and inventory be conducted in accordance with standard procedures. *State v. Milliorn*, 794 S.W.2d 181, 186 (Mo. banc 1990) (quoting *Opperman*, 428 U.S. at 375); *see also State v. Allen*, 817 S.W.2d 526, 527 (Mo. App. E.D. 1991). "An inventory search is valid where reasonable police regulations for inventory procedures are administered in good faith," *Jones*, 865 S.W.2d at 660, "even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure." *Bertine*, 479 U.S. at 374. The fact that a less intrusive alternative was available to protect the defendant's interests does not defeat the right to conduct an inventory. *State v. Meza*, 941 S.W.2d 779, 782 (Mo. App. W.D. 1997).

The fact that the police may have had suspicion that contraband or other evidence might be found does not invalidate an inventory search otherwise conducted under proper police procedure, *State v. O'Connell*, 726 S.W.2d 742, 748 (Mo. banc 1987) (citing *Friend*, 711 S.W.2d at 511); *see also Shelton*, 871 S.W.2d at 599, and the presence of an investigatory motive does not preclude finding an otherwise valid inventory to be constitutionally appropriate. *State v. Joos*, 966 S.W.2d 349 (Mo. App. S.D. 1998); *Meza*, 941 S.W.2d at 782. "[U]nless the police acted in bad faith or 'for the sole purpose of investigation,'" the inventory will be upheld. *Shelton*, 871 S.W.2d at 599 (quoting *State v. Surgeon*, 823 S.W.2d 63, 66 (Mo. App. E.D. 1991), and *Bertine*, 479 U.S. at 367). Additionally, participation or assistance by Drug Task Force employees does not render an otherwise lawful inventory unlawful. *State v. Wells,* 33 S.W.3d 202, 209 (Mo. App. S.D. 2000).

Existence of a routine or standard policy is necessary to demonstrate legitimate need for the inventory search and to limit police discretion. Although it was originally thought, after *Bertine*, 479 U.S. 367, that this required a policy that mandated impoundment or opening of containers, the Supreme Court's later decision in *Florida v. Wells*, 495 U.S. 1 (1990), has indicated that this is not the case. Although a policy that mandates impoundment or opening would clearly

suffice, *Bertine*, 479 U.S. at 367; *Allen*, 817 S.W.2d at 527, such a policy is not required. It is enough that a statute (*see, e.g.*, § 304.155.1(5), RSMo Supp. 2004) or policy establishes standardized criteria that permit the impoundment or opening in a given circumstance. *Milliorn*, 794 S.W.2d at 186; *see also Meza*, 941 S.W.2d at 781–82 (applying Kansas City's standard police operating procedures to uphold an inventory); *State v. Ramires*, 152 S.W.3d 385, 403–04 (Mo. App. W.D. 2004) (for inventory involving opening of packages to be valid, state must introduce evidence of standardized criteria or established routine with regard to such packages; failure to do so will lead to suppression). Moreover, while evidence that proper procedure was followed is helpful, *O'Connell*, 726 S.W.2d at 748, it appears not to be required. *See Bertine*, 479 U.S. at 383 (Marshall, J., dissenting). When there is no evidence that the police routinely impound vehicles in a particular situation, however, the exception is not appropriately applied. *Donohoe*, 770 S.W.2d at 259.

Even when the impoundment and inventory are clearly appropriate, questions may arise regarding proper scope. It is clear that the passenger compartment of a vehicle and the unlocked glove compartment are proper subjects of an inventory, *Opperman,* 428 U.S. at 366, as are unlocked containers in these areas, *Bertine*, 479 U.S. at 369. It is less clear whether the locked glove compartment is within the permissible scope of an inventory search absent a special showing of need, and at least one case questions that conclusion. In *State v. Mantle*, 779 S.W.2d 357 (Mo. App. S.D. 1989), the court stated that "[u]nless there is a special justification for a more extensive intrusion the routine search of a locked automobile trunk is unreasonable under the fourth amendment." *Id.* at 360 (quoting *United States v. Wilson*, 636 F.2d 1161, 1165 (8th Cir. 1980)). The scope of an inventory may, however, permissibly extend to removing items, such as pawn tickets and receipts, from a defendant's wallet. *State v. Simmons*, 955 S.W.2d 729, 736 (Mo. banc 1997).

b. (§9.30) Administrative Searches

In a series of cases beginning with inspections of homes and businesses for compliance with health and safety laws, the United States Supreme Court developed what has become

known as the administrative exception to the warrant requirement. That exception allows a variety of search activities motivated by protection of public health and safety unrelated to criminal activity. Although it initially required administrative warrants for such activity, *Camara v. Mun. Court of City & County of San Francisco*, 387 U.S. 523, 531–39 (1967), the exception has been extended to allow warrantless searches in many situations. The exception has been applied to the search of homes and businesses for fire and code violations, *Camara,* 387 U.S. 523; *see v. City of Seattle*, 387 U.S. 541 (1967), and to closely regulated businesses for compliance with regulatory schemes, *see, e.g.*, *N.Y. v. Burger*, 482 U.S. 691 (1987) (auto junkyards); *Donovan v. Dewey*, 452 U.S. 594 (1981) (quarries); *United States v. Biswell*, 406 U.S. 311 (1972) (gun dealers). Although this exception allowing warrantless inspections was initially limited to businesses having "a long tradition of close government supervision," *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978), or "pervasiveness and regularity" of regulation, *Dewey*, 452 U.S. at 606, the Court's extension of the exception to searches of automobile junkyards, conducted by the police rather than inspectors, with the primary purpose of deterring car theft, *Burger*, 482 U.S. at 691, is some indication that the exception has been considerably broadened.

In *Burger*, however, the Court continued to focus on five factors justifying warrantless administrative searches:

1. The reduced expectation of privacy in a closely regulated industry

2. A substantial government interest in the regulatory scheme

3. The need for frequent and unannounced inspections that would be frustrated by a warrant requirement

4. That the scheme provides a "constitutionally adequate substitute for a warrant," *id.* at 692, based on the regularity and scope of authorized inspections

5. That the inspections are carefully limited in time, place, and scope.

When searches meet these requirements, they will likely be found to be within the scope of the administrative exception. *Burger*, 482 U.S. at 702–03.

Missouri courts have had the opportunity to address how far the administrative search doctrine extends. In *Bezayiff v. City of St. Louis*, 963 S.W.2d 225 (Mo. App. E.D. 1997), the court refused to extend it to allow warrantless entries onto private property to seize automobiles that constitute a public safety hazard, despite an ordinance authorizing the removal of such vehicles. The court found that the ordinance violated the Fourth Amendment to the extent that, to effectuate the seizure, government agents make "entries which intrude upon constitutionally recognized expectations of privacy." *Id.* at 234. In these cases, entries can be made only with a warrant or consent. But an ordinance that conditions rental of housing units on obtaining a permit that requires granting consent to inspection of that unit before issuance of the permit does not violate the Fourth Amendment. *Ashworth v. City of Moberly,* 53 S.W.3d 564, 579–80 (Mo. App. W.D. 2001).

Another type of search that has been viewed as falling within the administrative search exception is inspection at a fire scene. When firefighters enter without a warrant to fight a fire, they do so under the exigent circumstances exception to the warrant requirement. Once the fire is out and the exigency is over, the administrative search exception allows them to remain for a reasonable period to investigate without a warrant. *Mich. v. Tyler*, 436 U.S. 499, 511 (1978). When firefighters want to re-enter the premises, however, the exception provides much more limited access. If the entry is for the purpose of criminal investigation, the administrative search exception is not applicable, and a traditional search warrant is required. If, however, the re-entry is to determine the origin of the fire, a more easily obtained administrative warrant may suffice. *Mich. v. Clifford*, 464 U.S. 287 (1984).

A final context in which the administrative search exception has been applied is vehicle checkpoints. In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Supreme Court held unconstitutional roving license stops to determine whether drivers were in compliance with license and registration laws. The Court believed the likelihood of successfully enforcing the regulatory scheme by means of roving random stops was

insufficient to justify this activity given the high degree of discretion afforded the police in making such stops. *See also Graham v. Dir. of Revenue*, 793 S.W.2d 577, 579–80 (Mo. App. S.D. 1990) (applying *Prouse* to hold unconstitutional random license check that was purported to be part of a lawful "sampling technique" in accordance with §§ 303.024–303.026, now RSMo 2000 and Supp. 2004). The Court in *Prouse* indicated, however, that fixed checkpoints that limited discretion might withstand scrutiny under the Fourth Amendment. *Prouse*, 440 U.S. at 663.

The Supreme Court of Missouri upheld the constitutionality of warrantless commercial vehicle weigh stations under the administrative search rationale. Finding the "state's interest in stopping, weighing and inspecting vehicles" to protect the "safety of those travelling a state's highways" and to minimize "the destructive impact of overweight vehicles on those highways" to be significant and the expectation of privacy in highly regulated commercial vehicles to be particularly low, *State v. Rodriguez*, 877 S.W.2d 106, 108–09 (Mo. banc 1994), the Court held that "permanent checkpoints at which all or nearly all of the commercial vehicles are required to submit to weighing and inspection constitute reasonable searches within the meaning of the Fourth Amendment." *Id.* at 109.

The constitutionality of sobriety checkpoints, as long as they are subject to administrative guidelines that adequately constrain discretion, was upheld by the United States Supreme Court in *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 453–55 (1990). Missouri courts have utilized factors similar to those set out in *Burger,* 482 U.S. 691, to uphold sobriety checkpoints, but they have refused to do so when they lack sufficient planning and guidelines. *Compare State v. Welch*, 755 S.W.2d 624 (Mo. App. W.D. 1988), *with State v. Canton*, 775 S.W.2d 352 (Mo. App. E.D. 1989). Similarly, fixed border area checkpoints to find illegal entrants into the country have been upheld. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *see* §9.31, *infra*.

Although Missouri courts had found drug interdiction checkpoints to be constitutional in reliance on these prior checkpoint cases, *see State v. Damask*, 936 S.W.2d 565 (Mo. banc 1996); *State v. Parish*, 937 S.W.2d 745 (Mo. App. S.D.

1997), the United States Supreme Court held that such checkpoints violate the Fourth Amendment. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). The Court stated that it had "never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing," *id.* at 41, and noted that its checkpoint cases "have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion." *Id.* When, as in *Edmond*, the purpose was not connected to roadway safety or other special need, *id.* at 43, but was rather designed to "uncover evidence of ordinary criminal wrongdoing," *id.* at 42, the seizure could not be constitutionally justified.

Edmond was applied to checkpoint stops virtually identical to those in *Damask*, 936 S.W.2d 565, in both *State v. Mack,* 66 S.W.3d 706 (Mo. banc 2002), and *United States v. Yousif*, 308 F.2d 820 (8th Cir. 2002). In *Mack,* the Supreme Court of Missouri upheld introduction of evidence obtained in a consent search of the defendant's vehicle after he exited and stopped at the checkpoint. The majority (in this 4-3 decision) found that the defendant's exiting at the isolated, sparsely populated exit constituted reasonable suspicion to support his detention at the checkpoint. Moreover, even if the mere exiting did not amount to reasonable suspicion, his sudden veering onto the ramp was sufficient to give rise to individualized suspicion. In dissent, three judges strongly disagreed, finding at best group, rather than individual, suspicion. In a well-reasoned opinion, Judge Stith criticized the majority opinion on many grounds. The dissenting opinion is consistent with the conclusion reached by the Eighth Circuit, which held that "reasonable suspicion cannot be manufactured by the police themselves." *Yousif*, 308 F.2d at 829.

The United States Supreme Court upheld a checkpoint stop to question motorists in the vicinity of a deadly hit-and-run accident. The Court distinguished *Edmond*, 531 U.S. 32, finding that the primary law enforcement purpose was not to determine whether the vehicle's occupants were committing a crime, but to ask the vehicle's occupants, as members of the public, for help in providing information about others. *Ill. v. Lidster*, 540 U.S. 419, 423 (2004). The Court found it anomalous that the law might "(1) ordinarily . . . allow police

freely to seek the voluntary cooperation of pedestrians but (2) ordinarily . . . forbid police to seek similar voluntary cooperation from motorists." *Id.* at 426. It thus found that "an *Edmond*-type presumptive rule of unconstitutionality does not apply" and that the checkpoint at issue passed the *Brown v. Texas*, 443 U.S. 47, 51 (1979), balancing test. *Lidster*, 540 U.S. at 426–27. While the precise scope of permissible suspicionless checkpoints remains unclear, it may well be that the economics and politics of such checkpoints provide the best protection against overuse of this law enforcement device. *See Lidster*, 540 U.S. at 426) ("[p]ractical considerations—namely, limited police resources and community hostility to related traffic tieups—seem likely to inhibit . . . proliferation" of police checkpoints).

c. (§9.31) Border and Border Area Searches

Searches made at the border, or at its functional equivalent (such as an airport), "are reasonable simply by virtue of the fact that they occur at the border." *United States v. Ramsey*, 431 U.S. 606, 616 (1977). Thus, no warrant or individualized suspicion is required for routine searches of people or their effects. More intrusive searches, such as those requiring intrusion into body cavities or detentions to await passage of items through the alimentary canal, require reasonable suspicion and a search that is reasonably designed to confirm or dispel that suspicion. *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). But more intrusive searches of vehicles, as opposed to persons, are not subject to heightened scrutiny. Thus, disassembly of a gas tank during a border search is permissible. *United States v. Flores-Montano*, 541 U.S. 149 (2004). The Court again reserved decision on "whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out." *Id.* at 1586–87, n.2 (quoting *Ramsey,* 431 U.S. at 618, n.13).

Brief detentions at fixed checkpoints are permitted in the vicinity of the border without individualized suspicion, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), as long as the checkpoint limits official discretion. *United States v. Ortiz*, 422 U.S. 891 (1975). Stops by roving patrols are permissible only when there is reasonable suspicion that the vehicle contains aliens who may be in the country illegally, *United*

States v. Brignoni-Ponce, 422 U.S. 873 (1975), and searches either by roving patrols or at fixed checkpoints require probable cause, *Ortiz,* 422 U.S. 891; *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

4. (§9.32) Protection of Officers and Preservation of Evidence

Increasingly, courts have recognized the dangers inherent in law enforcement and have construed Fourth Amendment requirements to permit the police to do their jobs safely. *See, e.g.*, *State v. Shannon*, 835 S.W.2d 406, 408 (Mo. App. W.D. 1992). Several exceptions to the warrant and probable cause requirements have officer safety as their basis. In addition, courts have recognized the need to allow the police to protect evidence from destruction, and several of these exceptions have preservation of evidence as an additional justification.

a. (§9.33) Search Incident to Arrest

A lawful custodial arrest brings with it the right to search the person of the arrestee, *United States v. Robinson*, 414 U.S. 218 (1973); *State v. Esquivel*, 987 S.W.2d 481, 483–84 (Mo. App. W.D. 1999), and the area within the arrestee's immediate control. *Chimel v. Cal.*, 395 U.S. 752, 763 (1969); *State v. Vitale*, 801 S.W.2d 451, 454 (Mo. App. E.D. 1990). The justification for this exception is based on both the need to protect the police and others by disarming the suspect and the interest in preserving possible evidence of crime. *Robinson*, 414 U.S. at 235; *State v. Vitale*, 795 S.W.2d 484, 486–87 (Mo. App. E.D. 1990). The right to search arises immediately upon arrest, and no individualized suspicion or showing of need is required. *State v. Lanear*, 805 S.W.2d 713, 718 (Mo. App. W.D. 1991) (citing *State v. Blair*, 691 S.W.2d 259, 261 (Mo. banc 1985), *cert. dismissed*, 480 U.S. 698 (1987), and *Robinson,* 414 U.S. at 235).

Search incident requires a "custodial" arrest. In *Knowles v. Iowa*, 525 U.S. 113 (1998), the United States Supreme Court rejected the purported doctrine of "search incident to citation." Finding that the justifications for a search incident to arrest do not come into play unless the defendant is taken into custody, the Court held that Iowa's practice of permitting such searches when officers could, but do not, effectuate full

custody arrests violated the Fourth Amendment. As long as the arrest is lawful and the individual is to be taken into custody, the right to search incident automatically comes into play, and no further showing is required. Neither the nature of the offense nor the seriousness of the charges has any bearing on the right to search. *Gustafson v. Fla.*, 414 U.S. 260 (1973); *Vitale*, 795 S.W.2d at 487–88.

Generally, the search incident must follow a valid, lawful arrest. It "may not precede an arrest and serve as part of its justification." *State v. Kovach*, 839 S.W.2d 303, 311 (Mo. App. S.D. 1992). When, however, the "formal arrest follow[s] quickly on the heels of the challenged search," it is not "particularly important that the search preceded the arrest rather than vice versa" as long as the fruits of the search are "not necessary to support probable cause to arrest." *Rawlings v. Ky.*, 448 U.S. 98, 111 and n.6 (1980).

The search of the person and the person's immediate effects may occur immediately or later at the station. An officer's taking possession of an item and thereby reducing it to control does not preclude the search of that item; such a conclusion would "render the search incident doctrine a mere exercise in semantics." *State v. Greene*, 785 S.W.2d 574, 577 (Mo. App. W.D. 1990). Items taken from the defendant that are immediately associated with the person, such as clothing or a purse, may be searched later as well, *United States v. Edwards*, 415 U.S. 800, 807 (1974); *Vitale*, 795 S.W.2d at 487, whereas personal property, such as luggage, must be searched at the scene, *Greene*, 785 S.W.2d at 577; *State v. Woods*, 637 S.W.2d 113, 116 (Mo. App. E.D. 1982).

Search incident of the area, however, must be "substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." *State v. Peterson*, 525 S.W.2d 599, 604 (Mo. App. W.D. 1975). The courts have defined the appropriate scope of such searches as the area of "immediate control," which is construed to mean "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Greene*, 785 S.W.2d at 576–77 (quoting *Chimel*, 395 U.S. at 763). This is sometimes characterized as the "zone of an arrestee's accessibility." *State v. Duncan*, 866 S.W.2d 510, 512 (Mo. App. W.D. 1993). But "accessibility, as a practical matter, is not the benchmark."

Vitale, 795 S.W.2d at 487. Courts "have interpreted the phrase 'immediate control' to extend beyond the area that is conveniently or easily accessible to the arrestee." *United States v. Morales*, 923 F.2d 621, 626 (8th Cir. 1991). When an item is in the area of immediate control, the right to search "is not constrained because the arrestee is unlikely at the time of the arrest to actually reach into that area." *Id.*

The scope of the area of "immediate control" is related to the "contemporaneous" requirement. Although the courts have not been strict in requiring any showing of real possibility that the defendant could have reached the area and actually obtained a weapon, they have been somewhat more willing to apply the contemporaneous requirement to limit such searches. Thus, when a defendant has been removed from the scene, courts routinely refuse to find the search incident rationale applicable. *See Peterson*, 525 S.W.2d at 604; *Morales*, 923 F.2d at 626 (discussing cases); *see also United States v. Robbins*, 21 F.3d 297, 300 (8th Cir. 1994). When the defendant is still on the scene and an item is arguably within the defendant's reach, *Duncan*, 866 S.W.2d at 512, courts are inclined to find the requirements met. *See, e.g.*, *Vitale*, 801 S.W.2d at 454 (defendant standing "directly adjacent" to area searched); *Morales*, 923 F.2d at 626 (defendant approximately three feet away from objects searched). The fact that a defendant is handcuffed may be a factor in determining "immediate control," *see Morales*, 923 F.2d at 626–27, but it is not controlling, *Vitale*, 795 S.W.2d at 486–87. *See also N.Y. v. Belton*, 453 U.S. 454 (1981).

Search incident of a vehicle is permissible when a defendant is arrested in the vehicle or was a "recent occupant" and there is both spatial and temporal proximity to the vehicle. *Thornton v. United States*, 124 S. Ct. 2127, 2131–32 (2004); *see also State v. Reed*, 157 S.W.3d, 358–59 (Mo. App. W.D. 2005). In such cases, the area of immediate control extends to the passenger compartment of the vehicle. *Belton,* 453 U.S. at 460. In *Belton,* the Court, after noting that lower courts were having difficulty finding a "workable definition" of the area of immediate control in the context of the arrest of a vehicle occupant, developed a "bright-line" rule that covers the passenger compartment and containers found in it. It is unclear whether this bright-line rule extends to locked containers or a locked glove compartment. *Belton* applies in

Missouri, and its standards are sufficient under the Missouri Constitution. *State v. Darrington*, 896 S.W.2d 727, 729 (Mo. App. W.D. 1995); *State v. Harvey*, 648 S.W.2d 87, 89–90 (Mo. banc 1983).

The permissibility of conducting a search incident to arrest of the passenger compartment of a vehicle when an occupant is arrested in the vehicle, but when there is no independent basis to detain the driver, was addressed in *State v. Bradshaw*, 99 S.W.3d 73 (Mo. App. E.D. 2003). The majority, relying on *State v. Taber*, 73 S.W.3d 699 (Mo. App. W.D. 2002) (§9.12, *supra*), held that a search incident under *Belton*, 453 U.S. 454, was not permitted. The dissenting judge viewed search incident as automatically permissible whenever an occupant of the vehicle is arrested, regardless of an independent right to detain the vehicle.

There is some indication of dissatisfaction on the United States Supreme Court with the expansion of *Belton* to allow broad searches in vehicles post-arrest as an "entitlement" rather than a narrow exception to the normal search requirements. *See Thornton*, 124 S. Ct. at 2133 (O'Connor, J., concurring); *see also* Scalia, J., concurring and Stevens, J., dissenting. In fact, a majority of the Court may be in favor of reconsidering the scope of this exception, perhaps limiting *Belton* searches to cases when it is reasonable to believe that evidence of the crime might be found. *See id*. at 2132, n.4 (addressing Justice Scalia's suggestion to that effect).

b. (§9.34) Protective Frisk

When an individual has not been arrested but is merely detained, no automatic right to search arises. The police may frisk a person who has been stopped only when there is reason to believe, based on specific and articulable facts, that the individual is armed and dangerous or otherwise poses a threat of injury to the police. *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *State v. Preston*, 861 S.W.2d 627, 631 (Mo. App. E.D. 1993); *State v. Hutchinson*, 796 S.W.2d 100, 104 (Mo. App. S.D. 1990). The test is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *State v. Kovach*, 839 S.W.2d 303, 313 (Mo. App. S.D. 1992). The purpose of a frisk is limited to protection of the police and third parties, and the

scope of the frisk is, therefore, limited to items such as "guns, knives, clubs, or other hidden instruments for the assault of the police officer." *State v. Caudle*, 884 S.W.2d 81, 84 (Mo. App. S.D. 1994) (quoting *Hutchinson*, 796 S.W.2d at 104).

The factual inquiry necessary to determine whether a reasonable belief exists to justify a frisk requires consideration of a combination of facts. *Kovach*, 839 S.W.2d at 313. In *Preston*, 861 S.W.2d 627, the presence of a numerically disadvantaged officer in a high-crime area confronted by a suspect thought to be under the influence of PCP was deemed sufficient. Although, because officer safety is involved, courts appear to be somewhat liberal in finding a risk of danger to the police, they have been unwilling to allow frisks when "the record is devoid of facts articulated by [the officer] as to why he believed the defendant was dangerous or might easily gain access to weapons." *Hutchinson*, 796 S.W.2d at 105. Missouri court decisions have demonstrated some uncertainty with regard to the extent to which nervous activity of a suspect may be sufficient to provide a reason to believe the individual is armed and dangerous and therefore justify a frisk. *Compare State v. Harrison,* 957 S.W.2d 774, 776 (Mo. App. S.D. 1997); *State v. McFall,* 991 S.W.2d 671, 674 (Mo. App. W.D. 1999); *State v. Donohoe*, 770 S.W.2d 252 (Mo. App. W.D. 1989), *with State v. Reynolds*, 753 S.W.2d 1 (Mo. App. E.D. 1988); *see also Kovach*, 839 S.W.2d at 312–13.

Officers may not automatically conduct a frisk while conducting a consensual vehicle search. Rather, officers must have reason to believe the suspect is armed and dangerous unless the suspect consents to the pat-down. *State v. Haldiman*, 106 S.W.3d 529 (Mo. App. W.D. 2003).

A frisk is essentially a pat-down of outer clothing. *Terry*, 392 U.S. at 8. Because a frisk is designed solely to uncover weapons or other objects that could pose a danger to the police, the scope of such searches is strictly limited. When the police, in the initial pat-down, feel an item that could be a weapon, further intrusion into the clothing is permitted to obtain the item and to determine whether it poses a danger to the police. If the item is not a weapon, it may not be seized unless, without further examination or manipulation, there is probable cause to believe it is contraband, evidence, or the fruit of a crime (and therefore subject to seizure under the

plain-view doctrine). *Preston*, 861 S.W.2d at 631. If the item could pose a danger to the police, it may be seized, at least for the duration of the stop.

Although the scope of frisks may arguably have been expanded in light of the Supreme Court's analysis of the "plain-feel" doctrine in *State v. Rushing*, 935 S.W.2d 30 (Mo. banc 1996), *see* §9.10, *supra,* Missouri courts continue to narrowly construe that scope. *See, e.g., State v. Davis*, 985 S.W.2d 876, 877–78 (Mo. App. E.D. 1998); *State v. Graeler*, 988 S.W.2d 57, 58–59 (Mo. App. E.D. 1999). As the court recognized in *Davis*, absent credible evidence that the officer believed there were weapons in the defendant's pocket or that the incriminating character of an item in the defendant's pocket was "immediately apparent," intrusion into the pocket to seize the item will be deemed beyond the scope of the frisk and therefore unconstitutional. *But see State v. Gantt,* 87 S.W.3d 330 (Mo. App. W.D. 2002).

A frisk will generally be upheld when the officer's claim that the item felt like a weapon has credence. Courts often require some articulation of what the officer believed the item to be and some concurrence between that belief and reality. When the nature of the item and the officer's testimony demonstrate a reasonable belief that the item may be a weapon or something that could endanger the officer, courts will normally uphold the frisk. *State v. Hensley*, 770 S.W.2d 730, 736 (Mo. App. S.D. 1989); *Harrison*, 957 S.W.2d at 776. When, however, the officer knows the item is not likely a weapon, further intrusion to retrieve it exceeds the permissible scope of the frisk. *State v. Leavitt*, 993 S.W.2d 557, 561–62 (Mo. App. W.D. 1999). When a suspect appears to have an item in a closed fist, officers may order the suspect to open the fist and drop the item by analogy to the frisk doctrine. *Caudle*, 884 S.W.2d at 85.

Protective searches of vehicles without a warrant and probable cause are also permitted under the Fourth Amendment. *Mich. v. Long*, 463 U.S. 1032 (1983). Because "roadside encounters between police and suspects are especially hazardous, and . . . danger may arise from the possible presence of weapons in the area surrounding a suspect," courts have recognized a limited exception for searches in these situations. *Hutchinson*, 796 S.W.2d at 104.

Thus, when a vehicle is lawfully stopped and an officer has reason to believe, based on specific and articulable facts, that the vehicle contains a weapon or other item that may pose an immediate danger to the police, that officer may conduct a limited search of the passenger compartment of the vehicle. *Kovach*, 839 S.W.2d at 310–11; *Hutchinson*, 796 S.W.2d at 104. The search may extend only to those areas in which a weapon could be found, and only containers that could hold a weapon may be opened.

c. (§9.35) Protective Sweep

Another type of search conducted for officer safety is the protective sweep, *Md. v. Buie*, 494 U.S. 325 (1990), which is a "quick and limited search of the premises, incident to arrest and conducted to protect the safety of police officers and others." *Id.* at 327; *accord State v. Mahsman*, 157 S.W.3d 245, 250 (Mo. App. E.D. 2004). When officers have a need to enter premises and have a legitimate right to do so, they have a limited right to search for individuals who could present a danger to their mission. *See State v. Rogers*, 825 S.W.2d 49, 53 (Mo. App. W.D. 1992) (officers have "a right to make a protective search of the house to ascertain that they [are] not in danger of an ambush by someone in the house"); *see also State v. Duncan*, 866 S.W.2d 510, 512 (Mo. App. W.D. 1993). An arrest in the home is a prerequisite to a valid protective sweep. *Mahsman*, 157 S.W.3d at 250.

When a sweep is permitted, police may look in closets or other areas immediately adjacent to the place of arrest without any particularized suspicion. In order to sweep additional areas, however, the police must possess articulable facts that, taken together with reasonable inferences, warrant a reasonably prudent officer in concluding that the area to be swept harbors an individual posing a danger to those on the arrest scene. *Buie*, 494 U.S. at 334.

The court addressed the meaning of the "immediately adjoining" requirement in *State v. Roberts*, 957 S.W.2d 449 (Mo. App. W.D. 1997). Although officers entered other rooms without particularized suspicion that additional persons might be present, the court found the search proper within *Buie*, 494 U.S. 325, when those rooms were adjacent to the bedroom in which the defendant was arrested, the duplex was

very small, and the search was quick (25 to 30 seconds) and limited to places a person could hide. *Roberts,* 957 S.W.2d at 454. Noting that determinations under *Buie* must be "fact specific," *id.* at 453, the court reversed the trial judge's suppression of evidence found in plain view during the sweep.

The protective sweep is "not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found." *Buie*, 494 U.S. at 335. Thus, while a protective sweep may extend to a cursory inspection under a bed because a person could be found there, moving a bed does not qualify as "quick and cursory" and is not properly justified as part of a sweep. *State v. Johnston*, 957 S.W.2d 734 (Mo. banc 1997). For a discussion of when a sweep of clothing for weapons may be permissible, see *State v. Adams*, 51 S.W.3d 94, 100 (Mo. App. E.D. 2001).

A sweep may last only as long as necessary to "dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Buie*, 494 U.S. at 336. Once officers have secured a premises and determined that it is unoccupied, they may no longer rely on protective sweep to justify search activity within the home. *State v. Rutter,* 93 S.W.3d 714, 725–26 (Mo. banc 2002). When, however, during the course of the sweep officers observe items they have probable cause to believe are contraband or evidence of crime, they may seize those items under the doctrine of plain view. *Duncan*, 866 S.W.2d at 512. When officers observe items that give rise to probable cause to believe the premises contain seizable items, they may include those observations in a warrant to search the premises. *See State v. Camden*, 837 S.W.2d 33, 37 (Mo. App. W.D. 1992).

5. (§9.36) Other Detentions and Searches Based on Safety Needs

When the police have a warrant to search, they may detain the owner/occupant of the premises during the course of that search to protect themselves from danger and to facilitate the search. *Mich. v. Summers*, 452 U.S. 692, 705 (1981). In *State v. Sutherland*, 859 S.W.2d 801, 804 (Mo. App. E.D. 1993), the court held that a "warrant to search for contraband founded upon probable cause implicitly carries with it the limited authority to

detain the occupants of the premises while a proper search is conducted." *See also Summers*, 452 U.S. at 705. Application of the *Summers* exception requires a warrant (or in some cases exigent circumstances, *Summers*, 452 U.S. at 702, n.17) and reason to believe the person to be detained is an occupant of the premises to be searched. *Sutherland*, 859 S.W.2d at 804–05. The "authority to detain incident to a search is categorical" and does not depend on a showing of specific need. *Muehler v. Mena,* 125 S. Ct. 1465, 1470 (2005).

Summers permits an occupant who is found in close proximity to be brought back to the premises for the duration of the search. *Summers*, 452 U.S. at 702, n.16 (defendant on steps leaving home); *see also Sutherland*, 859 S.W.2d at 804–05 (defendant in hallway outside hotel room). Similarly, the police may detain an occupant outside the occupant's home and prevent the occupant access to the premises for two hours while seeking a warrant to search the house. *Ill. v. McArthur*, 531 U.S. 326 (2001). "Inherent in *Summers'* authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." *Muehler*, 125 S. Ct. at 1470. Thus, where reasonable in the circumstances, an occupant may be handcuffed for the duration of the search. *Id.* at 1470–71.

Individuals at the scene of the execution of a search warrant may not automatically be searched unless mentioned in the warrant. But the "[p]olice may . . . take appropriate action to ensure their own protection while carrying out a search warrant." *State v. Shannon*, 835 S.W.2d 406, 408 (Mo. App. W.D. 1992) (quoting *United States v. Patterson*, 885 F.2d 483, 484–85 (8th Cir. 1989)). They "must have enough flexibility to react to whatever situation they confront upon entering the premises being searched." *Shannon*, 835 S.W.2d at 409. When officers are executing a search warrant for drugs in a private residence, that situation, which involves "the kind of transaction that may give rise to sudden violence," *id.* at 408 (quoting *Summers*, 452 U.S. at 702), is itself likely to create the concern for safety that justifies detention and frisk of individuals found on the premises. *Shannon*, 835 S.W.2d at 408–09. Individuals found on the premises during the search of a public place may not be searched without reason to believe that any particular individual is armed and dangerous. *Ybarra v. Ill.*, 444 U.S. 85 (1979).

Officers may closely monitor the movements of arrestees without any individualized showing of need. *Wash. v. Chrisman*, 455 U.S. 1, 6 (1982). Even if officers use less force or control initially than is permitted, this does not deprive the police of the right to use greater control even in the absence of a later showing of additional need. *Id.* Thus, the police, who were entitled to be "at the elbow" of the suspect, were not precluded from entering the defendant's room when they saw what they believed to be marijuana inside after allowing the defendant to enter the room unaccompanied to get his identification. The fact that officers do not remain at a suspect's elbow does not deprive them of that right when they choose, for whatever reason, to exercise it later. *Id.*

When, after being arrested at the threshold of the home, an individual needs to dress before accompanying officers to the station, officers may enter the premises and accompany the individual while the individual puts on clothing. *State v. Birmingham,* 132 S.W.3d 318, 324–25 (Mo. App. S.D. 2004). This is true regardless of whether the individual or the officers are the motivating force behind the person getting dressed. *Id.* at 325. The police may also monitor the activities of third parties who agree to obtain items for an arrestee. "The compelling interest in police safety that allows police to follow at the elbow of an arrestee as he is allowed to move around, *Chrisman*, 455 U.S. at 7, 102 S.Ct. at 817, also applies where a third party is sent to retrieve items for an arrestee." *State v. Wise*, 879 S.W.2d 494, 505 (Mo. banc 1994), *cert. denied*, 513 U.S. 1093 (1995). Once the item is obtained, the police may search that item to ensure their own safety, and the scope of the search is equivalent to search incident to arrest. *Id.*

Officers may order the driver, *Pa. v. Mimms*, 434 U.S. 106 (1977), or the passengers, *Md. v. Wilson*, 519 U.S. 408 (1997), of a lawfully stopped car to exit the vehicle based on officer safety. Thus, an officer making a traffic stop may order both the driver and the passengers to get out of the car pending completion of a stop without a particularized showing of need or cause. *State v. Pfleiderer*, 8 S.W.3d 249, 256 (Mo. App. W.D. 1999).

Inventory searches are another type of protective searches because they have as their basis protection of the police and the individual whose property is in custody. Inventory is dealt with in §9.29 above.

VIII. Challenging a Search or Seizure

A. (§9.37) Standing

The concept of standing addresses when a defendant has a sufficient personal stake to be permitted to raise the issue of the alleged unconstitutionality of a search or seizure. Before the mid-1970s, standing was an independent, preliminary issue, and a defendant could challenge a search or seizure if the defendant "(1) owned or had a possessory interest in the premises searched; (2) was legitimately on the premises at the time of the search; (3) owned the property seized; or (4) had lawful possession of the property seized, such as in the status of a bailee. Automatic standing existed in limited circumstances." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 20.06 (2002) (footnotes omitted). Since the United States Supreme Court's decision in *Rakas v. Illinois*, 439 U.S. 128 (1978), the law of standing has changed dramatically.

In *Rakas,* the Court rejected traditional "standing" analysis in favor of a determination of whether "the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas*, 439 U.S. at 143. Only a defendant who has such legitimate, personal expectation may challenge the search. The Court stated:

> "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.

Rakas, 439 U.S. at 133–34 (citations omitted). The Court has since reiterated that "[e]xpectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims." *United States v. Padilla*, 508 U.S. 77 (1993). "The inquiry, after *Rakas*, is simply whether the defendant's rights were violated by the allegedly illegal search or seizure." *United States v. Salvucci*, 448 U.S. 83, 87 n.4 (1980). *Accord State v. Kovach*, 839 S.W.2d 303, 308 (Mo. App. S.D. 1992); *State v. Childress*, 828 S.W.2d 935, 940 (Mo. App. S.D. 1992). Although the Court purportedly rejected standing as an independent concept, courts continue to use the terminology as a shorthand for analysis of legitimate expectation of

privacy, and it is used in that context here. *State v. Ramires*, 152 S.W.3d 385, 394 n.3 (Mo. App. W.D. 2004).

The Court has rejected all attempts to afford standing based on anything other than a showing of a personal, legitimate expectation of privacy or a showing of sufficient property interest in the items seized. Thus, *Rakas*, 439 U.S. 128, rejected both standing based on an individual being "legitimately on the premises" and "target standing," which would have afforded anyone at whom a search was aimed a right to challenge that search. *Kovach*, 839 S.W.2d at 308; *Childress*, 828 S.W.2d at 940. Automatic standing, which had allowed anyone charged with an offense for which possession of the seized item was a necessary element to raise the constitutionality of the search, was rejected in *Salvucci*, 448 U.S. 83. *State v. Darrington*, 896 S.W.2d 727, 730 (Mo. App. W.D. 1995); *State v. Martin*, 892 S.W.2d 348, 350–51 (Mo. App. W.D. 1995). Additionally, any thought that a co-conspirator might continue to have standing on that basis after *Alderman v. United States*, 394 U.S. 165 (1969), was clearly dispelled in *Padilla,* 508 U.S. 77.

Missouri courts have held that the standards for standing under the United States and the Missouri Constitution are the same. In *State v. McCrary*, 621 S.W.2d 266, 273 (Mo. banc 1981), the Court held that the reasonable expectation test for standing under Article I, § 15, of the Missouri Constitution is identical to the legitimate expectation of privacy test adopted by the United States Supreme Court in *Rakas*, 439 U.S. 128. *See also Childress*, 828 S.W.2d at 940–41. There has been considerable confusion on this issue, however.

In recent years, many courts have not followed the *Rakas* "legitimate expectation of privacy" analysis, but have instead reverted to other earlier doctrines. For example, in *State v. Melville*, 864 S.W.2d 452, 454 (Mo. App. W.D. 1993), *State v. Lorenzo*, 743 S.W.2d 529, 531 (Mo. App. W.D. 1987), and *State v. Hensley*, 770 S.W.2d 730, 736 (Mo. App. S.D. 1989), the court of appeals upheld the use of automatic standing to allow the defendants to challenge the searches. Eventually, the Western District overruled *Melville* and *Lorenzo*, reiterating that automatic standing no longer exists. *Martin*, 892 S.W.2d at 351; *see also State v. Mosby*, 94 S.W.3d 410, 416, n.3 (Mo. App. W.D. 2003).

Greater confusion continues to exist with regard to the relationship between Missouri statutory standards for pursuing a motion to suppress based on an allegation of illegal search and seizure and the constitutional requirements set out in the United States Supreme

Court cases. While it is clear that, under the constitutional analysis, the defendant bears the burden of demonstrating a legitimate expectation of privacy as a threshold question, *State v. Orso*, 789 S.W.2d 177, 181–82 (Mo. App. E.D. 1990), *cert. denied*, 499 U.S. 951 (1991) (citing *Rakas*, 439 U.S. at 131); *see also McCrary*, 621 S.W.2d at 273, it is also clear that § 542.296.1, RSMo 2000, allows a "person aggrieved by an unlawful seizure . . . and against whom there is a pending criminal proceeding growing out of the subject matter of the seizure" to pursue a motion to suppress. Courts have attempted to reconcile these apparently conflicting provisions, but confusion remains.

In *State v. Milliorn*, 794 S.W.2d 181, 184 (Mo. banc 1990), the Court construed § 542.296 as creating new law requiring the state to bear both the burden of going forward and the burden of persuasion when a search without a warrant has been conducted. It held that the statute reverses the burden previously placed on defendants in *State v. Yowell*, 513 S.W.2d 397, 402 (Mo. banc 1974), to go forward with probative evidence in support of their motions to suppress. *Milliorn,* however, did not specifically address the issue of standing.

In *State v. Tipton*, 796 S.W.2d 109 (Mo. App. S.D. 1990), the court addressed § 542.296.6 and the Supreme Court's decision in *Milliorn*. In *Tipton,* the trial court suppressed all evidence against the defendants because the government did not present any evidence in the hearing on the motion to suppress. The majority of the court construed *Milliorn* to place the burden of going forward on the government when the defendant alleged that the items seized "were taken from the person of the defendants and premises in which they had an interest and were seized without a warrant." *Tipton*, 796 S.W.2d at 112. Judge Hogan dissented, believing that, despite § 542.296.6, defendants still are required to make a preliminary showing that they have been aggrieved by an unlawful seizure before the burden shifts to the state. *Id.*

This confusion, also acknowledged in *State v. Byler*, 810 S.W.2d 677, 679 (Mo. App. S.D. 1991), was subsequently addressed in *Childress*, 828 S.W.2d 935. After reviewing the federal constitutional cases that would require that the defendant, as proponent of the motion to suppress, carry the burden of establishing that the defendant's own personal rights were violated, the court concluded that the opinion "could end at this point because defendant did not show a reasonable expectation of privacy in the vehicle or its contents." *Childress*, 828 S.W.2d at 942. The court then went on to say, however, that "as this

court understands *State v. Milliorn*, disposition of this appeal on that basis may be improper." *Id.* (citation omitted). After reviewing *Milliorn*, 794 S.W.2d 181, and *Tipton*, 796 S.W.2d 109, the court concluded that, because the state had not raised the issue of standing, it was necessary for it to reach the merits of the defendant's constitutional challenge.

This issue was most recently addressed at length in *Ramires*, 152 S.W.3d 385, where the court held that the Supreme Court of Missouri decision in *State v. Simmons,* 955 S.W.2d 752 (Mo. banc 1997), superseded *Milliorn* and allocated the burden of proof to the defendant to establish a legitimate expectation of privacy as a threshold matter. After reviewing both the statutory language and caselaw, the court determined that *Tipton* and *Childress* were wrongly decided. *Ramires*, 152 S.W.3d at 396. While *Simmons* does appear to require the defendant to bear the burden of going forward, it lacks any real analysis of this issue. This collection of apparently inconsistent cases leaves the law unsettled at this time.

It would seem that the Missouri General Assembly has the power to adopt standards for pleading and burdens of proof on motions to suppress as a matter of state law that are more favorable to defendants than federal constitutional standards. *Or. v. Hass*, 420 U.S. 714, 719 (1975). It is unclear whether they intended to do so. Because standing is no longer a separate doctrine with discrete analytical elements apart from the merits, *Childress*, 828 S.W.2d at 940 (quoting *United States v. Bouffard*, 917 F.2d 673, 675 (1st Cir. 1990)), and because it seems plain that the legislature intended the burden to be on the government with regard to the substance of the claim, it is possible that this conclusion was intended.

If courts follow *Milliorn,* 794 S.W.2d 181, *Tipton*, 796 S.W.2d 109, and *Childress*, they will require that defendants merely allege that they are aggrieved by the seizure under § 542.296.1. This places the burden on the government to come forward with persuasive evidence to rebut that allegation. If courts follow *Simmons* and *Ramires*, they will require the defendant to come forward with evidence sufficient to establish a legitimate expectation of privacy. Unless and until the Court clarifies the relationship between the statute and constitutional requirements, each party should be prepared to proceed or risk losing on the issue of standing. Where the government does not contest standing at trial and later raises the defendant's failure to have made the required preliminary showing on appeal,

remand may be required to allow the showing to be made. *See Ramires,* 152 S.W.3d at 398–402.

The substantive requirements for standing focus on the defendant's legitimate expectation of privacy in the area to be searched and, to a lesser extent, the defendant's interests in the property seized. Although the courts have rejected the notion that standing turns on "'arcane' concepts of property law," *Kovach*, 839 S.W.2d at 309 (quoting *Rawlings v. Ky.*, 448 U.S. 98, 105 (1980)); *see also Orso*, 789 S.W.2d at 182, such interests are clearly relevant to determination of these issues. *State v. Woods*, 790 S.W.2d 253, 260 (Mo. App. S.D. 1990); *Rakas*, 439 U.S. at 144, n.12. In fact, to be legitimate, a defendant's expectation of privacy "must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Woods*, 790 S.W.2d at 260 (quoting *State v. Nichols*, 628 S.W.2d 732, 735 (Mo. App. S.D. 1982)).

Courts have developed varying modes of analysis depending on the circumstances. While it is clear that a defendant does not have standing merely because the defendant is legitimately on the premises, *State v. Wise*, 879 S.W.2d 494 (Mo. banc 1994), *cert. denied*, 513 U.S. 1093 (1995), it is also clear that it is not necessary that the defendant be the owner of the premises to assert Fourth Amendment rights. A defendant who lives at a particular location with permission of the owner may have a sufficient expectation of privacy to have standing. *Orso*, 789 S.W.2d at 182. A mere casual visitor, however, does not have a sufficient expectation of privacy. *Wise*, 879 S.W.2d at 504. When a defendant is allowed to use an apartment on a regular basis and keeps clothing there, the defendant may well have standing despite not having a key, getting mail, or paying rent. *State v. Corpier*, 793 S.W.2d 430, 436–37 (Mo. App. W.D. 1990). An overnight guest will generally be deemed to have standing, *Minn. v. Olson*, 495 U.S. 91 (1990); *see also Wise*, 879 S.W.2d at 504, because such a guest has an expectation of privacy in the host's home that society is prepared to recognize as reasonable. *Id.* A person who has exclusive rights to control premises likely has standing. *Rakas*, 439 U.S. at 128. The absence of this control, however, does not defeat standing when other factors are present because the legitimacy of an individual's expectation of privacy is not determined by the presence or absence of others. *Corpier*, 793 S.W.2d at 437; *see also Olson*, 495 U.S. at 99–100. For a discussion of factors that courts consider in determining whether an expectation of privacy in another's home is legitimate, see *Corpier*, 793 S.W.2d at 437, n.3.

An expectation of privacy in commercial premises is "different from, and indeed less than, a similar expectation in an individual's home." *Minn. v. Carter*, 525 U.S. 83, 90 (1998). Thus, individuals who were in another person's home for two and a half hours merely to participate in packaging illegal drugs did not have a sufficient legitimate expectation of privacy to contest a purportedly unconstitutional search of the premises. While the scope of *Carter* is unclear, it does not appear to limit standing of social guests because at least five members of the court (Justice Ginsburg and the three other dissenters along with Justice Kennedy who concurred) would extend standing to "almost all social guests" in a host's home. It does appear, however, to substantially curtail standing of those on premises for commercial purposes.

The question of standing to challenge the search of a motel room was addressed in *State v. Mitchell,* 20 S.W.3d 546, 556–61 (Mo. App. W.D. 2000). The court held that a person's reasonable expectation of privacy in a rented room ends when the rental period ends, even though the person may continue to have belongings in the room, unless there is evidence that the motel management has implicitly or explicitly agreed to extend the rental period. The fact that the defendant may not yet have checked out is not determinative of whether the rental period is over, and this is true even though the failure to check out is based on the defendant's arrest. *Id.*; *see also State v. Immekus,* 28 S.W.3d 421, 429–30 (Mo. App. S.D. 2000) (defendant, to avoid capture, left motel room with door open in circumstances in which he would expect police to arrive shortly; he lacked standing to challenge police entry into the room).

Determining whether a defendant has a legitimate expectation of privacy in a vehicle is even more difficult. It is clear that a person's status as a driver or passenger of a vehicle is not sufficient, by itself, to confer standing on or to deny it to a defendant. That status is merely one factor in determining whether a defendant has a legitimate expectation of privacy sufficient to give rise to a right to challenge a search. To establish standing, a defendant must show some right of possession gained from an owner or one with authority to grant possession. *Childress*, 828 S.W.2d at 941. When a defendant establishes neither a property nor a possessory interest in the vehicle nor an interest in the property seized, standing cannot appropriately be found. *Kovach*, 839 S.W.2d at 308; *see also Darrington*, 896 S.W.2d at 730; *State v. Thoms*, 781 S.W.2d 578, 581–82 (Mo. App. S.D. 1989) (and cases cited). Moreover, a mere possessory interest in items, without some legitimate expectation of privacy in the vehicle, will not

suffice to challenge a search of the vehicle, although it may give standing to challenge a search of the item itself. *Kovach*, 839 S.W.2d at 309; *Rawlings*, 448 U.S. at 105–06.

Courts continue to attempt to clarify when a person in a vehicle has a sufficient expectation of privacy to challenge a search. A person who is not named in the rental agreement as an authorized driver and who does not otherwise establish authority with regard to a vehicle does not have standing to challenge a search of that vehicle. *State v. Toolen*, 945 S.W.2d 629, 632 (Mo. App. E.D. 1997). But it is clear that, even though an individual who is a passenger may not have standing to challenge the search of the vehicle itself, that individual does have standing to challenge the search of items in the vehicle in which the individual possesses a reasonable expectation of privacy. Thus, when police searched a duffel bag belonging to a person and in which he claimed an interest, he had standing to challenge the legality of that search. *State v. Lane*, 937 S.W.2d 721, 722 (Mo. banc 1997). But the mere presence of items belonging to an individual found in the search of a bag in a vehicle in which the person is riding does not confer standing on that individual to challenge the search of the bag when the individual makes no claim of ownership to the bag or its contents. *Toolen*, 945 S.W.2d at 632.

When the basis of alleged illegality is not the search of the vehicle itself, but the search as a fruit of an unlawful detention, both the driver and passengers are more likely to have standing to raise their claims. *State v. Miller*, 894 S.W.2d 649, 652 n.2 (Mo. banc 1995); *Kovach*, 839 S.W.2d at 312 (and cases cited). Both the driver and passengers of a vehicle can challenge the lawfulness of a stop because each "may object to the seizure of his own person as an illegal detention." *Id.* The fact that a passenger may later be free to depart does not prevent that person from having an interest sufficient to give rise to standing. *Id.*

The rules relating to standing to challenge searches and seizures in vehicles apply equally to searches and seizures of boats. Thus, the mere status as a driver of a boat does not confer standing when the driver is not the owner and no other basis for establishing a legitimate expectation of privacy is shown. *State v. Sullivan*, 935 S.W.2d 747, 755 (Mo. App. S.D. 1996).

It seems clear that, to establish standing, a defendant must at least allege a legitimate expectation of privacy in the area searched or, in some cases, a sufficient property interest in the items seized. Such an

interest may be sufficient when the focus of the alleged unconstitutionality is on the seizure itself and not on the precedent search. Statements made by a defendant to establish standing may not be used as evidence of guilt at trial, *Simmons v. United States*, 390 U.S. 377 (1968), but they may be used for impeachment, *see Salvucci*, 448 U.S. at 93–94. *See also United States v. Jaswal*, 47 F.3d 539, 543–44 (2nd Cir. 1995). Courts have held that there is no contradiction in a prosecutor asserting lack of standing at a hearing on the motion to suppress and attempting to prove possession or other connection with the item necessary for conviction at trial. *Childress*, 828 S.W.2d at 940 (and cases cited). Statements made by a defendant at trial denying an interest in the property searched cannot be used against that defendant on appeal to establish lack of standing to challenge the search. *Ramires*, 152 S.W.3d at 399–400.

B. (§9.38) Exclusionary Rule

In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court held that the exclusionary rule applies in state trials to exclude evidence obtained in violation of the constitution. In reversing its previous decision in *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court found that the interests in deterring official misconduct, *Mapp*, 367 U.S. at 656, and protecting the "imperative of judicial integrity," *id.* at 659, required application of the rule in state proceedings. In recent years, the Court has virtually rejected the judicial integrity rationale and has focused its continued recognition of the rule solely on deterrence. *Ariz. v. Evans*, 514 U.S. 1 (1995); *United States v. Leon*, 468 U.S. 897, 906 (1984); *United States v. Janis*, 428 U.S. 433, 446 (1976).

There is continuing debate regarding whether the exclusionary rule is constitutionally required. The Court characterizes exclusion not as a personal constitutional right of the defendant, but rather as a "judicially created remedy designed to safeguard against future violations of Fourth Amendment rights." *Evans*, 514 U.S. at 10; *United States v. Calandra*, 414 U.S. 338, 348 (1974). There is widespread belief that the rule could be abolished if other adequate remedies were put in its place, and Congress may well test that theory if it is able to enact legislation to do so.

The Court has not shown any indication that it will totally abandon the exclusionary rule as it applies to the states. Rather, it has significantly limited its application in recent years. "As with any remedial device, the rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously

served." *Evans*, 514 U.S. at 11. Because any decision to utilize the rule is based on a cost-benefit analysis, "[w]here 'the exclusionary rule does not result in appreciable deterrence, . . . clearly, its use . . . is unwarranted.'" *Id.* (quoting *Janis*, 428 U.S. at 454).

1. (§9.39) Limits on Application of Exclusionary Rule

The Court has limited applicability of the exclusionary rule in a variety of ways. First, it has limited the nature of proceedings and persons to which the rule applies. In general, the rule does not apply to most noncriminal proceedings, *see Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deportation proceedings); *United States v. Janis*, 428 U.S. 433, 443 (1976) (civil tax proceedings), with the exception of forfeiture proceedings based on criminal conduct, *One 1958 Plymouth Sedan v. Pa.*, 380 U.S. 693 (1965), or, in most cases, to pretrial or posttrial proceedings in a criminal case. *See, e.g.*, *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury); *Giordenello v. United States*, 357 U.S. 480 (1958); *see also United States v. Jenkins*, 4 F.3d 1338, 1344–45 (6th Cir. 1993), *cert. denied*, 511 U.S. 1034 (1994) (sentencing). *See generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.6(d) (4th ed. 2004). It does not apply to license-revocation proceedings under § 302.505, RSMo Supp. 2004. *Riche v. Dir. of Revenue*, 987 S.W.2d 331, 333–36 (Mo. banc 1999). This is true even though an officer has no good-faith basis for stopping the motorist. *Barlow v. Fischer,* 103 S.W.3d 901, 906 (Mo. App. W.D. 2003).

The exclusionary rule precludes the use of unconstitutionally seized evidence in the government's case-in-chief, but such evidence may be used in some circumstances to impeach a defendant who testifies at trial. *See United States v. Havens*, 446 U.S. 620 (1980); *Walder v. United States*, 347 U.S. 62 (1954). *See generally* 6 WAYNE R. LAFAVE, § 11.6(a). While the Supreme Court of Missouri has recognized that illegally obtained evidence that is inadmissible in the government's case-in-chief can be admitted on rebuttal to counter a defendant's perjury, *State v. Rutter,* 93 S.W.3d 714, 727 (Mo. banc 2002), it refused to extend *Havens* to allow use of the evidence in the government's case-in-chief to rebut statements made in the defendant's opening statement; such use must await defendant's actual testimony at trial. *Rutter*, 93 S.W.3d at 727–28.

Moreover, because the exclusionary rule is designed "to deter police misconduct," it only applies to illegal actions by police. *Ariz. v. Evans*, 514 U.S. 1, 11 (1995) (quoting *Ill. v. Krull*, 480 U.S. 340, 348 (1987), and *United States v. Leon*, 468 U.S. 897, 916 (1984)). Thus, when the alleged violation is the result of actions by someone other than the police, the exclusionary rule will not preclude use of the evidence obtained. *Evans*, 514 U.S. at 14–16 (error by court personnel); *Krull*, 480 U.S. at 346 (unconstitutional legislation); *Leon*, 486 U.S. at 916 (errors by magistrates and judges).

Perhaps the most significant limitation placed on the exclusionary rule was adoption of the good-faith exception in *Leon* and its companion case, *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). That exception provides that evidence seized "pursuant to a warrant issued by a detached and neutral magistrate should not be excluded, irrespective of the actual validity of the warrant, so long as the officer conducting the search acted in objectively reasonable reliance on that warrant." *State v. Brown*, 708 S.W.2d 140, 145 (Mo. banc 1986); *see also State v. Gordon*, 851 S.W.2d 607, 616 (Mo. App. S.D. 1993). *Leon* and *Sheppard* do not establish a blanket exception to the exclusionary rule. Both cases deal with defective warrants, and the rule does not extend generally to searches without a warrant. *See State v. Varvil*, 686 S.W.2d 507 (Mo. App. E.D. 1985). Moreover, the cases require objective, not subjective, good faith. *State v. Hensley*, 770 S.W.2d 730 (Mo. App. S.D. 1989).

In accordance with *Leon*, 468 U.S. 897, and *Sheppard*, 468 U.S. 981, suppression remains an appropriate remedy in four situations despite the fact that a warrant has been obtained:

1. When the affiant makes an intentional or reckless false statement

2. When the magistrate wholly abandons the judicial role

3. When the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable

4. When the warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid

State v. Hammett, 784 S.W.2d 293, 297 (Mo. App. E.D. 1989); *State v. Brown*, 741 S.W.2d 53 (Mo. App. W.D. 1987).

Missouri courts have taken the limits on the exception seriously and have made clear that exclusion should be decided on a case-by-case basis. *See, e.g.*, *Brown*, 741 S.W.2d at 60 (refusing to allow the good-faith exception to "save the day . . . in all cases where probable cause is lacking"); *see also State v. Munson*, 714 S.W.2d 515 (Mo. banc 1986) (Court cautions against cavalier use of the good-faith exception). Thus, when an officer "knowingly sought and seized items beyond the scope of the search warrant that he was executing," the good-faith exception did not apply. *Gordon*, 851 S.W.2d at 616. Similarly, when both the quality and quantity of information in a "bare bones" affidavit are incapable of supporting a finding of probable cause, the good-faith exception is not available. *Hammett*, 784 S.W.2d at 297; *see also Brown*, 741 S.W.2d at 59 (good-faith exception not applicable when affidavit "does not supply anything more than a most tenuous and conclusory suggestion . . . [of] criminal activity"). For a case in which the court refused to apply the good-faith exception because of false statements in the affidavit, see *State v. Trenter,* 85 S.W.3d 662, 679–83 (Mo. App. W.D. 2002).

The Supreme Court of Missouri has adopted the good-faith exception, *Brown*, 708 S.W.2d 140, indicating that *Leon*, 468 U.S. 897, is equally applicable under the Missouri Constitution and statutes. *State v. Watson*, 715 S.W.2d 277 (Mo. App. S.D. 1986); *State v. Sweeney*, 701 S.W.2d 420 (Mo. banc 1985). It appears that the good-faith exception is applicable to failures to conform to the statutes that render the warrant invalid, *Brown*, 708 S.W.2d at 146; *State v. Gannaway*, 786 S.W.2d 617, 619–20 (Mo. App. S.D. 1990), although a contrary conclusion was reached in *State v. Berkwit,* 689 S.W.2d 763, 765–66 (Mo. App. E.D. 1985).

Although Missouri courts have recognized that good-faith reliance on a warrant can be a basis for avoiding suppression, they infrequently use the good-faith exception even when it would be available as a basis for upholding admission of evidence obtained under a warrant. Rather, they rely on their duty to ensure that the magistrate had a "substantial basis" for concluding that probable cause exists. *See, e.g., State v. Kirby,* 128 S.W.3d 619, 621 (Mo. App. E.D. 2004); *State v. Dowell*, 25 S.W.3d 594, 605 (Mo. App. W.D. 2000); *but see State v. Pattie,* 42

S.W.3d 825, 827 (Mo. App. E.D. 2001) (court reverses trial court's suppression of evidence, relying on good-faith exception).

2. (§9.40) Exceptions to Exclusionary Rule: Inevitable Discovery and Independent Source

The Supreme Court has recognized additional exceptions to application of the exclusionary rule. In *Nix v. Williams*, 467 U.S. 431 (1984), the Court approved the "inevitable discovery" exception, holding that, when proof was introduced that the body of the victim would have been found in the same condition without the illegality, suppression was not necessary. *See also State v. Smith*, 735 S.W.2d 65 (Mo. App. E.D. 1987). Missouri courts have also recognized the exception, explaining that:

> Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. . . . Suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice.

State v. Lay, 896 S.W.2d 693, 701 (Mo. App. W.D. 1995) (quoting *State v. Butler*, 676 S.W.2d 809, 813 (Mo. banc 1984)); *State v. Engel*, 859 S.W.2d 822, 827–28 (Mo. App. W.D. 1993) (discussing history of exception).

To prevent the exception from swallowing the rule, inevitable discovery applies only when the prosecution establishes by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means. *State v. Blair*, 691 S.W.2d 259 (Mo. banc 1985), *cert. dismissed*, 480 U.S. 698 (1987), *overruled on other grounds by State v. Mease*, 842 S.W.2d 98, 106 (Mo. banc 1992); *see also*:

- *State v. Milliorn*, 794 S.W.2d 181, 184–87 (Mo. banc 1990) (inevitable discovery exception applies to inventory searches but requires showing that inventory would routinely and inevitably have been conducted);

- *State v. Coyne,* 112 S.W.3d 439, 443 (Mo. App. E.D. 2003); *State v. Richardson*, 810 S.W.2d 544 (Mo. App. W.D. 1991) (inevitable discovery applicable in light of testimony that department mandated impoundment and inventory in these circumstances);

- *State v. McNaughton*, 924 S.W.2d 517, 524 (Mo. App. W.D. 1996), *overruled on other grounds in State v. Pond*, 131 S.W.3d 792, 794 (Mo. banc 2004) (inevitable discovery appropriate when drug-sniffing dog was on its way).

Generally, absent evidence of standard operating procedures that would have clearly led to the search, *State v. Young*, 991 S.W.2d 173 (Mo. App. S.D. 1999), or proof that the government was actually pursuing an alternative line of investigation at the time of the constitutional violation, *State v. Rutter,* 93 S.W.3d 714, 726 (Mo. banc 2002), reliance on inevitable discovery is not appropriate. *But see State v. Rowland,* 73 S.W.3d 818, 824–25 (Mo. App. S.D. 2002) (court found it inevitable that a search warrant would have been sought even though that action was not already under way).

Courts should exercise care to use the exception only when it is determined that the subsequent search *would* have occurred and uncovered the evidence. The mere fact that the police could have done so should not be sufficient. *Compare Engel*, 859 S.W.2d at 828 (had police not been confused about the illegality of opening unlocked briefcases, "they would have obtained a valid search warrant, as they did for the locked briefcase), *with Lay*, 896 S.W.2d at 701 (police "would have been able to obtain a search warrant," although no showing that they would have done so). Thus, cases like *State v. Taylor*, 943 S.W.2d 675 (Mo. App. W.D. 1997), *mandate recalled and vacated,* 1 S.W.3d 610 (Mo. App. W.D. 1999), in which the court relied on inevitable discovery to prevent suppression of evidence, but failed to specifically focus its analysis on how the police would have discovered the evidence in any event, should be avoided. A close analysis of that case reveals, however, that the court appears to have been mixing independent source analysis with inevitable discovery without clearly distinguishing between the two. *Id.* at 677–79.

The Supreme Court approved the "independent source" exception in *Murray v. United States*, 487 U.S. 533 (1988), holding that evidence observed by law enforcement officers during an illegal entry of premises does not need to be excluded if the evidence is subsequently discovered during the execution of an otherwise valid search warrant sought and issued on the basis of information wholly unrelated to the prior entry. *See also Segura v. United States*, 468 U.S. 796 (1984); *State v. Miller*, 894 S.W.2d 649, 654 n.5 (Mo. banc 1995). This doctrine had previously been

recognized and applied in Missouri. *See State v. Redecker*, 572 S.W.2d 888, 890 (Mo. App. E.D. 1978); *State v. Thomas*, 491 S.W.2d 328, 330 (Mo. 1973).

3. (§9.41) Fruits of the Poisonous Tree and Purging the Taint

A final issue relating to the application of the exclusionary rule relates to the circumstances under which evidence derivative of a Fourth Amendment violation must be excluded as fruits of the poisonous tree. *State v. Miller*, 894 S.W.2d 649, 654 (Mo. banc 1995). The Court in *Miller* noted that there is "no steadfast rule" requiring exclusion of fruits; rather:

> [I]n determining whether the exclusionary rule should apply to render evidence inadmissible as "fruit of the poisonous tree," the question is "whether, granting establishment of the primary illegality, the evidence to which . . . objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Id. (quoting *State v. Lingar*, 726 S.W.2d 728 (Mo. banc 1987), and *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). The preliminary question is whether the evidence sought to be suppressed is a fruit of the illegal conduct in the first place. *See State v. Mosby*, 94 S.W.3d 410, 419 (Mo. App. W.D. 2003) (evidence "did not derive" from illegal government conduct, it cannot be deemed to be a "fruit of the poisonous tree").

In *Miller,* 894 S.W.2d 649, the government argued that an intervening consent had purged the taint of the prior illegal stop. Relying on *State v. Love*, 831 S.W.2d 631 (Mo. App. W.D. 1992), it contended that a "voluntary consent necessarily dissipates the taint" of the prior illegality. *Miller*, 894 S.W.2d at 654. The Court held that, although a voluntary consent may be sufficient to purge the taint of prior illegality, it does not necessarily do so and, therefore, does not obviate the need for a full analysis. To the extent that *Love* held to the contrary, it was overruled. *Miller*, 894 S.W.2d at 655.

Brown v. Illinois, 422 U.S. 590, 603–04 (1975), set out "three factors that should be considered in determining whether a confession retains the taint of a prior illegal seizure: (1) the temporal proximity of the illegality and the confession; (2) the presence of intervening circumstances; and (3) the purpose and

flagrancy of the official misconduct." *Miller*, 894 S.W.2d at 655. These same factors should be used to determine whether to suppress evidence obtained through a voluntary consent search following an illegal stop or arrest. *Id.* (citing *United States v. Tovar*, 687 F.2d 1210, 1215 (8th Cir. 1982)); *see also State v. Rodriguez*, 904 S.W.2d 531, 537–38 (Mo. App. S.D. 1995); *State v. Weddle*, 18 S.W.3d 389, 396 (Mo. App. E.D. 2000). While the third factor is frequently considered particularly important, "the absence of purposeful and flagrant misconduct cannot alone dissipate the taint in the complete absence of temporal distance and intervening circumstances." *Miller*, 894 S.W.2d at 656.

In *New York v. Harris*, 495 U.S. 14 (1990), the Supreme Court departed from normal attenuation analysis and adopted a per se rule when it held that, when probable cause to arrest exists, a statement taken outside a defendant's premises after a *Payton v. New York*, 445 U.S. 573 (1980), violation is not the fruit of illegality and does not need to be suppressed. This holding was applied and extended to a consent to search obtained after a *Payton* violation in *State v. Corpier*, 793 S.W.2d 430, 438–39 (Mo. App. W.D. 1990).

C. (§9.42) Motion to Suppress

A person aggrieved by an allegedly unlawful search or seizure and against whom there is a pending criminal proceeding growing out of the subject matter of the seizure may seek to prevent use of that evidence in the criminal proceeding. To do so, the individual must file a motion to suppress. *State v. Galazin*, 58 S.W.3d 500 (Mo. banc 2001).

1. (§9.43) General Requirements

Motions to suppress are governed by § 542.296, RSMo 2000. The motion shall be in writing and shall be filed with the court in which criminal proceedings relating to the subject matter of the seizure are pending. Section 542.296.2. The motion should be made before trial if the grounds for it are known. Section 542.296.3; Rule 24.05. If the motion is not made before trial, the court, in its discretion, may entertain the motion during trial, although courts are discouraged from having the hearing on the motion to suppress as part of the trial of the case. *State v. Young*, 534 S.W.2d 585 (Mo. App. W.D. 1976).

A hearing on the motion should be held before trial; at the hearing, the judge shall receive evidence on any necessary issue of fact. Section 542.296.6. Notice must be given to the prosecutor regarding the date, time, place, and nature of the hearing. Section 542.296.4. The defendant may testify at the suppression hearing, and any statements are not admissible at the subsequent trial. *United States v. Salvucci*, 448 U.S. 83 (1980). Although the Court has never explicitly so held, it appears that the defendant's statements, however, may be used for impeachment. *See id.* at 93–94 and n.9 (citing *United States v. Kahan*, 415 U.S. 239, 243 (1974)); *see also* §9.37, *supra*.

In the suppression hearing, the government bears the burden of establishing that the defendant's motion should be overruled, *State v. Milliorn*, 794 S.W.2d 181, 184 (Mo. banc 1990); § 542.296.6, once the defendant makes a sufficient assertion of standing to raise a violation of Fourth Amendment rights. *State v. Tipton*, 796 S.W.2d 109 (Mo. App. S.D. 1990). *But see State v. Burkhardt*, 795 S.W.2d 399, 404 (Mo. banc 1990). *See generally* §9.37, *supra*. The state's burden to establish that the defendant's motion should be overruled is by a showing of a preponderance of the evidence and not beyond a reasonable doubt. *State v. Sanders,* 16 S.W.3d 349, 351 (Mo. App. W.D. 2000); *see also State v. Young*, 991 S.W.2d 173 (Mo. App. S.D. 1999) (court took very seriously the state's requirement to meet its burden by a preponderance of the evidence).

If the motion to suppress is denied, the defendant "must, in order to preserve the issue for appellate review, make a specific objection to the items when they are offered in evidence at trial." *State v. Elliott*, 845 S.W.2d 115, 118 (Mo. App. S.D. 1993); *State v. Yowell*, 513 S.W.2d 397, 402–03 (Mo. banc 1974); *see also State v. Williams,* 9 S.W.3d 3, 11–12 (Mo. App. W.D. 1999) (failure to object at trial after litigating pretrial motion to suppress leads to plain error review). When the defendant has made a continuing objection to admission of evidence alleged to have been unlawfully seized in violation of the constitution, counsel's statement "no objection" when evidence is offered does not override continuing objection when all parties understand that counsel meant "no other objection." *State v. Baker,* 103 S.W.3d 711, 716–17 (Mo. banc 2003).

When the motion to suppress is taken with the case and argued after presentation of the evidence at trial, however, "the rationale for requiring a trial objection fails." *State v. Aziz*, 861 S.W.2d 803, 807 (Mo. App. E.D. 1993); *State v. Miller*, 815 S.W.2d 28, 34 (Mo. App. E.D. 1991). Thus, it appears that failure to object at that point will not preclude appellate review. *Id.* When the case is tried on the basis of submission of the evidence heard at the hearing on the motion to suppress and it is clear that defense counsel intended for the submission to serve to preserve the objection, appellate review is not precluded. *State v. LaFlamme*, 869 S.W.2d 183, 186 (Mo. App. W.D. 1993). Care is necessary, however, to avoid waiver of objection to admission of the evidence. *See State v. Apel*, 156 S.W.3d 461, 466 n.1 (Mo. App. W.D. 2005) (cautioning counsel regarding the only "sure way" to avoid risk of waiver). Additionally, the defendant must include the matter in the defendant's posttrial motion for a new trial. *Aziz*, 861 S.W.2d at 807; *State v. Flenoid*, 838 S.W.2d 462, 466 (Mo. App. E.D. 1992); *State v. Hardiman*, 943 S.W.2d 348 (Mo. App. S.D. 1997).

2. (§9.44) Appellate Review

If a motion to suppress is denied, the defendant may appeal after trial. If the motion to suppress is granted, the state, through the prosecutor or circuit attorney, may appeal. Section 547.200, RSMo 2000. Appeal by the state is interlocutory, § 547.200.3, and is governed by Rule 30.02. In ruling on a motion to suppress that was overruled, "an appellate court will consider the evidence presented both at the suppression hearing and at trial in determining whether the motion should have been granted." *State v. Goff,* 129 S.W.3d 857, 861–62 (Mo. banc 2004). Failure to include the transcript of the suppression hearing in the record on appeal precludes appellate review. *State v. Cotton,* 32 S.W.3d 577, 579 (Mo. App. W.D. 2000).

The standard of review used by the appellate court in reviewing the grant or denial of a motion to suppress has been the subject of some confusion. While it has been understood since *Illinois v. Gates*, 462 U.S. 213 (1983), that a judge reviewing the decision of a magistrate to issue a warrant is subjected to deferential review—whether there was a "substantial basis" for the finding of probable cause—the issue of the proper standard of review for appellate courts in reviewing warrantless searches had not been addressed by the Supreme Court. That issue was considered in

Ornelas v. United States, 517 U.S. 690 (1996), in which the Court held that appellate courts should engage in "independent appellate review of . . . ultimate determinations of reasonable suspicion and probable cause." *Id.* at 697. The Court believed that such independent review would help to "guide police, unify precedent, and stabilize the law." *Id.* at 698 (quoting *Thompson v. Keohane*, 516 U.S. 99 (1995)). According to the Court, de novo review "will come closer to providing law enforcement officers with a defined 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'" *Ornelas,* 517 U.S. 697–98 (quoting *N.Y. v. Belton*, 453 U.S. 454, 458 (1981)). The Court explained, however, that appellate review involves a two-step process: determination of "the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or probable cause." *Ornelas,* 517 U.S. at 696. Deferential review of findings of historical fact is appropriate; thus, appellate courts should review those facts only for "clear error," giving "due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* at 699. The ultimate determinations of probable cause or reasonable suspicion, however, require de novo review.

Although this mandate seems to have been a departure from the practice in Missouri, Missouri courts appear to have conformed after *Ornelas*, 517 U.S. 690. *See, e.g., State v. Goff,* 129 S.W.3d at 861–62; *State v. Hampton*, 959 S.W.2d 444, 450 n.28 (Mo. banc 1997); *State v. Weddle,* 18 S.W.3d 389, 391–92 (Mo. App. E.D. 2000); *State v. Tackett*, 12 S.W.3d 332, 336 (Mo. App. W.D. 2000). It is unclear, however, whether the test set out in *Ornelas* applies generally to issues relating to warrantless searches or only to determinations of probable cause and reasonable suspicion. Court decisions from other jurisdictions are mixed, c*ompare United States v. Tompkins,* 130 F.3d 117, 120 (5th Cir. 1997) (rejecting extension of *Ornelas* to review of lower court's determination regarding the validity of consent), *with Edwards v. Commonwealth,* 568 S.E.2d 454, 456 (Va. Ct. App. 2002) (applying *Ornelas* to consent), and Missouri has yet to clearly address the issue.

When a motion to suppress is erroneously denied and that denial is reversed on appeal, retrial is still appropriate even though the

evidence introduced at trial would have been insufficient without the suppressed evidence to make a submissible case. If it is possible that the prosecution can make a submissible case on retrial, discharge of the defendant is not required, *State v. Kinkead,* 983 S.W.2d 518, 519 (Mo. banc 1998), "because the state may produce other evidence that cures the evidentiary insufficiency." *State v. Granado*, 148 S.W.3d 309, 313 (Mo. banc 2004).

> [Additionally,] [w]here a case is reversed for trial court error in failing to sustain a motion to suppress, on remand the state may request a further evidentiary hearing on the motion to suppress to develop additional facts in opposition to the motion or it may proceed to trial without using the evidence illegally seized.

State v. Davis, 985 S.W.2d 876, 878 (Mo. App. E.D. 1998).

3. (§9.45) Review of Warranted Searches

Seeking suppression based on a challenge to a search conducted pursuant to a warrant raises unique issues. When a warrant is attacked on the ground that the affiant provided false information, it will be deemed invalid only if the defendant establishes that the affiant intentionally, knowingly, or recklessly included the false statement and that the remaining affidavit is insufficient to establish probable cause. *Franks v. Del.*, 438 U.S. 154 (1978); *State v. Hawkins*, 760 S.W.2d 926 (Mo. App. W.D. 1988). The defendant must make a "substantial preliminary showing" under *Franks*, *State v. Miller*, 815 S.W.2d 28, 33 (Mo. App. E.D. 1991), and bears the burden of setting forth specific allegations and an offer of proof showing what portions of the affidavit are claimed to be false and the basis for that claim. *State v. Laws*, 801 S.W.2d 68, 71 (Mo. banc 1990).

The deliberate omission of material information from a warrant application can be the basis for a successful challenge to the warrant. Such a challenge requires a showing that "(1) the police omitted facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading; and (2) that the affidavit if supplemented by the omitted information would not have been sufficient to support a finding of probable cause." *State v. Weide*, 812 S.W.2d 866, 870 (Mo. App. W.D. 1991); *see also Miller*, 815 S.W.2d at 33. An officer's failure to read police reports regarding the crime that had been prepared but not typed before the preparation of the affidavit does not constitute

intentional, knowing, or reckless disregard for the truth. *State v. Stallings*, 957 S.W.2d 383, 393–94 (Mo. App. W.D. 1997). A failure to advise the court of payments or promises of leniency to an affiant, *Weide*, 812 S.W.2d at 871, or about an informant's criminal history or involvement in criminal activity does not constitute a material omission or render an affidavit misleading. *State v. Mitchell,* 20 S.W.3d 546, 554–57 (Mo. App. W.D. 2000).

Where an affidavit in support of a warrant contains information derived from an illegal search, that information is tainted and must be disregarded, but it does not automatically invalidate the warrant. *State v. Mahsman,* 157 S.W.3d 245, 249, 251 (Mo. App. E.D. 2004). The question is whether, setting aside the tainted allegations, "the independent and lawful information stated in the affidavit is sufficient to show probable cause." *Id.* at 251 (quoting *State v. Macke*, 594 S.W.2d 300, 309 (Mo. App. E.D. 1980)). That determination is made by the reviewing court "without the deference ordinarily given to the issuing judge's decision on an affidavit containing only untainted information." *Mahsman,* 157 S.W.3d at 251.

The standard of review for searches conducted in accordance with a warrant is different from that for warrantless searches. While de novo review is appropriate for appellate review of probable cause determinations in cases without a warrant, *see* §9.44, *supra,* that is not the proper standard when a warrant was issued authorizing the search. In such cases, deferential review is required, and it is the duty of the reviewing court to ensure that the issuing judge had a "substantial basis" for finding probable cause. *State v. Norman,* 133 S.W.3d 151, 156 (Mo. App. S.D. 2004). The court in *Norman* engaged in a detailed analysis of the differing standards of review in Missouri for searches with and without warrants, and *Norman* should be consulted in this regard. *Id.* at 155–60; *see also State v. Rush*, 160 S.W.3d 844, 848–49 (Mo. App. S.D. 2005).

D. (§9.46) Motion for Return of Property

When a defendant moves to suppress and that motion is sustained, § 542.296.7, RSMo 2000, requires that the judge order the property subject to the motion to be returned to the moving party unless its retention is authorized by § 542.301, RSMo Supp. 2004, or other law. Section 542.301 governs return of stolen property and disposition of property used in the commission of a crime as well as obscene

materials. *State v. McAllister*, 767 S.W.2d 362, 364 (Mo. App. E.D. 1989). For a case discussing the return of property seized from a defendant who has been arrested, see *State v. Johnson*, 956 S.W.2d 941, 942 (Mo. App. W.D. 1997).

Currency is not a "tool[ ]" or "device[ ]" as used in § 542.301.1(2) and, therefore, cannot be subject to forfeiture based on that section. *State v. One Hundred Fifty-Two Thousand, Seven Hundred Sixty, and 00/100 Dollars ($152,760.00) in United States Currency*, 87 S.W.3d 374 (Mo. App. S.D. 2002). Video game machines used to commit the felony of promoting gambling in the first degree meet the statutory definition and are subject to forfeiture. *Chandler v. Hemeyer,* 49 S.W.3d 786, 792–93 (Mo. App. W.D. 2001). It is not necessary under § 542.301 that a conviction be obtained for forfeiture to occur. *Chandler*, 49 S.W.3d at 794.

A defendant who seeks return of property seized by the police may file a claim under § 542.301.2 praying that the court declare the property not subject to forfeiture and order that it be delivered to the moving party. In such a case, the notice and hearing provisions of § 542.301.2 must be followed. *McAllister*, 767 S.W.2d at 365. The state bears the burden of proving that it or another party has a right of possession superior to the person from whom the items were seized. *State v. Meeks*, 59 S.W.3d 531, 535–36 (Mo. App. E.D. 2001); *State v. Patchen*, 652 S.W.2d 265, 267–68 (Mo. App. W.D. 1983).

The one-year statute of limitations applicable to claims under § 542.301.1(1)(a) does not apply to individuals seeking return of property taken upon arrest. *Johnson*, 956 S.W.2d at 942; *McAllister*, 767 S.W.2d at 364–65; *see also Castelli v. City of Bridgeton*, 792 S.W.2d 909, 910 (Mo. App. E.D. 1990). Rather, a five-year statute of limitations applies, *Castelli* at 910; § 516.120(4), RSMo 2000, and begins to run not from the date of the seizure, but from when damages are sustained and capable of ascertainment. *Elam v. Dawson,* 156 S.W.3d 807, 809–10 (Mo. App. W.D. 2005). That may occur when police indicate they no longer need the items seized as evidence. *Id.* at 810. In *Williams v. Greene County Sheriff's Department,* 94 S.W.3d 450 (Mo. App. S.D. 2003), the Southern District, relying on the Western District case of *Yahne v. Pettis County Sheriff Department*, 73 S.W.3d 717 (Mo. App. W.D. 2002), held that the special statute of limitation found in § 516.130, RSMo 2000, does not apply to actions brought by a party from whom property has been seized. Rather, the statute of limitation found in § 513.630, RSMo 2000, applies. *Williams,* 94 S.W.3d at 452–54.

For a court to have jurisdiction to order the return of property, it must have jurisdiction over the *res* in question. Thus, if currency that is the subject of a claimant's motion has been transferred to the United States government before the circuit court judgment, the court has no jurisdiction to order its return. *State ex rel. Nixon v. Sweeney*, 936 S.W.2d 239 (Mo. App. S.D. 1996). When property is seized under a warrant, the officer seizing and holding that property "does so on behalf of the court . . . ." Because the "court has the authority to control the disposition of property seized pursuant to its warrant, . . . an officer holding property must respond to the orders of the court for which he acted, and holds property subject to the court's direction and disposition." *Boshers v. Humane Soc'y of Mo., Inc.,* 929 S.W.2d 250, 255 (Mo. App. S.D. 1996); *see also State v. Sledd*, 949 S.W.2d 643, 646 (Mo. App. W.D. 1997).

The issues regarding an individual's right to return of property are integrally related to the government's right of forfeiture. *See Sledd*, 949 S.W.2d at 646–48. Counsel considering seeking the return of property should consult the various statutes authorizing forfeiture, including § 195.140, RSMo Supp. 2004 (forfeiture of narcotics and money), § 313.832, RSMo 2000 (forfeiture related to gambling), and §§ 513.600, *et seq.*, RSMo 2000 and Supp. 2004 (Criminal Activity Forfeiture Act (CAFA)) as well as § 542.301. Additionally, it is recommended that counsel consult *Sledd*, 949 S.W.2d at 646–48 (which addresses the legislative history of § 513.647, now RSMo Supp. 2004), as well as *Karpierz v. Easley,* 31 S.W.3d 505 (Mo. App. W.D. 2000) (discussing CAFA). *See also* Chapter 33 of this deskbook.

IX. (§9.47) Conclusion

The law of search and seizure has changed significantly in the last 30 years, and with concern about terrorism and the advent of new technology, the issues are likely to get more complex. The balance between the individual's interests in freedom and privacy and the state's interests in security and effective law enforcement is a difficult one and is likely to keep pressure on the courts. The goal, elusive to this point, is to "give[ ] to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." *State v. Miller*, 894 S.W.2d 649, 657 (Mo. banc 1995) (quoting *Mapp v. Ohio*, 367 U.S. 643, 660 (1961)). Whether that goal can be met remains to be seen.

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Chapter 10

IDENTIFICATION

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I. (§10.1) Introduction

This chapter deals with the issue of identification in cases when the victim and perpetrator are unknown to each other. In these particular instances, the police will attempt to establish identity of the perpetrator by means of either a lineup, a showup, or a photograph identification procedure. This chapter also discusses identification by scientific methods, including DNA testing and fingerprinting.

II. Identification by Victim or Witness

A. (§10.2) Admissibility of Witness's Identification Testimony

The crucial test for determining the admissibility of identification testimony is two-pronged. First, the court must determine whether pretrial identification procedures were suggestive. If so, the court must then evaluate the impact of the suggestive procedure on the reliability of the identification made. *State v. Williams*, 717 S.W.2d 561, 564 (Mo. App. E.D. 1986), *cited with approval in State v. Greer*, 758 S.W.2d 126 (Mo. App. E.D. 1988). *See State v. Twitty*, 793 S.W.2d 561, 563 (Mo. App. E.D. 1990); *see also State v. Vinson*, 800 S.W.2d 444, 446 (Mo. banc 1990); *State v. Timmons*, 956 S.W.2d 277, 282 (Mo. App. W.D. 1997); *State v. Glover*, 951 S.W.2d 359, 362 (Mo. App. W.D. 1997).

Judicially recognized circumstances indicative of improper suggestions include the following:

- All in the lineup but the suspect are known to the identifying witness.
- Other participants in the lineup are grossly dissimilar in appearance from the subject.
- Only the suspect is required to wear distinctive clothing that the culprit wore.

- The witnesses are told by the police that they have caught the culprit, after which the defendant is brought before the witnesses alone or is viewed in jail.
- The suspect is pointed out before or during the lineup.
- The participants in the lineup are asked to try on an article of clothing that fits only the suspect.
- The witness is permitted to see the suspect in custody before the lineup.
- Witnesses are permitted to make wholesale identifications of the suspect in each other's presence.

See United States v. Wade, 388 U.S. 218, 233–34 (1967).

In Missouri, the courts have held that whether the identification procedure was prejudicially unfair must be determined by a consideration of the totality of the circumstances. It is, however, not suggestiveness but rather reliability of the evidence premised on the "totality of the circumstances" that is the linchpin to determine admissibility of identification evidence. *State v. Carter*, 572 S.W.2d 430, 435[8] (Mo. banc 1978); *State v. Cole*, 519 S.W.2d 370, 372[1] (Mo. App. E.D. 1975); *State v. McKee*, 639 S.W.2d 851 (Mo. App. E.D. 1982); *State v. Robinson*, 641 S.W.2d 423 (Mo. banc 1982); *State v. Story*, 646 S.W.2d 68 (Mo. banc 1983); *United States v. Briley*, 726 F.2d 1301 (8th Cir. 1984).

In *Neil v. Biggers,* 409 U.S. 188 (1972), the police used a showup procedure whereby the victim confronted the defendant alone at the police station. Even though it was conceded that a lineup consisting of several men would have been preferable to the showup by the defendant all by himself, the Supreme Court held that there were other indicia of trustworthiness that overcame the suggestiveness of the one-on-one confrontation. The factors the Court used in evaluating whether the indicia of trustworthiness overcame the suggestiveness included the following:

- Opportunity of witnesses to view the criminal at the time of the crime
- The witness's degree of attention
- The accuracy of the witness's prior description of the criminal
- The level of certainty demonstrated by the witness at the confrontation
- The length of time between the crime and the confrontation

Biggers, 409 U.S. at 199–200; *see also State v. McCreuiston*, 608 S.W.2d 460, 463[4] (Mo. App. E.D. 1980), as cited in *State v. Gullett*, 633 S.W.2d 454 (Mo. App. S.D. 1982); *Story*, 646 S.W.2d 68; *State v. Spears*, 821 S.W.2d 537 (Mo. App. E.D. 1991); *United States v. Thoreen*, 653 F.2d 1332, 1341 (9th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982); *State v. Gott*, 784 S.W.2d 344, 346 (Mo. App. S.D. 1990); *State v. Caldwell*, 785 S.W.2d 98, 101 (Mo. App. S.D. 1990) ("[r]eliability is to be assessed under the totality of the circumstances").

In the application of this rule, a three-part test similar to that stated in *Biggers*, 409 U.S. 188, is used. Consideration is given to:

1. the presence of an independent basis of identification;
2. the absence of any suggestive influence by others; and
3. a positive courtroom identification.

State v. Holland, 534 S.W.2d 590 (Mo. App. W.D. 1976); *see also State v. Belk*, 632 S.W.2d 103 (Mo. App. S.D. 1982).

If elements 1 and 3 are met under the factors in *Holland,* 534 S.W.2d 590, for determining whether an identification is reliable under the totality of the circumstances, the testimony of the witness is automatically admitted. *State v. Nunn*, 724 S.W.2d 257, 258 (Mo. App. W.D. 1986); *State v. Toney*, 680 S.W.2d 268 (Mo. App. E.D. 1984); *State v. Littleton*, 649 S.W.2d 225 (Mo. banc 1983); *United States v. Henderson*, 719 F.2d 934 (8th Cir. 1983).

An examination of *Manson v. Brathwaite*, 432 U.S. 98 (1977), confirms the criteria laid down in *Biggers*, 409 U.S. 188, to determine the admissibility of evidence offered by the prosecution concerning an identification. If the criteria are met, there is no due process violation. *Brathwaite*, 432 U.S. at 109; *see also Gregory v. Wyrick*, 730 F.2d 542 (8th Cir. 1984), *Adail v. Wyrick*, 711 F.2d 99 (8th Cir. 1983), and *Henderson*, 719 F.2d 934, all applying the *Biggers* criteria.

Examining the totality of the circumstances necessarily means that the entire trial must be scrutinized to see whether, after taking all the circumstances of the confrontation into account, the confrontation was so unfair as to be unconstitutional. *Clemons v. United States*, 408 F.2d 1230, 1250 (D.C. Cir. 1968).

In *Clemons* consideration of the following facts was approved:

- Was the defendant the only individual that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion that he was shown alone to the witness?

- Where did the confrontation take place?

- Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a lineup?

- Was the witness aware of any observation by another or other evidence indicating the guilt of the suspect at the time of the confrontation?

- Were any tangible objects related to the offense placed before the witness that would encourage identification?

- Was the witness's identification based on only part of the suspect's total personality?

- Was the identification a product of mutual re-enforcement of opinion among witnesses simultaneously viewing the suspect?

- Was the emotional state of the witness such as to preclude objective identification?

- Were any statements made to the witness before the identification indicating that the police were sure of the suspect's guilt?

- Was the witness's observation of the offender so limited as to render the witness particularly amenable to suggestion, or was the witness's observation and recollection of the offender so clear as to insulate the witness from a tendency to identify on less than a positive basis?

Impermissible suggestiveness can rise to the level of excluding an identification. For an example of practices permitted by the courts, see a summary in *State v. Hornbuckle*, 769 S.W.2d 89 (Mo. banc 1989). *Hornbuckle* stands for the proposition that, "[w]hile there are factors

which may have operated to cloud identification, within the parameter of impermissible suggestiveness, the extent to which the perception and memory of a witness is influenced by outside sources is a question for the trier of fact." *Id*. at 94.

A motion to suppress evidence of photographic identification and lineup identification of a defendant is limited on review by the appellate court to a determination of whether the evidence was sufficient to sustain the trial court's findings. *State v. Motley*, 740 S.W.2d 313, 317 (Mo. App. E.D. 1987) (citing *State v. Downing*, 671 S.W.2d 279, 280–81 (Mo. App. E.D. 1983)). Thus, in determining the admissibility of identification testimony, reliability rather than suggestiveness provides the linchpin in securing due process. *Robinson*, 641 S.W.2d at 427.

B. (§10.3) Burden of Proof

The defendant's burden is to prove that the identification procedure was unnecessarily and impermissibly suggestive. Only then will the court consider the reliability of the identification by balancing the *Neil v. Biggers,* 409 U.S. 188 (1972), factors against the suggestiveness of the procedure. *United States v. Thompson*, 730 F.2d 82, 85 (8th Cir. 1984), *cert. denied*, 469 U.S. 1024 (1984); *State v. Hill*, 839 S.W.2d 605 (Mo. App. W.D. 1992).

To prevail and suppress testimony when a showing of impermissible suggestivity exists, the defendant bears the burden of proving the unreliability of the testimony, which goes to the existence of an independent basis of identification. *See State v. Toney*, 680 S.W.2d 268, 276 (Mo. App. E.D. 1984) (cited with approval in *Williams v. State*, 755 S.W.2d 609 (Mo. App. E.D. 1988)); *State v. White*, 790 S.W.2d 467, 472 (Mo. App. E.D. 1990).

The importance of suggestiveness of out-of-court identification arises in the evaluation of the in-court identification. The question is the nexus between any claimed suggestiveness and the factors of reliability. Rarely will the nexus be so complete as to require the eyewitness identification to be removed from the jury's consideration. Normally, the issue will be one for the fact-finder and ordinarily a matter for cross-examination to test the reliability of the in-court identification by calling the jury's attention to the suggestibility of the original identification. *State v. Sanders*, 621 S.W.2d 386, 389 (Mo. App. W.D. 1981) (cited in *State v. Toney*, 680 S.W.2d 268); *see also State v. Charles*, 612 S.W.2d 778, 780 (Mo. banc 1981), *cert. denied*, 454 U.S. 972 (1981).

In *Toney*, 680 S.W.2d 268, the court suggested that, even when there has been a showing of a lineup that was, arguably, impermissibly suggestive, the defendant has to demonstrate a connection between the suggestiveness of the live lineup and the factors of reliability. These factors include:

> (1) The opportunity of the witness to view the criminal at the time of the crime; (2) the witness'[s] degree of attention; (3) the accuracy of the witness'[s] prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Id. at 275 (citing *State v. Higgins*, 592 S.W.2d 151, 159 (Mo. banc 1979)).

C. (§10.4) Exclusionary Rule—Fourth Amendment Considerations

Is an otherwise "fair" pretrial confrontation and otherwise admissible in-court identification tainted by an unlawful arrest without probable cause under the Fourth Amendment? The Fourth Amendment renders inadmissible not only tangible evidence obtained as a result of unconstitutional (without probable cause) arrest, but also the intangible fruits of such an arrest. *See Wong Sun v. United States*, 371 U.S. 471 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Davis v. Miss.*, 394 U.S. 721 (1969). These decisions hold that intangibles such as confessions and lineup identifications are not admissible in evidence if they are the fruits of an unconstitutional seizure of the person confessing.

In Missouri, identification testimony that is the product of an unlawful arrest, search, or seizure has been held to be inadmissible at trial. *State v. Thomas*, 491 S.W.2d 328 (Mo. 1973). In *Thomas* the Court applied the *Wong Sun* test, 371 U.S. at 488, i.e., "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

The *Wong Sun* rule, which determines whether the taint of the illegality has been sufficiently purged so as not to include any exploitation of the illegality, has been held (as to *Miranda* violations) not to be a per se or "but/or" rule, but a rule that must be applied to the facts of each case. *Brown v. Ill.*, 422 U.S. 590 (1975).

The court in *State v. Mayes*, 654 S.W.2d 926 (Mo. App. E.D. 1983), held that the admittance of a photograph that took place after an unlawful arrest required reversal when it was used to bolster the contradictory testimony of the only eye witness who could positively identify the perpetrator of the crime. *See also State v. Tettamble*, 720 S.W.2d 741 (Mo. App. E.D. 1986).

State v. Toney, 680 S.W.2d 268 (Mo. App. E.D. 1984), held that the lineup was not the fruit of an unlawful arrest when the defendant was arrested illegally on an unrelated charge and then arrested under a valid warrant while in jail.

In Missouri, an illegal arrest does not deprive the trial court of jurisdiction to try the case. *State v. Moore*, 580 S.W.2d 747, 749 (Mo. banc 1979). An illegal arrest does not necessitate the suppression of the defendant's face as a species of evidence suppressible as a fruit of an illegal arrest. *State v. Berry*, 609 S.W.2d 948 (Mo. banc 1980); *United States v. Crews*, 445 U.S. 463 (1980). In *State v. Brewer*, 861 S.W.2d 765, 768 (Mo. App. S.D. 1993), the court held that, just as in *Berry*, 609 S.W.2d at 952 n.3, a defendant's *presence* at a crime scene cannot be assailed as a "fruit of an illegal arrest" under the Fourth Amendment. *Brewer*, 861 S.W.2d at 768 (quoting *State v. Ford*, 677 S.W.2d 352, 354 n.2 (Mo. App. E.D. 1984)).

D. Lineups

1. Right to Counsel at the Lineup

a. (§10.5) Generally

Because knowledge of the historical development of a right will often help counsel understand that right, the following discussion traces the development of the Sixth Amendment right to counsel to the present state of the law.

To guarantee that identification procedures are fair and devoid of suggestion, the Supreme Court has ruled that:

- a post-indictment, out-of-court identification of the accused was a critical stage of a criminal prosecution;
- the Sixth Amendment requires the right to the assistance of counsel for the accused; and
- the exclusionary rule would be applied to evidence obtained in violation of that right.

United States v. Wade, 388 U.S. 218 (1967); *Gilbert v. Cal.*, 388 U.S. 263 (1967). The rulings in *Wade* and *Gilbert,* requiring counsel at the out-of-court identification stage, were not retroactive and were applicable only to confrontation conducted in the absence of counsel after June 12, 1967. *See Stovall v. Denno*, 388 U.S. 293 (1967).

When there was a denial of the defendant's Sixth (and Fourteenth) Amendment right to counsel under *Gilbert*, a per se exclusionary rule was applied to testimony concerning the out-of-court identification. In addition, the in-court identification would be excluded if it was evidence derived from a lineup conducted in violation of the accused's constitutional right to the presence of counsel at the critical lineup. *Gilbert,* 388 U.S. at 273. In *Gilbert* the prosecution presented evidence in its case-in-chief concerning the lineup identification. The Court refused to permit the state to show that the testimony had an independent source, and the per se exclusionary rule was the only effective sanction. *Id*.

In *Wade*, 388 U.S. 218, however, the Court recognized that there could be an independent source for the in-court identification (other than the lineup) that would not necessitate the application of the per se exclusionary rule.

In *Wade* the government did not bolster the in-court identification with proof of the lineup identification. The Court applied a test other than the *Gilbert* per se exclusionary rule—the *Wong Sun* test (*Wong Sun v. United States*, 371 U.S. 471 (1963))—to determine whether the in-court identification had an independent origin. The *Wong Sun* test is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wade,* 388 U.S. at 241.

In *Wade* the Court stated that the factors to be used in judging the independent source of the in-court identification include the following:

- The prior opportunity to observe the alleged criminal act

- The existence of any discrepancy between any pre-lineup description and the defendant's actual description
- Any identification of another person before the lineup
- The identification by picture of the defendant before the lineup
- Failure to identify the defendant on a prior occasion
- The lapse of time between the alleged act and the lineup identification

It has been suggested that the in-court identification has an independent source when the court finds that the identifying witness, by drawing on the memory of the events of the crime, has retained such a definite image of the defendant that the witness, in court, is able to make an identification without dependence on or assistance from the tainted pretrial confrontation and unaffected by any observations, prompting, or suggestions that took place. *See United States ex rel. Phipps v. Follette*, 428 F.2d 912 (2nd Cir. 1970).

Using these tests, the courts will most always find an independent source, leaving the question of the validity of the identification (based on the independent source) for the fact-finder to determine.

In both *Wade*, 388 U.S. 218, and *Gilbert*, 388 U.S. 263, the lineup took place after the indictment. In neither case, however, did the United States Supreme Court distinguish between pre-indictment and post-indictment lineups. Moreover, the Court held in *Gilbert* and *Wade* that the lineup was a critical stage of the proceeding and that the defendant, therefore, was entitled to counsel. *See Coleman v. Ala.*, 399 U.S. 1 (1970).

In 1972, the Supreme Court limited the *Wade*, *Gilbert*, and *Stovall*, 388 U.S. 293, rulings by holding that the right to counsel at pretrial identification procedures did not attach until or after the adversary judicial proceedings have been initiated. *Kirby v. Ill.*, 406 U.S. 682 (1972).

The decision in *Kirby* has de-emphasized the right-to-counsel issue and replaced it with emphasis on the manner in which the lineup was conducted. While some courts have followed the *Kirby* decision blindly, others have noted that *Kirby* was a plurality opinion and, therefore, not binding on the states, at

least in its broad pronouncements on right to counsel. *See People v. Anderson*, 205 N.W.2d 461 (Mich. 1973); *State v. Gray*, 503 S.W.2d 457 (Mo. App. E.D. 1973).

In Missouri, before *Kirby*, 406 U.S. 682, it had been decided that lack of counsel at a lineup did not deprive a defendant of the right to counsel or due process when the defendant had not been indicted and no information had been filed before the lineup. *State v. Walters*, 457 S.W.2d 817, 819 (Mo. 1970).

In 1972, the Supreme Court of Missouri examined its procedure to determine at which point the "adversary judicial proceedings" initiated so as to determine when to apply *Kirby*, 406 U.S. 682. *Arnold v. State*, 484 S.W.2d 248 (Mo. 1972). Because under Missouri procedure the adversary judicial proceeding commenced at the filing of the complaint and the issuance of a warrant, presence of counsel at a lineup was required. *Id*. at 250.

The decision in *Arnold* meant that, once a complaint was filed and a warrant issued, counsel was required at a lineup even though a criminal prosecution had not necessarily commenced.

In 1976 the Supreme Court of Missouri decided to overrule *Arnold* because it was in conflict with other holdings of the Court, which were consistent with *Kirby*, 406 U.S. 682. *Morris v. State*, 532 S.W.2d 455 (Mo. banc 1976). In re-examining its position as to the stage at which adversary judicial proceedings commence and Sixth Amendment guarantees are applicable to the defendant, the Court held that the initiation of judicial criminal proceedings was the appropriate point at which the defendant would be entitled to counsel under *Kirby*, 406 U.S. 682. The Court indicated that the initiation of judicial proceedings could occur by way of formal charge, preliminary hearing, indictment, information, or arraignment. Specifically, the Court held that the issuance of an arrest warrant does not initiate an adversary judicial proceeding. *Morris,* 532 S.W.2d at 458.

Based on the holding in *Morris*, an accused is entitled to counsel at a post-indictment or post-information lineup. No presence of counsel is required, however, when the lineup occurs before the defendant has been formally charged. *State v.*

Motley, 740 S.W.2d 313 (Mo. App. E.D. 1987) (citing *Morris,* 532 S.W.2d at 457).

In *State v. Abram*, 632 S.W.2d 60 (Mo. App. E.D. 1982), the court specifically held that a post-information or post-indictment, out-of-court lineup identification must be excluded per se if the accused's counsel is not present; absence of counsel violates an accused's Sixth Amendment right to counsel. The Eighth Circuit, in examining this issue, has held that there is no right to counsel before charges have been filed. *United States v. Amrine*, 724 F.2d 84 (8th Cir. 1983); *United States v. Olson*, 730 F.2d 544, 546 (8th Cir. 1984).

b. (§10.6) Waiver

A defendant may waive the constitutional right to counsel at a post-indictment/information lineup proceeding as long as the waiver is intelligently and knowingly made. *See United States v. Wade*, 388 U.S. 218 (1967); *Carnley v. Cochran*, 369 U.S. 506 (1962); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Information that the defendant has a right to counsel is necessary for the defendant to waive that right. *Long v. United States*, 424 F.2d 799 (D.C. Cir. 1969).

The burden of establishing an intelligent and knowing waiver of right to counsel at a lineup is on the government. *United States v. Valez*, 431 F.2d 622 (8th Cir. 1970).

The waiver of a defendant's right to counsel does not need to be expressed but can be inferred from the conduct of the defendant. *See United States v. Sublet*, 644 F.2d 737, 742 (8th Cir. 1981).

c. (§10.7) Substitute Counsel

In *United States v. Wade*, 388 U.S. 218 (1967), the United States Supreme Court left open the question of whether the presence of substitute counsel might suffice when notification and presence of the suspect's own counsel would result in prejudicial delay. *Id*. at 237.

The use of substitute counsel has been held by other courts to be proper and to satisfy the *Wade*/*Gilbert* rule (§10.5, *supra*)

requiring the presence of counsel. *Gilbert v. Cal.*, 388 U.S. 263 (1967); *United States v. Kirby*, 427 F.2d 610 (D.C. Cir. 1970); *United States v. Valez*, 431 F.2d 622 (8th Cir. 1970).

In Missouri, the use of substitute counsel has been upheld in *State v. Sigh*, 470 S.W.2d 503 (Mo. banc 1971).

2. Role of Counsel at the Lineup

a. (§10.8) Generally

In accordance with *United States v. Wade*, 388 U.S. 218 (1967), and *Moore v. Illinois*, 434 U.S. 220 (1977), a general per se exclusionary rule applies to testimony of pretrial identification at or after the initiation of adversary judicial proceedings. *See* §10.5, *supra*. While the *Wade* Court did not define the role of counsel at the lineup, in *United States v. Allen*, 408 F.2d 1287, 1289 (D.C. Cir. 1969), the District of Columbia Circuit stated:

> It would seem that appellant's counsel might best be able to serve his client's interest and the interest of justice if he is given in advance of the lineup the names of the witnesses who would attend; the time, place and nature of the crimes involved; and the descriptions of the suspect, if any, which the witnesses had given to the police. Counsel also might be allowed to have a role in setting up the lineup and proposing changes to avoid suggestive features. If such a procedure were followed, it might well be that, absent plain error or circumstances unknown to counsel at the time of the lineup, no challenges to the physical staging of the lineup could successfully be raised beyond objections raised at the time of the lineup.

See also Spriggs v. Wilson, 419 F.2d 759 (D.C. Cir. 1969).

An interview of the witness should be conducted as expeditiously as possible after the lineup to elicit doubts regarding the lineup identification. *See also* Chapter 3 of this deskbook.

b. (§10.9) Checklist

1. Let the suspect know what to expect.
2. Before the lineup, demand a copy of the description previously furnished by the witness—if it is not available, request that the witness provide one in writing before the lineup with a copy to counsel.
3. Determine the name of the witness.

4. Determine the time, place, and nature of the crime involved.
5. Insist on viewing other participants in the lineup to ensure fairness.
6. Obtain from other participants names, addresses, occupations, and physical characteristics.
7. Object to police personnel or non-prisoners being placed in the lineup.
8. Inquire as to whether the witness has previously viewed the suspect by photograph.
9. Ensure that the defendant is not wearing unique or attention-drawing clothing.
10. Ensure that the witness has not previously described clothing similar to that of counsel's client.
11. Insist that there be at least six or more individuals in the lineup.
12. Request that more than one lineup be held and that the client not appear in the first lineup.
13. Ensure that the client has no distinguishable physical characteristics (scars, limp, etc.).
14. Ensure that witnesses are separated from each other.
15. Request an interview with the witness before the lineup to ascertain the description and what police have told the witness and ensure that the witness has not heard the name of the suspect the witness is to view.
16. Insist that participants have similar physical characteristics, e.g., glasses, age, height, size, color, or hair.
17. Inquire if suspects will be called on to speak and what they will say.
18. Ensure that the client has no speech peculiarities, e.g., lisp, accent.
19. Insist on a photograph of the lineup—or take it yourself.
20. Insist on hearing all conversations between the police and the witness viewing the lineup.
21. Insist on being present at the witness post-lineup interview.
22. Make a record of objections; have the court reporter present to record, or have the police sign an acknowledgment of demands.
23. If the witness fails to make an identification in the first lineup in which the client appears, object to further lineups.

Counsel should consider making these requests even if the police do not legally have to comply because it is very difficult to have a suggestive lineup identification suppressed if there is an independent basis for the in-court identification.

3. (§10.10) Notice of Lineup

The defendant and defendant's counsel must be notified of the impending post-indictment lineup, and counsel's presence is a requisite. *See United States v. Wade*, 388 U.S. 218 (1967) (§10.5, *supra*).

The fact that a defendant may be represented by counsel on other charges does not infer an attachment of the *Wade* right to counsel on the new charge. *State v. Montgomery*, 596 S.W.2d 735 (Mo. App. E.D. 1980).

But if defendant's counsel is not notified because of an administrative slipup, substitute counsel is permissible to avoid prejudicial delay. *See United States v. Kirby*, 427 F.2d 610 (D.C. Cir. 1970).

4. (§10.11) Defendant's Right to Lineup

The failure to hold an actual lineup does not make a photographic display suggestive. *State v. Hadley*, 736 S.W.2d 580 (Mo. App. S.D. 1987). There is no constitutional right to a lineup. *State v. Haselhorst*, 476 S.W.2d 543, 547 (Mo. 1972) (cited in *State v. Knox*, 529 S.W.2d 455 (Mo. App. E.D. 1975)). Likewise, two photographic displays of the defendant when the defendant was the only one to show two full face views were not flawed or so suggestive as to violate due process of law. *Hadley,* 736 S.W.2d at 591.

The Eighth Circuit has held that a defendant's right to a pretrial lineup is left to the discretion of the trial judge. *United States v. Ostertag*, 619 F.2d 767, 771 (8th Cir. 1980).

In *United States v. Key*, 717 F.2d 1206 (8th Cir. 1983), the Eighth Circuit held that the court should order a pretrial lineup if it is requested by the defendant in light of justice and fair play, but there is no right to a lineup. While there is no constitutional right to compel the government to conduct a pretrial lineup, the court can and should order a lineup if the interests of justice and fair play require a pretrial lineup. *Id.* at 1209 (per curiam); *see also* Rule 25.06.

5. (§10.12) Compelled Participation in Lineup—Fifth Amendment Considerations

The Fifth and Fourteenth Amendments apply to the manner in which the lineup is conducted, but they do not grant the defendant the right to refuse to appear in lineups, as a lineup is non-testimonial in nature. *See United States v. Wade*, 388 U.S. 218 (1967), §10.5, *supra*.

Defendants free on bail may be compelled to stand in the lineup. *See United States v. Scarpellino*, 431 F.2d 475 (8th Cir. 1970).

Under Rule 25.06, the state, by written motion, may request a court order for the defendant to:

- appear in a lineup;
- speak for identification;
- be fingerprinted;
- pose for photographs not involving reenactment of a scene;
- try on articles of clothing;
- provide a handwriting sample;
- submit to the taking of specimens from under the fingernails;
- submit to the taking of samples of blood, hair, and other bodily materials as long as the taking involves no unreasonable intrusion (*see also* Chapter 9 of this deskbook, Search and Seizure); and
- submit to a reasonable physical or medical inspection.

It should be noted that, under Rule 25.06, the court must find the request to be reasonable, and the court must ensure that the defendant's constitutional rights are protected. The state must show good cause for the request. Upon request of either party, the court must conduct a hearing on the necessity of the discovery requested. *State v. Clark*, 711 S.W.2d 885, 888 (Mo. App. E.D. 1986); *see also* Chapter 7 of this deskbook, Discovery by Right or Through Court Action.

Under Rule 25.06, the court must make the grounds for its decision a part of the record, and the court must specify the material and information to be disclosed and time and manner in which the defendant will make the disclosure. The defendant's counsel has the right to be present during the disclosure.

6. (§10.13) Impermissible Suggestivity in Lineups

Missouri appellate courts assess the reliability of identification procedures under the totality of the circumstances and consider several factors, including the following:

- The opportunity of the witness to view the subject at the time of the crime
- The witness's degree of attention
- The accuracy of the witness's prior description of the criminal
- The level of certainty demonstrated by the witness at the confrontation
- The length of time between the crime and the confrontation

State v. Solomon, 7 S.W.3d 421 (Mo. App. S.D. 1999); *see also State v. Middleton,* No. CR195-8F (Adair County Cir. Ct. Aug. 5, 1999), *reh'g denied,* 995 S.W.2d 443 (Mo. banc 1999). Identification testimony is usually admissible because courts rely on the good sense and judgment of jurors for determining the trustworthiness of the identification. *Id.*

Police are not required to act as theatrical casting agents in setting up a jailhouse lineup. In *Solomon,* 7 S.W.3d 421, the police directed the defendant, along with everyone in the jailhouse lineup, to look up. When the defendant failed to respond to the first two requests, a third request to him, specifically by number, did not make the lineup impermissibly suggestive.

In *Solomon* the defendant also claimed that two of the inmates in the jailhouse lineup were several inches taller than the victim had described to the police on the day of the attack. In denying the claim that this was impermissibly suggestive, the court noted that to exclude identification testimony, the defendant must show that:

- the pretrial identification procedure was impermissibly suggestive; and
- the suggestive procedure made the identification at trial unreliable.

Identification testimony will only be excluded when the pretrial identification procedure was so suggestive that it gave rise to a very substantial likelihood of irreparable misidentification. *Id.*

In *State v. Gibbs*, 875 S.W.2d 159, 161 (Mo. App. E.D. 1994), the court held that the police are required to make "reasonable efforts" to find participants with physical characteristics similar to the suspect in a lineup. If reasonable efforts are taken, the lineup will not be considered impermissibly suggestive. *Id.*; *see also State v. Cooks*, 861 S.W.2d 769, 772 (Mo. App. E.D. 1993).

Furthermore, it has been held in Missouri that having a defendant appear in both a photograph lineup and a live lineup did not result in an impermissibly suggestive set of circumstances. *Olds v. State*, 891 S.W.2d 486, 489 (Mo. App. E.D. 1994).

In *State v. Weaver*, 912 S.W.2d 499, 520–21 (Mo. banc 1995), the Court held that a lineup is not impermissibly suggestive merely because of the color or characteristics of the clothing of the persons in the lineup. *Id.* (citing *State v. Tringl*, 848 S.W.2d 29, 32 (Mo. App. E.D. 1993)). The rule is that a lineup will be considered impermissibly suggestive only if the clothing is the sole basis of the identification. *Id.*

In *Weaver*, 912 S.W.2d 499, the Court stated that the basis for the witnesses' identification of the defendant was both the color of his clothing and his general build and appearance. The Court also noted that the identification of the defendant was consistent with the description previously given by the witnesses. Consequently, the identification was not impermissibly suggestive because the defendant could not prove that the identification process utilized by the police would "give rise to a substantial likelihood of irreparable misidentification." *Id.* at 521.

In *State v. Burns*, 581 S.W.2d 590 (Mo. App. E.D. 1979), the court held that the fact that the defendant was the only one in the lineup whose photograph had been previously shown to the victim was not impermissibly suggestive and was not a per se violation of the defendant's rights requiring suppression. *See State v. Conley*, 541 S.W.2d 4 (Mo. App. W.D. 1976); *State v. McIntosh*, 546 S.W.2d 756, 758 (Mo. App. W.D. 1977).

7. (§10.14) Videotaped Lineups and Sound Recordings

In *State v. Gomillia*, 529 S.W.2d 892 (Mo. App. E.D. 1975), a videotape that was made before the initiation of any adversary proceeding as defined by *United States v. Kirby*, 427 F.2d 610 (D.C. Cir. 1970), was presented to a witness after the initiation of adversary proceedings and within two days of the commencement of trial. In *Gomillia* the court found that even if counsel should have been present under *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967) (§10.5, *supra*), the per se exclusionary rule was not applicable unless there was evidence of taint that could not be overcome by an independent source to support the in-court identification. *Gomillia*, 529 S.W.2d at 899.

The Eighth Circuit has held that there is no right to counsel at a post-indictment showing of a videotaped lineup that was taped before indictment because videotape lineups are analogous to photograph lineups. *United States v. Amrine*, 724 F.2d 84 (8th Cir. 1983). Certain types of identification procedures, because of their nature, do not trigger the Sixth Amendment right to counsel regardless of when they occur. *Id*. at 86; *see also United States v. Dupree*, 553 F.2d 1189, 1192 (8th Cir. 1977), holding that there is no right to counsel at the playing of a tape-recorded voice array.

In *State v. Seaton*, 674 S.W.2d 214, 216 (Mo. App. S.D. 1984), the court excluded a tape recording intended to be used in testimony of a rape victim's ability to recognize the defendant's voice when "no attempt was made to identify and authenticate the tape." In *State v. Wahby*, 775 S.W.2d 147, 153–54 (Mo. banc 1989), the foundation requirements for use of a tape were listed as met when:

- the device was capable of recording;
- the operator was competent;
- there were no additions or deletions;
- the tape had been preserved; and
- the recording accurately reflected the conversation recorded.

See also State v. Morton, 684 S.W.2d 601, 605 (Mo. App. S.D. 1985).

The use of a videotaped lineup that was prepared before the offense in question, that had the defendant as part of the lineup, and that was accompanied by the police officers' testimony that

the lineup was prepared before the investigation could reasonably indicate to a layperson that the defendant had been involved in some previous criminal activity and is error because the evidence is irrelevant and casts suspicion on the defendant. *See State v. Theus,* 967 S.W.2d 234 (Mo. App. W.D. 1998). Reversal, however, is not automatic but is "dependant on the circumstances of the case" and would depend on the "extent of prejudice therefrom." *Id.* at 240 (citing *State v. Woody,* 699 S.W.2d 517, 524 (Mo. App. S.D. 1985)).

When the testimony of prior criminal activity may be highly prejudicial, particularly when balanced against the typical absence of probative value, *see State v. Garrett,* 825 S.W.2d 954, 958 (Mo. App. E.D. 1992), the circumstances are examined by the court in light of the strength of the state's case. *See State v. Motley,* 740 S.W.2d 313, 317 (Mo. App. E.D. 1987).

E. Photograph Identification

1. (§10.15) Right to Counsel at Photograph Displays

The Supreme Court has held that the Sixth Amendment right to counsel does not apply *at all* to photographic displays even though the defendant is in custody and under indictment. *See United States v. Ash*, 413 U.S. 300 (1973); *see also State v. Montgomery*, 596 S.W.2d 735 (Mo. App. E.D. 1980). The *Wade* decision's right to counsel does not attach in Missouri just because the defendant is represented by counsel on other charges. *United States v. Wade*, 388 U.S. 218 (1967) (§10.5, *supra*).

State v. Trimble, 654 S.W.2d 245 (Mo. App. S.D. 1983), follows *Ash,* 413 U.S. 300. *See United States v. Amrine*, 724 F.2d 84 (8th Cir. 1983) (there is no right to counsel at a showing of a pre-indictment video lineup).

2. (§10.16) Impermissible Suggestivity in Photograph Identification

The mere fact that a pretrial identification procedure is suggestive and unnecessary does not amount to a violation of the due process clause of the Fourteenth Amendment when the identification is otherwise reliable. *See Manson v. Brathwaite*, 432 U.S. 98 (1977); *Simmons v. United States*, 390 U.S. 377 (1968).

Missouri courts have been steadfast in their application of the five factors outlined in *Brathwaite* to determine the reliability of in-court identification. The factors to be considered include:

1. the opportunity of the witness to view the criminal at the time of the crime;
2. the witness's degree of attention;
3. the accuracy of the witness's prior description of the criminal;
4. the level of certainty demonstrated in the confrontation; and
5. the time between the crime and the confrontation.

The corrupting effect of the suggestive identification is weighed against these factors. In determining the admissibility of identification testimony, reliability rather than suggestiveness provides the linchpin in securing due process. *State v. Robinson*, 641 S.W.2d 423, 427 (Mo. banc 1982) (cited in *State v. Motley*, 740 S.W.2d 313 (Mo. App. E.D. 1987)). The reliability of the in-court identification testimony is to be assessed under the totality of the circumstances. *State v. Tettamble*, 746 S.W.2d 433 (Mo. App. S.D. 1988) (citing *State v. Story*, 646 S.W.2d 68, 71 (Mo. banc 1983)); *State v. Charles*, 612 S.W.2d 778, 780 (Mo. banc 1981), *cert. denied*, 454 U.S. 972 (1981); *State v. Caldwell*, 785 S.W.2d 98, 101 (Mo. App. S.D. 1990); *State v. Twitty*, 793 S.W.2d 561, 563 (Mo. App. E.D. 1990); *State v. Vinson*, 800 S.W.2d 444, 446 (Mo. banc 1990).

Dissimilarity in physical appearance alone is insufficient to establish impermissible suggestiveness. *State v. Reasonover*, 700 S.W.2d 178, 182–83 (Mo. App. E.D. 1985) (cited in *State v. Walker*, 755 S.W.2d 404 (Mo. App. E.D. 1988)); *State v. Greer*, 758 S.W.2d 126 (Mo. App. E.D. 1988) (citing *State v. Pettit*, 719 S.W.2d 474, 477 (Mo. App. E.D. 1986)); *see also State v. Morant*, 758 S.W.2d 110 (Mo. App. E.D. 1988); *State v. Humphrey*, 789 S.W.2d 186, 190 (Mo. App. E.D. 1990).

The fact that the victim knows that the police have a suspect in custody or that a suspect is present in a photograph array or lineup does not make the procedure suggestive. Thus, when the police told the victim that they had a suspect in custody before showing the victim a photograph array of four people including the defendant, it was not impermissibly suggestive. *Greer,* 758 S.W.2d 126 (citing *State v. Cook*, 753 S.W.2d 28 (Mo. App. E.D.

1988)) ("[i]t is implicit in a line up or photographic array that one of the persons shown is a suspect."). The fact that a defendant was the only man to have spots on his jumpsuit does not make a lineup suggestive. Features such as clothing are of only secondary importance to the factors of size, color, and sex in identifying suspects, and they may create suggestiveness only when they constitute the sole focal point of identification. *Morant,* 758 S.W.2d 110; *Motley*, 740 S.W.2d 313.

The Western District has held that "[a] pretrial identification procedure is unduly suggestive if the identification results not from the witness's recall of first-hand observations, but rather from the procedures or actions employed by the police." *State v. Glover*, 951 S.W.2d 359, 362 (Mo. App. W.D. 1997) (citing *State v. Nguyen*, 880 S.W.2d 627, 634 (Mo. App. W.D. 1994); *State v. Sublett*, 887 S.W.2d 618, 621 (Mo. App. W.D. 1994)). To determine whether a pretrial procedure is suggestive, the court can require "an examination of the process, including a comparison of the similarities of the subjects in the photographs and an evaluation of the conditions under which the identification occurred which are attributable to the police, including the police commentary." *Glover*, 951 S.W.2d at 362.

The court in *United States v. Roberts*, 928 F. Supp. 910, 925 (W.D. Mo. 1996), found that a photographic array was impermissibly suggestive under the totality of the circumstances test. In *Roberts* the police presented to the witness a series of photographs of women with completely different hair color than the defendant and women who were obviously of different ages than the defendant. Furthermore, the defendant was shown in a photograph with a "spit mask" that she was forced to wear while at the jail, and she looked extremely disheveled. *Id.*

In *State v. Cooks*, 861 S.W.2d 769, 772 (Mo. App. E.D. 1993), the court held:

> Dissimilarity in physical appearance, alone, is insufficient to establish impermissible suggestion. "It is not required that in such a lineup all distinguishing features of the subjects be obscured. 'That one among the array is marked by a physical feature more prominent than that of any other . . . does not necessarily invalidate an otherwise fairly induced identification.'"

Id. (quoting *State v. Carter*, 691 S.W.2d 417, 418 (Mo. App. S.D. 1985)) (citation omitted).

In *Cooks* the court held that a pretrial photographic lineup in a robbery case was not impermissibly suggestive even though, of the 20 photographs shown to the victim, the defendant's photograph was the only one in which a subject was wearing glasses. *Id*. While the victim had told police that the one thing she remembered about the assailant was that he wore glasses, the court held that the identification was reliable because:

- the police sifted through hundreds of pictures to find subjects with glasses; and
- the police placed pictures of the defendant with and without his glasses in the photograph array, and in both instances the victim quickly identified the defendant as her assailant.

Id.

Out-of-court identification procedures were not impermissibly suggestive, even though the defendant's photograph was the only one included in both photographic spreads shown to the victim, when:

- the victim was not told that the defendant was a suspect;
- there was no evidence that the defendant's appearance in the photographic spreads was suggestive; and
- the victim testified that she did not know that the defendant was the only person whose picture appeared in both spreads.

Armstrong v. Gammon, 195 F.3d 441 (8th Cir. 1999). The fact that the defendant's photograph was the only one to be included in both photographic lineups shown to the victim was insufficient, by itself, to show that the identification procedure was impermissibly suggestive. *Id.*

In-court identification is assessed for reliability under the totality of the circumstances despite any suggestive or inappropriate pretrial identification procedures. Thus, no due process violation occurred as a result of the witness's in-court identification of the defendant or his testimony regarding the pretrial photographic identification procedures used at the police station. *Jackson v. Gammon,* 195 F.3d 349 (8th Cir. 1999) (fact that witness knew defendant before drive-by shooting was considered in totality of circumstances).

Even if the police officer's revelation to the victim that they had a suspect in custody and had recovered a sheathed knife created an inference that one man in the photographic array was the suspect, such an implicit message did not render the photographic array impermissibly suggestive. *State v. Solomon,* 7 S.W.3d 421 (Mo. App. S.D. 1999).

Admissibility of colored slide reproductions, in lieu of the photographs from which they were made, is generally tested under the same principles attendant to admissibility of photographs. *State v. Masden,* 990 S.W.2d 190 (Mo. App. W.D. 1999).

3. (§10.17) Factors in Evaluating Circumstances of the Display

Counsel should look to the following factors in evaluating the circumstances of the display:

- The photograph display itself, including the number of total photographs, number of photographs of the defendant, manner in which the defendant is depicted in the photographs, and variance between the defendant and others displayed

- Suggestions by police to the witness

- Independent opportunity of the witness to observe the perpetrator of the crime during its commission

- Group viewing of photographs

See State v. Madewell, 603 S.W.2d 692 (Mo. App. S.D. 1980).

In *State v. Kirksey*, 647 S.W.2d 799 (Mo. banc 1983), the Court said that the need for law enforcement officials to capture an escaped prisoner provided exigent circumstances in justifying a photograph showup. *State v. Story*, 646 S.W.2d 68 (Mo. banc 1983). A photograph showup to a police officer was not unduly suggestive in light of his law enforcement training when surrounding circumstances that aggravated the inherent suggestiveness of a photograph showup resulted in impermissive suggestiveness. *United States v. Henderson*, 719 F.2d 934 (8th Cir. 1983).

4. (§10.18) Danger of Showing Photographs to Victim

If a witness misidentifies a defendant from an impermissibly suggestive photograph display, the witness's memory is apt to retain the image of the photograph rather than of the person actually seen, thereby reducing the trustworthiness of subsequent courtroom identification. *Simmons v. United States*, 390 U.S. 377, 383–84 (1968).

5. Time and Manner in Which Photographs Are Shown

a. (§10.19) On Day of Trial

Showing the defendant's photograph to witnesses on the day he was to testify was held impermissibly suggestive in *United States v. Dailey*, 524 F.2d 911 (8th Cir. 1975). But see *State v. Gomillia*, 529 S.W.2d 892, 896 (Mo. App. E.D. 1975), in which the totality of circumstances test applied to the question of taint.

In *State v. Tunstall*, 848 S.W.2d 530, 533 (Mo. App. E.D. 1993), the court held that, even when a prosecutor showed the state's witness a photograph of the defendant shortly before trial, the witness's out-of-court and in-court identifications of the defendant were sufficiently reliable.

b. (§10.20) Before Confrontation

An identification of the defendant in his hospital bed was held not suggestive when the witness picked the defendant's picture from mug shots in route to the hospital and was told the defendant's name and cause of hospitalization (gunshot wounds) before the confrontation. *State v. Overstreet*, 551 S.W.2d 621 (Mo. banc 1977).

The fact that the defendant's photograph was shown in a photograph array before a live lineup was not suggestive, and it was within the province of the jury to assess the witness's credibility on the issue of identification. *State v. Hornbuckle*, 769 S.W.2d 89 (Mo. banc 1989); s*ee State v. Caldwell*, 785 S.W.2d 98, 102 (Mo. App. S.D. 1990).

c. (§10.21) Size of Photographs

Generally, differences in the size or color of the photographs that compose the photographic spread have been held not to infringe due process or taint in-court identification if reliability factors are satisfied. *State v. Walker*, 755 S.W.2d 404 (Mo. App. E.D. 1988) (citing *State v. Trimble*, 654 S.W.2d 245, 256 (Mo. App. S.D. 1983)).

The disparity between the size of the identified photograph of the defendant and others within the display was deemed "insignificant" by a Missouri appellate court in *State v. Gomillia*, 529 S.W.2d 892 (Mo. App. E.D. 1975).

d. (§10.22) Number of Photographs

Use of a single photograph has been held not to be suggestive. *See State v. McGrath*, 603 S.W.2d 518 (Mo. 1980). The showing of a single photograph of a suspect to a witness when there is no improper comment or activity on the part of the police in showing the photograph does not result in impermissible suggestiveness. *State v. Thomas*, 705 S.W.2d 579, 582 (Mo. App. E.D. 1986), *cited with approval in State v. Morant*, 758 S.W.2d 110 (Mo. App. E.D. 1988); *see also State v. Vinson*, 800 S.W.2d 444, 446 (Mo. banc 1990); *State v. Winston*, 959 S.W.2d 874, 878 (Mo. App. E.D. 1997).

While courts have found that the showing of duplicate displays of photographs of the suspect is suggestive, an independent source or other reliable matters may exist upon which to support the identification. *United States v. Mears*, 614 F.2d 1175, 1177 (8th Cir. 1980), *cert. denied*, 446 U.S. 945 (1980); *see also State v. Hill*, 839 S.W.2d 605 (Mo. App. W.D. 1992).

It is not impermissibly suggestive to include only the defendant in two different "spreads" when showing a witness a photograph lineup. *United States v. Johnson*, 56 F.3d 947, 953 (8th Cir. 1995).

6. (§10.23) Discovery of Photographs

Counsel should file a *subpoena duces tecum* at the earliest opportunity and have the records custodian deliver the photographs to the clerk and entered into the record.

In federal courts the defendant may successfully require production of the photographs before trial under Rule 16 of the Federal Rules of Criminal Procedure. It should be noted that, under Rule 25.03(A)(9), a prosecutor, upon request, must disclose to defense counsel any exculpatory evidence that tends to negate the guilt of the defendant as to the offense charged. For nondivulgence to result in reversal, the evidence must be material and the nondisclosure must prejudice the defendant's rights. *See Lee v. State*, 573 S.W.2d 131, 133 (Mo. App. W.D. 1978).

In *State v. Berry*, 609 S.W.2d 948, 952 (Mo. banc 1980), the Supreme Court of Missouri held that the state's alleged refusal to relinquish a photograph of a second lineup in which the defendant appeared, but which the victim testified she did not view, was not germane to the defendant's contention of fallacious identification. The Court also held that the defendant was not prejudiced by the trial court's action in upholding the prosecutor's refusal to relinquish the photograph.

At the suppression hearing, the photographs should be produced by subpoena or consent. If the photographs are not available, the court cannot determine the suggestiveness of the procedure. *United States v. Hamilton*, 420 F.2d 1292 (D.C. Cir. 1969).

7. (§10.24) Use of Photographs at Trial; Mug Shots

The photographs previously identified by the victim/witness may have come from an old police file or may have been current photographs taken after the suspect's arrest. The best procedure to ensure that the jury is not prejudiced by these mug photographs is to delete all references on the photograph to dates, etc., by covering up these references before the exhibit is received and passed to the jury. *See State v. Crossman*, 464 S.W.2d 36 (Mo. 1971).

Missouri courts require that all incriminating evidence be masked before allowing its admission into evidence. A police photograph is admissible evidence when neither the photograph nor the accompanying testimony discloses a defendant's prior arrests or convictions. *State v. Tivis,* 933 S.W.2d 843, 846 (Mo. App. W.D. 1996). Missouri caselaw has been careful to mask inculpatory information. S*ee State v. McCauley,* 831 S.W.2d 741, 742 (Mo. App. E.D. 1992).

Missouri courts have also determined that testimony accompanying the admission of photograph lineups is permissible as long as there is no link to a defendant's prior crime. *See State v. Quinn,* 693 S.W.2d 198, 199 (Mo. App. E.D. 1985) (police officer's testimony stating that the photographs came from his "crime books" established that the defendant had a prior criminal record); *see also State v. Simmons,* 939 S.W.2d 487 (Mo. App. W.D. 1997) ("The description of the source of the photograph in this case ('records unit') is analogous to the description used in *Quinn* ('department')."). In *Simmons* the court found the term "records unit" to be sufficiently vague because the record was devoid of any evidence indicating that all photographs in the records unit were of persons with criminal histories. *Id.* at 489; *see also State v. Howard,* 714 S.W.2d 736 (Mo. App. E.D. 1986) (*Simmons*, 939 S.W.2d at 489–90, distinguished officers' remarks in *Howard* from those in *Quinn* when there was "a clear and unmistakable inference that the defendant had previously been arrested or convicted of a crime"). In *State v. Harris*, 534 S.W.2d 516 (Mo. App. E.D. 1976), the use of the phrases "mug shots" and photographs of "subjects on file in our department" did not improperly place a defendant's prior criminal record before the jury. *See also State v. Rutledge*, 524 S.W.2d 449, 458 (Mo. App. E.D. 1975). Mug shots are not inherently objectionable as they are neutral without indication of prior criminal activity. *State v. Cook*, 637 S.W.2d 110 (Mo. App. E.D. 1982).

In *State v. Motley*, 740 S.W.2d 313 (Mo. App. E.D. 1987), the admitted photographs contained the words "St. Louis Police Department" followed by an identification number. The appellate court found this admission into evidence to be error but not so prejudicial that it deprived the defendant of a fair trial, citing *State v. Tyler*, 676 S.W.2d 922 (Mo. App. E.D. 1984), for the proposition that in matters of evidence, the court reviews for prejudice, not mere error. *Motley,* 740 S.W.2d at 317.

The propriety of the use of a mug shot as evidence must be examined in the light of the facts and circumstances of each case. *State v. Rodgers,* 3 S.W.3d 818 (Mo. App. W.D. 1999); *State v. Wright,* 978 S.W.2d 495 (Mo. App. W.D. 1998). Mug shots are readily admissible into evidence when:

- all identifying information is masked;
- the defendant's identity is in issue; and
- admission of the mug shot will help the jury determine accuracy of identification.

State v. Wright, 978 S.W.2d 495.

While Missouri courts have avoided instructions with respect to identification, the Eighth Circuit Court of Appeals has upheld the use of mug shots and has granted cautionary instruction when requested (because police had picture of defendant did not necessarily mean he had a criminal record). *United States v. Bohr*, 581 F.2d 1294, 1299–1300 (8th Cir. 1978), *cert. denied*, 439 U.S. 958 (1978).

Therefore, it is even more important to argue the defendant's position vigorously to the trial court and have caselaw ready to support that position.

F. (§10.25) One-on-One Confrontations (Showups)

Even since *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967) (§10.5, *supra*), full compliance with the standards set forth in these cases is unnecessary when on-the-scene identification is involved. *See Russell v. United States*, 408 F.2d 1280, 1285 (D.C. Cir. 1969); *Bates v. United States*, 405 F.2d 1104, 1106 (D.C. Cir. 1968).

One-person showups, i.e., when a witness views a single individual for the sole purpose of identification, are permissible in Missouri. *See State v. Dodson*, 491 S.W.2d 334 (Mo. banc 1973); *State v. Allen*, 599 S.W.2d 782 (Mo. App. E.D. 1980); *see also Stovall v. Denno*, 388 U.S. 293 (1967); *but see United States ex rel. Rutherford v. Deegan*, 406 F.2d 217 (2nd Cir. 1969), *cert. denied*, 395 U.S. 983 (1969) (non-exigent circumstances confrontation at hospital). Missouri courts have approved one-on-one confrontation showups as a proper procedure.

Accidental showups have occurred at police stations when the victim/witness and the suspect are confronted. In *State v. Corkins*, 612 S.W.2d 35 (Mo. App. W.D. 1981), the victim knew that there was a suspect in custody but did not know he was at the station where she went to give her statement. Her view of him in a room where he was sitting with two officers was not unnecessarily suggestive, and the trial court correctly denied the motion to suppress the identification. *Id*. at 37.

Repeated presentation of a single suspect at unnecessary showups can create a substantial likelihood of irreparable misidentifications when there is no independent basis for identification. *See Sanchell v. Parratt*, 530 F.2d 286 (8th Cir. 1976); *Foster v. Cal.*, 394 U.S. 440 (1969).

Showing a single suspect to the witness is the most suggestive and, therefore, the most objectionable method of pretrial identification. *See United States v. Dailey*, 524 F.2d 911, 914 (8th Cir. 1975); *Sanchell,* 530 F.2d 286; *but see Neil v. Biggers*, 409 U.S. 188 (1972).

In Missouri, it is well settled that there is no prohibition against returning a freshly apprehended suspect to the scene of the crime for prompt identification by an eye witness. *State v. French*, 528 S.W.2d 170 (Mo. App. E.D. 1975); *State v. Maxwell*, 502 S.W.2d 382 (Mo. App. E.D. 1973).

Thus, Missouri courts have held that prompt on-the-scene showups do not violate due process of law (showup held ten minutes after the robbery). *Simms v. State*, 568 S.W.2d 801 (Mo. App. E.D. 1978). The rationale behind some of these opinions is that a fresh identification before a memory has diminished or a suspect has changed clothing is preferable. *Allen*, 599 S.W.2d 782.

The threshold question in the one-on-one confrontation at the scene is the propriety of the initial confrontation. The fact that the confrontation takes place with the suspect handcuffed and in custody does not render the situation impermissibly suggestive. *Maxwell,* 502 S.W.2d at 389.

If the confrontation is so unnecessarily suggestive as to be conducive to irreparable misidentification, the prosecution must prove by clear and convincing evidence that the in-court identification has an independent basis. *French,* 528 S.W.2d at 173. The test for admissibility is reliability, not suggestiveness. *State v. Story,* 646 S.W.2d 68 (Mo. banc 1983).

One-on-one or "showup" confrontations are a valid way of making an identification of a suspect in Missouri. *State v. Moore*, 925 S.W.2d 466 (Mo. App. E.D. 1996). Additionally, a showup is considered valid even if the defendant is in handcuffs and the officer tells the witness that the person is considered a suspect. *Id.* at 467.

In *State v. Blanchard*, 920 S.W.2d 147, 149 (Mo. App. E.D. 1996), the court held that a showup identification by a witness within 20 or 30 minutes after a theft was not impermissibly suggestive even though the defendant was the only black person present. The showup procedure was upheld because there was no evidence presented that the police unduly pressured the witness and the witness had previously provided the police with an accurate and detailed description that matched the defendant. *Id*.

G. (§10.26) Attacking the Identification Procedure

Reliability is the key in determining the validity of an identification. *State v. Story*, 646 S.W.2d 68 (Mo. banc 1983). To determine reliability, Missouri trial courts must look at the "totality of the circumstances" including:

- the opportunity of the witness to view the criminal at the time of the offense;
- the witness's degree of attention;
- the accuracy of the witness's prior description of the criminal;
- the level of certainty demonstrated by the witness at the confrontation; and
- the length of time between the crime and confrontation.

State v. Charles, 612 S.W.2d 778, 780 (Mo. banc 1981), *cert. denied*, 454 U.S. 972 (1981); *State v. Motley*, 740 S.W.2d 313 (Mo. App. E.D. 1987).

State v. Price, 689 S.W.2d 380 (Mo. App. E.D. 1985), held that pretrial identification procedures must be so impermissibly suggestive as to create a very substantial likelihood of misidentification at trial.

In *Little v. Armontrout*, 819 F.2d 1425 (8th Cir. 1987), the Eighth Circuit reversed the conviction based on the wrongful admission of the victim's post-hypnotic identification testimony as being in violation of due process. After the hypnosis session, the victim identified the defendant in a photograph lineup and in a personal lineup. The victim's identification of the defendant at trial was unequivocal. The court found the identification unreliable under the factors of *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

In *Alsbach v. Bader*, 700 S.W.2d 823 (Mo. banc 1985), the Supreme Court of Missouri held hypnotically induced testimony to be inadmissible per se. The Court found that post-hypnotic testimony

lacks scientific support for its reliability and thus is inadmissible. *State v. Foote*, 791 S.W.2d 879, 882 (Mo. App. E.D. 1990).

H. (§10.27) Admissibility of Expert Testimony

Missouri courts have consistently held that there is no abuse of trial discretion when the court refuses to permit expert witness testimony concerning the unreliability of eye witness identification. *See State v. Hill*, 839 S.W.2d 605 (Mo. App. W.D. 1992) (citing *State v. Whitmill*, 780 S.W.2d 45, 47[1] (Mo. banc 1989), in which the Supreme Court held that the trial court has discretion to exclude such testimony because it may improperly invade the province of the jury in determining witness credibility).

Missouri courts, in examining the use of expert testimony regarding psychological factors affecting reliability of eye witness identification and common misconceptions regarding reliability of identification, have held that it is not an abuse of discretion to prohibit testimony of this nature. *See Whitmill,* 780 S.W.2d 45; *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988); *State v. Simpson*, 793 S.W.2d 182, 186 (Mo. App. E.D. 1990); *State v. Hill*, 854 S.W.2d 486, 487 (Mo. App. E.D. 1993).

In *Lawhorn,* 762 S.W.2d 820, the Supreme Court of Missouri held that the trial court did not abuse its discretion in refusing to permit expert testimony on the issue of eye witness identification.

The courts have generally rejected defense expert testimony on eye witness identification on the theory that cross-examination of witnesses will reveal any alleged frailty in the identification. *See United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); *State v. Cunningham*, 863 S.W.2d 914, 923 (Mo. App. E.D. 1993).

In particular instances, however, expert testimony has been permitted to show unique and specific similarities between photographs and tangible objects depicted in the photographs, e.g., clothing. *Amaral,* 488 F.2d at 1148.

In *United States v. Green*, 525 F.2d 386, 392 (8th Cir. 1975), the Eighth Circuit permitted expert testimony on the issue of identification, noting that a jury of lay persons "would not have the experience to note the unique curl of the cuffs of the jacket, the electrical alligator clip, the crease in the pants cuff, the way the

seams of the pants lined up, the worn spots on the pants, and the eyelets and lacing of the shoes."

Scientific texts can be used in the examination of expert witnesses only if they are authoritative. *State v. Love,* 963 S.W.2d 236 (Mo. App. W.D. 1997).

Generally, an expert may rely on hearsay evidence as support for opinions as long as that evidence is of a type reasonably relied on by other experts in the field. The evidence does not need to be independently admissible. *State v. Brown,* 998 S.W.2d 531 (Mo. banc 1999); *see also State v. Candela*, 929 S.W.2d 852 (Mo. App. E.D. 1996). Medical records and police reports can be relied on by expert witnesses in giving their opinions. *Id.*

It is the burden of the party offering expert testimony to lay the foundation for its admission. *United States v. Williams,* 95 F.3d 723 (8th Cir. 1996) (consolidation of three cases).

I. (§10.28) Admissibility of Opinion Evidence

Witnesses should not give their opinions of the truth of a statement by another witness, though they may do the same thing in effect by denying the fact stated. *State v. Savory,* 893 S.W.2d 408 (Mo. App. W.D. 1995).

Generally, a lay witness may not testify as to an opinion on a matter in dispute because, when the witness does not possess specialized knowledge on the matter, the lay witness and the jury are in equal positions to form an accurate opinion. But lay witnesses may testify as to their opinions if they are in possession of knowledge that the jury does not also possess because it would be helpful to the jury in determining an issue in dispute. *State v. Winston,* 959 S.W.2d 874 (Mo. App. E.D. 1997).

Identification of the defendant by his girlfriend's sister in a photographic printout from a videotape taken by a surveillance camera during a convenience store robbery was more likely to be correct than the jury's identification after viewing the same videotape, and it was admissible lay opinion testimony. The sister had spent time with the defendant immediately surrounding the burglary and was familiar with his features. The person in the printout was moving quickly and was somewhat difficult to see, so the sister was more likely to correctly identify the defendant than

was the jury. *Id.* In the context of identifying a suspect, lay witness opinion testimony is admissible if there is a basis for concluding that the witness is more likely to correctly identify the defendant than is the jury. *Id.*

J. (§10.29) Hearsay

The *Degraffenreid* rule prohibited a third party from testifying as to hearsay identification of the defendant by the victim. *State v. Degraffenreid*, 477 S.W.2d 57 (Mo. banc 1972).

The underlying concern appears to have been not so much the hearsay quality of the testimony, but the fact that it was employed for the purpose of unprovoked bolstering of the identifying witness's testimony. *State v. Cook*, 628 S.W.2d 657, 659 (Mo. banc 1982).

The *Degraffenreid* rule rarely resulted in reversible error and was reexamined in *State v. Harris*, 711 S.W.2d 881 (Mo. banc 1986). *Harris* held that third-party hearsay regarding an identification is no longer presumptively inadmissible when the declarant and the corroborating witness both testify and are subject to cross-examination. *Id.* at 884. The Supreme Court of Missouri adopted the view of a substantial number of state and federal courts as to the competency of third-party testimony regarding pretrial identification. FED. R. EVID. 801(d)(1)(C) (since amended); *see also State v. Claypool*, 763 S.W.2d 313 (Mo. App. E.D. 1988).

K. (§10.30) Independent Source Rule

When an in-court identification is made upon a recollection independent of pretrial identification procedures, the in-court identification is proper. *United States v. Crews*, 445 U.S. 463 (1980). In Missouri, an in-court identification based on recollection independent of improper pretrial identification is admissible. *State v. Smith*, 675 S.W.2d 690 (Mo. App. E.D. 1984). Consideration must be given to the presence of an independent factual basis for the identification and a positive courtroom identification. *State v. Parker*, 458 S.W.2d 241, 244 (Mo. 1970); *State v. White*, 549 S.W.2d 914, 917 (Mo. App. E.D. 1977); *State v. Rutledge*, 524 S.W.2d 449, 458 (Mo. App. E.D. 1975).

In *State v. Berry*, 609 S.W.2d 948 (Mo. banc 1980), the defendant argued that the lineup was unduly suggestive because the victim selected him as her second choice. The Supreme Court of Missouri rejected the argument, holding that the in-court identification was not rendered inadmissible by such a factual situation. *Id.* at 953.

In *State v. Trimble*, 654 S.W.2d 245 (Mo. App. S.D. 1983), repeated sexual assault on children resulted in close attentiveness that can be likened to that of a rape victim. *State v. Story*, 646 S.W.2d 68 (Mo. banc 1983). The fact that the witness is a law enforcement officer who is trained to observe gives weight to the reliability of the identification. *United States v. Henderson*, 719 F.2d 934 (8th Cir. 1983). The fact that a witness was in the car with the suspect for ten minutes with no knowledge of the suspect's criminal intent indicates reliability because the witness's perceptions were not clouded by the excitement of the crime.

Reliability factors are important for the court in these independent source tests. Thus, courts have looked at numerous reliability factors and held that:

- rape victims are not casual, inattentive observers, but are likely to pay close attention to the assailant, *Berry,* 609 S.W.2d at 954;

- an opportunity to observe the suspect for two or three minutes on a brightly lit street and a detailed description of him were sufficient, *State v. Johnson*, 605 S.W.2d 151 (Mo. App. E.D. 1980); and

- a victim who saw a robber for 30 seconds to 1 minute before being knocked out had an adequate view of the assailant sufficient to form a substantial independent basis for an in-court identification, *State v. Brown*, 607 S.W.2d 881 (Mo. App. S.D. 1980).

But see *United States v. Dailey*, 524 F.2d 911 (8th Cir. 1975), which held that a witness/victim who had only a few seconds to observe did not have an adequate independent opportunity to observe.

Uncertainty or indefiniteness goes to the weight of the witness's testimony and does not affect admissibility. *See State v. Harris*, 860 S.W.2d 839, 842 (Mo. App. E.D. 1993); *State v. Stutts*, 756 S.W.2d 627, 628 (Mo. App. W.D. 1988).

Missouri courts have refused to consider the witness's emotional trauma or fear during the identification process as a factor in the lack of reliability. *State v. McCreuiston*, 608 S.W.2d 460 (Mo. App. E.D. 1980).

Missouri courts have also held that identifications can be held reliable though not totally accurate. *State v. Mayes*, 654 S.W.2d 926 (Mo. App. E.D. 1983); *Trimble,* 654 S.W.2d 245; *State v. Cody*, 800 S.W.2d 750 (Mo. App. E.D. 1990).

An in-court identification of the defendant is not always required. *State v. Lingar*, 726 S.W.2d 728, 732–33 (Mo. banc 1987), *cert. denied*, 484 U.S. 872 (1987). When a defendant is indirectly identified through witness testimony, an in-court identification may not be required. Likewise, a defendant is not entitled to a judgment of acquittal because of discrepancies or conflicts in the testimony of the state's witnesses. Inconsistencies are for the jury to resolve. *State v. Newberry*, 605 S.W.2d 117, 121 (Mo. 1980).

The independent source rule applies with equal force to any pretrial confrontation regardless of whether the issue is right to counsel or due process.

III. Identification by Scientific Evidence

A. DNA Evidence

1. DNA Admissibility

a. (§10.31) Standard

The general rule for admissibility of scientific evidence in the past has been the *Frye* test. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). This test allows scientific evidence only when the scientific deduction sought to be entered into evidence is "sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id*.

Missouri adopted the *Frye* test through *State v. Stout*, 478 S.W.2d 368 (Mo. 1972), and then modified it in *State v. Biddle*, 599 S.W.2d 182 (Mo. banc 1980), by holding that the proponent of scientific evidence must demonstrate a "wide scientific approval of [its] reliability." *Id*. at 191.

In the early 1990s, prosecutors sought to have DNA admitted, and courts around the country held hearings to determine the admissibility of this novel scientific evidence. In *United States v. Two Bulls*, 918 F.2d 56 (8th Cir. 1990), the Eighth Circuit held that, whether proceeding under the Federal Rules of

Evidence or *Frye*, 293 F. 1013, the basic requirement for admissibility of DNA evidence included the following:

- Whether the DNA evidence is scientifically acceptable
- Whether there are certain standard procedures that should be followed in conducting these tests
- Whether these standards were followed

Two Bulls, 918 F.2d at 61. Under this review, the Eighth Circuit determined that reversible error occurred because the trial court failed to determine whether the testing procedure that had been used was conducted properly. The Eighth Circuit ruled that there must be a preliminary showing that the DNA profiling was performed properly before expert testimony can be admitted as evidence. *United States v. Ortiz-Martinez*, 1 F.3d 662 (8th Cir. 1993).

But Missouri chose not to adopt the last two prongs of the *Two Bulls* admissibility test. In a case of first impression, the Supreme Court of Missouri relied on precedent and reaffirmed that *Frye* was the appropriate admissibility standard for the courts to apply when confronted with new scientific evidence. *State v. Davis*, 814 S.W.2d 593 (Mo. banc 1991), *cert. denied*, 502 U.S. 1047 (1992). The *Davis* Court made the admissibility of scientific evidence dependent solely on the first prong set out in *Two Bulls*, 918 F.2d 56: general acceptance of the test within the scientific community. *Ralph Davis*, 814 S.W.2d at 602–03. The Supreme Court of Missouri upheld the trial court's use of discretion in permitting expert testimony on the acceptance of DNA test results in the scientific community. No contradictory evidence was offered at the pretrial or trial stage, and the Supreme Court of Missouri declined to rule the admission an abuse of discretion. *Id*. Since that time, every Missouri court has applied this general acceptance *Frye*, 293 F. 1013, test when ruling on the admissibility of DNA evidence in a criminal case. *See State v. Kinder*, 942 S.W.2d 313 (Mo. banc 1996); *State v. Ferguson*, 20 S.W.3d 485 (Mo. banc 2000); *State v. Link*, 25 S.W.3d 136 (Mo. banc 2000).

The Supreme Court of Missouri further held that the actual manner in which DNA tests are conducted does not go to the admissibility of the evidence but only to the credibility of witnesses and the weight of evidence. *Ralph Davis*, 814

S.W.2d at 603. Missouri trial courts have repeatedly refused to make admissibility determinations based on the tests actually performed in the matter before them, and the appellate courts have upheld each of those decisions. *See*:

- *State v. Davis*, 860 S.W.2d 369 (Mo. App. E.D. 1993);
- *State v. Funke*, 903 S.W.2d 240 (Mo. App. E.D. 1995);
- *State v. Hoff*, 904 S.W.2d 56 (Mo. App. S.D. 1995);
- *Kinder*, 942 S.W.2d 313;
- *State v. Huchting*, 927 S.W.2d 411 (Mo. App. E.D. 1996);
- *Ferguson*, 20 S.W.3d 485;
- *State v. Faulkner*, 103 S.W.3d 346 (Mo. App. S.D. 2003);
- *State v. Keightley*, 147 S.W.3d 179 (Mo. App. S.D. 2004).

In *Huchting*, 927 S.W.2d 411, the defendant insisted that the language from *Davis*, 814 S.W.2d 593, "entitles him to a pretrial evidentiary hearing regarding the reliability of the test themselves." *Huchting*, 927 S.W.2d at 418. The defendant argued that the DNA evidence was unreliable for a number of reasons, to-wit: the laboratory had used unaccredited procedures, unspecified protocols, and procedures and statistics that had never been reviewed and approved by a higher court. But the *Huchting* court held that the "[d]efendant fails to understand the admissibility of DNA evidence in trial courts of this state." *Id*. "Where a defendant has objected to 'the manner in which the analysis was conducted' or to 'the specific test results,' such objection 'goes to the weight and not the admissibility of the evidence.'" *Id*.

Initially, courts in Missouri applied the general acceptance *Frye*, 293 F. 1013, test to both civil and criminal cases when determining the admissibility of scientific testimony. That changed in 1989 when the Missouri legislature passed § 490.065, now RSMo 2000, which specifically set out the admissibility test for scientific evidence in civil cases. The scientific testimony must help the trier of fact understand the evidence or determine a fact in issue, and the expert must be qualified. Section 490.065.3 specifically provides that:

> 3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or

> made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

The admissibility standard set out in § 490.065.3 allows the trial court to make a pretrial determination as to the reliability of expert witness testimony. The trial court must determine if the facts and data are of a type that are reasonably relied on by experts in the field and if the facts and data that form the basis for the expert's opinion are reliable.

In 1993, the United States Supreme Court rejected *Frye*, 293 F. 1013, as its admissibility standard for scientific evidence and applied a new standard. First, all proposed testimony must constitute scientific knowledge that will help the trier of fact understand or determine a fact in issue. This new test allows for a pretrial determination of reliability and sets out what the trial court should examine:

- Whether the expert's theory or technique has been generally accepted in the scientific community
- Whether the expert's methodology has been subjected to peer review or publication
- Whether the theory has or can be tested
- Whether the error rate for expert's theory is acceptable

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993). The United States Supreme Court further discussed the trial court's "gatekeeping" obligation in *Kuhmo Tire Co. v. Carmichael,* 526 U.S. 137 (1999). The Court in *Kuhmo* held that the trial court must determine whether the testimony is reliably based in the knowledge and experience of the relevant discipline. *Id*. at 149.

The determination of the admissibility of expert testimony provided for in either § 490.065.3 or *Daubert* allows the trial court to act as "gatekeeper" and to judge the reliability of the actual test performed in the case before the court.

The Supreme Court of Missouri examined the admissibility standard from § 490.065 in *Lasky v. Union Electric Co.*, 936

S.W.2d 797 (Mo. banc 1997). The *Lasky* Court held that § 490.065 was the applicable standard "in evaluating the admission of expert testimony" in civil cases. *Id*. at 801. In early 2004, the Supreme Court of Missouri extended this new admissibility standard beyond civil cases to administrative hearings. *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2004). Before this 2004 ruling, courts had expressed confusion as to the appropriate admissibility test: § 490.065, *Frye*, 293 F. 1013, or *Daubert*, 509 U.S. 579. *McDonagh*, 123 S.W.3d at 153. In *McDonagh* the Supreme Court of Missouri clearly rejected *Frye* and *Daubert*.

In criminal cases, the Supreme Court of Missouri has kept the *Frye* standard and has not, as of yet, applied the admissibility and reliability test from either § 490.065 or *Daubert* in a criminal case. In *State v. Keightley*, 147 S.W.3d 179 (Mo. App. S.D. 2004), the Southern District of the Missouri Court of Appeals reaffirmed the *State v. Ralph Davis*, 814 S.W.2d 593, holding that *Frye* is the appropriate admissibility standard and that the manner in which DNA tests are conducted goes only to the credibility of the witnesses and the weight of the evidence. The Supreme Court of Missouri originally accepted transfer of the *Keightley* case but later retransferred it to the Southern District, which readopted and reissued its original order.

b. Types of DNA Tests

(1) (§10.32) Restricted Fragment Length Polymorphism (RFLP)

The first type of DNA test admitted into Missouri courts was restricted fragment length polymorphism (RFLP). *State v. Ralph Davis*, 814 S.W.2d 593, 602–03 (Mo. banc 1991), *cert. denied*, 502 U.S. 1047 (1992). Over the course of time, other forensic DNA tests were created, marketed, and used by crime labs.

(2) (§10.33) Polymerase Chain Reaction (PCR)

The court in *State v. Hoff*, 904 S.W.2d 56 (Mo. App. S.D. 1995), admitted a new type of DNA test into evidence, polymerase chain reaction (PCR). This new type of DNA

testing was not challenged in a pretrial *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), hearing, but an objection was made that the state failed to establish that PCR testing had achieved general acceptance in the relevant scientific community. *Hoff*, 904 S.W.2d at 59. Relying on the trial testimony from the state's expert that PCR testing was generally accepted, on testimony that other law enforcement agencies were using it, and on numerous cases from other jurisdictions, the Southern District ruled that the trial court did not err in admitting the PCR-DNA test results. *Id.*

The court in *State v. Brown*, 949 S.W.2d 639 (Mo. App. E.D. 1997), ruled that the trial court did not abuse its discretion by refusing to conduct a *Frye* hearing or by admitting the PCR-DNA test result.

(3) (§10.34) Short Tandem Repeats (STR)

Once again, when the third type of DNA testing, short tandem repeats (STR), was admitted into Missouri courts, a *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), hearing was not conducted. *State v. Salmon*, 89 S.W.3d 540 (Mo. App. W.D. 2002). Defense counsel requested a *Frye* hearing because of the new type DNA testing being introduced by the state, but the trial court refused. At trial, defense counsel did not seek to make an offer of proof, and the state proceeded to call two witnesses who testified about the general acceptance of the STR-DNA testing method and the actual STR-DNA test results. *Id.* at 543–44. The Western District determined that "Mr. Salmon would not be prejudiced by the court's failure to hold a *Frye* hearing, unless the evidence was improperly admitted because there was insufficient evidence to prove that the PCR STR method of DNA testing has gained general acceptance in the scientific community." *Id.* at 544. After reviewing the testimony from the state's trial witnesses and looking to decisions from other jurisdictions, the court held that the STR-DNA testing technique was generally accepted in the scientific community. *Id.* at 545.

c. (§10.35) Correct Scientific Community

In *State v. Faulkner*, 103 S.W.3d 346 (Mo. App. S.D. 2003), the challenge was not to the STR-DNA test itself, but to the fact that "the trial court incorrectly identified the *applicable* [scientific] community" as the forensic science community. *Id.* at 357–58. The defendant argued that the appropriate communities for DNA typing were molecular biology and chemistry. When setting out the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), test in *State v. Davis,* 814 S.W.2d 593 (Mo. banc 1991), the Supreme Court of Missouri never determined the appropriate community. The Southern District found this argument to be without merit and pointed out that the "[a]ppellant presented no evidence at the *Frye* hearing that molecular biology or chemistry is the applicable field of science." *Faulkner*, 103 S.W.3d at 358.

d. (§10.36) Statistics

In *State v. Davis,* 814 S.W.2d 593 (Mo. banc 1991), the Supreme Court of Missouri examined decisions from other jurisdictions. While the Court determined that the basic principles of DNA are generally accepted in the scientific community, the Court did note that other jurisdictions had questioned "the reliability of statistical means utilized to derive a numerical power of identity." *Id.* at 602. *Davis* makes no further mention of possible DNA statistical issues. The next Missouri court to look at DNA statistical issues was the court in *State v. Funke*, 903 S.W.2d 240 (Mo. App. E.D. 1995). In *Funke* statistics were attacked for the first time on appeal, and the court held that there was no plain error in the admission of the statistical evidence. *Id.* at 244. The trial court in *State v. Huchting,* 927 S.W.2d 411 (Mo. App. E.D. 1996), denied the request for a *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), hearing on statistical issues. The court of appeals determined that "the overwhelming majority of jurisdictions that have found that DNA evidence is generally acceptable in the scientific community have not permitted separate *Frye* hearings for DNA testing techniques, laboratory conditions or interpretive statistics." *Huchting*, 927 S.W.2d at 418.

Experts utilize two distinct sciences—molecular biology and statistics—when testifying about the results of DNA tests.

Some experts test the actual biologic material while other experts generate genetic probability calculations (statistics) based on the results from the biological tests. *State v. Kinder*, 942 S.W.2d 313, 326 (Mo. banc 1996). The trial court in *Kinder* conducted Missouri's first *Frye* test to identify the appropriate statistical calculation in an RFLP-DNA case. *Id.* at 327.

> This statistical evidence was offered to help the jury evaluate the significance of the finding that a sample of DNA obtained from a victim matched the DNA profile of the defendant. The statistical estimate is interpreted as the probability that a person selected at random from a companion population would have a DNA profile that matches that of the crime sample.

Id. at 326. Several different methods were available to calculate statistics, but the state's expert used the product rule method. *Id.* The Court in *Kinder* acknowledged that "we are faced with a question that was not at issue in *Davis*." *Id.* at 327. The basis for Kinder's objection to the product rule was found in a 1992 report of the National Research Council (NRC). In determining that "the product rule is generally accepted in the scientific community, and that population frequency statistics based on the product rule are admissible," *id.* at 327, the Court noted:

- the fact that the 1996 NRC withdrew its objection to the product rule;
- the holding of *Huchting,* 927 S.W.2d 411; and
- the majority of other jurisdictions' approval of the product rule.

Id. Since *Kinder* was decided, Missouri courts have continued to hold that the product rule is the appropriate statistic to use in DNA population frequency calculations. *State v. Brown*, 949 S.W.2d 639 (Mo. App. E.D. 1997); *State v. Link*, 25 S.W.3d 136 (Mo. banc 2000); *State v. Faulkner*, 103 S.W.3d 346 (Mo. App. S.D. 2003).

2. (§10.37) Discovery Issues

Frequently, DNA testing labs use the entire biologic sample to perform a DNA test. *State v. Ferguson*, 20 S.W.3d 485 (Mo. banc 2000). In *Ferguson* the defendant failed to object before the testing began. The defendant raised an initial objection after the

testing was complete and the evidentiary sample consumed. *Id.* at 496. In *Ferguson* the Supreme Court of Missouri followed the United States Supreme Court's reasoning in *Arizona v. Youngblood*, 488 U.S. 51 (1988), and held that "[i]n cases where the testing agency finds it necessary to consume the only sample of evidence in the testing procedure, admission of the test results does not violate due process in the absence of bad faith on the part of the state." *Ferguson*, 20 S.W.3d at 496. To avoid a similar situation, a motion for a protective order can be filed in accordance with Rule 25.11. This way, the parties can have a judicial determination regarding the amount of sample available to the parties and whether the sample could be split between the parties. As an additional remedy, a party could petition the courts to allow a scientific observer who may not interfere but who may watch as the DNA testing is performed. *Commonwealth v. Evans*, 778 N.E.2d 885 (Mass. 2002) (defendant's observer allowed to watch performance of DNA test).

When a new scientific test becomes available, new discovery issues inevitably arise. Computers have become an integral part of the latest STR test. Computers are used in STR testing to collect, sort, type, and label the STR test results. To analyze STR test results, the raw data is modified as it is put through a number of computer programs. Discovery of the raw data allows the opposing party to compare the raw data against the interpreted results. *See*:

- JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY AND TECHNOLOGY BEHIND STR MARKERS (Academic Press 2001);

- *State v. Butterfield*, 27 P.3d 1133 (Utah 2001) (articles and descriptions of STR-DNA analysis);

- William C. Thompson, Simon Ford, Travis Doom, Michael Raymer & Dan Krane, *Evaluating Forensic DNA Evidence: Essential Elements of a Competent Defense Review*, THE CHAMPION (April 2003).

With computers comes the availability of raw data. Discovery of electronic data first became an issue in civil matters. *See* FED. R. CIV. P. 34 (computer data is considered a "document" under the rule and failure to make raw data available is a violation of discovery); *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376 (7th Cir.

1993). In 2001, the Illinois Supreme Court adopted Illinois Supreme Court Rule 417, which specifically requires all software programs and electronic files relating to DNA to be produced. This issue has rarely reached the appellate courts. *See State v. Haigns*, 121 Wash. App. 1019, 2004 WL 897964 (Wash. Ct. App., Apr. 27, 2004). While Missouri has no specific raw data discovery rules, parties may make a discovery motion under Rule 25.04 or Rule 25.06 to obtain raw data. The raw data from other types of scientific tests in Missouri has been held to be discoverable. *State ex rel. Svejda v. Roldan*, 88 S.W.3d 531 (Mo. App. W.D. 2002) (defendant must turn over raw data from psychological tests in discovery). Although this issue has not yet made its way to the appellate courts of Missouri, a number of Missouri trial courts have sustained motions for the discovery of raw electronic data in STR-DNA cases: *State v. Glass*, No. 01CR-168994 (Callaway County) (Missouri State Highway Patrol Crime Lab); *State v. Pittman*, No. 02CR-6567 (St. Louis County Crime Lab); *State v. Collins*, No. 031-02274 (Metropolitan City of St. Louis Crime Lab).

3. (§10.38) Laboratory Reports as Hearsay

Missouri law currently allows the opinion of an expert, contained in a laboratory report prepared by that expert, into evidence without the presence or testimony of that expert. *State v. Taylor*, 486 S.W.2d 239 (Mo. 1972). "[I]t must be shown as part of the report's foundation that the expert would be properly qualified to express an opinion if testifying in person." *State v. Mahan*, 971 S.W.2d 307, 316 (Mo. banc 1998). In *Mahan* the State sought admission of a blood test for human immunodeficiency virus (HIV) into evidence without knowing which laboratory expert actually performed the actual test. *Id.* at 316–17. The Court determined that the testimony of the custodian of records regarding the credentials of all possible examiners and the procedures followed by the lab laid a proper foundation for admission of the test result. *Id.* It is unclear what impact the most recent United States Supreme Court decision in *Crawford v. Washington*, 541 U.S. 36 (2004), could have on the admissibility of such testimony. The Court in *Crawford* determined that the admission of hearsay in that case deprived the defendant of his rights as protected by the Confrontation Clause in the Sixth Amendment to the United States Constitution. *Id.* Although the hearsay deemed inadmissible in *Crawford* was not expert testimony, what hearsay exceptions pass Constitutional muster

are still up in the air. A *Crawford* challenge could be made if the state sought the admission of DNA test results through hearsay.

4. (§10.39) DNA Profiling Systems

The provisions for the Missouri DNA Profiling System are set out in §§ 650.050–650.057, RSMo 2000 and Supp. 2004. This collection of statutes details the procedures for the collection, testing, and storage of DNA profiles from certain convicted felons. The 1996 amendment to § 650.055.1, RSMo, provided that "[e]very individual convicted in a Missouri circuit court, of a felony, defined as a violent offense under chapter 565, RSMo, or as a sex offense under chapter 566, RSMo, excluding sections 566.010 and 566.020, RSMo, shall have a blood or scientifically accepted biological sample collected for purposes of DNA profiling analysis." This included individuals who were incarcerated or on probation or on parole in accordance with § 217.650, now RSMo 2000. In 2004, the Missouri legislature changed § 650.055.1 and thereby changed which convicted felons would be placed into Missouri's DNA Profiling System. Effective August 28, 2004, § 650.055 requires a DNA sample from every individual guilty of a felony or any sexual offense under Chapter 566, RSMo, or anyone proven beyond a reasonable doubt to be a sexually violent predator. The 2004 amendments to §§ 650.050–650.055 provide a way to have a DNA profile expunged from the DNA Profiling System in certain circumstances. The 2004 amendment to § 650.055.2 also provides for the recommendation of revocation of probation or parole for anyone who refuses to provide a DNA sample.

The Missouri State Highway Patrol is responsible for establishing rules and protocols to implement the provisions of the DNA Profiling System. In a pro se challenge to the validity of Missouri's DNA Profiling System, *In re Cooper v. Gammon*, 943 S.W.2d 699 (Mo. App. W.D. 1997), Cooper challenged the validity of being confined to administrative segregation because of his refusal to give a blood sample in accordance with § 650.055. The court held that:

- the statute did not violate *ex post facto* prohibitions;
- the taking of blood was not an unreasonable search and seizure;
- the statute was not an impermissible intrusion on the inmate's privacy rights;

- the statute did not violate the inmate's privilege against self-incrimination; and
- the statute did not violate substantive due process.

Id. at 702–03. Before 2002, every jurisdiction upheld similar DNA profiling systems despite the rights enumerated in *Cooper*. The court in *United States v. Miles*, 228 F. Supp. 2d 1130, 1140 (E.D. Cal. 2002), was the first to determine that DNA profiling violated the Fourth Amendment. But see *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), for a more recent case upholding forced blood extractions for DNA profiling.

5. (§10.40) Post-Conviction DNA Testing

Post-conviction DNA testing can be ordered in certain circumstances. Section 547.035, RSMo Supp. 2004, provides that a person within the Department of Corrections can petition for post-conviction DNA testing. The statute sets out:

- what facts must be alleged in the motion, § 547.035.2;
- the number of copies of the motion that need to be filed, § 547.035.3;
- when the court will order the prosecutor to show cause why the motion should not be granted, § 547.035.4;
- when the court will order a transcript of the prior proceedings, § 547.035.5;
- when a hearing is to be held, § 547.035.6; and
- when the court is to order appropriate testing, § 547.035.7.

Section 547.037, RSMo Supp. 2004, next sets out the necessary procedures pertaining to a motion for release. *See State v. Fults*, 98 S.W.3d 877 (Mo. App. E.D. 2003) (court would not allow DNA testing because of guilty plea); *State v. Tyler*, 103 S.W.3d 245 (Mo. App. E.D. 2003) (DNA testing could not be done because of lack of evidence).

B. Other Scientific Evidence

1. (§10.41) Fingerprints

The following is an article that counsel may find useful.

Ten Facts About Digital Fingerprints by Mary Defusco of the Philadelphia Defenders, Michael Cherry, and Larry Meyer

1. The current fingerprint standard for points-of-similarity is based on inked fingerprints. Most prints now in use are "dry" prints, i.e.: taken without ink and rolled dry over a fingerprint scanner. These are digitized fingerprints. Also, latent crime scene prints and print fragments are often digitized, using digital, not film, technology. Digital images, although they may appear to be perfectly clear, are not as sharp or clear as either the original inked print or a film photo of it. They tend to miss exclusions which by default results in more points-of-similarity. Until the current fingerprint standard is corrected, several individuals could be matched against a given latent and the number of falsely imprisoned persons could easily increase greatly.

2. Fingerprint experts (mostly police officers) are not and cannot be expected to be biometric imaging experts. Therefore, they have little or no knowledge of the problems caused by the use of digital technology and they are telling the truth, to the absolute best of their knowledge, when they claim a fingerprint matches.

3. All fingerprint matches are based on points-of-similarity. When an image appears to be of good quality, even though it may not be, smaller areas and consequently fewer points-of-similarity are needed to declare a match.

4. Approximately 46million fingerprints have been digitized.

5. The use of low quality computer displays to match fingerprints is the norm. This procedure creates even more points-of-similarity, while often blurring or eliminating exclusions, thus placing the client at an even greater disadvantage.

6. Often digital fingerprints are computer "enhanced" and this places the client at yet another disadvantage, as the computer "enhancement" can interpret a definitive dissimilarity as unrelated dirt and eliminate it. The fingerprint examiner will never see the one characteristic which might have caused him to eliminate the client. Instead the "enhancement" will cause him to see what he believes to be a clear match.

7. If you ask a police department that has a Livescan digital fingerprint reader to retake a person's fingerprint after the person is arrested, they will once again use Livescan to take the print. Once the digital print is taken, they may again compare it to a digitalized version of the crime scene print or print fragment.

8. To avoid the problems outlined above, biometric imaging experts are required to distinguish between digital fingerprints and inked prints.

9. Digital photography is also often used to capture other forms of forensic evidence such as bite marks, tool marks, shoe and tire impressions, etc. All of the above outlined problems with digital evidence exist in these areas as well.

10. Many standards for evidence comparison (such as the fingerprint standards) are developed by the FBI sponsored Scientific Working Groups. These groups are only open to law enforcement personnel. Defense attorneys must be wary of accepting such standards without question. This is especially true in areas where new technology, such as digital imaging, has created problems with the old standard. Defense attorneys should consider the use of motions in limine to attack such standards. This is particularly true in burglary cases which rely heavily upon such evidence as fingerprints

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In *Schneider v. Delo,* 890 F. Supp. 791 (E.D. Mo. 1995), *aff'd*, 85 F.3d 335 (8th Cir. 1996), the state witness's testimony that the fingerprint found on the bottle of wine seized from the codefendant's home was the victim's fingerprint was admissible because whatever weaknesses there were in the witness's opinion went to the weight of the testimony and not admissibility.

2. (§10.42) Hair

In *State v. Marlow,* 888 S.W.2d 417 (Mo. App. W.D. 1994), the defendant's objection to the admission of photographic slides that compared the defendant's hair to hair of the person who committed the rape—for which the defendant was charged—was properly overruled. The expert's testimony about the possibility that hair found at the scene of the crime was the defendant's, along with photographic slides, aided the jury in its understanding of specific characteristics of each hair, the nature of similarities in the hair that was compared, and the manner in which the witness's analysis was conducted.

3. (§10.43) Letters

Execution or authenticity of a private writing must be established before it may be received as evidence. *State v. Davis,* 849 S.W.2d 34 (Mo. App. W.D. 1993). Authenticity of a document cannot be assumed; what it purports to be must be established by proof. Moreover, the fact that a letter purports to have been written and signed by the person to whom it is attributed does not establish its authenticity and genuineness. *Id.*

Under the reply letter doctrine, however, authenticity and genuineness of a letter purported to have been written and signed by the person to whom it is attributed is established when the letter is received in reply to other letters proven to have been sent to that party. *Id.*; *see also State v. Swigert,* 852 S.W.2d 158 (Mo. App. W.D. 1993).

A letter may be admitted over a defendant's objection when the defendant confirms the authenticity of the letter by the defendant's own testimony. *Id.*

IV. (§10.44) Jury Instructions

In *State v. Gilmore*, 797 S.W.2d 802 (Mo. App. W.D. 1990), the court reviewed decisions that have unequivocally rejected the argument that it is error for a trial court to refuse to submit additional cautionary jury instructions, concerning eye witnesses, modeled after those contained in *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), especially when the Missouri Approved Instructions adequately present the defendant's theory of innocence. *See*:

- *State v. Higgins*, 592 S.W.2d 151, 161 n.14 (Mo. banc 1979);
- *State v. Glass*, 703 S.W.2d 81, 83 (Mo. App. E.D. 1985);
- *State v. Price*, 689 S.W.2d 380, 382–83 (Mo. App. E.D. 1985);
- *State v. Moton*, 671 S.W.2d 347 (Mo. App. E.D. 1984);
- *State v. Rider*, 664 S.W.2d 617, 620 (Mo. App. S.D. 1984);
- *State v. Allen*, 663 S.W.2d 336 (Mo. App. E.D. 1983).

Missouri Approved Instruction–Criminal 302.01 (3rd ed.) submitted to the jury directs their attention to issues of witness credibility.

"[N]umerous cases have announced the settled proposition that a trial court does not err in declining to give an additional instruction on witness credibility beyond the general credibility instruction of MAI-Cr3d

302.01." *State v. Wright*, 751 S.W.2d 48, 53 (Mo. banc 1988); *see also State v. Borden*, 605 S.W.2d 88, 93 (Mo. banc 1980); *State v. Long*, 768 S.W.2d 664, 666 (Mo. App. E.D. 1989) (special cautionary instruction as to eye witness identification was unnecessary in Missouri courts "because the subject is adequately covered by other MAI-CR instructions" (citing *State v. Quinn*, 594 S.W.2d 599, 605 (Mo. banc 1980)).

Submission of a cautionary instruction such as that in *Telfaire*, 469 F.2d 552, would violate Rule 28.02(d), which requires that jury instructions be simple, brief, impartial, and free from argument. *Glass,* 703 S.W.2d at 83; *State v. Smith*, 632 S.W.2d 36, 40 (Mo. App. S.D. 1982) (citing *State v. Smith*, 607 S.W.2d 737, 739 (Mo. App. E.D. 1980)). Failure of a state court to give an instruction or some similar eye witness instruction will not violate due process so as to form a basis for federal habeas corpus relief. *Williams v. Lockhart*, 736 F.2d 1264, 1267 (8th Cir. 1984); *see also Amos v. Minn.*, 849 F.2d 1070 (8th Cir. 1988).

V. Appeal

A. (§10.45) Preservation for Appellate Review

Grounds asserted on appeal are limited to those stated at trial; the litigant is not permitted to broaden the objection the litigant presented to the trial court and may not rely on a theory different from the one offered at the trial. *State v. Herrick*, 814 S.W.2d 660 (Mo. App. S.D. 1991).

To properly preserve the issue of identification for appellate court review, the defendant must file a pretrial motion to suppress the identification, and a hearing must be held before trial. Section 542.296, RSMo 2000. The practice of taking the motion with the case should not be followed. *State v. Young*, 534 S.W.2d 585 (Mo. App. W.D. 1976). Assuming that the motion fails, objection must be made at trial when the in-court identification is made. *State v. Phelps*, 478 S.W.2d 304 (Mo. 1972); *Young*. Further, if defendant's counsel fails to object to the pretrial identification procedure and thereafter engages in cross-examination on the issue of the pretrial identification, the issue is not preserved for appeal. *State v. Holland*, 534 S.W.2d 590 (Mo. App. W.D. 1976); *State v. Gomillia*, 529 S.W.2d 892 (Mo. App. E.D. 1975); *State v. Henderson*, 510 S.W.2d 813, 821 (Mo. App. E.D. 1974); Rule 30.20.

By failing to state a claim in the motion for new trial or points relied on, the appellant preserves nothing for appellate review (review limited

to matters raised in points relied on). *State v. Williams*, 812 S.W.2d 518 (Mo. App. E.D. 1991).

The defendant failed to preserve for review the issue of suggestiveness in an out-of-court identification when he made only limited hearsay objections to witness testimony and no objection to other testimony or to the admission of a photograph array or lineup. *State v. Hornbuckle*, 769 S.W.2d 89 (Mo. banc 1989), *cert. denied*, 493 U.S. 860 (1989).

All assignment of errors in a defendant's motion for new trial not briefed in the appellate court are considered abandoned. *Metter v. Janssen*, 498 S.W.2d 581, 583 (Mo. App. E.D. 1973); *State v. Phelps*, 816 S.W.2d 227 (Mo. App. S.D. 1991); Rule 30.20.

Points relied on in the appellant's brief must state briefly and concisely what actions or rulings are sought to be reviewed and why they are claimed to be erroneous. *See* Rules 30.06(d), 84.04(d); *State v. Maxson*, 755 S.W.2d 277 (Mo. App. E.D. 1988).

B. (§10.46) Harmless Error

When the defendant's constitutional right to due process of law has been violated by an identification procedure that was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, the conviction must be reversed unless the government can demonstrate that the error was harmless beyond a reasonable doubt. *See Chapman v. Cal.*, 386 U.S. 18 (1967).

The harmless error doctrine is applicable when there is a constitutionally infirm identification admitted into evidence at the trial. The federal standard as set out in *Chapman* is as follows: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. The harmless error doctrine only applies to errors that are constitutional in nature. *United States v. Lane*, 474 U.S. 438, n.9 (1986).

In *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), §10.5, *supra*, it was held that the appellate courts may determine the issue of identification to be harmless error.

VI. (§10.47) Other Resources

Suggested sources for review include the following:

- Steve Cain, *Voiceprint Identification*, NARCOTICS, FORFEITURE, AND MONEY LAUNDERING UPDATE NEWSLETTER, U.S. Department of Justice, Criminal Division (Winter 1988)

- Bruce E. Koenig, *Authentication of Forensic Audio Recordings*, J. OF AUDIO ENGINEERING SOC'Y, Vol. 38, No. 1/2, p. 4 (Jan./Feb. 1990)

- Tom Owen, *Forensic Audio and Video—Theory and Applications*, J. OF AUDIO ENGINEERING SOC'Y, Vol. 36, No. 1/2, p. 39 (Jan./Feb. 1988)

- Edward J. Imwinkelried & Robert G. Scofield, *Attacking the Weight of the Prosecution's Scientific Evidence*, THE CHAMPION (April 1992)

- *IAI Voice Comparison Standards*, J. OF FORENSIC IDENTIFICATION (Jan./Feb. 1992)

- Steve Cain, *Verifying the Integrity of Audio and Videotapes*, THE CHAMPION (July 1993)

- JAMES W. OSTERBUG & RICHARD H. WARD, CRIMINAL INVESTIGATION (3rd ed. 2000 Anderson Pub. Co.)

- CHARLES C. SCOTT, PHOTOGRAPHIC EVIDENCE (1st ed. 1942) (2nd ed. 1969)

- ANDRE A. MOENSSENS, FINGERPRINT TECHNIQUES (1971)

- NATHAN R. SOBEL, EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS (2nd ed. 1981)

- ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (3rd ed. 1997)

- Randolph Jonakait, *Reliable Identification: Could the Supreme Court Tell in Manson v. Brathwaite?*, 52 U. COLO. L. REV. 511, 515 n.15 (1981)

- Bedau & Radelet, *Miscarriages of Justice Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria*, 24 LAW & HUM. BEHAV. 581 (2000)

- Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002)

- CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996)

- BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 182 (1995)

- Dekle et al., *Children as Witnesses: A Comparison of Lineup Versus Showup Identification Methods*, 10 APPLIED COGNITIVE PSYCHOL. 1 (1996)

- U.S. Department of Justice, National Institute of Justice, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999)

- Dunning & Stern, *Distinguishing Accurate From Inaccurate Identification via Inquiries About Decision Processes*, 67 J. PERSONALITY & SOC. PSYCHOL. 818 (1994)

- Gonzalez et al., *Misidentification and Failure to Identify in Lineups and Showups*, 64 J. PERSONALITY & SOC. PSYCHOL. 525 (1994)

- Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness and Identification Decisions of Adults and Children*, 21 LAW & HUM. BEHAV. 391 (1997)

- LOFTUS, EYEWITNESS TESTIMONY (1996)

- Luus & Wells, *The Malleability of Eyewitness Confidence: Co-Witnesses and Perseverance Effects*, 79 J. APPLIED PSYCHOL. 714 (1994)

- Penrod & Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL., PUB. POL'Y, & L. 817 (1995)

- ROSS, ADULT EYEWITNESS TESTIMONY (1994)

- SCHECK ET AL., ACTUAL INNOCENCE (2000)

- Sporer et al., *Choosing, Confidence and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315 (1995)

- Sporer, *Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups*, 78 J. APPLIED PSYCHOL. 22 (1993)

- Lisa J. Steele, *Physical Evidence Lineups: An Argument Which Deserves Exploration*, 34 CRIM. L. BULL. 348 (1998)

- Weingardt et al., *Misinformation Revisited: New Evidence on the Suggestibility of Memory*, 23 MEMORY & COGNITION 72 (1995)

- Wells & Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998)

- Wells & Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL., PUB. POL'Y, & L. 765 (1995)

- Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998)

- Wells et al., *Eyewitness Identification Confidence*, 11 N. DIR. IN PSYCHOL. SCI. 151 (2002)

- Wells, *Scientific Study of Witness Memory: Implications for Public and Legal Policy*, 1 PSYCHOL., PUB. POL'Y, & L. 726, 726 (1995)

- Yarmey & Yarmey, *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUM. BEHAV. 459 (1996)

VII. (§10.48) Form—Motion to Suppress Identification and Suggestions in Support

Comes now the defendant and moves this honorable court for an order suppressing from the use in evidence all identification evidence leading from and as a result of the use of lineups, showups, confrontations, or photographs of this defendant, for the following reasons:

1. The lineup, showup, and witness confrontation was held in the absence of the defendant's counsel and, therefore, violated the Sixth Amendment of the United States Constitution. *See Gilbert v. Cal.*, 388 U.S. 263 (1967); *Moore v. Ill.*, 434 U.S. 220 (1977).

2. The lineup, showup, witness confrontation, or photographic identification was so unduly suggestive and conducive to irreparable misidentification as to deny the defendant due process of law under the Fifth and Fourteenth Amendments of the United States Constitution. *See Stovall v. Denno*, 388 U.S. 293 (1967); *Simmons v. United States*, 390 U.S. 377 (1968) (photographic identification).

3. Any in-court identification was/will be tainted by the out-of-court identification.

4. The identification was the fruit of a previous illegal arrest or detention. *See Davis v. Miss.*, 394 U.S. 721 (1969).

5. A hearing should be held on the issue.

Wherefore, the defendant prays the Court for an order suppressing from the use in evidence any testimony or evidence relating to the lineups, showups, witness confrontations, or showing of the photographs and any in-trial identification of the defendant.

Randall D. Eggert*

Chapter 11

STATEMENTS OF A DEFENDANT

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VIII. (§11.39) Use of Suppressed Statements at Trial

IX. (§11.40) Appeal of Suppression Ruling and Post-Conviction Relief

X. (§11.41) Form—Motion to Suppress Statements

I. (§11.1) Introduction

The purpose of this chapter is to provide a basic reference tool for attorneys handling a criminal case involving a statement made by a defendant. Because it is impossible to cover all aspects of this topic in the space allotted, this chapter is intended to serve solely as a starting point. It does not obviate the need for thorough case preparation and research. This area of law is constantly changing; further research, therefore, is imperative.

The emphasis of this chapter is the in-court use of a defendant's statement. Problem areas are addressed from both the prosecution and defense perspectives because both sides must anticipate and understand the strategy and arguments of their opponents.

II. Discovery of the Existence of a Statement

A. (§11.2) Formal Discovery

Rule 25.03(A)(2) provides that, on written request from the defendant's counsel, the state shall disclose to the defendant "[a]ny written or recorded statements and the substance of any oral statements made by the defendant or by a co-defendant, a list of all witnesses to the making, and a list of all witnesses to the acknowledgment, of such statements, and the last known addresses of such witnesses." The government must disclose these statements even if it does not intend to introduce them in its case-in-chief, but instead seeks to reserve them for impeachment. *State v. Farr*¸ 69 S.W.3d 517, 522–23 (Mo. App. S.D. 2001); *State v. Willis*, 2 S.W.3d 801, 806 (Mo. App. W.D. 1999).

The sanction to be imposed for a violation of Rule 25.03 lies within the discretion of the trial court. *State v. Edwards*, 116 S.W.3d 511, 534 (Mo. banc 2003). When the state fails to comply with the timely disclosure requirement of Rule 25.03(A)(2), the appellate court will reverse the judgment of conviction only when the defendant demonstrates that the state's failure to make a timely disclosure resulted in fundamental unfairness or bore a real potential for substantively altering the outcome of the case. *Farr,* 69 S.W.3d at 523. Fundamental unfairness occurs in discovery violation cases when the state's failure to disclose results in the defendant's genuine surprise at learning of an unexpected witness or evidence and the surprise prevents meaningful efforts by the defendant to consider and prepare a strategy for addressing the state's evidence. *State v. Johnston,* 957 S.W.2d 734, 750 (Mo. banc 1997); *State v. Rousan*, 961 S.W.2d 831, 843 (Mo. banc 1998). An example of a court struggling with what is "fundamentally unfair" is *State v. Carlisle*, 995 S.W.2d 518, 521 (Mo. App. E.D. 1999) (state's failure to disclose under Rule 25.03 the defendant's written confession until the morning before trial was not so fundamentally unfair as to cause the outcome of the trial to be different when the trial court gave the defendant a half-day recess to examine the written confession and the defendant had given an oral confession that had been properly disclosed to the defendant before trial).

B. Interviews

1. (§11.3) Prosecution

Generally, the prosecution can easily determine if a statement by the defendant exists. The prosecutor must make sure, however, that the statement is properly preserved and complete. To do so, the prosecutor should carefully interview each witness to the statement to make sure that any oral statement is completely and accurately reduced to writing before memories fade. Often, when making the initial police report, the police are concentrating on quickly initiating prosecution, not necessarily on preserving evidence for trial. The details required for in-court testimony are often improperly recorded, which can result in important information being omitted from the police report or during in-court testimony. This can leave the police officer open to damaging cross-examination regarding the omissions and errors. If the prosecutor conducts further interviews, additional evidence, such as the existence of additional witnesses to statements or even additional statements, may surface.

It is imperative that the prosecutor diligently seek all statements made by the defendant, regardless of the content. Many law enforcement officers consider the terms "statement" and "confession" to be synonymous, and they do not disclose exculpatory statements made unless specifically asked. The prosecutor must be aware of exculpatory statements to both pinpoint and limit defenses. Furthermore, the prosecutor has a duty to disclose exculpatory statements by the defendant unknown to the defendant at the trial. *Brady v. Md.*, 373 U.S. 83, 87 (1963); *State v. Myers*, 997 S.W.2d 26, 33 (Mo. App. S.D. 1999).

2. (§11.4) Defense

The primary source of information regarding statements will be the defendant. The defense attorney should recognize that defendants in criminal cases may be reluctant to admit having given statements to the police, or they may not even recognize that they have given statements. Counsel must stress to the client that total honesty and complete information is essential to mount a proper defense. It is also important to ensure that the client understands that statements include any oral statements, as well as written ones.

The admissibility of statements will often hinge on the individual facts. A defense attorney should interview the client at an early stage regarding the circumstances surrounding any statements. Counsel may discover the existence of witnesses not mentioned in the police reports, such as other police officers, civilian police personnel, co-defendants, victims, and others. This information should be developed as soon as possible because it may be difficult or impossible to track down these additional witnesses, even after a brief period of time.

III. Raising the Issue

A. (§11.5) Necessity for Hearing

A defendant in a criminal case has a constitutional right to a judicial determination of the admissibility of pretrial statements. *Jackson v. Denno*, 378 U.S. 368 (1964); *State v. Edwards*, 30 S.W.3d 226, 231 (Mo. App. E.D. 2000). If the trial judge allows the statement to be considered by the jury without ruling on the voluntariness of the statement, the normal recourse by the appellate court will be to remand to the trial court to hold an evidentiary hearing to make that determination. If the trial court judge finds that the statement is voluntary, the conviction will stand, subject to further appellate review of the trial court's ruling. If the trial court judge finds that the statement is involuntary, the conviction is set aside and the case retried, without the statement being admitted. *State v. Taylor*, 999 S.W.2d 744, 747 (Mo. App. W.D. 1999); *State v. Day,* 970 S.W.2d 406, 410 (Mo. App. E.D. 1998), *appeal after remand*, 987 S.W.2d 824 (Mo. App. E.D. 1999). The prosecution may avoid such a hearing by committing itself not to use the defendant's statements or any of their fruits. *United States v. Talbert*, 271 F. Supp. 312 (S.D.N.Y. 1967).

B. Time of Objection

1. (§11.6) Generally

Rule 24.05 provides that "[r]equests that evidence be suppressed shall be raised by motion before trial; however, the court may in its discretion entertain a motion to suppress evidence at any time during trial." See also Rule 24.04 regarding pretrial motions.

2. (§11.7) Advantages of Earliest Objection

Generally, it is best to have a hearing regarding the admissibility of the defendant's statements at the earliest possible stage of the proceedings and to preserve the objection at each stage after that. In felony cases, when permitted, defense counsel should even object at the preliminary hearing stage.

Early objections help the defense attorney because:

- a successful hearing on the motion to suppress may effectively stop the prosecution;
- a hearing permits relatively free and open discovery, which is much broader than a hearing on the merits of the case;
- a hearing may assist in future plea negotiations because it essentially freezes testimony before the state has had the opportunity to prepare its witnesses better; and
- a hearing may convince the defendant that the statement is admissible and that the state thus has a strong case.

Dealing with objections to defendants' statements early in the proceedings may also assist the prosecutor because a hearing:

- will permit the prosecutor to preview the testimony of the state's witnesses to better evaluate the case and prepare witnesses for trial;
- frequently aids in plea bargaining because both sides have the opportunity to evaluate the strength of the case; and
- gives the prosecutor an opportunity to dispose of weak cases at an early stage.

C. (§11.8) Waiver

Though it is preferable to have a pretrial hearing on the admissibility of statements, it is not required to preserve the issue for appeal. *Wainwright v. Sykes*, 433 U.S. 72, 86 (1977). What is required, however, is a proper objection at trial when the state seeks to introduce the statement. *State v. Gardner*, 741 S.W.2d 1 (Mo. banc 1987), *cert. denied*, 486 U.S. 1025 (1988); *State v. Oglesby*, 103 S.W.3d 890, 891 (Mo. App. E.D. 2003).

A motion to suppress, on its own, without an accompanying objection, preserves nothing for appeal. *Oglesby*, 103 S.W.3d at 891. To preserve for appeal an objection to an inadmissible statement, the objection must be

specific and the point raised on appeal must be based on the same theory. *State v. Knese*, 985 S.W.2d 759, 766 (Mo. banc 1999).

Failure to object to a statement preserves nothing for appellate review, and the appellate court can review only for plain error. *State v. Smith*, 90 S.W.3d 132, 134 (Mo. App. W.D. 2002); *State v. Conn,* 950 S.W.2d 535, 537 (Mo. App. E.D. 1997). Conversely, if the defendant announces "no objection" to a statement being introduced in trial, that announcement amounts to an affirmative waiver of appellate review and plain error review is not warranted. *State v. Patino,* 12 S.W.3d 733, 740 (Mo. App. S.D. 1999).

D. (§11.9) Finality of Pretrial Ruling

Generally, a final ruling adverse to the defendant may not be relitigated in the trial court. It is possible, however, to have a second hearing in the trial court regarding the admissibility of a defendant's statement on a showing of new evidence. *State v. Winters*, 900 S.W.2d 636, 640 (Mo. App. W.D. 1995). An adverse ruling on the defendant's motion to suppress statements may be reargued on appeal as long as proper objection was made at trial and the issue was properly preserved for appeal at every stage of the proceedings, including in the motion for new trial.

Additionally, defense counsel may present evidence of the involuntariness of a defendant's statement to the jury to argue that the statement is fictitious, untrustworthy, or inaccurate and ought to be disregarded. *State v. Wilson*, 105 S.W.3d 576, 586 (Mo. App. S.D. 2003). The prosecutor should lay a foundation establishing the voluntariness and reliability of statements to rebut allegations put forth by the defense. The jury may ignore statements based on its own assessment of the credibility of witnesses. *State v. Kurtz*, 564 S.W.2d 856, 860 (Mo. banc 1978); *State v. Haley*, 73 S.W.3d 746, 753 (Mo. App. W.D. 2002). A jury instruction on confession or admission of the defendant (MAI-CR 3d 310.06) is available, but only if requested. *State v. Ray*, 647 S.W.2d 522, 523 (Mo. banc 1983); *Artis v. State*, 993 S.W.2d 585 (Mo. App. E.D. 1999). Before the instruction can be given, however, the defendant must present evidence that would support the contention that the statements were not made voluntarily or freely. *Wilson*, 105 S.W.3d at 586.

E. (§11.10) Preserving Objections for Appeal

A motion to suppress, on its own, preserves nothing for review. *State v. Oglesby*, 103 S.W.3d 890, 891 (Mo. App. E.D. 2003). Defendants must

specifically state their objections to the admission of statements at trial to preserve the point for appeal. *State v. Patino*, 12 S.W.3d 723, 740 (Mo. App. S.D. 1999); *State v. Wade*, 866 S.W.2d 908 (Mo. App. W.D. 1993). The trial court does not need to make a formal finding as to the admissibility of the statement, but the court must state its conclusions regarding the admissibility of the statement so that they appear clearly on the record. *Sims v. Ga.*, 385 U.S. 538 (1967); *State v. Schnick*, 819 S.W.2d 330, 336 (Mo. banc 1991); *State v. Scott*, 841 S.W.2d 787 (Mo. App. E.D. 1992).

While there is no need for the trial judge to make a particular formal finding of fact, the trial court's conclusions must make unmistakably clear that the confession is voluntary. *State v. Skillicorn*, 944 S.W.2d 877, 890 (Mo. banc 1997); *Schnick*, 819 S.W.2d at 330.

IV. (§11.11) Grounds for Objection and Suppression

Potential grounds for objecting to and suppressing statements include the following:

- That the statement was involuntary
- That the statement was taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966)
- That the statement was the fruit of the poisonous tree
- That the statement was taken in violation of the defendant's Sixth Amendment right to counsel

There are different rules and tests depending on which ground for suppression is used. Counsel, therefore, should understand which grounds form the basis for the motion to suppress.

A. (§11.12) Involuntariness

Voluntariness is still the basic test for determining the admissibility of statements. This is true even if *Miranda v. Arizona*, 384 U.S. 436 (1966), requirements are met. *Dickerson v. United States*, 530 U.S. 428, 444 (2000); *State v. Schnick*, 819 S.W.2d 330, 335–37 (Mo. banc 1991); *State v. Blackman*, 875 S.W.2d 122, 135 (Mo. App. E.D. 1994). The fact that a defendant waived *Miranda* rights is not dispositive on the issue of the voluntariness of the statement. Instead, the question must be, did the defendant willingly waive those rights? *State v. Day*, 970 S.W.2d 406, 409 (Mo. App. E.D. 1998).

The test for voluntariness is whether, under the totality of the circumstances, the defendant was deprived of the free choice to admit, deny, or refuse to answer and whether there was coercion of such a degree that the defendant's will was overborne at the time of the statement. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. banc 1998); *State v. Wood*, 128 S.W.3d 913, 915–16 (Mo. App. W.D. 2004). Although no single factor is dispositive, factors to be considered when reviewing the totality of the circumstances include:

- whether the defendant was advised of the *Miranda* rights and understood them;
- the defendant's physical and mental condition;
- the length of the questioning;
- the presence of police intimidation or coercion; and
- the withholding of food, water, and other needs.

Rousan, 961 S.W.2d at 845. These factors can be divided into two broad categories, which are discussed in §§11.13 and 11.14 below.

1. (§11.13) Actions of Interrogators

Actions of interrogators, such as promises, threats, beatings, deprivation of food or sleep, isolation of the defendant, tricks or deception, and violation of the "twenty-hour rule," should be considered. *See* § 544.170, RSMo Supp. 2004; *State v. Feltrop*, 803 S.W.2d 1, 12–13 (Mo. banc 1991), *cert. denied,* 501 U.S. 1262 (1991); *Roberts v. State*, 476 S.W.2d 490, 494 (Mo. 1972); *Gooden v. State*, 846 S.W.2d 214, 219 (Mo. App. S.D. 1993). Confessions extracted by a direct or implied promise of leniency are inadmissible. *State v. Smith*, 944 S.W.2d 901, 911 (Mo. banc 1997) (a noncommital statement by the police that is twisted into a promise in the mind of the defendant does not rise to the level of an implied promise); *State v. Skillicorn*, 944 S.W.2d 877, 890 (Mo. banc 1997). A confession derived from an interview by an interrogator who had been a spiritual advisor to the defendant was suppressed because that relationship had been intentionally exploited by the police to gain a confession. *State v. Wood*, 128 S.W.3d 913, 917–18 (Mo. App. W.D. 2004). But general encouragements to cooperate with law enforcement officers are far different from specific promises of leniency and do not make statements obtained afterward inadmissible. *State v. Simmons,* 944 S.W.2d 165, 175 (Mo. banc 1997). An officer's statements indicating that cooperation is in the best interests of the suspect are not improperly coercive and do not make a statement involuntary. *Id.*; *State v. Simms*, 131 S.W.3d 811,

814 (Mo. App. W.D. 2004). Law enforcement officers telling a defendant that the alleged criminal activity is "no big deal" before obtaining a statement from the defendant did not act to make the statement involuntary. *State v. Johnson*, 988 S.W.2d 115, 119–20 (Mo. App. W.D. 1999).

Trickery, deception, or subterfuge does not make a statement involuntary unless the deception offends societal notions of fairness or is likely to procure an untrustworthy confession. *State v. Davis*, 980 S.W.2d 92, 96 (Mo. App. E.D. 1998) (promise of a police officer that "[n]obody else[ ]" would see the defendant's videotaped confession did not render the confession involuntary).

2. (§11.14) Inherent Weaknesses of Defendant

Inherent weaknesses of the defendant, such as age, education, intelligence, experience, physical condition, addiction, and intoxication, should be considered. *State v. Flowers*, 592 S.W.2d 167, 169 (Mo. banc 1979); *State v. Clark*, 859 S.W.2d 782, 788 (Mo. App. E.D. 1993). A deficient mental condition does not by itself render a defendant's statement involuntary, and there is no constitutional right to confess "only when totally . . . and properly motivated." *State v. Knese*, 985 S.W.2d 759, 766 (Mo. banc 1999) (quoting *State v. Smith*, 944 S.W.2d 901, 911 (Mo. banc 1997)); *State v. Lyons*, 951 S.W.2d 584, 590 (Mo. banc 1997) (quoting *Colo. v. Connelly*, 479 U.S. 157, 166 (1986)). But when an interrogator manipulates the interrogator's role as a spiritual advisor to a defendant with clear mental problems, that inherent weakness would support the suppression of the defendant's confession. *State v. Wood*, 128 S.W.3d 913, 917–18 (Mo. App. W.D. 2004). A defendant cannot automatically exclude statements simply because the defendant made them while suffering from a reaction to medication, *State v. Clarkston*, 963 S.W.2d 705, 715–16 (Mo. App. W.D. 1998), or when the defendant was suffering from pain and also was taking medication for the pain, *State v. Bucklew*, 973 S.W.2d 83, 90 (Mo. banc 1998). A defendant who is intoxicated or under the influence of drugs cannot automatically have any statement made to the police under those conditions excluded. *State v. Brown*, 998 S.W.2d 531, 547 (Mo. banc 1999).

Before suppression is required, it must appear that the totality of the circumstances so influenced the defendant as to render the defendant unable to appreciate the consequences and nature of the statement. *See, e.g.*, *State v. Wise*, 879 S.W.2d 494 (Mo. banc 1994).

B. (§11.15) *Miranda v. Arizona*: Fifth Amendment Right to Counsel

This chapter attempts to only provide basic information concerning *Miranda v. Arizona*, 384 U.S. 436 (1966). In its decision, the Supreme Court went far beyond the specific facts of the case and included a lengthy discussion of modern interrogation techniques and the need for procedural safeguards to protect an accused's constitutional rights. The Court limited its holding to situations of *custodial* interrogation. General on-the-scene questioning was not affected by the decision. *Id.* at 478.

The Court summarized its holding as follows:

> Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Miranda, 384 U.S. at 444–45.

The United States Supreme Court affirmed the constitutionality of the rule articulated in *Miranda* in *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

The *Miranda* decision gives rise to many issues, which can generally be categorized into three areas:

1. Did custody and interrogation occur so that the warnings were required?

2. If so, were the warnings properly given?
3. If so, was there a proper waiver of the accused's rights?

The issues thus turn on the facts of each individual case.

1. (§11.16) Were Warnings Required?

Miranda v. Arizona, 384 U.S. 436 (1966), warnings are required only when a suspect is subjected to interrogation in a custodial setting. The Court defined such questioning as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id*. at 444. Applying that phrase to particular fact situations, however, remains open to argument and interpretation. *See Miranda*, 384 U.S. at 467 ("we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process"). For example, the Supreme Court has found *Miranda* applicable to questioning in a prison during the suspect's imprisonment on a separate offense, *Mathis v. United States*, 391 U.S. 1 (1968), and to questioning taking place in a suspect's home after he has been arrested and is no longer free to leave, *Orozco v. Tex.*, 394 U.S. 324 (1969).

a. (§11.17) Question of Custody

United States v. Griffin, 922 F.2d 1343 (8th Cir.1990), identified several factors to be considered in determining if a defendant is in custody when interrogated. These factors include an accused's freedom to leave the location where the inquiry takes place and the purpose, location, and length of the interrogation. *Id.* at 1348. *Griffin* concluded, however, that these factors alone are not conclusive. Other indicia of custody include:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere . . . was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning.

Id. at 1349. The Supreme Court of Missouri approved this analysis in *State v. Werner,* 9 S.W.3d 590 (Mo. banc 2000).

Werner noted, however, that "[t]his list is not exhaustive." Missouri courts look to the surrounding circumstances to determine whether the accused was in custody. *State v. Bradley*, 670 S.W.2d 123 (Mo. App. E.D. 1984). In *State v. Birmingham*, 132 S.W.3d 318, 323 (Mo. App. S.D. 2004), the court held that statements made by a defendant to his parole officer while under parole about a new crime were made while the defendant was in custody and required the parole officer to give the defendant his *Miranda* warnings (*Miranda v. Ariz.*, 384 U.S. 436 (1966)). In *State v. Taylor*, 109 S.W.3d 190, 192 (Mo. App. E.D. 2003), the court, in applying the *Griffin*, 922 F.2d 1343, factors, held that the defendant was in custody, even though he was questioned in his vehicle along the side of the road, because suspicion had already focused on the defendant and he was not free to leave the area.

Examples of when a person is found to not be in custody include *State v. Kalter*, 839 S.W.2d 670 (Mo. App. E.D. 1992), in which the court held that, because the defendant had not been arrested or restrained of his liberty, he was not in custody when he told the police officer, shortly after the officer arrived at his house, that he stabbed someone and the person was in the basement. *See also State v. Crane*, 841 S.W.2d 271 (Mo. App. W.D. 1992) (court held that the defendant was not in custody when the officer questioned him at the scene of an accident during an on-the-scene investigation); *State v. Griffin*, 848 S.W.2d 464 (Mo. banc 1993) (Court held that questioning during the standard intake interview did not constitute custodial interrogation because it was done for reasons other than to gain evidence to be used against defendants at future trials). Questions following a routine traffic stop do not constitute custodial interrogation unless the defendant is under arrest or otherwise restrained beyond that usually associated with a traffic stop. *State v. Brown*, 814 S.W.2d 304 (Mo. App. W.D. 1991). For a thorough discussion of the issue of when a suspect is in custody for *Miranda* purposes and the Eighth Circuit law on that issue, see *Griffin*, 922 F.2d at 1347–56.

Other factors courts consider to determine if custody existed include:

- the type of physical surroundings where questioning occurs, *United States v. Grady*, 665 F.2d 831, 833 (8th Cir. 1981);

- the ability of the defendant to refuse to answer questions, *State v. Hosto-Worthy*, 877 S.W.2d 150 (Mo. App. E.D. 1994); and
- whether the police officers had authority to make the arrest, *United States v. Jamieson-McKames Pharms., Inc.*, 651 F.2d 532, 543 (8th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held that statements made during a court-ordered psychiatric examination require the same procedural safeguards as custodial interrogations by police. The Court focused on the following three factors in holding that the defendant's statements were involuntary and inadmissible:

1. The defendant was in custody when the examination was ordered and conducted.
2. The defendant did not initiate the examination or introduce any examination-related evidence at trial.
3. The defendant was not advised before the examination of his constitutional rights, and he was not advised that the examination would be used at the penalty phase of the trial.

In *State v. Johnson*, 988 S.W.2d 115, 118–20 (Mo. App. W.D. 1999), the court affirmed the trial court's determination that no custodial interrogation had occurred with the defendant. In *Johnson* the defendant had asserted his innocence and had voluntarily agreed to take a polygraph test at the police station. A law enforcement officer took the defendant to the polygraph room and, before beginning the examination, asked the defendant about the accused crime. After being told by the officer that the crime, statutory sodomy, was "no big deal," the defendant made inculpatory statements. The court found that the defendant was not "in custody" at the police station when he made the statement.

Some cases have suggested that whether a suspect is the "focus" of an investigation is a factor to consider in determining whether the defendant was in custody, triggering the *Miranda* requirements. *Bradley*, 670 S.W.2d at 126. But at least one Missouri case has rejected this focus test, instead arguing that *Miranda* applies only when there is objective evidence that a defendant is purposefully restrained from liberty by the police.

State v. Middleton, 854 S.W.2d 504, 515–16 (Mo. App. W.D. 1993). This approach is supported in *Stansbury v. California*, 511 U.S. 318, 323 (1994) (per curiam), which held that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views of either the interrogating officers or the person being interrogated. The police officer's undisclosed view that the person is a suspect, therefore, is not relevant to the custody issue.

b. (§11.18) Question of Interrogation

Even if in custody for Fifth Amendment purposes, the accused may not be entitled to *Miranda* warnings if the questioning does not rise to the level of "interrogation," which the *Miranda* Court defined as "questioning initiated by law enforcement officers." *Miranda v. Ariz.*, 384 U.S. 436, 444 (1966). In *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980), the Supreme Court expanded the definition of "interrogation" to include not only express questioning but also its "functional equivalent," that is, "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." To determine whether the officer's conduct rose to the level of interrogation, the focus is on the suspect's perceptions, not the officer's intentions. A person who is asked preliminary, investigatory questions by police officers is not "in custody," thus triggering the *Miranda* protections. *State v. Kerr*, 114 S.W.3d 459, 462 (Mo. App. S.D. 2003).

In *State v. Reasonover*, 714 S.W.2d 706 (Mo. App. E.D. 1986), *cert. denied*, 480 U.S. 936 (1987), the court held that no interrogation occurred when the defendant initiated the contact with the police to assist them in investigating a murder. *See also State v. Perkins*, 774 S.W.2d 484 (Mo. App. E.D. 1989). In *State v. Bolen*, 731 S.W.2d 453 (Mo. App. E.D. 1987), the court held that there was no interrogation when the detective told the defendant that the arrest warrant said he was to have no contact with the victim, and the defendant stated that he did not know the victim.

In *State v. Lynn*, 829 S.W.2d 553, 554 (Mo. App. E.D. 1992), the court held that interrogation did occur and *Miranda* warnings were required when the investigation had reached the accusatory stage and the police continued questioning the defendant, despite her denials, until she confessed. The

defendant in *Lynn* was 17 years old. *But see Middleton*, 854 S.W.2d at 514–16 (questioning if this rose to the level of *custodial* interrogation).

In *State v. Walton*, 796 S.W.2d 374 (Mo. banc 1990), the Court held that, even though the defendant was under arrest and a police officer was present, the defendant's answer to a victim's question concerning the location of his wallet and the defendant's actions in leading the victims to their property were voluntary and admissible, despite the absence of *Miranda* warnings. *Miranda* rights do not attach to volunteered statements. *See State v. O'Toole*, 619 S.W.2d 804, 810–11 (Mo. App. E.D. 1981); *United States v. Criswell*, 696 F.2d 636 (8th Cir. 1983). When a police officer overheard the defendant make incriminating statements on the telephone, the Court held that no interrogation occurred. *State v. Payne*, 639 S.W.2d 597, 600 (Mo. banc 1982).

Questioning that occurs during routine booking is not interrogation requiring *Miranda* warnings. *State v. Isaiah*, 874 S.W.2d 429 (Mo. App. W.D. 1994). A request for consent to search is not an "interrogation" because giving consent to search is not a self-incriminating statement under the Fifth Amendment. *State v. Metz,* 43 S.W.3d 374, 382 (Mo. App. W.D. 2001).

2. (§11.19) Were Warnings Properly Given?

Under *Miranda v. Arizona*, 384 U.S. 436 (1966), the four warnings required before custodial interrogation are the following:

1. The defendant has a right to remain silent.
2. Any statement the defendant makes can be used as evidence against the defendant.
3. The defendant has a right to consult an attorney and to have one present during the interrogation.
4. If the defendant cannot afford an attorney and wants one, an attorney will be appointed to represent the defendant.

Miranda warnings do not have to be given exactly as written in *Miranda*, but law enforcement officers must convey the essential message of *Miranda* to the defendant. *Duckworth v. Eagan*, 492 U.S. 195, 203–04 (1989). Missouri courts decide the issue of the propriety of the warnings given on a case-by-case basis. *See*, *e.g.*, *State v.*

Williams, 486 S.W.2d 468, 474 (Mo. 1972) (warnings that omit the advice that an attorney will be appointed if the suspect cannot afford an attorney are fatally defective); *State v. Harper*, 465 S.W.2d 547 (Mo. 1971) (warnings omitting the advice that the defendant had the right to terminate the interrogation at any time did not violate *Miranda*); *State v. Woodward*, 587 S.W.2d 287, 289 (Mo. App. E.D. 1979) (warnings to a nonindigent defendant that omitted the advice that an attorney would be provided if the defendant could not afford one did not violate *Miranda*).

It is important for both the prosecution and the defense to recognize the necessity for a proper foundation before any statement may be introduced. The proper foundation requires proof that the defendant was informed of each right, indicated an understanding of each right, waived each right, and was willing to make a statement. The state has this burden of proof. *State v. Williams*, 956 S.W.2d 942, 947 (Mo. App. W.D. 1997).

3. (§11.20) Was There a Proper Waiver?

Because *Miranda v. Arizona,* 384 U.S. 436 (1966), warnings are generally given automatically, the question of the voluntariness of the waiver of rights has almost replaced the question of the voluntariness of the statement. Knowing and intelligent waiver of the right to silence is normally shown by evidence that the police officer read the list of *Miranda* rights to the accused, asked whether the accused understood those rights, and received an affirmative response. *State v. Gilbert*, 103 S.W.3d 743 , 749 (Mo. banc 2003). A waiver of rights does not need to take any particular form. *State v. Garrette*, 699 S.W.2d 468 (Mo. App. S.D. 1985). It may be inferred from the surrounding circumstances. *N.C. v. Butler*, 441 U.S. 369 (1979). A waiver of rights can be knowing and intelligent even if the accused does not know or understand all the possible consequences of the waiver. *State v. Debler*, 856 S.W.2d 641 (Mo. banc 1993); *State v. Powell*, 798 S.W.2d 709 (Mo. banc 1990), *cert. denied*, 501 U.S. 1259 (1991). A defendant's refusal to sign the written waiver form does not preclude a finding of an implied or express oral waiver. *State v. Wise*, 879 S.W.2d 494, 505–06 (Mo. banc 1994).

Once a defendant has invoked the right to counsel, a subsequent waiver of that right can be shown with evidence that the defendant initiated further communications with the police. *State v. Figgins*, 839 S.W.2d 630 (Mo. App. W.D. 1992). A defendant's intoxication, drug use, or low IQ does not necessarily invalidate an otherwise

voluntary waiver of rights. *State v. Knese*, 985 S.W.2d 759, 766 (Mo. banc 1999). *See*, *e.g.*, *State v. Armstrong*, 72 S.W.3d 327, 330–32 (Mo. App. S.D. 2002) (alcohol intoxication); *State v. Jacobs*, 861 S.W.2d 621 (Mo. App. W.D. 1993) (low IQ); *State v. Rogers*, 686 S.W.2d 472 (Mo. App. W.D. 1984) (drug dependency).

a. (§11.21) Waiver After Assertion of Right to Silence: The Problem of Multiple Interrogations

Miranda expressly requires that, once the accused indicates a desire to remain silent, the interrogation must cease, even if the accused previously waived that right. *Miranda v. Ariz.*, 384 U.S. 436, 473–74 (1966). That does not preclude the accused, however, from later knowingly and intelligently waiving the right to remain silent. *State v. Morris*, 719 S.W.2d 761 (Mo. banc 1986); *State v. Martin*, 820 S.W.2d 605 (Mo. App. E.D. 1991), *cert. denied*, 505 U.S. 1208 (1992).

In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Supreme Court addressed the related question of when police may resume interrogation once the accused has invoked the right to silence and terminated the interrogation. In *Mosley* the Court noted the following four factors as particularly significant in proving a valid waiver during the second interrogation:

1. The first interrogation ceased immediately upon the defendant's assertion of his right to remain silent.
2. A significant period of time elapsed between the first and second interrogations.
3. The police gave the defendant a fresh set of warnings before the second interrogation.
4. The second interrogation concerned new subject matter.

In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Supreme Court held admissible a second confession obtained after the first confession was obtained without the benefit of the *Miranda* warnings.

In *State v. Bucklew*, 973 S.W.2d 83, 87–89 (Mo. banc 1998), the Court found no *Miranda* violation when the defendant initially invoked his right to remain silent after arrest. The defendant was injured in a gun battle with the police and was hospitalized. The police approached the defendant five days later while the

defendant was being released from the hospital and again advised the defendant of his *Miranda* rights and asked him if he would give a statement. The defendant agreed and gave a lengthy statement. The Court, in finding that no *Miranda* violation had occurred, focused on the length of time between the first request for a statement and the second request and also that the police again advised the defendant of his *Miranda* rights before he gave his second statement. *See State v. Williams*, 956 S.W.2d 942, 947 (Mo. App. W.D. 1997) (defendant's confession given after *Miranda* is not rendered inadmissible because the police obtained a prior statement from the defendant without advising the defendant of *Miranda* rights when the first statement was exculpatory in nature and some time had elapsed from the first statement to the second statement).

In *State v. Grant*, 784 S.W.2d 831 (Mo. App. E.D. 1990), the court held that there was no *Miranda* violation when three days passed between the first and second interrogations and the police initiated the second interrogation after having spoken to other witnesses and obtaining additional information that they wanted to discuss with the defendant. But see *State v. Christian*, 604 S.W.2d 758, 762 (Mo. App. E.D. 1980), in which the court held that the defendant's right to cut off questioning was not "scrupulously honored" when the defendant, a 17-year-old, was held in custody for more than five hours and was given promises of leniency.

In *State v. Wood*, 559 S.W.2d 268 (Mo. App. E.D. 1977), *cert. denied*, 449 U.S. 876 (1980), the court held that the defendant did not waive his right to remain silent, despite the fact that he signed a written waiver form, because the defendant's requests to cut off questioning and for counsel were followed by 12 hours of persistent questioning with little or no sleep or food. The court reasoned that the subsequent warning and waiver forms that the defendant executed were the result of the seemingly interminable interrogation after the defendant realized that his requests were useless.

b. (§11.22) Waiver After Assertion of Right to Counsel: The Problem of Multiple Interrogations

Miranda v. Arizona, 384 U.S. 436 (1966), did not address the issue of whether the police could conduct a second interrogation when the suspect previously invoked the right to counsel. In *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981), the Supreme Court addressed that issue and held that, once a suspect invokes the right to counsel, re-interrogation is permissible only if the suspect initiates the second interrogation and if the waiver during the second interrogation is knowing and intelligent under the totality of the circumstances. In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), the Supreme Court held that the defendant initiated further conversation by asking a police officer, "Well, what is going to happen to me now?" In *Wyrick v. Fields*, 459 U.S. 42 (1982) (per curiam), the Court held that an accused's consent to a polygraph examination constitutes an initiation of interrogation, thereby waiving the right to counsel during a post-polygraph interrogation. The Supreme Court has also held that, if an accused has an attorney for one criminal charge, the police may still approach the suspect to discuss a different and unrelated criminal charge if they give the suspect *Miranda* warnings and the suspect waives those rights for that particular charge. *See McNeil v. Wis.*, 501 U.S. 171 (1991).

Missouri courts have generally followed the holding in *Edwards,* 451 U.S. 477. *See State v. Lyons*, 951 S.W.2d 584, 589–90 (Mo. banc 1997); *State v. Mease*, 842 S.W.2d 98 (Mo. banc 1992), *cert. denied*, 508 U.S. 918 (1993); *State v. Wade*, 866 S.W.2d 908 (Mo. App. W.D. 1993); *State v. Owens*, 827 S.W.2d 226 (Mo. App. E.D. 1991).

Additionally, the issue of multiple interrogations under *Edwards*, 451 U.S. 477, may arise if the defendant is released from custody and is later arrested on other charges. In *State v. Farris*, 125 S.W.3d 365 (Mo. App. W.D. 2004), the defendant was arrested on burglary charges and taken into custody by the police. The defendant asserted his *Miranda* rights and the police discontinued questioning. Afterward, the defendant was released, and several months later he was arrested for murdering the primary witness against him in the burglary case. After arrest, the defendant was read his *Miranda* rights and confessed to being at the victim's house the night of the

murder. The defendant sought to suppress the statement, claiming that his previous invocation of *Miranda* precluded the police from attempting a second interview, citing the rule in *Edwards*. The court in *Farris,* however, held that *Edwards* does not apply when there is a clear break in custody between the first and the second interview. *Farris*, 125 S.W.3d at 371–73.

4. (§11.23) Summary of *Miranda* Analysis

In summary, the *Miranda v. Arizona*, 384 U.S. 436 (1966), issues in any case may be generally analyzed as follows:

1. Was *Miranda* applicable?
   a. Was the defendant in custody?
   b. Was the defendant's statement made during interrogation?
   c. Was the interrogator a police officer or agent?
   d. Is there a "fruit of the poisonous tree" issue? (*See* §11.24, *infra*.)

2. Were *Miranda* requirements met?
   a. Were the warnings properly given?
   b. Was there a proper waiver of rights?
   c. Was the defendant competent to make a waiver?
   d. If there were multiple interrogations, did they comply with *Miranda* requirements?

C. (§11.24) Fruits of the Poisonous Tree

Even though a statement is voluntary and complies with *Miranda v. Arizona*, 384 U.S. 436 (1966), it may still be suppressed if it was obtained as the "fruit of the poisonous tree." This doctrine provides that, when evidence is derived from constitutional violations that fall within the purview of the exclusionary rule, that evidence may be tainted and therefore inadmissible in court. Statements obtained after an illegal arrest or after confrontation with illegally seized evidence may still be admissible, however, if the illegalities are relatively minor factors in producing the statement. Whether a taint exists is determined on the facts of each case, although some guidelines may be derived from the cases discussed below.

In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Court held that the defendant's statement was inadmissible when made as the direct result of an unconstitutional entry and arrest. The Court stated that all evidence, either tangible or intangible, that was obtained "so

immediately" from acts in violation of the Fourth Amendment constituted the "fruit" of the illegality and, therefore, was subject to the exclusionary rule.

In *Brown v. Illinois*, 422 U.S. 590 (1975), the Court rejected a per se rule in which *Miranda* warnings would automatically cure the taint of an illegal arrest and likewise rejected a per se rule in which the taint of an illegal arrest would always render a confession inadmissible. Instead, the Court said the test must be whether the confession was the product of free will depending on the facts of each case. Relevant factors in the determination include the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. See also *State v. Schnick*, 819 S.W.2d 330 (Mo. banc 1991), in which the Court found that any taint attending the defendant's suppressed statement was dissipated by the passage of time, the defendant's improved physical condition, and the repeated *Miranda* warnings given to the defendant before the subsequent confession. In *State v. Morin,* 873 S.W.2d 858 (Mo. App. S.D. 1994), the court found sufficient intervening circumstances between the defendant's arrest and his confession, even if the arrest was illegal.

In *Taylor v. Alabama*, 457 U.S. 687 (1982), the Court held inadmissible a written confession obtained six hours after an illegal arrest and after *Miranda* warnings. The Court reasoned that the taint of the illegal arrest could not be purged because only six hours elapsed between the arrest and the subsequent confession, and during the six hours, the defendant was repeatedly interrogated without counsel and was placed in a lineup.

Missouri courts have followed these guidelines when making determinations on a case-by-case basis. *State v. Taber*, 73 S.W.3d 699, 707 (Mo. App. W.D. 2002) (marijuana seized during illegal traffic stop of defendant held to be fruit of the poisonous tree); *State v. Kriley*, 976 S.W.2d 16, 20 (Mo. App. W.D. 1998) (discovery of a jar containing methamphetamine during the execution of a search warrant was fruit of the poisonous tree because the officers illegally entered the shed area attached to the defendant's house where the jar was found). *See also*:

- *State v. Kilgore*, 771 S.W.2d 57 (Mo. banc 1989), *cert. denied*, 493 U.S. 874 (1989) (subsequent events can purge taint of illegal arrest);

- *State v. Newell*, 462 S.W.2d 794 (Mo. 1971) (statements admissible when there was a three-day interval between the arrest and the statements, during which time defendant was advised of his rights and there was no evidence of prolonged questioning or coercion);

- *State v. Fair*, 467 S.W.2d 938 (Mo. banc 1971) (confession admissible after illegal arrest because voluntary under the totality of the circumstances);

- *State v. Dunlap*, 830 S.W.2d 432 (Mo. App. E.D. 1992) (sufficient attenuation between illegal arrest and statement because 24 hours elapsed between them, the police gave defendant *Miranda* warnings three times, and defendant was identified by the victim in a lineup and charged with the offense during the time period between the arrest and the statement);

- *State v. Carroll*, 745 S.W.2d 156 (Mo. App. E.D. 1987) (statements following illegal arrest admissible because sufficiently attenuated from arrest).

D. (§11.25) *Massiah v. United States*: Sixth Amendment Right to Counsel

Massiah v. United States, 377 U.S. 201 (1964), defines the standard for the admissibility of statements under the Sixth Amendment right to counsel. It provides that use at trial of any statements that have been deliberately elicited from the defendant after indictment and in the absence of counsel violate the defendant's Sixth Amendment right to counsel.

The facts of *Massiah* illustrate the type of interrogation that is likely to produce a "deliberately elicited" response from an accused. The accused in *Massiah* was indicted on federal narcotics charges. He retained counsel, pleaded not guilty, and was released on bail. While free on bail, the government planted a radio transmitter in the car of a consenting friend, and the accused made certain incriminating statements. Evidence of those statements was introduced at trial in contravention of the accused's Sixth Amendment right to counsel.

1. (§11.26) Scope of *Massiah*

Subsequent Supreme Court cases have interpreted *Massiah's* "deliberately elicited" standard, *Massiah v. United States*, 377 U.S.

201 (1964), to include statements procured through any form of interrogation, whether surreptitious or overt, *Brewer v. Williams*, 430 U.S. 387 (1977), and whether direct or indirect, *United States v. Henry*, 447 U.S. 264 (1980). In *Henry* the government deliberately elicited statements from the accused by planting an informant in the defendant's jail cell. The Court considered significant the following facts:

- The informant was acting under government instructions as a paid informant.
- The informant was a fellow inmate who was able to engage Henry in conversation without arousing suspicion.
- Henry was under indictment and entitled to assistance of counsel at the time he made the statements.

Henry, 447 U.S. at 271–72.

The Supreme Court has also stated that the Sixth Amendment right to counsel is "offense-specific" and applies only to the offense for which it is invoked. *Tex. v. Cobb*, 532 U.S. 162, 171–72 (2001). Therefore, the police may question a defendant about other criminal conduct than that for which the defendant has been charged unless the two crimes are "inextricably intertwined." Crimes are so "inextricably intertwined" that the Sixth Amendment right to counsel attaches to the new charges if the offenses would be considered the same under the test for determining double jeopardy outlined in *Blockburger v. United States*, 284 U.S. 299 (1932). *Cobb*, 532 U.S. at 172–73. Under the *Blockburger* test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger,* 284 U.S. at 304; s*ee State v. Mayes*, 63 S.W.3d 615, 634 (Mo. banc 2001) (invocation by defendant of Sixth Amendment right to counsel as to pending sodomy charge did not preclude police from questioning defendant about murder investigation because the crimes had different elements).

The Supreme Court has also held that listening, without any action to elicit incriminating remarks, does not violate a defendant's Sixth Amendment right to counsel. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). In *Kuhlmann* the police and a jailhouse informer listened to the defendant but took no action to elicit any statements from him. The key issue in Sixth Amendment inquiries is the intent of the

police, rather than the perceptions of the accused as in Fifth Amendment inquiries. *See United States v. Criswell*, 696 F.2d 636, 636 (8th Cir. 1983).

The following Missouri cases were reversed because post-indictment statements made in the absence of counsel were introduced at trial. In *State v. Witt*, 422 S.W.2d 304, 309 (Mo. 1967), the Court reversed the defendant's conviction because statements obtained in the absence of counsel when the defendant had an attorney of record were admitted at trial. The Court reversed the defendant's conviction in *State v. Peters*, 545 S.W.2d 414, 418–19 (Mo. App. W.D. 1976), because statements admitted at trial were obtained when the police placed a microphone in the defendant's former wife's hair to record incriminating statements during her visit with him in jail.

In contrast, in *State v. Owens*, 759 S.W.2d 73, 75 (Mo. App. S.D. 1988), the court held that further inquiry of a defendant regarding his answers following a polygraph examination did not violate his Sixth Amendment right to counsel. The defendant in *Owens* was charged with sodomy against his stepdaughter. He appeared for a polygraph examination in accordance with an agreement between his attorney and the prosecuting attorney. Following a pre-test interview, the officer determined that the defendant was not an appropriate test subject. The officer left the room. When the officer returned, he told the defendant that he should admit what he did, if he had done that with which he was accused. The defendant said that he did not want to talk about it with the officer because he was afraid he might get into trouble. The officer again said that the defendant should admit it because he might want to get help because of the nature of the charges. The defendant then made incriminating statements. The court found that the defendant had voluntarily waived his Fifth and Sixth Amendment rights to counsel. *Id.* at 76.

2. (§11.27) "Volunteered" Statements

While both *Massiah v. United States*, 377 U.S. 201 (1964), and *United States v. Henry*, 447 U.S. 264 (1980), prohibited the use of "deliberately elicited" statements, they left open the question of whether Sixth Amendment protection extends to "volunteered" statements made to the police or an informant. It appears that, after *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), passive listening that does not induce incriminating statements does not violate the Sixth Amendment. It is unclear, however, if use at trial of an accused's

volunteered statement to the police after indictment and when represented by counsel would violate the Sixth Amendment. The Supreme Court in *Beatty v. United States*, 389 U.S. 45 (1967), held inadmissible statements made by an accused during a meeting that the accused had initiated with the government agents, but it did not explain the basis for its holding.

Few Missouri cases have addressed the scope of *Massiah*'s protection concerning volunteered statements. *See*:

- *State v. Holt*, 592 S.W.2d 759, 770 (Mo. banc 1980) (defendant's incriminating statements made to his girlfriend during a telephone conversation wiretapped with the girlfriend's consent were admissible because no interrogation occurred under *Massiah*);

- *State v. Turner-Bey*, 812 S.W.2d 799 (Mo. App. W.D. 1991) (statements elicited by a fellow inmate acting on his own initiative and not as an agent of the government do not violate the Sixth Amendment);

- *State v. Reasonover*, 714 S.W.2d 706 (Mo. App. E.D. 1986) (defendant's assertion of the Sixth Amendment right to counsel in a separate unrelated case did not constitute an assertion of the Sixth Amendment right to counsel in a capital murder case when the police arrested defendant for capital murder while defendant was in custody for the other case);

- *United States v. Lambros*, 564 F.2d 26 (8th Cir. 1977) (information volunteered to a cellmate working in an undercover capacity is admissible and not violative of the Sixth Amendment).

3. (§11.28) Waiver of *Massiah* Rights

Under the Sixth Amendment right to counsel, the police may not interrogate a defendant in the absence of counsel and after indictment or arraignment unless the defendant has waived that right. *Brewer v. Williams*, 430 U.S. 387, 404 (1977). The state has the burden of showing a waiver of the Sixth Amendment right to counsel by a preponderance of evidence. *Id*. at 404; *State v. Owens*, 827 S.W.2d 226, 230 (Mo. App. E.D. 1991). Missouri courts have applied a stricter standard for finding a waiver of counsel under

Massiah v. United States, 377 U.S. 201 (1964), than under *Miranda v. Arizona*, 384 U.S. 436 (1966). *State v. Chandler*, 605 S.W.2d 100, 114–15 (Mo. banc 1980). In *Chandler* the Court required the government to prove "an intentional relinquishment or abandonment of a known right or privilege." *Id.* at 113.

Owens, 827 S.W.2d 226, provides a good illustration of issues involving *Massiah* waivers. In *Owens* the court stated that not only must any subsequent interrogation be initiated by a defendant once the defendant has invoked the Sixth Amendment right to counsel, but the defendant must also distinctly waive the right to counsel before the interrogation is valid. The defendant in *Owens* invoked his Sixth Amendment right to counsel. Later that day, a police officer picked up the defendant's mother at her request because she wanted to talk to the police. The mother said that she talked to the defendant and that he agreed to talk to the police and tell the truth. In other words, the mother said that the defendant told her that he "would" talk to the police. She did not say that he requested that the police come talk to him. While at the station house, the mother told a second officer that the defendant stated that he "wanted" to talk to the police. The first police officer left the mother at the station house and went to talk to the defendant at the city jail. The officer then told the defendant that the mother told him that the defendant wanted to talk—to make a statement. The defendant said that he did. The officer advised the defendant of his *Miranda* rights and questioned him.

The *Owens*, 827 S.W.2d 226, court found that the police did not badger the defendant or attempt to elicit incriminating statements once he asserted his Sixth Amendment right to counsel. *Id.* at 229. Instead, the defendant evidenced a willingness and desire to talk generally about the investigation, thereby initiating the interrogation. *Id.* The court also required the state to prove a waiver of the Sixth Amendment right to counsel by showing that the accused knew of the existence and scope of the right and voluntarily and intentionally relinquished it. *Id.* In this instance, the court found an accused's need for counsel at post-indictment questioning to be no stronger than the need at custodial interrogation. The court, therefore, found the giving of *Miranda* warnings to be sufficient evidence of a valid waiver of the Sixth Amendment right to counsel, even though the defendant had counsel and had previously invoked his Sixth Amendment right to counsel. *Patterson v. Ill.*, 487 U.S. 285, 292–96 (1988); *State v. Reese*, 795 S.W.2d 69 (Mo. banc 1990), *cert. denied,* 498 U.S. 1110 (1991). There is no requirement for the police

to notify the defendant's counsel that the defendant has indicated a desire to talk to the police. *Owens,* 827 S.W.2d at 231.

In *State v. Holman*, 965 S.W.2d 464, 468 (Mo. App. W.D. 1998), the defendant initiated a conversation with law enforcement personnel and, after being advised of his *Miranda* rights, assured them that he wished to speak to them, thus waiving his right to the presence of counsel at the interrogation.

In *State v. Clark*, 26 S.W.3d 448 (Mo. App. S.D. 2000), the defendant was charged with conspiracy to commit murder and was arraigned before the trial judge, but she never asserted her right to counsel under the Sixth Amendment. After the court appearance, law enforcement officers advised the defendant of her *Miranda* rights and obtained incriminating statements from her. The court held that an accused's incriminatory statements to law enforcement officers are not automatically inadmissible when the defendant's statements were made after the defendant's first appearance before the court and also after a *Miranda* waiver. *Id.* at 457.

E. (§11.29) Statements of Juveniles

Juvenile defendants subjected to interrogation are given protection that goes beyond the guidelines set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). This additional protection is derived from three sources:

1. Interpretations of the statutes of the Juvenile Code
2. Caselaw
3. The application of the "totality of the circumstances" test, which considers the "inherent weaknesses" of the defendant, including age

The pertinent provisions of the Juvenile Code are as follows:

> After a child is taken into custody as provided in section 211.131, all admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence given in cases under this chapter, as well as all reports and records of the juvenile court, are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceeding, civil or criminal, other than proceedings under this chapter.

Section 211.271.3, RSMo 2000.

> When a child is taken into custody with or without warrant for an offense, the child, together with any information concerning him and the personal property found in his possession, shall be taken immediately and directly before the juvenile court or delivered to the juvenile officer or person acting for him.

Section 211.061.1, RSMo 2000.

> When a child is taken into custody, the parent, legal custodian or guardian of the child shall be notified as soon as possible.

Section 211.131.2, RSMo 2000.

> When a petition has been filed, a child may waive his right to counsel only with the approval of the court.

Section 211.211.8, RSMo 2000.

Additionally, when giving a child the *Miranda* warnings, the interrogator must warn the child that "he has a right to have a parent, guardian or custodian present during questioning." Section 211.059.1(3), RSMo Supp. 2004.

Even if a child is charged in juvenile court with what would be a criminal offense if the child were an adult, the juvenile court proceedings are considered civil in nature. This comports with the purpose of the Juvenile Code to facilitate the care, protection, and discipline of the children who come within the juvenile court's jurisdiction. Section 211.011, RSMo 2000.

In *State v. Arbeiter*, 408 S.W.2d 26, 30–31 (Mo. 1966), when the juvenile was interrogated in violation of § 211.061, the statements implicating him in a homicide were inadmissible in a later prosecution. A statement a juvenile gave to a juvenile officer was not admissible when the juvenile was later tried as an adult in *State v. Simon*, 680 S.W.2d 346 (Mo. App. S.D. 1984). In *State v. White*, 494 S.W.2d 687, 692 (Mo. App. E.D. 1973), the court held that when a "child of tender age," a 15-year-old, has parents and an attorney and the child is in the custody of a law enforcement agency, before any in-custody interrogation, the law enforcement officers must make a reasonable effort to notify and have present both the parents and the attorney. If such an effort is not made, any statement obtained in the parents' and attorney's absence will be excluded. Missouri courts have also held that juveniles *should* be advised that they may be certified to stand trial as adults and any statement they make may be used against them in a later adult criminal prosecution. *State v. McMillian*, 514 S.W.2d 528 (Mo. banc 1974); *State*

v. Wright, 515 S.W.2d 421 (Mo. banc 1974). Failure to so warn the juvenile does not necessarily render the statement inadmissible; the totality of the circumstances, however, must still be examined to determine if the juvenile was aware of the potential result of the statement. *State v. Ross*, 516 S.W.2d 311, 318 (Mo. App. E.D. 1974); *Simon,* 680 S.W.2d at 353.

In *Fare v. Michael C.*, 442 U.S. 707, 718–24 (1979), the Court held that a juvenile's request to see a probation officer did not constitute a per se exercise of his Fifth Amendment rights under *Miranda*. The Court found that the request was not the same as a request for counsel and was, therefore, only one factor to consider under the totality of the circumstances when determining whether the juvenile properly waived his *Miranda* rights.

In *State v. Wade*, 531 S.W.2d 726, 729 (Mo. banc 1976), the Court held that the juvenile's statement was inadmissible after he was interrogated by police officers without first being delivered to juvenile court, even though the juvenile had misrepresented himself to be an adult.

In comparison, other Missouri cases have upheld statements given by juveniles without parents present if the waiver was knowing and voluntary. *State v. Gray*, 100 S.W.3d 881, 889 (Mo. App. S.D. 2003) (statements admissible, even if defendant was not informed that his mother wished to "help him" during his questioning, when defendant knowingly waived his right to have his mother present during questioning and when defendant had time before his questioning to talk with his mother). While a juvenile has a right to have a parent, guardian, or custodian present during any interrogation, the defendant's statement is not involuntary if the parent does nothing during the interrogation to protect the juvenile defendant' s rights. *State v. Barnaby*, 950 S.W.2d 1, 3–4 (Mo. App. W.D. 1997).

F. (§11.30) Statement Not Made

The defendant may raise the seemingly inconsistent argument that no statement was given, but if it was, it was involuntary or in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). In such cases, a determination as to the grounds for exclusion must be made before trial to determine the use of the statements for impeachment purposes.

V. Procedural Burdens

A. (§11.31) Burden of Proof

The initial burden of proceeding with the motion to suppress is on the defendant. Once the defendant has made the allegations regarding the inadmissibility of statements, the state bears the burden of proof to show that the statement was voluntary and that the police complied with *Miranda v. Arizona*, 384 U.S. 436 (1966). *See State v. Williams*, 956 S.W.2d 942, 947 (Mo. App. W.D. 1997). In the absence of a motion or objection, the state is under no obligation to prove compliance with *Miranda*. *State v. Groves*, 646 S.W.2d 82, 84 (Mo. banc 1983).

In *Lego v. Twomey*, 404 U.S. 477 (1972), the Supreme Court held that the state must prove the voluntariness of a confession by a preponderance of the evidence. Missouri courts have followed suit. *See State v. Powell*, 798 S.W.2d 709, 713 (Mo. banc 1990) (preponderance of the evidence applied); *State v. Thomas*, 522 S.W.2d 74, 76 (Mo. App. E.D. 1975) (state does not need to negate every possible circumstance that, if developed, would present an issue of fact as to whether the confession was voluntary). If there is conflicting evidence about the voluntariness of a confession, the decision to admit the confession is within the trial court's discretion. *State v. Caldwell*, 956 S.W.2d 265, 266 (Mo. banc 1997); *State v. Clemons*, 946 S.W.2d 206, 218 (Mo. banc 1997); *State v. Flowers*, 592 S.W.2d 167, 170 (Mo. banc 1979); *State v. McWhorter*, 836 S.W.2d 506, 507 (Mo. App. W.D. 1992).

B. (§11.32) Scope of Proof

For the hearing on the defendant's motion to suppress, all evidence concerning the circumstances surrounding the statement, including the defendant's capacity to understand the defendant's rights and to willingly waive them, is relevant. *See State v. Powell*, 798 S.W.2d 709, 713 (Mo. banc 1990). If applicable, defendants may want to introduce expert psychiatric testimony bearing on their capacity to knowingly and intelligently waive their rights.

C. (§11.33) Finding of Fact

To properly preserve the issue for appeal, it is essential that the court ruling on the defendant's motion to suppress make its conclusions regarding the voluntariness of the confession appear in the record "with unmistakable clarity." *Sims v. Ga.*, 385 U.S. 538, 544 (1967). Formal findings of fact or a written opinion are not required; it must just be

apparent from the record that the trial judge made the requisite determination that the confession was voluntary before allowing the jury to hear it. *State v. Scott*, 841 S.W.2d 787 (Mo. App. E.D. 1992); *State v. Monteer*, 467 S.W.2d 48, 53–54 (Mo. banc 1971). On appeal, the question is whether the evidence was sufficient to sustain the trial court's finding of voluntariness. *State v. Feltrop*, 803 S.W.2d 1, 12 (Mo. banc 1991).

If a trial court makes an incomplete finding of fact that the defendant's *Miranda v. Arizona*, 384 U.S. 436 (1966), waiver was "freely and voluntarily given" but does not address whether the waiver was "knowing and intelligent," that error is harmless and does not require reversal because it would be "absurd to say that such person [who gives a voluntary statement] has not made a knowing and intelligent waiver of his right to remain silent." *State v. Winfield*, 5 S.W.3d 505, 512 (Mo. banc 1999); s*ee also State v. Knese*, 985 S.W.2d 759, 767 (Mo. banc 1999).

VI. Introduction of Statements at Trial

A. (§11.34) Need for Corroboration

In Missouri, there must be independent proof of the *corpus delicti* before an extrajudicial confession of guilt may be regarded as evidence tending to show guilt. *State v. Edwards*, 116 S.W.3d 511, 544 (Mo. banc 2003); *State v. Londagin*, 102 S.W.3d 46, 51 (Mo. App. S.D. 2003). The *corpus delicti* consists of proof, direct or circumstantial, that the specific loss or injury charged occurred and that someone's criminality was the cause of the loss or injury. *State v. Hooker*, 713 S.W.2d 885 (Mo. App. S.D. 1986). The burden of proof for establishing the *corpus delicti* rests with the state. *Edwards*, 116 S.W.3d at 544. If there is evidence of corroborating circumstances that tends to prove the crime and corresponds with circumstances related in the defendant's confession, both the circumstances and the confession may be considered in determining whether the state has sufficiently proved the *corpus delicti*. *State v. Garrett*, 829 S.W.2d 622 (Mo. App. S.D. 1992).

B. (§11.35) Rule of Completeness

The "rule of completeness" requires that statements by the defendant admitted into evidence are not taken out of context. The rule is violated when admission of the defendant's statement in edited form distorts the true meaning of the defendant's statement or the editing excludes information that is substantially exculpatory to the defendant. *State v. Skillicorn*, 944 S.W.2d 877, 891 (Mo. banc 1997) (describes the rule of completeness but finds that it was inapplicable in Skillicorn's case).

C. (§11.36) Establishing Foundation

Once the state sufficiently establishes the *corpus delicti*, it must lay the proper foundation to introduce the statement. This testimony should come from the principal interrogating officer and should include a precise description of the circumstances surrounding the taking of the statement, including:

- the fact that *Miranda v. Arizona*, 384 U.S. 436 (1966), warnings were given and waived;
- whether the defendant read or corrected the written statement; and
- the method by which the written statement was reduced to writing or recorded.

See State v. Wise, 879 S.W.2d 494, 505 (Mo. banc 1994). If the statement is recorded, any pauses should be explained.

D. (§11.37) Tape Recorded or Videotaped Statements

As long as a proper foundation regarding accuracy is established, electronically or mechanically recorded statements are admissible in Missouri. *State v. Lusk*, 452 S.W.2d 219, 224–25 (Mo. 1970). A taped statement of the defendant can be compelling demonstrative evidence because it literally comes from the defendant's mouth, thus allowing factors such as speech patterns, tone of voice, emphasis, sincerity, and emotion to be presented to the jury. Videotaped statements add strong visual evidence of the defendant's demeanor, physical condition, and treatment to rebut or support allegations of involuntariness.

To be most effective, recorded statements should include a notation of the date, time, place, and persons present, along with the giving and acknowledgment of *Miranda v. Arizona*, 384 U.S. 436 (1966), rights. From the prosecution's perspective, the taped statement should discuss any anticipated defense attacks on the admissibility of the statement such as police treatment during custody.

Transcripts of a tape recording may be used if portions of the tape are inaudible or there is a need to identify the speakers. *State v. Plummer*, 860 S.W.2d 340, 344 (Mo. App. E.D. 1993). The admissibility of transcripts of tape recordings is within the trial court's discretion. *Id.* To demonstrate reversible error, a defendant must show that the admission of the transcripts prejudiced the case. *Id.*

United States v. McMillan, 508 F.2d 101, 105–06 (8th Cir. 1974) (citations omitted), *cert. denied*, 421 U.S. 916 (1975), contains excellent guidelines regarding the use of transcripts:

> The best evidence of the conversation is the tape itself; the transcript should normally be used only after the defendant has had an opportunity to verify its accuracy and then only to assist the jury as it listens to the tape. If accuracy remains an issue, a foundation may first be laid by having the person who prepared the transcripts testify that he has listened to the recordings and accurately transcribed their contents. Because the need for transcripts is generally caused by two circumstances, inaudibility of portions of the tape under the circumstances in which it will be replayed or the need to identify the speakers, it may be appropriate, in the sound discretion of the trial judge, to furnish the jurors with copies of a transcript to assist them in listening to the tapes. In the ordinary case this will not be prejudicially cumulative. Transcripts should not ordinarily be read to the jury or given independent weight. The trial judge should carefully instruct the jury that differences in meaning may be caused by such factors as the inflection in a speaker's voice or inaccuracies in the transcript and that they should, therefore, rely on what they hear rather than on what they read when there is a difference. Transcripts should not ordinarily be admitted into evidence unless both sides stipulate to their accuracy and agree to their use as evidence.

See also State v. Williams, 948 S.W.2d 429, 432 (Mo. App. E.D. 1997) (citations omitted); *State v. Fleischer*, 873 S.W.2d 310, 314 (Mo. App. S.D. 1994).

VII. (§11.38) Role of Jury

If there is an issue concerning the voluntariness of a confession, the court should hold a hearing outside the presence of the jury and make a finding that the confession is voluntary before admitting the confession into evidence before the jury. *Jackson v. Denno*, 378 U.S. 368 (1964); *Sims v. Ga.*, 385 U.S. 538 (1967).

On the issue of the voluntariness of a confession:

> The proper and well-established procedure is to conduct a hearing out of the presence of the jury on that issue, and if the court concludes from that evidence that the statement was free from improper inducement and that it was voluntarily given, the statement is admitted into evidence, and the jury determines the weight to be given to the statement.

State v. Edwards, 30 S.W.3d 226, 231 (Mo. App. E.D. 2000). The proper remedy for erroneously failing to hold a hearing on a motion to suppress a defendant's statement as involuntary outside the presence of the jury is to remand the matter to the trial court for a post-trial hearing on the issue of voluntariness. *Id.*

Although the jury plays no role in the initial determination of the voluntariness of the confession, defense counsel may still argue the surrounding facts and circumstances to the jury once the confession has been admitted in an effort to convince the jury that they should disregard the statement as involuntary, fictitious, untrustworthy, or inaccurate. The jury may then make the ultimate decision regarding voluntariness after proper instructions. *State v. Bridges*, 491 S.W.2d 543, 545 (Mo. 1973); *State v. Robinson*, 825 S.W.2d 877, 880 (Mo. App. W.D. 1992). The prosecutor should anticipate such an attack and lay a complete foundation establishing the voluntariness, reliability, and believability of the statements.

The defense attorney should request Missouri Approved Instructions–Criminal (MAI-CR 3d) 310.06 if there is an issue questioning the existence, believability, or voluntariness of a confession. The pertinent part of MAI-CR 3d 310.06 provides:

> Evidence has been introduced that the defendant made certain statements relating to the offense for which he is on trial.
>
> If you find that a statement was made by the defendant (, and that at that time he understood what he was saying and doing), and that the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement, then you may give it such weight as you believe it deserves in arriving at your verdict.
>
> However, if you do not find and believe that the defendant made the statement (, or if you do not find and believe that he understood what he was saying and doing), or if you do not find and believe that the statement was freely and voluntarily made under all of the circumstances surrounding and attending the making of the statement, then you must disregard it and give it no weight in your deliberations.

If either the prosecution or the defense requests MAI-CR 3d 310.06, the court must give it. It is an instruction that is clearly favorable to the defense and should not be overlooked when preparing for trial. The Notes on Use for the instruction state that "freely and voluntarily" should not be defined and that no further instructions should be given on the effect of various other facts, such as violence, mental coercion, threats, or other factors shown in evidence. The jury should not receive any instructions on the failure to give *Miranda v. Arizona*, 384 U.S. 436 (1966), warnings or the effect of a waiver of the defendant's rights under *Miranda*. *See Winfield v. State*, 93 S.W.3d 732, 741 (Mo. banc 2002) (discussion of the proper use of MAI-CR 3d 310.06).

VIII. (§11.39) Use of Suppressed Statements at Trial

The basis on which a statement is suppressed will determine the guidelines for use of the statement at trial. A confession that was suppressed because it was involuntary may not be used for any purpose because it was found to be untrustworthy. *Mincey v. Ariz.*, 437 U.S. 385 (1978). A confession that is only violative of *Miranda v. Arizona*, 384 U.S. 436 (1966), however, may be used to impeach the defendant. *Harris v. N.Y.*, 401 U.S. 222 (1971); *Or. v. Hass*, 420 U.S. 714, 722–24 (1975); *State v. Thomas*, 698 S.W.2d 942, 948 (Mo. App. S.D. 1985). The government may also use *Miranda*-violative statements to impeach the defendant's cross-examination responses that are "reasonably suggested" by the defendant's direct examination. *United States v. Havens*, 446 U.S. 620, 627–28 (1980); *Thomas*, 698 S.W.2d at 948.

As long as the defense makes a proper objection, the prosecution may not use the defendant's testimony at a suppression hearing during the state's case-in-chief, but the prosecution may arguably use the testimony for impeachment purposes. *Simmons v. United States*, 390 U.S. 377 (1968).

The possibility of the prosecution's use of the defendant's statements during the suppression hearing for impeachment purposes during trial should make the defense wary. The defense should be careful to limit the scope of the defendant's examination at the suppression hearing to minimize the possibility of damaging testimony being elicited. In addition, when drafting the motion to suppress, defense counsel should carefully limit the basis of the motion to relevant issues. Counsel should request a transcript of the defendant's testimony during the suppression hearing. Obviously, the defendant's testimony at trial and during the suppression hearing must be consistent.

IX. (§11.40) Appeal of Suppression Ruling and Post-Conviction Relief

For an in-depth discussion of the procedure and problems of appealing adverse suppression rulings, see Chapter 29 of this deskbook. Below are a few points particularly relevant to statements.

From the defense perspective, appellate decisions reveal that, once the trial court admits a statement, the decision is seldom reversed. Usual grounds for affirming include the following:

- No proper objection was made to the admission of the statement during trial so the issue was not preserved for appeal.
- An inadequate trial record was made of the defendant's contentions or the court does not need to review beyond the state's version of the facts.
- The defendant's trial testimony waived the defendant's objection to the statement.
- The issue is within the sole discretion of the trial court.
- The issue was an ultimate question of fact decided by the jury.

From the prosecutor's standpoint, an adverse ruling on the defendant's motion to suppress statements is final, except for a motion for rehearing at the trial level.

Appellate review of a trial court's ruling on a motion to suppress is limited to whether the evidence was sufficient to support the trial court's order. *State v. Williams*, 956 S.W.2d 942, 947 (Mo. App. W.D. 1997). The facts and all reasonable inferences are viewed in favor of the ruling. *Id.* The trial court's ruling will not be disturbed absent manifest error. *Id.* Some relevant cases involving appeal issues include:

- *Jackson v. Denno*, 378 U.S. 368 (1964) (conviction founded on an involuntary confession is a denial of due process);
- *State v. Stevens*, 467 S.W.2d 10, 20 (Mo. 1971), *cert. denied*, 404 U.S. 994 (1971) (no objection was made to the admission of the statement at trial; the court will not review an objection raised for the first time on appeal absent plain error); and
- *State v. Gay*, 523 S.W.2d 138, 143 (Mo. App. E.D. 1975) (testimony as to the events surrounding the interrogation is conflicting; the court does not need to go beyond the state's version of the facts).

Regarding post-conviction relief, it should be noted that, in *Withrow v. Williams*, 507 U.S. 680, 688–93 (1993), the Supreme Court held that, unlike the situation in Fourth Amendment claims, when a state has given the defendant a full and fair chance to litigate a Fifth Amendment *Miranda v. Arizona*, 384 U.S. 436 (1966), claim, federal habeas corpus relief is still available to a state prisoner alleging that the prisoner's conviction rests on statements obtained in violation of *Miranda*.

Some specific relevant cases regarding post-conviction relief include:

- *Clemmons v. State*, 520 S.W.2d 623, 624 (Mo. App. W.D. 1975) (defendant's Rule 27.26 (now repealed) motion based on a *Miranda* violation could not be heard after a voluntary and understandably made guilty plea because a deprivation of constitutional rights that antedates a voluntary guilty plea cannot be the basis for a collateral attack); and

- *Vidauri v. State*, 515 S.W.2d 562, 568–70 (Mo. 1974) (Court affirmed grant of new trial under a Rule 27.26 motion arguing that defendant's previously admitted confession should have been suppressed because there was a hearing held by the court outside the presence of the jury, timely proper objection was made at trial, the jury was instructed on the question of the voluntariness of the confession, but no objection to the confession was made in defendant's motion for new trial).

X. (§11.41) Form—Motion to Suppress Statements

[Caption]

[Name of Defendant], by and through counsel, moves this Court to suppress all alleged statements, whether oral, written, or videotaped or otherwise recorded, that the state intends to use in evidence against the defendant. In support thereof, Defendant states as follows:

A. The statement was not voluntary because:

1. Defendant was not presented before an associate circuit judge "as soon as practicable," the statement was obtained before presentation before an associate circuit judge, and a lawyer was not afforded Defendant before or during the interrogation.

2. The length and nature of Defendant's custody, the duration and nature of Defendant's interrogation, and the conditions under which the interrogation was conducted were inherently coercive as applied to a person of Defendant's education, background, and physical and mental condition at the time the interrogation occurred.

3. Defendant was subjected to mental, physical, and psychological duress during the interrogation.

4. Defendant, a person of limited education, was induced to make alleged statements by averments and promises of the arresting officers, and the averments were ones of implication in the offense charged and the promises were ones of leniency and of a desire to help Defendant.

B. The statement was made without Defendant first being advised of his constitutional rights, to-wit:

1. Defendant was not advised in clear and unequivocal terms of his right to remain silent before his interrogation.

2. Defendant was not advised that anything that he said could and would be used against him in a court of law.

3. Defendant was not advised of his right to consult with a lawyer and to have a lawyer present with him during the interrogation.

4. Defendant was not advised that a lawyer would be appointed for him if he was indigent.

5. Defendant did not waive his right to remain silent, his right to counsel, or his right to have counsel appointed to represent him.

6. The interrogation by the police officers did not cease when Defendant indicated that he wished to remain silent and that he wished to have appointed counsel present on his behalf during the interrogation.

All the matters herein mentioned were in violation of Defendant's constitutional rights under the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and under Article I, § 19, and Article I, § 10, of the Missouri Constitution.

C. The statement was the direct result of an unlawful arrest because:

1. The arrest was made without warrant and without authority.

2. Defendant did not violate any law, either misdemeanor or felony, in the presence of the officers that would warrant the arrest.

3. The arresting officer had no probable cause or reasonable grounds to believe that Defendant had committed a felony.

D. The statement was obtained in violation of Defendant's Sixth Amendment right to counsel because the police officers continued to deliberately elicit the statements from Defendant after he had invoked his Sixth Amendment right to counsel and he did not waive that right during any subsequent interrogations.

E. The confession was obtained in violation of Article I, § 15, of the Missouri Constitution, and of the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

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Attorney for Defendant

Tina M. Crow Halcomb*

Chapter 12

MISCELLANEOUS MOTIONS (OTHER THAN TO SUPPRESS), PROCEEDINGS, AND WRITS

I. (§12.1) Practical Purposes of Motions and Writs

II. (§12.2) Types of Motions

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B. (§12.4) Reduction or Setting of Bail
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H. (§12.10) Application for Change of Venue
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K. (§12.13) Motion to Require an Election
L. Motion for Severance and Separate Trial
1. (§12.14) Defendants
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3. (§12.16) Improper Joinder
M. (§12.17) Motion to Consolidate
N. (§12.18) Motion for Pretrial Conference

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I. (§12.1) Practical Purposes of Motions and Writs

Many cases have been won, mitigated, shortened, or simplified by the use of pretrial motions. Motions and extraordinary writs may be used to:

- simplify or zero in on the trial issues;
- prevent the introduction of incriminating, repetitious, irrelevant, or prejudicial evidence;
- secure a dismissal because of jurisdictional or other defects;
- discover evidence or leads to evidence (both incriminating and exculpatory);
- aid in inducing a plea or a better plea offer;
- impress the client;
- protect the record for purposes of appeal;
- protect the attorney against a future claim of incompetence or malpractice; and
- force the attorneys and the court to educate themselves as to the law.

Some of these reasons are far from judicial, but it is the intent of this chapter to be practical.

This chapter does not include a detailed discussion of motions to suppress, motions for judgment of acquittal, posttrial motions, motions to vacate, or motions in appellate courts, all of which are discussed in other chapters. All too often the lazy or inexperienced attorney, because

of the failure to properly prepare and file appropriate motions, subjects the client to an unfavorable result and the attorney to embarrassment and, possibly, future litigation.

There are those who believe that if anything was seized by law enforcement officers, or even others, a motion to suppress should be filed; if the defendant made any statements, including most exculpatory statements, a motion to suppress these statements should be filed, and so forth. It is the court's duty to pass on the legality of seizures, statements, lineups, etc., and not the defense attorney's. If such a motion is won—great; if lost—there may be grounds for an appeal. The attorney who does not file such a motion has nothing. But frivolous motions should never be filed.

Some defendants are, or they think they are, knowledgeable in the law and will suggest or demand the filing of pretrial motions. It should be remembered that it is the client's life and freedom that are at stake.

Copies of each motion filed should be given to the client. This demonstrates that the attorney is doing their job and keeps the client advised as to the proceedings. Lack of communication is a common complaint against lawyers, which can be avoided.

By way of caveat, the following points should always be remembered:

- Civil rules, motions, interrogatories, etc. generally do not apply in criminal cases.
- No motion form fits all cases. A motion should be drawn to fit the particular case.
- The law is constantly changing, and thorough research of the law and investigation of the facts are necessary in each case before the motions are prepared and filed.
- The objections raised in pretrial motions must be renewed at each opportunity throughout the trial and appeal, or they may be deemed to have been waived.
- Counsel should not rely on everything this author has written.

Motions are based on the peculiar facts of the particular case. This requires a knowledge of the facts that is as complete as possible, from the standpoint of both the defense and the prosecution. Generally, if there is a dispute as to any particular fact necessary to the determination of a motion, the court will adopt the version that is most favorable to the prosecution; seldom will a defendant prevail over a

police officer in a pretrial hearing when credibility alone is the determining factor.

Exhaustive research of the law is necessary, and, often, considerable ingenuity and finesse are required in preparing the motion and presenting the evidence or arguments at a pretrial hearing on the motion.

II. (§12.2) Types of Motions

Sections 12.3–12.47 discuss possible motions, most of which should be filed pretrial. The authorities cited are intended to be only a starting point for research. Not all of these motions will lie in every case, but they should be filed when appropriate. The following motions are discussed in other chapters of this deskbook:

- Motions to suppress physical evidence, *see* Chapter 9 of this deskbook
- Motions to suppress identification evidence, *see* Chapter 10 of this deskbook
- Motions to suppress statements and confessions, *see* Chapter 11 of this deskbook
- Motions to dismiss, *see* Chapter 13 of this deskbook

Other possible motions are discussed in other chapters.

A. (§12.3) Motions Attacking the Sufficiency of the Charge or the Commencement of the Proceedings

Felony proceedings may be initiated by the filing of a complaint or by indictment. Rule 22.01. The complaint may be filed before an associate circuit judge or a circuit judge. Normally, complaints are filed and heard before an associate circuit judge. After the complaint is filed, the defendant is entitled to a preliminary examination. Rule 22.09(a); § 544.250, RSMo 2000. See Chapter 6 of this deskbook for a discussion of preliminary examination hearings. If the associate circuit judge finds probable cause to believe that a crime was committed and that the defendant committed it, the defendant will be bound over for trial and an information will be filed.

Misdemeanor charges may be prosecuted by indictment or information. Rule 21.01. An information may be filed upon the prosecuting attorney's information and belief, Rule 21.02, without a preliminary examination being held.

When an indictment is returned by a grand jury, there is no preliminary examination. Defects in the convening or impaneling of a grand jury are waived by proceeding to trial without objection. *State ex rel. Woods v. Connett,* 525 S.W.2d 326 (Mo. banc 1975); *Johnson v. State,* 574 S.W.2d 957 (Mo. App. E.D. 1978). *See* Chapter 4 of this deskbook. An indictment may not be amended, but an information may be substituted for an indictment, as long as no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. Rule 23.08. An information may also be amended as long as no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. Rule 23.08. *See* Chapter 4 of this deskbook.

A motion may be filed seeking remand for a new preliminary examination because of defects in the preliminary examination proceedings or because of insufficiency of evidence, but there is no statute or rule and little case authority in Missouri authorizing or requiring the sustaining of such a motion. *See State v. Casteel,* 64 S.W.2d 286 (Mo. 1933); *State v. Graves,* 182 S.W.2d 46 (Mo. 1944) (plea in abatement refused). In *State v. Clark*, 546 S.W.2d 455 (Mo. App. W.D. 1976), the court held that the magistrate is the sole judge of the sufficiency of the evidence as to probable cause; absent fraud or arbitrary conduct, the magistrate's decision is not subject to review. *See Blue v. United States*, 342 F.2d 894 (D.C. Cir. 1964); *Ross v. Sirica*, 380 F.2d 557 (D.C. Cir. 1967). A motion for remand for a new preliminary hearing may also be made because a plea agreement that involved counsel's waiver of the preliminary hearing was not followed by the state or accepted by the court at the circuit level. Habeas corpus might be a method of attacking such defects or lack of evidence. A motion to remand may also be filed when the defendant is denied a preliminary hearing to which the defendant is legally entitled. Failure to object to the lack of a preliminary hearing is waived by proceeding to trial without objection. *State v. Simpson*, 846 S.W.2d 724 (Mo. banc 1993).

A motion to dismiss may lie to attack the filing of an information or return of an indictment, or the sufficiency of the information or indictment to allege an offense. *See* Chapter 13 of this deskbook. In a motion attacking composition of a grand jury, a defendant is entitled to demographic data relating to the grand jury selection wheel. *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606 (Mo. banc 1980). *See* Chapter 13, §13.22, of this deskbook. A motion to strike may lie to strike from the information or indictment matters that are surplusage, scandalous, irrelevant, or otherwise objectionable, e.g., an alias. *See United States v. Brighton Bldg. & Maint. Co.*, 435 F. Supp. 222 (N.D. Ill. 1977).

A motion for a bill of particulars may also be filed before or within ten days after arraignment or at such other time as may be permitted by the court, and a bill of particulars may be amended by the state. Rule 23.04. This motion lies when the information or indictment alleges the essential facts constituting an offense but fails to inform the defendant of the particulars of the offense sufficiently to prepare a defense. *Id*. The filing of a bill of particulars does not cure a defective information, *State v. Hasler*, 449 S.W.2d 881 (Mo. App. E.D. 1969), and it does not act as an amendment, *State v. Doolen* 759 S.W.2d 383 (Mo. App. S.D. 1988).

If objecting to the sufficiency of information or indictment, it is suggested that counsel also seek, at least in the alternative, a bill of particulars. The appellate courts in Missouri have sometimes in their opinions made mention of a failure to do so. *See State v. Cipolla*, 437 S.W.2d 162 (Mo. App. W.D. 1968). In *State v. Austin*, 861 S.W.2d 334 (Mo. App. S.D. 1993), the court refused to reverse because a motion for a bill of particulars had not been filed.

B. (§12.4) Reduction or Setting of Bail

Motions to reduce or set bail or conditions of release are discussed in Chapter 2 of this deskbook.

Rule 33.05 provides that a person for whom conditions of release have been imposed but who is still detained because of the inability to meet the conditions may apply, after 24 hours, to the court for a review of those conditions. *See also* § 544.455.4, RSMo 2000.

The court, on its own motion, or the defendant or the state, by motion, may seek to modify the conditions of release, regardless of whether the defendant has already been released. After notice to the parties and hearing, the court may increase or decrease the conditions. Rule 33.06; *see also* §12.39, *infra*. The court may order the re-arrest of a defendant who has been released if it appears that new or increased conditions should be imposed or that there has been a breach of condition. The defendant, by application, may secure a hearing on the matter. Rule 33.08. If the court fails to set conditions for release or sets inadequate or excessive conditions, the state or the defendant may file an application in a higher court for a determination. Rule 33.09.

Habeas corpus may also be a means of securing release on bail. Rule 91. A bond forfeiture may also lead to the filing of a motion:

- to set aside bond forfeiture, Rule 33.14;
- for remission of bond, *see State v. Argonaut Ins. Co.*, 541 S.W.2d 720 (Mo. App. E.D. 1976);
- for exoneration of surety, *see State v. Tennyson*, 537 S.W.2d 858 (Mo. App. W.D. 1976); or
- for judgment of default.

When a forfeiture has been entered and not set aside, the state may file a motion for judgment in the pending action, and notice of hearing is served on the clerk of the court, who mails notice to the obligors on the bond. Rule 33.14; *see* §12.39, *infra*.

Defects in the recognizance form or in the bail or forfeiture proceedings are not defenses to a judgment on a forfeiture. Section 544.575, RSMo 2000. The statutory method of enforcing a bond forfeiture is by writ of *scire facias*. *See* §§ 544.640, *et seq.*, RSMo 2000. A surety who surrenders the defendant before judgment on the forfeiture is discharged from further liability on the bond upon payment of the costs and expenses incurred because of the failure to appear. A certified copy of the bond empowers the surety and the sheriff to take custody of the defendant. Rule 33.13; §§ 544.600, 544.610, RSMo 2000.

Section 374.770.1, RSMo 2000, provides that, if the defendant is incarcerated somewhere within the United States, no forfeiture should be entered, or, if one has been entered, it should be set aside but the surety is responsible for the return of the defendant. The incarceration does not need to be at the time of the original forfeiture. *State v. Head*, 804 S.W.2d 833 (Mo. App. W.D. 1991); *see also* §12.43, *infra*.

C. (§12.5) Demand for Speedy Trial

The constitutional requirements of a speedy trial are under the Sixth and Fourteenth Amendments to the United States Constitution and article I, § 18(a), of the Missouri Constitution. A defendant who hopes to successfully claim an unconstitutional denial of a speedy trial must file a demand for trial. *State v. Harper*, 473 S.W.2d 419 (Mo. banc 1971).

The statutory authorities are principally contained in § 545.780, RSMo 2000. That statute provides only that, "[i]f defendant announces that he is ready for trial and files a request for a speedy trial, then the court shall set the case for trial as soon as reasonably possible thereafter." Such a demand is also a factor in determining whether a defendant has been denied the constitutional right to a speedy trial. If no demand for

speedy trial or other objection is made, the right is waived. *Harper*, 473 S.W.2d 419; see Chapter 13, §13.63, of this deskbook.

Special statutes may have an effect on how soon a case will be tried. For example, § 491.710, RSMo 2000, provides that criminal cases involving child victims and witnesses shall be given docket priority. Section 595.209(16), RSMo Supp. 2004, refers to a victim's right to speedy disposition of the cause. Section 544.457, RSMo 2000, pertaining to victims' rights, gives courts the power to deny bail for a defendant when it is determined that the defendant poses a danger to the victim, a witness, or the community. Section 544.676.3, RSMo 2000, provides that a defendant who has been denied bail for such a reason is entitled, upon written request filed at arraignment, to a trial to begin within 120 days of the arraignment or of an order granting a change of venue, whichever occurs last. That provision is waived and has no effect if the defendant requests or receives a continuance or if bail is later set for the defendant.

A seldom-used statute provides that a defendant who is in custody and is not tried by the end of the second term shall be discharged unless the delay is caused by the defendant or the court is without sufficient time to try the case. Section 545.890, RSMo 2000. The same is true after the third term if the defendant is free on bond. Section 545.900, RSMo 2000. The defendant must file application for discharge. The court can continue to the next term if material evidence is unavailable. Section 545.910, RSMo 2000. In cities or counties where there are more than two regular terms, the limit is extended to three and four terms, respectively. Section 545.920, RSMo 2000. In actual practice, these statutes and terms of courts have little meaning and effect. *See* Rule 20.01(c).

After a demand for a speedy trial has been made, relief should be sought by means of a motion to dismiss. *See* Chapter 13 of this deskbook.

The Uniform Mandatory Disposition of Detainers Law, §§ 217.450, *et seq.*, RSMo 2000, provides for the trial or discharge of a prisoner in custody on other pending charges within 180 days of a proper demand, whether the charge is by indictment, by information, or by complaint. Section 217.460, RSMo 2000. A prisoner in one state may have charges in another jurisdiction (either another state's or federal) tried or dismissed within 180 days if a proper demand under the Agreement on Detainers, § 217.490, RSMo 2000, is made. A state or federal government may bring a prisoner in another state (including Missouri) to trial on its charges by following the procedure in the Agreement on Detainers. In this situation, the defendant must be tried or discharged

within 120 days of arriving in that state if the defendant then so demands or objects to a later trial. *Reed v. Farley*, 512 U.S. 339 (1994); *see* §12.44, *infra*.

D. (§12.6) Motions to Dismiss on Other Grounds

Motions to dismiss on many other grounds are discussed in Chapter 13 of this deskbook.

E. (§12.7) Motions Attacking Introduction of Evidence

This discussion does not include motions, including motions for mistrial and objections made at trial, that are usually oral and made if and when they might be appropriate. Other chapters in this deskbook discuss motions to:

- quash search warrants, § 542.276.10, RSMo Supp. 2004, and to suppress evidence, Rule 24.05; § 542.296, RSMo 2000; *see* Chapter 9 of this deskbook;
- suppress a confession or other statement, *see* Chapter 10 of this deskbook; and
- suppress a lineup, showup, photographic display, or other identification, including a voice identification or a wiretap, § 542.414, RSMo Supp. 2004, *see* Chapter 11 of this deskbook.

These motions are generally based on a constitutional prohibition or on a specific statutory authority. The state may appeal from the granting of such a motion. Section 542.414; § 547.200.1, RSMo 2000.

A defendant or other person may file a motion for the return of seized property. Section 542.296.7; § 542.301, RSMo Supp. 2004. But such a claim must be made within one year of the seizure or else the unclaimed seized property is forfeited to the state. Section 542.301. Alleged obscene material is treated somewhat differently. Section 542.281, RSMo 2000; § 542.301.7. An appeal from a proceeding involving the disposition of seized property may be taken as in civil actions. Section 542.301.14.

The detention, arrest, or seizure of a person or property may also lead to a civil action against the individual officers or agency or the political subdivision for the alleged wrongful act, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), or under the Civil Rights Act, 42 U.S.C. § 1983. A specific statute may also provide for a civil action as a remedy, e.g., the § 542.418, RSMo Supp. 2004, civil action for illegal interception, disclosure, use, or procuring of a wire communication. Such actions are beyond the scope of this chapter.

Motions *in limine* have become very popular as a means to attempt to prevent the mention or introduction of irrelevant, incompetent, immaterial, prejudicial, or otherwise inadmissible evidence. Such motions have been used, for example, to attempt to prevent mention or introduction of evidence of:

- an alias of the defendant;
- other offenses or misconduct by a defendant or a witness;
- an ancient conviction of a crime by the defendant; or
- any other matter when the prejudicial effect far outweighs the probative value of the evidence.

Motions *in limine* may also be used to test the admissibility of other evidence before its offer at trial. The motion is directed to the discretion of the trial court. Whether it is sustained or overruled, the objection must be renewed during trial. *State v. Hurst*, 612 S.W.2d 846 (Mo. App. E.D. 1981). *But see United States v. Burkhead*, 646 F.2d 1283 (8th Cir. 1981). In *Luce v. United States*, 469 U.S. 38 (1984), the Supreme Court held that, when a defendant's pretrial motion *in limine* to prevent cross-examination of the defendant regarding a prior conviction was denied, the defendant, in order to appeal on that ground, must testify and be subjected to the cross-examination. If the state's motion *in limine* has been sustained, the defendant must offer the excluded evidence during the trial or else any error is waived. *State v. Oliver*, 729 S.W.2d 560 (Mo. App. E.D. 1987).

F. (§12.8) Mental or Physical Condition of Defendant or of Witness

The necessity of a notice of or plea of not guilty by reason of mental disease or defect excluding responsibility, Rule 25.05(A)(4); §§ 552.030.2, 562.086, RSMo 2000, is discussed in Chapter 15 of this deskbook. A motion for examination of the defendant may be appropriate on the issue of the defendant's:

- mental condition to determine competence to stand trial, § 552.020, RSMo 2000;
- mental condition to determine if the defendant was responsible at the time of the commission of the offense, § 552.030.4; or
- physical condition.

This examination may be used to secure testimony as to the defendant's physical ability or inability to do certain acts, e.g., whether the defendant is left-handed, can ejaculate, has a scar, etc.

The battered spouse syndrome, § 563.033, RSMo 2000, may be the basis for such an examination. *See* Chapter 14, §14.36, of this deskbook. An indigent may have a due process right to such an examination when the indigent's mental status is an issue. *Ake v. Okla.*, 470 U.S. 68 (1985).

Mental or physical examination motions do not need to be filed by a defendant who is not in custody and is not indigent. A motion may be necessary when the defendant, even if not indigent, is in custody so that the person making the examination can secure access to the defendant. Unless the defendant agrees, of course, the prosecution would need a motion if it desires such an examination. These motions by the state are discussed more fully in Chapters 7 and 15 of this deskbook. *See* Rule 25.06(B)(9).

There is little authority for motions for the mental or physical examination of the victim or witness, but due process may require in particular cases that the defendant be afforded an opportunity to have a victim or witness examined. For example, such an examination may be proper and required to determine a victim's or witness's mental capacity to consent—e.g., the defendant is charged with the rape of a mentally deficient girl who is alleged to be incapable of consent. Such a motion might also be a means of securing a blood typing test of the victim or, as another example, of having the witness's eyesight checked. If the state secures such an examination, the defendant should receive the results through discovery procedures.

G. (§12.9) Discovery Motions

Discovery proceedings are varied and numerous. A bill of particulars is discussed in §12.3 above. Discovery requests and motions under Rule 25 are discussed in Chapter 7 of this deskbook.

In a first degree murder case, the state and the defendant, at a reasonable time before commencement of the first stage of trial, upon request by the defendant, must reveal in writing a list of all aggravating or mitigating circumstances that the party intends to prove in the second stage, the names of all witnesses at the second stage, and copies of or the location of the custodian of any books, documents, photographs, or objects to be offered at that stage. No such disclosure is required if the death penalty is waived. Section 565.005, RSMo 2000.

For discovery requests for information about an alcohol chemical test at the direction of a law enforcement officer, see § 577.020.6, RSMo Supp. 2004, and § 577.029, RSMo 2000.

A motion "to reveal the deal" will often lie. *See Giglio v. United States*, 405 U.S. 150 (1972); *State v. Summers*, 506 S.W.2d 67 (Mo. App. W.D. 1974); *State v. Koonce*, 504 S.W.2d 227 (Mo. App. W.D. 1973). Such a motion should be filed when the defendant believes that some arrangement or bargain has been made with a co-defendant, a witness, or an informer that, in return for testimony or nontestimony:

- charges will be dismissed or will not be filed;
- a particular sentence will be imposed against the co-defendant or informer;
- the co-defendant, witness, or informer will be placed under the federal or state witness protection program;
- charges against a relative or friend will be dismissed or not filed;
- the co-defendant, witness, or informer, or a relative, will receive employment or other payment; or
- the co-defendant, witness, or informer, or anyone else at that person's request, will receive any other type or form of benefit.

Such bargains are very common and are sometimes made by the police without the knowledge of the prosecutor or by federal prosecutors or agents or prosecutors in other counties or states. These agreements definitely affect the credibility of the witness.

A "*Brady* motion" may also be appropriate to require the prosecution to reveal any evidence or information (not necessarily admissible in evidence) that may tend to bear on the defendant's innocence or mitigation and punishment. *Brady v. Md.*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976); *State v. Reynolds*, 422 S.W.2d 278 (Mo. 1967). The defendant generally, however, must point out what it is the defendant seeks to obtain. These motions are properly made during trial and after the prosecution evidence closes, but one should consider filing such a motion at the beginning of trial if the defendant believes there is any such evidence or information. The prosecutor may voluntarily provide the information, or the court may enter such an order to avoid a delay during the trial. The motion should be renewed at the close of the prosecution's evidence.

Rule 4–3.8(d) of the Rules of Professional Conduct places the duty on the prosecutor to disclose to the defense available evidence known to the prosecutor that is favorable to the defendant or mitigates the offense or punishment.

A motion for disclosure of an informer's identity is discussed in Chapter 7 of this deskbook. *See Roviaro v. United States*, 353 U.S. 53

(1957); *State v. Yates*, 442 S.W.2d 21 (Mo. 1969). Such disclosure may be required when it is necessary to the defendant's case on the merits. *See State v. Edwards*, 317 S.W.2d 441 (Mo. banc 1958). But disclosure is not required just to attack the information given to the police. *McCray v. Ill.*, 386 U.S. 300 (1967). If the prosecution asserts a privilege not to reveal the name, testimony regarding the information given is inadmissible, perhaps even in a probable cause hearing. *See Roviaro,* 353 U.S. 53. The defendant may want to file a motion for production of the informer for an interview, *United States v. Barnes*, 486 F.2d 776 (8th Cir. 1973); *United States v. McCarthy*, 292 F. Supp. 937 (S.D.N.Y. 1968), especially when the witness is in protective custody. There is no statutory or rule authority for a motion to interview a witness, and, of course, the witness can refuse to be interviewed.

Subpoenas duces tecum may be used to discover and inspect records. Under Rule 26.02(c), the court may direct that the books, papers, documents, or objects designated in the subpoena be produced before the court at a time before trial to permit inspection. A motion to quash or modify the subpoena lies if compliance would be unreasonable or oppressive. Rule 26.02(c). The court may condition denial of a motion to quash on advancement of reasonable costs of producing the books or objects subpoenaed. Section 491.100.3, RSMo 2000.

The prosecution commonly uses grand jury subpoenas to obtain pre-indictment *ex parte* discovery of testimony and books, documents, and other objects. A motion to quash may also be used to attack these subpoenas. A sole proprietor may be entitled to Fifth Amendment protection to the production of private business records, but the contents of the records themselves are not privileged. *United States v. Doe*, 465 U.S. 605 (1984). Contempt lies for the failure to obey the subpoena without just cause. Rule 26.02(g). Section 56.085, RSMo Supp. 2004, authorizes a prosecuting attorney to request a circuit judge to issue a subpoena requiring a witness to appear and produce books, records, and evidence at the prosecutor's office.

A motion for production of grand jury transcripts or minutes may be appropriate. Grand jury proceedings are secret, § 540.320, RSMo 2000, but transcripts and clerk's minutes showing testimony of witnesses are available to the prosecutor and the attorney general. Rule 25.03(A)(3) allows a defendant to obtain, by request without the necessity of a court order, any existing transcript of the grand jury testimony of the defendant and of any person that the state intends to call as a witness. In *State ex rel. Dunlap v. Hanna*, 561 S.W.2d 411 (Mo. App. W.D. 1977), the court held that a court reporter or stenographer is not required to

attend a grand jury; if one does, the defendant is entitled to have the notes transcribed and to receive those portions to which the defendant is entitled.

Section 540.300, RSMo 2000, provides that the court can require a grand juror to testify as to whether a witness before the grand jury testified differently than in court, upon a trial of the witness for perjury, or as to the defendant's testimony before the grand jury. *But see* §§ 540.310, 540.320, RSMo 2000; Op. Att'y Gen. 19 (1953). It is a class B misdemeanor to violate the oath of secrecy of the grand jury given to witnesses. Section 540.120, RSMo 2000. The grand jurors also take an oath of secrecy, § 540.080, RSMo 2000, the unauthorized violation of which is a class A misdemeanor. Section 540.320.

If there has been, or the defense suspects there has been, a wiretap, trap and trace, penregister, or other interception of a wire communication, or other form of electronic surveillance, a motion to disclose this should be filed. Sections 542.410, 542.412, RSMo Supp. 2004; *Alderman v. United States*, 394 U.S. 165 (1969). A motion should be filed to suppress privileged communications that were intercepted, § 542.406.4, RSMo Supp. 2004, and to suppress evidence of the wiretap or the intercepted conversations, § 542.414, RSMo Supp. 2004. Federal wiretaps and consensual telephone recordings are admissible in evidence, unless suppressed. *See State v. Spica*, 389 S.W.2d 35 (Mo. 1965).

Other possible discovery motions may include motions for examination or testing of evidence or items in police custody by a defense expert and motions to require the production of the prosecution expert's notes, charts, comparison samples, photographs, tapes, etc. for examination by a defense expert or for use on cross-examination. As in many discovery situations, these often can be obtained by an informed request or through the taking of a deposition of the expert (of course, serving the expert with a *subpoena duces tecum* to produce the notes, etc.).

A motion to allow the defendant or the defendant's expert to inspect the scene of the crime is sometimes necessary when the scene is in the victim's or some other unfriendly person's home or business or is otherwise inaccessible because of police barricades, etc.

Motions to require a lineup, fingerprint examination, photographic display, etc. may be filed by either the state or the defense. If the state shows good cause, and subject to constitutional limitations and any safeguards deemed appropriate by the court, a defendant may be ordered to:

- appear in a lineup;
- speak;
- be fingerprinted;
- be photographed;
- try on clothing;
- give handwriting samples;
- give blood, hair, etc.; or
- give specimens and samples.

Rule 25.06(B). *See* Chapter 7 of this deskbook. There is little authority for a court to order the police or prosecutor to hold a lineup, etc., and the witness cannot be compelled to attend such a lineup, etc. *See Stanley v. Cox*, 486 F.2d 48 (4th Cir. 1973) (defendant's right to be in a lineup was rejected); *but see Evans v. Superior Court of Contra Costa County*, 522 P.2d 681 (Cal. banc 1974) (such a motion was sustained). The filing of such a motion, even if unsuccessful, may give the defendant something to talk about in the trial. It would be disastrous if the court ordered a lineup and the defendant was identified. The courts in Missouri will not compel the police to give the defendant or a witness a lie detector test.

Discovery-type motions and requests may be as simple as the defendant demanding to see the arrest warrant, Rules 21.08, 22.05; § 532.630, RSMo 2000; obtaining the search warrant and property receipt left at the scene of a search, § 542.276.9, RSMo Supp. 2004; § 542.291.4, RSMo 2000; and receiving a copy of the information or indictment at arraignment, Rule 24.01. In homicide cases, the defendant is entitled to a copy of the verbatim record of the preliminary examination, Rule 22.10, but this may not be transcribed until there is a written request.

Depositions may be taken by the defendant under Rule 25.12, and they may be used by the defendant, if otherwise admissible, when:

- the witness is dead;
- the witness is out of state (unless this absence is procured by the defendant);
- the witness is unable to attend because of sickness or infirmity;
- the witness is a judge, lawyer, or physician and engaged in official or professional duties at the time of trial;
- the witness "[h]as invoked a testimonial privilege or other refusal to testify not produced by the action of the defendant"; or
- the witness is otherwise unavailable and the defendant, after good faith, has been unable to procure attendance.

Rule 25.13. It also appears that the deposition may be by written questions (interrogatories). Rule 25.12; *State v. McCormick*, 426 S.W.2d 62 (Mo. 1968).

Article I, § 18(b), of the Missouri Constitution limits the state's authority, however, to take depositions. Section 545.415, RSMo 2000, provides that the state can take depositions as in civil actions. Under article I, § 18(b), of the Missouri Constitution, the state may take a deposition if, after a hearing on the state's application, the court finds that a deposition is necessary to preserve testimony of a witness, but the order must fully protect the defendant's rights of confrontation and cross-examination. The defendant and the defendant's attorney are entitled to reasonable personal and travel expenses in attending. *See also* Rule 25.14; *State v. Granberry*, 491 S.W.2d 528 (Mo. banc 1973). Rule 25.16 provides that the state may use the deposition at trial if:

- the witness is dead;
- the witness is sick;
- the witness refuses to testify and the refusal was not caused by the state; or
- the state has been unable to procure the witness's attendance despite a good faith effort.

The defendant may use the deposition to impeach or otherwise.

If the defendant or the defendant's attorney did not attend the deposition, the use of the deposition at trial may deprive the defendant of the constitutional right of confrontation. *See State v. Jackson*, 495 S.W.2d 80 (Mo. App. W.D. 1973).

Section 492.303, RSMo 2000, authorizes the deposition (including by videotape) of an essential witness by the prosecuting attorney upon court order and with at least five days' notice to the defendant. An "essential witness" is an eyewitness other than the defendant or the defendant's spouse. The court should ensure that the defendant has received discovery and has had time to prepare. The defendant can be ordered to attend the deposition, and the defendant's and the defendant's attorney's expenses shall be paid. Such a deposition is admissible in evidence under the usual rules and if the witness fails or refuses to testify in the trial unless the refusal was caused by the state's actions.

Section 568.100.3, RSMo 2000, provides that the court, upon request of the prosecutor, may order that the testimony of a child who is the alleged victim of child sexual performance be videotaped in accordance

with § 492.303, or as otherwise provided by law. Section 491.680, RSMo 2000, allows video depositions of a child victim (a person under age 17), upon motion of the prosecuting attorney, for use during a preliminary hearing or trial in a criminal prosecution for offenses against the person, sexual offenses, or offenses against the family. The court presides over the deposition, and the defense attorney shall be given at least two opportunities to cross-examine the alleged child victim—once before the preliminary hearing and at least once before the trial—and shall have had discovery. Upon motion for good cause shown, the court may order the reexamination of the child. Section 491.687, RSMo 2000. Section 491.685, RSMo 2000, provides that, on motion of the prosecuting attorney, the defendant may be excluded from the deposition. This has been held to be an unconstitutional denial of confrontation. *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979). Section 491.699, RSMo 2000, provides for video depositions in juvenile court proceedings. In *Maryland v. Craig*, 497 U.S. 836 (1990), the Supreme Court approved of the defendant being excluded from a deposition when proper procedures were followed and there was a case-specific finding of necessity.

Sections 492.420, *et seq.*, RSMo 2000, provide a procedure for taking a deposition for perpetuation of testimony when no case is pending by filing a petition for a commission to take the deposition.

Either the state or the defense, on rare occasions, may seek to exhume or disinter the body of a deceased who has already been buried. An autopsy can only be had with the consent or order of a public officer or agency. Section 58.451, RSMo 2000; § 194.115, RSMo Supp. 2004; § 194.170, RSMo 2000. As to sudden infant deaths, see §§ 58.452, 58.722, and 194.117, RSMo 2000. Sections 58.360, *et seq.*, RSMo 2000 and Supp. 2004, provide for coroner's inquests, and §§ 58.451 and 58.720, RSMo 2000, provide for autopsies when death was by apparent criminal action. Section 58.445, RSMo 2000, requires a coroner or medical examiner to make tests necessary to determine the presence of and percentage concentration of alcohol, and drugs if feasible, in the blood of a deceased killed in a motor vehicle accident. Cases speak of the "sanctity of the grave." *Litteral v. Litteral*, 111 S.W. 872, 873–74 (Mo. App. W.D. 1908). But the medical examiner, in certain situations, may ask the prosecuting attorney to apply for a court order to exhume the body. Sections 58.451.4, 58.720.3.

H. (§12.10) Application for Change of Venue

See Chapter 8 of this deskbook; Rule 32. A defendant, under certain circumstances, can have two changes of venue. *Irvin v. Dowd*, 366 U.S. 717 (1961); Rule 32.09. The state is not entitled to a change of venue because the defendant has the constitutional right to a trial in the county where the offense occurred. A defendant may have a constitutional right to a change of venue. *Groppi v. Wis.*, 400 U.S. 505 (1971). But in *Patton v. Yount*, 467 U.S. 1025 (1984), the Supreme Court held that a refusal to grant a change of venue because of publicity was not a denial of a fair trial. When it appears that the inhabitants of the entire county are prejudiced and that a fair trial cannot be had, the court may order jurors summoned from any other county in the same or an adjoining circuit or some other county designated by the chief justice of the Supreme Court. The selection of the jury panel may be in the county where the trial will be held. Section 494.505, RSMo 2000.

A criminal nonjury trial of an inmate defendant, or a post-conviction proceeding of an inmate movant, in the court's discretion, may be heard in a facility of the Department of Corrections. Section 544.275, RSMo 2000. When the defendant is an inmate in the Department of Corrections and the defendant's physical appearance is required in court in the county or city in which the defendant is confined, appearance may be by means of closed circuit television for:

- the defendant's first appearance before an associate circuit judge;
- the defendant's waiver of preliminary hearing;
- the defendant's arraignment when a plea of not guilty is entered;
- the defendant's arraignment on a plea of guilty when the defendant has waived the right to be physically present;
- pretrial or posttrial proceedings not involving cross-examination of the witnesses;
- the defendant's sentencing after a trial when personal presence has been waived;
- the defendant's sentencing after a plea of guilty;
- nonjury civil proceedings involving the defendant; or
- other proceedings when the defendant has waived the right to be physically present.

Section 561.031, RSMo 2000.

I. (§12.11) Application for Disqualification of Judge

See Chapter 8 of this deskbook; Rule 32. Either side may file a motion for disqualification of a judge. This is sometimes referred to as a "motion to recuse," especially when the judge has an interest, bias, or prejudice in the proceeding or is a potential witness. Rule 2.03, Canon 3C, 3D; *see also* § 105.464, RSMo 2000. Judges may disqualify themselves without application. Rule 32.10. When a party has already had a change of judge, a second one may be secured under Rule 32.10 upon the suggestion of that party when appropriate. See also Rule 32.09(c), allowing a change of judge when fundamental fairness so requires. In a criminal contempt case when the contempt charged involves disrespect to or criticism of a judge, the judge is disqualified from presiding at the trial except with the defendant's consent. Rule 36.01(b).

J. (§12.12) Motion to Strike the Jury Panel or to Challenge the Array

A motion to strike the jury panel or to challenge the array may lie because the jury panel was not properly selected or qualified or because of selective discrimination or exclusion. *See Jones v. Ga.*, 389 U.S. 24 (1967); *Taylor v. La.*, 419 U.S. 522 (1975); *State v. Mooring*, 445 S.W.2d 303 (Mo. 1969); *State v. Davis*, 646 S.W.2d 871 (Mo. App. W.D. 1982); *see also* Chapter 21 of this deskbook. Such a motion may also lie because of widespread and continuous prejudicial publicity that has tainted the jury panel to such an extent that the defendant could not have a fair and impartial jury. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The normal remedy in this situation is to secure a change of venue, but can a defendant be required to seek a change of venue? Rules 32.03 and 32.04 provide that these applications must be made by the defendant. The motion may also lie under circumstances when the jury panel has become tainted since qualified and placed in the wheel, e.g., the jury also tried a co-defendant. *See* §12.10, *supra*.

The qualifications and manner of selection of grand jurors and of petit jurors are set out in §§ 494.400, *et seq.*, RSMo 2000 and Supp. 2004. See § 494.465, RSMo 2000, for challenges to the panel because of improper selection. Section 494.465 provides the exclusive statutory means to challenge a jury on the grounds that it was not selected in conformity with the statutory provisions. Such a challenge may be raised by a motion to stay the proceedings or a motion to quash indictment or for other relief alleging that there was a substantial failure to comply with the declared policies of those statutes regarding the selection of a grand jury. The motion must be filed before the petit jury is sworn to try the

case or within 14 days after the moving party discovers, or could have discovered by reasonable diligence, the grounds for the motion, whichever occurs later. If the motion contains a sworn statement of facts that, if true, would constitute a substantial failure to comply, the moving party is entitled to an evidentiary hearing.

A defendant is entitled to a jury of qualified jurors but not to a jury panel of qualified jurors. Section 494.480.4, RSMo 2000.

K. (§12.13) Motion to Require an Election

For discussions of a motion to require an election, see *State v. Foster*, 225 S.W. 671 (Mo. 1920), and *State v. Frankum*, 425 S.W.2d 183 (Mo. 1968). This motion may lie when the prosecution has charged the commission of the same offense in two ways (e.g., an offense charged in the alternative or a rape case where several acts of intercourse are alleged or proved). The court may not require an election until the close of the evidence, *State v. Seay*, 222 S.W. 427 (Mo. 1920), but this may not conform to the defendant's constitutional right to be informed of the nature or cause of the accusations made against the defendant. In homicide cases, elections are not required. Section 565.004.2, RSMo 2000. An election can be made by means of the instructions submitting the offense. *State v. Cobb*, 221 S.W.2d 745 (Mo. 1949). It has been held that requiring an election is within the discretion of the court, especially when the defendant did not object. *State v. Clark*, 182 S.W.2d 619 (Mo. 1944).

Section 556.041, RSMo 2000, provides that a defendant may be prosecuted for more than one offense arising out of the same conduct, but the defendant cannot be convicted of more than one such offense if:

- one is included in the other;
- they require inconsistent findings of fact;
- one offense prohibits general conduct and the other prohibits a specific instance of the conduct; or
- the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted (unless the law provides that specific periods constitute separate offenses).

L. Motion for Severance and Separate Trial

1. (§12.14) Defendants

Rule 23.06 allows joinder of defendants when "they are alleged to have participated in the same act or transaction or in the same series of acts or transactions." They may be charged in one or more counts separately or together, and all defendants do not need to be charged in each count. The state does not have to jointly charge defendants or offenses and may charge them separately even if properly joinable. *State v. Lincoln*, 482 S.W.2d 424 (Mo. 1972).

See also Chapter 4 of this deskbook; § 545.140.1, RSMo 2000. Section 545.140.3 provides that defendants shall not be charged jointly if substantial prejudice results. **"[S]ubstantial prejudice"** means "bias or discrimination against one or more defendants or the state which is actually existing or real" and not "merely imaginary, illusionary or nominal." Section 545.140.3. A motion for severance could be sought because of misjoinder.

Rule 24.06(b) provides that jointly charged defendants shall be tried together unless the court orders a separate trial. A severance shall only be ordered if the defendant files a written motion and the court finds that a probability of prejudice exists or that:

- the defendant is subject to assessment of punishment by the jury and prejudice may result thereby;
- there may reasonably be expected to be material and substantial evidence admissible against one or more defendants but not against another;
- there is an out-of-court statement not admissible against one defendant that is admissible against other defendants unless the reference to the other defendant can be eliminated; or
- a separate trial is necessary to a fair determination of the defendant's guilt.

Rule 24.06(b). Section 545.880, RSMo 2000, has similar provisions.

The next-to-the-last ground is directed to the problem in *Bruton v. United States*, 391 U.S. 123 (1968), which held that, if a nontestifying co-defendant has given a confession that implicates the other defendants, the prosecution intends to use that confession, and the portions as to the co-defendants cannot be expurgated, they

are entitled to a severance and separate trial. *See also Roberts v. Russell*, 392 U.S. 293 (1968). The rule is weakened and explained in *Frazier v. Cupp*, 394 U.S. 731 (1969).

Section 545.885.3, RSMo 2000, which applies to joinder of offenses, however, provides that each defendant tried jointly "under this section" shall be entitled to preemptory challenges as set out in § 494.480, RSMo 2000.

A particular defendant's right to a speedy trial might entitle the defendant to a severance, when, for instance, a jointly charged defendant has not yet been apprehended, is ill, or has been committed to a mental institution, etc. A severance may be accomplished by one, but not all, of the defendants filing an application for a change of venue. Rule 32.05. The effect of Rule 24.06 on the court's power to grant a severance *sua sponte* is not clear, but this Rule does provide that a severance shall only be upon the motion of the defendant. In *State v. Granberry*, 484 S.W.2d 295 (Mo. banc 1972), decided before the amendment to the above Rules and statutes, the Court held that a court may order a severance even without a request.

Sometimes, particular defendants will have a better or a worse chance of winning if jointly tried depending on:

- their relative involvement;
- their separate defense theories;
- their respective past records;
- their appearances;
- their attorneys; and
- the evidence against them.

Juries sometimes compromise by convicting one defendant and acquitting the other defendant. Rule 27.04 provides that the prosecution, at any time before jointly tried defendants go into their defense, may dismiss with prejudice as to one so that defendant may be called as a state's witness. If there is insufficient evidence against one defendant, that defendant should be discharged so that defendant can testify on behalf of the co-defendant. Obviously, the state can obtain a separate trial of defendants by charging them separately, or if jointly tried, by dismissing as to one or more defendants and refiling against them.

The propriety of the joinder is a matter of law, but a motion for severance is directed to the discretion of the court and is reversible only for abuse of that discretion. *State v. Eiland*, 809 S.W.2d 169 (Mo. App. E.D. 1991).

2. (§12.15) Offenses

Rule 23.05 allows joinder of offenses when they are of the same or similar character or are based on two or more acts that are of the same transaction or two or more acts that are connected or constitute parts of a common scheme or plan. *See also* § 545.140.2, RSMo 2000; Chapter 4 of this deskbook; *State v. Howard*, 601 S.W.2d 308 (Mo. App. E.D. 1980). Rule 24.07 provides that there shall be separate trials of jointly charged offenses only when:

- either party files a written motion for separate trial;
- either party makes a particularized showing of substantial prejudice; and
- the court finds the existence of bias or discrimination against the party that requires a separate trial.

See also § 545.885, RSMo 2000. Each charge should be made in separate counts.

Before these Rules, a defendant could not be tried and convicted of two crimes in the same trial. *State v. Collins*, 248 S.W. 599 (Mo. 1923) (an election was said to be a remedy). Of course, a defendant may be convicted of a lesser-included offense. Section 556.046, RSMo 2000. The state can obtain a severance by dismissing one or more counts and then refiling them. In *State v. Cook*, 673 S.W.2d 469 (Mo. App. E.D. 1984), it was held to be error to refuse a severance when one count charged possession of a firearm by a convicted felon. This evidence prejudiced the defendant as to the other counts because it required evidence of the prior conviction.

Homicides may be charged in separate counts with other homicides or other offenses if they can be joined under § 545.140.2, discussed above. A first degree murder, however, may only be tried with another charge of first degree murder unless:

- it is an alternative submission (no election shall be required);
- the defendant has been charged and proven to be a prior offender so that the court assesses punishment on that charge; or
- the state waives the death penalty.

Section 565.004, RSMo 2000. Of course, lesser degrees of homicide may be submitted if requested by either party or by the court. Section 565.025, RSMo 2000.

3. (§12.16) Improper Joinder

Before 1971, when two or more offenses were charged, the state, upon objection, was required to make an election at the close of the evidence. *See State v. Frankum*, 425 S.W.2d 183 (Mo. 1968). A motion for an election may still lie or relief may be sought by requested instructions or by motion to dismiss. *See* Chapter 13 of this deskbook. If no objection is made to improper joinder, it is deemed waived. *State v. Serna*, 526 S.W.2d 66 (Mo. App. W.D. 1975). This rule has been found to be constitutional. *Woods v. State*, 546 S.W.2d 14 (Mo. App. E.D. 1976); *State v. Baker*, 524 S.W.2d 122 (Mo. banc 1975). A motion for severance will lie when there has been improper joinder under the Rule and may lie seeking a severance within the discretion of the trial court. *State v. Brannom*, 539 S.W.2d 747 (Mo. App. E.D. 1976). Propriety of joinder is a matter of law, but a motion to sever is addressed to the trial court's discretion. *State v. Eiland*, 809 S.W.2d 169 (Mo. App. E.D. 1991).

Some of the considerations as to whether a severance of offenses should be sought are:

- the likelihood of winning two or more trials;
- whether the defense will tip its hand in the first trial;
- the expense of two trials;
- the probability of receiving concurrent rather than consecutive sentences; and
- the possibility of a compromise verdict by the jury.

Before a motion for severance is filed, all of these considerations should be discussed with the client. Severance may be sought because of misjoinder or because of prejudicial joinder.

M. (§12.17) Motion to Consolidate

Rule 24.06(a) provides that, when two or more defendants could have been joined in the same charge but are charged separately, they may be ordered joined on motion of either party. *See also* § 545.880.1, RSMo 2000. If there is a joinder over objection, the objecting party should then move for severance. There is no similar statutory authority for consolidation of offenses, but no doubt the court could do so within its discretion. The state could obtain joinder by dismissing and then recharging jointly.

N. (§12.18) Motion for Pretrial Conference

Rule 24.12 provides that the court, upon motion of either party or on its own motion, may order a pretrial conference. The purpose is to promote a fair and expeditious trial. The court should make a record of the matters agreed upon. This can be by a court reporter record or by court order or other record entry. No admission by the defendant or the defendant's attorney at the conference is binding unless the admission is reduced to writing and signed by the defendant and the defendant's attorney. No pretrial conference, under this Rule, shall be held when the defendant is not represented by counsel. The court also has the inherent power to call and hold a pretrial conference.

O. (§12.19) Motions by or for Indigents

In Missouri the majority of indigent individuals are represented by public defenders. Usually, no motions are involved in this process. The court will refer an individual to the public defender's office, and it is then initially up to that office to determine if the person qualifies for services. A defendant or the defendant's family may contact the public defender's office, or a defendant may make a written or oral request for the appointment of counsel. Section 600.048, RSMo 2000. On rare occasions, the public defender or other appointed counsel may enter representation upon direct order of court. Retained counsel who discovers that a client is indigent may seek to withdraw and have the public defender or someone else appointed to represent the defendant, or retained counsel may ask that they individually be appointed to represent the defendant. Rule 31.02; *see also* § 545.820, RSMo 2000; Rules 21.10 (misdemeanors), 22.08 (felonies), 24.02(b) (arraignments). Regarding withdrawal of counsel, see §12.35 below.

The statewide public defender system is established by Chapter 600, RSMo. Public defenders are appointed by the public defender commission, but the hiring of private attorneys by contract is also authorized. Sections 600.021.6, 600.042.1(10), RSMo 2000; *see also* § 600.042.1(11). Those persons eligible for the appointment of the public defender are set out in §§ 600.042.4 and 600.086, RSMo 2000.

An indigent defendant may be able to secure the assistance of an investigator, an expert witness, or a mental examination without cost. An indigent defendant may also seek to take depositions at the cost of the state by motion to the court. But see *State v. McCormick*, 426 S.W.2d 62 (Mo. 1968), which indicated that interrogatories to witnesses may be submitted under Rule 25.12. An indigent defendant, at the cost of the

state, may also seek to secure the written report of preliminary hearing testimony before an associate circuit judge in a homicide case made in accordance with Rule 22.10 or the transcript of a previous trial of the defendant or of a co-defendant. Such a motion should be based on due process and equal protection rights under the Fourteenth Amendment and on the defendant's rights to confrontation of witnesses. A defendant represented by the public defender system may obtain reports, documents, statements, and transcripts from an agency or political subdivision, including the prosecuting attorney, free of charge. Section 600.096, RSMo 2000.

Rule 25.03(A)(4) grants the defendant, upon request, the right to disclosure of such transcripts as well as some reports and statements.

A defendant who is not indigent may be found to have waived counsel by refusal to retain counsel after notice. *State v. Wilson*, 816 S.W.2d 301 (Mo. App. S.D. 1991).

P. (§12.20) Application for Continuance

Continuances of misdemeanor and felony trials are controlled by the same rules. The court may continue a criminal proceeding, for good cause shown, to a fixed date or to a date to set thereafter. Rule 24.08. An application for continuance should be by written motion and be verified or accompanied by the affidavit of the applicant or other credible person setting forth the facts on which the application is based, or it may be made orally if the adverse party consents. Rule 24.09.

Continuances of preliminary examinations appear to be governed by the same rules, except that § 544.320, RSMo 2000, provides that a preliminary hearing may be adjourned from time to time not exceeding 21 days at a time. It may be adjourned on motion of the defendant or the state to procure the attendance of witnesses or for other good and sufficient cause shown. The practice regarding preliminary hearings varies as to county. In St. Louis City, St. Louis County, and St. Charles County, for instance, preliminaries proceed through the courts at breakneck speed. This is particularly true as a result of the Supreme Court's adoption of guidelines as to how fast disposal of cases should be made. In other counties, the procedure may be somewhat slower, and, in practice, preliminary hearings are commonly continued for 30 days or longer, often by agreement and often by oral motion.

Rule 24.10 provides that, when a continuance is sought because of the absence of evidence, in either a felony or a misdemeanor case, the

application must show the materiality of the evidence and that due diligence has been used to obtain it. If it is a witness who is absent, the application must show:

- the witness's name;
- where the witness resides, if known;
- facts showing the probability of procuring the testimony within a reasonable time;
- what facts the witness will prove;
- that the facts cannot be proved by another witness who is available;
- that the witness is not absent by connivance, procurement, or consent of the applicant; and
- that the application is not made for vexation or delay but to obtain a fair and impartial trial.

See State v. Thomas, 433 S.W.2d 537 (Mo. 1968).

A continuance may be sought because the defendant or the defendant's attorney is ill, disabled, or unavailable, because of recent adverse prejudicial publicity, or because the defendant has ordered but not yet received a transcript of testimony at a prior trial. A continuance may also be sought when an amendment or substitute information has been filed. *See* Rule 23.08. When the effect of the pretrial publicity is speculative, denial of a continuance is not error when voir dire of the jury can reveal potential jurors with preconceived notions that would prevent them from being fair. *State v. Butler*, 676 S.W.2d 809 (Mo. banc 1984). See also § 494.505, RSMo 2000, authorizing selection of a jury from a different county.

The right to a speedy trial may also be a consideration in seeking or granting a continuance. A defendant who seeks a continuance, or even just does not object to a continuance, may be held to have waived a speedy trial, or the failure to object might weigh against the defendant in such a determination. *See Barker v. Wingo*, 407 U.S. 514 (1972); *see also* Chapter 13, §13.63, of this deskbook; §12.5, *supra*.

Missouri law no longer provides for mandatory continuances when the defendant is, or is represented by, a member of the legislature. Section 491.710, RSMo 2000, provides that cases involving a child victim or witness shall be given docket priority and, in ruling on any motion for continuance, the court shall consider the adverse impact the delay may have on the well-being of the child. A trial of a misdemeanor may be delayed by asking for a jury.

Delays in trial, although sometimes of benefit to the defendant because memories fail; witnesses die, move, or leave the police force; and the defendant is given a chance to be rehabilitated before trial or plea, are often detrimental because:

- the prosecutors, courts, and witnesses may become disgusted with the delays and the witnesses may become more positive in their testimony;
- the defendant could be charged again on a subsequent offense, and
- defense witnesses likewise disappear and have memory losses.

Juries also often become disgusted with the delays. In actual practice, depending on the circuit, the county, and the judge, continuance practice seldom conforms to the strictness of the law. It is suggested that counsel, through consultation with an experienced and knowledgeable practitioner or with the court, become acquainted with the local custom and practice. But counsel should always be aware that the court can properly rely on the Rules to justify the denial of a continuance.

Q. (§12.21) Issuance of Subpoenas and Attendance of Witnesses

See also Chapters 17 and 18 of this deskbook.

1. (§12.22) Subpoena for Witness

Subpoena forms may be obtained from the circuit clerk. Some clerks require that a praecipe or written order listing the witnesses be submitted as appears to be required by §§ 545.320 and 545.330, RSMo 2000, but Rule 26.02(a) provides that the clerk issue subpoenas in blank. Examining the praecipe, if any, will reveal which witnesses the state or defense may actually call during the trial. Sections 491.090 and 491.100, RSMo 2000, authorize a notary public to also issue trial subpoenas (*see also* § 575.130.2, RSMo 2000); but Rule 26.02(a) provides that the clerk issue subpoenas to either the state or the defendant. Rule 26.01.

2. (§12.23) *Subpoena Duces Tecum*

Rule 26.02(b) provides for the issuance by the clerk of a subpoena directing the production of books, papers, documents, or other designated objects. *See also* § 491.100.1, RSMo 2000. See §12.9 above for a discussion of the use of these subpoenas as a discovery tool and of motions to quash these subpoenas. Section 492.280, RSMo 2000, provides for *subpoenas duces tecum* in deposition proceedings by order of court. Rule 25.12 provides that the rules relating to depositions in civil cases shall apply in criminal cases. In practice, notaries public usually issue and serve deposition subpoenas, including *duces tecum*.

Section 56.085, RSMo Supp. 2004, authorizes the prosecuting attorney to request a circuit judge to issue a subpoena to any witness who may have information for the purpose of producing books, papers, records, or other evidence.

3. (§12.24) Service of Subpoenas

Service of a subpoena is made by delivering a copy to the person named in it. Fees and mileage do not need to be tendered to the witness. Service may be by the sheriff or any other person (except a defendant) who is at least 18 years old. Service may be made anywhere within the state. Rule 26.02(d). After service is made, a return should be made, which is by affidavit if the subpoena is served by someone other than an officer. Rule 26.02(e). The return should be filed with the clerk. Witnesses who have once been subpoenaed or required to give bond to appear have a continuing duty to attend until the case is disposed of or the witness is finally excused by the court. Rule 26.03; § 491.100.2, RSMo 2000.

4. (§12.25) Material Witnesses

When an affidavit has been filed in the court that a witness's testimony is material in a felony case and it is shown that it may become impracticable to secure the witness's presence by subpoena, the court may order the witness taken into custody. Conditions of release shall then be set in accordance with Rule 33.01. A witness who cannot comply with those conditions so as to secure this release should be discharged if the witness's testimony can be adequately secured by deposition and further detention is not necessary to prevent a failure of justice. Rule 33.12. It appears that there is

nothing to prohibit a defendant from requesting that a material witness be held on bond.

5. (§12.26) Habeas Corpus *ad Testificandum*

Upon an application by either party to secure the attendance of any person who is detained in jail or prison or is otherwise in custody (such as in juvenile custody or in a mental institution), a writ may issue so as to secure the party's testimony as a witness in a criminal action. Rule 26.04; §§ 491.230, *et seq.*, RSMo 2000. The application should state that the testimony of the witness is material and necessary to the applicant. Section 491.230.2, RSMo 2000, prohibits the use of such a writ in any civil proceeding to secure testimony of an inmate in the Department of Corrections, even if the inmate is a party. If the prisoner is a federal prisoner, arrangements must also be made with the Bureau of Prisons and the United States Marshal for the inmate's transportation and attendance. The cost of this must be paid in advance. A habeas corpus *ad prosequendum* is used to secure the attendance of a defendant who is in custody somewhere other than the local jail in order for the defendant to appear in court. *State v. Savage*, 461 S.W.2d 887 (Mo. banc 1971).

6. (§12.27) Uniform Law to Secure Attendance of Witnesses

The Uniform Law to Secure the Attendance of Witness from Within or Without a State in Criminal Proceedings, §§ 491.400–491.450, RSMo 2000, sets forth the statutory procedure in criminal proceedings for securing a witness who is in another state. This procedure can only be used when the other state has adopted the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings. A certificate from the court in Missouri must be obtained stating that the witness is a material witness and the number of days the witness will be required. The certificate may recommend that the witness be taken into immediate custody and delivered to an officer of Missouri. Section 491.420.1, RSMo 2000. The issuance of an application seeking such a certificate is discretionary, *State v. Sykes*, 611 S.W.2d 278 (Mo. App. E.D. 1980), and evidence may need to be presented in support of it. A tender of mileage (ten cents per mile) and $15 per day is required. Section 491.420.2. This amount shall come from the treasurer of the county. *Id*. The certificate is presented to a judge in the county in the other state where the witness can be found. The court shall then fix a hearing date and issue an order directing the witness to appear.

If the judge then determines that the witness is material and necessary, that attendance will not cause undue hardship, and that Missouri law will protect the witness from civil and criminal process (and it will—§ 491.430, RSMo 2000), the court should issue a summons (with a copy of the certificate attached) directing the witness to appear and testify. At the hearing, the certificate is prima facie evidence of the facts stated in it. Section 491.410, RSMo 2000. Of course, the witness may agree to appear voluntarily and might be served with a subpoena in Missouri.

R. Other Miscellaneous Motions and Pleadings

1. (§12.28) Motion for Enlargement of Time

When an act is required to be done or allowed within a specific time, the court, for cause shown, in its discretion, may extend the time with or without motion if the court does so within the specified period; after the expiration of the period, the court may extend the time upon motion and notice when failure resulted from excusable neglect. Rule 20.01(b). Some cases, statutes, and rules may still reference terms of court, but Rule 20.01(c) provides that terms of court no longer affect time limits.

When a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other pleading upon the party and the notice is served on the party by mail, the prescribed period is automatically extended by three days. Rule 20.01(e).

Motions should be filed or made before arraignment, but the court may permit them to be made within a reasonable time after that. Rule 24.04(b)3. Of course, a request for time to file motions must be made in writing or orally at the arraignment or there must be a motion filed thereafter seeking permission to file motions late. The time for filing a motion for new trial or for taking an appeal cannot be extended beyond the periods established by the applicable rules. Other motions, such as motions to suppress, may be filed at any time before trial, or even, in the court's discretion, during trial. Rule 24.05.

2. (§12.29) Waiver of Trial by Jury or Demand for Jury

Rule 27.01(a) provides that all criminal trials shall be by jury unless a jury is waived. This Rule applies to felony, misdemeanor, and

infraction cases. Section 543.200, RSMo 2000, provides, however, that the trial of a misdemeanor may be by an associate circuit judge unless the defendant or the prosecuting attorney demands a jury. Section 543.220.2, RSMo 2000, provides that the trial of infractions shall be without a jury, but the Rule may supersede the statute by the authority of Rule 19.02 and article V, § 5, of the Missouri Constitution. The defendant may waive a jury, with the assent of the court. In a felony case, the waiver must be made in open court and entered of record. Rule 27.01(b); MO. CONST. art. I, § 22(a). *See Brookhart v. Janis*, 384 U.S. 1 (1966). The state does not need to consent to such a waiver, but its objection can be considered by the court in its determination as to whether to assent to the waiver. A defendant does not have a constitutional right *not* to be tried by a jury except when a fair trial is impossible or unlikely. *See Singer v. United States*, 380 U.S. 24 (1965); *State v. Goree*, 762 S.W.2d 20 (Mo. banc 1988). For waiver in homicide cases, see § 565.006, RSMo 2000.

A party may request one or more alternate jurors because of the anticipated length of a trial. Up to four alternates may be impaneled. Section 494.485, RSMo 2000.

3. (§12.30) Requested Findings of Fact and Conclusions of Law

When a jury trial has been waived, either party may request findings of fact and conclusions of law, or the court may make special findings on its own discretion. Either party may file requested findings of fact. No rule exists, however, requiring the court to make such findings of fact or conclusions of law either orally or in writing, other than a finding of guilty or not guilty. Findings of fact are required as to some specific issues and proceedings:

- The voluntariness of a confession, *Boles v. Stevenson*, 379 U.S. 43 (1964); *State v. Boyer*, 646 S.W.2d 876 (Mo. App. E.D. 1983) (no plain error when record as a whole clearly indicates the confession was voluntary)
- Factual basis and voluntariness of a plea of guilty, Rule 24.02
- Ruling on a motion to vacate sentence under Rule 24.035 or 29.15
- Ruling on a defendant's offer of proof regarding a rape victim's prior sexual conduct, § 491.015.3, RSMo 2000

4. (§12.31) Motions for Citations of Contempt

Contempt may lie when a witness or party has disobeyed an order of the court or has been disruptive or disrespectful to the court, e.g., when there has been a disobedience to a subpoena. Rule 26.02(g). See also § 491.190, RSMo 2000, which authorizes a fine of up to $50 for failure to appear and testify. Willful violation by counsel of a discovery rule may lead to sanctions, including a contempt order. Rule 25.18. Civil contempt may be used for the enforcement of remedies and to protect rights of the parties. Section 545.360, RSMo 2000. It may also be used for a refusal to testify. Section 491.180, RSMo 2000. Refusal to testify before a grand jury is covered in §§ 540.190–540.210, RSMo 2000. A refusing witness may be committed until the witness testifies. Section 491.200, RSMo 2000. Under the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, §§ 491.400–491.450, RSMo 2000, a witness who fails to attend and comply is punished as other such witnesses. Sections 491.410.4, 491.420.2, RSMo 2000. Contempt may also be a punishment for willful failure to appear on bond. Section 544.665.2, RSMo 2000. Under § 494.450, RSMo Supp. 2004, a juror failing to attend may be fined up to $500 and ordered to complete community service. Victim and witness tampering is a criminal offense and is discussed in §12.46 below.

For acts constituting criminal contempt, see § 476.110, RSMo 2000. A person may be punished summarily if a judge certifies that the judge saw or heard the contemptuous conduct and it was committed in the actual presence of the court. Rule 36.01(a); § 476.130, RSMo 2000. Criminal contempt is prosecuted by notice and hearing. Here, the prosecution is much like a criminal charge. Notice may be orally in court or on application of the prosecutor or other attorney appointed by the court for that purpose. An order of arrest or order to show cause is then issued. The defendant is entitled to bail pending trial. The judge is disqualified to hear the matter if the contempt involves disrespect or criticism of the judge. Rule 36.01(b); § 476.130.

If the defendant is found guilty of contempt, the judgment and order of commitment must recite the essential facts constituting the contempt and fix the punishment. Rule 36.01; § 476.140, RSMo 2000; *In re Curtis v. Tozer*, 374 S.W.2d 557 (Mo. App. E.D. 1964). The punishment for criminal contempt is a fine or imprisonment in the county jail or both. Section 476.120, RSMo 2000. Appeal from a commitment for criminal contempt is by means of habeas corpus.

Section 532.440, RSMo 2000. An order finding the defendant guilty of civil contempt, however, may be appealed. *See Huber v. Huber*, 649 S.W.2d 955 (Mo. App. E.D. 1983).

5. (§12.32) Motion for Disqualification of Prosecutor

There is little authority for a motion for disqualification of the prosecutor. The prosecutor should not participate in a trial or prosecution when the prosecutor is:

- related to the defendant;
- the victim of the alleged offense;
- related to or otherwise interested in the victim;
- related to the judge;
- a witness to the offense; or
- particularly prejudiced against the defendant.

The Rules of Professional Conduct, which are adopted as Rule 4, apply to prosecutors. Rule 4–3.8 pertains to the special responsibilities of a prosecutor. Rule 4–3.6 pertains to trial publicity. In *State v. Tyler*, 587 S.W.2d 918, 929–30 (Mo. App. W.D. 1979), the court said "it is generally true that the prosecutor's personal animus against a defendant disqualifies him from prosecuti[on]." There, the fact that the defendant had filed lawsuits against the prosecutor was not sufficient proof of such hostility on the part of the prosecutor. Nor is the fact that the prosecutor has prosecuted the defendant on other occasions sufficient. *State v. Holt*, 603 S.W.2d 698 (Mo. App. S.D. 1980); *see also* Chapter 13, §13.52, of this deskbook. Section 56.110, RSMo 2000, provides that, if the prosecuting attorney or an assistant prosecutor is interested or employed in a case when that employment is inconsistent with duties as a prosecutor or is related to the defendant, the court may appoint some other person to act as prosecutor. Disqualification is called for only when the prosecutor has a personal interest of a nature that might preclude the prosecutor according fair treatment to the defendant. *Brewster v. State*, 577 S.W.2d 911, 914 (Mo. App. W.D. 1979). When one of the defendant's attorneys joins the prosecutor's staff, that office is disqualified from prosecuting the defendant. *State v. Croka*, 646 S.W.2d 389 (Mo. App. W.D. 1983); *State v. Boyd*, 560 S.W.2d 296 (Mo. App. W.D. 1977).

Of course, prosecutors may disqualify themselves and request the court to appoint a special prosecutor or request the attorney general to handle the prosecution. Section 27.030, RSMo 2000, provides that,

when directed by the Governor, the attorney general shall aid any prosecutor in the discharge of the prosecutor's duties. See also §§ 56.750, *et seq.*, RSMo 2000 and Supp. 2004, providing for the Missouri Office of Prosecution Services under the attorney general. An assistant attorney general may be appointed by the circuit court to prosecute even though there is no order from the Governor directing the assistant attorney general to so serve. *State v. Steffen*, 647 S.W.2d 146 (Mo. App. W.D. 1982). The attorney general is also granted the concurrent duty to enforce certain laws, e.g., the gambling laws, § 572.110, RSMo 2000, and the civil remedies against prostitution, § 567.100, RSMo 2000. Privately hired special prosecutors are not allowed. *State v. Harrington*, 534 S.W.2d 44 (Mo. banc 1976).

6. (§12.33) Demand for Sequestration of Jury

Section 494.495, RSMo 2000, provides that the court may permit the jury to separate at adjournments or recesses during trial or deliberations in all criminal cases, except capital cases. The jurors, when allowed to separate, shall first be admonished in accordance with MAI-CR 3d 300.04. Either party, by motion or otherwise, may attempt to convince the trial court to sequester the jury, and the court has the discretion to do so. The expense and inconvenience of sequestration is a strong argument against sequestration. Whether a party should request sequestration of a jury depends on:

- the publicity anticipated;
- whether the party suspects there may be an attempt to tamper with the jury;
- the length of trial;
- the makeup of the jury;
- the facilities available; and
- the prejudicial effect of the sequestration on the jury.

7. (§12.34) Gag Orders

Pretrial and trial publicity is often a major obstacle to a fair and orderly trial. Efforts to mitigate or halt such publicity may include a gag order on the news media or on the parties, witnesses, and attorneys involved in the case.

Gag orders are extremely difficult to draw constitutionally. *Neb. Press Assn. v. Stuart*, 427 U.S. 539 (1976); *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555 (1980); *but see Sheppard v. Maxwell*, 384

U.S. 333 (1966). Gag orders are permissible as to the attorneys. *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991). There is some question as to whether the defendant may be "gagged" because of the constitutional right to freedom of speech. It has been held that a pretrial hearing may not be closed over the defendant's objections unless the need for closure is so great that it overrides the defendant's Sixth Amendment right to a public trial and no narrower or less onerous restriction is feasible. *Waller v. Ga.*, 467 U.S. 39 (1984). The public and the press may have a First Amendment right to be present, and the same test appears to apply. *See Press-Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501 (1984). Public trial does not guarantee unlimited access to trials by the public. *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir. 1983) (proper to exclude all but relatives of defendant and victim).

A defendant who seeks to close a hearing must overcome the presumption of the First Amendment right of access and obtain specific findings demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest. *Press-Enter. Co. v. Superior Court of Cal.*, 478 U.S. 1 (1986).

S. (§12.35) Motion to Allow Withdrawal of Attorney

Sometimes, because of personal reasons, disputes with the client, the client's lack of faith in the attorney, lack of cooperation between the attorney and the client, or other reasons, it becomes necessary or desirable that the attorney withdraw. Conflicts of interest may require a withdrawal. *See Ciarelli v. State*, 441 S.W.2d 695 (Mo. 1969); *United States v. Winkle*, 722 F.2d 605 (10th Cir. 1983); *Barham v. United States*, 724 F.2d 1529 (11th Cir. 1984). In some instances, the defendant will file a pro se motion to fire the attorney.

Nonpayment of attorney fees is frequently the reason for the proposed withdrawal. Rule 4 contains the Rules of Professional Conduct; Rule 4–1.5 pertains to fees. Obviously, no retained attorney wants to represent a client without pay. Many attorneys insist on full payment before they will enter their appearance, but this involves difficulty because of the delay often necessitated by the client's attempts to secure the means with which to pay a substantial fee. It is recommended that counsel enter into a specific contract with the client as to exactly what services will be performed and what payments will be required. Some courts readily allow an unpaid attorney to withdraw. Other courts refuse withdrawal, taking the attitude of "tough luck." Under the former practice, some courts would appoint the previously retained counsel in

the hope that the attorney would at least receive something from the state for services rendered.

Rule 4–1.16 of the Rules of Professional Conduct covers declining or terminating representation. This Rule permits withdrawal by an attorney when the client fails substantially to fulfill an obligation to the lawyer (including payment of fees) when there has been reasonable warning of that to the client unless the court orders the attorney to continue representation. Rules 4–1.7, 4–1.8, 4–1.9, 4–1.10, and 4–1.11 of the Rules of Professional Conduct pertain to conflicts of interest and related matters; Rules 4–6.1 and 4–6.2 pertain to pro bono public service and court appointments.

A defendant sometimes decides on self-representation. The defendant has that constitutional right. *See Faretta v. Cal.*, 422 U.S. 806 (1975). Commonly, the court will appoint an attorney to be available to assist the defendant in the defense.

A public defender must continue on a case, including appeal, until the public defender is relieved of those duties by the director of the public defender's system or is permitted or ordered to withdraw by the court. Sections 600.044, 600.086, RSMo 2000.

T. (§12.36) Stipulations

Often, a trial can be simplified, shortened, or disposed of by both sides entering into stipulations of fact. These stipulations may be a means of presenting pretrial motions when there is little or no dispute over the facts. Stipulations can also eliminate the necessity of calling uncontradicted witnesses, the authentication of documents, chain of evidence, and other sometimes difficult or burdensome items of proof. It is necessary that the defendant personally execute the stipulation to avoid any subsequent claim of denial of confrontation unless this stipulation is made by counsel in open court. Stipulations are evidence. MAI-CR 3d 302.02. Lie-detector polygraph tests and their results are inadmissible even by stipulation. *State v. Biddle*, 599 S.W.2d 182 (Mo. banc 1980).

An offer of stipulation may also serve as a basis for preventing the introduction of highly inflammatory evidence during the trial. As an example, the defendant may want to offer to stipulate as to the cause of death or the identity of the deceased to avoid the necessity of the introduction of inflammatory photographs or descriptions of the wounds and the testimony of the aggrieved widow of the deceased. An offer to

stipulate, however, will not prevent the state from offering proof of the matter in question. *State v. Clemons*, 643 S.W.2d 803 (Mo. banc 1983) (gruesome photographs of deceased body). Parties may also enter into stipulations by which certain motions will be granted or certain actions taken, for instance, change of venue. Rule 32.02. Stipulations may be oral or written and entered into during or before trial.

U. (§12.37) Offers of Proof or Requests for Judicial Notice

A pretrial offer of proof or request for judicial notice is one means of attempting to secure a pretrial ruling on the admissibility of questionable evidence. Such offers lie within the discretion of the court. A pretrial offer of proof is important when the theory of the defense may turn on the admission of the evidence. If the offer is refused, it must be renewed during the trial. See *State v. Umfrees*, 433 S.W.2d 284 (Mo. banc 1968), for a discussion of offers of proof. An offer of proof is necessary when a motion for continuance is made based on the absence of evidence. Rule 24.10.

Section 491.015.3, RSMo 2000, provides that evidence of prior sexual conduct by the victim of a sex offense is not admissible unless the defendant files a motion accompanied by an offer of proof or makes such an offer *in camera* during the trial. *See State v. Jones*, 716 S.W.2d 799 (Mo. banc 1986); *State v. Murray*, 842 S.W.2d 122 (Mo. App. E.D. 1992) (evidence of prior consensual sex between defendant and victim is admissible on issue of consent). A defendant who fails to give proper notice may be prevented from presenting evidence under an exception. *Mich. v. Lucas*, 500 U.S. 145 (1991).

A statement of a child under the age of 14 relating to an offense against the person, to sexual offenses, or to offenses against the family involving a child victim are admissible in evidence as substantive evidence if:

- the court finds, at a hearing outside the presence of the jury, that there is sufficient indicia of reliability; and
- the child testifies, the child is unavailable as a witness, or the court finds that, although the child is available, significant emotional or psychological trauma that would result from testifying in the presence of the defendant makes the child unavailable.

The state must first notify the defendant or defense counsel of its intention to offer such a statement. Section 491.075, RSMo Supp. 2004. In the latter situation, the deposition of the child might be taken under

§ 491.680, RSMo 2000. *See* §12.9, *supra*. A video, verbal, or nonverbal statement of an alleged child victim under age 14 is admissible in evidence if:

- there was no attorney present at the giving of the statement;
- the recording is accurate and the operator of it was competent;
- the voices are identified;
- the statement was not made in response to questions calculated to lead the child into making a particular statement or doing an act in a particular way;
- the person conducting the interview and the child are available to testify; and
- the defendant has had the opportunity to view the recording before it is offered.

Either party may call the child as a witness. See also § 492.304, RSMo Supp. 2004, under which the statement is inadmissible unless the child testifies or the recording qualifies under § 491.075.

Crime laboratory reports are admissible at a preliminary hearing as long as the defendant or the defendant's attorney has been provided a copy of them at least ten days before the hearing and has been given an opportunity to interview the person conducting the test. The defendant may still subpoena that person to the hearing. Section 544.376, RSMo 2000.

Evidence that the defendant was suffering from the battered spouse syndrome is admissible on the issue of self defense or defense of another if the defendant has filed written notice of intent to offer such evidence. The court, upon motion of the state, shall appoint one or more private psychiatrists or psychologists or experienced physicians, or the director of the Department of Mental Health, to examine the defendant, and the court also may include the interview of witnesses in the order. Statements made by the accused are not admissible on the issue of guilt or innocence. Section 563.033, RSMo 2000.

In stealing, robbery, burglary, tampering, property damage, and similar cases, photographs of the personal property allegedly stolen are admissible to the same extent as the original item if they depict the owner or the owner's agent or representative, the date and time the photograph was taken, and the name of the owner; they must be signed by the photographer. Section 490.717.1, .2, RSMo 2000. The arresting police officer or security officer must give an accompanying written affidavit containing:

- a written description of the property including:
  - the retail price;
  - the manufacturer's number (if available); and
  - the style, color, and size;
- the name and address of the mercantile establishment where taken and of the owner of the property;
- the signature of the owner or representative;
- the name, badge number, and a sample of the signature of the arresting officer; and
- the name, address, and date and time of the signature of the photographs.

Section 490.717.2.

The property may be returned to the owner upon the filing of the photograph and these documents with the court or with the police authority holding the property. Section 490.717.3. A notarized affidavit of the buyer or purchasing department of a retail establishment stating value or costs is admissible on the issue of value at a preliminary hearing, but not at trial. Section 490.717.6.

Section 490.692, RSMo 2000, provides that records or copies of records that are admissible under The Uniform Business Records as Evidence Law, §§ 490.660–490.690, RSMo 2000, are admissible upon the affidavit of the custodian if a copy of the records and the affidavit are served on each party at least seven days before trial. The form of the affidavit is set out in that statute.

Offers of proof and requests for judicial notice may also be made orally during trial. If a defendant offers evidence to which the state objects and the objection is sustained, the defendant, to preserve the matter for appeal, generally must make an offer of proof that sets forth the evidence of testimony and why it is admissible. *State v. Rinehart*, 646 S.W.2d 827 (Mo. App. W.D. 1982). This may be done by marking and offering the exhibit in question, by interrogating the witness on the record but outside the hearing of the jury, *State v. Sullivan*, 553 S.W.2d 510 (Mo. App. W.D. 1977), or maybe by a narrative of counsel, especially if that is consented to by other counsel and the court, *State v. Bullington*, 680 S.W.2d 238, 243 (Mo. App. W.D. 1984). There are exceptions, e.g., no offer is necessary when the question asked elicits the expected answer and its relevancy and materiality. *State v. Pigques*, 310 S.W.2d 942, 951 (Mo. 1958).

V. (§12.38) Other Trial Motions and Requests

Trial motions and requests may include:

- requests for instructions, Chapter 24 of this deskbook, Rule 28, MAI-CR 3d, and *see State v. Olson*, 636 S.W.2d 318 (Mo. banc 1982);
- motions for a *Batson v. Kentucky*, 476 U.S. 79 (1986), hearing, Chapter 21 of this deskbook;
- trial objections;
- motions for mistrial;
- motions to strike;
- motions that the jury be instructed to disregard particular arguments or evidence;
- motions for sanctions; and
- motions for judgment.

W. (§12.39) Prosecution Motions and Pleadings

Some motions are particularly for the state, e.g., motions to deny, cancel, or increase bail under Rules 33.06 and 33.08. The court, on its own motion or on the motion of the prosecution, may order the re-arrest of the defendant; cancel, revoke, or require an increase in the bond or a different surety; or alter the conditions of the release. *See also* § 544.455.5, RSMo 2000; §12.4, *supra*. The state may file an application in a higher court seeking a review of the conditions of release that it feels are inadequate. Rule 33.09. The state may also file motions pertaining to failure to appear or bond forfeiture because of breach of a condition of bail or a condition of release. Rule 33.14; *see also* §12.4, *supra*. The court, on its own motion or on motion by the state, can issue a citation of contempt because of the defendant's failure to appear, § 544.665.2, RSMo 2000, or the court can modify the conditions of release because of a violation of conditions. Rule 33.06(a)(3). No bond forfeiture is to be entered if the defendant is in custody anywhere else. Section 374.770, RSMo 2000. There must also be a motion for judgment on the bond forfeiture before the surety or defendant is liable to pay the bond forfeiture. Rule 33.14; *see also State v. Anderson*, 413 S.W.2d 161 (Mo. 1967).

Sections 544.457 and 544.676, RSMo 2000, and § 595.209, RSMo Supp. 2004, allow a court to consider the danger a defendant poses to a victim, the community, or any person in setting conditions of release. See §12.46 below regarding revocation or forfeiture of bail because of witness or victim tampering.

Amending an information or filing a substitute information is permitted if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced. Rule 23.08; *City of Kansas City v. Harbin*, 600 S.W.2d 589 (Mo. App. W.D. 1980). *See* Chapter 4 of this deskbook; §12.3, *supra*. Related matters include a motion to endorse additional witnesses to the information or indictment, Rule 23.01(e), or amendments to allege prior, persistent, or dangerous offender status, which is not an additional charge. *State v. Morton*, 648 S.W.2d 642 (Mo. App. S.D. 1983). *See*:

- § 557.036.4(2), RSMo Supp. 2004;
- § 558.016, RSMo Supp. 2004;
- § 558.018, RSMo 2000 (sexual offenders);
- § 558.021, RSMo 2000;
- § 577.023, RSMo Supp. 2004 (intoxicated-related traffic offenders);
- § 578.389, RSMo 2000 (welfare fraud offenders);
- §§ 195.275, 195.285, 195.291, 195.292, 195.295, 195.296, RSMo 2000 (certain drug offenders).

Oral amendments are normally rejected and not valid, *State v. Hughes*, 731 S.W.2d 54 (Mo. App. E.D. 1987), but they are commonly made, especially in regard to plea bargains for a reduced charge. An amendment may be made by interlineation. Amendments to conform to the evidence are discussed in *State v. Harris*, 873 S.W.2d 887 (Mo. App. E.D. 1994). The state may voluntarily file a bill of particulars and may amend such a bill at any time, subject to conditions as justice requires, i.e., such conditions as the court orders upon request of the state or upon objection of the defendant. Rule 23.04.

A summons in lieu of a warrant may be used under some circumstances. A summons is used when the defendant is a corporation. Rules 21.09, 22.04. In misdemeanor cases, a summons is issued unless there is reasonable grounds for the court to believe that the defendant will not appear. Rules 21.03, 21.05. In a felony case, the court may issue a summons. Rule 22.04. A summons may be served by certified or registered mail or by an officer in the same manner as a civil summons. Rules 21.08, 22.06; *see also* Rules 54.13, 54.14. The state may choose to request that a warrant issue. In a misdemeanor case, the prosecution may seek to convince the court that the defendant will not appear in response to a summons. Rule 21.03. In a felony case, unless the court orders a summons to be issued, a warrant will issue upon the filing of the complaint or upon the return of a felony indictment. Rule 22.04. A warrant may be executed anywhere in the state by any peace officer,

who does not need to have the warrant in possession. Rules 21.08, 22.06; § 544.090, RSMo 2000. A warrant may also be requested by the state or issued on the court's own motion:

- when the defendant has failed to appear or has violated other conditions of release, Rules 33.06(b), 33.08;
- for taking a material witness into custody, Rule 33.12;
- when a conviction has been affirmed on appeal, Rules 30.22, 30.28; or
- when the defendant has violated a court order regarding victim or witness tampering (*see* §12.46, *infra*).

The state may file a motion to require the defendant to:

- give blood, breath, urine, or hair samples, handwriting and voice exemplars, fingernail scrapings, or other samples;
- be fingerprinted or photographed; or
- attend a lineup.

See also Chapters 7 and 9 of this deskbook; Rule 25.06(B). Such motions or requests can be made for the purpose of identification and have been held not to violate self-incrimination or search and seizure prohibitions. *United States v. Wade*, 388 U.S. 218 (1967); *Schmerber v. Cal.*, 384 U.S. 757 (1966); *United States v. Dionisio*, 410 U.S. 1 (1973). Such motions cannot be *en masse*, *Davis v. Miss.*, 394 U.S. 721 (1969), and they will not lie when the defendant is illegally arrested and detained. The order may be entered on motion of the state upon a showing of good cause, and it is subject to constitutional limitations. The order may set out safeguards the court deems appropriate. Rule 25.06(B). These requests may be made even before the defendant has been charged or arrested. *See United States v. Allen*, 408 F.2d 1287 (D.C. Cir. 1969). Rule 25.06(G) provides that the provisions in Rule 25.06(B) do not apply to investigative procedures before an indictment or information is filed. Before an intrusion in the body of the defendant will be allowed:

- there must be a clear indication that relevant evidence will be obtained;
- the method used must be a reliable one;
- the method used must be medically approved; and
- there must be a prior adversary judicial hearing.

State v. Overstreet, 551 S.W.2d 621 (Mo. banc 1977).

The prosecutor may also seek a search warrant, Chapter 542, RSMo; § 195.135, RSMo 2000 (*see* Chapter 9 of this deskbook), or an administrative search warrant. Various statutes authorize such a warrant, for example, § 195.375, RSMo 2000, authorizes a warrant to inspect "controlled premises."

In bad check cases, the prosecutor may, in addition to the face amount of the check, collect a reasonable service charge, which shall be turned over to the victim. Section 570.120.6(1), RSMo 2000.

In some drug cases, the prosecution may seek an order authorizing a wiretap. *See* §§ 542.400, *et seq.*, RSMo 2000 and Supp. 2004. Wiretap orders are unnecessary to overhear cordless telephones. *State v. King*, 873 S.W.2d 905 (Mo. App. S.D. 1994).

The state may also file other motions previously discussed, including a:

- motion *in limine*, §12.7, *supra*;
- motion for mental examination of the defendant, Chapter 15 of this deskbook; §12.8, *supra*;
- discovery request, Chapter 7 of this deskbook; §12.9, *supra*;
- discovery motion, Rule 25.06(A);
- motion for protective order, §12.9, *supra*;
- motion for sanctions, §12.9, *supra*;
- motion to exhume body of deceased, §12.9, *supra*;
- motion to quash *subpoena duces tecum*, §§12.9, 12.23, *supra*;
- motion for disqualification of judge, §12.11, *supra*;
- motion for pretrial conference, §12.18, *supra*;
- continuance, §12.20, *supra*;
- motion to hold material witness on bond, §12.25, *supra*;
- habeas corpus *ad testificandum*, §12.26, *supra*;
- motion for deposition, §12.23, *supra*;
- motion for enlargement of time, §12.28, *supra*;
- motion for appointment of special prosecutor, §12.32, *supra*;
- motion for citation of contempt, §12.31, *supra*;
- request for sequestration of jury, §12.33, *supra*;
- motion for gag order, §12.34, *supra*;
- stipulation, §12.36, *supra*;
- offer of proof or request for judicial notice, §12.37, *supra*; and
- subpoena, §12.22, *supra*.

Various motions may be filed pertaining to punishment, treatment, etc. of a convicted offender, e.g., under the abuse and lose law, §§ 577.500, *et seq.*, RSMo 2000 and Supp. 2004, pertaining to defendants charged with and convicted of alcohol- and drug-related traffic offenses.

1. (§12.40) Peace Bond

The prosecution may seek or enforce a peace bond under §§ 546.650, *et seq.*, RSMo 2000, which provide that the court, in addition to any other sentence, may require the defendant to give security to keep the peace or be of good behavior for a term of up to two years. Sections 542.020, *et seq.*, RSMo 2000, provide for the requiring of and the prosecution of recognizances posted as peace bonds when they have been broken.

2. (§12.41) Dismissal or *Nolle Prosequi*

A jointly charged defendant may be discharged to be a witness for the state. Rule 27.04; § 546.280, RSMo 2000; *see State v. Blevins*, 427 S.W.2d 367 (Mo. 1968). A dismissal is discretionary with the prosecutor at any time. *State v. Lawson*, 630 S.W.2d 185 (Mo. App. E.D. 1982). The prosecution may also dismiss a case as a part of a plea bargain, to avoid dismissal by the court, to avoid going to trial unprepared, because the prosecution has determined it cannot secure a conviction, or because justice would be served by the dismissal.

3. (§12.42) Public Nuisances

Some activities that are criminal may also be proceeded against civilly by injunctions and actions to abate public nuisances. These include:

- prostitution houses, § 567.080, RSMo 2000;
- gambling houses, § 572.090, RSMo 2000;
- pornography, § 573.070, RSMo 2000; and
- places used for the illegal sale or use of controlled substances, §§ 195.130, 195.253, RSMo 2000.

4. (§12.43) Forfeiture

The prosecution may also seek to forfeit personal, real, or intangible property. The Criminal Activity Forfeiture Act, §§ 513.600, *et seq.*, RSMo 2000 and Supp. 2004, authorizes a civil action forfeiture of any property, real or personal, used or intended to be used in the course of, derived from, or realized through criminal activity. It may be an *in rem* or an *in personam* action, and it may be filed before seizure. A jury trial may be had. If the defendant is acquitted or the criminal charge is dismissed, the civil action will be dismissed. The

forfeiture action may be stayed pending the bringing of criminal charges, and the property may be returned to the owner upon posting of bond. The time limits set out in § 513.607, RSMo Supp. 2004, are mandatory. *State v. Eberenz*, 805 S.W.2d 359 (Mo. App. E.D. 1991). But those time limits may be extended by order of the circuit court. Other statutes may provide for the forfeiture of and disposal of contraband or seized and unclaimed property. *See* §§ 195.140, 513.607, 542.301, RSMo Supp. 2004. Forfeiture may also proceed under federal law. *See* Chapter 33 of this deskbook.

X. (§12.44) Extradition and Detainers

Extradition is a procedure by which a defendant arrested in one jurisdiction may be moved to a different jurisdiction that wishes to try the defendant on a criminal charge. Extradition between nations is governed by treaties between the respective nations. Extradition between states is governed by constitutional provisions, statutes, and compacts between states. Removal between the counties within the state is usually by means of a writ of habeas corpus *ad prosequendum*.

Article IV, § 2, of the Constitution of the United States provides, in part, as follows:

> A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.

Federal extradition laws are found in 18 U.S.C. §§ 3181–96. The states are free to enact legislation on the subject ancillary to and on terms less than the federal law, yet they may not require more stringent standards than the federal law. *People ex rel. Dimas v. Shimp*, 403 N.E.2d 750 (Ill. App. Ct. 1980); *State ex rel. Sieloff v. Golz*, 258 N.W.2d 700 (Wis. 1977). Missouri laws are contained in its versions of the Uniform Criminal Extradition Law, Chapter 548, RSMo, and the Uniform Reciprocal Enforcement of Support Law, §§ 454.010–454.360, RSMo 2000.

Both Missouri procedures allow for extradition of persons found in State A who have committed acts in State B resulting in a crime in the demanding State, in addition to acts committed in the demanding State C initially. This added feature to the federal scheme exhibits the concept that the states may enact less stringent standards than the federal laws, i.e., more favorable to the demanding states. Sections 548.061, 454.050, 454.060, RSMo 2000. Missouri extradition laws cover both the removal from Missouri of a person charged elsewhere and the

transfer of a person charged in Missouri from some other state to Missouri. If no charge, either by indictment, information, or complaint, has been filed, extradition does not lie.

Section 548.021, RSMo 2000, allows Missouri to surrender any person found in Missouri who is demanded by another state and who is charged with "treason, felony or other crime," a phrase contained in article IV, § 2, of the United States Constitution. Although the demanding states retain discretion as to whom to extradite, even misdemeanors are extraditable offenses under this terminology. The expense of extradition, primarily transportation, leads most jurisdictions to elect not to extradite for misdemeanor offenses. The extradition also applies to warrants issued because of flight to avoid execution of sentence, escape or failure to return to confinement, or violation of conditions of bail, probation, or parole. Section 548.031, RSMo 2000.

A person arrested in an asylum state who is wanted in another jurisdiction for a criminal offense may waive extradition or consent to be transferred to the demanding state, regardless of whether the person has been charged there. To waive extradition, a defendant should sign a written waiver before a judge of a court of record after being first advised that the demanding state can be required to extradite the defendant and that the process may be contested by way of habeas corpus. Section 548.260, RSMo 2000.

A person who is wanted in another state and arrested may be charged on a fugitive complaint. Sections 548.131, 548.141, RSMo 2000. The arrested person may be released on bail unless the offense is punishable by death or life imprisonment; bail for other offenses is permissible and may be allowed in the discretion of the judge. Section 548.161, RSMo 2000. In practice, the amount of this bond is commonly the amount set in the demanding state. The cause is then scheduled for no more than 30 days to allow the demanding state to proceed with the extradition process. Section 548.151, RSMo 2000. If at the end of that period a governor's warrant has not been issued, the court may either discharge the defendant or continue the case for an additional 60 days and recommit or rebond or continue on bond the defendant. Section 548.171, RSMo 2000. Thus, the fugitive complaint may pend any length of time up to 90 days, but no longer. *Christopher v. Tozer*, 263 S.W.2d 864 (Mo. App. E.D. 1954); *Lombardo v. Tozer*, 264 S.W.2d 376 (Mo. App. E.D. 1954). The defendant, however, may be arrested elsewhere and the entire process started anew.

The asylum state should not honor a demand unless it is in proper form. The petition for requisition must be properly authenticated and include or be accompanied by a statement that the person sought committed the crime charged in the demanding state or committed acts in another state that resulted in the crime in the demanding state. It must also include a copy of the indictment, information, or complaint charging the offense supported by an affidavit before a magistrate and a copy of the warrant issued on the charging document. Section 548.031. It has been held that an affidavit before a judge without a copy of the information properly authenticated was held to meet the requirements of 18 U.S.C. § 3182 and was sufficient to satisfy Missouri law because of the supremacy of the federal law. *Application of Evans*, 512 S.W.2d 238 (Mo. App. S.D. 1974); *Hayes v. O'Connell*, 263 S.W.2d 66 (Mo. App. E.D. 1953). The petition for requisition should also include some finding of probable cause, and this finding is binding on the asylum state. *Mich. v. Doran*, 439 U.S. 282 (1978). The petition should:

- be signed by the prosecuting official or an assistant;
- designate the agent responsible for transporting the person demanded; and
- be sworn to before the clerk of the court with the clerk's signature authenticated by the judge and the judge's signature authenticated by the clerk.

The prosecutor who originally prepares the petition for requisition presents it and the supporting documents to the governor of the demanding state, and if the governor approves the request, the governor affixes a formal demand directed to the governor of the asylum state (along with the designation of agent). Section 548.231, RSMo 2000.

The governor of the asylum state may inquire into the request with the assistance of the attorney general, extradition attorney, secretary, or other official. Section 548.041, RSMo 2000. If the demand is proper, the governor of the asylum state issues a warrant for the arrest and surrender of the person to the demanding state's agent. The defendant is arrested (unless the defendant is already in custody) and is taken before a judge, who advises the defendant of the right to contest the extradition by habeas corpus. Sections 548.021, 548.071, 548.081, 548.091, 548.101, RSMo 2000. The defendant may then consent to extradition or be granted a reasonable time to seek habeas corpus. The court may grant bail pending hearing on the application. There is no provision for bail after the defendant is taken into custody on the governor's warrant. If there are pending charges in the asylum state, the defendant's actual surrender may be delayed pending disposition of the charges, and the

defendant may be allowed bail pending the disposition on equitable principles. *Meechaicum v. Fountain*, 696 F.2d 790 (10th Cir. 1983).

The habeas corpus review does not include the merits of the case in the demanding state, and it is limited to whether the governor of the asylum state exceeded authority in issuing the warrant. The issues that can be presented and determined are:

- whether the documentation is sufficient;
- whether the person is the person charged in the demanding state; and
- whether the person is a fugitive from the demanding state if the extradition is sought on that basis (i.e., under federal constitutional grounds).

Section 548.201, RSMo 2000. On the latter issue the defendant has a heavy burden to overcome. *In re Tinajero v. Schweitzer,* 658 S.W.2d 38 (Mo. App. E.D. 1983). Primarily, all that the courts of the asylum state can inquire into is whether the requirements of the extradition act have been met. *Cal. v. Superior Court of Cal.*, 482 U.S. 400 (1987).

After a person has been extradited and received in the demanding state, the person is not subject to civil process in actions based on the same facts as the criminal charge until the person is convicted, or if acquitted, until the person has had a reasonable time to leave the state. Section 548.251, RSMo 2000. The defendant, however, may be tried with other charges in the demanding state. Section 548.280, RSMo 2000.

The Uniform Mandatory Disposition of Detainers Law, §§ 217.450, *et seq.*, RSMo 2000, and the Agreement on Detainers, § 217.490, RSMo 2000, are discussed in §12.5 above. Under the latter, which is between the states (including the federal government), a defendant who makes the request is deemed to have waived extradition back to the original jurisdiction. When a defendant is serving a sentence in another state, a demanding state may obtain temporary custody of the defendant for the purposes of trying the defendant on a pending charge by the procedure contained in article IV of the Agreement. Under this procedure, the defendant is entitled to a hearing before transfer, *Cuyler v. Adams*, 449 U.S. 433 (1981), at which time the defendant is entitled to the assistance of counsel. *Cavallaro v. Wyrick*, 701 F.2d 1273 (8th Cir. 1983). While transferred, all of the charges in that state should be disposed of or dismissed. After the trial or other disposition, the defendant should be returned to the original state, and any sentence received as a result of this trial must be served concurrent with the sentence in the original state or at the end of it.

These detainers do not apply to parole or probation violation detainers, and they appear not to apply to cases when the defendant received a suspended imposition of sentence or a suspended execution of sentence. *State ex rel. Noble v. Barker*, 706 S.W.2d 76 (Mo. App. S.D. 1986).

Federal courts may issue mandamus to compel the governor of an asylum state to perform the mandatory ministerial duty to deliver a fugitive to the demanding state on a proper demand. *P.R. v. Branstad*, 483 U.S. 219 (1987).

If a defendant has already been arrested, removed, and transported illegally between jurisdictions, it does not defeat the jurisdiction of the second state or country to try the defendant. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

Y. (§12.45) Posttrial Motions

The following motions are beyond the scope of this chapter and are discussed in other chapters of this deskbook:

- Motion for judgment of acquittal notwithstanding verdict, Rule 27.07(c)
- Motion for new trial, Rule 29.11
- Motion to arrest or set aside judgment, Rule 29.13
- Motion to vacate sentence, Rules 24.035, 29.15
- Motions pertaining to an appeal made in either the trial court or the appellate court, including federal habeas corpus and petitions for writ of certiorari filed in the United States Supreme Court

See Chapters 26 and 31 of this deskbook.

A defendant found guilty of even first degree murder may be released on bail bond pending sentencing. *State v. Echols*, 850 S.W.2d 344 (Mo. banc 1993).

The court, upon petition, may reduce a sentence or term of probation or a term of conditional release or parole pronounced by the state board of probation and parole if:

- the defendant was:
  - convicted of a crime not involving violence or the threat of it; and
  - convicted of a crime that did involve alcohol or illegal drugs; and

- since the offense, the defendant has successfully completed a detoxification and rehabilitation program; and
- the defendant was not:
  - a prior offender, persistent offender, dangerous offender, or persistent misdemeanor offender as defined in § 558.016, RSMo Supp. 2004;
  - a persistent sexual offender as defined in § 558.018, RSMo 2000; or
  - a prior offender, persistent offender, or class X offender as defined in § 558.019, RSMo Supp. 2004.

Section 558.046, RSMo 2000.

It may be necessary for the state or victim to file a motion or petition either in the criminal case or in a separate action. This may be for a forfeiture of property, office, employment, or right. The collateral consequences of a criminal conviction are provided for in Chapter 561, RSMo. Some special statutes may also apply. Conditions of probation are set forth in Chapter 559, RSMo, and in §§ 217.750, *et seq.*, RSMo 2000 and Supp. 2004, and alleged violations of these conditions may lead to a revocation of probation.

If a felony involves the use of a firearm, the firearm and any other firearm or ammunitions found in the possession or under the immediate control of the defendant may be ordered confiscated and a disposal made. Section 571.095, RSMo 2000.

The Missouri Incarceration Reimbursement Act, §§ 217.825, *et seq.*, RSMo 2000, allows the state to recover from an inmate some of the costs of the inmate's incarceration under some circumstances. Suits seeking such reimbursement may be filed in the circuit court of the county where the prisoner was sentenced or in the county where the office of the Director of the Department of Corrections is located. Section 217.835, RSMo 2000.

Z. (§12.46) Victim's Rights

A motion may be filed for restoration of or claim to property seized from the defendant or the victim. The motion may be made by the true owner. Section 542.301, RSMo Supp. 2004.

Restitution may be a condition of probation. Probation may also include a provision for free work for a public or charitable purpose, i.e., community service. Section 559.021, RSMo Supp. 2004.

Upon a defendant's conviction for interference with custody, parental kidnapping, or child abduction, the court may order restitution of any reasonable expenses incurred by the legal custodian or parent in searching for or returning the child. Section 565.169, RSMo 2000. Federal law may also provide a remedy to victims under the Civil Rights Act or other statute, but such actions are beyond the scope of this chapter.

Section 537.050, RSMo 2000, provides that an injured party may recover damages from an offender in a separate civil action. Sections 8.150, 211.185, 537.045, and 570.087.3, RSMo 2000, provide limited liability of a parent or custodian for the acts of a child. A parent or guardian is also responsible for the adequate care of the minor child's pets. Section 578.014, RSMo 2000. Chapter 460, RSMo, provides for appointment by the circuit court of a trustee for an inmate. *See Lockhart v. Middleton*, 863 S.W.2d 367 (Mo. App. W.D. 1993); *McLaughlin v. McLaughlin*, 129 S.W. 21 (Mo. 1910); *Berdella v. Pender*, 821 S.W.2d 846 (Mo. banc 1991).

In addition to the criminal penalty for bad checks, there is a civil remedy in certain circumstances by which the original holder of a check can seek damages of three times the face value or $100, whichever is greater, plus attorney fees. The person receiving the bad check must first send a notice to the check writer by certified mail giving 30 days' notice to pay the check. These actions can be filed in small claims court. Judgment can be entered for these damages plus the amount of the check. Section 570.123, RSMo Supp. 2004. The suit does not lie if the original holder was paid the face amount and costs recovered by the prosecuting attorney under § 570.120.6, RSMo Supp. 2004. The holder has the choice of methods. If there is a bona fide dispute over the quality of goods sold or services rendered, this is a defense. Section 570.087 provides for a similar civil action by a mercantile establishment against a shoplifter or other thief regardless of whether the offender is an adult or a minor. The merchant is entitled to actual damages plus a penalty of between $100 and $250 and reasonable attorney fees. *Id*. The parents or guardians, if they have had actual custody for more than one year of an unemancipated minor thief, are liable for actual damages. This action is not conditioned on a criminal conviction.

A defendant may also be required to pay court costs, § 488.5334, RSMo 2000, which in recent years have increased substantially through the inclusion of a sum for the prosecutor, law enforcement education, etc. When the defendant is convicted of a city or state alcohol- or drug-related traffic offense, the court may order the defendant to reimburse the law enforcement agency the costs associated with that arrest. *Id*.

The agency may establish a schedule of these costs, but the court may reduce the amount if it determines it to be excessive. *Id*. Each convicted defendant must pay a sum—which varies according to the class of the offense—to the Crime Victims' Compensation Fund. A victim may make a claim to that fund, which is administered by the Division of Workers' Compensation. Chapter 595, RSMo. An indigent defendant who was represented by a public defender may be required, on motion, to pay all or part of that cost, and a judgment may be entered against the defendant for that sum. Section 600.090, RSMo 2000. Payment may be made a condition of probation. Section 600.093, RSMo 2000.

A defendant may be required, either by statute or by order of the court as a condition of probation, to attend counseling or a particular school or program, e.g., a traffic offender program, § 577.049, RSMo Supp. 2004; § 577.525, RSMo 2000 (abuse and lose statute), or sex offender program, §§ 566.140, 566.141, RSMo Supp. 2004. There may also be required programs for inmates in the Department of Corrections, e.g., sexual offenders of children, § 217.139, RSMo 2000; first offender program, § 217.345, RSMo 2000. Those programs, however, are beyond the scope of this chapter.

There are various statutes establishing victims' and witnesses' rights, including:

- §§ 595.200, *et seq.*, RSMo 2000 and Supp. 2004;
- §§ 491.600, *et seq.*, RSMo 2000 and Supp. 2004, the witness protection law;
- § 557.041, RSMo 2000, which grants the victim or family the right to appear and submit a written statement at sentencing and other proceedings and to be advised of a plea bargain offer; and
- § 217.690.6, RSMo Supp. 2004, which allows the victim to appear at parole hearings.

The prosecuting attorney and the law enforcement agency of the jurisdiction where the prosecution was initiated are also given notice of and may appear at the sentencing for any felony. Section 557.046, RSMo 2000. Victims of sex offenses shall be informed as to the results of HIV testing of the defendant. Section 191.663.5, RSMo 2000.

The following orders may also be sought by an alleged victim enjoining the defendant from contact and granting other relief:

- *ex parte* orders against adult abuse, §§ 455.010, *et seq.*, RSMo 2000 and Supp. 2004;
- witness protection orders, §§ 491.600, 491.610, RSMo 2000;
- orders against stalking, § 455.010, RSMo Supp. 2004; or
- child protective orders, § 455.516, RSMo Supp. 2004.

Sections 491.600 and 491.610, RSMo 2000, provide that a court, in its discretion, upon substantial evidence (including hearsay) that there has been intimidation or dissuading of a victim or witness or that this is reasonably likely to occur, may order the defendant or other person:

- not to violate § 575.270, RSMo 2000 (the crimes of tampering with a witness and victim tampering);
- to stay a specified geographic distance from the witness or victim;
- to have no connection whatsoever with the victim or witness except through an attorney under reasonable restrictions as the court may impose; or
- any combination of these restrictions.

A person who violates such an order may be prosecuted for an offense under § 575.270, charged with contempt of court, or both. If the defendant violates or causes a violation of the order, the defendant's conditions of release may be revoked and the defendant's bail may be forfeited or increased in amount.

Sections 455.501–455.516, RSMo 2000 and Supp. 2004, provide for child protection orders. Section 210.125, RSMo 2000, authorizes temporary protective custody of a child. See also §§ 491.675, *et seq.*, RSMo 2000, which is the Child Victim Witness Protection Law.

AA. (§12.47) Expungement and Closed Records

Section 610.100.2, RSMo Supp. 2004, provides that law enforcement agencies shall maintain arrest records, which shall be open to the public. A troublesome provision provides that investigative reports are closed records until the investigation becomes inactive. *Id.* This appears to deny even victims and insurance companies access to the reports. If a person is arrested but not charged within 30 days, the official records of the arrest and any detention or confinement shall be closed records, except that the disposition portion may be accessed for purposes of exculpation and for the purposes set out in § 610.120, RSMo Supp. 2004. Section 610.100.2. An arrest is defined as the actual restraint of the defendant, or the defendant's submission to the custody of the officer,

under authority of a warrant or otherwise for a criminal violation that results in the issuance of a summons or the defendant being booked. Section 610.100.1(1). If a charge is subsequently dismissed, the defendant is found not guilty, or the imposition of sentence is suspended, the official records of the case shall be closed records when the case is finally terminated except as mentioned above. Section 610.105, RSMo Supp. 2004.

Section 610.010(1), RSMo Supp. 2004, defines a "closed record" as being closed to the public. A defendant who received a suspended imposition of sentence before September 28, 1981 (the effective date of an amendment to the Sunshine Law) may make a motion to the court after the defendant's discharge for closure of the official records. Section 610.106, RSMo 2000. If the prosecutor objects, an informal hearing is held. *Id*. Since September 28, 1981, this is automatic. A person as to whom a record has been closed shall not be held to be guilty of perjury or giving a false statement by failing to recite or acknowledge the arrest or trial in response to any inquiry for any purpose, except under § 610.120 and § 491.050, RSMo 2000. Section 610.110, RSMo 2000. Violation of these provisions is a class A misdemeanor, § 610.115, RSMo 2000, and the closure may be enforced by an injunction. Section 610.030, RSMo 2000.

Section 610.120 provides that closed records should not be destroyed but shall be inaccessible to the general public and to all persons except:

- the defendant;
- courts;
- law enforcement agencies;
- child care agencies (§ 43.540, RSMo Supp. 2004);
- in-home service provider agencies (§ 660.250, RSMo Supp. 2004);
- nursing homes (§ 198.006, RSMo Supp. 2004); and
- federal agencies for the purpose of:
    - prosecution;
    - sentencing;
    - parole consideration;
    - criminal justice employment;
    - child care or nursing home employment;
    - Department of Revenue driving record purposes; and
    - federal investigative purposes or presidential executive order.

Criminal history information may be made available to qualified persons or organizations for research, evaluation, and statistical purposes under §§ 43.507 and 43.531, RSMo 2000. *See also* § 43.540.

Emergency telephone information ("911") and reports are also inaccessible to the general public. They are available to law enforcement agencies and to the Division of Workers' Compensation (Crime Victim's Compensation Fund) or under court order upon motion and good cause shown. Section 610.150, RSMo 2000. Sections 43.500, *et seq.*, RSMo 2000 and Supp. 2004, establish the central repository of criminal records under the Missouri State Highway Patrol criminal records division. Section 577.051, RSMo Supp. 2004, covers alcohol- and drug-related driving offense records that should be forwarded to the State Highway Patrol and that are then available to law enforcement officers, prosecuting attorneys, and judges in Missouri.

The "closed records" provision may appear to be clear, but counsel should consider *In re Mossie*, 768 F.2d 985 (8th Cir. 1985), which involved a failure to respond to questions during voir dire examination as to whether any of the jurors had ever been "convicted of any crime," "accused of a crime," or the subject of "a charge pending." Mossie had received a suspended imposition of sentence on a municipal violation. On appeal, after Mossie was cited for contempt, the Eighth Circuit Court of Appeals reversed on the basis that she had relied on the advice of counsel, who represented her on the ordinance violation and told her she could deny she had ever been charged with or convicted of an offense and could not be charged with perjury for failure to disclose it.

Section 491.050 provides that:

- a person who has been convicted of a crime is a competent witness;
- any prior criminal conviction may be proved to affect the person's credibility in a civil case; and
- in a criminal case, any criminal conviction, prior plea of guilty, plea of *nolo contendere*, and finding of guilty may be proved for such purpose by either cross-examination or proof by record.

Thus, a suspended imposition of sentence, although not a conviction under Missouri law, *see Yale v. City of Independence*, 846 S.W.2d 193 (Mo. banc 1993), may be used to impeach a witness. A suspended imposition of sentence may also be used to enhance punishment as a prior or persistent offender.

Sections 195.275 and 558.018, RSMo 2000, and §§ 558.016, 558.019, and 577.023, RSMo Supp. 2004, refer to "pleaded guilty to or has been found guilty."

Sections 610.122, *et seq.*, RSMo 2000 and Supp. 2004, authorize expungement of arrest records in very limited instances—when the court finds that the arrest was based on false information and that the following conditions exist:

- There was no probable cause, at the time of the expungement, to believe the person arrested committed the offense.
- No charges will be pursued.
- The arrested person had no prior or subsequent misdemeanor or felony convictions.
- The arrested person did not receive a suspended imposition of sentence for the offense or a related offense.
- No related civil action is pending.

The contents of the expungement petition are set forth in § 610.123, RSMo Supp. 2004, and the Supreme Court has adopted forms to be used in these proceedings. Either the petitioner or the agency protesting the expungement may appeal as in other civil actions. Section 610.124.2, RSMo 2000. Section 610.126.1, RSMo 2000, provides that the expungement "shall not reflect on the validity of the arrest and shall not be construed to indicate a lack of probable cause for the arrest."

After ten years, a person who has pleaded guilty to or been convicted of one alcohol-related driving offense that is a misdemeanor or ordinance violation not involving a commercial motor vehicle and who has not been convicted of any other alcohol-related offense since that date may apply for an expungement of the official records. Section 577.054, RSMo Supp. 2004 (two versions of this section appear in the statutes; one version became effective July 1, 1990, and the other version becomes effective September 30, 2005). A person can have only one expungement under this statute. *Id.*

Extraordinary circumstances have been held to support the equitable expungement of an arrest record even when there was probable cause. In *Buckler v. Johnson County Sheriff's Department*, 798 S.W.2d 155, 158 (Mo. App. W.D. 1989), the court said that Missouri courts of record have inherent equitable power to expunge records but that the power is limited to cases involving illegal prosecution, acquittal, or extraordinary circumstances. This authority may no longer be valid in view of § 610.126.2, which was enacted in 1993. That statute provides that, "Except as provided by sections 610.122 to 610.126, the courts of this state shall have no legal or equitable authority to close or expunge any arrest record."

Juvenile court records are kept separate from criminal records of persons 17 years of age or older, and they are open to the public only upon court order. Section 211.321, RSMo Supp. 2004. Disclosure is required when the juvenile is certified for trial as an adult for murder or a class A felony, and a pre-sentence report (§ 557.026, RSMo 2000) may include a list of particular violations of the Juvenile Code upon which the defendant has been adjudicated a delinquent.

Police records involving juveniles are also to be kept separately and are not to be opened for inspection except by court order, except:

- when the juvenile is certified for trial as an adult;
- when the juvenile is convicted of a criminal street gang offense (§§ 578.421, *et seq.*, RSMo 2000); or
- for the purpose of pursuing a civil forfeiture under § 195.140, RSMo Supp. 2004, which is applicable to property owned by or in the possession of children, § 195.146, RSMo 2000.

Section 211.321.3.

Juvenile records may also be released for statistical purposes. Section 211.321.4. The court, on its own motion or on application by the child, the child's representative, or the juvenile officer, may enter an order to destroy all social histories, records, and information, other than the official court file, which may be ordered sealed, as well as all peace officers' records, at any time after the child has reached age 17 if the court finds it is in the best interest of the child, unless jurisdiction of the court continues past age 17. Section 211.321.5. The victim or family may be informed of the informal adjustment or adjudication and disposition of the child's case. Section 211.321.6.

A full pardon by the Governor does not affect the defendant's criminal record, but it restores lost civil rights. Article IV, § 7, of the Missouri Constitution and § 217.800, RSMo 2000, grant the Governor the power to grant reprieves, commutations, and pardons. A pardon is the relieving of the punishment the law imposes for the commission of a criminal offense. It obliterates the conviction, but the guilt remains; it does not direct or authorize the closure or expungement of records, *State v. Bachman*, 675 S.W.2d 41 (Mo. App. W.D. 1984). Municipal ordinance violations, depending on the city or class of city, may be pardoned. For example, in Kansas City, the mayor may grant pardons under the authority of the Charter of Kansas City, Missouri, art. III, § 43, and § 44-10 of the Code of Ordinances. Sections 77.360 and 79.220, RSMo 2000, grant the power to pardon to mayors of third and fourth class cities.

III. (§12.48) Extraordinary Writs

A defendant does not have a right to appeal until there has been a final judgment. Thus, the defendant may desire to seek review of the rulings of a court without awaiting trial and judgment by means of extraordinary writs. These writs are seldom successful and are commonly summarily dismissed by the appellate courts because they seem to prefer trials on the merits in criminal cases. Several extraordinary remedies, however, may afford relief. Writs of error *coram nobis* and other similar remedies have been abolished. Rule 74.06(d).

Original writs may be filed and determined in the Missouri appellate courts, but generally they should be sought initially in the circuit court. Except for habeas corpus, original remedial writs will not be issued by appellate courts when an appeal would give adequate relief that can be afforded on appeal or by a writ application to a lower court. Rule 84.22. The procedure for these writs in the appellate courts is controlled by Rules 84.23, 84.24, 84.25(a), and by the local rules of the districts of the court of appeals. If a writ is denied by a lower court, review generally may be had only by filing an application for the writ in an appellate court.

A. (§12.49) Habeas Corpus

Habeas corpus tests the lawfulness of the restraint of the defendant or other person, and it is governed by Rule 91. Habeas corpus is a way of contesting the denial of bail or excessive bail when the defendant is still in custody. It may be used when the defendant is being detained but is not charged with an offense. For example, habeas corpus may lie when the defendant is charged with an offense for which no punishment is provided. *State v. Harper*, 510 S.W.2d 749 (Mo. App. W.D. 1974). Habeas corpus is the appeal route from a conviction of criminal contempt, and it is a means of attacking the conditions of confinement. Habeas corpus may be filed in federal court when the defendant claims confinement in violation of the federal constitution, federal laws, or a treaty. A discussion of this procedure is beyond the scope of this chapter, but it should be pointed out that, in general, only one such writ may be successfully filed, and the petitioner must have exhausted state remedies first. 28 U.S.C. § 2254; *Rose v. Lundy*, 455 U.S. 509 (1982). For the use of habeas corpus to test extradition, see §12.44 above.

B. (§12.50) Mandamus

Mandamus lies to compel the performance of a ministerial act and is governed by Rule 94. It does not lie to require the performance of a discretionary act, but it may lie to compel the exercise of that discretion. It seldom affords any relief in criminal cases. *See State ex rel. Corcoran v. Buder*, 428 S.W.2d 935 (Mo. App. E.D. 1968). It has been used to secure relief from an improper sentencing under the "abuse and lose" law (§§ 577.500, *et seq*., RSMo 2000 and Supp. 2004), *see State ex rel. Lee v. Bailey*, 817 S.W.2d 287 (Mo. App. W.D. 1991), and it is the remedy under § 545.780, RSMo 2000, to secure a speedy trial.

C. (§12.51) Prohibition

Prohibition is governed by Rule 97. It lies to protect against excesses of jurisdiction, *State ex rel. Weisman v. Edwards*, 645 S.W.2d 732 (Mo. App. E.D. 1983); *State ex rel. Wasson v. Schroeder*, 646 S.W.2d 105 (Mo. banc 1983), and it may lie to prohibit, e.g., a trial court from proceeding when the offense is barred by the statute of limitations. *See State ex rel. Lodwick v. Cottey*, 497 S.W.2d 873 (Mo. App. W.D. 1973). Prohibition does not lie if an appeal is an adequate remedy, *State ex rel. Westfall v. Gerhard*, 642 S.W.2d 679 (Mo. App. E.D. 1982), but it may lie to prevent unnecessary, inconvenient, and expensive litigation even if an appeal is available, *State ex rel. Police Ret. Sys. of St. Louis v. Mummert*, 875 S.W.2d 553 (Mo. banc 1994). A circuit judge has no authority to issue a writ of prohibition against an associate circuit judge.

D. (§12.52) Injunctions

Injunctions are governed by Rule 92. Injunctions may lie to enjoin or prohibit illegal prosecutions. Federal court injunctions of state prosecutions will lie only if the danger of irreparable injury is great and immediate and the threat to federally protected rights cannot be eliminated by defense to a single state prosecution, e.g., bad faith and harassment. *See Younger v. Harris*, 401 U.S. 37 (1971); *Rizzo v. Goode*, 423 U.S. 362 (1976). See also Annotation, Romualdo P. Eclavea, Annotation, *Supreme Court's Rule, and Exceptions to Rule, Against Federal Judicial Intervention in Pending or Threatened State Criminal Proceedings*, 44 L.Ed.2d 692 (1976), for a discussion of the United States Supreme Court's rule, and the exceptions to it, against intervention by federal courts in pending or threatened state prosecutions. There must be special circumstances such as a bad faith prosecution. *Gibson v. Berryhill*, 411 U.S. 564 (1973). Special statutes may also authorize injunctions, such as in the anti-stalking law. Sections 455.010, *et seq.*, RSMo 2000 and Supp. 2004.

A federal agent may be enjoined from testifying about an illegal search. *United States v. Navarro*, 441 F.2d 409 (5th Cir. 1971). Abstention of federal courts from interfering in state proceedings allows the state the initial opportunity to correct the alleged violation of federal rights. *Mabry v. Klimas*, 448 U.S. 444 (1980). The Eleventh Amendment prohibits federal courts from ordering state officials to comply with state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

E. (§12.53) Declaratory Judgment

Under Rule 87, a declaratory judgment may be a remedy to determine the validity of rules, the constitutionality or validity of statutes or ordinances, or other legal rights. It is normally filed initially in the circuit court and is generally discretionary. In practice, it affords little relief in criminal cases. Federal declaratory judgment actions apply the same rules as *Younger v. Harris*, 401 U.S. 37 (1971), if a prosecution is pending. *Samuels v. Mackell*, 401 U.S. 66 (1971). If no prosecution is pending, see *Steffel v. Thompson*, 415 U.S. 452 (1974), where bad faith was not required.

Other federal jurisdiction may be available. Removal of pending state criminal prosecution to federal court under 28 U.S.C. § 1443 is authorized when the defendant cannot enforce in the state courts a right under a federal law providing for equal civil rights or when the defendant is being prosecuted for an act done under color of authority derived from any equal rights law or for refusing to do any act on the ground that it would be inconsistent with this law. The procedure for this removal is set out in 28 U.S.C. §§ 1446 and 1447. See *Johnson v. Mississippi*, 421 U.S. 213 (1975), where removal was denied. If such a violation is alleged, the person may file a civil rights action under 42 U.S.C. § 1983 at law or in equity for violations of rights, privileges, or immunities under color of law.

IV. (§12.54) Form, Service, Filing, and Determination of Motions

Pleadings in criminal cases are the indictment or information and the pleas of not guilty, not guilty by reason of mental disease or defect excluding responsibility, or guilty. Demurrers and motions to quash have been abolished. "Any defense or objection which is capable of determination without trial of the general issue may be raised before trial by motion." Rule 24.04(b)1. Defenses and objections based on defects in the institution of the prosecution may be raised only by motion

before trial. Rule 24.04(b)2. Failure to do so is a waiver unless the court, for cause shown, grants relief from the waiver, *id.*, or upon appeal it is determined to be plain error, Rule 30.20. Questions regarding jurisdiction of the court over the offense, or whether the information or indictment states an offense, may be raised at any time. Rules 24.04(b)2, 29.11(d), 30.20.

A. (§12.55) Timeliness of Motions

Motions should be filed before arraignment or within such reasonable time thereafter as the court may permit. Rule 24.04(b)3. Some motions, applications, or petitions must or may be filed at other times, as required by other rules. Requests for instructions are made at the close of the evidence or at such earlier time as the court directs. Rule 28.02(b). An application for change of venue has special time limits. If by stipulation, it must be filed at least ten days before trial. Rule 32.02. If by application of the defendant in a county of 75,000 or fewer inhabitants, it must be filed within ten days after arraignment. Rules 32.03(a), 32.04(b). If the defendant also desires a change of judge, the two requests must be joined in a single application. Rule 32.08. An application for change of judge for a preliminary examination must be filed at least ten days before the examination. Rule 32.06. A change of judge for trial on the application of either party must be filed within ten days after arraignment. If the trial judge is designated later, it must be filed within ten days after this designation, but it must be before commencement of any proceeding on the record. Rule 32.07(b).

Amendment of an information or substitution of an information for an indictment can be filed at any time before verdict or finding. Rule 23.08. A motion for a bill of particulars should be filed within 10 days after arraignment or at such other time as the court may permit. Rule 23.04. A motion for severance of defendants must be made before commencement of trial. Rule 24.06(a), (b). A motion to suppress evidence should be filed before trial. In its discretion, the court can allow a motion to suppress evidence at any time during the trial. Rule 24.05. Requests or motions for discovery should be made within 20 days after arraignment, and they should be answered within 10 days after service of request unless the time is enlarged or shortened by the court. Rule 25.02. There is a continuing duty to disclose. Rule 25.08. In practice, the discovery time limits are seldom enforced. Protective orders and sanctions may be sought at any time. Rules 25.11, 25.18. A request for a pretrial conference may be made at any time. Rule 24.12. A motion for continuance may be made at any time. A local rule, such as exists in Jackson County, may attempt to establish a deadline before trial for these motions.

Clerical mistakes and errors in judgments, orders, or other records arising from oversight or omission may be corrected by the court at any time. Rule 29.12(c). The court may require that prior notice be given to the parties. *Id*. This is by *nunc pro tunc* order. See *State v. Cantrell*, 403 S.W.2d 647 (Mo. 1966), for a discussion of such an order.

B. (§12.56) Computation of Time

See Rule 20.01(a). The day of the event after which the designated period of time begins to run is not included. The last day of the period is included unless it is a Saturday, Sunday, or legal holiday. If the period of time prescribed or allowed is less than seven days, Saturdays, Sundays, and legal holidays are not counted.

C. (§12.57) Enlargement of Time

See Rule 20.01(b); §12.28, *supra*. Written motions and notice of the hearing on them should be filed and served at least five days before the time specified for hearing unless a different time is fixed by law, court rule, or order of the court. Rule 20.01(d). No prior notice is required when the motion may be granted *ex parte*, *id*., and an order modifying the five-day notice may be obtained *ex parte*, *id*.

D. (§12.58) Form of Motions

Written motions should contain a caption setting forth the court, the parties, the case number, and the title of the pleading, motion, or application. A motion should then set forth with particularity the grounds for it and the relief sought. It should be signed by the attorney unless required to be signed by the defendant or unless it is the defendant and not the attorney who is making the application. Proof of service should also appear on it. There is no specific rule as to forms of motions in criminal cases. See Rule 55.26 as to the form of civil motions. Local court rules may require a particular form. Rule 19.09 requires that all pleadings be on paper 8½ inches by 11 inches, and the use of recycled paper is encouraged.

When allowed, motions may be made orally in open court. To preserve the matter for appeal, the motion must set out distinctly and fully the defense or objection and the relief sought, and the motion must be made on the record.

A motion should include all defenses and objections then available to the defendant, Rule 24.04(b)2, or a waiver could occur. Sometimes it is

advisable to supplement a motion with written suggestions in support. Suggestions in opposition to a motion by the adverse party are often advisable. Even if no suggestions are filed, counsel should research and be familiar with the authorities on point before the motion is drawn and at a hearing on it. Some courts have local rules requiring the filing of suggestions. Generally, motions should be, and are, heard before trial unless the court orders that the hearing and its determination will be deferred until trial. Rule 24.04(b)4. The court may set the date for the hearing, but some local rules require that counsel notice up motions for hearing either at established law days or at other times convenient with the court. Rule 20.01(d) appears to require that a notice accompany any motion that may not be heard *ex parte*. Motions do not prove themselves, and it is sometimes advisable, or even necessary, to file and serve supporting affidavits with the motion. Opposing affidavits may be served at least one day before the hearing unless the court otherwise permits. Rule 20.01(d).

E. (§12.59) Service of Pleadings and Motions

Every written motion, except one that may be heard *ex parte*, and every written notice, application, and similar paper that is required to be served shall be served upon each party affected by it. Rule 20.04(a). Professional courtesy dictates that even *ex parte* motions and orders be served. Service is made upon the party's attorney unless the court orders or the law requires that it be made upon the defendant personally. If the party has more than one attorney, service may be made upon any one of them. Rule 20.04(b). Unless otherwise ordered by court, service is made:

- upon an attorney, by delivery of a copy to the attorney, by leaving a copy at the attorney's office with a clerk, secretary, or other attorney associated with or employed by the attorney, by mailing a copy to the attorney's last known address, or by fax; or
- upon the defendant, by delivery to the defendant, by mailing a copy to the defendant, or in the manner of service of summons set out in Rule 54.13.

Rule 20.04(c).

Service by mail is completed upon mailing. Rule 20.04(c). Service may be made under Rule 20.04(c) by any competent witness. For proof of service, see Rule 20.04(d).

Unless otherwise provided, a copy should be served on the day of filing or as soon thereafter as can be done. Rule 20.04(e). When service is by

mail, the time for any responsive pleading or the doing of any act is extended three days. Rule 20.01(e).

F. (§12.60) Filing of Motions

The court is deemed to be always open (at least by law) for the filing of any pleading. Rule 20.02(a). A pleading served on a party or the party's attorney should be filed with the court either before the service or within five days after it. Rule 20.04(f). Pleadings and other papers should be filed with the clerk or the clerk's designated deputy. A judge may permit papers to be filed with the judge, in which event the judge should note the date on them and forward them to the clerk's office. Rule 20.04(g). Local rule may allow pleadings to be filed by fax, but some courts also request the filing of a regular hard copy pleading. See Rules 20.04(h) and 43.02(d) authorizing facsimile transmission filing.

G. (§12.61) Effect of Determination of Motion

If the motion is denied or overruled, the defendant, in an appropriate case, may seek review by means of an extraordinary writ. Otherwise, the defendant must then proceed to trial or seek to dispose of the proceeding in some other manner. To preserve the grounds, the defendant must renew the request or objection at every available opportunity, including in the motion for new trial. *See* Chapters 26 and 29 of this deskbook. If the motion is sustained, the prosecution may be required to reevaluate its case, and a dismissal or favorable plea bargain may be obtained. In other instances, the favorable decision may not affect the outcome of the case in any way. In other instances, the favorable decision may enable the defendant to reach a more favorable verdict or even an acquittal.

The state may seek review of the court's finding by means of an extraordinary writ. *See State ex rel. Westfall v. Gerhard*, 642 S.W.2d 679 (Mo. App. E.D. 1982). When the court order has the substantive effect of quashing an arrest warrant, suppressing evidence, or suppressing a confession or admission, the state may appeal. Section 547.200.1, RSMo 2000. An appeal by the state is also allowed in other instances when the possible outcome of the appeal would not result in double jeopardy. Sections 547.210, 547.200.2, 547.230, RSMo 2000. Notice of appeal must be filed within five days. Rule 30.02 shortens the time limits for filing the record on appeal and briefs.

V. Forms

A. (§12.62) Motion for Bill of Particulars

[Caption]

Motion for Bill of Particulars

Defendant moves this honorable Court for an order requiring the prosecuting attorney to file and serve a bill of particulars for the following reasons:

1. Rule 23.04 provides for the filing and serving of a bill of particulars.

2. The indictment or information filed in this case fails to inform Defendant of the particulars of the offense sufficiently for [him/her] to prepare [his/her] defense or to plead a judgment in this case as a bar to a subsequent prosecution.

3. The prosecuting attorney should set in writing the following particulars:

[specify facts desired]

Wherefore, Defendant prays for an order of this Court compelling the prosecuting attorney to file and serve a bill of particulars setting forth the information set out in this motion.

B. (§12.63) Defendant's Request for Discovery

[Caption]

Defendant's Request for Discovery

Defendant, by and through [his/her] attorney, requests that the prosecuting attorney for the State of Missouri produce, within the time allowed by law, the following information that may be applicable to this cause under Rule 25.03:

1. The names and last known addresses of persons whom the State intends to call as witnesses at any hearing or at the trial, together with their written or recorded statements, and existing memoranda reporting or summarizing part or all of their oral statements.

2. Any written or recorded statements and the substance of any oral statements made by Defendant or by a co-defendant, a list of all witnesses to the making, a list of all witnesses to the acknowledgment of these statements, and the last known addresses of these witnesses.

3. Those portions of any existing transcript of grand jury proceedings that relate to the offense with which Defendant is charged, containing testimony of Defendant and testimony of persons whom the State intends to call as witnesses at a hearing or trial.

4. Any existing transcript of the preliminary hearing and of any prior trial held in Defendant's case if the State has this in its possession or if it is available to the State.

5. Any reports or statements of experts made in connections with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

6. Any books, papers, documents, photographs, or objects that the State intends to introduce into evidence at the hearing or trial or that were obtained from or belong to Defendant.

7. Any record of prior criminal convictions of persons the State intends to call as witnesses at a hearing or the trial.

8. Whether there has been any photographic or electronic surveillance (including wiretapping) relating to the offense with which Defendant is charged, of Defendant, of conversations to which Defendant was a party, or of [his/her] premises; this disclosure shall be in the form of a written statement by counsel for the State briefly setting forth the facts pertaining to the time, place, and persons conducting the surveillance.

9. Any material or information within the possession or control of the State that tends to negate the guilt of Defendant as to the offense charged or reduce the punishment.

Defendant requests that the prosecuting attorney use diligence and make a good faith effort to obtain any of the above items or information that may be in the possession or control of any other governmental personnel, under the authority of Rule 25.03(C).

Defendant requests that the duty to disclose be a continuing duty and that the prosecution furnish to Defendant such additional information as may come to its attention or within its possession or control hereafter including during trial under Rule 25.08.

Defendant also requests any evidence that the prosecution may have showing any bias, narcotics habit, psychiatric treatment, monetary incentives, promise or granting of leniency or favorable treatment, or other evidence showing lack of competence or impartiality of any witness that the prosecution intends to call, and whether the bias is in favor of law enforcement or the prosecution or against Defendant.

C. (§12.64) Request for Disclosure (First Degree Murder)

[Caption]

Request for Disclosure

If the State will seek the death penalty in this case, Defendant requests that the State notify Defendant of the following:

1. The fact that the State will seek the death penalty

2. Any aggravating circumstance, whether statutory or not, that the State intends to offer during the punishment stage of any trial

3. The names and addresses of any witness who established the aggravating circumstance and any exhibit, document, or other object the State intends to offer to establish the aggravating circumstance

4. Any mitigating circumstance that the State is aware of or has knowledge of

D. (§12.65) Motion to Reveal the Deal

[Caption]

Motion to Require State to Reveal Any Deal, Agreement, or Understanding With Any Potential Prosecution Witness or Informer and Suggestions in Support

Defendant moves this honorable Court for an order requiring the State to reveal to Defendant any deal, agreement, or understanding with any prospective or potential prosecution witness or any informer including, but not limited to, any grant or promise of official or unofficial immunity, leniency, recommendation, payment, preferential treatment, reward, or offer thereof, for the following reasons:

1. Defendant has reason to believe, from [his/her] and [his/her] attorney's independent investigation, that one or more persons who are prospective or potential witnesses for the prosecution or informers have been offered or given immunity, leniency, preferential treatment, payment, or other reward in exchange for the witness's agreement to give information or to testify before a grand jury or in this trial.

2. Defendant requests that the criminal record of arrests and convictions of any prospective prosecution witness or informer be furnished to Defendant, including any charge or offense of which the person is suspected or under investigation but not yet charged or arrested.

3. Defendant requests that [he/she] be furnished with the details of any agreement, understanding, offer, or deal, and if the prosecution denies any, Defendant requests that the denial be stated in the record of these proceedings.

4. Due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, requires that this information be revealed before trial so that Defendant may prepare [his/her] defense.

5. Defendant requests and demands that the State be required to produce for inspection and copying all statements, oral or written, or reports of interviews and grand jury testimony of each person, whether the prosecution intends to call that person as a witness or not.

6. This motion is made under the authority of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giles v. Maryland*, 386 U.S. 66 (1967).

Wherefore, Defendant prays for an order requiring the prosecution to reveal any deal, understanding, agreement, or offer and for such other orders as may be just and proper.

E. (§12.66) Motion for Production

[Caption]

Motion for Production

Defendant, by and through [his/her] attorney, moves this honorable Court for an order requiring the State, the prosecuting officials, and any law enforcement agency involved herein to produce for inspection and copying all tangible or intangible evidence or information, reports, or other documents that may be favorable to Defendant upon any issue of innocence, guilt, punishment and sentence, impeachment of witnesses, exoneration of Defendant, or credibility of witnesses, or tending to negate or negating any element of this offense, for the following reasons:

1. Under the authority of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giles v. Maryland*, 386 U.S. 66 (1967), Defendant's Fifth Amendment and Fourteenth Amendment, United States Constitution, rights are and would be violated if the prosecution suppresses, either actually or constructively, any evidence or information favorable to Defendant that might tend to prove or disprove a material issue or factor, including punishment, that is before the Court.

2. Defendant reasonably believes that the prosecuting officials may have in their care, custody, or control documents, police reports, and statements of grand jury testimony of witnesses or other persons that would prove beneficial to the defense because they suggest that Defendant is innocent or they cast doubt on the veracity and credibility of the prosecution's witnesses.

Defendant further requests all evidence or information regarding any criminal record of any prosecution witness and any understanding, agreement, or promise to any potential witness or informer regarding any immunity, deferred prosecution, leniency, or recommendation regarding any past, pending, or possible future charges against the person, including any payments of money, credit, or per diem.

Defendant further requests that the prosecuting officials be required to turn over all applicable material as described in this motion to Defendant and [his/her] counsel, or if they deny any of this information or evidence exists, that the denial be made in writing, filed herein or in open court and as part of the trial record, and that the Court examine

the investigative agency and the prosecution's file in camera to make an independent determination of the contents of it.

Under the Rules of Professional Conduct, Rule 4–3.8, public prosecutors have the duty to make timely disclosure to the defense of all information and evidence known to the prosecutor that tends to negate the guilt of Defendant, mitigate the degree of the offense, or reduce the punishment.

Defendant hereby resubmits this motion at the close of the plaintiff's case, if now overruled and denied.

Wherefore, Defendant respectfully asks for an order of this Court requiring the State and the prosecuting officials to produce and reveal to Defendant and [his/her] counsel all tangible and intangible evidence or information favorable to Defendant that pertains to Defendant's guilt or innocence, punishment, impeachment of evidence, exoneration of Defendant, negating of an element of the offense, or credibility of the prosecution's witnesses and for such other and further orders as may be proper.

[This is a sample *Brady* motion that may be filed before trial and should be renewed at the close of the prosecution's evidence.]

F. (§12.67) Motion to Quash Search Warrant and to Suppress Evidence

[Caption]

Motion to Quash Search Warrant and to Suppress Evidence

Defendant, an aggrieved person, in accordance with § 542.296, RSMo 2000, and Rule 24.05, moves for an order quashing search warrant and suppressing from the use in evidence items and evidence taken from the person, property, premises, or automobile of Defendant or in which Defendant was present or in which Defendant had a superior right or interest, and suppression of all evidence of this search and seizure and its fruits, and for the return of the items seized, upon the following grounds:

1. On or about _____, the _____ Circuit Court of _____ issued a search warrant.

2. The search warrant and subsequent search and seizure were illegal, unconstitutional, and unreasonable because the search warrant was issued without probable cause and was not supported by affidavits or written oath setting forth facts constituting or establishing probable cause as required by the Fourth and Fourteenth Amendments to the United States Constitution, Article I, § 15, Missouri Constitution, and § 542.276, RSMo Supp. 2004.

3. The search was general in nature and exceeded the authority of the search warrant, and items were seized that were not authorized by the warrant or otherwise by law.

4. The search and seizure were made without probable cause, and there was no contemporaneous lawful arrest, valid consent or exigent circumstances, or other lawful reason justifying or authorizing the search and seizure.

5. The search warrant did not particularly describe the person, thing, or place to be searched or the items to be seized as is required by §§ 542.261, *et seq.*, RSMo 2000 and Supp. 2004, and the Fourth and Fourteenth Amendments to the United States Constitution and Article I, § 18, of the Missouri Constitution.

6. The search warrant and the complaint or application and the affidavit for it were the fruits of a previous illegal, unconstitutional, and unreasonable search, arrest, detention, intrusion, or statement.

7. The items seized were testamentary in nature, were private papers or business records, or were not authorized to be seized by search warrant.

8. Among the items seized were _____.

9. The search and seizure violated Defendant's rights granted to [him/her] by §§ 10 and 15 of Article I of the Missouri Constitution and the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution.

10. The complaint or application, affidavit, and search warrant do not exist or are void and illegal upon their face.

11. The search warrant was illegally and improperly issued, and it does not comply with the requirements of law.

12. The search warrant was illegally and improperly executed, in violation of § 542.291, RSMo 2000.

Attached is a copy of the search warrant, the return and inventory, the complaint or application for search warrant, and the affidavit in support of it, if any.

Wherefore, Defendant prays that the search warrant be quashed, the evidence of the search and the items so seized and all fruits of the search and seizure be suppressed, and that the items be returned.

[This motion must state facts pertaining to the particular complaint regarding the search warrant.]

G. (§12.68) Motion to Suppress Physical Evidence

[Caption]

Motion to Suppress Physical Evidence

Defendant, under § 542.296, RSMo 2000, and Rule 24.05, moves for an order suppressing from the use in evidence items taken from the person, property, premises, or automobile of Defendant or in which Defendant was present or in which Defendant had a superior right or interest, or which the State alleges Defendant to have had possession of, and suppression of all evidence of the search and seizure and the fruits of it, and for the return of the items seized, upon the following grounds:

1. The search and seizure were made without warrant and without other lawful authority or justification.

2. The arrest and detention, if any, was illegal, unconstitutional, and unreasonable because [at the time of the claimed arrest and detention no offense was being committed in the officers' presence, the arrest was made without probable cause, the detention was without legal justification, the officers had no warrant for arrest, the arrest came after the search and seizure].

3. The search was general in nature and went beyond the area of arrest and beyond the justification.

4. The search and seizure was made without probable cause and there were no exigent circumstances justifying or authorizing the search and seizure.

5. The search and seizure was made for other than the fruits of the offense for which the arrest was made, and not for the officers' protection.

6. The officers were not making a reasonable and bona fide inventory or inspection but were making a warrantless search and seizure.

7. Any claimed consent was not voluntarily or understandingly and knowingly given or was by a person not legally authorized to consent.

8. The items were not in the plain view of the officers and were not at a place the officers had a lawful right to be, the criminal nature of the items was not immediately apparent, and the observation of the items was not inadvertent.

9. The items seized were testamentary in nature.

10. The search and seizure were the fruits of a previous illegal, unconstitutional, and unreasonable search, arrest, detention, intrusion, or statement.

11. Among the items seized were _____.

12. The search and seizure violated Defendant's rights granted by §§ 10 and 15 of Article I of the Missouri Constitution and the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution, and violated § 542.296, RSMo 2000.

Wherefore, Defendant prays that the evidence of the search, the items seized, and the fruits of the search be suppressed and returned and for such other and further orders as the Court deems proper.

[This motion should be tailored factually to the particular case and must allege facts.]

H. (§12.69) Motion to Suppress Statement of Defendant

[Caption]

Motion to Suppress Statement of Defendant

Defendant moves this honorable Court for an order suppressing from the use in evidence all testimony and other evidence relating to or leading from any written, oral, or recorded statement obtained from Defendant, whether incriminating or exculpatory, for the following reasons:

1. Before the statement was obtained, Defendant was not properly advised of [his/her] constitutional rights as set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), including Defendant's right to remain silent, that anything Defendant said could and would be used against [him/her] in a trial, that Defendant had a right to an attorney being present during questioning, that if Defendant could not afford an attorney one would be appointed for [him/her], and that Defendant had a right to stop the interrogation at any time [he/she] so desired.

2. The statement was not voluntary and was the result of mental [and/or] physical coercion, duress, and threats.

3. The statement was obtained by trick, promises, and false pretenses.

4. The statement was the fruit of an illegal, unconstitutional, and unreasonable arrest or detention of Defendant.

5. Defendant had no attorney present and did not adequately, voluntarily, and knowingly waive [his/her] right to counsel.

6. Defendant's statement was obtained in violation of Article I, §§ 18(a) and 19, of the Missouri Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, including the privilege against self-incrimination and the right to counsel and to due process of law.

Wherefore, Defendant prays for an order of this Court suppressing from the use in evidence all statements obtained from Defendant, whether written, oral, or recorded, signed or unsigned, and whether exculpatory or incriminating, and the fruits of the statements, including, but not

limited to, all evidence obtained as a result of and leading from the statements.

[This motion should be tailored to the particular case and must allege facts.]

I. (§12.70) Motion to Suppress Identification Evidence and Suggestions in Support

[Caption]

Motion to Suppress Identification Evidence and Suggestions in Support

Defendant moves this honorable Court for an order suppressing from the use in evidence all identification evidence leading from and as a result of the use of lineups, showups, confrontations, or photographs of Defendant for the following reasons:

1. The lineup, showup, [and/or] witness confrontation [was/were] held in the absence of Defendant's counsel and, therefore, violated the Sixth Amendment of the United States Constitution. *See Gilbert v. Cal.*, 388 U.S. 263 (1967); *Moore v. Ill.*, 434 U.S. 220 (1977). [If the defendant was already represented by counsel—so allege.]

2. The lineup, showup, witness confrontation, or photographic identification was so unduly suggestive and conducive to irreparable misidentification as to deny Defendant due process of law under the Fifth and Fourteenth Amendments of the United States Constitution. *See Stovall v. Denno*, 388 U.S. 293 (1967); *Simmons v. United States*, 390 U.S. 377 (1968) (photographic identification).

3. Any in-court identification was tainted by the out-of-court identification.

4. The identification was the fruit of a previous illegal arrest or detention. *See Davis v. Miss.*, 394 U.S. 721 (1969).

5. A hearing should be held on this issue.

Wherefore, Defendant prays the Court for an order suppressing from the use in evidence any testimony or evidence relating to the lineups, showups, or witness confrontation, or the showing of the photographs and any in-trial identification of Defendant.

[This motion should allege the specific facts of the particular lineup, etc.]

J. (§12.71) Application for Change of Venue and Change of Judge

[Caption]

Application for Change of Venue and Change of Judge

Defendant, by and through [his/her] attorney, states:

1. _____ County, Missouri, has a population of fewer than 75,000 inhabitants.

2. Rule 32.03 authorizes the filing of this Application for Change of Venue from this county.

3. Defendant requests a change of venue from _____ County and from the _____ Judicial Circuit.

4. Rule 32.07 authorizes the filing of an Application for Change of Judge.

5. Defendant requests a change of judge.

6. There has been substantial and continuous news media and other publicity about Defendant and these (and other) charges against Defendant throughout the Circuit.

7. The inhabitants of _____ County and of the _____ Judicial Circuit are prejudiced against Defendant.

K. (§12.72) Notice

[Caption]

Notice

To: _____
Prosecuting Attorney

_____, Missouri

Please take notice that Defendant will file and present to the Court the enclosed Application for Change of Venue and for Change of Judge on the _____ day of _____, 20___, at _____ A.M./P.M. or as soon thereafter as counsel may be heard.

Susan M. Elliott*

Chapter 13

MOTIONS TO DISMISS

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*Ms. Elliott received her J.D. from the University of Missouri-Kansas City School of Law. She is an attorney with the Office of the Public Defender, Capital Litigation Division, in Kansas City.

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I. Introduction

A. (§13.1) Purposes of Motions to Dismiss

This chapter presents a survey of grounds for motions to dismiss. Motions to dismiss may be filed throughout the criminal process, but they should be filed in the early stages of a prosecution to avoid waiving a complaint or being subjected to plain error review. Counsel should file a motion to dismiss whenever there is reason to believe that the state:

- has failed to meet statutory, constitutional, or timeliness requirements in the filing process;
- cannot establish jurisdiction or venue for the charges;
- cannot bear its burden of proof at pretrial proceedings or at trial; or
- has filed charges that violate the guarantee against double jeopardy.

Few motions to dismiss result in total dismissal of charges, but one that raises valid issues may force the prosecutor to redo all or part of the charging process to correct errors, or it may prompt a better plea offer to avoid the extra work. But dismissal may mean that the client has to go through the arrest process again, which is expensive and time consuming. A motion to dismiss should also seek an alternative curative remedy, such as a bill of particulars. Dismissal is an extreme remedy, and courts will look for a remedy that efficiently resolves a problem without dismissal. *See, e.g.*, *State v. Hadley*, 736 S.W.2d 580, 586–87 (Mo. App. S.D. 1987). It is always advisable to include in every prayer for relief a prayer for "such other relief as is just and necessary," which gives the court authority to enter some other relief short of dismissal.

B. (§13.2) Rules Regarding Pretrial Motions

Any defense or objection capable of determination without a trial of the general issue may be raised before trial by motion. Rule 24.04(b)(1). Challenges to defects in an indictment or information must be filed before trial or they are waived. But lack of jurisdiction or failure to charge an offense may be raised at any time. Rule 24.04(b)2.

C. (§13.3) Hearing on Motion to Dismiss

Hearings and determinations on pretrial motions should be before trial unless the court orders that the hearing and determination be deferred until trial. Rule 24.04(b)4. Counsel for the defendant must make sure that the court rules on these motions to preserve the issues for appeal. Defense counsel should present evidence, which may include affidavits, at a hearing on a motion to dismiss based on matters that are not part of the record ("pleas of abatement"). Section 545.830, RSMo 2000.

D. (§13.4) Preserving Issues for Appeal

The defendant should renew the objection during trial whenever possible and in a motion for new trial if one is filed or required. *See* Rule 29.11(d), (e). To preserve a constitutional question for appellate review, counsel must:

- raise the issue at the first available opportunity;
- state specifically the constitutional provision violated;
- state facts showing the violation; and
- preserve the objection throughout the proceedings.

Kansas City v. Howe, 416 S.W.2d 683 (Mo. App. W.D. 1967). Procedural default or deliberate bypass of an appeal right may prevent a review on appeal, in post-conviction proceedings, and on habeas corpus. *See Stone v. Powell*, 428 U.S. 465 (1976); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Thompson v. State*, 651 S.W.2d 657 (Mo. App. S.D. 1983).

If counsel does not file motions to dismiss in a timely manner and preserve the issues raised throughout the trial process, the likelihood of success on appeal is diminished by the lower standard of review, or no review at all. A party on appeal is held to the specific objections presented to the trial court. *State v. Jones*, 7 S.W.3d 413, 417 (Mo. App. E.D. 1999). If error occurs in a criminal case and is properly preserved, a rebuttable presumption of prejudice arises. *State v. Sanders*, 126 S.W.3d 5, 23 (Mo. App. W.D. 2003). If constitutional violations are preserved for appeal, the state bears the burden of proving that a federal constitutional error was harmless beyond a reasonable doubt. *State v. Dexter*, 954 S.W.2d 332, 340 n.1 (Mo. banc 1997). When the error is not preserved, the appellant must show that plain error occurred, resulting in manifest injustice. *State v. Frazier*, 927 S.W.2d 378, 382 (Mo. App. W.D. 1996). Review for plain error is

discretionary with the appellate court, and it is used sparingly. Rule 30.20; *State v. Rogers*, 95 S.W.3d 181, 185 (Mo. App. W.D. 2003).

E. (§13.5) Effect of Ruling

If the motion is overruled or denied, the defendant must proceed to trial unless other disposition is made of the case. Rule 24.04(b)5.

If the motion is granted, the defendant may be ordered discharged. If the motion is granted based on a technical defect in the proceedings, the court may order that the defendant be held in custody or that the defendant's conditions of release continue pending the filing of a new indictment or information. Rule 24.04(b)5. The defendant may be recharged unless prohibited by double jeopardy, statute of limitation, or other reason.

F. (§13.6) Timeliness of Appeal by State

The state may appeal from an adverse ruling on a motion to dismiss before verdict unless a reversal would result in double jeopardy. Section 547.200.2, RSMo 2000. The time limits for interlocutory appeals by the state are set forth in Rule 30.02. An appeal that is not timely filed is subject to dismissal. *State v. Bibb*, 922 S.W.2d 798 (Mo. App. E.D. 1996). An interlocutory appeal may lie when:

- the trial court determines that the indictment or information is insufficient;
- a judgment is arrested or set aside because the facts stated in the charge did not constitute an offense; or
- the trial court determines that it was without jurisdiction.

Section 547.210, RSMo 2000.

Rule 30.17 provides that an appeal by the state does not stay the operation of the order or judgment in favor of the defendant except in appeals from motions under Rules 24.035 and 29.15 (post-conviction motions to vacate sentence). If the judgment is reversed, the defendant may be rearrested upon warrant. The state does not have an appeal when a defendant has been acquitted. *State v. Pottinger*, 287 S.W.2d 782 (Mo. 1956); *State v. Marshall*, 27 S.W. 1107 (Mo. 1894). There is no right to appeal when evidence was required to support the dismissal. *State ex rel. Corcoran v. Buder*, 428 S.W.2d 935 (Mo. App. E.D. 1968).

The state may also file writs of mandamus and prohibition when appropriate. *See, e.g., State ex rel. Nixon v. Campbell*, 120 S.W.3d 225 (Mo. App. E.D. 2002).

II. Grand Jury Violations

A. (§13.7) Constitutional Right to Impartial Jury

The Fifth Amendment requires a legally constituted and unbiased grand jury for a valid indictment. U.S. CONST. amend. V; *see also* MO. CONST. art. I, § 18(a) ("right to . . . an impartial jury of the county"). The Sixth Amendment requires that jurors be selected from a fair cross-section of the population. U.S. CONST. amend. VI; *State v. Garrett,* 627 S.W.2d 635, 637 (Mo. banc 1982).

A motion to quash an indictment for discrimination in the jury selection process may be filed if counsel suspects discriminatory practices have been used to systematically exclude a protected group from selection for jury duty. The Supreme Court has held that racial discrimination in the selection and composition of a grand jury is constitutional error requiring reversal of a conviction. *Vasquez v. Hillery*, 474 U.S. 254 (1986).

1. (§13.8) Proof of Violation in Jury Selection

To prove a fair cross-section violation has occurred, the defendant must show that:

- the group excluded is a distinctive group within the community;
- the representation of this group is not fair and reasonable in relation to the number of such persons in the community; and
- the underrepresentation is a result of "systematic[, intentional] exclusion of the group in the jury-selection process."

Duren v. Mo., 439 U.S. 357, 364 (1979); *Castaneda v. Partida*, 430 U.S. 482, 494 (1977); *State v. Brooks*, 960 S.W.2d 479 (Mo. banc 1997), *cert. denied,* 524 U.S. 957 (1998). Age has not been established as a cognizable group for purposes of challenging a grand jury selection procedure. *State v. Ware*, 872 S.W.2d 601 (Mo. App. E.D. 1994); *State v. Jacobs*, 813 S.W.2d 318 (Mo. App. W.D. 1991).

The degree of underrepresentation must be proved by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors over a significant period of time. *State v. Baker*, 636 S.W.2d 902, 907–08 (Mo. banc 1982) (two and one-half years not enough). A selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing. Once the defendant has made a prima facie showing, the burden shifts to the state to rebut the case. *Id.*

In *Baker* the defendant filed a motion to quash the indictment alleging that African-Americans and women were systematically excluded from the grand jury pool of St. Louis City and from being grand jury foreperson. *Baker*, 636 S.W.2d at 907–08. The defendant presented evidence that three grand jury pools in St. Louis City over a two and one-half year period had 23.4% African-Americans, compared with 38.5% of the population. Over the same period, African-Americans made up 26.3% of grand jurors.

The state presented rebuttal testimony from government officials concerning the methods and qualifications for selection. But such self-serving testimony should be looked at with a great deal of "judicial scrutiny." *Baker*, 636 S.W.2d at 910. Circuit judges testified that they selected jurors on nondiscriminatory—but highly subjective—grounds ("greater than average maturity, responsibility and interest in the administration of justice . . . ."). *Id.* at 908. The judges said that "the types of jobs which blacks typically held did not allow them to serve as a grand juror for the required time" and "a large percentage of blacks requested to be excused from service for employment reasons." *Id.* at 908–09.

The Court held that two and one-half years was not a significant period of time, even though statistics from 3 pools and 12 grand juries over that time period were presented. *Id.* at 908–09. The Court noted that the jury that indicted the defendant was 33% African-American. *Id.* Thus, although the defense cannot prove discrimination with only 1 panel, the state can disprove discrimination with 1 panel. Missouri law does not require that grand jury master lists, which are necessary for any analysis, be maintained for more than five years. Section 494.410(4), RSMo Supp. 2004. This fact would seem to limit the time frame necessary to determine if discrimination in jury selection existed.

The United States Supreme Court found that a defendant's right to equal protection was violated by the grand jury selection process when:

- evidence showed that African-Americans were underrepresented by 14.3% on grand juries;
- the selection process indicated the race of eligible persons; and
- African-Americans were systematically weeded out in the process.

Alexander v. La., 405 U.S. 625 (1972). The defendant raised the issue before trial by motion to dismiss, which was denied. The Supreme Court reversed the conviction. But the Court has also said that a disparity of 40% might be explained with proper rebuttal evidence. *Castaneda*, 430 U.S. at 499. *See also Rideau v. Whitley*, 237 F.3d 472, 486–88 (5th Cir. 2000) (conviction reversed and indictment quashed when African-Americans made up 16.66% of county's registered voters but only 5% of venire, underrepresentation went on for a long time, and selection procedures were suspect).

Defendants are not entitled to demand a proportionate number of their race on the jury that tries them, *Swain v. Ala.*, 380 U.S. 202 (1965), or to demand that members of their race be included on the grand jury that indicts them, *Alexander*, 405 U.S. at 628; *Brooks*, 960 S.W.2d 479, *cert. denied,* 524 U.S. 957. Discrimination in the selection of the grand jury foreperson is not a sufficient violation of due process to warrant dismissal. *Hobby v. United States*, 468 U.S. 339 (1984), *but see Rose v. Mitchell*, 443 U.S. 545 (1979).

2. (§13.9) Effect of Juror Deception

If a juror intentionally withholds information or gives false answers to questions on matters that are material or relevant, the nondisclosure may be prejudicial to a defendant's right to a fair trial by 12 impartial jurors. *State v. Martinelli*, 972 S.W.2d 424, 433 (Mo. App. E.D. 1998). Any error in grand jury selection is rendered moot if the defendant is tried on a substitute information in lieu of grand jury indictment. *State v. Robinson,* 849 S.W.2d 693 (Mo. App. E.D. 1993).

B. (§13.10) Statutory Violations in Jury Selection

Failure to follow statutory requirements for selecting a jury panel in the past has resulted in reversal of a conviction. *State v. Hurst*, 99 S.W. 820 (Mo. App. W.D. 1907) (no showing in the record that the grand jury was sworn). But at this time, even if a juror is not technically qualified, a verdict will not be set aside unless the rights of a defendant were prejudiced and substantial injustice resulted. *State v. Tyler*, 587 S.W.2d 918 (Mo. App. W.D. 1979).

1. (§13.11) Failure to Follow Statutory Procedure

Failure to follow statutory selection procedures may still be grounds to quash a jury. Section 494.465, RSMo 2000. In *State v. Henke*, 820 S.W.2d 94 (Mo. App. W.D. 1991), the defendant filed a timely motion (the day before trial) to quash the jury panel for failing to substantially comply with §§ 494.400–494.505, now RSMo 2000 and Supp. 2004. The defendant's conviction was reversed and remanded because the board members did not follow procedures set out in Missouri statutes to create the master list. A motion to quash an indictment or a motion to stay proceedings for a substantial failure to comply with the declared policy of §§ 494.400–494.505 in selecting a grand or petit jury should contain a sworn statement of facts that constitute the substantial failure. Section 494.465, RSMo 2000. The movant is then entitled to an evidentiary hearing.

2. (§13.12) Grand Jury Selection Statutes

Grand and petit jury selection procedures are contained in §§ 494.400, *et seq.,* RSMo 2000 and Supp. 2004, and §§ 540.021, *et seq.*, RSMo 2000 and Supp. 2004. In 2003, the statutes were amended to provide that grand and petit jurors will be selected from the same master list of potential jurors. Section 540.021, RSMo Supp. 2004.

a. (§13.13) Procedure for Jury Selection

Each county in Missouri must have a three-person board of jury commissioners that supervises the jury selection process. The board is made up of:

- the presiding circuit court judge, or a judge appointed by that judge;
- the clerk of the circuit court; and
- the county clerk.

Section 494.405.2, RSMo 2000.

In counties of the first class having charter forms of government and in any city not within a county, the circuit court en banc will be the board. *Id*.

The board must compile and maintain a randomly selected list of potential jurors and their addresses, drawn from at least two government records (before July 1, 2004, jurors were selected from "public records") including voter registration, driver's license, and personal property tax lists. The potential juror list must contain the names of at least five percent of the general population and never have less than 400 names. The list and the records it is drawn from are public records. Section 494.410.4, RSMo Supp. 2004.

The board must draw randomly from this list the names of as many jurors as are needed and serve a summons for jury service and a juror qualification form approved by the court on prospective jurors to elicit information regarding the person's qualifications. Section 494.415, RSMo 2000. Unqualified jurors are deleted from the list.

Citizens may not be excluded for selection because of race, color, religion, sex, national origin, or economic status. Section 494.400, RSMo Supp. 2004; *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606 (Mo. banc 1980) (United States Constitution guarantees right to have case considered by a fair cross-section of defendant's community).

b. (§13.14) Who May Not Serve as Grand Juror

The following persons are ineligible for service on any jury:

- Persons under age 21
- Noncitizens
- Nonresidents
- Persons with a felony conviction

- Persons who cannot read, write, or understand the English language
- Persons on active military duty
- Judges
- Persons incapable of performing juror duties because of mental or physical infirmity

Section 494.425, RSMo Supp. 2004. The victim or a prosecution witness may serve as a grand juror unless a person who is in custody to answer a criminal charge objects to the competency of the witness. Section 540.060, RSMo 2000; *Davis v. United States*, 411 U.S. 233 (1973); *State v. Hemphill*, 460 S.W.2d 648 (Mo. 1970); *State v. Seidler*, 267 S.W. 424 (Mo. App. E.D. 1924) (defendant who was not being held at time grand jury was empanelled cannot complain of imperfection in its constitution).

C. Irregularities Before Grand Jury

1. (§13.15) Unauthorized Persons Present

The presence of unauthorized persons in a grand jury hearing when it conducts business may be a basis to dismiss an indictment. *State v. Eyman*, 828 S.W.2d 883 (Mo. App. W.D. 1992), *citing with approval*, *State v. Salmon,* 115 S.W. 1106 (Mo. 1909). Mr. Eyman, the target of a grand jury investigation, was arrested, brought before the grand jury, and questioned by law enforcement without being first informed of his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The county sheriff, a deputy sheriff, and the prosecutor's secretary breached the secrecy requirement of grand jury proceedings and were present when the grand jury questioned the defendant.

Mr. Eyman was convicted following trial. The appellate court reversed the conviction on other grounds, but also commented:

> We are convinced that the only way to enforce a strict compliance with the provisions of the law regarding the secrecy and deliberations of the grand jury, and to maintain the usefulness as well as the respect for the result of their investigations, is to abate indictments returned by them where the spirit of the law regulating their proceedings in finding such indictments have been absolutely disregarded. . . . This law should be complied with, and it should not be left to the courts to conjecture whether or not harm was done to persons accused or suspicioned of crime whose acts are being investigated before that body.

Eyman, 828 S.W.2d at 888 (citing *Salmon,* 115 S.W. at 1122).

2. (§13.16) Violations of Secrecy Oath

Grand jurors, stenographers, and witnesses are required to take an oath of secrecy. Sections 540.080, 540.105, 540.110, 540.120, 540.150, 540.320, RSMo 2000. During deliberations or voting, no one but the jurors may be present. *See State v. Sullivan*, 84 S.W. 105 (Mo. App. W.D. 1904); § 540.140, RSMo 2000. In *United States v. Mechanik*, 475 U.S. 66 (1986), the Court held that the presence of more than one witness at a time before the grand jury, in violation of the federal rules, was made harmless error by a guilty verdict at trial. In *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989), the Court held that due process does not require dismissal for violations of grand jury secrecy.

3. (§13.17) Calling Defendant to Testify

Calling a potential defendant before a grand jury and forcing the defendant to testify about incriminating matters denies due process and the defendant's privilege against self-incrimination, and that may be grounds to quash an indictment. *State v. Eyman*, 828 S.W.2d 883 (Mo. App. W.D. 1992). But Missouri grand jury procedure allows the prosecutor to call a potential defendant who refuses to testify before a grand jury and to force the witness to plead the protection of the Fifth Amendment. The prosecutor may then seek a hearing in court to have the court make a finding as to whether the witness has a legitimate claim to the privilege. *See* §§ 540.190–540.210, RSMo 2000. A prospective defendant may be called before the grand jury and not be advised of *Miranda v. Arizona*, 384 U.S. 436 (1966), rights. *United States v. Mandujano*, 425 U.S. 564 (1976) (witness must invoke privilege). The prosecutor can thus take advantage of unfair prejudice that flows from calling a witness to testify just so the jury can hear the witness invoke the privilege.

4. (§13.18) Calling Defense Witnesses After Indictment

It is an abuse of process and a denial of due process, as well as a statutory violation, to call defense witnesses before a grand jury after the defendant has been indicted. This, in effect, allows defense witnesses to be intimidated and allows the prosecution to take an *ex parte* deposition. Section 540.160, RSMo 2000.

5. (§13.19) Failure to Reveal Exculpatory Evidence

An indictment will probably not be dismissed because the prosecutor failed to reveal exculpatory evidence to the grand jury. *United States v. Williams*, 504 U.S. 36 (1992); *State v. Easter*, 661 S.W.2d 644, 645 (Mo. App. E.D. 1983) (court has no authority to prescribe standards of prosecutorial conduct before grand jury); *but see dissenting opinion, Williams*, 504 U.S. at 46–47; *State v. Hogan*, 676 A.2d 533 (N.J. 1996) (prosecutor should be required to present to grand jury substantial evidence that directly negates guilt).

6. (§13.20) Failure to Follow Voting Procedures

A grand jury in Missouri is composed of 12 jurors, § 540.021.4, RSMo Supp. 2004, and an indictment can be found by the concurrence of at least 9 jurors. MO. CONST. art. I, § 16; § 540.250, RSMo 2000. Thus, a motion to dismiss should be filed if no such vote was taken or no concurrence reached. It is not required that all 12 be present, deliberate, or vote. *State v. White*, 621 S.W.2d 287 (Mo. 1981); *State v. Connors*, 135 S.W. 444 (Mo. 1911). The defense may be entitled to an interlocutory appeal if an indictment is returned by an insufficient number of jurors. *United States v. Deffenbaugh Indus., Inc.*, 957 F.2d 749 (10th Cir. 1992).

D. (§13.21) Time for Objections

Objections to grand jury selection must be made before trial because the actions of an illegally constituted grand jury are only voidable and not void *ab initio*. *State ex rel. Woods v. Connett*, 525 S.W.2d 326 (Mo. banc 1975). The issue must be raised by motion to dismiss before a petit jury is sworn to try the case or within 14 days after the movant discovers or should discover the grounds for the motion, whichever is later. Section 494.465.1, RSMo 2000.

Because many technical flaws are not reviewable on appeal, interlocutory review may be available under the "collateral order exception" if the technical challenge is so fundamental that it causes an indictment to no longer be an indictment and therefore gives rise to a right not to be tried, as when the grand jury vote is inadequate to support an indictment. *See, e.g., United States v. Deffenbaugh Indus., Inc.*, 957 F.2d 749, 755 (10th Cir. 1992).

E. Right to Discovery of Grand Jury Records

1. (§13.22) Right to Grand Jury Database

Grand and petit jurors are drawn from the same master list. Section 540.021, RSMo Supp. 2004. Motions to dismiss based on discrimination in jury panel selection require discovery of data used in the process. Defense counsel is entitled to disclosure of demographic data maintained by the clerk of the circuit court relating to the master jury list, but not necessarily the names, addresses, and occupations of those listed. *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606 (Mo. banc 1980). In *State v. Woodworth*, 941 S.W.2d 679, 695 (Mo. App. W.D. 1997), the defendant filed a discovery request pretrial for the names and addresses of every person who had served on a grand jury during the ten years before the defendant's indictment because serving more than one time in a ten-year period on a grand jury is prohibited. Section 540.045.2, RSMo 2000. The defendant alleged reason to believe that a violation of § 540.045 had occurred. The appellate court said the trial judge was within its discretion to treat this request as a "fishing expedition" because the defendant did not state why he thought this.

2. Grand Jury Recordings and Transcripts

a. (§13.23) "Snitch" Testimony Must Be Recorded

Whether to record and transcribe grand jury proceedings generally is and has been a discretionary decision of the judge. Section 540.105, RSMo 2000. But grand jury proceedings must be recorded when a witness is testifying in exchange for immunity. Section 540.106, RSMo 2000. The defense is entitled to a copy of the transcript. Failure to record grand jury testimony of "snitches" may not provide grounds to dismiss an indictment. *See United States v. Cramer*, 447 F.2d 210, 213–14 (2nd Cir. 1971).

b. (§13.24) No General Right to Recording Testimony

Motions to quash an indictment for improprieties before the grand jury require that defense counsel discover what went on either through review of master list data, transcripts, or minutes, or through statements of witnesses. Defense counsel

has the right to discovery of existing grand jury transcripts containing the testimony of the defendant and of witnesses the state intends to call during trial. Rule 25.03(A)(3). The minutes of the clerk of the grand jury are given to the prosecuting attorney when the grand jury is discharged. Section 540.100, RSMo 2000. A defendant may request any minutes that were kept of grand jury witness testimony. *State v. McGee*, 757 S.W.2d 321 (Mo. App. W.D. 1988). But courts have held that a defendant has no due process right to demand that grand jury proceedings be recorded. *State v. Ringo*, 30 S.W.3d 811 (Mo. banc 2000), *cert. denied,* 532 U.S. 932 (2001); *State v. Greer*, 605 S.W.2d 93 (Mo. 1980). The defendant has no right to appeal the fact that a grand jury transcript was never made. *State v. Hope*, 954 S.W.2d 537, 543 (Mo. App. S.D. 1997).

c. (§13.25) Proof Necessary to Obtain Transcripts or Minutes

To prevail in a request for transcripts or minutes, counsel must show that it is necessary "to meet the ends of justice." To be successful on appeal, counsel must prove that the trial court abused its discretion by not ordering the transcripts. The seriousness of the case may be a factor to be considered by the trial court in ruling on a motion to record grand jury proceedings. *State v. Thomas*, 674 S.W.2d 131, 134 (Mo. App. E.D. 1984) (capital murder case). Appellate courts have found no abuse of discretion when the defendant argued simply that it would allow him to more effectively cross-examine witnesses if counsel had prior statements with which to test a witness's credibility. *State v. McGee*, 757 S.W.2d 321 (Mo. App. W.D. 1988). But requesting grand jury records may at least result in the court making an "in camera" review of records. *United States v. Deffenbaugh Indus., Inc.*, 957 F.2d 749, 754 (10th Cir. 1992).

Counsel may argue that perceptions and memories of all witnesses are imperfect, at best, and that principles of fairness require that the defendant have all statements of witnesses for use in testing a witness's credibility "to meet the ends of justice." Counsel may also point out that the federal government and some other states require all grand jury proceedings to be recorded, another recognition that these transcripts are important. *See, e.g.,* FED. R. CRIM. P. 6(e)(1);

CAL. PENAL CODE § 938 (West 2005); N.D. CENT. CODE § 29-10.1-16 (2003); VA. CODE ANN. § 19.2-212A (Michie 2004).

F. (§13.26) Insufficiency of Evidence

A grand jury, to return a true bill indictment, must hear some evidence. *See State v. Grady*, 84 Mo. 220 (1884), *aff'g*, 12 Mo. App. 361 (E.D. 1882); *State v. Selle*, 367 S.W.2d 522 (Mo. 1963); *State v. Hill*, 614 S.W.2d 744 (Mo. App. S.D. 1981). But the grand jury is the judge of the sufficiency of the evidence it hears. *Hill,* 614 S.W.2d 744. An indictment may be based on hearsay, *Costello v. United States*, 350 U.S. 359 (1956), or on illegally obtained evidence, *United States v. Calandra*, 414 U.S. 338 (1974) (defendant may not challenge indictment because it was based on evidence obtained by police in violation of Fifth Amendment); *but see Gelbard v. United States*, 408 U.S. 41 (1972) (wiretap evidence obtained in violation of Title III cannot be considered by the grand jury). But if the grand jury itself violates a witness's Fifth Amendment rights, *Costello* does not bar a grand jury challenge. *United States v. Garrett*, 797 F.2d 656 (8th Cir. 1986). It may be objectionable if the grand jury is not told that all the evidence presented is hearsay. *United States v. Estepa*, 471 F.2d 1132 (2nd Cir. 1972); *but see United States v. Rossbach*, 701 F.2d 713 (8th Cir. 1983) (hearsay testimony is okay if witness makes it clear that testimony is based on investigation, not on personal knowledge).

III. Lack of Jurisdiction

A. (§13.27) Over the Subject Matter

No conduct constitutes an offense unless it is made an offense by Missouri criminal code or statute. There are no common-law crimes in Missouri. Section 556.026, RSMo 2000. If the facts alleged in the information or indictment do not amount to a violation of a statute punishable as a crime, *State v. Harper*, 510 S.W.2d 749 (Mo. App. W.D. 1974), or if the facts do not show that the offense occurred within the geographic jurisdiction of the court, a motion to dismiss will lie. If an element of the offense occurred in Missouri, Missouri courts have jurisdiction over the offense.

Counsel should file a motion to dismiss if the facts of the case do not constitute a violation of the charging statute. *See, e.g.*:

- *State v. Haynes*, 17 S.W.3d 617 (Mo. App. W.D. 2000) (crime of escape from custody requires that, at time of escape, defendant is being held after arrest for a crime; defendant held on probation violation is not held for a crime);

- *State v. Rousseau*, 34 S.W.3d 254 (Mo. App. W.D. 2000) (defendant charged with making false statements to Missouri Gaming Commission concerning his involvement in the development of a riverboat casino in Kansas City, in violation of § 313.550.3, RSMo 2000; defendant filed a pretrial motion to dismiss, arguing that the statute applied only to horse racing activities and not to excursion gambling boat activities; the case was dismissed, upheld on appeal);

- *City of Bellefontaine Neighbors v. Meziere*, 926 S.W.2d 875 (Mo. App. E.D. 1996) (information charging "Driv[ing] Under The Influence of Alcohol (DUI .025)" not sufficient to support conviction for driving while intoxicated);

- *State v. Keith*, 839 S.W.2d 729 (Mo. App. W.D. 1992) (conviction reversed because information failed to allege that defendant abused his former wife under any definition provided in the relevant statute).

Several statutes provide for concurrent state and federal jurisdiction in certain geographical areas. *See, e.g.*, §§ 541.160–541.180, RSMo 2000 (Arkansas); § 12.027, RSMo 2000 (national parks); § 12.028, RSMo 2000 (federal jurisdiction and federal enclaves).

B. (§13.28) Over the Person of the Defendant

A defendant has a right under the Confrontation Clause of the Sixth Amendment, article I, § 18(a), of the Missouri Constitution, Rule 31.03, and § 546.030, RSMo 2000, to be present at a trial or guilty plea or whenever the defendant's presence has a relation, reasonably substantial, to the fullness of the opportunity to defend against the charge. *State v. Middleton*, 998 S.W.2d 520, 525–26 (Mo. banc 1999); *State v. Smulls*, 935 S.W.2d 9 (Mo. banc 1996). The focus is on whether, on the whole record, the defendant could have done or gained anything by attending. *Middleton*, 998 S.W.2d at 526. A defendant who has never been arrested, been summoned to appear, or actually appeared in court is not subject to jurisdiction to be tried. A defendant cannot be tried *in absentia*, *State v. Cook*, 432 S.W.2d 345 (Mo. banc 1968), although the defendant may be excluded from the

courtroom because of disruptive conduct, *Ill. v. Allen*, 397 U.S. 337 (1970); *State v. Roller*, 31 S.W.3d 152 (Mo. App. S.D. 2000), *cert. denied,* 532 U.S. 1040 (2001), and the trial may continue in the defendant's absence if the defendant voluntarily departs after trial has commenced, § 546.030; *State v. Colbert*, 344 S.W.2d 115 (Mo. 1961), *cert. denied*, 369 U.S. 822 (1962); *State v. Clay*, 11 S.W.3d 706 (Mo. App. W.D. 1999). The state does not lose jurisdiction by turning the defendant over to federal officials for a federal trial. *See Brown v. State*, 452 S.W.2d 176 (Mo. 1970).

IV. Improper Venue

A. (§13.29) General Venue Principles

The Sixth Amendment to the United States Constitution guarantees trial by a jury of the state and district in which the crime was committed. *State v. Garrett*, 416 S.W.2d 116, 118–19 (Mo. 1967). Section 541.033, RSMo Supp. 2004, provides that prosecutions shall be in any county where an element of the offense was committed. Failure to prove venue can be fatal to the state's case. When the evidence is insufficient to support a finding that venue for the charge of conviction was properly laid, a conviction cannot stand. *State v. Poelker*, 378 S.W.2d 491 (Mo. banc 1964).

Venue is a question of fact that ordinarily must be decided by the jury. *United States v. Miller*, 111 F.3d 747 (10th Cir. 1997); *State v. Seaton*, 817 S.W.2d 535, 536 (Mo. App. E.D. 1991). But venue is not an integral part of an offense and does not need to be proved beyond a reasonable doubt or by direct evidence, but may be inferred by all the evidence. *State v. Lingar*, 726 S.W.2d 728, 732 (Mo. banc 1987), *cert. denied*, 484 U.S. 872 (1987); *but see United States v. Netz*, 758 F.2d 1308 (8th Cir. 1985) (proof of venue is an essential element of the government's case). If the evidence of venue is in conflict, the defendant is entitled to a jury instruction regarding it. *Id.*

Complaints regarding proper venue are waived if the defendant fails to object at trial or before. *State v. Leigh*, 423 S.W.2d 690 (Mo. 1968); *State v. Davis*, 107 S.W.3d 410 (Mo. App. W.D. 2003) (defendant filed motion for change of venue out of time by filing it over a year after arraignment and two months before trial); *Winningham v. State*, 646 S.W.2d 145 (Mo. App. S.D. 1983). But if the defendant has no notice of the defect until the government rests its case, an objection is timely at the close of the evidence. *Netz*, 758 F.2d 1308.

When a defendant requests a change of venue, there is no guarantee that the defendant will be transferred to a venue with a similar racial makeup as the original venue. *State v. Brooks*, 960 S.W.2d 479, 487 (Mo. banc 1997), *cert. denied,* 524 U.S. 957 (1998).

B. (§13.30) Special Venue Statutes

Special venue statutes apply to specific offenses. *See, e.g.*:

- § 565.001.4, RSMo 2000, homicide;
- § 541.035, RSMo 2000, failure to file reports;
- § 541.110, RSMo 2000, accessory to a felony;
- § 541.060, RSMo 2000, receiving stolen property.

Special venue statutes apply to special circumstances. *See, e.g.*:

- § 541.040, RSMo 2000, larceny in another state;
- § 541.080, RSMo 2000, wounded in one county, died in another;
- § 541.070, RSMo 2000, stolen property taken into another county;
- §§ 541.090 and 541.100, RSMo 2000, wounded in one state, died in another.

C. (§13.31) Pleading and Proving Venue

It is sufficient to state the venue by naming the county or jurisdiction in the caption of the indictment or information. Rule 23.02(a). MACH-CR forms contain a reference to the venue in the body of the approved charging documents. An allegation of improper venue or the failure to allege venue is not grounds to dismiss. Rule 23.11; § 545.030.1(8), (9), RSMo 2000. In determining the sufficiency of evidence of venue, courts may take judicial notice of the location of cities, *State v. Hines*, 645 S.W.2d 88 (Mo. App. W.D. 1982), and of the official highway map of the state of Missouri, *State v. Seaton*, 817 S.W.2d 535, 536 (Mo. App. E.D. 1991).

D. Right to Change of Venue

1. (§13.32) Inflammatory Publicity

The Sixth Amendment and the Fourteenth Amendment Due Process Clause of the United States Constitution and article I, §§ 10 and 18(a), of the Missouri Constitution guarantee a fair trial by an impartial jury.

The defendant may move to dismiss based on a violation of these rights on the basis that the defendant cannot get an impartial jury because invidious or inflammatory publicity has corrupted the trial atmosphere. *See Rideau v. La.*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Murphy v. Fla.*, 421 U.S. 794 (1975). But in addition to dismissal, counsel should seek a less drastic remedy such as a change of venue. *State v. Crawford*, 416 S.W.2d 178, 183–84 (Mo. 1967) (no error in overruling motion to dismiss because defendant did not ask for a continuance or a change of venue).

There is no presumption of prejudice from pretrial publicity. *See Patton v. Yount*, 467 U.S. 1025 (1984). To establish juror partiality, the defendant must show either actual prejudice or circumstances so pervasive that a presumption of prejudice arises. Instances in which courts have found "presumed prejudice" to a defendant include:

- when, in a trial for kidnapping and rape, women spectators were in the courtroom wearing buttons stating "Women Against Rape," *Norris v. Risley*, 918 F.2d 828, 831–32 (9th Cir. 1990); and
- when the court determined that jurors had watched a TV news report of trial, *United States v. Davis*, 60 F.3d 1479, 1485 (10th Cir. 1985).

The possibility of succeeding with such a motion is greater when the adverse publicity was instigated or encouraged by prosecutorial misconduct. *See United States v. Sweig*, 316 F. Supp. 1148 (S.D.N.Y. 1970).

2. (§13.33) Other Reasons

A change of venue may be requested by the defendant for some reasons, other than to move to the district where the crime occurred, within ten days after the initial plea. Rule 32.02 (by agreement); Rule 32.03 (as a matter of right in some counties); Rule 32.04(b) (for cause). Section 541.033, RSMo Supp. 2004, states that prosecutions shall be in any county where an element of the offense was committed. Section 541.120, RSMo 2000, provides that, if at any time before verdict or judgment it appears the venue is wrong, the court may order that the proceedings be transferred to the proper county. Section 541.130, RSMo 2000, provides that a discharge of the jury in such a trial is without prejudice to further prosecution.

E. (§13.34) Waiver of Venue

Venue can be waived if lack of proper venue is apparent on the face of the indictment and there is no objection before trial. But if the defendant has no notice of the defect until the government rests its case, an objection is timely at the close of the evidence. *United States v. Netz*, 758 F.2d 1308 (8th Cir. 1985). If the court, on its own motion or on that of the state, declares a mistrial at that point and transfers the case to another district, it appears that retrial may be barred by double jeopardy.

V. (§13.35) Defects in Information

In Missouri, the state can initiate charges either by submitting a case to the grand jury or by filing a complaint and information. Without an indictment or information, the court has no jurisdiction to proceed, and this lack may even be raised for the first time on appeal. *State v. McQueen*, 282 S.W.2d 539 (Mo. 1955); MO. CONST. art. I, § 17. If the original of an indictment or information is unavailable, a copy certified by the court clerk or prosecuting attorney may be substituted. Rule 23.09.

A. (§13.36) Lack of Preliminary Examination

A defendant may file a motion to dismiss if the state fails to give the defendant a preliminary hearing before filing an information, but the more likely remedy courts will grant, if requested early on, is remand for a preliminary hearing. At the preliminary hearing, the state must present evidence that there is probable cause to believe that the defendant committed a felony. If the court makes this finding, it should bind the defendant over to the circuit court to answer to the charge. Rule 22.09; § 544.250, RSMo 2000; *State v. Mattic*, 84 S.W.3d 161 (Mo. App. W.D. 2002); *Lambus v. Kaiser*, 176 S.W.2d 494 (Mo. banc 1943). Proceeding to trial without objection is a waiver of the lack of a preliminary examination. Rule 24.04(b); *State v. Simpson*, 846 S.W.2d 724 (Mo. banc 1993); *State v. McBride*, 685 S.W.2d 953, 954 (Mo. App. S.D. 1985). The defendant is not entitled to a preliminary hearing on misdemeanors.

B. (§13.37) Defects in Preliminary Examination

The associate circuit judge is the sole judge of the evidence in the preliminary hearing; in the absence of fraud or purely arbitrary or malicious action by the judge, the judge's finding is conclusive. *State*

v. Admire, 495 S.W.2d 132 (Mo. App. W.D. 1973). Under Rule 22.09(b), the court is only required to find that "a felony" has been committed by the defendant to order that the defendant be held to answer to charges. *State v. Hadley*, 736 S.W.2d 580, 586 (Mo. App. S.D. 1987); *State ex rel. Thomas v. Crouch*, 603 S.W.2d 532, 535 (Mo. banc 1980) (judge of preliminary hearing is not required or authorized to make specific findings as to what degree of an offense should be charged).

The defendant has a Sixth Amendment right to an attorney at the preliminary examination, *State v. Barnard,* 820 S.W.2d 674, 679 (Mo. App. W.D. 1991); *Coleman v. Ala.*, 399 U.S. 1 (1970), and has a right to cross-examine state witnesses and to present evidence on the defendant's own behalf, Rule 22.09(b). Denial of these rights may be raised as defects affecting the validity of the preliminary hearing requiring remand or dismissal, but there must be a showing of prejudice. *Knight v. State*, 491 S.W.2d 282, 284–85 (Mo. 1973). If the judge finds no probable cause at the preliminary examination, the information cannot be filed in circuit court alleging that offense, but the defendant may be recharged by complaint and a new preliminary hearing held, or the defendant may be indicted by a grand jury. *Chamberlain v. State*, 721 S.W.2d 139 (Mo. App. E.D. 1986); *State v. Stewart*, 615 S.W.2d 600 (Mo. App. W.D. 1981).

Issues pertaining to preliminary hearings are not cognizable in a proceeding considering a post-conviction motion to vacate sentence. *Wright v. State,* 684 S.W.2d 412, 413 (Mo. App. E.D. 1984).

VI. Defects in Contents of Charges

A. (§13.38) Generally

Counsel may raise objections to an information or indictment by request for a bill of particulars, a motion to dismiss, or both. Rule 23.04; *State v. Austin*, 861 S.W.2d 334 (Mo. App. S.D. 1993). Defects in the charging proceedings must be raised before a plea is entered or soon thereafter. Rule 24.04(b). A defendant will only be granted relief based on a posttrial claim that an information is insufficient if the defendant demonstrates actual prejudice. *State v. Pride*, 1 S.W.3d 494, 503 (Mo. App. W.D. 1999).

Appellate courts find reversible error based on charging errors only for violations that cause actual prejudice to the defendant, and courts allow liberal amendments to correct or supply nonessential elements.

See, *e.g.*, *State v. Logan*, 941 S.W.2d 728 (Mo. App. E.D. 1997) (indictment not necessarily insufficient because statutory references were omitted or the wrong statute was cited). Therefore, counsel should be wary of older cases in this area that find error on technical grounds.

B. Failure to Allege an Offense

1. (§13.39) Basic Requirements of Criminal Charge

The Fourteenth Amendment requirement of due process of law incorporates the Sixth Amendment requirement that an accused in a criminal prosecution has the right to be informed of the nature and cause of the accusation. Article I, § 18(a), of the Missouri Constitution has a similar protection. *State v. Davis*, 963 S.W.2d 317, 326 (Mo. App. W.D. 1997). Rule 23.01(b)(2) states that an indictment or information must state "plainly, concisely, and definitely the essential facts constituting the elements of the offense charged." The test for the sufficiency of an indictment or information is whether it contains the essential elements of the offense charged as set out in the offense statute(s). *State v. Williams*, 126 S.W.3d 377, 380 (Mo. banc 2004). The charge should state the necessary *mens rea*. *Id.* at 382–83; § 562.021.3, RSMo 2000 (if no *mens rea* stated in statute, mental state is knowingly or purposely).

Generally, informations and indictments that follow the language of the statute are sufficient. Section 545.030, RSMo 2000; *State v. Gillespie*, 336 S.W.2d 677 (Mo. 1960); *State v. Mondaine*, 646 S.W.2d 372 (Mo. App. W.D. 1982); *State v. Hasler*, 449 S.W.2d 881 (Mo. App. E.D. 1969). But if a statute uses a generic term to define an offense, it is necessary to recite specific conduct to inform the accused of the charges. A term is "generic" when it does not proscribe specific conduct by which the offense is perpetrated. *State v. O'Connell*, 726 S.W.2d 742 (Mo. banc 1987) (the word "deceit" is not generic because statute describes behavior constituting "deceit"). *O'Connell* limits the rule in *State v. Kesterson*, 403 S.W.2d 606 (Mo. 1966), which held that the word "deceit" in the theft statute was generic and required that the state make specific allegations of how the deceit was carried out.

An information does not need to follow the language of the statute, however. *State v. Simone*, 416 S.W.2d 96 (Mo. 1967) (sufficient when words of similar import are used). The Supreme

Court has approved pattern charge forms (Missouri Approved Charges hereafter "MACH-CR") for many offenses. Rule 23.01(b) states that any charge that is consistent with these forms shall be deemed to comply with the requirements of Rule 23.01(b). The use of the pattern forms is recommended but not required. *State v. Mitchell*, 611 S.W.2d 223 (Mo. banc 1981). If the information follows the MACH-CR form, it is sufficient even if it fails to allege the culpable mental state. *Williams*, 126 S.W.3d 377 (information was insufficient because it did not contain substantial step as necessary element of attempt; but no error because no actual prejudice to defendant shown); *State v. Schleiermacher*, 924 S.W.2d 269 (Mo. banc 1996); *State v. Watson*, 850 S.W.2d 372 (Mo. App. E.D. 1993).

2. (§13.40) Purpose of Charging Instrument

A sufficient charging instrument serves three purposes:

1. To inform the accused of the charges so a defense can be prepared
2. To prevent retrial on the same charges in case of an acquittal
3. To inform the court of facts alleged so the court can determine if those facts as alleged are sufficient as a matter of law to withstand motions to dismiss or to support a conviction if one is to be had

State v. McCullum, 63 S.W.3d 242 (Mo. App. S.D. 2001).

3. (§13.41) Remedy for Insufficiency

If an indictment or information alleges essential facts constituting an offense but fails to inform the defendant of the particulars of the offense sufficient to prepare a defense, the court may, on motion by the defendant, direct the state to file a bill of particulars. Rule 23.04.

4. (§13.42) Technical Charging Requirements

An indictment or information should state the:

- name of the defendant;
- facts constituting the elements of the offense, including the facts necessary for enhanced punishment;

- date and place as definitely as can be done;
- name and degree of the charged offense; and
- statutory section proscribing the offense and the penalty for it.

Rule 23.01. The indictment or information must be signed by the prosecuting attorney. *Id. See also* Rules 37.33, *et seq.* (charging requirements for ordinance violations); *City of Bellefontaine Neighbors v. Meziere*, 926 S.W.2d 875 (Mo. App. E.D. 1996) (ordinance violation conviction reversed because charge was ambiguous).

Rule 23.02 sets forth how venue, joint ownership, value, and description of instruments, property, plates, money, and notes may be pleaded, as well as how intent to injure, cheat, and defraud may be pleaded. If charges are filed with an incorrect name of the defendant, the defendant may furnish the correct name, and it will be substituted in the indictment or information. Rule 23.07.

An indictment must also be signed by the foreperson of the grand jury. But the lack of the prosecutor's signature is a minor defect and does not deprive the court of jurisdiction unless the defendant alleges and proves resultant prejudice. *State v. Knight*, 764 S.W.2d 656 (Mo. App. E.D. 1988); *Walster v. State*, 438 S.W.2d 1 (Mo. 1969).

The omission of or the incorrect citation of the statute is not fatal. *State v. Hurtt,* 807 S.W.2d 185, 187 (Mo. App. S.D. 1991*, but see State v. Boshers*, 848 S.W.2d 36 (Mo. App. W.D. 1993). Omission of the statutory section number is not error absent a showing of prejudice. *Knight*, 764 S.W.2d at 658. The statutory citation does not validate an information or indictment that is otherwise insufficient, and it does not establish what offense is charged. *City of Kansas City v. Harbin*, 600 S.W.2d 589, 592 (Mo. App. W.D. 1980).

Rule 23.01(e) requires the state to endorse the names of material witnesses on the indictment or information. The failure to have any witnesses so endorsed is not grounds for dismissal because not all witnesses are required to be listed. But if the state fails to disclose the names and addresses of witnesses before trial, as required by Rule 25.03(A)(1), the defense may ask the court to exclude the testimony of unidentified witnesses.

5. (§13.43) Effect of Failure to Allege Element After *State v. Parkhurst*

Any defect that does not prejudice the substantial rights of the defendant will not invalidate an information or indictment. Rule 23.11; s*ee also* § 545.030, RSMo 2000 (listing defects that will not invalidate an information or indictment). Failure to allege an essential element in the information does not automatically require reversal. If the defense waits until after a conviction to contest the sufficiency of the charging document, the defendant is entitled to "narrow review," under which the charging document will be deemed insufficient only if it is so defective that "(1) it does not by any reasonable construction charge the offense of which the defendant was convicted or (2) the substantial rights of the defendant to prepare a defense and plead former jeopardy in the event of an acquittal are prejudiced." *State v. Williams*, 126 S.W.3d 377, 380 (Mo. banc 2004) (quoting *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo. banc 1992)); *State v. King*, 851 S.W.2d 800 (Mo. App. S.D. 1993); *see also State v. Kurt*, 858 S.W.2d 873 (Mo. App. E.D. 1993) (must object and show prejudice).

Before the decision in *Parkhurst*, 845 S.W.2d 31, courts found error based on technical deficiencies in charging documents. Courts held that nothing that was material to the charge would be taken by intendment or implication. *See, e.g.*, *State v. Bartlett*, 394 S.W.2d 434 (Mo. App. S.D. 1965); *State v. Cantrell*, 403 S.W.2d 647 (Mo. 1966); *State v. Simone*, 416 S.W.2d 96 (Mo. 1967). It was also long held that, if the indictment or information was defective for failing to be a plain and definite statement of facts constituting an offense, the court acquired no jurisdiction to proceed. *State v. Kerr*, 531 S.W.2d 536 (Mo. App. W.D. 1975); *State v. Gilmore*, 650 S.W.2d 627 (Mo. banc 1983). The same was true as to indictments. *State v. Bolin*, 643 S.W.2d 806 (Mo. banc 1983).

But *Bartlett,* 394 S.W.2d 434, was overruled in *King*, 851 S.W.2d 800. Relying on *Parkhurst*, 845 S.W.2d 31, the court in *King* held that statutory elements may be supplied by intendment or implication if the defendant does not raise the issue of insufficiency in a timely manner in accordance with Rule 24.04(b). In *State v. Briscoe*, 847 S.W.2d 792 (Mo. banc 1993), the Court also held that defects in the charging document do not deprive the court of jurisdiction.

6. (§13.44) Standard for Reversal Based on Defects

The Supreme Court explained the standard for review in *State v. Isa*, 850 S.W.2d 876, 887 (Mo. banc 1993):

> We no longer treat indictments and informations as magical incantations that permit defendants to escape if the verbal charms are uttered improperly. The state constitution guarantees a defendant only the right to "demand the nature and cause of the accusation." Mo. Const. art. I, § 18(a). . . . This guarantee assures that defendants will have notice of the charge, be able to prepare a defense, and avoid double jeopardy.

C. (§13.45) Amendments to Charging Documents

A prosecutor is entitled to exercise discretion as to whether to proceed by indictment or information. Section 545.010, RSMo 2000. The prosecutor can also file an information to supersede an indictment or take a case before a grand jury for a superseding indictment after an information has been filed, but the prosecutor may not proceed on both charges. *State v. McGee*, 757 S.W.2d 321 (Mo. App. W.D. 1988).

An information or indictment may be amended any time before verdict if there is no additional offense charged and the defendant's substantial rights are not prejudiced. Rule 23.08; *State v. Price*, 940 S.W.2d 534 (Mo. App. E.D. 1997) (no prejudice when charge amended from attempted rape to rape because same denial defense applied). An amended information alleging a different offense does not deprive the court of jurisdiction and is waived by the defendant proceeding to trial without objection. *State v. Simpson*, 846 S.W.2d 724 (Mo. banc 1993). The test of prejudice is whether the planned defense to the original charge would still be available after amendment. *State v. Love*, 88 S.W.3d 511, 517 (Mo. App. S.D. 2002).

An information may be filed as a substitute for an indictment as long as it does not allege an additional or different offense and the substantial rights of the defendant are not prejudiced. Section 545.300, RSMo 2000. An information may be amended under the same conditions. Rule 23.08; § 545.300; *see, e.g., State v. Amerson*, 661 S.W.2d 852 (Mo. App. S.D. 1983) (rape information may not be amended to charge sexual abuse in the first degree because it is not a lesser-included offense of rape, a mental state being an element).

An amended information may not be filed after trial when the original information did not allege an offense because without a valid

charge the court had no jurisdiction and should have dismissed. *State v. Urban*, 796 S.W.2d 599 (Mo. banc 1990), *cert. denied,* 500 U.S. 910 (1991).

D. (§13.46) Sufficiency—Miscellaneous Requirements

In a stealing or burglary offense, the indictment must allege the owner, occupier, or possessor, even though that is not an element of the offense, to show that the defendant was not the owner or person in custody. *State v. Weicht*, 23 S.W.3d 922 (Mo. App. S.D. 2000). In a burglary case, the description of the building is sufficient if the address is stated. *State v. Eaton*, 504 S.W.2d 12 (Mo. 1973).

Misdemeanor and ordinance informations do not require the same degree of specificity as felony informations, but they must still state with reasonable certainty facts that constitute an offense, and the defendant should not have to guess or speculate as to the meaning of the allegations. *State v. Muchnick*, 334 S.W.2d 386 (Mo. App. E.D. 1960); Rule 37.35; *City of Berkeley v. Stringfellow*, 783 S.W.2d 501, 502 (Mo. App. E.D. 1990).

Exceptions to criminal statutes that negate guilt must be alleged if those exceptions constitute a part of the description of the offense. *State v. McLemore*, 782 S.W.2d 127, 129–30 (Mo. App. E.D. 1989) (conviction under the ordinance requires negation that the weapon involved was both unloaded and secured in a locked container or in its original delivery carton).

E. (§13.47) Duplicity

Duplicity is when one count alleges more than one offense. *State v. Sellers*, 77 S.W.3d 2 (Mo. App. W.D. 2002), *reh'g, transfer denied.* A single offense should normally be charged in one count rather than several, even if different means of committing the offense are alleged. *Sanabria v. United States,* 437 U.S. 54, 66 (1978). Each offense should be charged in a separate count, and counts that are similar in character or are based on two or more related acts should be charged together. Rule 23.05. When an information alleges an offense that may be accomplished in several ways that are charged in the conjunctive, it is not duplicitous. *Ryan v. State*, 634 S.W.2d 529 (Mo. App. W.D. 1982).

Counsel may file a motion to dismiss a duplicitous count. *United States v. Adesida*, 129 F.3d 846, 849 (6th Cir. 1997) (count duplicitous

because charged both conspiracy and attempt to import heroin; conviction could result from less than unanimous verdict as to each charge). Counsel should also request a curative instruction explaining the state's increased burden of proof. *See, e.g., United States v. Verrecchia*, 196 F.3d 294, 297–98 (1st Cir. 1999); *United States v. Gordon*, 844 F.2d 1397, 1401 (9th Cir. 1988).

But sometimes duplicity reduces the number of counts (avoiding the risk of consecutive sentences) and increases the prosecutor's burden of proof and is not so confusing that it prejudices the defendant. *See, e.g., State v. Bradley*, 811 S.W.2d 379, 381 (Mo. banc 1991) (defendant charged with kidnapping two victims at the same time; court instructed jury that it must find that both victims were kidnapped with forcible compulsion).

F. (§13.48) Multiplicity

Multiplicity arises when a single offense has been fragmented into more than one count. The Fifth Amendment to the Constitution prohibits this because it places a defendant twice in jeopardy for the same offense. *United States v. Honken*, 271 F. Supp. 2d 1097 (N.D. Iowa 2003). Therefore, counsel should file a motion to dismiss multiplicitous counts. Multiplicity requires an election by the state, and duplicity requires striking all but one offense or amending to state separate counts. *See United States v. Brandom*, 320 F. Supp. 520 (W.D. Mo. 1970); *State v. Harlston*, 565 S.W.2d 773 (Mo. App. E.D. 1978).

Determining whether counts are multiplicitous requires a double jeopardy analysis. *See* §§13.68–13.79, *infra*.

G. (§13.49) Disjunctive Charges

Allegations that are charged disjunctively may be a source of prejudice for a defendant and warrant a motion to dismiss before trial to correct. Disjunctive charges may make it impossible to tell if a verdict (or indictment) was unanimous. When the state charged the defendant in the disjunctive with keeping a gaming table by unlawfully maintaining either a craps table or a poker table, the court reversed the conviction, holding that it was impossible to tell if the jury had reached a unanimous verdict. *State v. Marks*, 721 S.W.2d 51 (Mo. App. W.D. 1986). When an information alleged two distinct acts in the alternative and not in the conjunctive, the court held that it failed to allege the commission of either. *See State v.*

Hook, 433 S.W.2d 41 (Mo. App. W.D. 1968) (when statute prohibits several distinct acts alternatively, information charging more than one act must charge conjunctively); *State v. Hartman*, 273 S.W.2d 198 (Mo. banc 1954); *see also* MO. CONST. art. I, § 19 (double jeopardy).

But when the issue is first raised on appeal, the defendant must show actual prejudice or manifest injustice to be entitled to relief. *State v. Baker*, 103 S.W.3d 711, 721–22 (Mo. banc 2003) (defendant charged in the disjunctive with possessing several chemicals with the intent to manufacture methamphetamine; court stated that the evidence supported a finding that defendant possessed all of the chemicals).

VII. Prosecutorial Misconduct

A. (§13.50) General Misconduct

If the state uses improper methods to obtain a conviction, it may so infect the trial as to make the resulting conviction a denial of due process and grounds for a mistrial. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). For instance, the state may not comment on the defendant's failure to testify at trial, *Griffin v. Cal.*, 380 U.S. 609, 615 (1965), or express a personal opinion that the defendant is guilty, *United States v. Galloway*, 316 F.3d 624, 632–33 (6th Cir. 2003). The Double Jeopardy Clause prevents retrial when a defendant requests a mistrial because of prosecutorial misconduct only if the court makes a finding that the state intended to provoke the defendant into asking for a mistrial. *State v. Walker*, 130 S.W.3d 18 (Mo. App. E.D. 2004).

B. (§13.51) Selective Prosecution

Prosecutors have a great deal of discretion to file charges as they see fit. *State v. Patino*, 12 S.W.3d 733 (Mo. App. S.D. 1999). But counsel may file a motion to dismiss for selective prosecution if a client has been charged for an impermissible reason. *See Oyler v. Boles*, 368 U.S. 448 (1962). The facts necessary to support such a ground are extremely difficult to establish. *See Wayte v. United States*, 470 U.S. 598 (1985). In *United States v. Bourque*, 541 F.2d 290 (1st Cir. 1976), it was held that a defendant must show that the government normally has not prosecuted others for the crime with which the defendant is charged and that the decision to prosecute was made on impermissible motive, such as race or religion, or in retaliation for the defendant's attempt to secure constitutional rights. *United States v. Kelley*, 152 F.3d 881 (8th Cir. 1998); *State v. Anderson*, 79 S.W.3d 420 (Mo. banc 2002), *cert. denied,* 537 U.S. 898 (2002). The burden of

proof shifts to the government after evidence raises a doubt as to the prosecutor's motives. *United States v. Graham*, 323 F.3d 603 (8th Cir. 2003); *State v. Juarez*, 26 S.W.3d 346 (Mo. App. W.D. 2000). Not all courts follow this standard. *See United States v. Raven*, 500 F.2d 728 (5th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975).

It may be alleged, for instance, that prosecution was instituted in retaliation for the defendant's exercise of a constitutional right, *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972), or because of personal vindictiveness on the part of the prosecutor or a responsible member of the administration, *Moss v. Hornig*, 314 F.2d 89 (2nd Cir. 1963). Equal protection may play a strong part in such a motion.

When sufficient grounds are alleged, a hearing should be held. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961).

C. (§13.52) Vindictive Prosecution

Closely related to and often concurrent with discriminatory or selective prosecution is vindictive prosecution. Vindictiveness may come about as a result of the prosecutor's personal ill will toward the defendant. *Moss v. Hornig*, 314 F.2d 89 (2nd Cir. 1963); *United States v. Bourque*, 541 F.2d 290 (1st Cir. 1976). Personal animus of the prosecuting attorney may disqualify the prosecuting attorney from prosecuting the case. *See State v. Tyler*, 587 S.W.2d 918, 929 (Mo. App. W.D. 1979); *State v. Harris*, 477 S.W.2d 42 (Mo. 1972). But a prosecuting attorney is not prohibited from bringing charges just because the prosecuting attorney does not like a particular defendant. Something more must be present. Dismissal on these grounds does not prevent recharging by another prosecutor. *In re November 1979 Grand Jury Velsicol Chem. Corp. v. United States*, 616 F.2d 1021 (7th Cir. 1980).

A prosecutor cannot increase the charge against the defendant in retaliation for the defendant's exercise of a statutory or constitutional right. *State v. Quimby*, 716 S.W.2d 327 (Mo. App. W.D. 1986) (defendant asked for jury trial on misdemeanor; court held that state was vindictive when it dismissed the misdemeanors and filed felonies); *State v. Cayson*, 747 S.W.2d 155 (Mo. App. W.D. 1987); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972). The mere opportunity for vindictiveness is not enough to require dismissal. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Court held that, when a defendant had successfully challenged a conviction, a later

increase in punishment for the same offense was presumptively vindictive unless the increase resulted from the defendant's conduct after the original sentencing.

In *Thigpen v. Roberts*, 468 U.S. 27 (1984), the Court held that the prosecution of a defendant for a felony following the exercise of his statutory rights to appeal from four misdemeanor convictions carried a presumption of unconstitutional prosecutorial vindictiveness. Some cases refer to this as an "appearance of vindictiveness." *United States v. Andrews*, 612 F.2d 235 (6th Cir. 1979). When this occurs, the burden of rebuttal falls on the prosecution to show the absence of vindictiveness.

Other courts have required that actual vindictiveness be proved. *Ala. v. Smith*, 490 U.S. 794 (1989) (no presumption of vindictiveness when first sentence based on guilty plea and second sentence followed trial). If there is no reasonable likelihood of vindictiveness, the defendant must prove actual vindictiveness. *Id.* at 798–99; *Miracle v. Estelle*, 592 F.2d 1269 (5th Cir. 1979).

The Supreme Court held in *Blackledge v. Perry*, 417 U.S. 21 (1974), that a charge cannot be increased after the defendant invokes the right to a jury trial *de novo* unless the prosecution establishes objective evidence that the increased charge could not have been brought before the defendant exercised that right. Otherwise, the increase denies due process. But in *United States v. Goodwin*, 457 U.S. 368 (1982), the Court approved an increase in the charge after the defendant demanded a jury trial. There was no evidence that the increase was vindictive, and the change came pretrial. The Court distinguished *Blackledge* on that basis and said that an "initial decision should not freeze future conduct." *Id.* at 382. It was held that, to establish a due process violation, the defendant must prove objectively that the prosecutor's decision was motivated by a desire to punish the defendant for exercising the defendant's rights. *See also State v. Cortez-Figueroa*, 855 S.W.2d 431 (Mo. App. W.D. 1993).

A prosecutor's use of procedural rights that increases the chance of conviction without increasing the severity of the charge is permissible. *United States v. Motley*, 655 F.2d 186 (9th Cir. 1981). Bringing criminal charges after a defendant brings a civil suit is not impermissible vindictiveness. *United States v. Stacey*, 571 F.2d 440 (8th Cir. 1978).

A defendant may also seek to prevent vindictive or selective prosecution by means of federal court intervention. See, however, the requirements of *Younger v. Harris*, 401 U.S. 37 (1971). Outrageous government conduct, which is akin to entrapment, may lead to a dismissal.

VIII. (§13.53) Defects in Certification of Juveniles

A motion to dismiss is a means of attack on defects in an improper certification of a juvenile for trial as an adult. *State v. Abbott*, 654 S.W.2d 260 (Mo. App. S.D. 1983). In the discretion of a juvenile judge, a juvenile between the ages of 12 and 17—or in the case of some serious felonies a juvenile of any age—who has committed an offense that would be a felony if committed by an adult may be tried as an adult. Section 211.071, RSMo 2000. There must first be an investigation and report, a hearing in the presence of the child and the child's attorney, and a finding that the child is not a proper subject to be dealt with under the juvenile law. A defendant who fails to attack any defects in this procedure before trial as an adult waives the ability to challenge the procedure. *Jefferson v. State*, 442 S.W.2d 6 (Mo. 1969).

IX. Statute of Limitations

A. (§13.54) Statutory Provisions

If the state files criminal charges after statutory time frames have expired, counsel should file a motion to dismiss. Section 556.036, RSMo Supp. 2004, sets out the general time limitations for the commencement of criminal charges and outlines what circumstances will toll the running of the statute. The period of limitation does not run when the defendant is absent from Missouri or is "concealing himself from justice either within or without" Missouri or when a prosecution is pending against the defendant. Section 556.036.6.

There are exceptions to this general limitations statute. For instance, § 556.037, RSMo Supp. 2004, provides that prosecution for sexual offenses involving a person 18 years of age or under must be commenced within 20 years after the victim reaches the age of 18. If prosecution is for "forcible rape, attempted forcible rape, forcible sodomy, kidnapping, or attempted forcible sodomy," prosecution may start at any time. *Id*.

B. (§13.55) Waiver of Statute of Limitations

Statutes of limitation are generally viewed with favor. *But see State ex rel. Robinson v. Hartenbach*, 754 S.W.2d 568 (Mo. banc 1988). To claim the protection of a statute of limitations, counsel must file a motion to dismiss or the claim is waived. Rule 24.04(b)2. *Longhibler v. State*, 832 S.W.2d 908 (Mo. banc 1992), held that limitations are not jurisdictional and may be waived (overruling *State v. McKinney*, 768 S.W.2d 178 (Mo. App. E.D. 1989), and *State v. Civella*, 364 S.W.2d 624 (Mo. App. W.D. 1963)).

C. (§13.56) Dismissal Based on Face of Charging Instrument

The indictment or information must allege that the offense was within the period of limitations by alleging the date of the offense; if the statute was tolled, facts showing tolling must be pleaded and proved. *State v. Colvin*, 223 S.W. 585 (Mo. 1920). Proof of a different date during the trial than that alleged is sufficient as long as it is within the period unless the date is an element of the offense. *State v. Glazebrook*, 242 S.W. 928 (Mo. 1922); *see also State v. Negron*, 374 S.W.2d 622 (Mo. App. W.D. 1963). If there is a conflict in evidence as to the date of the offense, the issue is for the jury. *State v. Ford*, 228 S.W. 480 (Mo. 1921).

D. (§13.57) Calculating Period of Limitation

"An offense is committed either when every element [of it] occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity" in it terminates. Section 556.036.4, RSMo Supp. 2004. Time starts to run on the day after the offense is committed. *Id. See Tucker v. Kaiser*, 176 S.W.2d 622 (Mo. banc 1944). The filing of the information, not the complaint, marks the commencement of prosecution, which tolls the period of limitation. *State v. Bithorn*, 278 S.W. 685 (Mo. 1925).

Previously, even if an indictment or information was so defective as to require dismissal, it would still toll the statute of limitations. Section 541.230, RSMo (repealed in 1977), cited in *State ex rel. Lodwick v. Cottey*, 497 S.W.2d 873 (Mo. App. W.D. 1973). Now, only an amended indictment or information that charges the same offense as the original indictment or information will toll the statute. *State v. Robertson*, 764 S.W.2d 483 (Mo. App. W.D. 1989) (statute of

limitations was not tolled during the time defendant was being charged under an invalid amended information, which charged a different offense than the original charge); *but see State v. Stein*, 876 S.W.2d 623, 626 (Mo. App. E.D. 1994) (charges will toll statute of limitations if they are sufficient to inform defendant of the charges). The pendency of a lesser-included charge does not toll the statute of limitations of the greater charge, but a lesser-included charge is deemed charged by the greater offense. *State ex rel. Wickline v. Casteel*, 729 S.W.2d 56, 59 (Mo. App. S.D. 1987); *see also State v. Boshers*, 848 S.W.2d 36 (Mo. App. W.D. 1993) (when charge was not just defective but was void because it did not state an offense, statute of limitations was not tolled).

E. (§13.58) Effect of "Continuing Course of Conduct" Charges

If a legislative intent to prohibit a continuing course of conduct plainly appears, an offense is committed at the time when the course of conduct is terminated. Section 556.036.4, RSMo Supp. 2004. Section 564.016.6, RSMo 2000, clearly states that conspiracy is a continuing course of conduct that terminates, for statute of limitations purposes, when the offenses that are its object are committed or the agreement is abandoned by the defendant or other conspirators.

The Missouri legislature did not define receipt of stolen property as a "continuing offense" as it did the offense of conspiracy. Section 570.080, RSMo Supp. 2004. Misdemeanor incidents of theft or receipt of stolen property (under $500) may be aggregated to be charged as felonies. *Id*. Missouri courts have not decided whether each aggregated incident must fall within the period of limitations or whether the period of limitations begins to run when the last incident occurs. A Florida court has held that, when incidents are aggregated under similar statutes for theft, the state may only aggregate those incidents within the statute of limitations because to hold otherwise would lead to stale prosecutions. *State v. Diaz*, 814 So.2d 466, 467 (Fla. Dist. Ct. App. 2002).

F. (§13.59) Other Interpretations

It has been held that the misdemeanor statute of limitations bars prosecution when the charge was reduced from a felony and the defendant pleaded guilty to the reduced charge. *State v. Civella*, 364 S.W.2d 624 (Mo. App. W.D. 1963), *overruled by Longhibler v. State*,

832 S.W.2d 908 (Mo. banc 1992). But the Court in *State v. Leisure*, 796 S.W.2d 875 (Mo. banc 1990), found that the defendant waived any objection by accepting the plea. Criminal contempt is not barred by the one-year statute of limitations if it is based on the court's inherent supervisory power, *Osborne v. Owsley*, 264 S.W.2d 332 (Mo. banc 1954), *cert. denied*, 348 U.S. 822 (1954), but is barred by the one-year time limit if it is based on the contempt statute, § 476.110(3), RSMo 2000, § 556.036.2(2), RSMo Supp. 2004; *State ex rel. Robinson v. Hartenbach*, 754 S.W.2d 568 (Mo. banc 1988).

X. Denial of Speedy Trial

A. (§13.60) Constitutional Provisions

The Fourteenth Amendment's Due Process Clause makes the Sixth Amendment guarantee of a speedy trial applicable to the states. *Klopfer v. N.C.*, 386 U.S. 213 (1967). Article I, § 18(a), of the Missouri Constitution has a similar guarantee. This guarantee protects defendants from intentional and prejudicial pre-accusation delay. *Barker v. Wingo*, 407 U.S. 514 (1972); *see also State v. Buckles*, 636 S.W.2d 914 (Mo. banc 1982); *State v. Dean*, 637 S.W.2d 409 (Mo. App. S.D. 1982).

B. (§13.61) *Barker v. Wingo* Analysis of Speedy Trial Violations

When a lengthy period of time passes between the time a defendant is charged and the time the defendant is brought to trial, a motion to dismiss based on a violation of the defendant's right to a speedy trial may be filed. Missouri courts have adopted the method of analysis set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), for deciding whether a defendant has been deprived of the right to a speedy trial: "This analysis involves the balancing of four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right to speedy trial; and (4) prejudice to the defendant." *State v. Davis*, 903 S.W.2d 930, 936 (Mo. App. W.D. 1995).

C. (§13.62) When Speedy Trial Right Begins

The speedy trial right commences when the defendant has been arrested, *Dillingham v. United States*, 423 U.S. 64 (1975), or charged, *United States v. Marion*, 404 U.S. 307 (1971). *See State v. Bolin*, 643 S.W.2d 806 (Mo. banc 1983). The right exists even if the defendant is in prison in another jurisdiction, and the state must make a good

faith effort to try to bring the defendant to trial. *Smith v. Hooey*, 393 U.S. 374 (1969); *Dickey v. Fla.*, 398 U.S. 30 (1970); *State v. Powers*, 612 S.W.2d 8 (Mo. App. S.D. 1980).

D. (§13.63) Presumptively Prejudicial Time Frames

Dismissal is the only remedy if the defendant has been denied a speedy trial. *Strunk v. United States*, 412 U.S. 434 (1973). If no objection and no demand for speedy trial is made, the right is waived. *State v. Harper*, 473 S.W.2d 419 (Mo. banc 1971). Seeking a continuance of trial may also waive the right. The nature of the case may justify a longer delay. *State v. Stulce*, 630 S.W.2d 91 (Mo. App. E.D. 1981). The court in *State v. Woodworth*, 941 S.W.2d 679, 694 (Mo. App. W.D. 1997), held that a delay of eight months or longer is presumptively prejudicial and mandates examination of the other three factors of the balancing test. But in *United States v. Brown*, 325 F.3d 1032 (8th Cir. 2003), *cert. denied,* 539 U.S. 953 (2003), the court said that, to trigger speedy trial analysis, the accused must allege that an interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, which generally occurs if delay is at least one year long.

E. (§13.64) Actual Prejudice Necessary

To require reversal, the defendant must show actual prejudice, apparent on the record or by reasonable inference, not speculative or possible prejudice. *State v. Perry,* 954 S.W.2d 554, 566 (Mo. App. S.D. 1997); *State v. Darnell*, 858 S.W.2d 739, 746 (Mo. App. W.D. 1993). In making the determination of prejudice, the court considers:

- the prevention of oppressive pretrial incarceration;
- the minimization of anxiety and concern of the accused; and
- limitation or possible impairment of the defense.

State v. Bolin, 643 S.W.2d 806, 815 (Mo. banc 1983).

F. (§13.65) Missouri Speedy Trial Legislation

In 1977, Missouri enacted legislation that placed a 180-day time limit within which a defendant had to be tried after arraignment. Section 545.780, RSMo 1978. That statute was amended in 1984 to delete the time limits. Section 545.780, RSMo 2000. The court should set the case for trial as soon as reasonably possible after a defendant announces ready for trial and files a request for speedy trial. The

remedy for a violation of the statute is by mandamus, and dismissal is not appropriate unless the defendant's constitutional right to a speedy trial has been denied. Section 545.780.2.

Section 544.676, RSMo 2000, provides that, when a defendant has been denied bond pending trial because the defendant was a danger to the victim, a witness, or the community, the defendant, upon demand filed at arraignment, is entitled to trial within 120 days unless the defendant asks for a continuance or bail is set.

G. (§13.66) Disposition of Detainers

The Uniform Mandatory Disposition of Detainers Law, §§ 217.450, *et seq.*, RSMo 2000, and the Agreement on Detainers, § 217.490, RSMo 2000, require that detainers (outstanding warrants for arrest) be disposed of within 180 days after demand by a prisoner either in Missouri or elsewhere. These laws ensure that the state disposes of all charges against a defendant as soon as possible. *State v. Sederburg*, 25 S.W.3d 172 (Mo. App. S.D. 2000) (case dismissed because no jurisdiction after 180 days elapsed); *State ex rel. Kemp v. Hodge*, 629 S.W.2d 353 (Mo. banc 1982). The request for disposition of detainers must be correctly served by delivery to the Director of the Division of Adult Institutions or it will not trigger the 180-day period. Section 217.455, RSMo 2000.

H. (§13.67) Due Process Denial Because of Charging Delay

Even when a speedy trial right does not apply, due process of law may be a basis for dismissal because of pre-arrest or pre-charging delay that caused the defendant actual prejudice. *United States v. Marion*, 404 U.S. 307 (1971); *State v. Griffin*, 848 S.W.2d 464 (Mo. banc 1993). *But see United States v. Lovasco*, 431 U.S. 783 (1977) (17-month delay for investigative purposes was not a denial of due process even though defendant was prejudiced by the death of two witnesses); *see also State v. Clark*, 859 S.W.2d 782 (Mo. App. E.D. 1993) (18-year delay okay). Missouri courts have held that the test for determining whether delay in filing an information requires dismissal is whether (1) the defendant was prejudiced by a delay that (2) was intended by the prosecutor to gain a tactical advantage. *State v. Bell*, 66 S.W.3d 157, 161 (Mo. App. S.D. 2001). In *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965), it was recognized that a deliberate delay in arrest can be so prejudicial that fundamental fairness requires dismissal. A defendant, however, has no right to be

arrested. *State ex rel. Corcoran v. Buder*, 428 S.W.2d 935 (Mo. App. E.D. 1968).

XI. Double Jeopardy

A. (§13.68) General Provisions

A motion to dismiss may be filed on the ground that the charges violate the prohibition against double jeopardy. The Fifth Amendment, through the Due Process Clause of the Fourteenth Amendment, prohibits twice placing an accused in jeopardy for the same offense. *Benton v. Md.*, 395 U.S. 784 (1969). Article I, § 19, of the Missouri Constitution has a similar prohibition. The state provision has been said to be more limited than the federal. *State v. Urban*, 796 S.W.2d 599 (Mo. banc 1990), *cert. denied,* 500 U.S. 910 (1991). Double jeopardy protects a defendant from successive prosecutions for the same offense after acquittal or conviction and prohibits multiple punishments for the same offense. *Peiffer v. State*, 88 S.W.3d 439 (Mo. banc 2002).

B. Tests for Double Jeopardy

1. (§13.69) Same Elements Test

There is a distinction between an offense and the unlawful act from which it arises, and the rule against placing a defendant in jeopardy for the same offense is directed to the identity of the offense, not the act. *State v. Whitley*, 382 S.W.2d 665 (Mo. 1964).

If a single act is charged in two different counts, each for a violation of a separate statutory provision, the test in *Blockburger v. United States*, 284 U.S. 299 (1932), applies to determine whether the offenses are the same. The test is whether each statute requires proof of an element that the other does not. *Id.* at 304. *Blockburger* prohibits successive prosecutions for greater- and lesser-included offenses. *See Rutledge v. United States*, 517 U.S. 292 (1996).

The statutory elements of each offense, not the evidence adduced at trial, should be used for this analysis. *State v. Gordon*, 948 S.W.2d 673 (Mo. App. E.D. 1997); *United States v. Stephenson*, 924 F.2d 753 (8th Cir. 1991).

2. (§13.70) Unit of Prosecution and Rule of Lenity Tests

When the government charges that a single act results in more than one violation of the same statute, federal courts apply a "unit of prosecution rule" and the "rule of lenity." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952). Basically, the courts look to see if Congress clearly expressed intent to allow multiple counts for a single act, and they find that there was no intent if not clearly expressed in the statute. In *United States v. Walker*, 380 F.3d 391 (8th Cir. 2004), the Eighth Circuit held that possession of a gun and ammunition can be charged separately. But all other federal circuits have found that possession of a gun and ammunition at the same time is one offense, using the "unit of prosecution" and "rule of lenity." *Walker*, 380 F.3d at 393–94.

Failure to move for dismissal before trial because of multiplicitous counts may result in waiver of the issue on appeal. *United States v. Brown*, 287 F.3d 684, 688 (8th Cir. 2002).

3. (§13.71) Legislative Intent Test

In *Missouri v. Hunter*, 459 U.S. 359 (1983), the Court held that double jeopardy was not violated by cumulative punishments for the same conduct as long as the legislature clearly intended that result. But if there is no legislative intent to impose cumulative punishments, the "same elements" test of *Blockburger v. United States*, 284 U.S. 299 (1932), is still used to determine whether one offense is a lesser-included charge of the other. *Hunter,* 459 U.S. at 367–68; *see, e.g.*:

- § 564.016.7, RSMo 2000 (prohibits state from prosecuting for conspiracy when there has already been a conviction for the substantive offense that was the target of the conspiracy);
- *State v. Angle,* 146 S.W.3d 4 (Mo. App. W.D. 2004) (conviction of a defendant on both conspiracy to manufacture methamphetamine and possessing chemicals to use to manufacture methamphetamine violates double jeopardy);
- *State v. Flenoy*, 968 S.W.2d 141 (Mo. banc 1998) (offense statute states that punishment imposed should be in addition to punishment for commission of related felony);
- *State v. Davis*, 849 S.W.2d 34 (Mo. App. W.D. 1993);
- *State v. Owens*, 849 S.W.2d 581 (Mo. App. W.D. 1993).

If two offenses are not the same for purposes of barring multiple punishments at a single trial, they will necessarily not be the same for purposes of barring successive prosecutions. *United States v. Dixon*, 509 U.S. 688 (1993).

4. (§13.72) Totality of Circumstances Test for Conspiracies

A single agreement with multiple objectives involving separate substantive offenses is only a single conspiracy punishable once. *Braverman v. United States*, 317 U.S. 49 (1942). Many courts have adopted a "totality of circumstances" test to determine if there is one conspiracy or multiple conspiracies. *See United States v. Bennett*, 44 F.3d 1364, 1369 (8th Cir. 1995) (dispositive issue is whether there are two distinct conspiracies or one overall agreement).

5. (§13.73) Unitary Harm Rule

Other tests have evolved to determine whether charges violate double jeopardy in specific types of cases. *See, e.g., United States v. Graham*, 60 F.3d 463, 467 (8th Cir. 1995) (if false statement is made several times, question of whether each statement is a separate offense is analyzed using the "unitary harm rule" whereby the court looks to see whether the statements constituted "additional impairment[s] of . . . governmental functions").

C. (§13.74) Waiver of Privilege

A claim of double jeopardy is a personal privilege that is waived if not raised at the proper time. *State v. Todd*, 70 S.W.3d 509 (Mo. App. W.D. 2002). *But see Menna v. N.Y.*, 423 U.S. 61 (1975); *United States v. Broce*, 488 U.S. 563, 569 (1989) (double jeopardy is not waived even by a counseled plea of guilty). But if it can be determined from the face of the record that the court had no power to enter a conviction, the appellate court may reverse for plain error. *State v. Elliott*, 987 S.W.2d 418, 421 (Mo. App. W.D. 1999). In *Hagan v. State*, 836 S.W.2d 459, 461 (Mo. banc 1992), the Court recognized that, while the general rule is that "a plea of guilty . . . waives all non-jurisdictional defects and defenses," the courts will recognize an exception "if it can be determined from the face of the record that the sentencing court had no power to enter the conviction," based on a review of the charging document and transcript of the guilty plea.

D. (§13.75) Prosecution by Separate Sovereigns

Under the dual sovereign doctrine, successive prosecutions by two states for the same conduct are permissible. *Heath v. Ala.*, 474 U.S. 82 (1985). Two courts within the same state, however (even one municipal and one state), cannot try the same person for the same crime. *Waller v. Fla.*, 397 U.S. 387 (1970); *see also Abramson v. Griffin*, 693 F.2d 1009, 1010–11 (10th Cir. 1982) (double jeopardy barred prosecution for aggravated assault in state court after city court dismissed reckless driving charge based on the same incident).

Former § 195.210, RSMo 1978, which prohibited dual state and federal prosecutions for drug violations, was repealed in 1989. Because the federal government and the various states are separate sovereigns, a prior conviction in a state court does not bar a federal prosecution. *Abbate v. United States*, 359 U.S. 187 (1959); *United States v. Leathers,* 354 F.3d 955 (8th Cir. 2004). A trial in state court after a trial in federal court is not a denial of due process if it is not used as a tool of the state to advance a state interest that it could not obtain under its own statutes and rules. *Bartkus v. Ill.*, 359 U.S. 121 (1959); *United States v. Talley*, 16 F.3d 972 (8th Cir. 1994) (federal government had independent interest in prosecuting defendant for gun violation).

The United States Department of Justice has a general policy ("Petite Policy") against successive prosecutions when a prior state prosecution results in a termination of the case on the merits. U.S. Attorneys' Manual § 9-2.031, available at www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031. For a discussion of that policy see *Rinaldi v. United States*, 434 U.S. 22 (1977).

E. (§13.76) Missouri Statutes Prohibiting Double Jeopardy

Section 556.041, RSMo 2000, provides that, when the same conduct is a violation of more than one offense, a defendant may be prosecuted for each such offense. But the defendant may not be convicted of more than one offense if:

- one is a lesser-included offense or an attempt to commit the offense charged, as defined in § 556.046, RSMo Supp. 2004;
- inconsistent findings of fact are required for each offense;
- the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of that conduct; or

- the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, and the law does not provide that specific periods of the conduct constitute separate offenses.

Other statutes involving double jeopardy questions include:

- § 541.050, RSMo 2000 (prior conviction or acquittal for stealing or robbery in another state or country for theft of the same item a bar);
- § 564.016.7, RSMo 2000 (a defendant cannot be charged, convicted, or sentenced for both conspiracy and the substantive offense);
- § 544.665, RSMo 2000 (a defendant can be punished for bond jumping as well as contempt);
- § 476.160, RSMo 2000 (a defendant can be convicted of criminal contempt as well as any indictable offense involved in the contempt); and
- § 571.017, RSMo 2000 (a defendant can be punished for armed criminal action and the underlying crime).

See Mo. v. Hunter, 459 U.S. 359 (1983); *State v. Harvey*, 648 S.W.2d 87 (Mo. banc 1983) (defendant may be convicted of both armed criminal action and the underlying felony, and the sentences for them may be consecutive).

Rule 27.04 addresses discharge of a co-defendant so the co-defendant may testify as a witness.

F. (§13.77) When Double Jeopardy Precludes Retrial

Double jeopardy attaches when the jury is sworn or when the judge in a bench trial begins to hear evidence on the issue of guilt. *Serfass v. United States*, 420 U.S. 377 (1975); *State v. Morton*, 971 S.W.2d 335 (Mo. App. E.D. 1998); *Durham v. State*, 538 S.W.2d 881 (Mo. App. E.D. 1975). Double jeopardy does not attach when an indictment or information is dismissed before trial, and the defendant is subject to retrial. *State v. Stein*, 876 S.W.2d 623 (Mo. App. E.D. 1994).

If the prosecutor dismisses a case any time before trial, the state may refile it later without violating double jeopardy. *State v. Pippenger*, 741 S.W.2d 710, 712 (Mo. App. W.D. 1988). Double jeopardy does not bar retrial if the defendant moves for mistrial unless the defendant was provoked into doing so by the deliberate acts of the prosecutor or

court. *United States v. Poe*, 713 F.2d 579 (10th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984); *Or. v. Kennedy*, 456 U.S. 667 (1982); *State v. Walker*, 130 S.W.3d 18 (Mo. App. E.D. 2004). Double jeopardy bars retrial if a mistrial is declared *sua sponte* by the court when there was no manifest necessity and the ends of justice did not require it. *United States v. Jorn*, 400 U.S. 470 (1971). A mistrial, even declared *sua sponte*, if entered because of manifest necessity, does not bar retrial. *State v. Moon*, 602 S.W.2d 828, 836 (Mo. App. W.D. 1980). Retrial after a hung jury mistrial is permissible. *United States v. Sanford*, 429 U.S. 14 (1976); *State v. Berry*, 298 S.W.2d 429 (Mo. 1957). See *State v. Fitzpatrick*, 676 S.W.2d 831 (Mo. banc 1984), for a discussion of mistrials.

When a motion for new trial or other posttrial motion is sustained, *Hudson v. La.*, 450 U.S. 40 (1981), or a reversal on appeal is entered, because of insufficiency of evidence, double jeopardy bars a retrial. *Burks v. United States*, 437 U.S. 1 (1978); *Sanabria v. United States*, 437 U.S. 54 (1978) (even though there was evidence erroneously excluded); *State v. Basham*, 568 S.W.2d 518 (Mo. banc 1978). But when a new trial is granted because the verdict was against the weight of the evidence, rather than because there was insufficient evidence to support the conviction, double jeopardy does not bar a retrial. *Tibbs v. Fla.*, 457 U.S. 31 (1982); *State ex rel. Amrine v. Roper,* 102 S.W.3d 541 (Mo. banc 2003). A reversal on other grounds does not trigger double jeopardy. *State v. Holt*, 603 S.W.2d 698 (Mo. App. S.D. 1980).

In certain instances, double jeopardy does not bar a state appeal. *United States v. Scott*, 437 U.S. 82 (1978) (permissible when defendant terminated trial without submission to jury on issue of guilt). Appeal is permissible when the jury verdict of guilty is set aside by the trial court and judgment for the defendant is entered. The state may appeal and secure reinstatement of the verdict. *State v. Couch*, 793 S.W.2d 599 (Mo. App. E.D. 1990). Missouri allows an appeal in certain instances. Rule 30.02; §§ 547.200–547.230, RSMo 2000.

G. (§13.78) Rulings on Particular Charges

Double jeopardy has been the subject of many United States Supreme Court and other court decisions. *See, e.g.*:

- *Benton v. Md.,* 395 U.S. 784 (1969) (trial on burglary and larceny, acquittal of larceny, cannot be retried for larceny after obtaining new trial on burglary charge);
- *Breed v. Jones*, 421 U.S. 519 (1975) (cannot try a defendant as an adult after the defendant has had an adjudicatory hearing in juvenile court; should hold a transfer hearing first);
- *Iannelli v. United States*, 420 U.S. 770 (1975) (Wharton's rule on merging of conspiracy and substantive offense, when it requires more than one participant, is not required by the double jeopardy clause);
- *N.C. v. Pearce*, 395 U.S. 711 (1969) (increase in sentence on retrial).

A defendant may not be convicted of both armed criminal action and unlawfully exhibiting the weapon in a threatening manner, *State ex rel. Green v. Moore*, 131 S.W.3d 803 (Mo. banc 2004), or of felony murder and armed criminal action when the felony that the murder charge is based on is exhibiting a weapon in a threatening manner. Section 571.015.4, RSMo 2000; *Ivy v. State*, 81 S.W.3d 199 (Mo. App. W.D. 2002).

When the first jury in a capital murder case did not assess the death penalty, double jeopardy bars the state from seeking death a second time. *Bullington v. Mo.*, 451 U.S. 430 (1981). But double jeopardy does not prevent the state from seeking the death penalty a second time when the first jury hung on the issue of punishment and the court imposed a life sentence as required by statute. *Sattazahn v. Pa.*, 537 U.S. 101 (2003).

In *Harris v. Oklahoma*, 433 U.S. 682 (1977), the Court held that a conviction for felony murder bars trial for the underlying felony. *See State v. Morgan*, 612 S.W.2d 1 (Mo. banc 1981); *Williams v. State*, 646 S.W.2d 848 (Mo. App. E.D. 1982). *But see State v. Dukes*, 819 S.W.2d 394 (Mo. App. E.D. 1991). Conversely, it has been held that a defendant may not be convicted of armed criminal action unless the defendant is also convicted of the underlying felony. *State v. Barbee*, 822 S.W.2d 522 (Mo. App. E.D. 1991).

In *State v. Sprous*, 639 S.W.2d 576 (Mo. 1982), the Court held that a defendant could be tried and convicted of robbery as well as assault. *But see State v. Johnson*, 672 S.W.2d 158 (Mo. App. E.D. 1984) (double jeopardy when the same physical force was the basis of the robbery and the assault charges; not double jeopardy to charge defendant with stealing when robbery was inside store and theft of

car outside the store, and keys not taken during robbery). A theft of a truck and of steel from the same owner at the same time is one offense. *State v. Cody*, 525 S.W.2d 333 (Mo. banc 1975). In *State v. Whitmore*, 948 S.W.2d 643 (Mo. App. W.D. 1997), the court held that it was double jeopardy for the state to charge three robbery counts when there were only two victims, even though property of a third party was also taken.

In *State v. Burns*, 877 S.W.2d 111 (Mo. banc 1994), it was held that a subsequent prosecution for possession of 35 grams or more of marijuana was not barred by a previous acquittal of a charge of possession of 5 grams or more with intent to distribute.

H. (§13.79) Greater- and Lesser-Included Charges

The Double Jeopardy Clause prohibits a state or the federal government from trying a defendant for a greater offense after it has convicted the defendant of a lesser-included offense. *Brown v. Ohio*, 432 U.S. 161 (1977). Conviction of a lesser-included offense is an implied acquittal of the greater charge, and it bars retrial on it after a successful appeal of the lesser conviction. *Green v. United States*, 355 U.S. 184 (1957); *State v. McLemore*, 782 S.W.2d 127 (Mo. App. E.D. 1989); *State v. Moseley*, 735 S.W.2d 46 (Mo. App. W.D. 1987). But if the defendant requests separate trials on greater- and lesser-included offenses, double jeopardy is not violated. *Jeffers v. United States*, 432 U.S. 137 (1977). A double penalty, however, is still prohibited. *Id.* at 152.

In *Ohio v. Johnson*, 467 U.S. 493 (1984), the Supreme Court held that when, over the objections of the state, the defendant was allowed to plead guilty to a lesser offense, the state could still prosecute the defendant for the greater offense because there was no implied acquittal of the greater offense. The Court noted that double jeopardy might prevent double punishment.

I. Civil Penalties and Double Jeopardy

1. (§13.80) Fines and Taxes

It was originally held that neither collateral estoppel nor double jeopardy prevented the trial for and imposition of both a civil and a criminal penalty for the same act. *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232 (1972).

But a civil penalty or fine that is highly disproportionate to the crime has been held to be punitive in nature and to be prohibited by double jeopardy. In *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994), the Supreme Court of the United States held that a tax imposed on marijuana plants after the possessor had been convicted of possession of them was an excessive fine that was punitive in nature and, therefore, violated double jeopardy principles. The tax was equal to eight times the market value of the drugs. The Supreme Court in *Austin v. United States*, 509 U.S. 602 (1993), held that a civil forfeiture, if excessive, constitutes punishment, violates the Excessive Fines Clause of the Eighth Amendment, and cannot be imposed after the defendant has been criminally sentenced.

2. (§13.81) Civil and Criminal Penalties for Same Act

But the general rule still allows both civil and criminal penalties as long as the penalties are not excessive or if the property seized is related to the criminal activity. *Hudson v. United States,* 522 U.S. 93 (1997), *aff'g United States v. Ward*, 448 U.S. 242 (1980). To determine whether double jeopardy barred the imposition of civil and criminal penalties and punishments, the Court has examined whether the legislature intended the sanctioning statute to be civil or criminal; if the result is civil, the court examines whether there is "clear[ ] proof" that the sanction is nonetheless so punitive as to be criminal. *Hudson,* 522 U.S. at 99–100; *see also Rose v. Bd. of Zoning Adjustment Platte County*, 68 S.W.3d 507 (Mo. App. W.D. 2000); *State v. Elliott*, 987 S.W.2d 418 (Mo. App. W.D. 1999); *United States v. Lippert*, 148 F.3d 974 (8th Cir. 1998). Missouri courts have held that *in rem* civil forfeitures are not punishment for double jeopardy purposes. *State v. Scott*, 933 S.W.2d 884 (Mo. App. W.D. 1996). But property presumed forfeitable under § 195.140.2(3), RSMo Supp. 2004, requires a conviction of guilt before judgment of forfeiture can be entered. Section 513.617, RSMo 2000; *State v. Eicholz*, 999 S.W.2d 738 (Mo. App. W.D. 1999).

3. (§13.82) Civil Commitment

In recent years, Missouri has passed laws, as have other states, allowing the state to confine a defendant indefinitely if the defendant is determined to be a sexually violent predator (SVP). Sections 632.480–632.513, RSMo 2000 and Supp. 2004, allow the state to file a civil petition in probate court to commit an SVP to

the custody and care of the State Mental Health Department after the defendant is released from a prison sentence for the same acts. The sexual predator law was held constitutional as long as there is a finding that a "mental abnormality" causes the defendant "serious difficulty" in controlling sexually violent behavior. *In re Care & Treatment of Thomas v. State*, 74 S.W.3d 789, 791 (Mo. banc 2002). Courts have held that this does not violate double jeopardy when a defendant is charged after being criminally prosecuted for the same acts. *In re Care & Treatment of Collins*, 140 S.W.3d 121 (Mo. App. E.D. 2004).

4. (§13.83) Revocation of Licenses and Privileges

Administrative revocation of driving privileges and criminal prosecution for driving while intoxicated, based on the same conduct, do not constitute a double jeopardy violation. *Mason v. Dir. of Revenue*, 929 S.W.2d 266 (Mo. App. S.D. 1996).

J. (§13.84) Collateral Estoppel

Collateral estoppel means that once an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any lawsuit. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). In *Ashe* the United States Supreme Court incorporated collateral estoppel as a part of the Fifth Amendment guarantee against double jeopardy. The appellant in *Ashe* was acquitted of robbing one of five poker players, after which the state proceeded to try and convict him for robbery of another of the five victims. The Court examined the entire record of the proceedings and determined that the jury must have reached the verdict by finding insufficient evidence that the appellant was one of the robbers. The Court held that collateral estoppel barred prosecution on the same facts for the robbery of the other players. That doctrine applies only when the issues in the second trial are necessarily determined in the first trial. *State v. Clark*, 646 S.W.2d 409 (Mo. App. W.D. 1983). Collateral estoppel bars relitigation of ultimate fact issues (ones that the prosecution necessarily failed to prove) but not evidentiary fact issues (ones that the prosecution may have failed to prove) in subsequent proceedings. *State v. Curtis*, 921 S.W.2d 1 (Mo. App. W.D. 1996). The defendant has the burden of proving, through a review of the entire record and any other relevant matters, that the jury verdict necessarily determined the issue the defendant seeks to foreclose. *Ashe*, 397 U.S. at 444; *Prince v. Lockhart*, 971 F.2d 118, 123 (8th Cir. 1992).

A finding of fact in an administrative proceeding has no collateral estoppel effect in a criminal case. *See, e.g., State v. Hoyt*, 922 S.W.2d 443 (Mo. App. W.D. 1996); *State v. Mayfield*, 970 S.W.2d 917 (Mo. App. S.D. 1998). Collateral estoppel may not be used against the defendant. *Simpson v. Fla.*, 403 U.S. 384 (1971). *But see McCarthy v. United States,* 394 U.S. 459, 466 (1969) (government may use collateral estoppel against defendant who pled guilty and thus admitted facts pled in prior indictment). Collateral estoppel does not prevent multiple convictions and sentences, *State v. Carter*, 535 S.W.2d 537 (Mo. App. W.D. 1976), because Missouri applies the "separate and several offense" rule rather than the "same transaction" rule. It only prevents another trial after an acquittal.

K. (§13.85) Another Prosecution Pending

If two indictments or informations are filed for the same offense, the first one filed is suspended by the filing of the second. Rule 23.10(b). Thus, if the defendant is brought to trial on the first one, the defendant may move to dismiss it. *State v. Berry*, 298 S.W.2d 429 (Mo. 1957). If the second one is dismissed, the first is revitalized if not sooner dismissed. *State v. Granberry*, 530 S.W.2d 714 (Mo. App. E.D. 1975).

L. (§13.86) Appellate Relief

In *Abney v. United States*, 431 U.S. 651 (1977), the Supreme Court held that the denial of a motion to dismiss based on double jeopardy was a final appealable order. Prohibition would also be a proper remedy. *See also State v. March*, 130 S.W.3d 746, 747 (Mo. App. E.D. 2004) (when the court grants a motion to dismiss before trial, the ruling is a final appealable judgment that the state may appeal in accordance with § 547.200.1, RSMo 2000).

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Chapter 14

DEFENSES

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I. (§14.1) Introduction

The defenses discussed in this chapter are best presented at trial. Some defenses should or must be raised first by pretrial motion or notice as discussed in Chapters 12 and 13 of this deskbook, and some cannot be raised except during trial. Few defenses present a question of law; most are questions of fact for the jury to consider after the presentation of evidence, instruction, and argument.

The type of defense or defenses applicable depends on the offense charged and the special facts of each case. Often, a defendant will have two or more possible defenses available. Sometimes the best defense is to hold the prosecution to its burden. A defense attorney

may decide that the best defense is to attack the prosecution, the victim, the police, the witness, or the system. Other times the best defense is delay.

Which defense is best will depend on:

- whether the defendant wishes to testify;
- the credibility or appearance of the defendant's or the state's witnesses;
- the aggravation or mitigation involved in the case;
- the race, color, creed, or national origin of the defendant or the victim;
- whether it will be a court or a jury trial;
- the locality of the trial;
- the judge presiding;
- the extent of investigation by the police or the defendant;
- the abilities and experience of the attorneys for both sides; and
- the financial resources of the defendant.

This chapter is not an all-inclusive treatise on all available defenses. The discussion and citations are intended to be only a starting point in research.

Many defenses are defined and limited by statute. Some traditional or common-law defenses have been redefined or modified or are no longer available.

The burden of persuasion and the burden of going forward with the evidence will vary depending on what defense strategy in used. Some defenses must be disproved by the prosecution as part of the prosecution's case-in-chief; the absence of the defense must be established to prove the elements of the crime. At times, the defense may have the burden of "injecting the issue," in which case there must be some evidence establishing facts supporting the defense. Once this evidence is presented, the burden shifts to the prosecution to prove the defense invalid. Once the defense is submitted, any reasonable doubt on the issue requires a finding for the defendant. Section 556.051, RSMo 2000.

When attempting to raise these types of defenses, the issue is injected if evidence on the issue comes from any source whether defense or prosecution. *State v. Fincher*, 655 S.W.2d 54 (Mo. App. W.D. 1983). Affirmative defenses are not submitted to the jury unless supported

by evidence. *See* MISSOURI APPROVED INSTRUCTIONS–CRIMINAL (MAI-CR 3d). The defendant has the burden of persuasion that the defense is more probably true than not. Section 556.056(2), RSMo 2000. Placing the burden on the defendant as to affirmative defenses is constitutionally permissive. *Patterson v. N.Y.*, 432 U.S. 197 (1977). Some defenses, called "special negative defenses," must be referred to and cross-referenced in the main verdict-directing instruction. MAI-CR 3d 304.02, Notes on Use No. 11. A special negative defense is one on which the defendant does not carry the burden of proof and that is something other than a bare denial. Examples are self-defense, claim of ownership, and entrapment. These defenses must be supported by evidence before they are required to be submitted. *State v. Chevalier*, 623 S.W.2d 42 (Mo. App. W.D. 1981). For a chart of defenses with which counsel should be familiar, see MAI-CR 3d 304.11.

After discovery, once the best defense becomes clear, counsel should discuss the issues with the client and witnesses. Usually, it is best to raise a defense at the earliest opportunity. Unless it is intended to surprise and sandbag the prosecution, the defense may be revealed to the prosecution, law enforcement, and even the court to improve plea negotiations.

Opportunities to present a defense may include:

- cross-examination at preliminary or evidentiary hearings;
- plea negotiations;
- depositions;
- arraignment (a plea of not guilty by reason of mental disease must be made within ten days of entering a plea of not guilty);
- discovery requests;
- motions to dismiss;
- motions to suppress;
- other motions;
- arguments before court;
- letters to the prosecution and court;
- hearings on motions to suppress, etc.;
- pretrial conferences;
- motions *in limine*;
- pretrial offers of proof;
- opening statements;
- cross-examination of prosecution witnesses during trial;
- presentation of evidence and defense witnesses during trial;

- objections during trial;
- motions for acquittal during trial;
- requests for instructions;
- objections to the state's or court's instructions;
- closing argument (a defense has an unfettered right to present a closing argument in both a jury and a nonjury trial, *State v. Crooks*, 884 S.W.2d 90 (Mo. App. W.D. 1994));
- motions for new trial or other posttrial motions;
- appeal;
- motions to vacate sentence;
- motions to recall mandate; and
- habeas corpus.

Before revealing the theory, defense counsel should weigh the pros and cons. Reasons not to reveal the defense until trial may include the need to surprise the prosecution and to not allow the prosecution time to prepare. Another reason may be to deny a witness the opportunity to prepare testimony. For example, it may be smart to appear incompetent and unprepared in the cross-examination of an overzealous state's witness at the preliminary hearing, when the defendant is obviously going to be bound over, to avoid revealing areas of impeachment or areas of weakness in the state's case. Counsel should tell the client what counsel is doing or the client may seek a different attorney.

II. Defenses to All or Most Offenses

A. Lack of Culpable Mental State

1. In General

a. (§14.2) Voluntary Act

Offenses formerly included elements of intent, knowledge, malice, and willfulness. Under the Missouri Criminal Code, a person is not guilty of an offense unless the person's liability is based on a voluntary act. "[V]oluntary act" is defined in § 562.011.2, RSMo 2000, as "bodily movement performed while conscious as a result of effort or determination; or" failure "to perform an act of which the actor is physically capable." "Possession" is "a voluntary act if the possessor knowingly procures or receives the thing possessed, or having acquired control of it was aware of his control for a sufficient

time to have enabled him to dispose of it or terminate his control." Section 562.011.3. A defendant "is not guilty of an offense based solely upon an omission . . . unless the law defining the offense expressly so provides, or a duty to perform the omitted act is otherwise imposed by law." Section 562.011.4.

b. (§14.3) Culpable Mental State Usually Required

Except as provided in § 562.026, RSMo 2000, a person is not guilty of an offense unless the person acts with a culpable mental state. Section 562.016.1, RSMo 2000. A culpable mental state is not required:

- in infraction cases when no culpable mental state is prescribed by the statute defining the offense; or
- if "the offense is a felony or misdemeanor and no culpable mental state is prescribed by the statute defining the offense, and imputation of a culpable mental state to the offense is clearly inconsistent with the purpose of the statute defining the offense or may lead to an absurd or unjust result." Section 562.026(2). These are *malum prohibitum* offenses. There can be strict liability crimes, *Smith v. Cal.*, 361 U.S. 147, 150 (1959), in which *mens rea* does not need to be an element of an offense, *State v. Beishir*, 646 S.W.2d 74 (Mo. banc 1983).

"The law . . . assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts." *Cramer v. United States*, 325 U.S. 1, 31 (1945). But an instruction advising the jury of such a presumption denies due process of law. *Sandstrom v. Mont.*, 442 U.S. 510 (1979); *Conn. v. Johnson*, 460 U.S. 73 (1983).

c. (§14.4) Types of Culpable Mental States

Under § 562.016.2–.5, RSMo 2000, there are four types of culpable mental states—acting:

1. purposely;
2. knowingly;
3. recklessly; or
4. with criminal negligence.

The particular type required to be proven depends on the statute defining the offense. It may be required with respect to the conduct itself, the results of the conduct, or the attendant circumstances that constitute the material elements of the crime.

A person acts "purposely" with respect to the person's conduct or the conduct's result when "it is [the person's] conscious object to engage in that conduct or to cause that result." MAI-CR 3d 333.

A person acts "knowingly" with respect to the person's conduct or to attendant circumstances when the person is aware of the nature of the conduct or the existence of those circumstances. MAI-CR 3d 333. A person acts "knowingly" with respect to a result of the conduct when the person is aware that the conduct is "practically certain to cause that result." *Id*.

A person acts "recklessly" when the person "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." MAI-CR 3d 333.

A person acts "with criminal negligence" when the person "fails to be aware of a substantial and unjustifiable risk that circumstances exist or a result will follow, and such failure constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." MAI-CR 3d 333.

"Acting willfully" is not defined in MAI-CR 3d 333. But it is the culpable mental state in some areas of Missouri law. The definition varies depending on the field of law. The Supreme Court of Missouri, in *State v. Lee Mechanical Contractors, Inc.*, 938 S.W.2d 269, 272 (Mo. banc 1997), analyzes the history of the term "willfully" and finds it to be synonymous with the term "knowingly." But *Lee* limits the application of this definition to § 290.340, now RSMo 2000.

The term "willfully" is defined in the field of securities regulation in *State v. Dumke,* 901 S.W.2d 100 (Mo. App W.D.

1995). The trial court in *Dumke* submitted an instruction defining it as follows:

> A "willful" act or omission may be described as an intentional act or omission to perform an act in that the person was aware of what he was doing or failing to do. Proof of evil motive, intent to violate the law, or knowledge that the law was being violated is not required.

Id. at 101. The Western District affirmed this definition and distinguished the term "willful" when used in the field of securities law from the term when used in other contexts. *Id.* at 102. The court's rationale in upholding this definition is that requiring proof of an evil motive or of awareness that a party was violating the law would make enforcement difficult. *Id.* at 103.

Section 562.021, RSMo 2000, sets out guidelines regarding the application of culpable mental state to the Criminal Code. If the definition of the offense prescribes a particular "culpable mental state but does not specify the conduct, attendant circumstances or result to which it applies, . . . [it] applies to each such material element." Section 562.021.1.

If the definition of an offense prescribes a culpable mental state for a particular element or elements of an offense, the prescribed culpable mental state is required only for the specified element or elements, and it is not required for other elements of the offense. Section 562.021.2.

Except as provided in § 562.021.2 and in § 562.026, RSMo 2000, "if the definition of any offense does not expressly prescribe a culpable mental state for any elements . . ., a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly." Section 562.021.3. Reckless or criminally negligent acts do not establish such a culpable mental state. *Id.*

"If the definition of an offense prescribes criminal negligence as the culpable mental state, it is also established if a person acts purposely or knowingly or recklessly." Section 562.021.4. When recklessly is prescribed, it is established by acting purposely or knowingly. *Id.* Knowingly is established by acting purposely. *Id.*

Knowledge that conduct constitutes an offense and knowledge of the statute defining the offense are "not an element of an offense unless the statute clearly so provides." Section 562.021.5.

d. (§14.5) Responsibility for the Conduct of Another

"A person with the required culpable mental state is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is criminally responsible, or both." Section 562.036, RSMo 2000. A person is criminally responsible for the conduct of another when:

- the statute defining the offense makes the person responsible; or
- either before or during the offense, with the purpose of promoting its commission, the defendant:
  - aids;
  - agrees to aid; or
  - attempts to aid

  the other person in planning, committing, or attempting to commit the offense.

Section 562.041.1, RSMo 2000.

A person is not responsible for the conduct of another if:

- the person is the victim;
- the offense is defined so that the person's conduct was necessarily incident to its commission; if the conduct constitutes a related but separate offense, the person is liable for that offense; or
- before the commission of the offense the person abandons the purpose and gives timely warning to law enforcement authorities or otherwise makes proper effort to prevent the crime.

Section 562.041.2. The latter is an affirmative defense. Section 562.041.3.

It is no defense that the other person:

- was acquitted;
- was convicted of a different degree or offense;

- lacked criminal capacity;
- was unaware of the defendant's criminal purpose;
- was immune from prosecution; or
- was not amenable to justice.

Section 562.046(1), RSMo 2000.

And it is not a defense that the defendant does not belong to the class of persons who are legally capable of committing the offense. Section 562.046(2). *State v. Quisenberry*, 639 S.W.2d 579 (Mo. banc 1982), held that, if the principal of the offense lacked the requisite mental state for the crime, the accomplice could not be found guilty if the accomplice injects that issue.

"[W]hen two or more persons are criminally responsible for an offense which is divided into degrees, each person is guilty of such degree as is compatible with his own culpable mental state and with his own accountability for an aggravating or mitigating fact or circumstance." Section 562.051, RSMo 2000.

e. (§14.6) Corporations

Liability of a corporation and liability of an unincorporated association are defined in § 562.056, RSMo 2000. A person is criminally liable for criminal conduct of a corporation or an unincorporated association if the person causes that conduct. Section 562.061, RSMo 2000.

2. (§14.7) Negating Culpable Mental State

The required culpable mental state may be negated, either by lack of direct or circumstantial proof or by the defenses discussed in §§14.8–14.16 below.

a. (§14.8) Mental Disease or Defect Excluding Responsibility

Section 562.086, RSMo 2000, provides: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he was incapable of knowing and appreciating the nature, quality or wrongfulness of his conduct." The procedures for determining this are governed by Chapter 552, RSMo. For further discussion, see Chapter 15 of this deskbook and §14.45 below.

A previous adjudication of mental disease constitutes only an item of evidence on the issue, and there is no presumption of continuing insanity. *Burton v. State*, 641 S.W.2d 95 (Mo. banc 1982).

Competence to stand trial is an issue for the court, but the court can never direct a verdict or grant an acquittal based on insanity; it is always a jury question (unless the jury is waived). *State v. Turner*, 646 S.W.2d 896 (Mo. App. W.D. 1983). The state, under some circumstances, may accept the defense. Section 552.030.2, RSMo 2000. To use this defense, the defendant must either:

- plead "not guilty by reason of mental disease or defect excluding responsibility"; or
- within ten days after arraignment, "or at such later date as the court may for good cause permit," give notice of the intention to rely on this defense.

Section 552.030.2. This intended defense must also be disclosed, under Rule 25.05(A)(4), upon request by the state. MAI-CR 3d 306.02A and B and 308.03 submit this defense. Sanity is presumed, and the defendant has the burden of proof. *See* § 552.030.6; *State v. Bannister*, 339 S.W.2d 281 (Mo. 1960); *Leland v. Or.*, 343 U.S. 790 (1952). If this defense is successful, the defendant may actually be confined longer than if convicted of the offense. *See Jones v. United States*, 463 U.S. 354 (1983). There are some very negative evidentiary costs associated with this defense. Pleading this defense waives the doctor-patient privilege, the attorney-client privilege as it applies to a psychiatrist hired by the attorney, and to some extent the defendant's privilege against self-incrimination. *State v. Carter*, 641 S.W.2d 54 (Mo. banc 1982). See MAI-CR 3d 300.20 and 306.04, which limit expert testimony on this defense.

The partial defense of diminished capacity is discussed in §14.45 below.

b. (§14.9) Involuntary Intoxication or Drug Stupor

Voluntary intoxication or voluntary drug stupor—even when the drugs were taken for medical purposes—is no defense. But when either was induced involuntarily, it is a defense

when it deprived the defendant of the capacity to know or appreciate the nature, quality, or wrongfulness of the defendant's conduct. Section 562.076.1, RSMo 2000. *See State v. Small*, 344 S.W.2d 49 (Mo. 1961); *State v. Brown*, 79 S.W. 1111 (Mo. 1904). The defendant has the burden of injecting this issue. See MAI-CR 3d 310.52 for the instruction submitting this issue. Intoxication, however, may be sufficient to reduce the offense to a lesser degree. *See United States v. Leeper*, 413 F.2d 123 (8th Cir. 1969). *But see State v. Shipman*, 189 S.W.2d 273 (Mo. 1945). Section 562.076.3 provides that evidence of voluntary intoxication or of a drugged condition may be admissible if otherwise relevant, but in no event shall this evidence "be admissible for the purpose of negating a mental state which is an element of the offense." *Id*. A jury shall be so instructed when this evidence has been admitted. *Id*.; MAI-CR 3d 310.50. *State v. Erwin*, 848 S.W.2d 476 (Mo. banc 1993), held this instruction to be improper as relieving the state of its burden. See also *State v. James*, 869 S.W.2d 276 (Mo. App. E.D. 1994) (no evidence to support instruction), which states that no such instruction should be given if the defendant objects. *State v. Smoot*, 860 S.W.2d 799 (Mo. App. E.D. 1993), points out the necessity of the defendant making and preserving the right constitutional objection.

Sections 67.305 and 67.315, RSMo 2000, decriminalize public drunkenness except in specific instances, § 67.310, RSMo 2000; § 574.075, RSMo Supp. 2004; and §§ 577.001, *et seq*., RSMo 2000 and Supp. 2004. Some offenses specifically involve intoxication, e.g.:

- § 565.082, RSMo Supp. 2004, assault on a law enforcement officer in the second degree;
- § 565.024, RSMo 2000, involuntary manslaughter;
- § 565.060, RSMo 2000, assault in the second degree;
- §§ 577.001, *et seq.,* alcohol-related traffic offenses; and
- § 571.030.1(5), RSMo Supp. 2004, possessing or discharging a firearm while intoxicated.

The Criminal Code, when first in effect, January 1, 1979, provided that even voluntary intoxication could be, in some instances, a defense. This law was amended effective September 28, 1983. During the period when intoxication was a defense, the courts applied the defense narrowly. In *State v.*

Duncan, 648 S.W.2d 892 (Mo. App. S.D. 1983), the court held that, because robbery in the first degree did not contain the explicit requirement that it be committed with purpose or knowing intent, intoxication was not a defense. *See also State v. Beishir*, 646 S.W.2d 74 (Mo. banc 1983) (no defense to sodomy charge).

The claim might be presented that the defendant, being a chronic alcoholic, was involuntarily intoxicated because the defendant had no control. But such a claim was rejected in *State v. Johnson*, 327 N.W.2d 580 (Minn. 1982). The taking of drugs by a drug addict is not considered involuntary. *State v. Bishop*, 632 S.W.2d 255 (Mo. 1982); *see* §14.101, *infra*.

Intoxication may also be raised in a claim that a confession was involuntary. *State v. Ritter*, 644 S.W.2d 387 (Mo. App. E.D. 1982) (not excluded if defendant had mental capacity to know what defendant was saying, but may affect weight and credibility of statement, or that a consent to search was involuntary); *State v. Berry*, 526 S.W.2d 92 (Mo. App. S.D. 1975) (a factor to consider).

A police officer may testify as to the officer's opinion regarding the intoxication of the defendant. *State v. Mayabb*, 316 S.W.2d 609 (Mo. 1958); *State v. Crawford*, 646 S.W.2d 841 (Mo. App. E.D. 1982). The admission or exclusion of a lay opinion as to intoxication is within the court's discretion. *State v. English*, 575 S.W.2d 761 (Mo. App. W.D. 1978) (proper basis shown from proof of observations of conduct and appearance of defendant).

c. (§14.10) Infancy

A child of any age may be tried as an adult, if the court so orders, for:

- murder in the first degree;
- murder in the second degree;
- forcible rape;
- forcible sodomy;
- robbery in the first degree; or
- drug distribution.

Section 211.071, RSMo 2000.

As to other felonies, a defendant age 12 or older may be certified for adult trial. *Id.* If the defendant is under the age of 17, jurisdiction is in the juvenile court and not the adult criminal court unless transferred or certified by the juvenile court under § 211.071, which authorizes the certifying and transfer of children under age 17 for trial in the adult court. *Id.*

If a person under 17 is charged with a crime in a circuit or municipal court, § 211.061.2, RSMo 2000, requires immediate transfer to the juvenile court. Traffic violations by persons 15½ years old or older are heard in the regular adult traffic court. Section 211.031.1(2)(e), RSMo Supp. 2004.

An infant between the ages of 7 and 14 was previously presumed not to have criminal capacity. *State v. Jackson*, 142 S.W.2d 45 (Mo. 1940). Generally, a child under age 7 is not responsible for the child's actions. *See id.* The effect of § 211.071 on these holdings is in question.

The legislature has carved out a further exception to this in § 407.933, RSMo Supp. 2004, which prohibits any person less than 18 years of age from misrepresenting the person's age to purchase cigarettes or tobacco products. A person charged with this offense will be tried in an adult court and may be found guilty of an infraction.

Under § 491.060(2), RSMo 2000, a child under ten years of age who appears incapable of receiving just impressions of the facts or of relating them truly is incompetent to testify. A child under age ten who is a victim is allowed to testify without qualification. *Id.*

In a death penalty murder case, the youth of the defendant is a statutory mitigating factor, § 565.032.3(7), RSMo 2000, and a defendant under age 16 at the time of the murder cannot be sentenced to death. Section 565.020.2, RSMo 2000. The youth of a defendant in any other case may be a factor considered by the jury in determining guilt and assessing punishment.

d. (§14.11) Amnesia

There is little authority for the amnesia defense, but when amnesia can be proved, a defendant might defend on the

theory that, because of that condition of loss of memory or disorientation, the defendant could not form or have an intent. Proof of such a condition might well persuade a jury that the defendant should not be punished for something the defendant cannot remember. The defendant's incompetence to stand trial based on the inability to prepare a defense because of loss of memory may also prevent a trial or conviction. *See Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968). *But see United States v. Borum*, 464 F.2d 896 (10th Cir. 1972); *State v. Roussel*, 424 So.2d 226 (La. 1982). It appears that the test is whether the defendant can receive a fair trial. *United States v. Swanson*, 572 F.2d 523 (5th Cir. 1978).

In *State v. Garrett*, 595 S.W.2d 422, 433–34 (Mo. App. S.D. 1980), the court ruled that amnesia is no bar to prosecution of an otherwise competent defendant.

e. (§14.12) Accident, Mistake, or Inadvertence

An act that was not intended but that was done through accident, mistake, or inadvertence may not be criminal. Section 563.070, RSMo 2000. Accident, in this sense, is an event that is a fortuitous happening or circumstance without human agency or one involving human agency but that was unusual, unexpected, unforeseen, or fortuitous. Section 563.070. It may involve negligence and yet be unintentional. There is no MAI-CR 3d instruction submitting the defense of accident. *See* MAI-CR 3d 304.11D; *State v. Miller*, 772 S.W.2d 782 (Mo. App. S.D. 1989). Mistake is an unintended act or omission arising from ignorance, surprise, or misplaced confidence. It may be a mistake of fact or a mistake of law, and mistakes may involve intentional acts or omissions. An inadvertent act or omission is one that was done carelessly, heedlessly, and through a lack of attention, but with unintended result.

Ignorance of the law is generally no excuse. *State v. Welch*, 73 Mo. 284 (1880); *Kansas City v. LaRose*, 524 S.W.2d 112 (Mo. banc 1975). Ordinarily, everyone is presumed to know the law. A person who commits an act honestly believing that it is the person's duty may not be convicted of a crime that requires a criminal intent. *State v. McDonald*, 7 Mo. App. 510 (E.D. 1879); *see also* § 563.021, RSMo 2000 (discussed in §14.21 below); §14.52, *infra*.

The Criminal Code has attempted to codify these defenses. Section 563.070.1 provides that, as to offenses against the person, the conduct is excusable and not criminal when it is "the result of accident in any lawful act by lawful means without knowingly causing or attempting to cause physical injury and without acting with criminal negligence." The defendant has the burden of injecting the issue. The element of purposely, knowingly, recklessly, or even criminal negligence would presuppose the absence of accident.

Section 562.031.1, RSMo 2000, provides that mistake of fact or law is not a defense unless the mistake negates the existence of the required mental state. *See also State v. Quisenberry*, 639 S.W.2d 579 (Mo. banc 1982). It is no defense that the defendant believed the conduct was not criminal unless the defendant's belief is reasonable and:

- the offense was defined by an administrative regulation or order that had not been published and was unknown to the defendant; or
- the defendant acted in reasonable reliance on an official statement of law that was afterward determined to be invalid or erroneous.

Section 562.031.2. The defendant has the burden of injecting the issue of reasonable belief, but not the issue that the defendant's mistake negated the required mental state. Section 562.031.3.

The issues of accident and mistake are closely intertwined with the issue of culpable mental state. Also closely related is what is often referred to as "specific intent," i.e., the defendant must know the law is being violated. See *Liparota v. United States*, 471 U.S. 419 (1985), which involved a charge of illegally trafficking in federal food stamps. The Court held that knowledge of illegality had to be proved beyond a reasonable doubt but that the prosecution does not need to show that the defendant had knowledge of the specific regulations.

In regard to sexual offenses, Chapter 566, RSMo, when the offense depends on a victim being incapacitated, no crime is committed if the defendant reasonably believed the victim was not incapacitated and reasonably believed the victim

consented. The defendant has the burden of injecting the issue. Section 566.020.1, RSMo 2000. If the offense depends on the victim being under the age of 17, it is an affirmative defense that the defendant reasonably believed the victim was 17 or older. Section 566.020.3. It is not a defense that the defendant believed the victim was 14 years of age or older when the offense depends on the victim being under the age of 14. Section 566.020.2.

Reasonable belief that a defendant was legally eligible to remarry is a defense to a charge of bigamy, but the defendant has the burden of injecting the issue. Sections 568.010.2, .3, RSMo 2000.

f. (§14.13) Entrapment

When the intent to commit the offense originates in the mind of the entrapping officer or person acting in cooperation with the officer and the defendant did not have the predisposition to commit the act, the defendant has been unlawfully entrapped and is not guilty of the offense. It is not entrapment for the police merely to afford the defendant an opportunity to commit the act or to aid the defendant in the commission of the crime in order to get evidence against the defendant. *See United States v. Russell*, 411 U.S. 423 (1973); *Hampton v. United States*, 425 U.S. 484 (1976); *State v. Hammond*, 447 S.W.2d 253 (Mo. 1969). Older cases held that solicitation, coupled with a showing of reluctance or unreadiness by the defendant, raises the issue. *See State v. Weinzerl*, 495 S.W.2d 137 (Mo. App. W.D. 1973). *Weinzerl* was overruled by *State v. Willis*, 662 S.W.2d 252 (Mo. banc 1983), which held that uncontradicted evidence of unlawful inducement does not establish entrapment as a matter of law because the jury may disbelieve this evidence. If the defendant has a predisposition to commit the crime, due process will not afford the defendant relief, regardless of the misconduct of the government. *Hampton,* 425 U.S. 484.

Entrapment as a matter of law is almost impossible to establish. The evidence of the defendant's predisposition is generally the defendant's downfall. For example, in *State v. Coffman*, 647 S.W.2d 849 (Mo. App. W.D. 1983), the court held that proof of prior possession of marijuana was evidence of a predisposition to sell marijuana.

Thus, there are dangers in the use of the entrapment defense. Other similar acts of the defendant, though not charged, may become admissible to prove the defendant's predisposition. To rely on the defense, the defendant must normally admit the commission of the act. *See State v. Taylor*, 375 S.W.2d 58 (Mo. 1964).

The approved instruction on entrapment is MAI-CR 3d 310.28. It is a "special negative defense" that must be referred to in the main verdict-directing instruction, and the jury must find as part of the state's case that the defendant was not unlawfully entrapped.

The Criminal Code codifies this defense in § 562.066, RSMo 2000. The defendant has the burden of injecting the issue of entrapment. Section 562.066.4. The defense is not available to any crime that involves causing physical injury or placing another in danger of physical injury. Section 562.066.3. When the defense is injected, lack of entrapment becomes an element of the offense, and the state must prove the defendant's predisposition to commit the offense to rebut the inference. *State v. Hance*, 646 S.W.2d 894 (Mo. App. S.D. 1983). In *State v. Hohensee*, 650 S.W.2d 268 (Mo. App. S.D. 1982), the court said this was a "subjective test." *See also State v. Foster*, 838 S.W.2d 60 (Mo. App. E.D. 1992) (subjective test, which focuses on origin of the intent, rather than objective test, which focuses on whether the officer's activity should be condoned or rejected). As discussed in §14.14 below, some cases speak of the conduct of the police being so outrageous as to constitute entrapment. *See Willis v. United States*, 530 F.2d 308 (8th Cir. 1976); *Hohensee,* 650 S.W.2d 268 (violation of due process); *see also* §14.83–14.85, *infra*.

g. (§14.14) Outrageous Government Conduct

Outrageous government conduct is a related defense. This defense was recognized in *United States v. Russell*, 411 U.S. 423 (1973). *See also State v. Shannon*, 892 S.W.2d 761 (Mo. App. W.D. 1995). It is a due process defense distinct from entrapment, and it may apply even though the defendant had a predisposition. *See*:

- *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971);
- *United States v. West*, 511 F.2d 1083 (3rd Cir. 1975);
- *United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978);
- *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971).

This defense should be raised by motion to dismiss. *State v. King*, 708 S.W.2d 364 (Mo. App. W.D. 1986). Counsel should seek a pretrial hearing when evidence on the issue can be introduced. If this is the only defense, perhaps a jury may be waived and the issue submitted during a bench trial. It should be preserved in motions for acquittal and in a motion for new trial after a jury trial. See §14.100 below for further discussion.

h. (§14.15) Duress, Coercion, or Compulsion

If the defendant is forced to do a criminal act "by the use of, or threatened imminent use of, unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness . . . would have been unable to resist," the defendant is acting under duress and may not be guilty of that offense. Section 562.071.1, RSMo 2000. *See Johnson v. United States*, 291 F.2d 150 (8th Cir. 1961), *cert. denied*, 368 U.S. 880 (1961). The fear must be well-founded, and there must be no reasonable opportunity to escape the compulsion. Section 562.071.2 eliminates duress or compulsion as a defense in murder cases and also in situations "when the defendant recklessly places himself" in the position. *State v. Davis*, 559 S.W.2d 602 (Mo. App. W.D. 1977), holds that the defense was not available in murder, treason, or conduct equally *mala in se* or when the defendant had a reasonable opportunity to avoid the act without undue exposure to death or serious bodily harm.

The theory of duress has been argued in a variety of factual situations. The cases cited below demonstrate how flexible this defense is.

Threats of future injury are insufficient to establish the defense of duress. *State v. Horne*, 778 S.W.2d 756 (Mo. App. W.D. 1989); *State v. Lane*, 834 S.W.2d 242 (Mo. App. W.D. 1992). The defendant's predisposition to commit the offense may not be admissible when this defense is relied on. *United States v. McClain*, 531 F.2d 431 (9th Cir. 1976).

In *State v. Henderson*, 204 S.W.2d 774 (Mo. 1947), the Supreme Court of Missouri held that a wife acting in the presence of her husband was presumed to be acting under his coercion and, therefore, did not have the requisite intent to be guilty. See also *State v. Ready*, 251 S.W.2d 680, 682 (Mo. 1952), and *Davis,* 559 S.W.2d 602, which held that this is a rebuttable presumption. The validity of these cases and such a defense may be in serious question today. In *Barton v. United States*, 407 F.2d 1155 (10th Cir. 1969), it was held that coercion of a wife by her husband was a jury issue.

The defense of coercion, compulsion, or necessity has been submitted in a narcotics case on the theory that the defendant was addicted and that he could not refrain from transferring narcotics in order to obtain other narcotics to alleviate the pain of an injury. *United States v. McKnight*, 427 F.2d 75 (7th Cir. 1970), *cert. denied*, 400 U.S. 880 (1970). *See* §14.101, *infra*.

Duress is an affirmative defense. *State v. Brown*, 561 S.W.2d 388 (Mo. App. E.D. 1977); *State v. Wilkerson*, 616 S.W.2d 829 (Mo. banc 1981).

See §14.115 below for this defense when the defendant is charged with escape. *See also* §14.35, *infra*.

In a death penalty murder case, it is a statutory mitigating circumstance that the defendant acted under extreme duress or under the substantial domination of another person. Section 565.032.3(5), RSMo 2000.

A confession may be found by a jury to be untrustworthy because of police coercion. *State v. Blackman*, 875 S.W.2d 122 (Mo. App. E.D. 1994).

i. (§14.16) Renunciation, Abandonment, or Withdrawal

Section 562.041.2, RSMo 2000, creates the affirmative defense of abandonment. A defendant may assert that the defendant withdrew, abandoned, or renounced the enterprise before the crime was committed. *See State v. Betts*, 646 S.W.2d 94 (Mo. banc 1983). In *State v. Minor*, 556 S.W.2d 35 (Mo. banc 1977), the Court held that, when one of two robbers

ran from the scene before the second robber killed someone, this was not a withdrawal. *See also State v. O'Neal*, 618 S.W.2d 31 (Mo. 1981). If the evidence of abandonment is only minimal, it may not support a submission of the issue to the jury. *State v. Skillicorn*, 635 S.W.2d 82 (Mo. App. W.D. 1982).

A defendant may also abandon a conspiracy. *See State v. Chernick*, 280 S.W.2d 56 (Mo. 1955). Section 564.016.5(1), RSMo 2000, provides that, in a conspiracy case, it is a defense that the defendant "prevented the accomplishment of the objectives of the conspiracy under circumstances manifesting a renunciation of his criminal purpose." The defendant has the burden of injecting the issue of this defense. Section 564.016.5(2). If a defendant abandons the conspiracy, it is terminated as to the defendant only if the defendant advises the co-conspirators of the abandonment or informs law enforcement authorities of the conspiracy and the defendant's participation in it. Section 564.016.6(2). *See* §14.123, *infra*.

B. Bad Act or Conduct Not Criminal

1. (§14.17) Not All Prohibited or Illegal Acts Are Crimes

When no criminal punishment is provided for the commission of the act, it is not a crime. *See State v. Harper*, 510 S.W.2d 749 (Mo. App. W.D. 1974). "Legal impossibility" as a defense is appropriate when the actions of the defendant, even if fully carried out, would not constitute a crime. The defense of factual impossibility can be raised when the conduct could be criminal but circumstances unknown to the defendant prevent the defendant from bringing about the defendant's objective. *United States v. Conway*, 507 F.2d 1047 (5th Cir. 1975).

Section 556.026, RSMo 2000, provides that "[n]o conduct constitutes an offense unless made so by this code or by other applicable statute." There are no common-law crimes in Missouri.

2. (§14.18) Act of God

Events that are acts of God are not illegal, but the actions of the defendant coupled with an act of God may amount to a crime.

3. (§14.19) Consent or Condonation

Section 556.061(5), RSMo Supp. 2004, defines "consent." There is no consent when:

- the victim is legally incompetent to consent and the incompetence is manifested or known to the defendant;
- the victim is unable or known to the defendant to be unable to make a reasonable judgment regarding the conduct; or
- it is induced by force, duress, or deception.

Not all criminal acts may be consented to, for instance, murder. Mutual combat may result in criminal convictions of both combatants. See *State v. Hatfield*, 465 S.W.2d 468 (Mo. 1971), in which the Court found evidence of premeditation and deliberation from the number of blows and the viciousness.

Other offenses may contain consent as an element, e.g., stealing by deceit, while as to others consent is an absolute defense, e.g., stealing without consent. Consent is a defense to offenses that include the element of "without consent," "against the will," or something similar. Regarding sex offenses, see §14.77 below. The consent must be valid. Consent given through actual force or by fear induced by violence or threats of violence is not valid. *State v. Couch*, 793 S.W.2d 599 (Mo. App. E.D. 1990).

When the victim does not desire to prosecute, it is not mandatory that the charge be dismissed or that it not be filed; the prosecutor may subpoena the victim and compel the victim's testimony unless the victim takes advantage of some privilege. In other cases, the testimony of the actual victim may not be necessary. Regarding mutual combat, see §14.62, *infra*.

Some cases have indicated that the government may consent to a crime. *United States v. Sanford*, 503 F.2d 291 (9th Cir. 1974), *reversed on other grounds*, 421 U.S. 996 (1975), and 429 U.S. 14 (1976). Other cases have held that a victim who allows the crime to be committed has consented to the crime. *State v. Perrin*, 292 S.W. 54 (Mo. 1927). The entrapment defense is akin to consent.

Section 565.080.1, RSMo 2000, provides that consent is a defense to conduct that is an offense because it caused or threatened physical injury only when:

- the injury or threatened injury was not serious;
- the conduct and harm were reasonably foreseeable hazards of the victim's occupation or joint participation in a lawful athletic contest or competitive sport; or
- the consent establishes a justification under Chapter 563, RSMo.

The defendant has the burden of injecting the issue. Section 565.080.2.

Consent is a defense to:

- kidnapping, § 565.100, RSMo 2000; § 565.110, RSMo Supp. 2004;
- felonious restraint, § 565.120, RSMo 2000; and
- false imprisonment, § 565.130, RSMo 2000.

Consent is also a defense to:

- forcible rape, § 566.030, RSMo 2000; and
- forcible sodomy, § 566.060, RSMo 2000.

Consent is not a defense to:

- statutory rape or statutory sodomy, §§ 566.032, 566.034, 566.062, 566.064, RSMo 2000;
- sexual misconduct, § 566.093, RSMo Supp. 2004; or
- offenses involving children, § 566.068, RSMo 2000; § 568.045, RSMo Supp. 2004; §§ 565.153, *et seq.*, RSMo 2000.

In death penalty murder cases, it is a statutory mitigating circumstance that the victim was a participant in the defendant's conduct or consented to the act. Section 565.032.3(3), RSMo 2000.

4. (§14.20) Statute Repealed or Declared Unconstitutional

There can be no prosecution under a repealed statute for acts committed before repeal unless there is a savings clause or other proper authority for keeping it alive for that purpose. *United States v. Chambers*, 291 U.S. 217 (1934). Prosecution cannot be had under an unconstitutional statute unless the decision declaring it so is treated prospectively only. Section 1.160, RSMo

2000, provides that, if a statute is repealed or amended, it does not affect offenses occurring before the repeal, except that the punishment shall be according to the amendment. *See also* § 556.031, RSMo 2000.

5. (§14.21) Public Duty or Legal Authorization

The executioner cannot be convicted of murder for carrying out a death sentence. Other official acts committed under color of law by public officials or de facto public officials may likewise not be criminal, even though the same acts committed by someone else would have been criminal. These acts, however, must be authorized by statute or common law and not of the "Watergate" variety.

Section 563.021, RSMo 2000, provides that the use of physical force is justified when, unless otherwise illegal, it is required or authorized by a statute or judicial decree, such as those provisions defining the duties and functions of public servants or of private persons to assist public servants, or the execution of legal process, or military service. The defendant has the burden of injecting this issue. Section 563.021.3.

Section 563.046, RSMo 2000, covers the use of force by a police officer in making an arrest. Section 563.051, RSMo 2000, covers the use of force by a private person in making an arrest. Section 563.056, RSMo 2000, governs the use of force in preventing an escape from confinement. Section 563.061, RSMo 2000, governs the use of force by persons with responsibility for the care, custody, or safety of others, including:

- parents, guardians, teachers, or other persons entrusted with the care and supervision of a minor for a special purpose;
- wardens and jailors;
- operators of passenger carriers;
- physicians; and
- persons attempting to stop a suicide.

Section 578.315, RSMo 2000, provides that a bus driver may eject a passenger who is:

- disturbing the peace;
- using obscenity; or
- under the influence of or drinking or ingesting intoxicating beverages or controlled substances.

Section 578.320, RSMo 2000, provides that a person without bona fide business in a bus terminal may be requested to leave, and any deadly or dangerous weapon, explosive, or hazardous material on a bus or in a terminal may be seized. A security guard may detain any person violating §§ 578.300, *et seq.*, RSMo 2000, and, in doing so, may use reasonable force. Section 578.325, RSMo 2000.

Section 570.215, RSMo 2000, authorizes the detention of suspected library thieves, and § 537.125, RSMo 2000, authorizes a mercantile establishment to apprehend and detain suspected shoplifters and thieves.

This defense is closely related to immunity, §§14.29, *et seq.*, *infra*, and justification, §14.36, *infra*. *See also* §14.52, *infra*.

6. (§14.22) Agent

Defendants cannot avoid criminal liability by showing that they were acting as agents for another. *State v. Miller*, 237 S.W. 498 (Mo. 1922). Section 562.061, RSMo 2000, provides that a defendant is criminally liable for conduct that the defendant performs or causes to be performed in the name of or on behalf of a corporation or unincorporated association to the same extent as if the defendant had done it on their own.

See also §14.85, *infra*.

C. Lack of Jurisdiction (State vs. Federal) and Related Defenses

1. (§14.23) Lack of Proper Venue or Jurisdiction

See §§13.27–13.34 of this deskbook.

Under the special maritime and territorial jurisdiction of the United States, defined in 18 U.S.C. § 7, federal courts may have exclusive jurisdiction over crimes on federal territory. *See United States v. Brown*, 552 F.2d 817 (8th Cir. 1977); §§ 12.020, 12.040,

RSMo 2000. In other instances, the state may have full or partial jurisdiction over federal territory, buildings, or reservations. Section 12.028, RSMo 2000.

In some instances, the state cannot prosecute an act or transaction because the federal government has preempted the field. See also §14.32 below regarding federal officers.

Venue, however, is not an integral part of an offense. *State v. Lingar*, 726 S.W.2d 728 (Mo. banc 1987).

2. (§14.24) Statute of Limitations

See §§13.54–13.59 of this deskbook. That the offense was not commenced within the applicable period of limitations is a defense that was once held to go to jurisdiction and could be raised for the first time on appeal. *See State v. Civella*, 364 S.W.2d 624 (Mo. App. W.D. 1963) (defendant pled guilty). It has now been held otherwise. *See Longhibler v. State*, 832 S.W.2d 908 (Mo. banc 1992) (waived by pleading guilty). Recent statutory changes have carved out several exceptions to this defense. "A prosecution for murder, forcible rape, attempted forcible rape, forcible sodomy, attempted forcible sodomy, or any class A felony may be commenced at any time." Section 556.036.1, RSMo Supp. 2004. Prior acts or crimes of the defendant may be admissible during a trial to show intent, motive, identity, lack of accident or mistake, or common scheme, even though they occurred beyond the period of limitations. *State v. Bascue*, 485 S.W.2d 35 (Mo. 1972).

3. (§14.25) Double Jeopardy

See §§13.68–13.79 of this deskbook.

4. (§14.26) Illegal Arrest

The legality of the arrest does not affect the jurisdiction of the court, and it is not usually a defense. It may affect the admissibility of evidence under the "exclusionary rule." *See Mapp v. Ohio*, 367 U.S. 643 (1961) (search); *Davis v. Miss.*, 394 U.S. 721 (1969) (fingerprints); *Brown v. Ill.*, 422 U.S. 590 (1975) (confession). Illegal arrest is not a defense to a charge of resisting arrest. Section 575.150.3, RSMo Supp. 2004.

Violation of procedural requirements, such as the 20-hour rule, § 544.170, RSMo 2000, and the 24-hour rule, which limit the amount of time a suspect may be held by police without being charged, or the requirement that a person arrested on a warrant be brought before the associate circuit judge as soon as practicable, Rules 21.09 and 22.07, does not give rise to a defense against prosecution. *See State v. McKinney*, 498 S.W.2d 768 (Mo. 1973), *cert. denied*, 415 U.S. 926 (1974); *State v. Blankenship*, 526 S.W.2d 78 (Mo. App. S.D. 1975).

D. Immunity

1. (§14.27) Legislative Immunity

Article III, § 19, of the Missouri Constitution provides that senators and representatives are privileged from arrest during sessions of the General Assembly and 15 days before and after the session, except as to treason and felonies or breach of the peace.

In a federal criminal prosecution against a state legislator, there is no legislative privilege barring the introduction of evidence of legislative acts of the defendant. *United States v. Gillock*, 445 U.S. 360 (1980).

2. (§14.28) Diplomatic Immunity

See 22 U.S.C. §§ 254a–254e and *Farnsworth v. Zerbst*, 98 F.2d 541 (5th Cir. 1938). Jurisdiction of any action against a foreign diplomat or the diplomat's servants is in the Supreme Court of the United States. 28 U.S.C. § 1251.

3. (§14.29) Judicial, Police, and Prosecutor's Immunity

Judicial officers have immunity of sorts. Civilly, the immunity of judges is not removed unless they act in clear absence of all jurisdiction. The test considers the nature of the act and the expectation of the parties. *Stump v. Sparkman*, 435 U.S. 349 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

Police officers and court officials have at least quasi-immunity for purely ministerial acts when they do nothing more than perform orders issued by a court. *Duba v. McIntyre*, 501 F.2d 590 (8th Cir. 1974).

Prosecutors are not civilly liable under the federal Civil Rights Act, 42 U.S.C. § 1983, but they may be criminally liable under 18 U.S.C. § 242. *Imbler,* 424 U.S. 409. Court-appointed attorneys, however, are not immune, under federal law, from malpractice cases. *Ferri v. Ackerman*, 444 U.S. 193 (1979). When a public official is sued in that person's official capacity, the public official's municipality is liable. *Brandon v. Holt*, 469 U.S. 464 (1985). Municipal bodies themselves have no absolute immunity, *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978), but their officials may be immune.

Law enforcement officers have immunity from the drug laws when engaged in enforcement in good faith. Section 195.371, RSMo 2000. Prison officials have a qualified immunity from civil suits. *Procunier v. Navarette*, 434 U.S. 555 (1978).

Basically, the immunity of officials from civil rights actions, 42 U.S.C. § 1983, is a qualified good-faith immunity. *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). The burden is on the official to plead good faith in defense. *Gomez v. Toledo*, 446 U.S. 635 (1980). See also the discussions in §14.21 above and §14.52 below.

4. (§14.30) Executive Immunity

The extent of executive immunity has not been defined. Executive privilege is absolute only in military and diplomatic matters, and this privilege must yield to a need for evidence in a criminal case. *United States v. Nixon*, 418 U.S. 683 (1974).

5. (§14.31) Voter's Immunity

Article VIII, § 4, of the Missouri Constitution provides that voters are privileged from arrest while going to, attending, and returning from elections except for treason, felony, or breach of the peace.

6. (§14.32) Federal Officers

Federal officers must be tried for criminal violations in federal court, and not state court, for acts committed in the line of duty. *In re Neagle*, 135 U.S. 1 (1890).

The military may have jurisdiction through court martial procedure. Crimes against the United States or its agents may be within the exclusive jurisdiction of federal courts, as may be crimes against foreign officials.

As to civil immunity for federal officials, see *Butz v. Economou*, 438 U.S. 478 (1978).

7. (§14.33) Immunity From Prosecution

Missouri does not have any type of general immunity law. But Rule 27.04 provides for the discharge of a jointly charged co-defendant for the purpose of testifying against the other defendant with such a discharge being a bar to prosecution. Section 491.205, RSMo 2000, allows the state to compel a witness to testify even if the witness asserts the Fifth Amendment privilege. To compel testimony, the state must procure a court order for the witness to testify. Once the testimony is given, the witness cannot be prosecuted for any offense that was the subject matter of the inquiry. The only exception to this immunity is prosecution by the state for perjury. Section 541.050, RSMo 2000, bars prosecution in Missouri when a defendant has been charged for the same theft in another state. Statutes addressing other special situations include, e.g.:

- § 416.111, RSMo 2000, granting witness immunity in actions against monopolies;
- § 136.100, RSMo 2000, appearances before the state collector of revenue—transactional immunity;
- § 144.340, RSMo 2000, hearings before the Director of Revenue regarding sales tax—transactional immunity to individuals;
- § 288.230, RSMo 2000, employment security hearings—transactional immunity for individual witnesses;
- § 386.470, RSMo 2000, Public Service Commission hearings—transactional immunity for individuals;
- § 210.832.2, RSMo 2000, paternity actions; and
- § 537.294, RSMo 2000, owners of firearms ranges—immunity from civil or criminal liability for noise.

The granting of "use"—rather than "transactional"—immunity by order of court for federal grand jury, agency, congressional, or court witnesses is provided for in 18 U.S.C. §§ 6001, *et seq*. These statutes do not prohibit prosecution but only prohibit the

introduction in evidence or use of the testimony or information derived from the testimony in any criminal case except one for perjury. This has been held to be constitutional. *Kastigar v. United States*, 406 U.S. 441 (1972). In the prosecution of an immunized witness, the prosecution has a heavy burden of showing that the charge does not stem from testimony given under the grant of immunity. *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973). "Transactional" immunity prohibits prosecutions for the offense about which the defendant testifies. *See Counselman v. Hitchcock*, 142 U.S. 547 (1892). Federally granted immunity is binding on the states. Immunity granted by a court-martial-convening authority is binding on state and federal prosecuting authorities. *Terzak v. Usher*, 571 F. Supp. 1203 (D. Colo. 1983). When a witness receives use immunity to testify before a grand jury, that grant of immunity does not extend to the witness's testimony in a civil proceeding. *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983).

In Missouri, a prosecuting attorney, or the Attorney General, originally could not make an agreement not to prosecute that was binding so as to discharge the defendant from responsibility for the offense. *State v. Lopez*, 19 Mo. 254 (1853); *State v. Myers*, 49 S.W.2d 36 (Mo. 1932). Rule 24.02(d) now recognizes plea bargain agreements that are binding. Under due process of law, an informal grant of immunity to informers may also be binding when the informers have changed their position to their prejudice.

There is little authority for a defendant to obtain immunity for a defense witness. *See United States v. Herman*, 589 F.2d 1191 (3rd Cir. 1978); *Gov't of V.I. v. Smith*, 615 F.2d 964 (3rd Cir. 1980); *United States v. De Palma*, 476 F. Supp. 775 (S.D.N.Y. 1979).

8. (§14.34) Pardon or Amnesty

Article IV, § 7, of the Missouri Constitution gives the Governor power to grant pardons, but only after conviction, and not for treason or cases of impeachment. Section 217.800, RSMo 2000, authorizes conditional or restricted pardons by the Governor. Section 217.805, RSMo 2000, authorizes the Governor to remit fines or forfeitures. Article II, § 2, of the United States Constitution grants the President power to grant pardons for offenses against the United States, except in cases of impeachment (these may be granted before conviction).

> The legislature, by statute, may grant general amnesty for specific offenses.
>
> A defendant convicted of murder in the first degree will be punished by death or life imprisonment without eligibility for probation, parole, or release except by act of the Governor. Section 565.020.2, RSMo 2000.

E. (§14.35) Necessity

See also §14.15, *supra*; §14.115, *infra*.

Necessity to avoid a public or private injury greater than the injury that might reasonably result from the criminal act may be a defense. See *United States v. Kroncke*, 459 F.2d 697 (8th Cir. 1972), for a discussion of this possible defense.

Section 563.026, RSMo 2000, provides that, unless inconsistent with other provisions of Chapter 563, RSMo, defining justifiable use of physical force, or with some other law, it is, to all but class A felonies or murder, justifiable and a defense that the conduct was "necessary as an emergency measure to avoid an imminent public or private injury" that was about to occur through no fault of the defendant and that was of such gravity that, under ordinary standards of intelligence and morality, the desirability of avoiding the injury outweighed the offense. This defense cannot rest on considerations pertaining only to the morality and advisability of the statute in general or as applicable to the particular class of cases. This defense is an affirmative defense, and its applicability is initially a question of law for the trial court. See *City of St. Louis v. Klocker*, 637 S.W.2d 174 (Mo. App. E.D. 1982), for a discussion of the defense. In *Klocker* it was pointed out that the defense is based on a choice of evils. Neither necessity nor duress is a defense if a legal alternative exists. *United States v. Bailey*, 444 U.S. 394 (1980). See also §14.115 below for a discussion of necessity as a defense to escape and §14.101 below for a discussion of necessity as a defense to drug offenses.

Economic necessity, such as stealing in order to eat, is not a defense. *See Harris v. State*, 486 S.W.2d 573 (Tex. Crim. App. 1972). Proof of such a necessity, however, may be a mitigating factor or even create sufficient sympathy to win an acquittal of a minor offense.

F. (§14.36) Justification

The Missouri Criminal Code, in Chapter 563, RSMo, covers the defense of justifiable homicide or use of physical force in considerable detail. Section 563.031, RSMo 2000, provides that it is a defense to the use of physical force when and to the extent that the defendant reasonably believes it is "necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful force by" the victim, except when:

- the defendant was the initial aggressor, unless:
  - the defendant has withdrawn from the encounter and effectively communicated the withdrawal to the victim;
  - the defendant is a law enforcement officer; or
  - the defendant's aggression was justified under some law; or
- the third person the defendant is protecting would not be justified in using such force.

Deadly force may not be used unless the defendant reasonably believes it is "necessary to protect himself or another against death, serious physical injury, rape, sodomy or kidnapping or serious physical injury through robbery, burglary or arson." Section 563.031.2. The defendant has the burden of injecting this issue. Section 563.031.4.

Section 556.061(28), RSMo Supp. 2004, defines "[s]erious physical injury," and § 563.011(1), RSMo 2000, defines "[d]eadly force." Section 563.036, RSMo 2000, controls the use of force to prevent or terminate a trespass. Section 563.041, RSMo 2000, controls the use of physical force, including physical restraint, to prevent stealing, tampering, or property damage. Sections 563.046 and 563.056, RSMo 2000, control the use of force by a law enforcement officer, providing in part that the officer does not need to retreat or desist, and that the arrest must be lawful or reasonably believed by the officer to be lawful. Section 563.051, RSMo 2000, covers the use of force by a private person in assisting a law enforcement officer and in acting on the person's own in making an arrest. Section 563.061, RSMo 2000, covers the use of force by:

- a parent, guardian, teacher, or other person entrusted with the care and supervision of a minor or incompetent;
- jail or prison officials;
- the operator of a vehicle or other carrier of passengers;
- a physician in treating a patient; or
- someone preventing a suicide by another.

In all these instances, the defendant has the burden of injecting the issue. Section 563.061.6.

Justification based on the execution of a public duty or legal authorization is codified in § 563.021, RSMo 2000, and is discussed in §14.21 above.

A justification defense arising out of an emergency is governed by § 563.026, RSMo 2000, and is discussed in §14.35 above.

The defense of justification to criminal charges does not abolish or impair any civil remedy available to an alleged injured party. Section 563.016, RSMo 2000.

The battered spouse syndrome is recognized, and evidence of it is admissible on the issue of self-defense or defense of another. Section 563.033, RSMo 2000. Notice of the intended use of such evidence must be given. Section 563.033.2. The court, upon motion of the state, may appoint one or more psychiatrists, psychologists, or qualified physicians, or the Department of Mental Health, to examine the accused. *Id*. The order may also allow the interview of witnesses. *Id*.

Self-defense is more fully discussed in §§14.50–14.57 below.

The instructions submitting the issues of justification are contained in MAI-CR 3d 306.06–306.22 and 308.20. Series 306 instructions are to be given, when appropriate, regardless of whether requested, but whether the failure to do so is reversible error depends on a showing of prejudice. Rule 28.02(f).

G. General Denial

1. (§14.37) Insufficient Evidence

In a denial defense, the prosecution is put to the test. The prosecutor must establish the guilt of the defendant for the offense charged beyond a reasonable doubt. If the prosecution

does not succeed in this burden, the defendant should be acquitted upon motion at the close of the state's evidence, at the close of all the evidence, or even after a verdict of guilty. The court should even do so on its own motion when appropriate. Rule 27.07. But more often, the question of the sufficiency of the evidence is an issue for the jury. A new trial may be granted upon good cause shown. Rule 29.11. Thus, it would appear that a court could grant a new trial because the verdict was against the weight of the evidence. *State v. Gregory*, 96 S.W.2d 47 (Mo. 1936). If the court grants the motion because there was insufficient evidence, no new trial may be had, and the charge must be dismissed. On appeal, even when the sufficiency of the evidence has not been preserved as a ground for error, it is an issue that may be reviewed as plain error. *State v. McClunie*, 438 S.W.2d 267 (Mo. 1969).

Credibility of the witnesses for both the prosecution and the defense is generally the determining issue. Thus, a general denial often involves discrediting the victim, the prosecution witnesses, or the police. A general denial also might involve attacks on persons mentioned in evidence who do not testify at the trial. The defense may attempt to show that the witness is mistaken or lying. One of the major decisions to be arrived at is whether the defendant will testify. This may involve considerations of:

- the defendant's previous criminal convictions;
- the defendant's intelligence;
- the defendant's appearance;
- what defense is being presented;
- corroboration of the defendant's testimony;
- the possibility of perjury; and
- the natural desire of the jury to hear the defendant's story.

A general denial may be an offense instead of a defense. The defense may attempt to establish that the defendant is physically incapable of committing the alleged act or that someone else committed the offense. But in the latter regard, see *State v. Umfrees*, 433 S.W.2d 284 (Mo. banc 1968), and *State v. LaRette*, 648 S.W.2d 96 (Mo. banc 1983).

This defense may be based on the failure of proof of the *corpus delicti,* i.e., someone committed the crime. *See State v. Celmars*, 399 S.W.2d 145 (Mo. App. E.D. 1966); *State v. Brooks*, 861 S.W.2d

353 (Mo. App. S.D. 1993). If the *corpus delicti* is not established, the defendant's confession is inadmissible. *Kansas City v. Verstraete*, 481 S.W.2d 615 (Mo. App. W.D. 1972). The defendant's connection with the offense, however, is not a part of the *corpus delicti*. *State v. Murphy*, 415 S.W.2d 758 (Mo. banc 1967).

Earlier cases held that, in a circumstantial evidence case, the facts and circumstances shown in evidence must be consistent with each other, consistent with guilt, and inconsistent with all reasonable theories of innocence. *State v. Prier*, 634 S.W.2d 197 (Mo. banc 1982); *State v. Purlee*, 839 S.W.2d 584 (Mo. banc 1992). Those cases were overruled in *State v. Grim*, 854 S.W.2d 403 (Mo. banc 1993), and Missouri now follows the federal rule, *Holland v. United States*, 348 U.S. 121, 140 (1954). Circumstantial evidence is now considered like direct evidence: no cautionary instruction is given on it, and the issue is whether all the evidence establishes guilt beyond a reasonable doubt.

What is a reasonable doubt? This has been, and still is, a troublesome problem. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Supreme Court held that a constitutionally defective instruction on reasonable doubt is not harmless error. *Cage v. Louisiana*, 498 U.S. 39 (1990), involved an instruction equating reasonable doubt with a "grave uncertainty" and an "actual substantial doubt" and requiring a "moral certainty" rather than an evidentiary certainty that the defendant was guilty. The Supreme Court held that such an instruction suggested a higher degree of doubt than is required for an acquittal. In *Victor v. Nebraska*, 511 U.S. 1 (1994), however, the Court held that instructions that referred to "moral evidence" and "moral certainty" were not unconstitutional, but it did say that it did not approve of them.

MAI-CR 3d 302.04 provides:

> A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that (a) (the) defendant is guilty of the crime charged, you will find him guilty. If you are not so convinced, you must give him the benefit of the doubt and find him not guilty.

Attacks on this Missouri instruction have been unsuccessful. *See State v. Crawley*, 814 S.W.2d 8 (Mo. App. W.D. 1991).

This defense may also be based on a claim:

- of mistaken identity;
- that the defendant was merely present at the scene, *see State v. Irby*, 423 S.W.2d 800 (Mo. 1968); *State v. Castaldi*, 386 S.W.2d 392 (Mo. 1965);
- that the evidence has not established each and every element of the offense; or
- that there has not been the required corroboration in charges of:
    - treason, MO. CONST. art. I, § 30; § 576.070.4, RSMo 2000;
    - perjury, § 575.040, RSMo 2000; *State v. Burgess*, 457 S.W.2d 680 (Mo. banc 1970); or
    - rape, *State v. Creason*, 847 S.W.2d 482 (Mo. App. W.D. 1993).

A conviction not supported by evidence is a denial of due process of law. *Johnson v. Fla.*, 391 U.S. 596 (1968); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *State v. O'Brien*, 857 S.W.2d 212 (Mo. banc 1993).

The test of sufficiency of the evidence to support a verdict of guilty is whether a rational trier of fact could reasonably find guilt beyond a reasonable doubt based on the evidence. *Jackson v. Va.*, 443 U.S. 307 (1979); *State v. Siraguso*, 610 S.W.2d 338 (Mo. App. W.D. 1980); *City of Kansas City v. Oxley*, 579 S.W.2d 113 (Mo. banc 1979).

For the standards applied on appellate review of sufficiency, see Chapter 29 of this deskbook, *State v. Dulany*, 781 S.W.2d 52, 55 (Mo. banc 1989), and *Grim,* 854 S.W.2d 403.

If an information includes an element that is not essential, the state does not need to prove that element. *State v. Welsh*, 853 S.W.2d 466 (Mo. App. S.D. 1993).

2. (§14.38) Lack of Knowledge, Intent, Purpose, or Culpable Mental State

See §§14.2–14.6 of this deskbook. Lack of knowledge, intent, purpose, or culpable mental state is a defense that may be raised under a general denial, and it is a part of the insufficiency of evidence defense.

3. (§14.39) Alibi

An alibi is a defense that the defendant was somewhere else at the time of the crime and, therefore, could not be the guilty person. *State v. Hubbard*, 171 S.W.2d 701 (Mo. 1943). It is related to the SODDI defense—"Some Other Dude Did It."

Rule 25.05(A)(5) provides that, if the defendant intends to rely on the defense of alibi and the state makes a request for discovery specifying the place, date, and time of the alleged crime, the defendant must disclose this intention in writing and give specific information as to the place where the defendant claims to have been "and, as particularly as is known, the names and addresses of the witnesses by whom he proposes to establish such alibi." Rule 25.05(A)(5). *But see State v. Mansfield*, 637 S.W.2d 699 (Mo. banc 1982) (disapproving the disallowance of an alibi witness because of failure to disclose because of fundamental fairness). When the defendant discloses the alibi witnesses, the state, under fundamental fairness, is required to disclose witnesses it will call to rebut their testimony. *Wardius v. Or.*, 412 U.S. 470 (1973); *State v. Curtis*, 544 S.W.2d 580 (Mo. banc 1976). If the defendant's disclosure of alibi is equivocal, such as "the defendant may use alibi," the state does not need to disclose its rebuttal witnesses. *State v. Johnstun*, 674 S.W.2d 86 (Mo. App. W.D. 1984).

The approved instructions for submitting the alibi issue to the jury are MAI-CR 3d 308.04 and 308.06, but they are only required when requested and when there is some evidence supporting the submission. *State v. Webb*, 423 S.W.2d 795 (Mo. 1968); *see also State v. McGee*, 602 S.W.2d 709 (Mo. App. E.D. 1980). Alibi is not a "special negative defense," and it does not need to be cross-referenced in the main verdict-directing instruction. If proving the defendant's presence at the crime scene is necessary to prove the offense, the state always has this burden, and the burden is not on the defendant to prove an alibi. *See State v. Reece*, 324

S.W.2d 656, 661 (Mo. 1959). No instruction is necessary when the alibi is based solely on the defendant's own testimony that the defendant was not present. *State v. Williamson*, 877 S.W.2d 258 (Mo. App. W.D. 1994). This defense is discussed in depth in an article by the Honorable Orville Richardson in THE MISSOURI BAR COMMITTEE COMMENTS ON MISSOURI APPROVED CRIMINAL INSTRUCTIONS, *Alibi* (MoBar 1974). If the evidence shows an alibi for only part of the time during which the offense could have been committed, no alibi instruction is required. *State v. Chevalier*, 623 S.W.2d 42 (Mo. App. W.D. 1981).

Alibi is not a defense to all cases. If the defendant is charged as an accessory or a conspirator, the state does not need to always prove that the defendant was actually present at the scene of the crime because the proof may show that, although elsewhere, the defendant conspired or knowingly and intentionally aided or encouraged another in committing the offense. *State v. Craft*, 92 S.W.2d 626 (Mo. 1936); *State v. Spica*, 389 S.W.2d 35 (Mo. 1965).

A defendant is entitled to have this defense submitted to the jury, upon request, even if the evidence giving rise to it came in as a part of the state's case and even if the preponderance of the evidence opposes the defense. *See State v. Taylor*, 24 S.W. 449 (Mo. 1893); *State v. Yager*, 416 S.W.2d 170 (Mo. 1967).

4. (§14.40) Good Character

Rule 28.02(a) formerly required that, whether requested or not, the jury be instructed upon good character when there was such evidence. That rule has now been amended and no longer so provides. A defendant who desires such an instruction must request it. The approved instruction for submitting this defense is MAI-CR 3d 310.40. This instruction is only required when there is supportive evidence and only when the particular trait of character bore on the defendant's guilt or innocence. The instruction is only required when the defendant opens up the issue of the defendant's character as a "party." *State v. Baldwin*, 349 S.W.2d 212 (Mo. 1961). Refusal to give this instruction in the past was prejudicial error. *State v. Russo*, 470 S.W.2d 164 (Mo. App. S.D. 1971). Now, prejudice must be shown.

Evidence of the defendant's good character can only be introduced by evidence as to the defendant's reputation in the community. *State v. Schmidt*, 530 S.W.2d 424 (Mo. App. W.D. 1975).

The defense is based on the premise that a person of good character is not likely to commit the crime. If the defendant puts character in issue, the prosecution may cross-examine the defendant's character witnesses as to their knowledge of the defendant's character, including the defendant's arrests or acts of misconduct not resulting in convictions, even though the defendant has not testified. The state may also then call witnesses to testify as to the defendant's bad reputation and character. Unless the defendant puts character at issue, the prosecution cannot introduce such evidence (except prior convictions to impeach a testifying defendant, *State v. Thurman*, 521 S.W.2d 773 (Mo. App. W.D. 1975), or evidence of prior bad acts to show motive, intent, identity, lack of accident or mistake, or common scheme or plan).

Evidence may also be introduced as to a witness's reputation for truth or veracity (good or bad). *See* II MO. EVIDENCE §20.2 (MoBar 4th ed. 1993 and 2001 Cum. Supp.). This reputation evidence does not require an instruction to the jury. *State v. Williams*, 87 S.W.2d 175 (Mo. banc 1935). Evidence of the reputation of the defendant or the victim as to being quarrelsome and turbulent may also be admissible in self-defense situations. *State v. Robinson*, 130 S.W.2d 530 (Mo. 1939). Reputation evidence as to other traits may also be admissible in a limited number of other cases.

III. Semi-Defenses and Trial Tactics

A. (§14.41) "Mitigating" Tactics

In many cases, there is little or no real possibility of securing an acquittal. Therefore, the defense is actually an attempt to mitigate the punishment or to secure a conviction of a lesser offense or degree or of "attempt" rather than of the offense charged.

Various trial tactics, too many to discuss in toto, may be used. They may include an attempt to show the following:

- The victim deserved it.
- Others do far worse.
- The witnesses (often informers or co-defendants who have turned state's evidence) are more guilty than the defendant.

- Sympathy for the defendant or the defendant's family is appropriate.
- Prejudice against the victim (e.g., the victim is a corporation, car dealer, etc.) is appropriate.
- The police were brutal or were bumbling fools.
- The defendant has reformed.
- The prosecution is unfair or is using unfair tactics.
- The evidence should have or could have been much stronger.

Defense lawyers should use their knowledge of science, people, psychology, the community, and the law, and their imagination.

B. (§14.42) Excluding Evidence

Other trial tactics may include an attempt to exclude evidence, e.g., objections to the chain of evidence. In this regard, there is very little chance of success. *See*:

- *State v. Kern*, 447 S.W.2d 571 (Mo. 1969) (belief that item is same one that was used in crime held sufficient);
- *State v. Robinson*, 447 S.W.2d 71 (Mo. 1969) (discrepancies in the chain of evidence to be resolved by the jury);
- *State v. Everett*, 448 S.W.2d 873 (Mo. 1970) (do not need to have a witness who continuously had personal possession);
- *State v. Coleman*, 441 S.W.2d 46 (Mo. 1969) (no need of such proof when item positively identified and its condition is not a significant factor).

But see State v. Moxley, 14 S.W. 969 (Mo. 1890) (presumption of performance of duty will not fill gaps in the chain of evidence); *State v. Myers*, 172 S.W.2d 946 (Mo. 1943) (item not in the same condition when tested as it was when seized).

Objections of irrelevancy, hearsay, lack of foundation, etc. may also exclude evidence. Pretrial motions to suppress or motions *in limine* may also be used to try to exclude evidence. As a defense, this is seldom very fruitful unless the only incriminating evidence is obviously inadmissible.

C. (§14.43) Other Trial Tactics

Other trial tactics may be an attempt to confuse or trick the prosecutor, the court, or the jury (seldom successful) or an attempt to "sandbag" the prosecutor into not offering damaging evidence or into

offering helpful evidence. An attempt may be made to bring the entire case down to a battle of opposing experts or "which do you believe, the defendant or the victim?" Generally, however, the defendant loses in this contest. Delay is also a famous, but often useless, defense. A trial of the police department, the victim, or the informer or snitch is a common strategy, especially when there is little else. Of course, the defendant should be cleaned up, toned down, and sometimes dried out for the trial. The defendant should always be presented by the defense side in the very best possible light.

Trial tactics and strategy are controlled by substantive law, by the rules of evidence, and by the ingenuity of defense counsel, as well as, unfortunately, by the assets and means of the defendant or the defendant's family.

D. (§14.44) Lesser Offense

Rule 29.01(c) authorizes a verdict finding the defendant "guilty of an offense [that is] necessarily included in the offense charged or of an attempt to commit either the offense charged" or such a lesser offense. This offense or attempt, however, must have been submitted to the jury.

Section 556.046.1, RSMo Supp. 2004, defines an included offense as one that:

- "is established by proof of the same or less than all the facts required to establish the commission of the offense charged," *State v. Littlefield*, 594 S.W.2d 939 (Mo. banc 1980);
- "is specifically denominated by statute as a lesser degree of the offense charged;" or
- "consists of an attempt to commit the offense charged or to commit an offense otherwise included therein."

The court is not obligated to charge the jury regarding an included offense unless there is a reasonable basis for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense. *State v. Vineyard*, 839 S.W.2d 686 (Mo. App. E.D. 1992).

There has been considerable back and forth divergence of authority as to when lesser degrees of homicide must be submitted. Section 565.025, RSMo 2000, provides that § 556.046 generally controls the submission of lesser degrees but that no "lesser included offense shall be submitted unless requested by one of the parties or the court."

Often, trials are actually held for the determination of punishment. The guilt of the defendant is obvious, or there is little question but that the jury will convict. Defense counsel in these situations (assuming counsel cannot obtain a favorable plea bargain or the defendant flatly refuses to plead guilty to anything) tries to mitigate the offense or to obtain a conviction only of a lesser offense. As previously pointed out, a submission of a lesser-included offense is required only when there is evidence of probative value that could form a basis of acquittal of the greater offense and a conviction of the lesser. *State v. Taylor*, 645 S.W.2d 199 (Mo. App. S.D. 1982) (defendant's evidence was that no assault whatsoever occurred; lesser offense not required to be submitted). The fact that a jury might disbelieve some of the state's evidence does not entitle the defendant to an instruction on a lesser offense. *State v. Achter*, 448 S.W.2d 898 (Mo. 1970).

The older rules and decisions required that lesser-included offenses, when appropriate, had to be submitted regardless of whether requested. In *State v. Olson*, 636 S.W.2d 318 (Mo. banc 1982), however, the Court held that a defendant may not complain of the court's failure to give a lesser-offense instruction unless the defendant requests it specifically. In *State v. Story*, 646 S.W.2d 68, 73 (Mo. banc 1983), the Court held again that the "trial court must instruct the jury on all lesser included offenses supported by the evidence, and it is error not to do so." The Court in *Story* went on to say that, if a lesser-included offense is submitted without evidentiary support and the defendant is convicted of the lesser offense, it is error because the conviction denied the defendant fundamental fairness and is manifest injustice. See the discussion in Chapter 24 of this deskbook.

E. (§14.45) Diminished Responsibility

Even if a defendant is not suffering from a mental disease or defect sufficient to exclude responsibility, the defendant may yet offer evidence that, because of a mental disease, defect, or condition, the defendant did not have whatever state of mind is an element of the offense charged. Section 552.015.2(8), RSMo 2000; *State v. Anderson*, 515 S.W.2d 534 (Mo. banc 1974); *see State v. Strubberg*, 616 S.W.2d 809 (Mo. banc 1981) (not a complete defense). The instruction for submitting this issue to the jury is MAI-CR 3d 308.03. In death penalty murder cases, the defendant's mental capacity is specifically listed as a mitigating circumstance. Section 565.032.3(2), (6), RSMo 2000. If the evidence supports the defense of diminished mental

capacity, the trial court must instruct on any lesser-included offense not requiring the disputed state of mind. *State v. Mee*, 643 S.W.2d 601 (Mo. App. E.D. 1982); *see* Chapter 15 of this deskbook; §14.8, *supra*.

F. (§14.46) Jury Nullification

A defendant may also attempt to convince the jury that, although the defendant may be guilty, they should not be convicted under an unpopular or unfair law. There is no authority in Missouri for this defense, but if the jury acquits, no one can question their decision. *See Seiden v. United States*, 16 F.2d 197 (2nd Cir. 1926). The jury, under MAI-CR 3d 302.01, is instructed that it is their duty to follow the law. Historically, jury nullification has been a part of the American scene since the pre-Revolutionary War trial of Peter Zenger. It was disapproved in *Sparf & Hansen v. United States*, 156 U.S. 51 (1895). Nullification was also discussed in *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), in which the court recognized the power of the jury to acquit in defiance of the law but declined to approve instructing the jury as to that power for fear of reducing criminal justice to lawlessness. *United States v. Avery*, 717 F.2d 1020 (6th Cir. 1983), *cert. denied*, 466 U.S. 905 (1984). The trial court will probably not allow counsel to blatantly argue this defense. *But see United States v. Newman*, 743 F. Supp. 533 (M.D. Tenn. 1990).

G. (§14.47) Incompetence to Stand Trial

A defendant who is incompetent to stand trial as a result of an existing mental disease or defect cannot undergo a criminal trial and is committed to the Department of Mental Health as long as that unfitness endures. Section 552.020, RSMo 2000. The defendant may contest the continued hospitalization by means of habeas corpus, and the state may contest it by motion.

When the defendant is found to be incompetent, often the charges will eventually be dismissed. A defendant cannot constitutionally be held forever without a trial, even though the defendant is incompetent to proceed. *Jackson v. Ind.*, 406 U.S. 715 (1972); *see* Chapter 15 of this deskbook.

H. (§14.48) Alternatives to Criminal Prosecution

The defendant may sometimes convince the prosecutor that an alternative to criminal prosecution should be afforded, e.g., under an available pretrial diversion program (which does not exist

everywhere), or a civil commitment (*see, e.g.,* §§ 631.100, *et seq.*, RSMo 2000), or that the defendant should be prosecuted in some other jurisdiction. Specialty courts for drug and alcohol addiction and mental illness have become popular. Some of these alternatives actually are worse than the potential or likely punishment for the offense.

I. (§14.49) Building a Record

In other instances, the defendant, with little hope of securing an acquittal, may merely attempt to build a record for appeal. Appeals are beyond the scope of this chapter. *See* Chapter 29 of this deskbook.

To build a record for appeal, the defendant must:

- file appropriate pretrial motions to suppress, to dismiss, or for other relief;
- object to the matter in question at every opportunity;
- make offers of proof when necessary;
- move to strike, move for a mistrial, and move that the jury be instructed to disregard whenever appropriate; and
- renew the grounds in a timely posttrial motion.

See State v. Tatum, 653 S.W.2d 241 (Mo. App. S.D. 1983) (claim of constitutional error).

Some doctrines applicable to appeal include the following:

- Rules 29.12(b) and 30.20 define "plain errors" as those that affect the substantial rights of the defendant. The Rules provide that plain errors, in the discretion of the court, may be considered, though not preserved for review, when "manifest injustice or miscarriage of justice has resulted therefrom."

- Errors in favor of the defendant are not a just cause for complaint.

- The court may choose not to reverse even though there has been an error when the error was harmless. Rule 29.12(a). When it is a constitutional error, it must be harmless beyond a reasonable doubt. *See Chapman v. Cal.*, 386 U.S. 18 (1967); *Harrington v. Cal.*, 395 U.S. 250 (1969). If the evidence of guilt is overwhelming, the error will likely be held to be nonprejudicial.

- The appellate courts are reluctant to reverse on a claim that the cumulative effect of minor errors was prejudicial, but there are cases in which this has been done. *See State v. Tiedt*, 206 S.W.2d 524 (Mo. banc 1947). *But see State v. Paige*, 446 S.W.2d 798 (Mo. 1969).

IV. Defenses to Specific Offenses

A. Homicide and Assaults

1. (§14.50) Justifiable Homicide

See §14.36 of this deskbook.

a. (§14.51) Self-Defense and Defense of Another

See § 563.031, RSMo 2000. A person may use physical force on another when and to the extent that the person reasonably believes it is necessary to defend that person or a third person from what the person reasonably believes to be the use or imminent use of unlawful force by the other person.

This defense is not available if the defendant was the original aggressor unless:

- the defendant withdrew from the encounter and effectively communicated the withdrawal to the other person and the other person persisted in continuing the incident by the use or threatened use of unlawful force;

- the defendant is a law enforcement officer and was making an arrest; or

- the initial aggression was otherwise justified under the law.

The defense of another is not justified when, under the circumstances reasonably believed by the defendant, the person the defendant seeks to defend would not have been justified in using the protective force. For federal law on the defense of another, see *United States v. Grimes*, 413 F.2d 1376 (7th Cir. 1969).

Deadly force, i.e., force used for the purpose of causing or which the actor knows creates a substantial risk of causing death or serious physical injury, may not be used unless the defendant reasonably believes the:

> [F]orce is necessary to protect himself or another against death, serious physical injury [i.e., injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body], rape, sodomy or kidnapping or serious physical injury through robbery, burglary or arson.

Section 563.031.2.

This justification defense extends to the use of physical restraint as a protective force provided that the defendant takes all reasonable measures to end the restraint as soon as reasonable to do so. Section 563.031.3.

The defendant has the burden of injecting this issue, § 563.031.4, but once that has been done, the state has the burden of proving beyond a reasonable doubt that it was not self-defense. Evidence that the defendant was suffering from battered spouse syndrome is admissible. Section 563.033, RSMo 2000.

b. (§14.52) Public Duty

See also §14.21 of this deskbook and § 563.021, RSMo 2000.

See § 563.046, RSMo 2000, regarding a law enforcement officer's use of force in making an arrest. The officer does not need to retreat or desist from making an arrest or preventing an escape from custody if the officer reasonably believes the person has committed an offense. The law enforcement officer may use deadly force only when:

- it is authorized by some other provision of Chapter 563, RSMo (e.g., in self-defense); or
- the officer reasonably believes the deadly force is immediately necessary to effect the arrest and that the person:

- has attempted or committed a felony;
- is attempting to escape by use of a deadly weapon (i.e., a firearm, either loaded or unloaded, switchblade knife, dagger, billy, blackjack, or metal knuckles); or
- may otherwise endanger life or inflict serious physical injury unless arrested without delay.

The defendant has the burden of injecting the issue of this justification defense. Section 563.046.4. The use of any physical force in making an arrest is not justified under this statute unless the arrest is lawful or the officer reasonably believes it is lawful. Other statutes set forth the arrest authority of various law enforcement officers. *See* § 544.216, RSMo 2000; Chapter 1 of this deskbook. The unlawfulness of an arrest, however, is not a defense to a charge of resisting arrest. Section 575.150.4, RSMo Supp. 2004.

A private person who has been directed by one the person reasonably believes to be a law enforcement officer to assist the officer in making an arrest or preventing an escape from custody may use physical force when and to the extent the person reasonably believes it to be necessary to carry out the officer's direction unless the person knows or believes the arrest is not authorized. Section 563.051.1, RSMo 2000. *See* § 105.210, RSMo 2000 (officers may call male citizens over the age of 21 to come to their assistance). A private person making a citizen's arrest may use physical force to make an arrest or prevent an escape only when and to the extent it is immediately necessary and the private person reasonably believes the person has committed a crime and that person has in fact committed the crime. Section 563.051.2. Such a citizen may use deadly force only when:

- it is authorized by Chapter 563, RSMo;
- the citizen reasonably believes authorization to do so exists under the circumstances and the citizen is directed or authorized by a law enforcement officer to use deadly force; or
- the citizen reasonably believes it is immediately necessary to effect the arrest of a person who at that time and in the citizen's presence is attempting to or has committed a class A felony or murder or is attempting to escape by use of a deadly weapon.

Section 563.051.3. The defendant has the burden of injecting the issue of this justification. Section 563.051.4.

A jail or prison guard or law enforcement officer may use physical force to prevent an escape from confinement or while in transit to or from confinement when the officer reasonably believes it is immediately necessary. Section 563.056.1, RSMo 2000. Deadly force may be used when it is otherwise authorized by Chapter 563, RSMo, or when the defendant reasonably believes there is a substantial risk that the escapee will endanger human life or cause serious physical injury unless the escape is prevented. Section 563.056.2. The defendant has the burden of injecting the issue of justification. Section 563.056.3; *see also* §§ 217.280, 217.395, RSMo 2000. Section 563.061.2, RSMo 2000, sets forth the authority of the warden and guards to use physical force, including deadly force, to maintain order and discipline as is authorized by law. Section 217.405, RSMo 2000, creates the class C felony of inmate abuse.

The Eighth Amendment's prohibition against excessive force may provide relief for a prisoner against whom excessive force has been applied maliciously and sadistically to cause harm but not when it is applied in a good-faith effort to maintain or restore discipline. *Hudson v. McMillian*, 503 U.S. 1 (1992).

Excessive force in the course of an arrest, investigative stop, or other seizure of a free citizen is governed by the Fourth Amendment standard of objective reasonableness rather than a substantive due process standard. Reasonableness is judged from the perspective of a reasonable officer on the scene with allowances for the need of split-second decisions and without regard to the officer's underlying intent or motivation. The right to arrest or stop carries with it the right to use reasonable physical coercion. *Graham v. Connor*, 490 U.S. 386 (1989). An officer may constitutionally use deadly force if the officer has probable cause to believe the about-to-be-dead suspect poses a threat of serious bodily harm to the officer or others. *Tenn. v. Garner*, 471 U.S. 1 (1985).

See also §§14.21 and 14.29, *supra*.

c. (§14.53) Necessity

See § 563.026, RSMo 2000, and §§14.15, 14.35, and §14.115 of this deskbook.

d. (§14.54) Maintenance of Another's Welfare

The use of physical force by a person with the responsibility for the care, discipline, or safety of others is codified in § 563.061, RSMo 2000.

A parent, guardian, or other person entrusted with the care and supervision of a minor or incompetent person, or a teacher or other person entrusted with the care and supervision of a minor for a special purpose, may use physical force:

- when it is reasonably believed that the force used is necessary to promote the welfare of the minor or incompetent person;
- to further the special purpose for which the defendant was given responsibility over the minor; or
- to maintain reasonable discipline in a school, class, or other group

but only if the force used was not designed to cause or believed to create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain, or extreme emotional distress.

Section 563.061.1. See *State v. Black*, 227 S.W.2d 1006 (Mo. 1950), regarding a parent's right to reasonably chastise the parent's child.

A person responsible for the operation of or the maintenance of order in a vehicle or other carrier of passengers may use physical force when the person "reasonably believes that such force is necessary to prevent interference with its operation or to maintain order" in it. Section 563.061.3. Deadly force may be used only when the defendant reasonably believes it is necessary to prevent death or serious physical injury. *Id.*

A physician or person assisting the physician at the physician's direction may use physical force for the purpose of

administering a medically acceptable form of treatment, either with the consent of the patient or the parent, guardian, or other person legally competent to consent on behalf of a minor or incompetent person, or in an emergency. Section 563.061.4. A malpractice or civil assault action, however, may still lie against the doctor. Section 563.016, RSMo 2000.

A person may use physical force to prevent others from committing suicide or inflicting serious physical injury on themselves if the person reasonably believes it is necessary. Section 563.061.5.

The defendant has the burden of injecting the issue of any of these justifications. Section 563.061.6.

e. (§14.55) Defense of Premises

See § 563.036, RSMo 2000, for use of physical force in defense of premises. A person in possession or control of premises or a person licensed or privileged to be on or in any building, inhabitable structure, or other real property may use physical force "when and to the extent that he reasonably believes it necessary to prevent or terminate what he reasonably believes to be" an attempt to commit or the commission of the crime of trespass. Section 563.036.1. Trespass in the first and second degree is defined in §§ 569.140, 569.145, and 569.150, RSMo 2000. Deadly force may only be used:

- if authorized by Chapter 563, RSMo;
- when the defendant reasonably believes it is necessary to prevent an arson or burglary upon the defendant's dwelling; or
- when entry "is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth," and the defendant reasonably believes that (1) the entry is for the purpose of assaulting or offering physical violence to any person there and (2) force is necessary to prevent a felony.

The defendant has the burden of injecting the issue. Section 563.036.3. The defendant does not need to be acting in self-defense to be availed of this defense. *State v. Shiles*, 188 S.W.2d 7 (Mo. 1945).

The defense of habitation only lies when there is evidence of an attempted unlawful entry and a lawful occupant reasonably believes there is immediate danger of entry being attempted for the purpose of killing or inflicting serious bodily harm on the occupant. *State v. Battle*, 625 S.W.2d 252 (Mo. App. E.D. 1981). Under the former law, the defense of property involved resisting an attempt to commit any felony in any dwelling house in which the defendant was present. *See State v. Taylor*, 44 S.W. 785 (Mo. 1898). For a discussion of this defense, see *State v. Lumpkin*, 850 S.W.2d 388 (Mo. App. W.D. 1993).

f. (§14.56) Defense of Property

Any person may use physical force when and to the extent that person reasonably believes it is necessary to prevent what the person reasonably believes to be the commission of or an attempted stealing, property damage, or tampering. Section 563.041.1, RSMo 2000. Deadly force may be used only when it is authorized under other provisions of Chapter 563, RSMo. Section 563.041.2. This justification includes physical restraint, provided that the defendant takes all reasonable measures to terminate it as soon as it is reasonable to do so. Section 563.041.3. See also § 537.125, RSMo 2000, allowing a merchant the right to reasonably apprehend and detain suspected shoplifters when the merchant has reasonable grounds or probable cause. The defendant has the burden of injecting the issue of defense of property. Section 563.041.4.

g. (§14.57) Justifiable Homicide Decisions

Before the adoption of the Criminal Code, Missouri also recognized the common-law defense of justifiable homicide. Case decisions under that prior law may be helpful in the interpretation and application of the present codified defense. The common-law defense even covered excusable self-defense upon chance-medley or upon sudden combat. *See State v. Partlow*, 4 S.W. 14 (Mo. 1887).

In common-law self-defense, i.e., justifiable homicide, the defendant must have had a reasonable and immediate apprehension and fear of immediate danger, *State v. Hicks*, 438 S.W.2d 215 (Mo. 1969) (a defendant does not need to wait until the defendant is beaten or shot and may have had a

right to attack); *In re J___ M___*, 812 S.W.2d 925 (Mo. App. S.D. 1991), but the defendant could not use unnecessary and excessive force after the victim had withdrawn from the attempt, *State v. Sherrill*, 496 S.W.2d 321 (Mo. App. S.D. 1973); *State v. Adkins*, 537 S.W.2d 246 (Mo. App. E.D. 1976). The defendant must not have been the aggressor or provoked the threat of force, *State v. Aubuchon*, 394 S.W.2d 327 (Mo. 1965), unless the defendant had first withdrawn from the combat, *Sherrill,* 496 S.W.2d 321, or had retreated as far as the defendant could under the circumstances, *Partlow,* 4 S.W. 14.

The basis of this defense was that, because malice was an element of murder, if the killing was in self-defense, there was no malice and it was not murder. *See State v. Malone*, 301 S.W.2d 750 (Mo. 1957). Justifiable homicide was not a defense to inflicting punishment for past wrongs, *State v. McGee*, 234 S.W.2d 587 (Mo. banc 1950), but it might be a defense even if the defendant bore express malice toward the deceased, *State v. Matthews*, 49 S.W. 1085 (Mo. 1899). Words, threats, or insults, whether uttered by the defendant or the deceased, were not sufficient to make either person the aggressor, and mere words did not justify killing. *See State v. Robinett*, 281 S.W. 29 (Mo. 1926). *But see State v. Ball*, 262 S.W. 1043 (Mo. 1924) (words used for purpose of bringing on the difficulty, and thus affording an opportunity to kill, were held to make the speaker the aggressor); *State v. Graves*, 182 S.W.2d 46 (Mo. 1944). The fact that the defendant was armed, even illegally, did not make the defendant the aggressor, but it did deprive the defendant of "imperfect self-defense." *State v. Ferguson*, 182 S.W.2d 38 (Mo. 1944). An assault, without a battery, might be sufficient heat-of-passion provocation to reduce a murder to manslaughter. *State v. Williams*, 442 S.W.2d 61 (Mo. banc 1968). As to self-defense, a defendant does not need to wait until the aggressor gets "the drop on him." *Matthews,* 49 S.W. at 1086; *McGee,* 234 S.W.2d 587.

It was held that entering into mutual combat deprives both the combatants of the defense of self-defense because they were both aggressors. *State v. Williams*, 87 S.W.2d 175 (Mo. banc 1935); *State v. Hatfield*, 465 S.W.2d 468 (Mo. 1971). But it might reduce a murder charge to manslaughter. *State v. Fuller*, 302 S.W.2d 906 (Mo. 1957). But *Partlow*, 4 S.W. 14, and cases after it, said that voluntary combat did not deprive

either participant of the defense provided the defendant did not enter the conflict with the felonious intent to kill or do serious bodily harm. Under the Criminal Code, § 565.080, RSMo 2000, consent may be a defense only when:

- the injury is not serious;
- the conduct and harm are reasonably foreseeable hazards of the victim's occupation or joint participation in a lawful athletic contact or competitive sport; or
- consent otherwise establishes a justification under Chapter 563, RSMo.

See §14.19, *supra*.

The defendant has the duty to retreat, if retreat is practical, before resorting to killing. *Sherrill,* 496 S.W.2d 321; *Partlow*, 4 S.W. 14 (retreat is necessary when a defendant relying on a defense of self-defense was an aggressor). Earlier cases applied the "no retreat" rule that allowed a defendant to stand their ground without retreating. *See, e.g., State v. Bartlett*, 71 S.W. 148 (Mo. 1902). In *Brown v. United States*, 256 U.S. 335 (1921), it was said that whether the defendant retreated was one circumstance to be considered but not controlling. Under the Criminal Code, there is a duty to retreat, except in defense of habitation. *State v. Miller*, 653 S.W.2d 222 (Mo. App. W.D. 1983). A person who is attacked in the person's own dwelling has a right to stand their ground and not retreat. *State v. Allison*, 845 S.W.2d 642 (Mo. App. W.D. 1992).

A defendant could not use deadly force to oppose non-deadly force unless it reasonably appeared necessary to use deadly force. *State v. Cook*, 428 S.W.2d 728 (Mo. 1968). Life could be taken if it reasonably appeared there was no other alternative. *See State v. Demaree*, 362 S.W.2d 500 (Mo. banc 1962) (discussing right to "shoot and kill"). In other words, the defendant could not use excessive force and claim self-defense. *State v. Robinson*, 328 S.W.2d 667 (Mo. 1959); *State v. Harper*, 51 S.W. 89 (Mo. 1899). The defendant was not required to nicely gauge the force necessary. *See Cook,* 428 S.W.2d 728. But malice might be presumed from the intentional killing with a weapon. *Sherrill,* 496 S.W.2d 321.

A defendant might rely on self-defense even if the defendant provoked the use or threat of force if the defendant in good faith withdrew or attempted to withdraw and this was clearly indicated to the deceased. *See State v. Spencer*, 307 S.W.2d 440 (Mo. 1957); *State v. Heath*, 141 S.W. 26 (Mo. 1911).

The reasonableness of the cause and the necessity of the killing were viewed in the light of the circumstances as they appeared to the defendant. *State v. Roark*, 428 S.W.2d 508 (Mo. 1968); *State v. Cooksey*, 499 S.W.2d 485 (Mo. 1973).

A defendant might be entitled to an instruction submitting both self-defense and accident, if there was any evidence of both, even though the defendant in the defendant's own testimony repudiated either or both defenses. *State v. Bidstrup*, 140 S.W. 904 (Mo. 1911). When the defendant's personal testimony was the sole support for both defenses, the defendant could not secure the submission of both. *State v. Randolph*, 496 S.W.2d 257 (Mo. banc 1973); *State v. Walker*, 525 S.W.2d 826 (Mo. App. E.D. 1975).

A defendant might be entitled to the submission of both self-defense and defense of premises. *State v. Hunter*, 444 S.W.2d 392 (Mo. 1969).

"Imperfect self-defense" is not a complete defense, but it might mitigate the offense from murder to manslaughter. It was not an affirmative defense or a special negative defense. *See* ORVILLE RICHARDSON, THE MISSOURI BAR COMMITTEE COMMENTS ON MISSOURI APPROVED CRIMINAL INSTRUCTIONS, *Self-Defense: "Perfect" and "Imperfect" in Homicide* (MoBar 1974). Imperfect self-defense is not applicable in assault cases. *State v. Melton*, 15 S.W. 139 (Mo. 1891).

Justification defense instructions are in the 306 Series of MAI-CR 3d. The approved instruction for justifiable self-defense, a "special negative defense," is MAI-CR 3d 306.06. This instruction is to be given regardless of whether requested when there is some evidence of it. The state has the burden of proving beyond a reasonable doubt that the offense charged was not done in self-defense. *State v. Malone*, 39 S.W.2d 786 (Mo. 1931); *Miller,* 653 S.W.2d 222. The same defense is available in assault cases. *Spencer,* 307 S.W.2d 440. In *Miller* it was also said that self-defense is rarely so as a

matter of law and is generally a question for the jury. *State v. Stinson*, 714 S.W.2d 839 (Mo. App. W.D. 1986). If there is evidence of self-defense from either the defense or the prosecution, the court must instruct on the issue whether requested to or not. *State v. Griffin*, 859 S.W.2d 816 (Mo. App. W.D. 1993).

Self-defense may be available in a charge of unlawful use of a weapon by flourishing, *Griffin,* 859 S.W.2d 816; *State v. Ruffin*, 535 S.W.2d 135 (Mo. App. E.D. 1976), and it is a defense in assault charges, but it is not a defense in involuntary manslaughter, *State v. Miller*, 772 S.W.2d 782 (Mo. App. S.D. 1989).

Fear of the larger size of the other person does not justify the use of force. There must be sound affirmative action, gesture, or communication indicating immediate danger. *State v. Chambers*, 671 S.W.2d 781 (Mo. banc 1984). Thus, a threat to do a future injury will not justify the present use of force. In resisting an assault, a person is not required to determine with absolute certainty or nicely gauge the amount of force necessary, but the person must not use any more force than reasonably appears to be necessary under the circumstances. *In re J___ M___,* 812 S.W.2d 925.

The reputation of the defendant and the victim as to violence may be admissible in evidence when this defense is presented. *State v. Finn*, 243 S.W.2d 67 (Mo. 1951); *State v. Davis*, 365 S.W.2d 577 (Mo. 1963). Evidence of prior threats may also be admissible. *State v. Cole*, 263 S.W. 207 (Mo. 1924); *State v. Lloyd*, 263 S.W. 212 (Mo. 1924); *State v. Berry*, 526 S.W.2d 92 (Mo. App. S.D. 1975) (evidence of prior threats and of defendant's violent temper).

In actual practice, a jury may tend to disbelieve the defense if the defendant fires multiple shots. *Allison,* 845 S.W.2d 642 (defendant, who had been drinking with the victim, shot him numerous times with a .22 rifle when the victim refused to leave the defendant's home after being ordered to by the defendant and instead pushed the defendant into a window, breaking it).

2. (§14.58) Excusable Homicide

Section 563.070.1, RSMo 2000, provides that conduct that would otherwise constitute a crime under Chapter 565, RSMo (offenses against persons) "is excusable and not criminal when it is the result of accident in any lawful act by lawful means without knowingly causing or attempting to cause physical injury and without acting with criminal negligence," which is defined in § 562.016.5, RSMo 2000. The defendant has the burden of injecting this issue, § 563.070.2, and when so injected, the burden shifts to the prosecution. There is no approved MAI-CR 3d instruction submitting this defense. The issue of accident goes to the defendant's state of mind and can generally be addressed through a converse instruction. See §14.12 above for further discussion.

Under the former law, before the adoption of the Criminal Code, homicide was excusable if it was committed by accident or misfortune:

- in lawfully correcting a child or employee, or in doing any lawful act by lawful means, with usual and ordinary caution, and without unlawful intent; or
- in the heat of passion, upon any sudden or sufficient provocation, or upon sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel and unusual manner.

Common-law excusable homicide was recognized as well. At common law, it was excusable when it was in self-defense during a chance-medley (*see* §14.57, *supra*, "imperfect self-defense"), or was by accident or misadventure. *See* PROFESSOR JOHN SCURLOCK, THE MISSOURI BAR COMMITTEE COMMENTS ON MISSOURI APPROVED CRIMINAL INSTRUCTIONS, *Excusable Homicide* (MoBar 1974).

The defendant must have been acting lawfully, *State v. Browning*, 442 S.W.2d 55 (Mo. banc 1969), and the act must not have been done with reckless disregard for human life and safety, *State v. Bradley*, 179 S.W.2d 98 (Mo. 1944); *State v. Aitkens*, 179 S.W.2d 84 (Mo. 1944); *State v. Miller*, 772 S.W.2d 782 (Mo. App. S.D. 1989). A defendant can still rely on the defense of accident even though the defendant acted negligently, *Bradley*, 179 S.W.2d 98; *Aitkens*, 179 S.W.2d 84, as long as the defendant was not criminally negligent.

Both self-defense and accident defenses must be submitted and supported by the evidence. *State v. Cook*, 727 S.W.2d 413 (Mo. App. W.D. 1987). "Accident" is an unforeseen, unintended, and unexpected event. The act was intended, and thus not an accident, if the killing was the natural and probable consequence of the act done. *State v. Frazier*, 98 S.W.2d 707 (Mo. 1936). If death unexpectedly resulted from an intentional inflicting of an injury without justification, e.g., self-defense or official duty, it was not excusable and it was at least manslaughter. *Aitkens,* 179 S.W.2d 84; *State v. Simpson*, 471 S.W.2d 173 (Mo. 1971). It was manslaughter if the intentional act causing death was a misdemeanor. If the act was a felony, the common-law felony murder rule made it murder. *State v. Chambers*, 524 S.W.2d 826 (Mo. banc 1975). All participants in the offense were guilty of a killing committed by one. *State v. Mullen*, 528 S.W.2d 517 (Mo. App. E.D. 1975). But even if the prosecution evidence was to that effect, if there was some evidence to support an excusable homicide instruction, it had to be given, because the state's evidence was rebutted. *See State v. Ameen*, 463 S.W.2d 843 (Mo. 1971). If the death was the result of culpable negligence, it was not accidental. *State v. Hinojosa*, 242 S.W.2d 1 (Mo. 1951) (automobile accident). Whether, under that circumstance, it was second degree murder or manslaughter depends on the degree of probability of harm expected from the act. *See State v. Markel*, 77 S.W.2d 112 (Mo. 1934) (firing a gun toward a group of boys to scare them held second degree murder).

The defendant might also be entitled to argue excusable homicide when the defendant was adequately provoked to do some unjustifiable act that would not ordinarily cause serious injury or death. In *State v. Coff*, 183 S.W. 287 (Mo. 1916), the defendant's evidence was that the deceased attacked and grabbed the defendant, and in order to protect himself, the defendant hit the deceased, who was killed when he fell and hit his head on the curb. The Court held that the defendant was entitled to an accident instruction. No such instruction is approved today, but the defense is subject to being argued to the jury. *State v. Young*, 844 S.W.2d 541 (Mo. App. E.D. 1992). Accident is still a factual defense, and it would appear that it could be submitted to the jury as a converse instruction under MAI-CR 3d 308.02.

If the defendant had no agency in the killing, it was not accidental; it is not an offense at all as far as the defendant was concerned. *See State v. Tatum*, 414 S.W.2d 566 (Mo. 1967)

(deceased was killed when he struck the defendant's gun, which was laying on a table). In such cases, the defendant should submit a converse instruction telling the jury it should acquit unless it finds beyond a reasonable doubt that the defendant caused the death.

Excusable homicide may be a defense to both voluntary manslaughter, § 565.023, RSMo 2000, and involuntary manslaughter, § 565.024, RSMo 2000. In involuntary manslaughter, recklessness, rather than criminal negligence, is required unless the death occurred as a result of the defendant's operating a motor vehicle while intoxicated. Thus, the degree of negligence is a factual issue.

3. (§14.59) Resisting an Unlawful Arrest

Older cases held that a defendant had a right to use such force as was reasonably necessary to prevent or resist an unlawful arrest. *Kansas City v. Mathis*, 409 S.W.2d 280 (Mo. App. W.D. 1966); *State v. McGehee*, 274 S.W. 70 (Mo. 1925) (good faith of officer is immaterial); *State v. Burnett*, 188 S.W.2d 51 (Mo. 1945) (relative of arrestee resisting his illegal arrest held manslaughter). Section 563.046, RSMo 2000, provides that an officer may use physical force, even deadly force, under some circumstances, in making an arrest if the arrest is lawful or the officer reasonably believes it is lawful. Section 575.150.4, RSMo Supp. 2004, however, provides that the unlawfulness of an arrest is not a defense to a charge of resisting arrest. It appears that an illegally arrested defendant's remedy is a civil action against the officer. *See* § 522.010, RSMo 2000 (action on bond); 42 U.S.C. § 1983 (civil rights action). Self-defense never did lie when the defendant resisted a lawful arrest. *State v. Vaughan*, 98 S.W. 2 (Mo. 1906); *State v. Nolan*, 192 S.W.2d 1016 (Mo. 1946). A defendant who has submitted to the illegal arrest cannot then later resist. *State v. Whitley*, 183 S.W. 317 (Mo. 1916). An illegal arrest was once held to be sufficient provocation to reduce a killing to manslaughter. *State v. Messley*, 366 S.W.2d 390 (Mo. 1963). This is no longer true. *State v. Thomas*, 625 S.W.2d 115 (Mo. 1981).

An arrestee may resist the use of excessive force and may resist if the arrestee does not know that the person attempting to apprehend them is an officer. *Thomas*, 625 S.W.2d 115. In *State v. Hernandez*, 651 S.W.2d 187 (Mo. App. W.D. 1983), it was held that self-defense was not a defense to resisting arrest, but it may

be a defense to an assault charge arising out of the arrestee's resistance to excessive force by the officer. The officer also may be charged with assault or another appropriate crime when the officer knew the arrest was illegal.

4. (§14.60) Death Penalty Cases

Section 565.020, RSMo 2000, defines the offense of murder in the first degree as knowingly causing the death of another after deliberation. It is a class A felony and is punished by either death or life imprisonment without probation, parole, or release except by action of the Governor. Section 565.020.2. The former offense of "capital murder" was replaced by this statute. Section 565.030.4(1), RSMo Supp. 2004 (governing offenses committed on or after August 28, 2001), prohibits the execution of mentally retarded defendants. When a charge of first degree murder is submitted and the state requests the death penalty, the trial is in two stages. In the first stage, the trier shall decide guilt; in the second stage, the same trier shall decide punishment. Section 565.030, RSMo Supp. 2004. The statutory provisions are somewhat complicated and should be read closely. For joinder in homicide cases, see §12.15 of this deskbook and § 565.004, RSMo 2000. Venue in homicide cases is discussed in Chapter 8 of this deskbook. *See also* §§ 541.191, 565.001.4, RSMo 2000. Discovery of aggravating and mitigating circumstances is provided for in § 565.005, RSMo 2000. Waiver of jury trial is governed by § 565.006, RSMo 2000. The state may agree to the submission of the issue of punishment to a jury after a guilty plea or bench trial. Section 565.006.2. A waiver of jury on the issue of punishment after a jury trial in which the defendant was found guilty of first degree murder is only permitted with the consent of the state and the court. Section 565.006.3. The submission of a lesser offense or of lesser degrees is governed by § 556.046, RSMo Supp. 2004, and §§ 565.021.3 and 565.025, RSMo 2000, and the lesser offenses are not to be submitted unless supported by evidence and requested by one of the parties or the court.

If a two-stage trial is required but the defendant is not found guilty of first degree murder, no evidence shall be introduced in the second stage. If the defendant is found guilty of first degree murder, evidence may be introduced in the second stage regarding any aggravating or mitigating circumstances. The jury must determine if the evidence as a whole justifies a sentence of death or a life sentence without parole, etc. It may consider all

the evidence of any mitigation and aggravation including that submitted in the first stage of trial. Section 565.032, RSMo 2000. The jury is also instructed before it begins its deliberations on punishment that, if it cannot agree, the court shall assess the punishment at either life or death. Section 565.030 (the court's ability to impose death has been brought into question in recent court decisions). *See State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003).

Evidence is not limited to the statutorily listed aggravation or mitigation circumstances, § 565.030, and it may include, in the court's discretion, evidence concerning the victim and the impact on the family and others. The jury is not instructed on any specific evidence that may be in aggravation or mitigation, but the jury shall be instructed that each juror shall consider any evidence that the juror considers to be aggravating or mitigating.

Section 565.032.2 sets forth the statutory aggravating circumstances. They include the following:

- The defendant was previously convicted of first degree murder or of one or more serious assault crimes.
- The homicide occurred during the commission or attempt of another unlawful homicide.
- The defendant, by the murder, created a great risk of death to other persons when the device used is normally hazardous to more than one person.
- The murder was committed for the purpose of receiving money or other thing of value.
- The murder was of a present or former judge, prosecutor, peace officer, or elected official during or because of the exercise of that person's official duty.
- The defendant caused or directed another to commit the murder or the defendant committed it as an agent or employee of another.
- The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture or depravity of mind.
- The murder was of a peace officer or firefighter while engaged in official duties.
- The defendant was in lawful custody or had escaped from it.

- The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or confinement of the defendant or another.
- The murder was committed while the defendant was perpetrating, aiding or encouraging another person in the perpetration of, or attempting any felony degree of rape, sodomy, burglary, robbery, kidnapping, or controlled substance offense.
- The victim was a witness or potential witness, past or present, and was killed for that reason.
- The victim was an employee on duty with or inmate of the Department of Corrections or a local correction agency.
- The murder resulted from a hijacking.
- The murder was committed for the purpose of concealing any drug felony.
- The murder was for the purpose of causing a person to refrain from initiating or aiding in the prosecution of a drug felony.
- The murder was committed during the commission of a crime that is a part of a pattern of criminal street gang activity defined in § 578.421, RSMo 2000.

When the jury finds two aggravating circumstances, one of which is held to be not proved, the death sentence is still proper. *State v. LaRette*, 648 S.W.2d 96 (Mo. banc 1983).

Section 565.032.3 sets forth the statutory mitigating circumstances. They include the following:

- The defendant had no significant history of prior criminal activity.
- The defendant was under the influence of extreme mental or emotional disturbance.
- The victim was participating in the defendant's conduct or consented to it.
- The defendant was only an accomplice to the murder and the defendant's participation was relatively minor.
- The defendant was acting under extreme duress or under the substantial domination of another.
- The defendant's capacity to appreciate the criminality of the conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.
- The age of the defendant at the time of the crime.

Section 565.030.4 provides that the trier of fact shall assess the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the Governor if it:

- finds that the defendant is mentally retarded;
- does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances;
- concludes that the evidence in mitigation of punishment is sufficient to outweigh the evidence in aggravation; or
- decides under all the circumstances not to assess death.

If the trier of fact is a jury, it must set out in writing any statutory aggravating circumstance it found beyond a reasonable doubt. Section 565.030.4.

When the death penalty has been imposed, the sentence, regardless of whether an appeal is taken, must be reviewed by the Supreme Court. See § 565.035, RSMo 2000, which provides for and governs this review.

Of course, all relevant legal and factual defenses to the charge are available in the trial of a death penalty case. The defense, during both stages of the trial, also should have the view of mitigating the punishment and countering, by explanation or disproof, any aggravating circumstances on which the state may rely. Discovery of these circumstances under § 565.005 is essential. *See State v. Stokes*, 638 S.W.2d 715 (Mo. banc 1982) (notice immediately before trial sufficient when no showing of specific prejudice); *State v. Trimble*, 638 S.W.2d 726 (Mo. banc 1982).

5. (§14.61) Factual Defenses

Formerly, for a death to be a criminal homicide, the death had to occur within one year and one day of the wounding. This was known as the "year-and-a-day rule." *Larson v. State*, 437 S.W.2d 67 (Mo. 1969); *State v. Borders*, 199 S.W. 180 (Mo. 1917). Section 565.003.2, RSMo 2000, does away with this requirement.

Section 565.003.1 provides that the necessary culpable mental state may be found to exist even though the defendant intended to kill a different person.

The defendant may defend on factual bases, e.g., that the injury inflicted by the defendant was not the cause of the death. This is

generally a jury question. *State v. Crow*, 141 S.W.2d 66 (Mo. banc 1940). The defense of "grossly erroneous medical treatment" is discussed in *People v. Robinson*, 331 N.W.2d 226 (Mich. 1983). The defense may also go to the lack of deliberation or recklessness and indifference to reduce the degree of the offense or to mitigate the punishment and to avoid the imposition of the death penalty. *See* §14.60, *supra*.

Voluntary manslaughter, § 565.023, RSMo 2000, involves a homicide that would be murder in the second degree except that it was committed under the influence of sudden passion arising out of adequate cause. The defendant has the burden of injecting this issue to obtain a submission of this offense. Section 565.023.2. "Adequate cause" is cause "that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control." Section 565.002(1), RSMo 2000. "Sudden passion" is defined in § 565.002(7) as "passion directly caused by and arising out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation." *See State v. Blackman*, 875 S.W.2d 122 (Mo. App. E.D. 1994) (defendant not entitled to instruction on sudden passion).

In regard to the various degrees of assault, the mental state of the defendant plays a substantial part. Assault in the first degree, § 565.050, RSMo 2000, involves attempting to kill or knowingly causing or attempting to cause serious physical injury to another. Assault in the second degree, § 565.060, RSMo 2000, can involve the same acts as first degree assault but the defendant acts under the influence of sudden passion arising out of adequate cause. The defendant has the burden of injecting this issue. Section 565.060.2. Second degree assault also includes:

- attempting to cause or knowingly causing physical injury, i.e., other than "serious physical injury," by means of a deadly weapon or dangerous instrument;
- recklessly causing serious physical injury;
- causing serious physical injury as a result of criminal negligence while operating a motor vehicle while intoxicated or under the influence of controlled substances; or

- recklessly causing physical injury by means of a firearm discharge.

Section 565.060.1(2)–(5).

"Intoxicat[ion]" can result from alcohol, controlled substances, or drugs. Section 565.002(4).

Assault in the third degree, § 565.070, RSMo 2000, involves:

- attempting to cause or recklessly causing serious physical injury (without a deadly weapon);
- causing physical injury by means of a deadly weapon through criminal negligence;
- purposely placing another in apprehension of immediate physical injury;
- recklessly creating a grave risk of death or serious physical injury; or
- knowingly causing physical contact with another knowing he or she will regard it as offensive or provocative.

Section 565.070.1.

The class of this misdemeanor depends on which is involved. There are several other assault-type offenses.

The former second degree assault statute, § 565.060, RSMo 1978, referred to "extreme emotional disturbance for which there is a reasonable explanation or excuse." In *State v. Nunn*, 646 S.W.2d 55 (Mo. banc 1983), it was held to be reversible error to fail to submit that issue in a separate converse instruction, even though none was requested. The fact that the defendant had the burden of injecting the issue of sudden passion, etc., did not shift the burden of proof to the defendant. *State v. Taylor*, 651 S.W.2d 603 (Mo. App. W.D. 1983) (error in instruction submitting issue was harmless because defendant's evidence insufficient to inject the issue; testimony that defendant was "kind of upset" insufficient).

The Supreme Court has, in the past, had great difficulty in establishing a definitive rule as to when and what lesser offenses must be instructed on. *See State v. Baker*, 636 S.W.2d 902 (Mo. banc 1982). The latest homicide law provides that § 556.046, RSMo Supp. 2004, and § 565.021.3, RSMo 2000, control, and that no lesser offense is to be submitted unless requested by either party or the court.

6. (§14.62) Other Defenses to Assaults

A mere intent to do harm is insufficient. *State v. Selle*, 367 S.W.2d 522 (Mo. 1963). There must be intent with present means existing and preparation therefor, even though no actual violence is carried out. *See State v. Parker*, 378 S.W.2d 274 (Mo. App. S.D. 1964).

When injury is inflicted, the degree of injury may determine the degree of the offense. So, in defending an assault case, the degree of injury may be a factual issue, as may be the knowledge of the defendant, the degree of negligence, and the nature of the instrumentality used.

Consent freely given by a competent person is a defense unless the mutual combat involves a breach of the peace or other violation of the law. *See Hodges v. Schuermann Bldg. & Realty Co.*, 174 S.W.2d 909 (Mo. App. E.D. 1943); *see also* § 565.080, RSMo 2000; §14.19, *supra*.

Exercising a duty or authority may also be a defense, such as a parent or teacher exercising a limited right to correct a child. *See State v. Black*, 227 S.W.2d 1006 (Mo. 1950); *see also* §§14.21, 14.29, 14.52, *supra*.

B. Crimes Against Property

1. (§14.63) Burglary

Burglary may be either first degree, § 569.160, RSMo 2000, or second degree, § 569.170, RSMo 2000. Both degrees involve knowingly entering unlawfully or knowingly remaining unlawfully in a building or inhabitable structure for the purpose of committing a crime in it. First degree requires the additional element of:

- the use of explosives or a deadly weapon;
- the causing or threatening of immediate physical injury in effecting the entry or while within or in immediate flight from an inhabitable structure or building; or
- the presence in the structure of another person other than a participant in the crime.

Ownership of the burglarized premises by someone else must be proven, but proof of use of the premises by someone else is sufficient. *State v. Milligan*, 648 S.W.2d 913 (Mo. App. W.D. 1983); *State v. Lawrence*, 566 S.W.2d 243 (Mo. App. E.D. 1978).

There are also two degrees of trespass. Trespass in the first degree, under some circumstances, may be a lesser-included offense of burglary, *State v. Neighbors*, 613 S.W.2d 143 (Mo. App. W.D. 1980), but there must be evidence to support the submission, *State v. Milligan*, 645 S.W.2d 379 (Mo. App. W.D. 1983). First degree trespass, § 569.140, RSMo 2000, involves knowingly entering unlawfully or knowingly remaining unlawfully in a building or inhabitable structure or on real property. See *State v. Armstrong*, 863 S.W.2d 374 (Mo. App. E.D. 1993), for a discussion of sufficiency of evidence. As to trespass on real property, the defendant is not guilty unless:

- the property is fenced;
- the property is otherwise enclosed in a manner designed to exclude intruders; or
- notice against trespass is:
    - actually communicated to the defendant; or
    - posted in a manner reasonably likely to come to the attention of intruders.

Section 569.140.2.

Posting may also be by placing proper purple paint marks on posts and trees around the area. Section 569.145, RSMo 2000.

Trespass in the second degree, § 569.150, RSMo 2000, is an infraction, and it is an absolute liability offense.

Burglary no longer requires that the contemplated crime involve a felony or stealing; it can be any crime. Burglary does not require a breaking. But if the prosecution cannot prove the essential purpose for which the entry was committed, the defendant is not guilty of burglary. *See State v. Watson*, 383 S.W.2d 753 (Mo. 1964); *State v. Shepard*, 442 S.W.2d 58 (Mo. banc 1969). The original entry may be with consent. *State v. Smith*, 650 S.W.2d 640 (Mo. App. E.D. 1983). Under the former burglary statutes, the element of entry was satisfied by proof that any part of the defendant's body was within the building. *State v. Maddox*, 465 S.W.2d 607 (Mo. 1971).

> (2) "Inhabitable structure" includes a ship, trailer, sleeping car, airplane, or other vehicle or structure:
>
> (a) Where any person lives or carries on business or other calling; or
>
> (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or
>
> (c) Which is used for overnight accommodation of persons. [No person needs actually to be present at the time.]

Section 569.010(2), RSMo 2000.

The unlawful entry into a building where goods, merchandise, and items of value are located is sufficient to prove intent to steal, *State v. Davis*, 574 S.W.2d 940 (Mo. App. E.D. 1978), and recent unexplained possession of goods stolen in a burglary is sufficient to sustain a conviction, *State v. Jennings*, 649 S.W.2d 448 (Mo. App. W.D. 1983). *But see State v. Aziz*, 647 S.W.2d 586 (Mo. App. W.D. 1983) (such an inference does not alone overcome the defendant's presumption of innocence).

A claim of right may also be a defense to burglary with intent to steal. *State v. Quisenberry*, 639 S.W.2d 579 (Mo. banc 1982); § 569.130, RSMo 2000.

2. (§14.64) Possession of Burglar's Tools

See § 569.180, RSMo 2000. Defense of a charge of possession of burglar's tools may go to:

- the purpose for which the tools were possessed, *State v. Medley*, 232 S.W.2d 519 (Mo. 1950);
- the lack of possession by the defendant;
- the claim that they are not burglar's tools. *But see State v. Hefflin*, 89 S.W.2d 938, 103 A.L.R. 1301 (Mo. 1936); or
- the claim that the defendant is not a burglar.

But see State v. Mick, 506 S.W.2d 35 (Mo. App. W.D. 1974) (holding admissible evidence of the defendant's reputation and his association with burglars); *see also State v. Wing*, 455 S.W.2d 457 (Mo. 1970), *cert. denied*, 400 U.S. 1009 (1971).

3. (§14.65) Arson

There are several statutes pertaining to arson or related offenses:

- § 569.040, RSMo 2000, arson in the first degree, a person in or in the proximity;
- § 569.050, RSMo 2000, arson in the second degree;
- § 569.055, RSMo 2000, knowingly burning or exploding;
- § 569.060, RSMo 2000, recklessly burning or exploding;
- § 569.065, RSMo 2000, negligently burning or exploding;
- § 569.067, RSMo 2000, negligently allowing fire to escape to another's woods, cropland, grassland, prairie, or marsh.

Arson in both the first and second degree involves the knowing damage of a building or inhabitable structure by starting a fire or causing an explosion. It is not second degree arson if no one but the defendant has any possessory, proprietary, or security interest, or if all others having these interests consent, and if the sole purpose was to destroy or damage it for a lawful and proper purpose. Burning to collect insurance is not a lawful and proper purpose. The defendant has the burden of injecting this issue. For the definition of "[i]nhabitable structure," see § 569.010(2), RSMo 2000.

The starting of the fire or the causing of the explosion must have been willful and intentional, and the fire must have resulted from the agency of the defendant or the defendant's accomplices. *See State v. Paillou*, 321 S.W.2d 445 (Mo. 1959); *State v. Bunton*, 453 S.W.2d 949 (Mo. 1970). It is not arson if the fire started by accident, carelessness, natural causes, or an act of God. The offense charged and the evidence must fit within one of the statutory situations. Not all intentional fires are criminal even if they have incendiary origins.

Proof of motive or opportunity alone is not sufficient to establish guilt. *State v. Odum*, 351 S.W.2d 10 (Mo. 1961). An abandonment of the intention to burn and belated attempts to put out the fire are no defense. *State v. Purvis*, 525 S.W.2d 590 (Mo. App. W.D. 1975).

Section 569.070.1, RSMo 2000, prohibits the knowing causing of a "catastrophe by explosion, fire, flood, collapse of a building, release of poison, radioactive material, bacteria, virus or other

dangerous and difficult to confine force or substance." "'Catastrophe' means death or serious physical injury to ten or more people or substantial damage to five or more buildings or inhabitable structures or substantial damage to a vital public facility . . . ." Section 569.070.2.

Sections 569.100 and 569.120, RSMo 2000, make it a crime of property damage in the first and second degree, depending on the amount of damage, to knowingly damage the property of another or damage property for the purpose of defrauding an insurer. Claim of right may be a defense to damaging. *See* § 569.130, RSMo 2000. Consent is also a defense, except as to damage for the purpose of defrauding an insurer.

Interesting cases on the sufficiency of evidence in arson include *State v. Siraguso*, 610 S.W.2d 338 (Mo. App. W.D. 1980), and *State v. DuBose*, 617 S.W.2d 509 (Mo. App. E.D. 1981), which are very good starting points for research.

4. (§14.66) Robbery

Section 569.020, RSMo 2000, provides that robbery in the first degree is the forcible stealing of property when:

- someone is caused serious physical injury;
- the defendant is armed with a deadly weapon; or
- the defendant uses or threatens immediate use of a dangerous instrument.

Section 569.020.1.

Under § 569.030, RSMo 2000, robbery in the second degree occurs when the defendant forcibly steals property. Blackmail and extortion, under the Criminal Code, are stealing offenses. The robbery of a pharmacy may be either first or second degree. Sections 569.025, 569.035, RSMo 2000.

A taking without force may be stealing. Robbery does not include pickpocketing. *State v. Parker*, 170 S.W. 1121 (Mo. 1914). *But see State v. Spivey*, 204 S.W. 259 (Mo. 1918) (force in overcoming resistance). Stealing may be a lesser-included offense of robbery when there is evidence to support its submission. *State v. Swims*, 647 S.W.2d 191 (Mo. App. E.D. 1983); *State v. Cascone*, 648 S.W.2d 190 (Mo. App. W.D. 1983).

"Forcibly steals," so as to make stealing a robbery, requires the use or threatened immediate use of physical force on another person for the purpose of:

- preventing or overcoming resistance to the taking or to the retention of the property immediately after the taking;
- compelling the owner or another person to deliver up the property; or
- engaging in other conduct that aids in the commission of the theft.

Section 569.010(1), RSMo 2000. Thus, a shoplifting may become a robbery when, after the taking, for instance, the defendant uses force to get away from a store detective. *State v. Harris*, 622 S.W.2d 742 (Mo. App. W.D. 1981). A gun used does not need to be a real firearm. *State v. Dickerson*, 607 S.W.2d 196 (Mo. App. E.D. 1980). Yanking a purse from a lady's shoulder is not sufficient to make it robbery in the second degree. *State v. Tivis*, 884 S.W.2d 28 (Mo. App. W.D. 1994).

It may be a defense that the victim owed the defendant the money or property taken or that the defendant, in good faith, even mistakenly, believed the money was owed or that the property belonged to the defendant. Under these circumstances, there would be no purpose to steal. *State v. Culpepper*, 238 S.W. 801 (Mo. 1922). This is a "special negative defense." *See also State v. Tate*, 436 S.W.2d 716 (Mo. 1969). *But see State v. Romprey*, 339 S.W.2d 746 (Mo. banc 1960). Robbery requires a purpose to deprive the owner of the owner's property, i.e., an intent to steal. *State v. O'Connor*, 16 S.W. 510 (Mo. 1891); *State v. Gratten*, 375 S.W.2d 179 (Mo. 1964). See §14.70 below regarding the defense of claim of right. The statutes codifying this defense, §§ 569.130 and 570.070, RSMo 2000, do not appear to apply to robbery. "Claim of Right" is a defense envisioned in MAI-CR 3d 323.02. But this defense may no longer be available. *See State v. Williams,* 34 S.W.3d 440 (Mo. App. S.D. 2001). To use forceful self-help, of course, would no doubt be an assault. Assault under some circumstances may be a lesser offense of robbery. *State v. Lomack*, 586 S.W.2d 90 (Mo. App. E.D. 1979); *State v. Helm*, 624 S.W.2d 513 (Mo. App. W.D. 1981).

5. (§14.67) Stealing

Stealing involves the appropriation of "property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion." Section 570.030.1, RSMo Supp. 2004. "'Appropriate' means to take, obtain, use, transfer, conceal or retain possession." Section 570.010(2), RSMo Supp. 2004. "Deprive" means:

- the permanent withholding of property from the owner;
- restoring the property only upon the payment of a reward or compensation; or
- the use or disposition of the property in a manner making its recovery by the owner unlikely.

Section 570.010(8).

Whether this offense is a felony or a misdemeanor depends on the value of the item taken or what was taken. Section 570.030.3. The monetary value line of distinction is $500. Section 570.030.3(1). Section 570.020, RSMo Supp. 2004, sets forth the rules to be applied in determining value. Generally, it is the market value at the time and place of the theft. *See also State v. Saffold*, 563 S.W.2d 127 (Mo. App. W.D. 1978). The value of an instrument evidencing a debt is generally deemed to be its face amount. If no value can be determined, it shall be deemed to be under $500. Value can be established by the testimony of the owner's estimate of the item. *State v. Smith*, 650 S.W.2d 640 (Mo. App. E.D. 1983). Under § 570.030, the stealing of certain specific types of items is a felony regardless of value; for instance, the theft of anhydrous ammonia is a class C felony. Physically taking the property from the person of a victim is a felony regardless of its value. Section 570.030.3(2).

There are several special stealing statutes. For example, stealing someone else's animal is a class D felony regardless of value. Section 570.033, RSMo 2000. Section 570.210, RSMo Supp. 2004, creates the offense of library theft. Section 570.050, RSMo 2000, aggregates thefts in the same scheme or course of conduct. *State v. Snider*, 869 S.W.2d 188 (Mo. App. E.D. 1993), held that this statute cannot turn numerous misdemeanors into a felony.

Requisite knowledge or belief may be shown by evidence that the defendant:

- "failed or refused to pay for property or services of a hotel, restaurant, inn or boardinghouse;"
- gave such establishment in payment "a check or negotiable paper on which payment was refused;"
- left such establishment with the intent not to pay;
- "surreptitiously removed or attempted to remove his or her baggage from a hotel, inn or boardinghouse;" or
- "with the intent to cheat or defraud a retailer, possesses, uses, utters, transfers, makes, alters, counterfeits, or reproduces a retail sales receipt, price tag, or universal price code label, or possesses with intent to cheat or defraud, the device that manufactures fraudulent receipts or universal price code labels."

Section 570.030.2(1)–(5).

Stealing may be without consent of the owner, by deceit, or by coercion. Section 570.030.1. When stealing is by deceit, there must be some misrepresentations that:

- were false and not believed to be true by the defendant when made;
- were made with an intent to defraud; and
- were relied on by the victim.

See State v. Kesterson, 403 S.W.2d 606 (Mo. 1966). Deceit does not include falsity as to matters having no pecuniary significance or puffing statements. Deception as to the defendant's intention to perform a promise is not inferred from the fact alone that the defendant did not subsequently perform that promise. Section 570.010(7). *See State v. Saveraid*, 583 S.W.2d 238 (Mo. App. W.D. 1979) (failure to pay for an item as promised not stealing); *State v. Baugher*, 646 S.W.2d 865 (Mo. App. E.D. 1982).

"'Coercion' means a threat, however communicated" to:

- commit any crime;
- inflict a future physical injury on the victim or another;
- accuse another person of a crime;
- expose someone to hatred, contempt, or ridicule;
- harm another's credit or business repute;
- take or withhold action as a public servant or cause a public servant to do so; or

- inflict any other harm that would not benefit the defendant.

Section 570.010(3).

A threat of an accusation, lawsuit, or other official action is not coercion if the property sought to be obtained by it was honestly claimed as restitution or indemnification for harm done in the circumstances to which it relates or as compensation for property or lawful service. *Id*. The defendant has the burden of injecting the issue of justification. *Id*.

Stealing requires a purpose to deprive the owner of the property without honest claim to it. *See State v. Chambers*, 524 S.W.2d 826 (Mo. banc 1975), *cert. denied*, 423 U.S. 1058 (1976). This purpose must be proved beyond a reasonable doubt. *See State v. Newhart*, 503 S.W.2d 62 (Mo. App. W.D. 1973). An honest claim to ownership or the right to use the property is a "special negative defense" on which the state has the burden of proof after the issue is injected. *State v. Cummings*, 516 S.W.2d 49 (Mo. App. S.D. 1974); *see* §14.70, *infra*; § 570.070, RSMo 2000.

The unexplained recent possession of recently stolen property may be sufficient to sustain a conviction. *See*:

- *State v. Chase*, 444 S.W.2d 398 (Mo. banc 1969);
- *State v. Clark*, 438 S.W.2d 277 (Mo. 1969) (defendant's explanation is for the jury to determine and does not repel the possible inference from the possession);
- *State v. Webb*, 432 S.W.2d 218 (Mo. 1968) (possession does not need to be absolutely exclusive);
- *State v. Potter*, 560 S.W.2d 29 (Mo. App. E.D. 1977).

The length of time the defendant had dominion over the property is immaterial, and control of it even for an instant is sufficient to complete the crime of stealing. *State v. Williams*, 597 S.W.2d 722 (Mo. App. E.D. 1980). Testimony from the owner that the owner did not give consent is not necessary when circumstantial evidence establishes lack of consent. *State v. Comley*, 564 S.W.2d 330 (Mo. App. W.D. 1978).

Under § 570.040, RSMo Supp. 2004, a third conviction for stealing is a felony if the defendant has served at least ten days in jail for each prior. Under § 570.050, "[a]mounts stolen pursuant to one

scheme or course of conduct, whether from the same or several owners or whether at the same or different times, constitute a single criminal episode," and the aggregated value may be used in determining the grade of the offense.

Section 570.060.1, RSMo 2000, provides that a person who appropriates lost property is not guilty of stealing unless it was "found under circumstances which gave the finder knowledge of or means of inquiry as to the true owner." The defendant has the burden of injecting the issue of lost property. Section 570.060.2; *see State v. Chevalier*, 623 S.W.2d 42 (Mo. App. W.D. 1981).

6. (§14.68) Receiving Stolen Property

Section 570.080.1, RSMo Supp. 2004, makes it an offense, for the purpose of depriving the owner of a lawful interest in it, to receive, retain, or dispose of property of another knowing or believing that it has been stolen. Proof of the requisite knowledge or belief may be shown by evidence that the defendant:

- "was found in possession or control of other property stolen on separate occasions from two or more persons";
- "received other stolen property in another transaction within the year preceding the transaction charged"; or
- acquired it "for a consideration which he knew was far below its reasonable value."

Section 570.080.2.

Whether it is a felony or a misdemeanor depends on whether the value of the property was $500 or more. The state must introduce evidence of the item's value at the time of the theft and not two years later. *State v. Jones*, 843 S.W.2d 407 (Mo. App. E.D. 1992). If the defendant is a dealer in goods of the type in question, it is a felony regardless of value. Section 570.080.3.

It is no defense that the actual thief has not been convicted. Unlike the former law, the defendant may have been the thief. *State v. O'Dell*, 649 S.W.2d 504 (Mo. App. S.D. 1983). Proof that the defendant knew or believed the item to be stolen at the time the defendant received, retained, or disposed of it may be proved by circumstantial evidence. *State v. Ham*, 104 S.W.2d 232 (Mo. 1937); *State v. Taylor*, 422 S.W.2d 633 (Mo. 1968); *State v. McCoy*, 647 S.W.2d 862 (Mo. App. E.D. 1983). But mere proof of

possession is insufficient. *State v. Woods*, 434 S.W.2d 465 (Mo. 1968). Proof that the defendant negligently failed to ascertain if it was stolen is insufficient. *State v. Day*, 95 S.W.2d 1183 (Mo. 1936); *State v. Reo*, 510 S.W.2d 211 (Mo. App. S.D. 1974). The defendant's possession does not need to be exclusive. *State v. Simone*, 416 S.W.2d 96 (Mo. 1967). A defendant may be convicted of attempted receiving stolen property even though it was not actually stolen, e.g., in a reverse sting. *State v. Hunt*, 651 S.W.2d 587 (Mo. App. E.D. 1983).

Section 570.085.1(1), RSMo Supp. 2004, creates the offense of alteration or removal of item numbers when, with the purpose of depriving the owner of a lawful interest in the item, the defendant destroys, removes, covers, conceals, alters, or defaces the manufacturer's original serial number or other distinguishing owner-applied number or mark on any item with such a number or mark, for any reason whatsoever. It is also an offense to sell, offer for sale, pawn, or use as security for a loan or to buy, receive as security, or otherwise receive or have possession of any item with an altered or removed number or mark. Section 570.085.1(2), (3).

The offense is a felony if the aggregate value of the item or items is $500 or more. Section 570.085.2. Of course, the prosecution must prove the criminal purpose, and thus that the defendant knew or should have known that the number was altered or removed. See also §§ 301.390–301.401, RSMo 2000 and Supp. 2004, also prohibiting and criminally penalizing the altering, removing, or defacing of identification numbers on motor vehicles, trailers, tires, farm machinery, or construction equipment and the possession or sale of these items. The obvious defenses would include lack of knowledge, illegal search and seizure, "it's not mine," and "how would I know, those are supposed to be secret numbers."

Tampering may be another avenue for charging receiving a stolen automobile. *See* § 569.080.1(2), RSMo 2000.

7. (§14.69) Tampering

There are several tampering and related statutes:

- § 569.080, RSMo 2000, tampering in the first degree—tampering with or damaging property or facilities of a utility or health or safety institution for the purpose of and actually causing substantial interruption or impairment of its services; or knowingly receiving, possessing, selling, altering, defacing, destroying, or unlawfully operating an automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle without the consent of the owner;
- § 569.090, RSMo 2000, tampering in the second degree—tampering with the property of another for the purpose of causing substantial inconvenience to the owner or another; unlawfully riding in or on another's motor vehicle, airplane, or motorboat; or tampering with a utility meter to divert service or to prevent the proper measure of it (in the latter situation an inference is established against the person who uses or directly benefits from the meter tampering);
- § 569.095, RSMo Supp. 2004, tampering with computer data;
- § 569.097, RSMo Supp. 2004, tampering with computer equipment;
- § 569.099, RSMo Supp. 2004, tampering with computer users.

Telephone service fraud is prohibited by § 570.190, RSMo 2000. Unauthorized reproduction of recordings is prohibited by §§ 570.225, *et seq.*, RSMo 2000, and theft of cable television services is prohibited by § 570.300, RSMo Supp. 2004.

A claim that the defendant had permission or consent, *State v. Tate*, 436 S.W.2d 716 (Mo. 1969), or had a good-faith honest belief the defendant was the owner, *State v. McLarty*, 414 S.W.2d 315 (Mo. 1967); *State v. Drane*, 416 S.W.2d 105 (Mo. 1967), is a "special negative defense" on which the state has the burden of proof. *See* § 569.130, RSMo 2000; §14.70, *infra*. The defendant has the burden of injecting the issue of both of these defenses. Section 569.130.2.

8. (§14.70) Claim of Right

The claim-of-right defense has been codified in three separate statutes. Section 569.130, RSMo 2000, provides that a person has a defense to "damaging, tampering with, operating, riding in or upon, or making connection with property of another if he does so under a claim of right and has reasonable grounds to believe he has such a right." Section 570.010(3), RSMo Supp. 2004, provides for this defense to the offense of stealing by coercion. Section 570.070, RSMo 2000, provides for this defense as to stealing when, at the time of the appropriation, the defendant acted in honest belief that the defendant had a right to appropriate it, or the defendant acted in honest belief that the owner, if present, would have consented. In each of these, the defendant has the burden of injecting the issue, § 570.070.2, but once injected by evidence, the state has the burden of proving the absence of the honest belief, etc., beyond a reasonable doubt.

Closely related to this defense are other defenses, e.g., a defense to second degree arson. A second degree arson defendant may inject the issue that no other person but the defendant had any possessory, proprietary, or security interest in the damaged building, or that all others with these interests consented. Section 569.050.2, RSMo 2000.

The defense of honest belief of claim of right does not lie when the defendant testifies and denies that the defendant took the money. *State v. Cascone*, 648 S.W.2d 190 (Mo. App. W.D. 1983). In *State v. Quisenberry*, 639 S.W.2d 579, 584 (Mo. banc 1982), it was held that this defense is available in a burglary case based on entry with intent to steal. *Quisenberry* also held that, to inject the issue, there must be more than the unadorned self-serving testimony of the defendant. It was also pointed out that, although a person has no legal right to take property of another in satisfaction of an unrelated debt without permission of the owner, such a taking may yet negate the felonious intent necessary in a stealing charge. If the defendant has an honest but mistaken belief that the defendant owned the property or that the defendant had a right to it, the defense lies because such a belief negates the requisite mental state. *State v. Holtzclaw*, 258 S.W.2d 666 (Mo. 1953); *Quisenberry*, 639 S.W.2d at 582.

This defense does not apply to all offenses. For instance, it is not a defense to a charge of forgery. *State v. Sawyer*, 681 S.W.2d 526

(Mo. App. E.D. 1984). This defense should not be confused with the defense of mistake of law or mistake of fact.

C. Offenses Involving Fraud

1. (§14.71) Forgery

Section 570.090, RSMo Supp. 2004, defines the offense of forgery, and § 570.100, RSMo 2000, defines the offense of possession of a forging instrument. There must be a purpose to defraud. It must be calculated to deceive, *State v. Gullette*, 26 S.W. 354 (Mo. 1894), but this may be proved by circumstantial evidence, *State v. Gantt*, 504 S.W.2d 295 (Mo. App. W.D. 1973). Using as genuine or possessing with intent to use as genuine a forged instrument is a crime. There must also be intent to defraud, and the instrument must be used as being true (unless it is transferred with intent that it thereafter be used as true). The defendant must know that it is a forgery, but there is an inference that the person who uses a forgery either forged it or knew it was forged, unless satisfactorily explained. *State v. Massey*, 492 S.W.2d 48 (Mo. App. S.D. 1973). When the defendant signed the forged check, there is a rebuttable presumption that the defendant knew the check was false and that the defendant intended to defraud by uttering it. *State v. Hardin*, 645 S.W.2d 163 (Mo. App. S.D. 1982); *State v. Johnson*, 563 S.W.2d 133 (Mo. App. W.D. 1978). Honest claim of right is not a defense. *See* §14.70, *supra*.

The prosecution may have difficulty proving that the forgery occurred within the county or even in Missouri. *See State v. Hawkins*, 361 S.W.2d 775 (Mo. 1962).

There are no lesser-included offenses or degrees in forgery. *State v. Powell*, 400 S.W.2d 183 (Mo. 1966). Forgery may include making, erasing, destroying, completing, altering, or authenticating any writing or anything else so as to give the item an appearance of genuineness, antiquity, rarity, ownership, or authorship that it does not really possess. *See also* § 575.060.1(2), RSMo Supp. 2004 (prohibiting the submission of forgeries or false maps, samples, etc. to public servants).

2. (§14.72) Checks

Section 570.120.1, RSMo Supp. 2004, defines the offense of passing a bad check. It is an offense to make, issue, or pass a check or similar sight order for the payment of money:

- with a purpose to defraud, knowing that it will not be paid by the drawee or that there is no such drawee; or
- knowing that there are insufficient funds in the account or there is no such drawee, and the person fails to pay the check within ten days after receiving actual notice in writing that it has not been paid for these reasons.

Actual notice in writing means notice that is actually received by the defendant. Section 570.120.2. It may include the service of summons or warrant if the summons or warrant includes the information regarding the ten-day period in which it may be paid, which will result in dismissal of the charge. Notice is also satisfied by tender of notice to the defendant that the defendant refuses to accept. *Id*.

The crime is a felony if the check or checks are $500 or more. Section 570.120.4. Face amounts of bad checks passed in accordance with one course of conduct within a ten-day period may be aggregated to determine the grade of the offense. Section 570.120.3. But *State v. Snider*, 869 S.W.2d 188 (Mo. App. E.D. 1993), held that an aggregation statute cannot turn numerous misdemeanors into a felony. It is also a felony, regardless of amount, if the issuer had no account or if there was no such drawee. Section 570.120.4(2). See §§12.39 and 12.46 of this deskbook for a discussion of additional costs and penalties for bad checks. *See also* §§ 570.120, 570.123, RSMo Supp. 2004.

It is no defense that the defendant had undeposited funds available from which the check could be paid. *State v. DeClue*, 400 S.W.2d 50 (Mo. 1966). If the defendant did not know that the defendant had no funds in the bank, it may be a defense. *State v. Kleen*, 481 S.W.2d 229 (Mo. 1972) (defendant not told that bank had closed his account). The receipt of actual written notice and failure to pay the check within ten days is an offense. Opening an account under a fictitious name is not illegal (unless under the registration of fictitious name law). *State v. Euge*, 400 S.W.2d 119 (Mo. 1966).

If the person taking the check knew the check was insufficient at the time it was accepted, it was no crime. *State v. Phillips*, 430 S.W.2d 635 (Mo. App. E.D. 1968) (post-dated check). In view of the wording of the present statute, this may no longer be true. Payment within the ten days after notice may not be a defense when there is proof of the purpose to defraud. *Euge*, 400 S.W.2d 119. Failure to give this notice is not a defense, *State v. Kaufman*, 308 S.W.2d 333 (Mo. App. E.D. 1957), except when there is insufficient evidence of purpose to defraud. If the defendant has an arrangement or understanding with the bank for the payment of the check, it is a defense.

Both manners of committing this offense, § 570.120.1, require proof that the defendant acted knowingly. A person commits the crime of passing a bad check under § 570.120.1(1) when the person knew the check would not be paid or that there was no such drawee, and under § 570.120.1(2) when the person knew there were insufficient funds in the account or that there was no such account or drawee.

Check kiting is also an offense. *See* § 570.220, RSMo 2000.

Section 570.125.1, RSMo Supp. 2004, makes it an offense (the grade depending on the face amount or the aggregate amounts involved in the same course of conduct) to "knowingly, with the purpose to defraud, stop[ ] payment on a check or draft given in payment for the receipt of goods or services." Failure to make it good or to return the property within ten days of a written notice of nonpayment because of the stop payment order sent certified or registered mail to the issuer's last known address is prima facie evidence of violation of this statute. Section 570.125.3, .4. It does not appear that this statute applies to payments made on past debts. If the payment was stopped because the defendant thought that the check was lost in the mail or that the goods received were defective, even if the defendant was mistaken in that belief, the defendant should be found not guilty because the defendant had no purpose to defraud. There are numerous other offenses involving fraud, e.g., failure to return rented property. Section 578.150, RSMo Supp. 2004, also contains a notice provision.

D. Sex Offenses

1. (§14.73) Introduction

There has been much changing of the law regarding sex offenses in recent years. The 2000 Missouri legislature again revamped those offenses. These amendments changed the definitions of, among other terms, "deviate sexual intercourse" and "sexual contact." Deviate sexual intercourse is now defined as:

> [A]ny act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person.

Section 566.010(1), RSMo Supp. 2004. "Sexual contact" is now defined as "touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person." Section 566.010(3). This specifically includes contact through the clothing.

Section 566.111, RSMo Supp. 2004, now makes sex with an animal a class A misdemeanor for the first conviction and a class D felony thereafter.

2. (§14.74) Marriage Defense

Missouri has been on again and off again as to whether marriage is a defense to the crime of rape and sodomy. It may now be a defense again. Section 566.023, RSMo 2000, provides that marriage is an affirmative defense to the following offenses:

- § 566.032, RSMo 2000, statutory rape;
- § 566.034, RSMo 2000, statutory rape in the second degree;
- § 566.062, RSMo 2000, statutory sodomy in the first degree;
- § 566.064, RSMo 2000, statutory sodomy in the second degree;
- § 566.068, RSMo 2000, child molestation in the second degree;
- § 566.090, RSMo Supp. 2004, sexual misconduct in the first degree.

Section 566.085, RSMo, which did state that marriage was not a defense, has been repealed. The new statute did not make marriage a defense to forcible sodomy or forcible rape. Sections 566.030, 566.060, RSMo 2000.

3. (§14.75) Sex Offenses: Elements and Punishments

Section 566.030, RSMo 2000, sets out forcible or attempted forcible rape. The punishment is from five years to life.

Section 566.032, RSMo 2000, outlines statutory rape in the first degree (sex with a person less than 14 years old). The punishment is from five years to life. If serious injury is inflicted, the defendant displays a deadly weapon or dangerous instrument, there is more than one rapist, or the victim is less than 12 years old, the punishment is from ten years to life.

Section 566.034, RSMo 2000, outlines statutory rape in the second degree. This involves a defendant 21 years old or older who has sex with a victim who is less than 17 years old; it is a class C felony.

Section 566.040, RSMo 2000, deals with sexual assault. This is having sexual intercourse with another person knowing that it was without consent. There is no longer an age element, and the provisions establishing the offense of sexual assault in the second degree have been repealed. Sexual assault is a class C felony. This could be a lesser-included offense of forcible rape.

Section 566.060, RSMo 2000, sets out forcible sodomy or attempt to commit forcible sodomy. Without consent is no longer an element of this offense. The elements are deviant sexual intercourse and forcible compulsion. The punishment is five years to life. If serious physical injury is inflicted, a deadly weapon or dangerous instrument is displayed, or there is more than one person involved in the sex or deviate sex, it is ten years to life.

Section 566.062, RSMo 2000, outlines statutory sodomy in the first degree. This involves a victim of less than 14 years old. The punishment is five years to life or, if under the same circumstances as previously mentioned in regard to forcible sodomy or if the victim is less than 12 years old, it is ten years to life.

Section 566.064, RSMo 2000, deals with statutory sodomy in the second degree, which is identical to statutory rape in the second degree except it involves deviate sexual intercourse.

Section 566.067, RSMo 2000, sets out child molestation in the first degree, which involves sexual contact with a person less than 14 years old. It is a class B felony. It is a class A felony if the defendant was previously convicted under Chapter 566, RSMo, if serious physical injury was inflicted, if the defendant displayed a deadly weapon in a threatening manner, or if it was a part of a ritual or ceremony.

Section 566.068, RSMo 2000, deals with child molestation in the second degree, which involves sexual contact with a person who is less than 17 years of age. As previously pointed out, marriage is a defense to this offense. This is a class A misdemeanor, except that it is a class D felony under those circumstances in which the sentence was enhanced under child molestation in the first degree.

Section 566.070, RSMo 2000, outlines deviate sexual assault as having deviate sex with another person knowing that it is without consent. It is a class C felony. It appears that this could be a lesser-included offense to forcible sodomy.

Section 566.090, RSMo Supp. 2004, sets out sexual misconduct in the first degree. This involves deviate sexual intercourse with another person of the same sex or purposefully subjecting another to sexual contact without consent. This is a class A misdemeanor, but it can be a class D felony if the defendant has been convicted of a prior sex offense under Chapter 566, RSMo, if a deadly weapon was displayed in a threatening manner, or if it was part of a ritual or ceremony.

Section 566.093, RSMo Supp. 2004, outlines sexual misconduct in the second degree. This involves exposing the genitals under circumstances in which the defendant knows it is likely to cause affront or alarm or sexual contact in the presence of a third person or persons when the defendant knows it is likely to cause affront or alarm. This is a class B misdemeanor, but it can be a class A misdemeanor if there has been a prior conviction. "Affront" is not defined. This statute may be subject to constitutional attack as being too vague.

Section 566.095, RSMo 2000, sets out sexual misconduct in the third degree. This is a crime to solicit or request another to engage in sexual conduct under circumstances in which the defendant knows this is likely to cause affront or alarm. This is a class C misdemeanor. Marriage is not a defense to this offense.

Section 566.100, RSMo 2000, deals with sexual abuse. It involves sexual contact by forcible compulsion. Age is not an element, and lack of consent is not an element. It is a class C felony. It is a class B felony if:

- serious physical injury is inflicted;
- a deadly weapon or dangerous weapon is used in a threatening manner;
- the victim is subjected to sexual contact with more than one person; or
- the victim is under the age of 14.

There is now only one degree of sexual abuse.

Section 568.045, RSMo Supp. 2004, outlines endangering the welfare of a child in the first degree. It is a crime if there is a substantial risk to the life, body, or health of a child under the age of 17 or sexual contact with a person under the age of 17 over whom the person is a parent or guardian, or otherwise charged with care and custody. It is a class D felony, but it can be a class C felony if it is part of a ritual or ceremony.

A person convicted of a felony offense under §§ 589.400–589.425, RSMo 2000 and Supp. 2004, must register. Failure to register within ten days is a class A misdemeanor and a class D felony after that. Section 589.425, RSMo Supp. 2004.

Section 558.018, RSMo 2000, provides that, if a person is convicted of forcible rape, statutory rape in the first degree, forcible sodomy, statutory sodomy in the first degree, or an attempt to commit any of those four offenses, the prison term is extended if the person is a persistent sexual offender. A persistent sexual offender is someone who has previously been found guilty of or pled guilty to any of those offenses. If a defendant is determined to be a persistent sexual offender, the sentence is at least 30 years, which must be served without possibility of probation or parole. Section 558.018.3.

4. Defenses

a. (§14.76) Penetration

Rape must involve some penetration, however slight, of the female sex organ by the male sex organ, regardless of whether emission results. Section 566.010(4), RSMo Supp. 2004; *State v. Coffman*, 230 S.W.2d 761 (Mo. 1950). Slight proof is sufficient, *State v. Ivey*, 303 S.W.2d 585 (Mo. 1957), *cert. denied*, 362 U.S. 979 (1960), and there does not need to be medical proof, *State v. Edwards*, 476 S.W.2d 556 (Mo. 1972). Deviate sexual intercourse, in some instances, requires penetration, however slight. This is so when it is alleged it included a sexual act involving the sex organ or anus of a male or female and a finger, instrument, or object done for the purpose of arousing or gratifying the sexual desire of any person. Section 566.010(1).

Under the former law, some cases held that, in sodomy, penetration was necessary. *See State v. Dayton*, 535 S.W.2d 469 (Mo. App. W.D. 1976); *State v. Hubbard*, 295 S.W. 788 (Mo. 1927). This is no longer an element of the offense, *State v. Thompson*, 574 S.W.2d 432 (Mo. App. E.D. 1977), except as pointed out above.

b. (§14.77) Consent

Consent is not a defense to forcible rape, forcible sodomy, statutory rape, statutory sodomy, child molestation, or sexual abuse. "Forcible compulsion" means either physical force that overcomes reasonable resistance or an express or implied threat that places the victim in "reasonable fear of death, serious physical injury or kidnapping of such person or another person." Section 556.061(12), RSMo Supp. 2004. See *State v. Daleske*, 866 S.W.2d 476 (Mo. App. W.D. 1993), for a discussion of forcible compulsion. "Consent" is defined in § 556.061(5). An assent is not consent if:

- it is given by a person who lacks mental capacity to assent and that mental capacity is manifested or known to the defendant;
- it is given by a person so young, so intoxicated, or so mentally distressed or defective as to be unable to make a reasonable judgment; or
- it is induced by force, duress, or deception.

A victim is not incapacitated if the victim became unconscious or unable to appraise the nature of the victim's conduct, etc., after consenting to the act. Section 556.061(13). A defendant is not guilty if the defendant reasonably believed that the victim consented and was not incapacitated. Section 566.020.1, RSMo 2000. It should be noted that marriage was historically a defense to forcible rape and still is in some jurisdictions. This language was deleted from the Missouri code in 1990. The defendant has the burden of injecting the issue. The defendant is entitled to an instruction on this mistake of fact if the issue is injected. *State v. Scott*, 649 S.W.2d 559 (Mo. App. W.D. 1983). Decisions under the former law may be helpful in applying the present statute. *See* §14.19, *supra*. If the charge was statutory rape, consent was not a defense. *State v. Cochrell*, 492 S.W.2d 22 (Mo. App. E.D. 1973); *State v. King*, 119 S.W.2d 277 (Mo. 1938). If the victim was drugged (even if the drugs are taken voluntarily), asleep, mentally incompetent, or otherwise incapacitated from consenting, there is no consent. *State v. Stroud*, 240 S.W.2d 111 (Mo. 1951); *State v. Warren*, 134 S.W. 522 (Mo. 1911). *But see State v. Cunningham*, 12 S.W. 376 (Mo. 1889) (woman of weak intelligence is capable of consenting). The defendant must know of the incapacity.

Force is an element in forcible rape, *State v. Egner*, 296 S.W. 145 (Mo. 1927), and the instruction had to be without consent or against the will of the woman, *State v. Moore*, 353 S.W.2d 712 (Mo. 1962). The female had to resist to the utmost, *State v. Moore*, 143 S.W.2d 288 (Mo. 1940); *State v. McChesney*, 185 S.W. 197 (Mo. 1916), or, as said in *State v. Catron*, 296 S.W. 141 (Mo. 1927), "against the will" and "without the consent" meant the manifestation of the utmost reluctance and the greatest resistance on the woman's part. But not all cases seem to require this. Utmost resistance was not required when the will of the female was overcome through fear and threats. *State v. Neal*, 484 S.W.2d 270 (Mo. 1972). *But see State v. Wynn*, 357 S.W.2d 936 (Mo. 1962) (consent because of fear of violence is not consent). Failure to make an outcry or any concealment by a female tended to show consent and the absence of force. *State v. Cobb*, 221 S.W.2d 745 (Mo. 1949).

c. (§14.78) Culpable Mental State

In attempted rape, there must be proof of intent, but it may be inferred from the actions of the defendant. *State v. Ware*, 678 S.W.2d 863 (Mo. App. E.D. 1984).

In *State v. Beishir*, 646 S.W.2d 74 (Mo. banc 1983), the Court said that the offense of rape and sodomy did not include an element of culpable mental state other than that it be a voluntary act. Therefore, intoxication and similar defenses are not available. *See* §§14.7, *et seq., supra*.

d. (§14.79) Mistake as to Age

When the criminality depends on the victim being 13 years of age or younger, it is no defense that the defendant believed the child to be older. Section 566.020.2, RSMo 2000. When the criminality depends on the child being under age 17, it is an affirmative defense that the defendant reasonably believed that the child was 17 years of age or older. Section 566.020.3.

5. (§14.80) Evidence Issues

Defenses to statutory rape and sodomy are limited. Consent or lack of force is not a defense even if the female was a prostitute or deliberately seduced the defendant. *State v. Snow*, 252 S.W. 629 (Mo. 1923). Prior sexual intercourse by the defendant and the infant victim may be shown in evidence to show motive, etc. *State v. Graham*, 641 S.W.2d 102 (Mo. banc 1982). A victim who is of very tender years may be incompetent as a witness, but the victim's spontaneous utterances of complaint to the victim's mother or someone else may be admissible. *State v. Van Orman*, 642 S.W.2d 636 (Mo. 1982). Statements to social workers and the police may be admissible. *See* §§ 491.075, 492.304, RSMo Supp. 2004. Prior inconsistent statements are admissible as substantive evidence.

Section 566.025, RSMo 2000, provides that, if a defendant is charged with a violation of Chapter 566 or 568, RSMo, and the victim is under the age of 14, regardless of whether the victim's age is an element of the offense, evidence of a prior crime with a victim under the age of 14 is admissible. This was a legislative attempt to counter *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993), which held that much of this evidence is inadmissible.

Formerly, the reputation of chastity or proof of prior intimacies of the victim that tended to show an inclination to consent was admissible, *State v. Northern*, 472 S.W.2d 409 (Mo. 1971), but proof of specific acts with other men was not admissible, *State v. Yowell*, 513 S.W.2d 397 (Mo. banc 1974); *State v. Ruhr*, 533 S.W.2d 656 (Mo. App. W.D. 1976). The "Rape-Shield" law, § 491.015, RSMo 2000, now prevents the admission of evidence of previous sexual conduct unless the judge rules such evidence to be relevant. A close review of that statute is necessary, and a proper offer of proof must be made. See the following cases for a starting point of research on this rape-shield law: *State v. Gibson*, 636 S.W.2d 956 (Mo. banc 1982); *State v. Sherman*, 637 S.W.2d 704 (Mo. banc 1982); *State v. Ray*, 637 S.W.2d 708 (Mo. banc 1982).

Corroboration of the victim's testimony in a rape or incest case may also be necessary, especially when the victim is mature and the evidence is weak. *State v. Tompkins*, 277 S.W.2d 587 (Mo. 1955); *see also State v. Weekly*, 223 S.W.2d 494 (Mo. 1949); *State v. Warren*, 366 S.W.2d 311 (Mo. 1963). Corroboration is required when the testimony was contradictory and in conflict with the physical facts or the surrounding circumstances and ordinary experience or when it is not convincing but leaves the mind of the court clouded with doubts. *State v. Quinn*, 405 S.W.2d 895 (Mo. 1966); *State v. Akers*, 328 S.W.2d 31 (Mo. 1959); *State v. Bulen*, 646 S.W.2d 405 (Mo. App. W.D. 1983). Prompt complaint may be corroboration, *State v. Taylor*, 8 S.W.2d 29 (Mo. 1928); delay is not. Outcry may be corroboration, and the lack of outcry is not. *Cobb,* 221 S.W.2d 745. Other cases seem to place less reliance on the need for corroboration. *See State v. Garrett*, 494 S.W.2d 336 (Mo. 1973); *State v. Davis*, 497 S.W.2d 204 (Mo. App. E.D. 1973); *State v. Kuzma*, 751 S.W.2d 54 (Mo. App. W.D. 1987). No instruction regarding this is allowed by MAI-CR. *See* Note 3 to Notes on Use MAI-CR 3d 302.01.

Impotency of the defendant, in some circumstances, may be raised as a defense, showing the impossibility that the defendant did it. In *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993), an attorney was found to be ineffective for failing to pursue this defense on behalf of his client.

6. (§14.81) Incest

Section 568.020.1, RSMo 2000, defines the offense of incest as the marriage to, purported marriage to, or sexual intercourse or deviate sexual intercourse with:

- an ancestor or descendant by blood or adoption;
- a stepchild (during the marriage creating the relationship);
- a half or whole brother or sister; or
- an uncle, aunt, nephew, or niece of the whole blood.

The defendant must know the relationship exists, but the legitimacy of the relationship is immaterial.

Because incest is only a class D felony, prosecutors often file these charges, when the alleged victim is a minor, as rape or sodomy or both.

Obviously, marriage, age of the victim, and consent are not defenses. A general denial is about the only defense available except lack of knowledge and lack of relationship, or other defense based on lack of culpable mental state or availability of evidence.

7. (§14.82) Related Offenses

Indecent exposure is made illegal by § 566.093.1(1), RSMo Supp. 2004, and it has as elements that the defendant exposed "his or her genitals under circumstances in which he or she knows that his or her conduct is likely to cause affront or alarm." Often, this offense is filed against a man who urinates behind a tree when there is nowhere else to go. As to this offense, the defendant might raise a defense such as right of privacy or even freedom of speech. Accident, consent, lack of knowledge, and necessity are other possible defenses.

Abuse of a child, § 568.060, RSMo 2000, pertains to:

- inflicting cruel and inhuman punishments on a child under the age of 17;
- photographing or filming a child under 18 years of age engaging in a prohibited sexual act or the simulation of such an act; or

- causing or knowingly permitting a child to engage in such an act or simulation for the purpose of photographing or filming.

Section 568.060.1.

"[P]rohibited sexual act[s]" include but are not limited to sexual intercourse, deviate sexual intercourse, masturbation, bestiality, sadism, masochism, and nudity. Section 568.060.2. It is a class C felony unless serious emotional injury is inflicted on the child or it is a part of a ritual or ceremony, in which case it is a class B felony. Section 568.060.3. Defenses would not include consent, marriage, or, apparently, mistake as to age (because § 566.020, RSMo 2000, is inapplicable). Statutes such as this have been held not to violate the First Amendment. *N.Y. v. Ferber*, 458 U.S. 747 (1982). See also Chapter 573, RSMo, which includes several offenses involving providing pornography to minors (i.e., persons under age 18).

Other related offenses include:

- § 568.030, RSMo 2000, abandonment of child in the first degree;
- § 568.040, RSMo 2000, criminal nonsupport;
- § 568.045, RSMo Supp. 2004, § 568.050, RSMo 2000, endangering the welfare of a child;
- §§ 568.080–568.110, RSMo 2000, use of a child in sexual performance;
- § 568.175, RSMo 2000, trafficking in children; and
- §§ 565.149, *et seq.*, RSMo 2000, interference with custodial rights.

See § 565.160, RSMo 2000, for statutory defenses to parental kidnapping and child abduction.

E. Drug Offenses

1. (§14.83) Entrapment

Drug offenses are found in Chapter 195, RSMo. Entrapment was discussed in §14.13 above. *See also* § 562.066, RSMo 2000.

a. (§14.84) "Mere Conduit" Defense

See *United States v. Mosley*, 496 F.2d 1012 (5th Cir. 1974), which held that the defendant was entitled (under *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), *appeal after remand*, 470 F.2d 154 (5th Cir. 1972), *cert. denied*, 411 U.S. 949 (1973)) to an entrapment instruction when he claimed he obtained the drugs from an agent to sell them to another agent. Although *Mosley* was decided after *United States v. Russell*, 411 U.S. 423 (1973), its validity is in question. *See State v. Golightly*, 495 S.W.2d 746, 751 (Mo. App. W.D. 1973).

But in *United States v. Gomez-Rojas*, 507 F.2d 1213, 1218 (5th Cir. 1975), *cert. denied*, 423 U.S. 826 (1975), the court said: "Once the defendant presents a prima facie case of entrapment indicating that Government conduct created 'a substantial risk that the offense would be committed by a person other than one ready to commit it,' the burden shifts to the [prosecution] . . . ." *Id.* at 1218 (citation omitted). The court held *Bueno,* 447 F.2d 903, to still be valid. *See also United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974).

b. (§14.85) "Procuring Agent" Defense

The "procuring agent" defense, in which the defendant obtained drugs for the agent from another source as a favor to the agent or informer and had no intent to sell (and actually made no sale), *Garcia v. United States*, 373 F.2d 806, 809 (10th Cir. 1967), or the "casual exchange" defense, have sometimes been presented, generally unsuccessfully. Statutes against "dispensing" drugs avoid these defenses. *United States v. Pruitt*, 487 F.2d 1241 (8th Cir. 1973).

Missouri does not accept the "agency defense" that the defendant was only acting as the agent for the buyer or the seller. *State v. Miles*, 599 S.W.2d 948 (Mo. App. W.D. 1980). In fact, obtaining drugs for an officer is sufficient to convict the defendant of sale. *State v. Perkins*, 650 S.W.2d 339 (Mo. App. E.D. 1983).

The defense of entrapment opens up the defendant's drug past as it may show the defendant's predisposition, so counsel should beware.

2. (§14.86) Lack of Knowledge or Intent

A defendant, although intentionally in possession of a package or material, must have knowledge of its nature. *State v. Burns*, 457 S.W.2d 721 (Mo. 1970), held that the defendant must be shown to have knowledge that the defendant was in possession of the drug. The defendant must be conscious that the defendant is in possession of the drug, i.e., the defendant must be aware of the presence and character of the particular substance, but this may be proved by circumstantial evidence. *State v. Roberts*, 524 S.W.2d 174 (Mo. App. W.D. 1975); *State v. Young*, 427 S.W.2d 510 (Mo. 1968).

Possession may be either actual or constructive, § 195.010(34), RSMo Supp. 2004, but under either, the defendant must be intentionally and consciously in possession of the substance. *State v. Berry*, 488 S.W.2d 667 (Mo. App. W.D. 1972); *State v. Polk*, 529 S.W.2d 490 (Mo. App. E.D. 1975); *State v. Falkner*, 672 S.W.2d 373 (Mo. App. W.D. 1984) (circumstantial evidence case reversed). In *State v. Green*, 629 S.W.2d 326 (Mo. banc 1982), the Court held that narcotics cases required proof of the defendant's mental state.

Under the former law, it was held that, in a sale case, neither knowledge nor criminal intent was an element of the offense. *State v. Napolis*, 436 S.W.2d 645 (Mo. 1969). But in *State v. Gordon*, 536 S.W.2d 811 (Mo. App. E.D. 1976), the court said that the defendant has a duty to know what it is the defendant is selling. *But see State v. Rivers*, 554 S.W.2d 548 (Mo. App. E.D. 1977). In *State v. White*, 650 S.W.2d 341 (Mo. App. E.D. 1983), evidence of an offer to sell other drugs was admissible to show intent and motive. This would also go to the defendant's predisposition if the defendant raised the defense of entrapment. Possession of one drug may be admitted to prove knowledge of another. *State v. Webb*, 646 S.W.2d 415 (Mo. App. W.D. 1983).

The definition of "possession," § 195.010(34), says a person has actual or constructive possession if the person has knowledge of the drug's presence and illegal nature. Thus, an information charging possession should allege such knowledge. *See* MACH-CR 25.02. An information charging sale or distribution should allege that the defendant knew or consciously disregarded a substantial and unjustifiable risk that the substance was a controlled substance. MACH-CR 25.04.1, 25.04.2; *State v. Briscoe*,

847 S.W.2d 792 (Mo. banc 1993) (defendant denied relief when no trial objection and jury properly instructed).

Possession may be found to be possession with intent to distribute or trafficking because of the amount of the controlled substance involved.

As to a drug paraphernalia charge, the defendant may raise a defense of innocent possession, lack of knowledge, lawful use of item, item not near a controlled substance, defendant has no drug history, lack of residue on the item, etc. Section 195.010(17); §§ 195.223, *et seq.*, RSMo 2000 and Supp. 2004. Many of these defenses are available to a charge involving imitation controlled substances. Section 195.010(21); §§ 195.241, *et seq.*, RSMo 2000.

It is no defense to a charge of distribution to a minor under age 17 who is the defendant's junior by at least 2 years that the defendant did not know the distributee's age. Section 195.212.2, RSMo 2000. A defendant charged with distributing drugs within 2,000 feet of school property, § 195.214, RSMo Supp. 2004, does not need to know it is a school. *State v. Wheeler*, 845 S.W.2d 678 (Mo. App. E.D. 1993).

Law enforcement officers, while lawfully engaged in enforcement of the controlled substances laws in good faith, are immune from criminal liability. Section 195.371, RSMo 2000.

3. (§14.87) Illegal Search and Seizure

Many times, the defendant's only defense to a charge of possession of a controlled substance is based on a claim that the alleged drug was seized from the defendant or the defendant's property as a result of an illegal and unconstitutional search and seizure. *See* Chapter 9 of this deskbook.

4. (§14.88) Possession Defenses

See §14.86, *supra*.

a. (§14.89) Joint Possession

Often, the evidence will establish that the defendant was in joint possession of the premises where the controlled substance was found. In *State v. Wiley*, 522 S.W.2d 281 (Mo.

banc 1975), the Court held that, as to controlled substances, a person in exclusive control of the premises is deemed to be in possession and control of substances found there. Joint control may have the same consequences, but under that circumstance, there must be some further evidence or admission connecting the defendant with the drugs. *See also State v. Funk*, 490 S.W.2d 354 (Mo. App. W.D. 1973). The fact that the defendant was the husband and head of the household is not sufficient. *State v. McGee*, 473 S.W.2d 686 (Mo. 1971).

b. (§14.90) Control of Premises

As pointed out in §14.89 above, a defendant in exclusive control of premises is inferred to possess contraband found in the premises. When the premises are shared, no such inference arises without additional circumstances implicating the defendant. *State v. Lowe*, 574 S.W.2d 515 (Mo. App. W.D. 1978). For the same inference as to automobiles, see *State v. Virdure*, 371 S.W.2d 196 (Mo. 1963). An admission by the defendant can be sufficient to show possession. *State v. Stewart*, 542 S.W.2d 533 (Mo. App. S.D. 1976). When other people are present in a room, the defendant cannot be held to be in exclusive possession of drugs in the room. *State v. Barber*, 635 S.W.2d 342 (Mo. 1982). In *State v. West*, 559 S.W.2d 282 (Mo. App. E.D. 1977), the court held that there was no presumption that the owner of a car has knowledge of everything in it. Conviction of a defendant operating a rental car, rented to the passenger, in which marijuana was found in the trunk, was reversed because there was no proof the defendant knew about or exercised control over the marijuana. *State v. Allen*, 744 S.W.2d 865 (Mo. App. W.D. 1988). Proof that the defendant was apprehended holding a marijuana plant in a patch of such plants was insufficient to convict the defendant of manufacturing marijuana when there was no proof that he owned or had any possessory interest in, or control over, the land. *State v. Melton*, 733 S.W.2d 21 (Mo. App. S.D. 1987). A guest at premises where drugs are found is not guilty of possession of drugs by the mere fact of being present, but evidence of ready access to drugs may tend to show conscious possession.

Some drug offenses, such as manufacturing, may not require the defendant to be present, so "alibi" may not be a defense. *State v. Phegley*, 826 S.W.2d 348 (Mo. App. W.D. 1992).

c. (§14.91) Fleeting Possession

Some cases hold that mere fleeting possession is not sufficient (such as taking one drag off of a marijuana cigarette, etc.), but Missouri holds that this is no defense. *State v. Jefferson*, 391 S.W.2d 885 (Mo. 1965); *State v. Roberts*, 524 S.W.2d 174 (Mo. App. W.D. 1975).

d. (§14.92) Lawful Possession

A defendant possessing a drug in accordance with a prescription, *State v. Caffey*, 457 S.W.2d 657 (Mo. 1970), or within employment (when allowed by statute) is legal and not criminal. *See Needelman v. United States*, 261 F.2d 802 (5th Cir. 1958), *cert. denied*, 362 U.S. 600 (1960); *United States v. Moore*, 423 U.S. 122 (1975). Law officers' good-faith immunity is set out in § 195.371, RSMo 2000.

e. (§14.93) Possession by Consumption

When the possession of the drug is internal, the defendant having ingested or injected the drug, it probably is not sufficient to sustain a conviction for possession. Besides the problems of proof, such a charge might violate the rule of *Robinson v. California*, 370 U.S. 660 (1962) (narcotics addiction cannot constitutionally be a crime).

Possession is not a lesser-included offense of sale unless supported by evidence. *State v. Perkins*, 650 S.W.2d 339 (Mo. App. E.D. 1983).

There are few cases reversing a sale conviction. *But see State v. Perez*, 826 S.W.2d 61 (Mo. App. W.D. 1992).

5. (§14.94) Technical Defenses

If the drug is not on the Department of Health list (*see* 19 C.S.R. § 30-1.010), it is not a controlled substance, *State v. Starks*, 419 S.W.2d 82 (Mo. 1967); *State v. Ransom*, 412 S.W.2d 125 (Mo. 1967); *State v. Bridges*, 398 S.W.2d 1 (Mo. banc 1966), unless it is set out in the statutory schedule, *State v. Scarlett*, 486 S.W.2d 409 (Mo. 1972). The schedules are provided for and defined in § 195.017, RSMo Supp. 2004. Whether a drug is on a schedule is a

question of law. *State v. Hutchens*, 604 S.W.2d 26 (Mo. App. S.D. 1980).

a. (§14.95) Species Defense

State v. Allison, 466 S.W.2d 712 (Mo. 1971), holds that "marijuana" and "cannabis" are the same thing. Section 195.017, RSMo Supp. 2004, lists "Marijuana" as a Schedule I controlled substance, and § 195.010(24), RSMo Supp. 2004, defines "Marijuana" as all parts of the plant genus Cannabis in any species or form. Thus, it makes no difference whether it is Cannabis Sativa L. or I., etc. *See also United States v. Burden*, 497 F.2d 385 (8th Cir. 1974). A few courts have accepted the species defense. *United States v. Lewallen*, 385 F. Supp. 1140 (W.D. Wis. 1974).

b. (§14.96) Unusable Trace

Sometimes the amount of controlled substance in question is so tiny that it is unusable or was totally destroyed during testing. Some courts have held these infinitesimal amounts to be noncriminal. *People v. Leal*, 413 P.2d 665 (Cal. banc 1966). In *State v. Young*, 427 S.W.2d 510 (Mo. 1968), it was held that a "modicum" of an illegal drug is sufficient. As to marijuana, § 195.202, RSMo 2000, makes possessing or controlling 35 grams or less a misdemeanor. Some courts have held that, if the state uses up all of the alleged drug during its testing so that the defendant cannot seek the defendant's own testing, the defendant is denied due process. *See People v. Taylor*, 369 N.E.2d 573 (Ill. App. Ct. 1977). Section 195.010(24), RSMo Supp. 2004, in defining marijuana, excludes mature stalks, fibers from them, other oils or cakes from the seeds, and sterilized seeds incapable of germination. *State v. Hyzer*, 811 S.W.2d 475 (Mo. App. S.D. 1991), held that those portions cannot be counted in determining the amount of marijuana involved in the case.

c. (§14.97) Constitutional Attacks

Marijuana in Missouri is classified as a Schedule I controlled substance, along with hard narcotics like heroin. Some courts have found that it is unconstitutional to classify marijuana as a narcotic. *See People v. McCabe*, 275 N.E.2d 407 (Ill. 1971). Most courts, however, take the position that such a

classification does not deny due process or equal protection because the legislature has a right to choose between conflicting scientific opinions. *See Rener v. Beto*, 447 F.2d 20 (5th Cir. 1971); *State v. Stock*, 463 S.W.2d 889 (Mo. 1971); *State v. Burrow*, 514 S.W.2d 585 (Mo. 1974); *State v. Mitchell*, 563 S.W.2d 18 (Mo. banc 1978). In *People v. Lorentzen*, 194 N.W.2d 827 (Mich. 1972), a statute that required a minimum sentence of 20 years for a first offender conviction of selling marijuana was invalidated as violative of the Eighth Amendment prohibition against cruel and unusual punishment. The Supreme Court of Alaska, in *Ravin v. State*, 537 P.2d 494 (Alaska 1975), ruled that smoking marijuana in the defendant's own home was a constitutionally protected activity under the right of privacy.

d. (§14.98) "Chemistry" or Identification Defense

Unless the alleged substance is proved beyond a reasonable doubt to be the alleged controlled substance, the sale or possession of it is not the crime charged. Its identification as the alleged controlled substance is by the testimony of a so-called expert (unless stipulated). Often, this expert is not actually qualified to perform such testing or to testify to an opinion as to its chemical content. Identification of the substance is by opinion, and experts can be wrong. In *State v. Roper*, 591 S.W.2d 58 (Mo. App. E.D. 1979), the court went so far as to hold that the opinion of an experienced law officer was sufficient to make a submissible case of possession of marijuana.

In *State v. Eyman*, 828 S.W.2d 883 (Mo. App. W.D. 1992), the evidence that the defendant possessed cocaine came from the testimony of a snitch that he had used cocaine with the defendant several times and that he knew it was cocaine from the effect on his body. The court found this to be insufficient evidence to establish possession beyond a reasonable doubt.

It is impossible, within the limits of this chapter, to give a complete guide to attacking expert testimony and laboratory analysis. Chemical analysis is a specialized field, and counsel is advised to obtain an expert advisor; but certainly, counsel should be familiar with the basic chemistry of the tests of identification. An independent analysis of the alleged drug may reveal it to be non-controlled. Most identification tests

are not specific, and often the expert is not prepared to tell why marijuana "turns purple" or, in a comparison test, who made the original comparison, why it must be cocaine and not some other material, how they determined the "standard" was really cocaine, or what the chemical formula is that shows the incriminating reaction.

Tests are usually either:

- functional (color, precipitate, or crystal);
- spectrophotometric; or
- chromatographic.

Generally, the opinion that the substance in question is the specified drug, *and nothing else*, depends on a comparison (i.e., the test produced the same results on the questioned substance as it did on a known or "standard" substance). Obviously, comparisons may be a matter of degrees (is it purple or dark blue?) and may depend on:

- the lighting;
- the eyesight of the lab technician;
- the staleness of the reagent;
- whether it was shaken or properly compounded;
- the temperature of the room or the beaker;
- whether the slide was clean; and
- whether all the steps of the test were followed in the correct order.

The possibilities are endless. But counsel should remember that an unprepared cross-examination is worthless and often damaging.

Source materials on substance identification include the following:

- RICHARD E. SCHULTES & ALBERT HOFFMAN, THE BOTANY AND CHEMISTRY OF HALLUCINOGENS (Charles C. Thomas, Publisher, 2600 South First Street, Springfield, Illinois 62704, 800/258-8980) (ISBN 0398038635).

- Journal of Chromatographic Science (Preston Publications, 6600 W. Touhy Avenue, Niles, Illinois 60714).

- THE MERCK INDEX (Merck & Co., Inc., 13th ed. 2002).
- CLARKE'S ANALYSIS OF DRUGS AND POISONS (The Pharmaceutical Press, London, 3rd ed. 2003).
- W.P. Butler, Methods of analysis for alkaloids, opiates and synthetic drugs, U.S. Treasury Department, Internal Revenue Service, Pub. No. 341 (Nov. 1956).
- F. LEE BAILEY & HENRY B. ROTHBLATT, HANDLING NARCOTIC AND DRUG CASES (Lawyers Co-Operative Publishing Co., 1972).
- 22 AM. JUR. PROOF OF FACTS *Identification of Substances by Instrumental Analysis*, p. 385 (1969).
- Criminal Law Review, Feb. 1970 (National Association of Criminal Defense Lawyers, 1150 18th St. NW, Suite 950, Washington DC 20036, 202/872-8600).
- ANDRE A. MOENSSENS & FRED E. INBAU, SCIENTIFIC EVIDENCE IN CRIMINAL CASES (3rd ed. Foundation Press, 1986).
- Comprehensive selection of publications from CRC Press, *available at* www.crcpress.com/default.asp.

The following are types of tests commonly used:

Tests	**Type of Substance**
Marquis Color	Alkaloids, amphetamines, basic drugs
Koppanyi I and II	Barbituric acid derivatives
Cobalt Thiocyanate Froehdes—color reagent	Cocaine, basic drugs Similar to Marquis, but more specific and has greater range as to substances
Ultraviolet Absorption Spectrophotometry	Almost all drugs, but nonspecific as to barbiturates and certain types of speed (amphetamines—methamphetamines)
Thin Layer Chromatography	Almost all drugs
Gas Chromatography	Almost all drugs
Infrared Absorption	Amphetamines
Spectrophotometry	Amphetamines
Spectrophoto Fluorometry	Good for minute traces of many substances
Mass Spectrophotometry	All types of drugs—ultimate in identification
Microscopic Examination	Marijuana
Modified Duquenois	Marijuana

Counsel should obtain, if possible, copies of reports, charts, samples, and memoranda used by the prosecution chemist or toxicologist. These will indicate the steps the toxicologist routinely uses or did use to identify the substance. From this material, counsel may determine that the toxicologist has taken "shortcuts" in counsel's particular case, which may render questionable the identification.

In *State v. Weber*, 768 S.W.2d 645 (Mo. App. S.D. 1989), a conviction was reversed because the state failed to prove the chain of evidence that the item seized from the defendant was the item tested at the lab. But chain of evidence is normally simple to prove, and unless counsel is desperate for a defense or has some belief that the evidence has been mixed or mismarked, or that one of the officers in the chain has moved

to parts unknown, it may be best to stipulate to the chain. This prevents a parade of officers and hopefully sends the message, "We'll stipulate because we ain't scared."

6. (§14.99) Credibility of Agent or Informer

Often, in a sale case, the only defense is an attack on the credibility of the agent or the informer (regardless of whether the informer testifies). In almost every instance, the informer is cooperating with the police because the informer has been caught possessing or selling drugs or committing some other crime, and in return for the informer's successful cooperation, the informer is receiving a "deal" on those charges, or even per diem or other payment. If the informer is unsuccessful, all deals are off, and the informer knows it. This is an excellent reason for the informer to ensure success. Even if the informer does not testify at the trial, these "deals" may become relevant as a result of the defendant's testimony or because it was the informer that introduced the agent to the defendant.

The credibility of the officer is also generally subject to attack. Undercover work is dirty work, and it is distasteful to most jurors. These agents are often the newest and greenest members of the department or are untrained, unwanted, or unfit for other duties. In their efforts to infiltrate, it is almost always necessary that they participate in the activities of the group they are infiltrating, including the commission of crimes, sexual activities, and the use of the very drugs they are out to stop. It is in this that the lie lies. Invariably, the agent will testify that the agent "pretended" to smoke marijuana, a feat that is near impossible (the hot tip of even a cigarette of tobacco will not glow unless it is drawn on, and it is not necessary to inhale marijuana to obtain the effects of it).

There is generally a substantial delay between the offense and the arrest of the defendant. This is because of the desire to use the informer or the undercover agent as long as possible to secure as many cases against as many defendants as possible. The defense can sometimes establish that, although the defendant allegedly sold drugs to the agent, the agent never attempted to make a second "buy," although the agent has made two, three, or even more buys from other defendants. The question is then posed in the minds of the jury, could it be there was no second buy because there was no first buy? Or, did the agent think the

defendant was pretty small pickings? Because the minimum punishment for sale is five years, the jury might be inclined to give the defendant a break. Counsel must be positive that there were no other sales involving the defendant.

The other possibilities of these attacks are legion. Imagination of counsel is necessary. Readers who believe the author is too critical of agents should read *United States v. Marshall*, 488 F.2d 1169 (9th Cir. 1974).

7. (§14.100) Outrageous Government Conduct

As discussed in §14.13 above, entrapment is not a defense when the defendant was predisposed to commit the offense, but there are limits beyond which even the prosecution forces may not tread. Outrageous government conduct may result in a dismissal even though the defendant was predisposed. *See* §§14.13, 14.14, 14.83–14.85, *supra*.

8. (§14.101) Drug Addiction—Necessity, Coercion, or Compulsion

Drug addiction, in general, is also discussed in §§14.15 and 14.35 above. Normally, the test of determining criminal responsibility of a narcotics addict is the same as for insanity. *See also* §14.9, *supra*. But there is some question whether a nontrafficking addict possessor can be convicted of simple possession in view of *Robinson v. California*, 370 U.S. 660 (1962), which holds that addiction cannot constitutionally be punished as a crime. *See Watson v. United States*, 439 F.2d 442 (D.C. Cir. 1970). In *United States v. Moore*, 486 F.2d 1139 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 980 (1973), the Court held that such prosecutions were proper and that drug addiction was not a defense. In *United States v. Henry*, 417 F.2d 267 (2nd Cir. 1969), the defendant unsuccessfully attempted, in a defense of entrapment, to avoid propensity by establishing a pharmacological coercion because of withdrawal symptoms.

9. (§14.102) Statutory Exceptions

Sections 195.030, 195.050, 195.060, 195.080, 195.180, 195.198, and 195.371, RSMo 2000, § 195.070, RSMo Supp. 2004, and portions of § 195.010, RSMo Supp. 2004, set forth certain exceptions. The defendant has the burden of proof on those

exceptions or exemptions. Sections 195.180, 195.369, RSMo 2000; *State v. McCauley*, 522 S.W.2d 152 (Mo. App. W.D. 1975).

10. (§14.103) Cooperation

Often, the only defense is an agreement to cooperate in return for a reduction or dismissal. Many defendants and lawyers find this approach distasteful, dangerous, and unacceptable, but often necessary, particularly in view of mandatory minimum sentences for some drug offenses.

F. (§14.104) Other Offenses

Sections 14.105–14.124 below discuss offenses that have defenses that are peculiar to them, but the offenses are relatively rare. There are many other offenses that have specific statutory or peculiar defenses, but that are very rarely charged. Whatever the offense, counsel for the defendant and for the prosecution should read the statute defining it as an offense and review any other statute and at least the leading decisions pertaining to the offense to know what defenses are available.

1. (§14.105) Perjury

Perjury is defined in § 575.040, RSMo 2000. The crime of making a false affidavit is defined in § 575.050, RSMo 2000, and making a false declaration is defined in § 575.060, RSMo Supp. 2004. In each offense, the statement must be false. In the latter offense, it must have been made for the purpose of misleading a public servant in the performance of their duty. In perjury, the false testimony must be knowingly so, material, and for the purpose of deceiving. In a charge of making a false affidavit, the false swearing must be material and with the purpose to mislead any person.

a. (§14.106) Truth Is a Defense

State v. Brinkley, 189 S.W.2d 314 (Mo. 1945). If the alleged false answer given by the defendant was unresponsive or literally true, it cannot be the subject of a perjury prosecution. *Bronston v. United States*, 409 U.S. 352 (1973). The defendant must know that the statement was false. The older cases held that it must have been willful and corrupt. *State v. Higgins*, 28 S.W. 178 (Mo. 1894). Variances between testimony at two

different times is not per se perjury. *Tyler v. State*, 501 S.W.2d 189 (Mo. App. E.D. 1973). Some cases recognize the "exculpatory no" defense—a negative response cannot serve as proof of the requisite knowledge and willfulness. *United States v. Grotke*, 702 F.2d 49 (2nd Cir. 1983) (not applicable there).

b. (§14.107) Two Witness Rule

Falsity of testimony, affidavit, or statement must be proved by either:

- the direct evidence of two witnesses;
- the direct evidence of one witness and strongly corroborating circumstances;
- demonstrative evidence that conclusively proves the falsity;
- a directly contradictory statement by the defendant under oath and the direct evidence of one witness or strongly corroborating circumstances; or
- a judicial admission by the defendant.

Section 575.070, RSMo 2000.

A nonjudicial admission may constitute the necessary strongly corroborating circumstances. Section 575.070(5); *see also State v. Burgess*, 457 S.W.2d 680 (Mo. banc 1970).

c. (§14.108) Materiality

The inquiry to which the alleged false answer was given must have been material. *See State v. Brinkley*, 189 S.W.2d 314 (Mo. 1945); *State v. Swisher*, 260 S.W.2d 6 (Mo. banc 1953). Sections 575.040.1, 575.050.1, RSMo 2000; § 575.060.2, RSMo Supp. 2004. A fact is material, regardless of its admissibility under the rules of evidence, if it could substantially affect the course or outcome of the proceeding. Sections 575.040.2, 575.060.2. The defendant does not need to know that the fact is material. It is no defense that the defendant mistakenly believed it was immaterial or that the defendant was not competent, for reasons other than mental disability or immaturity, to make the statement. Sections 575.040.3, 575.060.2; § 578.385.3, RSMo Supp. 2004.

d. (§14.109) Acquittal on Underlying Charge Is No Defense

That the defendant was acquitted on a charge does not bar a prosecution for perjury arising out of the defendant's testimony during that trial. *State v. Clinkingbeard*, 247 S.W. 199 (Mo. 1922). As to a perjury charge, if the testimony was unsworn or not legally sworn to, it is not perjury. *State v. Carpenter*, 65 S.W. 255 (Mo. 1901); § 575.040.1, RSMo 2000.

e. (§14.110) Retraction

As to all three offenses—perjury, false affidavit, and false declaration—a retraction of the false testimony or statement may be a defense. As to false affidavit and false declaration, the retraction must be before the falsity was exposed and before any person took substantial action in reliance on it. Section 575.050.3, RSMo 2000; § 575.060.3, RSMo Supp. 2004. In perjury, the retraction must come in the course of the same official proceeding and before its falsity was exposed. Separate hearings at separate stages of the same proceeding, such as appearances before a grand jury, a preliminary hearing, depositions, or previous trials, are deemed to be in the course of the same proceeding. Section 575.040.4, RSMo 2000. The defendant has the burden of injecting the issue of retraction.

f. (§14.111) Related Offenses

Related offenses include:

- making a false report, § 575.080, RSMo Supp. 2004;
- making a false bomb report, § 575.090, RSMo 2000;
- refusal to identify as a witness, § 575.190, RSMo 2000;
- acceding to corruption, § 575.280.1(2), RSMo 2000; and
- perjury in obtaining public assistance, § 578.385, RSMo Supp. 2004.

g. (§14.112) Subornation

Subornation of perjury is an offense under § 575.270.1, RSMo 2000 (tampering with a witness), and it may also be under § 575.020, RSMo 2000 (concealing an offense).

2. (§14.113) Escape

Several offenses apply to escapes:

- Escape from commitment to a state mental hospital, § 575.195, RSMo Supp. 2004
- Escape or attempt to escape from custody after arrest, § 575.200, RSMo 2000
- Escape or attempt to escape from confinement after arrest or while serving a sentence, § 575.210, RSMo 2000
- Failure to return to confinement after conviction, § 575.220, RSMo 2000 (does not apply to persons released on bail, parole, or probation)

See also § 217.390, RSMo 2000.

a. (§14.114) Unlawfully Confined

That the defendant was not guilty of the offense for which the defendant was confined is not a defense. The Supreme Court of Missouri, in *State v. Croney*, 425 S.W.2d 65 (Mo. 1968), held that, if the defendant was confined under color of law, the defendant was not entitled to self-help and escape, even though there was some imperfection or defect in the sentence. Thus, the unlawfulness of the confinement is not a defense. But in *State v. Rentschler*, 444 S.W.2d 453 (Mo. 1969), it was held that the lawfulness of the confinement was an element of the offense. It would appear that this is not in conflict with *Croney*. *See State v. King*, 372 S.W.2d 857 (Mo. 1963).

In *State v. Jackson*, 645 S.W.2d 725 (Mo. App. E.D. 1982), the court held that "custody" included one person's exercise of control over another to confine the other person within certain physical limits. In *Jackson* a guard waited outside while an x-ray was being taken of the defendant. "Confinement" and "[c]ustody" are defined in § 556.061(4) and (7), RSMo Supp. 2004.

b. (§14.115) Necessity

In *State v. Rentschler,* 444 S.W.2d 453 (Mo. 1969), the defendant claimed he feigned an escape attempt to be transferred from the conditions of the institution. These contentions were held not to be defenses. *See State v. Haddix*,

566 S.W.2d 266 (Mo. App. W.D. 1978); *see also State v. King,* 372 S.W.2d 857 (Mo. 1963). But see Judge Seiler's dissent in *State v. Green*, 470 S.W.2d 565 (Mo. banc 1971), *cert. denied*, 405 U.S. 1073 (1972). *State v. Simmons*, 861 S.W.2d 128 (Mo. App. E.D. 1993), sets forth the elements of the defense of justifiable emergency or necessity, which include the following:

- Present and imminent danger
- Exhaustion of remedies or evidence that attempts to do so had been futile and no alternative was available
- Absence of use of force or violence by the defendant against innocent persons
- Surrender by the defendant when the danger was avoided

Other jurisdictions have recognized necessity resulting from fear of homosexual attacks to be a defense to escape. *See*:

- *People v. Harmon*, 220 N.W.2d 212 (Mich. Ct. App. 1974);
- *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969);
- *People v. Lovercamp*, 118 Cal. Rptr. 110 (Cal. Ct. App. 1974);
- *State v. Reese*, 272 N.W.2d 863 (Iowa 1978).

In *United States v. Bailey*, 444 U.S. 394 (1980), the Court held that, under a statute prohibiting escapes from federal custody or confinement, the defendant is only entitled to an instruction on defense of duress or necessity when there is evidence that the escapee made a bona fide effort to surrender or return to custody once the coercive force of the alleged duress or necessity had dissipated. Later Missouri cases have recognized a defense of necessity and have said that the elements of it are the imminence of danger to the person of the defendant and the defendant's voluntary return or attempt to return after the escape; in some instances of continued harassment, recourse to administrative and legal remedies will bear on the credibility of the claim. *See State v. Baker*, 598 S.W.2d 540 (Mo. App. W.D. 1980) (threatened physical violence to cause defendant to submit to homosexual relations); §14.35, *supra*.

c. (§14.116) Double Jeopardy

It is not double jeopardy that the defendant, because of the escape, lost the defendant's "good time" or received other administrative punishment. *State v. Croney,* 425 S.W.2d 65 (Mo. 1968).

d. (§14.117) Related Offenses

Related offenses are:

- aiding the escape of a prisoner, § 575.230, RSMo Supp. 2004;
- permitting escape, § 575.240, RSMo 2000; and
- failure to execute an arrest warrant, § 575.180, RSMo 2000.

3. (§14.118) Pornography

The subject of pornography is far too excessive to even touch upon, but it may be important to know that it is not a crime to possess obscene materials for private use with no intent to sell or circulate them. *Stanley v. Ga.*, 394 U.S. 557 (1969). There are particular procedures for the seizure of allegedly obscene materials. *See Marcus v. Search Warrant*, 367 U.S. 717 (1961); § 542.281, RSMo 2000; § 542.301, RSMo Supp. 2004.

The applicable statutes are in Chapter 573, RSMo, and they include prohibitions of promoting pornography, furnishing pornography to a minor, and public display of explicit sexual material. Injunctions and declaratory judgment actions may be used by the state as a remedy. Section 573.070, RSMo 2000. Federal statutes also prohibit or attempt to control obscenity. See, e.g., 18 U.S.C. §§ 552, 1461, *et seq.*, 1735, 1737, and 2251, *et seq.*, and various postal and customs laws. The First Amendment is generally the primary basis of any defense in these prosecutions.

4. (§14.119) Accessory After the Fact

The conduct of an accessory after the fact is now prohibited by § 575.030, RSMo 2000, entitled "[h]indering prosecution." It is a crime to harbor, conceal, or warn, or to provide money, weapons, transportation, or disguise to another for the purpose of preventing the person's apprehension, prosecution, conviction, or

punishment. Section 575.030.1(1)–(3). It is also an offense to "prevent[ ] or obstruct[ ], by means of force, deception or intimidation, anyone from performing an act that might aid in the discovery or apprehension of such person." Section 575.030.1(4).

Under the former law on the subject, a relative of the alleged criminal was not guilty of this offense. Relationship is no longer a defense, but it certainly would mitigate the offense.

The defense of duress or coercion could be applicable. *See* §14.15, *supra*. It would also be a defense that the defendant did not know the aided person had committed or was suspected of committing an offense, or that the defendant did not know that that person had taken the defendant's automobile, money, gun, etc. It is also a defense to a charge that the defendant warned the person and that the warning was given in connection with an effort to bring another into compliance with the law. Section 575.030.1(2).

Related offenses include:

- concealing an offense, § 575.020, RSMo 2000;
- false report, § 575.080, RSMo Supp. 2004—retraction is a defense;
- tampering with physical evidence, § 575.100, RSMo 2000;
- tampering with a public record, § 575.110, RSMo 2000;
- resisting arrest, § 575.150, RSMo Supp. 2004—*see* §14.59, *supra*;
- interference with the legal process, § 575.170, RSMo 2000;
- aiding a prisoner to escape, § 575.230, RSMo Supp. 2004; and
- tampering with a witness or the victim, § 575.270, RSMo 2000.

Lying, alone, is not hindering prosecution. *State v. McMasters*, 815 S.W.2d 116 (Mo. App. E.D. 1991).

5. (§14.120) Disorderly Conduct, Breaches of the Peace, Etc.

Freedom of speech and freedom to assemble play an important part in the offenses of disorderly conduct and breaches of the peace. There must be an intent to breach the peace or "fighting words." *Gooding v. Wilson*, 405 U.S. 518 (1972); *see also State v. Carpenter*, 736 S.W.2d 406 (Mo. banc 1987), *cert. denied*, 485 U.S.

992 (1988); *State v. Swoboda*, 658 S.W.2d 24 (Mo. banc 1983). To breach the peace of someone else, that person must be within the peace. *City of St. Louis v. Sage*, 254 S.W.2d 252 (Mo. App. E.D. 1953).

Can a police officer's peace be broken? Not according to *Village of Salem v. Coffey*, 88 S.W. 772 (Mo. App. W.D. 1905), and *dissent*, 93 S.W. 281 (Mo. App. W.D. 1905). But *State v. Bradley*, 515 S.W.2d 826 (Mo. App. W.D. 1974), indicated the contrary. An ordinance against cursing a police officer was held unconstitutional in *Lewis v. City of New Orleans*, 415 U.S. 130 (1974).

The specific offenses include the following:

- § 574.010, RSMo 2000, peace disturbance—unreasonably and knowingly disturbing or causing alarm to another by loud noise, offensive language face to face, threats of a felony, fighting, noxious or offensive odor, or causing inconvenience to another by unreasonably and physically obstructing vehicular or pedestrian traffic, etc.

- § 574.020, RSMo 2000, private peace disturbance

- § 574.040, RSMo 2000, unlawful assembly—knowingly assembling with six or more people and agreeing to violate criminal laws with force or violence

- § 574.050, RSMo 2000, rioting—unlawful assembly plus laws are violated with force or violence

- § 574.060, RSMo 2000, refusal to disperse—failing or refusing to leave the scene of the unlawful assembly or riot after lawfully commanded by a law officer to do so

- § 574.075, RSMo Supp. 2004, drunkenness in a school, church, assemblage of people, or courthouse

More serious offenses include promoting civil disorder, § 574.070, RSMo 2000, and institutional vandalism, § 574.085, RSMo 2000. Each statute should be read closely to determine what defenses may be available. For instance, in a charge of resisting arrest, the

defendant cannot be convicted of a felony when the charge or evidence only shows an attempt to arrest for a misdemeanor. *State v. Furne*, 642 S.W.2d 614 (Mo. banc 1982).

6. (§14.121) Weapons Offenses

Weapons offenses are contained in Chapter 571, RSMo, and most are classified as "unlawful use of a weapon." Section 571.030, RSMo Supp. 2004. That statute prohibits the discharge or exhibiting of weapons at various places and times and in various manners. Section 571.030.1 prohibits knowingly carrying a knife, firearm, blackjack, or other weapon readily capable of lethal use concealed on or about the defendant's person.

The size of the firearm or knife may be a defense. A concealable firearm is one with a barrel less than 16 inches in length from the face of the bolt or standing breech. Section 571.010(3), RSMo 2000. An ordinary pocket knife with no blade longer than 4 inches is also exempt. Section 571.010(10). But this exemption only applies to "pocket kni[ves]." *State v. Weir*, 752 S.W.2d 461 (Mo. App. W.D. 1988); *State v. Chowning*, 866 S.W.2d 165 (Mo. App. S.D. 1993). A rifle longer than 16 inches or a different type of knife, however, may give rise to a concealed weapons charge. A scratch awl (a tool) is not a weapon readily capable of lethal use. *State v. Luker*, 873 S.W.2d 316 (Mo. App. S.D. 1994).

Section 571.030.3 has been amended to allow the transport of concealed firearms in the passenger compartments of motor vehicles. Sections 571.101–571.121, RSMo Supp. 2004, allow the carrying of concealed firearms with a license if the weapon is otherwise legally possessed.

If the gun is not concealed, it is a defense, *State v. Holbert*, 420 S.W.2d 351 (Mo. 1967), unless it was exhibited in an angry or threatening manner, § 571.030.1(4), or was carried into a church, place of worship, school, election polling place, federal, state, or local government building, or place of public assemblage for any lawful purpose. Section 571.030.1(8). A municipality, however, may prohibit the open carrying of a loaded gun, but it may not prohibit the open carrying of an unloaded gun. *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33 (Mo. App. E.D. 1994).

The weapon must be on or about the defendant's person. In *State v. Jordan*, 495 S.W.2d 717 (Mo. App. E.D. 1973), the defendant

put a gun in a sack and put the sack in the trunk of his car; this was held insufficient to support a conviction. The weapon must be within easy reach and convenient control. *State v. Bordeaux*, 337 S.W.2d 47 (Mo. 1960); *State v. Shaw*, 647 S.W.2d 612 (Mo. App. E.D. 1983) (under seat in car).

Self-defense may be a defense to a charge of flourishing a deadly weapon. *State v. Ruffin*, 535 S.W.2d 135 (Mo. App. E.D. 1976).

It is no defense that the gun was unloaded, *State v. Dorsey*, 491 S.W.2d 301 (Mo. 1973), but it is a defense that the gun was defective and could not be fired, *State v. Baty*, 511 S.W.2d 139 (Mo. App. S.D. 1974) (point was not passed on); *State v. Lutjen*, 661 S.W.2d 845 (Mo. App. W.D. 1983) (weapon must be readily capable of lethal use).

Law enforcement officers, citizens called on and actually assisting such officers in making an arrest or preserving the peace, correction officers, wardens, members of the armed forces or national guard while on duty, judges, process servers, federal probation officers, and corporate security advisors under police board requirements and regulations, *see* § 84.340, RSMo 2000, are exempt. Section 571.030.2.

Section 571.030.3 also exempts from certain carrying provisions of the statute (i.e., subdivisions (1), (5), (8), and (10) of subsection 1) persons who are transporting the weapon in a nonfunctioning state or when it is unloaded (and ammunition is not readily accessible), or when the weapon is not readily accessible. The concealed prohibition does not apply when the defendant is also in possession of an exposed firearm or projectile weapon for the lawful pursuit of game or if the defendant is in the defendant's dwelling unit or on business premises over which the defendant has possession, authority, or control. Section 571.030.3. Also exempt from the concealed weapon prohibition are persons who are traveling in a continuous journey peaceably through Missouri. *See State v. Cooper*, 563 S.W.2d 784 (Mo. App. S.D. 1978) (slight departure from direct route all right; "peaceably" means not quarrelsome; intoxication does not destroy defense); *see also State v. Mason*, 571 S.W.2d 246 (Mo. banc 1978) (journey can be intrastate as well as interstate). But that exemption does not apply to persons traveling through Missouri during the commission of a felony or for any unlawful purpose. *State v.*

Purlee, 839 S.W.2d 584 (Mo. banc 1992) (marijuana in automobile).

Under the former law, it was held that the defendant had the burden of proof to establish these exemptions. *State v. Achter*, 514 S.W.2d 825 (Mo. App. S.D. 1974). The burden of proof is now on the state after the defense is raised. *King v. State*, 839 S.W.2d 709 (Mo. App. W.D. 1992); *Purlee*, 839 S.W.2d 584. It is also an offense to possess a concealable firearm (regardless of whether concealed) if the defendant has pleaded guilty to, been convicted of, or been confined for a dangerous felony or an attempt to commit such an offense under the laws of any state or of the United States within the preceding five years, or if the defendant is a fugitive from justice, is habitually intoxicated, is drugged, or is adjudged mentally incompetent. Section 571.070, RSMo 2000. There are also federal laws prohibiting receiving or possessing firearms after felony convictions or while charged with a felony. 18 U.S.C. § 922.

7. (§14.122) Nonsupport of Spouse or Child

The criminal statutes involved in nonsupport of a spouse or a child include the following:

- § 568.030, RSMo 2000, abandonment of a child less than 4 years old
- § 568.045, RSMo Supp. 2004, and § 568.050, RSMo 2000, endangering the welfare of a child less than 17 years old
- § 211.031, RSMo Supp. 2004, juvenile court jurisdiction
- § 568.040, RSMo 2000, criminal nonsupport of spouse or child

Either parent or both may be guilty of nonsupport of a minor child or stepchild.

The nonsupport must be knowing. Section 568.040.1. It must be without good cause. *Id.* It is a defense if the defendant, through no action of the defendant's, lacks the ability to pay adequate support, *State v. Akers*, 287 S.W.2d 370 (Mo. App. E.D. 1956), and the prosecution must prove the defendant's ability to support, *State v. Nelson*, 463 S.W.2d 614 (Mo. App. W.D. 1971). Good cause, under § 568.040.2(2), includes "any substantial reason why the defendant is unable to provide adequate support." It is not

good cause for the defendant to purposely maintain inability. Unemployment is not necessarily good cause. *State v. Degraffenreid*, 877 S.W.2d 210 (Mo. App. S.D. 1994). The defendant has the burden of injecting the issue of good cause. Section 568.040.3.

It is a defense that adequate support is being provided by the defendant. It is a defense that the defendant is not legally obligated to support the child. Section 568.040.1. It is a defense that the child or stepchild is emancipated by operation of law. *Id.*

It is not an offense to fail or refuse to pay alimony or maintenance to a former spouse, but the defendant, in some instances, may be guilty of contempt for failure to comply with a judgment ordering alimony or maintenance. *See State ex rel. Stanhope v. Pratt*, 533 S.W.2d 567 (Mo. banc 1976). Inability is an affirmative defense to such a contempt charge. *Haley v. Haley*, 648 S.W.2d 890 (Mo. App. E.D. 1982); *Huber v. Huber*, 649 S.W.2d 955 (Mo. App. E.D. 1983).

Providing recognized and legally permitted non-medical remedial treatment is sufficient for providing medical and surgical attentions. Section 568.040.2(4). This is an issue on which the defendant has the burden of injection. Section 568.040.3.

Nonsupport is a felony if the defendant committed the offense in each of 6 months within any 12-month period, or the defendant's total arrearage is in excess of $5,000. Section 568.040.4.

8. (§14.123) Conspiracy

Conspiracy is made a crime under § 564.016, RSMo 2000. It requires at least two persons to agree, for the purpose of promoting or facilitating the commission of a crime, that they or one of them will engage in conduct that constitutes this crime. An overt act must be alleged and proved to have been done by one of the conspirators. *State v. Madewell*, 846 S.W.2d 208 (Mo. App. S.D. 1993). In *State v. Hohensee*, 650 S.W.2d 268 (Mo. App. S.D. 1982), it was held that the defendant was guilty of conspiracy even though the other conspirators were actually undercover agents who had no intent to commit a crime.

The defense of a conspiracy case can be very difficult and complicated. Only the specific statutory defense is discussed

below. Conspiracy is a very tricky offense. For instance, in *Hohensee,* 650 S.W.2d 268, the court, upon a claim of entrapment, held that the defendant was guilty of conspiracy even though the other conspirators were undercover agents and thus lacked criminal intent. The uncorroborated testimony of an accomplice is sufficient to convict. *Madewell*, 846 S.W.2d 208.

As to conspiracy, it is a defense when the defendant prevented the accomplishment of the objectives of the conspiracy under circumstances manifesting a renunciation of the defendant's criminal purpose. *See* §14.16, *supra*. The defendant has the burden of injecting this issue. Section 564.016.5(2).

The statute of limitations, see §14.24 above and §13.54 of this deskbook, may supply a defense. A defendant cannot be charged, convicted, or sentenced for conspiracy and the substantive offense. Section 564.016.7. The federal rule is different. See *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978), which involved a "chain conspiracy" and a RICO prosecution.

The federal law is substantially different. 18 U.S.C. § 371; 21 U.S.C. § 846.

9. (§14.124) Attempt

An attempt, under § 564.011, RSMo 2000, occurs when, for the purpose of committing the offense attempted, the defendant does any act that is a substantial step toward its commission. A "substantial step" is conduct that is strongly corroborative of the firmness of the defendant's purpose to complete the commission. It is no defense that the attempted offense, under the actual circumstances, was factually or legally impossible of commission if it could have been committed had the circumstances been as the defendant believed them to be. Section 564.011.2. Thus, legal impossibility is not a defense. *State v. Hunt*, 651 S.W.2d 587 (Mo. App. E.D. 1983) (reverse sting by which defendant believed items were stolen even though they were not). Failure is no longer an element, so even if the offense was completed, the defendant can still be convicted of attempt. *State v. O'Dell*, 684 S.W.2d 453 (Mo. App. S.D. 1984); *State v. White*, 860 S.W.2d 805 (Mo. App. S.D. 1993).

V. (§14.125) Matters That Are Not Generally Defenses

Illegal arrest. *See* §14.26, *supra*.

Ignorance or mistake of the law or advice of attorney. *See* §14.12, *supra*. *See Tarvestad v. United States*, 418 F.2d 1043 (8th Cir. 1969), *cert. denied*, 397 U.S. 935 (1970) (on advice of attorney as a defense in some incidences when a specific intent is an element).

Settlement, condonation, or reparations with or to the victim. *State v. Cooper*, 85 Mo. 256 (1884); *State v. Thomas*, 300 S.W. 823 (Mo. 1927). An offer of restitution is not generally a defense. *State v. McCawley*, 180 S.W. 869 (Mo. 1915).

Ratification by the victim. *State v. Hammond*, 77 Mo. 157 (1882) (rape charge).

Custom and usage. Custom and usage is not a defense unless it would be relevant on the issue of consent or intent.

"Use immunity." Use immunity grants to witnesses. For a discussion of use immunity, see §14.33 above.

Impeachment of a public official. Impeachment of a public official does not bar criminal charges. MO. CONST. art. VII, § 3.

Others committing same violation. It is no defense that others committing the same violation are not being prosecuted.

Good or noble motive. Motive is not generally a defense. *See United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973). Motive is not an element of crime, *State v. Gregg*, 399 S.W.2d 7 (Mo. 1966), but evidence of motive is admissible, *State v. Richardson*, 515 S.W.2d 571 (Mo. 1974), and absence of motive may tend toward innocence, *State v. Stapleton*, 518 S.W.2d 292, 296 (Mo. banc 1975). Intent and motive are not the same. *State v. Logan*, 126 S.W.2d 256 (Mo. 1939).

Brainwashing and similar theories. Brainwashing, "television made me do it," and similar theories are not generally defenses.

Intoxication or drug addiction. *See* §14.9, *supra*.

VI. (§14.126) When and How Defenses Should Be Raised

The timing of defenses may be important in the tactics of trial. Certain defenses must be raised by pretrial motion, *see* Chapters 12 and 13 of this deskbook, while other defenses can only be raised through the testimony of the defendant or others.

The burden of proof on various defenses has already been mentioned. Basically, if the defense goes to an element of the offense, the prosecution has the burden of proof. *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). If the defense is a special negative defense, once there is evidence of it, the court must instruct upon it, regardless of whether requested. The state has the burden of proof on it beyond a reasonable doubt, and the verdict-directing instruction must negate that defense. If the defense is an affirmative defense and there is some evidence of it, it must be instructed upon if the court is requested to do so. In some instances, the burden of proof of an affirmative defense is on the defendant; for example, in a defense of mental disease or defect excluding responsibility, the burden is on the defendant. *Leland v. Or.*, 343 U.S. 790 (1952); *State v. Bannister*, 339 S.W.2d 281 (Mo. 1960). If the affirmative defense bears no direct relationship to the elements of the crime, the burden may constitutionally be placed on the defendant. *Patterson v. N.Y.*, 432 U.S. 197 (1977).

It is the duty of the trial court to instruct on all necessarily included lesser offenses or degrees, *State v. Fleming*, 528 S.W.2d 513 (Mo. App. E.D. 1975), if requested, *State v. Olson*, 636 S.W.2d 318 (Mo. banc 1982), and on all defenses shown in evidence, when requested to do so, *State v. Thomas*, 526 S.W.2d 893 (Mo. App. E.D. 1975). The defendant is also entitled to a converse instruction, MAI-CR 3d 308.02, if the defendant so requests, regardless of whether there is any affirmative evidence by the defense.

VII. (§14.127) Caveats

All of the defenses available or possible on every offense have not been discussed in this chapter.

Not all of these defenses are accepted in Missouri (or in the case of some mentioned, anywhere).

Not all of these defenses work.

There are other possible defenses. Counsel should be ingenious, diligent, resourceful, and willing to research the law and investigate the facts.

The law changes, often almost daily. Counsel should do their own research and not rely on this deskbook in toto; it is merely a starting point.

Counsel should be careful of conflicting and inconsistent defenses. *State v. Chevalier*, 623 S.W.2d 42 (Mo. App. W.D. 1981).

In the federal courts the law, the elements, and the defenses differ, sometimes substantially. This deskbook is geared to Missouri state crimes, trials, and procedures.

Counsel should not expect a novel defense, for instance one based on a post-traumatic stress syndrome (e.g., the defendant suffered from an urban combat-induced traumatic stress reaction bringing on her life-long exposure to intrafamily and community violence, and ending with her killing her boyfriend), to work the first and every time.

Earl F. Seitz*

Chapter 15

MENTAL FACTORS

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F. (§15.44) Motion to Dismiss Based on Lack of Capacity to Understand the Proceedings
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I. (§15.1) Introduction

This chapter will give attorneys an overview of the law in Missouri concerning criminal proceedings involving mental disease or defect of the accused. The legal standards that are applied by the court and what occurs with an accused who is found mentally incompetent at any stage of the proceedings or who is not responsible for criminal conduct because of mental disease or defect are discussed below.

II. (§15.2) Evaluation of the Defendant's Mental Condition

Counsel's initial contact with the client should shed some light on whether there is a potential defense of mental disease or defect. Counsel's personal observations of the client, how the client responds to questions, and the client's personal appearance will aid in this determination. Counsel should discuss with the client any prior treatment or diagnosis of mental illness and any prior psychiatric treatments or examinations.

If the client is incarcerated, counsel should interview the jailer as to the activities and behavior of the accused in jail.

Counsel should examine the police reports, if available, paying particular attention to the circumstances surrounding the crime itself and any bizarre statements made by the accused to the police, to the victim, or to other witnesses.

Counsel should consider hiring a psychiatrist to conduct a brief interview with the client. If it appears to counsel that a mental disease or defect is present, a one-hour interview by a psychiatrist may be very valuable in the ultimate decision of whether to rely on the defense of mental disease or defect.

If the accused client, in a previous criminal proceeding, has used the defense of mental disease or defect, counsel should obtain copies of the medical reports in relation to that examination. These reports can usually be obtained from the accused's former attorney, with permission from the accused, or from the prosecuting attorney. If necessary, counsel can file a motion with the court requesting copies of the prior psychiatric examination and report.

In most situations, members of the client's family will be urging counsel to obtain a psychiatric examination on the theory that something mentally must be wrong with the client to cause the commission of the criminal offense.

It is a rare case, however, in which a person is found incompetent to understand the nature of the proceedings or has a successful defense of mental disease or defect.

Counsel should not use the defense as a method of delaying the prosecution of the case.

If counsel feels from the investigation that the defendant is mentally incompetent, a psychiatric examination should be requested. It may well be a valid defense to the proceedings against the client, and if not, it may be of value in plea negotiations with the prosecutor.

III. (§15.3) Criminal Proceedings Involving Mental Illness

If counsel feels the client is suffering from a mental disease or defect, two issues need to be determined by two different legal tests:

1. The accused's ability and competence to understand the nature of the proceedings and the mental capacity to assist in the defense

2. The accused's defense of not being responsible for criminal conduct because of mental disease or defect

Section 552.015, RSMo 2000, provides as follows:

> 1. Evidence that the defendant did or did not suffer mental disease or defect shall not be admissible in a criminal prosecution except as provided in this section.

2. Evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible in a criminal proceeding:

(1) To determine whether the defendant lacks capacity to understand the proceedings against him or to assist in his own defense as provided in section 552.020;

(2) To determine whether the defendant is criminally responsible as provided in section 552.030;

(3) To determine whether a person committed to the director of the department of mental health pursuant to this chapter shall be released as provided in section 552.040;

(4) To determine if a person in the custody of any correctional institution needs care in a mental hospital as provided in section 552.050;

(5) To determine whether a person condemned to death shall be executed as provided in sections 552.060 and 552.070;

(6) To determine whether or not the defendant, if found guilty, should be sentenced to death as provided in chapter 558, RSMo;

(7) To determine the appropriate disposition of a defendant, if guilty, as provided in sections 557.011 and 557.031, RSMo;

(8) To prove that the defendant did or did not have a state of mind which is an element of the offense; . . . .

A. Definition of Mental Disease and Its Constitutionality

1. (§15.4) Section 552.010, RSMo

Section 552.010, RSMo 2000, defines "mental disease or defect" as follows:

> The terms "mental disease or defect" include congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. The terms "mental disease or defect" do not include alcoholism without psychosis or drug abuse without psychosis or an abnormality manifested only by criminal sexual psychopathy as defined in section 202.700, RSMo, nor shall anything in this chapter be construed to repeal or modify the provisions of sections 202.700 to 202.770, RSMo.

It should be noted that the criminal sexual psychopath laws—§§ 202.700–202.770, RSMo—were repealed in 1980.

It has been held that diminished capacity was not a viable defense to child pornography and child abuse charges against the defendant, so defense counsel's failure to raise diminished capacity as a defense at trial did not constitute ineffective assistance of counsel; the defendant's diagnosis of pedophilia was not a mental disease or defect that would render the defendant not responsible for his acts, and the defendant did not appear irrational. *State v. Foster*, 838 S.W.2d 60 (Mo. App. E.D. 1992), *cert. denied*, 507 U.S. 994 (1993);

State v. McGreevey, 832 S.W.2d 929 (Mo. App. W.D. 1992); *Blackmon v. Armontrout*, 875 F.2d 164 (8th Cir. 1989), *cert. denied*, 493 U.S. 939 (1989); *Mathenia v. Delo*, 975 F.2d 444 (8th Cir. 1992).

Defense counsel was not ineffective under Missouri law for failing to present a diminished capacity defense to murder charges based on involuntary intoxication when there was no evidence that the defendant's intoxication, if any, was so extreme as to negate purpose or knowledge. *Mathenia,* 975 F.2d 444, *reh'g denied.*

In *State v. Gary*, 913 S.W.2d 822 (Mo. App. E.D. 1995), the defendant, who was charged with first degree murder, offered as a defense the diminished capacity doctrine, seeking a conviction of a lesser degree of the crime. The prosecutor was permitted to offer evidence of possession and consumption of alcohol by the defendant to explain conduct purporting to demonstrate a mental disease or defect.

2. (§15.5) Constitutionality

The United States Supreme Court and the Supreme Court of Missouri have stated in challenges to the constitutionality of this definition of mental disease that the legislature is empowered to enact statutes defining criminal responsibility and a standard for determination of legal insanity. *Leland v. Or.*, 343 U.S. 790 (1952); *State v. Pennington*, 618 S.W.2d 614 (Mo. 1981).

B. Mental Disease or Defect Excluding Fitness to Stand Trial

1. (§15.6) Accused's Capacity to Understand Proceeding and Assist in the Defense

Section 552.020.1, RSMo 2000, provides that: "No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures."

Probation revocation proceedings are within the meaning of "sentenced" in § 552.020.1, and the probationer must have the mental fitness to proceed. A probation revocation hearing could not proceed as long as the probationer suffered from chronic amnestic disorder. *State ex rel. Juergens v. Cundiff,* 939 S.W.2d 381 (Mo. banc 1997).

In *State v. Elam*, 89 S.W.3d 517 (Mo. App. W.D. 2002), the court held that the actual presence of or treatment of some degree of mental illness "does not necessarily indicate legal incompetence for purposes of trial"—i.e., a defendant can be diagnosed with a mental disease, and the court ruling on the defendant's competence to proceed is a factual determiner and will be upheld "unless there is *no substantial evidence* to support the ruling." *Id.* at 521 (emphasis added).

In *State v. Braumruk*, 85 S.W.3d 644 (Mo. banc 2002), the defendant had previously been found incompetent to stand trial by a circuit judge, and the subsequent judge found him competent to proceed. The Supreme Court held that the prior court's finding did not permanently find the defendant incompetent, and a second competency hearing five years after the first competency hearing found the defendant competent to proceed.

2. (§15.7) Legal Test

The test for fitness to stand trial and whether the accused is competent to plead are the same. This test is whether an accused has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the accused has a rational, as well as factual, understanding of the proceedings; the determination is made by the trial court. *Dusky v. United States*, 362 U.S. 402 (1960); *Barnett v. State*, 618 S.W.2d 735 (Mo. App. E.D. 1981); *State v. Hunter*, 840 S.W.2d 850 (Mo. banc 1992), *cert. denied*, 509 U.S. 926 (1993), *reh'g denied*, 510 U.S. 929 (1993).

The circuit court is prohibited by statute from proceeding against an accused who, because of a trauma to the brain, is unable to assist in the defense, even though the accused has the capacity to understand the proceedings. *State ex rel. Sisco v. Buford*, 559 S.W.2d 747 (Mo. banc 1978).

"The test for competency is 'whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him.'" *Woods v. State,* 994 S.W.2d 32 (Mo. App. W.D. 1999) (quoting *State v. Vansandts*, 540 S.W.2d 192, 202 (Mo. App. E.D. 1972)).

Though the defendant presented evidence of paranoid schizophrenia and that he suffered from delusions, the test for competence was

satisfied, and the defendant was found competent to stand trial. *State v. Frezell,* 958 S.W.2d 101 (Mo. App. W.D. 1998).

Also see *State v. Jaynes,* 949 S.W.2d 633 (Mo. App. E.D. 1997), for a defendant suffering from active psychosis and persecutorial delusions who was found competent to stand trial.

In *State v. Anderson*, 79 S.W.3d 595 (Mo. App. W.D. 2002), the defendant alleged that the trial court erred in finding him competent to proceed. The defendant submitted the court-appointed doctor's report and the defendant's expert's reports. The reports varied considerably, with the court-appointed doctor finding him competent to proceed and the defendant's expert finding him not competent to proceed. The Supreme Court held that competence is an issue of fact for the trial court to decide and that decision will stand unless there is no substantial evidence to support it.

3. (§15.8) Competence to Enter a Plea

The standard for determining a defendant's competence to plead guilty is essentially the same as that for determining if a defendant is competent to proceed to trial. *Wilkins v. State*, 802 S.W.2d 491 (Mo. banc 1991); *State v. Hunter*, 840 S.W.2d 850 (Mo. banc 1992).

In *Westfall v. State*, 916 S.W.2d 365 (Mo. App. E.D. 1996), the defendant, in his Rule 24.035 motion, alleged ineffective assistance of counsel for failure to request a mental evaluation under § 552.020, now RSMo 2000. The court of appeals denied his motion based on the record of the plea hearing, noting the complexity of the case and the responsiveness of the defendant.

4. (§15.9) Provision for Examination

Section 552.020.2, RSMo 2000, provides that:

> Whenever any judge has reasonable cause to believe that the accused lacks mental fitness to proceed, he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals, who are neither employees nor contractors of the department of mental health for purposes of performing the examination in question, to examine the accused; or shall direct the director to have the accused so examined by one or more psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a

> minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals. . . .

The trial court was not required to order a mental examination of the defendant when there were no supporting affidavits, no evidence of past medical problems, and no psychological or psychiatric reports, even though the defendant wrote a bizarre bond reduction letter to the trial court and dressed as a woman throughout the proceeding. *State v. Antone*, 724 S.W.2d 267 (Mo. App. W.D. 1986).

In another case, the defendant filed a pre-trial motion for mental examination. The defendant testified at the hearing on his motion that he suffered from depression and nervousness and that he had been examined at Fulton State Hospital 13 years before but did not recall the diagnosis. On cross-examination, the defendant testified that he understood the charges against him and that he was able to communicate with and to understand his discussions with trial counsel. The trial court's denial of a motion for mental examination was affirmed. *State v. Mercado*, 787 S.W.2d 848 (Mo. App. E.D. 1990).

A trial court has the duty to *sua sponte* order an examination if there is reason to question the defendant's competence to proceed. *State v. Tilden,* 988 S.W.2d 568 (Mo. App. W.D. 1999).

The Supreme Court, in *State ex rel. Proctor v. Bryson*, 100 S.W.3d 775 (Mo. banc 2003), issued a relator writ of prohibition when the trial judge had ordered the defendant to undergo a mental health evaluation under §§ 552.020 and 552.030, RSMo 2000, at the request of the prosecutor. The Court issued the writ because the only allegations by the prosecutor requesting the examination were that the defendant was agitated, nervous, loud, and verbally abusive when arrested, and there were no allegations that the defendant was currently unable to stand trial:

> Neither Section 552.020.2 nor Section 552.020.4 allows the court, or the State, to assert a defense of mental disorder or defect on behalf of the defendant. When the Defendant does not on her own accord assert the mental disease or defect defense, the court has no authority to require [the Defendant] to submit to an examination relating to [the Defendant's] mental state at the time of the alleged crime.

Proctor, 100 S.W.3d at 778.

The defendant in *State v. Yeager*, 95 S.W.3d 176 (Mo. App. W.D. 2003), requested a second mental examination nine days before trial. The first examination determined mental illness but found that the defendant's mental condition did not interfere with the defendant's ability to communicate and effectively assist his counsel and understand the proceedings. In the second request, the defendant's counsel stated that the condition of the defendant's mental state had changed drastically. The trial court denied the motion under the belief that the defendant was entitled to only one examination. This was incorrect because § 552.020.2 provides for multiple mental examinations. The court of appeals affirmed the defendant's conviction, holding that there was no evidence or suggestion in the record that the defendant was no longer capable of understanding the proceeding or assisting in his own defense.

5. (§15.10) Right of Counsel to Be Present at Mental Examination

Although a psychiatric examination by a qualified physician to determine the ability of an indigent defendant to stand trial is a constitutionally guaranteed right, the privilege of having an attorney present at the examination does not fall in that category. *State v. Brown*, 601 S.W.2d 311 (Mo. App. E.D. 1980).

6. (§15.11) Requirement for Hearing

When the trial court fails to conduct a hearing on the defendant's mental fitness to proceed when there is evidence to raise a bona fide doubt as to competence of the defendant, the United States Supreme Court has stated that the defendant is denied a fair trial. *Pate v. Robinson*, 383 U.S. 375 (1966).

This requirement for a hearing continues throughout all stages of the proceeding if the trial court has reasonable cause to believe that the defendant has a mental defect or disease excluding fitness to proceed even when the psychiatric report certifies the accused as fit to proceed (e.g., defendant's absurd behavior on witness stand during trial). *King v. State*, 581 S.W.2d 842 (Mo. App. E.D. 1979); *State v. Moon*, 602 S.W.2d 828 (Mo. App. W.D. 1980); *State v. Messenheimer*, 817 S.W.2d 273 (Mo. App. S.D. 1991). Missouri courts have stated, however, that the trial court does not need, *sua sponte*, to hold a hearing just because a psychiatric report indicates that a defendant is suffering from a mental disease or defect under § 552.010, RSMo 2000, even though the report also states that the

defendant is incompetent to stand trial. *Bryant v. State*, 563 S.W.2d 37 (Mo. banc 1978); *McCabe v. State*, 614 S.W.2d 757 (Mo. App. E.D. 1981).

In another case, no requirement for a competency hearing existed when three psychiatric reports ordered by the court under Chapter 552, RSMo, all stated that the defendant was competent to stand trial and the defendant failed to contest the reports as stated in § 552.020.7, now RSMo 2000. *State v. Caudill*, 789 S.W.2d 213 (Mo. App. W.D. 1990).

The defendant was not entitled to a continuance for the purpose of obtaining a mental examination, after conviction of first degree murder but prior to the penalty phase of the trial, as support for mitigating circumstances, when he testified fully as to his mental condition in support of the mitigating circumstances submitted and had not previously required a mental examination. *State v. Smith*, 781 S.W.2d 761 (Mo. banc 1989).

Appellate review of competence to stand trial when no mental examination was sustained or ordered is based on whether the failure to order an examination under the circumstances constitutes a denial of due process. *Woods v. State,* 994 S.W.2d 32 (Mo. App. W.D. 1999); *State v. Frezell,* 958 S.W.2d 101 (Mo. App. W.D. 1998).

7. (§15.12) Issue Raised by Defense

The issue of mental disease or defect of the accused is usually raised by the defense attorney, who files with the trial court a notice of intention to rely on the defense and a motion requesting the court to order a psychiatric examination. If the mental condition of the accused is quite obvious, the prosecuting attorney will normally not oppose the motion for mental examination. If the prosecuting attorney does oppose the motion, defense counsel should be prepared to present competent evidence that will convince the trial court that there is reasonable cause to believe the accused's condition. Psychiatric treatment that is remote in time is not sufficient to require a trial court to order a mental examination for the purpose of determining the accused's fitness to proceed. *State v. Harris*, 477 S.W.2d 42 (Mo. 1972). The Supreme Court of Missouri has held that a prior adjudication of mental fitness of the accused is relevant. *Burton v. State*, 641 S.W.2d 95, 98 (Mo. banc 1982). If counsel truly feels that the defendant is suffering from a mental disease or defect, counsel should present all of the evidence to substantiate this

condition to avoid a Rule 24.035 action against counsel for failure to do so.

Factors for a court to consider as to a defendant's competence to proceed were listed in *State v. Tilden,* 988 S.W.2d 568, 578 (Mo. App. W.D. 1999), as follows:

(1) prior commitments to mental institutions for evaluations;
(2) inappropriate behavior and responses on the witness stand;
(3) the bizarre circumstances of the criminal activity in the instant case;
(4) the nature of the prior offenses causing the earlier examination.

In *State v. Simonton,* 49 S.W.3d 766 (Mo. App. W.D. 2001), the trial court had ordered the defendant to disclose any reports or witnesses' opinions as to the defendant's state of mind at the time of the offense, and on the second day of trial, the defendant's counsel advised the state and the court of the psychiatrist's opinion. The court of appeals found that the trial court erred in excluding the psychiatrist's testimony and opinion as to the defendant's mental state at the time of the offense (murder) and held that the prejudice to the state was minimal but that excluding the testimony created substantial prejudice to the defendant. Excluding the psychiatrist's testimony was too drastic of a remedy for the discovery violation.

8. (§15.13) Issue Raised by Prosecution

If the prosecuting attorney files the motion requesting a mental examination, it will be conducted, as § 552.020.2, RSMo 2000, provides, under the direction of the Department of Mental Health and will be taxed as court costs. The decision as to which person performs the examination rests basically with the accused. The prosecuting attorney will normally be more receptive to a report from a state psychiatrist. Counsel should keep in mind that a private psychiatrist may well be more inclined to give a more favorable report concerning the condition of the client. The author suggests that counsel ask colleagues who they use for a private psychiatric examination.

If the accused's condition is quite obvious, an examination by any psychiatrist will usually establish the defense. If it is not obvious, the defense attorney should give serious consideration to a private examination if funds are available.

9. (§15.14) Procedures After Initial Examination

After the report of the initial examination has been delivered to the attorney for the accused, within ten days, upon written request, counsel is entitled to an examination of the accused by a psychiatrist of counsel's own choice. Section 552.020.11(2), RSMo 2000. This second request should be made timely. *State v. Shaw*, 646 S.W.2d 52, 54 (Mo. 1983). The cost of this examination will be borne by the client. *State v. Collier*, 624 S.W.2d 30 (Mo. App. E.D. 1981); *Newbold v. State*, 492 S.W.2d 809 (Mo. 1973).

If neither the state nor the accused or the accused's counsel contests the opinion contained in the psychiatric report, the court may make a finding on the record based on the report filed or hold a hearing on its own motion. Section 552.020.7.

There are only two occasions when a competency hearing on fitness to proceed is required:

1. When a report is contested
2. When the circumstances of a trial create a bona fide doubt of an accused's fitness to proceed

State v. Mayfield, 562 S.W.2d 404 (Mo. App. E.D. 1978); *Mikel v. State*, 550 S.W.2d 863 (Mo. App. W.D. 1977); *Boyer v. State*, 527 S.W.2d 432 (Mo. App. E.D. 1975).

The issue of competence to stand trial is solely the decision of the trial court. *State v. Wagner*, 587 S.W.2d 299 (Mo. App. E.D. 1979).

A defendant who represented himself was not entitled to a third competency hearing for his purported foolish decisions during trial. *Wise v. Bowersox*, 136 F.3d 1197 (8th Cir. 1998), *cert. denied,* 525 U.S. 1026 (1998), *reh'g denied,* 525 U.S. 1129 (1999).

10. Procedures After a Determination That Defendant Lacks Fitness to Proceed

a. (§15.15) Statutory Provisions

Section 552.020.9, RSMo 2000, states that, "If the court determines that the accused lacks mental fitness to proceed, the criminal proceedings shall be suspended and the court shall commit him to the director of the department of mental health."

b. (§15.16) Speedy Trial

A delay of the trial because of the defendant's mental incapacity is not a denial of the defendant's constitutional right to a speedy trial. *State v. Kent*, 515 S.W.2d 457 (Mo. banc 1974); § 545.780.2, RSMo 2000.

c. (§15.17) Release From Commitment

Section 552.020.11, RSMo 2000, provides that the committing court, 6 months after a commitment under this section, may order the head of the facility where the accused is located or a designate to determine whether the accused is now mentally fit to proceed and, if not, whether there is a substantial probability that the accused will attain the mental fitness to proceed in the foreseeable future. This report is to be done and filed within 30 days, with copies to the prosecuting attorney and defendant's counsel. After the report is filed, the accused or the state can request an independent examination. If neither the state nor the defendant requests a second examination and contests the findings in the initial report, the court can order a hearing or make a determination based on the report filed. The court will make one of the following three findings:

1. If the accused is now mentally competent, the criminal proceeding will resume.

2. If the accused is not now mentally competent, but there is a substantial possibility that the accused will be competent in the reasonably foreseeable future, the commitment is continued for 6 months, then a second report will be ordered.

3. If the accused lacks the mental capacity to proceed and no reasonably foreseeable probability exists of the accused being able to proceed in the future, the court may dismiss the charges and the accused is discharged, unless proper proceedings have been filed under Chapter 632, RSMo (involuntary detention), or Chapter 475, RSMo (mentally incapacitated).

IV. Mental Disease or Defect at Time of Criminal Conduct

A. (§15.18) Issue of Incompetence at Time of Criminal Conduct—Statutory Provisions

Section 552.030.1, RSMo 2000, states that, "A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect such person was incapable of knowing and appreciating the nature, quality, or wrongfulness of such person's conduct."

B. (§15.19) Legal Presumption That Persons Are Free From Mental Disease or Defect

"All persons are presumed to be free from mental disease or defect excluding responsibility for their conduct . . . ." Section 552.030.6, RSMo 2000. This is a conclusive presumption unless substantial evidence is introduced to the contrary. *State v. Thomas*, 625 S.W.2d 115 (Mo. 1981).

The burden of proof rests on the accused to establish that the accused was suffering from a mental disease or defect excluding responsibility at the time of the conduct charged. Section 552.030.6; *State v. Burton*, 544 S.W.2d 60 (Mo. App. W.D. 1976); *State v. King*, 526 S.W.2d 58 (Mo. App. W.D. 1975); *State v. Bradshaw*, 593 S.W.2d 562 (Mo. App. W.D. 1979); *State v. Henderson*, 824 S.W.2d 445 (Mo. App. E.D. 1991). Placing the burden of proof on the accused has been held to be constitutional. *Leland v. Or.*, 343 U.S. 790 (1952).

In *State v. Harris*, 774 S.W.2d 487 (Mo. App. E.D. 1989), two psychiatrists testified on behalf of the defendant that, at the time of the alleged offenses, he was suffering from paranoid schizophrenia and was unable to appreciate the nature of his actions. One psychiatrist testified that if the defendant was suffering from a mental disease, it was not of such a nature as would affect his ability to appreciate the wrongfulness of his acts. In a bench trial, even in the absence of expert testimony that a defendant is not suffering from a mental disease excluding responsibility for the defendant's conduct, the statutory presumption of sanity, § 552.030.6, standing alone, is evidence sufficient to sustain the findings of the trier of fact on this issue. *Harris,* 774 S.W.2d 487.

C. (§15.20) Timeliness of Notice of Defense

The accused must give timely notice of the intention to rely on the defense of mental disease or defect excluding responsibility, or evidence of this defense will not be admissible. The accused must either enter a plea of not guilty by reason of mental disease or defect at the arraignment or give notice of it within the statutory time. If the state files the appropriate discovery motion, this notice must be given:

- at arraignment;
- within ten days thereafter; or
- at such later date as the court may for good cause permit.

If the defense of mental disease or defect is not raised in accordance with the statutory requirements of § 552.030.2, RSMo 2000, the trial court has considerable discretion of whether to permit the defendant to raise the defense. *State v. Broderick*, 625 S.W.2d 912 (Mo. App. S.D. 1981); *State v. Haley*, 603 S.W.2d 512 (Mo. 1980); *State v. Isa*, 850 S.W.2d 876 (Mo. banc 1993).

A motion for an order for mental examination may be made at any time before sentencing, but the trial court is required to enter an order for mental examination only when it has reasonable cause to believe that the defendant has a mental disease or defect excluding fitness to proceed. *State v. Rider*, 664 S.W.2d 617 (Mo. App. S.D. 1984).

In *State v. McMillin*, 783 S.W.2d 82 (Mo. banc 1990), the defendant was convicted of murder in the first degree and sentenced to death. Thereafter, counsel purported to have filed the motion for mental examination under Chapter 552, RSMo. A Chapter 552 psychiatric evaluation, however, cannot be ordered after the defendant is sentenced.

D. (§15.21) Jury Determination and Instructions

Whether the defendant has a mental disease or defect excluding responsibility for the defendant's conduct is an issue solely for the jury to decide. Section 552.030.6, RSMo 2000. There can be no directed verdict of not guilty by reason of mental disease or defect. This is always a jury question unless the jury is waived.

The jury can reject the defense even if no contradictory medical evidence is offered by the state. *State v. West*, 575 S.W.2d 257 (Mo. App. W.D. 1978).

If substantial evidence is not introduced by the accused to refute the presumption of § 552.030.6, the trial court is not required to instruct the jury on the defense of mental disease or defect. *State v. Thomas*, 625 S.W.2d 115 (Mo. 1981); *State v. Bacon*, 501 S.W.2d 499 (Mo. App. W.D. 1973).

Evidence of mental disease or defect is admissible to prove that the defendant did not have a state of mind that is an element of the offense, and failure to give a manslaughter instruction in a murder prosecution when there is substantial evidence that the defendant was not capable of premeditation is reversible error. *State v. Anderson*, 515 S.W.2d 534 (Mo. banc 1974).

The jury is not bound by the opinion of a doctor that the defendant was unable to conform personal conduct to the requirements of law or to appreciate the nature of the crimes that the defendant committed. *State v. Blackmon*, 664 S.W.2d 644 (Mo. App. S.D. 1984).

When a clinical psychologist, who testified for the defendant, testified that, though the defendant was an alcoholic, he had no mental disease or defect and there was no other evidence in the defendant's prosecution for driving while intoxicated to support the defense, the trial court did not err in giving a verdict-directing instruction that did not refer to the defense of mental disease or defect excluding responsibility. *State v. Middlemas*, 654 S.W.2d 355 (Mo. App. S.D. 1983).

In another case, the trial court erred when it permitted the prosecutor to argue to the jury that the defendant's medical history of aggressive behavior could be considered in arriving at their decision, contrary to § 552.020.12, RSMo 2000. *State v. Burnfin*, 771 S.W.2d 908 (Mo. App. W.D. 1989).

It was not error for the prosecution to tell the jury in closing argument that whether the defendant's mental condition rose to the level of mental disease or defect did not matter given the evidence before the jury; the Court reasoned that all evidence was relevant when the defendant used the defense of diminished capacity as to his mental ability to form the necessary mental state. *Nicklasson v. State,* 105 S.W.3d 482 (Mo. banc 2003).

The trial court, which had properly instructed the jury that the defendant has the burden of establishing an insanity defense by the greater weight of credible evidence, erred by stating at the close of the "hammer" instruction, given after a jury deadlock, that the jurors must

not find as fact that which they did not believe "beyond a reasonable doubt to be true." *State v. Moss*, 789 S.W.2d 512 (Mo. App. S.D. 1990).

A defendant is not entitled to an instruction defining "antisocial conduct" when the Notes on Use do not require or permit the definition of that term. *State v. Childers*, 791 S.W.2d 779 (Mo. App. E.D. 1990).

In *Khaalid v. Bowersox,* 259 F.3d 975 (8th Cir. 2001), the defendant's conviction for first degree murder and armed criminal action was affirmed on the defendant's petition for writ of habeas corpus, *see State v. Jones,* 919 S.W.2d 12 (Mo. App. E.D. 1996), that was filed in the United States District Court for the Eastern District of Missouri and denied. The district court held that the psychologist's testimony offered by the defendant was not admissible in guilty pleas from a trial that did not include the determination that the defendant suffered from mental disease or defect as defined by Missouri law.

In *State v. Bass,* 81 S.W.3d 595 (Mo. App. W.D. 2002), the state, in its prosecution and burden of proof, was not required to prove beyond a reasonable doubt that the defendant did not suffer from a mental disease or defect at the time of the criminal activity. The burden is on the defendant to overcome the statute's presumption of sanity.

E. (§15.22) Impeachment of Defendant With Own Statements in Psychological Examination

In *State v. Carter*, 641 S.W.2d 54 (Mo. banc 1982), the Supreme Court stated that "a defendant who pleads insanity waives all other privileges . . . and the privilege against self-incrimination."

When the defendant's statements to a psychiatrist were offered solely for the purpose of determining the defendant's mental condition and were subject to limiting instructions given by the trial court under § 552.030.5, RSMo 2000, and MAI-CR 2d 2.36, there is no violation of the defendant's Fifth Amendment privilege. *State v. Barnes*, 740 S.W.2d 340 (Mo. App. E.D. 1987).

In *State v. Copeland,* 928 S.W.2d 828 (Mo. banc 1996), the murder trial of Faye Copeland, the defendant did not rely on the defense of mental disease or defect. In the penalty phase, the defense introduced the testimony of a psychologist that the defendant was suffering from battered spouse syndrome at the time of the murders. The Supreme Court held that it was permissible for the state to then introduce evidence from a psychiatrist, who had examined the defendant, that the

defendant was not a battered spouse and that the defendant's Fifth Amendment right against self-incrimination was not violated. *Id.*

A statement made by the defendant to a psychiatrist and included in the defendant's medical records relating to the defendant's mental condition could be used by the prosecutors in the cross-examination of the psychiatrist to discredit his expert testimony. *State v. Thompson,* 985 S.W.2d 779 (Mo. banc 1999).

F. Acceptance of or Acquittal on Grounds of Mental Disease or Defect

1. (§15.23) Statutory Provisions

Section 552.040.2, RSMo 2000, states:

> When an accused is tried and acquitted on the ground of mental disease or defect excluding responsibility, the court shall order such person committed to the director of the department of mental health for custody. The court shall also order custody and care in a state mental health or retardation facility unless an immediate conditional release is granted pursuant to this section. . . . [T]he director of the department of mental health, or the director's designee, shall determine the time, place and conditions of confinement.

If the state accepts the defense of mental disease or defect excluding responsibility, a commitment under § 552.040.2 should be ordered by the court. Section 552.030.2, RSMo 2000.

2. (§15.24) Petition for Release

The committed person or the superintendent of the hospital where the person is committed may petition the court for a conditional or unconditional release. Copies of the petition for release must be served on the prosecuting attorney of the county in which the commitment arose. If no objection to the release is filed within 15 days, the court must release the committed person. If objection to the release is filed, a hearing is held. The objection to the committed person's release can be made by the superintendent of the hospital where the person is committed or by the prosecuting attorney.

All parties (prosecuting attorney, superintendent of the hospital, committed person) are entitled, upon written application, to an examination of the committed person by a physician of their choosing, at their expense. Section 552.040.5, RSMo 2000.

The trial court, not the treating physician, makes the determination whether the evidence clearly establishes that the committed person should be released following an acquittal by reason of mental disease or defect. *State v. Davee*, 558 S.W.2d 335 (Mo. App. S.D. 1977).

Release is limited to those defendants who are found to be so free of mental disease as to no longer be a danger to themselves or others. *State v. Pertuisot*, 547 S.W.2d 192 (Mo. App. E.D. 1977).

To grant an unconditional release, the trial court must find that the defendant does not continually have a mental disease or defect and that the defendant, in the reasonable future, is not likely to have a mental disease or defect rendering the defendant dangerous to him- or herself or others. *State v. Weekly*, 107 S.W.3d 340 (Mo. App. W.D. 2003).

To deny a conditional release, the trial court must find that the defendant is still suffering from a mental disease or defect that renders the defendant dangerous to him- or herself or others. *State v. Carter*, 125 S.W.3d 377 (Mo. App. W.D. 2004).

"An order denying the application shall be without prejudice to the filing of another application after the expiration of one year from the denial of the last application." Section 552.040.8.

Section 552.040.5 provides that, when a previously committed person files an application for conditional or unconditional release and the prosecutor makes a timely objection, the court is to hold a hearing on the application for release within 60 days after the objection is filed. In *State v. Hoover*, 719 S.W.2d 812 (Mo. App. W.D. 1986), a hearing was held after 60 days, and the court held that the statutory language was directory, not mandatory. *See also State v. Will*, 753 S.W.2d 333 (Mo. App. S.D. 1988).

3. (§15.25) Costs

The costs for the care and treatment of a committed person under § 552.080, RSMo 2000, are taxed as costs. *Robb v. Estate of Brown*, 518 S.W.2d 729 (Mo. App. W.D. 1974).

4. (§15.26) Burden of Proof

The defendant must establish facts to support the defendant's release from the mental institution, and the trial court can properly require more evidence than a psychiatric opinion. *State v. Davee*, 558 S.W.2d 335 (Mo. App. S.D. 1977).

In *In re Grass v. Nixon*, 926 S.W.2d 67 (Mo. App. E.D. 1996), the petitioner, in his conditional-release hearing, offered the testimony of three St. Louis State Hospital psychiatrists that, in their opinions based on a reasonable medical certainty, the petitioner was not likely to be dangerous to others while on conditional release. The court of appeals reversed the circuit court's grant of his petition, holding that clear and convincing certainty of public safety must exist before conditional release.

G. Intoxicated or Drugged Condition of Accused

1. (§15.27) Section 562.076, RSMo

Section 562.076, RSMo 2000, states:

> 1. A person who is in an intoxicated or drugged condition, whether from alcohol, drugs or other substance, is criminally responsible for conduct unless such condition is involuntarily produced and deprived him of the capacity to know or appreciate the nature, quality or wrongfulness of his conduct.
> 2. The defendant shall have the burden of injecting the issue of intoxicated or drugged condition.
> 3. Evidence that a person was in a voluntarily intoxicated or drugged condition may be admissible when otherwise relevant on issues of conduct but in no event shall it be admissible for the purpose of negating a mental state which is an element of the offense. In a trial by jury, the jury shall be so instructed when evidence that a person was in a voluntarily intoxicated or drugged condition has been received into evidence.

2. (§15.28) Voluntary Intoxication

Voluntary intoxication is no defense to a criminal charge. *State v. McGreevey*, 832 S.W.2d 929 (Mo. App. W.D. 1992); *State v. Elam,* 779 S.W.2d 716 (Mo. App. E.D. 1989).

The Supreme Court, in *State v. Erwin*, 848 S.W.2d 476 (Mo. banc 1993) (an excellent reading of the history of Missouri law), held that a jury may not consider voluntary intoxication on the issue of a defendant's mental state.

The voluntary taking of methamphetamines by the defendant could not form the basis of a defense of not guilty by reason of mental disease or defect. *State v. Mouse*, 989 S.W.2d 185 (Mo. App. S.D. 1999).

Once again, evidence of the defendant's claim of voluntary intoxication based on amphetamine and alcohol usage was not admissible to negate the mental state of the defendant in *Mouse v. State,* 90 S.W.3d 145 (Mo. App. S.D. 2002), a first degree assault case.

In *State v. Johnson* 95 S.W.3d 221 (Mo. App. S.D. 2003), the defendant objected to the instruction submitted by the court on voluntary intoxication/drug use because his defense was that of a pre-existing mental disease or defect that was triggered by his use of LSD. The court held that the trial court was required to give the instruction set out in MAI-CR 3d 310.50 under § 562.076.3, RSMo 2000.

H. (§15.29) "Sudden Passion Arising Out of Adequate Cause"

In the crime of assault in the first degree, if the accused acts under the influence of sudden passion arising out of adequate cause, the offense will be assault in the second degree. Section 565.060.1(1), RSMo 2000. The defendant has the burden of injecting this issue of influence of sudden passion. Section 565.060.2.

V. Mental Illness During Service of Sentence or Before Execution and Related Proceedings

A. (§15.30) Procedure for Transfer

If a director of a correctional institution has reasonable cause to believe that an inmate is in need of mental health treatment, the inmate will be transferred to a state mental hospital for care and treatment. The inmate will remain at the facility for 96 hours. After 96 hours, the inmate will be returned to the correctional facility unless the inmate is voluntarily committed or the director of the mental health facility, under Chapter 632, RSMo, files for involuntary detention and treatment. Section 552.050.1, RSMo 2000.

B. (§15.31) Credit for Treatment Time

The inmate will receive credit on the inmate's sentence for the time spent at the mental health facility. Section 552.050.2, RSMo 2000.

C. (§15.32) Continuing Mental Illness

If the inmate at the mental facility has completed the original sentence imposed and is still mentally ill, the inmate may be released to any person if, in the opinion of the superintendent of the health facility, it is reasonably safe for the inmate to be at large. If, in the opinion of the superintendent, the inmate is still in need of treatment after the original sentence from the criminal offense has been served, the inmate can be retained only if a hearing under Chapter 632, RSMo, has been held. Section 552.040.4 and .5, RSMo 2000.

D. Mental Disease or Defect Upon Sentence to Death

1. (§15.33) Statutory Provisions

Section 552.060.1, RSMo 2000, provides:

> No person condemned to death shall be executed if as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out.

2. (§15.34) Hearing

If the warden has reasonable cause to believe that an inmate sentenced to death has a mental disease or defect, the warden must immediately notify the Governor, who will stay the execution. A hearing is then held in the circuit court of Cole County, where all parties are entitled to present evidence in relation to the inmate's mental condition. After the hearing, the circuit judge will certify to the Governor the judge's findings, and the execution will proceed if there is no finding of mental disease or defect excluding fitness for execution. If the finding is of mental disease or defect excluding fitness for execution, the inmate will be held in the penal institution subject to transfer to a mental institution. Section 552.060.2, .3, and .4, RSMo 2000.

Section 552.060.2, .3, and .4 provides as follows:

> 2. If the director of the department of corrections has reasonable cause to believe that any inmate then in confinement in a correctional facility and sentenced to death has a mental disease or defect excluding fitness for execution, he shall immediately notify the governor who shall forthwith order a stay of execution of the sentence if there is not sufficient time between such notification and time of execution for a determination of the mental condition of such person to be made in accordance with the provisions of this section without such stay. The director shall also, as soon as reasonably possible, notify the director of the department of mental health and the prosecuting or circuit attorney of the county where the defendant was tried, the attorney general and the circuit court of the county where the correctional facility is located.
>
> 3. As soon as reasonably possible, after the notification prescribed in subsection 2 of this section, the circuit court of the county shall conduct an inquiry into the mental condition of the offender after first granting any of the parties entitled to notification an examination by a physician of their own choosing on proper application made within five days of such notification.
>
> 4. If the court, after such inquiry, certifies to the governor and to the director that the prisoner does not have a mental disease or defect of the type referred to in subsection 1 of this section, the governor shall fix a new date for the execution, if a stay of execution had previously been made, and shall issue a warrant for the new execution date to the chief administrative officer of the correctional facility, who shall then proceed with the execution as ordered. If the court, after such inquiry, certifies to the governor and to the director that the prisoner has a mental disease or defect of the type referred to in subsection 1 of this section, the offender shall not be executed but shall be held in the correctional facility subject to transfer to a mental hospital and further proceedings under section 552.050 if the provisions of section 552.050 are applicable. If any offender who has not been executed because of any certification by the director as herein provided is thereafter certified by the director as free of a mental disease or defect of the type referred to in subsection 1 of this section, the governor shall fix a new date for the execution and shall issue a warrant for the new execution date to the chief administrative officer of the correctional facility, who shall then take charge and custody of the offender and proceed with the execution as ordered in the warrant.

E. (§15.35) Unconditional or Conditional Release From State Mental Hospital, Hearings, and Escape—Procedures for Release

Section 552.040, RSMo 2000, sets out the procedures for conditional and unconditional release of a committed person.

Section 552.040.15 provides the procedures for trial releases up to 96 hours for a previously committed person.

Section 552.040.19 provides as follows:

> The head of a mental health facility, upon any notice that a committed person has escaped confinement, or left the facility or its grounds without authorization, shall immediately notify the prosecutor and sheriff of the county wherein the committed person is detained of the escape or unauthorized leaving of grounds and the prosecutor and sheriff of the county where the person was tried and acquitted.

The trial court in *McKee v. State*, 923 S.W.2d 525 (Mo. App. W.D. 1996), in denying the petitioner's application for conditional release, made the following findings: "Court finds that Petitioner's release would *not be dangerous* to others, but the Petitioner, if released, would not be able to conform his conduct to the requirements of the law. Conditional release denied." *Id.* (emphasis added).

The court of appeals amended the trial court's order to read: "Court finds that Petitioner's release would be dangerous to others because he would be unable to conform his conduct to the requirements of the law. Conditional release denied." *Id.*

The court of appeals reasoned that, because the trial court found that the petitioner was incapable of conforming his conduct to the requirements of the law, he was dangerous to others.

In *State v. Weekly*, 107 S.W.3d 340 (Mo. App. W.D. 2003), the defendant filed an application for unconditional release. At the hearing, the only witness, a psychiatrist, testified that Mr. Weekly was not, at the time of the hearing, suffering from a mental disease or defect. The trial court sustained the defendant's motion for unconditional release. The court of appeals reversed the trial court, finding that the defendant did not satisfy the statutory test, § 552.040.9, and failed to meet his burden of proof showing that he was not likely to be dangerous in the reasonable future.

In *Grass v. State,* No. ED 80880, 2003 WL 21441163 (Mo. App. E.D. June 24, 2003), the defendant murdered his wife in October 1992 and in 1994 was found not guilty by reason of mental disease or defect and put under the custody of the state Department of Mental Health (DMH). In August 1996, the defendant escaped from confinement. He was captured and convicted of the escape offense in 1997 and sentenced to five years in the Missouri Department of Corrections, eventually being paroled to the DMH. The defendant applied for conditional release, which was denied. The defendant, on appeal, asserted that the trial court erred in denying his request for examination by independent experts and independent

recommendations. The court of appeals held that due process was satisfied by the defendant being examined by a psychiatrist who worked for the state mental hospital and that the defendant was not entitled to independent examination.

In *In re George*, 45. S.W.3d 516 (Mo. App. S.D. 2001), the defendant's petition for conditional release that had been objected to by the DMH was granted by the trial court because the evidence indicated that the defendant's mental condition was the same as in the 1999 report. The court of appeals affirmed. The DMH's objections seemed to arise from the defendant's violation of rules while on four 96-hour home passes in July 1999—four years after plea of not guilty by reason of mental disease or defect. The defendant was highly recommended for conditional release because the treatment team felt that he was not then a danger to himself or others.

The defendant's petition for conditional release in *Greeno v. State*, 59 S.W.3d 500 (Mo. banc 2001), was denied by the trial court with its order finding that the defendant did not meet his burden of proof that he was not dangerous to himself or others. The defendant appealed, alleging that *Styles v. State,* 838 S.W.2d 10 (Mo. App. W.D. 1992), requires that the court make specific findings that the petitioner is suffering from a mental disease or defect. The Supreme Court stated:

> There is no unique requirement that before denying a conditional release, the circuit court make a specific *written* finding that an insanity acquitee is suffering from a mental disease or defect, unless findings are requested in accordance with Rule 73.01(c). In the absence of such a request, all fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached. To the extent contrary, *Styles I*, and its progeny, should no longer be followed.

Greeno, 59 S.W.3d at 503–04.

VI. Sexually Violent Predator Act

A. (§15.36) Generally

The Sexually Violent Predator Act, §§ 632.480–632.513, RSMo 2000 and Supp. 2004, provides the legal proceedings whereby a person convicted of a sexually violent offense as defined in § 632.480(4), RSMo Supp. 2004, can be civilly committed indefinitely if a judge or jury determines that the person is a sexually violent predator (SVP).

B. (§15.37) Venue

In *Barlow v. State*, 114 S.W.3d 328 (Mo. App. W.D. 2003), the proper venue for commitment under the SVP Act was the probate division of the circuit court of the county where the sex offender had previously been convicted as a criminal sexual psychopath.

C. (§15.38) Committing Person as a Sexually Violent Predator

The required finding to commit a defendant as an SVP is that the defendant has a mental abnormality that predisposes the defendant to commit sexually violent offenses in a degree causing the defendant serious difficulty in controlling the behavior. *In re Amonette v. State*, 98 S.W.3d 593 (Mo. App. E.D. 2003).

In a trial to commit the defendant as an SVP, the state is required to present evidence from which the jury could find, beyond a reasonable doubt, that the defendant suffered from a mental abnormality, as defined in § 632.480(2), that made it more likely than not that the defendant would engage in predatory acts of sexual violence if not confined. *In re Cokes*, 107 S.W.3d 317 (Mo. App. W.D. 2003).

There must be substantial evidence that a defendant was more likely than not to re-offend sexually. *See In re Coffel*, 117 S.W.3d 116 (Mo. App. E.D. 2003).

A trial court cannot order a competency examination of a defendant in a civil proceeding to commit the defendant as an SVP because due process does not require in this proceeding that the defendant understand or be able to assist the attorney. *State ex rel. Nixon v. Kinder*, 129 S.W.3d 5 (Mo. App. W.D. 2003).

VII. Forms

A. (§15.39) Notice of Intent to Rely on Defense of Mental Disease or Defect

[Caption]

Notice of Intent to Rely on Defense of Mental Disease or Defect

The defendant, _____, by counsel, having been arraigned in this case on the ____ day of _____, 20___, gives notice of intent to rely, *inter alia*, on the defense of nonresponsibility for any alleged criminal conduct because the defendant, as a result of mental disease or defect, did not know or appreciate the nature, quality, or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law.

_____

B. (§15.40) Motion for Psychiatric Examination

[Caption]

Motion for Psychiatric Examination

_____, counsel for the defendant, moves the Court, on behalf of the defendant, _____, to order a psychiatric examination of the defendant at a facility of the division of mental health to determine:

1. whether the defendant has the capacity to understand the proceedings against him or to assist in his own defense, and

2. whether the defendant, at the time of the alleged offense, as the result of mental disease or defect, did not know or appreciate the nature, quality, or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law.

A "background information sheet" containing information in support of this motion is attached.

Wherefore, the defense requests that the Court order a psychiatric examination as requested.

C. (§15.41) Background Information Sheet

Background Information Sheet

A. General Information:

1. Defendant's name _____
2. Circuit court case no. _____
3. Prosecuting attorney _____
4. Defendant's occupation _____
5. Defendant's attorney and address _____
   _____
   _____
6. Members of family from whom additional information can be obtained (give addresses) _____
   _____
   _____
   _____

B. Psychiatric Background

1. Are any reports of a psychiatrist or psychologist available? (Please enclose) _____
   _____
2. Do you know if the defendant has ever been a patient in a mental or other hospital? _____
   If so, where? What dates? _____

C. This Request for Psychiatric Evaluation:

What knowledge in your possession or observations of the defendant's behavior cause you to believe that the psychiatric evaluation you have requested is necessary?

_____
_____

What observations of the defendant's behavior have been related to you by other people, including information concerning the defendant's use of alcohol or drugs?

_____
_____

D. (§15.42) Motion for Psychiatric Examination by Private Physician

[Caption]

Motion for Psychiatric Examination by Private Physician

_____, counsel for the defendant, moves the Court, on behalf of the defendant, _____, to order a psychiatric examination of the defendant by _____, M.D., a private physician who has consented to conduct the examination, to determine:

1. whether the defendant has the capacity to understand the proceedings against him or to assist in his own defense, and

2. whether the defendant, at the time of the alleged offense, as a result of mental disease or defect, did not know or appreciate the nature, quality, or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law.

A "background information sheet" containing information in support of this motion is attached.

Wherefore, the defense requests that the Court order a psychiatric examination as requested.

_____

E. (§15.43) Order for Psychiatric Examination

[Caption]

Order for Psychiatric Examination

The Court, having examined the motion for a psychiatric examination filed on behalf of the defendant, finds that a report concerning the defendant's mental condition is necessary in this case.

Wherefore, it is ordered that the Director of the Jackson County Department of Corrections cause the defendant, _____, to be delivered to [the Superintendent of State Hospital No. 1, Fulton, Missouri] [the Superintendent of Western Missouri Mental Health Center, Kansas City, Missouri] [the Superintendent of State Hospital No. 2, St. Joseph, Missouri] [name and address of private physician] as often as may be necessary for the completion of the examination and psychiatric report specified.

It is further ordered that [a physician or physicians designated by the Superintendent of (name of facility)] [name of private physician] examine the defendant and report the results of the examination in writing, in triplicate, to the Clerk of the Court and that the report contain the following:

1. Detailed findings

2. An opinion as to whether the accused has a mental disease or defect, and its duration

3. An opinion as to whether the accused, as a result of a mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his own defense and if so, an opinion as to when the defendant will have such capacity, if ever

4. An opinion as to whether at the time of the alleged criminal conduct the accused, as a result of mental disease or defect, did not know or appreciate the nature, quality, or wrongfulness of his conduct or as a result of mental disease or defect was incapable of conforming his conduct to the requirements of the law

5. A recommendation as to whether the accused should be held in custody in a suitable hospital facility for treatment pending the Court's determination of the issue of mental fitness to proceed

6. A recommendation as to whether the accused, if found by the Court mentally fit to proceed, should be detained in such hospital facility pending further proceedings

7. Any evidence that the defendant was suffering from any abnormal mental condition or was so mentally retarded as to show that he could not [insert form of specific intent to be negated, e.g., have deliberately shot the alleged victim] or have the state of mind requisite for the commission of the crime

8. Any evidence of mental retardation that would affect the defendant's ability to understand and appreciate the nature and quality or wrongfulness of his conduct or affect his ability to conform his conduct to the requirements of the law

At the conclusion of the examination, the defendant is to be returned to the custody of the Jackson County Department of Corrections unless otherwise ordered by the Court. The expenses for the examination, the maintenance of the defendant while being examined, and the transportation of the defendant to and from the place of the examination will be taxed as costs in this action.

Dated this _____ day of _____, 20____.

_____
Judge

If the defendant is free on bond, the first paragraph should read as follows:

> Wherefore, it is ordered that the defendant report to [name of facility or name and address of private physician] no later than the _____ day of _____, 20____, and return at such times as may be requested by the examining physician for the completion of the examination and psychiatric report specified.

If the defendant is free on bond at conclusion of the examination, the last paragraph should read as follows:

> The expense of the examination is to be taxed as costs in this action.

F. (§15.44) Motion to Dismiss Based on Lack of Capacity to Understand the Proceedings

[Caption]

Motion to Dismiss

The defendant, _____, by counsel, moves the Court to dismiss this case.

As grounds for this motion, the defendant would show to the Court as follows:

1. The defendant, as a result of a mental disease or defect, lacks the capacity to understand the proceedings against him or assist in his own defense. Section 552.020.1, RSMo 2000. See the report of _____, M.D., attached to this Motion to Dismiss as Exhibit A.

2. The nature of the defendant's mental disease or defect is such that there is no likelihood that he will ever have sufficient capacity to understand the proceedings so as to allow him to be tried, convicted, or sentenced.

Wherefore, the defendant prays that this case be dismissed.

_____

G. (§15.45) Motion to Dismiss Based on Inability to Defend Because of Incapacity and Lack of Substantial Evidence

[Caption]

Motion to Dismiss

The defendant, _____, by counsel, moves the Court to dismiss this case.

As grounds for this motion, the defendant would show to the Court as follows:

1. The defendant was found by the Court to be mentally unfit to proceed on _____, 20____. The defendant is now confined at [name of facility] pursuant to this Court's order.

2. The defendant alleges that he will not be mentally fit to proceed within the reasonably foreseeable future.

3. The defendant alleges that there is a lack of substantial evidence available to support a conviction and requests that the Court review the evidence and thereafter dismiss this case. *See Ex parte Kent*, 490 S.W.2d 649, 653 (Mo. banc 1973).

Wherefore, the defendant prays that the Court review the available evidence and enter its order dismissing the case.

_____

H. (§15.46) Motion for Hearing on Defense Motions During Defendant's Incapacity

[Caption]

Motion for Hearing and Ruling on Defendant's Motion During Defendant's Incapacity

_____, counsel for the defendant, on behalf of the defendant, _____, moves the Court for a hearing and a ruling on the defendant's pending motion to _____.

As grounds for this motion, the defense alleges as follows:

1. The defendant was found by the Court to be mentally unfit to proceed on _____, 20_____. The defendant is now confined at [name of facility] under this Court's order.

2. The defendant will not be mentally fit to proceed to trial within the reasonably foreseeable future.

3. There is now pending in this cause the defendant's motion to _____. A ruling on that motion may result in the dismissal of this case. A hearing on the motion can be fairly conducted without the defendant's participation. *See Ex parte Kent*, 490 S.W.2d 649, 653 (Mo. banc 1973).

Wherefore, the defense prays that the Court grant the relief requested.

_____

I. (§15.47) Notice

[Caption]

Notice

The defendant_____, by counsel states, under § 552.030, RSMo 2000, that he has no defense to the charges pending against him, other than the defense of mental disease or defect excluding responsibility and that he intends to rely solely on that defense.

_____

J. (§15.48) Order

[Caption]

Order

Now, on this _____ day of _____, 20___, the defendant, _____, having served written notice that he has no defense to the charges pending against him, other than the defense of mental disease or defect excluding responsibility, and that defense having been accepted by the State, under § 552.030.2, RSMo 2000, and a report of psychiatric evaluation filed with the Court on the _____ day of _____, 20___, having been received in evidence and that report finding unequivocally that the defendant is suffering from mental disease or defect excluding responsibility, the Court finds the defendant, _____, to be suffering from mental disease or defect excluding responsibility.

Now, therefore, it is ordered, adjudged, and decreed that the defendant _____, is found not guilty under § 552.030 and is hereby committed to the custody of the Director of the Division of Mental Health for care and treatment for as long as the law provides, under § 552.040.1, RSMo 2000.

The Director of the Jackson County, Missouri, Department of Corrections, in whose custody the defendant is presently confined, is hereby ordered to deliver the defendant to State Hospital No. 1, Fulton, Missouri, where the defendant is to be confined and treated at the expense of Jackson County, Missouri.

_____
Judge

Dated this _____ day of _____ 20___.

K. (§15.49) Motion for Mental Examination

[Caption]

Motion for Mental Examination

_____, counsel for the defendant, states to the Court that he has reason to believe that the defendant lacks the capacity to understand the nature of the proceedings against him and, further, that now and at the time of the alleged act, the defendant may have had a mental disease or defect and as a result may have to be committed under § 552.020, RSMo 2000.

Wherefore, the defendant's attorney requests an order directing that the defendant be submitted to a mental examination under § 552.020 and further requests that the order be directed to the Superintendent of Western Missouri Mental Health Center, Kansas City, Missouri.

Kent E. Gipson*

Chapter 16

PLEA BARGAINING

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B. (§16.16) Fifteen-Minute Guilty Plea

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I. (§16.1) Introduction

The overwhelming majority of criminal charges in Missouri and the United States are disposed of through negotiated guilty pleas. The purpose of this chapter is to set forth the applicable law and constitutional limitations on guilty pleas, as well to provide practical tips to the criminal defense practitioner for negotiating and disposing of their clients' cases through guilty pleas. It would be impossible to thoroughly catalog all of the circumstances and situations that a criminal defense practitioner may encounter in plea bargaining. In fact, the most successful plea bargainers among criminal defense practitioners must learn this craft through experience and the process of trial and error.

It is important to emphasize that there are no hard-and-fast rules regarding how to and how not to plea bargain. Every attorney should develop a style that fits the attorney's personality and abilities. Every criminal practitioner, however, should be aware of the applicable law and constitutional limitations placed on guilty pleas. In addition, it is of the utmost importance that every criminal defense practitioner learn and study the local practices of a particular county or circuit, as well as know the habits and tendencies of the prosecutor and the sentencing judge involved in the particular case.

It is also of the utmost importance that defense counsel obtain the trust and respect of the defendant and be familiar with the facts and circumstances and strength of the evidence to support the charge against the client in order to give intelligent and sound advice to the defendant regarding the decision whether to plead guilty. A defense attorney should develop the skills and reputation that the attorney will be ready, willing, and able to take the case to trial if the prosecution or the court is not inclined to go along with a plea bargain that the defendant would accept. If a prosecutor knows a particular defense attorney is reluctant

to try a case, this knowledge will almost always factor into the plea bargaining process, with the defendant often suffering adverse consequences.

This chapter outlines strategies and approaches for the criminal defense attorney to follow from the time of retention or appointment to represent a defendant until final disposition through a plea of guilty and sentencing.

II. Constitutional Requirements and Applicable Law

A. (§16.2) Voluntariness Requirement

The Supreme Court has stated that to comport with due process guilty pleas must be voluntarily made, and as such, a knowing and intelligent waiver of a criminal defendant's constitutional rights must be established on the record during the plea. *Boykin v. Ala.*, 395 U.S. 238 (1969). An outline of the record to be made in Missouri state courts is set forth in Rule 24.02. Rule 24.02(b) requires that the trial court, before accepting a plea of guilty, advise the defendant of the:

- range of punishment for the offense charged;
- right to counsel; and
- various constitutional rights the defendant would have if the choice was made to take the case to trial.

The court must also establish on the record that the plea was not induced by any threats or promises other than the plea bargain agreement.

B. (§16.3) Enforcement of Plea Bargain Agreements

The United States Supreme Court has held that, when a prosecuting attorney fails to follow the terms of a previously announced plea bargain, due process requires that the court either order specific performance of the previous plea bargain or, alternatively, allow the defendant to withdraw the guilty plea. *Santobello v. N.Y.*, 404 U.S. 257 (1971). Rule 24.02(d)4 addresses the situation when a trial court refuses to go along with a negotiated plea agreement between the prosecutor and defendant. In that situation, the defendant must be given an opportunity to withdraw the guilty plea. If the defendant still desires to plead guilty, however, it must be made clear on the record that the court is not bound

by any plea agreement previously reached between the parties. *See State v. Simpson*, 836 S.W.2d 75 (Mo. App. S.D. 1992).

C. (§16.4) Factual Basis and *Alford* Pleas

In the vast majority of guilty pleas, a factual basis is established through the direct testimony of the defendant, who admits guilt of the offense in open court during the plea hearing. In fact, Rule 24.02(e) requires that, before acceptance of a guilty plea, the court determine that a factual basis exists for the plea.

In interpreting Rule 24.02(e), Missouri's appellate courts have given the trial courts great flexibility in establishing a factual basis for a guilty plea. Normally, at the guilty-plea hearing, the defendant recites the factual basis during the plea colloquy. But a defendant is not required to admit or recite the facts constituting the offense in the guilty-plea proceeding if the factual basis is established when a defendant acknowledges the facts as recited by the judge or the prosecutor. *See, e.g.*, *State v. Morton*, 971 S.W.2d 335, 340 (Mo. App. E.D. 1998). It is, however, necessary that the defendant express "an awareness of the nature and elements of the charge to which he or she pleads guilty." *Carmons v. State*, 26 S.W.3d 382, 384 (Mo. App. W.D. 2000) (quoting *Vann v. State*, 959 S.W.2d 131, 134 (Mo. App. S.D. 1998)).

In a more recent case, the Southern District of the Court of Appeals held that there was an insufficient factual basis for an assault-in-the-second-degree plea when the judge merely read to the defendant the charging document and obtained a statement from the defendant that he was guilty of that charge. *Jones v. State*, 117 S.W.3d 209 (Mo. App. S.D. 2003). In *Jones* the defendant pled guilty to assault in the second degree for knowingly causing physical injury to the victim by means of a dangerous instrument. Although the court read the charge to the defendant, the court of appeals held that there was an insufficient factual basis to sustain the plea because there was no explanation in the plea hearing as to what the dangerous instrument was or the extent of the injuries sustained by the victim.

The lesson of *Carmons*, 26 S.W.3d 382, and *Jones*, 117 S.W.3d 209, is that something more than a vague admission of the elements of the offense is necessary to provide a factual basis for a plea. Either the defendant, the judge, or the prosecutor must state with some particularity all of the elements of the offense to establish a sufficient factual basis under Rule 24.02(e).

The United States Supreme Court, however, has held that there is no constitutional prohibition against accepting a guilty plea from a criminal defendant—even in situations when the defendant maintains innocence—provided that the prosecution's evidence is sufficient to convict and the plea has been entered knowingly and voluntarily in light of all the facts and circumstances in the case. *N.C. v. Alford*, 400 U.S. 25 (1970); *see also Bradley v. State*, 494 S.W.2d 45 (Mo. 1973). *Alford* makes clear, however, that there is no requirement that a judge accept an *Alford* plea. Acceptance is discretionary with the trial judge.

Therefore, a common problem that arises for the criminal practitioner is attempting to convince often reluctant trial judges to accept an *Alford* plea in a particular case. It is this author's opinion that many trial judges' reluctance to accept *Alford* pleas is based on the impression that an *Alford* plea is somehow easier to collaterally attack than a guilty plea in which the defendant admits guilt on the record. This assumption is untrue. If anything, *Alford* pleas are more difficult to collaterally attack because in *Alford* situations all of the parties and the judge make a very careful record to establish the knowing and voluntary nature of the plea. Assuming the prosecution has strong evidence supporting conviction, a collateral attack of an *Alford* plea can almost never succeed. *See Brownlow v. Groose*, 66 F.3d 997 (8th Cir. 1995). When confronted with trial judges reluctant to accept *Alford* pleas, it is advisable that defense counsel make this argument to attempt to get them to change their minds.

Although it is this author's opinion that *Alford* pleas should be almost universally accepted in all cases, *Alford* pleas are particularly appropriate in the following two circumstances:

1. When it is clear from the evidence that the defendant acted under the influence of alcohol or drugs that clouded the defendant's memory of the events surrounding the crime and prevent the defendant from truthfully admitting guilt
2. When a defendant's conviction after trial has been reversed on appeal and remanded to the trial court for retrial

D. (§16.5) Aborted Guilty Pleas

Rule 24.02(d)5 prevents the prosecution from using any statements made by the defendant in connection with a guilty plea hearing or guilty plea negotiation at a subsequent trial or other proceeding. Thus, if for whatever reason a guilty plea is not accepted even after the defendant has testified regarding the factual basis of the crime, any such

statements cannot be used by the prosecution at the defendant's subsequent trial. Defense attorneys, however, should be cautioned that an exception applies—these statements can be used to prosecute a defendant for perjury or making false statements to authorities. Therefore, a criminal defendant who makes incriminating statements in an aborted guilty plea hearing risks being charged with perjury if the defendant subsequently testifies differently at trial.

E. (§16.6) Miscellaneous

A valid guilty plea must also be based on the reasonably competent advice of counsel or else it may be deemed involuntary in a subsequent collateral attack. Such attacks are rarely successful unless counsel makes a blatant error in advising the defendant to plead guilty, such as misadvising the defendant about eligibility for parole.

It is also a requirement that the defendant be mentally competent to plead guilty and to knowingly and voluntarily waive the right to trial. This is not an issue in the vast majority of cases. This topic can usually be covered in the preliminary questioning during the guilty plea hearing.

III. Practical Considerations for Defense Attorneys

A. (§16.7) Introduction

Sections 16.8–16.14 below contain some general tips for defense lawyers for handling a criminal case from the time of arrest and the initiation of legal proceedings until disposition in court by a plea of guilty. As stressed earlier, there is no right or wrong way to plea bargain that can apply to everyone. Counsel should adopt a style based on counsel's own personality, strengths, and skills, taking into consideration the practices and customs of the venue in which the case arises and, most important, the peculiar facts of the case.

B. (§16.8) Discovery and Investigation

It would border on malpractice if a defense lawyer pleaded a client guilty to a serious charge without first obtaining, and thoroughly reviewing, the relevant discovery and police reports and, thereafter, discussing possible options with the defendant. Only after a review of the evidence, discussions of possible defenses, and examination of the background of the defendant can a reasonably competent defense lawyer give

intelligent advice regarding whether to plead guilty or proceed to trial. Thorough knowledge of the facts and the defendant's background is also necessary so that defense counsel can make a plea bargain pitch to the prosecutor about mitigating factors or weaknesses in the state's case.

C. (§16.9) Diversion Programs and Other Community-Based Alternatives

Before advising a defendant to plead guilty, defense counsel should explore possible alternative dispositions available in the county or venue. Many counties have pretrial diversion programs for certain categories of offenses or offenders that are preferable alternatives to disposition through a formal guilty plea. Most pretrial diversion programs allow a defendant to complete a period of counseling or other programs that, upon successful completion, will result in the dismissal of charges. Diversion is usually available in many counties on drug or alcohol offenses, as well as in domestic violence situations. This alternative is almost always open to a first-time offender charged with an alcohol or drug offense or a domestic abuse charge. Defense counsel should explore the possibility that the client might qualify for community-based sentencing alternatives under § 217.777, RSMo 2000.

D. (§16.10) Associate Circuit Division and Preliminary Hearings

When representing a defendant on a felony charge, it is almost always advantageous to try to dispose of the case through a guilty plea in the associate circuit division before preliminary hearing. In this situation, it is important to try to convince the prosecutor to reduce the felony charge to a misdemeanor in exchange for a negotiated plea of guilty. This can usually be accomplished for first-time offenders, particularly in urban counties, on the docket when the case is set for preliminary hearing.

If a misdemeanor plea is not possible in associate circuit division, many prosecutors will still engage in felony plea bargaining during that stage of the proceedings. Often, in exchange for a waiver of preliminary hearing, the prosecutor will agree to a felony plea bargain that can be executed at the circuit court arraignment that will follow.

Defense counsel should not automatically waive preliminary hearings unless some advantage can be gained from doing so. Having a preliminary hearing can be a valuable discovery tool in preparing for a subsequent trial or exposing the weaknesses of the prosecution's case to aid in subsequent plea bargain negotiations. A waiver, however, may be

in the client's best interest in some situations, such as when the defendant has posted bond on the charge and counsel learns that the case will be taken to the grand jury unless a waiver is executed.

E. (§16.11) Local Customs and Personalities

Probably the most important ingredient to successful plea bargaining for a defense attorney is to become familiar with the local practices and procedures in the county or venue. This must be learned through experience. The first critical factor is to gain an intimate knowledge of the personality and tendencies of the prosecutor or assistant prosecutor in the case. It is very important that defense attorneys establish their credibility and integrity with prosecuting attorneys to effectively plea bargain their cases.

F. (§16.12) Negotiating With Prosecutors

In this author's experience, probably the most important factor in successful plea bargaining is developing a good working relationship and rapport with the prosecuting attorney. This relationship must be based on mutual trust and respect. The prosecutor should understand that, if necessary, counsel is not afraid to take the case to trial. On the other hand, it is usually very effective for defense attorneys to lay some of their cards on the table to attempt to facilitate a favorable plea bargain that will avoid trial.

Defense attorneys should keep in mind that many prosecutors, especially in urban areas, have extremely large caseloads and are often not intimately familiar with the facts of most of their cases unless and until a trial date looms near. Some prosecutors will offer their best plea bargains at early stages of the case to save themselves time and preparation and as a means of "docket control." On the other hand, some prosecutors will not offer a favorable plea bargain until the case is on the verge of trial to avoid the time-consuming obligation of trying the case.

No matter who the prosecutor is or what stage of proceedings counsel is in, defense counsel should always keep lines of communication open with the prosecutor about potential plea bargains. It is not all that unusual for favorable plea bargain arrangements to be reached during the middle of a trial, or even while a jury is deliberating on a defendant's guilt or innocence.

In short, knowing which factors to advance with a particular prosecutor in a case can be the key to effective plea bargaining. Inexperienced

practitioners, or attorneys taking a case in a venue away from their normal location of practice, should proceed with caution and attempt to learn as much as possible about the prosecutor's habits from other attorneys or sources before proceeding with plea bargain discussions.

G. (§16.13) Judges

The second most important factor in plea bargaining is knowing the judge's attitudes and tendencies in criminal matters. Some judges like to actively participate in plea bargaining discussions between the prosecutor and defense counsel; other judges will not even talk about plea bargaining unless and until a negotiated arrangement has been reached. Experienced practitioners are well aware that almost all experienced judges develop reputations and tendencies that should be known to counsel before entering a plea of guilty before that judge. This is particularly important when there is no negotiated plea bargain and the judge is free to sentence the defendant within the statutory range of punishment. A defense attorney should not plead a defendant up to a judge without having an intelligent guess as to what the judge will do given the facts and circumstances of the case. Before pleading a defendant up to a particular judge, counsel should know that judge's track record, either from personal experience or through discussing the judge's tendencies with other experienced practitioners from that venue.

H. (§16.14) Plea Bargaining Alternatives

The most preferable type of plea bargain is the negotiated disposition when the prosecutor, the defense, and the judge agree that, upon a plea of guilty, the defendant will receive a guaranteed sentence. Such a disposition, however, is not always possible for various reasons. Some counties or jurisdictions do not plea bargain in such a manner. In some jurisdictions, criminal defendants must plead up to a particular charge, often a lesser-included offense or a misdemeanor, without any agreement of what the judge will give the defendant within the statutory range of punishment.

When a negotiated plea agreement is not possible, defense counsel should explore the option of pleading the defendant up to the court on a charge with a sentencing lid or ceiling of a certain number of years. After a pre-sentence investigation (PSI), both sides are free to argue for an appropriate sentence within the range of punishment. This option has several advantages for both sides. It gives the defense an opportunity to argue for and obtain probation. On the other hand, it gives the prosecution the opportunity to ask for significant prison time.

The following illustration presents a common factual situation in which a "PSI with a lid" plea bargain is an appropriate and effective way to plea bargain the case: The defendant is a first offender charged with the class A felony of robbery in the first degree. The evidence of guilt is overwhelming. The defendant refuses to plead guilty unless he has some chance to get probation. The prosecutor will not come below an offer of 10 years imprisonment on the charge. In this situation, an effective alternative resolution might be to counter offer that the defendant plead up to the lesser-included offense of the class B felony of robbery in the second degree, that a PSI be ordered, and that the prosecution agree to a lid of 12 years. Thus, at sentencing, the defense has a reasonable opportunity to argue for and receive probation, and the prosecutor can argue for a term of years in excess of the original plea offer. In such a situation, even if the judge does not give the client probation, it is unlikely that the judge will give the defendant a term of years in excess of the original 10-year offer.

One final alternative that a criminal defense attorney should be aware of is the "120-day call-back" statute, § 559.115, RSMo Supp. 2004, which gives the sentencing judge the discretion, within 120 days of the judgment, to suspend the remainder of the defendant's penitentiary sentence and place the defendant on probation. An agreement to bring a defendant back from the penitentiary after 120 days can be part of a negotiated plea bargain with the prosecutor and the judge, or it can be pursued in most cases by the defendant when a penitentiary sentence is received after a trial or a guilty plea. To secure consideration by the judge of the 120-day call-back option, it is preferable for defense counsel, after approximately 60 days, to write the judge, enclosing a form order that the judge can mail to the penitentiary for a report regarding the defendant's behavior and adjustment to incarceration since arrival at the penitentiary. Thereafter, counsel can again request, in writing with an enclosed order, that the judge suspend the remainder of the execution of the defendant's sentence and place the defendant on probation.

In 2003, the Missouri legislature passed S.B. 5, which, among other things, modified the 120-day call-back procedure. S.B. 5, 92nd Gen. Assembly, 1st Reg. Sess. (Mo. 2003). The changes effected in the 120-day call-back procedures are too numerous to mention in their entirety. But it is clear that the spirit of this legislation was to ease prison overcrowding by strongly encouraging the circuit courts to utilize alternatives to incarceration, particularly for nonviolent, first-time offenders. *See* § 558.016.8, RSMo Supp. 2004.

Of particular significance in the plea-bargaining context is the new requirement that the court must release a defendant on a 120-day shock probation if the Department of Corrections (DOC) determines that the defendant has successfully completed the shock-incarceration program. The sentencing court can override this presumption of granting probation only after conducting a hearing and finding that release would constitute an "abuse of discretion." Section 559.115.3. If the sentencing court does not respond to the DOC's notification of completion, the defendant "shall be released on probation." *Id*. All criminal defense attorneys in Missouri are strongly urged to closely study the provisions enacted into law by Senate Bill 5 in pursuing plea-bargain options for their clients.

Rule 29.07 gives any defendant, after a guilty plea or trial, the right to a PSI conducted by the Board of Probation and Parole. A PSI is generally unnecessary if a negotiated plea bargain for a particular sentence has been reached between the prosecutor and the defense. Sometimes, however, a PSI is ordered by a judge before the judge decides whether to accept or reject the plea bargain. PSIs are almost always appropriately ordered when there is no negotiated plea bargain in a situation when the defendant has "pled up" to the court on a particular charge.

IV. Guilty Plea Hearing

A. (§16.15) Introduction

Once a negotiated plea agreement has been reached, the defendant, with counsel, must appear in open court to enter into the plea. If the plea involves a felony, a record of the proceedings must be prepared. *See* Rule 24.03. The most important duty of the defense attorney is to adequately prepare the defendant for the questions that will be asked, particularly ensuring that the defendant is willing and able to make a factual basis for the plea. Counsel should otherwise prepare the defendant for the questions that will be asked pertaining to the voluntariness of the plea and the waiver of constitutional rights.

B. (§16.16) Fifteen-Minute Guilty Plea

At the guilty plea hearing, the first order of business is for the prosecuting attorney to announce the plea bargain agreement on the record. Thereafter, the defendant, through counsel, indicates a desire to accept this plea bargain and enters a plea of guilty in accordance with its terms. The defendant should then be sworn in as a witness and questioned by either the judge or defense counsel. Most accomplished

judges and defense attorneys can complete a guilty plea colloquy with the defendant in approximately 15 minutes. The following script is suggested:

Questions to the defendant by defense counsel:

1. Could you state your name for the record?

2. Are you the same person who is charged with the offense in this case?

3. Can you read, write, and understand the English language?

4. Have you heard and understood the plea bargain agreement announced by the prosecutor a moment ago in open court, and is it your desire to plead guilty and accept the terms of that plea bargain?

5. Has anyone promised you anything or threatened you with anything other than the plea bargain agreement to induce you to plead guilty?

6. Are you pleading guilty voluntarily and because you believe it's in your best interest to do so under the terms of the plea bargain agreement?

7. Are you under the influence of any drugs or alcohol that would prevent you from understanding this proceeding here today?

8. Do you suffer from any mental disease or defect that would prevent you from understanding this proceeding or that would provide you any defense to the charge?

9. Do you understand that, by pleading guilty, you are giving up a number of constitutional rights?

10. Do you understand that, if you pled not guilty, you would have a right to a trial in front of a judge or a jury of 12 people?

11. If you choose to go to trial, you would have a number of constitutional rights. Among those rights is the right to be presumed innocent unless and until all 12 jurors find you guilty beyond a reasonable doubt and the right to have counsel represent you and confront and cross-examine the witnesses against you. You would also have the right to testify in your own defense or you could choose not to testify, and the judge would instruct the jurors that they could

not assume you were guilty merely because you chose not to testify. You also have the right to put on a defense and have the court subpoena witnesses to appear and testify on your behalf. Do you understand that, by pleading guilty, you are giving up or waiving each and all of these constitutional rights that you would have if you chose to take the case to trial?

12. Have you had an adequate amount of time to discuss the case with me (your attorney) before making the decision to plead guilty here today?

13. Have you been satisfied with the services and advice that I have given to you as your attorney in your case?

14. Do you have any complaints about my representation at all that you wish to make at this time to the judge before the judge's acceptance of the plea bargain?

15. Do you understand that you are currently charged with _____ and that the range of punishment is a minimum of _____ years to a maximum of _____ years?

16. Have I, as your counsel, fully explained this range of punishment to you?

17. Are you pleading guilty because you are in fact guilty of the offense charged?

18. In this case, the indictment or information alleges that on _____ you committed the offense of _____. Could you, in your own words, explain to the court what you did on that date that makes you guilty of that offense?

    [Defendant admits guilt and establishes factual basis for the offense.]

19. Are you pleading guilty of your own free will because you think it is in your best interest and because you are in fact guilty of this offense?

20. Are you asking that this judge accept your plea of guilty and sentence you according to the plea bargain agreement?

The court then enters findings of the following nature into the record:

- The court finds that the defendant's plea of guilty was made knowingly, voluntarily, and with the understanding of the nature of the charges against the defendant and the range of punishment.
- The defendant further understands [his/her] constitutional rights and has explicitly waived them.
- The court finds there is a factual basis for the plea and that the defendant has been competently represented by counsel.

The court, therefore, accepts the defendant's plea of guilty. The defendant is adjudged guilty on the offense of _____, and in accordance with the plea bargain agreement, the defendant is sentenced to _____.

V. Particular Problems and Strategic Dilemmas

A. (§16.17) Dealing With an Unsympathetic Prosecutor, Judge, or Both

All criminal defense attorneys will have at least a handful of experiences with an inexperienced or uncompromising prosecutor who will refuse to offer an acceptable plea bargain for some reason. In that situation, defense counsel and the client are placed in a strategic dilemma about how to proceed. Hopefully, the case will be in front of an experienced, reasonable, and fair-minded judge who is not reluctant to intervene in such circumstances.

It is often an effective strategy to request a pretrial conference with the judge to determine whether the judge might intervene to help facilitate a plea bargain when the prosecutor's offer, in the defendant's view, is disproportionate to the facts of the case. Some judges will exert pressure on the prosecutor to make a more favorable agreement, while other judges will strongly indicate to defense counsel that an open-ended plea, even without a negotiated agreement, will result in a more favorable disposition. Defense counsel is cautioned, however, not to rely on unsubstantiated hunches regarding a judge's likely behavior under this scenario unless that judge has a proven track record of acting in such a manner.

An even bigger problem arises if counsel is also in front of a judge who refuses to intervene in plea bargaining, has a reputation as a very tough sentencer, or both, which would make a plea up to the court a dangerous and risky proposition. Assuming that it is too late to obtain a change of judge, the defendant may have little choice other than to try the case.

Because, under Missouri law, juries sentence defendants if they find them guilty absent the application of the prior or persistent offender law, it is sometimes a viable strategy to take an obviously guilty defendant to jury trial solely on the issue of punishment. The following illustration, based on an actual case in which the author was involved, is an example of when this strategy can be effectively employed:

The defendant is a young male, with no prior felony convictions, charged with two separate counts of the class "C" felony of tampering with a motor vehicle, which are not joined for trial. The defendant has confessed to both crimes and has been in jail since his arrest. The prosecuting attorney, during the months preceding the scheduled trial date on the first count, has steadfastly refused to offer the defendant a probation or minimal county jail time plea offer. On the morning of trial, the best the prosecution will offer is three years in the penitentiary on both counts to run concurrently.

The defendant has three choices:

1. Take the three years
2. Plead up to the court
3. Go to trial on the first count of tampering with a motor vehicle

The defendant, on the advice of counsel, opted for the third choice. From the beginning of the case, defense counsel conceded the defendant's guilt, making punishment the only issue for the jury to decide. After finding the defendant guilty, the jury recommended that the defendant serve 31 days in the county jail, which he had already served. The prosecution immediately agreed to plead out the defendant on the second count to concurrent county jail time.

Before embarking on this strategy, counsel should factor into this decision the impact of § 557.036, RSMo Supp. 2004, which establishes bifurcated trials on guilt and punishment in all criminal cases. Under the prior law, the jury would recommend punishment based solely on what they heard regarding the commission of the crime. But under the

new law, both parties are permitted at the punishment stage of trial to introduce evidence, at the discretion of the trial court, involving:

- the impact of the crime on the victims;
- the nature and circumstances of the offense; and
- the history and character of the defendant.

Section 557.036.3.

These evidentiary rules raise several unanswered questions as to the permissible scope of victim-impact and character evidence that would be permitted in sentencing-phase trials. Unless and until the appellate courts place some strict limitations on the scope of this evidence, there is a significant risk in embarking on a "trial on punishment only" strategy. For instance, if the client has a significant number of prior arrests that did not result in conviction, it is quite possible that those arrests would be admissible at the second stage of trial. But it appears to this author that this strategy remains a viable alternative in cases involving nonviolent offenses when the defendant has a relatively clean record.

B. (§16.18) Dealing With a Difficult Defendant

Most lawyers in private practice do not have the same problems as public defenders or appointed counsel in dealing with difficult criminal defendants. Usually, a defendant who chooses to pay counsel a fee will follow counsel's advice. Public defenders and appointed counsel, however, are usually not so fortunate.

Developing a rapport with and gaining the trust of the criminal defendant is a critical component of expeditious and effective plea bargaining. Obviously, counsel's best efforts and negotiations with the prosecution will be fruitless if the client does not trust counsel enough to follow counsel's advice and take a favorable plea bargain. The most common mistake that public defenders and appointed counsel make is pushing the client too soon to accept a plea bargain, often during the initial meeting with the client. A more effective approach, in the vast majority of cases, is to move more slowly and avoid pressuring the client to accept the guilty plea during the initial interview or meeting. Instead, counsel should initially stress that counsel is ready, willing, and able to fight the case all the way through jury trial if that is what the defendant wants. Counsel should mention briefly that a plea bargain is a possibility, but that, if one is offered, counsel will not pressure the defendant to take it if counsel does not think it is in the defendant's best interest.

Developing a good relationship with the client takes work and often involves a complex understanding of psychology and personality traits. Some attorneys are much better at this function than others. Every criminal defendant is unique. Experienced attorneys, however, can spot different types of personality profiles among the clients they represent and, as a result, know how to foster a healthy attorney-client relationship, resulting in far fewer headaches and a smoother disposition of the case. A 17-year-old first-time offender should be handled differently than a 35-year-old repeat offender who has been to the penitentiary several times. As with many of the topics mentioned in this chapter, these skills are usually only developed through practice, experience, and a healthy dose of common sense.

C. (§16.19) Co-Defendants and "Snitches"

Counsel should undertake the representation of multiple co-defendants with great hesitation because of the substantial possibility that a conflict of interest between clients will arise at some point. It has become common, especially in the federal system, for co-defendants to agree to testify against one another in exchange for a more lenient sentence. Thus, it is generally unwise, if not unethical, for a single lawyer to represent more than one co-defendant in a case.

Successfully obtaining a plea bargain for a client who wants to "snitch" on partners in crime usually involves a good sense of timing. Often, the first co-defendant to approach the prosecutor with this suggestion becomes the "designated snitch," and the other co-defendants are out of luck. As with many things in life, timing is everything!

The following procedure is usually followed in negotiating and executing a plea bargain for a "snitch." Once the agreement is reached, the defendant enters a plea, and the terms of the agreement are made on the record. Sentencing is deferred until after the disposition of all of the co-defendants' trials. Then, the "snitch" is brought back and sentenced under the terms of the bargain.

Defense counsel should be cautioned against entering into any "secret deals" with prosecutors because of the possibility that a prosecutor might prefer to enhance the client's credibility at a co-defendant's trial by "hiding the ball" through not divulging the agreement. This practice would violate the constitutional rights of the co-defendant under *Brady v. Maryland*, 373 U.S. 83 (1963). *See State v. Patterson*, 618 S.W.2d 664 (Mo. banc 1981). Furthermore, such a "secret deal" would not be

enforceable if the prosecutor, for whatever reason, later decides to back out of the deal.

D. (§16.20) Pleas of Not Guilty by Reason of Insanity and Related Mental Health Issues

If defense counsel, upon the initial consultation with a criminal defendant, has reason to believe that the defendant is mentally ill, counsel should take necessary steps to have the defendant subjected to a mental examination to determine competence to proceed and mental responsibility for the alleged offense. The procedures to be followed in conducting mental evaluations are set forth in Chapter 552, RSMo.

A strategic dilemma often occurs in a situation when a defendant who is charged with a relatively minor offense is found by an expert to be either incompetent or not guilty by reason of insanity (NGRI). If the defense attorney on behalf of the defendant elects to have the defendant committed to the Department of Mental Health as incompetent to proceed or not guilty by reason of insanity, there is a substantial risk that counsel, in effect, has plea bargained the defendant to a sentence of life without parole. This result would obviously not be in the defendant's best interest when the charge is a class C or D felony or a misdemeanor. In these situations, there are other options that may be more beneficial to the client and to society.

When a defendant has been found mentally incompetent to proceed, counsel should explore the option, with the assent of the prosecutor, of having the defendant civilly committed instead of being committed to the Missouri Department of Mental Health as incompetent to proceed on the criminal charge. Civil commitment is normally a very simple procedure that usually involves having the county public administrator appoint someone as a legal guardian to the accused. After this guardianship is established, the client is generally placed in a group home or other appropriate facility, and the guardian thereafter manages the defendant's personal and financial affairs. When this is accomplished, the criminal charges are dismissed by the prosecutor.

Similarly, when a defendant is mentally competent to proceed but has a viable NGRI defense, entering an NGRI plea on a relatively minor offense may not be in the client's best interest. In this situation, defense counsel should explore other possible sentencing alternatives, such as placing the client on probation and putting the client in some community-based mental health treatment program. This author has encountered several cases over the years in which mentally ill

individuals have been committed to the Department of Mental Health for decades for relatively minor offenses. These situations likely occurred because the defense attorneys went along with an insanity plea without thinking through the long-term consequences.

E. (§16.21) Capital Cases

Murder cases in which the prosecution elects to seek the death penalty present the defense attorney with a unique set of problems and challenges. When handling a capital punishment case, defense attorneys should be reminded of the often-cited phrase from the United States Supreme Court that "death is different." Preparing and handling a death penalty case in the same manner as a non-capital case could have potentially fatal consequences for the client.

Before undertaking representation in a capital punishment case, any competent defense attorney should understand that it will be an enormous undertaking that exacts a greater physical and emotional toll than representing a defendant on even a very serious non-capital charge. Because of the stakes involved, plea bargaining is much more difficult in a capital case than in other types of cases.

The primary rule of thumb for death penalty cases is to do everything possible to negotiate the death penalty out of the case. To accomplish this result, defense counsel must work much harder to develop a rapport with and gain the absolute and unwavering trust of the client. Obviously, it is much more difficult to convince a criminal defendant to take a plea bargain for life without parole than it is to convince a defendant to take a lesser period of incarceration on a non-capital offense. As a result, a great deal of effort must be expended early on to convince the client to follow counsel's advice if a plea bargain emerges that takes the death penalty out of the case.

It is very unusual to find a first-degree murder case in which the prosecutor will not waive death in exchange for a guilty plea to a sentence of life without parole. The more common difficulty is convincing the defendant to accept such serious punishment on a guilty plea. To convince the client to do this, it is important that counsel conduct a thorough investigation of the facts and circumstances, as if the case were a sure trial in a non-capital context. This thorough investigation will often be invaluable in obtaining mitigating factors and the client's trust and respect, which could ultimately end up saving the client's life.

Counsel in death penalty cases are presented with a unique set of difficulties that are not present in other criminal cases. Understandably, defendants in capital cases often take the position that they would rather be executed than be incarcerated for the rest of their natural lives. In some rare cases, capital defendants want to fire their attorneys, plead guilty, and ask for the death penalty. The potential ethical dilemmas facing defense counsel in capital cases are too voluminous and complex to discuss at length in this chapter.

The best advice that this author can give to any attorney representing a defendant in a death penalty case is to plead the case at all costs. Oddly enough, it usually takes less work to try a capital case than to negotiate a plea bargain. In this regard, it is interesting to note that, with a couple of exceptions, every post-*Furman v. Georgia*, 408 U.S. 238 (1972), Missouri death-row inmate had the opportunity to plead guilty for a life sentence or, in some cases, a term of years.

If a case in which the death penalty is being sought goes to trial, the deck is stacked against defense counsel. *See Lockhart v. McCree*, 476 U.S. 162 (1986). Many criminal defense attorneys have deluded themselves into believing that there is no way a jury would convict their clients or sentence them to death. Such delusions by otherwise skilled and competent attorneys have led to death sentences for their clients.

VI. (§16.22) Conclusion

Effective plea bargaining involves a harmonious interaction between the personalities involved in the criminal justice system—the accused, the accused's counsel, the prosecutor, and the judge. It is the author's hope that this chapter has provided some practical tips and information to aid criminal defense attorneys in achieving favorable plea bargain dispositions for future clients.

Richard G. Callahan*

Chapter 17

FINAL TRIAL PREPARATION BY THE STATE

I. (§17.1) Introduction—Assumptions

II. (§17.2) Last Minute Pleas

III. (§17.3) Police and Laboratory Reports

IV. (§17.4) Information or Indictment

V. (§17.5) Witnesses

VI. (§17.6) Prior Convictions

VII. (§17.7) Discovery

VIII. (§17.8) Crime Scene Visits

IX. (§17.9) Legal Research

X. (§17.10) Jury Instructions

XI. (§17.11) Witness and Exhibit Lists

XII. (§17.12) Voir Dire

XIII. (§17.13) Subpoenas

XIV. (§17.14) Bifurcated Trials

XV. (§17.15) Conclusion

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I. (§17.1) Introduction—Assumptions

For the purposes of this chapter, it is assumed that the normal trial preparation was undertaken when the case was initially set for trial. This chapter addresses what steps to take when counsel is approximately three to six weeks away from trial.

II. (§17.2) Last Minute Pleas

The bane of all prosecutors is the so-called trial that always seems to go away at the last moment. This phenomenon is caused by the human tendency to put off difficult choices until the last possible moment and is further encouraged by some defense counsel who are always hoping for a tactical advantage from last-minute witness problems. While prosecutors admittedly waste much valuable time in preparing for trials that do not actually occur, the only alternative is poor preparation in the hope that a last-minute plea will result. The folly of that approach is quickly discovered upon finding oneself out to trial on a case that has not been prepared properly.

If an anticipated plea of guilty is not taken until the day of trial, many judges will have the jury in court ready and waiting in case the plea of guilty is not accepted. This practice leaves the prosecutor at a great disadvantage because, if something happens to stop the plea of guilty, the court will usually expect the trial to proceed as originally scheduled, and the prosecutor is thus forced to complete all the trial preparation as if the case were actually proceeding to trial. This is an unfair situation and should be eliminated either by having the judge excuse the jury in advance on the assurance of defense counsel that the plea will take place or by scheduling the plea of guilty to be taken earlier.

III. (§17.3) Police and Laboratory Reports

It is very important to ensure that counsel has all the police reports in the file. Inevitably, some officers are tardy in preparing follow-up reports, and some of these reports may not be added to the police department records until months after the case was first filed. The only way to ensure that the prosecutor has a complete set is to reorder a new set of reports. It is necessary to do this early enough so that if new reports are discovered, the prosecutor has sufficient time to endorse any new witnesses and comply with the defense discovery request. Also, counsel should be alert to those cases in which more than one law

enforcement agency has assisted in the investigation; it is important to have reports from all of the agencies involved.

Counsel needs to ensure that the physical evidence was delivered to a police laboratory for appropriate testing and that the prosecutor has the results of all laboratory tests that have been done in the case. If counsel is lucky enough to be in a jurisdiction where cases go to trial more quickly, sometimes untested evidence is still in the laboratory. More common, however, is the situation in which the law enforcement agency did not promptly deliver the physical evidence to the laboratory, and that is why all the testing has not yet been completed. To be able to review what physical evidence will be available for trial, counsel should obtain copies of the physical inventory sheets on the evidence that has been seized. This frequently is not included with the police reports, and counsel must make a special request.

IV. (§17.4) Information or Indictment

The most common mistake made by experienced prosecutors, as well as new prosecutors, is the failure to review the information or indictment to ensure that the charging language not only conforms to the facts of the case but also maximizes the chances for a conviction. A good method for reviewing the charging language is to have a copy of the MAI-CR 3d instruction that the prosecutor will have to utilize at trial. Many instructions offer a multitude of choices in terms of the language and theory of the crime. If counsel wants to be able to take advantage of the full range of choices that the instruction allows, counsel must utilize those same various charging options in the information or indictment. For example, most burglary charges will only utilize the charging option that the defendant entered with intent to steal, but there may be instances when the prosecutor wishes to include additional crimes such as assault. If these options are included in the charging document, the prosecutor will have a greater range of possibilities at instruction time. The assault statutes require particular attention because they set forth many ways by which an individual can commit the crime of assault in the second degree or assault in the third degree. At instruction time, the prosecutor will only be able to utilize the options in the instruction if the prosecutor has included them in the charging document.

V. (§17.5) Witnesses

A second important reason for reviewing the charging document is to ensure that all necessary witnesses have been endorsed. A good safety rule is to always include the endorsement of a custodian of records from the local police department and the local laboratory just in case certain live witnesses become unavailable and the matter can be proved up through business records. When witnesses are expected, the medical records custodian should similarly be endorsed just in case medical witnesses suddenly become unavailable. The golden rule is to endorse everyone who is remotely connected to the case. If on the day of trial the prosecutor does not want the defense attorney, during voir dire, to read an inordinate number of witnesses whom everybody but the venire panel recognizes will not be called, the prosecutor can always delete witnesses at that time. It is always easier to delete witnesses on the day of trial than it is to endorse them.

VI. (§17.6) Prior Convictions

The information or indictment should also be reviewed to ensure that prior convictions have been pleaded and that the necessary witnesses are endorsed to prove up the prior convictions if the prosecutor has not obtained certified copies of the convictions in advance. There are two reasons for pleading and proving up the prior criminal record of a defendant. The first reason is to invoke judge sentencing rather than jury sentencing. In this regard, to invoke judge sentencing, the prosecutor needs to prove that the defendant has two misdemeanor or one felony plea of guilty, finding of guilt, or conviction. See § 558.016, RSMo Supp. 2004, for definitions of "persistent misdemeanor offender" and "prior offender."

A second reason for pleading and proving prior offenses is to enhance the punishment to which the defendant will be subject upon conviction. Section 558.016 provides for punishment enhancement of class B, C, and D felonies in the case of persistent or dangerous offenders; § 558.018, RSMo 2000, provides for punishment enhancement in rape cases for persistent sexual offenders; and §§ 195.285, 195.291, 195.295, and 195.296, RSMo 2000, provide punishment enhancement in drug cases for prior and persistent drug offenders. For the effect of punishment enhancement provisions on crimes not classified, see § 557.021.3, RSMo 2000. Additionally, certain statutes have their own provisions dealing with the effect of prior offenses, such as in the case of stealing or driving while intoxicated.

VII. (§17.7) Discovery

Counsel should read and re-read the discovery rules until they know what is covered by the rules and what is not. Most prosecutor offices develop informal exchange procedures, which seem to work well in the norm. For special cases, however, special steps should be employed to enable the prosecutor to prove that the state has complied with the discovery rules. One popular procedure is to use a Bates numbering machine, numbering consecutively the pages of all reports, inventory receipts, and machine copies of photographs that are to be turned over to the defense. Once this compilation is created, the prosecutor should make two extra copies, one to be retained in the prosecutor's file and the other to be filed with the court. For the court copy, a face sheet can be added that lists the style of the case, contains the heading *Notice of Compliance With Discovery*, and simply reads, "Comes now the state and files notice of its compliance with the discovery in that copies of the attached reports have been provided to defense counsel." In adopting this approach, the prosecutor may want to ensure that the judge seals the court filing so that the entire case file does not end up on the front page of the newspaper the next day. When defense counsel is provided a copy of this filing, the prosecutor creates an independent record deposited with the court, which protects the prosecutor from accusations that the prosecutor failed to provide required material.

The discovery rules generally do not require the preparation of a police report that summarizes the substance of a witness's testimony. Thus, if the police have not reduced a particular interview to writing, while the officer may be cross-examined on why the officer did not prepare such a report, no violation of discovery rules occurs simply by this failure to prepare a report. An important exception, however, is with respect to any statements made by the defendant. In these instances, the discovery rules do require the preparation of a memorandum that summarizes the defendant's statement together with a list of those individuals who were present. In most cases, there will inevitably be isolated statements made by the defendant, either during the booking process, while in route to the station, or at the scene, that did not seem important enough for the officers to generate a report. Officers delight in telling the prosecutor of such statements on the day of trial, and then they are confounded when informed that the prosecutor is not going to be able to use the statements because they have not been reduced to a writing that the prosecutor could convey to the defense counsel. Aside from developing a long-range training program for the law enforcement agencies within the prosecutor's jurisdiction so as to avoid or minimize this problem, the prosecutor should ascertain the

names of all individuals, both police and lay, who may have had contact with the defendant and find any oral statements of the defendant that have not been reduced to writing. If nothing else, the prosecutor should then summarize these treatments and convey them in a subsequent disclosure package.

Under § 545.415, RSMo 2000, the state also has a right to take the deposition of any witness. Obviously, this provision would not apply to a defendant or a defendant's spouse claiming the spousal privilege; it would apply, however, to all other defense witnesses. It is also important to remember that, if the purpose of the deposition is to preserve the testimony of a state's witness rather than to seek discovery from a defense witness, the procedures set forth in Rule 25.14 must be followed.

Regarding any discovery to be received from the defense, the prosecutor should first verify that a discovery request has been filed on behalf of the state. If the prosecutor has filed a discovery request, the prosecutor should seek to obtain an affirmative statement from the defense that they do not have any witnesses that they intend to disclose. If the prosecutor has trouble in obtaining such a statement, the filing of a motion to compel discovery is in order. Lastly, a check of the court file will sometimes reveal copies of subpoenas that the defense has requested.

VIII. (§17.8) Crime Scene Visits

The prosecutor should always visit the scene of the crime. In terms of trial preparation, this visit will enable the prosecutor to better understand the various reports and witness statements and will also help in determining whether any additional photographs are needed or whether the use at trial of a diagram may be appropriate. A crime scene visit will also improve trial demeanor. During the opening statement, the prosecutor will be able to speak with greater confidence of the geography and the events, and this confidence will also make for better direct examinations of witnesses as the prosecutor speaks in first person terms with them.

IX. (§17.9) Legal Research

While most criminal cases will not present any unique legal issues, the prosecutor should review reports with an eye toward anticipating defense objections to certain testimony or evidence and prepare

accordingly. The trial casebook published by the Missouri Office of Prosecution Services is an excellent resource book, and whether the prosecutor needs to prepare a memorandum in advance or simply have copies of the cases in the file will depend on the complexity of the issue. In assault cases in which the prosecutor can reasonably anticipate a self-defense claim, it is also a good practice to prepare a short memorandum summarizing for the judge why reputation evidence of the victim is or is not admissible. If the prosecutor has reason to believe that the defense may attempt to offer certain evidence that is inadmissible, a motion *in limine* can be used to bring these issues to the court in advance so the judge has an opportunity to consider the prosecutor's cases; this is preferable to hitting the judge cold in the middle of trial and hoping that the judge does the right thing.

X. (§17.10) Jury Instructions

The prosecutor should always have jury instructions prepared in advance. The hurried pace of a trial is not the proper atmosphere in which to draft jury instructions, and it will inevitably lead to mistakes, which may lose a hard-won jury verdict on appeal. The verdict-directing instruction should always be drafted to maximize the possible theories by which the jury may return a verdict of guilty. Particular problem areas such as accessorial liability, felony murder, attempts, and self-defense require a more contemplative atmosphere in which to construct jury instructions.

XI. (§17.11) Witness and Exhibit Lists

Before trial, the prosecutor should prepare a list of the witnesses that the prosecutor actually intends to call in the order in which the prosecutor intends to call them. The order of witnesses is a very important strategy consideration and something that deserves careful consideration. Additionally, an order of witness list:

- makes it easier for the prosecutor's investigator and staff to assist;
- gives the witnesses some notion of when they will testify; and
- makes the experience a little less intimidating for the witnesses.

The prosecutor should never have witnesses sitting around needlessly waiting to testify. A witness who spends several hours in the witness room waiting to testify becomes bored and less attentive and will not do

as well on the stand as a witness who has had the benefit of better planning and consideration from the party calling the witness.

In addition to a witness list, the prosecutor should have an exhibit list prepared long before trial. The prosecutor should place the exhibit tag on the items of physical evidence and have the tags numbered to correspond with the numbers on the exhibit list. Court reporters are very appreciative of lawyers who have pre-numbered all of their exhibits and provided the court reporter, as well as the judge, with a typed copy of the exhibit list. More importantly, the preparation of anexhibit list in advance necessarily forces the prosecutor to review all of the physical evidence that exists in the case. The prosecutor should never be examining the physical evidence for the first time on the day of trial. All the physical evidence in the case should be brought into the prosecutor's office several days before trial so the prosecutor has the opportunity to go through the evidence and tie down any problems with respect to chain of custody and similar issues. With respect to business records, the prosecutor will obviate the necessity for a custodian if the prosecutor has obtained certified copies of the business records in advance of trial and provided those copies to the defense counsel.

XII. (§17.12) Voir Dire

In addition to preparing voir dire questions in advance, the prosecutor should find out the local jurisdiction's practice as to what jury information sheets are available and review them. The prosecutor should also talk to local law enforcement officers in that jurisdiction about the panel to be sure none of them are known to be mentally unstable or criminals or otherwise poor jurors. Likewise, the prosecutor should consider running criminal histories on the jury panel. It is allowed, although any significant information discovered should be supplied to the defense.

XIII. (§17.13) Subpoenas

The fact that the prosecutor has issued subpoenas does not necessarily mean that the subpoenas have been served. The prosecutor should always check the court file to ensure that a return of service has been filed showing that the witness has been served. The prosecutor may frequently find that a return of *non est* is made, and if discovered sufficiently soon, there will be enough time to locate that particular witness. Returns on subpoenas that have been served at the request of

the defense can sometimes also provide a clue as to what witnesses the defense may be planning to call.

XIV. (§17.14) Bifurcated Trials

If the state has not proved that the defendant is a prior, persistent, dangerous, or persistent misdemeanor offender, and if the defendant has not waived jury sentencing, the matter of punishment must be submitted to the jury. Section 557.036.4, RSMo Supp. 2004. For trials occurring on or after June 27, 2003, punishment is submitted to the jury in a second stage proceeding, which occurs immediately after the jury has returned a verdict of guilty. The 305 series of MAI-CR 3d contains the jury instructions and accompanying notes on use, which must be used and followed for the punishment phase of the trial. It is important to remember that the discovery rules also apply to the second stage, and so any additional witnesses that the state intends to call, as well as their statements, must be disclosed to the defense. Section 557.036.3 provides that second stage evidence may include evidence concerning the impact of the crime upon the victim and the victim's family, the nature and circumstances of the offense, and the history and character of the defendant.

XV. (§17.15) Conclusion

Every good trial performance by a lawyer is the result of proper preparation—no exceptions. The most important trial preparation occurs shortly after the arrest with a proper charging decision and the necessary follow-up investigation. Nevertheless, the steps outlined in this chapter should help the reader with a review of the case file a few weeks before trial to ensure that nothing obvious has been overlooked and that the case is indeed ready to proceed to trial.

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Chapter 18

FINAL TRIAL PREPARATION FOR THE DEFENSE

I. (§18.1) Introduction

II. (§18.2) Defining the Task

III. (§18.3) Pretrial Considerations

A. (§18.4) Trial Setting
B. (§18.5) Attendance of Witnesses
C. (§18.6) Continuances
D. (§18.7) Trial Court
E. (§18.8) Prosecuting Attorney
F. (§18.9) Testimony—Client and Witnesses
G. (§18.10) Interviewing Witnesses and Taking Tape-Recorded Statements
H. (§18.11) Witness Preparation
I. (§18.12) Preparing Court Exhibits
J. (§18.13) Organizing and Cleaning Up Files

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IV. Trial Strategy

A. (§18.14) Pretrial Motions
1. (§18.15) Anticipate Prosecutor Motions *in Limine* and Protective Order
2. (§18.16) Pretrial Objections to Last-Minute Prosecution Disclosures
B. (§18.17) Sufficiency of the Charge
C. (§18.18) Voir Dire
D. (§18.19) Opening Statement
E. (§18.20) Prosecution's "Moving Force"
F. (§18.21) Makeup of the Jury Panel
G. (§18.22) Trial Expectations—What Can Be Accomplished
1. (§18.23) Acquittal
2. (§18.24) Lower Sentence
3. (§18.25) Bargaining Position
4. (§18.26) Setting Up an Appeal

V. Mechanics of Defense

A. (§18.27) Reduced Charge and Bond
B. (§18.28) Advantages of Making Bail
C. (§18.29) Subpoenas
D. (§18.30) Using Police Officers
E. (§18.31) "Short" Trials
F. (§18.32) Using Assistants
G. (§18.33) Evidence Case Summaries; Preparation of a Trial Brief
H. (§18.34) Objections List
I. (§18.35) Keeping a Trial Record
J. (§18.36) List of Exhibits
K. (§18.37) Motions and Instructions
L. (§18.38) Jury Instructions
M. (§18.39) Preparation of a Trial Notebook or File Folders

VI. (§18.40) Orchestrating the Trial

VII. (§18.41) Things Counsel Should Do Before and During Trial

VIII. (§18.42) Two-Stage Trials

IX. (§18.43) Exhibit Form

I. (§18.1) Introduction

Throughout this deskbook the reader will find answers to "how to," "when to," and "why to" do things necessary to the defense of a client in a criminal prosecution. The thrust of this chapter is to provide suggestions to make the reader not only adequate counsel, but potent as well, for the name of this game is winning and not merely presiding as a member of a cast in a play or as entertainment.

II. (§18.2) Defining the Task

The trial is the culmination of the criminal case. Anyone who doubts that statement should read the advance sheets. It is clear from a cursory examination of the cases reported that the overwhelming majority of criminal cases on appeal are affirmed.

Preparation is paramount so that defense counsel is in control of the events that happen in the course of the trial. It is psychologically valuable to:

- be in control of the trial;
- move it at the right pace and speed;
- properly time the impact of the evidence; and
- be able to make forcible and compelling arguments, all to the defendant's benefit.

The trial of a criminal case, in at least one respect, is similar to building a house of cards, which is not meant to imply that criminal defenses are flimsy or without substance—far from it. But counsel must understood that, despite the constitutional requirement concerning the burden of proof and the benefit of the doubt, the climate in the courtroom will be one of expectation that the state will prove its case and that the defendant will be convicted. And, just as in the house-of-cards example, this can be overcome, but it is necessary that all cards remain in place, that there be no chinks in the defense's armor, and that, when the dust settles at the end of the trial, the house is still standing.

In thinking about the impending trial, it is always well to remember that the rules of court tend to provide the prosecution with the most chances to impress the jury. If the jury perceives the defendant and the defense lawyer as passive spectator types, the state will gain an impressive advantage, which is likely to happen because the

prosecutor will be doing more talking than the defense counsel in most cases. Defense counsel will want to be visible at each stage of the trial—the voir dire, the opening statement, the examination of witnesses, and the closing arguments.

III. (§18.3) Pretrial Considerations

Now that the task has been defined, it is appropriate to devote some thought to the problem of getting the job done, applying oneself to the task of doing things so that, when the trial begins, counsel will be absolutely ready.

A. (§18.4) Trial Setting

The first consideration is the time element. Because counsel will want to set aside the necessary time for trial preparation immediately before the trial's beginning, counsel should carefully arrange their schedules and watch the court's docket. Counsel should be in touch with the clerk and opposing counsel, as well as counsel on cases ahead on the court's docket, for information as to when the trial will be reached. In Jackson County, a printed docket sheet is circulated to lawyers who have cases in the criminal divisions about two weeks ahead of the week for which the trial is set.

In the City of St. Louis, felony cases begin in Division 25 with a preliminary hearing or waiver. If a waiver occurs, the accused is arraigned in this division and then the case is assigned to a trial division. There is a "bulk" division of pleas. All cases are assigned by Division 16, except five of the divisions handle their own individual dockets now. In St. Louis County, felony cases begin in either Division 32 or 33. These divisions handle all of the misdemeanor cases. In the City of St. Louis, misdemeanor cases are handled currently in Division 24 but are sent to another division if counsel requests a jury trial or if the judge in Division 24 is disqualified. Unlike the City, if the right to a preliminary hearing is waived in Division 32 or 33, the case is then sent to the circuit court for arraignment. In actuality, the arraignment occurs before a clerk in the circuit clerk's office and then the case is assigned to a trial division. "Notice" in the City is given when the defendant is arraigned and then other dates are given in person by the clerk of the division. In St. Louis County, an initial appearance date is given in the Circuit Court Division to which a case is assigned and then subsequent notices are sent by the clerk, usually of that division. In

the City and County, the trial date is selected by the judge, and counsel is given that information.

Requests for a continuance must be timely filed, be sworn to, state specific reasons, and be "noticed up" for hearing. Cases evaporate on the dockets rather swiftly, and it is not unusual to be Number 15 in line on the eve of trial and then quickly advance to Number 1. Therefore, keeping in mind the basic knowledge that most criminal cases are not tried, counsel should watch carefully the cases set down ahead of the client's and get mentally prepared for trial.

B. (§18.5) Attendance of Witnesses

Counsel will want to be prepared not only to plan counsel's own schedule, but also to arrange for the availability of trial witnesses. Witnesses always have myriad reasons why it would be inconvenient for them to appear in court on any given day, and they seem to believe arrangements for a trial can be made as firmly as those for a dinner date or a wedding, so they need careful handling. Counsel's office staff should alert all witnesses by telephone as soon as the trial date is learned. This should be followed up with a subpoena. If the case is continued, letters should be sent to remind the witness of the trial date, advise of a new date, and remind the witness that the witness is still under subpoena. Any hostile witness should be interviewed and subpoenaed at the same time.

Subpoenas will only be suppressed if they are oppressive or unreasonable. Doctors and other professional witnesses should be alerted to upcoming trial dates so their calendars can be tentatively scheduled.

Counsel should attempt to plan witness testimony just like a script in a play. Some witnesses will want to know specifically when they will testify. Counsel should not subpoena all witnesses for the same time unless they will be moved quickly in and out of the courtroom.

C. (§18.6) Continuances

All lawyers know that most cases are continued from time to time and also that it is fashionable for those who comment on criminal law to blame defense counsel for the delay in trials. Nevertheless, there will be times when a continuance will be required. If so, counsel should know the rules of court concerning continuances so that a continuance can be requested, if need be, and not be denied. See

Rule 24.10 and *State v. Paige*, 550 S.W.2d 582 (Mo. App. E.D. 1977), regarding continuances based on unavailability of witnesses or absence of evidence. If a continuance is sought for the purpose of obtaining the presence of a witness, the application must show due diligence to obtain the witness and reasonable grounds for belief that attendance of the witness will be procured within a reasonable time. *State v. Coats*, 835 S.W.2d 430 (Mo. App. E.D. 1992); Rule 24.10(a), (b). A showing is required of materiality of evidence sought, what facts it would be expected to prove, and that no one else could provide the same evidence. Rule 24.10(c). All motions must be in writing unless the opposing party consents to or the court finds good cause for an oral motion. Rule 24.09.

Before a continuance is requested, however, counsel should consider whether the request waives any rights the client has to a speedy trial under § 545.780, RSMo 2000.

See Chapter 13, Motions to Dismiss, of this deskbook for a further discussion of some of the options to consider.

D. (§18.7) Trial Court

The forum of the trial might be the next consideration. Of course, if it is necessary to travel distances to get there, counsel should make arrangements ahead of time to get a quiet motel room. It is extremely useful to be familiar with the temperament of the people who will be occupying the courtroom, e.g., the judge, the reporter, the bailiffs, and the clerk. Counsel should anticipate the climate of the courtroom and be ready to adapt to it.

E. (§18.8) Prosecuting Attorney

While on the subject of the principal players in the trial, a word about the opponent might be appropriate. Anyone who does not already know who opposing counsel is and know something about that person's style should find this information out from the lawyers and courthouse workers who have seen the person in action. Possibly, counsel could go by the courthouse to watch opposing counsel try a case or to speak with other attorneys in the area. Prosecutors are prone to repeat their stock arguments in each case and to handle their witnesses, question prospective jurors, and make their strikes the same way in each case. Once counsel learns the book on the opponent, counsel can more intelligently plan tactics for the trial.

F. (§18.9) Testimony—Client and Witnesses

The next consideration ought to be given to the client and the witnesses. Counsel should examine the strengths and weaknesses of witnesses. Counsel should plan to avoid exposing any shortcomings and to maximize strengths. The shortcomings may be many. It is well to remember that first impressions are lasting and that witnesses will probably be viewed with some skepticism by the jurors, so it is important to overcome this obstacle. Under discovery rules, counsel is required to determine the identity of potential witnesses and to notify the other side in advance of the trial as their names and addresses become known. *See* Rule 25.05.

If the prosecutor fails to disclose all reports, statements, and names and addresses of witnesses, counsel should file and notice up a motion to compel and a motion for protective order to limit the prosecutor from last-minute disclosures.

G. (§18.10) Interviewing Witnesses and Taking Tape-Recorded Statements

As a case is finally prepared for trial and counsel has completed an evidence list, counsel should also prepare a witness list.

The witness list has all of the names and telephone numbers of defense witnesses in the order in which they are to be called so that they can be telephoned during the trial if counsel needs to rearrange or reschedule. With each witness counsel should calculate particular exhibits that the witness will identify and what other facts counsel intends to prove by virtue of calling the witness.

The broad general rule is that counsel should not call a witness that will both hurt and help the client.

Any final witnesses that have not been contacted or interviewed by counsel or counsel's investigator should be contacted before trial. Ideally, the investigator should always be present, even if counsel does the interview, so counsel can call the investigator to testify if need be if the witness changes testimony later. Failure to contact and attempt to interview key witnesses might constitute ineffective assistance of counsel and provide grounds for malpractice. Counsel might wish to take a handwritten statement from the witness or to record a statement of the witness; the tape or transcript of the

interview may arguably have to be disclosed to opposing counsel if a request for disclosure has been made.

H. (§18.11) Witness Preparation

Witnesses should be prepared to withstand the onslaught of the prosecuting attorney during cross-examination. Of course, witnesses should be told that they must speak the truth in all things. If the prosecutor asks them what defense counsel told them to say, their answer ought to be, "He told me to tell the truth." The witnesses should be advised that the prosecutor will seek to trip them up on minor and trivial details, and if they are not certain of the details, they should answer that they are uncertain rather than try to guess at the correct answer. Witnesses should never be consulted about their versions of the facts in the company of one another. The reason is obvious: If this were disclosed during the trial, it would look as though witnesses were trying to get their stories straight, rather than trying to tell the truth of what did or did not happen.

Alibi witnesses should be cautioned that they may be asked questions by the prosecutor as to what occurred on the day before the day in question, on the day after the day in question, or several hours before or after the occurrence that is under scrutiny in the trial. Unless they can demonstrate that their memory of these events is as good as their memory of the events surrounding the crime charged, their testimony will be largely ineffective.

Good character witnesses can be cross-examined about whether they know of prior arrests of the defendant (and whether a conviction resulted), so counsel should be careful about calling good character witnesses unless counsel has fully moved for discovery and is thoroughly knowledgeable about any alleged prior arrests of the defendant. By calling good character witnesses, counsel runs the risk of "opening the door" to damaging information about the defendant. Counsel should take great care and know the history of the client before the client's character is placed at issue.

If the client is convicted, counsel should be prepared for stage-two sentencing witnesses.

Counsel should tell witnesses, as well as the client, what to wear in court. Witnesses should be dressed respectfully and comfortably. The client should dress comfortably; the jury can and will sense if the client is uncomfortable. Clients and witnesses do not necessarily need

to wear a suit and tie to look respectful. The Mendendez brothers were respectable in sweaters. The clothing depends on the client. It should always be remembered that the client may not speak, and the client's clothing could project the wrong image.

I. (§18.12) Preparing Court Exhibits

While taking a final look through the file making final trial decisions, counsel can decide what additional court exhibits are necessary. Were necessary photographs taken, blown up, and mounted on foamboard for ease in passing to the jury? Are aerial photographs needed? Are maps, diagrams, flowcharts, or other trial exhibits needed? Many exhibits can be prepared with computer software commercially available for $100 or less.

Counsel should make a list of all exhibits with a corresponding list of witnesses that will identify the exhibit and how counsel intends to get it into evidence. Which witnesses will testify that it is a fair and accurate representation of what it depicts and whether it aids or assists the jury in better understanding the crime scene and the defendant's theory of the case?

At the same time, counsel can make a list of all the opponent's proposed exhibits and evidence and carefully decide which are objectionable and which are not. Good trial strategy may be to not unnecessarily object to every item of evidence or to object only to specific exhibits. An alternative plan may be to file a motion to suppress, motion *in limine*, or motion for protective order where objections are made outside the hearing of the jury (but on the record), remembering to preserve them in the course of the trial by objecting at least once to a particular exhibit.

J. (§18.13) Organizing and Cleaning Up Files

One exasperating aspect of trial work is having miscellaneous correspondence, pleadings, investigations, interview notes, telephone messages, and scribbled notes. It is suggested that counsel prepare a trial notebook where counsel alphabetizes with file tabs all of the potential prosecution and defense witnesses so that counsel can turn to them in a quick, orderly fashion.

If counsel decides not to prepare a trial notebook, counsel should purchase multicolored files, e.g., green for correspondence, red for legal pleadings, brown for investigation, pink for jury instructions,

and so forth. In this manner, counsel will have all of the papers organized.

A day or two before trial, counsel should read and re-read every single telephone message, letter, and pleading that is contained in the files. Counsel should recheck the prosecutor's discovery against counsel's file to make sure that the prosecutor has added nothing. A day or two before jury trial, counsel should check the court file to make certain counsel has a copy of everything.

IV. Trial Strategy

A. (§18.14) Pretrial Motions

After counsel determines what housekeeping needs to be done and sets aside the time to accomplish these tasks, it would be well to turn attention to the strategy of the defense. A word ought to be said about the law part of representing a criminally accused client at this point. Counsel should define the client's legal position on the issues in the case before the beginning of the trial. Of course, it is necessary to know what the criminal charge really says and whether there are lesser-included offenses contained in the charge against the client; counsel should try to come to some determination as to whether the charge is sufficient or adequate. By this time, counsel should have filed any motions that are required to be filed before trial; counsel should then review those motions and rethink the matter so that any additional motions can be timely filed.

A checklist of motions includes the following:

State Defense Criminal Trial Motions

1. Motion for Bill of Particulars
2. Motion to Dismiss
3. Demand for Speedy Trial
4. Motion for Court Ordered Disclosure
5. Motion for Disclosure of Specific Object
6. Motion for Disclosure of Impeaching Information
7. Motion to Remand for New Preliminary Hearing
8. Motion to Dismiss for Pre-Indictment Delay
9. Motion to Dismiss for Failure to State a Crime
10. Motion to Dismiss for Illegal Issuance of Arrest Warrant
11. Motion to Dismiss for Destruction of Evidence
12. Motion to Dismiss for Disjunctive Pleading

13. Motion to Dismiss for Pre-Indictment Delay
14. Motion to Dismiss for Failure to Grant a Speedy Trial
15. Motion to Suppress Search Warrant
16. Motion to Suppress Warrantless Search
17. Motion to Suppress Statements
18. Motion to Suppress Lineup
19. Motion *in Limine* to Exclude Expert Testimony
20. Motion to Suppress Photographic Array
21. Motion *in Limine* to Suppress Certain Evidence
22. Motion for Protective Order
23. Motion to Quash Misdemeanor or Felony Convictions
24. Motion to Suppress Evidence of Prior Bad Acts
25. Motion for Entry to Premises
26. Motion for Advanced Copy of Jury List
27. Motion to Order Venire Questionnaire
28. Motion for Medical Authorization
29. Motion for Psychiatric Exam and Mental Exam
30. Motion to Reduce Bond
31. Motion to Reveal Names and Addresses of Witnesses (Informant)
32. Motion to Reveal Plea Bargain of Informants
33. Motion for Allowance of Issuance of Defendant *Subpoena Duces Tecum* at Preliminary Hearing
34. Motion for Discovery of Juvenile, Welfare, and DFS Records
35. Motion for Commission to Take Out-of-State Depositions
36. Notice of Claim of Unconstitutionality
37. Motion for Return of Property and Legal Suggestions
38. Motion to Reshuffle Jury Panel
39. Motion to Dismiss for Governmental Misconduct
40. Defendant's General Legal Suggestions or Trial Brief
41. Motion to Suppress Statements on Grounds of Marital Privilege
42. Motion for Mistrial
43. Motion for Directed Verdict at the Close of Plaintiff's Evidence
44. Motion for Directed Verdict and Judgment Acquittal at the Close of All of the Evidence
45. Motion for New Trial
46. Motion to Dismiss for Lack of Probable Cause Finding
47. Motion for Jury to Take Notes

Federal Criminal Trial Motions

1. Motion for Early Disclosure
2. Motion for *Brady v. Maryland* Information
3. Motion for Discovery of Witnesses and Addresses
4. Motion for Discovery, Production, and Independent Analysis of Scientific Evidence
5. Motion to Discover Drug Courier Profile Information
6. Motion to Produce Specified Object
7. Motion to Dismiss Indictment
8. Motion to Produce Information and Records
9. Motion for Protective Order
10. Motion *in Limine*
11. Motion to Compel Government to Disclose All Promises or Inducements Made to, Agreements Made With, and Remuneration Given to Informants (Reveal the Deal)
12. Motion to Compel Government Disclosure of Informants' Addresses or in Alternative to Make Informants Available for Interview
13. Defendant's Pretrial Motion for Disclosure of Exculpatory Evidence
14. Motion for a Separate Hearing to Determine Existence of Conspiracy
15. Motion to Dismiss Indictment Due to Grand Jury Abuse
16. Motion to Dismiss for Prosecutor/Police Misconduct
17. Motion to Take Deposition
18. Motion to Enlarge Time for Filing Pretrial Motions
19. Motion to Sever Defendants
20. Motion to Sever Counts
21. Motion for Mental Exam
22. Motion to Permit Individual Voir Dire
23. Motion to Set Bond
24. Motion for Change of Venue
25. Motion to Quash Grand Jury Subpoena
26. Defendant's Response to Government's Request for Detention
27. Motion to Preserve Evidence
28. Motion to Compel Production of Sentencing Guideline Information
29. Motion for Home Detention
30. Motion for Grand Jury Transcript
31. Motion for a Court-Ordered Downward Departure
32. Motion for Approval to Institute Pre-Sentence Investigation Before a Plea of Guilty

1. (§18.15) Anticipate Prosecutor Motions *in Limine* and Protective Order

It is not unusual for the prosecutor to file motions at the last minute on the day of trial, seeking to "gut" or limit some of counsel's best evidence. Out of their handbook, prosecutors will come up with certain pattern stock cases.

Prosecutors will often try to talk with the defense attorney in the hallway and informally probe to find out what the defense attorney's anticipated defense is going to be. They will inquire as to what the client may testify to, what counsel's case is, and how counsel is going to present and argue the case. Once prosecutors get this information, they will frame pretrial motions that they may file on the day of trial. Counsel can object that the prosecutors' motions were not timely filed and did not give the defense sufficient time to file legal suggestions in opposition. Counsel must be prepared!

2. (§18.16) Pretrial Objections to Last-Minute Prosecution Disclosures

It is not uncommon, at the last minute, for the prosecutor to attempt to clean up the felony information by changing the allegations, adding additional trial witnesses, or disclosing exhibits or bench and field notes of testifying witnesses, none of which was in the prosecutor's pretrial discovery.

Counsel should be prepared to mount objections to these last-minute disclosures and not let the prosecutor get away with it. Such "trial by ambush" causes the defense attorney to change trial strategy and evidence at the last minute, and it is unfair. Counsel will need to show that counsel is surprised by the prosecution's disclosures and that it has prejudiced the client's defense.

B. (§18.17) Sufficiency of the Charge

A criminal complaint, information, or indictment must sufficiently advise the defendant of the nature and cause of the accusation against the defendant so that counsel can prepare a defense.

Counsel should carefully check to make sure there are no disjunctive or alternative pleadings. If so, a motion for a bill of particulars should

be filed to clarify exactly what the client is charged with and when and where the offense allegedly took place.

A charge filed in the alternative using the word *or* is probably valid unless counsel objects. *State v. Lusk*, 452 S.W.2d 219 (Mo. 1970). It must follow the language of the statute.

The prosecution is allowed to amend the criminal charge up to the time the matter is submitted to the jury, unless the defendant is prejudiced, as long as no new charge is alleged and assuming that it is supported by the evidence. An amendment cannot affect a substantial right, and the defendant's evidence must be equally applicable; otherwise the amendment should not be permitted. *State v. Johnson*, 811 S.W.2d 411 (Mo. App. E.D. 1991); *State v. Moton*, 733 S.W.2d 449 (Mo. App. E.D. 1986); Rule 23.08.

Variances between the criminal charge and subsequent jury instructions should be carefully watched by counsel and objected to.

The criminal charge should describe the "nature and cause of the accusation" under the Sixth Amendment, United States Constitution:

- so that a defendant can determine the facts to be admissible at trial to support the charge, *State v. Downs*, 593 S.W.2d 535 (Mo. 1980);
- to notify the defendant of the specific offense for which the defendant is charged, *State v. Hasler*, 449 S.W.2d 881 (Mo. App. E.D. 1969);
- so that it is sufficiently specific to enable the court and the defendant to determine what facts are admissible as such necessary descriptive averments, *State v. Ladner*, 613 S.W.2d 951 (Mo. App. E.D. 1981); and
- to protect the defendant against double jeopardy.

There are some criminal charges that are totally defective, i.e., they are fatal because there is a missing element, while other criminal charges are simply imperfect because they fail to allege "fundamental particulars necessary to a proper understanding of the charge" and its importance. *State v. Grays*, 629 S.W.2d 466 (Mo. App. E.D. 1981); *State v. Puckett*, 607 S.W.2d 774 (Mo. App. E.D. 1980); *State v. Charity*, 619 S.W.2d 366 (Mo. App. S.D. 1981).

C. (§18.18) Voir Dire

Counsel should try to determine what proof will be made in the trial and to persuade the jury from the outset as to the client's side of the case. This persuasion should begin, as will undoubtedly be mentioned in other parts of this deskbook, while counsel is examining the prospective jurors on voir dire and should continue through the opening statement and throughout the trial to the final verdict. For a discussion of jury selection, see §18.21 below and Chapter 21, Voir Dire and Jury Selection, of this deskbook.

D. (§18.19) Opening Statement

As noted in §18.18 above, counsel's efforts to persuade the jury should begin at the outset of the case. An analogous situation is a football game where the home team is back on the ten-yard line and the defensive squad is valiantly trying to contain the onslaught of the visiting team from there. The crowd is calling frantically, "Dee-fense! Dee-fense," but by that time it is usually too late to avoid the touchdown. In the authors' opinions, the opening statement is just as important to a successful conclusion as is the closing argument. If counsel is confident that the facts in the opening statement will not be blatantly contradicted by either the state's evidence or the client's defense, counsel should consider making it immediately after the prosecutor's mandatory opening statement. By making an opening statement at this time, the impact of the prosecutor's remarks may be weakened, and the jury may be keyed into the theory of the defense. Polls and surveys verify that the majority of jurors make up their minds at the close of the opening statements and rarely deviate from that opinion. Thus, get licks in "early while the getting is good."

In preparing the opening statement, counsel should remember that it is essential that the jury pay attention to defense counsel's remarks if the defense is to get a favorable verdict at the conclusion of the trial. Jurors are only human, and their attention spans are limited; they will not be able to ingest and assimilate all the information presented at trial. If a good-quality opening statement is provided, the jurors will use it as a guide for the evidence presented during the course of the trial, both for positive and negative evidence. To accomplish this objective, the following should be considered:

- Set the bow. A good-quality beginning of the opening will captivate the jury's attention for the entire opening statement. This is done by "setting your bow" just like a concert violinist who is sitting erect, the bow set on the strings, preparing for the first note of the concert. When counsel is waiting for the first note of the opening statement, counsel should give a silent pause so that the jurors can follow every "note" of the opening. Once jurors are sitting up and ready to listen, counsel should begin with a captivating, non-generic, and theme-oriented statement that grabs more attention from the jury.

- Tell a story. Once the bow has been set, the jury is ready to listen to the defendant's position. If the story is told correctly, the jury will be persuaded enough to put the evidence presented later into the various components and subsets that counsel provides them during the opening statement. Also, a story is easier to remember than all the legal jargon that overwhelms most jurors at some point during the trial.

- Humanize and personalize the client. When referring to the defendant, do not say "the defendant" but, rather, use the defendant's real name to show the jury that this person is a fellow human being. This may get some sympathy from the jury, but more importantly, it will allow the jury to relate at least to the client. Counsel might also want to dehumanize the state's witnesses and victim by using generic terms to refer to these people. This can backfire if counsel is dealing with a "good" witness or victim for the state.

Counsel should be clear when speaking to the jury and avoid using big words or dwelling on minor points. Counsel may attempt to use exhibits in the opening statement. Exhibits help tell the story and capture the jury's attention. The use of exhibits will probably require prior approval from the court.

For a more complete treatment of this subject, see Chapter 22, Opening Statements, of this deskbook.

E. (§18.20) Prosecution's "Moving Force"

Another thing that might be well to think about is the question, "Who is the moving force behind the prosecution?" Only children in school are naive enough to believe that each prosecution is begun and

carried out for the sole reason that every transgression must be punished and justice must be rendered in every case that is brought to the attention of the police and the courts. In large cities, prosecuting attorneys have funds made available to them through grants for specialized task forces on rape and other crimes, and it may be that these people working under the grant are the moving parties in that type of a case in a given situation. The police are usually the moving force behind the prosecution in cases of burglary, auto theft, and robbery because they want to see these cases cleared and they want to have good statistics as far as convictions are concerned. Robbery, auto theft, and burglary are the types of crimes that the public expects the police to help prevent.

In a murder case, it may be the prosecutor who is the moving force behind the court action, especially if the victim was a member of the underworld or a person whose relatives are either nonexistent or non-caring and about whom the police care little. Knowledge of the identity of the moving force behind the prosecution should enable defense counsel to point the defense against the more vulnerable parties on the state's side of the case without exciting the wrath of the others. It will do little good to complain about police brutality or unconstitutional identification procedures in a rape case. It is the victim's credibility that must be impeached. Likewise, the burglary case is a good case to show what police procedures were not used, and it does little good to attack the victim. In a murder case, the principal witness is absent, so if the victim had some character flaws, that might be the place to point the attack.

F. (§18.21) Makeup of the Jury Panel

Picking the jury might be the most important thing that the lawyer does during the course of the criminal trial. Thought should be given to what the group character of the jury will probably be, e.g., whether they will be peers of the defendant or whether they will have a perception of being superior to the defendant. To do this intelligently, counsel has to know the size of the panel to be qualified in the particular case and what the makeup of that panel will generally be. In regard to the number of challenges allowed the prosecution and defense, when a charge is punishable by death, both the prosecution and the defense are allowed nine challenges. With any other charge when the possible punishment entails imprisonment in a penitentiary, both the prosecution and defense are allowed six challenges. A distinction is no longer made between cities of various size. In addition, when defendants are being tried together, each

defendant has the right to the same number of challenges they would be entitled to if they were being tried alone. The prosecution in such a case, however, is allowed double the number of challenges. If counsel is left with 12 who perceive the defendant to be below them on the social scale and they conclude that the defendant is guilty, they are liable to give the defendant a heavy sentence.

If unusual circumstances are involved in the case, counsel may try to get additional challenges by asking the judge.

G. (§18.22) Trial Expectations—What Can Be Accomplished

Counsel should decide what result can reasonably be expected to be achieved by means of the trial. At the risk of laboring football analogies, it would be well to keep in mind that only the most naive spectator would believe that each offensive play by a football team is designed to score a touchdown. There are short yardage plays and long yardage plays. Probably most important, the plays that are going to be run by the team are designed around the capabilities of the players on that team.

1. (§18.23) Acquittal

In like manner, some cases are tried to obtain an acquittal. An example of this would be when a client who has no prior record and a respectable job—possibly a family man—is charged with an offense of great moral turpitude, such as child molestation, incest, or something similar. In these cases, because of the nature of the offense, it is extremely unlikely that the state is going to be willing to reduce the charge to something that can be acceptable to the defendant; it is also extremely unlikely that any outcome short of an acquittal is going to be satisfactory to the defendant. Counsel may not want to offer a lesser-included instruction if the defendant seeks an acquittal of the pending charges.

2. (§18.24) Lower Sentence

Another group of cases might be tried to obtain a sentence lower than the one recommended by the state if the client were to request the court to accept the plea of guilty. In applying this strategy, it is important to note that, under § 557.036.4, RSMo Supp. 2004, if the defendant is found to be a persistent or dangerous offender under § 558.016, RSMo Supp. 2004 (which

can include a suspended imposition of sentence), the judge will determine the sentence.

See Chapter 27, Sentences, of this deskbook for a discussion of sentencing in general.

3. (§18.25) Bargaining Position

Another group of cases might be those that are tried to gain time for the defendant to bargain in the future. It may be counsel's last resort, and counsel determines to go to trial with the hope of obtaining a mistrial because of some error on the part of the state or the court. Then, if the case is going to be rescheduled as a result of a mistrial, it will be at a much later date. Witnesses may lose interest, certain evidence may be not available, and counsel may be in a much better position to bargain for a lower punishment than the first time around.

See Chapter 16, Plea Bargaining, of this deskbook, which explores other alternatives to trial.

4. (§18.26) Setting Up an Appeal

Some cases may be tried merely to take an appeal and have the decision reversed. They would include those cases when double jeopardy is an issue, there is a defect in the charge, or counsel has a belief that the trial court has erred on a motion to suppress. With these thoughts in mind, it seems appropriate now to discuss the mechanics of defense.

V. Mechanics of Defense

A. (§18.27) Reduced Charge and Bond

During last-minute trial preparations, the prosecutor may reduce the charge against the client to a lesser offense. If that happens, counsel should try to obtain a much lower bond for a client who has been in jail during the pendency of the case. Often, prosecutors will reduce first degree murder to second degree murder, or second degree murder to manslaughter, to make their proof easier. When this happens, most courts will have little aversion to reducing bonds, and it may be that the bond can be reduced to the point where the client can successfully qualify to be freed. This helps the defendant help in their defense. The

client can investigate the case, locate missing witnesses, confer with counsel in the office, and earn funds to help with attorney fees.

B. (§18.28) Advantages of Making Bail

The advantages of being freed during the trial, of course, cannot be overstated. Just the fact that a deputy sheriff will not be dogging the client's heels throughout the client's stay in the courtroom and the corridors adjoining it, or taking the client to and from the jail at recess time, is enough to change the whole climate of the trial. Add to these the advantages of the client being able to go home and see their family throughout the course of the trial and to wear clean fresh clothes each day of the trial, and counsel will have a client whose personality is such that the client can look the jurors in the eye and feel on their level.

If the client is in jail during the trial, counsel will need to ensure that the client has civilian clothing to be worn during the trial. Informal arrangements can be made with the sheriff or warden before trial. If not, counsel should request a court order allowing civilian clothes.

C. (§18.29) Subpoenas

Thorough preparation for trial requires the liberal use of subpoenas. Many witnesses promise to be on hand and fail to make their promises good. If they have been subpoenaed, they will more likely honor their promises. If not, the court will give assistance in obtaining their presence (a body attachment), and counsel will avoid the embarrassment of having talked about certain evidence during the opening statement that now cannot be produced. Many prosecutors ask the witnesses on the stand if they have been subpoenaed or if they volunteered to appear on behalf of the defendant. If they can truthfully say that they have come to court in answer to the court subpoena, the client will benefit.

See Chapter 12, Miscellaneous Motions (Other Than to Suppress), Proceedings, and Writs, and Chapter 17, Final Trial Preparation by the State, for other aspects of this problem.

D. (§18.30) Using Police Officers

When thinking about subpoenaing witnesses, counsel should not feel limited to witnesses for the defense. Often, police witnesses will be valuable aids to the defense. Counsel should take the case when the police department does not consider itself too intimately involved—e.g.,

a rape case, when there is little or no evidence besides the eyewitness evidence. By calling a police witness who may be able to contradict a civilian witness for the state, counsel obtains two advantages. First, the jury can be shown that the defense is not at war with the police, but is relying on them the same as any other good citizen would to solve a case. Second, counsel can be put in the position of being able to argue that the state knew about the witness in advance but did not call the witness in order to bolster its own theory rather than to enlighten the jury. Often, police reports contain favorable as well as unfavorable items.

E. (§18.31) "Short" Trials

Counsel should not assume that the prosecution will call a police witness simply because the prosecutor has endorsed the police witness on the charging paper because the officer may hurt the state's case as much as help it. Many leading prosecutors have the attitude that the more complex and complicated they make a case out to be, the less apt the jury is to convict. Therefore, some prosecutors strive to present a case that is short and simple so that they can hammer on one damaging point against a defendant. Counsel will find that this so-called "short" case is difficult to handle because the point that the state has selected to bring against the client, after all, is still unable to be refuted.

F. (§18.32) Using Assistants

Trying a criminal case alone is a lot like sailing a sailboat without a crew. It is not recommended except for experts, and then only in fair weather. There are certain useful tools and aids that counsel ought to carefully consider having in counsel's corner. One of these would be an assistant. The assistant can be either a lawyer or an investigator who sits in the second chair and keeps track of the evidence and witnesses and who can serve as a traffic director at the trial, ushering witnesses in and out of the courtroom in the proper order and seeing to it that they are ready to testify when called on to do so. Counsel should have a secretary or paralegal sitting in the back of the courtroom taking notes while counsel is busy in the course of the trial. If counsel can utilize these assistants, it would be advisable to do so. They can keep a separate list of possible points for a subsequent motion for new trial. They can watch jurors' reactions to witnesses. They can suggest questions to ask and give constructive advice.

Assistants can make notes of key points that are stated by witnesses and that can be used in closing. They can keep counsel focused and calm, because much transpires during a trial.

G. (§18.33) Evidence Case Summaries; Preparation of a Trial Brief

Many successful criminal trial specialists maintain a so-called "bible" or collection of case summaries on questions of search and seizure evidence, permissible arguments, competency of infants to testify, qualifications of jurors, and similar items. This permits them to make their point succinctly if objecting and to back up their actions when objections are made with the advantages of preventing undue delays in the trial and of setting the tempo of the case. Jurors do not like interruptions, especially those that require them to leave the jury box, and they could seek to identify the cause of this irritation, possibly to punish the individual responsible in their verdict.

Counsel should file ahead of time a trial brief that focuses on issues in the case and contains legal suggestions.

H. (§18.34) Objections List

Counsel might make up a laundry list of possible objections to keep handy at the trial. Our appellate courts, on a number of occasions, have criticized defense counsel for failing to make specific objections and, more importantly, have refused to review points of claimed error if proper objections were not made at the proper time.

I. (§18.35) Keeping a Trial Record

Another handy tool to have ready before the trial is a trial record. This can be in printed form or it can be made up by counsel in a more primitive manner. The object is to have some format so that counsel can set down the events as they occur during the trial, using dates and times in chronological sequence. If the case is lost, counsel will have no transcript to aid in the formulation of the after-trial motions. A paralegal should record verbatim, or almost verbatim, references to objections and possible trial court errors.

J. (§18.36) List of Exhibits

An invaluable aid is a form, *see* §18.43, *infra*, on which exhibits can be listed with notes on how designated, by whom presented, whether

offered, whether an objection is made, and whether received in evidence. Most prosecuting attorneys' offices have printed forms for this purpose, and it should not be difficult to obtain a copy. In Jackson County, the practice is to number all exhibits consecutively, whether offered by the defendant or by the plaintiff. Even though the defendant may have one or two exhibits, they may bear numbers such as 17 or 32 in sequence of all the exhibits. These numbers can become confused quite easily by the time counsel needs to think about taking an appeal or a motion for new trial. In St. Louis City and County, the prosecutor's exhibits are assigned numbers, and the defense exhibits are assigned letters, eliminating some of this confusion.

Counsel should have exhibits ready to introduce ahead of trial so the jury does not have to wait. They should be pre-marked and an exhibit list prepared.

K. (§18.37) Motions and Instructions

It is always wise to prepare all anticipated trial motions and instructions in advance of the trial, even those instructions that the opponent normally prepares. Certain instructions for the defense will not be given unless requested in the proper form. If this occurs and the proof ends abruptly, counsel should be prepared to conclude the trial or present the client's side of the case without any unnecessary delay, once again avoiding the wrath of the jury. It is helpful to obtain the prosecutor's instructions at the earliest juncture to facilitate the preparation of converse instructions in proper form. Counsel should also anticipate the prosecutor's instructions. It is fairly easy to do if counsel reviews all discovery and charging documents. Defense counsel should prepare converse and other instructions ahead of time, even if defense counsel does not have the state's instructions. See Chapter 24, Instructions, of this deskbook for a more specific treatment of instructions.

Counsel will usually know in advance of trial the battle lines with respect to evidence. It might be helpful to prepare in advance half-page "pocket briefs" that can be given to the court in the midst of argument. More important, this information will be an aid in the effort to properly preserve error.

Counsel should be prepared for a state's motion *in limine* in sexual cases. Counsel should not be intimidated by a lengthy motion filed the morning of trial that ostensibly guts the defense theory of the

case. Many of these motions are boilerplate, and the defense must preserve error and make an offer of proof.

L. (§18.38) Jury Instructions

Counsel, shortly after being employed, should prepare rough draft jury instructions by looking at MISSOURI APPROVED INSTRUCTIONS–CRIMINAL, Third Edition, and finding the applicable instructions.

If possible, counsel should inquire of the prosecutor in advance of the trial if the state's jury instructions are prepared because the defense will need the state's verdict director to prepare the defendant's converse instructions. Defense counsel will want to consider whether self-defense or lesser-included defense instructions are appropriate.

Counsel should carefully compare the criminal information or indictment with the state's verdict-director instruction. No material or prejudicial variances can exist. Section 546.080, RSMo 2000; *State v. Lomax*, 627 S.W.2d 898 (Mo. App. S.D. 1982).

If a crime may be committed in several different ways and the information charges one or more of those methods, the same method must be submitted in the verdict-directing instruction. *State v. Pope*, 733 S.W.2d 811 (Mo. App. W.D. 1987); *State v. Burkhart*, 34 S.W.2d 563 (Mo. App. S.D. 1931).

If disjunctive allegations are charged in the information, the evidence must prove them, *State v. Lusk*, 452 S.W.2d 219 (Mo. 1970), and a verdict director then can allege either one of the alternative ways, but it must be among one of those alleged in the information. *State v. Shepard*, 442 S.W.2d 58 (Mo. banc 1969).

If substantial evidence of good character can be proved, counsel will want to seriously consider whether to give a good character instruction. Substantial evidence of good character must be proved before the defense is entitled to the instruction. *State v. Campbell*, 868 S.W.2d 537 (Mo. App. E.D. 1993). Of course, counsel should be careful about putting on good character witnesses because these witnesses can be cross-examined about prior arrests and prior bad acts of the defendant.

Lesser-included instructions should be given, but only if there is proof, direct or circumstantial, or a reasonable basis in fact, *State v. Trujillo*, 869 S.W.2d 844 (Mo. App. W.D. 1994), for acquittal of the

greater offense and conviction of the lesser, *State v. Moore*, 729 S.W.2d 239 (Mo. App. E.D. 1987).

Counsel should try to decide whether the client will take the stand. Of course, issues arise in trial that force the client to take the stand. Counsel should prepare the jury in voir dire by telling them that the client may not take the stand. The authors believe that counsel should not have the jury instruction regarding the defendant's lack of testifying read to the jury because it only serves to call attention to the fact and may start the jury thinking about it. The prosecution and court will be required to prepare the normal and usual boilerplate trial instructions as well as stage-two punishment instructions.

Rule 28.02(c) requires the use of Missouri Improved Instructions, and failure to follow applicable instructions or the "Notes on Use" constitutes error, the prejudicial effect of which is to be judicially determined.

In federal court, a defendant is entitled to an instruction on the theory of defense as long as it is the correct statement of the law and the theory is supported by the evidence. *United States v. Boucher*, 796 F.2d 972 (7th Cir. 1986). As to errors, on appeal the court will review the entire record to see whether instructional errors are harmless "beyond a reasonable doubt." *Chapman v. Cal.*, 386 U.S. 18 (1967).

It may be helpful for counsel to check the circuit clerk's office or federal district clerk's office to review court files of previous similar cases. Good ideas can be obtained from looking at instructions given or refused by judges in similar cases.

There are several schools of thought as to how counsel should act at the instruction conference, which is normally held in the court's chambers. The authors normally remain quiet, do not assist or comment on the state's instructions, and make a separate specific (Rule 28.03) objection to each and every instruction given by the state. The authors know of no affirmative duty to aid the prosecuting attorney in presenting the proposed instructions to the court.

M. (§18.39) Preparation of a Trial Notebook or File Folders

Some lawyers choose to prepare a trial notebook a few weeks before the beginning of trial. Others begin a trial notebook at the beginning of the case. As described below, each tab is colored and preprinted,

with the first ten tabs relating to the pretrial phase of the case and the second ten relating to the trial of the case. In fact, by the time of trial, these sets are often split into two or three notebooks. Obviously, counsel could think of many other tab titles specific to the case. For example, a medical-intensive case might need specific tabs for various types of evidence. The local office supply store can supply the most basic of dividers that will serve this function. Some of the tabs need no description. If counsel does not use a trial notebook, file folders can be used to organize files. *See* §18.13, *supra*.

- *Docket*—Handwritten docket or notes kept by the lawyer and copies of up-to-date court dockets to provide a quick history of court appearances and actions in the case.

- *Case Info*—Bio sheet on client and intake from initial office conference. This sheet contains the contact information on the client for quick reference.

- *Things To Do*—This section contains running lists and a running witness list with all contact information showing the date of the interview and who completed it.

- *Correspondence*

- *Pleadings*

- *Prelim/Omnibus*—Transcript of preliminary hearing or federal court omnibus hearing order.

- *Discovery*—Information and documents, such as police reports, obtained from the state. Before trial, it is wise to keep this material in one place so, when disputes arise about the state's lack of disclosure, counsel will have only that material at hand. Some attorneys will want to keep a log here of when they obtained copies of these documents. Later, this material or copies can be broken up and placed in different parts of the notebook.

- *Investigation*—The defense investigation of the case is kept here at first. Often, this is a totally separate notebook, alphabetically tabbed by the last name of the witness. Just before trial, counsel can separate the prosecution from defense witnesses.

- *Medical*—Client's medical records, psychiatric evaluations, and other medical information. It is good to arrange these chronologically or alphabetically by hospital or doctor, depending on the case. Counsel should put signed client medical release authorizations here.

- *Attorney Notes*—All notes from phone conversations or office conferences with anyone involved in the case.

- *Charge/Proof*—Complaint, information, and statute that the client allegedly violated.

- *Voir Dire*—Jury list, voir dire questions, and research materials that will apply to voir dire.

- *Opening*—Outline of opening statement.

- *Prosecution Witnesses*—Outline of cross of state's witnesses. As the time for trial nears, counsel should pull investigation material to this section of notebook. The prior statements and depositions of each witness will be behind each outline.

- *Defense Witnesses*—Outline of direct examinations.

- *Jury Instructions*

- *Closing*—Outline of closing and notes kept throughout for later use.

- *Error/New Trial*—List of overruled objections and other notes for use in preparing motion for new trial.

- *Sentencing*—Outline of sentencing hearing and presentence reports.

- *Miscellaneous Research*—Copies of statutes and cases that counsel might need during trial.

VI. (§18.40) Orchestrating the Trial

All of the previous statements lead up to counsel's ability to orchestrate the trial. This is often the difference between merely adequate counsel and counsel who is capable of winning any given case, counsel who is much more valuable to the client as a bargainer

and as an advocate. Counsel who has planned well and made good use of time in the days before the beginning of the trial will be more likely to achieve the ultimate purpose—that is, getting the desired result, whether it is to win, lose (small), draw, or get rained out. Just as in war and chess, anticipation and foresight are among a lawyer's most powerful weapons. Counsel should plan so that when the last word is uttered and the trial ended, counsel can be assured that each part of the trial supported that position and that the house of cards is still intact. Counsel, of course, will be required to make a few speeches during the course of the trial. Counsel should plan that there will be some evidence to talk about in these speeches to explicitly persuade the jury of the client's point of view. It would be beneficial to rehearse these speeches in advance so that counsel does not fumble with words or delay the speech to find references, exhibits, and the words and thoughts needed. An advantage of rehearsing is that counsel will be able to polish phrases and see where the spoken word differs from the written word in its effectiveness. If the final preparation for trial is done thoroughly and seriously, counsel will know the weakness of the opponent's case.

VII. (§18.41) Things Counsel Should Do Before and During Trial

1. Know the prosecutor and the presiding judge.

2. Notice up all motions before trial and be prepared to argue all motions. Ensure that the judge rules on all motions and that rulings are reflected in the docket sheet.

3. Prepare a witness list that includes full names, addresses, and home and work telephone numbers. If any witnesses will both help and hurt the client, counsel should not call those witnesses.

4. Organize the file so that everything can be found with ease.

5. Prepare a trial notebook.

6. Determine ahead of time which exhibits will be used and several different ways to get the exhibits into evidence in case the state is initially successful in keeping out evidence with an objection.

7. Prepare voir dire questions from the issues in the case. Counsel will want jurors who can relate to the client's background.

8. Give an opening statement whenever possible, outlining counsel's theory of the case.

9. Limit the objections in the presence of the jury. The jury could perceive that counsel is hiding something. Counsel should anticipate the state's evidence and witnesses and attempt to address the testimony or exhibits through objections that are proffered outside the presence of the jury.

10. Avoid going after every witness or feeling that every witness needs to be cross-examined. A good trial lawyer will know when to shut up and sit down. Counsel should pick battles very carefully and only cross-examine witnesses that hurt the client's theory of the case.

11. Develop a theme for the defense and hammer that theme home all throughout the trial and especially in closing.

12. Prepare jury instructions before trial. Doing this will please the judge and make the trial run more smoothly. Counsel should make sure that there is a good character instruction, failure-to-testify instruction, and mere-presence-at-the-scene instruction and obtain the state's verdict-director instruction so the necessary converse instruction can be prepared.

13. Make decisions on stage-one and stage-two trial strategies. If the client is convicted, counsel is required to proceed immediately with the stage-two sentencing trial.

VIII. (§18.42) Two-Stage Trials

Section 557.036.2, RSMo Supp. 2004, provides that a jury trial must proceed in two stages. At the first stage, the jury decides whether the defendant is guilty or not guilty. The issue of punishment is not submitted to the jury at the first stage but instead at the second stage.

At the second stage, the attorneys may present supporting or mitigating evidence that includes, within the court's discretion, evidence concerning the:

- impact of the crime on the victim, the victim's family, and others;
- nature and circumstances of the offense; and
- history and character of the defendant.

Section 557.036.3.

The state proceeds first, then the defendant, and the state has the right to close the argument.

The second stage of the trial will not proceed if the defendant requests in writing, before voir dire, that the court assess the punishment in case of a finding of guilty. In effect, this greatly lengthens a trial and means counsel needs to prepare for the second stage of the trial immediately upon conclusion of the first stage.

IX. (§18.43) Exhibit Form

I	= Introduced	S	= State
A	= Admitted without objection	D	= Defendant
X	= Admitted over objection	VT	= Videotape
EX	= Offered but objected to and excluded	TP	= Transparency
		BR	= Business Records
NO	= Marked but not offered	MR	= Medical Records
WD	= Offered then withdrawn	GM	= Diagram
LTD	= Admitted for limited purpose		

In the Circuit Court of _____ County, Missouri
Division _____

State of Missouri,)
)
)
v.) Case No. _____
)
_____)
Defendant.)

EXHIBITS

Exhibit Number	Description	Show to Witnesses	Action Taken

Rose Ann Feldman*

Chapter 19

MISDEMEANORS

I. (§19.1) Introduction

II. (§19.2) "Misdemeanor" Defined

III. (§19.3) Classification of Misdemeanors

IV. (§19.4) Jurisdiction in Misdemeanor Cases

V. (§19.5) Arrest and Appearance

VI. (§19.6) Charging Document

VII. (§19.7) Statute of Limitations

VIII. Pretrial Motions

A. (§19.8) Change of Venue
B. (§19.9) Change of Judge

IX. (§19.10) Right to Trial by Jury and Demand for Trial by Jury

X. (§19.11) Trial

XI. (§19.12) Instructions to the Jury

XII. (§19.13) Motion for New Trial

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This chapter includes material from the Third Edition, which was prepared by Jeffrey J. Rosanswank.

XIII. (§19.14) Allocution and Sentencing

XIV. (§19.15) Appeal

XV. (§19.16) New Statutory Classifications of Misdemeanors

I. (§19.1) Introduction

The purpose of this chapter is to provide the reader with a basic outline of the law applicable to misdemeanor practice in the Missouri state court system. It should be noted that, in an effort to avoid the duplication of materials set out elsewhere in this deskbook, the information provided in this chapter is limited to matters that pertain only to misdemeanor practice or to law or procedure that differs from that applicable in felony cases. The reader should refer to other pertinent chapters of this deskbook that describe the general procedures applicable to the trial of all criminal cases.

II. (§19.2) "Misdemeanor" Defined

A crime is a misdemeanor if the applicable statute designates it as such or "if persons convicted thereof may be sentenced to imprisonment for a term of which the maximum is one year or less." Section 556.016.3, RSMo 2000.

III. (§19.3) Classification of Misdemeanors

Misdemeanors are classified, for the purpose of sentencing, into three categories, with the maximum punishment applicable to each category indicated below:

1. Class A Misdemeanors—Maximum punishment of one year imprisonment and a $1,000 fine for individuals; maximum punishment of a $5,000 fine for corporations
2. Class B Misdemeanors—Maximum punishment of six months imprisonment and a $500 fine for individuals; maximum punishment of a $2,000 fine for corporations
3. Class C Misdemeanors—Maximum punishment of 15 days imprisonment and a $300 fine for individuals; maximum punishment of a $1,000 fine for corporations

In lieu of a fine within the range noted above, a person convicted of a misdemeanor through which a "gain" is derived, as "gain" is defined in

§ 560.011.2, RSMo 2000, may be sentenced to a fine that does not exceed double the amount of gain from the commission of the offense. Similarly, a corporation convicted of a misdemeanor through which it derived gain may be fined in any higher amount not exceeding double the amount of the corporation's gain from the commission of the offense. An individual offender may be fined up to $20,000 under this provision. *See* §§ 557.016.2, 560.016, 560.021, RSMo 2000; § 558.011.1, RSMo Supp. 2004.

IV. (§19.4) Jurisdiction in Misdemeanor Cases

"Except as otherwise provided by law, the circuit courts shall have exclusive original jurisdiction" over misdemeanor cases. "Except as otherwise provided by law, circuit judges may hear and determine originally all" misdemeanor cases. Section 541.020, RSMo 2000.

"Associate circuit judges may hear and determine originally, with circuit judges, coextensive with their respective counties, all" misdemeanor cases. Section 541.015, RSMo 2000.

V. (§19.5) Arrest and Appearance

Upon the filing of an information charging a defendant with a misdemeanor, a summons must be issued unless the court finds reasonable grounds to believe that the defendant will not appear on the summons or that the defendant poses a danger to the crime victim, the community, or any other person. Rule 21.03(a). In that case, a warrant for the defendant's arrest may be issued. *Id*. When an indictment is returned, either a summons or a warrant for arrest may be issued. Rule 21.03(b). Former Rule 21.05, which authorized the issuance of a warrant if the court believed that the defendant would leave the state, is now incorporated into Rule 21.03(a)(1). The new Rule 21.05 sets forth the required elements for a summons.

Upon the filing of an information, the prosecutor must file a statement of probable cause. Rule 21.02. A statement of probable cause must be written and include:

- the name of the accused, or if the name is not known, some means of identifying the accused;
- the facts supporting a finding of probable cause to believe that a crime was committed and that the accused committed the crime;

- a statement that the facts are true; and
- a signed form showing notice that the making of false statements in the probable cause statement is punishable by law.

Rule 21.04.

Any person arrested for a misdemeanor without a warrant must be discharged within 20 hours unless charged with a crime and held by a warrant. *See* § 544.170, RSMo Supp. 2004.

Further, any person arrested on a warrant for a misdemeanor must be brought before a judge of the court from which the warrant was issued as soon as practicable. Rule 21.09. The judge must then inform the defendant of:

- the crime charged;
- the right to hire counsel;
- the right to request the appointment of counsel if the defendant is indigent;
- the right to remain silent; and
- the fact that any statement made by the defendant may be used against the defendant.

Rules 21.10, 31.02(a); § 544.260, RSMo 2000.

Counsel must be appointed to represent an indigent defendant who is detained or charged with a misdemeanor that will probably result in confinement in the county jail upon conviction, including appeals from a conviction in such a case. In addition, counsel must be appointed in a misdemeanor case if at any stage of the proceedings it appears to the court that, because of the gravity of the offense charged and other circumstances of the defendant, the failure to appoint counsel may result in injustice to the defendant.

The foregoing provisions notwithstanding, the court has no duty to appoint counsel if, after being informed of the defendant's rights, the defendant requests to proceed without the benefit of counsel and the court finds that the defendant has intelligently waived the right to counsel. Rule 31.02(a); § 600.042.4(2), RSMo 2000.

VI. (§19.6) Charging Document

"All misdemeanors shall be prosecuted by indictment or information in the courts of the appropriate jurisdiction." Rule 21.01; § 545.010, RSMo 2000. The prosecutor "may file an information charging the commission of a misdemeanor based upon the prosecutor's information and belief that the offense was committed." Rule 21.02. It must be supported by a written statement of probable cause as prescribed in Rule 21.04. Rules 21.02, 21.04; *see* §19.5, *supra*. It should be noted that the prosecutor's knowledge has been eliminated as a basis on which to charge by information as previously permitted in former Rule 21.02.

VII. (§19.7) Statute of Limitations

A prosecution is commenced either when an indictment is found or when an information is filed. Prosecutions for any misdemeanor offense must be commenced within one year, except in certain cases.

When fraud or breach of fiduciary duty is a material element of the offense, a prosecution may be commenced during the time the public official is in office or within two years after, but no more than three years. Section 556.036.3(1), RSMo Supp. 2004.

When an offense is based on misconduct in office, a prosecution may be commenced during the time the public official is in office or within two years after, but no more than three years. Section 556.036.3(2).

Also, the legislature has created a limited exception to the statutory period of limitation for any offense based on an intentional and willful fraudulent claim of child support arrearage to a public servant in the performance of the public servant's duties. Section 556.036.3(3).

When a sexual offense is alleged, a prosecution must be commenced within 2 years after the victim reaches 18 years of age. Section 556.037, RSMo Supp. 2004.

The general one-year time limitation starts to run on the day after the offense is committed. "An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated." Section 556.036.4.

VIII. Pretrial Motions

A. (§19.8) Change of Venue

A written application for change of venue in a misdemeanor case, whether for cause or as a matter of right, must be filed within ten days after the initial plea is entered in the case. Rules 32.03(a), 32.04(b).

B. (§19.9) Change of Judge

An application for change of judge in a misdemeanor case must be filed within ten days after the initial plea is entered in the case. But if the designation of the trial judge occurs more than ten days after the entry of the initial plea, the application must be filed within ten days of the designation of the trial judge or before commencement of any proceeding on the record, whichever is earlier. Rule 32.07(b).

A defendant who desires both a change of venue and a change of judge must join both requests in a single application. Rule 32.08.

IX. (§19.10) Right to Trial by Jury and Demand for Trial by Jury

In misdemeanor cases, after the defendant's plea of not guilty is entered, either the defendant or the prosecuting attorney may demand a jury. If no jury demand is made, the case may be tried by the associate circuit judge. Section 543.200, RSMo 2000. This provision appears to place the burden on the defendant to demand a jury trial if the defendant desires one.

Rule 27.01(a) and article I, § 22(a), of the Missouri Constitution, however, state that all issues of fact in *any* criminal case shall be tried by a jury unless trial by jury is waived. *See also* § 546.040, RSMo 2000; MO. CONST. art. I, § 18(a). "The defendant may, with the assent of the court, waive a trial by jury and submit the trial of any criminal case to the court, whose findings shall have the force and effect of the verdict of a jury." Rule 27.01(b). These provisions serve to guarantee every defendant a trial by jury unless it is waived. Nevertheless, the better practice would be to make a formal demand for trial by jury, if for no other reason than to allow the court adequate time to summon a jury.

In *State ex rel. Ashcroft v. Crandall*, 627 S.W.2d 284 (Mo. banc 1982), the Supreme Court of Missouri held that the defendant's constitutional right to waive a jury trial with the assent of the court, MO. CONST. art. I,

§ 22(a), took precedence over the state's demand for a jury trial under § 543.200.

X. (§19.11) Trial

All proceedings relating to the trial of a misdemeanor case before an associate circuit judge shall be governed by the practice in criminal cases before circuit judges, to the extent applicable and to the extent to which no other statutory provision is controlling. Section 543.220, RSMo 2000; Rule 27.03.

No person can be tried or be allowed to enter a plea of guilty in a misdemeanor case without being personally present unless the court, the prosecuting attorney, and the defendant consent to the defendant's absence. Rule 31.03(a); § 546.030, RSMo 2000. A defendant convicted of a misdemeanor must be personally present when sentence and judgment are pronounced unless the court, the prosecuting attorney, and the defendant consent to the absence of the defendant. Rule 29.07(b)(2).

If the case is tried before an associate circuit judge, the jury shall be composed of 12 persons unless a lesser number is agreed upon. The jury cannot be composed of less than 6 persons. Section 543.210, RSMo 2000.

In misdemeanor jury trials, the state and the defendant each have the right to a peremptory challenge of two jurors. Section 494.480.2(3), RSMo 2000.

During the trial of a misdemeanor case, the court may permit the jury to separate at any adjournment or recess of the court, both during the trial and during any jury deliberation. Section 494.495, RSMo 2000.

Criminal jury trials in which punishment is submitted to the jury must be bifurcated. In the first stage, the jury will decide whether the defendant is guilty or not guilty. The issue of punishment is not submitted to the jury in the first stage, although the jury will be informed of the statutory range of punishment. If the jury finds the defendant guilty, the second stage of the trial is then conducted, during which the jury decides punishment. During the second stage of the trial, evidence may be adduced supporting or mitigating punishment. Section 557.036, RSMo Supp. 2004.

XI. (§19.12) Instructions to the Jury

In the trial by jury of a misdemeanor case, the court shall instruct the jury, in writing, upon all questions of law necessary for the jury's guidance in returning a verdict. When applicable, the court may use the instructions and verdict forms as set out in MAI-CR 3d, or as otherwise authorized under Rule 28. Rule 27.03.

If the jury finds the defendant guilty of a misdemeanor offense, one of three punishments may be fixed by the jury:

1. Imprisonment in the county jail for a fixed term, not to exceed the maximum term for the particular offense
2. Imprisonment in the county jail for a fixed term, not to exceed the maximum term for the particular offense, and a fine, the amount of which will be fixed by the court
3. No imprisonment, but a fine, the amount of which will be fixed by the court

See § 558.011, RSMo Supp. 2004; § 560.026, RSMo 2000; MAI-CR 3d 304.40.

Effective June 27, 2003, various statutory changes were promulgated, among them § 557.036, RSMo Supp. 2004, which requires that criminal jury trials be bifurcated if there is sentencing by the jury. *See* §19.11, *supra*. Jury instructions have, therefore, undergone significant changes.

One of the most significant changes is that verdict directors will not contain a punishment clause. Therefore, the last paragraph of the verdict director (which begins with, "If you find the defendant guilty. . . you will assess and declare one of the following punishments . . .") is now deleted unless the offense is an infraction (trespass second degree). See the electronic version of the supplement of MAI-CR 3d, which is available in CD form from the Publications Department of the Supreme Court of Missouri (573/751-7337) for a fee. For a list of revisions, see Supreme Court of Missouri Order dated June 27, 2003, *available at* www.osca.state.mo.us/sup/index.nsf/OrdersRules?OpenView.

XII. (§19.13) Motion for New Trial

"The court may grant a new trial upon good cause shown." Rule 29.11(a). In cases tried before a jury, a motion for a new trial must be filed that alleges all errors counsel wishes to preserve for appellate review.

Rule 29.11(d). In cases tried without a jury, a motion for a new trial is not necessary to preserve any matter for appellate review, and the better practice is not to file one because doing so limits appellate review to the issues presented in the motion for new trial—except as to issues regarding the jurisdiction of the court, the sufficiency of the evidence, or whether the indictment or information states an offense. Rule 29.11(e)(2).

XIII. (§19.14) Allocution and Sentencing

At the time of sentencing in a misdemeanor case, the defendant must be informed by the court of the jury's verdict and asked whether there is any legal cause to show why judgment should not be pronounced. Section 546.570, RSMo 2000. The requirement that allocution be provided to the defendant at the time of sentencing, however, is directory as to misdemeanor cases, and the failure to provide allocution at the time of sentencing in a misdemeanor case shall not invalidate the judgment or sentence of the court. Section 546.580, RSMo 2000.

"A sentence of imprisonment for a misdemeanor shall be for a definite term and the court shall commit the [defendant] to the county jail or other authorized penal institution for the term of [the] sentence or until released under procedure established elsewhere by law." Section 558.011.3(2), RSMo Supp. 2004.

Historically, the responsibility of sentencing assessment in misdemeanor jury trials has been exclusively that of the jury. *State v. Finch*, 746 S.W.2d 607 (Mo. App. W.D. 1988). The legislature, however, has defined a class of "persistent misdemeanor offender[s]," described as those who have pleaded guilty to or been found guilty of two or more class A or B misdemeanors in violation of certain specified sections of the Criminal Code, which offenses were committed at different times. Section 558.016.5, RSMo Supp. 2004. When the trial court determines that an individual is a persistent misdemeanor offender as defined by statute, the responsibility for the assessment of punishment is removed from the jury and becomes the exclusive responsibility of the court. Section 557.036.4(2), RSMo Supp. 2004.

XIV. (§19.15) Appeal

The Rules of Appellate Procedure, Rule 30, *et seq.*, apply to both felony and misdemeanor cases. "After the rendition of final judgment in a criminal

case, every party shall be entitled to any appeal permitted by law." Rule 30.01(a).

In any misdemeanor case, a record shall be kept, and any persons aggrieved by a judgment in the case may appeal upon that record to the appropriate appellate court. Section 543.335, RSMo 2000. At the judge's discretion, the record may be stenographic or one made by electronic, magnetic, or mechanical sound or video recording devices. *Id*. When the record is made by other than a court reporter, the clerk of the court must forward the tape or record to the clerk of the appropriate appellate court, who *may* then arrange for the written transcript. *Id*. Section 512.180.2, RSMo Supp. 2004, states in pertinent part that "in any misdemeanor case . . . a record shall be kept . . . ."*See also* § 543.335.

XV. (§19.16) New Statutory Classifications of Misdemeanors

Some criminal offenses have been revised in Chapters 569 and 570, RSMo.

For example, the amount for a misdemeanor stealing charge is now less than $500. Section 570.030, RSMo Supp. 2004. Counsel should review Chapters 569 and 570, RSMo, for other changes. It is best to review the statutes and supplements to make sure that the defendant has been charged correctly.

A misdemeanor stealing offense can no longer be enhanced to a felony stealing charge unless:

- the accused has been convicted on two separate occasions of a stealing-related offense within ten years of the date of occurrence of the present offense; and
- the two prior convictions resulted in the defendant serving a sentence of ten days or more.

Section 570.040, RSMo Supp. 2004.

James R. Robison*

Chapter 20

TRIALS

I. (§20.1) Introduction

II. (§20.2) Jurisdiction

III. (§20.3) Pleadings

IV. (§20.4) Ethical Considerations

V. Multiple Defendants

A. (§20.5) Representation of Multiple Defendants
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VI. (§20.7) Trials on Multiple Counts

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VIII. Rights of Defendants

A. (§20.10) Rights of Defendant During Trial
B. (§20.11) Right to Effective Assistance of Counsel—Jury Qualification Forms
C. (§20.12) Right to Be Personally Present
D. (§20.13) Right Against Self-Incrimination
E. (§20.14) Right to Trial by Jury
F. (§20.15) *Batson* Challenges During Jury Selection

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G. (§20.16) Bifurcated Trials
H. (§20.17) Right to Counsel
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J. (§20.19) Doctrine of Fundamental Unfairness

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XI. (§20.22) Defense Evidence

XII. (§20.23) Order of Proof

XIII. (§20.24) Should the Defendant Testify?

XIV. (§20.25) Waiver of Jury

I. (§20.1) Introduction

Since the first edition of this deskbook was published in 1977, there have been many changes in the practice of criminal law. One of the changes resulted from the enactment of a new criminal code very shortly after that publication. Another change resulted from the amendment of Article V, the judicial article of the Missouri Constitution, which became effective January 2, 1979. The amendments to Article V resulted in the creation of the unified trial court system, with all former magistrates and probate judges becoming associate circuit court judges. Significant changes were made regarding appellate jurisdiction in felony cases. Before the amendment, the Supreme Court had exclusive appellate jurisdiction in all felony cases.

Perhaps no change in the criminal justice system has been more significant than the creation and development of the Missouri public defender system. Before the establishment of the office of public defenders, the defense of "indigent" defendants was handled by appointed counsel on a case-by-case basis. The appointments were made by the trial court, and the work was done largely on a pro bono basis. When the first public defender system was authorized by the General Assembly, the system was confined to certain designated counties. The General Assembly did, however, appropriate a limited amount of funds to be applied to the payment of court-appointed defense counsel in those circuits where the state system was not in place. This was generally a very limited amount and never covered the total cost of defending a

criminal case. The trial judges had to parcel the money out with an eye to making the appropriation for each year extend through the end of the year. Consequently, the amount appropriated usually represented only a fraction of the total cost.

Generally, the attorneys who were appointed were from the younger members of the bar in any particular circuit. It was not unusual, however, for senior members of a local bar to receive appointments, depending on the complexity of the particular case. While this system sometimes created economic problems for particular lawyers, it had a feature that no longer exists in the criminal justice system—it was an excellent way for a young lawyer to gain trial experience. With the advent of the public defender system and its extension to all circuits, that source for gaining trial experience no longer exists. There is an entire generation of lawyers, including many excellent trial lawyers, who have never had the occasion to try a criminal case. Today, a very high percentage of all criminal cases filed in Missouri are handled by public defenders. This phenomenon has resulted in the creation of an excellent training ground for those attorneys who spend a part of their career with the public defender service, but it has left a huge void for many others in the context of trial experience.

It has also probably affected the general attitude of members of the bar toward the defense of criminal cases. There are undoubtedly many attorneys who would feel that a publication such as this is totally irrelevant to their practice because they are unlikely to ever be either hired or appointed to defend a criminal case.

One other significant change in the trial of criminal cases is in the type of cases being filed. In years past, drug cases were a small fraction of total criminal prosecutions. Today, at least from anecdotal evidence, they may very well represent the majority of all criminal prosecutions.

II. (§20.2) Jurisdiction

Missouri has a "single tier" court system at the trial level. MO. CONST. art. V, § 14. Original jurisdiction over all criminal matters is vested in the circuit court. Some limitation exists, however, on the jurisdiction of the associate divisions of the circuit court.

Associate circuit judges "may hear and determine" all criminal matters provided by law, as well as such additional cases or classes of cases as may be provided by law. Section 478.220, RSMo 2000, now makes that provision. Essentially, the original jurisdiction of an associate circuit

judge includes all misdemeanor actions; in felony cases, however, an associate circuit judge is restricted to those actions that occur before the filing of the information. Felony information can only be filed in the circuit division. Thus, an associate circuit judge in a felony case may take such actions as setting bail and hearing motions to suppress evidence as well as any other type of motion that can be filed before the information.

Perhaps the most significant role of the associate circuit division in felony cases is to conduct preliminary hearings. This power is related to a restriction on circuit court jurisdiction. Misdemeanor cases may be filed originally in either the associate or circuit division, although the vast majority of misdemeanors are filed in the associate division. Either division has jurisdiction to try and determine misdemeanor cases. The circuit court, however, cannot acquire jurisdiction of a felony case unless there has first been a preliminary hearing, or the waiver thereof, in an associate division, or unless the case is initiated by indictment. If there has been an indictment by a grand jury, the case may be filed directly in the circuit division. Grand juries are the exception rather than the rule in outstate Missouri, so the vast majority of all felony cases in those areas must originate in an associate division. Grand juries are in session more frequently in the metropolitan areas, so a larger percentage of felony cases there may be filed originally in the circuit court.

This does not mean that a circuit judge is wholly without jurisdiction to conduct a preliminary hearing in a felony case before it is actually filed in the circuit division; nor does it mean that an associate circuit judge may not preside over a felony trial. Section 478.240, RSMo 2000, grants to the presiding judge in a circuit the power to assign an associate judge anywhere in the circuit to hear such cases or classes of cases as the presiding judge may designate. But the judge who conducted the preliminary hearing in a case may not be assigned to hear the trial of that case. Section 478.240.2(2).

The Supreme Court is authorized to make temporary transfers of judicial personnel from one court or district to another. *See* MO. CONST. art. V, § 6. Under special assignment by the Supreme Court, any circuit judge or associate circuit judge may be assigned to sit temporarily on any court in the state.

The jurisdiction for appeals from misdemeanor cases tried in the associate circuit division no longer includes an automatic right to a trial de novo in the circuit court. Section 543.335, RSMo 2000, requires that, in any misdemeanor case tried before an associate circuit court, a record

must be kept and the appeal on that record must be to the appropriate appellate court. At the discretion of the judge, the record may be by stenographic record or by a recording device.

The standard remedy for attempting to avoid the effect of adverse pretrial publicity has been to change the venue of a case to some other location where, hopefully, a jury can be selected from persons who have not been exposed to the pretrial publicity. Historically, this has involved transferring the entire trial to another county. It is no longer mandatory that the entire trial be moved. Section 494.505, RSMo 2000, provides that, under certain circumstances, the trial may remain in its original county with a jury to be selected from some other county and then transported to the place of trial. When this procedure is invoked, the court, at its discretion, may order the jury to be selected from another county in the same circuit, from a county in any adjoining circuit, or from a county that is neither in the circuit nor in an adjoining circuit.

III. (§20.3) Pleadings

Criminal cases are initiated by written pleadings just as civil cases are ordinarily initiated by the filing of a petition. The criminal pleading that is analogous to a civil petition may be either:

- a complaint;
- an information; or
- an indictment.

Regardless of the form used, the primary function of the pleading is to inform defendants specifically of the charges against them.

Complaints, which are used when the prosecuting attorney initiates a felony case in the associate circuit division, must comply with Rule 22.02 as to form and contents. The form and content of both indictments and informations are governed by Rule 23.01.

An indictment is, of course, the form of initial pleading used when the charge originates with a grand jury. An information is the initial pleading filed by the state in the circuit division when the charge originates by the filing of a prosecutor's complaint in the associate circuit division and there has been either a preliminary hearing or an express waiver of a preliminary hearing.

There are several pleadings that may be filed on behalf of a defendant. If the state's pleading, whether an indictment or information, is not

believed to be in compliance with the applicable rule as to form and content, that issue can be raised by a motion to dismiss. If it is believed that the indictment or information alleges the essential facts of the offenses charged but fails to adequately inform the defendant of the particulars of the offense sufficiently to prepare a defense, this issue may be raised by filing a motion for a bill of particulars in accordance with Rule 23.04. It should be noted that a motion for a bill of particulars must generally be filed within ten days following arraignment, which will usually occur at the defendant's first appearance in the circuit court. Rule 23.04 does allow a court the discretion to allow a motion for a bill of particulars to be filed after the ten-day period.

Issues pertaining to improper joinder of offenses or defendants may also be raised by motion. *See* Rules 23.05 and 23.06.

Special rules of pleading apply when a defendant wishes to raise the defense of not guilty by reason of mental disease or defect. The title of § 552.010, RSMo 2000, "Mental disease or defect defined," suggests that it contains a codified definition of *mental disease or defect*. This section is more helpful for the purpose of defining some of the abnormalities that do not constitute a *mental disease or defect*. Section 552.030.1, RSMo 2000, does contain a description of the defense. It provides that, "A person is not responsible for criminal conduct if, at the time of such conduct, as a result of a mental disease or defect such person was incapable of knowing and appreciating the nature, quality, or wrongfulness of such person's conduct." Section 552.030.2 contains the requirement that the defense must be specifically pleaded, either at the time of arraignment or at such later date as the court may permit. Courts are generally fairly liberal in allowing the assertion of the plea at a later date because the issue of a defendant's mental stability is something that sometimes manifests itself well after the time for entering a plea to the charge. An interesting aspect of § 552.030.2 is that it grants to the prosecuting attorney the power to accept a defense of not guilty by reason of mental disease or defect when counsel for a defendant asserts the defense in writing accompanied by a statement that the accused has no other defense. If the written statement is filed on behalf of the accused and the prosecuting attorney accepts the defense, the court must enter a judgment of acquittal and order the commitment of the accused as provided in § 552.040, RSMo 2000. In a rare case, the manifestation of a mental disease or defect will be so apparent that a prosecuting attorney will be willing to accept the defense. It should be noted that a prosecuting attorney cannot accept the defense until there has been a pretrial examination of the defendant as provided in § 552.020, RSMo 2000.

The mental defect issue also arises in the context of the ability of an accused to understand the proceedings against the accused or to assist in the defense. *See* § 552.020.1. It is therefore possible for the onset of a mental disease or defect or other mental abnormality to occur after the commission of an offense, in which case it may not be asserted as a defense, but it may preclude the defendant from being able to assist in the defense to the extent that the court must postpone the trial as long as the incapacity lasts. Trial judges are empowered to raise the issue on their own motion even when it has not been pleaded if they have "*reasonable cause to believe that the accused lacks mental fitness to proceed . . . .*" Section 552.020.2 (emphasis added). It has been held, however, that a trial court does not have the authority to compel a defendant to undergo a psychiatric examination to determine the defendant's mental state at the time of an alleged crime when the defendant has never asserted mental disease or defect as a defense. *State ex rel. Proctor v. Bryson,* 100 S.W.3d 775 (Mo. banc 2003). The rationale of *Proctor* is that there are no statutory provisions that would allow the court or the state to assert a defense of mental disease or defect on behalf of a defendant. The authority granted to the trial judge to raise mental fitness on the court's own motion would, therefore, appear to be limited solely to the issue of fitness to proceed to trial as opposed to the existence of the requisite mental competence at the time of the commission of the alleged offense.

In connection with the mental disease or defect defense, it should be remembered that there is a presumption that all persons are free of any mental disease or defect that would exclude criminal responsibility. Consequently, the burden of proving that defense remains with the defendant. Section 552.030.6. Finally, an acquittal by reason of a mental disease or defect does not mean that the accused is released from custody. The trial court must order the commitment of such an individual to the custody of the Director of the Missouri Department of Mental Health. A defendant who has asserted the defense of mental disease or defect may, at the defendant's option, have the jury instructed as to the contents of § 552.040.1. Section 552.040.1(2) provides a definition of a "secure facility" as one "in which persons committed to the department of mental health pursuant to [Chapter 552, RSMo,] shall not be permitted to move about the facility . . . nor to leave the facility . . . without approval by the head of the facility . . . without adequate supervision consistent with the safety of [the person and] the public."

Counsel should strongly consider making a request for such an instruction so that the jury hears from the court that an acquittal does

not automatically mean that the accused will be released back into society.

Rule 24.02(a) spells out the pleas that may be entered in criminal cases. A defendant may plead:

- not guilty;
- guilty;
- not guilty by reason of mental disease or defect excluding responsibility; or
- both the general plea of not guilty and the plea of not guilty by reason of mental disease or defect.

If a defendant refuses to plead, or when the defendant is a corporation, the court is required to enter a plea of not guilty. Rule 24.02(c) places further restrictions on the acceptance of a guilty plea. The court is not permitted to accept a guilty plea without addressing the defendant personally in open court to determine that the plea is voluntary and not the result of force or threats or promises that go beyond the terms of a plea agreement. Rule 24.02(d) addresses the procedure for plea bargains. Rule 24.02(b) is further designed to ensure that a defendant who is pleading guilty is doing so with a full understanding of the defendant's rights and the consequences of the plea. Counsel should never participate in entering a guilty plea without first having reviewed the matters covered by Rule 24.02(b) with the accused.

It should be kept in mind that courts are not obligated to accept guilty pleas based on plea bargains between the prosecuting attorney and counsel for the accused. This will usually not be a problem. The sheer number of criminal prosecutions could seriously limit the criminal justice system if there were not some method of disposing of cases with plea bargains with some degree of certainty that the plea bargain will be accepted by the court. A safety valve of sorts is available when a court will not accept the terms of a plea bargain. In that event the court is required by Rule 24.02(d)4 to permit an accused to withdraw a guilty plea entered under the rejected plea bargain.

Finally, the court is obligated by Rule 24.02(e) to expressly find that there is a factual basis for the plea before entering a judgment of guilty based on a plea of guilty. In many circuits the court will require a written petition for leave to enter a plea of guilty. Those petitions are prepared on forms available in the clerk's office. One section of the petition will call for a written description of the facts to which the defendant is pleading guilty.

It is possible in certain situations to enter a guilty plea without the accused first acknowledging the existence of the factual basis for a finding of guilt. Missouri courts do not recognize the plea of *nolo contendere*, or "no contest," which is a permissible plea in some jurisdictions. *State v. Norman,* 380 S.W.2d 406 (Mo. banc 1964). If, therefore, a defendant refuses to plead, or if the plea as entered does not confess the charge to be true, the court is required to proceed as if the defendant had formally pleaded not guilty. Section 546.020, RSMo 2000. The unavailability of the *nolo contendere* plea has been tempered somewhat by recognition of the so-called "Alford Plea," named for *North Carolina v. Alford,* 400 U.S. 25 (1970). Under this decision, if the trial court will agree, an accused may enter a plea of not guilty without admitting all of the facts that would constitute the elements of the offense. By entering an Alford Plea, which is very similar to a plea of *nolo contendere*, a defendant assents to the charge without technically admitting guilt. When a court is willing to accept an Alford Plea, the plea stands on the same footing as one in which the accused has specifically admitted the commission of the particular acts constituting the offense. *Jenkins v. State,* 788 S.W.2d 536 (Mo. App. S.D. 1990).

Some judges will not accept Alford Pleas, and the failure to do so is not an abuse of discretion because there is no constitutional right to have a guilty plea accepted. *State v. Jackson,* 651 S.W.2d 547 (Mo. App. W.D. 1983).

There is another issue that may potentially arise in the trial of offenses against the person, particularly intra-family disturbances. Missouri law now recognizes the so-called "battered spouse syndrome." *See* §§ 563.031 *et seq.,* RSMo 2000. The syndrome has been defined as a "type of post-traumatic stress disorder that manifests itself in a collection of symptoms including a highly fearful state, isolation, withdrawal, and a heightened sensitivity to situations that precede violence or an increase in violence." *State v. Edwards,* 60 S.W.3d 602, 613 (Mo. App. W.D. 2001). While the battered spouse syndrome does not constitute a defense, evidence of the presence of the syndrome may be asserted, under the proper circumstances, in aid of the question of whether the accused acted in self-defense or in the defense of another. Its function is to aid a jury in determining whether a defendant's fear and claim of self-defense are reasonable. *Id.* at 613. A defendant who proposes to offer evidence of the battered spouse syndrome is required to notify the court in writing in advance of the trial. To that extent, the notice is analogous to a pleading. If the issue is properly asserted, the defendant will be entitled to modification of the pattern jury instruction on self-defense. See

Edwards, 60 S.W.3d 602, for a good discussion of the jury instruction issue.

IV. (§20.4) Ethical Considerations

Every lawyer will sooner or later be asked how it is possible to represent someone who is known by the lawyer to be guilty. There is obviously a notion in the minds of many people that only innocent persons should have the right to counsel. In reality, a very high percentage of all criminal prosecutions result in a conviction, and most of those convictions result from pleas of guilty. It is, therefore, a foregone conclusion that representing defendants in criminal prosecutions will entail representing a good many guilty individuals. It has to be kept in mind that Missouri has developed a criminal justice system that starts with the concept that all persons are presumed to be innocent, and the burden rests on the state to prove guilt beyond a reasonable doubt. There is, therefore, clearly nothing unethical in protecting the rights of an accused in a criminal prosecution. The United States is a nation of laws, and over centuries of trial and error, it has been concluded that the rights of the innocent can best be protected by granting the right to a fair trial to all persons.

It is, therefore, the ethical obligation of defense counsel to rigorously guard a client's rights. See generally DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER (West 1973), for a good discussion of the history and rationale of the trial procedures designed to protect the rights of the criminally accused.

An excellent starting point for an understanding of a lawyer's ethical obligations to the client and to the criminal justice system is the very broad statement contained in the Preamble to Rule 4 of the Rules of Professional Conduct. An online version of the Rules of Professional Conduct is available at:

www.osca.state.mo.us

Zealous protection of the rights of an accused does not, of course, justify counsel in taking actions that would otherwise be inappropriate. Under Rule 4-1.16, it is mandatory that a lawyer terminate representation of a client if:

- the representation would result in violation of the Rules of Professional Conduct or other law; or

- the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes to be criminal or fraudulent; or
- the client has or is attempting to use the lawyer's services to perpetrate a crime or fraud.

Under Rule 4-3.3, lawyers are prohibited from knowingly making a false statement of material fact or law to the court or from failing to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. A lawyer may not ethically offer evidence that is known to be false, and a lawyer who learns of the falsity of evidence after it has been offered is obligated to take remedial steps. Rule 4-3.3 is followed by detailed comments dealing with misleading legal arguments, false evidence, perjury by a criminal defendant, and requisite remedial measures, among other things. These comments will be extremely helpful in sorting out just what counsel is required to do in order to remain within ethical bounds.

In so-called "high-profile" criminal cases, the media sometimes asks counsel about the details of the case; this can bring on ethical problems. There is no one "good way" to deal with the media in this context. It probably is safer to err by saying too little rather than too much. Rule 4-3.6 will provide substantial guidance in dealing with pretrial publicity. Extrajudicial comments that will have a substantial likelihood of prejudicing a proceeding are prohibited. Criminal trials, to a much greater extent than civil trials, offer opportunities to abuse the restrictions on pretrial publicity. To a large extent, this results from the role of the media in highly publicized cases. There is a proliferation of television programs that are more or less on the air around the clock. They have spawned a number of legal commentators who sometimes become panelists to discuss the latest high-profile cases. Rule 4-3.6 recognizes the complexity of the problems facing counsel in this type of case. The opening sentence of the Comment to Rule 4-3.6 states that: "It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression."

Balancing those rights is critical, however, because there can be serious consequences from overdoing pretrial publicity, not only from the standpoint of interfering with the rights of the state and the accused, but also because of the sanctions that may be imposed on counsel who go too far. See 50 J. MO. BAR 335 (1995) for an excellent article written by Cape Girardeau County Prosecuting Attorney H. Morley Swingle and entitled *Warning: Pretrial Publicity May Be Hazardous to Your Bar License.*

Rule 4-3.8 contains several provisions that specifically apply to prosecuting attorneys. A prosecuting attorney occupies a role that is somewhat unique in the adversarial process by which attorneys try criminal cases. The prosecuting attorney is not an advocate in the ordinary sense of the word but is the people's representative. As such, the prosecuting attorney's primary duty is not to secure a conviction but rather to see that justice is done. *State v. Harrington,* 534 S.W.2d 44, 49 (Mo. banc 1976). Prosecuting attorneys have, therefore, a specific obligation to refrain from any methods calculated to produce a wrongful conviction. *Jackson v. State,* 465 S.W.2d 642 (Mo. 1971). In addition to presenting the state's case, it is the duty of a prosecuting attorney to see that the accused receives a fair trial. *State v. Grays,* 856 S.W.2d 87 (Mo. App. E.D. 1983).

One of the very critical obligations imposed on prosecuting attorneys is the duty to disclose, even without request, any exculpatory evidence, including evidence that may be used to impeach a witness for the state. *State v. Robinson,* 835 S.W.2d 303 (Mo. banc 1992).

Notwithstanding the ethical considerations that apply to defense counsel, it is not the prerogative of counsel to decide the guilt or innocence of an accused. On the other hand, counsel in criminal cases is constantly confronted with the question of whether an accused is well-served to simply dump the issue of guilt or innocence in the lap of the jury. Counsel must evaluate a case and discuss the risks of going to trial with the client. Counsel will generally be in a better position than the client to objectively assess the risks. There will be few cases in which counsel should not at least explore what disposition of a case may be available through a plea bargain, and once the options are known, the accused should be fully informed as to all options.

V. Multiple Defendants

A. (§20.5) Representation of Multiple Defendants

Criminal cases quite frequently involve multiple defendants charged jointly with the same offense. Counsel assumes many risks by undertaking to defend more than one defendant in the same case. In many cases involving multiple defendants, the existence of a conflict of interest for counsel will be apparent from the outset. Officers involved in the investigation of criminal cases frequently need the cooperation of one defendant to make a case against another. In many cases, the degree of culpability will vary tremendously. This will almost always present an opportunity for one jointly charged defendant to obtain more lenient

treatment by "cooperating with the state" in making a case against a co-defendant. When two jointly charged defendants are represented by the same counsel, one of the defendants will totally lose any advantage that might otherwise be available from "cooperating." Sometimes this is an issue that does not become apparent until well into the prosecution of a case. Consequently, it is virtually impossible for counsel to evaluate a situation early enough to know with certainty that counsel will not be placed in the awkward position of having one client who stands to benefit by agreeing to testify against another client. The only safe way to avoid this predicament is to avoid undertaking representation of more than one defendant in the same criminal case.

Missouri does not have a "witness immunity" rule as such, but Rule 27.04 results in something quite similar. Under that rule, when two or more persons have been charged jointly, the court may, upon motion of the state, order the discharge of one of the defendants in order to make that defendant available as a witness for the state against another defendant in the same case. This motion must be made before the defendants have started putting on defensive evidence. When a defendant has been discharged under Rule 27.04, the discharge will bar a subsequent prosecution of the discharged defendant for the same offense.

B. (§20.6) Separate Trials

Section 20.5 above discusses the potential problems facing counsel from an ethical standpoint if counsel undertakes the representation of more than one defendant in the same case. A related problem can come up in the context of having more than one accused tried jointly, even when each is represented by separate counsel. Judicial efficiency is often cited as a reason for charging multiple defendants in the same case. There is certainly some advantage to having to assemble witnesses only one time, not to mention the time that is saved for the prosecution. These advantages have to be weighed against the prejudicial effect that a trial of multiple individuals can have on one or more of the defendants. It sometimes becomes very difficult for a jury to separate the evidence admissible against one defendant from that admissible against another. The remedy, when it is believed that a joint trial will result in prejudice against one or more defendants, is a motion for a severance. This is a motion that will be difficult to win.

At one time a jointly charged defendant was entitled to a severance as a matter of right, except in cases of rape and sodomy, as long as a motion for severance was filed before the commencement of the trial. That

remedy no longer exists as a matter of right. The decision to sever now rests within the discretion of the trial court. *State v. Isa,* 850 S.W.2d 876 (Mo. banc 1993). In *Isa*, the Court held that a motion to sever a joint trial is appropriate only when there is a serious risk of compromise of a defendant's rights or of the jury's ability to make a reliable judgment about guilt or innocence. These are decisions that are obviously very subjective in nature and sometimes much easier to analyze in hindsight than before the commencement of a trial. Unfortunately, by that time it will be too late to preserve the issue by motion, so any time it is a potential issue it should be raised by motion at the earliest opportunity.

VI. (§20.7) Trials on Multiple Counts

Joinder of offenses into multiple counts in a single indictment or information is allowed if the offenses charged "are of the same or similar character or based on two or more acts that are part of the same transaction or on two or more acts or transactions connected or that constitute parts of a common scheme or plan . . . ." Rule 23.05; *see also* § 545.140.2, RSMo 2000.

The breadth of Rule 23.05 is consistent with the rule that a defendant in a criminal case has no federal or state constitutional right to be tried on only one offense at a time. *State v. Perkins*, 826 S.W.2d 385 (Mo. App. E.D. 1992).

There is, nevertheless, judicial discretion to grant a severance of properly joined criminal offenses if a denial of a severance would result in clear prejudice of a defendant's right to a fair trial. *State v. Allbritton*, 660 S.W.2d 322 (Mo. App. E.D. 1983). The joinder of offenses is either proper or improper as a matter of law, and if the joinder is proper, whether to grant a severance is left to the discretion of the trial court. *State v. Hobbs*, 826 S.W.2d 851 (Mo. App. E.D. 1992).

The procedure for obtaining a severance is set out in Rule 24.07. The Rule requires that motions for severance of offenses be supported by a particularized showing of substantial prejudice if the offenses are not tried separately. The court must find the existence of a bias or discrimination against the party that requests a separate trial of the offense.

The filing of a motion for severance is essential. The trial court has no alternative and must try all offenses charged in a single indictment or information to one jury in a single trial when no motion for severance is filed. *State v. Shubert*, 747 S.W.2d 165 (Mo. App. W.D. 1988).

Factors to be considered by a trial court in ruling on a motion for severance include the following:

- The number of offenses charged
- The complexity of the evidence
- Whether the trier of fact will be able to distinguish the evidence and apply the law intelligently to each offense

State v. Shive, 621 S.W.2d 715 (Mo. App. S.D. 1981); *State v. Stoer*, 862 S.W.2d 348 (Mo. App. S.D. 1993).

Only the evidence of the state will be considered by a court of appeals in reviewing the trial court's refusal to grant a severance. *Perkins,* 826 S.W.2d 385*: State v. Morant*, 758 S.W.2d 110 (Mo. App. E.D. 1988).

Because the propriety of joinder is a matter of law, the trial court's decision is not entitled to deference. *State v. Jones*, 863 S.W.2d 353 (Mo. App. W.D. 1993).

The extreme prejudicial effect of a jury hearing evidence of more than one offense was recognized by the Supreme Court in *State v. Green*, 236 S.W.2d 298, 301 (Mo. 1951), in which the Court said:

> Evidence of other separate and distinct robberies, of which there has been no charge or conviction, is not admissible either for the purpose of impeaching the defendant as a witness or testing his credibility *and it is difficult to conceive of anything more prejudicial than the detailed recitation of six independent robberies.*

Id. (emphasis added).

Green did not directly deal with the issue of improper joinder of offenses, but it clearly recognizes the prejudicial effect when a jury is allowed to hear evidence of multiple offenses.

For an example of a case in which joinder was held to be improper, see *State v. Wood*, 613 S.W.2d 898 (Mo. App. W.D. 1981). In *Wood*, the court of appeals held that the trial court properly permitted joinder of a number of robberies committed at one motel but erred in allowing those counts to be joined with a charge of robbery at another motel. The first set of robberies had occurred at a motel on East 31st Street in Kansas City. The other occurred 30 or 40 minutes later at a motel on South Highway 71 in Kansas City. The court of appeals said: "To avoid the emasculation of the evidentiary rule, the joinder rule must be construed so that joinder is permitted only when proof or evidence of the

commission of one crime must be necessary to the proof of the commission of the other crime." *Id.* at 901.

To be a "common scheme or plan" for purposes of joinder under Rule 23.05, the offenses charged must be products of a single or continuing motive. *State v. Allen*, 674 S.W.2d 606 (Mo. App. E.D. 1984). When the joinder of offenses that are not part of a common scheme or plan is allowed, the defendant is exposed to prejudice by allowing proof of commission of unrelated crimes. In that situation, a reviewing court must be able to declare beyond a doubt that the tainted evidence did not affect the jury in its fact-finding process. *State v. Smith*, 682 S.W.2d 861 (Mo. App. E.D. 1984). In that regard, because the propriety of joinder is a matter of law, the trial court's decision is not entitled to deference. *Jones,* 863 S.W.2d 353.

As a matter of precaution and to avoid waiving the issue, counsel might consider raising the issue of improper joinder of offenses by a motion under Rule 24.07 in every case when the indictment or information charges more than one offense. The prejudicial effect, although not obvious in pretrial proceedings, may become more apparent as the state's evidence develops, and as a question of law the issue is then reviewable by a court of appeals.

Any motion requesting a separate trial, therefore, should be as detailed as possible, and every effort should be made to offer the best evidence available in support of the prejudicial effect of denying a separate trial. The opinion in *United States v. Lane*, 474 U.S. 438 (1986), may be helpful. In *Lane*, the Supreme Court extensively discussed the effect of misjoinder and then held that "error involving misjoinder . . . requires reversal only if the misjoinder results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'"

This does not mean to say that a defendant should abandon all hope of obtaining a severance. See, e.g., *State v. Williamson*, 668 S.W.2d 597 (Mo. App. W.D. 1984), in which a defendant showed prejudice when he made a convincing showing that he had important testimony to give concerning one count and a strong need to refrain from testifying on another count.

VII. Practical Considerations

A. (§20.8) Generally

A thorough knowledge of the facts in any given case is critical. Facts have to be considered in the broad context of not only physical actions but also mental processes. Because of the element of *mens rea*, the mental intent of an individual can determine whether the very same physical act is criminal conduct or innocent behavior. In some instances, the state of mind of the defendant can be used to reduce the degree of an offense.

Much of this depends totally on what the defendant was thinking and the ability to convey those thoughts to the jury within the framework of the rules of evidence. The best source of information as to the defendant's state of mind is the defendant. It is essential, therefore, that counsel have the confidence of the client and the ability to communicate with the client.

In fixing on the facts, it is a safe rule to be skeptical of what counsel is told by the investigating officers and to be equally as skeptical of what counsel is told by the defendant.

Defendants in criminal cases take many approaches to communicating with their attorneys. Not surprisingly, a fair number will simply lie to their lawyer; some will hold back and only give up information as it is directly requested; some will lack the communicative skills to even tell their own version; a fair number will play mind games with counsel; a significant number never seem to comprehend the seriousness of their situation; and just about as many overreact to the extent of being almost terrified and, therefore, do not communicate well at all.

Faced with this problem, it is still important to continue to rely on the defendant for as much information as can be obtained from the defendant and to then check out everything counsel is told with as many sources as possible.

The more counsel knows about the facts, the less apt counsel will be to ask the wrong question or to step into other traps in presenting evidence or cross-examining the state's witnesses. Counsel can also avoid overstating or, even worse, misstating the case in the opening statement to the jury.

One important objective in dealing with a client in the pretrial process should be to identify the issues that will be helpful to the defense *and that can be supported by believable evidence*. Conversely, this will assist counsel in eliminating issues on which the evidence might not be reasonably believable.

In other words, defense counsel should strive to narrow the presentation of evidence to the extent that the jury will not have to decide nonessential issues. The law of averages alone will cause some of those issues to be decided against the position of the defendant. The strength of the state's evidence will naturally cause other issues to be decided against the defendant. Each issue that is decided against a defendant increases the chances of other issues being decided against the defendant. If a jury decides a number of nonessential issues contrary to the interest of a defendant, it will increase the likelihood that the jury will weigh the evidence against a defendant on the essential issues.

The focus, therefore, should be on streamlining a defendant's evidence to the extent that it is practical so the jury will not be asked to decide matters that are not essential to the theory of defense. The goal should be to reduce to the narrowest extent those issues on which the defense will have the burden of persuasion. Obviously, the burden of proof on most issues is with the state, and nothing should be offered that will cause the jury to think otherwise.

This same reasoning should be used to prevent the state from getting into matters that are easily proven but not relevant. The reception of evidence, when the objection is its relevancy, is largely discretionary with the trial court. How far the state is allowed to wander will largely be left to the trial judge. If the state is allowed to go into many issues that have questionable relevance, and it becomes apparent that objections will not be successful, there are times when the closing argument can be used to minimize the state's case by reciting in detail some of the nonissues that the state spent time proving and then follow a recital of those instances with rhetorical questions as to what that evidence really proved on the real issues in the case.

B. (§20.9) Preparing the Defendant and Defense Witnesses for Trial

The concept of streamlining the issues is discussed in §20.8 above. The practical application of that concept involves spending sufficient time in trial preparation with the witnesses so that they understand the hazards of opening areas that can have a negative effect on the jury. The

witnesses must be given a clear understanding of exactly what issues are hoped to be resolved with their testimony.

If specific objectives cannot be delineated for a witness, perhaps that particular witness should not be used. Human nature being what it is, every witness has the potential to do or say something that will turn out to be harmful to the side that called the witness. For that reason, the risk can be reduced by simply not using non-essential witnesses or witnesses whose testimony will merely be cumulative.

One of the realities of defending criminal cases is that the pool that defense witnesses are selected from will not always contain the most convincing ladies and gentlemen in the world. Witnesses who truly want to help a criminal defendant will often have the same background as the defendant and be subject to the same impeaching factors.

Great care should be used in deciding whether to use a particular witness. There are, of course, many situations when there is simply no choice, and a poor witness is better than no witness at all.

There are ways to improve the appearance of witnesses with such simple things as haircuts, fresh shaves, and neat clothing. Individual mannerisms are more difficult to improve, but sufficient time in pretrial preparation can usually help even the worst witnesses.

The defendant and defense witnesses should be persuaded to dress neatly and conservatively for courtroom appearances. This does not mean that all witnesses should be dressed as if they were on the way to church. Naturalness and comfort are important to the appearance of a witness. Not every person feels, looks, or acts natural and comfortable in plain ties and dark suits.

In summary, it is pretty much a judgment call, keeping in mind local customs, how jurors generally dress, and the personal habits of defendants and defense witnesses. For safety's sake, it may even be a good idea to ask the defendant and defense witnesses to appear at their lawyer's office for a "dress rehearsal" in the actual clothing they plan to wear.

The same reasoning applies to counsel. For the vast majority of lawyers, conservative dress and conduct is the best approach.

The defendant and defense witnesses should be given some instruction on how to react to cross-examination. They should be made to understand that if they have testified truthfully, they do not have to give ground just because cross-examination becomes more hostile than direct examination. All witnesses should be cautioned against becoming angry at the questioner.

If there are obvious vulnerabilities, such as prior convictions, close relationship to the defendant, etc., those should probably be brought out during direct examination so there can be no inference that a witness had something to hide and would have gotten away with it if the witness had not been exposed to cross-examination by adverse counsel.

VIII. Rights of Defendants

A. (§20.10) Rights of Defendant During Trial

The basic source of a defendant's rights under Missouri law is MO. CONST. art. I, § 18(a), which provides as follows:

> That in criminal prosecutions, the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.

The annotations to this provision in Vernon's Annotated Missouri Statutes provide a wealth of caselaw on the subject. The Missouri Rules of Criminal Procedure are helpful in further identifying these rights.

In homicide prosecutions, a defendant has the right to a verbatim transcript of the testimony at a preliminary hearing. Rule 22.10 mandates that the record be made and further requires that it be transcribed upon the written request of either the state or the defendant. This is the only instance in which a record must be made of the testimony at a preliminary hearing.

The preservation of testimony at a preliminary hearing can be an inexpensive way of taking depositions of witnesses because counsel for the defendant also has the right to subpoena witnesses. It is not a perfect substitute for taking a witness's deposition because some judges will hold a tight rein on the questioning. There is a substantial adverse effect of preserving testimony at a preliminary hearing. If a witness later becomes unavailable, and generally only state's witnesses are examined at a preliminary hearing, the record of that

witness's testimony can be used as evidence at the trial. *State v. Fleming*, 451 S.W.2d 119 (Mo. 1970).

This problem does not exist with testimony of adverse witnesses presented in depositions because generally the defendant is not present at the depositions; the defendant, therefore, has not had the right to a face-to-face confrontation with the witness, which is provided for in MO. CONST. art. I, § 18. *State v. Jackson*, 495 S.W.2d 80 (Mo. App. W.D. 1973). It is important that defense counsel never take depositions with the defendant present. Confrontation will not have occurred, and the depositions will not be usable against the defendant in subsequent proceedings.

The state, by proper motion under Rule 25.14, can obtain an order compelling the defendant to be present at the taking of depositions by the state. This procedure, if followed, eliminates the exclusionary effect of *Jackson*. As a practical matter, Rule 25.14 is seldom employed because the state rarely has need of a witness's deposition, and most depositions taken by the defendant are for discovery purposes rather than to actually preserve evidence. The prosecuting attorney, on the other hand, may only take depositions to preserve testimony—not for discovery. Rule 25.14; *State v. Kelley*, 693 S.W.2d 114 (Mo. App. W.D. 1985).

B. (§20.11) Right to Effective Assistance of Counsel—Jury Qualification Forms

Section 494.415, RSMo 2000, provides for the use of "Jury Qualification Forms." These forms, containing instructions for completion, must be mailed to all persons selected for jury service. The statute provides that the forms are to be completed and returned to the court within ten days. Because the statute leaves it to each circuit court to develop its forms, with very little in the way of objective standards for the information to be obtained, the quality and scope of the information available from these forms varies widely from circuit to circuit. Section 494.415(3) provides that "any prospective juror who fails to return a completed juror qualification form as instructed may be directed by the board of jury commissioners to appear forthwith to fill out a juror qualification form." Whether this rule is enforced at all is questionable. It is not unusual to find that, for any particular jury panel, there are a number of members for whom no form is on file.

A lawyer's nightmare occurred in a death penalty case that would suggest that defense counsel may have a mandatory duty to review the jury qualification forms in advance of trial. *Knese v. State*, 85 S.W.3d 628

(Mo. banc 2002). A suggestion, in view of *Knese*, is that counsel may want to consider asking the court to strike for cause any member of a panel for whom a jury qualification form is not on file.

It is clear that one of the rights of a defendant is effective assistance of counsel. Remedies for the protection of this right include the post-conviction remedies provided by Rules 24.035 and 29.15. The message of *Knese* is that counsel should never fail to review all jury qualification forms before conducting voir dire. In *Knese,* a capital case, there were two or three individuals who did not return their qualification forms until the day of trial. Trial counsel had reviewed the ones already filed but failed to read the ones filed on the day of trial. Two of the individuals who filed their forms late were selected to serve on the jury, and one of them was the foreman. One of the forms not reviewed by counsel contained a statement that the juror thought that the laws were far too soft on criminals and that what was needed was to build more prisons, give out longer sentences, and grant fewer paroles. Regarding the death penalty, the individual who served as foreman of the jury stated in his form that he thought executions should be held in public. He stated that if a criminal thought that execution might take place on the town square in front of thousands of people, the criminal might think twice before committing murder. One of the other jurors stated in his form that he disfavored endless appeals, parole boards, good time, and clergy to pamper a killer. He then added: "If he is found guilty, do it."

The Supreme Court found that the responses suggest, although not conclusively, that the two jurors would automatically vote to impose the death penalty after a guilty verdict. At a minimum, the court said that counsel should have read the forms, and his failure to do so was ineffective assistance of counsel. In view of that decision, a very strong argument could be advanced that, until a prospective juror has complied with § 494.415 and any applicable local court rules, that person should be stricken from the panel for cause.

C. (§20.12) Right to Be Personally Present

The defendant has the right to be personally present at all stages of the trial. Rules 31.02 and 31.03. Rule 31.03(a) does provide that, by agreement, in misdemeanor cases the defendant's presence can be waived. This is a practical necessity, or the traffic court docket would become unmanageable.

Another exception is provided by Rule 31.03(b), which allows a defendant to voluntarily be absent when a verdict is received.

Rule 31.01 codifies a defendant's right to promptly, upon request, be permitted to consult with counsel. This is an important right. In *State v. Ikerman*, 698 S.W.2d 902 (Mo. App. E.D. 1985), the court held that, although a defendant may not have had a constitutional right to counsel when requested to submit to a warrantless taking of a blood sample for intoxication testing while he was at a hospital following an accident, his limited rights under Rule 31.01 and § 544.170, now RSMo Supp. 2004, were violated by refusing him the opportunity to consult with his mother, an attorney, or anyone at the hospital. The results of the test were properly suppressed. *Ikerman* is worth reading for its discussion of the rights of defendants to consult with counsel relative to a police request that they submit to an alcohol test under the Missouri implied consent law.

The fact that defendants have a right to be personally present at all stages does not necessarily mean that it is always a good idea for them to be present. For example, there may be conferences in chambers when it is really better that they not be present. It has been held that an action taken outside the presence of defendants is a ground for reversal only when the absence bears a reasonably substantial relationship to their right to defend themselves. *Peterson v. United States*, 411 F.2d 1074 (8th Cir. 1969), *cert. denied*, 396 U.S. 920 (1969).

An 1883 Missouri decision holds that, if counsel for some reason does not want the client present at the time of trial or if the defendant desires not to be present, the right to be present may be waived. *State v. Wagner*, 78 Mo. 644 (1883). Such a defendant should appear personally before the judge, with counsel, and apply in writing for a waiver of the right of confrontation. It is discretionary with the court to either grant or deny the right. There might conceivably be some advantage to having a defendant not present if identification by eyewitnesses is likely to be an issue. It is very easy for a witness to pick out the person sitting next to the lawyer at the counsel table.

Defendants can waive their right to be present by engaging in disruptive conduct in the courtroom, which can justify a judge in having them removed in order to ensure the dignity, order, and decorum of the proceedings. *United States v. Cochran*, 475 F.2d 1080 (8th Cir. 1973), *cert. denied,* 414 U.S. 833 (1973).

In *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. banc 1975), the Supreme Court held that a witness may testify by closed circuit television as long as the defendant is present at the receiving end and has the right to cross-examine the witness. See also, however, *State ex rel. Turner v.*

Kinder, 740 S.W.2d 654 (Mo. banc 1987), in which the Court held that taking guilty pleas and conducting preliminary hearings via video hookup between a courthouse and a conference room in the penitentiary is not permissible. Section 561.031, RSMo 2000, expressly authorizes the physical appearance of an incarcerated defendant by the use of closed circuit television under certain conditions for the limited purposes provided in the statute. The statute is applicable when the physical appearance of a person is required in court and the person is being held in a place of custody or confinement. In that situation, the physical appearance requirement may be satisfied by the use of a two-way audio-visual communication such as closed-circuit television or computerized video conferencing, provided that such audio-visual communication provides two-way visual communication between the court and the place of custody or confinement and that a full record of the proceedings is made by split-screen imaging and recording of the proceedings in the courtroom and in the place of confinement. Assuming that the necessary facilities are available, this procedure may be utilized to satisfy the physical appearance requirement in the following situations:

- In the first appearance before an associate circuit judge on a criminal complaint
- For the waiver of a preliminary hearing
- For an arraignment when a plea of guilty is not entered
- For an arraignment when a plea of guilty is entered if there has been a proper waiver of a defendant's right to be physically present
- At any pretrial or posttrial proceeding not allowing cross-examination of witnesses
- At sentencing after conviction if there has been a proper waiver of a defendant's right to be physically present

As a general rule, defendants have a right not to be exposed to the jury while wearing handcuffs or shackles. *Russell v. State*, 494 S.W.2d 30 (Mo. 1973). They can forfeit that right, however, by their own conduct if they become sufficiently disruptive to permit the trial court to find good cause for them to be physically restrained. *State v. Robinson*, 507 S.W.2d 61 (Mo. App. W.D. 1974); *State v. Borman*, 529 S.W.2d 192 (Mo. App. S.D. 1975); *see also* Joan M. Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 ST. LOUIS U. L.J. 351 (1971).

D. (§20.13) Right Against Self-Incrimination

The right against self-incrimination is one of the most recognized rights. It is guaranteed by the Fifth Amendment to the United States Constitution and article I, § 19, of the Missouri Constitution. To further protect this right if it is exercised, a prosecuting attorney is precluded from commenting in closing argument on a defendant's failure to testify. Rule 27.05(a); *State v. Chunn*, 657 S.W.2d 292 (Mo. App. E.D. 1983). Counsel should remember to object "early and often" to such prosecutorial misconduct. In *State v. Crawford*, 719 S.W.2d 11, 12 (Mo. App. W.D. 1986), there was a comment on the accused's failure to testify. There was no objection. Judge Dixon noted:

> There is no doubt that if the trial court had overruled a proper objection to the comments and the motion for new trial had preserved the error, the statements would have required reversal if they could not be said to be harmless beyond a reasonable doubt.
>
> . . . .
>
> . . . The fact that there was no objection does not change the erroneous nature of the comments.
>
> . . . .
>
> . . . no basis exists for [the] application of the plain error rule.

Id. at 12 (citations omitted).

Rule 27.05 also applies to the spouse of a defendant. It is error for a prosecuting attorney to attempt to goad the defendant into giving up the privilege not to testify by making any reference to the issue during opening statement. *State v. Croka*, 646 S.W.2d 389 (Mo. App. W.D. 1983), *appeal after remand*, 693 S.W.2d 133 (Mo. App. W.D. 1985). Even an indirect reference by the prosecutor to a defendant's failure to testify can be reversible error. *State v. Carter*, 847 S.W.2d 941 (Mo. App. E.D. 1993).

A suggestion in a question during voir dire to the possibility that the defendant may not testify can be error. *State v. Bohlen,* 698 S.W.2d 577 (Mo. App. E.D. 1985).

A related rule precludes the state from offering evidence as to the defendant's silence following an arrest. *State v. Powell*, 682 S.W.2d 112 (Mo. App. E.D. 1984). It is important to immediately object to any suggestion on behalf of the state that the defendant remained silent

following arrest. Any error based on comments by the state on the defendant's post-arrest silence is waived in the absence of a timely objection. *State v. Green*, 798 S.W.2d 498 (Mo. App. S.D. 1990).

Defendants have the right, however, to have the jury instructed specifically that they had the right not to testify and that under the law no presumption of guilt may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify. Rule 27.05(b).

Whether such an instruction should be requested is a decision that has to be made in the context of a particular case. One argument in favor of offering the instruction is the simple reality that it will be obvious to the jury that the defendant did not testify, so it may be better to have the judge expressly direct that the jury not use that fact against the defendant and hope that they take their oath seriously enough to follow the instruction. In most situations this may be better than leaving them on their own. At least with the instruction given, defense counsel can argue that the defendant's failure to testify cannot be used as any basis for inferring guilt.

The ideal would be to always represent defendants who are capable of giving convincing testimony on their own behalf and who do not have a history of convictions that becomes admissible for impeachment purposes if they do testify. It takes a real optimist to expect a jury to sit through a trial, never hear from the one person who should be in the best position to deny that person's guilt, and not be influenced to some extent by the absence of that testimony.

If a defendant has not testified and the prosecuting attorney makes any comment that comes close to referring to that fact, an immediate objection should be made because improper closing argument seldom will be considered on appeal unless the issue is properly presented by an objection. The objection should usually include a motion to instruct the jury to disregard the comment, and if that is denied, it may be the safe course to also move for a mistrial to be sure that the error is preserved for consideration on appeal.

It is also improper for the court to comment on the evidence in a criminal trial. Rule 27.06.

Because this chapter is intended to cover trials, as opposed to pretrial matters, the subject of suppressing out-of-court statements will not be addressed, other than to note the absolute necessity of:

- a contemporaneous objection at the time the evidence is actually offered during the trial; and
- obtaining the judge's acceptance of a continuing objection when appropriate.

See Chapter 11 of this deskbook, which deals with that subject in detail.

Since 1966, the decision of the United States Supreme Court in *Miranda v. Arizona,* 384 U.S. 436 (1966), has provided a major source of guidance in the enforcement of the right against self-incrimination. In a recent case, *Missouri v. Seibert*, 124 S. Ct. 2601 (2004), the Supreme Court, in a plurality opinion, affirmed a decision of the Supreme Court of Missouri, *State v. Seibert,* 93 S.W.3d 700 (Mo. banc 2002), which held that statements that are made after *Miranda* warnings are given, but that are clearly the product of pre-warning questioning and statements, should be suppressed. In this case, the Supreme Court of Missouri found that the interrogation was "nearly continuous." *Seibert*, 93 S.W.3d at 706.

Seibert raised *Miranda* issues in the context of a bizarre factual situation. A charge of murder arose out of an attempt to burn a house trailer. One teenager died in the fire, and another was severely burned. The defendant, who was the mother of the injured child, had gone to be with him at a hospital in St. Louis County. A police officer from Rolla requested that a St. Louis County officer take the defendant into custody, with specific instructions that the defendant not be advised of her *Miranda* rights. She was then transported to the police station in Rolla and questioned about the incident, without benefit of the *Miranda* warnings, until she made some admissions. She was then given a 20-minute break, and the questioning resumed with the interview being tape recorded. During this stage of the interview, the defendant was provided with the *Miranda* warnings. Her tape recorded admissions then came into evidence. After the conviction was affirmed by the court of appeals, the case was transferred to the Supreme Court, which, by a four-to-three decision, reversed the conviction. The United States Supreme Court affirmed. The opinion of the Supreme Court of Missouri is worth reading for the detailed review of the reasons for having a *Miranda* rule.

Counsel should be cautioned that *Miranda* protection cannot be invoked by a telephone call from an attorney to the agency that has a client in custody. *See State v. Hensley*, 83 S.W.3d 681 (Mo. App. S.D. 2003). The court of appeals said that it was of no consequence that the client was never informed that his attorney had called the police station.

E. (§20.14) Right to Trial by Jury

The right to trial by jury, unlike some of the other rights of defendants, is qualified. Under the Sixth and Fourteenth Amendments to the United States Constitution, the right to trial by jury is limited to those actions in which the potential penalty exceeds six months imprisonment. *Baldwin v. N.Y.*, 399 U.S. 66 (1970).

The right to jury trial under the Missouri Constitution can be found in MO. CONST. art. I, § 22(a). Section 546.040, RSMo 2000, states the issue very plainly and succinctly: "All issues of fact in any criminal cause shall be tried by a jury, to be selected, summoned and returned, in a manner prescribed by law."

The statute appears on its face to conflict with MO. CONST. art. I, § 22(a), which provides that "in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court . . . ."

Section 546.050, RSMo 2000, appears, on its face, to be inconsistent with § 546.040, at least insofar as misdemeanor trials are concerned. Section 546.050 provides that the defendant and prosecuting attorney, with the assent of the court, may submit the trial of misdemeanors to the court. Findings in all such offenses have the force and effect of the verdict of a jury.

As a practical matter, most misdemeanors are probably tried by the court without a jury. Notwithstanding the seemingly inconsistent language in some of the statutes dealing with the subject, there is an express court rule on waiver of jury. See Rule 27.01(a), which provides that, "All issues of fact in any criminal case shall be tried by a jury . . . unless trial by jury be waived as provided in this Rule."

Rule 27.01(b) then provides that the defendant, with the assent of the court, may waive a trial by jury and submit the trial of any criminal case to the court; the court's findings have the same force and effect as a jury verdict. In felony cases, such waiver by the defendant is to be made in open court and entered in the record.

In *State ex rel. Ashcroft v. Crandall*, 627 S.W.2d 284 (Mo. banc 1982), the Court addressed the apparent conflict in the statute, holding that a prosecuting attorney's statutory right to demand a jury trial in a misdemeanor case does not take precedence over the constitutional right

of an individual defendant to waive a jury trial upon obtaining the assent of the court.

It appears equally clear that a court is not obligated to give its consent to a defendant's waiver of a jury trial. *State v. Hornbuckle*, 746 S.W.2d 580 (Mo. App. E.D. 1988); *Polys v. State*, 724 S.W.2d 265 (Mo. App. E.D. 1986).

It is doubtful that a jury may be waived if there is an issue of obscenity. One of the issues involved in such cases, which will ordinarily involve city ordinance violations, is whether "the average person applying contemporary community standards"—*see McNary v. Carlton*, 527 S.W.2d 343, 345 (Mo. banc 1975)—would find the material obscene. The Supreme Court of Missouri appears to have held that only a jury can decide such an issue. *See*:

- *XLNT Corp. v. Mun. Court of Kansas City*, 546 S.W.2d 6 (Mo. banc 1976)
- *Martin v. Mun. Court of Kansas City*, 546 S.W.2d 7 (Mo. banc 1976)
- *City of Kansas City v. Darby*, 544 S.W.2d 529 (Mo. banc 1976)
- *McNary*, 527 S.W.2d 343

Though the right to a trial by jury can only be waived voluntarily, the courts have held in misdemeanor prosecutions that, if the defendant does not specifically request a trial by jury and the case is heard by a court, the defendant has effectively waived the right to trial by jury. *State v. Belleville*, 362 S.W.2d 77 (Mo. App. E.D.1962); *State v. Williams*, 349 S.W.2d 375 (Mo. App. E.D. 1961). The court in *State v. Patrick*, 816 S.W.2d 955 (Mo. App. S.D. 1991), discussed the effect of MO. CONST. art. I, § 22(a), § 546.050, and Rule 27.01. In *Patrick*, the docket sheet showed that the defendant had appeared on more than one occasion and that the case had been set for trial to the court. At the time of the final appearance, an announcement was made that the defendant was entering a plea of guilty, and in the process of accepting the guilty plea, the court instructed the defendant that he would have to relinquish his driver's license. At this point, the defendant declared that he did not understand that he would lose his driver's license as a result of a guilty plea.

He was then granted leave to withdraw the plea. The case was scheduled for an immediate bench trial. At that juncture, the defendant's lawyer filed a handwritten document styled "request for jury

trial." The trial judge then took the position that the right to a jury trial had been waived at one of the defendant's three previous appearances.

The case was then tried by the court, and the defendant was found guilty. The court of appeals reversed the conviction and stated that it found no authority supporting the trial court's conclusion that the implicit agreement of the defendant's lawyer to the settings for trial to the court constituted a waiver of the defendant's right to a jury trial, nor did the fact that he entered a guilty plea waive his right to a jury trial, which would ordinarily be the case, but when he was allowed to withdraw the guilty plea, he was restored to his original position, which included the right to a jury trial.

Section 543.200, RSMo 2000, approaches the problem from a different angle. That section provides that, if the defendant enters a plea of not guilty in a misdemeanor case, either the defendant or the prosecuting attorney may demand a jury, but if no jury is demanded, the case may be tried by the associate circuit judge. This statute would seem to eliminate the need for an express waiver of a jury trial on the record.

Implicit in the trial of criminal cases is the constitutional requirement that the jury consist of 12 persons. Article I, § 22(a), of the Missouri Constitution provides, however, that just as defendants may waive a trial by jury, they may also waive a jury of 12 persons and consent to a jury of less than 12 persons. *State v. McGee*, 447 S.W.2d 270 (Mo. banc 1969), *cert. denied*, 397 U.S. 1056 (1970).

Whether a defendant should waive a trial by jury as a tactical matter is discussed in greater detail in §20.25 below.

F. (§20.15) *Batson* Challenges During Jury Selection

One aspect of trial by jury is the manner in which the jury is selected. In *Batson v. Kentucky,* 476 U.S. 79 (1986), the Supreme Court held that a party may not exercise peremptory challenges to remove potential jurors solely on the basis of gender, ethnic origin, or race. There are three stages to a *Batson* challenge:

1. The opponent to the removal of a venire person makes the challenge to the use of a peremptory challenge for one of the forbidden purposes.
2. The proponent must then articulate an explanation for the challenge that is race-neutral.

3. The opponent must then assert that the reason given is pretextual.

State v. Marlowe, 89 S.W.3d 464 (Mo. banc 2002). At the second stage, the race-neutral explanation need not be persuasive. During the third stage, the opponent must show that the proffered reasons are merely pretextual. The issue is one of plausibility of the explanation. The trial court must resolve these factual issues in view of a number of factors spelled out in *Marlowe.*

Whether the *Batson* issue has really made any difference in the trial of cases in Missouri is open to question. In *Smulls v. State,* 71 S.W.3d 138 (Mo. banc 2002), the Supreme Court found from a study of the state's three largest jurisdictions—the City of St. Louis, St. Louis County, and Jackson County—that there had been about 100 cases in which the death penalty had been imposed since its reinstatement. Of those in which race was an issue, two cases had been remanded to a trial court to conduct a proper *Batson* challenge. Only one reported case was found that was remanded for a new trial because an appellate court found that a *Batson* challenge had been improperly denied. The Supreme Court noted in its opinion that, "if *Batson* has any effect in this state, it is simply trial court law where even rumors of sustained *Batson* challenges are hard to come by." The Court noted that there are no large scale empirical studies as to the effect of *Batson* on racial discrimination in jury selection, but the studies examined to date show either no effect or only a very limited effect on the use of peremptory challenges to discriminate. The Court also suggested that the only way to completely eliminate racial profiling in jury selection would be to eliminate the peremptory challenge.

G. (§20.16) Bifurcated Trials

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court held that the death penalty as it was presently being enforced was in violation of the Eighth Amendment prohibition against cruel and unusual punishment. The Court stopped short of finding that the death penalty was per se in violation of the constitution but decided the case on the basis of procedures then in place in most states for deciding when the death penalty would be given. This decision had the practical effect of suspending the use of the death penalty for several years. Missouri and many other states addressed the questions raised in *Furman* by substantially amending the procedures for assessing the death penalty. The result in Missouri was the enactment of § 565.030, now RSMo Supp. 2004, which requires bifurcated trials in capital cases so that issues

relating to the aggravating circumstances required to justify the assessment of the death penalty would not be presented to a jury until the jury had already resolved the issue of guilt or innocence.

The use of bifurcated trials was extended to non-capital cases by action of the General Assembly during the 2003 term. *See* § 557.036, RSMo Supp. 2004. The amendment became effective in July 2003, and the St. Louis Post-Dispatch, in its August 1, 2003, edition, reported that the first case tried under the new procedure had just been completed in St. Louis County. *See State v. Mario DeLaTorres,* No. 02CR-2477 (St. Louis County Cir. Ct., July 9, 2003).

Any analysis of this issue should also include a thorough review of *Ring v. Arizona,* 536 U.S. 584 (2002). In *Ring,* the Supreme Court held that an Arizona statute that allowed the trial judge, sitting alone, to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty violated the Sixth Amendment right to a jury trial in capital prosecutions. Under the Arizona statute in question, a death sentence could not legally be imposed unless at least one of several specific aggravating circumstances was found to exist beyond a reasonable doubt. The question presented was whether that aggravating circumstance could be found to exist by the trial judge, as Arizona law specified, or whether the Sixth Amendment's guarantee of a jury trial, made applicable to the states by the Fourteenth Amendment, requires that the aggravating determination be entrusted to the jury. The Supreme Court of Missouri has found that the rationale of *Ring* applies to the Missouri death penalty procedures. *See State v. Whitfield,* 107 S.W.3d 253 (Mo. banc 2003). In *Whitfield*, the defendant was convicted of first degree murder and armed criminal action and sentenced to death, but the jury was unable to agree on punishment during the penalty phase of the trial. The trial judge then followed the four-step process required by § 565.030.4. After the judge had made the requisite findings, he imposed the death penalty. The Supreme Court of Missouri set aside the death penalty on the basis that, under *Ring,* a defendant in a capital case is entitled to a jury determination of the facts on which eligibility for the death sentence is predicated.

Although both *Ring* and *Whitfield* involve the application of the bifurcated trial process in capital cases, they may provide guidance for the use of the new process in non-capital cases.

Assuming that the new procedure for bifurcated trials in non-capital cases survives constitutional challenges, it may in reality transfer the imposition of penalty entirely into the hands of the judges, as is now the

case in federal courts. There is no constitutional right to be sentenced by a jury. *Powell v. Bowertans,* 895 F. Supp. 1298 (E.D. Mo. 1995), *aff'd,* 112 F.3d 966 (8th Cir. 1997). Section 557.036.1 expressly recites that:

> Upon a finding of guilt upon verdict or plea, the court shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances, having regard to the nature and circumstances of the offense and the history and character of the defendant and render judgment accordingly.

This language would suggest that juries are simply no longer to be involved in the assessment of the penalty. Section 557.036.2, however, goes on to provide for the bifurcated process during which, in the first stage, the jury can decide only whether the defendant is guilty or not guilty of any submitted offense. The issue of punishment is not submitted to the jury during the first stage of the trial. Section 557.036.3 provides for a second stage of the trial if, during the first stage, the jury has found the defendant guilty.

> The issue at the second stage of the trial is the punishment to be assessed and declared. Evidence supporting and mitigating punishment may be presented. Such evidence may include, within the discretion of the court, *evidence concerning the impact of the crime upon the victim, the victim's family and others, the nature and circumstances of the crime, and the history and character of the defendant.*

Section 557.036.3 (emphasis added).

Even though the admission of such evidence is a matter of discretion with the court, it can be anticipated that some of it could be extremely prejudicial in nature. For this reason, it may be reasonable to assume that there will be fewer and fewer requests to have a jury determine punishment. This eventuality is covered by § 557.036.4(1), which expressly provides that there does not need to be a second stage of a trial "if a defendant requests in writing, prior to voir dire, that the court assess the punishment in case of a finding of guilty." A second stage will not be used in those cases in which the state pleads and proves that the defendant is a prior offender, persistent offender, dangerous offender, or persistent misdemeanor offender as defined in § 558.016, RSMo Supp. 2004, or a predatory sexual offender as defined in § 558.018, RSMo 2000.

If there is a second stage and the jury is unable to agree on the punishment to be assessed, the court proceeds to decide the penalty, as provided for in § 557.036.1. It appears from § 557.036.5 that the trial judge will be limited in assessing a penalty, when there is a second stage, to a term no greater than assessed by the jury, unless the jury assesses a penalty that is less than the lowest term for that offense

allowed by law, in which case the court must assess punishment at the lowest level provided for that particular offense.

It will be some time before a sufficient number of appeals have been decided to really know how this procedure is going to affect the criminal justice system. As an observation, it seems likely that a fair number of defendants will take advantage of the provisions of § 557.036.4(1) by filing a written election to waive the second stage. It should be kept in mind that this is a decision that must be made before the commencement of voir dire.

H. (§20.17) Right to Counsel

A defendant has a right to counsel in every case in which the defendant is potentially liable to a jail sentence, whether a misdemeanor, felony, or municipal ordinance violation. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

There has never been a decision by the United States Supreme Court touching upon the rights of a person who is subject only to a fine to have counsel. *Argersinger*, 407 U.S. at 37, specifically acknowledges that it did not decide that issue.

Conversely, the right to counsel also includes the right to not be represented by counsel. *Faretta v. Cal.*, 422 U.S. 806 (1975). Missouri law has long recognized a criminal defendant's right to a pro se defense. That right is based on MO. CONST. art. I, § 18(2). *Bibbs v. State*, 542 S.W.2d 549 (Mo. App. E.D. 1976); *see also* Rule 31. Rule 31.01 and Rule 31.02 both establish a defendant's right to counsel essentially from the time the defendant is taken into custody. Rule 31.02(a), however, does provide that the court does not have a duty to appoint counsel if the defendant, after being informed of the defendant's rights, requests to proceed without the benefit of counsel and the court finds that the defendant has intelligently waived the right to have counsel.

Competence of the defendant in legal issues is not to be considered in accepting a waiver. Only the knowing, intelligent, and voluntary nature of the waiver is at issue. *But see State v. Tilley*, 548 S.W.2d 199 (Mo. App. E.D. 1977).

Even when defendants have waived counsel before trial, they have the right to change their minds. The waiver of counsel may be withdrawn by the defendant at any time before the jury is sworn. *Fields v. State*, 507 S.W.2d 39 (Mo. App. W.D. 1974).

Rule 31.02(a) also authorizes the court to appoint counsel, even though a defendant may wish to waive counsel, if, at any stage of the proceedings, it appears to the court that, because of the gravity of the offense charged and other circumstances affecting the defendant, the failure to appoint counsel may result in an injustice to the defendant.

Refusal to permit defendants to represent themselves in the absence of an unequivocal request to exercise that right does not constitute plain error for purposes of appellate consideration. *State v. Freeman*, 702 S.W.2d 869 (Mo. App. S.D. 1985). The right to counsel does not carry with it the right to any particular counsel. *State v. Kent*, 637 S.W.2d 119 (Mo. App. E.D. 1982), *cert. denied*, 459 U.S. 1115 (1983).

Lack of counsel may be a ground for attacking the validity of a conviction. Lack of counsel, however, is only significant when defendants have not waived their right to counsel. Waiver of counsel cannot be presumed by the failure of the defendant to request counsel. *State v. Jones*, 487 S.W.2d 586 (Mo. App. E.D. 1972).

If there is no express waiver on the record, the burden is on the state to prove that a waiver occurred. *Jones,* 487 S.W.2d 586. Issues based on the defendant's inability to afford counsel should be rare since the establishment of the Missouri public defender system. *See* Chapter 600, RSMo.

Section 600.051, RSMo 2000, will be of assistance in determining when the waiver of counsel may be permitted. In the absence of a statutory waiver of counsel form as prescribed in § 600.051, there is probably a presumption of lack of waiver.

The problem of attempting to represent multiple defendants, discussed above in §§20.5 and 20.6, can also raise lack-of-counsel issues. In *State v. Cox*, 539 S.W.2d 684 (Mo. App. E.D. 1976), it was held that an attorney who was representing both the defendant and a prosecution witness in the case against the defendant was representing conflicting interests in violation of the defendant's Sixth Amendment right to counsel whose assistance is unimpaired by obligations to other clients. See also *Holloway v. Arkansas*, 435 U.S. 475 (1978), in which the problem was caused by the court's insistence that one lawyer represent more than one defendant.

The issue of right to counsel is also related to the right to have counsel assigned during an interrogation before trial. Section 20.13 above, which

discusses self-incrimination and the current status of the *Miranda* rule, should be considered in connection with this section.

I. (§20.18) Right to Cross-Examine Witnesses and Right to Compulsory Process

All parties are entitled to compulsory process, usually in the form of witness subpoena. MO. CONST. art. I, § 18(a). The procedure to obtain witness subpoenas will differ from circuit to circuit and county to county.

Counsel should determine if there are any particular procedures established by local court rule. In most instances, subpoenas may be obtained on request from the court clerk. They can usually be obtained in blank for service by defense counsel or counsel's agents, or they can be delivered to the sheriff's office for service as any other process.

In all cases, including misdemeanors, defendants have the right to:

- confront their accusers;
- cross-examine witnesses who have testified against them; and
- have compulsory process to force the appearance of witnesses.

Argersinger v. Hamlin, 407 U.S. 25 (1972); *State v. Stokely*, 842 S.W.2d 77 (Mo. banc 1992). This right, however, is not totally without limitations. The defendant must be given an opportunity for effective cross-examination but not cross-examination that is effective in whatever way and to whatever extent the defense might wish. The trial court does have discretion to restrict cross-examination. *State v. Tate*, 850 S.W.2d 385 (Mo. App. W.D. 1993).

There are statutory limitations on cross-examination in certain types of cases. The rape shield law, § 491.015, RSMo 2000, puts very strict limitations on the right to cross-examine prosecuting witnesses in certain crimes as to prior sexual conduct. The statute does not exclude all such evidence but requires that a written motion to offer such evidence be made and ruled on in an *in camera* proceeding. The United States Supreme Court in *Olden v. Kentucky*, 488 U.S. 227 (1988), held that Kentucky's rape shield law, within the particular circumstances of that case, violated the defendant's Sixth Amendment right of confrontation by unreasonably restricting the right of cross-examination.

The factual situation and holding are fairly narrow, but the reasoning may be helpful in meeting the requirements of § 491.015.2.

While it has been held that a defendant has no state or federal constitutional right to confront witnesses who do not give evidence at trial, *State v. Benton*, 812 S.W.2d 736 (Mo. App. W.D. 1991); *State v. Croka*, 693 S.W.2d 133 (Mo. App. W.D. 1985), it is clear that the defendant is entitled to know the identity of the witnesses and what statements they may have made. This right comes under the rules of disclosure. Rule 25 deals with disclosure and depositions and is expressly applicable to all criminal cases, including misdemeanors. The right to disclosure commences upon the filing of an indictment or information. Rule 25.01.

Rule 25.03 prescribes information that must be disclosed by the state to the defendant upon request and without court order. This information includes names and last known addresses of persons whom the state intends to call as witnesses, together with their written or recorded statements and existing memoranda reporting or summarizing part of their oral statement.

The state is also required to disclose any material or information within its possession or control that tends to negate the guilt of the defendant as to the offense charge. Thus, if witnesses are interviewed whose testimony, if given, would be exculpatory to the defendant, the defendant has an absolute right to that information.

J. (§20.19) Doctrine of Fundamental Unfairness

The Supreme Court of Missouri has recognized a category of situations in which a conviction may be reversed simply because of the fundamentally unfair nature of something that occurred during the trial even though no constitutional violation occurred.

This doctrine has frequently been invoked when a prosecuting attorney has withheld information from the defense counsel. *See*:

- *State v. Scott*, 479 S.W.2d 438 (Mo. banc 1972)
- *State v. Aubuchon*, 381 S.W.2d 807 (Mo. 1964)
- *State v. Harrington*, 534 S.W.2d 44 (Mo. banc 1978)
- *State v. Luton*, 795 S.W.2d 468 (Mo. App. E.D. 1990)

The Supreme Court, in describing the doctrine of fundamental unfairness in *Scott,* said: "We are not limited to constitutional minima; rather we strive for practices which will best promote the quest for truth." *Scott,* 479 S.W.2d at 442. This language would suggest that, although no existing rule or constitutional provision is violated, if the

state engages in conduct that is unfair by its very nature, reversible error may occur.

When there is conduct on the part of the state that appears to take "unfair" advantage in any way, counsel should be sure that a record is made of the conduct. A detailed objection and request for sanctions should be made. Usually there should be a motion for mistrial if the issue comes up during the course of the trial. The motion should set out specifically what the state has done that is believed to be fundamentally unfair.

Even when the trial court at that juncture refuses to grant any relief, the completion of all of the evidence may strengthen the argument that a particular occurrence during the course of the trial resulted in such a fundamentally unfair situation as to warrant a new trial.

IX. (§20.20) Reception of Evidence

The order in which a felony trial proceeds is spelled out in Rule 27.02. This Rule establishes the order in which the various stages of the trial are to be conducted, including the intervals at which the court is to give specific instructions to the jury.

A good understanding of the rules of evidence is basic to the protection of the rights of a criminal defendant during trial, since one of counsel's foremost obligations to clients is to see that they are not judged on the basis of improper evidence. For this reason, counsel must constantly be alert to "protect the record" by the use of timely objections.

There is some art to making objections because they are disruptive of the flow of the evidence and, if overdone, can create a negative impression on the jury. There are many instances when a proper objection might be sustained but the particular question or answer, although technically inadmissible, is harmless or relatively harmless.

Objections can become very annoying to the jury and should be used sparingly when information sought to be elicited by a particular question is not felt to be a serious matter.

On the other hand, unless a timely objection is made, counsel can expect little relief on appeal. When an objection is made after testimony has already been given, the objection comes too late. *State v. Delgado*, 774 S.W.2d 549 (Mo. App. S.D. 1989). It should be remembered that, although counsel may hope for an acquittal, counsel must always

anticipate the possibility of a conviction and subsequent appeal. If all counsel has are objections that have been sustained by the trial court, it is easy for a court of appeals to find that counsel already has all of the relief that is requested. Each objectionable event, therefore, should be thought of as a three-step process. First, is the objection to what occurred? If the objection is overruled, the point is preserved. If the objection is sustained, counsel should go to step two: ask that the jury be instructed to disregard what happened. If that is denied, the point is preserved. If the judge does instruct the jury, counsel can then go to step three: ask for a mistrial. Counsel should keep pushing because generally all three steps are necessary to preserve a prejudicial event for appellate review.

Objections to evidence must be made at the earliest opportunity once the objectionable character of the testimony becomes apparent. *State v. Guy*, 770 S.W.2d 362 (Mo. App. S.D. 1989).

Of course, ruling on an objection after a witness has already answered the question preserves nothing for review in the absence of a motion to strike the testimony. *State v. Brown*, 752 S.W.2d 382 (Mo. App. E.D. 1988). An objection to evidence must be sufficiently clear and definite so that the court will understand the reason for the objection. *State v. Bartholomew*, 829 S.W.2d 50 (Mo. App. W.D. 1992).

Objections:

- must be specific;
- must point out the grounds of the objection; and
- are to be determined on the grounds stated.

State v. Foulk, 725 S.W.2d 56 (Mo. App. E.D. 1987).

If the objectionable nature of a witness's answer is not apparent until it has already been given, the issue of error may be preserved by properly moving to strike the witness's answer. *State v. Williams*, 664 S.W.2d 226 (Mo. App. E.D. 1983).

The greater the extent of pretrial discovery, the better position counsel will be in to know whether objections should be made to keep out material that will have a definite prejudicial effect on the defendant.

Unfortunately, the nature of a criminal trial will still cause many surprises to occur, particularly when counsel assumes that counsel knows what a witness's answer will be. When, whether, and how to make objections can only be learned with actual trial experience. The

safe course, however, when there is any doubt, is to go ahead and make the objection in the hope that the issue will be preserved for the court of appeals.

If the objection will of necessity be long and detailed or if by its language it may be expected to adversely affect the jury, a request should be made to approach the bench so that it may be made out of the hearing of the jury.

Once again, it is a tactic that has to be used sparingly because of the impression it can create that there is information the jury would have if it were not for counsel's interference.

Once an objection has been timely and properly made and overruled, counsel does not waive the objection by failing to make it when the same matter is raised again. *State v. Danner*, 490 S.W.2d 298 (Mo. App. W.D. 1973). This can be a dangerous rule to rely on, however, because almost any slight difference in the later evidence may mean that a new objection should have been made. When evidence has been admitted without objection, it generally is in the case for all purposes and may be given its natural and logical probative effect by the trier of fact. *State v. Henderson*, 667 S.W.2d 33 (Mo. App. E.D. 1984).

It serves no purpose to object to evidence that has already been admitted once without objection. *State v. Mallett*, 732 S.W.2d 527 (Mo. banc 1987), *cert. denied*, 484 U.S. 933 (1987). In addition to opposing evidence presented by the state, counsel may often have evidence to present on behalf of the client. The state will be interested in trying to keep that evidence from the jury. If the court sustains an objection by the state to some piece of evidence or testimony counsel is trying to get on the record, counsel should not give up! Counsel should insist on making an offer of proof. The preferred method of making the offer is by question and answer. To accomplish this, counsel will need to ask the court to have the jury removed until an offer is made. Counsel then proceeds to ask the witness the questions counsel wants answered. Only by making such an offer of proof can counsel present a record to the appellate court to enable it to weigh what effect the testimony or other evidence would have had—in many instances once the trial court hears the offer it will change its mind and allow the evidence! If the court denies the opportunity to make an offer of proof, counsel is more than halfway home. Counsel might also want to make a narrative offer of proof, either at that time or in chambers or during the hearing on the motion for a new trial.

X. (§20.21) Cross-Examination

The right of confrontation of witnesses includes the right to cross-examine those witnesses. Effective cross-examination always involves some element of luck because there is never a way to be totally prepared for all the answers.

A safe cross-examination, however, involves preparation. There will be many witnesses who simply do not require cross-examination. If a witness's testimony on direct examination has not been particularly harmful or if that testimony has merely gone to establish some fact that counsel could have admitted in the first place, there is little point in giving that witness further opportunity to say something that could be harmful unless counsel is sure in advance of the ability to substantially impeach the witness's testimony.

Many of the witnesses who testify in criminal trials will be much more adept at testifying than witnesses in a typical civil case. This is because they generally include law enforcement officers such as members of the highway patrol, police officers, and laboratory technicians who participate regularly in criminal investigations and who are, therefore, frequently called as witnesses.

Witnesses of this type must be cross-examined with special caution because most of them clearly think of themselves as part of the prosecution team rather than as independent witnesses who belong to neither side. Therefore, they will take advantage of any opportunity to give an answer that is harmful to the defendant if counsel opens the door to them by careless cross-examination.

At the outset of this chapter, emphasis was given to the importance of counsel's familiarity with the facts in a case. The benefit of having that additional knowledge about the facts will probably pay more dividends in cross-examination than in any other aspect of the trial.

One tendency to guard against in cross-examination is undue aggressiveness. There are occasional witnesses who set themselves up in such a way that the jury probably enjoys seeing them brought down a notch. Most of the time, however, jurors may be more inclined to identify with the witness rather than the attorney who is attempting to give the witness a hard time by challenging the witness's testimony. This is another reason why great care has to be used in handling witnesses on cross-examination.

XI. (§20.22) Defense Evidence

Unlike civil cases, the defendant will not usually have the burden of proof on what would in civil cases be considered "affirmative defenses." These include such things as alibis, entrapment, self-defense, accident, and duress. These situations require that, once there has been some evidence that would warrant a finding of the particular defense, the burden shifts to the state to disprove that defense. These are generally referred to as "special negative defenses." An exception is the defense of not guilty by reason of mental disease or defect, in which case the defendant carries the burden of proof on the existence of the defense and the jury is so instructed.

Chapter 14 of this deskbook deals specifically with defenses; Chapter 24 deals with instructions and is, therefore, directly related to defenses. In keeping with the concept that the purpose of this chapter is to discuss how to try a criminal case rather than to give a detailed discussion of substantive law, those chapters should both be read in conjunction with this section.

As previously noted, the defendants have the option of resting their cases without offering any defensive evidence because the burden of proof remains with the state. Before exercising this option, however, counsel must recognize that jurors are ordinary people and, as such, have the ordinary quirks of human nature. One of those is the tendency to believe that where there is smoke, there will also be fire. Thus, they may, despite the court's instruction, attach at least some evidentiary weight to the mere fact that the defendant has been charged. They are apt to think that this could never have happened unless there was a pretty good reason to believe the defendant is the guilty party. It does not take much of this kind of thinking to totally disarm the defendant's best weapon: the presumption of innocence.

If, therefore, there is any reasonably believable evidence of a defense, it had better be offered. *Reasonably believable* is the key element. If the defendant's story that is to be relied on as a defense is not reasonably believable, counsel should warn the defendant in advance that, if the jurors do not believe the defendant, they will be that much more likely to believe the state's evidence and to draw some of the permissible inferences that can lead to a conviction. Because lawyers are not blessed with infallibility, deciding whether a story is reasonably believable is not an easy task. Of course, there will be some extreme situations in which it will not be too difficult.

In considering what should or should not be offered by way of defense evidence, one should always be careful about getting into areas that may not be critical to the defense but that are perceived as something that might tilt the balance. This category is easier to talk about than to define. It sometimes includes those issues that, at the first interview with a client, will be offered as an explanation by the client, who has sometimes sat around for days trying to think of ways to put the best possible spin on a situation. The risk that counsel runs in getting into questionable areas is that it sometimes requires the jury to decide issues that are not essential one way or the other to the final decision of guilt or innocence. If a jury decides that it does not believe some non-essential issue that is testified to by a defendant or a defense witness, then it may cause credibility problems with issues that are essential. It should always be remembered that many, if not most, criminal jury trials may ultimately be resolved over the burden of proof and the issue of reasonable doubt. Some cases will present specific defense theories, e.g., self-defense, mental disease or defect, alibi, etc. Most, however, are more likely to be decided on the basis of whose witnesses appear and sound most believable. This gives counsel room to argue the issue of reasonable doubt. To the extent, therefore, that any defense evidence comes before the jury that may also raise doubts in the minds of jurors as to that evidence, the reasonable doubt that must be overcome by the state becomes a much weaker tool in closing argument. Defense counsel should always, to the extent that there is any choice in the matter, avoid offering any evidence that will not necessarily result in an acquittal if believed but that may very well cause a jury to disbelieve other more essential evidence.

This reasoning also applies to what may be said by counsel in opening statements and closing arguments. Promising more than can be delivered in opening statements can be damaging. Defense counsel has the option of reserving an opening statement until after the state has completed its case. By exercising this option, counsel gains the benefit of knowing what has been presented on behalf of the state before describing a defendant's anticipated evidence to the jury. The problem with this option is that the jury will have heard both the state's opening statement and all of the evidence on its case in chief before it learns anything about the defendant's case. There is no hard and fast rule for deciding when counsel should reserve an opening statement. A closing argument that asserts more than the defense has established can be equally damaging to the full benefit of reasonable doubt.

XII. (§20.23) Order of Proof

This section deals with the order in which the defendant's witnesses should be used, as opposed to the order of trial, which is governed by Rule 27.02 and § 546.070, RSMo 2000.

The state, of course, will have to put on at least enough evidence to make a prima facie case before defense counsel has to put on any evidence. Counsel should plan well in advance of that point the order in which the defense witnesses will be called. Generally, the only objective here is to present the witnesses in as logical an order as their availability will permit. Another good general rule is to try to open and close with the strongest witnesses. This is in the hope that what the jury hears first and last will make a stronger impression than what comes in between.

Before any trial witness is used, however, counsel should clearly define just what they want to accomplish with that particular witness. This will enable counsel to determine which witnesses are essential and which are optional. As a rule of thumb, the fewer witnesses counsel calls, the better off counsel will be. Each witness who testifies increases the odds that one of them will give an unexpected answer that is harmful to the defendant or that one of them will prove to be subject to impeachment. It will generally be better for the defendant to be the last or close to the last witness. In many, if not most, criminal trials, one side or the other will have requested the court to impose the rule excluding witnesses from the courtroom. This rule cannot be used to exclude the defendant, so the later in the trial the defendant is called, the more testimony the defendant will have heard from the other witnesses. If inconsistencies in the defense testimony have developed, the defendant may be able to explain some of them to the satisfaction of the jury. This is only possible if the defendant has had the benefit of hearing the other testimony before being called on to testify.

XIII. (§20.24) Should the Defendant Testify?

With a few significant exceptions, the conduct of a criminal trial is no different than that of a civil trial. The plaintiff, who has the burden of proof in a civil case, puts on a case first. The state has that burden in a criminal trial and likewise goes first with its evidence. The defense has the right of cross-examination, and the state must have presented evidence that, if believed, will support a verdict of guilty in order to survive a motion for acquittal. The defendant has the option of offering evidence or resting at the close of the state's case. The latter course is

based on the proposition that the state has the burden of proving a defendant's guilt beyond a reasonable doubt, and the defendant, of course, is presumed to be innocent. This presumption by itself will not result in a great many acquittals, so the defendant should plan on offering as much defensive evidence as can be mustered on the defendant's behalf as long as it is kept in mind that there is a great risk in offering any evidence that may not be reasonably believable.

One of the principal differences in the trial of a civil case and the trial of a criminal case is based on constitutional provisions that a defendant cannot be compelled to give evidence against him- or herself. U.S. CONST. amend. V; MO. CONST. art. I, § 19. Thus, the defendant has the absolute right to decide whether to testify. If the defendant chooses not to testify, the state is not permitted to comment on the defendant's failure to personally deny the charges or to justify the defendant's conduct. Rule 27.05; § 546.270, RSMo 2000. This rule also applies to the defendant's spouse. Any direct reference to the defendant's failure to testify by the prosecuting attorney in closing argument to the jury may be ground for mistrial. Counsel should always be on alert for any suggestion by the prosecutor that tends to imply to the jury that they should in any way consider the defendant's failure to testify. An immediate objection and motion for mistrial should be made outside the hearing of the jury because the motion will usually serve to emphasize what the prosecutor has been trying to get the jury to consider. A defendant who does not testify has the option of having the jury specifically instructed that no presumption of guilt or inferences of any kind may be drawn from the failure to testify. Rule 27.05(b).

Another exception to the general rule is the extent to which a defendant who does elect to testify may be cross-examined. The rule in criminal cases is that defendants may not be cross-examined on any subject that they did not go into on direct examination. Section 546.260, RSMo 2000. Counsel should be extremely cautious, however, in relying on this rule because the trial court is allowed a great deal of discretion in determining what has been opened up by the defendant's testimony on direct examination.

Section 546.260 provides that the defendant "shall be liable to cross-examination, as to any matter referred to in his examination in chief, and may be contradicted and impeached as any other witness in the case . . . ." The extent of permissible cross-examination of the defendant is discussed at length in *State v. Beishir*, 332 S.W.2d 898 (Mo. 1960). In

Beishir, the defendant, who was charged with armed robbery, took the stand but limited his testimony to:

- an admission to two prior convictions;
- a statement that he was elsewhere at the time the robbery was committed; and
- a denial that he was involved.

On cross-examination, the state was permitted, over an objection predicated solely on the ground that such matters were outside the scope of direct examination, to interrogate the defendant as to:

- his arrest in the company of two of his co-defendants;
- the search of his person and his possession of a pistol at the time of his arrest; and
- the finding of a pistol in the automobile in which he was seated at the time of his arrest.

In upholding the right of the state to conduct this cross-examination, the Supreme Court said:

> It is well settled that a defendant who testifies may be impeached by proof of prior inconsistent statements.* * * Moreover, the statute "does not mean that a defendant can take the stand and in answer to one or two well-prepared interrogatories sweep away the whole structure of the state's case, and then remain immune from a cross-examination on the issue thus tendered." When "the questions put to him involved practically the whole issue tendered by the indictment, * * * he cannot be heard to complain that the state proceeded to cross-examine him on these matters. * * * Cross-examination, as used in the statute, does not mean a mere categorical review of the matters stated by defendant." * * * Furthermore, as said in State v. Ayres, 314 Mo. 574, 285 S.W. 997, 998, in admitting a prior statement about a matter inconsistent with defendant's testimony in chief: "The 'matter referred to in his examination in chief' means the things he testifies about. * * * If the defendant in chief in a general way refers to a subject, he may be examined in detail as to that subject. Where he states a fact in relation to his actions, the prosecutor may inquire as to particular circumstances which would throw light on that fact." So, in this case, defendants' sweeping denial of the theft was a statement of fact in such a general way as to open for cross-examination in detail the whole subject of whether or not they committed it; and made their prior inconsistent statements that they did so admissible for their impeachment.

Beishir, 332 S.W.2d at 902 (quoting *State v. Kaufman*, 254 S.W.2d 640, 641 (Mo. 1953)).

The problem faced by counsel in deciding whether to permit defendants to testify and, if they do testify, the extent to which they should be examined on direct, is perhaps best illustrated by a comment in the

court's opinion in *State v. Williams,* 519 S.W.2d 576, 578 (Mo. App. E.D. 1975) (quoting *State v. Scown*, 312 S.W.2d 782, 786 (Mo. 1958)), as follows:

> The statute and adjudicated cases do not "give us any yardstick by which we can accurately measure the breadth of a cross-examination and tell clearly whether its proper scope has been infringed. It is probably impossible to lay down any definite rule. Each case is very much dependent upon its own facts and background."

It is obvious, therefore, that counsel can never safely put a defendant on the witness stand without running some risk of permitting the state to open up an area that will be harmful to the defendant in the eyes of the jury. The only way to avoid this problem is by not calling the defendant as a witness.

On the other hand, that degree of safety may be a luxury that the defendant cannot afford. Human nature being what it is, there will be few jurors who do not feel that they are entitled to hear from the defendant as to why the defendant should not be convicted. When that "moment of truth" does not come and the defendant, who is in the best position to know whether he or she is guilty, does not stand up and say so, it may be expecting too much of human nature to assume that the jury will continue to honor the presumption of innocence.

Counsel's best course in deciding whether to use the defendant as a witness is to ensure that counsel knows as much as can possibly be learned about the defendant and the defendant's conduct. Much of this information, of necessity, will have to come from the defendant, who must be convinced at the outset that no information should be withheld based on a fear that counsel who learns the bad as well as the good may not work as hard for an acquittal. Going to trial without having convinced the defendant of this fact can result in a conviction by accident simply because counsel was not well enough informed to be able to make the correct decision as to trial strategy.

Once counsel is satisfied that all the available information has been obtained, some help can be obtained by a careful examination and comparison of the factual situation with the already decided cases, such as:

- *Williams,* 519 S.W.2d 576
- *Beishir,* 332 S.W.2d at 902
- *State v. Adams*, 497 S.W.2d 147 (Mo. 1973)
- *State v. Rice*, 519 S.W.2d 573 (Mo. App. E.D. 1975)

- Additional cases cited in the annotation to § 546.260 and under 42 MO. DIG. 2D *Witnesses* Key Nos. 277 and 337 (1985)

In deciding whether to call the defendant as a witness, it should also be kept in mind that the defendant's prior criminal record can be used for impeachment purposes, whereas if the defendant does not testify, any prior convictions are inadmissible. *State v. Wolfe,* 343 S.W.2d 10 (Mo. banc 1961).

It is far better for a defendant who chooses to testify to admit any prior convictions on direct examination than to wait and have to admit them on cross-examination. It may even be best to mention them during voir dire or in the opening statement, if it is certain at that point that the defendant will testify. Taking it up during voir dire gives counsel an opportunity to discuss the matter with the jury and, in some instances, to weed out those jurors who will consider the existence of a criminal record as proof of guilt in the present charge. At best, counsel will have laid the groundwork to remind the jury in closing argument that all of them knew of the convictions and still gave assurance that they could decide the instant case purely on the basis of the evidence of guilt or innocence. At worst, it will simply make them aware in advance of a fact they are sure to learn.

It is important to keep in mind that only actual convictions may be shown, and it is error to cross-examine the defendant regarding the details of prior convictions, *State v. Scott*, 459 S.W.2d 321 (Mo. 1970), although it is permissible to show the nature of the crimes, *State v. Washington*, 383 S.W.2d 518 (Mo. 1964). Convictions for violations of city ordinances are not admissible for impeachment purposes. *State v. Roberts*, 278 S.W. 971 (Mo. 1925).

Other convictions that are not admissible include:

- convictions in which the defendant was denied counsel in violation of *Gideon v. Wainwright,* 372 U.S. 335 (1963), and *Loper v. Beto*, 405 U.S. 473 (1972);
- convictions that were a nullity as a matter of law, *State v. Kirkland,* 471 S.W.2d 191 (Mo. 1971); and
- convictions in juvenile court, *State v. Davis*, 472 S.W.2d 389 (Mo. 1971); *State v. Tolias*, 326 S.W.2d 329 (Mo. 1959).

It is no longer true that a conviction must have become final to be used for impeachment purposes. See *State v. Jackson*, 651 S.W.2d 547 (Mo. App. W.D. 1983), in which the defendant had previously been found

guilty of a separate offense but was appealing that conviction at the time of a trial on a second offense. The court of appeals, citing § 491.050, now RSMo 2000, concluded that a finding of guilty made by a trier of fact was admissible for impeachment purposes notwithstanding the fact that the conviction was presently being appealed and, therefore, had not become final. There are cases that hold that a plea of guilty that leads to a suspended imposition of sentence may not be used for impeachment purposes. *State v. Frey*, 459 S.W.2d 359 (Mo. 1970), and *State v. Crate*, 493 S.W2d 1 (Mo. App. E.D. 1973), are two such cases. But counsel can no longer rely on those cases because of the subsequent enactment of § 491.050, which provides that actual convictions and prior pleas of guilty may be used for impeachment purposes. *See also State v. Urban*, 798 S.W.2d 507, 514 (Mo. App. W.D. 1990).

The right to prove prior convictions for impeachment purposes must also be distinguished from any attempt by the state to show that the defendant is guilty of the commission of other crimes. The state, as a general rule, is not allowed to prove against defendants any crime not alleged, either as a foundation for a separate punishment or as aiding the proof that they are guilty of the offense charged, even though they have put their character in issue by electing to testify in their own behalf. *State v. Spray*, 74 S.W. 846 (Mo. 1903); *State v. Spinks*, 125 S.W.2d 60 (Mo. 1930).

Unfortunately, the restrictions on cross-examination are subject to many exceptions, and the trial court has a great deal of discretion in deciding whether one of the exceptions applies, so counsel should be prepared to argue that the exceptions are not applicable because of the particular factual situation. Generally speaking, evidence of other crimes is competent to prove the specific offenses charged when it tends to establish motive, intent, absence of mistake or accident, common scheme or plan, or the identity of the person charged with the commission of the crime on trial. *State v. Wing*, 455 S.W.2d 457 (Mo. 1970); *State v. Mitchell*, 491 S.W.2d 292 (Mo. banc 1973). The Supreme Court has emphasized the importance of narrowly limiting evidence of other crimes. *State v. Bernard*, 849 S.W.2d 10 (Mo. banc 1993); *State v. Shaw*, 847 S.W.2d 768 (Mo. banc 1993), *cert. denied*, 510 U.S. 895 (1993), *reh'g denied*, 510 U.S. 1006 (1993).

Another potential problem exists if the victim of an offense was under the age of 14. In reaction to the holding in *Bernard*, the General Assembly enacted § 566.025, now RSMo 2000. That section provides that, in the prosecution of victims under 14 years of age, the state may offer evidence of any other crimes committed by the defendant against

such victims, even if the defendant was not charged or convicted of such crimes. The rationale for admitting such evidence is that it shows the defendant's propensity to commit such crimes.

Should an attempt be made to offer such evidence, either during cross-examination of the defendant or in the form of testimony from some other witness, counsel should object immediately; if it is admitted, a motion should be made for a mistrial.

The objection should include statements that the proof goes to show the commission of other crimes not sufficiently related to the cause on trial and that it is misleading in its probative force. The court is required to subject the admission of such evidence to rigid scrutiny. *State v. Holbert*, 416 S.W.2d 129 (Mo. 1967). If the nexus is not clearly apparent between extraneous criminal transactions and the offense for which the defendant is on trial, the defendant is to be given the benefit of the doubt, and the evidence should be rejected. *State v. Holliman*, 529 S.W.2d 932 (Mo. App. E.D. 1975); *State v. Reed*, 447 S.W.2d 533 (Mo. 1969).

If counsel has a defendant who may have committed other offenses for which the defendant was not convicted, it is important that defense counsel avoid offering any evidence that could be construed as proof of those other offenses; when the defendants do anything to bring out their participation in other crimes, they waive the exclusionary rule. *State v. Duncan*, 254 S.W.2d 628 (Mo. 1953).

When a defendant's prior convictions are in evidence, the defendant has the option of having the jury instructed on the purposes for which the prior convictions may be considered. *See* MAI-CR 3d 310.10 and 310.12.

XIV. (§20.25) Waiver of Jury

While this chapter has been devoted primarily to trial by jury, it is possible in Missouri for a defendant to waive a jury in a felony case. It is significant, however, that a jury cannot be waived without the court having first given its assent. Rule 27.01; MO. CONST. art. I, § 22(a). It is submitted that there are very few instances when a defendant can seriously consider waiving a jury in a felony trial. On occasion, a particular jury panel will have established a track record of being so obviously conviction-minded that the defendant's chances with the judge may be just as good. The opposite is far more likely to be the case. A great many judges at some time in their legal career will have served as prosecuting attorneys or assistant prosecuting attorneys, and some of

their past experience is always going to carry over. Even those judges who have not been involved in prosecution will normally have heard so many criminal trials that they will tend to be more skeptical than jurors of defense theories. It must also be remembered that one of the primary functions of a defense attorney is to keep out of the record incompetent and prejudicial information concerning the client or the facts of the case.

In a jury-tried case, it is usually possible to sort out those items of evidence or testimony that are incompetent and have them excluded by the court without the jury ever having been exposed to them. In a court-tried case, this is impossible because the judge, of necessity, must know what evidence the judge is ruling to exclude. Once a judge has heard the evidence, even though it may not be legally admissible, it is no more realistic to expect the judge to ignore it than it is to expect the jury to disregard it.

It is also more difficult to obtain a reversal of a court-tried case on appeal than a jury-tried case. For example, a certain amount of latitude in the admission of evidence is allowed in jury-waived trials; even when an error is made in the admission of evidence, except when the trial court relied on that evidence in arriving at its finding, the error is ordinarily held to be nonprejudicial. *State v. Hodge*, 655 S.W.2d 738 (Mo. App. S.D. 1983). It is also presumed that the trial court will not be confused or misled and will only consider evidence that is competent and relevant. *State v. Travis*, 625 S.W.2d 630 (Mo. App. E.D. 1981). Given that presumption, it may be a practical impossibility to persuade a court of appeals that the trial court relied on erroneous evidence in arriving at its finding.

It is sometimes argued that, because of pretrial publicity, an impartial jury cannot be selected for a particular case and, therefore, it is better to have the entire case tried by the court. Of course, many cases exist in which publicity has a serious impact. In some instances, however, a change of venue or motion for continuance will soften the pretrial publicity and accomplish far better results for a defendant than waiving a jury trial. That argument also ignores the fact that the trial judge is exposed to just as much pretrial publicity as those members of the community who make up the jury panel. In many instances, a judge's exposure to pretrial publicity will be even greater than that of a layperson because of frequent contact with officers of the law, prosecuting attorneys, etc.

Every right that a defendant has waived is just one less problem facing a court of appeals in deciding whether a conviction will be affirmed. For

these reasons, counsel should never recommend that their clients waive a jury without having fully discussed all implications with the client and then only when there is some overpowering reason to do so.

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Chapter 21

VOIR DIRE AND JURY SELECTION

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The forms in §§21.54–21.59 are the work of Ronald Sokol and James Wyrsch. The author finds them very helpful examples for counsel to adapt to the circumstances of counsel's case.

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I. Introduction

A. (§21.1) Purpose

The purpose of the voir dire process is to select a fair and impartial jury. *State v. Pennington*, 642 S.W.2d 646 (Mo. 1982). Missouri law allows counsel wide latitude in asking probing questions about jurors' attitudes about factual or legal issues related to the case in order to develop challenges for cause and to intelligently exercise peremptory challenges. *State v. Brown*, 547 S.W.2d 797 (Mo. banc 1977); *see also State v. Leisure*, 749 S.W.2d 366 (Mo. banc 1988). Voir dire also provides an opportunity to educate the jurors on the issues in the case. It is also counsel's opportunity to build rapport with the jury. This opportunity is not as great in federal courts in Missouri because voir dire tends to be conducted primarily by the court, based on written questions proposed in advance by the attorneys. But federal judges have the discretion to allow counsel to conduct all or part of the voir dire, and they frequently sustain motions to permit counsel for both sides to conduct voir dire on particularly sensitive or important issues in the case.

B. (§21.2) Scope

This chapter is intended to provide a broad overview of the Missouri voir dire process. There are many treatises and training materials available on questioning techniques and strategies, which are not covered in this chapter. This chapter presents a general outline of the jury selection process, including statutory and constitutional considerations, pertinent rules, and some of the practical considerations involved.

II. Authorities

A. (§21.3) Constitutional

An accused in a criminal case has a constitutional right to a fair and impartial jury: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. XI. This Sixth Amendment provision is applicable to state criminal prosecutions. *Duncan v. La.*, 391 U.S. 145 (1968); *Baldwin v. N.Y.,* 399 U.S. 66 (1970). The right to voir dire a jury to expose a potential juror's bias or prejudice grows out of these constitutional underpinnings. *Turner v. Murray*, 476 U.S. 28 (1986). The Missouri Constitution likewise guarantees the right to a fair and impartial jury. "[I]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county." MO. CONST. art. I, § 18(a). Article I, § 22(a), of the Missouri Constitution provides: "That the right of trial by jury as heretofore enjoyed shall remain inviolate; provided that a jury for the trial of criminal and civil cases in courts not of record may consist of less than twelve citizens as may be prescribed by law . . . ."

Missouri law requires a jury of 12 unless either the entire jury or the number of jurors is waived by the defendant. See article I, § 22(a), of the Missouri Constitution and Rule 27.01 as to waiver of a jury trial. *State v. McGee,* 447 S.W.2d 270 (Mo. banc 1969), *cert. denied*, 397 U.S. 1056 (1970); *Kansas City v. Duncan,* 142 S.W. 246 (Mo. 1911). But § 543.210, RSMo 2000, allows as few as 6 jurors to hear misdemeanor and infraction cases in associate circuit divisions upon agreement of the parties.

The constitutional right to trial by jury also includes the right to question prospective jurors about issues important to the rights of the defendant. For example, a defendant accused of an interracial crime is entitled to have the venire panel questioned on the issue of racial bias, *Turner*, 476 U.S. 28, and a defendant in a capital case is entitled to ask whether prospective jurors are biased in favor of the death penalty. *Morgan v. Ill.*, 504 U.S. 719 (1992).

The United States Supreme Court held that a juror's failure to truthfully respond to voir dire questions about relationships with witnesses or counsel violated a defendant's Fourteenth Amendment right to due process of law and a fair and impartial jury. *Williams v. Taylor*, 529 U.S. 420 (2000). In that case, a juror had been married to the sheriff, who was

a witness in the case, and the prosecutor represented her in her divorce. At the time of Williams' trial, she was on friendly terms with her ex-husband, but failed to respond when asked if she was related to a witness. The Court ordered a hearing on Williams' claim of juror misconduct, stating, "It may be that petitioner could establish that [the juror] was not impartial." *Id.* at 442.

Likewise, Missouri law allows a remedy when a juror fails to disclose or misrepresents material information during voir dire. *Bell v. Sabates*, 90 S.W.3d 116, 120 (Mo. App. W.D. 2002), reaffirmed that a "motion for new trial will be granted if the moving party shows that a juror failed to disclose material information during *voir dire* that resulted in bias and prejudice to the moving party." To establish a claim of juror nondisclosure, counsel must have asked a question "reasonably calculated to elicit the allegedly withheld information." *Id.* (citing *Banks v. Vill. Enters., Inc.*, 32 S.W.3d 780, 788 (Mo. App. W.D. 2000)). A question will trigger the juror's duty to disclose "only if a lay person would reasonably conclude that the undisclosed information was solicited by the question." *Id.* Thus, in *Sabates,* a juror's failure to disclose that he had been a defendant in a civil suit required a new trial when counsel asked if any prospective juror had been involved in a lawsuit or legal claim. Although the case involved a civil dispute, *Williams*, 529 U.S. 420, makes it unmistakably clear that the rule is equally applicable in criminal cases.

The Equal Protection Clause of the Fourteenth Amendment prohibits a party from discriminating against prospective jurors on the basis of race, ethnicity, or gender at any stage in the jury selection process. *Strauder v. W. Va.*, 100 U.S. 303 (1879); *Duren v. Mo.,* 439 U.S. 357 (1979); *Batson v. Ky.,* 476 U.S. 79 (1986); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994). Article I, § 5, of the Missouri Constitution also prohibits disqualifying jurors based on "religious persuasion or belief." *Batson* also prohibits defense counsel from using peremptory challenges in a discriminatory manner.

B. (§21.4) Statutory

Within constitutional limits, a state may regulate the qualifications of jurors. *Strauder v. W. Va.*, 100 U.S. 303 (1879). Missouri statutes are designed to ensure a random sample of qualified venirepersons for every trial—thereby providing the parties with an opportunity to select a jury that represents a fair cross-section of the community. While a defendant must show the intentional systematic exclusion of women or minorities to prevail on a constitutional challenge to the jury selection process,

§ 494.465, RSMo 2000, actually provides greater protection. A defendant is entitled to injunctive or appellate relief if it can be shown that the jury is not empanelled in strict adherence to the applicable statute, regardless of the ethnic or gender makeup of the resulting pool of jurors. *State ex rel. Woods v. Connett*, 525 S.W.2d 326 (Mo. banc 1975); § 494.465.

Chapter 494, RSMo, sets forth general qualifications and provisions relating to jurors; Chapter 546, RSMo, provides the specifics of criminal jury selection and qualification standards and procedures. Significant provisions include the following:

- Section 494.465 provides for filing a motion to challenge the jury when there is a failure to comply with the statutory provisions (§ 494.465.3 states that this is the exclusive remedy).

- Section 494.470, RSMo 2000, lists the challenges for cause in civil *and* criminal cases.

- Section 494.480, RSMo 2000, provides for peremptory challenges in civil *and* criminal cases. Section 494.480.4 further provides that the failure of the trial court to sustain a challenge for cause shall not be grounds for appeal unless the challenged venireperson actually sits on the jury.

- Section 494.505, RSMo 2000, provides for jurors to be summoned from another county as an alternative to conducting the entire trial in another county upon a change of venue.

C. (§21.5) Rules

Local rules in some jurisdictions provide counsel questionnaires concerning basic personal history of prospective jurors. *See generally* Rules 27, 37. There is no prohibition against counsel seeking leave of court to submit counsel's own questionnaire to members of the jury pool in advance of trial.

A jury trial may be requested in municipal ordinance violation cases. Rule 37.61(c). The request must be made by motion at least ten days before the scheduled hearing; if the motion is sustained, the trial shall be conducted as in misdemeanor cases. Rule 37.61(d), (e). But there is no constitutional requirement of a jury trial for an ordinance violation and it must be specifically provided by law. *City of Independence v. Deffenbaugh Indus., Inc.*, 804 S.W.2d 383 (Mo. App. W.D. 1990). See

footnote 3, page 385, of *Deffenbaugh* regarding jury trials provided by law for ordinance violations.

III. Motions to Quash Jury Panel

A. (§21.6) In General

Motions to quash the jury panel are made to attack the selection of the petit jury panel. Any number of grounds can be urged, including but not limited to the following:

- The jury was not selected in accordance with applicable statutes. *Compare State ex rel. Woods v. Connett*, 525 S.W.2d 326 (Mo. banc 1975) (successful grand jury challenge), *with State v. Gresham*, 637 S.W.2d 20 (Mo. banc 1982) ("key man" selection process).
- The methods of selecting the jury do not ensure that the jury is drawn from a fair cross-section of the community. *See, e.g., Duren v. Mo.,* 439 U.S. 357 (1979); *Gresham,* 637 S.W.2d 20.
- The statutes and constitutional provisions governing the selection of the jury are unconstitutional on their face or as applied. *See, e.g., Duren,* 439 U.S. 357.
- Prejudicial pretrial publicity is such that the jurors are biased against the defendant. *See, e.g., Irvin v. Dowd*, 366 U.S. 717 (1961).
- Prejudicial remarks of the judge, the prosecutor, or a juror during voir dire are such that the prospective jury should be discharged. *State v. Carter,* 557 S.W.2d 47 (Mo. App. E.D. 1977).
- The court improperly overruled challenges for cause. *See State v. Turnbough*, 498 S.W.2d 567 (Mo. 1973); *State v. Payne,* 639 S.W.2d 597 (Mo. banc 1982); *but see State v. Reynolds*, 619 S.W.2d 741 (Mo. 1981); *State v. Brown,* 547 S.W.2d 797 (Mo. banc 1977).
- A sufficient number of peremptory strikes was not afforded to the defendant. *State v. Williams*, 515 S.W.2d 544 (Mo. 1974).
- The court improperly restricted questioning during voir dire, *Brown,* 547 S.W.2d 797, or permitted improper questions to be put to the panel, *State v. Van,* 543 S.W.2d 827 (Mo. App. E.D. 1976); *State v. Kiner,* 441 S.W.2d 720 (Mo. 1969). *See* §21.7, *infra.*
- The prosecutor used peremptory challenges to exclude a legally cognizable class of persons from jury duty. See the discussion in §§21.23–21.28 below.

For the mechanics of making a jury composition challenge, see WILL ROUNTREE & ELISSA KRAUSS, JURYWORK: SYSTEMATIC TECHNIQUES (National Jury Project, West Publishing, 2nd ed., 1983).

B. (§21.7) Making the Record

To properly preserve a challenge to the jury panel for appellate review, the defendant should make a written motion before trial, stating with particularity the grounds for the challenge. *State v. Lindsey*, 630 S.W.2d 191 (Mo. App. S.D. 1982). The motion must conform to Rule 24.04.

Section 494.465, RSMo 2000, establishes the "exclusive means" to challenge a jury for failure to comply with §§ 494.400–494.505, RSMo 2000 and Supp. 2004, and directs that a motion be filed at any time (including during trial) before the jury is sworn or within 14 days after the movant discovers or could have discovered (in the exercise of reasonable diligence) the grounds, whichever is *later*. The failure to make a timely and proper objection to the selection process constitutes a waiver. *State v. Sumowski*, 794 S.W.2d 643 (Mo. banc 1990). But § 494.465 may not apply to a jury selection challenge based on constitutional violations. *State ex rel. Riederer v. Coburn*, 830 S.W.2d 427 (Mo. App. W.D. 1991).

In *State v. Brown*, 547 S.W.2d 797, 805 (Mo. banc 1977), the Supreme Court of Missouri held that it was:

> [N]ot necessary to move to quash or discharge the panel in order to preserve for inclusion in a motion for new trial and review on appeal the specific objections made during voir dire to questions asked by the other party or to preserve for review the trial court's ruling refusing to permit proposed questions to be asked of the panel.

That holding is in doubt since the enactment of § 494.465. In *State v. Bost*, 820 S.W.2d 516 (Mo. App. W.D. 1991), the court stated that § 494.465 represents the policy in Missouri that *all* challenges to a juror's qualifications must be presented to the trial court before the jury is sworn or within 14 days after discovery or after they should have been discovered. Because opinions held by the prospective jurors on material matters of fact or the law are the statutory basis for challenging a juror (§ 494.470.1 and .2, RSMo 2000), counsel should consider making a specific motion for relief based on § 494.465 despite the holding in *Brown,* 547 S.W.2d 797, to preserve objections to certain questions permitted by the trial court. Counsel should, therefore, diligently attempt to comply with the provisions of § 494.465 or risk forfeiting the right to challenge a juror's qualifications.

Counsel should move to quash the jury before the date set for trial if the basis for such a motion is known before the prospective jury panel is present in court. After voir dire, but before the jury is sworn, the motion should be made again and a ruling obtained. At the end of the voir dire process, counsel should not answer that the jurors are "accepted" or previous objections may be waived. *See Brown,* 547 S.W.2d 797. The motion must be renewed again in the motion for new trial. A challenge to the array of a grand or petit jury must be raised before the jury is sworn when the grounds for objection are known. *State v. Robinson*, 484 S.W.2d 186 (Mo. 1972). When the challenge to the array claims a denial of right to equal protection of the law, objection before the trial begins is sufficient. An objection to the array made for the first time in the motion for new trial is untimely unless there is a showing that the defendant had no knowledge before trial of the matters complained of or had no means to obtain this knowledge. *Doran v. Ross,* 221 S.W.2d 756 (Mo. App. W.D. 1949). Under § 494.465, the movant is entitled to an evidentiary hearing on the motion.

C. (§21.8) Burden of Proof

The defendant must bear the heavy burden of showing facts sufficient to establish the grounds for the motion. *See*:

- *State v. Briscoe*, 646 S.W.2d 424 (Mo. App. W.D. 1983);
- *State v. Mooring*, 445 S.W.2d 303 (Mo. 1969);
- *State v. Hutchens*, 604 S.W.2d 26 (Mo. App. S.D. 1980);
- *State v. Montjoy*, 587 S.W.2d 624 (Mo. App. S.D. 1979);
- *State v. Camillo*, 610 S.W.2d 116 (Mo. App. W.D. 1980).

Mere statements of counsel are not sufficient and do not prove themselves. *See, e.g.*, *State v. Dowe*, 432 S.W.2d 272 (Mo. 1968). See *State v. Smith,* 467 S.W.2d 6 (Mo. 1971), in which a showing of statistical possibilities plus testimony of county officials responsible for jury selection showing intentional exclusion of women made out a prima facie case of systematic exclusion of women and shifted the burden to the state. It should be noted, however, that there is no per se constitutional right to have a jury composed of persons of the defendant's own racial, gender, religious, economic, educational, or cultural background. *State v. Gray,* 478 S.W.2d 654 (Mo. 1972); *State v. Strawther*, 476 S.W.2d 576 (Mo. 1972). Rather, the law contemplates that a random selection process, free of improper discrimination, will produce a jury made up of a fair and representative cross-section of the community.

In a challenge based on the assertion that an unconstitutional discriminatory selection process was used, the defendant establishes a prima facie case by showing that there has been an intentional exclusion of a legally cognizable group (i.e., an identifiable class within the community, without which the jury does not represent a fair cross-section of the community) and that this exclusion constituted a continuing percentage discrimination. Once this is shown, the burden shifts to the state to show that the prospective panel was drawn in accordance with constitutional standards. *Smith,* 467 S.W.2d 6.

In a challenge based on a denial of the Sixth Amendment right to a fair and impartial jury or a due process claim, the defendant does not need to be a member of the class of persons excluded in order to have standing to make the challenge. *Peters v. Kiff,* 407 U.S. 493 (1972); *Fay v. N.Y.*, 332 U.S. 261 (1947). But if the challenge is based on the Fourteenth Amendment's equal protection clause, the defendant must be a member of the excluded class. *Alexander v. La.*, 405 U.S. 625 (1972). *But see Powers v. Ohio*, 499 U.S. 400 (1991).

Total exclusion of a particular group is sufficient to make a prima facie case of discrimination. *Norris v. Ala.,* 294 U.S. 587 (1935). *See also Arnold v. N.C.,* 376 U.S. 773 (1964); *Brown v. Allen*, 344 U.S. 443 (1953); *State v. Logan*, 111 S.W.2d 110 (Mo. 1937); *cf. Strawther,* 476 S.W.2d 576. See John E. Curran, Comment, *Constitutional Law—Burden of Proof in Juror Discrimination Cases in Missouri*, 38 MO. L. REV. 99 (1973), discussing *Strawther*, 476 S.W.2d 576, and containing an excellent compilation of authorities. It should be noted that, in an under-representation case—there are members of the class but not enough in proportion to their numbers in the community—a statistical showing is insufficient to make a prima facie case (as it is in a total exclusion case). *Brown,* 344 U.S. 443; *Whitus v. Ga.*, 385 U.S. 545 (1967); *State v. Davis,* 646 S.W.2d 871 (Mo. App. W.D. 1982).

It should be noted that "courts have recognized a wide range of social, political, racial and religious groups as identifiable classes within the community." Comment, 38 MO. L. REV. 99, 100, and cases cited in footnote 13.

In a case involving pretrial publicity, the defendant may show the existence of the publicity by newspaper articles, a poll of the citizens of the community, testimony of persons familiar with the community, and other evidence tending to show that publicity has adversely affected the attitudes of prospective jurors about the case. Before dismissal of the case is warranted, voir dire, change of venue, and continuance must be

shown to be ineffective in protecting the defendant's right to a fair trial. *See* §21.6, *supra*. Reversible error may occur, however, if a jury panel is shown to be polluted by pretrial publicity. *State v. Baumruk*, 85 S.W.3d 644, 650 (Mo. banc 2002).

Other grounds for quashing the panel must be accompanied by a showing of prejudice to the defendant or that the defendant's interests have been adversely affected. *See*:

- *State v. Pettis*, 522 S.W.2d 12 (Mo. App. W.D. 1975) (statutory provisions relating to selection of a jury are directory only);

- *State v. Carter*, 557 S.W.2d 47 (Mo. App. E.D. 1977) (defendant must show remarks of prosecutor, juror, or judge to be prejudicial or disparaging to defendant's defense; court eliminated any possible prejudice by sustaining the objection to the remarks and by instructing the prospective jury to disregard them);

- *State v. Taylor*, 324 S.W.2d 643 (Mo. 1959);

- R.P. Davis, Annotation, *Bias, Prejudice, or Conduct of Individual Member or Members of Jury Panel as Ground for Challenge to Array or to Entire Panel*, 76 A.L.R.2D 678 (1961);

- *State v. Jackson*, 659 S.W.2d 12, 14 (Mo. App. E.D. 1983).

But when the defendant has been restricted improperly in questioning prospective jurors during voir dire, *State v. Brown*, 547 S.W.2d 797 (Mo. banc 1977), or when a sufficient number of peremptory strikes was not afforded a defendant, *State v. Williams,* 515 S.W.2d 544 (Mo. 1974), the error is preserved for appellate review even without a showing of prejudice to the defendant or of an adverse effect on the defendant's interests. As for the standard of review of the trial court's rulings on challenges for cause, see the discussion in §21.10 below.

A motion to quash the panel is an appropriate remedy when counsel for the opposing side uses peremptory challenges in a discriminatory manner, either historically, *Swain v. Ala.,* 380 U.S. 202 (1965), or in the particular case being tried, *Batson v. Ky.,* 476 U.S. 79 (1986). For a more detailed discussion of *Batson,* see §§21.23–21.28 below.

In any challenge based on failure to select the venire in accordance with statute, there is a strong presumption that the jury has been selected

properly. *State v. Sumowski*, 794 S.W.2d 643 (Mo. banc 1990); *see also* § 494.465, RSMo 2000; *State v. Townsend*, 593 S.W.2d 639 (Mo. App. E.D. 1980).

IV. (§21.9) Qualifications and Exemptions

Missouri law defines a qualified juror as one who is "in a position to enter the jury box disinterested and with an open mind, free from bias or prejudice" and willing to "accord each witness's testimony the weight to which it is entitled." *State v. Ealy*, 624 S.W.2d 490, 493 (Mo. App. W.D. 1981). Section 494.400, RSMo Supp. 2004, provides the general statutory qualifications for jurors:

> All persons qualified for grand or petit jury service shall be citizens of the state and shall be selected at random from a fair cross section of the citizens of the county or of a city not within a county for which the jury may be impaneled, and all such citizens shall have the opportunity to be considered for jury service and an obligation to serve as jurors when summoned for that purpose, unless excused. A citizen of the county or of a city not within a county for which the jury may be impaneled shall not be excluded from selection for possible grand or petit jury service on account of race, color, religion, sex, national origin, or economic status.

Section 494.425, RSMo Supp. 2004, states that the following are ineligible for grand or petit jury service:

> (1) Any person who is less than twenty-one years of age;
> (2) Any person not a citizen of the United States;
> (3) Any person not a resident of the county or city not within a county served by the court issuing the summons;
> (4) Any person who has been convicted of a felony, unless such person has been restored to his civil rights;
> (5) Any person unable to read, speak and understand the English language, unless such person's inability is due to a vision or hearing impairment which can be adequately compensated for through the use of auxiliary aids or services;
> (6) Any person on active duty in the armed forces of the United States or any member of the organized militia on active duty under order of the governor;
> (7) Any judge of a court of record;
> (8) Any person who, in the judgment of the court, is incapable of performing the duties of a juror because of mental or physical illness or infirmity . . . .

Section 494.430, RSMo Supp. 2004, states that the following persons *shall* be excused upon timely application from service as a grand or petit juror:

> (1) Any person who has served on a state or federal petit or grand jury within the preceding two years;
>
> (2) Any person whose absence from his or her regular place of employment would, in the judgment of the court, tend materially and adversely to affect the public safety, health, welfare or interest;
>
> (3) Any person upon whom service as a juror would in the judgment of the court impose an undue or extreme physical or financial hardship;
>
> (4) Any person licensed to engage in and actively engaged in the practice of medicine, osteopathy, chiropractic, dentistry or pharmacy . . . .

V. Challenges

A. (§21.10) For Cause

Section 494.470.3, RSMo 2000, provides:

> All challenges for cause may be tried by the court on the oath of the person challenged or on other evidence and such challenges shall be made before the juror is sworn. If the cause of challenge be discovered after the juror is sworn and before any part of the evidence is delivered, the juror may be discharged or not in the discretion of the court.

Any juror disqualified under the terms of the statutes cited in §21.9 above may be challenged for cause. It is error for the court to fail to sustain a valid challenge for cause. *State v. Smith*, 649 S.W.2d 417 (Mo. banc 1983). But the error is reversible only if the challenged person actually serves on the jury. Section 494.480.4, RSMo 2000. A juror must be disqualified if the juror has not been impaneled according to law. *See State ex rel. Woods v. Connett,* 525 S.W.2d 326 (Mo. banc 1975).

The cause for the challenge must be specified, *State v. Forsha*, 88 S.W. 746 (Mo. 1905), and must be made by the defendant or the right is waived, *State v. Tash*, 528 S.W.2d 775 (Mo. App. W.D. 1975).

A challenge to the qualifications of a juror may be denied as untimely if it is made after the jury is sworn unless false answers were given or deceptions otherwise practiced as to matters actually inquired into on voir dire. *State v. Crawford*, 416 S.W.2d 178 (Mo. 1967). In this event, due diligence of the defendant and the defendant's counsel must be shown. *State v. Schleicher*, 442 S.W.2d 19 (Mo. 1969). The defendant must show that the defendant's rights were prejudiced and that a substantial injustice resulted. *State v. Robinson*, 484 S.W.2d 186 (Mo. 1972). An adequate evidentiary record must also be made. An unverified statement in a motion for new trial is not sufficient; the matter must be proved by testimony or affidavit. *State v. Childers,* 268 S.W.2d 858 (Mo. 1954).

It should be noted that, if counsel for the defendant announces, after voir dire, that the panel is "satisfactory" or "accept[s]" the jurors, counsel waives the right to present any challenge for cause thereafter. *State v. Turnbough*, 498 S.W.2d 567 (Mo. 1973). *Turnbough* further suggests that a motion to quash the panel is also necessary to preserve the record on *challenges for cause. But see State v. Brown,* 547 S.W.2d 797, 805 (Mo. banc 1977) (that part of the *Turnbough* decision that requires that a motion to quash be filed in order to preserve "specific objections made during voir dire to questions asked by the other party or to preserve for review the trial court's ruling refusing to permit proposed questions to be asked of the panel" was overruled). *Brown* also holds that a question of the court to counsel at the end of voir dire whether the final panel was the "accepted panel" (with an affirmative response by defense counsel) is not an acceptance and, therefore, not a waiver of prior objection. For an example of a successful posttrial challenge for cause, see *State v. Coy,* 550 S.W.2d 940 (Mo. App. W.D. 1977).

To preserve the matter for appeal, objections to the striking of jurors must be made at the time the court acts. *State v. Ofield*, 651 S.W.2d 190 (Mo. App. W.D. 1983).

Trial before a jury that has made up its mind that the defendant is guilty before trial begins violates due process of law. *Irvin v. Dowd*, 366 U.S. 717 (1961); *Brown*, 547 S.W.2d 797. Due process of law may be denied if the jurors possess knowledge of the defendant's past misdeeds. It depends on the "totality of the circumstances." *Murphy v. Fla.*, 421 U.S. 794 (1975); 13 AM. CRIM. L. REV. 285 (1975); Michael L. Boicourt, Comment, *Pre-Trial Publicity*, 34 MO. L. REV. 538 (1969). And it is the duty of the trial court in the first instance to eliminate those jurors who have a preconceived opinion of the defendant's guilt. *State v. Spidle*, 413 S.W.2d 509 (Mo. 1967). A juror who has formed an opinion as to the guilt of the accused is incompetent to serve unless the juror can lay aside the opinion, have an open mind, and be guided solely by the evidence. *State v. Cornett*, 381 S.W.2d 878 (Mo. banc 1964). But a juror is not the judge of the juror's own qualifications. *Triplett v. St. Louis Pub. Serv. Co.*, 343 S.W.2d 670 (Mo. App. E.D. 1961). The trial court's decision should be based on facts stated by the prospective juror, not on the juror's own conclusions as to the juror's ability to act impartially. *State v. Lovell*, 506 S.W.2d 441 (Mo. banc 1974); *State v. Byrd*, 646 S.W.2d 419 (Mo. App. W.D. 1983). If the total examination of the juror shows doubt whether the juror could be fair, the juror should be excused for cause. A juror who is predisposed to believe any particular class or person (e.g., a police officer) is not a qualified juror. *State v. Owens*, 620 S.W.2d 448 (Mo. App.

W.D. 1981). Jurors are incompetent to serve when they cannot give proper weight to testimony, e.g., when they:

- are of the opinion that the defendant's failure to testify would be a factor weighing against innocence;
- believe the defendant has the burden of proving alibi; or
- believe they would have trouble adhering to the standard of reasonable doubt, such as taking the word of the victim or a police officer over that of the defendant if there was a conflict.

State v. Scott, 482 S.W.2d 727 (Mo. banc 1972); *State v. Hicks*, 530 S.W.2d 396 (Mo. App. E.D. 1975); *Spidle,* 413 S.W.2d 509; *Lovell,* 506 S.W.2d 441; *State v. Draper*, 675 S.W.2d 863 (Mo. banc 1984). Even if a juror has expressed an opinion that the juror is prejudiced against a particular crime, *State v. Burns,* 85 Mo. 47 (1884), or prejudiced against a defense such as insanity, *State v. Baker*, 152 S.W. 46 (Mo. 1912), the juror is impartial if the court believes a statement that the juror will lay aside the prejudice and give the defendant a fair trial. *State v. Harrell*, 655 S.W.2d 849 (Mo. App. E.D. 1983). Although the court may exclude a juror on the juror's own motion, it is not required to do so. *State v. Dodson*, 595 S.W.2d 59 (Mo. App. E.D. 1980).

Missouri courts once jealously guarded the right of a defendant to have *all* valid challenges for cause sustained so that a peremptory strike would not be "wasted" on a juror who should have been removed for cause. "Under the law defendant is entitled both to a qualified panel *and* the statutory number of peremptory challenges. He need not sacrifice one to the other." *State v. Morrison,* 557 S.W.2d 445, 446 (Mo. banc 1977). But this protection was abrogated by statute after the Supreme Court of Missouri granted new trials to defendants sentenced to death by juries selected in violation of this principle. *State v. Schnick*, 819 S.W.2d 330 (Mo. banc 1991); *State v. Wacaser*, 794 S.W.2d 190 (Mo. banc 1990). Now, a defendant is entitled to *appellate* relief only if the unqualified person actually sits on the jury—forcing the defendant to make the choice that the Court in *Morrison* found unconscionable. Section 494.480.4, RSMo 2000. Of course, the trial court is still under an obligation to provide the accused with a full panel of qualified jurors. In any case, when the failure to strike an unqualified juror may be a ground for appeal, counsel should include the jury list showing the strikes for cause and the peremptory strikes in the trial record. *State v. Ealy*, 624 S.W.2d 490, 493 (Mo. App. W.D. 1981).

The decision of the trial judge whether to exclude a juror for cause is discretionary. *State v. Cuckovich*, 485 S.W.2d 16 (Mo. banc 1972); *State*

v. Pflugradt, 558 S.W.2d 794 (Mo. App. W.D. 1977); *State v. Treadway*, 558 S.W.2d 646 (Mo. banc 1977). According to the author of the note, Mark T. Stoll, *Voir Dire Examination—Challenges for Cause and Abuse of Discretion*, 41 MO. L. REV. 632, 633 (1976):

> The general standard of review adopted by the Supreme Court of Missouri provides that a trial judge's ruling on a challenge for cause should not be disturbed on appeal except in three situations. If it can be shown that there is some fact which, in and of itself, necessarily shows prejudice, that the juror's demeanor disclosed prejudice, or that there was an admission of prejudice, the trial court will be found to have abused its discretion. All doubts are to be resolved in favor of the finding of the trial court. [Footnotes omitted.]

See State v. Engleman, 634 S.W.2d 466 (Mo. 1982). *See also* Newton C. Brill, *Voir Dire I—Examination of Jurors*, 29 MO. L. REV. 259 (1964); Robert E. Rosenwald, *Exemption From Jury Service and Challenges for Cause in Missouri*, 15 ST. LOUIS L. REV. 230 (1930); Lyman Field, *Voir Dire Examination—A Neglected Art*, 33 UMKC L. REV. 171, 172-73 (1965); John Scurlock, *Basic Principles of the Administration of Criminal Justice with Particular Reference to Missouri Law*, 44 UMKC L. REV. 139, 304–05 (1975).

1. (§21.11) Death Qualification of Jurors

Overwhelming empirical evidence shows that a "death qualified" jury, i.e., a jury from which persons who have strong scruples against capital punishment are excluded, is so strongly biased in favor of the prosecution that it is incapable of presuming a defendant innocent. See *Grigsby v. Mabry,* 758 F.2d 226 (8th Cir. 1985), *rev'd, Lockhart v. McCree*, 476 U.S. 162 (1986), and the scientific studies discussed in those cases. In spite of this fact, the Supreme Court has ruled that it is permissible for the government to eliminate jurors whose views on the death penalty are such that their ability to follow the law and the instructions of the court is "substantially impair[ed]." *Lockhart,* 476 U.S. 162; *Wainwright v. Witt*, 469 U.S. 412 (1985).

There are limits on the state's death qualification process. It is a violation of the due process clause to "entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Witherspoon v. Ill.*, 391 U.S. 510, 521 (1968). A jury is improperly impaneled when it is selected "by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522–23. In explaining what it means for a juror to

be so "substantially impaired" that it is constitutionally permissible to exclude the juror from the jury, the United States Supreme Court stated:

> But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. . . . Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

Adams v. Tex., 448 U.S. 38, 50 (1980).

The defense has a corollary right to question and challenge prospective jurors who are biased in favor of the death penalty. *Morgan v. Ill.*, 504 U.S. 719 (1992). The Missouri Constitution states that "no person shall, on account of his religious persuasion or belief, . . . be disqualified from testifying or serving as a juror." MO. CONST. art. I, § 5. This provision may place some limits on the death qualification process, though this has not been tested.

Juror questionnaires can be effective and efficient in complex cases to assist in selection and to identify jurors who should be questioned about specific subjects or beliefs. In a fairly recent capital case, *Knese v. State*, 85 S.W.3d 628 (Mo. banc 2002), defense counsel had these questionnaires available, but failed to read questionnaires that were received on the morning of trial. One prospective juror, who eventually was selected as foreman of the jury, wrote in his questionnaire that the law is "way too soft" on criminals and that the solution to crime is to "build more jails" and give out longer sentences and fewer paroles. He advocated public executions, stating, "make executions public. If a criminal knew he was being executed in a public square in front of thousands of people, he might [think] twice about committing a murder." Another person, who was eventually selected to serve, "stated that he disfavored 'endless appeals,' 'parole boards,' 'good time,' and 'clergy to pamper a killer,' and wrote: 'if he is found guilty, do it.'" *Id.* at 632. Defense counsel did not question the jurors directly. Both jurors remained silent in

response to the trial court's question, "Basically folks, that is what I'm asking you is the death penalty question. Is there anybody here that feels that they could not follow the Court's instructions?" *Id.*

In finding that defense counsel was ineffective for failing to question and challenge for cause the jurors in question, the Supreme Court reviewed the law governing the qualifications of jurors in death penalty trials:

> A defendant has a right to a fair and impartial jury. U.S. Const. amends. VI, XIV; Mo. Const. art. I, sec. 18(a). One aspect of this right is adequate voir dire to identify unqualified jurors. *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222, 2230, 119 L.Ed.2d 492 (1992); *State v. Clark*, 981 S.W.2d 143, 146 (Mo. banc 1998). To that end, a veniremember should be asked if he or she holds any prejudices or biases that would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581, 589 (1980). This inquiry is meant to reveal whether a juror can set aside any prejudices and impartially fulfill his obligations as a juror. *Wainwright v. Witt*, 469 U.S. 412, 421–22, 105 S.Ct. 844, 850, 83 L.Ed.2d 841, 851 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1776–77, 20 L.Ed.2d 776, 784–85 (1968).

Knese, 85 S.W.3d at 632.

The Court observed that the questionnaires of the two jurors in question "suggest—although not conclusively establishing—that they would automatically vote to impose death after a murder conviction." *Id.* at 633. The Court found that trial counsel's failure to read all of the questionnaires and question the jurors about their views on the death penalty constituted inadequate performance under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), stating, "At a minimum, counsel should have read the questionnaires, and voir dired to determine whether they could serve as jurors. Failure to do so is ineffective assistance of counsel." *Knese*, 85 S.W.3d at 633. Observing that "the United States Supreme Court, as a 'per se rule,' requires vacating a death sentence imposed by a jury whose composition is affected by *Witherspoon* error," the Court found that Knese was prejudiced by his attorney's deficient performance, and it remanded the case for a new sentencing hearing. *Id.* (citing *Gray v. Miss.*, 481 U.S. 648, 668 (1987)).

2. (§21.12) Rights of the Accused

Jurors must state unequivocally that they would draw no inference of guilt from the defendant's failure to testify. The ability to

"probably" make a decision "just by the evidence" is not sufficient. *State v. Odom,* 712 S.W.2d 466, 468 (Mo. App. E.D. 1986). Likewise, it was error for the trial court to deny a challenge for cause when a juror stated that she would like to hear the defendant's side and that his failure to testify might "[p]ossibly" cause her to think defendant had something to hide. *State v. Stewart,* 692 S.W.2d 295 (Mo. banc 1985); *see also State v. Bohlen,* 698 S.W.2d 577 (Mo. App. E.D. 1985). But any abuse of discretion by the court's failure to strike such venirepersons is not prejudicial if the defendant testifies. *State v. Brooks,* 693 S.W.2d 211 (Mo. App. W.D. 1985).

A juror's hostility to the rights of the defendant will support a challenge for cause and, in extreme cases, could poison the entire panel against the defense, requiring a mistrial. In *State v. Lynch*, 816 S.W.2d 692, 693 (Mo. App. S.D. 1991), the trial court should have investigated the bias of a member of the panel who said "these proceedings are taking too long, we could have already convicted the guy and gone home by now," and it was reversible error to overrule the defendant's motion for a mistrial.

3. (§21.13) Statutory Disqualification—Publicity, Opinions, and Relationships

Section 494.470, RSMo 2000, provides the following persons shall not be sworn as jurors in the cause:

> No witness or person summoned as a witness in any cause, no person who has formed or expressed an opinion concerning the matter or any material fact in controversy in any case that may influence the judgment of such person, and no person who is kin to either party in a civil case or to the injured party, accused, or prosecuting or circuit attorney in a criminal case within the fourth degree of consanguinity or affinity . . . . [No] [p]ersons whose opinions or beliefs preclude them from following the law as declared by the court in its instructions . . . . [Any other cause] authorized by the law.

4. (§21.14) Relationships With Police, Prosecutors, Etc.

It is important to distinguish between jurors who are partial toward police testimony and those that merely have personal relationships with law enforcement officers. The former are not qualified jurors; the latter may or may not be qualified to serve, depending on the individual bias. When a venireperson expresses partiality toward a police officer's testimony per se, that person should be excluded. *State v. Stewart,* 729 S.W.2d 246 (Mo. App. S.D. 1987). In *State v. Jones,* 692 S.W.2d 343 (Mo. App. E.D. 1985), the trial court's failure

to remove for cause a venireperson who was married to a former police officer and stated that she would have "probably" judged a police officer's testimony the same as anyone else's was held to be reversible error. *See also State v. Hopkins,* 687 S.W.2d 188 (Mo. banc 1985); *State v. Willis*, 688 S.W.2d 38 (Mo. App. E.D. 1985).

In *State v. Plaster*, 813 S.W.2d 349 (Mo. App. E.D. 1991), the court found no abuse of discretion in excusing a juror for cause when the juror acknowledged that the prosecutor handling the case was the same one that prosecuted a criminal charge against him. In *State v. Martin*, 815 S.W.2d 127 (Mo. App. S.D. 1991), the court found no error in failing to strike a juror who knew several police officers. The court pointed out that simply knowing or being related to a police officer is not a basis for challenging the juror for cause (citing *State v. Merritt*, 734 S.W.2d 926 (Mo. App. E.D. 1987), and *State v. Williams*, 643 S.W.2d 832 (Mo. App. E.D. 1982)). The court cited *State v. Guy*, 770 S.W.2d 362 (Mo. App. S.D. 1989), stating that marriage to a police officer was not grounds for challenging the juror. But in *State v. Schnick*, 819 S.W.2d 330, 333 (Mo. banc 1991), the Court reversed a conviction for three counts of first degree murder when a juror was asked if law enforcement officers were entitled to more believability than others and the juror answered "[n]ot necessarily, but you know them and the job they have done and you believe them before you would a stranger." In *Schnick* the Court discussed the need to establish prejudice in some situations. *See State v. Draper*, 675 S.W.2d 863 (Mo. banc 1984).

See also Dennis v. United States, 339 U.S. 162 (1950) (employees of the federal government cannot be automatically challenged for cause when the United States is a party).

5. (§21.15) Making the Record and Review

Errors in the exclusion of potential jurors should always be made on the side of caution, especially when a replacement can be easily obtained. *State v. Stewart,* 692 S.W.2d 295 (Mo. banc 1985). Questionable jurors should be excluded. *State v. Hopkins,* 687 S.W.2d 188 (Mo. banc 1985); *State v. Carter,* 544 S.W.2d 334 (Mo. App. E.D. 1976).

A challenged juror must actually serve on the jury before the appellate court may order a new trial. Section 494.480.4, RSMo 2000.

a. (§21.16) Burden of Proof

The burden is on the defendant to discover and present to the court factors that may disqualify jurors. *State v. Ofield*, 651 S.W.2d 190 (Mo. App. W.D. 1983); *State v. Rider*, 664 S.W.2d 617 (Mo. App. S.D. 1984). Failure to challenge a juror for cause may constitute a waiver. *State v. Tash*, 528 S.W.2d 775 (Mo. App. W.D. 1975).

b. (§21.17) Timely Objection

Section 494.470.3, RSMo 2000, states that all challenges for cause may be tried by the court and shall be made before the juror is sworn. A challenge for cause must be made with particularity. *State v. Mace*, 170 S.W. 1105 (Mo. 1914).

c. (§21.18) Trial Court's Authority

The trial court has the authority to strike prospective jurors on its own motion, and it is not limited to the strict terms of the applicable statutes when ruling on the competence of prospective jurors. *State v. Woods*, 662 S.W.2d 527 (Mo. App. E.D. 1983) (intoxicated venirepersons).

d. (§21.19) Challenge After Trial

A challenge made to a juror's qualifications for the first time after trial can be considered only for plain error, *State v. Ofield*, 651 S.W.2d 190 (Mo. App. W.D. 1983); *State v. Smith*, 703 S.W.2d 50 (Mo. App. E.D. 1985), unless the juror concealed the fact that the juror was not qualified to serve, *State v. Kirkpatrick*, 428 S.W.2d 513 (Mo. 1968). Such concealment occurs only when the juror gives false information or fails to respond with material information to a specific question. *See, e.g., State v. Bruce*, 655 S.W.2d 66 (Mo. App. E.D. 1983). Also, it should be noted that trial counsel have been found ineffective for failing to challenge jurors who admit bias on voir dire. *Johnson v. Armontrout*, 961 F.2d 748, 751 (8th Cir. 1992); *Presley v. State*, 750 S.W.2d 602 (Mo. App. S.D. 1988); *State v. McKee*, 826 S.W.2d 26, 27 (Mo. App. W.D. 1992).

e. (§21.20) Motion to Quash and Waiver

It is not necessary to move to quash or discharge the panel to preserve for review objections to voir dire questions asked by the

other party or to preserve for review the trial court's refusal to permit proposed questions to be asked of the panel. *State v. Brown*, 547 S.W.2d 797 (Mo. banc 1977). It should be noted that the issue must also be included in the motion for new trial. *See* §21.7, *supra*. It is still possible to waive objections to voir dire questioning or challenges for cause by accepting the panel if counsel's intent to make a waiver is evident. *See Brown,* 547 S.W.2d 797.

f. (§21.21) Record for Review

It is the responsibility of defense counsel to make appropriate objections to the trial court's rulings on the conduct of voir dire or the exclusion or retention of jurors. The failure to do so could result in the forfeiture of meaningful appellate review unless the prejudice from the error is severe enough to qualify as plain error. *See, e.g.*, *State v. Dansberry*, 18 S.W.3d 518, 523 (Mo. App. E.D. 2000); *State v. Reyes*, 108 S.W.3d 161 (Mo. App. W.D. 2003). In *Evans v. State,* 70 S.W.3d 483 (Mo. App. W.D. 2002), the failure to provide a transcript of voir dire waived any right of appellate or post-conviction review of alleged error in the jury selection process.

B. Peremptory Challenges

1. (§21.22) In General

Section 494.480.2, RSMo 2000, provides:

> 2. In all criminal cases, the state and the defendant shall be entitled to a peremptory challenge of jurors as follows:
>
> (1) If the offense charged is punishable by death, the state shall have the right to challenge nine and the defendant nine;
>
> (2) In all other cases punishable by imprisonment in the penitentiary, the state shall have the right to challenge six and the defendant six;
>
> (3) In all cases not punishable by death or imprisonment in the penitentiary, the state and the defendant shall each have the right to challenge two.

The trial court may impanel alternate jurors as it deems appropriate. Each side is entitled to one peremptory challenge from the alternate panel for every two alternate jurors selected. Section 494.485, RSMo 2000.

Section 494.480.4 provides: "Within such time as may be ordered by the court, the state shall announce its peremptory challenges first and the defendants thereafter."

A defendant is entitled to a full panel of qualified jurors before being required to make peremptory strikes. *State v. Wacaser*, 794 S.W.2d 190 (Mo. banc 1990); *State v. Leisure*, 810 S.W.2d 560 (Mo. App. E.D. 1991). To avoid a reversal on appeal for failure to strike an unqualified juror, the state may waive a peremptory challenge to provide the defendant a full panel of qualified jurors. *State v. Cobb*, 820 S.W.2d 704 (Mo. App. S.D. 1991). *But see* § 494.480.4.

If the state waives the death penalty, a "capital panel" is not required (i.e., the number of peremptory challenges is reduced). *State v. Morgan*, 453 S.W.2d 932 (Mo. 1970); *State v. Pettis*, 522 S.W.2d 12 (Mo. App. W.D. 1975). It is error if the prospective jury panel is not sufficient to afford the defendant the required amount of peremptory challenges. *State v. Williams*, 515 S.W.2d 544 (Mo. 1974). But the defendant will waive this error by failing to make a timely objection. *State v. Francis*, 544 S.W.2d 306 (Mo. App. W.D. 1976); *State v. Thomas*, 530 S.W.2d 265 (Mo. App. E.D. 1975). The right to exercise peremptory challenges may be waived either by the state or by the defendant. *State v. Supinski*, 378 S.W.2d 602 (Mo. App. S.D. 1964); *Thomas,* 530 S.W.2d 265; *see also Cobb,* 820 S.W.2d 704.

2. (§21.23) Discriminatory Use of Peremptory Challenges—*Batson v. Kentucky*

Use of peremptory challenges to exclude women or minorities from the jury violates the constitutional right to equal protection of the law. *See, e.g.*, Thomas M. Bradshaw, *Peremptory Challenges in Criminal Cases—Trial by a Jury of Whose Peers?,* 33 J. MOBAR 170–77 (1977); *see also Swain v. Ala.,* 380 U.S. 202 (1965).

a. (§21.24) *Batson v. Kentucky* Historical Perspective

Exclusion of members of a defendant's race from the grand or petit jury on the basis of race is a denial of *equal protection. Strauder v. W. Va.,* 100 U.S. 303 (1879). In *Swain v. Alabama,* 380 U.S. 202 (1965), the Court held that the prosecutor violates equal protection by using peremptory challenges to exclude African-Americans. But in so holding, the Court imposed on the defendants a crippling burden of proof. To obtain relief under

Swain, a defendant had to show that in case after case, no matter what the circumstances, the prosecutor used peremptories to exclude African-Americans so that no African-Americans served on the jury. Even though the Court in *Swain* clearly announced that race discrimination by a prosecutor in the use of peremptories violates the Equal Protection Clause, the practice continued unabated for decades because the law provided no effective remedy.

In *Batson v. Kentucky,* 476 U.S. 79 (1986), the Supreme Court relaxed the burden of proof element of *Swain,* 380 U.S. 202, and held that it is no longer necessary to show *systematic* exclusion of persons from a jury on the basis of race. A prima facie case of discrimination can be made solely by the use of challenges in an individual case. Once a prima facie case of discriminatory intent is made, the burden shifts to the state to show that the basis for the peremptory challenges is not racially motivated. The reasons tendered by the state are subject to impeachment by the defense. *See State v. Lawrence*, 791 S.W.2d 729 (Mo. App. E.D. 1990). But see *Purkett v. Elem*, 514 U.S. 765 (1995), which suggests that there must be discriminatory intent inherent in the prosecutor's explanation before a *Batson* violation can be found.

An interesting aspect of the *Batson* decision is its discussion of the rights of the jurors and the Court's concern that the systematic exclusion of minorities from petit juries continued to disenfranchise minorities. In effect, the Court was allowing the defendant to step into the shoes of the jurors who were the target of unlawful discrimination. This analysis led the Court later to grant the prosecution the right to challenge the defendant's discriminatory use of peremptory challenges. *Ga. v. McCollum*, 505 U.S. 42 (1992). *Batson* now applies equally to both parties in all cases, civil and criminal.

b. Mounting a *Batson* Challenge

(1) (§21.25) Establishing a Prima Facie Case

To establish a prima facie case under *Batson v. Kentucky,* 476 U.S. 79 (1986), the defendant must show that the prosecutor has exercised peremptory challenges to remove members of a cognizable group and that all relevant circumstances of the case raise an inference that the prosecutor used peremptory challenges to exclude persons

on the basis of race or gender. "[R]elevant circumstances" include such things as a pattern of strikes against jurors from the defendant's group and the prosecutor's questions and statements during voir dire. *State v. Smith*, 791 S.W.2d 744 (Mo. App. E.D. 1990). In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the United States Supreme Court demonstrated the analysis required of a reasonable application of its *Batson* decision, prohibiting discrimination in the exercise of peremptory challenges. The Court ruled that a prisoner presented a sufficient case for habeas corpus relief when the prosecuting attorney, from an office with a history of using peremptory challenges to exclude people of color from petit juries, used a majority of his challenges to exclude African-Americans and asked prospective African-American jurors different and more probing questions in his search for "race neutral" reasons to strike them. *Id*. at 331–35.

A *Batson,* 476 U.S. 79, challenge to the state's use of peremptory strikes must be made before the remaining venirepersons are discharged or it will not be preserved for review. The best time to make such a challenge is after the state's exercise of peremptory challenges and before the defendant's exercise of peremptory challenges. *See also State v. Lawrence,* 791 S.W.2d 729 (Mo. App. E.D. 1990).

(2) (§21.26) Preliminary Procedure

To preserve the record for appeal and to protect the defendant's right to challenge the state's use of peremptory strikes removing persons of a cognizable group, the following procedure should be followed:

1. The race of all venirepersons should be placed on the record.
2. An objection should be made each time the prosecutor strikes a member of a cognizable group and a record made as to the race or group to which the juror belongs. The objection should be made before the time that the jury is sworn in and the venire dismissed.
3. A record of the race or cognizable group to which the defendant belongs should be made.
4. The court should be moved to require the prosecutor to justify the strike on the record.

5. An objection to the sufficiency of the proffered reason should be made along with a record showing that similarly situated jurors outside the cognizable group have not been struck.
6. A record of the racial composition of the jury selected should be made.

See State v. Harding, 734 S.W.2d 871 (Mo. App. E.D. 1987); *State v. Jones,* 726 S.W.2d 400 (Mo. App. E.D. 1987).

(3) (§21.27) State's Burden of Proof

Under *Batson v. Kentucky,* 476 U.S. 79 (1986), once a prima facie case is made by the defendant, the burden of proof shifts to the state to provide neutral explanations for the challenges. In *State v. Antwine*, 743 S.W.2d 51 (Mo. banc 1987), the Court adopted a different rule: The prosecutor's duty to provide a race-neutral explanation is triggered by the defendant's objection based on *Batson*, regardless of whether a prima facie case had been made. *See also State v. States*, 809 S.W.2d 6 (Mo. App. E.D. 1990). The prosecutor's explanation must be:

- race-neutral;
- related to the case;
- clear and reasonably specific; and
- legitimate.

The explanation does not need to rise to the level of a strike for cause. But jurors may not be challenged on the basis that they would be partial to the defendant because of their shared race. A simple denial of a discriminatory motive is not sufficient justification for a challenge. The Supreme Court of Missouri has held that *Batson,* 476 U.S. 79, requires the trial court to objectively and subjectively assess the voir dire proceedings and to focus on all of the information and intuitive perceptions gathered to determine whether the prosecutor's use of peremptory challenges is racially motivated. Therefore, neutral explanations that are merely facially legitimate do not satisfy *Batson*. *See Antwine,* 743 S.W.2d 51. The court in *State v. Butler,* 731 S.W.2d 265 (Mo. App. W.D. 1987), set forth factors to be used by the trial court in assessing the legitimacy of the state's explanations:

- The susceptibility of the particular case to racial discrimination, i.e., the race of the victim and that of the witnesses.

- The prosecutor's demeanor: "Is the prosecutor 'engaging in a process of careful deliberation based on many factors' during voir dire or has he failed to 'engage these same jurors in more than desultory voir dire or indeed to ask them any questions at all?'"

- Any past pattern of discriminatory practices by the prosecutor's office, although an absence of a past pattern is not persuasive. Hint: Defense attorneys can use computerized research to determine whether a particular prosecutor has ever had a case reversed on a *Batson* challenge.

- Evaluation of the explanation itself, focusing on the prosecutor's treatment of similarly situated non-minority jurors and whether the explanation is so biased as to be invalid. The trial court also should consider whether the prosecutor has stated explanations that actually reflect what occurred during the voir dire. For example, in *State v. Brinkley*, 753 S.W.2d 927 (Mo. banc 1988), a juror stated that his home had been burglarized by neighborhood kids and he had retrieved the stolen property without calling the police. The prosecutor's explanation for striking the juror was that he had taken the law into his own hands and personally apprehended the suspect. The Court rejected this explanation because the juror's remark indicated that he merely recovered his property and that the present case was not one in which the defendant "took the law into his own hands."

The court in *Butler,* 731 S.W.2d 265, held that only objectively supportable explanations will survive a *Batson* challenge. But in *Antwine,* 743 S.W.2d at 65, the Supreme Court of Missouri limited *Butler,* stating that the prosecutor may rely on "hunches" and past experiences as long as racial discrimination is not the motive.

The Supreme Court of the United States, in *Powers v. Ohio*, 499 U.S. 400 (1991), held that a criminal defendant may object to race-based exclusions of jurors regardless of whether the defendant and excluded jurors are the same race. *See State v. Meyers*, 811 S.W.2d 400 (Mo. App. E.D. 1991).

Some examples of "neutral" reasons rejected by the Court can be found in *Butler,* 731 S.W.2d 265:

- Striking a venireperson because she was elderly and the prosecutor had had an elderly juror in another case who was intimidated. The court found that there was nothing to indicate that this particular juror was intimidated and an elderly white man was not struck.

- Striking a juror who was looking around and laughing and who "looked at the floor the whole time." The court said the prosecutor could not have it both ways!

- Striking a nurse because the prosecutor's experience was that nurses are too compassionate. The court held that the prosecutor's prior experience was not a reason related to the case being tried. It also noted that the prosecutor did not strike a white juror who worked for the American Nurses Association.

In *State v. Payton*, 747 S.W.2d 290 (Mo. App. E.D. 1988), the court provides an analysis of *Batson,* 476 U.S. 79, along with summaries of *Butler*, 731 S.W.2d 265, and *Antwine*, 743 S.W.2d 51. The court in *Payton* held that it was not necessary for the prosecution to utilize all its strikes to remove African-Americans and it is not necessary to remove all African-Americans to find a "pattern" sufficient to establish a prima facie case. The court held that a disproportionate utilization of strikes against African-Americans, when the defendant is African-American and the victim is white, is a relevant circumstance that may be sufficient to establish the prima facie case.

In *State v. Crump,* 747 S.W.2d 193 (Mo. App. E.D. 1988), the court held that the fact that five African-Americans

remained on the jury panel after the prosecution made its peremptory strikes undercut any inference of purposeful discrimination on the basis of race. This decision is difficult to reconcile with *Batson,* 476 U.S. 79, because *Batson* was decided on equal protection grounds and not on the Sixth Amendment basis of the right to a fair cross-section. An equal protection analysis looks to the intent of the prosecutor, while a Sixth Amendment analysis looks to the final composition of the jury. It would seem that, if the prosecutor's intent in removing a juror was racially motivated, the defendant's right to equal protection has been violated regardless of the final composition of the jury.

c. (§21.28) Sixth Amendment Challenges: The Fair Cross-Section Test

A defendant has a right under the Sixth Amendment to be tried by a jury whose members have been selected from a venire that represents a fair cross-section of the community. *Duren v. Mo.,* 439 U.S. 357 (1979); *Taylor v. La.*, 419 U.S. 522 (1975); *State v. Kelly*, 506 S.W.2d 61 (Mo. App. W.D. 1974); *cf. State v. Duren*, 556 S.W.2d 11 (Mo. banc 1977). For an excellent discussion of the constitutional principles involved in the selection of a jury from a fair cross-section of the community, see John Scurlock, *Basic Principles of the Administration of Criminal Justice with Particular Reference to Missouri Law*, 44 UMKC L. REV. 139, 294–96 (1975).

In *State v. Smith,* 737 S.W.2d 731 (Mo. App. W.D. 1987), the court held that a Sixth Amendment challenge to the state's use of peremptory challenges to exclude persons of a particular race requires a showing that the state succeeded in reducing the numbers of a particular race below the percentage of that race in the community or on the venire. It is important to note that the final racial composition of the jury is irrelevant under *Batson v. Kentucky,* 476 U.S. 79 (1986). The focus is on the prosecutor's use of peremptory challenges, so a defendant is entitled to relief when a prosecutor uses peremptory challenges in a discriminatory manner even if the defendant's race is amply represented in the resulting jury.

3. (§21.29) Defendants Tried Jointly

Section 494.480.3, RSMo 2000, provides:

> 3. In all criminal cases where several defendants are tried together, the following provisions shall apply:
>
> (1) Each defendant then on trial shall be allowed separate peremptory challenges as provided in subsection 2 of this section;
>
> (2) The number of peremptory challenges allowed the state by subsection 2 of this section shall be multiplied by the number of defendants then on trial in each case.

The state is entitled to an increased number of peremptory challenges for alternate jurors in multiple-defendant cases. *State v. Mahurin*, 799 S.W.2d 840 (Mo. banc 1990).

4. (§21.30) Alternate Jurors

Section 494.485, RSMo 2000, provides:

> If in any case to be tried before a jury it appears to the court to be appropriate, the court may direct that a number of jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be selected in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the principal jurors. Alternate jurors who do not replace principal jurors shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law for each two alternate jurors to be impaneled. The additional peremptory challenge may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against the alternates.

The trial court has discretion to replace a juror with an alternate juror. *State v. Tabor*, 657 S.W.2d 317 (Mo. App. E.D. 1983). In *Tabor* the trial court refused to replace a juror with an alternate when the juror appeared to be asleep and had to be awakened by the sheriff. In *State v. Whitman*, 788 S.W.2d 328 (Mo. App. E.D. 1990), the trial judge indicated that he was not "pleased" with a juror who had been in and out of a drowsy state, but he refused to substitute an alternate and did not abuse his discretion in so ruling. In *State v. Cook*, 782 S.W.2d 762 (Mo. App. E.D. 1989), the trial judge did not abuse his discretion by refusing to substitute an alternate for a juror who he noted had his eyes closed "a couple of times during the first

day of the trial." But in *State v. Youngblood,* 648 S.W.2d 182 (Mo. App. S.D. 1983), the trial judge substituted an alternate for a juror who the judge and prosecuting attorney noted sleeping several times during the trial.

The substitution of an alternate for a sitting juror has been approved in the following cases:

- *State v. Brusatti*, 745 S.W.2d 210 (Mo. App. E.D. 1987) (on the second day of trial, a juror advised the court that she was a cousin of a police officer who testified as a witness);
- *State v. Woods*, 705 S.W.2d 76 (Mo. App. E.D. 1985) (trial court excused a juror during the presentation of the defendant's evidence when the juror advised the court that she had not expected the trial to last so long and she had not revealed her vacation plans);
- *State v. Williams*, 659 S.W.2d 298 (Mo. App. E.D. 1983) (trial judge substituted an alternate juror—even though the alternate had been discharged—when a juror became ill immediately before beginning deliberations in the case);
- *Williams v. State*, 558 S.W.2d 671 (Mo. App. W.D. 1977) (trial judge substituted an alternate for a regular juror upon discovery that the regular juror was under the age of 21).

But once deliberations have begun, an alternate juror may not be substituted.

5. (§21.31) Service of List of Jurors and Timing of Peremptory Challenges

Section 494.415, RSMo 2000, provides for the preparation of a qualified jury list containing information regarding the perspective jurors' qualifications. This list must be signed under oath. It should be noted that information contained in a juror's service questionnaire is not alone a sufficient record for disqualification of a juror. *State v. Morehouse*, 811 S.W.2d 783 (Mo. App. W.D. 1991).

In most jurisdictions in Missouri, a list of prospective jurors is provided to counsel for both parties before voir dire. In some instances, the prospective panel will be known several days or even weeks before trial because, in some areas, the jurors are almost "professional" jurors, i.e., they are selected to serve for the entire term of court. When this circumstance arises, counsel has the benefit of learning a good deal about the jurors before voir dire. In some

jurisdictions, e.g., Jackson County, defendants are provided—just before voir dire—with a list of jurors, together with the jurors' questionnaires.

Peremptory strikes are made "only after the voir dire examination has concluded." *State v. Brown,* 547 S.W.2d 797, 801 (Mo. banc 1977). In *State v. Brown*, 554 S.W.2d 574 (Mo. App. E.D. 1977), the state changed one of its strikes after the defendant had exercised his peremptories. The court affirmed the conviction absent a showing of prejudice to the defendant. The trial court had offered to permit the defendant to make all of his strikes again, but the offer was refused. *Cf. State v. Steeley*, 65 Mo. 218 (1877) (error when state refused to reveal its strikes before defendant made his strikes); s*ee State v. Williams*, 606 S.W.2d 777 (Mo. 1980) (no abuse of discretion was found by the trial judge in refusing to allow defense counsel to correct an error in his peremptory strikes).

6. (§21.32) Number of Jurors to be Summoned

Section 494.420.2, RSMo 2000, provides: "Whenever a judge of the circuit court shall require a panel of jurors for jury service, he shall designate the number of jurors required. This number of jurors shall be randomly selected in a manner specified by the board of jury commissioners from the qualified jury list."

Failure to provide a sufficient number of jurors to which the defendant is entitled is reversible error, *State v. Williams*, 515 S.W.2d 544 (Mo. 1974). Failure to provide the correct number of jurors can be waived if the defendant fails to object before the jury is sworn. *State v. Nichols*, 165 S.W.2d 674 (Mo. 1942); *State v. Thomas*, 530 S.W.2d 265 (Mo. App. E.D. 1975). The defendant should move to quash the jury panel as soon as the defendant learns of the basis of such a motion and before the time the jury is sworn. This matter must also be put in the motion for new trial. *Nichols*, 165 S.W.2d 674; *Thomas,* 530 S.W.2d 265; *State v. Francis*, 544 S.W.2d 306 (Mo. App. W.D. 1976); §21.7, *supra.* An allegation that a sufficient number of jurors was not provided cannot be raised for the first time in a post-conviction motion. *State v. Cox*, 392 S.W.2d 265 (Mo. 1965).

7. (§21.33) Method by Which Additional Jurors Are Summoned

If an insufficient number of jurors is summoned, the court can direct the sheriff to round up bystanders to serve as jurors. Section 494.435, RSMo 2000, provides:

> Whenever there is an unanticipated shortage of available petit jurors drawn from a qualified jury list, the court may require the sheriff or a jury supervisor to summon a sufficient number of petit jurors from bystanders. If any party objects to bystanders being summoned, additional jurors shall be selected at random from the qualified jury list.

It has been held that the provisions of this statute's predecessor are directory only, and "unless the defendant shows that he has been prejudiced or his interests have been adversely affected by the failure to observe these statutory provisions, he is not entitled to any relief on this ground." *State v. Pettis*, 522 S.W.2d 12, 15 (Mo. App. W.D. 1975); *see also State v. Alexander*, 620 S.W.2d 380 (Mo. banc 1981).

8. (§21.34) Making the Proper Record and Objections as to Jurors Peremptorily Struck—Sufficient Time for Making Strikes

Failure to strike the prospective juror's name off the jury list—even though the defendant announced in court the intention to strike the juror—can result in the juror still being seated. *State v. Blankenship*, 536 S.W.2d 520 (Mo. App. S.D. 1976). The court must give the defendant sufficient time to make strikes—ten minutes was held insufficient in *State v. Hudspeth*, 51 S.W. 483 (Mo. 1899). Waiver of any objection to a juror can occur if the defendant does not promptly object to the seating of the juror, *State v. Nichols*, 165 S.W.2d 674 (Mo. 1942), or if the defendant announces an "accept[ance]" of the whole *panel*, *State v. Turnbough*, 498 S.W.2d 567 (Mo. 1973). But see the discussion in *State v. Brown,* 547 S.W.2d 797, 804–05 (Mo. banc 1977) (it is not necessary to move to quash the jury panel to preserve for appellate review the specific objections made during voir dire to questions asked by the other party or to preserve for review the trial court's ruling refusing to permit proposed questions to be asked of the panel).

See the discussion regarding the effect of § 494.465, RSMo 2000, in §21.4 above.

9. (§21.35) Time of Objection

The juror's qualifications must be challenged before the jury is sworn except when grounds for objection were hidden by actions of the juror. *State v. Powers*, 613 S.W.2d 955 (Mo. App. S.D. 1981); *State v. Hurst*, 612 S.W.2d 846 (Mo. App. E.D. 1981); *see also State v. Lindsey*, 630 S.W.2d 191 (Mo. App. S.D. 1982) (a belated challenge to

selection of additional venirepersons by a sheriff *who testified in the case* was untimely). See the discussion regarding the effect of § 494.465, RSMo 2000, in §21.4 above.

VI. Conduct of the Voir Dire

A. (§21.36) Concept

Though usually expressed as a process of selection, voir dire is, in application, a process of elimination. *Kidd v. Chicago, R.I. & P. Ry. Co.*, 274 S.W.1079 (Mo. 1925). Jury selection is accomplished, to a degree, by the jury commission before the trial panel reaches the courtroom. The object of the voir dire process is to identify jurors who should be eliminated for cause because of bias, prejudice, or lack of qualification and jurors who should be excluded with peremptory strikes.

The questioning of potential jurors is intended to develop information so counsel may prove the grounds for challenges for cause and form the basis for intelligent exercise of peremptory challenges. *State v. Brown*, 547 S.W.2d 797 (Mo. banc 1977). Complete and truthful answers by jurors are mandatory for the operation of the process, and the intentional withholding or falsification of answers by jurors is presumptively prejudicial, requiring a new trial. *State v. Coy*, 550 S.W.2d 940 (Mo. App. W.D. 1977); *see also Williams v. Taylor*, 529 U.S. 420 (2000). The process is considered so important to the concept of trial that even erroneous prosecution strikes may be corrected under the proper circumstances. *State v. Brown*, 554 S.W.2d 574 (Mo. App. E.D. 1977); *see also State v. Endres*, 698 S.W.2d 591 (Mo. App. E.D. 1985).

In *State v. Salkil*, 649 S.W.2d 509 (Mo. App. S.D. 1983), the court said that Missouri caselaw requires a defendant, in a motion for new trial based on concealed bias of a juror, to (1) allege and show intentional concealment by the juror of the facts and (2) provide an affidavit from the juror in which the facts showing bias are revealed.

B. Procedure

1. (§21.37) Inquiry by Court and Counsel

In state courts, voir dire is primarily conducted by counsel, though the trial judge may also make limited inquiry—either preliminary background questions or specific inquiry necessary to rule on challenges for cause. *See State v. Wooley*, 115 S.W. 417 (Mo. 1908). The court has a duty to seek clarification of equivocal answers to

questions regarding potential prejudice. *State v. Boyd*, 643 S.W.2d 825 (Mo. App. E.D. 1982); *State v. Hendrix,* 646 S.W.2d 830 (Mo. App. W.D. 1982). "[T]he trial court's duty to make an independent inquiry as to a potential juror's qualifications arises only when the venireperson equivocates about his ability to be fair and impartial. *State v. Wheat*, 775 S.W.2d 155, 158 (Mo. banc 1989)." *State v. Burgess*, 800 S.W.2d 743, 746 (Mo. banc 1990).

MAI-CR 3d 300.02 must be read to the jury panel before voir dire examination begins. This instruction advises the jury that it must be sworn and answer questions. It also advises the panel of the presumption of innocence and the definition of reasonable doubt.

2. (§21.38) Questionnaire Forms and Jury Lists

In practice, many jurisdictions provide counsel with questionnaire forms or jury lists providing such basic information as name, address, age, employment, and marital status of the panel members. If not, frequently this information is developed by the trial judge. Thereafter, each side conducts general examination of the panel as a whole, followed by individual interrogation. The exact format to be followed is generally within the discretion of the court, and counsel unfamiliar with the judge's preferences would be wise to become familiar with them sufficiently in advance of trial to avoid being thrown off stride or being criticized before the jury because of the vagaries of local practices. This is one of the primary benefits of obtaining local counsel.

The court has discretion to allow parties to use a more extensive questionnaire tailored to the facts and issues in the case being tried. Customized questionnaires are commonly used in capital cases and other cases that might involve complex, controversial, or sensitive issues. Information about jurors' attitudes about particular types of crimes or certain criminal justice issues, or their exposure to pretrial publicity, can often be obtained more effectively and efficiently by the use of a questionnaire in advance of voir dire. In many cases, parties can agree to exclude jurors whose questionnaire responses clearly indicate that they should be excluded for cause. A thorough questionnaire can also identify jurors who should be questioned about sensitive or potentially inflammatory subjects outside the hearing of the rest of the jury, thus reducing the risk that a juror's prejudicial responses might taint the rest of the panel. Typically, arrangements are made to bring jurors to court to complete the questionnaire several days or weeks before the commencement of the

trial to give counsel an opportunity to review the questionnaires before trial. Otherwise, counsel runs the risk of failing to note potential areas of concern raised by questionnaire responses. See, e.g., *Knese v. State*, 85 S.W.3d 628 (Mo. banc 2002), in which trial counsel was found ineffective for failing to question or challenge jurors whose questionnaire responses revealed bias against the defense on the issue of punishment in a death penalty case.

3. (§21.39) Pretrial Investigation of Jurors

Procedures also vary between judges and circuits as to pretrial availability of jury lists and questionnaires. While many experienced practitioners advocate pretrial investigation of jurors when possible, care should be taken to avoid jury tampering or the appearance of jury tampering. See Rule 4–3.5 of the Rules of Professional Conduct, which provides: "A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; . . ." *See, e.g.*, Rule 21.3.3, Fifth Judicial Circuit Court of Missouri: "Attorneys shall not converse with jurors about court procedure, jury service, verdicts or cases which may be set for trial, during their term of service. This rule shall be called to the attention of jurors on their first day of service." To like effect is Rule 21.3, Twenty-Ninth Judicial Circuit of Missouri.

Experts, as well as volunteers, can be employed to prepare questions to conduct surveys to determine what kind of juror would be most favorable to a particular case. These experts can help counsel conduct a voir dire that probes jurors' biases and prejudices in a meaningful way. For examples of how this pretrial investigation can result in a favorable verdict, see WILL ROUNTREE & ELISSA KRAUSS, JURYWORK: SYSTEMATIC TECHNIQUES (National Jury Project, West Publishing, 2nd ed., 1983). *See also* Joshua Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEORGETOWN L.J. 839 (1968); *United States v. Falange,* 426 F.2d 930 (2nd Cir. 1970). Must the prosecutor disclose to the defense what information it has obtained concerning prospective jurors? *See Hamer v. United States*, 259 F.2d 274 (9th Cir.1958); *United States v. Kyle,* 469 F.2d 547 (D.C. Cir. 1972); *United States v. Costello*, 255 F.2d 876 (2nd Cir. 1958).

4. (§21.40) Examination of Individual Jurors Out of the Presence of Other Jurors

Whether jurors are to be examined out of the hearing of other jurors is discretionary. *State v. Yowell*, 513 S.W.2d 397 (Mo. banc 1974); *State v. Lee*, 556 S.W.2d 25, 30 (Mo. banc 1977). Such an examination should always be requested when the juror has prior knowledge about the case, especially if the pretrial publicity has been extensive.

"Whether to conduct *voir dire* individually or in small groups is a matter within the control of the trial court and is not a basis for reversal of a conviction absent a showing of both an abuse of discretion and actual prejudice to the defendant." *State v. McMillin*, 783 S.W.2d 82, 94–95 (Mo. banc 1990) (citing *State v. Leisure*, 749 S.W.2d 366, 376 (Mo. banc 1988)). The trial court can require the defendant to put questions to the panel generally rather than asking the same question of each potential juror. *State v. Davidson*, 583 S.W.2d 208 (Mo. App. W.D. 1979).

5. (§21.41) Scope of Examination

As with so much else in the voir dire process, the nature and scope of inquiry allowed is largely in the discretion of the trial judge, subject to review only for a manifest abuse of discretion. But a liberal latitude is allowed in examination of the panel. *State v. Lumsden*, 589 S.W.2d 226 (Mo. banc 1979), *cert. denied*, 446 U.S. 984 (1980); *State v. Newman*, 651 S.W.2d 185 (Mo. App. W.D. 1983):

> It is the rule in this state that a liberal latitude is allowed in the examination of the jurors on their voir dire. * * * (2) The purpose of the examination by defendant of the panel on their voir dire is to develop, not only facts which might form the basis of a challenge for cause, but also such facts as might be useful to him in intelligently determining his peremptory challenges.

State v. Granberry, 484 S.W.2d 295, 299 (Mo. banc 1972) (citing *State v. Miller*, 207 S.W. 797, 798 (Mo. 1918)). But compare *State v. Thompson*, 610 S.W.2d 629 (Mo. 1981), *cert. denied,* 454 U.S. 840 (1981), holding that the state may inquire concerning application of rules on felony-murder and accessories, and *State v. Knapp*, 534 S.W.2d 465 (Mo. App. E.D. 1975), finding it improper to tell the jury what the instructions will be or inform them as to law applicable to the case during voir dire. Although this conflict may be a result of the paraphrasing of the instructions in *Knapp*, that court did not

refer to *State v. Green*, 511 S.W.2d 867 (Mo. 1974), or its requirement that the instruction must be stated verbatim or accurately paraphrased. *See also State v. Garrett*, 627 S.W.2d 635 (Mo. banc 1982), *cert. denied,* 459 U.S. 906 (1982).

See also:

- *State v. Lee*, 486 S.W.2d 412 (Mo. 1972) (permitting prosecuting attorney to ask prospective jurors if they would automatically reject testimony of certain state witnesses if it is revealed that they made inconsistent statements, were found to be liars, or were admitted liars or perjurers was error);

- *State v. Stone*, 188 S.W.2d 20 (Mo. 1945) (in a murder prosecution, refusal to permit defendant's counsel to interrogate jurors on voir dire examination respecting whether they were acquainted with certain friends and associates of deceased who, with deceased, were members of a certain gang was error when defendant's counsel had informed court that he sought this information preparatory to making peremptory challenges);

- *State v. Hoelscher*, 273 S.W. 1098 (Mo. App. E.D. 1925) (refusal to permit questions of prospective jurors as to whether they were members of the Ku Klux Klan was error);

- *State v. Miller*, 207 S.W. 797 (Mo. 1918) (error to refuse to permit defendant's counsel to ask one of the jurors what church he attended when one of the state's witnesses was a pastor of a certain church);

- *State v. Van,* 543 S.W.2d 827 (Mo. App. E.D. 1976) (error for state to tell jury what law is on voir dire but no prejudice was shown).

Abuse of discretion can occur if the court improperly restricts voir dire examination. *State v. Brown,* 547 S.W.2d 797 (Mo. banc 1977), held that it was error for the court to prohibit defense counsel from inquiring of prospective jurors whether they had a fixed opinion against applying the law of self-defense. For further discussion of this case, see §§21.6 and 21.8 above. Counsel is also entitled to tell the jury something about the facts of the case to allow the court and

all parties to find out bias. *State v. Leisure,* 749 S.W.2d 366 (Mo. banc 1988). Parties have a right to inquire:

- into jurors' relationship with possible witnesses, *State v. Moiser,* 738 S.W.2d 549 (Mo. App. E.D. 1987);
- into jurors' past arrests, *State v. Ruff,* 729 S.W.2d 556 (Mo. App. E.D. 1987);
- if jurors would automatically believe or disbelieve a witness, *State v. Hobby,* 706 S.W.2d 232 (Mo. App. W.D. 1986); or
- whether the opposing attorney had represented any of them, *Kollmeyer v. Waters,* 735 S.W.2d 82 (Mo. App. E.D. 1987).

Counsel's latitude on voir dire is not without limits, however. It stands to reason that any conduct by counsel for either side that would be improper during presentation of the evidence or during closing argument is likewise improper during voir dire. Thus, the state's voir dire of potential venirepersons that dealt with jurors' legal understanding of what constituted burglary went into significant facts of the case and was improper. *State v. Jenkins*, 741 S.W.2d 767 (Mo. App. E.D. 1987). Counsel cannot ask questions that would require jurors to speculate on the weight they might give to certain testimony. *State v. Nunn*, 724 S.W.2d 257 (Mo. App. W.D. 1986). It is improper for the prosecution to suggest that the state or the court could not force any witness to testify. *State v. Bohlen,* 698 S.W.2d 577 (Mo. App. E.D. 1985).

It is also improper for counsel to attempt to argue the case on voir dire, even under the guise of inquiring into the venire's prior knowledge of the case. A good discussion of the law may be found in *State v. Reyes*, 108 S.W.3d 161, 165 (Mo. App. W.D. 2003). In *Reyes* the prosecutor asked the venire panel if members had heard about the case and then told prospective jurors that the state would present evidence that "the defendant took a butcher knife some 15 inches in length and repeatedly, repeatedly stabbed Mr. Duarte something like between 25 to 30 wounds, to the point that he died." The court reviewed the prosecutor's argumentative voir dire for plain error because defense counsel failed to specify in his objection the portions of the prosecutor's question to which he took exception. Noting that Reyes was correct in arguing that the "phrasing of the *voir dire* questions in a manner which preconditions the jurors' minds to react even subconsciously in a particular way to anticipated evidence" is improper, the court nevertheless affirmed Reyes' conviction because the evidence of his guilt was overwhelming. *Id*. at 166.

As a general rule, it is error to allow the state to admit evidence that or even disclose to the jury that a co-defendant has been convicted or pled guilty to the charges. *State v. Dansberry*, 18 S.W.3d 518, 523 (Mo. App. E.D. 2000). But such evidence may be used by the state to preemptively rehabilitate a testifying co-defendant in anticipation of impeachment by the defendant based on the co-defendant's incentive to get a better deal on the co-defendant's own charges. In *Dansberry* the state, on voir dire, anticipating that a co-defendant would testify for the state, asked prospective jurors whether they would automatically disbelieve a witness who "admitted his involvement . . . [and] knows what his sentence is going to be." *Id.* at 522. That witness subsequently asserted his Fifth Amendment privilege and, therefore, did not testify. Although the prosecutor's statements were made in the good-faith belief that the co-defendant would testify, his disclosure to the jury that Dansberry's co-defendant had admitted the charges and would be sentenced accordingly deprived Dansberry of the Sixth Amendment right to confront and cross-examine witnesses against him. Even though trial counsel failed to make the appropriate objection, the court of appeals, relying on *State v. Jordan*, 627 S.W.2d 290, 293–94 (Mo. banc 1982), found that the prosecutor's statements on voir dire constituted plain error.

6. (§21.42) Presence of Defendant

The defendant must be present during the voir dire, and counsel should consult with the client in making the strikes. *Cf. State v. Kelly*, 365 S.W.2d 602 (Mo. 1963); Rule 31.03 (defendant's right to be present); Rule 31.03(c) (presence of defendant presumed); Rule 31.02 (right to counsel).

7. (§21.43) Necessity, Time, and Effect of Swearing Jury

Jurors must be sworn before the cause is tried. Section 546.070, RSMo 2000. Swearing of the jury fixes the time at which the defendant is placed in jeopardy insofar as the double jeopardy clauses of the Missouri and federal constitutions are concerned. *Downum v. United States,* 372 U.S. 734 (1963); *Ill. v. Somerville*, 410 U.S. 458 (1973). *See* Richard W. Miller, *The Plea of Double Jeopardy in Missouri*, 22 MO. L. REV. 162 (1957). Failure to swear the jury to try the case is reversible error. *State v. McKinney*, 120 S.W. 608 (Mo. 1909).

8. (§21.44) Sequestration of and Admonition to Prospective Jury

Section 494.420.1, RSMo 2000, provides:

> Those persons constituting the qualified jury list, when summoned, shall be placed under the control and supervision of the sheriff or other person designated by the board of jury commissioners in a designated area to be provided in the courthouse.

Section 494.495, RSMo 2000, provides:

> The court may permit the jury to separate at any adjournment or recess of the court during the trial and jury deliberation in all cases of misdemeanor or felony, except in capital cases. When the jurors are permitted to separate, after being impaneled as provided for in sections 494.400 to 494.505, and at each adjournment the court shall admonish them that it is their duty not to converse among themselves, nor to suffer others to converse with them or in their hearing on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them, or until they return to the jury room to continue their deliberations.

The admonishment required by this statute is set out in MAI-CR 3d 300.04. Although it has been held that this admonition is not required until the jury is impaneled, it is a good practice to ask the court to give MAI-CR 3d 300.04 during voir dire, particularly if the prospective jurors separate overnight, to reduce the possibility of prejudice.

9. (§21.45) Invocation of the Rule on Witnesses

Although the rule excluding witnesses from the courtroom technically does not apply except to trial proceedings, the court normally will grant a request to exclude witnesses during voir dire. Certainly, this request should be made to avoid tipping counsel's hand to the opposing witnesses.

C. (§21.46) Strategy: Role of Counsel

Voir dire strategy is discussed in §§21.47–21.53 below. See also the excellent discussions of voir dire in F. LEE BAILEY & HENRY R. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS (2nd ed. 1985); 1 GOLDSTEIN, TRIAL TECHNIQUE, ch. 9 (3rd ed. 2004); ANN FAGAN GINGER, JURY SELECTION IN CRIMINAL TRIALS (Law Press 1984); and CATHY E. BENNETT & ROBERT HIRSCHHORN, BENNETT'S GUIDE TO JURY SELECTION AND TRIAL DYNAMICS IN CIVIL AND CRIMINAL LITIGATION

(West 1993). The Rothblatt, Ginger, and Goldstein books contain sample questions, and the Ginger book in particular has questions on nearly every topic.

1. (§21.47) Keep Purposes of Voir Dire in Mind

Counsel's primary objectives in questioning prospective jurors are to lay the basis for challenges for cause and to obtain enough information about the jurors to make intelligent peremptory strikes.

One of the goals of the voir dire is to gain background information about the prospective jurors. This inquiry is legitimate because jurors must be qualified according to statute. See the discussion in §21.9 above. As noted in §21.38 above, jury questionnaires can be an effective way to obtain information such as the juror's:

- name;
- address;
- age;
- employment and length of employment;
- length of residence;
- marital status;
- number of children;
- name of spouse;
- employment of spouse;
- prior jury service; and
- other important biographical information.

In addition, information should be gained concerning whether:

- the prospective juror has ever been a witness in a case;
- the prospective juror has ever served on a grand jury;
- the prospective juror or a member of their immediate family has ever been employed as a law enforcement officer or employed by the State of Missouri; or
- the prospective juror or a member of their immediate family has been a victim of the kind of crime as was allegedly committed in the instant case.

Questions concerning acquaintance with the parties, counsel, and the facts of the case, of course, should be asked. There is some authority that inquiry may be made of the political, educational, social, religious, and regional background of the prospective juror. *Cf. Rose v. Sheedy*, 134 S.W.2d 18 (Mo. 1939); *Pope v. United States,*

372 F.2d 710 (8th Cir. 1967); L. S. Rogers, Annotation, *Racial, Religious, Economic, Social, or Political Prejudice of Proposed Juror as Proper Subject of Inquiry or Ground of Challenge on Voir Dire in Criminal Case*, 54 A.L.R.2D 1204 (1957).

2. (§21.48) Making a Record; Keeping Notes

It is essential that counsel make adequate notes concerning the answers given by the jurors during voir dire and use these in making challenges for cause and peremptory strikes. Failure to make adequate notes may lead to striking the wrong juror or failing to make an adequate and specific challenge for cause. If a prosecutor makes a mistake in exercising strikes, it may be corrected. *State v. Brown*, 554 S.W.2d 574 (Mo. App. E.D. 1977). If defense counsel makes a mistake in exercising strikes, too bad! *State v. Harris*, 356 S.W.2d 889 (Mo. 1962). Counsel should prepare a seating chart to record information concerning the jurors. Counsel can also use the chart to ask questions of the individual jurors—and the jurors may appreciate counsel for remembering their history so readily. The notes should not only concern the background of the juror (name, address, marital history, prior jury service, employment, etc.) but should also record how the juror appeared to react on questions. Notes should concern the mannerisms of the juror, the juror's race, and what reading materials the juror brought to court, if any. In those jurisdictions providing a juror questionnaire, fewer notes need to be made. If possible, someone other than the examiner should make notes of the responses and note nonverbal responses.

It should also be noted that defense counsel can be found constitutionally ineffective for failing to challenge a juror who admits bias or prejudice against the defendant or who may be otherwise unqualified to serve. "The failure to challenge for cause a venireperson who admits to a prejudice against the defendant is ineffectiveness absent an acceptable explanation." *State v. McKee*, 826 S.W.2d 26, 28 (Mo. App. W.D. 1992). *Accord Johnson v. Armontrout*, 961 F.2d 748, 751 (8th Cir. 1992).

3. (§21.49) Questions to the Jury

Questions of the jurors should be prepared in advance and tailored to the particular case. Sample sets of questions are provided in §§21.56-21.59 below. Before trial, counsel should consider the types of jurors wanted and the types of jurors not wanted. More attention should be devoted to determining those who are likely to be negative

and how to discover or recognize the situation. Counsel should remember that jury selection is a process of elimination!

Inquiry should always be made concerning prior jury service. *See United States v. Mutchler*, 559 F.2d 955 (5th Cir. 1977). There is a debate among counsel whether to ask about the actual verdict reached during prior deliberations, the contention on the one side being that most prospective jurors will answer that they reached a guilty verdict and thereby "pollute" the panel, the opposing contention being that some at least will answer "innocent" and thus the defense will want those jurors on the panel and force the state to use its peremptory challenges on these jurors. Not all courts will allow inquiry as to the previous verdicts arrived at by the venirepersons.

4. (§21.50) Need to Prepare

How counsel conducts voir dire depends largely on the facts of the case. Counsel should have an extensive knowledge of not only counsel's own case, but the opponent's case as well.

A large volume of research is available on the psychology and dynamics of juries. Much of it is contradictory! The folklore among lawyers about who makes a good or bad juror often tends toward the ridiculous, and it is often based on unwarranted presumptions about the attitudes and behavior of certain classes of people. The use of juror profiles can be a valuable tool for guiding the use of peremptory challenges, but it is no substitute for asking probing questions about the individual jurors' experiences and attitudes.

Having the facts of the case well in hand is also necessary because counsel should make a brief statement to the jurors of the facts of the case, not only to determine whether the jurors have knowledge of the case but also to determine whether the jurors might be disposed against a particular defense—e.g., alibi, self-defense, insanity—or would follow the court's instructions on the law in general. To some extent, counsel may explain the law to the jury to see if there is a predisposition against applying the law. For example, the prosecutor will ask if the jurors would convict a person charged with marijuana possession. The defense will want to ask if the jurors would apply the law of "reasonable doubt" and "presumption of innocence."

5. (§21.51) Commitment of the Jury

It is improper to commit the juror in advance on the ultimate question of the defendant's guilt or innocence, whether this commitment is direct or indirect. In the lead cases of *State v. Katz Drug Co.*, 352 S.W.2d 678, 684 (Mo. banc 1961), and *State v. Kiner*, 441 S.W.2d 720, 722 (Mo. 1969), the following questions were held improper:

- "Now, if I prove to your satisfaction and beyond a reasonable doubt that February 22, 1959, was a Sunday, and that the Katz Drug Company at their 8th and Washington store sold goods, wares and merchandise which were not medicines or drugs and not items of immediate necessity, and if the Court instructs you that that is a violation of the law, will you convict?"

- "And if after hearing all the testimony as it comes from the witness stand and the Judge's instructions on the law, if the state proves to you beyond a reasonable doubt as to the guilt of the defendant, is there any reason you could not and would not vote to find him guilty?"

See also State v. Pinkston, 79 S.W.2d 1046 (Mo. 1935); *State v. Boyer,* 112 S.W.2d 575 (Mo. 1938). A good rule of thumb in spotting a question that improperly seeks to commit the jury is that it asks the jurors what they "will" or "would" do under certain, often hypothetical, circumstances. Merle Silverstein, Note, *The Limitations on Voir Dire Examination of Jurors in Criminal Prosecutions*, 1950 WASH. U.L.Q. 381; S. R. Shapiro, Annotation, *Propriety and Effect of Asking Prospective Jurors Hypothetical Questions, on Voir Dire, as to How They Would Decide Issues of Case*, 99 A.L.R.2D 7 (1965).

6. (§21.52) Prejudice

Many prospective jurors will not speak truthfully when asked if they are prejudiced—against members of a particular race, nationality, or creed, against crime, etc. It is better—and, again, questions along this line should be cleared with the court in advance—that these questions be asked indirectly. "Do you have any feeling against this type of case?" "Have you ever lived in an integrated neighborhood?" "Have you ever belonged to any organizations where minorities were members?" Although *State v. Nelson*, 459 S.W.2d 327 (Mo. 1970),

appears to limit individual questioning of the jurors on the issue of racial bias, *Turner v. Murray*, 476 U.S. 28 (1986), casts considerable doubt on the constitutional validity of this holding.

7. (§21.53) Pretrial Publicity

Pretrial publicity may result in a jury that is prejudiced against the defendant. A presumption of prejudice arises from pervasive and inflammatory press coverage, *Rideau v. La.*, 373 U.S. 723 (1963), or from a trial conducted in a carnival atmosphere, *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Tex.*, 381 U.S. 532 (1965). Trial by such a jury violates due process of law. *Irvin v. Dowd,* 366 U.S. 717 (1961); *Rideau*, 373 U.S. 723. But the mere fact that the jurors are aware of the criminal record of a defendant or prior court proceedings by means of the news media does not automatically constitute disqualification. If the jurors can set aside what they saw, read, or heard and be guided only by what the evidence shows, there is no "actual prejudice." *Murphy v. Fla.*, 421 U.S. 794 (1975). The test is one of the "totality of the circumstances." *Id*. To ensure a fair and impartial jury, various methods are available to counsel, including the following:

- Gag orders may be used against the media, but these are very difficult to obtain. *See* §12.34 of this deskbook.
- Jurors, when a proper record is made, may be challenged for cause.
- A continuance may be granted until the publicity dies down. *See* §§12.10 and 12.20 of this deskbook.
- Sequestration of the jury during voir dire may be granted. *See* §21.44, *supra.*
- Individual interrogation of the jurors—as opposed to general interrogation—may be granted. *Cf. State v. Schlagel,* 490 S.W.2d 81 (Mo. 1973); *State v. Vineyard*, 497 S.W.2d 821 (Mo. App. S.D. 1973).
- The court should be asked to admonish the prospective jurors that they not read or listen to anything about the case. *Cf. State v. Taylor*, 413 S.W.2d 849 (Mo. 1967).

The relationship between jury selection and change of venue in protecting the defendant's constitutional right to a fair and impartial jury was accentuated in a St. Louis County case in which the trial court denied the defendant's motion to change venue in a very high profile case. Kenneth Baumruk was sentenced to death for the murder of his wife during a hearing on their dissolution of marriage

in the St. Louis County Courthouse in Clayton, Missouri. Attorneys and court personnel were also shot by Baumruk in the altercation. The case was highly publicized; a professor of political science conducted an opinion poll of eligible jurors and determined that 70% of the potential jurors remembered the case, and 98% of those persons believed that Baumruk was either definitely (80%) or probably (18%) guilty. Nevertheless, Baumruk's motion for change of venue was denied. Eight of the twelve jurors who ultimately sat on Baumruk's jury remembered the incident; one juror acknowledged that, as a result of the media reports, he believed Baumruk was guilty.

The Supreme Court reversed Baumruk's conviction because the denial of a change of venue violated the defendant's right to "a fair trial by a panel of impartial, 'indifferent' jurors." *State v. Baumruk*, 85 S.W.3d 644, 650 (Mo. banc 2002) (citing *Irvin*, 366 U.S. 717). Although the decision whether to grant or deny a change of venue is within the discretion of the trial court, that discretion is abused "when the record shows that the inhabitants of the county are so prejudiced against the defendant that a fair trial cannot occur in that county." *Baumruk,* 85 S.W.3d at 648. Figuring prominently in the Court's decision was the fact that the case was heard in the same courthouse where the shootings took place, and that fact was repeatedly emphasized throughout the trial. Acknowledging that trial court decisions to deny a change of venue are rarely overturned on appeal, the court noted that "the physical setting of the trial was a constant reminder of the horrible events that occurred in the very place where the trial was being held." *Id.* at 651. Equally important in the Court's analysis was the expert testimony regarding the opinion poll that was designed specifically for Baumruk's case. Under the circumstances, the Court held that it was virtually impossible for Baumruk to receive a fair trial in St. Louis County and that the trial court abused its discretion when it denied Baumruk's motion to change venue.

VII. Forms

A. (§21.54) Motion for Protective Order

[Caption]

Motion for Protective Order

Defendant, _____, by and through [his/her] attorney, moves this honorable Court for a protective order and files suggestions in support.

Suggestions in Support of Motion

1. Defendant is a well-known person of long standing in the community.

2. Secret grand jury proceedings are involved in this case, including possible discovery of grand jury proceedings, which should not be a matter of public discussion or concern.

3. Because of the prominence of Defendant, any publicity resulting from the proceedings in this matter could be prejudicial and Defendant's rights to privacy could be violated.

4. Counsel for the State, _____, has been contacted, and [he/she] has stated that [he/she] has no objection to the entry of this order.

Wherefore, Defendant respectfully suggests that the Court enter a protective order—a suggested form is attached—and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

_____
Defendant's Attorney
Signature Block
(Certificate of Service)

B. (§21.55) Protective Order

[Caption]

Protective Order

Upon application of Defendant, and the state having no objection, and good cause appearing, it is hereby ordered:

1. That all files, records, pleadings, and, more specifically, all records relating to this matter in the Prosecuting (Circuit) Attorney's Office, State Highway Patrol's Office, _____ Police Department's offices, Circuit Clerk's Office, and this Court's files, be closed, and not be opened except to Defendant's counsel, counsel for the state, the Court, and such other persons as the Court may approve from time to time.

2. That all further hearings in this matter be closed hearings, except to Defendant, legal counsel for the state and Defendant, the trial court, court officers, and testifying witnesses whose presence is necessary to the proceedings.

3. That no lawyer or law firm associated with the prosecution or the defense of this case shall give or authorize any extrajudicial statement or interview relating to the trial or the parties or issues in the trial that a reasonable person would expect to be disseminated by public communication.

4. That all courthouse personnel, including but not limited to investigative agency personnel, attorneys, assistant prosecuting attorneys, bailiffs, court clerks and office personnel, probation officers and office personnel, court reporters, and any circuit court judge's office personnel, are prohibited from disclosing to any person, without authorization by this Court, information relating to this case. Further, all such personnel are forbidden to divulge any information concerning arguments and hearings held in chambers or otherwise outside the presence of the public.

It is so ordered.

_____
Circuit Judge

Dated: _____

[NOTE: *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), held that criminal trial proceedings may be closed to the press and public only in extreme circumstances.]

C. (§21.56) Suggested Topics and Questions for Voir Dire Examination—State

1. Introducing the jury to the case and the circumstances out of which the charge arises.

2. Knowledge of the occurrence.

3. At the conclusion of this case under appropriate instructions by [his/her] honor the judge, I will ask you that, should you find the defendant guilty, you impose the maximum punishment of death. Does any member of the panel have any religious, moral, or conscientious scruples or disabilities against the death penalty and its imposition so that in any case, regardless of the evidence, they could not impose the death penalty or would not even consider its imposition?

   The key is are you willing to consider all penalties allowed under the statute or are you irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the trial of the case.

   (Those persons who respond affirmatively to the basic question should be immediately questioned individually and asked the following: Mr. _____ or Ms. _____, I understand that you could not in any case impose the death penalty. You would automatically exclude it as a possible punishment regardless of the circumstances and the nature of the crime.)

4. Knowledge of the victim or family or do business with the victim.

5. Knowledge of the defendant or any of the others who may be charged.

6. Knowledge of defense counsel or [his/her] associates. Brief background of defense counsel if appropriate.

7. Knowledge of prosecutor or any of [his/her] assistants.

8. Knowledge of potential state's witnesses who *may or may not* be called.

9. Any member of the panel or member of [his/her] immediate family or very close friend ever been the victim of a similar crime.

10. Prior jury service: I am going to inquire about services you had as a juror before today in a criminal case. My question is not designed to elicit a response from those of you who may have served on a jury in a civil case. I am inquiring only about prior experience as a juror in a criminal case. Are there members of the panel who have had prior service as a juror in a criminal case?

    a. When did you serve as a juror?
    b. What was the charge or the nature of the charge in that case?
    c. Without telling me whether the jury found the defendant guilty or innocent, please tell me whether the jury actually decided that issue. (If the juror indicates that [he/she] did serve on a criminal case but the jury did not decide the issue of guilt or innocence, make the additional inquiry asking whether the issue of guilt or innocence was submitted to the jury or whether the jury actually deliberated in the case.)
    d. Have you had any other services as a juror in a criminal case? (If so, repeat the foregoing questions.)
    e. Would you be influenced in this case in any way by your previous experience as a juror in a criminal case?

11. Anyone who cannot sit in judgment on fellow human.

12. Any other reason not alluded to by the voir dire questions that the juror feels would make it difficult to sit fairly and impartially.

13. Any physical conditions that would make it difficult for a juror to serve.

14. Because of the nature of this case, you will not be allowed to separate once this panel has been reduced to the 12 who will hear it and the alternate who will be selected. This means, of course, that you will not be able to go home to your families and will not be able to attend to your business affairs while serving on this jury. This, of course, would be something that would be a hardship on any of us. But are there members who believe that

this requirement would create an undue hardship on you or your family, more severe than the hardship that would be experienced by any other panel member?

15. Topics for individual examination of each prospective juror:

    a. Marital status
    b. Age, if deemed appropriate
    c. Number of children and age of children if important
    d. Occupation and duration of occupation
    e. Occupation of spouse
    f. Length of time resided at present address or in the county

16. So-called "ideal" juror.

D. (§21.57) Outline of Typical Voir Dire—State

I. Introduction
   1. Tell the jury who you are and where they are in the case.
   2. Explain the purpose of the voir dire.
   3. Ask how many have served on criminal juries before.

II. Identify all of the participants in the trial and witnesses
   1. If a venireperson knows your witnesses, ask if the venireperson would be able to lay aside that acquaintanceship and be guided by the evidence presented and by the law as given.
   2. If a venireperson knows the defendant or the defendant's family, ask if it would not be embarrassing and perhaps even painful to have to return a verdict against the defendant when you are so closely acquainted with the defendant's [mother, brother, etc.].

III. Outline of the case
   1. The type of case determines how much information you give the venire panel.

IV. Reveal your weaknesses
   1. Any deals that had to be made.
   2. Only one eye witness.
   3. Circumstantial evidence only.
   4. Unlikable prosecution witness.
   5. Prior inconsistencies.

V. Technical knowledge of venireperson
   1. Ballistics
   2. Fingerprints
   3. Chemistry

VI. Any reason venireperson could not sit in judgment on [his/her] fellow human—any reason venireperson cannot impose life imprisonment, particularly on a young female defendant or underprivileged defendant

E. (§21.58) Voir Dire—State

Members of the jury panel, it is the duty of the lawyers representing the state and the defendant, _____ , to ask you some questions (some of which you may feel are pretty personal) to ensure that both sides get a fair trial by an impartial jury. It is not our intent to indiscriminately pry into your personal affairs. We ask what we ask in order to ascertain in our judgment whether you have any history that might unintentionally influence your decision in this case.

I am _____, Assistant Prosecuting Attorney.

Defendant's attorney is _____.

Defendant is _____.

Defendant's family is _____.

The witnesses who may testify in this case are _____
_____.

In this case, the State charges that on _____
Defendant did _____.

Do you have any knowledge or information about this case, either personal or obtained from any other source, such as newspaper, radio, or television?

How many have sat as a juror in a criminal case before? Did you arrive at a verdict?

Have you or any member of your immediate family ever been associated with any law enforcement agency?

Would you tend to give more credibility to a law enforcement officer than other persons?

Have any of you ever been a witness to the commission of a crime? Have any of you ever testified in a criminal case? If so, was your testimony on behalf of the State or the defendant? Have any of you ever been a victim of a criminal act? Is there anyone on the panel who feels that he or she could not sit in judgment on a fellow human?

Do you feel that the crime charged here (_____) should not carry a penalty of up to _____?

Any physical reason why you cannot or should not serve as a juror in this case?

Any reason at all why you could not serve on the jury in this case and render a fair and impartial verdict based on the evidence from the witness stand and based on the law that will be given by the Court?

F. (§21.59) Suggested Voir Dire Questions—Defense

1. I am _____ and I have been appointed by the Court to represent _____, the defendant in this case (or I represent _____, the defendant in this case [if hired]).

2. I am associated with (or a member of) the law firm of _____. Has anyone on the jury panel ever been represented by or opposed by that firm?

3. The prosecuting attorney's office has numerous employees and attorneys. Today _____ is prosecuting this cause against _____. Does anyone on the panel know _____ or any of the attorneys, investigators, or other employees of the prosecutor's office?

4. The defendant lives at _____ with [his/her] spouse _____ and their children. [He/She] is employed at _____. Does any member of the jury panel know the defendant or the defendant's family?

5. Has any member of the jury panel or any of their close relatives or friends ever been, or thought they have been, the victim of a crime?

    a. Was anyone apprehended for that crime?
    b. Did you testify in a trial?
    c. Were you dissatisfied with the outcome?
    d. [If no one was apprehended] You have no reason to believe the defendant committed that offense?

6. Has any member ever been a witness in a criminal trial, either for the prosecution or the defense?

7. Is any member related to or acquainted with, or has any member done business with, any of the following persons who have been listed by the prosecution as possible witnesses [read list]?

8. The following persons may also testify or be mentioned in evidence. Does anyone know them? [List defense witnesses, informers, the deceased, etc.]

9. Has any member of the jury panel served on a previous jury in a criminal trial? If so, please state whether the jury you served on rendered a verdict without telling the result.

10. Has any member of the jury panel ever served on a grand jury, federal or state?

11. Is there any member of the panel who is employed by the State of Missouri, or is any member of your family an employee in any capacity of any agency of the State of Missouri? If the answer is in the affirmative, which member of your family is an employee, by what agency, and in what capacity?

12. Is any member of this panel or any member of your family a member of any law enforcement agency, including sheriffs' agencies, police departments, military police, federal security police, or any type of law enforcement? Has anyone on this jury panel ever been involved in an undercover capacity for a law enforcement agency?

13. The defendant stands charged by an indictment (or information) that the Court will subsequently inform you is only a charge or allegation by the prosecution that the defendant has allegedly committed some offense. Would the mere fact that the defendant has been charged make it difficult or impossible for you to render a just and true verdict?

14. Is there any member of this panel who, regardless of the evidence and instructions that will be subsequently given by the Court, could not follow these instructions in arriving at a verdict of not guilty for the defendant?

15. Has anyone on the jury panel ever had any legal training? If so, please give details.

16. Is any member closely related to a lawyer? If so, who?

17. It is anticipated that the prosecution will call a number of law enforcement officers. Is there anyone on the jury panel who would tend to give more weight to the testimony of law enforcement officers than to other witnesses, or who would believe that these law enforcement officers could not be mistaken in their statements?

18. Is anyone on the jury panel familiar with the facts of this case by any means? If so, please give details.

19. Has anyone read, heard about, or discussed this case with anyone? If yes, go into details.

20. The defendant is charged with the offense of _____. Does the fact that [he/she] is so charged in any way influence you in this case? In other words, is there anything about such a charge that would tend to make you reluctant to believe that you could render a fair and just verdict in this case and give both the defendant and the prosecution a fair trial?

21. Is there any reason whatsoever, whether I or [Mr./Ms.] _____ has touched upon it, that you believe now, after reflection, that it might be difficult for you to sit as a fair and impartial juror on this case?

Keith M. Bail*
Chastidy Dillon-Amelung**

Chapter 22

OPENING STATEMENTS

I. Necessity

A. (§22.1) For the Prosecution
B. (§22.2) For the Defense

II. (§22.3) Purpose and Scope

III. (§22.4) Test of Sufficiency

IV. (§22.5) What the Prosecutor's Opening Statement Can Include

V. (§22.6) What the Prosecutor's Opening Statement Cannot Include

VI. Suggestions on Strategy

A. (§22.7) Length
B. (§22.8) Be Positive and Exact
C. (§22.9) Expert Testimony
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E. (§22.11) Organization
F. (§22.12) Main Witnesses
G. (§22.13) Problems
H. (§22.14) Motions *in Limine*—Limiting Opening Statements

VII. (§22.15) Preparation

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VIII. (§22.16) Structure, Style, and the Story Model

IX. (§22.17) Presentation

X. (§22.18) Conclusion

I. Necessity

A. (§22.1) For the Prosecution

Rule 27.02 provides: "The order of trial by jury in felony cases shall be as follows: . . . (f) The attorney for the state shall make an opening statement. . . ." *See also* § 546.070(1), RSMo 2000.

B. (§22.2) For the Defense

The defendant is not required to make an opening statement at any time. The decision of whether and when to give an opening statement must be based on the uniqueness of the individual case. It is rarely a good idea to reserve or waive the opening. The defendant may make an opening immediately after the prosecutor's opening or may choose to make an opening after the state has rested and before the defendant presents the defendant's case. If the defense will not have any witnesses or other evidence, the defense may still make an opening statement to outline evidence it will elicit using prosecution witnesses. *State v. Thompson*, 68 S.W.3d 393 (Mo. banc 2002).

II. (§22.3) Purpose and Scope

The purpose of the opening statement is to advise the jury of the nature and facts of the case and to outline the anticipated proof and the significance of the evidence to be presented. *State v. Carter*, 847 S.W.2d 941 (Mo. App. E.D. 1993); *State v. Harris*, 731 S.W.2d 846, 849 (Mo. App. W.D. 1987). The prosecutor ought to say where the crime was committed. But venue is not required to be shown in the opening statement. *State v. Smith*, 988 S.W.2d 71 (Mo. App. W.D. 1999).

III. (§22.4) Test of Sufficiency

The court has the power to direct a verdict of acquittal without hearing any evidence should the prosecutor fail in the opening to state facts that, if proved, would be sufficient to convict the

defendant. The opening statement must state all elements necessary to make a prima facie case. If the state fails to state facts sufficient to make a prima facie case, a motion for judgment of acquittal should be granted. Section 546.070(1), RSMo 2000; Rule 27.02(f). Such action should be taken only after the prosecutor has been given an opportunity to "correct or embellish" the insufficient opening statement. *State v. Gray*, 423 S.W.2d 776 (Mo. 1968). In determining the sufficiency of the opening statement, the facts stated and the reasonable inferences favorable to the state to be drawn from the facts are to be accepted by the trial court as true. *State v. Bauers*, 702 S.W.2d 896 (Mo. App. E.D. 1985); *State v. Jones*, 255 S.W.2d 801 (Mo. 1953); *State v. Whites*, 538 S.W.2d 70 (Mo. App. S.D. 1976).

IV. (§22.5) What the Prosecutor's Opening Statement Can Include

The prosecutor's opening statement can include evidence that the state intends to introduce, including evidence that is arguably admissible but may later be excluded, if made in good faith. *State v. Debler*, 856 S.W.2d 641 (Mo. banc 1993); *State v. Rios*, 840 S.W.2d 284 (Mo. App. W.D. 1992); *State v. Lane*, 791 S.W.2d 947 (Mo. App. S.D. 1990). For example, the prosecutor may:

1. Refer to the commission of another crime when:

    a. the other crime and the one on trial are so intermingled as to be inseparable in the evidence, *State v. Aubuchon*, 394 S.W.2d 327 (Mo. 1965); *State v. Foster*, 557 S.W.2d 651 (Mo. App. W.D. 1977);

    b. the evidence of the other crime shows the joint enterprise of this defendant with others, *Kraus v. United States*, 87 F.2d 656 (8th Cir. 1937);

    c. the other crime tends to establish the identity of the defendant, *State v. McKeever*, 101 S.W.2d 22 (Mo. 1936);

    d. the reference to the other crime (illicit relationship with the victim) tends to show the motive for the crime on trial (homicide), *State v. Knight*, 206 S.W.2d 330 (Mo. 1947); *State v. Kurtz*, 564 S.W.2d 856 (Mo. banc 1978); or

e. the other crime shows motive, intent, absence of mistake or accident, common plan, or identity, *State v. Fox*, 510 S.W.2d 832 (Mo. App. E.D. 1974).

2. Call the defendant a bum if the facts of the case show that the defendant is, in fact, an indigent transient. *State v. Gartrell*, 71 S.W. 1045 (Mo. 1903).

3. State that the defendant forfeited bond in a previous term of court and that a bench warrant has been issued for the defendant to show flight. *State v. Dudley*, 149 S.W. 449 (Mo. 1912).

4. Refer to the statement of another made in the presence of the defendant under circumstances in which the defendant should have denied the statement. *State v. Rohman*, 261 S.W.2d 69 (Mo. 1953).

5. State that the defendant made admissions before the murder that the defendant was going to commit it and afterward that the defendant did commit it. *State v. Townsend*, 462 S.W.2d 754 (Mo. 1971).

6. Refer to the fact that there was a reward offered for the return of the defendant. *State v. Matkins*, 34 S.W.2d 1 (Mo. 1930).

7. Employ dramatics. *State v. Edmonds*, 347 S.W.2d 158 (Mo. 1961).

8. State that the defendant attempted to bribe a witness. *State v. Massey*, 542 S.W.2d 88 (Mo. App. E.D. 1976).

9. State that the defendant was read *Miranda* rights. *State v. Hodges*, 586 S.W.2d 420 (Mo. App. E.D. 1979).

10. State that the defendant has a "drug problem" to explain the defendant's poor memory. *State v. Davis*, 860 S.W.2d 369 (Mo. App. E.D. 1993).

V. (§22.6) What the Prosecutor's Opening Statement Cannot Include

In an opening statement the prosecutor cannot:

1. State that the charges against the defendant arose out of charges made by a grand jury (but such was not considered reversible error). *Weaver v. United States*, 379 F.2d 799 (8th Cir. 1967).

2. Refer to other crimes committed by the defendant or the defendant's associates, *State v. Lee*, 486 S.W.2d 412 (Mo. 1972); *State v. Harris*, 629 S.W.2d 399 (Mo. App. E.D. 1981), unless one of the exceptions discussed in §22.5 above applies.

   > "Evidence of other crimes may be admissible when it tends to show motive, intent, the absence of mistake or accident, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other and the identity of the person charged with the commission of the crime."

   State v. Shaw, 915 S.W.2d 775, 783 (Mo. App. W.D. 1996) (citing *State v. Harris*, 870 S.W.2d 798, 810 (Mo. banc 1994)).

3. Refer to evidence that cannot be introduced. *State v. Levy*, 170 S.W. 1114 (Mo. 1914); *State v. Turner*, 633 S.W.2d 421 (Mo. App. W.D. 1982).

4. Refer to evidence that is inadmissible upon objection or when the only witness that is able to furnish the evidence is not available. *State v. Stillman*, 310 S.W.2d 886 (Mo. 1958); *State v. Boyd*, 600 S.W.2d 97 (Mo. App. E.D. 1980).

5. Express an opinion as to the guilt of the defendant. *State v. Chester*, 445 S.W.2d 393 (Mo. App. S.D. 1969).

6. Comment on the defendant's failure to talk to the police. *State v. Sales*, 610 S.W.2d 652 (Mo. App. S.D. 1980).

7. Comment on the defendant's failure to testify, *State v. Zindel*, 918 S.W.2d 239 (Mo. banc 1996); *see also* § 546.270, RSMo 2000, or state that the defendant will testify, *State v. Croka*, 646 S.W.2d 389 (Mo. App. W.D. 1983).

VI. Suggestions on Strategy

A. (§22.7) Length

Usually the court places no limit on the length of an opening statement. The opening statement should match the case. The short, two-witness burglary case is generally preceded by a short opening statement. The complicated embezzlement case involving many details normally demands a detailed, particularized, explanatory opening statement.

B. (§22.8) Be Positive and Exact

The jury should be told that "this is what the evidence will be" rather than "this is what I expect the evidence will be." Proper preparation should give counsel confidence that the evidence "will be" that which counsel states in the opening statement.

Counsel should give the names of witnesses and exact times and details of important parts of the case. For example, counsel should not say "the first officer on the scene that night found the body" but, rather, "District Officer John Doe arrived first at 1208 Main Street at 6:10 p.m. He entered the house and found the body of Richard Roe in the kitchen. He had been shot three times in the head." Counsel also needs to keep it simple and not confuse the jury with less important names, dates, or times.

The jury should be impressed that counsel is neither understating nor overstating the case but is simply presenting the exact facts for the jury's consideration.

C. (§22.9) Expert Testimony

Juries like expert testimony, e.g., ballistics and fingerprints. For this reason and because it is sometimes complicated, it is good to detail this evidence in the opening statement. The jury then hears it twice, ensuring that the testimony is understood.

D. (§22.10) Use of Exhibits

Exhibits should be used in opening statements. Such exhibits may include, but do not need to be limited to, PowerPoint. Opposing counsel and the court should be notified beforehand of the intent to use exhibits in opening statement. Only admissible exhibits should be

used. It may also be helpful to have counsel stipulate, on the record, to the use of the exhibits in opening. Good practice is to have this pretrial discussion on the record, so that if an objection comes up during the opening and the exhibit is excluded, an appellate attorney cannot accuse trial counsel of acting in bad faith.

It is proper, with the court's permission, to refer to exhibits such as diagrams, charts, and pictures in opening statements to make the statement clearer to the jury. *State v. Luallen*, 654 S.W.2d 226 (Mo. App. S.D. 1983); *State v. Jones*, 749 S.W.2d 356 (Mo. banc 1988).

E. (§22.11) Organization

The opening statement should present the facts that are to be proved in the most understandable and logical way. It is a story, usually dramatic, that should command the jury's attention and understanding. It is essential, therefore, that it be easily understood and logically presented. The order of the presentation of facts in the opening statement may determine the sequence in which the witnesses presenting those facts in testimony take the witness stand.

Complicated cases can usually be broken into parts. For example, in a murder case a jury can be told that:

- the first part of the case will deal with the relationship of the victim and the defendant before the murder;
- the second part of the case will deal with the crime scene investigation and items found there;
- the third part of the case will be the arrest of the defendant and search of the defendant's person and recovery of property; and
- the fourth part of the case will include the laboratory reports, articles found at the crime scene, and articles found as a result of the search of the defendant's person.

This type of organization makes the case easier to remember. As one part of the statement concerning the case is concluded, the jury should be told that "the scene shifts" or "we now enter Phase II." This holds the interest of the jury; if they have missed one phase, their interest can be renewed when counsel begins speaking about another phase.

In reality there are myriad effective ways to organize an opening statement, and the way counsel chooses depends not only on the complexity of the case but also on many other factors, ranging from the most interesting or critical fact about the case to the personality of counsel.

F. (§22.12) Main Witnesses

Usually the case centers on one or two principal witnesses. Details should be given to the jury about these witnesses. Background information about where the witnesses live and their employment, or anything good about the witnesses, should be told to the jury so that, when they take the stand, the jury is prepared to like them.

G. (§22.13) Problems

If the case has an obvious defect or problem, it is usually best for the prosecutor to be the first one to mention it. If the prosecution fails to address problems, a good defense attorney will surely bring it to the jury's attention, and the jury may get the impression that the prosecutor was trying to "hide the facts." For example, if the state's main witness first denied that she saw the defendant at the scene of the murder when she was interviewed by the police officer, this fact should be told to the jury with whatever explanation the witness offers, e.g.:

> She did not tell Detective Wayne she had seen the killer on the night of the murder because she was afraid for her life. She later overcame this fear and called the police department and voluntarily made a statement, which is the basis for this prosecution.

By putting the weakness and the explanation before the jury at the same time, it is more likely that they will accept the explanation.

H. (§22.14) Motions *in Limine*—Limiting Opening Statements

Both sides should consider filing motions *in limine* to limit opening statements. For example, a motion *in limine* may be brought to limit counsel from discussions on inadmissible evidence.

VII. (§22.15) Preparation

Many attorneys believe, incorrectly, that they can "wing" the opening statement. In reality, the opening statement requires painstaking preparation.

Preparation begins with the police reports. The attorney should know the case almost by heart before the opening statement. Counsel should outline the investigation of the case in chronological order to understand how the case unfolds before placing facts into a compelling and informative statement.

VIII. (§22.16) Structure, Style, and the Story Model

The "story model" is increasingly gaining acceptance in the criminal defense community. The model is described in great detail by Nancy Pennington and Reid Hastie in *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991). The theory behind the story model is based on the belief that jurors can better process information in the structure of a story. Pennington and Hastie's research shows that jurors will impose a narrative story construction on the evidence heard. *Id.* at 521. According to Hastie and Pennington:

> the story will be constructed from three types of knowledge. . .: (1) case-specific information acquired during the trial (*e.g.*, statements made by witnesses about past events relevant to the decision); (2) knowledge about events similar in content to those that are the topic of dispute (*e.g.*, knowledge about a similar crime in the jurors's community); and (3) generic expectations about what makes a complete story (*e.g.*, knowledge that human actions are usually motivated by goals).

Id. at 521–22. Thus, Hastie and Pennington conclude that the jury will accept the story that best covers the evidence and is the most coherent. *Id.* at 523.

The structure of the story is limited only by the creativity of the attorney. One common method of structure is chronology. While this structure is comfortable, it is usually the least persuasive from the defense point of view. The state has already given a chronology of the facts. Each attorney should consider literary techniques such as flashback, foreshadowing, or analogy in structuring the opening statement.

The content of the story is equally important to the successful opening statement. The story must be complete and coherent. *Id.* at 527. Complete means that the story includes *all* of the relevant facts. This includes so-called "bad" facts. It is rarely a good strategy to ignore bad facts because to do so is to lose credibility with the jury. The attorney must explain why those bad facts fit in with the defense theory of the case. The theory presented must be coherent. Coherence has "three components: *consistency, plausibility*, and *completeness*." *Id*. at 528.

While the "story model" may seem foreign at first, it is an extremely effective method of opening statement.

IX. (§22.17) Presentation

The best advice to any attorney making an opening statement is to "be yourself." The best way to feel comfortable about the opening statement is to have it thoroughly prepared. Writing the opening statement out, practicing the opening statement in front of law office staff, and videotaping the opening statement are all good ways to practice the presentation. The lawyer should be conscious of body language, both positive and negative.

The lawyer should not be afraid to show sincere emotion. Emotion does not equal argument. The attorney should identify the emotion of the case and communicate it in the opening statement through the telling of the story.

X. (§22.18) Conclusion

The opening statement is the most important part of the trial. It sets the tone of the case. Whether for the state or for the defendant, an effective opening statement requires thorough preparation, artful advocacy, and effective presentation.

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Chapter 23

EVIDENCE

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In part, this chapter is a revision and update of materials previously prepared by Craig A. Johnston and Melinda K. Pendergraph.

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J. (§23.80) Declaration of Family History—Pedigree
K. (§23.81) Learned Treatises
L. (§23.82) Curative Admissibility and Invited Error
M. (§23.83) Prior Inconsistent and Consistent Statements
N. (§23.84) Co-Conspirator's Statements
O. (§23.85) Child Witness

XI. (§23.86) Confessions and Admissions

I. Judicial Notice

A. (§23.1) Generally

Many facts are matters of common knowledge and of such notoriety as not to be subject to any reasonable dispute. *State v. Stavricos*, 506 S.W.2d 51, 57 (Mo. App. S.D. 1974); *see also Brown v. State*, 530 S.W.2d 56 (Mo. App. E.D. 1975); *State v. Johnson*, 705 S.W.2d 483 (Mo. banc 1986).

Judicial notice is a rule of evidence that presumes the matter subject to notice as true and thus dispenses with the necessity of establishing that fact by evidence. *Baris v. State*, 846 S.W.2d 764, 765 (Mo. App. W.D. 1993), *overruled on other grounds by Cooley v. Dir. of Revenue*, 896 S.W.2d 468 (Mo. banc 1995).

Because the matter judicially noticed may be established without supporting evidence, that matter must have independent reliability and trustworthiness. *State v. Weber*, 814 S.W.2d 298, 303 (Mo. App. E.D. 1991); *see also State v. Johnson*, No. ED83773, 2004 Mo. App. LEXIS 1479 (Mo. App. E.D. Oct. 12, 2004).

The effect of taking judicial notice of a matter is that the matter becomes the equivalent of evidence, *Zickefoose v. Thompson*, 148 S.W.2d 784, 792 (Mo. 1941), amounting to a prima facie level of proof, *Eng. v. Old Am. Ins. Co.*, 426 S.W.2d 33, 40–41 (Mo. 1968); *see also*:

- *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo. App. W.D. 2006)
- *Learfield Commc'ns, Inc. v. Hartford Accident & Indem. Co.*, 837 S.W.2d 299 (Mo. App. W.D. 1992)

The court is not required to have actual knowledge of a matter to take judicial notice of it. Thus, if a matter is otherwise subject to judicial notice, a court may refresh its memory by reference to reliable publications. *Buhrkuhl v. F.T. O'Dell Constr. Co.*, 95 S.W.2d 843, 846 (Mo. App. E.D. 1936). But the fact that a matter may be ascertained by reference to reliable but highly technical publications does not require a court to take judicial notice of it unless a proper foundation for its admission is made. *Cupples Hesse Corp. v. State Tax Comm'n*, 329 S.W.2d 696, 701 (Mo. 1959).

Considerable discretion is vested in the court, and even though a matter might be of requisite notoriety, a court may refuse judicial notice to reach a just result. *State v. Umfleet*, 587 S.W.2d 612, 618 (Mo. App. E.D. 1979); *see also State v. Harris*, 598 S.W.2d 200 (Mo. App. S.D. 1980). Moreover, any doubts as to the notoriety of a matter should be resolved in the negative. *Morfit v. Thompson*, 282 S.W. 113, 116 (Mo. App. E.D. 1926).

Three discernible areas of matters subject to judicial notice have developed:

1. Those matters that are of common knowledge of people of ordinary intelligence, *Weber*, 814 S.W.2d 298

2. Those matters that, while not meeting the standard of notoriety, are capable of certain verification and may be readily ascertained by resort to a readily available, accurate, and credible source, *State v. Jordan*, 761 S.W.2d 685, 687 (Mo. App. E.D. 1988); *Hagen v. Perryville Bd. of Aldermen*, 550 S.W.2d 797, 798–99 (Mo. App. W.D. 1977)

3. Those matters that are within the special province of the court, *Morrison v. Thomas*, 481 S.W.2d 605, 608 (Mo. App. W.D. 1972); *State v. Hurd*, 520 S.W.2d 158, 164 (Mo. App. S.D. 1975)

Regarding the first category, see *Stimage v. Union Electric Co.*, 465 S.W.2d 23, 26 (Mo. App. E.D. 1971) (judicial notice regarding knowledge common to all that a vehicle such as the defendant's could have stopped in less than 114 feet; it was the kind of notice that "a court may take of those matters commonly known by mankind and which a jury may properly consider in arriving at a verdict without independent proof of fact").

Missouri courts are not inclined to enlarge the scope of judicial notice by the use of the "verifiability" concept of category two. *Cupples Hesse Corp.*, 329 S.W.2d 696; *Kansas City v. Dugan*, 524 S.W.2d 194 (Mo. App. W.D. 1975).

The third area, often called judicial knowledge, includes domestic and foreign law, rules of court, terms of court, etc. But when judicial notice is taken of another court file, the other court file must be independently proved, *Weber*, 814 S.W.2d 298; *Randall v. St. Albans Farms, Inc.*, 345 S.W.2d 220, 223 (Mo. 1961), and introduced into

evidence, absent an admission of its contents by opposing counsel, *State v. Pennick*, 364 S.W.2d 556, 559 (Mo. 1963); *State v. Hurst*, 845 S.W.2d 669, 670 (Mo. App. E.D. 1993).

> Requiring independent proof of the other court file insures the existence and genuineness of that court file as well as providing the opposing party an opportunity to attack the propriety of taking such judicial notice, and the independent proof may be made by the court taking judicial notice of its own file, provided that file is physically before the court.

Weber, 814 S.W.2d at 303. When the showing of the file's existence is essential to enable a party to bear its burden of proof on some matter at issue, the record itself must be introduced in evidence because judicial notice only serves to dispense with the necessity of identifying the record. *State v. Cullen*, 646 S.W.2d 850, 855 (Mo. App. W.D. 1982); *see also*:

- *State v. Smith*, 665 S.W.2d 663 (Mo. App. S.D. 1984) (a "docket sheet" from the Circuit Court of Cape Girardeau County showing an information filed on the defendant was insufficient to warrant a finding beyond a reasonable doubt that the appellant had pleaded guilty to or been found guilty of a felony)

- *State v. Martin*, 882 S.W.2d 768 (Mo. App. E.D. 1994) (dates of the convictions alleged in the information were different from those actually proven, and the actual charges were different; thus, the defendant had no notice of the charges on which the court heard evidence and based its finding that the defendant was a prior and persistent offender)

In a post-conviction case, the movant must direct the court's attention to the specific portion of the transcript to support the allegations in the motion. *Pollard v. State*, 807 S.W.2d 498, 501 (Mo. banc 1991), *rehearing denied*, *Pollard v. State*, No. 72887, 1991 Mo. LEXIS 49 (Mo. banc May 3, 1991).

Missouri courts are required by statute and the Missouri Constitution to take judicial notice of certain matters. Among these are the laws of other states, §§ 490.080, 490.110, and 509.220, RSMo 2000, and the charters of cities, MO. CONST. art. VI, § 33.

The proper procedure for the party seeking judicial notice is to call the court's attention to the matter to afford the adverse party the opportunity to rebut it. *Morrison*, 481 S.W.2d 605. Facts so well

known that they enter into evidence notwithstanding a party's failure to bring them to the court's attention are, in a sense, judicially noticed by a judge or a jury. The trial court may, and often does, dispense with proof of a matter simply by taking judicial notice of it *sua sponte*. Courts of appeal have held that the trial court has a duty to take judicial notice of a statute that lists the proscribed drug as a controlled substance, thus relieving the state of having to introduce evidence of the existence of the statute or to request the trial court to take judicial notice of it. *State v. Rios*, 840 S.W.2d 284, 288 (Mo. App. W.D. 1992).

Statutes directing courts to take judicial notice of certain matters generally provide for the manner in which they will be brought before the court. Section 490.080 provides that "[e]very court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States." Section 490.090, RSMo 2000, states that "[t]he court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information." Section 490.110 provides that:

> Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.

Other statutes and rules compel judicial notice of the law of another state when the pleading expressly relies on the law or makes allegations to show that the law of another state must be applied. Section 509.220; Rule 55.21.

When the law requires that a court take judicial notice of a matter about which the court is ignorant, the burden rests on the party desiring the recognition to bring it to the court's attention, *Corbett v. Terminal R.R. Ass'n of St. Louis*, 82 S.W.2d 97 (Mo. 1935); *Dugan*, 524 S.W.2d 194, and the court is not bound to take judicial notice of the matter absent this suggestion. *See also Chen v. Li*, 986 S.W.2d 927 (Mo. App. E.D. 1999) (the respondent's written statements were never introduced into evidence, and there was no indication that the trial court took judicial notice of the documents that were filed but not introduced).

B. (§23.2) Matters Judicially Noticed

Courts have taken judicial notice of a large number of matters. The following is a nonexhaustive list of these matters:

- Statutes and Constitution of the state, *City of St. Joseph v. Roller*, 363 S.W.2d 609, 611 (Mo. 1963); *Burton v. State*, 641 S.W.2d 95 (Mo. banc 1982), even if there is not a specific request or specific proof offered by the parties, *State v. James*, 796 S.W.2d 398, 399 (Mo. App. E.D. 1990)

- Charters of Missouri home rule cities, MO. CONST. art. VI, § 19, and counties, MO. CONST. art. VI, § 18(j); *Forste v. Benton*, 792 S.W.2d 910, 914 (Mo. App. S.D. 1990)

- Federal statutes, *Miller v. Medley*, 281 S.W.2d 797 (Mo. 1955); *see also Crane v. Loy*, 436 S.W.2d 739 (Mo. 1968); § 490.080, RSMo 2000

- The rules and regulations of federal administrative agencies, *Fredrick v. Bensen Aircraft Corp.*, 436 S.W.2d 765, 769 (Mo. App. S.D. 1968), and state administrative agencies, § 536.031, RSMo Supp. 2007, including the Missouri Code of State Regulations, *State ex rel. Gordon v. Copeland*, 803 S.W.2d 153, 159 n.8 (Mo. App. S.D. 1991); *Birdnow v. Dir. of Revenue*, 767 S.W.2d 384, 385 (Mo. App. E.D. 1989)

- That bloodhounds are frequently used to apprehend escapees, *State v. Fields*, 434 S.W.2d 507 (Mo. 1968)

- That a "steel or iron bar 1 to 1½ inches in diameter and 12 to 15 inches in length," if "repeatedly wielded as a bludgeon to strike a victim about the head and neck until unconscious" would qualify as a "dangerous instrument" under § 556.061(9), RSMo Supp. 2007, *State v. Seagraves*, 700 S.W.2d 95, 97 (Mo. App. E.D. 1985); *see also State v. Kobel*, 927 S.W.2d 455 (Mo. App. W.D. 1996)

- Automobile stopping distance, *State v. Overkamp*, 865 S.W.2d 376, 387 (Mo. App. E.D. 1993)

- Distance between cities, *State ex rel. Leonard Trucking Co. v. Div. of Transp., Dep't of Econ. Dev.*, 825 S.W.2d 19 (Mo. App. W.D. 1992)

- The average walking speed of a person, *State v. Burley*, 523 S.W.2d 575, 579 (Mo. App. W.D. 1975); *Miller v. St. Louis Pub. Serv. Co.*, 389 S.W.2d 769 (Mo. 1965)

- The court's own records, *State v. Johnson*, 714 S.W.2d 752, 764 (Mo. App. W.D. 1986), including supplementary proceedings that are ancillary to the criminal proceeding, *Turner v. State*, 669 S.W.2d 642, 644 (Mo. App. S.D. 1984); thus, in a post-conviction proceeding, the motion court can take judicial notice of the trial transcript, even if it was not introduced at the post-conviction hearing, *Hodge v. State*, 749 S.W.2d 423, 424 (Mo. App. S.D. 1988)

  But if a trial court takes judicial notice of its records in another case, it should cause the record in the present case to disclose the precise matters it has so considered, *State v. Cullen*, 646 S.W.2d 850, 855 (Mo. App. W.D. 1982).

  The Supreme Court of Missouri has noticed records in another case before it. *State v. Gilmore*, 681 S.W.2d 934 (Mo. banc 1984).

- Another state's statute or law; the adoption of The Uniform Judicial Notice of Foreign Law Act, §§ 490.070–490.120, RSMo 2000, eliminated the *Redick v. M.B. Thomas Auto Sales, Inc.*, 273 S.W.2d 228 (Mo. 1954), requirement of pleading a foreign statute or of alleging sufficient facts to imply reliance on the foreign law.

  But counsel should note the requirement of reasonable notice to the adverse party in § 490.110, RSMo 2000. As a practical matter, § 509.220, RSMo 2000, and The Uniform Judicial Notice of Foreign Law Act are often cited together and generally stand for the same proposition. *See generally Perry v. Carter*, 620 S.W.2d 50 (Mo. App. S.D. 1981). Although The Uniform Judicial Notice of Foreign Law Act allows a court to take judicial notice of the statutes of every state to find and judicially notice the applicable statute when the state is attempting to prove that a defendant is a prior or persistent offender, the date that the prior offense was committed has to be known. Otherwise, the applicable state statute that established the criminality of the defendant's act cannot be determined by either the trial court or the appellate court, and thus, it cannot be determined whether the prior conviction

was a felony. *State v. McGowan*, 950 S.W.2d 273, 275–76 (Mo. App. S.D. 1997); *State v. Yung*, 246 S.W.3d 547 (Mo. App. S.D. 2008) (the applicable statute could not be ascertained in *McGowan* through judicial notice because there was no specification of the particular statute on which the defendant's conviction was based and nothing in the record from which the date of offense could be inferred; this was not the case in *Yung*).

- That a "revolver" fires only one bullet on each pull of the trigger, *State v. Goforth*, 881 S.W.2d 256, 263 (Mo. App. S.D. 1994)

- Speed limits, even if no specific request is made and no specific proof on the subject is presented at trial, *State v. Dollens*, 878 S.W.2d 875, 878 (Mo. App. E.D. 1994)

- Official highway map of Missouri, *State v. Morrison*, 869 S.W.2d 813, 815 (Mo. App. S.D. 1994)

- That 44 mature marijuana plants would constitute more than five grams of marijuana, *State v. Reyes*, 862 S.W.2d 377, 387 (Mo. App. S.D. 1993)

- That specific buildings and streets are within certain cities and counties, *Smith v. State*, 837 S.W.2d 25, 28 (Mo. App. W.D. 1992)

- That cocaine is a highly toxic and dangerous drug that has few legitimate medical uses, *Hooker v. State*, 775 S.W.2d 303, 307 (Mo. App. S.D. 1989)

- That the defendant is African-American, *State v. Lockett*, 763 S.W.2d 281, 284 (Mo. App. E.D. 1988)

- The percentage of African-Americans in Jackson County according to the Census of Population, *State v. Smith*, 737 S.W.2d 731, 732 (Mo. App. W.D. 1987)

- The population of a county, *State v. Bowling*, 734 S.W.2d 565, 568–69 (Mo. App. S.D. 1987)

- The calendar and the day of the week on which a particular date fell, *State v. Farmer*, 719 S.W.2d 922, 923 (Mo. App. S.D. 1986)

- That most people are tired at 2:15 a.m. and probably not as alert as earlier in the evening, *Moore v. Bd. of Educ. of Fulton Pub. Sch. No. 58*, 836 S.W.2d 943, 948 (Mo. banc 1992)

- Units of weight and measure, *State v. Carwile*, 441 S.W.2d 763, 765 (Mo. App. S.D. 1969)

- Times of sunrise and sunset, *State v. Selle*, 367 S.W.2d 522, 525 (Mo. 1963); *State v. Gallimore*, 633 S.W.2d 232, 233 (Mo. App. S.D. 1982)

- That gloves and crowbars are tools of burglars and thieves, *State v. Russell*, 324 S.W.2d 727, 731 (Mo. 1959)

- The authoritative nature of a text or learned treatise in an expert witness's profession, which may later be used during cross-examination to test or challenge the expert's testimony, *Coats v. Hickman*, 11 S.W.3d 798 (Mo. App. W.D. 1999)

- The trial court's own records in prior proceedings (to establish that the appellant has been diagnosed as a pedophile and was in need of intensive treatment that could not be provided by persons responsible for the appellant's care), *Amonette v. State*, 98 S.W.3d 593 (Mo. App. E.D. 2003)

Courts have refused to take judicial notice of the following:

- Whether an officer holds a commission as a peace officer with authority to arrest for a misdemeanor, *Baris v. State*, 846 S.W.2d 764, 765–66 (Mo. App. W.D. 1993), *overruled by Cooley v. Dir. of Revenue*, 896 S.W.2d 468 (Mo. banc 1995) (to the extent that *Baris* held that allowing the oral testimony of an officer to prove the certification would run afoul of the best evidence rule, *Baris* is overruled)

- The existence or contents of municipal ordinances, *Forste*, 792 S.W.2d 910; *State ex rel. Barnes v. Hunter*, 867 S.W.2d 282, 283–84 (Mo. App. S.D. 1993); *State ex rel. Dotson v. County Comm'n of Clay County*, 941 S.W.2d 589 (Mo. App. W.D. 1997). *But see Animal Shelter League of Ozarks, Inc. v. Christian County Bd. of Adjustment*, 995 S.W.2d 533 (Mo. App. S.D. 1999)

- The law of foreign countries (court insisted that it be pleaded and proved), *Lane v. St. Louis Union Trust Co.*, 201 S.W.2d 288 (Mo. 1947)

- The rules of the circuit court unless they are admitted into evidence or embodied in the record, *State v. Perkins*, 680 S.W.2d 331, 333 (Mo. App. S.D. 1984)

- Matters of record in other courts, *State v. Collett*, 526 S.W.2d 920, 929 (Mo. App. E.D. 1975); *State v. Hill*, 817 S.W.2d 609, 611 n.2 (Mo. App. E.D. 1991); *see* § 490.130, RSMo Supp. 2007, and § 490.140, RSMo 2000 (on introduction of court records in evidence)

- Records and facts in one action in deciding another and different one, *Mince v. Mince*, 481 S.W.2d 610, 614 (Mo. App. W.D. 1972); *Edward Runge Land Co. v. Busch*, 594 S.W.2d 647, 650 (Mo. App. E.D. 1980). But this rule may be relaxed upon considerations of justice and expediency. *Layton v. State*, 500 S.W.2d 267, 269–70 (Mo. App. S.D. 1973); *Hoekstra v. Jenkins*, 730 S.W.2d 263 (Mo. App. E.D. 1987); *Mitchell v. State*, 532 S.W.2d 219 (Mo. App. S.D. 1976); *Barker v. State*, 505 S.W.2d 448 (Mo. App. S.D. 1974); *First Nat'l Bank of Kansas City v. Christopher*, 624 S.W.2d 474, 479 (Mo. App. W.D. 1981); *Penny v. Ozark Mountain Country Mall, Inc.*, 738 S.W.2d 137 (Mo. App. S.D. 1987)

- "[G]ypsy techniques," *State v. Marks*, 721 S.W.2d 51, 56 (Mo. App. W.D. 1986)

- The precise construction of standard U-Haul cargo compartments, *State v. Villa-Perez*, 835 S.W.2d 897, 902–03 (Mo. banc 1992)

- The clicking noise made when the trigger of a pistol is pulled with the safety in the "on" position, *State v. Arbuckle*, 816 S.W.2d 932, 936 (Mo. App. S.D. 1991)

- Untranscribed testimony unless the parties have stipulated to the testimony, *State v. Smith*, 776 S.W.2d 912, 914 (Mo. App. E.D. 1989)

- The fact that no silver dollars were minted in 1819 and 1829, *State v. Kelly*, 539 S.W.2d 106, 110 (Mo. banc 1976)

- Facts stated in a party's brief on appeal, *State v. Davit*, 125 S.W.2d 47, 52 (Mo. 1939)

- An attorney's professional reputation, *id.*

- The character of a road or whether it has been in use as a public road because this is a question of fact to be determined by evidentiary proof, *State v. Thenhaus*, 117 S.W.3d 702 (Mo. App. E.D. 2003)

II. Presumptions

A. (§23.3) General Considerations

"A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action." 21B CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5124 at 489 (2005). In certain recurring fact situations, proof of Fact A renders the inference of Fact B so highly probable that it is deemed sensible and fair to assume the truth of Fact B. 2 MCCORMICK ON EVIDENCE §§ 255–57 (Kenneth S. Brown ed., 6th ed. 2005).

Before a presumption comes into operation, the party seeking its benefit must first establish the "basic fact," the existence of which is a condition precedent to the "presumed fact." For example, when a party seeks to invoke the presumption that a person missing for at least seven years is dead, the party must first establish the "basic fact" (that the person has been missing for seven years) from which the "presumed fact" (death) arises.

For the most part, presumptions arising in criminal prosecutions favor the accused, and no presumptions can establish guilt or a fact essential to a conviction. *State v. Lee*, 488 S.W.2d 272, 273 (Mo. App. W.D. 1972). But certain presumptions act against the accused, such as:

- the presumption of sanity;

- the presumption of knowledge of the law; and

- the presumption that people intend the natural and reasonable consequences of their acts.

A presumption against the accused casts on the accused the burden of coming forward with evidence on the point.

B. (§23.4) Rebuttable vs. Conclusive Presumptions

Presumptions of law are also often classified as conclusive or rebuttable, a "conclusive presumption" being an inference that "must be drawn from the proof of given facts . . . which no evidence will be permitted to overthrow." 22A C.J.S. *Criminal Law* § 954, pp. 485–86 (2006); *Rose v. City of Riverside*, 827 S.W.2d 737, 738 (Mo. App. W.D. 1992) (everyone is conclusively presumed to know the law and that presumption applies to municipal ordinances).

In criminal cases, conclusive presumptions can violate the Due Process Clause. *See Sandstrom v. Mont.*, 442 U.S. 510, 517, 521–23 (1979) (unconstitutional to prove a defendant's guilt through the use of a conclusive presumption that removed an element of the offense from the case once the state proved the predicate facts), *overruled in part as stated in Manson v. Haponik*, No. 05-CV-3412 (BMC), 2007 U.S. Dist. LEXIS 51934 (E.D.N.Y. July 13, 2007) (jury instruction violates *In re Winship*, 397 U.S. 358 (1970), when it resolves an element of the crime, alleviating the jury's role as fact finder and lowering the prosecution's burden of proof). In *Sandstrom*, an instruction was given in a murder case that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Court held that a reasonable juror could have understood the instruction to create either a conclusive or burden-shifting presumption that the defendant had the requisite mental state. *Sandstrom*, 442 U.S. at 520; *see also*:

- *Francis v. Franklin*, 471 U.S. 307, 317–18 n.5 (1985)
- *State v. Erwin*, 848 S.W.2d 476, 481–83 (Mo. banc 1993), *cert. denied*, 510 U.S. 826 (1993)
- *State v. Martin*, 260 S.W.2d 536, 546 (Mo. banc 1953)
- *State v. Cook*, 282 S.W.2d 533 (Mo. 1955)
- *State v. Cook*, 262 S.W.2d 866 (Mo. 1953)
- *Neve v. Reliance Ins. Co. of Phila.*, 357 S.W.2d 247 (Mo. App. W.D. 1962)

California statutes that provided that a defendant is "presumed to have embezzled" a vehicle if it is not returned within 5 days of the expiration of a rental agreement and that an "intent to commit theft by fraud is presumed" for failure to return rented property within 20 days of demand were found to be unconstitutional because they were mandatory presumptions relieving the state of proving elements of the crime. *Carella v. Cal.*, 491 U.S. 263, 264 (1989). In determining whether a statute is unconstitutional because of burden shifting, courts should ask whether the presumption in question is mandatory, such that the jury instruction could have been understood by reasonable jurors to require them to find the presumed fact if the state proves certain predicate facts. *Id.* at 264.

States may constitutionally place the burden of proving self-defense on the defendant. *Martin v. Ohio*, 480 U.S. 228, 235–36 (1987). *But see Gov't of V.I. v. Smith*, 949 F.2d 677 (3rd Cir. 1991) (in a murder prosecution under Virgin Islands law, once the defendant has properly placed self-defense in issue, the prosecution must prove its absence beyond a reasonable doubt).

A rebuttable presumption of law is an inference that continues until overthrown by a sufficient amount of proof. For instance, § 195.140.2(2), RSMo Supp. 2007, provides that any money "found in close proximity to forfeitable controlled substances, imitation controlled substances, or drug paraphernalia, or forfeitable records of the importation, manufacture, or distribution" of such substances is presumed to be forfeitable. The burden of proof is on claimants of the property to rebut this presumption. This rebuttable presumption does not violate due process. *State ex rel. Cook v. Saynes*, 713 S.W.2d 258, 262–63 (Mo. banc 1986). The statute involves a rebuttable presumption, rather than an irrebuttable presumption. *Id.* at 262.

C. Specific Presumptions

1. (§23.5) Innocence

The "*presumption* of innocence" is probably better called the "*assumption* of innocence" because it describes the assumption that, in the absence of contrary facts, any person's conduct upon a given occasion was lawful. Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 173 (1969). This presumption of innocence is a real presumption in favor of the defendant and abides with the defendant at every

stage of the trial. *Gargotta v. United States*, 77 F.2d 977 (8th Cir. 1935). *But see United States v. Smith*, 542 F.2d 711 (7th Cir. 1976) (evidence was adequate to sustain the jury's determination that appellant knew of the stolen nature of the gun; *Gargotta*, therefore, was not controlling). A defendant is entitled to the safeguards of a jury trial and to the presumption of innocence no matter whether the defendant is innocent or guilty. MO. CONST. art. I, §§ 18(a) and 22(a); *State v. Reese*, 481 S.W.2d 497, 499 (Mo. banc 1972). This includes a properly instructed jury as to the state's burden of proof. *Cage v. La.*, 498 U.S. 39 (1990) (per curiam). *But see Estelle v. McGuire*, 502 U.S. 62 (1991) (disapproved the standard of review language for jury instructions and reaffirmed the "'reasonable likelihood' standard" of *Boyde v. California*, 494 U.S. 370, 380 (1990)).

Once a defendant has been afforded a fair trial and convicted of the charged offense, the presumption of innocence disappears. *Herrera v. Collins*, 506 U.S. 390 (1993).

2. (§23.6) Mental Disease or Defect

An accused is presumed to be free from mental disease or defect excluding responsibility and has the burden of convincing the jury by substantial evidence that a mental disease or defect excluding responsibility exists. *State v. Henderson*, 824 S.W.2d 445, 449 (Mo. App. E.D. 1991). Thus, there is a rebuttable presumption that the accused is sane and was sane at the time of the crime. *State v. Roland*, 808 S.W.2d 855, 858 (Mo. App. W.D. 1991). To rebut this presumption, the defendant must introduce substantial evidence of lack of responsibility, in which case the matter becomes one for the trier of fact to decide. *State v. Bacon*, 501 S.W.2d 499, 501 (Mo. App. W.D. 1973); *see also State v. Collier*, 624 S.W.2d 30 (Mo. App. E.D. 1981).

These principles are codified in § 552.030.6, RSMo 2000: "All persons are presumed to be free of mental disease or defect excluding responsibility for their conduct, whether or not previously adjudicated . . . to be or to have been sexual or social psychopaths, or incompetent." The statute allows the defense to introduce substantial evidence of lack of mental disease or defect excluding responsibility, but in the absence of that evidence, the presumption of responsibility is conclusive. *State v. Moss*, 789 S.W.2d 512, 514 (Mo. App. S.D. 1990); *see also State v. Bass*,

81 S.W.3d 595 (Mo. App. W.D. 2002); *State v. Floyd*, 18 S.W.3d 126 (Mo. App. S.D. 2000).

Even if substantial evidence of lack of responsibility is introduced, the presumption continues, and the jury is to be so instructed upon request by the state. *Moss*, 789 S.W.2d at 514. Further, the jury must be instructed that the burden requires a showing by a preponderance or greater weight of credible evidence that the defendant was suffering from a mental disease or defect excluding responsibility at the time of the conduct charged. The statutory presumption alone is substantial evidence to sustain the jury's finding of sanity. *State v. Harris*, 774 S.W.2d 487, 491–92 (Mo. App. E.D. 1989); *State v. Lee*, 654 S.W.2d 876, 880–81 (Mo. banc 1983); *State v. Butler*, 676 S.W.2d 809 (Mo. banc 1984).

A statute that provides for presumption of competence and places on the defendant the burden of proving incompetence by a preponderance of the evidence does not violate procedural due process. *Medina v. Cal.*, 505 U.S. 437, 450–51 (1992); *see also Leland v. Or.*, 343 U.S. 790 (1952) (rejected a challenge to a statute that required a defendant to prove the defense of insanity beyond a reasonable doubt).

A problem can develop if the defense is mental disease or defect and the jury becomes deadlocked. The language in the "hammer" instruction, MAI-CR 3d 312.10, increases the burden of proving the defense of mental disease or defect excluding responsibility. *Moss*, 789 S.W.2d at 517–18. In *Moss*, it did not matter that the instructions given were in a form promulgated by the Supreme Court of Missouri.

3. (§23.7) Recent Possession of Stolen Property

When the offense charged is receiving stolen property, possession of stolen property, in and of itself, raises no presumption that the possessor knew that the property had been stolen by another. Section 570.080, RSMo Supp. 2007; *State v. Magers*, 452 S.W.2d 198, 200 (Mo. 1970).

Although unexplained possession of recently stolen property does not give rise to an inference that the possessor is guilty of receiving stolen property, it is, nonetheless, a circumstance that the jury is entitled to consider. *State v. Taylor*, 691 S.W.2d 379,

382 (Mo. App. E.D. 1985). If the offense involves burglary or theft, evidence of recent possession of stolen property by the defendant is sufficient to submit the case to the jury. *State v. Sales*, 857 S.W.2d 480, 481 (Mo. App. S.D. 1993).

4. (§23.8) Possession and Uttering of Forged Instruments

Knowledge of the falsity of a purported writing is a necessary element of the crime of forgery. Section 570.090.1, RSMo Supp. 2007; *State v. Taylor*, 778 S.W.2d 276, 279 (Mo. App. W.D. 1989); *State v. Scurlock*, 998 S.W.2d 578 (Mo. App. W.D. 1999).

But this knowledge can be logically inferred from the evidence. *Taylor*, 728 S.W.2d at 279. "[T]he possession of and attempt to pass a forged instrument raises a presumption or inference that the person in possession forged it and, unless its possession is explained to the satisfaction of the trier of the facts, such presumption becomes conclusive." *Id.*; *State v. Gantt*, 504 S.W.2d 295 (Mo. App. W.D. 1973). *But see State v. Sanford*, 605 S.W.2d 219, 221 (Mo. App. E.D. 1980) (presumption stated in *Gantt* is immaterial if "the charge is merely uttering a forged instrument; because the state did not have to prove that it was the defendant who did the forgery to sustain a conviction for uttering, it was not necessary to allow the defendant to "rebut" the presumption).

This is not a true presumption; rather, it is another way of saying that certain inferences can logically follow from certain facts. *Taylor*, 778 S.W.2d at 279. Because the jury is the final arbiter of whether the defendant knowingly used a forged check and the state still has the burden of proving that beyond a reasonable doubt, this so-called presumption is not a mandatory presumption and, thus, does not violate due process. *Id.*

The appellant in *State v. Carroll*, 41 S.W.3d 878 (Mo. banc 2001), challenged the presumption as shifting the burden to the defendant to prove innocence. The Supreme Court upheld the convictions in *Carroll*, stating:

> Specifically, [Carroll] urges that the state cannot put any burden on the defendant to prove his or her innocence, and the line of Missouri cases purporting to do so must be reversed. Applying that argument here, Carroll proclaims that the state did not prove that she altered the check, which is the act that is charged. According to her, the evidence established only that she may have deposited a check written by Bobby Carroll and that someone had altered the check other than him.

> While Carroll's argument might be plausible were the evidence different, it is meritless under the proof here. This is not an instance where an accused had unexplained possession of a forged instrument and passed it. Carroll avowed she acquired possession of the check directly from Bobby Carroll. Consequently, the state did not need to eliminate the possibility that, after the check was written, a third person acquired possession of it and altered the name of the payee and the amount before Carroll acquired possession.

Id. at 883; *see also Scurlock*, 998 S.W.2d 578 (relying on *Taylor*, 778 S.W.2d 276, and *Gantt*, 504 S.W.2d 295); *State v. Brown*, 103 S.W.3d 923 (Mo. App. W.D. 2003) (citing *Scurlock* and reversing Brown's conviction when the trial court had denied the admission of evidence offered by Brown). "[W]e must review the rejected evidence to determine whether it was logically relevant to his claimed lack of knowledge that the check was not genuine." *Brown*, 103 S.W.3d at 928.

5. (§23.9) Destruction of Evidence

Generally, the withholding, suppression, destruction, spoliation, or fabrication of evidence raises an unfavorable inference or presumption. *Osborne v. Purdome*, 250 S.W.2d 159, 162 (Mo. banc 1952). The accused's destruction of evidence may justify a rebuttable presumption or inference by the jury that this evidence, if produced, would have been unfavorable to the accused, and any presumption flowing from this action is always against the accused.

Thus, evidence that an accused attempted to fabricate or procure false evidence in the accused's favor or to destroy evidence against the accused is admissible as showing a consciousness of guilt. *State v. Smith*, 194 S.W.2d 905, 907 (Mo. 1946); *State v. Christian*, 245 S.W.2d 895, 898 (Mo. 1952).

6. (§23.10) Fraudulently Stopping Payment on an Instrument

Section 570.125, RSMo Supp. 2007, charges the crime of fraudulently stopping payment on an instrument. It is prima facie evidence of a violation if a person stops payment on a check or draft and fails to make good on it, or "return or make and comply with reasonable arrangements to return the property for which the check or draft was given . . . within ten days after notice in writing from the payee that the check or draft has not been paid

because of a stop payment order." Section 570.125.3; *cf. Carella v. Cal.*, 491 U.S. 263, 264 (1989). Section 570.120, RSMo Supp. 2007, on passing bad checks, used to have a similar provision regarding prima facie evidence of a violation after a ten-day notice, but that section was amended in 1992. Now the ten-day notice is an element required to be established for one of the violations of that section.

7. (§23.11) Stealing by Deceit

To make a submissible case under § 570.030, RSMo Supp. 2007 (stealing and penalties), the state must show that the defendant had the intent to cheat or defraud at the time that the defendant made the false representation to cause the victim to part with the victim's money. *State v. Sielfleisch*, 884 S.W.2d 422, 428 (Mo. App. E.D. 1994). "Otherwise, there is no element of deceit or fraud, and the defendant [upon nonperformance] would be guilty of no more than breach of contract, not subject to criminal sanction." *Id.* at 428.

To prove the subjective intent of the accused, the state may present evidence of similar incidents in which the accused consistently made the same or similar promises. *Id.*

> "The theory which underlies admission of such evidence is that if a defendant consistently makes the same promise to a number of victims, and, after obtaining the victim's money, consistently fails to perform, it may be fairly inferred from the pattern of behavior that no mischance could reasonably explain all the failures of performance. Thus, a strong presumption exists that the defendant must have intended not to perform in any instance and particularly in the situation in which he has been charged."

State v. Tidlund, 4 S.W.3d 159, 164 (Mo. App. S.D. 1999) (quoting *State v. Basham*, 571 S.W.2d 130, 132 (Mo. App. E.D. 1978)). *See also State v. Mann*, 23 S.W.3d 824 (Mo. App. W.D. 2000) (evidence that the defendant falsely represented, on a Medicaid claim form submitted to the Department of Social Services, that he provided 27½ hours of psychological services to ten patients in one day was sufficient to support conviction for stealing by deceit).

III. Relevancy

A. (§23.12) Generally

In Missouri, evidence relevant to any matter in issue should be admitted, *State v. Sanderson*, 528 S.W.2d 527, 531 (Mo. App. E.D. 1975); *State v. O'Neal*, 718 S.W.2d 498 (Mo. banc 1986), unless there is a particular rule or ground for its exclusion, *State v. Medley*, 232 S.W.2d 519, 524 (Mo. 1950), *cert. denied*, 340 U.S. 956 (1951), and a proper objection to its admission is made, *State v. Papin*, 386 S.W.2d 355, 359 (Mo. 1965). Evidence is relevant and material if it tends to prove or disprove a fact in issue or corroborates other relevant evidence. *State v. Alexander*, 875 S.W.2d 924, 928 (Mo. App. S.D. 1994); *State v. Perkins*, 753 S.W.2d 567, 575 (Mo. App. E.D. 1988); *see also State v. Gilyard*, 979 S.W.2d 138 (Mo. banc 1998) (testimonial evidence of an uncharged sexual assault was admissible because it was sufficiently unusual and distinctive to serve as the defendant's "signature"); *State v. Hawkins*, 58 S.W.3d 12 (Mo. App. E.D. 2001) (rap lyrics were admitted properly because they were considered to contradict the defendant's testimony of his peaceful nature).

Relevant evidence tends to prove or disprove a fact that is of consequence. *Ashby v. Johnson*, 792 S.W.2d 7, 8 (Mo. App. E.D. 1990). Irrelevant evidence should be excluded, but the admission, even over an objection, of evidence that is merely irrelevant or immaterial, but not prejudicial, does not constitute reversible error. *State v. Walden*, 490 S.W.2d 391, 393 (Mo. App. E.D. 1973); *see also State v. Thomas*, 540 S.W.2d 97 (Mo. App. E.D. 1976) (testimony by alibi witness was not prejudicial because evidence of the same import had previously been introduced without any objection).

Further, evidence is not to be excluded, even if it is irrelevant and prejudicial, if it is so interwoven with relevant evidence as to make the introduction of the latter impossible without the introduction of the former. *State v. Dupree*, 477 S.W.2d 129, 131 (Mo. 1972). Evidence only needs to be relevant; it does not have to be conclusive. *State v. Mercer*, 618 S.W.2d 1, 9 (Mo. banc 1981), *cert. denied*, 454 U.S. 933 (1981); *State v. Richardson*, 838 S.W.2d 122, 124 (Mo. App. E.D. 1992).

The determination of the relevance of proffered evidence is within the discretion of the trial court, *State v. Gibson*, 636 S.W.2d 956, 958 (Mo. banc 1982), *appeal after remand*, 684 S.W.2d 413 (Mo. App. E.D.

1984), *overruled on other grounds by State v. Thompson*, 68 S.W.3d 393 (Mo. banc 2002), though this discretion is limited in that, before it can exclude evidence as irrelevant, the court should find that it is irrelevant beyond doubt, *State v. Schlup*, 724 S.W.2d 236, 242 (Mo. banc 1987), *cert. denied*, 482 U.S. 920 (1987). "[D]oubts as to the relevancy of evidence should be resolved in favor of the admissibility of the evidence." *State v. Proctor*, 546 S.W.2d 544, 545 (Mo. App. E.D. 1977); *State v. Gibson*, 760 S.W.2d 524, 526 (Mo. App. E.D. 1988) ("A criminal trial is a search for truth, and this search can be distorted when relevant information is withheld.").

The erroneous exclusion of relevant evidence can constitute reversible error. *Richardson*, 838 S.W.2d at 125. Moreover, depriving an accused in a criminal case of relevant testimony may constitute a constitutional violation. *State v. Hill*, 817 S.W.2d 584, 587–88 (Mo. App. E.D. 1991). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Miss.*, 410 U.S. 284, 302 (1973). Evidence should be admitted when the evidence in question might tend to prove the innocence of an accused in a criminal case. *Wash. v. Tex.*, 388 U.S. 14, 18–19 (1967); *United States v. Scheffer*, 523 U.S. 303 (1998) (does not support a right to introduce polygraph evidence when exclusion of evidence did not significantly undermine the fundamental elements of the defendant's defense).

The trial court also has the discretion to admit evidence that it has found to be relevant, even though that evidence is prejudicial. *State v. Richardson*, 515 S.W.2d 557, 560 (Mo. banc 1974). The admission of inflammatory evidence will not be held to be error, absent a showing of a clear abuse of discretion, as long as the evidence is relevant. *State v. Mucie*, 448 S.W.2d 879, 887 (Mo. 1970); *State v. Mullen*, 528 S.W.2d 517 (Mo. App. E.D. 1975) ("[A] bullet is hardly the type of exhibit which would be characterized as so highly prejudicial as to be excluded on that ground. This exhibit is not comparable to blood-spattered clothing or gruesome photographs of the deceased or menacing weapons. Therefore, even if the bullet had been lacking in probative value, it would not have been reversible error to admit it.").

The introduction of irrelevant evidence will also not be held to be error as long as it is not prejudicial and inflammatory. *State v. Franklin*, 526 S.W.2d 86, 92 (Mo. App. E.D. 1975); *State v. Noel*, 693 S.W.2d 317 (Mo. App. E.D. 1985). It is only the conjunction of prejudice and irrelevance that provides a basis for reversal.

For an example of error in improperly excluding relevant defense evidence, see *State v. McCoy*, 69 S.W.3d 482 (Mo. App. S.D. 2000). The trial court improperly excluded evidence regarding information that would have negated the appellant's *mens rea* of receiving stolen property. *See also State v. Brown*, 103 S.W.3d 923 (Mo. App. W.D. 2003) (evidence negated an essential element of the state's case that Brown had knowledge that checks were issued without the victim's authority; Brown's defense was that the checks were presented to him during the course of his business as a cab driver).

Evidence that is inadmissible because it is not relevant can, nevertheless, become admissible because a party has opened the door to it with a theory presented in an opening statement. Therefore, a defendant's opening statement can open the door to evidence of a prior crime. *Bucklew v. State*, 38 S.W.3d 395, 401 (Mo. banc 2001).

B. Specific Relevancy Problems

1. (§23.13) Circumstantial Evidence

Circumstantial evidence is relevant if it tends logically to prove or disprove or to support or establish a fact or issue between the parties. *State v. Cox*, 527 S.W.2d 448, 453 (Mo. App. E.D. 1975). Any element of any crime may be proved by circumstantial evidence. *State v. Fields*, 434 S.W.2d 507, 516 (Mo. 1968).

In *State v. Grim*, 854 S.W.2d 403, 405–08 (Mo. banc 1993), the Supreme Court abandoned the "circumstantial evidence rule." That rule had required, when the state's evidence consisted entirely of circumstantial evidence, that the facts and circumstances establishing guilt be consistent with each other, consistent with the guilt of the defendant, and inconsistent with any reasonable theory of innocence, though the evidence did not need to be absolutely conclusive of guilt or demonstrate the impossibility of innocence. *Grim*, 854 S.W.2d at 406. The Court held that, "If a jury is convinced beyond a reasonable doubt, so long as the evidence meets the minimal appellate standard required by due process, we need not disturb the result simply because the case depended wholly, mostly, or partially upon circumstantial proof." *Id.*

2. (§23.14) Motive

Motive is relevant as circumstantial evidence of guilt. *State v. Snider*, 869 S.W.2d 188, 193–94 (Mo. App. E.D. 1993). When the defendant maintains innocence, evidence of motive or absence of motive is relevant. *State v. Hill*, 866 S.W.2d 160, 163–64 (Mo. App. S.D. 1993). Trial courts have great latitude in admitting evidence of the defendant's motive. *State v. Blackman*, 875 S.W.2d 122, 139–140 (Mo. App. E.D. 1994); *State v. Ottwell*, 852 S.W.2d 370, 373 (Mo. App. E.D. 1993). Thus, the state can develop motive, even though it involves evidence of other crimes. *Id.*; *State v. Mallett*, 732 S.W.2d 527, 534 (Mo. banc 1987), *cert. denied*, 484 U.S. 933 (1987). *But see State v. Courter*, 793 S.W.2d 386, 390 (Mo. App. W.D. 1990) (evidence of past aberrant sexual conduct of the appellant "was prejudicial to the appellant, it was inadmissible under the common scheme or plan exception to the rule barring evidence of uncharged crimes and it also was too remote in point of time to be of probative value in the subject prosecution"). Evidence of motive has been allowed to discredit a claim of self-defense. *State v. DeWeese*, 751 S.W.2d 389, 393 (Mo. App. E.D. 1988).

Evidence of the defendant's racial prejudice is admissible when it may supply possible motive for the defendant's actions. *State v. Henke*, 954 S.W.2d 685, 687 (Mo. App. W.D. 1997); *see also Carfagno v. Commonwealth*, 576 S.E.2d 765 (Va. App. 2003); *State v. Coutee*, 879 S.W.2d 762, 767 (Mo. App. S.D. 1994); *State v. Novak*, 949 S.W.2d 168, 171 (Mo. App. E.D. 1997). *But see Dawson v. Del.*, 503 U.S. 159 (1992) (it is constitutional error to admit the defendant's membership in a white racist prison gang when that evidence was not relevant to any issue being decided in the punishment phase of a capital murder case and when the evidence was not tied in any way to the murder).

Evidence that the murder victim had sought an *ex parte* order of protection against the defendant is relevant to explain the defendant's motive for murder. *State v. Nastasio*, 957 S.W.2d 454, 459 (Mo. App. W.D. 1997).

Even if motive is relevant, it still must be shown by competent evidence; thus, otherwise inadmissible hearsay cannot be admitted under the state-of-mind exception as direct evidence of a defendant's state of mind or a true indication of the defendant's motive. *State v. Kelley*, 953 S.W.2d 73, 85 (Mo. App. S.D. 1997); *State v. Revelle*, 957 S.W.2d 428, 433 (Mo. App. S.D. 1997).

Evidence of the defendant's earlier suicide attempt was held to be relevant to motive to kill the victim when it showed his possessiveness and the lengths that the defendant would go to keep the victim in a relationship. *State v. Hayes*, 15 S.W.3d 779, 785 (Mo. App. S.D. 2000).

Evidence that the defendant had not paid child support for over one year and was charged with criminal nonsupport was relevant to motive in a murder case and was admissible. Evidence that the defendant did not admit his guilt of the crime was not "other crimes" evidence but, instead, was evidence of not committing a crime. *State v. Edwards*, 116 S.W.3d 511 (Mo. banc 2003).

3. (§23.15) Incriminating Others

Evidence that someone other than the defendant had the opportunity to commit the charged offense, or had motive to do so, is not admissible absent proof that the other person "committed some act directly connecting him with the crime." *State v. Wise*, 879 S.W.2d 494, 510 (Mo. banc 1994) (quoting *State v. Schaal*, 806 S.W.2d 659, 669 (Mo. banc 1991), *cert. denied*, 502 U.S. 1075 (1992); *State v. Easley*, 662 S.W.2d 248, 251–52 (Mo. banc 1983)). Evidence that another had opportunity or motive to commit the offense is not relevant, without more, to any issue. *Wise*, 879 S.W.2d at 511. "Because of the high tendency of such evidence to confuse and misdirect attention from the issues of the case, courts allow the evidence only where the defendant is able to tie the evidence to proof that the other person committed an act directly connecting him with the crime." *Id.*; *Schaal*, 806 S.W.2d at 669.

In *State v. Woodworth*, 941 S.W.2d 679 (Mo. App. W.D. 1997), the appellate court found that the trial court committed reversible error in excluding the defendant's evidence that another person had motive and opportunity to commit the charged crimes. The defendant had offered testimony that one of the victims told the police that a person other than the defendant had committed the crimes. Although this was hearsay, because the charges involved murder and assault, under § 491.074, now RSMo 2000, the statements were admissible as prior inconsistent statements to impeach the assault victim when at trial that victim said that he was unable to make any identification. *Woodworth*, 941 S.W.2d at 690. Because the prior inconsistent identification was direct evidence linking the other person to the crime, it would have permitted the defendant to introduce other evidence, which was

also offered, of motive and opportunity on the part of the other to commit the crime. *Id*. at 690–92.

In *State v. Butler*, 951 S.W.2d 600 (Mo. banc 1997), the Supreme Court found that the defendant had received ineffective assistance of counsel when counsel failed to perform an adequate investigation and present evidence that another person was connected to the charged murder and also had motive and opportunity to commit the crime. Evidence that a witness had seen a car coming from the area of the body driven by an individual who fit the description of the victim's nephew and evidence that the nephew had attempted to sell a ring similar to the ring that was taken from the victim's body at the time of the murder connected the nephew to the charged crime. *Butler*, 951 S.W.2d at 609–10. This direct evidence would have also allowed the defense to present an abundance of other evidence showing that the nephew had motive and opportunity to commit the crime. *Id.*

4. (§23.16) Acts Before Crime Charged

Evidence of the defendant's actions before the commission of the crime may be relevant to the issue of the defendant's participation in the crime. *State v. Kenley*, 693 S.W.2d 79 (Mo. banc 1985), *cert. denied*, 475 U.S. 1098 (1986). *But see State v. Courter*, 793 S.W.2d 386, 390 (Mo. App. W.D. 1990) (evidence of past aberrant sexual conduct of appellant "was prejudicial to appellant, it was inadmissible under the common scheme or plan exception to the rule barring evidence of uncharged crimes and it also was too remote in point of time to be of probative value in the subject prosecution"); *State v. Gamache*, 519 S.W.2d 34, 40 (Mo. App. E.D. 1975).

When intent is an issue, evidence of the defendant's actions before the commission of the crime may be relevant to the defendant's intent. *State v. McCreary*, 504 S.W.2d 132, 135 (Mo. App. E.D. 1973). Evidence that the defendant, before the crime, possessed certain articles connected with the crime may be introduced to show motive, malice, intent, knowledge, or preparation as long as they tie the defendant to the crime charged. *State v. Evans*, 237 S.W.2d 149, 151 (Mo. 1951); *State v. Green*, 674 S.W.2d 615, 620 (Mo. App. E.D. 1984). Acts not connected with the crime charged are not admissible. Thus, the admission of evidence of an altercation between a witness and the defendant shortly before a

homicide, when the victim of the homicide was in no way involved, was improper. *State v. Maddox*, 98 S.W.2d 535, 536 (Mo. 1936).

See also:

- *State v. Brotherton*, 266 S.W.2d 712 (Mo. 1954) (evidence of gun and shells was properly admitted because they were connected with the crime and with the defendant)

- *State v. Meidle*, 202 S.W.2d 79 (Mo. 1947) (testimony concerning the defendant's statements about his legal right to protect his land, his previous acts trying to fire at a trespasser, and his veiled threats toward possible trespassers on his land "were relevant and admissible to prove the existence of design and state of mind from which defendant's act of shooting proceeded and support[] the inference of the defendant's criminal purpose or intent in firing the fatal shot")

Admission of evidence of the commission of other illegal acts by the defendant when the acts were different in nature and location from those acts for which the defendant was charged was erroneous. *State v. Temple*, 262 S.W.2d 304, 306 (Mo. App. S.D. 1953).

In *State v. Ray*, 945 S.W.2d 462 (Mo. App. W.D. 1997), reversal was required when the trial court erroneously excluded evidence of events transpiring 48 hours before the shooting. The defendant was charged with murder, and this evidence would have explained the defendant's possession of the murder weapon while going to a reputed drug house where the murder occurred. *Id.* at 468–70. The evidence included that the defendant:

- went looking for his runaway daughter at a reputed drug house inhabited by the victim;

- was harassed and threatened by young men connected with the residence; and

- as a result, armed himself for protection.

Id. The exclusion of this evidence denied the defendant the opportunity to explain possession of a gun in support of a claim of accidental shooting. *Id.*

5. (§23.17) Acts After Crime Charged

Conduct of the defendant, after the commission of the offense, that tends to connect the defendant with the crime, even though not a part of the *res gestae*, may be relevant to the question of guilt. *State v. Lee*, 404 S.W.2d 740, 750 (Mo. 1966).

Specific types of activity providing inferences of guilt include the following:

- Flight from the scene or vicinity of the crime, *State v. Rodden*, 728 S.W.2d 212 (Mo. banc 1987), *cert. denied*, 499 U.S. 970 (1991); *see also State v. Perryman*, 851 S.W.2d 776 (Mo. App. E.D. 1993)

- Resisting arrest, or the threat of arrest, *State v. Stepter*, 794 S.W.2d 649, 656 (Mo. banc 1990); *State v. Kilgore*, 447 S.W.2d 544, 547 (Mo. 1969); *State v. Jones*, 583 S.W.2d 212 (Mo. App. W.D. 1979) (the fact that the defendant was carrying a gun at the time of arrest was not admissible unless he had attempted to avoid or escape arrest or the weapon was connected to the crime)

- Concealment of identity, *State v. Gibson*, 856 S.W.2d 78, 79 (Mo. App. E.D. 1993)

- Escape, attempted or successful, *State v. Sanders*, 842 S.W.2d 170, 175 (Mo. App. E.D. 1992); *State v. Robinson*, 725 S.W.2d 50, 52–53 (Mo. App. W.D. 1987) (even when the defendant was being held for more than one crime and there is no way to tell what motivated the defendant's action); *State v. Cochran*, 366 S.W.2d 360, 362 (Mo. 1963), *cert. denied*, 375 U.S. 981 (1964); *State v. Biddle*, 599 S.W.2d 182, 192 (Mo. banc 1980) ("[T]he facts did not demonstrate an effort by the defendant to hide or to evade arrest . . . and his lying in the open ditch in an area with better hiding places nearby was not evidence of concealment under *Cochran*")

- Feigning insanity, *State v. Preston*, 673 S.W.2d 1 (Mo. banc 1984), *cert. denied*, 469 U.S. 893 (1984)

- Destroying evidence, *State v. Lockett*, 639 S.W.2d 132, 135–36 (Mo. App. W.D. 1982)

- Fabricating evidence, *State v. Freeman*, 667 S.W.2d 443, 449 (Mo. App. S.D. 1984)

- Suborning perjury, *State v. Smith*, 770 S.W.2d 469, 473 (Mo. App. W.D. 1989); *State v. Christian*, 245 S.W.2d 895, 898 (Mo. 1952)

- Threatening prosecution witnesses, *State v. Chunn*, 701 S.W.2d 578, 585 (Mo. App. S.D. 1985); *but see State v. Girardier*, 801 S.W.2d 793, 796 (Mo. App. E.D. 1991)

- When the defense is accident, silence immediately after the event, *State v. Corlew*, 463 S.W.2d 836, 840 (Mo. 1971)

C. Character of Witnesses

1. (§23.18) Generally

Evidence of a witness's character for truth and veracity may be used for the limited purpose of impeaching the witness. *State v. Messley*, 366 S.W.2d 390, 393 (Mo. 1963). A witness may also be impeached by any prior convictions, pleas of guilty, pleas of *nolo contendere*, or findings of guilty. Section 491.050, RSMo 2000. Both felony and misdemeanor convictions can be used for impeachment. *State v. Bagby*, 93 S.W.2d 241 (Mo. 1936); *State v. Powell*, 632 S.W.2d 55, 58 (Mo. App. E.D. 1982); *State v. Jones*, 809 S.W.2d 45 (Mo. App. E.D. 1991). Convictions for city ordinance violations cannot be used for impeachment. *See State v. Keenan*, 779 S.W.2d 743, 746 (Mo. App. S.D. 1989) (city ordinance violations); *State v. Moore*, 84 S.W.3d 564 (Mo. App. S.D. 2002) (no error if the state's questioning was in regard to convictions other than municipal violations); *State v. Helm*, 892 S.W.2d 743, 745 (Mo. App. E.D. 1994); *State v. Pennington*, 24 S.W.3d 185 (Mo. App. W.D. 2000) (the trial court abused its discretion in admitting the evidence of Pennington's prior uncharged crimes).

The general rule in the past was that juvenile convictions could not be used for impeachment. *State v. Walters*, 528 S.W.2d 790, 792 (Mo. App. W.D. 1975); *see also State v. Burnfin*, 560 S.W.2d 283 (Mo. App. W.D. 1977), *vacated on other grounds by Lee v. Mo.*, 439 U.S. 461 (1979). But certain juvenile adjudications can now be used to impeach the credibility of a witness, including a criminal defendant. Section 491.078, RSMo 2000, provides that juvenile adjudications for any of the following acts may be used

to impeach the witness's credibility if the acts occurred within three years of the date of any sworn testimony by the witness:

> (1) An act that would have been a class A or class B felony if committed by an adult;
> (2) An act that would have been a class C or class D felony if committed by an adult, if the juvenile court record contains at least one other adjudication for any act that would have been a felony if committed by an adult.

Section 491.078.1.

Section 491.078.2 provides that:

> In any case in which a defendant is charged with a sexual offense under the provisions of chapter 566, RSMo, a juvenile court adjudication of the defendant may be used to question the credibility of the defendant if such adjudication is for an act which would have been a violation of chapter 566, RSMo, if the act had been committed by an adult and if such juvenile court adjudication occurred within three years of the commission of the pending offense. If the defendant's juvenile court records contain more than one adjudication for acts which would have been violations of chapter 566, RSMo, if committed by an adult, such multiple adjudications shall be admissible for impeachment regardless of when they occurred.

Under certain circumstances, the juvenile adjudication is subject to inquiry under the confrontation clause of the Sixth Amendment. *Davis v. Alaska*, 415 U.S. 308 (1974); *Pa. v. Ritchie*, 430 U.S. 39, 54 (1987) ("Because defense counsel was able to cross-examine all of the trial witnesses fully, we find that the Pennsylvania Supreme Court erred in holding that the failure to disclose the CYS [Children and Youth Services] file violated the Confrontation Clause."); *State v. Howard*, 693 S.W.2d 888 (Mo. App. W.D. 1985).

If the witness denies the conviction on cross-examination, counsel may introduce the court record to prove the prior conviction and impeach the witness. *State v. Williams*, 524 S.W.2d 137, 139 (Mo. App. W.D. 1975); *State v. Ivy*, 710 S.W.2d 431 (Mo. App. E.D. 1986). But if the witness unequivocally admits the conviction, including the nature of it, on direct examination, the court record becomes inadmissible during cross-examination of that witness. *Hoover v. Denton*, 335 S.W.2d 46 (Mo. 1960).

In *Lewis v. Wahl*, 842 S.W.2d 82, 85 (Mo. banc 1992), the Supreme Court held that "[t]he exclusion of a single misdemeanor conviction of speeding that is unrelated to any issue other than

witness credibility is of such little consequence that no reversal of a judgment will be made on that basis."

Although cross-examination of a witness on the basis of prior criminal convictions is a matter of right, *State v. Morris*, 460 S.W.2d 624 (Mo. 1970), *appeal after remand*, 477 S.W.2d 40 (Mo. 1972), inquiry into the prior convictions is limited to the nature of the crimes. Thus, the examining attorney may not attempt to elicit the specific details of the crime. *State v. Scott*, 459 S.W.2d 321 (Mo. 1970); *State v. Boxley*, 497 S.W.2d 129 (Mo. 1973) (the prosecutor did not elicit or attempt to elicit any details or incidents of the crimes or of the "juvenile" experience other than as above recited). Also, generally, the credibility of a witness may not be impeached by showing an arrest, investigation, or criminal act that has not resulted in a conviction. *State v. Taylor*, 498 S.W.2d 614, 616 (Mo. App. E.D. 1973); *State v. Easley*, 662 S.W.2d 248 (Mo. banc 1983) (narrow exception); *State v. Coleman*, 524 S.W.2d 27 (Mo. App. E.D. 1975). But bias or other motivating reasons may permit such evidence. *See State v. Joiner*, 823 S.W.2d 50, 52–55 (Mo. App. E.D. 1991); *State v. Lockhart*, 507 S.W.2d 395, 396 (Mo. 1974).

While the witness may be impeached by evidence of general reputation for truth and veracity, the credibility of a witness may not be impeached by showing a general reputation for immorality or by showing a specific act of immorality. *State v. Williams*, 513 S.W.2d 718, 721 (Mo. App. E.D. 1974); *State v. Williams*, 492 S.W.2d 1, 5 (Mo. App. E.D. 1973); *State v. Michalski*, 725 S.W.2d 620 (Mo. App. E.D. 1987). In fact, any attempt to impeach the credibility of a witness must be directed to the witness's reputation for truth and veracity. *State v. Kain*, 330 S.W.2d 842, 845 (Mo. 1960).

The scope of collateral matters admissible to impeach a witness is within the sound discretion of the court. *Messley*, 366 S.W.2d at 393.

2. (§23.19) Character of Defendant

The law presumes that every person's character is good and that a defendant has the right to be tried under that presumption. *State v. Pinkston*, 79 S.W.2d 1046, 1047 (Mo. 1935). *But see State v. White*, 440 S.W.2d 457, 460 (Mo. 1969) ("the prosecutor's statement, 'presumably claiming that [the defendant] needs some

money,' is not far afield from an inference that any juror would draw from an attempt to commit an armed robbery . . . and appellant's character was not improperly impugned" by this statement). When there is substantial evidence of the defendant's good character, the defendant is entitled to a jury instruction on its relevance. *State v. Woods*, 428 S.W.2d 521, 523 (Mo. 1968); MAI-CR 3d 310.40.

Reputation or character testimony is admissible only when the defendant's reputation is in issue. *See*:

- *State v. Milligan*, 654 S.W.2d 204, 208 (Mo. App. W.D. 1983)
- *State v. Blakey*, 203 S.W.3d 806, 813 (Mo. App. S.D. 2006) ("State did not offer evidence of Defendant's prior misconduct to prove intent or to show a reputation for violence, but to explain why Victim was not taken to the hospital when his injuries were first discovered.")
- *State v. Jones*, 777 S.W.2d 639, 642 (Mo. App. W.D. 1989) ("[T]he cross-examination was not designed to rebut evidence of Jones' good reputation, but was designed to discredit his explanation for running from the auditorium after the rape.")
- *State v. Clark*, 711 S.W.2d 885 (Mo. App. E.D. 1986) (because the defendant did not put his character in issue, the trial court erred when it allowed a witness to testify about the defendant's violent nature when drinking, but no prejudicial error was found)
- *State v. Johnson*, 496 S.W.2d 852, 857 (Mo. 1973)

"[T]he prosecution may not call a reputation character witness unless the defendant first calls such a witness." *Haynam v. Laclede Elec. Coop., Inc.*, 827 S.W.2d 200, 205–06 (Mo. banc 1992); IA JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 58 (1983 and Supp. 1990). "Except for the character trait of truthfulness and veracity, a defendant does not put his character into evidence by simply testifying." *State v. Gregory*, 822 S.W.2d 946, 949 (Mo. App. S.D. 1992); *State v. Gateley*, 907 S.W.2d 212, 220 (Mo. App. S.D. 1995) ("[T]he characterization of defendant as a 'very upstanding person' related to his reputation for truth and veracity, a character trait not requiring an instruction."). Any impeachment

of a defendant's character must be confined to the issue of credibility, unless a defendant's evidence goes to reputation for some character trait other than truthfulness. *Gregory*, 822 S.W.2d at 949. A defendant may not be impeached by a showing that the defendant's general reputation for morality is bad or by a showing of specific acts of immorality; the attack must be addressed directly to the reputation of the defendant for truth and veracity. *Id.* Thus, it was not proper for the state to elicit evidence concerning drinking slogans displayed on the defendant's van in an involuntary manslaughter prosecution because the slogans were not relevant. *State v. Hernandez*, 815 S.W.2d 67, 69–71 (Mo. App. S.D. 1991). In *State v. McClanahan*, 954 S.W.2d 476 (Mo. App. W.D. 1997), the appellant's character was brought into question when the state asked about any prior convictions and about the appellant's drug treatment; the court found the evidence irrelevant but not so prejudicial as to overcome the conviction.

In addition, "truthfulness" is not synonymous with "honesty" in the context of character evidence; "honesty" encompasses truthfulness but has a more comprehensive meaning. *Gregory*, 822 S.W.2d at 950. Thus, by asking character witnesses about the defendant's reputation for "honesty," the proponent expands the inquiry beyond the defendant's reputation for truthfulness. *Id.*; *State v. Foster*, 665 S.W.2d 348, 353–54 (Mo. App. S.D. 1984); *State v. Wells*, 586 S.W.2d 354, 359 (Mo. App. E.D. 1979).

It is reversible error for a witness to be interrogated as to the general reputation of the defendant for "honesty and fair dealing" if the matter has not been opened by the defendant. *State v. Bugg*, 292 S.W. 49, 50 (Mo. 1927). *But see State v. Williams*, 87 S.W.2d 175, 181, 183 (Mo. 1935) (if "the defendant testifies but does not put his character in issue the morality rule permits the state to prove his bad general character, that is to say, his bad reputation for morality, but only for the purpose of impeaching him as a witness. . . . to avoid ambiguity and injustice to the defendant as far as possible, . . . the impeaching testimony should be confined to the real and ultimate object of the inquiry, which is the reputation of the witness for truth and veracity.").

If the defendant decides to adduce favorable character evidence, there are some limitations. To testify as to the defendant's character, a witness must establish, through a declaration or other exhibition, knowledge of or familiarity with the defendant's reputation for the character trait in question among the people

with whom the defendant lives, works, or otherwise associates. *Cantrell v. Superior Loan Corp.*, 603 S.W.2d 627, 638–39 (Mo. App. E.D. 1980).

"The witness must qualify to give an opinion by showing such acquaintance with the person, the community in which he has lived, and the circles in which he has moved, as to speak with authority of the terms in which generally he is regarded." *Woods*, 428 S.W.2d at 523 (quoting 97 C.J.S. *Witnesses* § 55 (1957)). The personal views of the witness with regard to the defendant's possession of the character trait are not admissible. *State v. Antwine*, 506 S.W.2d 397, 399 (Mo. 1974); *State v. Cross*, 343 S.W.2d 20, 24 (Mo. 1961) (quoting I WHARTON'S CRIMINAL EVIDENCE § 225, p. 468 (12th ed.)). Likewise, evidence of the witness's general knowledge of particular acts is not admissible to establish the defendant's good character. *State v. Schmidt*, 530 S.W.2d 424, 426 (Mo. App. W.D. 1975). But evidence that a witness, who is shown to have been in a position to know of the defendant's bad reputation, has never heard anything against the defendant's character is admissible as evidence of the defendant's good character. *State v. Cavener*, 202 S.W.2d 869, 875 (Mo. 1947).

Evidence of character, to be properly admissible, must be confined to character traits involved in the offense charged. *State v. Clemmons*, 460 S.W.2d 541 (Mo. 1970); *State v. Sneed*, 529 S.W.2d 38 (Mo. App. E.D. 1975).

The evidence must be confined to the reputation of the defendant for the relevant character trait at or before the time of the charged offense. *State v. Jackson*, 373 S.W.2d 4, 7–8 (Mo. 1963); *State v. Roberts*, 785 S.W.2d 614 (Mo. App. E.D. 1990) (the reputation evidence for the appellant was not admissible when the court found that the witnesses did not know the appellant's reputation for a reasonable period before the crime); *Bugg*, 292 S.W. at 50.

Once the defendant has placed character in evidence, the state may offer rebuttal evidence, subject to the same restrictions placed on the defendant with regard to the relevance of the trait to the offense charged, the reputation evidence, *State v. Earvin*, 510 S.W.2d 419, 422 (Mo. 1974), and the time referred to, *State v. Wertz*, 90 S.W. 838 (Mo. 1905). Under certain circumstances, the prosecution can avoid these restrictions. The defendant's reputation may be used, even when it has not been placed in issue, to show the intent with which the defendant possessed

certain tools when the charge is possession of burglar's tools. *State v. Caffey*, 436 S.W.2d 1 (Mo. 1969). Elements of the defendant's background that may be irrelevant to any character trait involved in the offense charged may be argued if they bear on the defendant's credibility and the defendant has taken the stand. *State v. Lawrence*, 423 S.W.2d 807, 809 (Mo. 1968). Evidence of prior convictions, though related to specific acts, may be adduced to rebut a defendant's reputation evidence for peacefulness. *State v. Wicker*, 222 S.W. 1014, 1017 (Mo. 1920). To test their knowledge, reputation witnesses may be asked questions on cross-examination about specific acts of misconduct committed by the defendant. *State v. Siems*, 535 S.W.2d 261 (Mo. App. E.D. 1976); *see also*:

- *State v. Hendrix*, 699 S.W.2d 779 (Mo. App. S.D. 1985) (witness had been asked about defendant's reputation and had replied that it was "good"; this was sufficient to place defendant's character in issue and warrant the submission of an instruction on character evidence to the jury)
- *State v. Wells*, 586 S.W.2d 354, 357 (Mo. App. E.D. 1979) (there was no error when the defendant's character witnesses were asked, on cross-examination, if they felt that the persons who formed the basis of the defendant's good reputation would have a different opinion if they had been aware that "he was arrested for a theft of interstate shipment by the Federal Authorities. . . . State may cross-examine a character witness with reference to defendant's prior arrests and accusations of specific misconduct for the purpose of testing the trustworthiness, knowledge and good faith of the witness")

"In such cross-examination the state may inquire into mere rumors concerning the character of the defendant." *Siems*, 535 S.W.2d at 264. But there are limits to the scope of examination of character witnesses: The state's questions cannot be asked merely for the purpose of improperly showing other crimes or for the purpose of going into collateral details; the questions must not be argumentative or call for a conclusion or assume facts. *Id.*; *State v. Carroll*, 188 S.W.2d 22, 24 (Mo. 1945); *State v. Selle*, 367 S.W.2d 522 (Mo. 1963).

The form of the question is a factor to be considered when determining whether the question is to test the witness's credibility or to improperly show other crimes or collateral details. *State v. Creason*, 847 S.W.2d 482, 487 (Mo. App. W.D. 1993). The practice of couching the question in terms of personal knowledge has been criticized and prohibited. *See* Wanda E. Wakefield, Annotation, *Cross-Examination of Character Witness for Accused With Reference to Particular Acts or Crimes—Modern State Rules*, 13 A.L.R.4TH 796, 812–13 (1982). In addition, "it is improper to propound hypothetical questions that assume supposed facts and call for an opinion predicated thereupon." *Selle*, 367 S.W.2d at 530.

The state cannot call a rebuttal witness for the sole purpose of impeaching that witness with the witness's criminal record in order to raise an inference of the defendant's bad character because of the defendant's association with that witness. *Gregory*, 822 S.W.2d at 951–52.

3. Character of Victim

a. (§23.20) Assault and Homicide

Because the law presumes all persons to be of good character, evidence of the good character of the victim offered by the prosecution is not relevant until the defendant attacks the victim's character. *State v. Isa*, 850 S.W.2d 876, 895 (Mo. banc 1993).

In addition, when self-defense is an issue, the defendant may introduce evidence of the victim's prior specific acts of violence of which the defendant had knowledge, provided that the acts sought to be established are reasonably related to the charged offense. *State v. Harden*, 823 S.W.2d 87, 89 (Mo. App. E.D. 1991) (plain error).

State v. Duncan, 467 S.W.2d 866, 867 (Mo. 1971), held that a defendant may prove that the victim bore the reputation of having a violent and turbulent disposition or character when self-defense is alleged, and such evidence, if the defendant knew of the victim's reputation, must be admitted. *State v. Nelson*, 484 S.W.2d 306 (Mo. 1972), held that the reputation or character of a victim of murder or assault by violence cannot be established by proof of specific acts of violence on the victim's part against persons other than the defendant.

State v. Waller, 816 S.W.2d 212, 216 (Mo. banc 1991), held:

> Where justification is an issue in a criminal case, the trial court may permit a defendant to introduce evidence of the victim's prior specific acts of violence of which the defendant had knowledge, provided that the acts sought to be established are reasonably related to the crime with which the defendant is charged.

See also:

- *State v. Chambers*, 891 S.W.2d 93 (Mo. banc 1994) (a hearsay statement by the defendant was not evidence of prior specific acts of violence by the victim, so *Waller* does not apply)
- *State v. Stillings*, 882 S.W.2d 896 (Mo. App. S.D. 1994) (to be consistent with the law before *Waller*, defense counsel presented testimony consistent with law that victim had reputation for being a "fighter"; therefore, there was not ineffective assistance of counsel)
- *State v. Lawson*, 876 S.W.2d 770 (Mo. App. S.D. 1994) ("The defendant must show that he was aware of the specific act or acts of violence. The incidents must not be too remote in time and must be of quality such as to be capable of contributing to the defendant's fear of the victim.")
- *State v. Bost*, 820 S.W.2d 516 (Mo. App. W.D. 1991) (the Western District remanded to allow the defendant to proffer other specific acts of violence involving the victim but having no connection with the defendant for the trial court to determine whether the prior acts were reasonably related to the crime and therefore admissible)

If the defense introduces evidence of the victim's former violent acts, the door is opened for the prosecution to introduce evidence of the victim's peaceful character. *State v. Gibson*, 502 S.W.2d 310, 316 (Mo. 1973). In addition, if the defendant attacks the victim's character, the prosecution may introduce evidence of the defendant's character for violence and turbulence. *State v. Page*, 577 S.W.2d 177, 178–79 (Mo. App. E.D. 1979); *State v. Schlup*, 785 S.W.2d 796, 800–02 (Mo. App. W.D. 1990).

But when the accused denies committing the act, eliminating self-defense as an issue, the court may reject evidence bearing on the victim's general reputation for violence. *State v. Crow*, 486 S.W.2d 248, 252–53 (Mo. 1972).

Waller, 816 S.W.2d 212, abrogated the previous rule that the defendant was not allowed to show specific acts of violence against persons other than the defendant. But evidence of specific acts of violence by the victim may be rejected if there is no proof that the defendant knew of the incidents or if they are too remote. *Chambers*, 891 S.W.2d at 110 (6 and 7 years before murder); *State v. Parkhurst*, 845 S.W.2d 31, 36 (Mo. banc 1992) (the incident was 14 months before the charged offense, involving different participants).

To elicit this evidence, the defendant must lay a proper foundation:

- Self-defense must have been raised by other competent evidence.
- The defendant must show that the defendant was aware of the specific act or acts.
- The incidents "must not be too remote in time and must be of quality such as to be capable of contributing to the defendant's fear of the victim."

Waller, 816 S.W.2d at 216 Further, the trial court must caution the jury that:

- the evidence is to be considered solely with regard to the reasonableness of the defendant's apprehension that the victim was about to harm the defendant and not for the purpose of establishing that the victim probably acted in conformity with prior acts of violence; and
- the character of the deceased and the deceased's specific past violent acts are not otherwise relevant to the issues before them.

Id.

The trial court also has discretion to place reasonable limitations on the extent to which prior violent acts may be

proved. *Id.* If the trial court sustains a state's motion *in limine* to keep *Waller* evidence out, the defendant still has to make an offer of proof during trial concerning evidence of prior specific violent acts by the victim because a motion *in limine* preserves nothing for appeal. *Lawson*, 876 S.W.2d at 777. The defendant must attempt to present that evidence at trial and, if an objection is sustained, an offer of proof must still be made. *State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997).

b. (§23.21) Sexual Offenses

Opinion and reputation evidence of the complaining witness's prior sexual conduct may be admissible in a prosecution under Chapter 566, RSMo (sexual offenses), or related to sexual conduct under Chapter 568, RSMo, subject to limitations provided by § 491.015, RSMo 2000, the "rape shield" statute. Specific instances of sexual conduct are admissible to show:

- sexual conduct of the complaining witness with the defendant to prove consent if reasonably contemporaneous with the date of the alleged crime;
- sexual activity showing an alternative source of origin of semen, pregnancy, or disease;
- the surrounding circumstance of the alleged crime; or
- the previous chastity of the complaining witness when, by statute, previous chaste character must be proved by the prosecution.

Section 491.015.1(1)–(4).

A defendant proffering evidence of sexual conduct of the complaining witness must file a written motion with offer of proof or make an offer of proof on the record outside the hearing of the jury. Section 491.015.3; *State v. Miller*, 870 S.W.2d 242, 245 (Mo. App. S.D. 1994). The court must hold an *in camera* hearing and rule on the question of admissibility. The ruling must be sealed and delivered to the parties and the appellate court in the event of an appeal. Section 491.015.3; *State v. Fellows*, 629 S.W.2d 613, 615 (Mo. App. W.D. 1981).

The rape shield statute, § 491.015, has been held to be constitutional. *State v. Madsen*, 772 S.W.2d 656, 661–62 (Mo. banc 1989). For one example of a case applying the statute, see *State v. Hale*, 917 S.W.2d 219 (Mo. App. W.D. 1996). This statute applies to both testimony sought to be obtained from the victim during cross-examination and testimony through other witnesses. *Madsen*, 772 S.W.2d at 661–62.

The relevancy test in § 491.015.2 only applies if the evidence is also admissible under one of the exceptions listed in § 491.015.1. *State v. Jones*, 716 S.W.2d 799, 800 (Mo. banc 1986). Evidence of specific instances of a rape victim's prior sexual conduct is not independently admissible under § 491.015.2 but, rather, will only be admitted when the trial court finds it relevant to a material fact or issue as listed in the four exceptions set forth in § 491.015.1(1)–(4). *Jones*, 716 S.W.2d at 800, *repudiating*:

- *State v. Brown*, 636 S.W.2d 929 (Mo. banc 1982), *cert. denied*, 459 U.S. 1212 (1983)
- *State v. Ray*, 637 S.W.2d 708 (Mo. banc 1982)

As the Court in *Jones* noted, if all relevant evidence were admissible, there would be no reasons for the exceptions in § 491.015.1(1)–(4).

Evidence of voluntary sexual intercourse between the defendant and the victim that occurred three and one-half to four and one-half months before the alleged rape was not admissible on the issue of consent because the alleged prior conduct was not "reasonably contemporaneous" with the crime. *Jones*, 716 S.W.2d at 801. As the Court stated in *Jones*, however, if the situation would have involved "merely a swearing match between the complaining witness and the accused on the issue of consent we would be inclined to reverse and remand for new trial." *Id.*

Evidence of prior consensual intercourse between the defendant and the victim was inadmissible because the alleged conduct occurred between two and five years before the charged offense and, thus, was not reasonably contemporaneous with the date of the alleged crime. *State v.*

Foulk, 725 S.W.2d 56, 61 (Mo. App. E.D. 1987). Evidence of consensual intercourse between the defendant and the alleged victim occurring three to six months before the charged offense, however, was "reasonably contemporaneous," and the exclusion of this evidence was reversible error. *State v. Murray*, 842 S.W.2d 122, 124–26 (Mo. App. E.D. 1992) (evidence of the prior consensual relationship should have been admitted; because facts of the case did not sufficiently corroborate the victim's testimony, the probative value of the proposed evidence outweighed the need to protect the victim's privacy). The *Murray* court distinguished *Jones*, 716 S.W.2d 799, and *Foulk* based on the lack of corroborating evidence in *Murray*: "When the facts of a case sufficiently corroborate a rape victim's testimony, the probative value of evidence of prior consensual sexual conduct with the defendant is outweighed by the need to protect the victim's privacy." *Murray*, 842 S.W.2d at 126.

Section 491.015 may not be applied mechanistically to exclude evidence that the defendant is entitled to present by way of cross-examination of witnesses against the defendant or by means of defense witnesses. *State v. Douglas*, 797 S.W.2d 532 (Mo. App. W.D. 1990). *But see*:

- *State v. Cowles*, 203 S.W.3d 303 (Mo. App. S.D. 2006) (*Douglas* not persuasive in this case)

- *State v. Sales*, 58 S.W.3d 554 (Mo. App. W.D. 2001) (unlike in *Douglas*, the state never presented evidence or testimony claiming or suggesting that victim's precocious sexual knowledge was acquired from an encounter with the appellant; therefore, the appellant was not constitutionally entitled to cross-examine the victim about any past abuse or present evidence of that abuse)

See also:

- *State v. Miller*, 870 S.W.2d 242 (Mo. App. S.D. 1994) (offer of proof is specific only with respect to time frame and not relevant to sexual activity)

- *Lewis v. State*, 806 S.W.2d 89 (Mo. App. W.D. 1991) (there was no request made by the defendant to cross-

examine the victim with respect to other sexual activity and no direct evidence that the victim had been sexually involved with someone else)

- *State v. Weiler*, 801 S.W.2d 417 (Mo. App. W.D. 1990) (exclusion of evidence of the victim's sexual practices was not prejudicial to the defendant when the evidence presented before the jury without objection of the state included descriptions of the victim's familiarity with the male anatomy, and evidence that was excluded would not impeach victim's credibility)

The court in *Douglas,* 797 S.W.2d 532, rejected the state's contention that *Jones*, 716 S.W.2d 799, rigidly ruled out evidence of the alleged victim's prior sexual history that did not fit in one of the categories expressly permitted by the rape shield statute if the exclusion of the evidence deprived the defendant of the constitutional right to a fair trial. The state unfairly elicited testimony that one of the victim's hymen was absent, implying that the defendant was the cause of it, while the defendant was precluded from introducing evidence that the victim had told her physician that she had been sexually active with her boyfriend before the charged offense was alleged to have occurred. *Douglas*, 797 S.W.2d at 535–36; *see also*:

- *Olden v. Ky.*, 488 U.S. 227 (1988) (the defendant was deprived of the right to confrontation when prohibited from proving that the victim made up her charge of sexual battery to protect her relationship with her live-in boyfriend)

- *Wealot v. Armontrout*, 948 F.2d 497 (8th Cir. 1991) (the limitation on cross-examination violated the defendant's confrontation rights because a reasonable jury might have received a different impression of the credibility of the victim, as well as that of her husband, had the defense counsel been permitted to show that the victim had a strong motive for falsely accusing the defendant)

- *Freeman v. Erickson*, 4 F.3d 675 (8th Cir. 1993) (Freeman failed to substantiate his claim that the victim had a recent sexual relationship with a third party)

Refusal to allow cross-examination of the alleged victim concerning a previous complaint of sexual abuse involving someone else was reversible error. *State v. Lampley*, 859 S.W.2d 909 (Mo. App. E.D. 1993). *But see*:

- *State v. Samuels*, 88 S.W.3d 71, 84 (Mo. App. W.D. 2002) (unlike *Lampley*, "no indication "that either A.S. or A.B. made any previous allegations of abuse and received a benefit from those allegations. There is no connection between any prior allegations of abuse the girls may have made and a motive to lie in the present case")

- *State v. Kelley*, 83 S.W.3d 36, 40 (Mo. App. W.D. 2002) ("The trial court properly granted the state's Motion In Limine because Kelley failed to show that the evidence of H.S.'s prior sodomy complaints fell within any of the exceptions to the rape shield statute. Kelley also failed to show the relevance of these prior allegations to his defense of fabrication.")

- *State v. Brasher*, 867 S.W.2d 565, 568 (Mo. App. W.D. 1993) (the trial court ruled that no evidence could be introduced regarding race, but "evidence could be introduced regarding [victim] having a boyfriend and a conflict between the victim and her father caused by that relationship"; defense counsel chose not to cross-examine the boyfriend; there was no error in limiting scope of cross)

In *Lampley*, 859 S.W.2d at 911, the evidence was relevant to show how the nine-year-old victim benefited from the prior complaint when the subject of the prior complaint was convicted of a charge and removed from the victim's home. The court concluded that the evidence of the prior event was relevant to impeach the victim's credibility and that the exclusion of the evidence violated the defendant's right to a fair trial. Section 491.015 was not implicated because it was not necessary to the defense that a prior complaint that became beneficial to the victim was substantial. The prior sexual activity of the victim was not the stated subject of cross-examination; rather, the subject was a prior complaint that resulted in a benefit and constituted possible motive to fabricate the present complaint. *Id.*; *see also State v. Hedrick*, 797 S.W.2d 823, 827 (Mo. App. W.D. 1990).

D. (§23.22) Tendered Guilty Plea Withdrawn

Generally, a withdrawn guilty plea, and any statement made in connection with it, is not admissible as evidence at a subsequent trial adjudicating the defendant's guilt or innocence of that charge. *Kercheval v. United States*, 274 U.S. 220 (1927).

The reasons for this rule include the great probative value that a jury is likely to attach to a guilty plea and the fact that the use of a withdrawn guilty plea as evidence would have the effect of reinstating the original guilty plea in direct conflict with the court's determination to hold that plea a nullity. *State v. Meyers*, 12 S.W. 516, 519 (Mo. 1889) (disallowing evidence that defendant tried to plead guilty at arraignment), *overruled on other grounds by Ex parte Keet*, 287 S.W. 463 (Mo. banc 1926). "By refusing to receive the plea, and granting the defendant a trial, this, of necessity, meant a trial with the issues of fact to be determined by the jury, and not to be determined by the previous plea of the defendant, which admitted all that the state desired to prove." *Meyers*, 12 S.W. at 519.

The admissions of an accused in attempting to carry out a plea agreement are "involuntary in law and . . . not admissible on the trial of [the] case for any purpose whatever" if the guilty plea is "aborted." *State v. Hoopes*, 534 S.W.2d 26, 37 (Mo. banc 1976). *But see*:

- *State v. White*, 622 S.W.2d 939 (Mo. banc 1981) (*Hoopes* not applicable because a statement made by the defendant was an attempt by the defendant to clear himself of culpability rather than to confess guilt)

- *State v. Hughes*, 596 S.W.2d 723, 727 (Mo. banc 1980) ("[T]here was sufficient evidence in the record to support the trial court's initial finding that appellant knowingly waived his rights and that appellant made the statements in question voluntarily and not in reliance on promises of leniency.")

- *State v. Juarez*, 26 S.W.3d 346, 355 (Mo. App. W.D. 2000) ("the court did not admit evidence of Defendant's withdrawn plea in the jury trial. Rather, in pronouncing sentence, the judge noted that the jury found Defendant guilty and that Defendant himself had admitted his guilt during his plea two years earlier"; no error found)

- *Williams v. State*, 745 S.W.2d 803 (Mo. App. S.D. 1988) (no breach of plea agreement found)

- *State v. Sanders*, 714 S.W.2d 578 (Mo. App. E.D. 1986) (appellant refused to carry out his side of the plea bargain)

- *Stokes v. State*, 671 S.W.2d 822, 824 (Mo. App. E.D. 1984) ("[T]he state in good faith carried out its end of the plea agreement until movant's unilateral decision to abrogate it; but for defendant's actions, he would have been sentenced in . . . accordance with plea agreement.")

These statements are inadmissible at trial "whether the utterances of the accused be thought of as a confession, a plea of guilty later withdrawn by leave of court, or an attempt to enter a plea of guilty upon certain promises having been made by an official." *Hoopes*, 534 S.W.2d at 35. The statements made during an aborted plea are conclusively deemed involuntary; thus, an evidentiary hearing to determine whether the admissions were voluntary is not necessary. *State v. Neal*, 649 S.W.2d 261, 262 (Mo. App. S.D. 1983).

But if the defendant injects evidence that is subject to rebuttal testimony regarding the earlier guilty plea, the rebuttal evidence is admissible. *State v. Hadley*, 249 S.W.2d 857, 860 (Mo. 1952).

Rule 24.02(d)5, in conformance with these cases, provides that, except in a prosecution of perjury or false statement, evidence of a guilty plea "later withdrawn, or of an offer to plead guilty to the crime charged or of any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible" against the defendant. Cases in Missouri dealing with this Rule have stated unequivocally that those aborted pleas, and any statements made in connection with the pleas, are not admissible against a defendant. *State v. Danneman*, 708 S.W.2d 741, 743 (Mo. App. E.D. 1986).

Danneman also rejected the state's argument that the defendant waived any objection to the use of the guilty plea when he testified to it on direct examination. The Eastern District noted that this was only done after the trial court had ruled that the state could use the guilty plea to impeach the defendant, and thus the defendant had "no choice" but to bring it out on direct examination. *Danneman*, 708 S.W.2d 741; *State v. Price*, 787 S.W.2d 296, 300 (Mo. App. W.D. 1990).

In *State v. Harper*, 855 S.W.2d 474, 478 (Mo. App. W.D. 1993), the court held that Rule 24.02(d)5 did not apply to a situation in which the victim of multiple crimes testified that she heard the defendant plead guilty in another county to offenses also involving her as the victim. Rule 24.02(d)5 only applies to incomplete plea agreements or offers to plead, and it is not applicable to completed pleas. *Harper*, 855 S.W.2d at 478.

In addition, Rule 24.02(d)5 does not prohibit the testimony of witnesses whose involvement is learned in plea bargain discussions. *State v. Lawson*, 738 S.W.2d 520, 521 (Mo. App. S.D. 1987), *overruled on other grounds by State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997). "[T]he state is not foreclosed from proving relevant facts from independent sources even though those facts were discussed during plea negotiations." *Lawson*, 738 S.W.2d at 521. Further, it has been held that evidence of a defendant's offer to an officer to reveal the names of accomplices if the officer would talk to the prosecutor is an admission against interest and thus admissible. *State v. Sipe*, 648 S.W.2d 177, 181 (Mo. App. W.D. 1983). Because the conversation did not involve the prosecutor, the evidence did not fall within the proscription of evidence of plea bargaining between the prosecutor and defense under Rule 24.02. *Sipe*, 648 S.W.2d 177.

IV. Defenses

A. (§23.23) Entrapment

Entrapment is a valid defense as provided in § 562.066, RSMo 2000. The defense requires proof of both:

- inducement to engage in unlawful conduct; and
- an absence of a willingness to engage in that conduct.

State v. Willis, 662 S.W.2d 252, 255 (Mo. banc 1983); *State v. Scrutchfield*, 742 S.W.2d 192 (Mo. App. W.D. 1986) (defendant denied the crime for which he was charged and was not entitled to an entrapment instruction). When a defendant is predisposed to commit an offense, entrapment, under a "subjective test," is not available. *State v. Hohensee*, 650 S.W.2d 268, 270 n.2 (Mo. App. S.D. 1982); *see also*:

- *Collins v. Dir. of Revenue*, 2 S.W.3d 164, 168 (Mo. App. S.D. 1999) (nothing in this record compelled "a finding that the deputy sheriff or patrolman manufactured a crime that would not otherwise have occurred, or that the officers themselves engaged in criminal conduct")

- *State v. Pollard*, 941 S.W.2d 831, 834 (Mo. App. W.D. 1997) ("The defense of outrageous government conduct is distinct from the defense of entrapment because proof of defendant's predisposition to commit the crime charged renders the defense of entrapment unavailable.")

- *State v. Jay*, 774 S.W.2d 293 (Mo. App. S.D. 1987) (none of the evidence that incriminated defendant was obtained by outrageous police conduct, nor was such conduct the basis for either of the charges against defendant)

- *State v. King*, 708 S.W.2d 364, 367 (Mo. App. W.D. 1986) (appellant conceded "that he may not raise a defense of entrapment because his prior sales of drugs reported by Baumgardner and his ability to supply marijuana to Bailenson when the two purchases charged here were made demonstrate a pre-disposition to commit the offense")

- *State v. Robinson*, 664 S.W.2d 543, 545 (Mo. App. E.D. 1983)

Evidence of prior criminal acts similar to the charged offense is relevant and admissible evidence of the defendant's predisposition. *State v. Adams*, 839 S.W.2d 740, 743 (Mo. App. W.D. 1992). A defendant has the initial burden of injecting the issue of entrapment with evidence of unlawful government inducement and the defendant's lack of predisposition. *Id.* at 743. Once the defendant meets this initial burden, the state has the burden of proving lack of entrapment beyond a reasonable doubt. *Id.*

B. (§23.24) Alibi

The defense of "alibi" is that the defendant was at a different place than where the alleged crime was committed. *State v. Miner*, 639 S.W.2d 569, 571 (Mo. 1982). Alibi is not a true defense because, when the presence of the defendant at the place and time of the commission of the crime is essential to guilt, the burden is always on the prosecution to prove the defendant's presence beyond a reasonable doubt. *State v. Phegley*, 826 S.W.2d 348, 355 (Mo. App. W.D. 1992).

Rule 25.05(A)(5) requires a defendant to:

- disclose the intent to rely on alibi;
- provide specific information as to where the defendant was at the time of the offense; and
- outline the names and addresses of the alibi witnesses.

Failure to comply with Rule 25.05 may result in the exclusion of alibi testimony. *State v. Wooten*, 735 S.W.2d 30, 31 (Mo. App. E.D. 1987). The trial court's action is reviewed for abuse of discretion and will be disturbed on appeal only if the action results in fundamental unfairness to the defendant. *State v. Williams*, 815 S.W.2d 43, 49 (Mo. App. W.D. 1991); *see also State v. Jones*, 860 S.W.2d 386 (Mo. App. E.D. 1993). But disallowing an alibi witness is a drastic remedy that may deprive a defendant of the right to call witnesses and to present a defense. *State v. Gooch*, 659 S.W.2d 342, 343 (Mo. App. S.D. 1983). Therefore, the exclusion remedy should be used "with the utmost of caution." *Id.* (quoting *State v. Mansfield*, 637 S.W.2d 699, 703 (Mo. banc 1982)). *But see*:

- *Williams*, 815 S.W.2d at 49 (the testimony of the defendant's father could not have established where the defendant's was at the time of the shooting)
- *Wooten*, 735 S.W.2d at 31 (the trial court did not abuse its discretion when it disallowed the defendant's alibi testimony for his failure to respond to the state's discovery request that it be informed if the defendant was going to raise an alibi defense, as required by Rule 25.05(A)(5))
- *State v. Martin*, 103 S.W.3d 255 (Mo. App. W.D. 2003)

The defendant is required to disclose the alibi defense even when the only evidence of alibi to be presented is the defendant's own testimony. *State v. Anderson*, 18 S.W.3d 11 (Mo. App. W.D. 2000).

C. (§23.25) Duress or Coercion

Duress is generally a defense against all crimes except murder, § 562.071.2(1), RSMo 2000; *State v. Isa*, 850 S.W.2d 876, 900 (Mo. banc 1993), though it is unavailable to defendants who recklessly placed themselves in a situation in which the duress was likely to occur,

§ 562.071.2(2). For the defense of duress, coercion "must be present, imminent and impending, and of such a nature as to induce well grounded apprehension of death or serious bodily injury." *State v. Lane*, 834 S.W.2d 242, 244–45 (Mo. App. W.D. 1992); *see also State v. Rogers*, 912 S.W.2d 670 (Mo. App. S.D. 1995) (no defense of duress when there was no certainty that defendant would have been incarcerated in the same institution with them once he was sentenced and no evidence that any of those defendant allegedly feared had harmed or attempted to harm defendant). To invoke the defense of duress, the threat cannot be a future action, and the defendant cannot have had a reasonable opportunity to avoid the act. *Lane*, 834 S.W.2d at 244–45.

An instruction on duress should have been given when the co-defendant nervously pointed his gun at the defendant and told him to "get [the victim's] stuff." Neither the fact that the defendant never questioned or protested the command nor the fact that the defendant ran away following the robbery precludes the defense. *State v. Crenshaw*, 14 S.W.3d 175 (Mo. App. E.D. 2000).

Duress does not lie as a defense to murder. Section 562.071.2(1). But duress can be submitted as a defense to armed criminal action, even when the armed criminal action charge is premised on second-degree murder. *State v. Juarez*, 26 S.W.3d 346 (Mo. App. W.D. 2000).

D. (§23.26) Intoxication

Under § 562.076, RSMo 2000, voluntary intoxication is not a defense to a criminal charge. *Smith v. Groose*, 998 F.2d 1439 (8th Cir. 1993); *State v. McGreevey*, 832 S.W.2d 929, 931 (Mo. App. W.D. 1992); *see also*:

- *Thomas v. Marshall*, No. 07cv1240-DMS (WMc), 2007 U.S. Dist. LEXIS 87230 (S.D. Cal. Nov. 27, 2007)
- *Quinton v. Clay*, No. 07cv361 LAB (WMc), 2007 U.S. Dist. LEXIS 23723 (S.D. Cal. Mar. 29, 2007)
- *Mouse v. State*, 90 S.W.3d 145 (Mo. App. S.D. 2002)
- *State v. Mouse*, 989 S.W.2d 185 (Mo. App. S.D. 1999)

Involuntary intoxication that deprives a defendant of the "capacity to know or appreciate the nature, quality or wrongfulness of his conduct" is a valid defense. Section 562.076.1. The defendant has the

burden of injecting the issue. Section 562.076.2; *State v. Shields*, 862 S.W.2d 503, 505 (Mo. App. E.D. 1993); *State v. Samuels*, 905 S.W.2d 536 (Mo. App. S.D. 1995). Evidence must show that the defendant was intoxicated to the point that the defendant was unable to know or appreciate the quality or wrongfulness of the conduct at the time of the offense. *Shields*, 862 S.W.2d at 505. Therefore, when a defendant is able to recall details of the crime, the intoxication defense is not available. *Smith v. State*, 784 S.W.2d 855, 857 (Mo. App. E.D. 1990).

The revised version of MAI-CR 3d 310.50 on voluntary intoxication s constitutional because jurors are told that the state must prove every element of the crime beyond a reasonable doubt. *State v. Taylor*, 944 S.W.2d 925, 936 (Mo. banc 1997).

E. (§23.27) Self-Defense or Defense of Another

A person is permitted to use physical force on another to the extent reasonably necessary to defend oneself or another from the use or imminent use of unlawful force by the other person. Section 563.031.1, RSMo Supp. 2007. "The elements of self-defense are absence of aggression or provocation on the part of defendant, a necessity, real or apparent for defendant to employ deadly force to save himself from immediate danger of serious bodily injury or death, and reasonable cause for such belief." *State v. Isom*, 660 S.W.2d 739, 742 (Mo. App. E.D. 1983); *see also State v. Barnett*, 767 S.W.2d 38 (Mo. banc 1989); *State v. Harris*, 710 S.W.2d 324 (Mo. App. E.D. 1986). The mere possibility that an event may happen in the future does not create an "immediate danger." *State v. Martin*, 666 S.W.2d 895, 899 (Mo. App. E.D. 1984). Evidence of a victim's prior specific acts of violence of which the defendant has knowledge and that are reasonably related to the charged offense are admissible. *State v. Waller*, 816 S.W.2d 212, 216 (Mo. banc 1991); *see* §23.20, *supra*.

The defendant has the burden of injecting the issue of self-defense by adducing evidence during either the state's case or the defendant's case. *State v. Fincher*, 655 S.W.2d 54, 57–58 (Mo. App. W.D. 1983); *see also State v. Galbraith*, 723 S.W.2d 55 (Mo. App. W.D. 1986). Once the defendant has injected the issue, the burden shifts to the state to prove the absence of self-defense beyond a reasonable doubt. *State v. Allison*, 845 S.W.2d 642, 645 (Mo. App. W.D. 1992).

F. (§23.28) Battered Spouse Syndrome

Evidence of the battered spouse syndrome is admissible on the issue of whether the accused lawfully acted in self-defense or defense of another. Section 563.033.1, RSMo 2000. This evidence does not depend on the marital status of the defendant. *State v. Williams*, 787 S.W.2d 308, 311–12 (Mo. App. E.D. 1990). For this evidence to be admissible, a defendant must establish a prima facie showing of traditional self-defense—danger of death or imminent serious physical injury. *State v. Anderson*, 785 S.W.2d 596, 600 (Mo. App. W.D. 1990).

Battered spouse syndrome evidence is limited to self-defense or defense of others and is not admissible as a general defense. *State v. Copeland*, 928 S.W.2d 828, 838 (Mo. banc 1996), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. banc 2008). For evidence of battered spouse syndrome to be admissible to support lack of criminal intent, the defendant must comply with the provisions of Chapter 552, RSMo, regarding mental disease or defect and must provide notice of the intent to rely on the defense. *Copeland*, 928 S.W.2d at 837–38.

The traditional concepts of self-defense do not apply to persons suffering from battered spouse syndrome. *State v. Edwards*, 60 S.W.3d 602 (Mo. App. W.D. 2001). A battered woman is a terror-stricken person whose mental state is distorted. *Id.* at 602 (citing *State v. Hundley*, 693 P.2d 475, 479 (Kan. 1985)). Thus, evidence of self-defense should be weighed by the jury in light of how an otherwise reasonable person who is suffering from battered spouse syndrome would have perceived the situation and reacted in view of the prolonged history of physical abuse. *Williams*, 787 S.W.2d 308. *See also State v. Worrall*, 220 S.W.3d 346 (Mo. App. E.D. 2007).

G. (§23.29) Exculpatory Evidence

The Supreme Court of Missouri held in *State v. Barriner*, 111 S.W.3d 396, 400 (Mo. banc 2003), a capital case, that exculpatory hair evidence found at the crime scene was logically and legally relevant—and thus admissible—and that excluding exculpatory hair evidence was prejudicial.

> The evidence Barriner sought to present was more than the mere motive or opportunity of another person. It was not disconnected or remote. The hairs are physical evidence that could indicate another person's interaction with the victims at the crime scene. Barriner was entitled to present to the jury this evidence of another person's direct connection to the murders.

V. Demonstrative Evidence

A. (§23.30) Generally

Demonstrative evidence is admissible when it is relevant to a material fact at issue. *State v. Isa*, 850 S.W.2d 876, 890 (Mo. banc 1993). The evidence is relevant if it tends to establish any fact in issue or aids the jury in any way in arriving at a correct verdict. *State v. Bolder*, 635 S.W.2d 673, 688 (Mo. banc 1982), *cert. denied*, 459 U.S. 1137 (1983). Demonstrative evidence that corroborates testimonial evidence is admissible. *State v. Black*, 748 S.W.2d 184, 186 (Mo. App. E.D. 1988). Trial courts have broad discretion to determine the admissibility of demonstrative evidence. *State v. Moore*, 721 S.W.2d 141, 144 (Mo. App. E.D. 1986).

B. (§23.31) Photographs

Photographs are admissible if they tend to:

- corroborate testimony of witnesses;
- assist the jury in understanding the facts and the testimony of witnesses; or
- prove an element in the case.

State v. Isa, 850 S.W.2d 876, 890–91 (Mo. banc 1993). Trial courts have broad discretion in admitting photographs. *State v. Mease*, 842 S.W.2d 98, 108 (Mo. banc 1992), *cert. denied*, 508 U.S. 918 (1993). The test to be applied is whether the prejudicial effect outweighs the probative value. *State v. Weems*, 840 S.W.2d 222, 229 (Mo. banc 1992); *State v. Crews*, 851 S.W.2d 56 (Mo. App. E.D. 1993). Photographs should not be admitted when their sole purpose is to arouse the emotions of the jury and to prejudice the accused. *State v. Day*, 866 S.W.2d 491, 495 (Mo. App. S.D. 1993).

A photograph of personal property alleged to have been wrongfully taken is competent evidence of the property and is admissible in prosecutions for such crimes as robbery, burglary, stealing, tampering, and property damage. Section 490.717.1, RSMo 2000.

C. (§23.32) Moving Pictures and Videotape

Motion pictures or videotapes, like photographs, are admissible if they are relevant and their prejudicial effect does not outweigh their probative value. *State v. Mease*, 842 S.W.2d 98 (Mo. banc 1992), *cert. denied*, 508 U.S. 918 (1993). Videotaped confessions and crime scene videos are admissible. *State v. Anderson*, 862 S.W.2d 425, 431–32 (Mo. App. E.D. 1993), *overruled on other grounds by Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002); *State v. Richardson*, 838 S.W.2d 122, 124–25 (Mo. App. E.D. 1992). But courts have expressed concerns about the dangers associated with an actor playing the role of the defendant in a crime scene videotape. *See*, *e.g.*, *State v. Caudill*, 789 S.W.2d 213, 215–16 (Mo. App. W.D. 1990); *Anderson*, 862 S.W.2d 425 (videotaped reenactment was admissible because the defendant played his own role and the officers who played the victims did not attempt any dramatization of the victim's actions).

D. (§23.33) Sound Recordings and Wiretaps

Like photographs and videotapes, sound recordings are admissible, if relevant, to assist the jury in understanding the facts or testimony of witnesses or to establish any element of the state's case. *State v. Isa*, 850 S.W.2d 876, 888 (Mo. banc 1993). Admission is within the sound discretion of the trial court. *Id.*

Sections 542.400–542.422, RSMo Supp. 2007, establish mandatory procedures governing the initiation of a wiretap. Section 542.412 outlines when the contents of a wiretap can be used as evidence in a criminal prosecution.

Taped telephone conversations were admissible under Missouri's wiretap statute, § 542.414, now RSMo Supp. 2007, when an undercover Missouri Highway Patrol officer testified that he told the confidential informant that the recordings were needed for the benefit of the case. *State v. North*, 941 S.W.2d 16, 18 (Mo. App. W.D. 1997). Under § 542.414, the officer could testify that the informant consented; the informant was not required to testify. *North*, 941 S.W.2d at 18.

A cordless telephone conversation is not a communication protected under the wiretap statute. *State v. King*, 873 S.W.2d 905, 909 (Mo. App. S.D. 1994). In *King*, the parties had no reasonable expectation of privacy in a communication that was broadcast by radio in all directions to be overheard by countless people. *Id.* Similarly, a tape

recording of police officers' communications with a prisoner at a jail was not a "wire communication" within the meaning of the Missouri wiretap law. *Angel v. Williams*, 12 F.3d 786 (8th Cir. 1983). *But see In re High Fructose Syrup Antitrust Litig.*, 216 F.3d 621 (7th Cir. 2000), *cert. denied*, *A.E. Staley Mfg. Co. v. Dellwood Farms, Inc.*, 537 U.S. 1188 (2003) (involved recording one's own conversations).

See also State v. Martinelli, 972 S.W.2d 424, 431 (Mo. App. E.D. 1998) ("Here, the voice-activated recorder was directly plugged into a phone jack in defendant and victim's home. The recording which took place came from the phone jack and the conversation carried over the phone line. Nothing in the record indicates that the recording that took place was directly received from the radio transmission from the cordless phone.").

E. (§23.34) Instruments and Devices Used in Commission of Crime

Physical objects allegedly used in the commission of a crime must meet tests of relevancy, materiality, and probative value. *State v. Hicks*, 515 S.W.2d 518, 523 (Mo. 1974).

Chain of custody of physical evidence is irrelevant when an exhibit is positively identified. *State v. Ingram*, 607 S.W.2d 438, 441 (Mo. 1980); *State v. Gasaway*, 720 S.W.2d 3, 5 (Mo. App. W.D. 1986). Weapons of the defendant unrelated to the offense are not admissible. *State v. Perry*, 689 S.W.2d 123, 125 (Mo. App. W.D. 1985); *see also State v. Reyes*, 740 S.W.2d 257, 265 (Mo. App. W.D. 1987) (it was error admitting into evidence a knife that was found in the front seat when defendant was in the back seat the whole time, no one ever saw the defendant in possession of the knife, no one connected the knife with the crime, and the knife was not similar to the shotgun that killed the victim).

But weapons are admissible in evidence even if they were not used in the crime as long as they relate to the crime with which the defendant is charged. *State v. Kreutzer*, 928 S.W.2d 854, 869 (Mo. banc 1996) (a BB gun found in the defendant's car at the time of his arrest was admissible because it may have been used to gain entry into the victim's home, bore on the defendant's cool reflection, and had been purchased shortly before the murder; the gun was relevant for guilt and to show the untruthfulness of the defendant's statements); *see also*:

- *State v. Turner*, 713 S.W.2d 877 (Mo. App. E.D. 1986) (the state could introduce evidence that the defendant had a gun in his possession when he was arrested, although the gun was unconnected with the crime for which he was arrested; being armed tended to show that the defendant might have contemplated resistance)

- *State v. Ervin*, 835 S.W.2d 905 (Mo. banc 1992) (a shotgun was clearly connected to the defendant and continuing criminal activity)

- *State v. Smulls*, 935 S.W.2d 9, 20 (Mo. banc 1996) (two knives found in the defendant's car when he was arrested were admissible because they could have been used in preparation of crime; "Although there was no evidence presented demonstrating the knives were actually used during the crimes, a jury could conclude the knives constituted evidence of preparation.")

- *State v. Friend*, 822 S.W.2d 938, 944 (Mo. App. S.D. 1991) ("There was sufficient connection between the revolver and the assault; the trial court did not abuse its discretion in admitting the gun into evidence.")

- *State v. Ramsey*, 820 S.W.2d 663 (Mo. App. W.D. 1991) (shotgun was sufficiently connected to Ramsey and to the crime)

- *State v. Thompson*, 985 S.W.2d 779 (Mo. banc 1999) (ammunition in defendant' possession at time of arrest was admissible)

Weapons not connected with either the accused or the charged offense lack any probative value, and their admission into evidence is inherently prejudicial and constitutes reversible error. *Reyes*, 740 S.W.2d at 261–63; *State v. Huff*, 831 S.W.2d 752, 754 (Mo. App. E.D. 1992); *State v. Grant*, 810 S.W.2d 591, 592 (Mo. App. S.D. 1991).

Likewise, a demonstration with an unrelated weapon is improper. *Grant*, 810 S.W.2d 591. But the demonstrative use of a weapon similar to that allegedly used to threaten a victim was permissible in *State v. Silvey*, 894 S.W.2d 662, 668 (Mo. banc 1995) (the knife used by the prosecution in this case was proved to be similar to the knife owned by the defendant and was relevant to a material issue in the case). The demonstration was necessary, because of the unique and

almost indescribable character of the butterfly knife, to demonstrate the possible effect of the defendant's threats and to explain why the victim delayed for six months in reporting abuse. *Silvey*, 894 S.W.2d at 668; *see also State v. Black*, 50 S.W.3d 778 (Mo. banc 2001) (evidence during the guilt phase, especially a physician's testimony, demonstrated that the exhibit (knife sheath) was similar to the weapon used to kill the victim).

F. (§23.35) Models, Maps, Diagrams, Plats, and Charts

As with other demonstrative evidence, the decision to admit diagrams or drawings is within the discretion of the trial court. *State v. Isa*, 850 S.W.2d 876, 891 (Mo. banc 1993). These exhibits do not need to be drawn to scale; they simply must aid and not mislead the jury. *State v. Jackson*, 663 S.W.2d 312, 316 (Mo. App. E.D. 1983).

G. (§23.36) Anatomically Correct Dolls

Demonstrative evidence in the form of an anatomically correct doll that aids both the witness's testimony and the jury in arriving at a correct verdict is admissible. *State v. Culkin*, 791 S.W.2d 803, 810 (Mo. App. E.D. 1990).

VI. (§23.37) Evidence of Other Crimes and Bad Acts by Defendant

Generally, evidence of other crimes is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes. *State v. Reese*, 274 S.W.2d 304, 307 (Mo. banc 1954). *But see*:

- *State v. Bolden*, 494 S.W.2d 61, 65 (Mo. 1973) ("[T]he evidence of prior assault and accompanying threats, if reported, tended to show the intent and motive behind the present crime [assault with intent to kill with malice aforethought], and evidence of such was thus properly admitted.")

- *State v. Mitchell*, 491 S.W.2d 292 (Mo. banc 1973) ("[The] defendant made a trial issue of his identity and . . . he makes also an appellate point of his identification. In such posture, the evidence of the second rape, closely following the rape for which he was on trial, would have been competent to show the opportunity for, and the identification of, defendant as the rapist.")

- *State v. Shumate*, 478 S.W.2d 328 (Mo. 1972) (common plan or scheme embraced the commission of similar sex offenses (copulation), and the separate acts of appellant are considered as parts of the res gestae of the crime charged)

The use of the word "crime" covers any wrongdoing, charged or uncharged, that could have been the subject of a criminal charge. *State v. Chiles*, 847 S.W.2d 807, 809 n.2 (Mo. App. W.D. 1992); *State v. Sladek*, 835 S.W.2d 308, 313 n.1 (Mo. banc 1992) (Thomas, J., concurring), *distinguished by State v. Simmons*, 944 S.W.2d 165 (Mo. banc 1997) (testimony was not "other crimes" testimony because it spoke "directly to [the defendant's] motive and the deliberateness of his general plan to steal and murder"; therefore, it was admissible). "[O]ther crimes" includes reference to the fact that a defendant was on parole. *State v. Brown*, 670 S.W.2d 140, 141 (Mo. App. S.D. 1984). *But see State v. Boulware*, 923 S.W.2d 402, 406 (Mo. App. W.D. 1996) (passing reference to a parole officer was "vague, indefinite, and did not make reference to a specific crime"; therefore the trial court did not plainly err by not ordering a mistrial). "[O]ther crimes" also includes a statement that a defendant's "mug shot" had initials other than the victim's on the back, thus implying other arrests. *State v. Blaney*, 801 S.W.2d 447, 450–51 (Mo. App. E.D. 1990).

The burden is on the defendant to show that the evidence actually constitutes evidence of other crimes. *State v. Simms*, 859 S.W.2d 943, 945–47 (Mo. App. E.D. 1993).

The rule also covers noncriminal misconduct that would amount to an attack on the defendant's character. *State v. Kitson*, 817 S.W.2d 594, 597 (Mo. App. E.D. 1991); *see also State v. Davis*, 877 S.W.2d 669 (Mo. App. W.D. 1994) (statements made by the defendant in which the defendant expressed a desire to kill three young women who had caused problems for his family and have sexual relations with them while they were dying were not statements of other crimes and were properly admitted because they dealt with the offense at issue and night of the murder).

But see:

- *State v. Huse*, 842 S.W.2d 579, 584 (Mo. App. S.D. 1992) ("[T]he evidence offered to show a witness had a propensity to engage in anal intercourse, and such witness had both the motive and opportunity to inflict the injuries received by [the

victim] . . . fails because [the defendant] offered no evidence connecting [the witness] in this case.")

- *State v. Daugherty*, 823 S.W.2d 33 (Mo. App. E.D. 1991) (evidence of defendant and his wife's sexual conduct does not constitute misconduct but was used to corroborate the victim's testimony and is therefore admissible)

The state cannot elicit testimony that the defendant is homosexual in an attempt to prove that the defendant had sex with a young boy. *State v. Ellis*, 820 S.W.2d 699, 702 (Mo. App. E.D. 1991).

Evidence of other crimes is admissible if it is logically relevant—it has some legitimate tendency to establish directly the defendant's guilt of the charges for which the defendant is on trial—and if it is legally relevant—its probative value outweighs its prejudicial effect. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993); *see*:

- *State v. Vorhees*, 248 S.W.3d 585 (Mo. banc 2008) (trial court erred by admitting evidence of other uncharged sexual conduct with another minor because evidence of prior bad acts, regardless of the degree of their similarity to the acts in the charged case, could not be admitted to corroborate the victim's testimony)

- *State v. Strughold*, 973 S.W.2d 876 (Mo. App. E.D. 1998) (evidence of defendant's harboring pornographic material was relevant to his charge of furnishing pornography to minors, and therefore its admission was not error)

See also § 566.025, RSMo 2000.

When the evidence of the defendant's uncharged misconduct is directly relevant to some disputed material fact, and thus serves a legitimate purpose rather than merely indicting the defendant as a "bad person" with the propensity to commit the particular type of crime, the prior crimes rule is no bar. *State v. Shaw*, 847 S.W.2d 768,

778 (Mo. banc 1993). The point for which this evidence is accepted must be in issue. *State v. Griffin*, 336 S.W.2d 364, 367 (Mo. 1960); *see also*:

- *State v. Engberg*, 376 S.W.2d 150 (Mo. 1964) (the testimony of four witnesses was cumulative and dealt with offenses related to the offense charged and was, therefore, within the discretion of the court to admit)

- *State v. Beardsley*, 549 S.W.2d 133, 136 (Mo. App. W.D. 1977) ("[The a]ppellant's assault on the two customers in the Silver Dollar Tavern, done immediately prior to the kidnapping, showed his motive to escape arrest, his intent to do so, and his plan to do so, all interrelated and connected to the later crime of kidnapping which was, under the evidence, also done for the purpose of avoiding apprehension.")

- *State v. Williams*, 369 S.W.2d 408 (Mo. banc 1963) (the court held that evidence concerning the death of the victim's male companion was proper under the *res gestae* exception to the hearsay rule because events formed a continuous transaction with the single purpose of raping the victim)

Under the traditional common-scheme-or-plan exception allowing admission of evidence of prior misconduct only if it was part of or connected to the same general criminal enterprise, remoteness in time of the prior misconduct can make difficult, or even impossible, proof of a traditional common plan or scheme between separate acts of misconduct. *Bernard*, 849 S.W.2d at 19; *Ellis*, 820 S.W.2d at 703. But under the signature *modus operandi* or corroboration exception, the remoteness in time of the other bad acts is only a factor that goes to the weight afforded the evidence. *Bernard*, 849 S.W.2d at 19. The passage of time between the incidents and the number of unusual and distinctive incidents that occurred in the past should be taken into account by the trial court. *Id.* In *State v. Stegall*, 353 S.W.2d 656 (Mo. 1962), the Court held that evidence of a similar crime committed 14 months after the charged offenses was too remote. *See also*:

- *State v. Washburn*, 549 S.W.2d 636 (Mo. App. W.D. 1977)

- *State v. Cutler*, 499 S.W.2d 387, 388 (Mo. 1973)

- *Bernard*, 849 S.W.2d at 19 ("Although the events about which the four testified occurred between 12 and 13 years prior to the trial in the present case, the remoteness is outweighed by there being at least four nearly identical incidents so unusual and distinctive as to corroborate the victim's testimony."), *overruled by Vorhees*, 248 S.W.3d 585 (the trial court erred by

admitting evidence of other uncharged sexual conduct with another minor because evidence of prior bad acts, regardless of the degree of their similarity to the acts in the charged case, could not be admitted to corroborate the victim's testimony)

- *Chiles*, 847 S.W.2d at 809–10
- *State v. Burgess*, 780 S.W.2d 688, 689–92 (Mo. App. S.D. 1989)
- *State v. Courter*, 793 S.W.2d 386 (Mo. App. W.D. 1990)

In addition, in *State v. Helm*, 892 S.W.2d 743, 745 (Mo. App. E.D. 1994), the court held that the defendant's two prior burglary convictions—one was ten years before and the other was almost ten months before the charged offense—were too remote and tenuous to be admissible to show the defendant's "intent." The court also held that the fact that the defendant testified did not waive the issue because the state first injected the issue over the defendant's objections before his testimony. *Id.*

In *State v. Skillicorn*, 944 S.W.2d 877, 886–89 (Mo. banc 1997), *cert. denied*, 522 U.S. 999 (1997), the Supreme Court made it clear that the "recognized exceptions" identified in caselaw are not an exclusive list within which "other crimes" evidence must fall in order to be admissible. In *Skillicorn*, the defendant was charged with capital murder under an accomplice-liability theory. At trial, the defense theory disputed the element of deliberation and asserted that the co-defendant shot the victim without the defendant's knowledge. The state introduced evidence that, after the murder, the defendant and his co-defendant drove the victim's stolen car to a house. At that house, both co-defendants took firearms from the car's trunk and held them to a woman's head and threatened her. *Skillicorn* held that the challenged evidence was a continuation of the sequence of events that presented a coherent picture of the crimes. *Id.* at 887. The Court also noted that, rather than an unrelated crime that might be used only to prejudice the jury, the evidence of the defendant's participation in the other crime was relevant and connected to the crime because it occurred only a few hours after the murder and involved the same guns used in the perpetration of the victim's murder. *Id.* The Court noted that the jury could also infer from this evidence the defendant's murderous mental state during the period surrounding the charged murder and that he had no intention of distancing himself from the co-defendant's actions. *Id.* This evidence

helped establish the defendant's deliberation on the murder and that he aided the co-defendant in perpetrating the murder—both elements of the crime charged.

Even though evidence of other crimes has been admitted to show the defendant's knowledge, *State v. Flenoid*, 838 S.W.2d 462, 469 (Mo. App. E.D. 1992); *State v. Charlton*, 114 S.W.3d 378 (Mo. App. S.D. 2003); *Yahne v. State*, 943 S.W.2d 741 (Mo. App. W.D. 1997), the proffered evidence still must be "legally relevant," that is, its prejudicial effect must not outweigh its probative value, *State v. Dudley*, 912 S.W.2d 525, 526 (Mo. App. W.D. 1995). *But see State v. Kelly*, 119 S.W.3d 587 (Mo. App. E.D. 2003) (not error to admit testimony when a police officer's comment about unspecified prior dealings with the residence in front of which the defendant was standing did not refer to any specific criminal act by the defendant or anyone living at that residence and did not definitely associate him with another crime). Thus, when a defendant was charged with possession of codeine, it was reversible error for the state to introduce evidence of the defendant's prior conviction for the sale of codeine. *Dudley*, 912 S.W.2d at 526. When the defendant was charged with second-degree drug trafficking, it was reversible error for the state to introduce evidence of the defendant's prior convictions for possession of drugs and drug trafficking. *State v. Blackmon*, 941 S.W.2d 526, 528–29 (Mo. App. E.D. 1996). In both *Dudley* and *Blackmon*, it was determined that the prejudicial effect of the evidence of "other crimes" outweighed its probative value.

Although prior misconduct of the defendant directed toward the victim of the offense on trial can be admissible, *State v. Graham*, 641 S.W.2d 102, 105 (Mo. banc 1982), it is not necessarily so, *State v. Wallace*, 943 S.W.2d 721 (Mo. App. W.D. 1997). *But see State v. Blakey*, 203 S.W.3d 806 (Mo. App. S.D. 2006) (it was not an error to admit evidence of the defendant's prior misconduct because the evidence was offered to explain why a particular witness acted as she did). Evidence of prior acts of abuse by the defendant against the victim was not admissible in a first-degree assault prosecution when the evidence was only marginally probative to show that the defendant intended "serious physical injury" and was extremely prejudicial. *Wallace*, 943 S.W.2d 721.

The balancing of the value and effect of the evidence is within the sound discretion of the trial court. *State v. Shaw*, 636 S.W.2d 667, 672 (Mo. banc 1982), *cert. denied*, 459 U.S. 928 (1982); *see also*:

- *State v. Bannister*, 680 S.W.2d 141 (Mo. banc 1984)
- *State v. Gilmore*, 661 S.W.2d 519 (Mo. banc 1983)

But other-crimes evidence should be subjected to rigid scrutiny; if the trial court does not clearly perceive the connection between the uncharged misconduct and the charged offense, the defendant should be given the benefit of the doubt, and the evidence should be rejected. *Sladek*, 835 S.W.2d at 311, 312.

Generally, evidence of other, uncharged misconduct has a legitimate tendency to prove the specific crime charged when it tends to establish the following:

- Motive—*State v. Mallett*, 732 S.W.2d 527, 534 (Mo. banc 1987), *cert. denied*, 484 U.S. 933 (1987); *but see State v. Lee*, 626 S.W.2d 252 (Mo. banc 1982) (evidence was that the defendant was an escapee from an Oklahoma prison)

  The motive exception in sex cases has been primarily limited to prior incidents involving the same victim. *Contrast State v. Burkhart*, 242 S.W.2d 12 (Mo. 1951) (same victim, admissible), *with State v. Atkinson*, 293 S.W.2d 941 (Mo. 1956) (different victim, inadmissible); *see also*:

  - *State v. Gillespie*, 336 S.W.2d 667, 682 (Mo. 1960) (evidence of prior acts against victim admissible because "[a]ll their subsequent acts constituted an aggravation and a continuation of the original assault, and proof of these constituted evidence of a 'common scheme or plan' embracing the commission of the whole series of related abuses and offenses.")
  - *State v. Mantia*, 748 S.W.2d 785 (Mo. App. E.D. 1988)

- Intent—
  - *State v. Wing,* 455 S.W.2d 457, 464 (Mo. 1970), *cert. denied*, 400 U.S. 1009 (1971) (in a possession-of-burglar-tools case, evidence of prior convictions for burglary is admissible to show intent)

- *State v. Crockett*, 801 S.W.2d 712 (Mo. App. E.D. 1990)
- *State v. Johnson*, 811 S.W.2d 411, 415 (Mo. App. E.D. 1991)
- *State v. Charlton*, 114 S.W.3d 378 (Mo. App. S.D. 2003)

- Absence of mistake or accident—*State v. Hudson*, 521 S.W.2d 43, 46 (Mo. App. E.D. 1975); *State v. Hepperman*, 162 S.W.2d 878, 888–85 (Mo. 1942)

- A common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other—*State v. O'Neal*, 618 S.W.2d 31, 34 (Mo. 1981); *State v. Lue*, 598 S.W.2d 133, 137 (Mo. banc 1980) (crimes are not so related if not so blended or connected that the investigation of one involves an inquiry into the other); *Courter*, 793 S.W.2d at 390

- The identity of the person charged with the commission of the crime on trial—*Lee*, 626 S.W.2d at 254; *Bernard*, 849 S.W.2d at 13

  But under the identity exception, evidence of uncharged misconduct must be nearly identical to that charged and so unusual and distinctive as to constitute a signature of the defendant's *modus operandi*. *State v. Vowell*, 863 S.W.2d 954, 957 (Mo. App. S.D. 1993). In *State v. Gilyard*, 979 S.W.2d 138, 142 (Mo. banc 1998), the Court found evidence admissible when it showed "a remarkably consistent pattern of sexual assaults that include demanding sex and enforcing those demands through the unusual and distinctive means of biting the victims on the cheek."

Evidence of prior misconduct that does not fall within one of the five enumerated exceptions may be admissible if the evidence is logically and legally relevant. *Vowell*, 863 S.W.2d at 957. The exceptions set out in *Reese*, 274 S.W.2d 304, are not mutually exclusive. The uncharged crime may be admissible on more than one theory. *State v. Brooks*, 810 S.W.2d 627, 630 (Mo. App. E.D. 1991). Nevertheless, even when prior crime evidence is admissible under one of the exceptions, it can only be admitted if the probative value of the evidence outweighs its prejudicial effect. *Chiles*, 847 S.W.2d at 809; *see also State v. Johnson*, 161 S.W.3d 920, 924 (Mo. App. S.D. 2005)

(concluded that evidence of defendant's uncharged prior misconduct was not legally relevant, in that its prejudicial effect outweighed its probative value, and that the trial court abused its discretion in permitting the older girl to testify).

See also State v. Smith, 32 S.W.3d 352 (Mo. banc 2000) (evidence of prior charged and uncharged crimes, during both the guilt and penalty phase, was properly admitted).

A. (§23.38) Victims Under 14 Years of Age

Section 566.025, RSMo 1994 (since amended in 2000), which allowed the admission of certain other-crimes evidence in prosecutions under Chapter 566 or 568, RSMo, involving a victim under 14 years of age, was determined to be unconstitutional in 1998. That statute provided:

> In prosecutions under chapter 566 or 568 involving a victim under fourteen years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed other charged or uncharged crimes involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he is charged, provided that such evidence involves acts that occurred within ten years before or after the act or acts for which the defendant is being tried.

The Supreme Court held that this legislative attempt to allow the introduction of propensity evidence at trial was unconstitutional. *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998).

Burns held that § 566.025 violated the Missouri Constitution when the uncharged crime was presented while guilt remained undecided. *Burns*, 978 S.W.2d at 762. The Court held that this section offended article I, §§ 17 and 18(a), of the Missouri Constitution.

Article I, § 17, provides, in pertinent part, "That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information." Article I, § 18(1), provides, in pertinent part, "That in criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation."

The Supreme Court noted that §§ 17 and 18 guarantee a criminal defendant the right to be tried "only on the offense charged." *Burns*, 978 S.W.2d at 760.

> The general rule concerning the admission of evidence of uncharged crimes, wrongs, or acts is that evidence of prior uncharged misconduct is not admissible for the purpose of showing the propensity of the defendant to commit such crimes. This Court has recognized that showing the defendant's propensity to commit a given crime is not a proper purpose for admitting evidence, because such evidence "may encourage the jury to convict the defendant because of his propensity to commit such crimes without regard to whether he is actually guilty of the crime charged.

Id. at 761 (quoting *State v. Bernard*, 849 S.W.2d 10, 16 (Mo. banc 1993)) (citation omitted).

Burns noted that § 566.025 made no provision for consideration of whether evidence is logically or legally relevant; rather, its language was mandatory, requiring that propensity evidence "shall be admissible." *Burns*, 978 S.W.2d at 761. As a result, the statute stood in disregard of §§ 17 and 18. *Id*. *Accord State v. Sales*, 984 S.W.2d 183 (Mo. App. W.D. 1998); *State v. Carter*, 996 S.W.2d 141 (Mo. App. W.D. 1999).

It is important to note that, in an apparent response to *Burns*, 978 S.W.2d 759, the legislature enacted an amendment to § 566.025, now RSMo 2000, effective August 28, 2000. That new section provides:

> In prosecutions pursuant to this chapter or chapter 568, RSMo, of a sexual nature involving a victim under fourteen years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed other charged or uncharged crimes of a sexual nature involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he or she is charged unless the trial court finds that the probative value of such evidence is outweighed by the prejudicial effect.

Thus, while § 566.025 no longer requires the "other crime" to have occurred within ten years before or after the charged crime, it does require the probative value of the "other crime" evidence to outweigh its prejudicial effect. The constitutionality of this current version of the statute has yet to be determined.

B. (§23.39) Other Exceptions

In cases involving fraud or false pretenses, evidence of prior and subsequent crimes may be admitted because the required mental states must ordinarily be shown by circumstantial evidence. *State v. Shaw*, 847 S.W.2d 768, 778 (Mo. banc 1993). Other exceptions to the "other crimes" rule include the following:

- To show the defendant's knowledge, *State v. Cheesebrew*, 575 S.W.2d 218, 222–23 (Mo. App. E.D. 1978) (possession of marijuana on an earlier date); *see also*:

  - *State v. Seltzer*, 629 S.W.2d 460 (Mo. App. E.D. 1981) (because the evidence that the defendant had stolen the two cars was circumstantial it was proper to show his other sales of stolen cars to prove that he knew the two cars had been stolen)

  - *State v. Flenoid*, 838 S.W.2d 462, 469 (Mo. App. E.D. 1992) (the defendant was charged with possession of cocaine, testified, and was impeached with prior drug convictions, most not involving cocaine; state used the convictions as evidence of guilt)

  - *State v. Charlton*, 114 S.W.3d 378 (Mo. App. S.D. 2003)

  - *Yahne v. State*, 943 S.W.2d 741 (Mo. App. W.D. 1997)

  But see:

  - *State v. Collins*, 669 S.W.2d 933, 935–36 (Mo. banc 1984) (reversible error in a sale-of-marijuana case to permit a rebuttal witness to testify that the defendant had given marijuana to an undercover informant before the date of the charged marijuana sale)

  - *State v. Smith*, 884 S.W.2d 358 (Mo. App. S.D. 1994) (reversible error in a sale-of-marijuana case to show that the defendant had purchased marijuana from an undercover detective almost two weeks after the charged event)

  - *State v. Parker*, 988 S.W.2d 93 (Mo. App. S.D. 1999)

- To show the defendant's consciousness of guilt, *State v. Henderson*, 750 S.W.2d 555, 559–60 (Mo. App. E.D. 1988)

- To show the complete "story" surrounding the charged offense, *State v. Cooksey*, 499 S.W.2d 485, 488 (Mo. 1973); *State v. Cannady*, 670 S.W.2d 948 (Mo. App. E.D. 1984); *State v. Hill*, 827 S.W.2d 196, 198 (Mo. banc 1992), or the "*res*

gestae," *Flenoid*, 838 S.W.2d at 467 (in a prosecution for possession of cocaine, it was permissible to show that the defendant was also carrying a beeper and currency)

- To rebut self-defense, *State v. Russell*, 602 S.W.2d 465, 466 (Mo. App. E.D. 1980); *State v. Ford*, 623 S.W.2d 574, 575–76 (Mo. App. E.D. 1981); *State v. Arney*, 731 S.W.2d 36, 41–42 (Mo. App. S.D. 1987) (evidence that the defendant's prior convictions involved assaults against law enforcement officers was relevant to show intent and to rebut self-defense in charges of assault on the officers)

Prior misconduct of the defendant directed toward the victim of the offense on trial is admissible under the theories of motive, intent, or absence of mistake or accident. *See*:

- *State v. Graham*, 641 S.W.2d 102, 105 (Mo. banc 1982) (prior sexual activity between defendant and same victim indicates a sexual desire for victim and tends to establish motive); *but see State v. Courter*, 793 S.W.2d 386 (Mo. App. W.D. 1990) (evidence of past aberrant sexual conduct of the appellant "was prejudicial to the appellant, it was inadmissible under the common scheme or plan exception to the rule barring evidence of uncharged crimes and it also was too remote in point of time to be of probative value in the subject prosecution")

- *State v. Schaal*, 806 S.W.2d 659, 664 (Mo. banc 1991), *cert. denied*, 502 U.S. 1075 (1992)

- *State v. Williams*, 865 S.W.2d 794, 802–04 (Mo. App. S.D. 1993) (prior incidents of assault on the murder victim by the defendant were admissible to show absence of mistake or accident)

- *State v. Bolden*, 494 S.W.2d 61 (Mo. 1973) (intent and motive)

Severance of jointly charged offenses is not mandated merely because evidence relating to some offenses would not be admissible in the trial of other offenses if they were tried separately. *State v. Conley*, 873 S.W.2d 233, 238 (Mo. banc 1994).

> A relevant factor in the determination of prejudice is whether evidence of separate crimes would have been inadmissible propensity evidence had the two crimes not been joined. However, even where the evidence would not be admissible if the charges are tried separately, any prejudice may be overcome where the evidence with regard to each crime is sufficiently simple and distinct to mitigate the risks of joinder.

Id. at 238–39.

VII. Privilege

A. (§23.40) Attorney-Client Privilege

An attorney is incompetent to testify as to any communication made to the attorney by the client in that relationship. Section 491.060(3), RSMo 2000. The privilege belongs to the client and not to the attorney. *United States v. Long*, 328 F. Supp. 233, 235 (E.D. Mo. 1971). As a result, only the client may waive the privilege. *Id.*

A client waives the privilege if the client places the subject matter of the privileged communication in issue. *Sappington v. Miller*, 821 S.W.2d 901, 904–05 (Mo. App. W.D. 1992). Thus, a client asserting the statute of frauds regarding the attorney's authority to sign a settlement agreement waives the privilege. *Id.* at 904–05. Similarly, a movant in a post-conviction proceeding raising an issue of ineffective assistance of counsel waives the privilege. *Jackson v. State*, 540 S.W.2d 607, 610 (Mo. App. E.D. 1976); *Scruggs v. State*, 839 S.W.2d 51 (Mo. App. E.D. 1992). But the privilege is only waived to the extent that a communication bears directly on the issue of ineffective assistance of counsel. *Veneri v. State*, 474 S.W.2d 833, 840 (Mo. 1971); *State v. Norris*, 577 S.W.2d 941, 948 (Mo. App. S.D. 1979). Additionally, in a suit for attorney fees, the former client cannot invoke the privilege as to the extent of the services performed by the attorney. *Weinshenk v. Sullivan*, 100 S.W.2d 66, 70 (Mo. App. E.D. 1937). The death of a client also terminates the privilege. *Pasternak v. Mashak*, 428 S.W.2d 565, 569 (Mo. 1967), *cert. denied*, 390 U.S. 907 (1968).

For the privilege to be invoked, there must be an attorney-client relationship. The communication must be made in the course of professional employment. *Pipes v. Sevier*, 694 S.W.2d 918, 924–25 (Mo. App. W.D. 1985). If counsel provides advice and the defendant relies on the advice, the privilege attaches to the conversation, even though the attorney does not subsequently represent the client. *State v. Longo*, 789 S.W.2d 812, 815 (Mo. App. E.D. 1990); *see also*

McFadden v. State, 256 S.W.3d 103 (Mo. banc 2008). The client's reasonable belief that an attorney is representing the client provides the basis for the privilege. *Longo*, 789 S.W.2d at 816.

The privilege only applies to the subject matter of the privileged communication. Thus, an attorney could testify about the attorney's observation of the client's mental condition without violating privilege, as distinguished from disclosure of any private communications. *State v. Shire*, 850 S.W.2d 923, 931–32 (Mo. App. S.D. 1993). Similarly, the address of a client as supplied by letters to counsel was not privileged and could be disclosed. *Jafarian-Kerman v. Jafarian-Kerman*, 424 S.W.2d 333, 340 (Mo. App. W.D. 1967).

Communications must be confidential for privilege to apply. Thus, information provided by the client and the attorney's advice made in the presence of a third party are not privileged. *Shire*, 850 S.W.2d at 931.

B. (§23.41) Physician-Patient Privilege

The physician-patient statutory privilege applies to licensed physicians, chiropractors, psychologists, and dentists and their patients. Section 491.060(5), RSMo 2000. The privileged information must have been acquired while the physician was attending the patient in a professional character, and the information must be necessary for the treatment of the patient. *State v. Henderson*, 824 S.W.2d 445, 450 (Mo. App. E.D. 1991). The person claiming the privilege has the burden to show the necessity. *Id.* The privilege extends to a nurse if the nurse is acting under the direction of a physician or is assisting the physician in the treatment. *Id.*

The physician-patient privilege is not absolute; it must give way if there is a stronger countervailing societal interest. *State ex rel. Health Midwest Dev. Group, Inc. v. Daugherty*, 965 S.W.2d 841, 844 (Mo. banc 1998); *see also State ex rel. St. John's Reg'l Med. Ctr. v. Dally*, 90 S.W.3d 209 (Mo. App. S.D. 2002). Indeed, courts should strictly construe statutes creating privileges. *Daugherty*, 965 S.W.2d at 843. Accordingly, peer-review-committee documents in *Daugherty* were not privileged. *Id*. at 844.

Any information that a physician acquires from a patient that is necessary to provide treatment is privileged. *State ex rel. Jones v. Syler*, 936 S.W.2d 805, 807 (Mo. banc 1997); *see also Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47 (Mo. banc 1999).

The physician-patient privilege did not protect discovery of nursing home records relating to a patient's physical and sexual assaults of other patients because the alleged acts had no immediate relationship to medical treatment. *State ex rel. Dixon Oaks Health Ctr., Inc. v. Long*, 929 S.W.2d 226, 231 (Mo. App. S.D. 1996). The privilege, if applicable, applies to both civil and criminal cases and relates to both physicians and nurses acting under the direction of physicians. *Id.* at 229.

A parent has the right to claim physician-patient privilege on behalf of a child when it would be in the best interests of the child to do so. *State ex rel. Wilfong v. Schaeperkoetter*, 933 S.W.2d 407, 409 (Mo. banc 1996). *But see Attorney Ad Litem for D.K. v. Parents of D.K.*, 780 So.2d 301 (Fla. Dist. Ct. App. 2001). The parent cannot claim or waive the privilege of a child when the interest of the minor would not be protected.

Only the patient can waive the physician-patient privilege. *Dixon Oaks Health Ctr.*, 929 S.W.2d at 229. A denial of an allegation does not constitute a waiver. *Rodriguez*, 996 S.W.2d at 63. Otherwise, the patient would be forced to choose between waiving the privilege and suffering judgment by default. *Dixon Oaks Health Ctr.*, 929 S.W.2d at 229. But parties who place their mental condition in issue waive the physician-patient privilege to exclude the testimony of any physician who examined them for that purpose. *State v. Johnson*, 968 S.W.2d 123, 131 (Mo. banc 1998), *cert. denied*, 525 U.S. 935 (1998).

The physician-patient privilege survives the patient's death. *Leritz v. Koehr*, 844 S.W.2d 583, 584 (Mo. App. E.D. 1993). In the absence of a waiver by the patient, the physician has a duty to assert the privilege on behalf of the patient. *St. Louis Little Rock Hosp., Inc. v. Gaertner*, 682 S.W.2d 146, 151 (Mo. App. E.D. 1984).

A patient waives the privilege by placing physical condition in issue in the pleadings or prior proceedings. *State v. Evans*, 802 S.W.2d 507, 511–12 (Mo. banc 1991).

A patient also waives the privilege if the patient makes statements not necessary to medical treatment in the presence of third parties, such as police officers. *State v. Middaugh*, 802 S.W.2d 570, 573 (Mo. App. W.D. 1991). Failure to object to testimony about privileged communication also constitutes a waiver. *State v. Schupp*, 677 S.W.2d 909, 912 (Mo. App. E.D. 1984).

The privilege is "testimonial" and does not apply to a psychiatrist's telephone call to a private crime-reporting service to report a patient's involvement in a crime. *State v. Beatty*, 770 S.W.2d 387, 392 (Mo. App. S.D. 1989); *see also*:

- *Brandt v. Pelican*, 856 S.W.2d 658 (Mo. banc 1993) (statutory privilege does not apply to *ex parte* communications with a patient's treating physician during the discovery period of litigation)
- *Brown v. Hamid*, 856 S.W.2d 51, 54 (Mo. banc 1993) (there is no physician-client relationship when the expert witness physician never treated the patient)

The privilege also does not apply to certain prosecutions for child abuse or neglect. Section 210.140, RSMo Supp. 2007. This statute does not violate equal protection. *State v. Ward*, 745 S.W.2d 666, 670 (Mo. banc 1988).

A physician's notes of a psychiatric examination of a defendant were not an opinion, theory, or conclusion of the defendant's counsel or a communication by the defendant to his attorney and, therefore, did not qualify as "work product." *State v. Skillicorn*, 944 S.W.2d 877, 897–98 (Mo. banc 1997), *cert. denied*, 522 U.S. 999 (1997). Accordingly, once the defendant put his mental condition in issue—here, during the penalty phase—the physician's notes were discoverable. *Id*.

C. (§23.42) Minister-Penitent Privilege

The minister-penitent statutory privilege requires that the communication be made to the minister in a professional capacity as spiritual advisor, confessor, counselor, or comforter. Section 491.060(4), RSMo 2000. The privilege belongs to the person confessing and cannot be waived by the spiritual advisor. *Eckmann v. Bd. of Educ. of Hawthorn Sch. Dist. No. 17*, 106 F.R.D. 70 (E.D. Mo. 1985). A priest's testimony regarding observations and impressions of the defendant that did not concern the defendant's confession to the priest does not violate the privilege. *State v. Kurtz*, 564 S.W.2d 856, 860–61 (Mo. banc 1978).

D. (§23.43) Spousal Disqualification

A person cannot be compelled to testify against a spouse in a criminal action but, at the option of the defendant, may testify on behalf of the other. Section 546.260.1, RSMo 2000. But this privilege does not apply to criminal prosecutions under Chapter 565, 566, or 568, RSMo. Section 546.260.2. The privilege also does not apply:

- to communications made in the presence of others, *State v. Turner*, 716 S.W.2d 462, 466–67 (Mo. App. E.D. 1986); *State v. Montgomery*, 571 S.W.2d 784, 787 (Mo. App. E.D. 1978);

- to one spouse's threats of violence against the other, *State v. Wolford*, 754 S.W.2d 875 (Mo. App. W.D. 1988); or

- if a person has no reason to believe that a marital relationship exists, such as when the defendant never divorces his first wife and enters into marriage with a second wife to obtain benefits of the privilege, *State v. Byrd*, 676 S.W.2d 494, 501–02 (Mo. banc 1984), *cert. denied*, 469 U.S. 1230 (1985).

A criminal defendant who elects to testify does not relinquish the privilege to exclude testimony of a spouse. *State v. Phegley*, 826 S.W.2d 348, 356 (Mo. App. W.D. 1992).

VIII. Expert Testimony

A. (§23.44) Generally

Missouri rules governing the admissibility of expert testimony differ for civil and criminal cases. Section 490.065, RSMo 2000, provides for expert testimony in civil actions: The test for admissibility is whether the testimony will assist the trier of fact and whether the testimony can embrace an ultimate issue; hypothetical questions do not need to be used.

In criminal cases, expert testimony is admissible if it is clear that the subject of the testimony is such that jurors, for want of experience or knowledge, would be incapable of drawing a proper conclusion from the facts. *State v. Lawhorn*, 762 S.W.2d 820, 822 (Mo. banc 1988); *State v. Cunningham*, 863 S.W.2d 914, 923 (Mo. App. E.D. 1993). Therefore, the essential test of admissibility is whether the expert

testimony would be helpful to the jury. *State v. Williams*, 858 S.W.2d 796, 798 (Mo. App. E.D. 1993).

An expert's opinions must be based on facts within the expert's knowledge or on hypothetical questions that include proven facts and not merely assumptions. *State v. Chandler*, 860 S.W.2d 823, 825 (Mo. App. E.D. 1993). An expert can rely on hearsay evidence to support an opinion if the evidence is of the type reasonably relied on by other experts in the field. *State v. Rowe*, 838 S.W.2d 103, 110 (Mo. App. E.D. 1992). The opinion can be based on otherwise inadmissible evidence. *Id.* at 110; *State v. Woltering*, 810 S.W.2d 584, 586 (Mo. App. E.D. 1991). Whether to admit expert testimony is within the sound discretion of the trial court. *State v. Davis*, 814 S.W.2d 593, 603 (Mo. banc 1991), *cert. denied*, 502 U.S. 1047 (1992).

In determining the admissibility of the results of scientific procedures, Missouri utilizes the standard enunciated in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). *Davis*, 814 S.W.2d at 600. This standard requires that the procedure be one that has gained general acceptance in the particular field in which it belongs. *Id.* In making this determination, the courts look for guidance in the decisions of other jurisdictions, as well as in professional literature and surveys of the history of the process involved. *Id.* The Supreme Court of Missouri has rejected the "relevancy/reliability approach" utilized by many state courts and the federal courts. *Id.*

B. (§23.45) Qualifications

Qualification of an expert is a matter resting within the trial court's discretion. *State v. Schaefer*, 855 S.W.2d 504 (Mo. App. E.D. 1993). The test of expert qualification is whether the expert has knowledge from education or experience that will aid the trier of fact. *State v. Mallett*, 732 S.W.2d 527, 537 (Mo. banc 1987), *cert. denied*, 484 U.S. 933 (1987). This expertise may have been gained by practical experience rather than by scientific study or research. *See*:

- *State v. Rhone*, 555 S.W.2d 839, 841–42 (Mo. banc 1977)
- *State v. Marks*, 721 S.W.2d 51, 56 (Mo. App. W.D. 1986)

The expert witnesses must be shown to have sufficient experience with the subject matter. *State v. Moore*, 690 S.W.2d 453, 456 (Mo. App. E.D. 1985). Therefore, the court can restrict testimony to the subject

matter of the witness's expertise. *State v. Roland*, 808 S.W.2d 855, 859 (Mo. App. W.D. 1991) (expert testimony was not admissible when the defendant "sought to have an expert on satanic cults testify as to a subject outside his realm of competence, namely, the psychological impact of satanic beliefs"; the expert did not have a degree in psychology or psychiatry, and the defendant did not show that the expert "had the requisite empirical knowledge of satanism's effect on the psyche of individuals to permit receipt of his testimony on that subject").

The extent and character of the expert's learning, knowledge, or skill, however it is derived, goes to the weight to be given the testimony, rather than to admissibility.

C. Specific Expert Testimony

1. (§23.46) Ballistics and Firearms

Results of ballistics tests and expert opinion based on the tests are relevant and admissible and have high probative value. *State v. Burney*, 143 S.W.2d 273 (Mo. 1940). Experts may testify that a bullet recovered from the body of the deceased or the scene came from a particular weapon. *State v. Couch*, 111 S.W.2d 147 (Mo. 1937); *State v. Hindman*, 543 S.W.2d 278, 284 (Mo. App. S.D. 1976). Experts may give their opinion of the distance of a gun from the victim when it was fired based on gun powder stippling. *State v. Isom*, 660 S.W.2d 739, 741 (Mo. App. E.D. 1983). But expert opinion on a subject about which lay jurors are conversant is not admissible. *State v. Jordan*, 751 S.W.2d 68, 78 (Mo. App. E.D. 1988) (the trial court properly refused to allow a police officer to testify about whether a right-handed person's aim would be affected if the gun was held in the left hand).

2. (§23.47) Bite Marks

The science of bite mark comparison has been recognized as generally acceptable by the scientific community, and expert opinion of comparisons has been held admissible. *State v. Sager*, 600 S.W.2d 541, 561–73 (Mo. App. W.D. 1980), *cert. denied*, 450 U.S. 910 (1981); *State v. Kleypas*, 602 S.W.2d 863, 867–70 (Mo. App. S.D. 1980).

3. (§23.48) Blood

Expert testimony regarding:

- blood identifications;
- the time for blood to congeal; and
- the appearance of blood stains,

is admissible. *State v. Jones*, 518 S.W.2d 304, 311 (Mo. App. S.D. 1975). A chemist properly opined that red stains were blood, considering the location of the stains, the body, and the bullet hole in the wall. *State v. Middleton*, 854 S.W.2d 504, 516 (Mo. App. W.D. 1993). Blood grouping tests are relevant and admissible to show the identity of a particular person. *State v. Sprout*, 365 S.W.2d 572, 575 (Mo. 1963). The most sophisticated procedure for blood identification is deoxyribonucleic acid (DNA) analysis. *See* §23.50, *infra*.

4. (§23.49) Cause of Death or Injury

Expert testimony is admissible to show the cause of death or injury. *State v. Taylor*, 663 S.W.2d 235, 239 (Mo. banc 1984).

Thus, a physician could give testimony that a rape victim's wounds were caused by forcible intercourse. *Id.* at 239; *see also State v. Schaefer*, 855 S.W.2d 504 (Mo. App. E.D. 1993). Testimony is admissible even when a medical examiner cannot absolutely state the cause of death. *State v. Carter*, 670 S.W.2d 104, 107 (Mo. App. W.D. 1984).

5. (§23.50) DNA Analysis

DNA analysis, used in determining whether biological samples, such as blood or semen recovered from a crime scene, came from a particular person is a procedure sufficiently established to have gained general acceptance in the scientific community and, thus, is admissible in evidence. *State v. Davis*, 814 S.W.2d 593, 602–03 (Mo. banc 1991), *cert. denied*, 502 U.S. 1047 (1992).

The product rule and the population-frequency statistics based on that rule are reliable and generally accepted in the scientific community and, therefore, are admissible. *State v. Kinder*, 942 S.W.2d 313, 327 (Mo. banc 1996). In *Kinder*, the Court also reaffirmed the admissibility of restriction-fragment-length-polymorphism DNA analysis.

Polymerase-chain-reaction DNA analysis is also admissible because the analysis is generally accepted in the scientific community. *State v. Hoff*, 904 S.W.2d 56, 59 (Mo. App. S.D. 1995); *see also United States v. Beasley*, 102 F.3d 1440 (8th Cir. 1996); *State v. Brown*, 949 S.W.2d 639, 641 (Mo. App. E.D. 1997).

Section 547.035.1, RSMo Supp. 2007, permits a "person in the custody of the department of corrections claiming that forensic DNA testing will demonstrate the person's innocence of the crime for which the person is in custody" to file a post-conviction motion seeking such testing. The motion must contain specific enumerated information for the movant to be entitled to a hearing and DNA testing. As set forth in § 547.035.2:

> The motion must allege facts under oath demonstrating that:
> (1) There is evidence upon which DNA testing can be conducted; and
> (2) The evidence was secured in relation to the crime; and
> (3) The evidence was not previously tested by the movant because:
> (a) The technology for the testing was not reasonably available to the movant at the time of the trial;
> (b) Neither the movant nor his or her trial counsel was aware of the existence of the evidence at the time of trial; or
> (c) The evidence was otherwise unavailable to both the movant and movant's trial counsel at the time of trial; and
> (4) Identity was an issue in the trial; and
> (5) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.

The Supreme Court of Missouri has held that § 547.035 applies to people who pled guilty as well as those who went to trial. *Weeks v. State*, 140 S.W.3d 39 (Mo. banc 2004).

6. (§23.51) Drugs and Narcotics

The identity and nature of controlled substances is proper subject matter for expert testimony. *See*, *e.g.*:

- *State v. Evans*, 637 S.W.2d 62, 66 (Mo. App. E.D. 1982)
- *State v. Fedrick*, 600 S.W.2d 612, 613 (Mo. App. E.D. 1980)
- *State v. Stavricos*, 506 S.W.2d 51, 58–59 (Mo. App. S.D. 1974)

7. (§23.52) Explosives and Incendiary Devices

Opinion testimony regarding origin of fire and intensity of heat is within the wide discretion of the trial court. *State v. Turnbough*, 388 S.W.2d 781, 785–86 (Mo. 1965); *State v. Letcher*, 772 S.W.2d 795, 798 (Mo. App. W.D. 1989). Experience in fighting fires alone does not qualify a person as an expert to give an opinion as to where the fire started. *State v. Williams*, 654 S.W.2d 292, 293 (Mo. App. S.D. 1983).

8. (§23.53) Eyewitness Identification

The Supreme Court of Missouri has held that expert testimony on eyewitness identification is not admissible because the subject matter is within the general realm of common experience of jurors and goes to the credibility of witnesses. *See*:

- *State v. Whitmill*, 780 S.W.2d 45, 47 (Mo. banc 1989)
- *State v. Cunningham*, 863 S.W.2d 914 (Mo. App. E.D. 1993)
- *State v. Hill*, 854 S.W.2d 486 (Mo. App. E.D. 1993)
- *State v. Kennedy*, 842 S.W.2d 937 (Mo. App. S.D. 1992)
- *State v. Lawhorn*, 762 S.W.2d 820, 822–23 (Mo. banc 1988)

9. (§23.54) Fingerprints

Comparison of fingerprints is appropriate subject matter for an expert witness. *See*:

- *State v. Thompson*, 610 S.W.2d 629, 637 (Mo. 1981), *cert. denied*, 454 U.S. 840 (1981)
- *State v. Maxie*, 513 S.W.2d 338, 344 (Mo. 1974), *cert. denied*, 420 U.S. 930 (1975)

This type of examination has gained general acceptance in the scientific field so that the procedure and evidence of general acceptance are not required. *State v. Lawshea*, 798 S.W.2d 198, 200 (Mo. App. E.D. 1990).

10. (§23.55) Footprints and Tire Tracks

A police officer can testify about visual comparison between a shoe and shoe print, even if no plaster cast or photograph of the shoe print was made. *State v. Gardner*, 700 S.W.2d 172, 173 (Mo. App. S.D. 1985); *State v. Woodson*, 140 S.W.3d 621 (Mo. App. S.D. 2004). Evidence of shoes and prints is admissible without expert foundation. *State v. Stillions*, 689 S.W.2d 96, 99 (Mo. App. E.D. 1985); *State v. Cullen*, 591 S.W.2d 49, 52 (Mo. App. S.D. 1979).

Regarding tire tracks, see *State v. Farris*, 639 S.W.2d 279, 281–82 (Mo. App. E.D. 1982) (a police officer may testify about comparisons of tire tracks and tires and the officer's conclusion that they match).

11. (§23.56) Hair and Fibers

Hair sample comparisons are proper subject matter for expert testimony. *State v. White*, 621 S.W.2d 287, 292–93 (Mo. 1981); *State v. Daniels*, 655 S.W.2d 106, 108 (Mo. App. S.D. 1983); *State v. Jones*, 777 S.W.2d 639 (Mo. App. W.D. 1989) (testimony concerning hair sample comparisons was considered reliable testimony). The weight to be given to the testimony is for the jury. *United States v. Haskins*, 536 F.2d 775 (8th Cir. 1976), *cert. denied*, 429 U.S. 898 (1976).

Similarly, results of fiber comparison are admissible. *State v. Smith*, 637 S.W.2d 232, 237–38 (Mo. App. W.D. 1982); *Daniels*, 655 S.W.2d 106.

While competent hair comparison evidence is admissible in Missouri in a criminal trial, its probative value has limitations, and the evidence has been criticized. *State v. Butler*, 24 S.W.3d 21, 49–57 (Mo. App. W.D. 2000) (Stith, J., dissenting).

12. (§23.57) Handwriting and Questioned Documents

Section 490.640, RSMo 2000, provides for testimony on the comparison of disputed writings with genuine writings. The opinion does not bind the jury, whose duty it is to determine the weight to be accorded the evidence. *State v. Boyington*, 544 S.W.2d 300, 306 (Mo. App. W.D. 1976); *State v. Farmer*, 612 S.W.2d 441, 446 (Mo. App. S.D. 1981). Expert opinion that a defendant likely did not endorse checks was admissible to show theft. *State v. Lue*, 813 S.W.2d 922, 925 (Mo. App. E.D. 1991).

13. (§23.58) Hypnosis

Expert testimony on witness perception based on hypnosis is not admissible. *State v. Bullington*, 684 S.W.2d 52, 55 (Mo. App. W.D. 1984).

14. (§23.59) Intoxication Tests

Section 577.029, RSMo Supp. 2007, outlines the procedures for drawing blood samples taken to determine blood alcohol content. Because the legislature has detailed specifically the requirements for the taking of the blood, the trial court has no discretion in admitting blood test results that do not absolutely and literally comply with the technical requirements of § 577.029. *State v. Setter*, 763 S.W.2d 228, 231 (Mo. App. W.D. 1988). For example, the state's failure to present any evidence that the needle used to withdraw a blood specimen from a motorist was sterile constituted reversible error. *Id. But see Snelson v. Bd. of Police Comm'rs*, 859 S.W.2d 794, 798 (Mo. App. E.D. 1993) ("[T]he clerical error of failing to record [the defendant's] name in the log book was appropriately remedied by subsequent addition of the subclassification letters, and did not act to fatally flaw the drug testing procedures utilized by the department.").

Section 577.037, RSMo Supp. 2007, provides for the admission of the results of chemical tests for blood alcohol content.

Expert testimony on the effects of alcoholic blackout is not admissible absent a showing of widespread acceptance in the scientific community and relevance to a valid defense. *State v. Erwin*, 848 S.W.2d 476, 480 (Mo. banc 1993), *cert. denied*, 510 U.S. 826 (1993). Similarly, an alcohol abuse counselor's proffered testimony on alcoholism and its effect on the thought process was inadmissible when the defendant did not plead guilty by reason of mental disease or defect caused by alcoholism. *State v. Stone*, 731 S.W.2d 466, 469 (Mo. App. S.D. 1987).

The results of a blood-alcohol test performed on a motorist after he was taken to the hospital were admissible under the business records exception to the hearsay rule, notwithstanding noncompliance with §§ 577.020–577.041, now RSMo 2000 and Supp. 2007. *State v. Todd*, 935 S.W.2d 55, 59 (Mo. App. E.D. 1996).

The state lays a prima facie foundation for introducing blood-alcohol tests by showing that a qualified person tested the blood sample with equipment and techniques approved by the Missouri Department of Health. *Todd v. Lohman*, 911 S.W.2d 321, 323 (Mo. App. W.D. 1995).

15. (§23.60) Mental Disease or Defect

A qualified expert may render an opinion on mental disease or defect. *See*:

- *State v. Cochran*, 203 S.W.2d 707 (Mo. banc 1947)
- *State v. Crawford*, 416 S.W.2d 178 (Mo. 1967)

An opinion is not barred because it invades the province of the jury. *State v. Brigham*, 709 S.W.2d 917, 920–21 (Mo. App. S.D. 1986). But if an opinion is not offered as a diagnosis of a mental disease or defect and is a conclusion that could be drawn by a juror, it is inadmissible as expert testimony. *State v. Erwin*, 848 S.W.2d 476, 480–81 (Mo. banc 1993), *cert. denied*, 510 U.S. 826 (1993).

The trial court properly excluded a physician's testimony because of defense counsel's failure to disclose the physician's notes upon order by the court. *State v. Skillicorn*, 944 S.W.2d 877, 893 (Mo. banc 1997), *cert. denied*, 522 U.S. 999 (1997), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. banc 2008).

But in *State v. Simonton*, 49 S.W.3d 766 (Mo. App. W.D. 2001), the court found that, although the defense had violated the discovery rule requirement that the defendant disclose to the state additional discoverable information, the exclusion of the witness's testimony resulted in fundamental unfairness to the defendant.

> Here, the prejudice to [the defendant] considering the importance of Dr. Harry's testimony with respect to Mr. Simonton's defense and the seriousness of the charge in this case is great. The prejudice to the State, however, was minimal and could have been relieved by less drastic means. Thus, this court finds that the trial court abused its discretion in excluding Dr. Harry's testimony. While exclusion of testimony is appropriate in some circumstances, the exclusion in this case was too drastic a remedy. The trial court should have fashioned some other remedy to alleviate any harm to the State, while at the same time protecting Mr. Simonton's right to present such a vital witness to his defense.

Id. at 785–86; *see also State v. Martin*, 103 S.W.3d 255 (Mo. App. W.D. 2003).

16. (§23.61) Neutron Activation Analysis

Neutron activation analysis, used to determine whether a party recently discharged a firearm, is recognized as reliable and accurate by the scientific community. *State v. Jackson*, 566 S.W.2d 227, 228–29 (Mo. App. E.D. 1978); *State v. Ross*, 530 S.W.2d 457, 459 (Mo. App. S.D. 1975).

17. (§23.62) Polygraph Tests

Results of polygraph examinations are inadmissible in evidence because they lack scientific support for their reliability. *State v. Biddle*, 599 S.W.2d 182, 185 (Mo. banc 1980). *But see*:

- *State v. Burch*, 939 S.W.2d 525 (Mo. App. W.D. 1997)
- *Campbell v. Pers. Bd. of Kansas City*, 666 S.W.2d 806 (Mo. App. W.D. 1984) (the court essentially found that the city was not prohibited from requiring or employing the use of polygraph examinations in the course of a lawful investigation related to the city's business)
- *State v. Woods*, 639 S.W.2d 818, 820 (Mo. 1982)
- *State v. Newman*, 699 S.W.2d 29 (Mo. App. S.D. 1985)

It is also irrelevant and inadmissible that the accused offers to submit to a polygraph examination. *State v. Jacks*, 525 S.W.2d 431, 435 (Mo. App. W.D. 1975).

Even though polygraph evidence does not meet state law standards for reliability, it may be admissible during the penalty phase of a capital murder trial because a defendant is entitled to present any and all relevant information in mitigation. *Rupe v. Wood*, 863 F. Supp. 1315 (W.D. Wash. 1994), *aff'd*, 93 F.3d 1434 (9th Cir. 1996).

Even though the results of polygraph tests are not admissible, the statements made by the test taker (usually a defendant) are admissible, and the test giver can testify to statements made before, during, and immediately after the test. *Wyrick v. Fields*,

459 U.S. 42, 47–48 (1982), *on remand at Fields v. Wyrick*, 706 F.2d 879 (8th Cir. 1983); *State v. Dixon*, 655 S.W.2d 547, 555–56 (Mo. App. E.D. 1983), *overruled on other grounds by State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997); *State v. Owens*, 759 S.W.2d 73, 75 (Mo. App. S.D. 1988); *State v. Reeter*, 848 S.W.2d 560 (Mo. App. W.D. 1993).

In *United States v. Scheffer*, 523 U.S. 303 (1998), the Court held that a per se rule against the admission of polygraph evidence in court martial proceedings did not violate the Fifth or Sixth Amendment rights of the accused to present a defense. The test for whether exclusion of evidence abridges an accused's right to present a defense depends on whether the rule is "arbitrary" or "disproportionate" to the purposes it is designed to serve. *Id.* at 308. To violate the Constitution, the exclusion must infringe on a weighty interest of the accused. *Id.* Central to such an analysis is whether the excluded evidence was reliable. *Id.* at 309.

18. (§23.63) Rape Trauma Evidence

Expert testimony of the "rape trauma syndrome" may not be used in a rape prosecution to bolster the complaining witness's credibility. *State v. Taylor*, 663 S.W.2d 235, 241 (Mo. banc 1984).

The syndrome could result from a number of stressful situations, and the prejudice to the defendant outweighs the probative value. *Id.* at 241. But an expert can testify about symptoms displayed by the complaining witness and their consistency with traumatic experience. *State v. Ogle*, 668 S.W.2d 138 (Mo. App. S.D. 1984), *cert. denied*, 469 U.S. 845 (1984). Evidence of a rape victim's physical and psychological changes as presented by disinterested experts is admissible to prove elements of sexual offense, such as lack of consent. *State v. Kennedy*, 842 S.W.2d 937, 942 (Mo. App. S.D. 1992). *But see State v. Pollard*, 719 S.W.2d 38 (Mo. App. E.D. 1986) (testimony of alleged victim's mother about her behavior after alleged sodomy was not admissible; potential prejudice to defendant outweighed benefit of presenting testimony to jury).

19. (§23.64) Soil Comparisons

Expert testimony comparing soil samples found at the crime scene with mud found on the defendant's footwear was properly admitted. *State v. Kelley*, 674 S.W.2d 216, 219 (Mo. App. S.D. 1984).

20. (§23.65) Tool Marks

Opinion evidence that tool marks were caused by a particular tool is relevant and admissible to prove identification. *State v. Sims*, 395 S.W.2d 445 (Mo. 1965).

21. (§23.66) Trained Dogs

Missouri allows evidence that a defendant was trailed and identified by a trained dog. *State v. Fields*, 434 S.W.2d 507 (Mo. 1968). Generally, a proper foundation requires that the dogs:

- are of purebred stock (this usually requires a document of pedigree);
- are characterized by acute scenting ability and the power of discrimination to track human beings;
- are trained to track human beings;
- by experience, have proven themselves to be reliable and able to follow a trail to the exclusion of all other trails;
- were put on the trail at the scene of the crime and followed the trail to its end; and
- made some sign of identification of the suspect when they found the suspect.

State v. Steely, 33 S.W.2d 938, 940 (Mo. 1930). This evidence alone is insufficient to support a conviction and must be corroborated by other substantial evidence. *Fields*, 434 S.W.2d 507.

22. (§23.67) Truth Serum Interviews

Truth serum interviews are not admissible in Missouri. *State v. Foerstel*, 674 S.W.2d 583, 593–94 (Mo. App. W.D. 1984).

IX. Hearsay

A. (§23.68) Definition and Principle

A hearsay statement is an out-of-court statement that is offered to prove the truth of the matter asserted and, thus, rests for its value on the credibility of the out-of-court declarant. *State v. Harris*, 620 S.W.2d 349, 355 (Mo. banc 1981).

A hearsay statement is generally inadmissible. *State v. Shurn*, 866 S.W.2d 447, 457–58 (Mo. banc 1993). But hearsay evidence may be admissible if it falls within a "firmly rooted" exception or shows "particularized guarantees of trustworthiness." *State v. Debler*, 856 S.W.2d 641, 648 (Mo. banc 1993). The term "statement" includes both oral and written assertions. *Baker v. Atkins*, 258 S.W.2d 16, 20 (Mo. App. W.D. 1953); *Cremer v. Mo. Pac. R.R. Co.*, 811 S.W.2d 23, 26 (Mo. App. E.D. 1991). But if the statement is not an assertion, in that it is not intended to communicate a fact, it is not hearsay. *State v. Joiner*, 823 S.W.2d 50, 55 (Mo. App. E.D. 1991); *State v. Tate*, 817 S.W.2d 578, 579–80 (Mo. App. E.D. 1991), *post-conviction proceeding*; *case remanded*, 830 S.W.2d 501 (Mo. App. E.D. 1992).

"The essential principle of the hearsay rule is to secure trustworthiness of testimonial assertions by affording the opportunity to test the credit of the witness, and it is for this reason that these assertions are to be made in court subject to cross-examination." *State v. Kirkland*, 471 S.W.2d 191, 193 (Mo. 1971). Hearsay evidence is objectionable because the person who made the offered statement is not under oath and is not subject to cross-examination.

One of the major problem areas in the past regarding hearsay has been testimony as to out-of-court identifications. In *State v. Degraffenreid*, 477 S.W.2d 57 (Mo. banc 1972), the Supreme Court of Missouri held that the testimony of a third party that an identifying witness had identified the defendant was inadmissible hearsay in the absence of any impeachment of the identifying witness's testimony with respect to extrajudicial identification or of evidence of a prior inconsistent statement of the identifying witness, and the introduction of such testimony was generally prejudicial error.

But the Supreme Court overruled *Degraffenreid* in *State v. Harris*, 711 S.W.2d 881 (Mo. banc 1986).

Harris held that such evidence was no longer presumptively inadmissible when the declarant and the corroborating witness both testify and are subject to cross-examination. *Harris*, 711 S.W.2d at 884. The Court noted that the testimony of a third party that an identifying witness has identified the defendant is technically hearsay, but it is admissible to the same extent as similar testimony by a crime victim, provided that the victim also testifies that the victim identified the defendant in an extrajudicial identification. *Id. But see State v. Mozee*, 112 S.W.3d 102, 108 (Mo. App. W.D. 2003) (inadmissible hearsay when the individual "purportedly making the identification of the defendant did not testify at trial and was not available for cross-examination").

The hearsay rule does not exclude what a witness, subject to cross-examination, observed either through the witness's senses or through the use of scientific instruments. *City of Webster Groves v. Quick*, 323 S.W.2d 386, 390 (Mo. App. E.D. 1959) (testimony as to readings of electric speed device is not hearsay evidence). Thus, when a witness operates a motion picture camera and is subject to cross-examination and testifies that the film correctly portrays what was seen by the witness, this testimony is not hearsay evidence. *State v. Spica*, 389 S.W.2d 35, 46 (Mo. 1965), *cert. denied*, 383 U.S. 972 (1966).

B. (§23.69) Hearsay and the Confrontation Clause

The Sixth Amendment to the United States Constitution reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The right to confront witnesses and compel them to be judged by their statements and demeanor is one of the core values of the Sixth Amendment's Confrontation Clause. *Pointer v. Tex.*, 380 U.S. 400, 403 (1965). An essential right or interest secured by confrontation is the right to cross-examine witnesses. *State v. Blair*, 638 S.W.2d 739, 754 (Mo. banc 1982), *cert. denied*, 459 U.S. 1188 (1983); *Bruton v. United States*, 391 U.S. 123, 126 (1968). Cases addressing this right include the following:

- *Idaho v. Wright*, 497 U.S. 805, 827 (1990) (under the totality of the circumstances surrounding the daughter's statements, there were no special reasons for supposing that the incriminating statements were particularly trustworthy; the state failed to show that the statements possessed sufficient "particularized guarantees of trustworthiness" under the Confrontation Clause to overcome that presumption)

- *Lee v. Ill.*, 476 U.S. 530 (1986) (the confession of an accomplice was presumptively unreliable, and the codefendant's confession did not bear "sufficient indicia of reliability to overcome the presumption"; the court found that the confession was not rendered reliable because some of its facts interlocked with facts in petitioner's confession; substantive use of the hearsay confession violated the petitioner's confrontation clause rights to cross-examine witnesses under amendment VI to the United States Constitution)

Admitting extrajudicial statements does not violate the Confrontation Clause if the declarant testifies as a witness and is subject to full cross-examination. *Cal. v. Green*, 399 U.S. 149, 158 (1970); *Del. v. Fensterer*, 474 U.S. 15 (1985) (the Confrontation Clause is generally satisfied when the defense receives a full and fair opportunity to probe and expose the infirmities of a witness's testimony that is marred by forgetfulness, confusion, or evasion, and the admission of the expert testimony in *Delaware* did not offend the confrontation clause despite his inability to recall the basis for his opinion). Admitting a nontestifying defendant's statement inculpating a co-defendant violates the Confrontation Clause. *Bruton*, 391 U.S. at 135–37; *United States v. Perez-Garcia*, 904 F.2d 1534, 1541 (11th Cir. 1990).

The United States Supreme Court, in *Crawford v. Washington*, 541 U.S. 36 (2004), held that testimonial out-of-court statements by a witness are barred, under the Confrontation Clause, unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness, regardless of whether these statements are deemed reliable by the court. The holding in *Crawford* abrogates *Ohio v. Roberts*, 448 U.S. 56 (1980). *Crawford* states that there is no Confrontation Clause problem when the declarant testifies—see the discussion below. *See also*:

- *United States v. Daniel*, 173 Fed. Appx. 766 (11th Cir. 2006) (because of the doctrinal uncertainty of *Crawford*, court followed the approach taken in *United States v. Abdelazz*, 144 Fed. Appx. 821 (11th Cir. 2005) (if the confrontation clause error was harmless beyond a reasonable doubt, the admission of the same statement under a hearsay exception is also harmless)

- *United States v. Abram*, 171 Fed. Appx. 304 (11th Cir. 2006) (no confrontation clause problem because testimony from the co-defendant fell under the co-conspirator exception of Federal Rule of Evidence 801(d)(2)(E))

- *United States v. Brown*, 441 F.3d 1330, 1360 (11th Cir. 2006) ("[T]he private telephone conversation between mother and son, which occurred while [the defendant] was sitting at her dining room table with only her family members present, was not testimonial.")

Missouri courts have found that counsel was not ineffective for failure to anticipate *Crawford*. *Strong v. State*, 263 S.W.3d 636 (Mo. banc 2008).

The Supreme Court of Missouri has addressed *Crawford*. In *State v. March*, 216 S.W.3d 663 (Mo. banc 2007), the Court found that a laboratory report was testimonial under both *Crawford*, 541 U.S. 36, and *Davis v. Washington*, 547 U.S. 813 (2006), and held that its admission was a violation of the Confrontation Clause. For another Missouri cased applying *Crawford*, see *State v. Smith*, 240 S.W.3d 753, 755 (Mo. App. E.D. 2007):

> Having determined that Wife's statements were testimonial and therefore subject to the Confrontation Clause under *Crawford*, we turn to the substance of Defendant's point. Defendant asserts the trial court erred in admitting the hearsay statements of Wife because the admission of such statements violated his rights to confront witnesses against him. Specifically, Defendant argues that the trial court's ruling violated the holding of *Crawford* because he had no opportunity to conduct discovery prior to his preliminary hearing. Defendant's argument is unpersuasive.

In *In re N.D.C.*, 229 S.W.3d 602 (Mo. banc 2007), the Supreme Court of Missouri found that *Crawford* applied to juvenile proceedings. "The suggestion that juvenile offenders should not benefit from the same constitutional protections is contrary to *Gault*[, 387 U.S. 1 (1967)]." But in the particular circumstances of *N.D.C.*, the Court found that the child's statements to her mother were nontestimonial, so *Crawford* did not apply. *See also*:

- *Guese v. State*, 248 S.W.3d 69 (Mo. App. S.D. 2008) (child witness)

- *State v. Atkeson*, 255 S.W.3d 8 (Mo. App. S.D. 2008) (boys testified at trial)

- *State v. Turner*, 242 S.W.3d 770 (Mo. App. S.D. 2008)

In *Turner*, the appellant had the opportunity at the preliminary hearing to confront and cross-examine a witness and the opportunity at trial to present evidence impeaching the witness's credibility.

> As such, the purposes of the confrontation clause of the Sixth Amendment were fulfilled by the preliminary hearing testimony in this case. Accordingly, in that Appellant was afforded an opportunity to cross-examine [the witness] at the preliminary hearing and he actually availed himself of that opportunity through counsel, we conclude that Appellant's constitutional rights and the principles of *Crawford* were not violated;

Id. at 776 (citations omitted).

The United States Supreme Court has held that the Confrontation Clause was violated when a co-defendant called by the state invoked the Fifth Amendment privilege and refused to answer any questions, including questions based on his extrajudicial statement implicating the defendant. *Douglas v. Ala.*, 380 U.S. 415, 419–22 (1965). *But see N.M. v. Earnest*, 477 U.S. 648, 649 (1986) ("[T]o the extent that *Douglas* . . . interpreted the Confrontation Clause as requiring an opportunity for cross-examination prior to the admission of a codefendant's out-of-court statement, the case is no longer good law."). In *Bruton*, 391 U.S. 123, a witness testified as to a co-defendant's oral confession that implicated Bruton. The co-defendant did not testify, and the Court held that the maker of the extrajudicial statement was unavailable and that the defendant was denied his constitutional right of cross-examination and confrontation.

Confrontation was denied when the testimony of a witness at a preliminary hearing, when the defendant was not represented by counsel, was admitted at the trial after a showing that the witness was out of state. *Pointer*, 380 U.S. 400. If the defendant is represented at the preliminary hearing, the transcript is not admissible unless there is a showing that the witness is actually unavailable. *Barber v. Page*, 390 U.S. 719, 724–25 (1968); *see also*:

- *Roberts*, 448 U.S. 56 (transcript of unavailable witness not admissible when the prosecution failed to make "good-faith effort" to secure the absent witness's attendance; the state had done nothing to show the Court that the witness would be absent because of her unavailability)

- *Manacusi v. Stubbs*, 408 U.S. 204 (1972) (unavailability was found when the state's witness had removed himself permanently to a foreign country)

A hearsay objection does not preserve any constitutional claims relating to the same testimony. *State v. Parker*, 886 S.W.2d 908, 925 (Mo. banc 1994); *State v. Chambers*, 891 S.W.2d 93, 103–04 (Mo. banc 1994). Constitutional claims must be made at the first opportunity with citations to specific constitutional sections. *Parker*, 886 S.W.2d 908; *Chambers*, 891 S.W.2d 93.

C. (§23.70) Special Proceedings

In *State v. Justus*, 205 S.W.3d 872 (Mo. banc 2006), the Supreme Court of Missouri held that *Crawford v. Washington*, 541 U.S. 36 (2004), applies to § 491.075, now RSMo Supp. 2007.

> [T]he child's out-of court statements were "testimonial," under the Supreme Court precedents, as there was not an ongoing emergency and because the primary purpose of the interrogations was to prove past events potentially relevant to a later criminal prosecution. Admission of the statements, without a prior opportunity for cross-examination, violated Justus' constitutional right to confront witnesses against him.

Justus, 205 S.W.3d at 874. For a case addressing non-testimonial statements, see *State v. Wyble*, 211 S.W.3d 125 (Mo. App. W.D. 2007).

Hearsay may form the basis of a probation revocation proceeding when the probationer or the probationer's counsel has the opportunity to cross-examine the witness. *Brandt v. Percich*, 507 S.W.2d 951, 957 (Mo. App. E.D. 1974); *Ex parte Moore v. Stamps*, 507 S.W.2d 939, 949 (Mo. App. E.D. 1974). But revocation of probation based solely on a written probation violation report and unsigned laboratory report indicating the detection of a narcotic substance can deny a probationer's due process rights. *In re Carson*, 789 S.W.2d 495, 497 (Mo. App. S.D. 1990). In determining whether hearsay should be admitted in a parole revocation proceeding, the fact-finder must engage in a balancing process, weighing such factors as:

- why confrontation is undesirable or impractical;
- whether the hearsay evidence sought to be admitted bears substantial indicia of reliability; and
- whether the parolee challenges the accuracy of the hearsay evidence during the course of the hearing.

State ex rel. Mack v. Purkett, 825 S.W.2d 851, 855–56 (Mo. banc 1992) (limiting *Carson*, 789 S.W.2d 495, to the facts presented in that case).

In *Mack*, the Supreme Court discharged the defendant, finding a due process violation at Mack's parole revocation proceeding because no live witnesses were present and there was no showing of good cause as to why the witnesses could not be present. *Id.* at 857.

Hearsay may also be the basis for the issuance of a search warrant as long as there is substantial basis for crediting the hearsay. *State v. Bauers*, 702 S.W.2d 896, 900 (Mo. App. E.D. 1985). The test for sufficiency of the hearsay information is whether present information, as reasonably corroborated by other matters within the deposer's personal knowledge, is truthful or reliable. *See*:

- *State v. Phillips*, 532 S.W.2d 533, 535–36 (Mo. App. S.D. 1976)

- *State v. Cunningham*, 838 S.W.2d 472, 474 (Mo. App. W.D. 1992) ("The issuing magistrate used common sense in interpreting the information he had before him and executing this search warrant; i.e., a rear-end collision of such force one party was killed, strong odor of alcohol on other driver's breath one hour and forty-five minutes later, and that driver receiving medical care at the local hospital.")

- *State v. Rohrer*, 589 S.W.2d 121, 126 (Mo. App. S.D. 1979) (citations omitted) ("Here, the informant gave detailed information based on personal observation. Such a statement may in itself sufficiently establish reliability of the informant. In addition, in this case by the use of that information the residence and field of marijuana were easily located. The reliability of the informant was best 'established by the affiant relating some corroboration' of the informant's information.")

- *State v. Hammett*, 784 S.W.2d 293, 295 (Mo. App. E.D. 1989)

- *State v. Laws*, 801 S.W.2d 68 (Mo. banc 1990) (no hearsay when the record sufficiently established a basis for probable cause because, on the basis of the affidavit before him, the magistrate had a substantial basis for concluding there was a "fair probability" that that contraband would be found in the defendant's residence based on the informant's statements, corroborated by the fact that he had been found reliable in the past, and an understanding that the informant learned his information through personal observation)

- *State v. Hawkins*, 58 S.W.3d 12, 22 (Mo. App. E.D. 2001) (citations omitted) ("Here, the offense had occurred just hours before the issuance of the search warrant and the search was for evidence pertaining to that offense and Defendant's flight from the scene. Looking only at the affidavit itself, the affiant relied on hearsay information from individuals who saw the shooting and Defendant's flight from the scene. In this situation, the issuing judge could reasonably infer evidence of the crime would probably be located in Defendant's residence because it was adjacent to the crime scene.")

- *State v. Ford*, 21 S.W.3d 31, 35 (Mo. App. E.D. 2000) ("statements of the reliable informant, along with the personal observations of police, were sufficient to show a fair probability that contraband would be found at Defendant's residence"; when the informant approached the woman to buy drugs, the police watched her leave the meeting site, travel directly to the defendant's home, return, and give the informant the drugs)

- *State v. Berry*, 801 S.W.2d 64, 65 (Mo. banc 1990) (it was not hearsay when the informant "personally observed" marijuana in the defendants' home, the informant described the location, container, and quantity of marijuana, the informant had firsthand observation of the marijuana, and the police verified the accuracy of the information)

In a death-penalty punishment phase, even if the hearsay evidence does not fall within a recognized exception to the hearsay rule, the exclusion of hearsay testimony can violate due process when the testimony is highly relevant to a critical issue in the punishment phase of the trial and substantial reasons exist to assume the reliability of the hearsay statements. *State v. Phillips*, 940 S.W.2d 512, 517–18 (Mo. banc 1997); *Green v. Ga.*, 442 U.S. 95, 97 (1979).

X. Hearsay Exceptions

A. (§23.71) Proof That Statement Was Made

Extrajudicial statements that would otherwise be excluded as hearsay if introduced to prove the truth of the matter contained in them are admissible if offered only as circumstantial evidence or relevant facts as follows:

- To show reasons for a person's conduct, *Bond v. Wabash R.R. Co.*, 363 S.W.2d 1, 5 (Mo. 1962)

- To show intent, *State v. Singh*, 586 S.W.2d 410, 418 (Mo. App. S.D. 1979); *but see*:

  - *State v. Rios*, 234 S.W.3d 412 (Mo. App. W.D. 2007) (the court held that the trial court erred by admitting into evidence the victim's statement to a witness that he was going to confront the defendant about whether the defendant was married under the state-of-mind exception to the hearsay rule because the statement did not indicate that the defendant intended to do so in the immediate future)

  - *State v. Randolph*, 689 S.W.2d 535, 540 (Mo. App. E.D. 1985) (hearsay found and prejudicial when the admission of the decedent's testimony a substantial time before his death "was an invitation to the jury to believe that if appellant had robbed and placed one man in a bathtub, he was probably guilty of killing and placing decedent in a bathtub. The prejudice to the appellant in receiving this evidence far outweighed any possible relevancy or probative effect it might have had.")

  - *State v. Miller*, 664 S.W.2d 229, 231 (Mo. App. E.D. 1983) ("[T]he decedent's statements were in regard to injuries several years before her death and were not proof that on August 26, 1981 she was either afraid of defendant or of knives and would not have approached him with a knife. The hearsay testimony made no direct reference to Barbara's state of mind but merely accused defendant of prior acts against

her. The thrust of the testimony was toward defendant's conduct remote in time rather than, as in *Singh*, toward decedent's state of mind shortly before her death. Unlike *Singh*, the testimony here was presented in the state's case in chief not in rebuttal, and no limiting jury instruction was given. The state's questions elicited hearsay which did not come under the state of mind exception. The trial court erred in overruling defendant's hearsay objection.")

- To prove good faith, *Moore v. Metro. Life Ins. Co.*, 237 S.W.2d 210, 212 (Mo. App. E.D. 1951)

- To prove the fact that the statement was made, *State v. Chambers*, 891 S.W.2d 93, 104 (Mo. banc 1994)

- For impeachment purposes to show bias, *Massman v. Muehlebach*, 95 S.W.2d 808, 810–12 (Mo. App. W.D. 1936)

- To show notice or knowledge if the notice or knowledge is an essential element in the case, *Plodzien v. Whaley*, 610 S.W.2d 63, 67 (Mo. App. E.D. 1980)

- To show basis for an expert's testimony, *State ex rel. State Highway Comm'n of Mo. v. Carlson*, 463 S.W.2d 74, 78–80 (Mo. App. W.D. 1970); *see also State ex rel. Mo. Highway & Transp. Comm'n v. Pedroley*, 873 S.W.2d 949 (Mo. App. E.D. 1994)

If the extrajudicial statement is offered to show that the statement was made, it does not matter whether the statement is true or false, only that the statement was made. *James v. Turilli*, 473 S.W.2d 757, 760 (Mo. App. E.D. 1971). Extrajudicial statements may be admitted to rehabilitate a witness. *State v. Few*, 530 S.W.2d 411, 413–14 (Mo. App. W.D. 1975).

Statements made by out-of-court declarants that explain subsequent police conduct are admissible. *See*:

- *State v. Dunn*, 817 S.W.2d 241, 243 (Mo. banc 1991)

- *State v. McRoberts*, 485 S.W.2d 70, 73 (Mo. 1972)

- *State v. Brooks*, 618 S.W.2d 22, 26 (Mo. banc 1981)

But these statements are not automatically admissible, and they may result in reversible error if the statement also goes to a contested issue. *See*:

- *State v. Valentine*, 587 S.W.2d 859, 861 (Mo. banc 1979)
- *Kerr v. State*, 167 S.W.3d 809 (Mo. App. S.D. 2005) (testimony was not hearsay and not offered at trial for its truth; it was an explanation of the course of an officer's participation in the investigation)
- *State v. Jones*, 583 S.W.2d 561, 563 (Mo. App. E.D. 1979)
- *State v. Shigemura*, 680 S.W.2d 256, 257–58 (Mo. App. E.D. 1934)

As the Supreme Court of Missouri warned in *Dunn*, 817 S.W.2d at 243–44 n.1: "The holding on this point should not be taken to suggest that prosecutors may, with impunity, elicit hearsay information received from an informant, particularly when the statement directly proves an issue crucial to the state's burden of proof and is offered for the truth of the matter asserted."

B. (§23.72) Declarations Against Interest

Generally, declarations against penal interest by third parties are not admissible as an exception to the hearsay rule in criminal cases. *See*:

- *State v. Leisure*, 838 S.W.2d 49, 57 (Mo. App. E.D. 1992)
- *State v. Turner*, 623 S.W.2d 4, 8 (Mo. banc 1981), *cert. denied*, 456 U.S. 931 (1982)
- *State v. Hodge*, 655 S.W.2d 738, 742 (Mo. App. S.D. 1983)
- *State v. Hutchison*, 957 S.W.2d 757, 761–62 (Mo. banc 1997)
- *State v. Skillicorn*, 944 S.W.2d 877 (Mo. banc 1997), *cert. denied*, 522 U.S. 999 (1997)
- *State v. Bolds*, 913 S.W.2d 393 (Mo. App. W.D. 1996)

But there are exceptions. Before *Chambers v. Mississippi*, 410 U.S. 284 (1973), Missouri courts consistently held that declarations

against the penal interest of an unavailable witness were not admissible as an exception to the hearsay rule in criminal proceedings. *State v. Brown*, 404 S.W.2d 179, 185 (Mo. 1966).

In *Chambers*, 410 U.S. 284, the trial court refused to allow the defendant to adduce testimony that a witness had made oral confessions to three witnesses. The United States Supreme Court noted that the evidence would have exonerated the defendant and was "originally made and subsequently offered at trial under circumstances that provided considerable assurance of [its] reliability," *id*. at 300, because:

- each confession was in a real sense self-incriminatory and unquestionably against interest;
- each statement was spontaneously made to a close acquaintance shortly after the murder; and
- the statements were corroborated by other evidence.

Id. at 300–01. *Chambers* held that, although it was not displacing the hearsay rule or creating any new exceptions, the defendant was deprived of a fair trial in violation of the Due Process Clause. *Id*. at 302–03.

State v. Batek, 638 S.W.2d 809, 812 (Mo. App. E.D. 1982), followed *Chambers* in holding that declarations against penal interests are not admissible in Missouri as an exception to the hearsay rule unless:

- they are corroborated by other substantial, reliable evidence; and
- the declarant's complicity, if true, would exonerate the accused.

See also Leisure, 838 S.W.2d at 57.

In *Turner*, 623 S.W.2d at 9, the Supreme Court of Missouri cautioned against opening the door to extrajudicial confessions beyond the facts presented in *Chambers*. *See*:

- *State v. Blankenship*, 830 S.W.2d 1, 6–8 (Mo. banc 1992) (disallowing proffered statement because it was not clearly against penal interest, it was not made spontaneously to close

friends, and it was not corroborated by other credible evidence in the case)

- *State v. Starks*, 820 S.W.2d 527, 531 (Mo. App. E.D. 1991)

- *State v. Fuller*, 837 S.W.2d 304, 308–09 (Mo. App. W.D. 1992)

See also Kay W. Van Pelt, Comment, *The Standard of Reliability for Declarations Against Penal Interest in Missouri*, 48 MO. L. REV. 801 (1983).

For an example of a case holding an improper limitation of evidence, see *State v. Carroll*, 629 S.W.2d 483 (Mo. App. W.D. 1981). For opposite holdings, see:

- *State v. Anglin*, 45 S.W.3d 470 (Mo. App. W.D. 2001) (because a co-defendant's statements were not made to a close acquaintance, they did not provide "substantial indicia of reliability"; therefore, the trial court did not abuse its discretion in disallowing the testimony of the co-defendant, nor was the defendant prejudiced by its exclusion)

- *State v. Jones*, 671 S.W.2d 296 (Mo. App. W.D. 1984) (there was no corroborating testimony or evidence to support the reliability of the co-defendant's statement, and even if the statement was true, it would not exonerate the defendant)

The statement of such a person may be admitted when the statement, at the time it was made, was so contrary to the declarant's pecuniary, proprietary, or penal interest that the statement most probably would not have been made unless the declarant believed it to be true. *State v. Brown*, 833 S.W.2d 436, 438 (Mo. App. W.D. 1992).

The United States Supreme Court has limited Federal Rule of Evidence 804(b)(3), dealing with statements against a declarant's penal interest. In *Williamson v. United States*, 512 U.S. 594 (1994), after alleged co-defendant Harris refused to testify, the trial court allowed into evidence Harris's confession in its entirety, including portions that implicated defendant Williamson. The United States Supreme Court reversed Williamson's conviction, holding that only those portions of the statement that actually inculpate the declarant are admissible under Rule804(b)(3); thus, those statements that were not self-inculpatory were not covered and were inadmissible against the co-defendant, Williamson. *Williamson*, 512 U.S. at 599–60; *see*

also United States v. Wexler, 522 F.3d 194 (2nd Cir. 2008) (statements were admitted because each statement made by the co-defendant incriminated himself as well as the defendant).

But an admission of a party opponent is different because it should not properly be considered as hearsay at all. *Brown*, 833 S.W.2d at 438; *see also State v. Simmons*, 233 S.W.3d 235 (Mo. App. E.D. 2007); *Williams v. State*, 226 S.W.3d 871 (Mo. App. S.D. 2007); *State v. Howell*, 143 S.W.3d 747 (Mo. App. W.D. 2004); IV JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1048, at p. 4 (1972). An admission of a party opponent only needs to:

- be material to the issues of the case;
- have sufficient probative value to be relevant; and
- be offered by the opposing party.

Brown at 439. If the statements are not actually unfavorable to, or contradictory to, the opposing party's position, they are excludable on the grounds of relevancy. *Id.*

C. (§23.73) Dying Declarations

The statement of a deceased victim of criminal homicide is admissible as probative of the truth of the statement if the statement was uttered while the declarant believed death was imminent and had abandoned all hope of recovery. *State v. Liggins*, 725 S.W.2d 75, 76 (Mo. App. E.D. 1987). The statements are only admissible if offered in a homicide prosecution. *Cummings v. Ill. Cent. R.R. Co.*, 269 S.W.2d 111, 119–21 (Mo. 1954). There has been a limitation that the statement is only admissible as a dying declaration if it is offered when the death of the deceased is the subject of the charge. *State v. Hodge*, 655 S.W.2d 738, 742 (Mo. App. S.D. 1983) (disallowing admission of suicide note of alleged co-defendant that implicated defendant). The length of time between the injury and the final death is immaterial as long as the victim is convinced they will die. *Id.*; *State v. Brandt*, 467 S.W.2d 948 (Mo. 1971). Although not necessary, the best method of proving the state of mind of the declarant is the declarant's express statement concerning that state of mind. *Liggins*, 725 S.W.2d at 76. This belief may also be inferred, however, from the declarant's condition and other circumstances that indicate the declarant's apprehension of imminent death. *State v. Mahone*, 699 S.W.2d 60, 62 (Mo. App. E.D. 1985); *State v. Boyd*, 669 S.W.2d 232, 235 (Mo. App. E.D. 1984).

This evidence is competent evidence and, therefore, is admissible whether introduced by the defendant or the state and whether favorable or unfavorable to the defendant. *State v. Proctor*, 269 S.W.2d 624, 626–30 (Mo. 1954). While it is the province of the jury to determine the weight of such a statement, the question of admissibility is a question for the court. *State v. Carr*, 610 S.W.2d 296, 299 (Mo. App. E.D. 1980). Statements are not admissible as dying declarations unless a sufficient foundation has been laid, *State v. Woodard*, 521 S.W.2d 498, 500 (Mo. App. W.D. 1975), and opinions or conclusions of the victim are inadmissible, *State v. Kyle*, 225 S.W. 1012, 1017 (Mo. 1920), as are statements when it is shown that the victim could not have known the truth of the matter, *State v. Wilks*, 213 S.W. 118, 120–21 (Mo. 1919). *See State v. Matthews*, 111 S.W.2d 62 (Mo. 1937) (the trial court did not err in admitting a statement made by the victim as a dying declaration because it contained only facts and no opinions or conclusions, but it cautioned that, on retrial, certain immaterial portions of the statement were to be excluded). The statement must be one of fact and not a mere conclusion or expression of opinion based on collateral facts or hearsay rather than observation. *Mahone*, 699 S.W.2d at 62; 2 MCCORMICK ON EVIDENCE § 313 (John W. Strong ed., 5th ed. 1999). The subject matter of the declaration is restricted to:

- the identification of the accused and the deceased;
- the act of killing; and
- the circumstances immediately attending that act.

State v. Hughes, 125 S.W.2d 66, 69 (Mo. 1939). In addition, a party can introduce contradictory statements to impeach a dying declaration. *State v. Cole*, 547 S.W.2d 494, 496–97 (Mo. App. S.D. 1977). If other evidence was admitted that covers substantially the same testimony, the admission of the hearsay statement may be harmless error. *Carr*, 610 S.W.2d at 300.

D. (§23.74) Spontaneous Declarations and Excited Utterances

"Excited utterances" or "spontaneous declarations" are admissible if:

- the declarant has been subjected to a startling event;
- the statement is made before there is time to fabricate; and
- the statement relates to the circumstance of the occurrence.

State v. Mahone, 699 S.W.2d 60, 62 (Mo. App. E.D. 1985); *State v. Pflugradt*, 463 S.W.2d 566, 572 (Mo. App. W.D. 1971). The statement

or utterance must be a reaction to the event itself and not to the intervention of the police. *State v. Simmons*, 734 S.W.2d 513, 514 (Mo. App. E.D. 1987). The essential test for the admissibility of such statements is spontaneity, *Pflugradt*, 463 S.W.2d 566, but each case will turn on its own facts; the statement does not need to be immediate but must be contemporaneous and "instinctive and spontaneous," *State v. Sutton*, 454 S.W.2d 481, 487 (Mo. 1969). The event and the statement do not need to be simultaneous as long as the statement is provoked by the excitement of the event and the declarant is still under the control of that excitement. *State v. Jackson*, 872 S.W.2d 123 (Mo. App. E.D. 1994). Thus, a declaration may fall within the excited utterance exception even though it was made several minutes after the startling event if the excitement persists. *State v. Milner*, 795 S.W.2d 621, 623 (Mo. App. E.D. 1990); *State v. Williams*, 673 S.W.2d 32, 35 n.4 (Mo. banc 1984). *But see State v. Stottlemyre*, 752 S.W.2d 840, 843 (Mo. App. W.D. 1988) (The defendant "knew that he was in potential trouble with the police. The inference is clear that he had reason to exculpate himself and enough time to fabricate a statement. He made no other exculpatory statements to any of the people who arrived before Trooper Leavene, and the facts do not indicate that he was under such stress as would make his later statement an excited utterance. In light of such evidence, the trial court did not abuse its discretion in refusing to admit his declaration to Trooper Leavene as an exception to the hearsay rule.").

The test is whether the utterance was "made under the immediate and uncontrolled domination of the senses as a result of the shock produced by the event." *State v. Russell*, 872 S.W.2d 866, 870 (Mo. App. S.D. 1994) (quoting *State v. Van Orman*, 642 S.W.2d 636, 639 (Mo. 1982)); *State v. Dunn*, 821 S.W.2d 512 (Mo. App. W.D. 1991). The time or place does not control this determination, although it is relevant. *State v. Debler*, 856 S.W.2d 641, 648 (Mo. banc 1993) (while the passage of time, 15 hours, and the change of location were relevant, the controlling fact was that the utterance was not the product of the shock of the murder but, rather, the emotion of the witness talking to his mother; thus, it was not admissible as an excited utterance); *State v. Williams*, 716 S.W.2d 452, 454 (Mo. App. S.D. 1986) (the trial court did not err in excluding a statement made by the defendant, 15 to 20 minutes after the shooting, that the gun accidentally discharged because the defendant had plenty of time to fabricate the statement).

One requirement for a hearsay statement to be admitted into evidence as an excited utterance is that a startling event or condition occurred. *State v. Kemp*, 919 S.W.2d 278, 280 (Mo. App. W.D. 1996). But the alleged excited utterance, in itself, is insufficient to establish that a startling event did occur. *Id.* Some independent proof that the event could have occurred is necessary. *State v. Post*, 901 S.W.2d 231, 234 (Mo. App. E.D. 1995); *see also State v. Kemp*, 212 S.W.3d 135 Mo. banc 2007). If there is no independent proof of the startling event, the statement is inadmissible under this exception. *Post*, 901 S.W.2d at 234; *Kemp*, 919 S.W.2d at 280.

State v. Strong, 142 S.W.3d 702, 718 (Mo. banc 2004), declined to extend *State v. Bell*, 950 S.W.2d 482, 483 (Mo. banc 1997)—*see* §23.75, *infra*—to the excited utterance exception.

These statements are presumed inadmissible, and the burden is on the offeror to show admissibility. *Bynote v. Nat'l Super Mkts., Inc.*, 891 S.W.2d 117, 122 (Mo. banc 1995). Statements are not admissible as spontaneous declarations if a sufficient foundation has not been laid to show that the event was the cause of the utterance. *State v. Hook*, 432 S.W.2d 349, 353 (Mo. 1968). But the proponent of the evidence "does not have to show that the evidence is without flaw, or that the jury could not find it to be reflective rather than spontaneous, if it meets the general standards for admissibility." *Williams*, 673 S.W.2d at 35. Further, it is not a proper basis for exclusion to say that the statement was "self-serving" because, if a statement otherwise meets the "excited utterance" test, it is not excludable simply because it is helpful to the declarant's position. *Id.* Although the trial court has a "measure of discretion" in deciding the admissibility of these statements, the question of admissibility is a question of law subject to appellate review, and discretion is not a complete answer. *Id.*

E. (§23.75) Declarant's Present State of Mind

The "declarant's present state of mind" exception to the hearsay rule allows the admission of extrajudicial statements to show the state of mind of the declarant at that time if that is at issue in the case. *See*:

- *United States v. Brown*, 490 F.2d 758, 762 (D.C. Cir. 1973)
- *Frazier v. Mitchell*, 188 F. Supp. 2d 798, 813 (6th Cir. 2001) (hearsay evidence of state of mind was admissible when the "identity of Tiffany's murderer was the critical issue in the

trial. Her expressions of fear were probative because they supported the substantial evidence of petitioner's likely motive. In addition, the testimony that she said she was sleeping with a knife under her pillow pointed to the source of the wound observed after the murder on the petitioner's arm.")

- *Kontos v. Kontos*, 968 F. Supp. 400 (S.D. Ind. 1997)
- *State v. Boliek*, 706 S.W.2d 847, 850 (Mo. banc 1986), *cert. denied*, 479 U.S. 903 (1989)
- *State v. Kennedy*, 842 S.W.2d 937 (Mo. App. S.D. 1992)

Generally, statements about a declarant's present mental condition made out of court are excepted from the hearsay ban and are admissible when they are relevant and the relevancy outweighs their prejudicial effect. *State v. Bell*, 950 S.W.2d 482, 484 (Mo. banc 1997). *Bell* found that the hearsay testimony that Ms. Allen said Mr. Bell had previously abused her was not a declaration of her state of mind and was pure narration of past acts by another. Accordingly, it was inadmissible hearsay, and the trial court abused its discretion by allowing it to be presented to the jury. *Id.* at 484.

When state-of-mind testimony is sought to be used in an attempt to demonstrate the truth of the underlying facts rather than solely to show state of mind, the evidence must be excluded. *Brown*, 490 F.2d at 763; *State v. Singh*, 586 S.W.2d 410, 418 (Mo. App. S.D. 1979).

The statement must be introduced solely to show the declarant's state of mind and be accompanied by a limiting instruction. *Brown*, 490 F.2d at 763 n.10.

The use of this hearsay exception is generally limited to cases in which hearsay declarations of mental condition are especially relevant—particularly when the defendant has put the decedent's mental state at issue by claiming accident, self-defense, or suicide. *Bell*, 950 S.W.2d at 483; *Singh*, 586 S.W.2d at 418; *State v. Randolph*, 698 S.W.2d 535, 539 (Mo. App. E.D. 1985). Accident cases that have allowed the admission of this evidence are situations when the defendant, as the actor causing the death, is undisputed but the issue raised is whether the defendant acted intentionally or accidentally. *State v. Kelley*, 953 S.W.2d 73, 83–84 (Mo. App. S.D. 1997), *overruled on other grounds by Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002). If

the defendant denies participation in the crime, the victim's hearsay statements are not relevant. *Kelley*, 953 S.W.2d at 83–84; *see also*:

- *State v. Post*, 901 S.W.2d 231, 236 (Mo. App. E.D. 1995)
- *State v. Nastasio*, 957 S.W.2d 454, 458–59 (Mo. App. W.D. 1997)
- *State v. Rios*, 234 S.W.3d 412 (Mo. App. W.D. 2007)
- *State v. Revelle*, 957 S.W.2d 428, 432 (Mo. App. S.D. 1997) (reversible error to admit hearsay note from the victim)

The hearsay must also be a "contemporaneous" statement of fear, emotion, or other mental condition. *Bell*, 950 S.W.2d at 484. It must be a declaration of state of mind and not a narration of past acts by another. *Id.* at 484; *see also*:

- *Shepard v. United States*, 290 U.S. 96, 105–06 (1933)
- *State v. Benson*, 142 S.W.2d 52, 54 (Mo. 1940)

Hearsay statements that do no more than recount past events are not proper subjects for this exception. *Bell*, 950 S.W.2d at 484. And the state-of-mind exception does not justify or permit hearsay evidence when its primary purpose is to show motive or any other state of mind of the defendant. *Kelley*, 953 S.W.2d at 85 (the victim's statements concerning the future of her marriage with the defendant were not admissible); *Revelle*, 957 S.W.2d 428.

For other cases allowing evidence in under the state of mind exception, see:

- *United States v. De Carlo*, 458 F.2d 358 (3rd Cir. 1972) (a letter was admitted for the sole purpose of showing the decedent's state of mind, and the trial court had instructed the jury as to the limited scope of admissibility; the court concluded that there was no confusion or prejudice caused by admission of the letter because the jury already had other evidence to convict the defendants)
- *Oberman v. Dun & Bradstreet, Inc.*, 507 F.2d 34 (7th Cir. 1974) (the appellant's testimony regarding his conversation with the building owner was within the state of mind exception to the hearsay rule and was properly considered)

For other cases not allowing evidence in under this exception, see:

- *State v. Rios*, 234 S.W.3d 412 (Mo. App. W.D. 2007) (the trial court erred by admitting into evidence the victim's statement to a witness that he was going to confront the defendant about whether the defendant was married under the state-of-mind exception to the hearsay rule because the statement did not indicate that the defendant intended to do so in the immediate future)

- *Randolph*, 698 S.W.2d at 540 (hearsay found and prejudicial when the admission of the decedent's testimony a substantial time before his death "was an invitation to the jury to believe that if appellant had robbed and placed one man in a bathtub, he was probably guilty of killing and placing decedent in a bathtub. The prejudice to the appellant in receiving this evidence far outweighed any possible relevancy or probative effect it might have had.")

- *State v. Miller*, 664 S.W.2d 229, 231 (Mo. App. E.D. 1983) ("[T]he decedent's statements were in regard to injuries several years before her death and were not proof that on August 26, 1981 she was either afraid of defendant or of knives and would not have approached him with a knife. The hearsay testimony made no direct reference to Barbara's state of mind but merely accused defendant of prior acts against her. The thrust of the testimony was toward defendant's conduct remote in time rather than, as in *Singh*, [586 S.W.2d 410,] toward decedent's state of mind shortly before her death. Unlike *Singh*, the testimony here was presented in the state's case in chief not in rebuttal, and no limiting jury instruction was given. The state's questions elicited hearsay which did not come under the state of mind exception. The trial court erred in overruling defendant's hearsay objection.")

F. (§23.76) *Res Gestae*

The "*res gestae*" exception to the hearsay rule refers to:

> [T]hose exclamations and statements made by either the participants, victims or spectators to a crime immediately before, during, or immediately after the commission of the crime, when the circumstances are such that the statements were made as a spontaneous reaction or utterance inspired by the excitement of the occasion and there was no opportunity for the declarant to deliberate and to fabricate a false statement.

State v. White, 621 S.W.2d 287, 294–95 (Mo. 1981) (quoting *State v. Hook*, 432 S.W.2d 349, 352 (Mo. 1968)); *State v. Brazil*, 813 S.W.2d 327, 330 (Mo. App. E.D. 1991). Modern commentators, however, have discouraged the term "*res gestae*" and prefer to talk in terms of the "excited utterance" exception to hearsay. *State v. Wilson*, 812 S.W.2d 213, 214 (Mo. App. E.D. 1991); *State v. Williams*, 673 S.W.2d 32, 34 (Mo. banc 1984). See §23.74 above for a discussion of the excited utterance exception.

In *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 121 (Mo. banc 1995), the Supreme Court noted that the use of the term "*res gestae*" in arguing for the admission of out-of-court, third-party statements fails to clarify the specific category of the hearsay rule exception sufficiently for a trial court to understand the evidentiary standard the party invokes. Therefore, the Supreme Court will no longer recognize the phrase "*res gestae*" as carrying sufficient meaning to support either the admission of or an objection to proffered testimony. *Id.*

G. (§23.77) Former Testimony

The right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against the accused. *Crawford v. Washington*, 541 U.S. 36 (2004). An exception has been recognized for testimony given at a previous judicial proceeding against the same defendant when the testimony was subject to cross-examination and the witness is now unavailable. *State v. Lindsay*, 709 S.W.2d 499, 504 (Mo. App. W.D. 1986). To qualify for admission under this exception, the proponent of the evidence must show that the declaration bears adequate indicia of reliability. *Id.* at 504. Testimony at a prior hearing is admissible when:

- it was before a judicial tribunal;
- the witness was sworn and testified;
- the accused was present and had an opportunity for cross-examination;
- the parties and issues were substantially the same in the case; and
- the witness is unavailable after due diligence.

State v. Sumowski, 794 S.W.2d 643, 648 (Mo. banc 1990); *State v. Dreiling*, 601 S.W.2d 660, 662 (Mo. App. S.D. 1980); *see also*:

- *State v. Aaron*, 218 S.W.3d 501 (Mo. App. W.D. 2007)
- *State v. Burns*, 112 S.W.3d 451 (Mo. App. W.D. 2003)

It is only necessary that the witness producing the testimony was under oath and could have been cross-examined; it does not matter whether the opportunity was exercised. *State v. Logan*, 126 S.W.2d 256, 259 (Mo. 1939)*; see also State v. Baker*, 185 S.W.2d 644, 644 (Mo. 1945) (the defendant argued on appeal that the trial court erred "in permitting the state to read to the jury a transcript of the testimony given at the coroner's inquest by [a police sergeant] who was absent from the state on active military duty, at the time of the trial"; the court stated that it appeared that the defendant "was there represented by the same attorney who defended him at the trial, and that the testimony in question was given in his (defendant's) presence, and that his said attorney subjected the witness to a full and searching cross-examination"; the court held that the "defendant, by action and words, has waived any right to complain of the reception of such testimony").

The criminal charges may be different, *State v. Brown*, 56 S.W.2d 405, 407–09 (Mo. 1932); *Baker*, 185 S.W.2d at 644, and absolute identity of parties is not required. *See*:

- *Bartlett v. Kansas City Pub. Serv. Co.*, 160 S.W.2d 740, 743 (Mo. 1942)
- *Maxwell v. City of Springfield*, 705 S.W.2d 90, 93–94 (Mo. App. S.D. 1986)
- *Aaron*, 218 S.W.3d 501

Testimony given at a properly held preliminary hearing is admissible when the witness is unavailable to testify at trial. *State v. Griffin*, 848 S.W.2d 464, 470 (Mo. banc 1993). The inability of defense counsel to conduct the same cross-examination early in the pretrial process as would be conducted at trial does not mean that the testimony lacks sufficient reliability to admit it for trial. *Id.*

A witness can be unavailable because of:

- death, *Logan*, 126 S.W.2d 256;
- sickness or infirmity, *Kirton v. Bull*, 68 S.W. 927, 929 (Mo. 1902);
- loss of memory, *Orr v. State Farm Mut. Auto. Ins. Co.*, 494 S.W.2d 295, 299 (Mo. banc 1973); *Cal. v. Green*, 399 U.S. 149, 165–66 (1970);
- insanity, *State v. Pierson*, 85 S.W.2d 48, 52–54 (Mo. 1935);
- a claim of the privilege against self-incrimination, *State v. Holt*, 592 S.W.2d 759, 766 (Mo. banc 1980); *Sutter v. Easterly*, 189 S.W.2d 284, 289 (Mo. 1945);
- the objecting party's procurement, *State v. Brown*, 285 S.W. 995, 996 (Mo. 1926); or
- the fact that the witness cannot be located after a diligent search, *State v. Granberry*, 491 S.W.2d 528, 531 (Mo. banc 1973).

A witness is not "unavailable" unless the state made a good-faith effort to obtain the witness's presence at trial. *See*:

- *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *overruled on other grounds by Crawford*, 541 U.S. 36
- *Barber v. Page*, 390 U.S. 719, 724–25 (1968)
- *Manacusi v. Stubbs*, 408 U.S. 204 (1972) (unavailability found when state's witness had removed himself permanently to a foreign country and unavailability was sufficiently strong)

The burden of proving good faith is on the state. *Lindsay*, 709 S.W.2d at 505. The state must use reasonable diligence to ensure the presence of a witness at trial. *Id.* If the location of the witness is known and is amenable to process, due diligence and good faith require that the prosecutor use the power of process to bring the person before the court; if the location is not known, good faith requires the prosecutor to undertake all reasonable initiatives to produce the witness. *Id.* at 507. But when no subpoena had been issued, *State v. Gallina*, 178 S.W.2d 433, 434 (Mo. 1944), or when the

sheriff had falsified the return, *State v. Kain*, 330 S.W.2d 842, 843–44 (Mo. 1960), prior testimony was not admissible. *See also*:

- *Kain*, 330 S.W.2d at 844 ("In the instant case a subpoena was issued for witness Ruggles seven days prior to the trial and the Sheriff's return, showing service, was filed on the day of the trial. However, the testimony of the officer established the falsity of his return. . . . no sufficient showing of diligence on the part of the prosecuting officials to locate and secure the presence of witness . . . at the trial and the admission in evidence of his testimony at the preliminary hearing constituted prejudicial error.")

- *State v. Hicks*, 591 S.W.2d 184 (Mo. App. S.D. 1979) (a good-faith effort was found to produce unavailable witness)

Section 491.680, RSMo 2000, provides for the admission as substantive evidence of videotaped depositions of an alleged child victim (person under 17 years of age) in a Chapter 565, 566, or 568, RSMo, prosecution. The Supreme Court of Missouri has held that admission of such a deposition under § 491.680 violates a defendant's right to confrontation in the absence of evidence that the minor child is unavailable because of emotional and psychological trauma that would result from testifying in open court. *State v. Sanchez*, 752 S.W.2d 319 (Mo. banc 1988); *see also*:

- *State v. Naucke*, 829 S.W.2d 445 (Mo. banc 1992), *cert. denied*, 506 U.S. 960 (1992) (the trial court found that testifying either in open court or in the defendant's presence would cause emotional harm to the child victim such that it rendered the child victim unavailable)

- *State v. Wyble*, 211 S.W.3d 125 (Mo. App. W.D. 2007) (no violation of the Sixth Amendment Confrontation Clause by allowing the victim's grandmother, the victim's mother, and a social worker to testify about the abuse)

- *State v. Griffin*, 202 S.W.3d 670 (Mo. App. W.D. 2006)

H. (§23.78) Past Recollection Recorded

Witnesses are permitted to refresh their memories by looking at almost anything either before or while testifying. This is called present recollection refreshed. *Watson v. Meredith Dev. Co.*, 410 S.W.2d

338, 340–42 (Mo. App. E.D. 1966); *see also State ex rel. Williams v. Williams*, 609 S.W.2d 456 (Mo. App. W.D. 1980). But if the witness's memory cannot be revived, a party may wish to introduce a memorandum that the witness made at or near the time of the event. *City of Kansas City ex rel. Jennings v. Integon Indem. Corp.*, 857 S.W.2d 233, 236–37 (Mo. App. W.D. 1993). Records of past recollection are admissible to prove the facts recorded if:

- the writing does not refresh the memory of the witness;
- the witness has no present recollection of the matter recorded; and
- the writing was made at or near the time of the event recorded.

State v. Bradley, 234 S.W.2d 556, 560 (Mo. 1950).

A past recollection recorded is admissible when it appears that the witness:

- can identify the writing;
- adequately recalls the making of it at or near the time of the event; and
- can testify to its accuracy.

Ferguson v. Overhead Door Co. of Springfield, Inc., 549 S.W.2d 356, 360 (Mo. App. S.D. 1977); *Williams*, 609 S.W.2d at 459.

It should be noted that, if the witness read and signed the document recorded by another, declaring at the time that it was accurate and correct, the writing or record is admissible. *Ferguson*, 549 S.W.2d 356.

I. (§23.79) Business Records

The admissibility of business records is in accordance with The Uniform Business Records as Evidence Law, §§ 490.660–490.692, RSMo 2000. The court has wide discretion as to whether requirements for admission are met. *State v. Graham*, 641 S.W.2d 102, 106 (Mo. banc 1982). *But see State v. Thrasher*, 654 S.W.2d 142 (Mo. App. E.D. 1983) (citations omitted) ("The portion of the hospital record specifically objected to should not have been admitted into

evidence. It contained hearsay statements made by the complainant and recorded by a social service employee. It was hearsay upon hearsay. . . . The record was also not a statement of medical diagnosis or treatment and was not admissible as a patient's history necessary to observation, diagnosis, and treatment and essential to the examination and care of the patient.").

Records must be made in the regular course of business, "at or near the time of the act, condition or event." Section 490.680. *See*:

- *Thomas v. Dir. of Revenue*, 875 S.W.2d 582, 584 (Mo. App. W.D. 1994) (allowing admission of maintenance report on breathalyzer machine even though records custodian did not have personal knowledge of mode of preparation)

- *Williams v. Dir. of Revenue*, 889 S.W.2d 879 (Mo. App. S.D. 1994) (arresting officer testified that he did not know when the report had been prepared, other than what it said, and that he was not the custodian of the records; the licensee's hearsay objection was sustained; the trial court reinstated his license, holding that the officer was not a proper testifying witness to authenticate the report prepared by another officer and filed with the state's Department of Health; because there was no testimony from the custodian of the maintenance report, the objection was properly sustained)

- *State v. Luleff*, 781 S.W.2d 199, 201 (Mo. App. E.D. 1989) (disallowing highway patrol reports because a deputy with the sheriff's department was not able to testify as to the mode of the preparation of the exhibits or that they were made in the regular course of business)

- *Goodloe v. Dir. of Revenue*, 838 S.W.2d 506, 508–09 (Mo. App. W.D. 1992)

The burden is on the proponent to qualify the records under the statutes. *In re Estate of White*, 665 S.W.2d 67, 69 (Mo. App. S.D. 1984). When parts of a record are objectionable as hearsay or for any other reason, they may be excluded by timely objection. *State v. Foster*, 501 S.W.2d 33, 36 (Mo. 1973). Further, entries in the form of opinions are not admissible if the declarant was not making a statement concerning a matter within the declarant's expertise and as to which the declarant would be competent to express an opinion if

testifying in person. *State v. Rhone*, 555 S.W.2d 839, 841 (Mo. banc 1977). *But see*:

- *State v. Hall*, 761 S.W.2d 691 (Mo. App. E.D. 1988) (lab analyst, whose conclusions were introduced into evidence, was not required to be independently qualified as an expert)

- *State v. Bellah*, 745 S.W.2d 213, 217 (Mo. App. E.D. 1987) ("The state addresses the qualifications of the two laboratory technicians in the direct examination of the supervisor of the lab. We find the trial court was well within its discretion to admit the opinions of the experts contained in the laboratory reports.")

A properly introduced business record is not inadmissible because of a constitutional lack of confrontation if there is no showing that the record included substantive probative evidence that the defendant committed the crime. *State v. Cook*, 440 S.W.2d 461 (Mo. 1969); *State v. Turnbough*, 497 S.W.2d 856, 859 (Mo. App. E.D. 1973) ("The records admitted into evidence in this case do not mention the defendant at all.").

Medical records are admissible as business records in criminal cases and are not hearsay, and medical history that is necessary for diagnosis and treatment is encompassed within this exception. *State v. Griffin*, 497 S.W.2d 133 (Mo. 1973). But not everything within a hospital report is necessarily admissible, and parts may remain hearsay if the statements are not generally necessary for diagnosis and treatment. *State v. Russell*, 872 S.W.2d 866, 870 (Mo. App. S.D. 1994); *Thrasher*, 654 S.W.2d at 144; *see also State v. Jackson*, 671 S.W.2d 816, 817 (Mo. App. E.D. 1984) (a document was admissible when "the examining physician testified as to information that did not refer to either the defendant or the rape incident. Also, it is clear that the statement was a necessary part of the medical record and was so essential to the examination and care of the patient as to make it admissible").

Police reports may be admissible as business records. *Edgell v. Leighty*, 825 S.W.2d 325, 329 (Mo. App. S.D. 1992); *see also State v. Bybee*, 254 S.W.3d 115 (Mo. App. W.D. 2008); George L. Blum, Annotation, *Admissibility in State Court Proceedings of Police Reports as Business Records*, 111 A.L.R.5TH 1 (2003). *But see State v. Harry*, 741 S.W.2d 743, 744 (Mo. App. E.D. 1987) (upholding the exclusion of a booking sheet because there was no evidence that the entries were

based on the officers' personal observations or that the "defendant had a business duty to transmit the information to the detective").

Reports may not act as a substitute for the officer's testimony. *State ex rel. Pini v. Moreland*, 686 S.W.2d 499, 502 (Mo. App. E.D. 1984); *State v. McKinney*, 763 S.W.2d 702, 708 (Mo. App. E.D. 1989). Laboratory reports have been held admissible as business records. *State v. Hall*, 750 S.W.2d 637, 639 (Mo. App. E.D. 1988). Official arrest records, *State v. Weindorf*, 361 S.W.2d 806, 810–11 (Mo. 1962), and work house records are admissible if they meet statutory requirements, *State v. Kent*, 382 S.W.2d 606, 607 (Mo. 1964). Fingerprint cards are admissible under § 490.680, now RSMo 2000. *State v. Williams*, 797 S.W.2d 734, 739 (Mo. App. W.D. 1990).

Section 490.692, RSMo 2000, provides that business records or copies of records that would be admissible under the business record exception are admissible in evidence on affidavit of the custodian. *Narsh v. Dir. of Revenue*, 878 S.W.2d 82, 83 (Mo. App. E.D. 1994). That statute provides a sample form affidavit. Section 490.692.3. But before a party is permitted to offer business records into evidence under § 490.692, all other parties to the action must be served with copies of the records and affidavit at least seven days before the day of trial. Section 490.692.2. Compliance with these requirements must be made. *Goodloe*, 838 S.W.2d at 509.

The failure to comply with the statutory seven-day notice requirement for business records to be admitted by affidavit of the custodian under § 490.692 can render the records inadmissible. *State v. Caldwell*, 904 S.W.2d 81, 82–83 (Mo. App. W.D. 1995). Thus, when the state failed to give the required notice before introducing the defendant's driving record into evidence as a business record, the defendant's conviction for driving while revoked was reversed when there was no other evidence that the defendant's license was revoked. *Id.*

It should be noted that, unlike § 490.692, § 302.312, RSMo 2000, does not require properly certified copies of records from the Missouri Department of Revenue or Bureau of Vital Records of the Missouri Department of Health to be served on the parties seven days before trial. *See State v. Calhoon*, 7 S.W.3d 494 (Mo. App. W.D. 1999).

J. (§23.80) Declaration of Family History—Pedigree

Hearsay statements in regard to family history are usually admissible as an exception to the hearsay rule. For admissibility of a declarant's statement:

- the declarant must have been related by blood or marriage to the person of whom the declarant spoke;
- the declarant must be unavailable; and
- the statement must have been made *ante litem motem* (before the controversy) or made with no apparent motive for the declarant to falsify the facts.

Brown v. Conway, 598 S.W.2d 549, 551 (Mo. App. W.D. 1980); *Gordon v. Metro. Life Ins. Co.*, 176 S.W.2d 506 (Mo. App. W.D. 1943).

The statement may be oral or written, *Estate of Fedina v. Fedina*, 491 S.W.2d 552, 560 (Mo. 1973). Documents admissible under this exception include:

- a family Bible, *Gordon*, 176 S.W.2d 506;
- a deed or a letter, *Hemonas v. Orphan*, 191 S.W.2d 352 (Mo. App. W.D. 1945); and
- the record of a proceeding, *Woodward v. United States*, 185 F.2d 134 (8th Cir. 1950).

The subject matter of a statement or document may embrace any notable fact in the family history with no formal limitation, and it includes such things as the following:

- Marriage, *Osmak v. Am. Car & Foundry Co.*, 40 S.W.2d 714 (Mo. 1931), *but see Crawford v. Byers Transp. Co.*, 201 S.W.2d 971 (Mo. 1947) (whether the widow and the husband were legally married was a question for the jury to determine)
- Relationships generally, *Rauch v. Metz*, 212 S.W. 357 (Mo. banc 1919)
- A person's own age, *State v. Marshall*, 39 S.W. 63 (Mo. banc 1897)

- The age of other persons, *State v. Gulley*, 199 S.W. 124 (Mo. 1917)

But when age is material, a sheet of paper in a family Bible is inadmissible to establish the age of the prosecutrix if the mother or grandmother is still alive. *State v. Bowman*, 213 S.W. 64 (Mo. 1919). It has been held that a person's name is not hearsay. *State v. Valentine*, 506 S.W.2d 406, 409 (Mo. 1974).

K. (§23.81) Learned Treatises

In general, books printed by private persons or organizations, including medical books, are not admissible as substantive evidence of proof of the facts contained in them. *Kelly v. St. Luke's Hosp. of Kansas City*, 826 S.W.2d 391, 396 (Mo. App. W.D. 1992). Books or other learned treatises may be used on cross-examination for impeachment by testing the knowledge of the expert, but they become inadmissible as hearsay if used to prove facts stated in the opinions or as evidence of facts stated in the treatises. *Id.* at 396.

Handbooks and other occupational publications are often admissible into evidence if a foundation is laid showing that they are based on a reliable source or prepared for use in a trade or profession and are generally regarded in that trade or profession as trustworthy and reliable. *Baker v. Atkins*, 258 S.W.2d 16, 20–21 (Mo. App. W.D. 1953).

L. (§23.82) Curative Admissibility and Invited Error

The principle of curative admissibility and invited error provides that, when improper or incomplete evidence is presented, the adversary may sometimes answer that evidence with like evidence. *State v. Starr*, 492 S.W.2d 795 (Mo. banc 1973). "The invited error doctrine is that a party who has introduced evidence pertaining to a particular issue may not object when the opposite party introduces related evidence intended to rebut or explain." *State v. McFall*, 737 S.W.2d 748, 756 (Mo. App. S.D. 1987).

If part of the evidence is introduced by one party, the whole of that evidence, to the extent it relates to the same subject matter and concerns the specific matter opened up, may be elicited by the other party. *See*:

- *State v. Brandt*, 467 S.W.2d 948 (Mo. 1971)
- *State v. Williams*, 448 S.W.2d 865, 868–69 (Mo. 1970)

"[W]here the defendant has injected an issue into the case, the state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." *State v. Lingar*, 726 S.W.2d 728, 734–35 (Mo. banc 1987), *cert. denied*, 484 U.S. 872 (1987).

See also Chambers, 891 S.W.2d 93, 103 (Mo. banc 1994), which limited *Lingar* to holding merely that "evidence initially inadmissible (because irrelevant) may become relevant when the opponent injects an issue"; *State v. Debler*, 856 S.W.2d 641, 649 (Mo. banc 1993) ("Here, the defense merely referred to the existence of the statement. Such minimal discussion does not raise a sufficient negative inference to justify admitting the statement to rebut the alleged inference.").

The doctrine of curative admissibility has no applicability if the party seeking to use the doctrine was the party that first injected the issue into the case. *State v. Kelley*, 953 S.W.2d 73, 84 (Mo. App. S.D. 1997), *overruled on other grounds by State v. McQuary*, 173 S.W.3d 663 (Mo. App. W.D. 2005); *State v. Revelle*, 957 S.W.2d 428, 432–33 (Mo. App. S.D. 1997) (curative admissibility doctrine did not apply because the state first injected the issue of the parties' non-amicable marriage; therefore, a note written by the victim, defendant's wife, and entered as evidence was hearsay not saved by any exception, was prejudicial to defendant, and did not qualify as rebuttal evidence). Thus, the state cannot submit incompetent evidence solely to refute an issue that the defense has not yet injected into the case. *Kelley*, 953 S.W.2d 73; *Revelle*, 957 S.W.2d 428.

M. (§23.83) Prior Inconsistent and Consistent Statements

Traditionally, evidence showing a witness's prior inconsistent statements was not admissible as substantive evidence but could only be used for impeachment. *State v. Granberry*, 491 S.W.2d 528, 531 (Mo. banc 1973).

A corollary rule held that a party could not impeach its own witness in a civil or criminal trial absent a showing of surprise or that the witness was hostile. *State v. Byrd*, 676 S.W.2d 494, 502 (Mo. banc 1984). In 1985, the Supreme Court of Missouri abrogated the traditional rule against impeaching counsel's own witness with prior inconsistent statements in civil cases. *Rowe v. Farmers Ins. Co.*, 699 S.W.2d 423, 425 (Mo. banc 1985). *Rowe* also held that a prior inconsistent statement could be used as substantive evidence in a civil case if the witness was present for cross-examination. *Id.* at 425.

That same year, the Missouri legislature enacted § 491.074, now RSMo 2000.

Section 491.074 was amended, effective August 28, 2000, providing that: "Notwithstanding any other provisions of law to the contrary, a prior inconsistent statement of any witness testifying in the trial of a criminal offense shall be received as substantive evidence, and the party offering the prior inconsistent statement may argue the truth of such statement." Thus, § 491.074 is no longer limited to prosecutions under Chapter 565, 566, or 568, RSMo.

Admission of a witness's prior inconsistent statement under § 491.074 does not violate the confrontation clauses of the Missouri and federal constitutions when the witness is present in the courtroom and subject to cross-examination, *State v. Bowman*, 741 S.W.2d 10, 13 (Mo. banc 1987), and it does not violate due process or equal protection, *State v. Bible*, 750 S.W.2d 676 (Mo. App. E.D. 1988). *Accord Cal. v. Green*, 399 U.S. 149 (1970). Regarding *Bowman*, *see also State v. Wolfe*, 13 S.W.3d 248 (Mo. banc 2000), *State v. Blankenship*, 830 S.W.2d 1 (Mo. banc 1992), and *State v. Twenter*, 818 S.W.2d (Mo. banc 1991). The application of § 491.074 to a crime committed before the enactment of that section has been held not to run afoul of the prohibition on *ex post facto* laws. *State v. Belk*, 759 S.W.2d 257, 259 (Mo. App. E.D. 1988).

The only necessary foundation under § 491.074 is an inquiry as to whether the witness made the prior statement and whether the statement is true; the former common-law rule about impeachment of counsel's own witness and the "friendly/hostile" distinction as to witnesses is abolished by the statute. *Bowman*, 741 S.W.2d at 13–14. *Bowman* specifically declined to address the issue of whether inconsistent statements may be used as substantive evidence if the witness does not admit making them or declines to submit to cross-examination. *Id.* at 14 n.6.

Early on, Missouri appellate courts held that, in criminal cases, prior inconsistent extrajudicial statements of a witness could not be admitted as substantive evidence when the witness denied at trial having made the statements. *See*:

- *State v. Oliver*, 775 S.W.2d 308, 310 (Mo. App. E.D. 1989)
- *State v. Pickens*, 780 S.W.2d 355, 356 (Mo. App. E.D. 1989)

- *State v. Jennings*, 815 S.W.2d 434, 443–44 (Mo. App. E.D. 1991) (but holding that it was not necessary for the declarant to admit making the statements if from the declarant's testimony and other evidence it is established that the statements were made)

But in 1992, the Supreme Court of Missouri made it clear that "the admission of an out-of-court statement that the witness does not recall making does not violate the Confrontation Clause." *State v. Blankenship*, 830 S.W.2d 1, 12 (Mo. banc 1992) (citing *Green*, 399 U.S. 149). The Supreme Court noted that there is no prerequisite that the prior statement be supported by indicia of reliability if the declarant is available at trial for cross-examination. *Blankenship*, 830 S.W.2d at 12. If a proper foundation has been made, prior inconsistent statements are admissible, even if the witness denies having made the statement, whether or not the prior statement was recorded. *State v. Woodworth*, 941 S.W.2d 679, 690–92 (Mo. App. W.D. 1997).

There must be some real inconsistency before evidence of alleged inconsistent statements becomes competent. *State v. Sloan*, 786 S.W.2d 919, 921 (Mo. App. W.D. 1990). Whether an inconsistency exists is determined by the whole impression and effect of what has been said, and mere isolated words or phrases or an omission of detail will not suffice as a basis for the necessary contradiction. *Id.*; *Blankenship*, 830 S.W.2d at 9.

Section 491.074 does not extend to the admission of prior consistent statements, which are normally only admissible to rehabilitate an impeached witness. *State v. Ellis*, 820 S.W.2d 699, 703 (Mo. App. E.D. 1991). Prior statements consistent with the trial testimony of the witness are admissible in rehabilitation when the witness has been impeached with prior inconsistent statements or other matters tending to imply recent fabrication, *State v. Henderson*, 666 S.W.2d 882, 887–89 (Mo. App. S.D. 1984), including implication that testimony was fabricated to facilitate a plea bargain or other "deal" for the witness, *State v. Johnson*, 684 S.W.2d 581, 583–84 (Mo. App. E.D. 1984). The consistent statement should predate the inconsistent statement examination. "[U]ntil a witness is impeached, admission of prior consistent statements is improper and self-serving." *State v. Earvin*, 539 S.W.2d 615, 616 (Mo. App. E.D. 1976)*; see also*:

- *State v. Hutson*, 646 S.W.2d 822 (Mo. App. W.D. 1982) (the court found that the trial court properly excluded the testimony of a proposed defense witness who sought to rehabilitate another witness because her proposed testimony did not tend to support the other witness)

- *State v. McClendon*, 895 S.W.2d 249, 252 (Mo. App. E.D. 1995) (the consistent statement, as testified to by the attorney, was made more than a year after the prior inconsistent statement, which was made to, and tape-recorded by, an investigator for the state; the subsequent consistent statement was inadmissible as a prior consistent statement when the only other purpose for the attorney's testimony was to bolster the trial testimony of the witness)

- *Broome v. Bi-State Dev. Agency*, 795 S.W.2d 514, 518 (Mo. App. E.D. 1990)

- *Haynam v. Laclede Elec. Coop., Inc.*, 827 S.W.2d 200, 205, 207 (Mo. banc 1992)

The use of the prior consistent statement should be limited to the extent necessary to counter the subject on which the witness was impeached. *State v. Cole*, 867 S.W.2d 685, 686 (Mo. App. E.D. 1993).

A prior consistent statement that exceeds the scope of the impeachment is incompetent and inadmissible. *Id.* The prior consistent statement must be relevant to the inconsistent statement and can only be used to the extent necessary to counter the subject on which the defendant was impeached. *State v. White*, 745 S.W.2d 688, 689 (Mo. App. W.D. 1987); *State v. Mueller*, 872 S.W.2d 559, 565 (Mo. App. E.D. 1994). Thus, the use of duplicative and corroborative extrajudicial statements is substantially restricted. *State v. McMillin*, 783 S.W.2d 82, 98 (Mo. banc 1990); *see also*:

- *Cole*, 867 S.W.2d 685 (playing the tape-recorded statement in its entirety for the jury was improper bolstering in that it substantially repeated the in-court testimony of the victim's sister; in addition, the taped statement contained hearsay statements; as such, the cumulative error of improper bolstering and admission of hearsay statements resulting from playing the entire tape-recorded statement was prejudicial error and constituted grounds for reversal)

- *State v. Hutton*, 825 S.W.2d 883, 887 (Mo. App. E.D. 1992) (setting out test of whether (1) prejudice occurs by the improper admission of prior consistent statements, (2) the declarant is available for cross-examination, and (3) the statements are merely cumulative evidence)

In *State v. Seever*, 733 S.W.2d 438, 441 (Mo. banc 1987), the state first introduced a videotape and then called the victim to the stand where she gave testimony covering all the elements of the case. The statement and the testimony covered the same precise ground, resulting in an undue advantage for the state. *Id.* The Court reversed and remanded for a new trial because it could not say there was no prejudice because of sharply contrasted fact issues, including the defendant's denial. *Id.*; *see also State v. Courter*, 793 S.W.2d 386, 390–91 (Mo. App. W.D. 1990). *Seever* was superseded by statute in *State v. Skipper*, 101 S.W.3d 350 (Mo. App. S.D. 2003). Section 492.304.1, RSMo 1986, prescribed circumstances in which "visual and aural recordings of a verbal or nonverbal statement of a child when under the age of 12 who is alleged to be a victim of an offense under the provisions of chapter 565, 566 or 568, RSMo, is admissible into evidence." The statute was changed in 1992 by deleting § 492.304.1(8) and subsection 2 of the 1986 revision. New subsections 2 and 3 were enacted:

> 2. If the child does not testify at the proceeding, the visual and aural recording of a verbal or nonverbal statement of the child shall not be admissible under this section unless the recording qualifies for admission under section 491.075, RSMo.
> 3. If the visual and aural recording of a verbal or nonverbal statement of a child is admissible under this section and the child testifies at the proceeding, it shall be admissible in addition to the testimony of the child at the proceeding whether or not it repeats or duplicates the child's testimony.

Section 492.304.2 and .3, now RSMo Supp. 2007. In 2004, the age of 12 years was changed to 14 years. Section 492.304.1.

Although a prior inconsistent statement may be admitted as substantive evidence under § 491.074, when the sole evidence against a defendant in a statutory rape case was the prior inconsistent statement and at trial the prosecutrix repeatedly recanted that a crime occurred, the conviction could not be upheld without corroborating evidence. *State v. Pierce*, 906 S.W.2d 729, 735–37 (Mo. App. W.D. 1995). Under these circumstances, the criminal conviction could not be based only on the inconsistent statement. *Id.* at 736–37. But *Pierce*

is inapplicable when corroborating evidence exists to support the prior inconsistent statements on which the conviction is based. *State v. Archuleta*, 955 S.W.2d 12, 15 (Mo. App. W.D. 1997). For additional cases with sufficient corroborating evidence, see:

- *State v. Johnson*, 262 S.W.3d 257, 259 (Mo. App. W.D. 2008) ("[T]here was sufficient corroboration of [the victim]'s prior inconsistent statements presented by two witnesses and the physical evidence.")

- *State v. Duley*, 219 S.W.3d 842, 844 (Mo. App. W.D. 2007) ("Duley's conviction did not rest only on the victim's single prior inconsistent statement. The jury heard the prior inconsistent statements of six witnesses who all said that they had seen Duley shoot a gun at the party. Moreover, even if the *Pierce* rule did apply to this case, the prior inconsistent statements of each of the six witnesses strengthened and rendered more probable the truth of the others' prior inconsistent statements, hence corroborating the others' prior inconsistent statements.")

- *State v. Fields*, 181 S.W.3d 252, 256 (Mo. App. W.D. 2006) ("Ms. Vanvacter's prior statement that she saw Defendant with the crack cocaine in the car seat beside him was not the only evidence presented to prove that [the defendant] possessed or controlled the crack cocaine. As discussed, the substance was found in plain view on the front seat of [the defendant]'s car, and both women who had access to the car that night testified that the substance was not theirs. Furthermore, evidence was presented that [the defendant] was involved in drug activity and distribution.")

- *State v. Hayes*, 169 S.W.3d 613, 623–24 (Mo. App. S.D. 2005) ("[T]he questions and answers that produced S.H.'s out-of-court statement were seen and evaluated by the jury. The questioner was a Child Advocacy Center worker. The jury had the same opportunity to assess whether S.H.'s statements were maneuvered so as to result in 'an inaccurate statement' as it did to assess whether answers given to attorneys' questions at trial were maneuvered so as to result in inaccuracies. The jury had the opportunity to assess the partiality or impartiality of the questioner. . . . The videotaped statement the jury saw and heard was received as substantive evidence. § 491.074. The jury was afforded the opportunity to

> assess both the statements made during the videotaped interview and the statements S.H. made in her trial testimony and to evaluate the questioning process by which answers to questions were elicited.")

While one of the foundational requirements of *Bowman*, 741 S.W.2d at 13–14, for admission of a prior inconsistent statement is an inquiry into the truth of the statement, a § 491.074 statement is admissible regardless of the declarant's answer as to its verity. *State v. Lyons*, 951 S.W.2d 584, 594 (Mo. banc 1997). Therefore, any technical deficiency in foundation might not be prejudicial. *Id.*

N. (§23.84) Co-Conspirator's Statements

An out-of-court declaration of one conspirator made during the conspiracy is admissible in evidence against co-conspirators if it is relevant and in furtherance of the conspiracy, even if the defendant was not present and had no knowledge of the statement. *State v. Cornman*, 695 S.W.2d 443, 446 (Mo. banc 1985). *But see*:

- *State v. Hoover*, 220 S.W.3d 395 (Mo. App. E.D. 2007) (a telephone conversation was inadmissible as co-conspirator's statements when there was no demonstration of concealment or attempts to defeat the prosecution)

- *State v. Clevenger*, 733 S.W.2d 782 (Mo. App. S.D. 1987) (in reversing a defendant's conviction, the court concluded that the statements of the defendant's son, a co-conspirator in the murder, were inadmissible when they were made after termination of the conspiracy)

If the statements are admissible under this exception to the hearsay rule, the use of those statements does not deprive an accused of the right to confront witnesses against the accused. *State v. Newberry*, 605 S.W.2d 117, 125 (Mo. 1980).

If the statement was made before the formation of the conspiracy, or after the consummation of the purpose for it, it is inadmissible. *State v. Chernick*, 278 S.W.2d 741, 748 (Mo. 1955); *State v. Rayner*, 549 S.W.2d 128, 131 (Mo. App. W.D. 1977). After the termination of the conspiracy, out-of-court statements made by a co-conspirator are inadmissible against other co-conspirators. *See*:

- *State v. Jennings*, 815 S.W.2d 434, 442 (Mo. App. E.D. 1991) ("[A]ppellant's coconspirator made the statement after completion of the crimes but during a discussion with appellant and a third party who had agreed to store both the weapon used in the crimes and the money constituting the fruits of the crimes. Statements made at a time when efforts are being taken to conceal evidence and avoid exposure are properly admissible.")

- *Clevenger*, 733 S.W.2d at 784

Thus, it is impermissible for a sheriff to testify that, after talking to a co-conspirator, the defendant was arrested. *State v. Johnson*, 538 S.W.2d 73, 77 (Mo. App. S.D. 1976); *see also State v. Hurd*, 657 S.W.2d 337 (Mo. App. S.D. 1983) (when an officer discussed with the defendant about buying stolen firearms, and the next day, an older male told the officer that the guns had been taken in a burglary, that statement was determined to be proper under the co-conspirator exception).

It is also impermissible for a prosecuting attorney to state that, after conversation with an alleged co-conspirator of the defendant, a warrant was issued for the defendant's arrest. *State v. Chernick*, 280 S.W.2d 56 (Mo. 1955).

"[I]n furtherance of the conspiracy" is considered to take in acts aimed at the ultimate goal of the conspiracy, so that acts or statements occurring after the commission of the crime but before the fruition of the conspiracy are admissible against a defendant. *State v. Deyo*, 358 S.W.2d 816, 823–24 (Mo. 1962). The requirement that the act or statement be in furtherance of the conspiracy is often applied broadly, with the result that evidence somehow relating to the conspiracy comes in. But narrative statements of past events made after the termination of a conspiracy are inadmissible against a co-conspirator. *State v. Hill*, 179 S.W.2d 712 (Mo. 1944). The fact that a conspiracy has ended as far as its primary objective may be concerned does not preclude its continuance for various secondary purposes, such as disposition of fruits of the crime. When there is evidence of such a continuance, evidence of acts or declarations of a conspirator may be admissible against a co-conspirator. *State v. Finley*, 588 S.W.2d 229, 231 (Mo. App. W.D. 1979). Thus, it may be shown that any one of the co-conspirators was in possession of fruits of the crime or of the weapon or instrument with which the crime was committed. *State v. Reynolds*, 560 S.W.2d 313, 316–18 (Mo. App. E.D.

1977); *State v. Daugherty*, 631 S.W.2d 637, 643 (Mo. 1982). In addition, it may be admissible to introduce statements made at a time efforts were being made to conceal the crime or evidence of the crime and avoid exposure. *State v. Isa*, 850 S.W.2d 876, 892–93 (Mo. banc 1993); *State v. Ronimous*, 319 S.W.2d 565, 569–70 (Mo. 1959). But even if the conspiracy is continuing, statements made after the completion of the crime still must involve an effort to conceal the crime or defeat prosecution. *Jennings*, 815 S.W.2d at 442; *Clevenger*, 733 S.W.2d at 785. Statements made after the crime was consummated must further the objectives of the conspiracy. *State v. Wilson*, 812 S.W.2d 213, 215 (Mo. App. E.D. 1991).

Before co-conspirator statements are admissible, there must be independent evidence of the claimed conspiracy. *Cornman*, 695 S.W.2d 443. The state must demonstrate the conspiracy by a preponderance of the evidence. *State v. Reagan*, 654 S.W.2d 636, 640 (Mo. App. E.D. 1983). The independent evidence necessary to establish a conspiracy may be completely circumstantial. *State v. Danforth*, 654 S.W.2d 912, 919–21 (Mo. App. W.D. 1983). Proof of the conspiracy does not have to precede the hearsay statements, but the conspiracy must be later connected. *Danforth*, 654 S.W.2d at 921.

A defendant is entitled to have the case based solely on the merits of the charge against the defendant; therefore, it is usually reversible error to introduce evidence to the effect that a co-defendant has pleaded guilty or has been convicted of the same offense. *State v. Fenton*, 499 S.W.2d 813, 816 (Mo. App. S.D. 1973). Admission of such evidence violates the defendant's right to be tried on their own. *State v. McCarthy*, 567 S.W.2d 722, 724 (Mo. App. W.D. 1978). *But see*:

- *State v. Borden*, 605 S.W.2d 88 (Mo. banc 1980) (the disclosure by the state of the state's key witness's willingness to accept the state's offer for a lesser charge in exchange for favorable testimony did not taint the defendant with guilt by association)

- *State v. Olinghouse*, 605 S.W.2d 58 (Mo. banc 1980) (testimony did not refer to the disposition of any charge against the co-defendants)

It is equally impermissible to introduce evidence that a co-defendant was acquitted. *State v. Carter*, 847 S.W.2d 941, 947 (Mo. App. E.D. 1993); *State v. Hall*, 687 S.W.2d 924, 927 (Mo. App. W.D. 1985).

In cases that have found reference to the disposition of the co-defendants' charges for the same offenses to be prejudicial error, the challenged references have had two factors in common:

1. They either stated or raised a clear inference as to the disposition of the other charge.

2. They had no probative value on the charge at issue.

See, *e.g.*, *Fenton*, 499 S.W.2d 813; *State v. Aubuchon*, 381 S.W.2d 807 (Mo. 1964).

O. (§23.85) Child Witness

Section 491.075, RSMo, amended by Senate Bill 714, 94th General Assembly, 2nd Regular Session (Mo. 2008), which allows admission as substantive evidence of extrajudicial statements of a victim/witness under the age of 14 years in a prosecution commenced under Chapter 565, 566, 568, or 573, RSMo, requires the victim/witness to testify unless the child is unavailable as a witness or the court finds that the significant emotional or psychological trauma that would result from testifying in the presence of the defendant makes the child unavailable as a witness. Section 491.075.1(2)(b) and (c). The "unavailability" provision in § 491.075.1(2)(b) has been restricted to circumstances in which a child witness is either physically unavailable to testify at trial or is deemed unavailable because of lack of responsiveness on the witness stand. *See*, *e.g.*, *State v. Wideman*, 940 S.W.2d 18, 20 (Mo. App. W.D. 1997); *State v. Sanders*, 126 S.W.3d 5, 16 (Mo. App. W.D. 2003) ("[T]he evidence was sufficient to support the trial court's findings that R.S. was legally unavailable as a witness due to the serious emotional or psychological trauma which would result if she were required to testify in the presence of appellant, both during the videotaped deposition proceeding and at trial. In particular, the trial court did not make its determination based only on its own prior experience and general knowledge, but issued case-specific findings on the trauma issue only after conducting an evidentiary hearing at which five witnesses testified, each of whom was subjected to cross-examination by appellant's trial counsel.").

A child's out-of-court statement that does not fall within a firmly rooted hearsay exception is presumed inadmissible absent a showing that the circumstances surrounding the statement provide a sound basis for rebutting this presumption. *State v. Jankiewicz*, 831 S.W.2d

195, 198–99 (Mo. banc 1992). The proper forum for such a showing is a § 491.075 hearing conducted out of the presence of the jury. *Id.* *Accord State v. Russell*, 872 S.W.2d 866, 871–72 (Mo. App. S.D. 1994); *Idaho v. Wright*, 497 U.S. 805 (1990) (hearsay statements that do not fall within a firmly rooted exception are presumptively unreliable and inadmissible).

In determining whether a child victim's out-of-court statement regarding an alleged sex offense admitted under § 491.075 is sufficiently reliable to overcome the presumption against admission of hearsay, courts must examine whether the child's knowledge of the subject matter is unexpected in a child of similar age. *State v. Redman*, 916 S.W.2d 787, 792 (Mo. banc 1996); *N.J.K. v. Juvenile Officer*, 139 S.W.3d 250 (Mo. App. W.D. 2004); *State v. Porras*, 84 S.W.3d 153 (Mo. App. W.D. 2002). In assessing content reliability of the hearsay statements, courts should not place undue emphasis on the particular vocabulary used by the child but must determine whether knowledge of the subject matter described by the child is unexpected of a child of similar age. *Redman*, 916 S.W.2d at 789, 792.

Section 491.680, RSMo 2000, provides for the admission as substantive evidence of videotaped depositions of an alleged child victim (person under 17 years of age) in Chapter 565, 566, or 568, RSMo, prosecutions.

Section 491.685, RSMo 2000, provides that, on motion of the state, the court may exclude the defendant from the child victim deposition proceedings.

The Supreme Court of Missouri has held that admission of such a deposition in accordance with § 491.680 violates a defendant's right to confrontation in the absence of evidence that the minor child is unavailable because of emotional and psychological trauma that would result from testifying in open court. *State v. Sanchez*, 752 S.W.2d 319 (Mo. banc 1988); *see also*:

- *State v. Naucke*, 829 S.W.2d 445 (Mo. banc 1992), *cert. denied*, 506 U.S. 960 (1992) (the trial court's finding that testifying either in open court or in the defendant's presence would cause emotional harm to the victim such that the victim was rendered unavailable)

- *State v. Griffin*, 202 S.W.3d 670 (Mo. App. W.D. 2006)

- *State v. Bewley*, 68 S.W.3d 613 (Mo. App. S.D. 2002)

- *State v. Wyble*, 211 S.W.3d 125 (Mo. App. W.D. 2007) (there was no violation of the Sixth Amendment Confrontation Clause by allowing the victim's grandmother, the victim's mother, and a social worker to testify about the abuse instead of the child testifying in person)

In *Naucke*, 829 S.W.2d at 458, the Court ruled that §§ 491.680 and 491.685 do not violate a defendant's right to confrontation as guaranteed by article I, § 18(a), of the Missouri Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, applying the standards set out in *Maryland v. Craig*, 497 U.S. 836 (1990). *See also United States v. Gigante*, 166 F.3d 75 (2nd Cir. 1999) ("the closed-circuit television procedure utilized for [a child]'s testimony preserved all of [the] characteristics of in-court testimony": (1) he was sworn; (2) subject to full cross-examination; (3) testified in full view of the jury, court, and defense counsel; and (4) gave testimony under the eye of the defendant; therefore, the defendant did not forfeit any constitutional protections).

Section 492.304, RSMo Supp. 2007, provides for the admission of visual and aural recordings of a child under the age of 14 years. If the visual and aural recording of a verbal or nonverbal statement of a child is admissible under this section and the child testifies at the proceeding, it is admissible in addition to the testimony of the child at the proceeding regardless of whether it repeats or duplicates the child's testimony.

The Supreme Court of Missouri has held that admission of a videotaped interview with a psychologist, in accordance with § 492.304, does not violate a defendant's right to confrontation because the statute requires the child/witness to be available to testify at trial. *State v. Schaal*, 806 S.W.2d 659, 663 (Mo. banc 1991), *cert. denied*, 502 U.S. 1075 (1992); *State v. Mann*, 35 S.W.3d 913 (Mo. App. S.D. 2001). In *Schaal*, the child was in the courtroom but was not called to testify. *Schaal*, 806 S.W.2d at 663. The Court further held that this provision does not violate an accused's due process rights by placing the burden on the defendant because the statute is neutral on which party should call the witness. *Id.* at 663–64.

XI. (§23.86) Confessions and Admissions

For an admission or confession to be admissible, there must be a determination that the confession was voluntary after the defendant was advised of the defendant's constitutional rights. *State v. Anderson*, 800 S.W.2d 465, 467 (Mo. App. E.D. 1990). The test for voluntariness of a confession is whether, under the totality of the circumstances, the defendant was deprived of free choice to admit, deny, or refuse to answer questions and whether physical or psychological coercion was of such a degree that the defendant's will was overcome when the confession was made. *State v. Wilkinson*, 861 S.W.2d 746, 750 (Mo. App. S.D. 1993); *State v. Loazia*, 829 S.W.2d 558 (Mo. App. E.D. 1992). The voluntariness of a confession depends on the absence of police overreaching, not on the mental ability of the defendant. *State v. Debler*, 856 S.W.2d 641 (Mo. banc 1993); *State v. Bittick*, 806 S.W.2d 652, 658 (Mo. banc 1991).

In determining voluntariness, relevant facts include the following:

- Age
- Experience
- Intelligence
- Gender
- Lack of education
- Infirmity
- Susceptibility to coercion

State v. Clark, 859 S.W.2d 782, 788–89 (Mo. App. E.D. 1993). The state bears the burden of showing the voluntariness of the confession. *State v. McVay*, 852 S.W.2d 408, 413 (Mo. App. E.D. 1993); *State v. Rank*, 849 S.W.2d 230, 232 (Mo. App. W.D. 1993). Section 600.048, RSMo 2000, requires that jails and other detention facilities post, in a conspicuous place, a notice informing suspects of their rights to counsel. This statute has been interpreted not to establish any substantial rights greater than those in *Miranda v. Arizona*, 384 U.S. 436 (1966). *Bittick*, 806 S.W.2d at 656.

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Chapter 24

INSTRUCTIONS

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I. (§24.1) Introduction

Counsel who does not know the law on which a case will be submitted cannot intelligently advise a client on plea negotiations or decide what evidence or testimony to offer at trial. The early preparation of jury instructions is the most effective way for counsel to focus the investigation and trial strategy. Procrastination can cause counsel to overlook potential problems with the evidence or the theory of the case, which could be to the client's detriment. The preparation of jury instructions, though not especially difficult, is time consuming and requires meticulous attention to detail. Counsel should prepare this phase of trial at the earliest possible time.

Since January 1, 1974, Missouri has used pattern instructions in criminal cases. This means that much of counsel's work has already been done by the Supreme Court's Committee on Charges and Instructions, which is responsible for drafting and periodically making necessary revisions to *Missouri Approved Instructions—Criminal* (S. Ct. Mo. 3rd ed.), now in its third printing and commonly known as MAI-CR 3d. Each instruction printed in the book is followed by Notes on Use, which contain directions on the use of that particular instruction, and there is a chapter called, "How to Use This Book." Counsel must become familiar with these. Except for brief references to basic principles, this chapter will not repeat substantial portions of the MAI-CR 3d. Instead, the author will highlight matters that are important to an understanding of legal issues regarding jury instructions and point out aspects of the most recent revisions to MAI-CR 3d.

II. (§24.2) General Statutory and Constitutional Provisions

In a criminal case, the trial court is required to "instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving the verdict, which instructions shall include a definition of the term reasonable doubt." Section 546.070(4), RSMo 2000. A verdict-directing instruction authorizing a conviction must require the jury to find beyond a reasonable doubt every fact

necessary to constitute the essential elements of the crime charged. *State v. Jones*, 865 S.W.2d 658 (Mo. banc 1993). The due process clause of the Fourteenth Amendment requires that the accused be presumed innocent and that the state bear the burden of proving guilt beyond a reasonable doubt. *Coffin v. United States*, 156 U.S. 432 (1958); *In re Winship*, 397 U.S. 358 (1970). The due process clause also requires that the jury be instructed in accordance with these principles. *Taylor v. Ky.*, 436 U.S. 478 (1978). The due process clause is violated by instructions that have the effect of relieving the state of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *See, e.g.*:

- *Francis v. Franklin*, 471 U.S. 307 (1985) (finding a due process violation when the jury was instructed that the defendant "is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted")

- *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (finding a due process violation when the law and instructions required the defendant in a homicide case to prove by a fair preponderance of the evidence that "he acted in the heat of passion on sudden provocation")

Rose v. Clark, 478 U.S. 570 (1986), held unconstitutional a jury instruction that, "All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption."

Counsel must be familiar with this constitutional and statutory framework to adequately fulfill counsel's obligation to the client and the court. Even though the use of MAI-CR 3d is mandated under Rule 28, the Rule recognizes that there may be instances in which there is no applicable MAI-CR form or the MAI-CR form must be modified. Rule 28.02(d). MAI-CR 3d also contains the following Reservations: "The Court has adopted these proposals without judicially deciding or foreclosing any legal, constitutional, procedural, instructional, or other issues that may arise in cases even though the procedures, instructions, and Notes on Use adopted by the Court are followed and used." MAI-CR 3d ii, iii (9-1-01). Therefore, in addition to becoming familiar with MAI-CR 3d and the Notes on Use, counsel must be thoroughly familiar with constitutional safeguards and the substantive law of the case.

III. (§24.3) Counsel's Function—Preparing for the Instruction Conference

Although § 546.070.4, RSMo 2000, explicitly places on the trial court the responsibility to instruct the jury, counsel for the state and counsel for the defendant each have specific duties. The court looks to counsel for the state to prepare instructions in the 300, 302, and 304 Series, along with the verdict director and any mandatory definitions. The court relies on defense counsel for written instructions on the law with respect to the defense in the case. The court is required under Rule 28.02(e) to conduct an instruction conference at the close of the evidence. At this time, or at such earlier time as the court may direct, counsel for each party must submit written instructions to the court. A party failing to tender a written instruction may waive the right to have the jury instructed on a particular point of law, so it is imperative that counsel be prepared to tender an instruction on any matter counsel wants submitted, even if the duty traditionally falls on opposing counsel. For example, a defense attorney who wishes to have the jury instructed on a lesser-included offense must be ready to tender a verdict director and verdict forms on the lesser offense, even though the prosecutor is generally expected to prepare those.

The form of the tendered instructions is set out in Rule 28.02(b). The court gets an original and a copy of each instruction, and each party get a copy. Each copy (but *not* the original) is marked "MAI-CR _____" or "MAI-CR _____, Modified" or "Not in MAI-CR _____" as the case may be. The MAI-CR edition and applicable instruction number should be filled in the blank. Although not required by the Rule, it is common to identify the party offering the instruction by including on the copies the phrase "offered by (defendant or plaintiff)." At the conclusion of the instruction conference, the court numbers consecutively the instructions to be given to the jury. Instructions and verdict forms that are refused "shall be so marked by the court, identified alphabetically, filed, and shall be kept as a part of the record of the case." Rule 28.02(e).

As mentioned in the introduction, preparation for the instruction conference must begin at the earliest possible time. The author suggests beginning with the receipt of the charging document and performing the following exercise. Lay the indictment or information side-by-side with

the statute defining the offense and the applicable MAI-CR verdict director and ask these questions:

- Is the charging document or pattern instruction different from the statute in any respect?
- Does the pattern instruction submit theories of guilt not explicitly set out in the statute or the charging document?
- What is the mental state required for the offense?
- Does the instruction require a finding on the appropriate mental state?
- What evidence exists that supports or negates each element of the offense?

The answers (or lack of answers) to these questions will alert counsel to potential issues with respect to the sufficiency of the indictment or information, the necessity for a bill of particulars, whether the opposing party's submitted verdict director is supported by the pleadings, and whether the MAI-CR verdict director is defective or should be modified.

The next step is for counsel to review the Notes on Use under the verdict director. The Notes contain specific directions on the use and modification of each instruction. Counsel should review the Notes on Use to determine:

- what should or should not be included in the verdict director;
- whether it should specifically cross-reference a particular defense; and
- whether certain definitions may or must be given.

Defense counsel should consider submitting converse instructions or instructions in the 306, 308, and 310 Series, or instructions in the Notes on Use under the applicable verdict director, that highlight certain matters favorable to the defense. Counsel must also consider submitting instructions in the 306, 308, and 310 Series that advise the jury on evidentiary matters. Finally, counsel should consider whether there are matters of law that the jury should be instructed on but that are not included in MAI-CR. These matters are treated in more detail below.

Counsel's duty to meticulously prepare written instructions before the instruction conference is demonstrated in recent cases finding defense counsel ineffective for failing to submit instructions in proper form. In *Patterson v. State*, 110 S.W.3d 896 (Mo. App. W.D. 2003), trial counsel in a robbery case was held to be ineffective for failing to submit in proper form an instruction submitting the lesser-included offense of stealing.

Defense counsel's proposed instruction, which attempted to submit the lesser offense of stealing, hypothesized that the defendant "forcibly stole" money from the victim, which more accurately described conduct constituting second degree robbery. The trial court refused to give the jury defense counsel's proposed instructions and did not submit any lesser-included offense. The court of appeals held that counsel's submission of proposed instructions belied any claim of trial strategy on counsel's part, particularly in light of counsel's argument that the jury could find from the record that the defendant did not use or threaten to use physical force against anyone. Relying on *Perkins v. State*, 77 S.W.3d 21, 25 (Mo. App. E.D. 2002), the court found trial counsel ineffective for failing to request a lesser-included offense instruction that was warranted by the evidence. Because the evidence of the threat of physical harm was not overwhelming, the court found a reasonable probability that a juror might have determined that there was no threat of physical force in the stealing, and therefore the defendant established that he was prejudiced by his trial counsel's submission of a defective lesser-included offense instruction.

See also *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002), a capital case in which defense counsel's non-MAI penalty phase instructions were rejected by the trial court and counsel had not prepared standard MAI instructions as a fall-back position. The appropriate instruction submitting mitigating circumstances was downloaded from the court's computer, but the last paragraph was inadvertently omitted. The Court found that Deck was prejudiced by counsel's submission of a defective instruction because "[t]he missing paragraphs of the instruction told the jury about the need to balance this mitigating evidence with the aggravating circumstances focused on by the State, and what evidence the jury could consider in deciding mitigation." *Id.* at 430.

IV. (§24.4) Mechanics of MAI-CR 3d

Like the first and second editions of MAI-CR, MAI-CR 3d is divided into series. Instructions in each series share common characteristics. Instructions in the 300 Series are given orally but not in writing. MAI-CR 3d 300.02, 300.04, and 300.06 are given in every case at the times indicated in the Notes on Use. MAI-CR 3d 300.20 is given only when an expert witness testifies as to statements of the accused during a mental examination.

Instructions in the 302 Series must be given in all trials orally and in writing. The court generally expects the state to have the standard instructions in the MAI-CR 3d 300 and 302 Series prepared in writing before the commencement of voir dire. Note that MAI-CR 3d 302.01 through 302.04, inclusive, must be numbered as instructions one through four, and instructions MAI-CR 3d 302.05 and 302.06 will always be next to last and last, respectively. Other instructions may be required by Notes on Use to be given in a particular order.

Other series include the following:

- 304 Series, General Verdict Directing Forms, Defenses, and Verdict Mechanics
- 306 Series, Instructions Required Whether Requested or Not
- 308 Series, Instructions Required if Requested by Defendant
- 310 Series, Instructions Required if Requested by State or Defendant
- 312 Series, Instructions After Deliberation
- 313 Series, Homicides (Before August 28, 2001)
- 333 Series, Definitions

Each series between 313 and 333 contains pattern verdict-directing instructions, which are grouped together to correspond with the chapter of the Missouri Criminal Code defining the offense—for example, the 320 Series deals with Sexual Offenses under Chapter 566, RSMo.

Note: The effective date of each instruction and accompanying Notes on Use is set out in the upper left-hand corner of each page. The latest modifications may be obtained from:

Supreme Court Publications
P.O. Box 448
Jefferson City, Mo, 65102
telephone number (573) 751-7337

When updating a set of MAI-CR 3d, do not discard the old pages that are superseded by the new modifications; keep them in the

back of Volume 3. The former instructions may be needed in cases that occur before the effective date of certain statutes.

The date of the offense or the trial may affect which instruction or form of instruction must be given.

MAI-CR 3d contains a section entitled "Effective Dates," which sets out the general rule that MAI-CR 3d must be used for all trials that occur after January 1, 1987. MAI-CR 3d iii (1-1-05). It also sets out the corresponding rule that the jury must be instructed in accordance with the substantive law in effect at the time of the offense. If the offense occurred before January 1, 1987, and the substantive law was different than that reflected in MAI-CR 3d, the applicable instruction from MAI-CR or MAI-CR 2d would be given as to that particular point of law; MAI-CR 3d forms would still be used for all other substantive and procedural matters. *See, e.g.*, *State v. Anding*, 752 S.W.2d 59 (Mo. banc 1988). A similar situation will occur when the legislature has changed the substantive law with respect to an offense but the instruction committee has not yet published appropriate revisions. Until MAI-CR 3d instructions are published, counsel will have to draft appropriate submissions in accordance with Rule 28.02(d).

As noted in the preceding section, the prosecutor is generally charged with the responsibility of preparing the standard instructions that are given in every case. Each of the instructions in the MAI-CR 3d 300, 302, and 304 Series submits important principles, including the burden of proof, the presumption of innocence, and jury unanimity, so an oversight can have serious consequences. In *State v. Goucher*, 111 S.W.3d 915 (Mo. App. S.D. 2003), the failure to submit MAI-CR 3d 302.05, instructing the jury that its verdict as to guilt or innocence must be unanimous, was held to be plain error requiring a new trial. Because no other instruction told the jury that it must be unanimous, the court found that the omission constituted "structural error," or "error per se," because the defendant could have been convicted on a bare majority vote of the jury. It is important to note that the jury in the case was not polled; had a poll revealed a unanimous verdict, the error would clearly have been harmless.

A. (§24.5) Verdict Director

The central law of the case is submitted in the verdict-directing instruction, which must set out each distinct proposition that the state must prove or disprove. All legal defenses must logically relate to the offense charged, either by way of negating one or more elements of the

offense or by excusing or mitigating the conduct or mental state charged in the verdict director.

When there is an appropriate verdict-directing instruction in the MAI-CR 3d 313 Series through the 332 Series, that form should be used. If there is no applicable form in those series, then MAI-CR 3d 304.02 will be used as a general format. This occasionally occurs with non-code offenses or when MAI-CR 3d has not yet been modified for new legislation. The elements of the offense that are included in the verdict director are limited not only by the statute defining the offense but by the charging document as well. *See, e.g.*, *State v. Pope*, 733 S.W.2d 811 (Mo. App. W.D. 1987).

Missouri law requires a culpable mental state for most crimes. If the statute creating an offense fails to specify a mental state, § 562.021.3, RSMo 2000, provides that "a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly . . . ." The exception to this rule is found in § 562.026, which provides:

> A culpable mental state is not required:
> (1) If the offense is an infraction and no culpable mental state is prescribed by the statute defining the offense; or
> (2) If the offense is a felony or misdemeanor and no culpable mental state is prescribed by the statute defining the offense, and imputation of a culpable mental state to the offense is clearly inconsistent with the purpose of the statute defining the offense or may lead to an absurd or unjust result.

In 1993, the legislature repealed then § 562.021.2, RSMo, which stated:

> Except as provided in section 562.026 if the definition of an offense does not expressly prescribe a culpable mental state, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly or recklessly, but criminal negligence is not sufficient.

This resulted in much confusion. The Supreme Court of Missouri made it clear that the repeal of § 562.021.2 did not dispense with a culpable mental state requirement for those offenses. Instead, it required courts to carefully examine the statutory scheme to determine the appropriate mental state, which must then be properly set out in the verdict director as an element of the offense. *State v. Hatton*, 918 S.W.2d 790, 794 (Mo. banc 1996) (finding a culpable mental state of knowingly required for the offense of distributing cocaine near public housing under § 195.218, RSMo Supp. 2004).

In *State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997), the Court concluded that, although § 195.223.2, now RSMo Supp. 2004, creating the offense of drug trafficking, specifies no mental state, the prosecution must prove that the defendant acted knowingly. To determine what mental state is required, the Court looked to similar offenses. "The more logical analysis of trafficking in the second degree is to conclude that overlapping versions of the same crime have the same culpable mental state—knowledge." *Carson,* 941 S.W.2d at 521. The lesser offense, possession of drugs under § 195.202, RSMo 2000, requires the defendant to act knowingly. The Court concluded that it would be illogical for the more serious offense of trafficking to have a lesser culpable mental state. *Carson,* 941 S.W.2d at 522. Because Carson's defense was that he didn't know the two packages of cocaine were in his luggage, he was prejudiced by the submission of a lesser mental state, and a new trial was required. *Id*. at 523. The Court urged the legislature to "promptly address this confusion" created by the repeal of § 562.021.2. The legislature responded to the Court's suggestion by restoring the current version of § 562.021.3 in 1997.

The verdict director must be consistent with the charging document; an instruction at variance with the charge is improper. *State v. Garrette*, 699 S.W.2d 468 (Mo. App. S.D. 1985). Variance between the verdict director and the indictment or information will result in reversal of the conviction if a new and distinct offense from that charged is submitted to the jury. *State v. Newbold*, 731 S.W.2d 373 (Mo. App. W.D. 1987). In *State v. Marks*, 721 S.W.2d 51 (Mo. App. W.D. 1986), the court noted that "the variance between the Information and the instruction resulted in the statement of two different offenses . . . and 'constructively amended' the Information." In *Marks*, the court even noted that this development abridges a defendant's constitutional entitlement to a unanimous jury verdict for conviction in a criminal case under article I, § 22(a), of the Missouri Constitution and the Sixth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment. Simply stated, a defendant cannot be tried on charges that are not made in the information or indictment. *See United States v. Yeo*, 739 F.2d 35 (8th Cir. 1984). It is also error to give separate verdict-directing instructions that would authorize multiple convictions for a single offense. For example, the prosecuting attorney may not submit separate instructions for the simultaneous theft of an automobile and items within the automobile. *State v. Stone*, 731 S.W.2d 466 (Mo. App. S.D. 1987). When a crime can be committed by any of several methods, the information or indictment must charge one or more of the different methods, and the method submitted in the verdict-directing instruction must be among those alleged in the information. *State v.*

King, 747 S.W.2d 264 (Mo. App. E.D. 1988). Likewise, the offense must be submitted or defined in accordance with a bill of particulars. *State v. Moseley*, 735 S.W.2d 46 (Mo. App. W.D. 1987).

The importance of conforming the verdict director to the charge and the evidence was illustrated in *State v. Weekley*, 967 S.W.2d 190 (Mo. App. S.D. 1998). Weekley was charged with stealing two trucks. The information charged him in two counts and identified the truck in each count by a vehicle identification number (VIN). The verdict director for each count tracked the VIN numbers charged in the information. Unfortunately, the state neglected to introduce evidence of the VIN for the trucks that were stolen and eventually recovered. A perplexing problem arose when Weekley was acquitted on one count and convicted on the other. The failure to prove the VIN numbers of the trucks made it impossible to determine which truck the jurors believed Weekley stole. The court reversed the conviction because "one of the propositions hypothesized in the verdict-directing instruction was utterly without evidentiary support." *Id*. at 193. Further, "the double jeopardy clause of the Constitution of the United States forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster at the first trial." *Id*. at 194.

It is extremely convenient that MAI-CR 3d is available in electronic format. But counsel should be careful to avoid common hazards inherent in the use of word processors. In *State v. Shatto*, 786 S.W.2d 232 (Mo. App. W.D. 1990), the defendant was charged with Count I, interfering with an arrest, and Count II, resisting arrest. At the close of the evidence, the court sustained a motion for judgment of acquittal as to Count I, and Count II was submitted to the jury. But the state's verdict director, although setting out the elements of resisting arrest, instructed the jury to assess and declare punishment if the jury found the defendant guilty "under Count II of interfering with an arrest." The court, citing *State v. Oliver*, 720 S.W.2d 45 (Mo. App. S.D. 1986), noted that the burden of showing that a deviation from the MAI-CR standard instruction was not prejudicial is on the party deviating from the approved instruction. The court found that the instruction was confusing and misleading and reversed and remanded for a new trial.

1. (§24.6) Punishment

Defendants with no prior felony convictions have a statutory right to jury sentencing. Section 557.036.4, RSMo Supp. 2004. But § 557.036.4(2) provides that the court can sentence the defendant if the jury has found the defendant guilty but cannot agree on

punishment. MAI-CR 3d 305.07 must be given to the jury when the court has determined that the jury has deadlocked on the issue of punishment. That instruction informs the jury that it is their "primary duty and responsibility" to determine guilt or innocence and to assess punishment.

When a defendant is subject to jury sentencing, the trial is divided into two stages. Section 557.036.2. In the first stage, the jury decides whether the defendant is innocent or guilty of the charged offenses. If the defendant is found guilty, a second stage of trial commences on the question of punishment. Each side is permitted, but not required, to present evidence on the defendant's background and character, after which the jury decides the defendant's sentence within the statutory range. Section 557.036.3. The bifurcated trial procedure appears to apply to both felonies and misdemeanors.

The court is required by § 557.036.3 to instruct the jury as to the range of punishment for the offense and to assess and declare punishment unless the defendant, before voir dire, files a written request that the court assess punishment, or unless the state pleads and proves that the defendant is a prior, persistent, or dangerous offender under § 558.016, RSMo Supp. 2004, and the offense being submitted is a felony. *State v. Meeks*, 734 S.W.2d 282 (Mo. App. W.D. 1987). MAI-CR 2d 304.02 contains a submission for A, B, C, and D felonies and A, B, and C misdemeanors and infractions. For non-code offenses, punishment alternatives should be submitted in the same general format as for code offenses.

When a statute has the effect of increasing the penalty for an offense or expanding the definition of an offense, the ex post facto clause of article I, § 9, of the United States Constitution and article I, § 13, of the Missouri Constitution prohibits application of the statute to any offense that occurs before the effective date of the new law. *See, e.g.*, *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988). Counsel should therefore be very careful to use the verdict-director instruction, both as to the substance of the offense and as to punishment, that reflects the law that was in effect at the time of the offense. Furthermore, the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment requires that any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Apprendi v. N.J.,* 530 U.S. 466 (2000).

An important exception to the rule is set out in § 1.160, RSMo 2000, which provides that "if the penalty or punishment for any offense is reduced or lessened by any alteration of the law creating the offense, the penalty or punishment shall be assessed according to the amendatory law." Effective August 28, 1989, Chapter 195 was substantially overhauled, and many drug offenses were brought within the code for purposes of assessment of punishment. Several categories of sale or possession of controlled substances that had carried maximum sentences as high as 20 years or life were redefined as class C felonies, reducing the maximum sentence to 7 years. The defendant is entitled to be sentenced under the lower range of punishment if the defendant's conviction is not yet final at the time the amendment becomes law. Thus, in *State v. Pena*, 784 S.W.2d 883 (Mo. App. W.D. 1990), the defendant was entitled to have his case remanded for re-sentencing under the new statute, which went into effect while his case was pending on appeal. Although sentencing a defendant under the wrong range of punishment is plain error, which will entitle the defendant to a new sentencing hearing, *State v. Wommack*, 803 S.W.2d 170 (Mo. App. S.D. 1991), the question of whether the defendant is entitled to a new trial when the jury is instructed on the wrong range of punishment depends on whether the defendant is prejudiced under the facts of the particular case. *Cf. State v. Wright*, 797 S.W.2d 811 (Mo. App. W.D. 1990); *State v. Cline*, 808 S.W.2d 822 (Mo. banc 1991). See also *Searcy v. State*, 784 S.W.2d 911 (Mo. App. E.D. 1990), granting relief to a person sentenced to 40 years on second degree murder after § 565.021, now RSMo 2000, changed the range of punishment for that offense to 10 to 30 years or life.

Many offenses and offenders are now subject to mandatory parole eligibility requirements. The Southern District of the Court of Appeals recently held that defense counsel was not ineffective for failing to request that the jury be told that the defendant would be required to serve 85% of a sentence imposed for the offense of second degree murder. *Deckard v. State*, 110 S.W.3d 891 (Mo. App. S.D. 2003).

In *Ring v. Arizona*, 536 U.S. 584 (2002), the United States Supreme Court held that the Sixth Amendment entitles "[c]apital defendants . . . to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589. In *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), the jury was unable to reach a verdict on the issue of punishment, deadlocking at 11 to 1 in favor of life. Under § 565.030.4, now RSMo Supp. 2004,

the trial court made the necessary findings and sentenced Whitfield to death. Finding that Whitfield had a constitutional right to have a jury determine facts rendering him eligible for the death penalty, the Court recalled its mandate, set aside Whitfield's death sentence, and re-sentenced Whitfield to life imprisonment without eligibility for probation, parole, or release except by act of the Governor. *Whitfield* and *Ring* have obvious implications for penalty phase instructions. Language implying that the jury can pass the buck to the trial judge on sentencing must be deleted and replaced with language advising jurors that the duty to make the findings leading to life or death rests exclusively with them.

2. (§24.7) Cross-Referencing Defenses

The verdict director must cross-reference relevant defenses. Instructions that purport to cover the whole case but that entirely ignore a defense that is supported by the evidence constitute reversible error. *State v. Barnes*, 714 S.W.2d 822 (Mo. App. W.D. 1986). Special negative defenses must be cross-referenced in the manner described in MAI-CR 3d 304.02 Notes on Use 11. That note also lists the special negative defenses that are included in MAI-CR 3d. Affirmative defenses are cross-referenced in the manner described in MAI-CR 3d 304.02 Notes on Use 13. There is a useful chart in MAI-CR 3d 304 Series 304-60–304-63 that outlines affirmative defenses and special negative defenses, and the circumstances and method of submission. It also references statutes and prior MAI-CR 2d instructions. The MAI-CR 3d 304 Series also addresses the mechanics of verdict-directing instructions in trials involving multiple counts, multiple defendants, or accomplice liability.

2. (§24.8) Accomplice Liability

Special problems arise when the jury is being asked to convict the defendant as an accomplice. By statute, the defendant is liable for an offense only if the defendant has the required "culpable mental state" for that offense. Section 562.016, RSMo 2000. To be responsible as an accomplice, the defendant must act "with the purpose of promoting the commission of an offense . . . ." Section 562.041(2), RSMo 2000. MAI-CR 3d 304.04 is somewhat vague on this point. It requires the jury to first find whether the offense was committed by *either* the defendant or another *and* that the defendant aided, encouraged, or acted together with another person for "the purpose of promoting or furthering the commission of that

[*name of offense*]." Suppose defendant A drove defendant B to a store, intending to wait by the door while defendant B stole merchandise. While in the store, defendant B got into a fight with the shop keeper and struck him while fleeing with the goods. Defendant B thereby elevated the offense to robbery, second degree. Under MAI-CR 3d 304.04, will the jury find defendant A responsible for stealing or second degree robbery? Under the statute, it is clear that defendant A would be guilty of stealing. Under MAI-CR 3d 304.04, it seems the jury could go either way, even though the Notes on Use recognize that, "In order to be guilty of an offense based upon the conduct of another, the accessory must have *both* the purpose to aid the commission of an offense *and* whatever culpable mental state is required for the offense." MAI-CR 3d 304.04, Notes on Use 7(b) (emphasis added). Defense counsel should consider drafting an appropriate converse instruction to clarify the jury's responsibility. *See* §24.10, *infra.* In no event, however, may the jury be instructed on accomplice liability with respect to any proposition in the penalty stage of a capital trial. *State v. Isa*, 850 S.W.2d 876 (Mo. banc 1993).

This ambiguity is especially troublesome in homicide cases. For this reason, in first degree murder cases language must be included in the instruction that tells the jury that it must find, beyond a reasonable doubt, that the defendant personally deliberated on the murder. MAI-CR 3d 304.04 provides detailed directions for adapting the instruction to cover the following situations:

- When the conduct elements of the offense are committed entirely by another person or persons
- When the defendant and another or others are joint actors
- When it is not clear whether the conduct elements were committed by the defendant or another person
- When the defendant is personally responsible for the conduct of another

Each situation requires a somewhat different submission. MAI-CR 3d 304.04 Notes on Use 5. In no event, however, may the defendant's accessory liability be based only on conduct committed *after* the commission of the offense. On request of the defendant, the jury must be so instructed. MAI-CR 304.04 Notes on Use 8. Also note that when applicable, the verdict director submitting accessory liability must cross-reference the affirmative defense of abandonment. *Id.*

A potential problem remains in the language of the instructions. Under §§ 562.036 and 562.041, RSMo 2000, accessory liability is based on conduct that "aids or attempts to aid" another in the commission of an offense. But the instruction permits a finding of guilt when the defendant merely "encourages" another to engage in criminal conduct. MAI-CR 304.04 Notes on Use 8.

Principles of accessory liability can be very confusing to jurors, so care must be taken in drafting the verdict director submitting accomplice liability. The Notes on Use for MAI-CR 3d 304.04, submitting accomplice liability, observe that there are four common situations in which the defendant's liability is based in part on liability for the conduct of some other person:

1. The defendant committed no conduct elements of the offense and is liable solely on the basis of aiding the other person or persons.
2. The defendant and the other person(s) jointly committed the offense.
3. The evidence is not clear or conflicts as to whether the defendant simply aided or acted jointly by committing some or all of the conduct elements of the offense.
4. The defendant committed all of the conduct elements of the offense, and someone else aided or acted with the defendant.

State v. Thompson, 112 S.W.3d 57, 68 (Mo. App. W.D. 2003); MAI-CR 3d Notes on Use 4.

Various forms of the accomplice liability instructions are appropriate in each of the above situations. Be aware, however, that the evidence must support the form of submission selected. Thus, if there is no evidence that the defendant personally engaged in the conduct charged so that the defendant's liability is based solely on a theory that the defendant aided or encouraged another person or persons, it is inappropriate to submit the principle criminal conduct as being committed by "the defendant or other persons." While such erroneous submissions have been held to be harmless error, *State v. Cox*, 820 S.W.2d 532, 536 (Mo. App. W.D. 1991), prejudicial error was found in *Thompson* because, under the somewhat complicated facts in that case, the disjunctive submission of accessory liability in violation of the Notes on Use could have resulted in the jury finding Thompson guilty without unanimously finding all the constituent elements of the crime.

B. (§24.9) Definitions

A change between MAI-CR 2d and MAI-CR 3d is in the treatment of definitions. Under MAI-CR 2d, definitions were always submitted as a separate instruction. Under MAI-CR 3d, definitions are often required to be part of the instruction that uses the term being defined. For example, MAI-CR 3d 306.06, submitting the defense of self-defense, contains a paragraph defining "reasonable belief" and must also be modified to define "serious physical injury" if that term is used. The need for definitions arises most frequently in verdict-directing instructions. Counsel should always check the Notes on Use under each pattern instruction to determine whether certain terms may be or must be defined. Occasionally the definition of a technical term is necessary to fully instruct the jury on all relevant and material matters of law. *State v. Brokus*, 858 S.W.2d 298 (Mo. App. E.D. 1993); *State v. Ogle*, 627 S.W.2d 73 (Mo. App. S.D. 1981); *State v. Seddens*, 643 S.W.2d 302 (Mo. App. E.D. 1982).

There are a few specific rules that counsel should note. It is error to fail to give a definition that is required by the Notes on Use under any instruction. Definitions that are permitted but not mandatory under the Notes on Use must be given at the request of either party or may be given on the court's own motion. The definition must be given as it appears in MAI-CR 3d 333.00, except that no definition should contain portions not applicable to the facts of the particular case. If a definition is required or permitted, but the definition is not contained in MAI-CR 3d 333.00, counsel should draft an appropriate instruction. This will most frequently occur when a particular crime should be defined, but no definition appears in MAI-CR 3d 333.00. Note F under MAI-CR 3d 333.00 appears to forbid the definition of a term unless it is specifically required or permitted by the Notes on Use under the instruction containing the term. If the jury requests the definition of such a term, Note F under MAI-CR 3d 333.00 suggests that the court reply that the term has "its common and generally understood meaning." Counsel should nevertheless request definitions that counsel feels are necessary to the jury's understanding of the case. Several verdict-directing instructions specify a mental state for an offense but do not specifically require or permit the definition of the term that is used to describe the mental state. Counsel should not be deterred from requesting a definition of terms such as "knowingly," "purposely," "recklessly," etc., if such a definition might be helpful to the jury.

There are a number of crimes outside the criminal code for which no pattern instruction has been provided in MAI-CR. In these situations, the generic instruction forms provided in MAI-CR 3d 304.02 should be used. But no directions are provided with respect to what terms may or must be defined for the jury in the submission of such offenses. The trial court has discretion to determine what, if any, definition is appropriate.

A good example of such a situation arose in *State v. Barnes*, 942 S.W.2d 362 (Mo. banc 1997). The defendant was charged with workers' compensation fraud under § 287.128, now RSMo 2000, for which there was no pattern instruction in MAI-CR 3d. The state was obliged to prove that Barnes made material misrepresentations in the course of committing the offense. The verdict director submitted by the state, based on MAI-CR 3d 304.02, included a definition providing that a representation is material "if it might reasonably influence or has a natural tendency to influence." *Barnes,* 942 S.W.2d at 369. On appeal, Barnes complained that the trial court should have used the definition set out in conjunction with the crime of perjury, § 575.040.2, now RSMo 2000, which provides that a fact is material "if it could substantially affect, or did substantially affect, the course or outcome of the cause, matter, or proceeding." *Barnes,* 942 S.W.2d at 368. Because the definition set out in MAI-CR 3d 333.00 was "tailored for a different offense," and the definition submitted was "relevant to workers' compensation fraud and not inconsistent with the definition in MAI-CR 3d 333.00," no error was committed. *Barnes,* 942 S.W.2d at 368. Obviously, the trial court has wide latitude in the submission of definitions when MAI provides no pattern instruction. Counsel would be well-advised to tender a verdict-directing instruction defining terms that may be helpful to the jury in understanding the legal theory of the case. As long as the definition is not in conflict with MAI, there is a good chance it will be given.

Many offenses are defined in such a manner as to incorporate other offenses as a distinct element of the crime charged. For example, the offense of burglary requires the state to prove that the defendant entered premises with the intent to commit a crime. It is important that the crime incorporated into the charge offense be correctly defined in the verdict director. In *State v. Carpenter*, 57 S.W.3d 405 (Mo. App. S.D. 2001), the defendant was convicted by a jury of first degree burglary and armed criminal action for breaking into his girlfriend's home with the intention to commit a felony assault on her. The verdict director submitting first degree burglary advised the jury that "A person commits the crime of assault if he purposely or knowingly places or attempts to place another in fear of physical harm." Carpenter objected to the

instruction because of the definition given for assault, which the court conceded "comes closer to third degree assault under Section 565.070.1(3), [now RSMo 2000], than any other crime of assault" because it excused the state from its burden of proving the higher mental element of purposely as opposed to the lower mental element of knowingly. The court also reversed the armed criminal action conviction because a conviction for armed criminal action cannot stand unless the defendant is first found guilty of the underlying felony of first degree burglary.

C. (§24.10) Converse Instructions

Defense counsel should always consider submitting a converse instruction focusing the jury's attention on particular elements of the offense on which the state's evidence may be weak or controverted. A significant change from MAI-CR 2d is that the defense is not entitled to a general converse that covers all elements of the offense; the "However . . ." clause of the verdict director serves that purpose. Under MAI-CR 3d 308.02, the defense may converse any one or more elements upon which the state has the burden of persuasion, but may not converse every element. The Note under MAI-CR 3d 308.02 places numerous other limitations on the use of converse instructions. The defense may not converse a matter that is the subject of a specific instruction that is cross-referenced in the verdict director and instructs the jury to find the defendant not guilty. MAI-CR 3d 306.06, the defense of alibi, instructs the jury to find the defendant not guilty but is not cross-referenced in the verdict director and therefore does not preclude the use of a converse on any issue. MAI-CR 3d 308.04 and 308.06. A notable exception to this general rule is the defense of diminished mental capacity. MAI-CR 3d 308.03, submitting the defense of diminished mental capacity, is not cross-referenced in the verdict director, and yet Note 7 under that instruction indicates that its use prevents the defendant from conversing the mental element of the offense.

The use of a converse instruction is especially important when the defense asserts that the crime that occurred is a lesser-included offense of the crime charged. By conversing the weak element or elements in the state's case, defense counsel gives the jury a logical bridge from the greater offense to the lesser offense.

D. (§24.11) Lesser-Included Offenses

Missouri law with respect to submitting lesser offenses is full of surprises. The rules seem simple enough, but the application of the rules may require some research. Persuading the court to give a lesser-included offense may require more than merely offering a verdict director submitting the lesser offense because giving an instruction not supported by the charge or the evidence can lead to reversal if the defendant is convicted of the lesser charge; refusing to submit a lesser-included offense that is supported by the charge and the evidence can likewise lead to reversal.

If a defendant is convicted of a lesser offense that is not included in the charge, a reversal is required because the defendant is denied due process if the defendant is convicted of an offense not within the scope of the charge. Thus, in *State v. Shipley*, 920 S.W.2d 120 (Mo. App. E.D. 1996), the trial court erred in submitting stealing by deceit as a lesser offense of robbery. The appellate court explained:

> Stealing by deceit requires proof of *additional* facts, not just "the same or less" facts. Those additional facts include the defendant's deceit, the defendant's statements, and the victim's reliance thereon. See MAI-CR 3d 324.02.2, stealing by deceit, and compare with MAI-CR 3d 323.02, first degree robbery. Thus, stealing by deceit is not a lesser included offense of robbery.

Id. at 123. Shipley's conviction was reversed, in spite of his trial attorney's failure to object to the submission of the lesser offense, because "it is 'elementary law that an accused cannot be charged with one offense and convicted of another.'" *Id*. (quoting *State v. Gant*, 586 S.W.2d 755, 762 (Mo. App. W.D. 1979)).

On the other hand, the trial court risks reversal for failing to submit a lesser offense that is warranted by both the charge and the evidence. In *State v. Barnard*, 972 S.W.2d 462 (Mo. App. W.D. 1998), the court reversed the defendant's conviction for statutory sodomy, § 566.062, now RSMo 2000, because the trial court failed to submit the lesser offense of child molestation in the second degree. In arriving at this conclusion, the court applied the statutory elements test:

> "If the greater of the two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater."

Barnard, 972 S.W.2d at 465 (quoting *State v. Neighbors*, 613 S.W.2d 143, 148 (Mo. App. W.D. 1980)). To apply this test, the court asked whether,

under the evidence in the case, it is impossible to commit the greater without committing the lesser. Barnard testified that he did reach into the 13-year-old victim's pants and touch her vagina but that he withdrew his hand immediately. He denied penetration. On this evidence, the court reasoned:

> The question whether "it is impossible to commit the greater without committing the lesser" becomes, under the facts of this case, whether it is impossible to penetrate the vagina of the Victim with the Appellant's finger without the Appellant touching the vagina of the Victim. It is.

Barnard, 972 S.W.2d at 465–66. Because credibility was the central issue in the case, the court found that the failure to submit the lesser offense required a new trial.

The author recommends that counsel ask two questions:

1. Is the lesser offense included in the offense charged?

2. Would the evidence support a verdict acquitting the defendant of the greater offense but finding the defendant guilty of the lesser offense?

The first question may not be as easy to answer as it seems. One must begin with the principle that it is denial of due process of law to be convicted of a crime other than the one charged. *State v. Blair*, 638 S.W.2d 739, 747 (Mo. banc 1982). Thus a "court may not instruct on an offense not specifically charged in the information or indictment unless it is a lesser included [or lesser degree] offense." *State v. Smith*, 592 S.W.2d 165 (Mo. banc 1979). The question of what constitutes an offense that is included in the indictment or information is controlled by § 556.046.1, RSMo Supp. 2004:

> 1. A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when:
> (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
> (2) It is specifically denominated by statute as a lesser degree of the offense charged; or
> (3) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein.
> 2. The court shall not be obligated to charge the jury with respect to an included offense unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. An offense is charged for purposes of this section if:
> (1) It is in an indictment or information; or

> (2) It is an offense submitted to the jury because there is a basis for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense.
>
> 3. The court shall be obligated to instruct the jury with respect to a particular included offense only if there is a basis in the evidence for acquitting the defendant of the immediately higher included offense and there is a basis in the evidence for convicting the defendant of that particular included offense.

The tests under § 556.046.1(2) and (3) are relatively easy to apply. Attempts and lesser degrees of the offense charged are explicitly included in the offense charged, regardless of whether the lesser offense contains an element that is not a part of the greater offense. *See, e.g.*, *State v. Wilkerson*, 616 S.W.2d 829 (Mo. banc 1981). An important exception to this general rule is when the lesser degree of the offense punishes distinctly different conduct than the greater degree.

A lesser offense is deemed to be included in a charged offense if it is "specifically denominated by statute as a lesser degree of the offense charged." Section 556.046.1(2). But it does not follow that it will always be appropriate to submit a lesser degree. In *State v. Hagan*, 79 S.W.3d 447 (Mo. App. S.D. 2002), the defendant was charged with two counts of promoting child pornography in the first degree but was convicted under each count of the lesser offense of promoting child pornography in the second degree, § 573.035, RSMo 2000. Even though the defendant was convicted of a statutorily denominated lesser offense, the court ruled that, under the law in effect at the time of the crime, promoting child pornography in the second degree is not a lesser offense of promoting child pornography in the first degree because the crimes punish completely different conduct:

> Comparing the pre-2000 versions of promoting child pornography in the first degree and promoting child pornography in the second degree, the statutory elements test is not met. The focus of promoting child pornography in the second degree is on selling, delivering, exhibiting, or otherwise making available child pornography. Section 573.035, RSMo [2000]. The focus of promoting child pornography in the first degree is on photographing, videotaping, producing, publishing, or otherwise creating child pornography. Section 573.025, RSMo [2000]. It is possible for one to commit the crime of promoting child pornography in the first degree without first committing the crime of promoting child pornography in the second degree. Therefore, the pre-2000 version of promoting child pornography in the second degree is not a lesser included offense of promoting child pornography in the first degree, and it was error for the trial court to instruct the jury on that charge.

Hagan, 79 S.W.3d at 454–55. The court affirmed Hagan's conviction of child abuse but discharged him on the two counts of promoting child pornography in the second degree, relying on the rule that, "It is not proper to instruct the jury on a lesser offense unless it is impossible to

commit the greater offense without first committing the lesser included offense." *Id.* at 454 (citing *State v. Garms*, 750 S.W.2d 702, 704 (Mo. App. E.D. 1988)). The court explained that "'Due process requires that a defendant may not be convicted of an offense which is not charged in the indictment or information.'" *Id.* (quoting *Brooks v. State*, 51 S.W.3d 909, 914 (Mo. App. W.D. 2001)).

Problems are more frequently encountered in determining what constitutes an included offense under subdivision (1) of § 556.046.1. To determine whether an offense is a lesser-included offense under § 556.046.1(1), counsel must focus on the elements required by the statutes defining each offense. *State v. Gobble*, 675 S.W.2d 944 (Mo. App. E.D. 1984). The test is whether the greater of the two offenses encompasses all of the legal and factual elements of the lesser crime. *State v. VanDoren*, 657 S.W.2d 709 (Mo. App. E.D. 1983). The greatest difficulty arises when the elements of each offense appear quite similar but are not identical. The acid test in that situation is whether it is impossible to commit the greater offense without also committing the lesser offense. *State v. Seddens*, 624 S.W.2d 470 (Mo. App. W.D. 1981). Under this test, trespass in the first degree is always included in a burglary charge because one cannot commit a burglary without also committing a trespass. *State v. Davis*, 625 S.W.2d 903 (Mo. App. W.D. 1981). On the other hand, it is possible to drive while intoxicated without driving with excessive blood alcohol content, so driving with excessive blood alcohol content in violation of § 577.012, RSMo Supp. 2004, is not a lesser-included offense of driving while intoxicated under § 577.010, RSMo 2000. *State v. Robertson*, 764 S.W.2d 483 (Mo. App. W.D. 1989).

In homicide cases, § 565.025, RSMo 2000, explicitly defines what offenses are included in a charge of first or second degree murder. The only homicides that are not included in a charge of first or second degree murder are voluntary manslaughter under § 565.023.1(2), RSMo 2000 (knowingly assisting in the commission of self-murder), and involuntary manslaughter under § 565.024.1(2), RSMo 2000 (vehicular manslaughter).

If this analysis leads to the conclusion that the lesser offense is not included in the charge, it may not be submitted under any circumstances. If the lesser offense is included in the charge, counsel must make further inquiry to determine whether an instruction on the lesser offense is warranted.

The second question is whether the evidence can be interpreted in a way that would justify acquittal of the greater charge and conviction of the lesser. The test to be applied in making this determination is different for homicides and offenses other than homicide because each category is governed by different statutory and constitutional provisions. For an informative discussion of the distinction, see *State v. Olson*, 636 S.W.2d 308 (Mo. banc 1982), but counsel should note that *Olson* was decided before § 565.025 was enacted in 1983.

A recurring issue is what quantum of evidence is sufficient to trigger the court's duty to submit the lesser offense. *State v. Givens*, 917 S.W.2d 215 (Mo. App. W.D. 1996), is a good example of the analysis that the appellate court will bring to the issue. Givens was charged with drug trafficking in the second degree, § 195.223, now RSMo Supp. 2004, which required the state to prove that he had at least 2 grams of cocaine base in his possession. The charge was based on 17 ziplock plastic bags that each contained a substance that appeared to be crack cocaine. At the crime lab, all 17 bags were weighed while still containing the suspect substance. Then one bag was emptied and weighed, and the weight of the empty bag was multiplied by 17 and deducted from the total weight. A forensic chemist testified that this method of calculation yielded a total net weight of 2.02 grams of crack cocaine. On cross-examination, the chemist admitted that he did not test the contents of every bag and that a possibility existed that one of the bags did not contain a controlled substance. He further admitted that the chemical identity of the substance, and not its weight, was his primary concern. The court of appeals concluded, "When the weight of the controlled substance is calculated to be .02 of a gram over the statutorily required amount, and the evidence does not guarantee that the weight is correct, there is a basis to submit the lesser included offense." *Givens,* 917 S.W.2d at 218 (citing *State v. Hyzer*, 811 S.W.2d 475 (Mo. App. S.D. 1991)); *see State v. Bethel*, 569 S.W.2d 270 (Mo. App. E.D. 1978). It was therefore error to refuse to submit the lesser offense of possession of cocaine, § 195.202, now RSMo 2000.

The source of the evidence supporting the lesser offense appears to be of no consequence to the court's duty to submit the lesser charge to the jury. In *State v. Edwards*, 980 S.W.2d 75 (Mo. App. E.D. 1998), the defendant's conviction for robbery in the first degree was reversed for failure to submit robbery in the second degree. The state charged, and the victim testified, that the defendant used a knife during the robbery. The state's case included a confession by the defendant, repudiated by him at trial, admitting the theft but denying the use of a weapon. The court of appeals ruled that the trial court should have submitted the

lesser offense of second degree robbery when the state's evidence warranted its submission, notwithstanding the fact that the defendant himself testified that the evidence was untrue.

The recent case of *Patterson v. State,* 110 S.W.3d 896 (Mo. App. W.D. 2003), is a reminder that the state's production of sufficient evidence to convict the defendant of the greater charge does not foreclose submission of a lesser offense. The state presented evidence that Mr. Patterson entered a Long John Silver's restaurant in Platte County and put his right hand in his jacket pocket, as though he had something pointed at the cashier. Mr. Patterson demanded that she give him "all the money." When she opened the register, he reached in and removed the money. The trial court refused to give defense counsel's proposed instructions because they were defective and did not submit any lesser-included offense. The court of appeals reversed the conviction, reasoning that, while the jury could find that Mr. Patterson threatened the use of immediate physical harm on the store employees by holding his right hand in his jacket pocket in a manner consistent with having a pistol and by otherwise acting and speaking in a manner consistent with an armed holdup, the record also would have allowed a juror to reasonably find that Mr. Patterson did not actually use physical force on another person during the course of the theft and that he did not explicitly threaten immediate physical harm to anyone. Because the evidence of the threat of physical harm was not overwhelming, the court found a reasonable probability that a juror might have determined that there was no threat of physical force in the stealing, and therefore Mr. Patterson established that he was prejudiced by his trial counsel's submission of a defective lesser-included offense instruction.

1. (§24.12) Offenses Other Than Homicide

For all offenses other than homicide, the test for submitting lesser offenses is whether "there is a basis for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense." Section 556.046.2(2), RSMo Supp. 2004. Thus the giving of instructions on lesser-included offenses is required only if the evidence arguably shows the lack of an essential element of the greater offense. *State v. Burnett*, 694 S.W.2d 769 (Mo. App. E.D. 1985); *State v. Saffold*, 563 S.W.2d 127, 129 (Mo. App. W.D. 1978). In deciding whether the evidence supports the instruction on a lesser offense, the evidence must be viewed in the light most favorable to giving the instruction, leaving it to the jury to make the decision as to which grade of offense, if any, the defendant is guilty of. *Id.* The defense is not required to produce affirmative proof negating one or

more elements of the greater offense; the question is whether "the evidence, in fact or *by inference,* would provide a basis for both an acquittal of [the greater offense] *and* a conviction of [the lesser offense]." *State v. Moore*, 729 S.W.2d 239, 240 (Mo. App. E.D. 1987). In *Moore*, it was reversible error to refuse the defendant's request for a first degree trespass instruction in a burglary case when the evidence showed that his car was broken down and he knocked before entering. Even though the defendant did not testify and produced no other specific evidence on the question of his intent to steal, the inferences were sufficient to submit the question to the jury. The court was careful to point out that the test of whether a lesser offense instruction should be given is not satisfied by finding that the evidence is sufficient to sustain a conviction of the greater offense. The tests for sufficiency of the evidence to sustain a conviction and to support an instruction on a lesser offense are separate and distinct.

The law formerly required that the court instruct the jury on lesser-included offenses supported by the evidence, even absent a request by the defense. *State v. Zweifel*, 615 S.W.2d 470 (Mo. App. E.D. 1981). In *State v. Olson*, 636 S.W.2d 318, 322–23 (Mo. banc 1982), the Supreme Court held that "a defendant may not complain about the court's failure to give a lesser-offense instruction unless the defense requests it specifically . . . ." This places on counsel the burden of determining whether it is in the client's best interest to submit an instruction on the lesser offense. If the defendant's chances for acquittal are great and a lesser offense might diminish the chances for acquittal by allowing the jury to compromise, defense counsel may not want a lesser offense submitted. On the other hand, if the chances for acquittal are very slim, defense counsel may want to offer the jury every possible chance to compromise. Whatever strategic decision is made, if defense counsel fails to request an instruction on a lesser offense, an appellate court will not come to the rescue. The rule of *Olson* is specifically retained in MAI-CR 3d 304.11.G. Either party may request an instruction on a lesser offense, or it may be given on the court's own motion. MAI-CR 3d 304.02, Notes on Use 3b; *see also* MAI-CR 3d pp. v-vi.

2. (§24.13) Homicide

The practice of treating the issue of lesser-included homicide offenses different than non-homicide offenses has its roots in the due process requirement, announced in *Beck v. Alabama*, 447 U.S. 625, 638 (1980), that the jury must have the option of convicting the

defendant of a non-capital offense "if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction." The Court recently clarified the doctrine, explaining that the due process clause does not require a trial court to submit a lesser offense that is not supported by the charge or the evidence. *Reeves v. Neb.*, 524 U.S. 88 (1998).

Missouri continues to apply a stricter standard for the submission of lesser homicide offenses. This is largely because the difference between degrees of offenses involves often subtle distinctions in the defendant's mental state. This is especially true on the question of first and second degree murder:

> In most homicide cases, however, a defendant is entitled to a second degree instruction. *State v. Mease*, 842 S.W.2d 98, 112 (Mo. banc 1992), *cert. denied*, 508 U.S. 918, 113 S. Ct. 2363, 124 L. Ed. 2d 269 (1983). The difference between first and second degree murder is the element of deliberation. For a conviction of first degree murder, the state must prove beyond a reasonable doubt that the defendant deliberated when he caused the death of another. Section 565.020. Deliberation is a mental state and is difficult to prove through direct evidence. *State v. Turner*, 623 S.W.2d 4, 7 (Mo. banc 1981). "The mental elements establishing murder may be proved by indirect evidence and inferences reasonably drawn from the circumstances surrounding" the offense. *Id.* In most cases, indirect evidence of deliberation also supports a finding of lack of deliberation. A jury may draw different inferences from the facts on the issue of whether the defendant deliberated. *State v. Stepter*, 794 S.W.2d 649, 653 (Mo. banc 1990). Deliberation is, therefore, a question of fact for the jury and a second degree murder instruction is usually warranted.

State v. Santillan, 948 S.W.2d 574, 576 (Mo. banc 1997). In *Santillan*, the trial court refused to submit a second degree murder instruction to the jury even though it was requested by both parties. The state argued on appeal that, because Santillan claimed that he did not participate in the offense, there was no issue as to the degree of the offense. The Court rejected that argument, stating:

> It is also possible, however, for a rational fact finder to conclude that appellant knowingly caused the death but did not deliberate. As an additional example, evidence of appellant's failure to call for medical attention and burial of the body would allow a reasonable juror to infer deliberation but, also, would allow a reasonable juror to infer only a cover-up after the death of Singh. *See e.g.*, *State v. Branch*, 757 S.W.2d 595, 599-600 (Mo. App. E.D. 1988).

Santillan, 948 S.W.2d 574, 576–77. The Court made it clear that:

> The defendant is not required to put on affirmative evidence as to lack of deliberation to obtain submission of a second degree murder instruction. To the extent that [*State v. Olson*, 636 S.W.2d 318 (Mo. banc 1982)] and [*State v. Chambers*, 884 S.W.2d 113 (Mo. App. W.D. 1994)] may be read to require

> a defendant to put on affirmative evidence as to the lack of an essential element of the higher offense, they are overruled.

Id. at 576; *accord State v. Smith*, 966 S.W.2d 1 (Mo. App. W.D. 1997); *State v. Wallace*, 943 S.W.2d 721 (Mo. App. W.D. 1997). The Court concluded by cautioning that "if there is any doubt upon the evidence, the trial court should resolve any doubts in favor of instructing on the lower degree of the crime, leaving it to the jury to decide which of two or more grades of an offense, if any, the defendant is guilty." *Santillan,* 948 S.W.2d at 576 (citing *State v. Beck*, 849 S.W.2d 668, 670 (Mo. App. E.D. 1993)).

Instructions on lesser offenses or lesser degrees of homicide are now governed by § 565.025, RSMo 2000. The statute represents a substantial departure from the previous rule, which was referred to as the "automatic submission rule." Under MAI-CR 2d 15.00 Note 3, the court was obliged to instruct the jury on lesser degrees or offenses of homicide that were justified by the evidence. Under the "justified by the evidence" test as applied then, a manslaughter instruction was always given because proof of any homicide necessarily encompassed the charge of manslaughter. Section 565.025 does away with the automatic submission rule and specifically brings homicide cases under § 556.046, RSMo Supp. 2004, which is discussed in §24.12 above. Counsel would be misled, however, to assume that § 565.025 eliminates the distinction between homicides and other offenses because there are overriding constitutional considerations.

When the state is asking for a sentence of death, "if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the state] is constitutionally prohibited from withdrawing that option from a jury in a capital case." *Beck v. Ala.*, 447 U.S. 625, 638 (1980). The United States Supreme Court addressed the issue of whether *Beck* entitles a defendant to instructions on all offenses that are lesser than and included within a capital offense as charged in *Schad v. Arizona*, 501 U.S. 624 (1991). In *Schad*, a plurality of the United States Supreme Court, with four justices dissenting, found no due process violation when the jury was instructed in the alternative on first degree murder and felony murder, both of which were punishable by death, and also on second degree murder, a non-capital offense. The trial court refused the defendant's tendered instruction submitting robbery as a lesser-included offense of felony-murder. When the submission of second degree murder was justified by the evidence,

the jury had the "third option" to convict the defendant of a non-capital offense as required by *Beck*. But Justice Souter, writing for the plurality, stated "That is not to suggest that *Beck* would be satisfied by instructing the jury on just any lesser included offense, even one any without support in the evidence." Thus the court is constitutionally required to submit a lesser-included offense when it is supported by the evidence, and MAI-CR 3d 313.00, Supplemental Notes on Use 3 acknowledges this. On the other hand, it may likewise be error to submit a lesser-included offense that is not justified by the evidence. Thus in *State v. Anding*, 752 S.W.2d 59 (Mo. banc 1988), when the defendant was charged with capital murder based on a contract-for-hire killing, it was error to instruct the jury on manslaughter absent evidence of adequate provocation. (The offense was committed in 1975. At that time, the substantive law was that the defense had to inject the issue of adequate provocation in order to mitigate second degree murder to manslaughter.) Because Anding was convicted of manslaughter and the instruction was not justified by the evidence, the conviction was reversed and the defendant was discharged.

In *State v. Stepter*, 794 S.W.2d 649 (Mo. banc 1990), the Supreme Court was faced with a very rare situation in which the trial court submitted the offense of first degree murder to the jury but refused to submit any lesser-included offense whatsoever, including the lesser-included offense of second degree murder that was tendered by the defendant. The Court ruled that it was reversible error under § 556.046.2 to refuse to submit murder in the second degree. The Court described the issue as "whether the evidence, in fact or by inference, provides a basis for both an acquittal of first degree murder *and* a conviction of second degree murder. The element at issue is deliberation." *Stepter*, 794 S.W.2d at 652. Relying on *State v. Olson*, 636 S.W.2d 318 (Mo. banc 1982), the Court answered this question in the affirmative because "there is a way in which the jury could infer a different version of the events, one that supports a finding of the absence of deliberation." The Court was careful to point out that its ruling in *Stepter* did not obligate trial courts to follow an automatic submission rule and further declined to decide the issue of whether the basis for submitting a lesser-included offense may be found solely in the disbelief of testimony. But see *State v. Mease*, 824 S.W.2d 98 (Mo. banc 1992), in which the Court affirmed the trial court's refusal to submit any lesser-included offense of first degree murder when the defendant lay in wait for the victim.

In determining whether a lesser-included offense should be given in a homicide, counsel and the court should scrutinize MAI-CR 3d 313.00, Supplemental Notes on Use. As a general rule, each lesser offense is submitted when two conditions exist:

1. It is justified by the evidence.
2. It is requested by one of the parties or given on the court's own motion.

As is frequently the case, there are notable exceptions. First, in order to submit, on the state's request, MAI-CR 3d 313.06, Murder in the Second Degree: Felony, as an alternative to MAI-CR 3d 313.04, Murder in the Second Degree: Conventional, proper notice must be given in the charging document. *See* MACH-CR 13.02 and 13.04 Notes on Use 2. The Notes on Use 7 for MAI-CR 313.06 provide that, even if the state has not given proper notice of an intention to rely on a particular felony, the defense may nevertheless request a submission on murder in the second degree-felony if it is justified by the evidence. Thus, while the prosecution is bound by its decision to provide notice (or decline to provide notice) of a particular felony, the prosecutor's election does not deprive the defense of its right to have the jury instructed on second degree felony murder.

To submit MAI-CR 3d 313.08, Manslaughter Voluntary, as a lesser-included offense, there must be sufficient evidence of sudden passion arising from adequate cause, and MAI-CR 3d 313.04 must have been submitted. Of course, in all cases there must be a request by one of the parties, or the court may give the instruction on its own motion.

Note: It is unclear whether this rule is based on the assumption that 1) a charge of felony murder cannot be mitigated to manslaughter or 2) voluntary manslaughter is not a lesser-included offense of second-degree felony murder. Resolution of this issue will have to wait for a case in which the defendant denies participation in the underlying felony but claims to have killed the victim in sudden passion. Stranger things have happened.

E. (§24.14) Defenses

A defendant is entitled to an instruction on any theory of defense that the evidence tends to establish. *State v. Thomas*, 674 S.W.2d 131 (Mo. App. E.D. 1984), *cert. denied*, 469 U.S. 1223 (1985). The author again refers the reader to the chart set out MAI-CR 3d 304 Series

pp. 304-60–304-63 for an annotated laundry list of defenses and applicable instructions. Some instructions submitting defenses are in the MAI-CR 3d 306, 308, and 310 Series. An instruction in the MAI-CR 3d 306 Series must be given if there is evidence to support it, whether or not either party requests it. Instructions in the MIA-CR3d 308 Series are given only if requested by the defendant. Instructions in the MAI-CR 3d 310 Series are given if requested by either party.

Other defenses are mentioned in the Notes on Use under the verdict director for the offense to which the defense applies. Some of these defenses, which are scattered throughout MAI-CR 3d, are included in the chart mentioned in the preceding paragraph. Thus, that chart may also serve as a convenient reference for common defenses that are not the subject of a separate instruction in the MAI-CR 3d 306, 308, or 310 Series. For defenses not listed, counsel should review Chapters 562 and 563, RSMo, the chapter that creates the offense charged, and the Notes on Use under the applicable verdict director. Counsel should also be aware that many of the new instructions contain no cross-references to defenses in the MAI-CR 3d 306 Series, even though those defenses might be available. (For example, MAI-CR 3d 319.32 and 319.34, assault of a law enforcement officer, make no reference to the availability of justification as a defense.)

The defenses treated separately by MAI-CR 3d generally involve something more than a straightforward denial of involvement in the offense charged. Many involve some affirmative proposition put forth by the defense or which must be negated by the state. These situations create a special need to appropriately instruct the jury on the burden of proof with respect to these matters. Defenses of this type generally fall into two broad categories: special negative defenses and affirmative defenses.

1. (§24.15) Special Negative Defenses

A special negative defense is one on which the defendant has the burden of injecting the issue, which means that:

> (1) The issue referred to is not submitted to the trier of fact unless it is supported by evidence; and
>
> (2) If the issue is submitted to the trier of fact any reasonable doubt on the issue requires a finding for the defendant on that issue.

Section 556.051, RSMo 2000.

In the context of a self-defense case, the burden of injecting the issue was described as follows:

> First, an accused can meet his "burden of injecting the issue" of self-defense under the statute if evidence thereof is introduced from whatever source and an accused is not deprived of such defense upon his failure to introduce direct evidence by way of evidence for the defense. Secondly, there must be evidence introduced, from whatever source, to support the issue. Thirdly, if there is evidence to support the issue, the burden rests upon the prosecution to prove beyond a reasonable doubt that the homicide was not justified. An accused bears no burden of proof on the issue of self-defense, but merely bears the burden of "injecting" the issue into the case from whatever evidentiary source.

State v. Fincher, 655 S.W.2d 54, 58 (Mo. App. W.D. 1983). "The evidence must be reviewed in the light most favorable to the defendant's hypothesis of self-defense," *State v. Ehlers*, 685 S.W.2d 942, 948 (Mo. App. S.D. 1985), and it must establish a prima facie case of all elements of the defense being offered, *State v. Grier*, 609 S.W.2d 201, 203 (Mo. App. W.D. 1980).

In *State v. Peek*, 806 S.W.2d 504 (Mo. App. E.D. 1991), the court was required to decide whether a self-defense instruction should have been given under very unusual circumstances. The defendant was accused of attacking a couple, stabbing the man several times, and rendering the woman unconscious with a hammer. The defendant testified that he acted in self-defense; while he was struggling with the man, the woman, whom he claimed was armed with a hammer, jumped on his back. He testified that he forcibly took the hammer away from her, struck her with it, and then continued to defend himself against the man. The court submitted a self-defense instruction with respect to the assault of the man but refused a self-defense instruction as to the assault on the woman because she was much smaller than the defendant. The appellate court stated:

> Whether [Karen] herself intended or was capable of doing great physical harm to defendant, her engagement in the battle increased the danger to defendant from [Terry] and defendant would be justified in removing that increased danger. The reasonableness of defendant's belief in the necessity of using deadly force is generally a question for the jury.

Id. at 505. This analysis is consistent with the general rule that, in determining whether to submit a particular instruction, the court must view the evidence in the light most favorable to giving the instruction. See also *State v. Weems*, 840 S.W.2d 222 (Mo. banc 1992), holding that another hammer-wielding defendant was entitled to the instruction.

The Supreme Court of Missouri has held that the defendant may have the right to have the jury instructed on more than one defense, even if the defenses are somewhat different. In *State v. Redmond*, 937 S.W.2d 205 (Mo. banc 1996), a defendant convicted of second degree murder claimed that he acted in self-defense. He testified that, during a heated argument, the victim displayed a gun, and Redmond, fearing for his life, struck a fatal blow with a baseball bat. The trial judge submitted the defense of self-defense, which the jury rejected, but refused to submit the defense of sudden passion, which would mitigate the crime to voluntary manslaughter. On appeal, Redmond's conviction was reversed for failure to submit the defense of sudden passion because the jury "might determine that Redmond's apprehension of the harm was unreasonable or that the amount of force used in his defense was unreasonable." *Id.* at 209. Nevertheless, the jury might also believe Redmond's claim that the victim displayed a gun. Because "a jury could rationally reject self-defense and find sudden passion arising from adequate cause based on Redmond's testimony," it was error to fail to submit both self-defense and sudden passion. *Id.* In response to the state's argument that *State v. Jennings*, 778 S.W.2d 294 (Mo. App. E.D. 1996), and *State v. Simmons*, 751 S.W.2d 85 (Mo. App. E.D. 1988), prohibited the submission of more than one theory of defense, the Court stated:

> *Jennings* and *Simmons* are overruled to the extent those decisions could be read to hold that an instruction on self-defense and an instruction on sudden passion based on the same testimony are inherently inconsistent and should not be given together. Each instruction should be evaluated separately and should be given if supported by the evidence, without regard to whether the other instruction is also being given.

Redmond, 937 S.W.2d at 209–10. Thus, as a general rule, if self-defense is submitted as to second degree murder and manslaughter is submitted as a lesser offense, both verdict directors must cross-reference the self-defense instruction. See, e.g., *State v. Reynolds*, 72 S.W.3d 301 (Mo. App. S.D. 2002), in which trial counsel failed to object to the failure to cross-reference the defense of self-defense in the verdict director submitting manslaughter as a lesser-included offense. The court nevertheless found that the omission constituted plain error, stating, "'Manifest injustice results when a defendant meets his burden of injecting the issue of self-defense into the case but the trial court does not submit an instruction on the issue to the jury regardless of whether the defendant requests the instruction.'" *Id.* at 305–06 (quoting *State v. Morrow*, 41 S.W.3d 56, 59 (Mo. App. W.D. 2001)). The court made it clear that the jury may be instructed

on both voluntary manslaughter and self-defense. Note that when two special negative defenses apply, they may not be submitted in the disjunctive because the jury must unanimously reject both defenses before finding the defendant guilty. *See, e.g., State v. White,* 92 S.W.3d 183, 192–93 (Mo. App. W.D. 2002) (finding plain error when the verdict director advised the jury that it must find that the defendant did not act under the influence of sudden passion arising from adequate cause *or* that the defendant did not act in lawful self-defense).

In prosecutions for rape and sodomy, the defense now has the burden of injecting the issue of marriage under § 566.023, RSMo 2000. *See* MAI-CR 3d 320.01 Notes on Use 2, and MAI-CR 3d 320.09.1, Notes on Use 2. It is interesting to note that lack of marriage between the complaining witness and the defendant continues to be an independent element of other sex offenses set out in the MAI-CR 3d 320 Series.

2. (§24.16) Affirmative Defenses

An affirmative defense is one on which the defense has the burden of proof, which means that:

> (1) The defense referred to is not submitted to the trier of fact unless supported by evidence; and
> (2) If the defense is submitted to the trier of fact the defendant has the burden of persuasion that the defense is more probably true than not.

Section 556.056, RSMo 2000. This type of defense is less common than the special negative defense because of the constitutional limitations on shifting the burden of proof of the defense. *See In re Winship*, 397 U.S. 358 (1970); *State v. Comennos*, 461 S.W.2d 9 (Mo. banc 1970). Thus, the law can permissibly place on the defense the burden of proving the existence of a mental disease or defect excluding responsibility under Chapter 552, RSMo, *see* MAI-CR 3d 306.02, but may not place on the defense the burden of proving that the defendant did not have the mental state required for the offense, *see* MAI-CR 3d 308.03, Notes on Use 3.

As noted above, the defendant is entitled to an instruction on any theory of defense that the evidence tends to establish. *State v. Thomas*, 674 S.W.2d 131 (Mo. App. E.D. 1984), *cert. denied,* 469 U.S. 1223 (1985). This is true even when the defenses are inconsistent with one another, such as self-defense and accident, as long as each theory is supported by evidence. *State v. Sanders*, 541 S.W.2d 530 (Mo. banc 1976).

The insanity defense is restricted to those situations in which the defendant, "as a result of mental disease or defect . . . was incapable of knowing and appreciating the nature, quality or wrongfulness of [the defendant's] conduct." Section 552.030, RSMo 2000; MAI-CR 3d 306.02A. Also note that the instructions distinguish between insanity, which is an affirmative defense, *id*. Notes on Use 2, and diminished mental capacity, which is a special negative defense, *id*. Notes on Use 4; MAI-CR 3d 308.02, and is unaffected by § 552.030.

Aside from the above rules, which are universally applicable, each defense has its own little quirks about the form and circumstances in which it is submitted. Details of particular defenses are too numerous to detail here; the reader is better served by the general advice to examine the statute, pattern instruction, and Notes on Use applicable to the particular defense. A final note under this section is that counsel should pay special attention to the form in which the defense is submitted, which will vary according to which party has the burden of proof. A special negative defense should be cross-referenced in the verdict director in one of the forms described in MAI-CR 3d 304.02, Notes on Use 11. An affirmative defense should be cross-referenced in the verdict director as described in MAI-CR 3d 304.02, Notes on Use 13; *see also* MAI-CR 3d 310.24 n.3.

F. (§24.17) Cautionary Instructions

There are a number of instructions that advise the jury on particular matters of evidence. MAI-CR 310.08, Presence at or Near the Scene, cautions the jury on the burden of proof in the particular circumstance described in the instruction. MAI-CR 3d 310.08 must be given if requested by either party but only if there is evidence placing the defendant at the scene and the verdict director instructs the jury on accomplice liability. This latter requirement is a substantial change from MAI-CR 2d. A similar instruction, MAI-CR 3d 310.02, has been disapproved by the Court, which indicated that this instruction may no longer be given. *State v. Grim*, 854 S.W.2d 403 (Mo. banc 1993). *But see Taylor v. Ky.*, 436 U.S. 478 (1978).

Other cautionary instructions limit the jury's consideration of particular matters. MAI-CR 3d 300.20, Mental Responsibility: Limitation of Expert Testimony, must be given orally to the jury when a physician or other person receives statements and information from the defendant as a result of a mental examination under § 552.030, RSMo 2000. MAI-CR 3d 306.04 is the written submission on the same subject. Each instruction

limits the scope of statements made during a mental examination as required by § 552.030.5.

MAI-CR 3d 308.14.1, Right of Defendant or Spouse to Refrain From Testifying, must be given if it is requested by the defendant and if the defendant does not testify. This instruction is based on the defendant's Fifth Amendment privilege and on § 546.260, RSMo 2000. Because the defendant has an absolute right to prevent the court or the prosecutor from commenting on the defendant's failure to testify, this instruction may not be given at the state's request or on the court's own motion. MAI-CR 308.14.2, addressing the right of the spouse to refrain from testifying, must be given if the defendant's spouse does not testify and if requested by either party.

The MAI-CR 3d 310 Series contains a number of instructions advising the jury on or limiting the use of different types of evidence. Each instruction is accompanied by Notes on Use that explain the circumstances under which it may be given, but there are some specific matters that should be noted.

Extreme care should be taken with respect to cautionary instructions that tell the jury that certain evidence or circumstances do not constitute a defense. Such instructions may relieve the state of its burden of proof or shift to the defense the burden of disproving elements of the offense, in violation of the due process clause. *See* §24.2, *supra*. MAI-CR 3d 310.50, which limits the defense of voluntary intoxication, was recently amended to address this potential defect after the decision in *State v. Erwin*, 848 S.W.2d 476 (Mo. banc 1993). This problem can arise with any instruction that inappropriately limits the jury's consideration of the defendant's evidence or theory of defense.

MAI-CR 3d 310.10, Impeachment of Defendant by Conviction of "Unrelated Crimes" Shown Purely for the Purpose of Impeachment, contains a sentence that may be included only if requested by the defendant. Because that sentence cautions the jury against using the unrelated conviction as evidence of guilt, defense counsel should always request it. Also, defense counsel should note that the instruction requires that the defendant's prior convictions be listed in the instruction, while MAI-CR 2d 310.14, Impeachment of a Witness Other Than Defendant by Prior Offenses, simply refers to "an offense." If both instructions are being submitted in the same case, defense counsel may wish to modify one instruction or the other so that the defendant's convictions aren't unfairly emphasized.

Because limiting instructions in the MAI-CR 3d 310.00 series are broadly applicable, counsel should become familiar with all of them. Knowing and understanding these instructions is important in building a record most favorable to the client. Not only is the jury explicitly told that it may not draw certain conclusions from the evidence, but opposing counsel's use of the evidence in closing argument is also limited.

G. (§24.18) Instructions After Deliberations

MAI-CR 3d 312 Series contains instructions that may be given, in the discretion of the court, "when the length of deliberation or communication from the jury causes the Court to believe that the jury may be deadlocked." MAI-CR 3d 312.10, n.2. The Notes on Use require that counsel be given an opportunity to object on the record to the giving of the instruction, and the court should note in the record the times that:

- the jury first retired to deliberate;
- the instruction is given; and
- the jury returns a verdict or a mistrial is declared.

MAI-CR 3d 312.10 is known as "the hammer." The desired effect of the hammer is to get the jury to agree on a verdict, and it is strongly worded to achieve that end. Giving the hammer instruction under inappropriate circumstances may violate the defendant's right to a unanimous verdict by a fair and impartial jury. "When it appears from the circumstances that a verdict is coerced by the court, it must be overturned." *State v. Rojano*, 519 S.W.2d 42 (Mo. App. E.D. 1975). The appellate court looks at the totality of the circumstances to determine whether the verdict is the product of coercion. *State v. Mason*, 588 S.W.2d 731 (Mo. App. E.D. 1979). It has been held that giving the hammer instruction to a deadlocked jury when the court knows how the jury stands on conviction or acquittal constitutes prejudicial error. *State v. Johnson*, 610 S.W.2d 101 (Mo. App. W.D. 1980). The rationale is that the jury, if it is aware that the court knows which way it is leaning, may take the hammer instruction as an indication from the court that the jury is on the right track, and thus the minority jurors may be unduly influenced. *State v. Holt*, 592 S.W.2d 749, 772 (Mo. banc 1980). For a good example of how a trial court might otherwise coerce a verdict, see *State v. McNail*, 767 S.W.2d 84 (Mo. App. E.D. 1989).

The hammer is sometimes referred to as the "Allen Charge" based on the Supreme Court decision in *Allen v. United States*, 164 U.S. 492 (1896), which affirms the giving of the so-called hammer instruction. The decision as to when to give the instruction is within the trial court's

discretion. *See State v. McAllister*, 468 S.W.2d 37, 30 (Mo. 1971); *State v. Calmese*, 657 S.W.2d 662, 663 (Mo. App. E.D. 1983). While the court should not give the instruction if it results in a coercive verdict, a trial court has been upheld in giving this instruction only one and one-half hours after deliberations began. *See State v. Hayes*, 563 S.W.2d 11, 12 (Mo. banc 1978). On the other hand, see *State v. Burns*, 808 S.W.2d 1 (Mo. App. E.D. 1991).

It is common for jurors to ask questions of the court during deliberations. Frequently, courts receive questions asking for evidence, exhibits, transcripts, or additional instructions to clarify matters of law. The court of appeals has made clear that the court's response to such questions may constitute an instruction, even when the court did not necessarily intend to instruct the jury on any legal question. In *State v. Richardson*, 951 S.W.2d 718 (Mo. App. W.D. 1997), the jury, after asking questions about parole eligibility, told the court that it was hopelessly deadlocked. The trial judge, in open court, asked the jury if it could reach a verdict if the question of punishment were omitted, and the foreperson responded in the affirmative. The court then gave the jury the hammer instruction, MAI-CR 3d 312.10.

Defending the trial court's action on appeal, the state argued that the court's inquiry did not amount to an "instruction." That argument was rejected:

> "Instruction" is defined as "the act of instructing; education; knowledge, information, etc. given or taught; any teaching, lesson, rule, or precept; a command or order; details on procedure; or directions." Webster's New World College Dictionary 700 (3rd ed. 1997). Although we agree that the trial court did not expressly instruct the jury that it could disregard punishment in returning its verdicts, it did, however, essentially, by its comments on the record, indicate to the jury that it was permissible for it to return its verdicts without an assessment of punishment. This then was a "direction" or "detail of procedure" from the trial court as to the law with respect to the jury's responsibility to assess and declare punishment in returning its verdicts and, as such, would constitute an instruction.

Richardson, 951 S.W.2d at 720. The court of appeals emphasized that when MAI instructions and Notes on Use provide specific rules to govern particular situations, trial courts risk reversal when deviating from those directions. *Id*. at 721–22. The specific scenario in *Richardson* is unlikely to recur as a result of the bifurcation of non-capital jury-sentencing trials.

V. (§24.19) Not in MAI-CR 3d

While MAI-CR excludes the use of other forms, Rule 28.02(c), counsel will encounter situations in which there is no appropriate instruction in MAI-CR 3d. When these occasions arise, any instruction offered must comply with the following rule:

> If an MAI-CR form must be modified or if there is no applicable MAI-CR form, the modified form or the form not in MAI-CR, if given, shall be simple, brief, impartial, and free from argument. It shall not submit detailed evidentiary facts. All instructions, where possible, shall follow the format of MAI-CR instructions, including the skeleton forms therein.

Rule 28.02(d). If there are matters of law material to the case that are necessary to the jury in reaching a verdict but that are not in MAI-CR or not adequately covered in MAI-CR, the court may nevertheless be obliged to give an instruction on the matter. *See* § 546.070(4), RSMo 2000. In the eyewitness identification case, for example, defense counsel may want to consider offering a written cautionary instruction on eyewitness testimony. While it is doubtful that a Missouri appellate court will reverse a conviction for failing to give an identification instruction, the giving of a separate cautionary instruction on eyewitness identification is left to the discretion of the trial court. *State v. Williams*, 674 S.W.2d 46 (Mo. App. E.D. 1984); *cf. State v. Warren*, 635 P. 2d 1236 (Kan. 1981). Counsel should also offer a modified MAI-CR 3d instruction if the pattern instruction is somehow not in compliance with the law. *See, e.g.*, *State v. Van Horn*, 625 S.W.2d 874 (Mo. 1981).

MAI-CR 3d does not cover all situations in which evidence is offered for a particular purpose. When evidence is received for a limited purpose, the person against whom the evidence is admitted is entitled to have the court instruct the jury as to the limited purpose of the evidence. *State v. McClure*, 504 S.W.2d 664 (Mo. App. E.D. 1974). A common situation not covered by MAI-CR 3d occurs when a party seeks the admission of out-of-court statements to explain the subsequent conduct of a witness. *See, e.g., State v. Young*, 490 S.W.2d 28 (Mo. 1973). If hearsay, relevance, and materiality objections to such evidence are overruled, counsel should ask the court to instruct the jury as to the limited purpose of the testimony. Counsel might consider adapting MAI-CR 3d 300.20 to fit the occasion and request that the court's instruction specifically follow one of those formats.

Another category of instructions omitted from MAI-CR 3d is curative instructions, which the court may be required to give to withdraw an

incompetent or prejudicial matter from the jury's consideration. A general admonition is always given to the jury at the beginning of the trial. MAI-CR 3d 302.02. But defense counsel must specifically move for a mistrial or to instruct the jury to disregard objectionable evidence, testimony, or argument at the time the objection is sustained or risk waiving the right to appellate review of the error. *See State v. Cuckovich*, 485 S.W.2d 16, 23–24 (Mo. banc 1972). If counsel is entitled to have the court instruct the jury to disregard a matter, counsel should suggest specific language to avoid the risk that the court might compound the prejudicial error by repeating or emphasizing the objectionable matter.

VI. (§24.20) Appellate Review

"The giving or failure to give an instruction or verdict form in violation of this Rule 28.02 or any applicable Notes On Use shall constitute error, the error's prejudicial effect to be judicially determined." Rule 28.02(f). To preserve instructional error for appellate review, a party must object to the instruction before its submission to the jury, specifying the ground for the objection, and raise the issue in a timely filed motion for new trial. Rule 28.03. When a party wants the jury instructed on a specific matter, it is necessary to tender an instruction in proper form if required to do so under the Notes on Use.

A technical rule of appellate procedure was enforced in *State v. Tatum*, 807 S.W.2d 126 (Mo. App. S.D. 1991), in which the court held that instructional error was not preserved for appellate review when the challenged instruction was not set out in full in the argument portion of the brief. It is not sufficient to include the instruction in the legal file on appeal.

The harmless error doctrine of *Chapman v. California*, 386 U.S. 18 (1967), applies to instructional error, even if it involves a violation of constitutional rights. *Rose v. Clark*, 478 U.S. 570 (1986). When reviewed for error the instructions are considered as a whole. *State v. Holt*, 592 S.W.2d 759 (Mo. banc 1980). The court finds prejudicial error when the jury may have been adversely influenced by an erroneous instruction or by the lack of an instruction required by the law. *State v. Rodgers*, 641 S.W.2d 83 (Mo. banc 1982). When MAI-CR 3d is not followed, the appellate court will reverse the conviction if "the object and purpose of the omitted instruction is not otherwise fulfilled." *State v. Nunn*, 646 S.W.2d 55, 59 (Mo. banc 1983); *State v. Cook*, 727 S.W.2d 413 (Mo. App. W.D. 1987).

The application of the harmless error doctrine to instructional error was clarified in *Yates v. Evatt*, 500 U.S. 391 (1991). *Yates v. Aiken*, 484 U.S. 896 (1985), was remanded to the South Carolina Supreme Court for reconsideration in light of *Francis v. Franklin*, 471 U.S. 307 (1985), based on an instruction that "malice is implied or presumed from the use of a deadly weapon." The South Carolina Supreme Court found that the error was harmless because, under the evidence, the jury could have found Yates guilty of murder in spite of the erroneous instruction. The United States Supreme Court found that this was an erroneous application of the harmless error rule, which requires the appellate court to determine whether the error was harmless "beyond a reasonable doubt." The Supreme Court then conducted its own harmless error analysis, found that the error was not harmless, and remanded the case for further proceedings.

The Supreme Court of Missouri, relying on *Walton v. Arizona*, 497 U.S. 639 (1990), fashioned a unique standard of appellate review of erroneous instructions that seems to apply only to the sentencing phase of capital trials. In *State v. Feltrop*, 803 S.W.2d 1 (Mo. banc 1991), the Court acknowledged that a penalty phase instruction was facially vague in violation of the Eighth Amendment to the United States Constitution but proceeded to determine that the error in submitting the instruction was of no consequence because the trial court's denial of a defense request to consider a life sentence constituted an independent and adequate sentencing process, which cured any preceding instructional error. In a non-capital case, *State v. Cline*, 808 S.W.2d 822 (Mo. banc 1991), the Court subsequently found an erroneous sentencing instruction so prejudicial as to require a new trial but made no reference to the rule in *Feltrop*. Dissenting, Justice Blackmar stated that the results in *Cline* and *Feltrop* could not be explained unless one views *Feltrop* as a "mutant decision."

Several cases cited above note that trial counsel's failure to preserve the record requires instructional error to be reviewed under the plain error rule. The Supreme Court recently held that, even when an appellate court has found that instructional error did not result in a manifest injustice, the error may be revisited in post-conviction proceedings under a claim of ineffective assistance of counsel. *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002). Deck was sentenced to death on two counts of first degree murder. After the defense counsel's tendered instructions submitting mitigating circumstances were rejected, the defense counsel downloaded penalty phase instruction MAI-CR 3d 313.44A from the trial court's computer but failed to note that the last two paragraphs apparently did not print. As a result, counsel offered an

incomplete version of the downloaded instructions, which omitted the caution that the jurors did not need to be unanimous on particular facts and circumstances in mitigation of punishment.

The Court noted that, on direct appeal, it had denied relief, stating, "For instructional error to rise to the level of plain error, *the trial court must have so misdirected or failed to instruct the jury so that it is apparent that the instructional error affected the verdict*." *Deck,* 68 S.W.3d at 424 (quoting *State v. Deck*, 994 S.W.2d 527, 540 (Mo. banc 1999)). The Court distinguished the standard for relief under plain error review on appeal and the standard for relief on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), noting that some Missouri cases "have overlooked *Strickland's* careful admonition that a movant need not prove that an error was outcome-determinative in order to be entitled to post-conviction relief."

The Court suggested that the erroneous application of *Strickland* may be based on its earlier language in *Sidebottom v. State*, 781 S.W.2d 791 (Mo. banc 1989), in which the Court had rejected a claim of plain error on direct appeal, then affirmed the post-conviction denial of a claim of ineffective assistance of counsel for failing to preserve the error, stating that "on the facts of the present case and the law as applied to them, the bases for the Court's finding of no manifest injustice on direct appeal serve now to establish a finding of no prejudice under the *Strickland* test." *Sidebottom*, 781 S.W.2d at 796. The Court noted that several opinions have relied on this language to incorrectly conclude that "[a] finding of no manifest injustice on direct plain error review establishes a finding of no prejudice for purposes of the *Strickland* test." *Deck,* 68 S.W.3d at 427 (quoting *State v. Williams*, 945 S.W.2d 575, 583 (Mo. App. W.D. 1997)). The Court clarified its holding in *Sidebottom*:

> As is evident, *Sidebottom* did not state that a finding of no plain error on direct appeal necessarily equates to a finding of no prejudice under *Strickland*. It simply held that the facts that formed the bases of its finding of no plain error in that case also formed the bases of the finding of no *Strickland* prejudice on the post-conviction motion. In so doing, it properly applied the *Strickland* standard, not the plain error standard, stating, "movant fails to show that, but for trial counsel's failure to object and then to request a mistrial, there was a 'reasonable probability that the result would have been different.'" *Sidebottom*, 781 S.W.2d at 797.

Deck, 68 S.W.3d at 426–27. The Court pointed out that "the two tests are not equivalent" because, while "plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative, *Strickland* clearly and explicitly holds that an outcome-

determinative test cannot be applied in a post-conviction setting." *Id*. at 427 (citing *Strickland,* 466 U.S. at 693 (citation omitted)). Therefore, to the extent that *Sidebottom* and its progeny apply a different standard, "they are inconsistent with *Strickland* and should no longer be followed." *Id*. A less rigorous standard is appropriate for determining claims of ineffective assistance of counsel because the defendant is asserting "the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." *Deck,* 68 S.W.3d at 428 (quoting *Strickland*, 466 U.S. at 694). But the Court cautioned that "this theoretical difference in the two standards of review will seldom cause a court to grant post-conviction relief after it has denied relief on direct appeal, for, in most cases, an error that is not outcome-determinative on direct appeal will also fail to meet the *Strickland* test." *Deck,* 68 S.W.3d at 428.

Applying the *Strickland* standard, the Court found that Deck was prejudiced by counsel's submission of a defective instruction because: "The missing paragraphs of the instruction told the jury about the need to balance this mitigating evidence with the aggravating circumstances focused on by the State, and what evidence the jury could consider in deciding mitigation." *Deck*, 68 S.W.3d at 430. Further, notes and questions from the jury room during deliberations suggested that the jurors were confused about the issue of mitigation. The unequivocal evidence of the jurors' confusion was pivotal to the outcome of the case:

> It is the jurors' focus on mitigation and their apparent confusion about it when considering whether to impose the death penalty that causes this Court to conclude that this case belongs in that small group of cases in which the *Strickland* standard of review leads to a different outcome than does the heightened standard applied on plain error review.

Id. at 431.

The Supreme Court of Missouri has made it clear that all trial and appellate courts have the power to remedy apparent defects in a pattern instruction. In *State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997), the Court ruled that courts of appeals indeed have the jurisdiction to hear challenges to pattern instructions. The Court explained:

> In fact, this Court has held that MAI-CR and its Notes on Use are "not binding" to the extent they conflict with the substantive law. *State v. Anding*, 752 S.W.2d 59, 61 (Mo. banc 1988). "Procedural rules adopted by MAI cannot change the substantive law and must therefore be interpreted in the light of existing statutory and case law." *Id.* citing *Mo. Const. art. V § 5; State v. Dixon*, 655 S.W.2d 547, 558 (Mo. App. E.D. 1983), *cert. denied* 464 U.S. 1072, 104 S.Ct.

982, 79 L.Ed.2d 219 (1984). As the introductory comments to MAI-CR3d specifically provide:

> The Court has adopted these proposals without judicially deciding or foreclosing any legal, constitutional, procedural, instructional, or other issues which may arise in cases even though the procedures, instructions, and Notes on Use adopted by the Court are followed and used.

MAI-CR3d "How to Use This Book-Reservations" pp. ii-iii (1987).

Carson, 941 S.W.2d at 520. The Court ruled that, "If an instruction following MAI-CR3d conflicts with the substantive law, *any* court should decline to follow MAI-CR3d or its Notes on Use," and provided an appendix of cases that, to the extent holding otherwise, are overruled. *Id.* (emphasis added).

VII. (§24.21) Conclusion

The author hopes that this chapter will be useful to the practitioner in using MAI-CR 3d and in spotting and analyzing potential problems. Although this chapter sets out some of the general rules governing jury instructions, it does not address all of the quirks of each particular instruction. There are many areas in MAI-CR 3d that, by themselves, could be the subject of a more extensive chapter than this, and the author made no attempt to tackle them. This chapter is by no means exhaustive but hopefully provides a good foundation from which to work.

Timothy W. Jones*

Chapter 25

CLOSING ARGUMENT

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II. For the Defense

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I. For the Prosecution

A. (§25.1) When Given

Rule 27.02, Felonies—Order of Trial, provides:

> (n) The court shall fix the length of time for the arguments and shall announce same to counsel. The attorney for the state shall make the opening argument, the attorney for defendant shall make an argument, and the attorney for the state shall conclude the argument. Each side may waive its right to argument.

See also Rules 27.03 (misdemeanors) and 37.62 (ordinance violations).

As Rule 27.02 states, the parties may waive the final argument and submit the case following the court's instructions. The only time when it seems appropriate to do so would be in a very short jury-waived case in which the trial court has recently heard the evidence and argument would be superfluous. Even in these cases, it is suggested that the court be asked if there are any subjects about which it would like to hear the prosecutor's (or defense attorney's) comments. An attorney should never miss a chance to have "the last word" and keep that attorney's position as the foremost thought in the mind of the jury or the trial court.

B. (§25.2) Scope—Use of Instructions, Exhibits, and Diagrams

The prosecutor should use an enlargement of the state's verdict-directing instruction(s) as an introduction to the argument. The prosecution should point to the elements of the instructions and explain how each has been proved. Reminding the jury of specific facts that were introduced as evidence in the case and matching those facts to the law of the case as shown in the jury instructions can be a very effective tool in persuading the jury that the prosecution has proven its case. If the jurors can see how the facts match with the law, they will tangibly be able to understand how the case has been proved.

Exhibits such as pictures, diagrams, and charts all may be used in the closing argument. The state may even prepare and use a chart of incriminating circumstances based on witnesses' testimony. *State v. James*, 749 S.W.2d 356 (Mo. banc 1988). The chart may then be used in opening and closing arguments. It should be marked for identification, but not admitted into evidence. *In re Estate of Passman*, 537 S.W.2d 380 (Mo. banc 1976).

The argument can include any statement based on the facts and the reasonable inferences to be drawn from the evidence. *State v. Shurn*, 866 S.W.2d 447 (Mo. banc 1993). Even a statement based on incompetent evidence, if admitted by the court without objection, can be the basis of argument. *State v. Brock*, 273 S.W.2d 166 (Mo. 1954). But an argument cannot be based on evidence excluded during the trial even if the evidence was erroneously excluded. *State v. Williams*, 376 S.W.2d 133 (Mo. 1964).

In *State v. Hall*, 748 S.W.2d 713 (Mo. App. E.D. 1988), the court held that the prosecutor could not put on a demonstration to show how to conceal a gun to show why witnesses did not see the identity of persons who threw the gun away. If the demonstration had been part of the evidence, it could have been repeated as part of the argument.

In *State v. Henke*, 901 S.W.2d 921 (Mo. App. W.D. 1995), however, a prosecutor was permitted to demonstrate during closing arguments how it was believed that the defendant held a shotgun while shooting the victim when the demonstration was consistent with the testimony presented.

And in *State v. Biggs,* 91 S.W.3d 127 (Mo. App. S.D. 2002), the prosecutor was permitted, during closing argument, to brandish the hatchet allegedly used by the defendant.

C. (§25.3) A Review of Cases

Caselaw has dealt with the subjects that follow as they pertain to closing arguments. It is important to note that proper objection to closing arguments is imperative for proper preservation of error, which permits the court of appeals to use the most liberal standard of review on appeal. *State v. Shurn*, 866 S.W.2d 447 (Mo. banc 1993).

1. (§25.4) Epithets

Epithets are still "ill-advised," and, if there is no evidentiary basis for an epithet, it can be prejudicial error. *State v. Miller*, 604 S.W.2d 702 (Mo. App. W.D. 1980).

The courts have permitted referring to the defendant by the following terms:

- A "cold blooded murder[er]," *State v. Spencer*, 195 S.W.2d 99 (Mo. 1946)
- A "menace," *State v. Benjamin*, 309 S.W.2d 602 (Mo. 1958)
- A "dangerous man," *State v. Jones*, 227 S.W.2d 713 (Mo. 1950)
- A "drunken killer," *State v. Eison*, 271 S.W.2d 571 (Mo. 1954)
- A "vulture," *State v. Hardy*, 276 S.W.2d 90 (Mo. banc 1955)
- A "mean punk" and "a vicious man," *State v. Tate*, 468 S.W.2d 646 (Mo. 1971)
- A "young punk," *State v. Wallace*, 504 S.W.2d 67 (Mo. 1973)
- A "pusher," *State v. Taylor*, 508 S.W.2d 506 (Mo. App. E.D. 1974)

- A "professional car thief," *State v. Nichelson*, 546 S.W.2d 539 (Mo. App. E.D. 1977)
- A "hoodlum," *State v. Poole*, 556 S.W.2d 493 (Mo. App. E.D. 1977)
- A "dopehead," *State v. Jarmon*, 556 S.W.2d 469 (Mo. App. E.D. 1977)
- A "turkey," *State v. Merritt*, 591 S.W.2d 107 (Mo. App. W.D. 1979)
- A "hired killer," *State v. Fuhr*, 660 S.W.2d 443 (Mo. App. W.D. 1983)
- A "child molester," *State v. Burke*, 719 S.W.2d 887 (Mo. App. E.D. 1986)
- An "animal," *State v. Wood*, 719 S.W.2d 756 (Mo. banc 1986)
- A "killer," *State v. Harris*, 824 S.W.2d 111 (Mo. App. E.D. 1992)
- The "scum of the earth," *State v. Herron*, 863 S.W.2d 6 (Mo. App. S.D. 1993)
- "Rambo," when the defendant himself used that name, *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993)
- A "nasty-mouthed woman," *State v. Copeland*, 928 S.W.2d 828 (Mo. banc 1996)

The Supreme Court has also permitted a prosecutor to refer to the testimony of the defendant's expert witness as "voodoo." *State v. Clayton*, 995 S.W.2d 468 (Mo. banc 1999).

The defendant cannot be called a "dirty, low-down hound and scoundrel." *State v. Dixon*, 253 S.W. 746 (Mo. 1923). Nor can the defendant be referred to as a criminal of any class or kind—particularly, the defendant cannot be called a "car thief" when the defendant is charged with assault. *State v. Stockbridge*, 549 S.W.2d 648 (Mo. App. W.D. 1977).

The distinction between the above cases apparently is that even epithets and name calling are justified if the epithet is based on the evidence presented, e.g., the defendant can be called "a drunken killer" if in fact the defendant killed somebody and was intoxicated. Similarly, the defendant can be called a "professional car thief" if that is the charge. But even a defendant who is a car thief may not be so labeled if not on trial for car theft. *Stockbridge,* 549 S.W.2d 648; *State v. Grissom*, 804 S.W.2d 777 (Mo. App. E.D. 1990).

2. (§25.5) Demeanor of Defendant

Comments on the defendant's demeanor in the courtroom—for example, the defendant's:

- snarling looks, *State v. Harmon*, 296 S.W. 391 (Mo. 1927); or
- lack of sympathy and laughing throughout the trial, *State v. Hale*, 371 S.W.2d 249 (Mo. 1963),

are proper if supported by the evidence. In the case of "snarling looks" and "laughter" that take place during the course of the trial, it would be wise to make a record at the time the action takes place so that a later argument will have a clear and solid foundation.

3. References to Defendant

a. (§25.6) Defendant's Testimony

A defendant who does testify is subject to cross-examination as is any other witness. When a defendant does testify, a defendant's failure to testify regarding a specific fact in issue is a legitimate topic for comment by the state. *State v. Hood*, 313 S.W.2d 661 (Mo. 1958); *State v. Stidham*, 305 S.W.2d 7 (Mo. 1957). For example, if a witness testifies that he saw the defendant wiping blood from his hands 30 minutes after the stabbing death of the victim and the defendant who testified says nothing about it or offers no explanation, then such a fact can be argued.

A court has also found that a prosecutor did not commit plain error in presenting an improper inference for the jury to believe that the defendant was not being truthful by

suggesting that the defendant was able to listen to all the evidence and then make up his own story. *State v. Norville*, 23 S.W.3d 673 (Mo. App. S.D. 2000).

Further, it is not erroneous for a prosecutor to state that a testifying defendant had an incentive to lie and did in fact "lie" because a defendant clearly has an interest in the outcome of a trial. *State v. Juarez*, 26 S.W.3d 346 (Mo. App. W.D. 2000). The prosecutor did not make an inappropriate comment on the presumption of innocence or suggest that the defendant was guilty merely because he had been charged. *Id*.

b. Failure to Testify

(1) (§25.7) Defendant

If the defendant offers no testimony, using the words "defendant," "accused," and "testify" or their equivalent is usually grounds for reversible error. *State v. Corpier*, 793 S.W.2d 430 (Mo. App. W.D. 1990); *City of Cape Girardeau v. Jones*, 725 S.W.2d 904 (Mo. App. E.D. 1987). A defendant has an absolute right to be free from self-incrimination. U.S. CONST. amend. V; MO. CONST. art. I, § 19; § 546.260, RSMo 2000.

Specifically, the courts have found error in the following situations:

- When the prosecutor argued that the jurors have not seen anyone get on the stand and testify about exactly what was on the defendant's mind, *State v. Kempker*, 824 S.W.2d 909 (Mo. banc 1992)

- When the prosecutor argued that self-defense could only be proved by one of two people—one of whom was dead, *State v. Feltrop*, 803 S.W.2d 1 (Mo. banc 1991)

- When the prosecutor said, "we want to ask you what you were doing with these guys," *State v. Nelson*, 719 S.W.2d 13 (Mo. App. W.D. 1986) (finding this comment to be an inappropriate comment on the defendant's decision not to testify)

- When the prosecutor argued that the defendant failed to volunteer an exculpatory statement following the defendant's arrest, or when the prosecutor made any reference to the defendant's post-arrest silence, *State v. Flynn*, 875 S.W.2d 931 (Mo. App. S.D. 1994) (held to be plain error)

But once the defendant waives the right to remain silent, all speech or non-silence of the defendant may be admitted into evidence and commented on. *State v. Frazier*, 927 S.W.2d 378 (Mo. App. W.D. 1996).

A prosecutor's statement of "What kind of man does it take to shoot two people in a crowded Westport area?" was found not to be inflammatory on its face or under the circumstances and context in which the remark was made. *State v. Pettit*, 976 S.W.2d 585 (Mo. App. W.D. 1998).

The prosecutor can argue that the state's evidence is:

- "uncontradicted," *State v. Willis*, 328 S.W.2d 593 (Mo. 1959); *State v. Hamilton*, 612 S.W.2d 141 (Mo. App. E.D. 1980); *United States v. Singer*, 732 F.2d 631 (8th Cir. 1984); *United States v. Durant*, 730 F.2d 1180 (8th Cir. 1984); *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993); *State v. Lee*, 841 S.W.2d 648 (Mo. banc 1992);

- "undenied," *State v. Hampton*, 430 S.W.2d 160 (Mo. 1968);

- "undisputed or uncontroverted," *State v. Hardy*, 276 S.W.2d 90 (Mo. banc 1955);

- "clear and uncontroverted," *State v. Butler*, 601 S.W.2d 659 (Mo. App. E.D. 1980); or

- the only "evidence" in the case, *State v. Schupp*, 677 S.W.2d 909 (Mo. App. E.D. 1984).

The prosecutor can also state that, "[T]here's no contest about the evidence." *State v. Barnum*, 14 S.W.3d 587 (Mo. banc 2000).

A prosecutor's repeated statements that the defendant should "tell the truth" were not impermissible comments on the defendant's failure to testify but rather statements that referred to the defendant's various stories about the murders told to police and relatives. *State v. Futo*, 990 S.W.2d 7 (Mo. App. E.D. 1999).

And stating, during the penalty phase of a capital murder trial, that every "legal nicety" had been observed did not amount to improper comment on the defendant's failure to testify. *State v. Barton*, 998 S.W.2d 19 (Mo. banc 1999).

The prosecutor is permitted to refer to the fact that the defense has failed to call witnesses or offer evidence. *See*:

- *State v. Floyd*, 598 S.W.2d 517 (Mo. App. E.D. 1980)
- *State v. Williams*, 597 S.W.2d 722 (Mo. App. E.D. 1980)
- *Feltrop,* 803 S.W.2d 1
- *State v. Sidebottom*, 753 S.W.2d 915 (Mo. banc 1988)
- *State v. Tolliver*, 839 S.W.2d 296 (Mo. banc 1992)
- *State v. Buzzard*, 909 S.W.2d 370 (Mo. App. S.D. 1995)

(2) (§25.8) Defendant's Spouse

Failure of a defendant's spouse to testify cannot be argued. Rule 27.05; *State v. Baldwin*, 358 S.W.2d 18 (Mo. 1962). But see *State v. Frankoviglia*, 514 S.W.2d 536 (Mo. 1974), in which the Court said that the referral to the accused's failure to testify must be "direct, nonambiguous and unequivocal" in order to be reversible error. Also, in *Frankoviglia*, the Court considered the error remedied by a prompt instruction to the jury to disregard the prosecutor's comments. *See also* § 546.260, RSMo 2000 (marital privilege).

c. (§25.9) Defendant's Mental State

The state may argue that it does not have the burden of proving the defendant's mental capacity or ability; mental elements of a crime are satisfied by showing the

circumstances of the crime's commission. *State v. Gebhardt*, 725 S.W.2d 628 (Mo. App. E.D. 1987). Further, the Court in *Nicklasson v. State*, 105 S.W.3d 482 (Mo. banc 2003), held that a prosecuting attorney's statement during closing argument to the effect that the evidence of the defendant's mental instability did not matter was a reasonable interpretation of the law of diminished capacity.

4. (§25.10) Defendant's Failure to Call a Favorable Witness

The state may comment on the defendant's failure to call a particular witness if:

- the defendant had "superior ability to know or identify the witness";
- the defendant had superior ability to know the "nature of the testimony"; and
- the relationship between the defendant and the witness indicates that the witness, under ordinary circumstances, would likely favor the defendant.

State v. Dudley, 809 S.W.2d 40 (Mo. App. W.D. 1991); *State v. Gillis*, 807 S.W.2d 513 (Mo. App. W.D. 1991); *State v. Bostic*, 789 S.W.2d 804 (Mo. App. W.D. 1990).

But when a witness is equally available or equally unavailable to both parties, the trial court will not permit counsel to argue to the jury that an adverse inference arises from a party's failure to call that missing witness. *State v. Crawford*, 32 S.W.3d 201 (Mo. App. S.D. 2000).

The state has been permitted to comment on the absence of the following witnesses:

- Defendant's mother, *Dudley,* 809 S.W.2d 40; *State v. Clark*, 711 S.W.2d 928 (Mo. App. E.D. 1986)
- Defendant's unnamed alibi witness, *Bostic,* 789 S.W.2d 804

- Defendant's brother, *State v. Chunn*, 784 S.W.2d 228 (Mo. App. E.D. 1989); *State v. Farrell*, 682 S.W.2d 118 (Mo. App. E.D. 1984)

- Defendant's good friend, *State v. Welsh*, 775 S.W.2d 557 (Mo. App. S.D. 1989)

- Defendant's parents, *State v. Davis*, 686 S.W.2d 503 (Mo. App. W.D. 1985)

- Relatives and friends who could corroborate alibi, *State v. Ivory*, 609 S.W.2d 217 (Mo. App. E.D. 1980)

- Friends that the defendant claimed to be with on the night of the crime, *State v. Karnes*, 608 S.W.2d 455 (Mo. App. E.D. 1980)

- A person with a "community of interest" with the defendant and who allegedly cased the confectionery for the defendant immediately before the robbery, *State v. Dickerson*, 607 S.W.2d 196 (Mo. App. E.D. 1980)

- Defendant's friends and co-workers, *State v. Collins*, 587 S.W.2d 303 (Mo. App. E.D. 1979)

- A chemist after the defense had obtained the court's permission to have substance examined by the chemist, *State v. Morrison*, 545 S.W.2d 376 (Mo. App. W.D. 1976)

- Three or four people that the defendant stated that he was drinking with at the time of the robbery, *State v. Williams*, 532 S.W.2d 826 (Mo. App. E.D. 1975)

- Defendant's friends, with whom the defendant was at a party at the time of the commission of the crime, *State v. Long*, 925 S.W.2d 220 (Mo. App. E.D. 1996)

- Defendant's father, *State v. Hibler*, 21 S.W.3d 87 (Mo. App. W.D. 2000)

5. (§25.11) Convictions as Deterrents

The prosecutor can call the jury's attention to the prevalence of crime in the community, the necessity of convicting the guilty to deter crime, and the evil that would flow to society from a failure of the jury to do its duty. *See*:

- *State v. Newlon*, 627 S.W.2d 606 (Mo. banc 1982)
- *State v. Nasello*, 30 S.W.2d 132 (Mo. 1930)
- *State v. Hendrix*, 310 S.W.2d 852 (Mo. 1958)
- *State v. Olds*, 603 S.W.2d 501 (Mo. banc 1980)
- *State v. Pendleton*, 860 S.W.2d 807 (Mo. App. E.D. 1993)
- *State v. Plummer*, 860 S.W.2d 340 (Mo. App. E.D. 1993)
- *State v. Jeffries*, 858 S.W.2d 821 (Mo. App. E.D. 1993)

This type of comment is permissible even though there was no evidence introduced about crime in the area. Such are matters of common knowledge. *State v. Preston*, 861 S.W.2d 627 (Mo. App. E.D. 1993); *State v. McDonald*, 661 S.W.2d 497 (Mo. banc 1983).

This kind of appeal is best left to the final half of the closing argument, and it usually can be employed in response to a defense counsel's plea that a conviction of the client on such flimsy evidence will result in a miscarriage of justice and a weakening of the judicial system. The state can effectively argue that the danger to the judicial system is not of convicting too many guilty people but in leaving unpunished those who are guilty, with the result that, punishment being uncertain, crime is prevalent. *State v. Walls*, 744 S.W.2d 791 (Mo. banc 1988); *see also State v. Hughes*, 908 S.W.2d 804 (Mo. App. E.D. 1995).

The state cannot argue that the defendant's acquittal would permit the defendant to go back into the community and commit other crimes. *State v. Couch*, 523 S.W.2d 612 (Mo. App. W.D. 1975); *State v. Buford*, 619 S.W.2d 777 (Mo. App. W.D. 1981); *State v. Joles*, 755 S.W.2d 622 (Mo. App. E.D. 1988); *see also State v. Kriebs*, 978 S.W.2d 460 (Mo. App. S.D. 1998). But the court of appeals has permitted the state to argue that a stiff sentence will deter "the defendant as well as others" from committing similar crimes. *Jeffries,* 858 S.W.2d at 825.

The prosecutor can argue the prevalence of crime reported in the newspaper and on television and ask the jury to "do something about it." *State v. Mayo*, 927 S.W.2d 535 (Mo. App. E.D. 1996).

The prosecutor can argue that the jury is the "voice of the community" in setting the standards for the county in the prevention of crime. *State v. Hughes*, 908 S.W.2d 804 (Mo. App. E.D. 1995).

The prosecutor may also argue that the jury would have to answer to the community if the defendant was acquitted in light of the overwhelming evidence against the defendant. *State v. Cruz*, 971 S.W.2d 901 (Mo. App. W.D. 1998).

The prosecutor may not argue that defense counsel has suborned perjury or fabricated evidence, but the prosecutor can argue that defense counsel's arguments were smoke screens. *State v. Weaver*, 912 S.W.2d 499 (Mo. banc 1995).

The prosecutor crosses the line by calling on the jury to "raise the window and say we're mad as hell." *State v. Link*, 25 S.W.3d 136 (Mo. banc 2000). But the Court in *Link* declined to reverse, mostly because an objection had not been timely made to the statement at the trial level, and the Court did not find manifest injustice in the statement although it was improper. *Id.*

In *State v. Collins,* 150 S.W.3d 340 (Mo. App. S.D. 2004), the prosecutor's comments during closing argument that members of the jury were "the only ones who can protect the little ones" and that "if these kids are going to be saved" it was going to be by the jury were not improper.

6. Personalizing

a. (§25.12) Prosecutor's Personal Opinion

The prosecutor may not tell the jury about the prosecutor's personal opinion that would include facts not in evidence. The prosecutor may not say, for example, "I believe the complaining witness" or "I know the defendant is guilty." *State v. Jones*, 604 S.W.2d 665 (Mo. App. E.D. 1980); *see also United States v. Singer*, 660 F.2d 1295 (8th Cir. 1981); *State v. Bramlett*, 647 S.W.2d 820 (Mo. App. W.D. 1983); *State v. Roberts*, 838 S.W.2d 126 (Mo. App. E.D. 1992).

The state may not argue that, if the state did not think the defendant was guilty, it would not have charged the defendant with the crime. *State v. Robinson*, 864 S.W.2d 347 (Mo. App. W.D. 1993).

The obvious reason that such comments are not justified is that they are based on facts not in evidence. *State v. Givens*, 851 S.W.2d 754 (Mo. App. E.D. 1993); *State v. Williams*, 839 S.W.2d 732 (Mo. App. S.D. 1992).

In *State v. Collins*, 150 S.W.3d 340 (Mo. App. S.D. 2004), the prosecutor's comments during closing arguments that variance in the testimony of victims was not evidence that the victims were lying and that both he and law enforcement agencies were "interested in truth and justice" did not constitute impermissible vouching.

In *State v. Fanning*, 647 S.W.2d 177 (Mo. App. S.D. 1983), the prosecutor, apparently in response to defense counsel's statement of his opinion that the defendant was innocent, argued, "The son-of-a-bitch . . . is guilty as hell." The prosecutor promptly apologized following an objection by defense counsel. Defense counsel did not ask for a mistrial, and the court of appeals said that, even though the comment was improper, it would not disturb the jury's guilty verdict because the defense counsel had not asked for a mistrial at the time of the statement. This form of argument, though, is not recommended.

The prosecutor's statement that the accused is guilty is admissible if it is made clear that the prosecutor's opinion is based on the evidence. *State v. Tokar*, 918 S.W.2d 753 (Mo. banc 1996); *State v. Albanese*, 9 S.W.3d 39 (Mo. App. W.D. 1999); *State v. Sanders*, 903 S.W.2d 234 (Mo. App. E.D. 1995).

It is improper, though, for the prosecutor to argue that prosecutors do not "go for convictions" but rather take an oath to "do justice," even in retaliation for defense counsel's assertion that prosecutors "go for convictions." *Garrett v. United States,* 78 F.3d 1296 (8th Cir. 1996).

It was not improper vouching or personalization for a prosecutor to comment that it was obvious to him what happened and that "we know why" the victim ran out of the

house, was naked, and was bleeding because the statements were proper responses to the defense's argument and referred the jury to testimony in the record. *State v. Collins*, 962 S.W.2d 421 (Mo. App. W.D. 1998).

b. (§25.13) Referring to Jurors Personally

It is permissible to ask for a conviction to generally preserve law and order in society but not to preserve the safety of the jury's children, wives, and families. Such an appeal to the personal fears of the jury is error. *State v. Battle*, 588 S.W.2d 65 (Mo. App. E.D. 1979); *State v. Groves*, 295 S.W.2d 169 (Mo. banc 1947); *State v. Raspberry*, 452 S.W.2d 169 (Mo. 1970); *State v. Heinrich*, 492 S.W.2d 109 (Mo. App. W.D. 1973).

The state may not challenge the jurors on how they will account to family and friends for a verdict of acquittal. *State v. Thomas*, 780 S.W.2d 128 (Mo. App. E.D. 1989).

In *State v. Lynch,* 131 S.W.3d 422 (Mo. App. W.D. 2004), it was not improper personalization for the prosecutor to use the term "you" in closing argument.

Arguing that the jurors pray that their children do not have to experience what the victim's children went through is an improper, personalized argument. *State v. Tokar*, 918 S.W.2d 753 (Mo. banc 1996).

But the prosecutor commenting that an acquittal in a kidnapping case would tell future victims that they must "resist to the point of being killed" was not an improper personalization because the argument did not implicate any personal threat to a juror or family member of a juror. *State v. Holmes*, 978 S.W.2d 440 (Mo. App. E.D. 1998); *see also State v. Cunningham*, 32 S.W.3d 217 (Mo. App. S.D. 2000).

Also, a prosecutor's use of the word "you" to characterize a key witness's feelings and actions during the murders that were the subject of the trial did not amount to an "improper personalization." *State v. Wolfe*, 13 S.W.3d 248 (Mo. banc 2000); *see also State v. Ferguson*, 20 S.W.3d 485 (Mo. banc 2000).

And a prosecutor's argument that referred only in general terms to "people in our society" who are worried about "our sister, our mother, [and] our daughter" being in danger was at most an indirect reference of danger to jurors or their families and not an "improper personalization." *Hall v. State*, 16 S.W.3d 582 (Mo. banc 2000).

c. (§25.14) Referring to Victim

The state may not ask jurors to place themselves in the shoes of the victims of crimes. *State v. Roberts*, 838 S.W.2d 126 (Mo. App. E.D. 1992); *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995). The state may not argue that the victim may have been someone "dear and close to us." *State v. Harris*, 714 S.W.2d 561 (Mo. App. W.D. 1986).

But it was not plain error or improper personalization for a prosecutor to have the jury sit in silence for five minutes during his argument to demonstrate how long the defendant stood on the victim's neck. *State v. Knese*, 985 S.W.2d 759 (Mo. banc 1999).

Further, the defendant in a capital murder case was not entitled to a mistrial when the prosecutor stated during the closing argument of the guilt phase that "anything less than a finding of first degree murder would be an insult to [the victims]." *State v. Smith*, 32 S.W.3d 532 (Mo. banc 2000). The Court determined that this comment was made during a proper discussion of whether the defendant's actions constituted first degree murder; it was isolated, brief, and not emphasized; and it did not suggest that the jurors would have to explain their actions after trial. *Id.*

The court in *State v. Manwarren,* 139 S.W.3d 267 (Mo. App. S.D. 2004), held that a prosecutor's closing argument that argued the personal characteristics and worth of the victim was not manifest injustice.

d. (§25.15) Referring to Defense Counsel Personally

Personal attacks on defense counsel by the prosecutor are improper. *State v. Ward*, 807 S.W.2d 225 (Mo. App. E.D. 1991). Although this is the general rule, when personal attacks do occur, it is not always considered reversible error.

In *State v. Howard*, 896 S.W.2d 471 (Mo. App. S.D. 1995), the court permitted a statement "that defense counsel's job was to divert the jury's attention from the real issues." *See also State v. Fritz*, 913 S.W.2d 941 (Mo. App. W.D. 1996).

In *State v. Collins*, 150 S.W.3d 340 (Mo. App. W.D. 1998), the court found that a prosecutor's comments during closing argument, in discussing defense counsel's use of victims' depositions, that defense counsel deposed them three times and tried to "make them look like liars," were not impermissible personal attacks on trial counsel.

7. (§25.16) Other Crimes of Defendant

The prosecutor may not refer to the defendant's conviction or involvement in other crimes as grounds for conviction in the case on trial. *State v. Parker*, 617 S.W.2d 83 (Mo. App. E.D. 1981); *State v. Lee*, 486 S.W.2d 412 (Mo. 1972). Nor may the prosecutor comment on the fact that the defendant was charged with any crime other than the one on trial. *State v. Tillman*, 454 S.W.2d 923 (Mo. 1970). In some instances, it is proper to introduce evidence of another crime, *see* §22.5 of this deskbook, but the prosecution must be careful in referring to other crimes not to suggest that those are the bases for conviction in the case on trial. It is best to resolve issues relating to this topic outside of the purview of the jury. And the usual practice is to resolve these matters pretrial in the form of a motion *in limine* so that both parties are clearly aware of what aspects of the defendant's past can be introduced during the course of the trial.

The state may refer to the defendant's prior convictions only as those convictions relate to credibility. *State v. Mosley*, 766 S.W.2d 755 (Mo. App. S.D. 1989); *State v. Blackburn*, 789 S.W.2d 126 (Mo. App. E.D. 1990).

8. (§25.17) Punishment

The prosecutor may not ask for any specific punishment in the rebuttal portion of closing argument unless it is mentioned in the initial argument, although the reference need only be slight. *State v. Peterson*, 423 S.W.2d 825 (Mo. 1968); *State v. Ross*, 606 S.W.2d 416 (Mo. App. E.D. 1980); *State v. Malveaux*, 604 S.W.2d 728 (Mo. App. W.D. 1980); *State v. Fox*, 916 S.W.2d 356 (Mo. App. E.D. 1996). So if the prosecutor plans to ask for a term of years,

that term of years, as a reference to punishment, must be made in the first half so that the defendant has an opportunity to respond to that argument. The prosecutor can then take up the subject again in the rebuttal part of the argument.

A statement in the opening part of the state's argument that punishment would be discussed in the second half was sufficient to permit the prosecutor to argue for a specific term of years in the second half. *State v. Pena*, 784 S.W.2d 883 (Mo. App. W.D. 1990); *State v. Manier*, 789 S.W.2d 208 (Mo. App. S.D. 1990).

Prosecutors can discuss mercy in closing arguments because mercy is a valid sentencing consideration when based on the circumstances of the case in that a jury can sentence the defendant to life in prison even if it determines that the aggravating circumstances outweigh the mitigating circumstances. *State v. Rousan*, 961 S.W.2d 831 (Mo. banc 1998). A prosecutor is allowed to argue that the defendant does not deserve mercy under the facts of a particular case. *Id.*

Finally, at the penalty-phase closing argument of a capital case, a prosecutor can be within the scope of permissible argument in characterizing a sentence of life imprisonment as a "reward" in comparison to the defendant receiving the death penalty. *State v. Ringo*, 30 S.W.3d 811 (Mo. banc 2000).

a. (§25.18) Probation, Parole, or Appeal as Affecting

The prosecutor may not refer to the fact that the defendant is likely to be paroled or get probation in a shorter time than the term of years the jury sets in its verdict. The same is true of the fact that the state has no right to appeal. Probation, parole, and appeal are not a consideration of the jury and are not to be argued by either party. *State v. Lewis*, 443 S.W.2d 186 (Mo. 1969); *State v. Cornett*, 381 S.W.2d 878 (Mo. banc 1964); *State v. Benjamin*, 309 S.W.2d 602 (Mo. 1958).

b. (§25.19) Prior Crimes as Affecting

It is proper to argue that the jury should not consider punishment because the court will assess punishment, *State v. Haynes*, 528 S.W.2d 11 (Mo. App. E.D. 1975); but it is error to use the terms "habitual," or "criminal," or a similar reference, either in the trial or in the closing.

9. (§25.20) Retaliatory Argument

Anything that is in retaliation to arguments raised by the defense attorney is proper material to be raised in the prosecutor's rebuttal, even though it would not be proper otherwise. *See*:

- *State v. Shields*, 619 S.W.2d 937 (Mo. App. E.D. 1981)
- *State v. Kirksey*, 528 S.W.2d 536 (Mo. App. E.D. 1975)
- *State v. Lacy*, 548 S.W.2d 251 (Mo. App. W.D. 1977)
- *State v. Warren*, 320 S.W.2d 575 (Mo. 1959)
- *State v. Shurn*, 866 S.W.2d 447 (Mo. banc 1993)
- *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993)
- *State v. Petty*, 967 S.W.2d 127 (Mo. App. E.D. 1998)

In *Kirksey,* the court permitted the prosecutor to argue that he could prove that the scar on the defendant's face was not there at the time of the crime although there was no evidence introduced as to the fact. This argument was permitted because the defense, in argument, challenged an eyewitness who identified the defendant but made no reference to the defendant's facial scars. The defense put on no evidence as to when the defendant's scars were inflicted. *Kirksey*, 528 S.W.2d 536.

The prosecutor can comment on the defendant's failure to testify if the defendant's attorney tries to take advantage of the defendant's silence. For example, defense counsel, in a rape case, challenged the prosecutor to answer certain questions that he contended could only be answered under his (the defendant's) theory that the victim knew the defendant and acquiesced to him; the prosecutor could then comment on the defendant's failure to testify. *State v. Green*, 549 S.W.2d 644 (Mo. App. W.D. 1977).

The state may argue the defendant's failure to subpoena witnesses in retaliation to defense counsel's remark concerning the calling of certain witnesses. *State v. Stepter*, 794 S.W.2d 649 (Mo. banc 1990); *State v. Plummer*, 860 S.W.2d 340 (Mo. App. E.D. 1993).

In rebuttal, the prosecutor may argue that the defendant had an equal opportunity to call the informant as a witness in response to the defendant's argument that the state failed to call the informant when the witness was equally available to both parties. *State v. Davenport*, 924 S.W.2d 6 (Mo. App. E.D. 1996).

Additionally, in *Goudeau v. State*, 152 S.W.3d 411 (Mo. App. S.D. 2005), a prosecutor's comments during rebuttal closing argument that a logical inference existed that the defendant robbed a store, hid a robbery weapon in a tree, and came back to retrieve the weapon wearing different clothes were not improper.

The Court in *State v. Deck,* 136 S.W.3d 481 (Mo. banc 2004), found that the portion of the closing argument in which the prosecuting attorney asked jurors to think about the victims of the murder before their deaths was an appropriate reference to the record and an appropriate response to the defendant's closing argument.

Finally, in *State v. Tinsley,* 143 S.W.3d 722 (Mo. App. S.D. 2004), the state's comment during closing argument that it did not need to call a prospective witness and that the defendant could have brought in the witness was permissible retaliation to the defense's closing argument.

10. (§25.21) Pre- and Post-Arrest Statements and Conduct or Flight

The prosecutor may not argue the defendant's failure to volunteer an exculpatory statement. *State v. Leonard*, 606 S.W.2d 403 (Mo. App. E.D. 1980); *State v. Hill*, 823 S.W.2d 98 (Mo. App. E.D. 1991). But courts have permitted comment on a defendant's silence and failure to make an exculpatory statement during the period before arrest and before receiving the *Miranda* warning. *Jenkins v. Anderson*, 447 U.S. 231 (1980); *State v. Lawrence*, 569 S.W.2d 263 (Mo. App. E.D. 1978); *State v. Koster*, 684 S.W.2d 488 (Mo. App. E.D. 1984); *State v. Masslon*, 746 S.W.2d 618 (Mo. App. E.D. 1988).

The state could argue that the defendant told the prosecutor himself that he was guilty when he started running and not risk a reversal on the ground that it was a comment on the defendant's failure to testify. *State v. Blewett*, 853 S.W.2d 455 (Mo. App. W.D. 1993); *State v. Katura*, 837 S.W.2d 547 (Mo. App. S.D. 1992).

11. (§25.22) Fingerprints

The state does not have to introduce evidence of fingerprints, and it is error to permit the defendant to argue about the absence of

fingerprints. *State v. Simpson*, 611 S.W.2d 556 (Mo. App. E.D. 1981); *State v. Wiggley*, 515 S.W.2d 791 (Mo. App. E.D. 1974).

12. (§25.23) Previous Trials

There is no rule that prevents a previous trial from being referred to in the course of trial or argument. *State v. Nevels*, 609 S.W.2d 725 (Mo. App. W.D. 1980).

13. (§25.24) Reasonable Doubt Arguments

The state may not define reasonable doubt but may discuss the concept of reasonable doubt. *State v. Jacobs*, 866 S.W.2d 919 (Mo. App. W.D. 1993). For an improper definition to be reversible, it must be objected to by defense counsel, the objection must be overruled, and the state must continue to argue a definition of reasonable doubt. *State v. Williams*, 659 S.W.2d 778 (Mo. banc 1983); *State v. Massey*, 817 S.W.2d 624 (Mo. App. E.D. 1991).

D. (§25.25) When Improper Argument Is Reversible Error

The court has wide latitude in controlling the scope of the closing argument and what constitutes permissible references. Unless this discretion is clearly abused to the prejudice of the accused, the trial court's rulings will not be disturbed on appeal. *State v. Castillo*, 853 S.W.2d 381 (Mo. App. E.D. 1993). To be reversible error, the argument must have a "decisive effect on the jury," *State v. Plummer*, 860 S.W.2d 340 (Mo. App. E.D. 1993), or, as stated in *State v. Mahurin*, 799 S.W.2d 840 (Mo. banc 1990), be "clearly injurious to the accused." *See also State v. Sanders*, 714 S.W.2d 578 (Mo. App. E.D. 1986); *State v. Quinn*, 871 S.W.2d 80 (Mo. App. E.D. 1994).

E. (§25.26) Strategy Suggestions—Be Yourself and Be Repetitious

An objection cannot be made to a closing argument because the argument is "repetitious." Counsel is urged to be repetitious. If the points are worth making, they are worth making several times. The old preacher's adage should be followed, that is: "Tell them what you're going to tell them, then tell them, then tell them what you've told them."

F. (§25.27) Capital Murder

The statutes governing first degree murder calling for capital punishment are §§ 565.020 *et seq*., RSMo 2000 and Supp. 2004. The evidence to be considered in assessing punishment is set out at § 565.032, RSMo 2000. Following is a sampling of capital murder decisions since the enactment of these statutes that show what has been "permitted":

- Personal characteristics of victims and the defendants are relevant to sentence. *State v. Whitfield*, 837 S.W.2d 503 (Mo. banc 1992); *State v. Petary*, 781 S.W.2d 534 (Mo. banc 1989).

- It is the state's job to hold the defendant accountable, and just punishment, deterrence, and retribution are three reasons to impose the death penalty. *State v. Ramsey*, 864 S.W.2d 320 (Mo. banc 1993).

- Death for the defendant would be more humane than what the defendant provided the victim; the defendant believed in capital punishment in executing the victim without a trial by a judge or a jury. *Antwine v. State*, 791 S.W.2d 403 (Mo. banc 1990).

- The jury should imagine the terror imposed on the victim's family and their helplessness and torment. *Petary,* 781 S.W.2d 534.

- The death penalty will serve as a deterrent to crime in the community. *State v. Sandles*, 740 S.W.2d 169 (Mo. banc 1987).

- The defendant shows lack of remorse. *State v. Richardson*, 923 S.W.2d 301 (Mo. banc 1996).

- The prosecutor can suggest to the jury that, as a last resort, the judge could select the sentence to be imposed on the defendant. *Id.*

- The prosecutor could comment during the penalty phase that, when the defendant "does his next murder . . . he really gets scared because he knows there's no such thing as a free murder." *State v. Morrow*, 968 S.W.2d 100 (Mo. banc 1998).

- The prosecutor's personal opinion that "the only just and proper punishment for this case is an imposition of the death sentence" was an argument fairly based on the evidence. *State v. Barnett*, 980 S.W.2d 297 (Mo. banc 1998).

- The prosecutor's comment during closing argument of the penalty phase of trial that the defendant had the burden to present mitigating evidence and that the defendant's mitigating-factors evidence was insufficient to offset the aggravating factors was not improper, especially considering the court's curative instruction. *State v. Armentrout*, 8 S.W.3d 99 (Mo. banc 1999).

- Biblical references contained in the prosecutor's penalty phase closing argument were permitted. *State v. Christeson*, 50 S.W.3d 251 (Mo. banc 2001).

"What is not permitted" includes the following:

- Calling the defendant a mass murderer and serial killer when not based on the evidence. *Whitfield,* 837 S.W.2d 503.

- Claiming the defendant poses a danger to other prison inmates in the absence of evidence that the defendant had failed to adjust to incarceration in the past. *Id.*

- Expressing a personal belief in the propriety of the death sentence, referring to the prosecutor's position of authority, linking the defendant to famous mass murderers, appealing to the personal fears and emotions of the jurors, and asking the jury to "kill" the defendant. *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989).

- Arguing the cost of feeding, housing, and medical care for the defendant for 50 years. *Blair v. Armontrout*, 916 F.2d 1310 (8th Cir. 1990).

- Using excessive Biblical references. *State v. Phillips,* 940 S.W.2d 512 (Mo. banc 1997) (but in this case the prosecutor was allowed to state that the defendant had offered her son as a sacrificial lamb and that she had placed her own kiss of Judas on her son).

- Asking the jury why a citizen should work the rest of her natural life just so the defendant can live in the penitentiary and stating that it was more humane to sentence the defendant to death so that the victims can get on with their lives, combined with an unsupported description of the instantaneous death in the gas chamber. *Antwine v. Delo*, 54 F.3d 1357 (8th Cir. 1995).

- Misstating the law during closing arguments—e.g., stating to the jury that one not-guilty vote would free the defendant. *State v. Graham*, 916 S.W.2d 434 (Mo. App. E.D. 1996) (but argument not prejudicial in this case).

II. For the Defense

A. (§25.28) Purpose and Scope

The closing argument is perhaps the most powerful portion of the trial for the defense attorney. The closing argument is the attorney's last chance to attempt to persuade the jury to acquit the client. The closing argument is the last thing the jury will hear from the defense before going to the jury room to deliberate. It is important that the closing argument be well prepared, powerful, and persuasive. In Missouri, counsel has wide latitude during closing argument, and the trial court has broad discretion in the control of closing argument. *State v. Wren*, 643 S.W.2d 800 (Mo. 1983); *State v. Sumowski*, 792 S.W.2d 381 (Mo. App. E.D. 1990); *State v. Bogue*, 788 S.W.2d 772 (Mo. App. E.D. 1990).

Because counsel has wide latitude in closing argument, it is important for the defense attorney to be on guard to protect against impermissible argument on the part of the state. Counsel has a right and a duty to object to impermissible argument to protect the client's right to a fair trial. *State v. Grayson*, 668 S.W.2d 153 (Mo. App. E.D. 1984).

B. (§25.29) Areas of Improper Argument by the Prosecutor

The closing argument is an area ripe with possibilities for abuse. Because the court is given such broad discretion in closing argument, however, the appellate courts will only reverse a conviction if counsel has made proper objections and preserved the record. Often, appellate courts will find the error, even if properly preserved, to be harmless. Therefore, the best advocacy approach is to file a motion *in*

limine before closing argument detailing those areas of concern before closing. This strategy is effective for many reasons:

1. It gives the defense attorney time to address the issues fully and to make a complete record while not in the heat of battle.
2. The trial court is more likely to be persuaded when the argument is made outside the confines and time constraints of the closing argument.
3. The motion *in limine* has a deterrent effect on the prosecutor. Even when the trial court overrules the defense attorney's motion *in limine*, the prosecutor is forewarned that the attorney will likely renew the objection during argument. Rather than risk being objected to, the prosecutor may well decide to avoid the area altogether.

The following is a laundry list of areas of improper argument that counsel should be familiar with:

- It is improper for the prosecuting attorney to personalize the case to the jurors or to attempt to engender fear in the jurors for themselves or for their families. *State v. Raspberry*, 452 S.W.2d 169 (Mo. 1970); *State v. Mooney*, 714 S.W.2d 216 (Mo. App. E.D. 1986); *State v. Long*, 684 S.W.2d 361 (Mo. App. E.D. 1984).

- It is improper for the prosecutor to indicate to the jury the prosecutor's personal opinion or that the prosecutor has special knowledge about the case. *State v. Hornbeck*, 702 S.W.2d 90 (Mo. App. E.D. 1985); *Grubbs v. State*, 760 S.W.2d 115 (Mo. banc 1988), *cert. denied*, 490 U.S. 1085 (1989); *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989); *State v. Grant*, 702 S.W.2d 857 (Mo. App. W.D. 1985).

- It is improper for the state to argue facts that are not in evidence. *Long,* 684 S.W.2d 361; *State v. Bohlen*, 670 S.W.2d 119 (Mo. App. E.D. 1984); *State v. White*, 440 S.W.2d 457 (Mo. 1969). In *State v. Williams,* 119 S.W.3d 674 (Mo. App. S.D. 2003), the prosecutor's reference to excluded testimony in closing argument was likewise considered manifest injustice.

- It is improper for the state to use epithets. *State v. Munoz*, 678 S.W.2d 834 (Mo. App. E.D. 1984); *State v. Fuhr*, 660 S.W.2d 443 (Mo. App. W.D. 1983); §25.4, *supra*.

- Counsel should watch for arguments that minimize the jury's role. *Nave v. State*, 757 S.W.2d 249 (Mo. App. E.D. 1988).

- It is improper for the state to comment on the defendant's failure to testify. *State v. Parkus*, 753 S.W.2d 881 (Mo. banc 1988), *cert. denied*, 488 U.S. 900 (1988); *State v. Chunn*, 657 S.W.2d 292 (Mo. App. E.D. 1983); *State v. Cummings*, 765 S.W.2d 366 (Mo. App. S.D. 1989). *State v. Busey,* 143 S.W.3d 6 (Mo. App. W.D. 2003), likewise found that a prosecutor's inadvertent but direct comment about a defendant's failure to testify was prejudicial and not harmless.

- Counsel should move to exclude the adverse inference with respect to absent witnesses in the appropriate circumstances. *State v. Webster*, 659 S.W.2d 286 (Mo. App. E.D. 1983).

- It is improper for the prosecutor to argue evidence of other crimes, both charged and uncharged, as evidence of guilt in the closing argument. *State v. Kenley*, 693 S.W.2d 79 (Mo. banc 1985); *State v. Hadley*, 736 S.W.2d 580 (Mo. App. S.D. 1987); *State v. Beck*, 745 S.W.2d 205 (Mo. App. E.D. 1987).

- It is improper for the state to make arguments that denigrate defense counsel. *State v. Burnfin*, 771 S.W.2d 908 (Mo. App. W.D. 1989).

- It is improper for the state to make an incorrect statement of the law. *State v. Clemmons*, 753 S.W.2d 901 (Mo. banc 1988), *cert. denied*, 488 U.S. 948 (1988).

- It is improper for the state to define reasonable doubt or other terms that are in the instructions. *State v. Robinson*, 696 S.W.2d 826 (Mo. App. W.D. 1985); *State v. Morris*, 680 S.W.2d 315 (Mo. App. S.D. 1984).

- It is improper for the state to argue that the presumption of innocence has been overcome. *State v. Norton*, 681 S.W.2d 497 (Mo. App. E.D. 1984).

- It is improper for the state to argue the defendant's prior convictions as evidence of guilt. *State v. Mosley*, 766 S.W.2d 755 (Mo. App. S.D. 1989).

- It is improper for the state to argue to the jury that they should convict based on the defendant's future dangerousness. *State v. Joles*, 755 S.W.2d 622 (Mo. App. E.D. 1988).

- It is improper for the state to argue that the jury should convict the defendant based on racial prejudice. *State v. Worstell*, 767 S.W.2d 352 (Mo. App. E.D. 1989).

- It is improper for the state to argue, in rebuttal, issues that were not used in the opening half of the state's argument. *State v. Murray*, 744 S.W.2d 762 (Mo. banc 1988), *cert. denied*, 488 U.S. 871 (1988).

- It is improper for the state to argue punishment in the rebuttal of its closing argument if the state did not argue punishment in the first half. *State v. Burton*, 721 S.W.2d 58 (Mo. App. W.D. 1986).

- It is improper for the state to argue to the jury that they are going to have to account to their friends if they acquit the defendant. *State v. Thomas*, 780 S.W.2d 128 (Mo. App. E.D. 1989).

- It is improper for the state to minimize the importance of the lesser-included offenses. *State v. Fisher*, 773 S.W.2d 178 (Mo. App. W.D. 1989).

- It is improper for the state to say that it is "happy" to prosecute the defendant. *State v. Bohlen*, 690 S.W.2d 174 (Mo. App. E.D. 1985).

- It is improper for the state to argue that the jury should give the defendant a harsh sentence because of parole eligibility. *State v. Lewis*, 443 S.W.2d 186 (Mo. 1969).

- Any argument that places the impartiality of the court in question is error. *State v. Williams*, 646 S.W.2d 107 (Mo. banc 1983).

- It is reversible error to tell the jury that the co-defendants in the case pleaded guilty and agreed to testify against the defendant when they were not called as witnesses. *State v. Jordan*, 627 S.W.2d 290 (Mo. banc 1982).

- It is improper for the state to refer to the defense attorney's proper objections during the course of the trial as an attempt to cut off the state's right to present testimony. *State v. Sarten*, 344 S.W.2d 1 (Mo. 1961).
- A prosecutor made an improper statement in referring to the unrelated murders of two sisters who wrote a poem that the prosecutor read to the jury when the murders and the authors of the poem were irrelevant to any issue in the case. *State v. Ozier*, 961 S.W.2d 95 (Mo. App. E.D. 1998).

- A prosecutor's statements that unequivocally invited the jury to infer that the defendant was guilty of driving while intoxicated because he requested to speak with his attorney after being given the *Miranda* warnings constituted plain error warranting reversal and remand of the case for a new trial. *State v. Wessel*, 993 S.W.2d 573 (Mo. App. E.D. 1999); U.S. CONST. amend. V.

- When a prosecutor makes numerous references to uncharged crimes during the testimony of witnesses and again during closing argument, the prosecutor commits error that is not harmless, thus depriving the defendant of the right to a fair trial and requiring the case to be reversed and remanded. *State v. Pennington*, 24 S.W.3d 185 (Mo. App. W.D. 2000).

- A prosecutor committed plain error that resulted in manifest injustice in a stealing case when he argued that the defendant failed to present any evidence that another source of funds existed when the state knew the evidence did exist and had not been introduced only because the state had successfully argued for its exclusion. *State v. Weiss*, 24 S.W.3d 198 (Mo. App. W.D. 2000).

C. (§25.30) Objections

It is important for counsel to object to improper argument at the first opportunity. Failure to do so will result in waiver of error. *State v. Rogers*, 970 S.W.2d 402 (Mo. App. W.D. 1998). This process begins with the motion *in limine*. The attorney must not only make an objection but must also request relief. Counsel should first request a mistrial. If the court overrules the defense's request for mistrial, the attorney should ask for other forms of relief. Failure to ask for relief other than a mistrial will preserve nothing for review. The basic chain of requested relief is as follows:

1. Mistrial
2. Curative instruction
3. That the comment be stricken and the jury instructed to disregard

If the prosecutor persists in making improper argument, counsel should request the court to admonish the prosecutor to cease the improper argument.

It is important for the defense attorney to get a ruling. Often, in the heat of closing argument and objections at the bench, the court and counsel forget to get a ruling on the record. Counsel, politely, must insist that the court make a ruling on the objection and the request for relief. Failure to do so is failure to preserve the record and waives the client's right on appeal.

The best way to preserve counsel's objections is by filing a motion *in limine* outlining all of the federal and Missouri constitutional grounds on which the motion is stated and citing relevant caselaw. This eases the burden on the attorney during closing argument in preserving the issues. For a thorough discussion regarding defense objections to improper prosecution argument and creative motion and practice in closing argument for the defense, see RAY MOSES, JURY ARGUMENT IN CRIMINAL CASES: A TRIAL LAWYER'S GUIDE 1-33-1-58 (2nd ed. 1993).

D. (§25.31) Preparation

The first stage in the preparation of closing argument is for the attorney to acquire a thorough understanding of the facts of the case and how they apply to the law. This begins from the moment the attorney gets the file. The attorney should keep an idea/theory notebook in which to jot down ideas as they come out during the course of the investigation. It is also extremely necessary to obtain copies of the jury instructions well in advance of the trial. A thorough understanding of the facts of the case and the instructions that the jury will be given allows the attorney to have a thorough understanding of the case.

The attorney should have a theory of defense or "theme" before starting trial. Many attorneys prepare closing arguments before preparing any other stage of the trial. No matter how counsel prepares for trial, the attorney should have some form of closing argument prepared before picking the jury. That closing argument

can then be refined as the trial goes on to fit the facts as they actually came in through the witness stand.

One helpful way to analyze the facts of the case is to make a list of all of the facts beyond change—i.e., those facts that the jury will believe to be true. The attorney should then structure a theory of defense that incorporates all of these facts. If the theory does not incorporate a fact beyond change, it will lose. The developed theory should be written in the idea notebook; it can then be changed and refined as trial preparation proceeds.

The next stage in preparing the closing argument is to have an understanding of the psychology of closing argument. The attorney must think as a juror will think and not as an attorney. One helpful way to determine how a juror will respond to the facts in the evidence is to conduct mini mock trials in front of lay volunteers. These volunteers can be family members, office staff, school groups, or focus groups that the attorney is able to develop through the community. No attorney should go to trial without having "tried" the case to at least one non-lawyer. The attorney must have an understanding of how the lay juror is going to react to the case.

In most instances, the lay jurors will react on an emotional level and not a factual level. The emotional level is where the attorney must persuade the jury. The attorney must identify the emotion of the case and incorporate that emotion with the theory of the case. *See generally* LARRY S. POZNER & ROGER J. DODD, CROSS-EXAMINATION: SCIENCE AND TECHNIQUES (LexisNexis 2nd ed. 2004).

The next step in preparing the closing argument is organizing the argument. Perhaps the most difficult part of formulating the closing argument is the introduction. The introduction must be powerful and persuasive. The attorney should keep in mind the principles of primacy and recency—i.e., that the jurors remember what they hear first and last. The attorney should not waste the opportunity to make a point with the jury by starting the closing argument with irrelevant, ingratiating comments such as thanking the jury for their time and attention. Such comments rarely come across with sincerity and earn no points with the jury toward the goal: acquittal. Therefore, the attorney should have a planned and practiced five-to-ten sentence introduction that will sum up the defense theory and explain to the jury why the defendant should be found not guilty. If the attorney feels compelled to thank the jury, that can be done after the introduction.

The body of the argument should be a persuasive discussion of the facts of the case and how they prove the defense theory. It is helpful to use demonstrative aids during this portion of the closing argument. Jurors will remember what they see visually. Therefore, charts, models, drawings, and demonstrations are all effective tools to use during the body of the closing argument to keep the jury's attention and to persuade the jury.

The closing argument should be as well prepared as any other portion of the trial. The attorney should draft the closing early in the representation and practice it. It is a good idea to either practice the closing argument in front of other individuals in the attorney's office or to videotape the closing argument. The attorney at all times should be aware that the jury is not only listening to what the attorney is saying but also watching the attorney. The attorney must:

- look the jurors in the eye;
- appear confident and sincere; and
- appear to have faith in the jury.

If the jury can sense that the attorney does not like or does not believe in the client, neither will the jury.

There are a variety of literary techniques that can be used in the more advanced and effective closing argument. RAY MOSES, JURY ARGUMENT IN CRIMINAL CASES, A TRIAL LAWYER'S GUIDE ch. 3 (2nd ed. 1993), provides an extensive list and discussion of these various forms or techniques, including transitional phrases, quotes, humor, analogies, metaphors, similes, anecdotes and stories, irony and sarcasm, rhetorical questions, alliteration, assonance, allusion, inversion, and antithesis.

E. (§25.32) Length of Argument

In Missouri, the trial court has broad discretion in setting time limits for closing argument. In most instances, the trial court is generous in permitting defense counsel enough time to argue the case. Should counsel feel that the trial court has not given the attorney enough time in which to make all of the points necessary to respond to the state's arguments, the attorney should request additional time and, if denied, make an offer of proof as to what argument counsel would have made if additional time had been granted.

A more important decision for the attorney is how much time to request from the court for closing argument. The attorney should keep in mind the capacity for the jury to receive and process information. By the time the defense attorney has gotten up to address the jury, they have already heard jury instructions and the first half of the state's closing argument. Therefore, the defense attorney has the awesome task of getting the jury's attention and keeping it. Sometimes less is more. While the attorney should certainly ask for plenty of time in which to make all of the points, the attorney should be careful to not ask for too much time. The attorney should have a planned closing argument that will:

- be powerful and persuasive;
- keep the jury's attention; and
- get the defense theory across to the jury in a clear and concise manner.

Rambling on will make no points with the jury and, in all likelihood, will cost the defense in terms of persuasive value. The closing argument should:

- have a clear beginning;
- make specific points in the middle; and
- have a strong and persuasive conclusion.

III. (§25.33) Bibliography

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Chapter 26

AFTER-TRIAL MOTIONS

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L. (§26.79) Summary

I. (§26.1) Scope of Chapter

This chapter examines:

- motions for judgment of acquittal, Rule 27.07;
- motions for new trial, Rule 29.11;
- motions to reduce punishment, Rule 29.05;
- motions for conditional release pending appeal, Rules 30.16, 33.09; and
- motions for DNA testing, §§ 547.035, 547.037, RSMo Supp. 2004.

Beyond this chapter's scope are post-conviction remedies such as Rule 24.035, Rule 29.15, and petitions for habeas corpus under Rule 91. Also omitted is any extended discussion of how to preserve claims of error before and during trial, such as rules and caselaw governing motions *in limine*, motions to suppress evidence, contemporaneous objections to evidence, offers of proof, and similar items.

II. Motions for Judgment of Acquittal

A. (§26.2) Rule Governing

Motions for judgment of acquittal are governed by Rule 27.07.

B. (§26.3) Purpose

A motion for judgment of acquittal permits the defendant to assert at trial that the evidence is insufficient to sustain a conviction of the offense or offenses charged. Rule 27.07. The defense may assert the motion at the close of the state's evidence, at the close of all the evidence, and after a verdict. *Id.* Rule 27 abolished the motion for directed verdict, although a motion so styled will be treated on appeal as a motion for judgment of acquittal. *Id.*; *State v. Chester*, 445 S.W.2d 393, 395 (Mo. App. S.D. 1969).

C. (§26.4) Grounds for Granting

The trial court must grant the motion "if the evidence is insufficient to sustain a conviction of such offense or offenses." Rule 27.07(a). In reaching this question, the court will:

- resolve all evidentiary conflicts and questions of credibility in the state's favor;
- ignore all evidence favorable to the defense; and
- assess whether the evidence, so construed, would permit a reasonable jury to convict the defendant.

State v. Thomas, 529 S.W.2d 379, 383 (Mo. 1975); *State v. Corley*, 628 S.W.2d 380, 381–82 (Mo. App. E.D. 1982). A court will not weigh conflicting evidence or reach its own credibility determinations, other than when a trial court considers a motion for new trial under Rule 29.11. *See State v. Jerelds*, 637 S.W.2d 80, 81 (Mo. App. E.D. 1982); *State v. Dick*, 636 S.W.2d 425, 428 (Mo. App. S.D. 1982).

D. Time for Filing

1. (§26.5) Before Verdict

Rules 27.07(a) and 27.07(c) permit the defendant to file a motion for judgment of acquittal before and after the verdict. Before the case is submitted to the jury, the defense may file its motion at the close of the state's evidence, then again at the close of all evidence. Rule 27.07(a). The defendant does not need to move for judgment of acquittal before a case is submitted to the jury in order to file such a motion after the verdict. Rule 27.07(c). The court may also enter a judgment of acquittal on its own motion at the close of either party's evidence. Rule 27.07(a).

2. (§26.6) After Verdict or Discharge of Jury

If the jury returns a guilty verdict, the defense may file or renew a motion for judgment of acquittal within 15 days. Rule 27.07(c). This deadline may be extended for an additional 10-day period, on application of the defense and for good cause shown. *Id.* These extensions are routinely granted even moments after a verdict. Similarly, the defense has 15 days to move for judgment of acquittal if the jury is discharged without reaching a verdict. *Id.* This deadline, too, may be extended by 10 days for good cause. *Id.*

The time limits provided by Rule 27.07(c) are identical to those governing motions for new trial. *See* Rule 29.11(b). Following an adverse jury verdict, counsel routinely file a single motion alternatively captioned as a motion for judgment of acquittal and a motion for new trial.

E. Right of Appeal

1. (§26.7) By Defendant

The defendant may appeal the trial court's denial of a motion for judgment of acquittal, although a criminal appeal is ultimately from the trial court's judgment and sentence rather than its denial of the motion; a judgment is final for appellate purposes only when a judgment and sentence have been entered by the trial court. *State v. Murphy*, 626 S.W.2d 649, 650 (Mo. App. E.D. 1981); *State v. Manis*, 603 S.W.2d 706, 707 (Mo. App. S.D. 1980); § 547.070, RSMo 2000; Rule 30.01(a).

2. (§26.8) By State

By operation of § 547.200.2, RSMo 2000, the state may appeal the trial court's grant of a motion for judgment of acquittal, but only if the motion was granted *after* a guilty verdict. An appeal by the state is permitted "except in those cases where the possible outcome of such an appeal would result in double jeopardy for the defendant." *Id*. Double jeopardy is implicated only if the government's appeal might necessitate a second trial. *United States v. Jenkins*, 420 U.S. 358, 364–65 (1975); *United States v. Wilson*, 420 U.S. 332, 352–53 (1975). An appeal from the grant of a post-verdict motion for judgment of acquittal cannot necessitate a retrial; the verdict is reinstated if the state succeeds, and the grant of the motion is upheld if it fails. Thus, the state's post-verdict appeal of the trial court's order granting a motion for judgment of acquittal does not offend the Double Jeopardy Clause as long as the jury convicted the defendant. *See Jenkins*, 420 U.S. at 365; *United States v. Woodruff*, 600 F.2d 174, 175 (8th Cir. 1979); *State v. Magalif*, 131 S.W.3d 431, 434 (Mo. App. W.D. 2004).

On the other hand, the Double Jeopardy Clause prohibits an appeal by the prosecution when the trial court sustains the defendant's motion for judgment *before* the return of a guilty verdict. A ruling favorable to the state would require a second trial. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 574–76 (1977). Similarly, double jeopardy bars an appeal from a trial court's ruling, at the close of the state's case, that the state's evidence was insufficient to establish the defendant's guilt. *Smalis v. Pa.*, 476 U.S. 140 (1986).

The state may appeal the trial court's pre-verdict dismissal of an indictment as long as the trial court did not base its ruling on the sufficiency of evidence. *State v. Coor*, 740 S.W.2d 350, 354–56 (Mo. App. S.D. 1987). If the trial court's rationale is unclear, the case will be remanded for further proceedings. *State v. Reed*, 770 S.W.2d 517, 520–21 (Mo. App. E.D. 1989).

F. (§26.9) Scope of Appellate Review

In reviewing the denial of a motion for judgment of acquittal, the appellate court will consider whether the state presented a submissible case. *State v. Mann*, 129 S.W.3d 462, 464 (Mo. App. S.D. 2004); *State v. Foster*, 930 S.W.2d 62, 63 (Mo. App. E.D. 1996). A case is submissible if the state has presented enough evidence to allow a reasonable juror to conclude that all elements of the offense have been proven beyond a reasonable doubt. *State v. Langdon*, 110 S.W.3d 807, 811 (Mo. banc 2003); *State v. Thenhaus*, 117 S.W.3d 702, 703 (Mo. App. E.D. 2003). In addressing this question, the court will:

- construe all evidence in the light most favorable to the verdict;
- give the state the benefit of all reasonable inferences that can be drawn from the evidence; and
- ignore all evidence favorable to the defense.

State v. Thomas, 529. S.W.2d 379, 383 (Mo. 1975); *State v. Reed*, 583 S.W.2d 531, 532 (Mo. App. E.D. 1979). Inferences in favor of the defense will be considered only if "they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them." *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). The scope of review is unaffected by whether the case was tried to a jury or the court. *Mann*, 129 S.W.3d at 465.

If the defense offers *any* evidence after the state rests, it waives any claim that the trial court erred by denying a motion for judgment of acquittal at the close of the state's case. *State v. Madani*, 910 S.W.2d 362, 364 (Mo. App. S.D. 1995); *Holtkamp v. State*, 588 S.W.2d 183, 188 (Mo. App. E.D. 1979). A reviewing court will consider only whether the trial court erred in overruling a motion for judgment of acquittal at the close of all the evidence. *State v. Manning*, 612 S.W.2d 823, 825 (Mo. App. E.D. 1981). In making that determination, the court will assess all the trial evidence, including those portions of the defense's evidence that are favorable to the state. *State v. Campbell*, 655 S.W.2d 96, 97 (Mo. App. S.D. 1983).

III. Motions for New Trial

A. (§26.10) Rule Governing

Rule 29.11 governs the filing of a motion for new trial.

B. (§26.11) Purpose

The ostensible purpose of a motion for new trial is to allow the trial court to correct its own errors without the delay and expense of an appeal and also to narrow and clarify the issues for appeal. *See State v. McBrien*, 178 S.W. 489, 492 (Mo. 1915); *State v. Miller*, 360 S.W.2d 633, 636 (Mo. 1962). Although seldom granted, motions for new trial carry profound procedural consequences for subsequent appellate, post-conviction, and habeas review. If not presented in a motion for new trial, a claim is generally not preserved for appellate review and will be considered for "plain error" only. Rule 29.11(d); *State v. Christeson*, 50 S.W.3d 251, 267 (Mo. banc 2001); *State v. Johnson*, 22 S.W.3d 183, 191 (Mo. banc 2000). Trial counsel's failure to so preserve an issue may or may not be remedied through a claim of ineffective assistance under Rule 29.15. *See* §26.33, *infra*. Similarly, an appellate court's exercise of "plain error" review may or may not result in a procedural default of the underlying claim in federal habeas corpus proceedings. *Hornbuckle v. Groose*, 106 F.3d 253, 257 (8th Cir. 1997).

C. (§26.12) Grounds for Granting

Rule 29.11(a) allows the trial court to grant a new trial "upon good cause shown." The court may grant a new trial to remedy essentially any reversible error that can be asserted on direct appeal or collateral review, such as an involuntary confession by the defendant, misconduct by the prosecutor, or even trial counsel's ineffectiveness. *See*, *e.g.*, *State v. Gower*, 418 S.W.2d 10, 14 (Mo. 1967); *State v. Tinoco*, 967 S.W.2d 87, 90 (Mo. App. W.D. 1998); *State v. Miller*, 682 S.W.2d 838, 842–43 (Mo. App. E.D. 1984). The trial court may also order a new trial if the verdict is against the weight of the evidence as opposed to its sufficiency for a conviction, although such a claim is not cognizable on appeal. *State v. Dowe*, 432 S.W.2d 272, 275 (Mo. 1968). The court may award a new trial if presented with newly discovered evidence that would probably result in the defendant's acquittal at a retrial as long as the evidence could not have been discovered earlier through the exercise of reasonable diligence. *See State v. Hankins*, 599 S.W.2d 950, 954 (Mo. App. S.D. 1980); *State v. Pinkus*, 550 S.W.2d 829, 838 (Mo. App. S.D. 1977); *State v. Williams*, 652 S.W.2d 102, 114 (Mo. banc 1983); *State v. Flemming*,

855 S.W.2d 517, 519–20 (Mo. App. S.D. 1993). Even then, the grant or denial of a new trial is entrusted to the circuit court's discretion. *Id*. at 519.

D. Time for Filing

1. (§26.13) Generally

Rule 29.11(b) requires the motion to be filed "within fifteen days after the return of the verdict."

2. (§26.14) Computation of Time

In counting the days within which a defendant may move for a new trial, the day the verdict is rendered is not to be included. Rule 20.01(a). The last day of the period is to be included unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday. *Id.*

3. (§26.15) Extensions

The presumptive 15-day period may be extended for an additional 10 days for good cause shown. Rule 29.11(b). The defense must both request and obtain the extension from the court before the initial 15-day limit expires. *Id.*; *State v. Jones*, 643 S.W.2d 34, 36 (Mo. App. E.D. 1982). The mere filing of a request or motion for extension within the initial 15-day period does not suffice. *Id*. The maximum period for filing a motion for new trial is, therefore, 25 days from the verdict. *State v. Hawkins*, 645 S.W.2d 739, 740 (Mo. App. S.D. 1983).

The time limits of Rule 29.11(b) are jurisdictional and not waivable by either party or the court, whether by a *nunc pro tunc* order or otherwise. *Id.*; *State v. Brown*, 615 S.W.2d 626, 627 (Mo. App. S.D. 1981); *State v. Hooper*, 364 S.W.2d 542, 544 (Mo. 1963). The 15- and 25-day limits apply to all possible grounds for new trial, including newly discovered evidence. *State v. Turnbough*, 604 S.W.2d 742, 745 (Mo. App. E.D. 1980). They also apply to any amended motion, which must still be filed within 15 days of the verdict unless a 10-day extension has been timely requested and granted. *State v. Hamilton*, 732 S.W.2d 553, 555 (Mo. App. E.D. 1987). A narrow exception exists for newly discovered evidence that completely exonerates the defendant, as discussed in §26.41 below. Similarly, the court of appeals held in *State v. Tinoco*, 967 S.W.2d 87, 89 (Mo. App. W.D.

1988), that a trial court is authorized to consider a claim of trial counsel's ineffectiveness as "plain error" under Rule 29.12(b).

Aside from these narrow and indefinite exceptions, an untimely motion for new trial is a legal nullity that preserves nothing for appellate review. *State v. Sloan*, 664 S.W.2d 41, 42 (Mo. App. W.D. 1984); *see also* Rule 29.11(d) (enumerating claims that do not need to be asserted in a motion for new trial). A reviewing court will consider the appellant's claims for plain error only. *Sloan*, 664 S.W.2d at 42–43.

4. (§26.16) When Motion Deemed Filed

A motion for new trial is considered "filed" only when it is lodged in the clerk's office and not when it is mailed. *State v. Johnson*, 522 S.W.2d 106, 110 (Mo. App. S.D. 1975). Rule 20.04(g) authorizes the judge to permit papers to be filed with the judge, but the safer course is to file the motion with the clerk. *See State v. Bounds*, 644 S.W.2d 652, 653 (Mo. App. E.D. 1981) (reserving question of whether motion was "filed" when presented to judge or when received and filed by clerk).

5. (§26.17) Supplemental or Amended Motions

Supplemental or amended motions for new trial must be filed within the specified time limits, even if the original motion was timely filed. *State v. Berry*, 609 S.W.2d 948, 951 (Mo. banc 1980); *State v. Woolford*, 545 S.W.2d 367, 372 (Mo. App. W.D. 1976). A timely amended motion waives any grounds asserted in the initial motion unless it refers to the initial motion. *State v. Carroll*, 62 S.W.2d 863, 867 (Mo. 1933); *State v. Burns*, 280 S.W. 1026, 1028–29 (Mo. 1926). By contrast, an untimely amended motion is a legal nullity and leaves an earlier, timely filed motion intact. *State v. Harris*, 82 S.W.2d 877, 880 (Mo. 1935).

6. (§26.18) Burden of Showing Extension

When a motion for new trial is filed beyond the original 15-day deadline, it is the defendant's burden to show that an extension was timely requested and granted. *State v. Larrabee*, 572 S.W.2d 250, 251 (Mo. App. W.D. 1978). Rule 29.11(b) allows the 15-day period to be extended for one additional period of up to 10 days. If the length of an extension is not clear from the record, the appellate court will treat the motion as timely filed as long as the trial court ruled on the

merits of the motion. *State v. Norris*, 577 S.W.2d 941, 942–43 (Mo. App. S.D. 1979); *State v. Smith*, 518 S.W.2d 665, 667 (Mo. App. E.D. 1975). The customary practice is for counsel to request the additional 10-day extension immediately after the verdict, at which point the request and the judge's ruling will be transcribed for the record.

7. (§26.19) Effect of Untimely Motion

Subject only to narrow exceptions, a motion for new trial filed beyond the time limits provided in Rule 29.11(b) will preserve nothing for appellate review. *State v. Rogers*, 621 S.W.2d 111, 112 (Mo. App. E.D. 1981). Failure to file a timely motion will limit a defendant's appeal to three classes of errors:

1. Jurisdictional issues (including whether the indictment or information states a criminal offense)
2. "Plain errors" that affect the defendant's "substantial rights"
3. The sufficiency of the state's evidence

Rule 29.11(d); *State v. Harris*, 636 S.W.2d 403, 404 (Mo. App. E.D. 1982); *State v. West*, 629 S.W.2d 429, 431–32 (Mo. App. W.D. 1981).

Untimely motions that raise issues of newly discovered evidence are discussed in §26.41 below.

E. (§26.20) Time for Ruling

Rule 29.11 does not require the court to rule on a motion for new trial within any particular length of time, but a motion will be deemed denied if not resolved within 90 days. Rule 29.11(g). No judgment or sentence is valid if the time for filing a motion for new trial has not passed or if a motion is on file but unresolved for fewer than 90 days. Rule 29.11(c). Any appeal filed before such a final judgment is premature, and the appellate court lacks jurisdiction to entertain it. *State v. Wren*, 609 S.W.2d 480, 481 (Mo. App. W.D. 1980). If a motion for new trial is not filed within the time limit or if one is filed and overruled, Rule 29.11(c) requires that "judgment shall be rendered without unreasonable delay."

F. (§26.21) Form of Motion

Unlike its predecessor, Rule 29.11 does not require that a motion for new trial be written in any particular format, such as separately numbered paragraphs. The Rule does not even expressly require a written motion, but the specificity with which counsel must assert and preserve errors

under prevailing appellate caselaw—*see* §§26.23–26.24 and §§26.35–26.41 below—all but requires the motion to be in writing.

G. (§26.22) Allegations of Error—General Rule

For an issue to be preserved for full appellate review, the defendant must present it in a timely motion for new trial. Rule 29.11(d); *State v. Armentrout*, 8 S.W.3d 99, 108 (Mo. banc 1999); *State v. Monath*, 42 S.W.3d 644, 651 (Mo. App. W.D. 2001). Three types of claims are expressly omitted from the general rule:

- The trial court's jurisdiction
- Whether the charging instrument states an offense
- The sufficiency of the evidence to sustain the conviction

Rule 29.11(d). A claim omitted from a motion for new trial may be reviewed for "plain error," but only in the appellate court's discretion, with relief available only if necessary to correct a "miscarriage of justice" or a "manifest injustice." Rule 30.22; *Monath*, 42 S.W.3d at 651. A motion for new trial is not required to preserve appellate review in a court-tried case. Rule 29.11(e); *State v. Hamilton*, 8 S.W.3d 132, 134 n.1 (Mo. App. S.D. 1999).

H. Specificity of Allegations of Error

1. (§26.23) Jury-Tried Cases

Beyond the general rule that a claim of error "must be included" in a motion for new trial to be preserved for appellate review, the Rule does not set forth the specificity with which the error must be described. Rule 29.11(d) was effectively amended July 1, 2002, by deleting the language below governing the specificity with which a defendant must allege issues and claims in a motion for new trial:

> Where definite objections or requests were made during the trial, including specific objections to instructions, a general statement in the motion of any allegations of error based thereon is sufficient. Any specific objections, except specific objections to instructions, that were not made at the trial before submission to the jury must be set forth in the motion for new trial to preserve the error for review. Specific objections to instructions must be made as provided in Rule 28.03. Allegations of error based on matters occurring or becoming known after final submission shall be specifically set out.

The amended version of Rule 29.11(d) makes no distinction between instructional and other errors. More importantly, the amended rule arguably heightens defense counsel's burden by omitting the provision that an error specifically preserved during trial only needs to be generally described in the motion. Compare *State v. Pennington*, 24 S.W.3d 185, 188–89 (Mo. App. W.D. 2000) (under predecessor rule, a nonspecific allegation in motion for new trial preserves appellate review when considered alongside the specific objections at trial; question was whether the entire set of trial and post-trial arguments was "sufficiently particular to aprise [sic] the trial court and [the appellate] court of the ruling under attack and the reasons therefor").

As of this writing, no published cases within the authors' research discuss the amendments to Rule 29.11(d). Because the Rule is silent as to the specificity required, the safest course is for trial counsel to assert each claim separately and to set forth the legal and factual basis of each—regardless of whether the error in question was objected to during the trial. Counsel should, therefore, continue to heed the general rule that vague, nonspecific, or nonparticularized assignments of error in a motion for new trial will not preserve an issue for appellate review. *See, e.g.*, *State v. Reed*, 640 S.W.2d 188, 193 (Mo. App. W.D. 1982); *State v. Wells*, 585 S.W.2d 267, 268 (Mo. App. S.D. 1979). In light of the amendment to Rule 29.11(d), counsel should *not* rely on previous caselaw permitting a general objection in a motion for new trial when a definite objection was made on the record at trial. *See State v. Lowe*, 647 S.W.2d 196, 197 (Mo. App. E.D. 1983).

A more thorough discussion of the specificity necessary to preserve particular types of issues for appellate review appears in §§26.35–26.41 below.

2. (§26.24) Judge-Tried Cases

A motion for new trial is not necessary to preserve any matter for appellate review in a court-tried case. Rule 29.11(e); *State v. Hamilton*, 8 S.W.3d 132, 134 n.1 (Mo. App. S.D. 1999). But if the defense does file such a motion, any claims that are not asserted in it are not preserved for appellate review (other than claims challenging the court's jurisdiction, the charging instrument's adequacy, and the sufficiency of the evidence). Rule 29.11(e).

I. (§26.25) Affidavits and Necessity for Hearing

Rule 29.11(f) permits the movant to file and serve affidavits with a motion for new trial if the motion is based on facts outside the record. Affidavits accompanying a motion for new trial should be specific and nonconclusory in nature. *State v. Zweifel*, 570 S.W.2d 792, 795 (Mo. App. E.D. 1978). The state may file opposing affidavits within 10 days, and the period may be extended for an additional 20 days by agreement of the parties or by the court for good cause shown. Rule 29.11(f). The court may permit the defense to file reply affidavits. *Id.*

Objections to a defendant's affidavits are waived if the state fails to produce contrary affidavits or evidence within the allowed time. *State v. Hurd*, 520 S.W.2d 158, 164 (Mo. App. S.D. 1975). In these cases, the court may consider the defense's affidavits, but it does not need to accept their contents as true; the credibility of the affiants' declarations remains a question for the trial court to determine. *See id.*; *State v. Burton*, 544 S.W.2d 60, 68 (Mo. App. W.D. 1976); *State v. Coleman*, 460 S.W.2d 719, 724 (Mo. banc 1970).

The final sentence of Rule 29.11(f) states that "[d]epositions and oral testimony *may* be presented in connection with after-trial motions" (emphasis added). The published authorities do not specify whether the trial court is *required* to conduct a hearing on a proper request, although it does not need to do so in the absence of one. *State v. Scott*, 621 S.W.2d 915, 918 (Mo. 1981); *State v. Wade*, 635 S.W.2d 51, 54 (Mo. App. W.D. 1982); *State v. Jones*, 531 S.W.2d 67, 76 (Mo. App. W.D. 1975). Courts are encouraged to allow oral argument on after-trial motions whenever feasible as a matter of sound policy, but Rule 29.11 does not specifically require this. *State v. Davis*, 653 S.W.2d 167, 178 (Mo. banc 1983).

J. (§26.26) Burden of Proof

The defendant has the burden of proving the allegations in a motion for new trial. *State v. Drake*, 514 S.W.2d 653, 656 (Mo. App. S.D. 1974). Unverified allegations are not self-proving. *State v. Hummel*, 652 S.W.2d 749, 751 (Mo. App. E.D. 1983); *State v. McMillin*, 581 S.W.2d 612, 616 (Mo. App. S.D. 1979). Therefore, if an issue raised in the motion involves matters outside the record (such as newly discovered evidence), a defendant's failure to supply some proof by affidavit or oral testimony will result in an adverse ruling on the issue. *State v. Batek*, 638 S.W.2d 809, 813 (Mo. App. E.D. 1982); *Hummel*, 652 S.W.2d at 751. The trial court must resolve any questions of credibility, and its rulings are accorded substantial deference on appeal. *Drake*, 514 S.W.2d at 656.

K. (§26.27) Trial Court's Failure to Rule on Motion

A motion for new trial is considered denied for all purposes if it is not resolved within 90 days of filing. Rule 29.11(g); *Green v. State*, 581 S.W.2d 478, 480 (Mo. App. S.D. 1979); *State ex rel. Parks v. Barker*, 567 S.W.2d 130, 132 (Mo. banc 1978). The court lacks authority to act on the motion after 90 days. *Id*. at 132. "In computing the ninety days no day shall be counted during which the court lacks power to act." Rule 29.11(g).

L. (§26.28) Trial Court's Power to Grant New Trial in Absence of Timely Motion

Rule 29.13(b) provides: "The court may, with the consent of the defendant, order a new trial of its own initiative before the entry of judgment and imposition of sentence but not later than thirty days after the verdict of the jury is returned." Under this Rule, the trial court may order a new trial on its own motion before judgment is entered and sentence is imposed. *State v. Coffman*, 647 S.W.2d 849, 851 (Mo. App. W.D. 1983).

M. (§26.29) Trial Court's Power to Set Aside Judgment After Entry of Judgment

Within 30 days after entry of judgment *and* before the filing of a transcript of the record in the appellate court, the trial court may arrest or set aside a judgment in a criminal case either because "the facts stated in the indictment or information do not constitute an offense" or on the ground that the trial "court is without jurisdiction of the offense charged." Rule 29.13(a). The court may do so *sua sponte* or on motion of the defense. Rule 29.13(b).

After judgment and sentence have been entered, however, a trial court has no authority to set aside a conviction on grounds other than the two listed in Rule 29.13(a). *State ex rel. Wagner v. Ruddy*, 582 S.W.2d 692, 694–95 (Mo. banc 1979); *State ex rel. Parks v. Barker*, 567 S.W.2d 130, 132 (Mo. banc 1978). Similarly, a trial court lacks jurisdiction to entertain a motion for new trial under Rule 29.11 after a notice of appeal has been filed. *State v. Davis*, 698 S.W.2d 600, 603 (Mo. App. E.D. 1985).

N. Right of Appeal

1. (§26.30) By Defendant

A criminal defendant cannot generally appeal until a "final judgment" has been reached. Section 547.070, RSMo 2000; Rule 30.01(a). A judgment in a criminal case becomes final only when sentence is imposed. *State v. Murphy*, 626 S.W.2d 649, 650 (Mo. App. E.D. 1981); *State v. Manis*, 603 S.W.2d 706, 707 (Mo. App. S.D. 1980). Strictly speaking, then, a defendant must appeal from the judgment and sentence imposed, not from the denial of a motion for new trial. *City of St. Louis v. Mueller*, 313 S.W.2d 189, 191 (Mo. App. E.D. 1958). An appeal lodged before sentencing is premature. *State ex rel. Wagner v. Ruddy*, 582 S.W.2d 692, 693–94 (Mo. banc 1979); *State v. Harris*, 486 S.W.2d 227, 229 (Mo. 1972). If, however, the defendant attempts to appeal from the denial of a motion for new trial rather than the judgment and sentence imposed, an appellate court will treat this notice of appeal as an "attempt[ ] in good faith to appeal from the respective judgment[ ]," and it will not dismiss the appeal. *Mueller*, 313 S.W.2d at 191.

2. (§26.31) By State

Despite earlier authority to the contrary, it is now clear that the state cannot generally appeal the grant of a motion for new trial, which is viewed by the courts as an interlocutory, non-final order. *State v. Ring*, 86 S.W.3d 481, 483–84 (Mo. App. W.D. 2002); *State v. Carter*, 78 S.W.3d 786, 789 (Mo. App. E.D. 2002). *Ring* and *Carter* are based on the interplay of § 547.200.1 and .2, RSMo 2000, Rule 30.01, and *State v. Burns*, 994 S.W.2d 941 (Mo. banc 1999). Section 547.200.1 allows an interlocutory appeal by the state in four enumerated circumstances—when the trial court:

1. quashes an arrest warrant;
2. determines that the defendant is unfit for trial;
3. suppresses evidence; or
4. suppresses an admission or confession.

More generally, § 547.200.2 permits the state to appeal in "all other criminal cases" except when the appeal could result in double jeopardy for the defendant. Rule 30.01(a), however, limits appeals to the period "[a]fter the rendition of *final judgment* in a criminal case" (emphasis added). In *Burns* the Supreme Court of Missouri held that § 547.200.2, which allows an appeal by the state in "all criminal

cases" other than those enumerated in § 547.200.1, applies only to final orders or judgments. *Burns*, 994 S.W.2d at 942–43. A judgment is "final" only if it "disposes of all disputed issues in the case and leaves nothing for future adjudication." *Id.* at 942. The trial court in *Burns* dismissed the state's charges without prejudice after the state failed to produce a confidential informant for an interview with defense counsel. *Id.* at 941. The order was not "final" because it did not preclude the state from re-filing charges and commencing with trial; thus, the court lacked jurisdiction to consider the appeal. *Id.* at 942–43.

The Eastern and Western Districts of the court of appeals have extended *Burns*' holding to the grant of a motion for new trial. *See Ring*, 86 S.W.3d 481; *Carter*, 78 S.W.3d 786. As long as the court's order does not have the effect of foreclosing a further trial, it is not appealable. *Ring,* 86 S.W.3d at 483–84; *Carter*, 78 S.W.3d at 788–89. Aside from a retrial, the state's sole remedy lies in mandamus or prohibition, which are available only if the trial court lacked authority to act as it did or "usurp[ed] . . . judicial power." *Ring*, 86 S.W.3d at 484 n.8; *Carter*, 78 S.W.3d at 943.

O. (§26.32) Waiver of Right to File a Motion

A defendant may validly waive the right to file a motion for new trial, but only if the waiver is knowing, intelligent, voluntary, and expressly made. *State v. Hauser*, 101 S.W.3d 320, 321 (Mo. App. E.D. 2003); *State v. Pence*, 428 S.W.2d 503, 505 (Mo. 1968); *State v. Phason*, 406 S.W.2d 671, 673–74 (Mo. 1966); *Forbes v. State*, 627 S.W.2d 58, 59 (Mo. App. W.D. 1981). A valid waiver of the right to file a motion for new trial limits the scope of appellate review to an examination of "plain error" under Rule 30.20. *State v. Hagen*, 496 S.W.2d 877, 878 (Mo. App. E.D. 1973).

A defendant may not charge trial counsel with ineffectiveness if a motion for new trial has been validly waived, but a waiver based on erroneous legal advice will not be found to be knowing, voluntary, and intelligent. *Forbes*, 627 S.W.2d at 59; *Ray v. State*, 532 S.W.2d 478, 482–83 (Mo. App. S.D. 1975).

P. (§26.33) Failure to File Motion as Ineffective Assistance of Counsel

When the defendant desires to file a motion for new trial and trial counsel either fails or refuses to do so, this inaction will normally constitute ineffective assistance of counsel. *Nicholson v. State*, 524 S.W.2d 106, 111 (Mo. banc 1975). Counsel's failure to file a *timely* motion for new trial may similarly constitute ineffective assistance. *State v. Batek*, 638 S.W.2d 809, 811–12 (Mo. App. E.D. 1982); *Barkwell v. State*, 619 S.W.2d 511, 512 (Mo. App. S.D. 1981). When counsel thus fails to file a motion for new trial, the appropriate remedy is a remand to the trial court to vacate the judgment and sentence to permit the defendant to file a motion for new trial to be deemed timely. *Nicholson*, 524 S.W.2d at 111–12.

When a motion for new trial is untimely filed and the appellate court finds that the untimeliness was because of counsel's negligence, the court will examine the issues raised in the tardily filed motion to determine whether the defendant was prejudiced by the motion's untimeliness. *Batek*, 638 S.W.2d at 812; *Rodgers v. State*, 610 S.W.2d 25, 29 (Mo. App. E.D. 1980). Relief will be denied if a review of the motion fails to demonstrate any error in the proceedings that could have resulted in a successful and fully preserved appeal. *Batek*, 638 S.W.2d at 812; *Barkwell*, 619 S.W.2d at 512. Rather than outright reversal of the defendant's conviction, the customary remedy for an untimely filing is for the appellate court to consider the merits of the claims raised on appeal—in essence, the court disregards the motion's untimeliness. *Garrett v. State*, 591 S.W.2d 89, 90 (Mo. App. W.D. 1979).

As of this writing, it is unclear whether counsel's omission of a particular claim from a motion for new trial can constitute ineffective assistance of counsel. The authorities that have directly addressed the question have answered it in the negative, at least when the underlying claim (such as the unobjected-to admission of illegally obtained evidence) was raised and rejected on direct appeal under the "plain error" standard. *State v. Askew*, 822 S.W.2d 497, 504 (Mo. App. E.D. 1991); *White v. State*, 558 S.W.2d 372, 375 (Mo. App. E.D. 1977). These authorities are cast into doubt by *Deck v. State*, 68 S.W.3d 418 (Mo. banc 2002). In *Deck* the Supreme Court of Missouri overruled a line of cases that precluded ineffectiveness claims as to issues that were rejected on appeal under "plain error" review. In doing so, the Court observed that the standard governing "plain error" (that the error was a "manifest injustice") is more difficult to establish than the standard governing claims of counsel's ineffectiveness (which requires a "reasonable probability" that the trial's

outcome would have been different but for counsel's errors). *Id.* at 427. Therefore, the absence of "plain error" on appeal does not preclude a later showing that counsel's ineffectiveness prejudiced the defendant. *Id.*

A logical extension of *Deck*, 68 S.W.3d 418, is that an unsuccessful allegation of "plain error" on direct appeal does not preclude a later assertion that counsel was ineffective for failing to preserve it for full review. The "prejudice" underlying such a claim lies in the possibility that a new trial would have been granted, or that the appellate court would have reversed the conviction under plenary review, if trial counsel had included the issue in a motion for new trial. Whether such claims are viable after *Deck* remains to be seen. *But see Deckard v. State*, 110 S.W.3d 891, 894–95 (Mo. App. S.D. 2003) (citing *Deck* and reviewing merits of claim that counsel failed to file a timely motion for new trial contending that trial court erred by not submitting a certain lesser-included instruction; claim rejected because defendant was not entitled to such an instruction); *Boyd v. State*, 86 S.W.3d 153 (Mo. App. E.D. 2002) (rejecting claim that counsel failed to preserve issue for appeal by raising it at trial; such error by trial counsel did not "undermine the proper functioning" of movant's trial under *Strickland v. Washington*, 466 U.S. 668 (1984)).

Q. Preservation of Points for Appeal

1. (§26.34) General Rules

As mentioned in §26.11 above, a defendant must generally include an issue in a motion for new trial to preserve it for appellate review. Rule 29.11(d). The degree of specificity required under the latest amendment to Rule 29.11(d) is unclear, so counsel should continue to heed the preexisting rule that issues in a motion for new trial must specify their legal and factual basis. *See*, *e.g.*, *State v. Jennings*, 649 S.W.2d 448, 452 (Mo. App. W.D. 1983). But even a specific complaint in a motion for new trial will not generally preserve an issue for review if there was not a specific objection when the error occurred, accompanied by a proper request for relief from the trial court. *State v. Walker*, 629 S.W.2d 558, 559 (Mo. App. S.D. 1981). A motion for new trial may not broaden or enlarge the scope of counsel's trial objection. *State v. Jones*, 515 S.W.2d 504, 506 (Mo. 1974); *State v. Brown*, 607 S.W.2d 813, 814 (Mo. App. S.D. 1980). The point on appeal must be based on the same theory as that presented at trial and in the after-trial motion. *State v. Sanner*, 655 S.W.2d 868, 880 n.16 (Mo. App. S.D. 1983); *State v. Quick*, 639 S.W.2d 880, 888 (Mo.

App. W.D. 1982); *State v. Blair*, 631 S.W.2d 91, 94 (Mo. App. W.D. 1982).

Thus far, the Supreme Court of Missouri has declined to exempt death penalty cases from the general rule that errors not assigned in a motion for new trial are not preserved for appellate review. *State v. Nave*, 694 S.W.2d 729, 735 (Mo. banc 1985). The Court has, nevertheless, observed that its "plain error" review is "particularly broad and generous in death penalty cases." *State v. Ervin*, 835 S.W.2d 905, 932 (Mo. banc 1992).

2. Preservation Requirements—Specific Areas

a. (§26.35) Sufficiency of Indictment or Information

Under Rule 29.11(d), a claim that the indictment or information does not state an offense does not need to be included in a motion for new trial to preserve the question for appellate review. In fact, it has been held that an appellate court has a duty to examine, *sua sponte*, the sufficiency of the charging instrument in accordance with Rule 30.20. *State v. Eckard*, 655 S.W.2d 596, 597 (Mo. App. E.D. 1983). Nevertheless, a defendant's failure to make such a challenge before the verdict will preclude relief unless:

- the indictment or information is so defective that it does not, under any reasonable construction, charge the defendant of the offense for which the defendant was convicted; or
- the defendant's substantial rights to prepare a defense or plead former jeopardy are prejudiced by the defect.

State v. Parkhurst, 845 S.W.2d 31, 33–34 (Mo. banc 1992).

Defects falling outside of these two categories must be timely raised at trial and asserted in a motion for new trial to be preserved for review. Such claims include:

- assignments of error relating to the improper joinder of counts, *State v. Wright*, 551 S.W.2d 884, 886 (Mo. App. E.D. 1977);
- variances between the indictment and the evidence, *State v. Boone*, 490 S.W.2d 318, 322 (Mo. App. W.D. 1973);

- technical defects in the information, *State v. Gray*, 432 S.W.2d 593, 594–95 (Mo. 1968);

- the improper amendment of an information, *State v. Ronimous*, 319 S.W.2d 565, 568 (Mo. 1959), or the improper substitution of an information for an indictment, *State v. Green*, 305 S.W.2d 863, 869 (Mo. 1957); and
- deficiencies in the allegations relating to the application of the "persistent offender" statute, *State v. Smith*, 633 S.W.2d 412, 417 (Mo. App. W.D. 1982).

b. (§26.36) Sufficiency of Evidence

Effective July 1, 2002, Rule 29.11(d) exempts challenges to the sufficiency of the evidence from the general rule that an issue must be included in a motion for new trial to be preserved for appeal. *See also State v. Stephens*, 88 S.W.3d 876, 880 (Mo. App. W.D. 2002) ("Except for questions concerning jurisdiction, the sufficiency of the charging instrument, and the sufficiency of the evidence to convict, allegations of error in a jury-tried case must be included in a motion for new trial to be preserved for appellate review.").

Despite the clear language of Rule 29.11(d), the better practice is for counsel to include these claims in a motion for new trial, particularly if the defendant does not file a motion for judgment of acquittal. The courts' application of the Rule's predecessor warrants this thoroughness. Former Rule 29.11(d) provided that a motion for new trial did not need to include "questions authorized by Rule 27.07 to be presented by motion for judgment of acquittal." Despite this language, numerous appellate courts held that a defendant who failed to raise the question of the sufficiency of the evidence in a motion for new trial did not preserve the issue for review—regardless of whether the question was presented in a motion for judgment of acquittal. *See*, *e.g.*:

- *State v. Nations*, 676 S.W.2d 282, 283 n.2 (Mo. App. E.D. 1984);
- *State v. Hardin*, 627 S.W.2d 908, 910 (Mo. App. W.D. 1982);
- *State v. Snelling*, 647 S.W.2d 909 (Mo. App. E.D. 1983);
- *State v. Jackson*, 477 S.W.2d 47, 53 (Mo. 1972).

Appellate courts may remain unaware of Rule 29.11(d) and its exception for challenges to the sufficiency of the evidence. Counsel may assert such a claim in a motion for new trial, although the prevailing practice is to file a motion that alternatively seeks a judgment of acquittal and new trial.

All of that said, the failure to preserve a challenge to the sufficiency of the evidence may have little practical effect. A conviction on insufficient evidence is "plain error" as a matter of law. *State v. Withrow*, 8 S.W.3d 75, 77 (Mo. banc 1999) ("If the evidence is insufficient to sustain a conviction, plain error affecting substantial rights is involved from which manifest injustice must have resulted."); *State v. Williams*, 416 S.W.2d 71, 74 (Mo. 1967). Of course, when a trial or appellate court finds that the evidence is insufficient to sustain the conviction, the proper remedy is a judgment of acquittal and discharge of the accused rather than a new trial. *Burks v. United States*, 437 U.S. 1 (1978); *State v. Basham*, 568 S.W.2d 518, 521 (Mo. banc 1978).

c. (§26.37) Instructions

A defendant must specifically object to an instruction before its submission to the jury to preserve the issue for appeal, although the failure to do so does not preclude "plain error" review. Rule 28.03; *State v. Wurtzberger*, 40 S.W.3d 893, 878–79 (Mo. banc 2001). Even if the defense timely objects during trial, an instructional error must be re-asserted in a motion for new trial by virtue of the provision in Rule 29.11(d) that allegations of error in jury-tried cases "must be included in a motion for new trial" to be preserved for appellate review.

Unlike its predecessor, the current version of Rule 29.11(d), effective July 1, 2002, does not expressly permit a "general statement" in the after-trial motion when a "definite" or "specific" objection was made at trial. Compare Former Rule 29.11(d) (2001). Therefore, vague and non-specific assignments of error in a motion for new trial will not preserve an issue for appellate review. *See*, *e.g.*, *State v. Reed*, 640 S.W.2d 188, 193 (Mo. App. W.D. 1982) (motion asserted that instruction was "required to be given whether requested or not; and the same was supported by the evidence"); *State v. Payne*, 548 S.W.2d 269, 270 (Mo. App. W.D. 1977 ("[t]he court erred in submitting Instruction No. 6 to the jury over the objection of defendant's counsel".); *State v. Gadberry*, 638 S.W.2d 312, 313

(Mo. App. E.D. 1982) ("[I]ndividually and taken together said instructions improperly state the law, comment upon the evidence, invade the province of the fact finder (the jury) and confuse and mislead the jury."). When the claim involves the trial court's failure or refusal to give an instruction that requires evidentiary support for its submission, the defendant's motion must state what evidence justified or warranted the giving of the instruction. *State v. Sanders*, 541 S.W.2d 530, 532 (Mo. banc 1976); *State v. Couvion*, 655 S.W.2d 80, 83 (Mo. App. E.D. 1983); *State v. Brydon*, 626 S.W.2d 443, 454 (Mo. App. W.D. 1981). The motion may not merely state a conclusion that there was sufficient evidence to require a particular instruction. *State v. Jenkins*, 622 S.W.2d 281, 284 (Mo. App. E.D. 1981).

d. (§26.38) Suppression of Evidence

In addition to filing a motion to suppress evidence that has been illegally seized or obtained, and timely objecting to the evidence at trial, the defendant must present the issue in a motion for new trial to preserve it for appeal. *See*:

- *State v. Williams*, 951 S.W.2d 332, 335 (Mo. App. S.D. 1997);
- *State v. Skaggs*, 650 S.W.2d 23, 25 (Mo. App. E.D. 1983);
- *State v. Roberts*, 622 S.W.2d 226, 227 (Mo. App. E.D. 1981);
- *State v. Rayford*, 611 S.W.2d 377, 378 (Mo. App. E.D. 1981);
- *State v. Howard*, 564 S.W.2d 71, 74 (Mo. App. E.D. 1978).

This rule applies to claims involving:

- illegally seized physical evidence, *State v. Yowell*, 513 S.W.2d 397, 402 (Mo. banc 1974); *State v. Pruitt*, 556 S.W.2d 63, 65 (Mo. App. E.D. 1977);
- involuntary or illegally obtained statements or confessions of an accused, *Rayford*, 611 S.W.2d at 378; and
- testimony resulting from impermissibly suggestive identification procedures, *State v. Johnson*, 533 S.W.2d 629, 631 (Mo. App. E.D. 1976).

The motion for new trial, as well as the trial objection, must be definite and specific. *State v. Major*, 564 S.W.2d 79, 82–83 (Mo. App. E.D. 1978); *Roberts*, 622 S.W.2d at 227. Objections and arguments that merely reiterate general allegations of error contained in a motion to suppress evidence do not preserve a claim for appellate review. *State v. Redd*, 550 S.W.2d 604, 608 (Mo. App. E.D. 1977). Because an appellate court will not review new arguments other than for plain error, the defendant's theory on appeal must correspond with the objections made at trial and in the motion for new trial. *State v. Ritter*, 644 S.W.2d 387, 390 (Mo. App. E.D. 1982); *State v. Hulsey*, 557 S.W.2d 715, 720 (Mo. App. S.D. 1977).

e. (§26.39) Constitutional Issues

A defendant must present any constitutional claim, other than the sufficiency of the evidence, in a timely filed motion for new trial to preserve it for full appellate review. *State v. Shive*, 621 S.W.2d 715, 717 (Mo. App. S.D. 1981); Rule 29.11(d). The motion must set forth in detail "the specific grounds or causes" that allegedly justify a new trial, such as an argument that certain evidence was obtained in violation of a particular right "afforded . . . by the Constitution of the United States or of the State of Missouri, or the decisional law of the Federal or State courts." *State v. Hulsey*, 557 S.W.2d 715, 719 (Mo. App. S.D. 1977); *accord State v. Garrette*, 699 S.W.2d 468, 480–81 (Mo. App. S.D. 1985) (motion for new trial did not specify which constitutional provisions were violated by statutes under which defendant was convicted, and did not preserve claims for appellate review).

Of course, a constitutional claim raised for the first time in an after-trial motion is generally not preserved because the defense must raise the issue at the first opportunity and object contemporaneously to the alleged violation. *See State v. Pullen*, 843 S.W.2d 360, 364 (Mo. banc 1992); *State v. Webb*, 646 S.W.2d 415, 417 (Mo. App. W.D. 1983); *State v. Harrelson*, 636 S.W.2d 83, 87 (Mo. App. E.D. 1982).

f. (§26.40) Continuances

The timing, content, and format of a motion for continuance are governed by Rules 24.09 and 24.10 and are beyond the scope of this chapter. Even if properly presented to the trial court, however, the defendant must renew the issue in a motion for

new trial. *State v. Nave*, 694 S.W.2d 729, 735 (Mo. banc 1985); *State v. Mercer*, 600 S.W.2d 45, 47 (Mo. App. W.D. 1980); *accord State v. Wolf*, 91 S.W.3d 636, 644–45 (Mo. App. W.D. 2002) (declining to review claim for plain error when denial of continuance was omitted from motion for new trial and appellant did not explain how the denial adversely affected the outcome of his mental examination). A defendant may not, for the first time on appeal, raise a claim concerning the trial court's denial of a continuance. *State v. Baumer*, 561 S.W.2d 398, 399 (Mo. App. E.D. 1977). Similarly, an appellate court will not consider grounds for a continuance that were not specifically presented below. *State v. Crawford*, 646 S.W.2d 841, 843 (Mo. App. E.D. 1982).

g. (§26.41) Newly Discovered Evidence

Trial courts have broad discretion to grant or deny a new trial on the basis of newly discovered evidence, but the remedy is not favored. *State v. Williams*, 652 S.W.2d 102, 114 (Mo. banc 1983); *State v. Rattler*, 639 S.W.2d 277, 279 (Mo. App. E.D. 1982).

As long as the motion is filed within the 15- or 25-day time limit established by Rule 29.11(b), the movant is entitled to relief if the movant makes four showings:

1. That the new evidence came to the defendant's knowledge after trial
2. That the defendant's failure to discover the new evidence before trial was not owing to a lack of diligence
3. That the new evidence is so material that it would probably produce a different result in a new trial
4. That the new evidence is not merely cumulative or intended to impeach the testimony of a witness

State v. Taylor, 589 S.W.2d 302, 305 (Mo. banc 1979); *State v. Stone*, 869 S.W.2d 785, 786–87 (Mo. App. W.D. 1994); *State v. Flemming*, 855 S.W.2d 517, 519–20 (Mo. App. S.D. 1993); *State v. Roe*, 845 S.W.2d 601, 606 (Mo. App. E.D. 1992). Evidence that merely contradicts the testimony of a state's witness will not suffice. *See*, *e.g.*, *State v. Leitner*, 945 S.W.2d 565, 574 (Mo. App. S.D. 1997) (murder victim's daughter's statement in pre-sentence investigation report did not justify new trial, where it would only impeach daughter's sworn trial testimony, which did not mention an incident described in the statement).

Nonetheless, newly discovered evidence is sufficiently material if it is "credible and reasonably sufficient to raise a substantial doubt in the mind of a reasonable person as to the result in the event of a new trial." *Stone*, 869 S.W.2d at 787 (quoting *State v. Jennings,* 34 S.W.2d 50, 54 (Mo. 1930)).

A motion for new trial based on newly discovered evidence must be accompanied by some proof, either within the motion or by accompanying affidavits. *State v. Batek*, 638 S.W.2d 809, 813 (Mo. App. E.D. 1982). The unverified allegations of defense counsel are not self-proving, and a motion will be rejected if the claims are not substantiated by the record because the defendant has the burden of showing compliance with all the prerequisites for obtaining a new trial on this ground. *State v. Riley*, 536 S.W.2d 501, 505 (Mo. App. E.D. 1976).

An *untimely* motion for new trial based on newly discovered evidence is considerably more problematic. Other than a motion for DNA testing under § 547.035, RSMo Supp. 2004, or § 547.037, RSMo Supp. 2004, Missouri law provides no recognized judicial mechanism to seek a new trial based on evidence discovered after the deadline for seeking a new trial has passed. *State v. Clark*, 112 S.W.3d 95, 98 (Mo. App. W.D. 2003); *State v. Gray,* 24 S.W.3d 204, 208 (Mo. App. W.D. 2000); *but see State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003) (habeas relief available under Rule 91 for death-sentenced inmate upon showing of "clear and convincing evidence" of actual innocence).

The authorities are split on the availability of relief, but most permit an otherwise untimely new trial motion under the court's inherent authority or "plain error" review—but only if the new evidence completely exonerates the defendant. The Eastern District Court of Appeals was the first court to offer such a remedy. Faced with the convincing tape-recorded recantation of a child abuse victim who provided the only evidence against the defendant when the recording came to light more than six months after the deadline for seeking a new trial, the court in *State v. Mooney*, 670 S.W.2d 510 (Mo. App. E.D. 1984), held that it had the inherent authority to remand the case with instructions that the defendant be permitted to file a motion for new trial based on the newly discovered evidence. *Id.* at 515–16. To a similar effect is *State v. Williams*, 673 S.W.2d 847 (Mo. App. E.D. 1984), which ordered the case remanded to the trial

court for consideration of a supplemental motion for new trial on the ground that the new evidence, if believed, "would completely exonerate defendant of any complicity in the crime of which he was convicted." *Id.* at 847. The court later clarified that such a remand is available only in the court's discretion and only to prevent a miscarriage of justice. *State v. Davis*, 698 S.W.2d 600, 603 (Mo. App. E.D. 1985).

The Western District Court of Appeals has permitted otherwise untimely motions for new trial under similar circumstances. The court has repeatedly held that it has the inherent authority to remand a case to consider a belated claim of newly discovered evidence, but the evidence must "completely exonerate" the defendant. *State v. Young*, 943 S.W.2d 794, 799 (Mo. App. W.D. 1997); *State v. Jackson*, 925 S.W.2d 856, 860 (Mo. App. W.D. 1996); *State v. Garner*, 976 S.W.2d 57, 59 (Mo. App. W.D. 1998); *Clark*, 112 S.W.3d at 99; *accord Gray*, 24 S.W.3d at 208–10 (observing that remedy may be available under the "plain error" rule as well as under the court's inherent authority). Again, such a remedy lies completely within the court's discretion. *Clark*, 112 S.W.3d at 99.

Initially skeptical of the remedy recognized by the Eastern District, the Southern District has since acknowledged the narrow availability of untimely motions for new trial based on recently discovered evidence. In *State v. Bransford*, 920 S.W.2d 937, 949 (Mo. App. S.D. 1996), the court held that a remedy is available "only in 'exceptional circumstances'" and only "when the newly discovered evidence will exonerate the accused"; *accord State v. Hill*, 884 S.W.2d 69, 76 (Mo. App. S.D. 1994) (same). Evidence that is "merely of an impeaching nature" does not warrant this relief. *Bransford*, 920 S.W.2d at 949; *cf. State v. Greathouse*, 694 S.W.2d 903, 911–12 (Mo. App. S.D. 1985) (appellate court "has no authority" to remand for consideration of a belated motion for new trial based on newly discovered evidence); *State v. Hicks*, 803 S.W.2d 143, 146 & n.2 (Mo. App. S.D. 1991) (distinguishing *Mooney*, 670 S.W.2d 510, and *Williams*, 673 S.W.2d 847, and reserving the question of whether the court would recognize the remedy afforded in those cases).

An untimely motion based on newly discovered evidence is cognizable only until the direct appeal is final. *Clemmons v. State*, 795 S.W.2d 414, 418 (Mo. App. E.D. 1990); *State v. Warden*, 753 S.W.2d 63, 65 n.3 (Mo. App. E.D. 1988).

IV. Motions for Reduction of Punishment

A. (§26.42) Rule Governing

Rule 29.05 governs motions for reduction of punishment. It provides: "The court shall have power to reduce the punishment within the statutory limits prescribed for the offense if it finds that the punishment is excessive."

B. (§26.43) Purpose

A motion for reduction of punishment is designed to give the trial court the opportunity to reduce a sentence returned by the jury or, when the punishment is assessed by the trial court, to allow the court to reconsider the length or severity of the sentence originally pronounced.

C. (§26.44) Grounds for Granting

A trial court is empowered to reduce a sentence within the statutory limits if the punishment assessed is excessive, either because the sentence is the result of "passion or prejudice," *State v. Johnson*, 549 S.W.2d 348, 351 (Mo. App. E.D. 1977), or because the sentence constitutes "cruel and unusual punishment" in violation of the Eighth Amendment or article I, § 21, of the Missouri Constitution, *State v. Maxwell*, 502 S.W.2d 382, 396 (Mo. App. E.D. 1973).

D. (§26.45) Time for Filing

When the jury assesses the sentence by advisory verdict, a defendant's motion to reduce sentence should be included in the motion for new trial. *State v. Rule*, 543 S.W.2d 325, 326 (Mo. App. W.D. 1976); *State v. Watson*, 400 S.W.2d 129, 132 (Mo. 1966) (conducting "plain error" review). If, however, the issue of punishment is not submitted to the jury or if the trial court imposes a lesser punishment than that assessed by the jury, the defendant should raise the issue of an allegedly excessive sentence at the time of sentencing because allocution affords the defendant an opportunity to raise any infirmities in the sentencing procedure. *State v. Tate*, 657 S.W.2d 727, 729 (Mo. App. E.D. 1983); *State v. Greenwood*, 643 S.W.2d 837, 839 (Mo. App. E.D. 1982); *State v. Feeler*, 634 S.W.2d 484, 487 (Mo. App. S.D. 1981). A trial court loses jurisdiction to reduce a sentence under Rule 29.05 as soon as it enters judgment and sentence. *State v. Prosser*, 131 S.W.3d 858 (Mo. App. E.D. 2004); *State v. VanSickel*, 726 S.W.2d 392, 392–93 (Mo. App. W.D. 1987).

E. (§26.46) Right of Appeal

If timely presented and properly preserved, the denial of a motion for reduction of sentence may be raised on direct appeal from a conviction, at least when the sentence imposed was originally assessed by the jury, and an appellate court is empowered to reduce the sentence within statutory limits if it finds that the sentence is excessive or constitutes cruel and unusual punishment. *State v. Johnson*, 549 S.W.2d 348, 351 (Mo. App. E.D. 1977); *State v. Agee*, 474 S.W.2d 817, 820–21 (Mo. 1971).

Although Rule 29.05 allows the court to reduce any excessive sentence within statutory limits, the Southern District Court of Appeals has held that the rule applies only to "jury assessment of punishment" and not when the defendant seeks a reduced sentence following a guilty plea. *State v. Smith*, 633 S.W.2d 253, 254 (Mo. App. S.D. 1982); *accord State v. Vidal*, 843 S.W.2d 392, 393 (Mo. App. S.D. 1992). Literally applied, the decision in *Smith* would effectively foreclose appellate review of the denial of all Rule 29.05 motions because, under § 557.036, RSMo Supp. 2004, the trial court is always empowered to decide "the extent or duration of sentence" and "every criminal sentence is a sentence of the court." *State v. Lewis*, 633 S.W.2d 110, 118 n.8 (Mo. App. W.D. 1982). Rule 29.05 has not been interpreted in such a technical fashion, however, and it appears that appellate courts will continue to review the denial of these motions, at least when the trial court has imposed the same punishment assessed by the jury. *See State v. Vaughn*, 32 S.W.3d 798, 800–01 (Mo. App. S.D. 2000); *State v. McAlester*, 635 S.W.2d 76, 77–78 (Mo. App. W.D. 1982); *State v. Stewart*, 636 S.W.2d 345, 347–48 (Mo. App. E.D. 1982).

Recent amendments to § 557.036, relating to the procedures governing jury sentencing, do not purport to abrogate Rule 29.05, leaving intact the judge's authority to reduce the sentence assessed by the jury. Section 557.036.3; *State v. Bryant*, 658 S.W.2d 935, 940 (Mo. App. W.D. 1983).

F. Scope of Review

1. (§26.47) Abuse of Discretion

Reduction of punishment rests within the trial court's discretion. *State v. McClanahan*, 954 S.W.2d 476, 481 (Mo. App. W.D. 1997). An abuse of discretion must clearly appear in the record for the sentence to be overturned. *State v. McAlester*, 635 S.W.2d 76, 77 (Mo. App. W.D. 1982); *State v. Mucie*, 448 S.W.2d 879, 889 (Mo. 1970).

2. (§26.48) Excessive Punishment Because of Passion and Prejudice

When a defendant alleges that the punishment is excessive because it is the result of passion and prejudice on the part of the jury or sentencing court, the passion and prejudice, as well as an abuse of the trial court's discretion, must clearly appear from the record. *State v. Stewart*, 636 S.W.2d 345, 347 (Mo. App. E.D.1982); *State v. Gardner*, 524 S.W.2d 38, 41 (Mo. App. S.D. 1975). The factors to be considered on appeal include, but are not limited to:

- whether the penalty was the maximum provided by law;
- whether the crime was brutal;
- the length of time the jury took to deliberate; and
- the existence of any specific acts of prejudicial misconduct by witnesses, the court, or the prosecution.

Stewart, 636 S.W.2d at 347–48 & n.2; *State v. Mucie*, 448 S.W.2d 879, 889 (Mo. 1970); *State v. Agee*, 474 S.W.2d 817, 821 (Mo. 1971).

A punishment will not be deemed excessive or the result of passion or prejudice merely because it is the maximum authorized by statute, *State v. McAlester*, 635 S.W.2d 76, 78 (Mo. App. W.D. 1982); *Mucie*, 448 S.W.2d at 889, or because the jury was quick to return a guilty verdict, *State v. Caffey*, 365 S.W.2d 607, 610–11 (Mo. 1963); *Agee*, 474 S.W.2d at 821.

3. (§26.49) Disproportionate Sentences as Cruel and Unusual Punishment

The Eighth Amendment to the United States Constitution proscribes not only barbaric punishments, but also sentences that are disproportionate to the crime committed. *Solem v. Helm*, 463 U.S. 277 (1983). But relief will be granted only if the sentence is "grossly disproportionate" to the severity of the crime. *Rummel v. Estelle*, 445 U.S. 263, 271–72 (1980). Successful challenges to the proportionality of a particular sentence are "exceedingly rare." *Hutto v. Davis*, 454 U.S. 370, 374 (1982). The Court in *Solem* invalidated a life sentence, issued under a South Dakota recidivist statute, imposed on a defendant who passed a fraudulent check for $100 and who had six prior felony convictions for relatively minor and non-violent offenses.

The Supreme Court somewhat retreated from *Solem*, 463 U.S. 277, in *Harmelin v. Michigan*, 501 U.S. 957 (1991), in which the Court upheld a life-without-parole sentence for a first-time offender

convicted of possessing more than 650 grams of cocaine. A plurality opinion issued by Justice Scalia, and joined by only one other justice, remarked that "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee." *Id.* at 965. The remaining seven justices—those concurring and dissenting from the denial of relief to Mr. Harmelin—remained of the opinion that the Eighth Amendment *does* apply to non-capital cases. *See id.* at 997, 1005 (Kennedy, J., concurring), 1009–27 (White, J., dissenting), 1027–28 (Marshall, J., dissenting), 1028–29 (Stevens, J., dissenting). A number of Missouri courts have erroneously held that *Harmelin* overruled *Solem* and concluded that the Eighth Amendment does not place any limitation on prison terms for non-capital offenses. *See State v. Donnell*, 862 S.W.2d 445, 453 (Mo. App. W.D. 1993); *State v. Stoer*, 862 S.W.2d 348, 354 (Mo. App. S.D. 1993); *Cain v. State*, 859 S.W.2d 715, 718 (Mo. App. E.D. 1993).

More generally, the state courts have routinely rejected claims that a non-capital sentence is cruel and unusual. As long as a punishment is within the statutory limits for an offense, its length is not cruel and unusual unless it is "*so disproportionate to the offense committed so as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances*." *State v. Mitchell*, 563 S.W.2d 18, 26 (Mo. banc 1978) (quoting *State v. Johnson*, 549 S.W.2d 348, 352 (Mo. App. E.D. 1977)); *State v. Walker*, 618 S.W.2d 43, 44 (Mo. App. S.D. 1981); *State v. Manis*, 614 S.W.2d 771, 773 (Mo. App. S.D. 1981); *Abell v. State*, 606 S.W.2d 198, 200 (Mo. App. E.D. 1980). The courts have repeatedly upheld lengthy durational sentences. *See*, *e.g.*:

- *State v. Brown*, 636 S.W.2d 929, 936 (Mo. banc 1982) (65 years without parole for 5 convictions of forcible sodomy and rape);
- *State v. Repp*, 603 S.W.2d 569, 571 (Mo. banc 1980) (6 consecutive 5-year sentences for tendering no-account checks);
- *Mitchell*, 563 S.W.2d at 27 (7 years for selling 11 grams of marijuana);
- *State v. Stephens*, 507 S.W.2d 18, 22–23 (Mo. banc 1974) (200 years for second-degree murder);
- *Abell*, 606 S.W.2d at 199–201 (50 years for sale of marijuana);
- *State v. Dayton*, 535 S.W.2d 479, 489 (Mo. App. W.D. 1976) (concurrent sentences of 150 years for 2 counts of forcible sodomy).

4. (§26.50) Death Penalty as Cruel and Unusual Punishment

The United States Supreme Court and the Supreme Court of Missouri have held that the death penalty is not cruel and unusual punishment. *Gregg v. Ga.*, 428 U.S. 153, 187 (1976); *State v. Williams*, 652 S.W.2d 102, 112 (Mo. banc 1983). But the Eighth Amendment authorizes the death penalty only if the defendant killed, attempted to kill, or intended that a killing take place or that lethal force be used. *Enmund v. Fla.*, 458 U.S. 782, 797 (1982). "Intent" can, nevertheless, be inferred if the defendant participated in a felony that resulted in murder if the defendant acted with reckless indifference to human life. *Tison v. Ariz.*, 481 U.S. 137, 157–58 (1987). The death penalty is per se forbidden for the offense of raping an adult victim. *See Coker v. Ga.*, 433 U.S. 584, 592 (1977).

Although the death penalty for premeditated murder is not per se disproportionate to the offense, the Supreme Court of Missouri is required by statute to determine whether a sentence of death "was imposed under the influence of passion, prejudice, or any other arbitrary factor" and whether the "sentence of death is excessive or disproportionate to the penalty imposed in similar cases" in light of the crime, the defendant, and "the strength of the evidence." Section 565.035.3(1), (3), RSMo 2000. The Supreme Court of Missouri has twice vacated death sentences on the ground of proportionality. *State v. Chaney*, 967 S.W.2d 47 (Mo. banc 1998); *State v. McIlvoy*, 629 S.W.2d 333, 341–42 (Mo. banc 1982). Its proportionality review is, nevertheless, quite limited, and the Court has refused to compare the capital case at hand with similar homicide cases in which the death penalty was not imposed. *Lyons v. State*, 39 S.W.3d 32, 44 (Mo. banc 2001).

V. Motions for Conditional Release Pending Appeal

A. (§26.51) Rules Governing

The primary Rules governing motions for conditional release pending appeal are Rules 30.15, 30.16, 33.01, and 33.09.

B. (§26.52) Purpose and Effect

A motion for conditional release pending appeal under Rule 30.16 is designed to allow a defendant to remain at large or to secure release from custody pending a direct appeal from a judgment of conviction in a criminal case. Under Rule 30.15(b), a sentence of imprisonment is automatically stayed if an appeal is taken and the defendant is conditionally released under Rule 33 pending that appeal.

C. (§26.53) Right to Release Pending Appeal

A defendant has no absolute right to bail pending appeal under the state or federal constitutions. *Application of Holt*, 518 S.W.2d 451, 452 (Mo. App. S.D. 1975); *Starkey v. Swenson*, 370 F. Supp. 594, 596 (E.D. Mo. 1974). Although article I, § 20, of the Missouri Constitution provides that "all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great," it has been repeatedly held that this provision applies only "before conviction." *Wiglesworth v. Wyrick*, 531 S.W.2d 713, 720–21 (Mo. banc 1976); *Ex parte Carey*, 267 S.W. 806, 807[1] (Mo. banc 1924); *Ex parte Heath*, 126 S.W. 1031, 1035 (Mo. 1910). There is likewise no federal constitutional right to bail pending appeal, either under the Eighth Amendment or under any other constitutional provision. *Young v. Hubbard*, 673 F.2d 132, 134 (5th Cir. 1982); *Finetti v. Harris*, 609 F.2d 594, 597 (2nd Cir. 1979).

Rather, the right to release pending appeal derives solely from what is now § 547.170, RSMo Supp. 2004. *Holt,* 518 S.W.2d at 542. Although § 547.170 provides that the trial court "may" release a defendant on bond pending appeal, it nevertheless has been held that this statute, before its amendment in 1993, entitled a defendant, "as a matter of right," to bail pending appeal "except in cases in which a sentence of death or imprisonment for life is imposed." *Carey*, 267 S.W. at 808. Section 547.170 was amended in 1993 and now provides that a defendant is not entitled to bond on appeal if the defendant "is under sentence of death or imprisonment in the penitentiary for life," or under sentence of imprisonment for a violation of:

- § 195.222, RSMo Supp. 2004 (trafficking drugs in the first degree);
- § 565.021, RSMo 2000 (murder in the second degree);
- § 565.050, RSMo 2000 (assault in the first degree); or
- § 566.030, RSMo 2000 (forcible rape).

An obvious prerequisite to the right of release pending appeal is that a valid appeal be perfected and remain pending. "In the absence of a valid appeal, [a defendant] has no claim to release on an appeal bond." *Holt*, 518 S.W.2d at 453.

D. (§26.54) Procedure for Filing Application

An application for conditional release pending appeal must be filed, in the first instance, in the trial court where the conviction was entered. Rule 30.16. If the court fails to set conditions for release or sets excessive conditions, an application may subsequently be filed "in a higher court", and that court may then enter an order setting or modifying the conditions for release. Rule 33.09(a), (b).

As part of the application for conditional release, the defendant is required by Rules 30.16 and 33.09(c) to file with the circuit court clerk a signed and acknowledged application specifying the post office address to which all notices in connection with the case may be mailed.

E. (§26.55) Conditions of Release

Rule 30.16 provides that the conditions of a defendant's conditional release pending appeal "shall be determined by the trial court pursuant to Rule 33." This sentence specifically refers to Rule 33.01, which provides, *inter alia*, that the "court shall set such conditions for release as will reasonably assure the appearance of the accused," Rule 33.01(b), and which contains a nonexclusive list of the types of conditions that a court may place on a defendant's release. Rule 30.16 provides that one mandatory condition of release pending appeal shall be "that the defendant will render himself or herself in execution and will obey every order and judgment of the appellate court or every order and judgment of the trial court entered at the direction of the appellate court."

In determining which other conditions of release should be imposed, the court shall take into consideration:

> [T]he nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character, mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings.

Rule 33.01(e).

F. Right of Review

1. (§26.56) By Defendant

When the trial court fails to set conditions for release or sets excessive conditions, a defendant may file an application in a higher court "stating the grounds for the application and the relief sought." Rule 33.09(a). If the higher court finds that the accused is entitled to be released and no conditions of release have been set or the conditions are excessive, "the court shall make an order setting or modifying conditions for the release of the accused." Rule 33.09(b).

Unlike prior Rule 28.12 (now repealed), Rule 33.09(a) does not require a defendant to file the application for review in "the appellate court having jurisdiction of the appeal." Rather, it merely provides that the defendant may file the application "in a higher court." Presumably, then, a defendant would not be prohibited from requesting the court of appeals to set or review the terms of the conditional release even when jurisdiction of the appeal is vested in the Supreme Court of Missouri. Under former Rule 28.12, the court of appeals was not empowered to grant a defendant a conditional release when jurisdiction of the appeal was lodged in the Supreme Court of Missouri. *State v. Combs*, 301 S.W.2d 529, 530[3] (Mo. App. S.D. 1957).

Also, if the defendant is dissatisfied with the terms of the conditional release set by the court of appeals, the language of Rule 33.09(a) suggests that those conditions may be reviewed by the Supreme Court of Missouri in accordance with an application under that Rule rather than by writ of habeas corpus.

2. (§26.57) By State

Rule 33.09(a) also provides that an application may be filed in a higher court "by the state" if a court sets "inadequate" conditions of release. If the higher court finds that the original conditions are inadequate, it will enter an order "setting or modifying conditions for the release of the accused." Rule 33.09(b).

G. (§26.58) Revocation of Conditional Release

When a defendant who has been conditionally released pending appeal fails to appear or to obey every order of the appellate court, or all orders and judgments entered by the trial court at the direction of the appellate

court, either the appellate or the trial court "shall cause the defendant to be arrested upon process issued for that purpose." Rule 30.28.

A defendant's right to conditional release ends upon the "adoption" (rather than the "issuance") of an opinion affirming the judgment of conviction. Rule 33.01(a). By special order, the affirming court may permit the defendant to remain on bond following the adoption of an opinion affirming the conviction, pending the disposition of post-opinion motions or applications. Rule 33.01(a).

H. (§26.59) Effect of Failure to Appear

Under § 544.665, RSMo 2000, a defendant who is conditionally released pending appeal and who fails to surrender to the custody of the court upon affirmance of the conviction is not only subject "to the forfeiture of any security which was given or pledged for [the defendant's] release," § 544.665.1, but also is guilty of an offense punishable by a fine, a term of imprisonment of up to five years, or both, depending on the nature and degree of the conviction appealed from. Section 544.665.1(1), (2); *State v. Adams*, 532 S.W.2d 524 (Mo. App. S.D. 1976). The penalty provisions of § 544.665 are not exclusive and do not prevent a court from punishing a defendant for contempt for failing to return to custody. Section 544.665.3.

VI. Post-Conviction DNA Testing

A. (§26.60) Scope

Sections 26.61–26.78 below discuss the issues that confront litigants seeking or opposing motions for post-conviction DNA testing filed under § 547.035, RSMo Supp. 2004. Discussions of the types of forensic DNA testing available, what biological materials may be subjected to DNA profiling and comparison, and similar technical issues are beyond the scope of this chapter.

It is not entirely accurate to categorize these motions as "after-trial motions." As is discussed in some detail, these motions can be filed after a trial, but they can also be filed even when no trial was necessary to convict the defendant, i.e., when the defendant pleads guilty to the charge. In that sense, they are much more akin to post-conviction motions filed in accordance with Rule 24.035 or Rule 29.15. They are "after trial" in the sense that they are post-conviction motions—they cannot be filed during trial or before trial.

B. (§26.61) Significance of Post-Conviction DNA Testing

To date, more than 200 persons have been freed from prisons in the United States because post-conviction DNA tests have shown that they could not possibly have committed the crimes for which they were incarcerated. Almost all of these "exonerees" had exhausted all of their statutory and constitutional appealable issues long before they were released. Thus, statutes permitting convicted persons to obtain court-ordered DNA testing and to petition the court for release upon obtaining favorable results from the tests often provide the last and best hope for the actually innocent to obtain freedom from their unjust incarceration.

C. (§26.62) Where Is Motion Filed? When Must it Be Filed?

Section 547.035.1, RSMo Supp. 2004, specifies that the motion is filed "in the sentencing court." There are no filing deadlines or limitations periods on these motions. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210 (Mo. banc 2001). Successive motions are not specifically banned by the statute.

D. (§26.63) What Are Procedural Requirements for Motion?

The "[m]ovant shall file the motion and two copies . . . with the clerk of the sentencing court." Section 547.035.3, RSMo Supp. 2004. "The clerk shall file the motion in the original criminal case" and then send a copy to the prosecuting attorney for the circuit. *Id.* Even though the motion is filed in the criminal case and may retain the original criminal case number, "[t]he procedure to be followed for such motions is governed by the rules of civil procedure insofar as applicable." Section 547.035.1.

"The motion must allege facts under oath." Section 547.035.2. Although the statute specifies only certain facts that the movant must allege under oath, clearly the better practice would be to file a "global" verification for all allegations in the motion. While the Supreme Court of Missouri has held that the movant's signature without the formality of notarization is sufficient verification of a pro se Rule 29.15 motion, *State v. White*, 873 S.W.2d 590 (Mo. banc 1994), the Court has yet to permit that degree of informality in § 547.035 motions. But the lack of verification does not appear to be jurisdictional. Litigants have been permitted to remedy the failure to verify key allegations of the motion even during the pendency of an appeal from a denial of the motion on other grounds. *Weeks v. State*, 140 S.W.3d 39, 47, n.7 (Mo. banc 2004).

E. (§26.64) Who May File Motion?

At a minimum, the movant must be a "person in the custody of the department of corrections." Section 547.035.1, RSMo Supp. 2004. Thus, the motion is not available to those awaiting trial, those who are in trial, or those who have been convicted but are not yet in the custody of the Missouri Department of Corrections. Section 547.035.1 would also seem to prevent a person who has been released from custody after completing the sentence from seeking to "clear their name" through court-ordered DNA testing.

At one time, it was believed that it made a difference under the DNA statute how a person came to be in the custody of the Department of Corrections. Various circuit courts and at least one appellate court have held that a person who had pled guilty to the charges that resulted in incarceration could not obtain relief through such a motion. *Weeks v. State*, No. ED 81171, 2003 WL 1889589 (E.D. Mo. April 15, 2003). These courts found justification for these rulings in language in various clauses in the statute referring to the state of mind of the defendant or defendant's "trial counsel . . . at the time of trial," § 547.035.2(3)(b), or issues that were "in the trial," § 547.035.2(4). The lower courts reasoned that the General Assembly intended to limit the class of movants to those who had been found guilty in a *trial* and to not include those who had pled guilty sometime before a *trial*.

Those decisions were reversed in *Weeks v. State*, 140 S.W.3d 39 (Mo. banc 2004). The Court held that incarcerated persons who have been found guilty in a trial and those who have pled guilty to charges are equally eligible to file these motions. The Court relied primarily on the language of § 547.035.5, which, upon issuance of an order to show cause, requires the clerk of the sentencing court to "notify the court reporter to prepare and file the transcript of the trial or the movant's guilty plea and sentencing hearing . . . ." The Court held that this provision made it clear that the General Assembly intended for those who had pled guilty to be able to avail themselves of the statute and that to interpret the statute in any other way would render this particular section of the statute meaningless. *Weeks*, 140 S.W.3d at 46.

F. (§26.65) What Must Motion Allege? What Must Motion Court Find in Order to Grant Relief?

The following sections detail the facts that the motion must allege.

1. (§26.66) There Is Evidence Upon Which DNA Testing Can Be Conducted, § 547.035.2(1), RSMo

"(1) There is evidence upon which DNA testing can be conducted." Section 547.035.2(1), RSMo Supp. 2004.

This is arguably the most difficult factual pleading requirement for most movants. Currently, the vast majority of post-conviction DNA motions are filed by the inmate pro se. In some cases, it is obvious that biological material should exist for DNA testing. In most cases of sexual assault, there will be a "rape kit" containing vaginal swabs and perhaps slides as well as hair samples, for example. But this is not always true, and the movant cannot assume it to be true. *State v. Westcott*, 121 S.W.3d 543 (Mo. App. W.D. 2003). While § 650.056, RSMo Supp. 2004, requires the Missouri State Highway Patrol to preserve all evidence containing DNA in sexual assault and other types of convictions, there is no guarantee that just because those items existed at the time of trial they will still exist at the time of the filing of the motion. Inmates are certainly in a poor position to ascertain the current existence of evidence in the hands of the police, prosecution, or crime lab. Even if the inmate could somehow be certain of the existence of the evidence, that does not ensure that there is a sufficient quantity or quality of evidence for "DNA testing." It is, therefore, nearly impossible for most inmates to know with "oath-taking" certainty that this type of evidence still exists, even if it is obvious that it existed at some point in the proceedings.

Furthermore, advances in DNA technology have made previously "untestable" evidence suitable for DNA extraction and profiling. Quantities of blood, semen, saliva, tissue, and hair that were considered of little evidentiary significance years ago are now prime candidates for DNA profiling. While some inmates have access to their entire case file, including the discovery documents that may include lab reports and evidence inventories, many do not. Even if they do have this access, the inmates may lack knowledge about what materials are capable of being tested for the presence of biological materials. Without access to private counsel, a private investigator, or a DNA expert, the average movant is at a distinct disadvantage in meeting this statutory requirement.

There is no provision in the statute for the appointment of counsel before the filing of the motion. Counsel may be appointed for the indigent movant if the court orders a hearing on the motion, but a hearing is not required if the court determines, after an examination

of the initial motion and after review of the response of the prosecuting attorney, that "the motion and the files and records of the case conclusively show that the movant is not entitled to relief." Section 547.035.6. Therefore, the court could determine that the motion is defective because the unrepresented inmate did not allege sufficient facts showing that there is "evidence upon which DNA testing can be conducted," § 547.035.2(1), and thus deny the movant a hearing. Ironically, counsel could be denied to the indigent inmate entirely because the inmate lacked knowledge about the subject matter on which the inmate would most benefit from the assistance of counsel.

2. (§26.67) The Evidence Was Secured in Relation to the Crime, § 547.035.2(2), RSMo

"(2) The evidence was secured in relation to the crime." Section 547.035.2(2), RSMo Supp. 2004.

In most cases, this pleading requirement is not difficult to meet. Typically, the police have obtained biological materials from the rape kit. They may have also seized biological specimens that serve as "standards" from the victim and suspects such as blood, saliva, head hair, and pubic hair. In some cases, "elimination standards" are obtained from husbands and other known sexual partners of sexual assault victims. All of these items are clearly "secured in relation to the crime" within the meaning of the statute.

One appellate court has held that evidence seized in connection with crimes allegedly committed by the movant in one county cannot serve as the basis for a DNA motion directed at a conviction in a second county. In *State v. Tyler*, 103 S.W.3d 245 (Mo. App. E.D. 2003), the court held that biological evidence seized in connection with crimes attributed to the movant in Columbia and St. Louis could not satisfy the statutory requirement to challenge a conviction in the Kansas City area. But this denial of testing might be more accurately categorized as a situation in which there was no biological evidence in existence to test in the Kansas City case, thus it was based on a failure to meet the requirements of § 547.035.2(1) rather than § 547.035.2(2).

The statute does not define the word "evidence" or the phrase "DNA testing." Traditional DNA testing consists of several components (highly simplified here):

- Identifying substances containing DNA
- Extracting the DNA from those substances
- Profiling the DNA extracted from two or more profiles
- Comparing the profiles of the various samples to make an identification of the contributors of the substances

It is possible that some of the "evidence" in a case has been "secured in relation to the crime" and that certain other "evidence," if extracted, profiled, and compared with the DNA profiles secured in relation to the crime, would yield an identification that could prove exonerating for the movant. For example, what if the police did not obtain biological standards from all of the suspects in the case? Could a movant request that DNA found at the scene of a homicide that did not belong to either the victim or the movant be tested against the DNA of another suspect? Would it matter whether that suspect's DNA is available from a source other than evidence "secured in relation to the crime" or would have to be obtained by court order? One appellate court has suggested, perhaps in dicta, that the motion court is without authority to order a physical examination of a victim, witness, or third party, even if that third party is no more than an "elimination suspect," such as a husband or boyfriend of a sexual assault victim. *Snowdell v. State*, 90 S.W.3d 512, 515 (Mo. App. E.D. 2002). The issues raised in *Snowdell* are currently under consideration in other Missouri appellate courts.

Would it matter whether that suspect's DNA profile is available in the Combined DNA Index System database or whether it would have to be profiled anew from freshly obtained evidence? Does "DNA testing" always consist of extraction and profiling, or can "DNA testing" under this statute consist only of comparisons of known DNA profiles? What if the evidence that the movant wants tested was readily available to police at the time of the crime and could have or should have "been secured in relation to the crime" but was not? Does that give the motion court authority to order seizure of the material that the movant argues is relevant to identification of the perpetrator? These questions are unanswered in the statute and the caselaw to date.

3. (§26.68) The Evidence Was Not Previously Tested by the Movant Because, § 547.035.2(3), RSMo

"(3) The evidence was not previously tested by the movant because [of the existence of one of the conditions described in §§26.69–26.71 below]." Section 547.035.2(3), RSMo Supp. 2004.

a. (§26.69) The Technology for the Testing Was Not Reasonably Available to the Movant at the Time of the Trial, § 547.035.2(3)(a), RSMo

"(a) The technology for the testing was not reasonably available to the movant at the time of the trial." Section 547.035.2(3)(a), RSMo Supp. 2004.

The first date on which technology for identifying wrongdoers with DNA profiling and comparison became available is a matter of some disagreement, but there is no question that at least two private labs, Cellmark and Lifecodes, were doing business throughout the United States by the late 1980s. The first case in Missouri in which DNA testing was acknowledged was *State v. Davis*, 814 S.W.2d 593 (Mo. banc 1991). At that time, the Supreme Court of Missouri noted that Cellmark and Lifecodes were the primary labs in existence in the United States. For persons who were convicted before *Davis*, it would appear obvious that the defendant did not have reasonable access to DNA technology at the time of trial. But for cases going to trial after *Davis*, making that determination can be difficult. The General Assembly did not offer guidance in the statute; certainly, the legislature did not specify a date beyond which it would be presumed that a defendant would have had access to DNA technology at the time of trial.

The Supreme Court of Missouri clarified this issue in *Weeks v. State*, 140 S.W.3d 39 (Mo. banc 2004). The Court held that the movant does not need to prove "that DNA testing was not technologically possible or was unavailable anywhere at the time of trial." *Id*. at 48. Rather, the test for determining whether DNA testing was reasonably available to a movant was a subjective one: under the circumstances unique to that movant, was the technology reasonably available to the movant at the time of trial? The Court examined the movant's financial condition and his education and training to determine his ability to obtain DNA testing. The Court also took into account the lack of training and experience his trial counsel had in the field of DNA profiling and concluded that, regardless of whatever else was happening in the United States or the rest of Missouri, as to Rubin Weeks, the technology for DNA testing was not reasonably available to him.

A different movant has argued that, while a particular type of DNA testing was available to him at trial (RFLP testing), he should be granted a test using the newer PCR technology. In *State v. Kinder*, 122 S.W.3d 624 (Mo. App. E.D. 2003), the court rejected this argument, saying that the movant had at least one reliable form of DNA testing available to him at trial. The court declined to "read the language in this subsection as referring to the availability of a specific method of DNA testing, potentially opening the door to retesting each time a new and improved method of DNA testing may be developed." *Id.* at 632.

It could be presumed that the result in *Kinder* might have been different if the new form of testing sought by Kinder provided an opportunity for previously untestable evidence to be profiled for the first time. Mitochondrial DNA testing would be one such example. Before the development of mitochondrial DNA testing, which allows extraction of DNA from the walls of a human cell rather than the nucleus of the cell, developing a DNA profile from a shaft of human hair (bearing no other biological tissue) was impossible. It would be reasonable to assume that, if *Kinder* had sought DNA profiling of a hair that had not previously been profiled through mitochondrial testing, the holding might have been different.

b. (§26.70) Neither the Movant Nor His or Her Trial Counsel Was Aware of the Existence of the Evidence at the Time of Trial, § 547.035.2(3)(b), RSMo

"(b) Neither the movant nor his or her trial counsel was aware of the existence of the evidence at the time of trial." Section 547.035.2(3)(b), RSMo Supp. 2004.

While this provision would seem to be self-explanatory, difficult questions could arise. What if the movant and the defense attorney are aware of the existence of the evidence, but not aware that it contains DNA? For example, what if the litigants know that a bed sheet is in evidence, but do not know at the time of trial that a tiny amount of blood or semen is present on it? What if the method for detecting these tiny quantities of the biological substance did not exist at the time of trial? What if the litigants knew that there was a nylon stocking in evidence but were not aware that the victim claimed that it was worn over her attacker's head and face and, thus, might contain skin cells

or saliva that could be tested? Mere knowledge of the existence of the evidence may not be the same as having knowledge of its nature and quality with respect to DNA testing.

c. (§26.71) The Evidence Was Otherwise Unavailable to Both the Movant and Movant's Trial Counsel at the Time of Trial, § 547.035.2(3)(c), RSMo

"(c) The evidence was otherwise unavailable to both the movant and movant's trial counsel at the time of trial." Section 547.035.2(3)(c), RSMo Supp. 2004.

To date, only one Missouri case has construed this provision of the statute. In *State v. Kinder*, 122 S.W.3d 624 (Mo. App. E.D. 2003), the movant did not conduct DNA testing on a certain sample in part because he believed the results of the testing already conducted by the state to be exculpatory. When the results presented at trial no longer seemed exculpatory to him, it was too late for the movant to conduct his own testing; thus, he argued, the evidence was unavailable to him to test at the time of trial. The court found that the fact that the evidence was available for testing before trial was sufficient and denied his motion for post-conviction testing.

Presumably, this provision covers the situation in which evidence containing DNA is known to have existed but has been lost, misplaced, or intentionally withheld from the defense. It might also include a scenario in which DNA testing conducted at the time of trial apparently consumed so much of the available biological sample that no additional testing could be conducted. But with the passage of time and evolution of new testing technologies capable of developing a profile from smaller, previously untestable samples, testing is now possible. Thus, evidence that was at one time "unavailable" is now "available" for testing.

4. (§26.72) Identity Was an Issue in the Trial, § 547.035.2(4), RSMo

"(4) Identity was an issue in the trial." Section 547.035.2(4), RSMo Supp. 2004.

Again, it is not necessary for a movant to allege or prove that a "trial" took place. The phrase "in the trial" or "at the time of trial" has been construed by the Supreme Court of Missouri to mean at the time of conviction. *Weeks v. State*, 140 S.W.3d 39, 44–46 (Mo. banc 2004). But whether convicted by verdict, judgment, or guilty plea, a movant must establish that identity of the perpetrator was an issue in the case.

It should be noted that identity of the perpetrator is not necessarily a contested issue in a criminal proceeding. In many sexual assault trials, the defendant acknowledges that there was sexual contact with the complaining witness but argues that the contact was entirely consensual. In this instance, the defendant does not contest identity, but rather whether a crime has been committed. Identity is not an issue; therefore, DNA testing of biological specimens would not be expected to produce evidence relevant to the consent issue. Similarly, the homicide defendant may acknowledge responsibility for killing the victim and argue that the killing was legally justified by self-defense or defense of others, for example. Identity of the killer is not an issue; therefore, DNA testing of biological specimens will not be relevant to the central issue in the case. Movants with failed self-defense or consent defenses are not entitled to relief under the statute.

When a movant pleads guilty to the charge, it is more difficult to determine whether identity was an issue in the case. When the defendant has announced the intention to interpose an alibi defense (before pleading guilty), it is clear that identity is an issue in the case. When the defendant has interposed a defense of mental disease or defect or some other diminished capacity defense (before pleading guilty), it is equally clear that identity is not an issue in the case. But for those defenses that do not have to be "announced" by the defendant, presumably, the history of the investigation should be reviewed to determine if identity of the perpetrator was ever in issue. This was the approach the Supreme Court of Missouri took in *Weeks*, 140 S.W.3d 39. The Court acknowledged the efforts of the police and crime labs to identify the rapist through examination of physical evidence (other than the biological specimens obtained in the rape kit) and concluded that identity was an issue in the case up until the time of the plea. *Id.* at 47.

5. (§26.73) A Reasonable Probability Exists That the Movant Would Not Have Been Convicted if Exculpatory Results Had Been Obtained Through the Requested DNA Testing, § 547.035.2(5), RSMo

"(5) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing." Section 547.035.2(5), RSMo Supp. 2004.

There is a strong presumption in the legal community that nothing could be more persuasive to a judge or jury that a rape defendant is innocent than the results of DNA testing showing that his semen was not present on the vaginal swab or smears or other stains obtained from the clothing or bed sheets of the victim. It is axiomatic that, if a fact-finder is presented with this evidence, there is a reasonable probability that the movant would not be convicted. But this position assumes that the substances sought to be tested and the testing requested on those substances would yield such obviously relevant results. This is not always the case.

In some cases, even if biological material is available for testing, an exclusion of the defendant as a contributor to the specimen may not be exonerating on the particular charge. It is also unwise to assume that this evidence exists or ever existed. A movant who alleged that a pelvic examination was conducted on one of his alleged victims and that biological samples containing human DNA must have been obtained during that examination was denied testing because he "failed to plead any facts . . . [explaining] how such samples would contain any DNA relevant to the charges against him." *State v. Westcott*, 121 S.W.3d 543, 546 (Mo. App. W.D. 2003).

Assume that a defendant charged with rape (many years before DNA testing was available) challenged the identity of the rapist. A rape kit was obtained from the defendant for possible serological testing (ABO blood typing), but, of course, no DNA testing was done on the vaginal swabs obtained in the rape kit. The defendant is convicted by the testimony of the victim. Years later, he seeks post-conviction DNA testing of the swabs, and it is granted. The tests are performed, and the DNA on the vaginal swabs does not match the defendant's DNA. Does this automatically mean that a "reasonable probability exists that the movant would not have been convicted" if these results had been presented to the jury? Normally, yes, but what if the victim told the hospital that obtained the vaginal swabs

that she had consensual sex with her spouse one hour before she was raped? What if the victim told the hospital or police that she had recent consensual sex and that the rapist used a condom or did not ejaculate? Would negative DNA results in these situations necessarily create a "reasonable probability . . . that the movant would not have been convicted"? In those circumstances, the prosecution could argue that the absence of the movant's semen does not prove the absence of a sexual assault.

The warning for movants and their counsel is that the movant must request testing of the right substances and request the right type of testing for those substances for this statutory requirement to be met. An evaluation of all of the available evidence in the case is essential to proper pleading of this element.

A scenario likely to recur as more of these motions are litigated is the one considered by the Eastern District Court of Appeals in *Snowdell v. State*, 90 S.W.3d 512 (Mo. App. E.D. 2002). Snowdell sought "testing" of a pubic hair that was included in the rape kit of the victim. Testimony at trial excluded Mr. Snowdell as the source of the pubic hair. The victim's husband had not contributed samples of his pubic hair for comparison during the investigation. Snowdell argued that, by comparing the DNA profile of the pubic hair against the DNA profile of the husband, the lab could determine if the pubic hair found in the rape kit came from a third, unidentified male. Snowdell's argument was that, if there was such a person, he must have had sexual contact with the victim; therefore, he was either a consensual partner or a rapist. The victim testified that she had only had sexual contact with her husband and the rapist. Therefore, a finding that the pubic hair belonged to a third person would have to be exculpatory either because it would establish that a third man was the rapist or, if it was a consensual partner, that the victim perjured herself.

The *Snowdell*, 90 S.W.3d 512, court rejected this argument, saying that further testing would be "cumulative" and that the failure to present cumulative evidence is not prejudicial. In addition, as previously noted, the court ruled that the motion court had no authority to order the husband of the victim to provide a sample of pubic hair. *Id.* at 515. The message to movants and their attorneys is clear: The interplay of the various provisions of this statute is important and must be carefully considered when requesting certain samples to be tested.

G. (§26.74) Procedural Considerations and Hearing

At every stage of the proceedings, the court will review the motion, files, and records of the case to determine if the movant is entitled to relief. The court shall enter a show cause order unless the "files and records of the case conclusively show that the movant is not entitled to relief." Section 547.035.4(1), (2), RSMo Supp. 2004. Similarly, after the entry of a show cause order and after the response by the prosecutor, the court shall order a hearing on the motion unless "the motion and the files and records of the case conclusively show that the movant is not entitled to relief." Section 547.035.6.

There is no definition in the statute of what constitutes the "files and records of the case." Does it include only those pleadings in the file that existed as of the time of trial? Does it include post-conviction pleadings such as a petition for a writ of habeas corpus or Rule 29.15 or Rule 24.035 motions and the affidavits and testimony submitted in support of those pleadings? If the jurisdiction in question is one in which the state responds to discovery requests by filing the documents made available to the defense through discovery with the court, do these documents (e.g., witness interviews, defendant statements or confessions, police reports, medical records, prior conviction records, non-testifying expert reports, etc.) become part of the "files and records of the case" that can be considered by the motion court? Does it matter that some of those documents would never be admissible if offered at a trial or hearing? Because these questions are unanswered by the statute and the caselaw to date, counsel on either side of a post-conviction DNA motion should be diligent about determining what is available to the motion court at the time of the filing, and if it requires redaction or supplementation, to make the appropriate motions to limit or expand the record available to the court. Perhaps the closest analogy available in the law is the requirement that the integrity and completeness of the record available to a Missouri appellate court is initially the responsibility of the appellant, but the appellee must supplement the record as necessary for its purposes. While the Supreme Court of Missouri in *Weeks v. State*, 140 S.W.3d 39 (Mo. banc 2004), permitted the record on appeal before that Court to be supplemented with allegedly previously undisclosed exculpatory information in the hands of the prosecution or its agencies (i.e., so-called "Brady material," *Brady v. Md.*, 373 U.S. 83 (1963)) that was uncovered only after appellate counsel got involved in the case, clearly the better practice is, to the extent possible, to make that information a part of the "files and records of the case" available to the motion court. *Weeks*, 140 S.W.3d at 42–3, n.2.

If the court orders a hearing and the movant is indigent, "counsel shall be appointed to represent the movant." Section 547.035.6. The hearing shall be on the record, but the movant does not need to be present. *Id*. The movant's testimony may be taken by deposition. *Id*. At the hearing, the burden is on the movant to prove the allegations of the motion by a preponderance of the evidence. *Id*.

H. (§26.75) Testing Protocols and Cost of the Testing

Section 547.035, RSMo Supp. 2004, leaves it to the parties to work out protocols for testing the biological material, including what lab will perform the testing. If the parties cannot agree on a facility, the court will designate one. The court will also impose reasonable conditions on the testing to protect the state's interest in the integrity of the evidence and the testing process. Section 547.035.7(2). While this provision of the statute has yet to be construed by a Missouri court, it is likely that the type of "reasonable conditions" envisioned by the drafters might include:

- specifying a certain chain of custody and documents to be completed by each party in the chain;
- restrictions on exhaustion of samples; and
- splitting samples for test replication or testing by other labs or with other (more sensitive) technology.

The statute is silent on the issue of who pays for the testing. As a result, movants and prosecutors have sometimes shared the cost of testing or actively sought out labs that would provide the necessary tests at little or no cost. While the cost of certain types of DNA testing has decreased dramatically over the years, the newer and more sensitive forms of extraction and profiling can still be quite expensive. Most incarcerated persons (and many non-incarcerated persons) could not possibly afford to advance the funds necessary to pay for the more sophisticated forms of testing. It would seem to be a useless act for the legislature to create a right to post-conviction DNA testing for indigent persons without providing a mechanism for funding the cost of the testing.

With the passage of amendments to § 650.055, now RSMo Supp. 2004, in 2004, it now appears that the General Assembly has always intended for the state to bear the initial cost of the testing. That amendment, enacted three years after the right to post-conviction DNA testing was created through § 547.035, provides that, if the results of DNA testing ordered under this statute confirm the person's guilt, the person shall "[b]e liable for any reasonable costs incurred when conducting the DNA test, including but not limited to the cost of the test." Section 650.055.10(1). If

§ 547.035 already required the movant to bear the cost of testing in every instance, this new language would be unnecessary and would be mere surplusage. The most reasonable interpretation of these two statutes, reading them in harmony with each other, is that the state advances the costs of testing, and the movant must repay the costs only if the tests confirm the movant's guilt.

I. (§26.76) What Happens if Testing Is Unfavorable to Movant?

In addition to having to pay for the costs of the testing as stated above, the movant can be sanctioned under the provisions of § 217.262, RSMo 2000, which can include delays in eligibility for parole, a deduction from the movant's prison account, and being written up for a conduct violation.

J. (§26.77) What Happens if Testing Is Favorable to Movant?

If testing ordered by the court under § 547.035, RSMo Supp. 2004, demonstrates the movant's innocence of the crime for which the movant is in custody, a motion for release may be filed in the sentencing court. Section 547.037.1, RSMo Supp. 2004. Upon filing of the motion, the court will order the prosecuting attorney to show cause why the release should not be granted. Section 547.037.2. If the prosecutor consents to the motion and if the court finds that the testing demonstrates the movant's innocence, the court shall order the release. Section 547.037.3. If the prosecutor opposes the motion for release, the court shall conduct a hearing on the record. Section 547.037.4. If the movant is indigent, the court shall appoint the public defender's office to represent the movant. *Id*. At this hearing, the burden is on the movant to prove the allegations of the motion by a preponderance of the evidence. *Id*. "The court shall issue findings of fact and conclusions of law whether or not a hearing is held." Section 547.037.6. Either side may appeal from the court's findings and conclusions as in other civil cases. *Id*.

K. (§26.78) What Happens if Movant Is Released?

Section 650.055.9, RSMo Supp. 2004, provides that compensation shall be paid to those exonerated by DNA testing under § 547.037, RSMo Supp. 2004. Recovery of $50 per day of incarceration following the wrongful conviction is allowed. Section 650.055.9. The person released by virtue of DNA testing has one year from the date of release from confinement to file the petition for payment of restitution. *Id*. There are

other restrictions limiting the class of persons who may recover under this statute, and counsel is advised to read the subdivisions of § 650.055.9 carefully before filing such a petition. Enactment of this statute waives the defense of sovereign immunity for these specific suits for restitution, but it also prohibits the exonerated felon from "seeking any civil redress from the state, its departments and agencies, or any employee thereof, or any political subdivision or its employees." Section 650.055.9.

L. (§26.79) Summary

The evolution of the technology in this field and the imprecision of phrases used in § 547.035, RSMo Supp. 2004—e.g., "DNA testing," "files and records of the case," and "evidence"—will provide fertile ground for judicial construction and, therefore, may result in continued revision of the availability of post-conviction DNA testing for many years to come.

Penny J. Umstattd-Cope*

Chapter 27

SENTENCING

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Cautionary Note: House Bill 353, 93rd Gen. Assembly, 1st Reg. Sess. (Mo. 2005), an omnibus crime bill, was sent to Governor Blunt on May 26, 2005, for signature. Should H.B. 353 be signed by the Governor, its provisions will be effective August 28, 2005, and will change some of the information in this chapter. The changes incurred by H.B. 353 are noted below in §§27.21, 27.25, 27.26, and 27.29.

I. Introduction

A. (§27.1) Sentencing Defined

Black's Law Dictionary (Bryan A. Garner ed., 7th ed. 1999) defines a sentence as: "The judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer." The Supreme Court of Missouri has stated that the term "sentence":

> may be said to denote the action of the court of criminal jurisdiction, formally declaring to accused the legal consequences of the guilt which he has confessed or of which he has been convicted. However, a sentence is not, strictly speaking, the act of the court but the judgment of the law of which the court is commanded to pronounce.

State v. Pruitt, 169 S.W.2d 399 (Mo. 1943). The punishment may include imprisonment, a fine, or both and must be statutorily authorized. The court may also place a defendant on probation for a period of time and may add special conditions to the probation such as:

- electronic monitoring or house arrest;
- attending economic programs (shoplifting offenders), drug or alcohol counseling, or programs such as the Alcohol and Drug Education Program (ADEP) and the Substance Abuse Traffic Offender Program (SATOP);
- paying restitution; or
- having no contact with the victim or co-defendants.

Long before the sentencing phase of a criminal case, the attorney should prepare the defendant for the possible outcomes if the defendant is convicted of the offense(s) charged. The preparation should include not only informing the defendant of the minimum and maximum sentence that could be imposed but also basics such as how to dress for the court, the defendant's attitude and demeanor during the process, how to address the court or any other person that may have a say when it comes time to the actual sentencing, receiving treatment or counseling should the attorney believe it will help in the sentencing, etc. Sometimes it is the simplest item that a court recalls—such as remorsefulness or awareness that the defendant has a problem and needs help—that may assist the defendant in receiving a better sentence upon conviction. From day one of the representation, the attorney should be preparing the defendant to make the best impression on the court that the defendant can.

B. (§27.2) Sentencing a Province of the Court

Section 557.036, RSMo Supp. 2004, details the role of the court and of the jury in sentencing a criminal defendant. Section 557.036.1 states that "the court shall determine the extent or duration of a defendant's sentence or other disposition to be imposed" upon a finding of guilt upon a plea or verdict. The court must take into consideration the offense that is the basis for the conviction and the defendant's background when rendering its judgment. When the defendant is considered a prior offender, a persistent offender, a dangerous offender, a persistent sexual

offender, or a predatory sexual offender, the court should not seek an advisory verdict from the jury and, if one happens to be rendered, the court is not to deem it advisory but only surplusage. Section 557.036.7. In all other cases, the court may seek an advisory verdict from the jury. It is an "advisory verdict" because the jury does not assess the punishment in a criminal prosecution but only gives its recommendation on what it thinks the punishment should be. Although the Sixth Amendment to the United States Constitution gives a criminal defendant the right to a jury trial, it does not give the defendant the right to have the punishment set by the jury. *See State v. Hunter,* 840 S.W.2d 850 (Mo. banc 1992); *State v. Cline,* 808 S.W.2d 822 (Mo. banc 1991). The court may or may not follow the jury's recommendation, but it cannot exceed the term declared by the jury unless the jury has made a recommendation that is lower than the statutorily authorized sentence. In that case the court cannot impose a term greater than the lowest term authorized by statute.

The defense attorney should be aware of the Missouri Sentencing Recommendations. The goal of the Recommendations is "to achieve a system of sentencing that is fair, protects the public and uses corrections resources wisely." Introduction, Missouri Sentencing Advisory Commission, Report on Recommended Sentencing (April 2005). Information about the Commission and a copy of the April 2005 report are available at:

www.mosac.mo.gov/index.htm

Under § 558.019.6, now RSMo Supp. 2004, the Sentencing Advisory Commission was created to establish a guideline or system of recommended sentences for felony offenses that must fall within the statutory minimum and maximum sentences provided by law. The Sentencing Advisory Commission published an Advisory Sentencing Guidelines Users Manual in 1998 that contained its original recommendations. It has been replaced by the Commission's April 2005 Report on Recommended Sentencing discussed above.

These sentencing recommendations are not to be used when a defendant is sentenced by a jury. Each circuit court should have the manual, but because the recommendations are advisory only, not every court uses them. It seems that the major metropolitan areas are more accepting of their use than the rural areas. The attorney should review the recommendations and be prepared to argue either for or against the recommended sentence for the particular offense the defendant is being sentenced for.

C. (§27.3) Role of the Jury

Section 557.036, RSMo Supp. 2004, determines how a jury will participate in the trial of a criminal prosecution. In 2003, S.B. 5 amended § 557.036 by making two stages to a trial. The first stage of the trial is the determination of whether the defendant is guilty or not guilty of the submitted offense. During this first stage the punishment issue is not submitted to the jury. The second stage of the trial takes effect only if the jury determines that the defendant is guilty of the submitted offense, and the assessment of the punishment is done during this stage. At this second stage the jury will hear evidence that supports or mitigates the statutorily authorized punishment and declare the defendant's punishment. Section 557.036.3. Evidence may consist of reiterating or detailing the nature and circumstances of the offense, victim impact evidence, the defendant's history, and, possibly, character evidence. But under certain circumstances during the second stage of the trial, the court and not the jury will assess the punishment. These include when:

- the defendant requests in writing before voir dire that the court assess the punishment if found guilty; or
- the defendant is proven to be a prior offender, a persistent offender, a dangerous offender, a persistent misdemeanor offender under § 558.016, RSMo Supp. 2004, a persistent sexual offender under § 558.018, RSMo 2000, or a predatory sexual offender under § 558.018.

Further, if the jury cannot reach a decision of the defendant's punishment, the court will assess the punishment. Section 557.036.4.

The bifurcation of the criminal jury trial requires the use of additional instructions, which can be found at MAI-CR 3d 305.01–305.07. These instructions are used only when the defendant has been found guilty during the first phase of the trial. The Notes on Use for MAI-CR 3d 305.02 state that, before the second stage of the trial begins, the court should make a determination of whether the defendant, the prosecutor, or both intend to introduce evidence during the second stage. If so, this instruction on the order of proceeding is to be given immediately after the first instruction of MAI-CR 3d 305.01, which outlines the punishment limits prescribed by law for the offense. If no evidence is presented, MAI-CR 3d 305.02 is not given, and the court gives the verdict mechanics found in MAI-CR 3d 305.03. The last instruction to the jury is MAI-CR 3d 305.04, which deals with the argument of counsel. Other instructions may need to be given to the jury, depending on the

circumstances of the case. For instance, MAI-CR 3d 308.14 may need to be given if the defendant does not testify. The attorney will probably need to make some modifications to the language of these other instructions because of the bifurcation of the trial. Also, if the jury is having difficulty reaching an agreement on the defendant's punishment, the court should give MAI-CR 3d 305.07, which states that "it is the primary duty and responsibility of the jury to assess and declare the punishment" but if, after "due deliberation," the jury is unable to agree, the verdict form should so state, and the court will fix the defendant's punishment. How long a jury's deliberation has to be before becoming a "due deliberation" is not set in stone and should be decided on a case-by-case approach.

D. (§27.4) Improper Jury Verdicts

Under certain circumstances, the court will be required to declare and assess the punishment for a defendant who has been found guilty by a jury. If a jury is unable to agree on the defendant's punishment or the punishment declared is unauthorized by law, the court is to assess and declare the punishment. Section 556.036.4, RSMo Supp. 2004; Rule 29.03. If the jury assesses the defendant's punishment beyond that authorized by statute for the offense the defendant is convicted of, the court must assess and declare the punishment within the authorized limits. Rule 29.04. Or, if the jury assesses the defendant's punishment below the authorized limits, the court must assess and declare the defendant's punishment at the lowest limit authorized by law. Rule 29.06.

The defendant's attorney should look carefully at the instructions when a jury assesses a punishment that is above or below the authorized limit. If the instructions as to punishment were incorrect, the court cannot assess and declare a punishment that is within the authorized limit. The Supreme Court of Missouri has held that a criminal defendant is entitled to a verdict director that instructs the jury on the correct range of punishment. *See State v. Whardo*, 859 S.W.2d 138 (Mo. banc 1993); *State v. Cline,* 808 S.W.2d 822 (Mo. banc 1991).

II. Time of Sentencing

A. (§27.5) Delay in Sentencing

Sentencing of a criminal defendant must be imposed by the court without unreasonable delay. Rule 29.07(b)(1). There is limited Missouri caselaw setting forth what constitutes an unreasonable delay in the

sentencing. Each case should be considered individually with a look at the totality of its particular circumstances causing the delay and any adverse effects suffered by the defendant because of the delay. The courts have held that there are certain factors to be taken into consideration to make this decision. Some of the factors to be considered include the following:

> (1) length of delay;
> (2) whether defendant affirmatively demanded sentencing;
> (3) whether the delay was purposefully sought to unreasonably impose a form of unlimited probation;
> (4) whether the delay adversely affected the defendant's period of incarceration;
> (5) whether the delay prejudiced the defendant's right to a new trial;
> (6) whether defendant believed prosecution abandoned; and
> (7) was the delay so inordinate that the remedial purpose and effect perceived by society for punishment no longer remained viable.

State v. Russ, 978 S.W.2d 42, 43 (Mo. App. E.D. 1998) (citing *State ex rel. Hines v. Cottey*, 558 S.W.2d 252, 255 (Mo. App. W.D. 1977)). In *Hines,* the court determined that a two-year delay under the circumstances of the case was not unreasonable.

B. (§27.6) Motion for New Trial

Before the judgment and sentence is rendered by the court under Rule 29.07(b), the defendant has the right to file a motion for a new trial, which may be granted upon good cause. Rule 29.11(a). The motion for new trial must be filed within 15 days after the return of the verdict. One extension of 10 days may be granted the defendant for good cause if the defendant requests an extension within the original 15 days. Rule 29.11(b). If the defendant files the motion for new trial and it is denied by the court, or if it is denied by the passage of time, which occurs if the court fails to rule on the motion within 90 days of its filing, the court is to render judgment and sentence against the defendant without an unreasonable delay. Rule 29.11(c). Failure to allow the defendant to file the motion for new trial before the judgment and sentence is rendered is, unless waived by the defendant, a violation of the defendant's right to file the motion and requires reversal. *See City of Riverside v. Johnson*, 507 S.W.2d 48 (Mo. App. W.D. 1974); *State v. Merridith*, 433 S.W.2d 578 (Mo. 1968).

III. Procedure for Sentencing

A. (§27.7) Presence of the Defendant and Counsel

Section 546.550, RSMo 2000, requires that a criminal defendant be personally present for the judgment if the conviction is for an offense that is punishable by imprisonment or if imprisonment is assessed as punishment by a jury. If the punishment is for a fine only, the defendant must be personally present or some "responsible" person must undertake to pay the judgment and costs. Usually the attorney for the defendant will be the person that pays the judgment and costs. Under Rule 29.07(b)(2), however, the defendant must be personally present if the conviction is for a felony, regardless of whether it is punishable by imprisonment or a fine. If it is a misdemeanor conviction, the defendant must be personally present unless the court, the prosecuting attorney, and the defendant's attorney consent to the defendant's absence during the sentence and judgment. If the above statute and rule are taken together, the defendant must personally appear for all felony convictions but may not have to personally appear when the conviction is for a misdemeanor and involves a fine. Failure of the defendant to appear at the sentence and judgment may result in a warrant being issued. Section 546.560, RSMo 2000.

The sentencing of a defendant in a criminal prosecution is a critical stage of the proceedings, and the defendant is entitled to have an attorney present during this stage. *See State v. Hollensbe,* 720 S.W.2d 14 (Mo. App. E.D. 1986); *State v. Crow,* 377 S.W.2d 129 (Mo. 1964). But this right can be waived if the defendant intelligently and with full knowledge of the consequences makes the waiver. *See McBride v. State,* 484 S.W.2d 480 (Mo. 1972); *State v. Lillibridge,* 399 S.W.2d 25 (Mo. 1966), *cert. denied,* 384 U.S. 945 (1966). Further, the right to counsel does not guarantee that the defendant will have a particular attorney at sentencing, and the defendant's trial counsel sending another attorney from the same office does not in and of itself constitute a violation of the defendant's right to counsel at that stage or create ineffective assistance of counsel. *See Nickelson v. State,* 583 S.W.2d 746 (Mo. App. E.D. 1979); *McBride,* 484 S.W.2d 480.

B. (§27.8) Allocution

When the criminal defendant appears before the court for judgment and sentence, the court must inform the defendant of the verdict or finding and ask the defendant if there is any reason or legal cause known to the defendant why the judgment and sentence should not be pronounced.

Section 546.570, RSMo 2000; Rule 29.07(b)(1). This is allocution. Thereafter if the court finds no just cause why the judgment and sentence should not be pronounced, the court must render the defendant's judgment and sentence.

Allocution allows the defendant to state to the court any infirmities in the sentencing procedure; if the defendant fails to do so, it is not preserved for appellate review. *See Roll v. Bowersox,* 16 F. Supp. 2d 1066 (W.D. Mo. 1998); *State v. Athanasiades,* 857 S.W.2d 337 (Mo. App. E.D. 1993). This does not mean that the evidence may be reargued at this point. *Athanasiades,* 857 S.W.2d 337.

The allocution procedure is to be considered directory if the defendant has been heard on a motion for new trial or the case is a misdemeanor. If this procedure is omitted after a motion for new trial is heard, the judgment or sentence is not invalidated. Rule 29.07(b)(1). Further, the court is not required to grant allocution following the defendant's guilty plea. *Richardson v. State*, 470 S.W.2d 479 (Mo. 1971).

C. (§27.9) Judgment Ripe for Appeal

In order for a criminal defendant to appeal a conviction and sentence, the judgment must be final or "ripe" for appeal. In a criminal proceeding, this means that the defendant has been granted allocution, if applicable, and has been formally sentenced by the court. Rule 29.07(c) states that the conviction judgment "shall set forth the plea, the verdict or findings, and the adjudication and sentence." It is not enough that, following a guilty verdict by a jury, the jury assesses a punishment. This is only an advisory verdict for the court, and the court must still pronounce formal judgment and sentencing of the defendant after allowing the required time for a motion for a new trial to be filed as described in §27.6 above. Section 546.590, RSMo 2000, provides for the clerk of the sentencing court to "enter such judgment fully on the minutes, stating briefly the offense for which such conviction shall have been had." The court must inspect the minutes and "conform them to the facts." The judgment's validity is not affected or impaired if the court or the clerk should fail to follow these steps. *Id.*

If an appeal is filed by the defendant before the judgment is ripe, the appellate court will dismiss the appeal as premature or, in certain cases, hold the appeal in abeyance. The appellate courts cannot rule on the merits of a case when there is no final judgment from the trial court. *State v. Collins,* 580 S.W.2d 320 (Mo. App. S.D. 1979).

The following cases held that the case was not ripe for appeal because of the lack of a final judgment:

- *State v. Ramos,* 751 S.W.2d 135 (Mo. App. S.D. 1988)
- *State v. Palmer*, 556 S.W.2d 513 (Mo. App. S.D. 1977) (motion for new trial not being ruled on by the court)
- *State v. Collins,* 580 S.W.2d 320 (Mo. App. S.D. 1979) (a defendant must be given a chance to file a motion for new trial)
- *State v. Nicholson,* 544 S.W.2d 896 (Mo. App. S.D. 1976) (failure of a court to grant allocution and to render the judgment and sentence the defendant)
- *State v. Craven,* 635 S.W.2d 87 (Mo. App. W.D. 1982) (no record of the final judgment found)

A suspended imposition of sentence is not considered a final judgment and cannot be appealed. *See*:

- *State v. Lynch,* 679 S.W.2d 858 (Mo. banc 1984)
- *Yale v. City of Independence,* 846 S.W.2d 193 (Mo. banc 1993)
- *State v. Kimberley,* 103 S.W.3d 850 (Mo. App. W.D. 2003)
- *Uxa v. Marconi*, 128 S.W.3d 121 (Mo. App. E.D. 2003)

1. (§27.10) Notice of Right to Appeal

At the time the court imposes a sentence in a case in which the defendant has entered a plea of not guilty, the court is to advise the defendant of the right to appeal the conviction and sentence. The court must also advise the defendant that the defendant may request to file the appeal in forma pauperis should the defendant not be able to pay the cost of an appeal. Rule 29.07(b)(3). If the defendant states to the court at that time that the defendant cannot afford the cost of the appeal, the court will likely question the defendant as to the defendant's financial circumstances, including any assets available to the defendant. Although it is not required of the defendant to inform the court at this time of the defendant's inability to pay for the appeal, to do so will save time in the processing and will lessen the likelihood of the defendant not meeting the time limitations for the appeal. At this time the defendant may also request that the court appoint a public defender to represent the defendant on the appeal. Again, the court will take into consideration the financial circumstances of the defendant and enter the appropriate orders if the defendant qualifies for the public defender.

2. (§27.11) Examination of Defendant as to Post-Conviction Relief and Assistance of Counsel

At the conclusion of the final sentencing, the court is to advise the defendant of the right to post-conviction relief under Rule 24.035 or Rule 29.15. Rule 24.035 is applicable if the defendant pled guilty to a felony, and Rule 29.15 is applicable if the defendant was found guilty of a felony after a trial. Rule 29.07(b)(4). Generally the court will advise the defendant of the grounds on which a motion may be filed and the time limitation for filing the motion. The grounds for filing include allegations that:

- the conviction or sentence violates the Constitution or laws of the state of Missouri or of the United States;
- assistance of counsel at the trial or appellate level was ineffective;
- the court was without jurisdiction to impose the sentence; or
- the sentence was in excess of the maximum limit authorized by statute.

The time limit for filing the motion is 90 days after the date the mandate of the appellate court is issued affirming the judgment or sentence if an appeal has been taken, or 180 days after the date the defendant is delivered to the custody of the Department of Corrections if no appeal has been taken. Usually the court will advise the defendant that failure to meet these time limitations will completely waive any claims that the defendant may have for relief. Usually the court will require the defendant to acknowledge in writing that the defendant has been advised of the right to file for post-conviction relief. It is advisable for the defendant's attorney to provide in writing to the defendant the applicable rules regarding post-conviction relief.

Rule 29.07(b)(4) also requires the court, at the conclusion of the final sentencing, to examine the defendant regarding the effectiveness or ineffectiveness of the attorneys that have represented the defendant throughout the course of the criminal proceedings. This examination may be conducted outside the presence of the defendant's counsel, but this is not required. Although each trial attorney wants the client to state that the client is happy with the representation given by the attorney, in criminal cases, especially cases with lengthy terms of imprisonment, the attorney should discuss ahead of time what the defendant should state to the court upon this examination. The attorney may want to suggest to the defendant that the

defendant reserve judgment on this issue and state that the defendant is not certain about the representation and that there may be issues that appear later that will need to be raised.

If, after the examination of the defendant as to the effectiveness of the attorney(s), the court finds no probable cause to find that ineffective assistance of counsel exists, the trial counsel may continue representing the client. But if the court finds probable cause that there is ineffective assistance of counsel and that the defendant is entitled to an appeal and wants an appeal, the court must order the trial attorney to file a timely notice of appeal. Thereafter, within ten days of the judgment of conviction becoming final, the trial attorney must withdraw, and new counsel will be appointed by the court. The new counsel is to perfect the appeal if one is filed. Further, the new counsel must determine whether grounds exist for a motion to be filed under Rule 24.035 or Rule 29.15 and, if so, timely file the motion. Rule 29.07(b)(4).

3. (§27.12) Setting of Appeal Bond

Rule 30.16 provides that: "if a convicted defendant is entitled to a conditional release pending an appeal, the conditions shall be determined by the court under Rule 33." The court must also determine the amount of the appeal bond, and the defendant's attorney should move for the court to set the amount and the conditions of the appeal bond at the time of the final sentencing hearing. The defendant and the defendant's attorney need to be prepared for the possibility that the appeal bond may be higher than the one set before the trial and conviction took place. Discussions should be made in advance of the judgment and sentencing hearing to determine how the appeal bond is going to be paid, and preparations should be made to have everything lined up to pay an increased amount in order to keep the defendant free. Counsel should also discuss with the defendant that the defendant should have personal affairs in order just in case the defendant is incarcerated for a period of time before the appeal bond is posted.

Some defendants will not be entitled to conditional release pending appeal. Under § 544.671, RSMo 2000, a defendant who is under a death sentence or life imprisonment or who receives an imprisonment term for violations of § 195.222, RSMo Supp. 2004 (trafficking drugs, first degree); § 565.021, RSMo 2000 (second degree murder); § 565.050, RSMo 2000 (assault, first degree); or

§ 566.030.1, RSMo 2000 (forcible rape), will not be entitled to conditional release pending the appeal.

IV. Limitations on the Authority of the Court

A. (§27.13) Statutory and Constitutional Limitations

A trial court may impose a sentence that is within the statutory limits of the crime the defendant has been convicted of. There are certain exceptions to this, e.g., the court may not exceed a jury's verdict (discussed in §27.2 above), and it may have to recognize certain plea bargain agreements (discussed in §27.14 below). With these limited exceptions, the court may consider:

- the range of imprisonment listed in § 558.011, RSMo Supp. 2004;
- the range of fines for defendants convicted of a C or D felony in § 560.011, RSMo 2000;
- the range of fines for defendants convicted of misdemeanors or infractions in § 560.016, RSMo 2000; and
- the range of fines for corporations in § 560.021, RSMo 2000.

If a defendant has been found to be a "persistent offender" or a "dangerous offender" as defined in § 558.016, RSMo Supp. 2004, or a "persistent sexual offender" as defined in § 558.018.2, RSMo 2000, the range of punishment may be extended by the trial court.

Other restrictions placed on a trial court in sentencing a defendant fall under the Eighth Amendment to the United States Constitution and article I, § 21, of the Constitution of Missouri, which deal with "cruel and unusual punishment." The appellate courts of Missouri have held that a punishment falling into the statutorily authorized limit cannot be judged excessive. *See State v. Lachterman*, 812 S.W.2d 759 (Mo. App. E.D. 1991). But see *State v. Hall*, 56 S.W.3d 475, 481 (Mo. App. W.D. 2001) (quoting *State v. Lee,* 841 S.W.2d 648 (Mo. banc 1992)), stating that it is "'clear that comparison to sentences given to other defendants for the same or a similar crime is irrelevant except when the court finds the sentence in question grossly disproportionate.'" It appears, based on this language in *Hall* and *Lee,* that the courts will not find a sentence to be in violation of the "cruel and unusual punishment" provision of the Eighth Amendment to the United States Constitution or article I, § 21, of the Constitution of Missouri if the sentence falls into

the statutorily authorized range of punishment unless the sentence is grossly disproportionate to the crime committed.

Further, under § 558.019.6, RSMo Supp. 2004, the Sentencing Advisory Commission was created to establish a guideline or system of recommended sentences for felony offenses that must fall within the statutory minimum and maximum sentences provided by law. In 1998, the Sentencing Advisory Commission published an Advisory Sentencing Guidelines Users Manual containing its original recommendations. The Users Manual has been replaced by the Report on Recommended Sentencing published by the Commission in June 2004 and revised in April 2005. These sentencing recommendations are not to be used when a defendant is sentenced by a jury. Each circuit court should have the manual, but because the recommendations are advisory only, not every court uses them. The recommendations seem to be used more frequently in the larger metropolitan areas than in the rural areas. But the attorney should be aware of the recommendation for the offense that the defendant will be sentenced for and be prepared to argue either for or against the recommendation. Information about the Commission and a copy of the April 2005 report are available at:

www.mosac.mo.gov/index.htm

B. (§27.14) Conformity to a Plea Bargain Agreement

Rule 24.02(d) outlines the plea agreement procedure that must be followed by the court when the prosecuting attorney and the defendant have reached an agreement on the punishment issues after the defendant enters a plea of guilty to the crimes the defendant is charged with or bargained for. If an agreement has been reached by the prosecuting attorney and the defendant, they must inform the court of the agreement. The court may either accept or reject the agreement. If the court accepts the agreement, the court advises the defendant that it will "embody the disposition provided for" in the judgment and sentence. Rule 24.02(d)(3). If the court does not accept the agreement, the court must inform the defendant and the prosecuting attorney, on the record, of this decision and advise the defendant that:

- the defendant is not bound by the agreement and has the opportunity to withdraw the guilty plea if based on Rule 24.02(d)(1)(A), (C), or (D); and
- if the defendant goes forth with the guilty plea, the court may sentence the defendant to punishment that is less favorable than the plea agreement would have been.

If the agreement is for a non-binding recommendation, the court does not have to allow the defendant to withdraw a guilty plea before sentencing the defendant to a punishment other than what has been recommended by the prosecuting attorney. Thus, it is imperative for the defendant's attorney to understand the terms of the agreement and to make sure that the defendant also understands the difference between a non-binding recommendation and a true plea agreement and the effect of each at the sentencing hearing. If the defendant does not, the matter will probably end up in a Rule 29.07(b)(d) or Rule 24.035 hearing.

The procedure as stated in Rule 24.02(d) sounds simple enough, but it has proven not to be. There are numerous cases discussing plea agreements and their binding authority (or lack thereof) on the courts in sentencing. Upon appellate review, the courts have considered whether the plea agreement was:

- a non-binding recommendation; or
- a binding agreement that included a "genuine sentence concession."

Harrison v. State, 903 S.W.2d 206, 208 (Mo. App. W.D. 1995). There must also be consideration of:

- whether the defendant truly understood the difference between a non-binding recommendation and a true plea agreement; and
- the effects that a non-binding agreement has on the court's sentencing power.

See Harrison, 903 S.W.2d 206; *Dennis v. State,* 116 S.W.3d 552 (Mo. App. W.D. 2003); *Simpson v. State,* 990 S.W.2d 693 (Mo. App. E.D. 1999); *Comstock v. State*, 68 S.W.3d 561 (Mo. App. W.D. 2001).

The court in *Harrison* defined "non-binding" to mean that "the court does not have to allow defendant to withdraw the plea even though the court is not planning to follow the prosecutor's recommendation." *Harrison*, 903 S.W.2d at 211 n.2. In reviewing the cases that have issued opinions on these issues, it is clear that the court will look at each individual case and the knowledge and understanding that the defendant had before the plea hearing and at the actual hearing. If the defendant does not clearly understand the effect of the non-binding agreement at the time of entering a guilty plea, the appellate courts will reverse the plea court.

The court is further granted some latitude on its sentencing when the defendant has failed to comply with the terms of the plea agreement. *See Cupp v. State*, 982 S.W.2d 304 (Mo. App. S.D. 1998); *State v. Weatherford,* 631 S.W.2d 668 (Mo. App. E.D. 1982). On the other hand, if the prosecuting attorney fails to live up to the plea agreement, the court has discretion to vacate and set aside the judgment and:

- discharge the movant;
- re-sentence the defendant;
- order a new trial; or
- correct the judgment and sentence as the court determines is appropriate.

See Evans v. State, 28 S.W.3d 434 (Mo. App. S.D. 2000).

C. (§27.15) Exhaustion of Jurisdiction With Entry of Judgment

Unless statutorily authorized to retain jurisdiction, the sentencing court loses its jurisdiction over a case once the judgment and sentence have occurred. *See State ex rel. Williams v. Wilson,* 63 S.W.3d 650 (Mo. banc 2002); *State ex rel. Simmons v. White,* 866 S.W.2d 443 (Mo. banc 1993). The court may retain jurisdiction under the following:

- § 559.115.2, RSMo Supp. 2004 (the granting of probation within 120 days after the defendant has been delivered to the Department of Corrections)
- § 217.364, RSMo 2000 (drug treatment program)
- Rules 24.035 and 29.15 (post-conviction relief actions)
- § 558.046, RSMo 2000 (reduction of sentence)
- Rule 29.07(d) (set aside guilty plea)

V. Fines

A. (§27.16) Maximum Fines

The maximum amounts a court may impose for a fine are found in §§ 560.011 and 560.016, RSMo 2000:

Classification of the Offense	Maximum Fine
C or D felony	$5,000
A misdemeanor	$1,000
B misdemeanor	$ 500
C misdemeanor	$ 300
Infraction	$ 200

In addition, if the defendant has gained money or property through the commission of the crime the defendant is charged with, the defendant may be ordered to pay an amount up to double the amount of the gain and not to exceed $20,000. This amount is to be determined by the court. "Gain" is defined in § 560.011.2 as "the amount of money or the value of property derived from the commission of the crime."

Corporations are subject to the fines set forth in § 560.021, RSMo 2000, which are:

Classification of the Offense	Maximum Fine
Felony	$10,000
A misdemeanor	$ 5,000
B misdemeanor	$ 2,000
C misdemeanor	$ 1,000
Infraction	$ 500

Further, the corporation may be fined a higher amount up to double the amount of the corporation's gain from the commission of the offense as defined in § 560.011. Section 560.021.2. If the offense is outside the code, the court may assess a special fine against a corporation if it is specified in the offense statute, and the amount is to be within the limits specified in that statute or a higher amount up to double the amount of the corporation's gain from the commission of the offense as defined in § 560.011.

B. (§27.17) Control of Payment or Default in Payment

After the court determines the amount of the fine that a defendant must pay, the court is required to consider the burden that the payment of the fine will place on the defendant's financial resources. The court cannot sentence a defendant to pay a fine in such an amount that the defendant will not be able to make restitution or reparation to the victim of the offense. The court also must not sentence the defendant to pay a fine in addition to any other sentence that is authorized by § 557.011, RSMo 2000, unless:

- the defendant has derived pecuniary gain from the offense; or
- the court believes the fine will deter such an offense from happening again or will correct the defendant in the defendant's actions.

Section 560.026, RSMo 2000.

At the time the court sentences the defendant to pay a fine, it may also set a payment schedule that the defendant has to comply with. It cannot impose an alternative incarceration sentence at that time in case the defendant does not pay the fine as ordered. Section 560.026. It is only after the defendant has failed to pay the fine as ordered that the court may impose a different sentence. Section 560.031, RSMo 2000, authorizes the court to issue a warrant of arrest or a summons for the defendant's appearance to show cause why the fine has not been paid as ordered. If the court finds that the failure is excusable under this section, it may:

- give the defendant additional time to pay the fine;
- reduce the amount of the fine or the installment payment; or
- revoke the fine or the unpaid portion in whole or in part.

Section 560.031.3.

If the court finds that the failure was not excusable, it may order the defendant to be incarcerated for up to 180 days if the fine was for a felony conviction or up to 30 days if it was for a misdemeanor or infraction conviction. Payment of the fine during the incarceration period may release the defendant. The court may also reduce the sentence for good cause shown, which usually includes the payment of the fine. Section 560.031.2.

If a corporation does not pay its fine as ordered by the court, the person or persons authorized to make the disbursements of the corporation's assets, and their supervisors, may be subject to incarceration under the provisions of § 560.031.1 and .2. Section 560.031.4.

VI. Imprisonment

A. (§27.18) Authorized Imprisonment for Classified Offenses

Under § 557.016, RSMo 2000, there are four classifications of felonies (class A through class D), three classifications of misdemeanors (class A through class C), and one classification of infractions. Following these classifications, § 558.011.1, RSMo Supp. 2004, sets forth the authorized terms of imprisonment as follows:

Classification of Offense	Authorized Term of Imprisonment
Class A felony	10 years to 30 years, or life imprisonment
Class B felony	5 years to 15 years
Class C felony	up to 7 years
Class D felony	up to 4 years
Class A misdemeanor	up to 1 year
Class B misdemeanor	up to 6 months
Class C misdemeanor	up to 15 days
Infraction	no term of imprisonment; maximum $200 fine

The criminal instruction for jury sentencing is found in MAI-CR 3d 304.02.

Under § 558.011.2, the sentencing court has discretion in class C and D felony cases to sentence the defendant to imprisonment for "a special term not to exceed one year in the county jail or other authorized penal institution, and the place of confinement shall be fixed by the court." The section further provides that, in class C or D felony cases, if the sentencing court sentences a defendant to imprisonment for a term that is longer than one year, it must commit the defendant to the Department of Corrections "for a term of years not less than two years and not exceeding the maximum authorized terms."

Section 558.011.2 has been interpreted by the Supreme Court in *State v. Quisenberry,* 639 S.W.2d 579, 588 (Mo. banc 1982), to "permit the conclusion that if a class C or D felon is sentenced to a term of one year, the court has discretion to commit him either to the Division of Corrections for a regular sentence (Subsection 3), or to the county jail or other authorized penal institution for a special term (Subsection 2)." In *State v. Downen*, 952 S.W.2d 807 (Mo. App. W.D. 1997), the defendant argued that it was a violation of § 558.011.2 to sentence her to the Department of Corrections when each of her seven sentences was only a one-year term. Citing *Quisenberry,* the Western District concluded that the sentencing court had discretion to sentence the defendant to the Department of Corrections.

B. (§27.19) Unclassified Sentencing Provisions

Section 557.021, RSMo 2000, provides for the classification of offenses that do not fall into the listed classifications or that fail to set forth a prescribed punishment. This section states that a misdemeanor that does not have a penalty prescribed is a class A misdemeanor, and a felony that does not have a penalty prescribed is a class D felony.

Other provisions that fall outside of the terms of § 558.011, RSMo Supp. 2004, include the following:

1. Section 565.020.2, RSMo 2000, first degree murder, which is a class A felony and punishable by either death or life imprisonment without eligibility for probation or parole or release except by an act of the Governor. If the defendant is less than 16 years old at the time of the commission of the crime, the death sentence is not available.

2. Section 566.030, RSMo 2000, forcible rape or an attempt to commit forcible rape, which is a felony and is punishable by life imprisonment or a term of at least 5 years. If the defendant, during the course of the crime, inflicts serious physical injury or displays a deadly weapon or dangerous instrument in a threatening manner or subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, it is punishable by life imprisonment or a term of at least 10 years.

3. Section 566.060.2, RSMo 2000, forcible sodomy or an attempt to commit forcible sodomy, which is a felony and is punishable by life imprisonment or a term of at least 5 years. If the defendant, during the course of the crime, inflicts serious physical injury or displays a deadly weapon or dangerous instrument in a threatening manner or subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, it is punishable by life imprisonment or a term of at least 10 years.

4. Section 566.032.2, RSMo 2000, statutory rape in the first degree, which is a felony and punishable by life imprisonment or a term of at least 5 years. If the defendant, during the course of the crime, inflicts serious physical injury on any person, displays a deadly weapon or dangerous instrument in a threatening manner, or subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, or if the victim is

less than 12 years of age, it is punishable by life imprisonment or a term of at least 10 years.

5. Section 566.062.2, RSMo 2000, statutory sodomy in the first degree, which is a felony and punishable by life imprisonment or a term of at least 5 years. If the defendant, during the course of the crime, inflicts serious physical injury on any person, displays a deadly weapon or dangerous instrument in a threatening manner, or subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, or if the victim is less than 12 years of age, it is punishable by life imprisonment or a term of at least 10 years.

6. Section 558.018, RSMo 2000, provides for an extended term of imprisonment for defendants who have been found guilty of forcible rape, statutory rape in the first degree, forcible sodomy, statutory sodomy in the first degree, or an attempt of any of these if the court finds that the defendant is a persistent sexual offender. Section 558.018.2 defines "persistent sexual offender" as one who has previously pleaded guilty to or been found guilty of any of these stated crimes, rape, or sodomy. If the defendant is found to be a persistent sexual offender, the term of punishment is at least 30 years without probation or parole.

Section 558.018.5 also defines a "predatory sexual offender" as a person who:

> (1) Has previously pleaded guilty to or has been found guilty of the felony of forcible rape, rape, statutory rape in the first degree, forcible sodomy, sodomy, statutory sodomy in the first degree, or an attempt to commit any of the preceding crimes or child molestation in the first degree when classified as a class B felony or sexual abuse when classified as a class B felony; or
>
> (2) Has previously committed an act which would constitute an offense listed in subsection 4 of this section, whether or not the act resulted in a conviction; or
>
> (3) Has committed an act or acts against more than one victim which would constitute an offense or offenses listed in subsection 4 of this section, whether or not the defendant was charged with an additional offense or offenses as a result of such act or acts.

Section 558.018.4 provides as follows:

> The court shall sentence a person who has pleaded guilty to or has been found guilty of the felony of forcible rape, statutory rape in the first degree, forcible sodomy, statutory sodomy in the first degree, or an attempt to commit any of the preceding crimes or child molestation in the first degree when classified as a class B felony or sexual abuse when classified as a class B felony

> to an extended term of imprisonment as provided for in this section if it finds the defendant is a predatory sexual offender.

A defendant that is found to be a predatory sexual offender is to be sentenced to life imprisonment with eligibility for parole. But § 558.019.4, RSMo Supp. 2004, does not apply to any person found to be a predatory sexual offender for the purpose of determining the minimum term of imprisonment or the length of the sentence as defined in the statute. There is no final discharge from parole for any person found to be a predatory sexual offender. Section 558.018.6. The minimum time a predatory sexual offender must serve before being eligible for parole, conditional release, or other early release is set forth in § 558.018.7.

No defendant who has been found to be a persistent sexual offender or a predatory sexual offender may be furloughed by the Department of Corrections, notwithstanding any law to the contrary. Section 558.018.8.

C. (§27.20) Extended Term for Persistent or Dangerous Offenders

Section 558.016, RSMo Supp. 2004, authorizes the court to sentence a defendant to an extended term of imprisonment if it finds the defendant guilty of being a persistent offender or a dangerous offender.

- A "prior offender" is defined as a person "who has pleaded guilty to or has been found guilty of one felony." Section 558.016.2.

- A "persistent offender" is defined as a person "who has pleaded guilty to or has been found guilty of two or more felonies committed at different times." Section 558.016.3.

- A "dangerous offender" is one who "[i]s being sentenced for a felony during the commission of which he knowingly murdered or endangered or threatened the life of another person or knowingly inflicted or attempted or threatened to inflict serious physical injury on another person" and "has pleaded guilty to or has been found guilty of a class A or B felony or a dangerous felony." Section 558.016.4.

- A "persistent misdemeanor offender" is a person "who has pleaded guilty to or has been found guilty of two or more class A or B misdemeanors . . . committed at different times, which are defined as offenses [in the] chapters [set forth]." Section 558.016.5.

All of the prior pleas or findings of guilty must be made before the commission of the present offense. Section 558.016.6.

Upon the finding that a defendant is a persistent offender or a dangerous offender, the court may, after following § 558.021, RSMo 2000, sentence the defendant to an extended term of imprisonment. The total authorized maximum terms of imprisonment are set forth in § 558.016.7 and are as follows:

(1) For a class A felony, any sentence authorized for a class A felony;
(2) For a class B felony, any sentence authorized for a class A felony;
(3) For a class C felony, any sentence authorized for a class B felony;
(4) For a class D felony, any sentence authorized for a class C felony.

A defendant who is convicted of a non-violent class C or class D felony with no prior prison commitment may be eligible for probation, parole, or other court-approved alternative sentence after serving 120 days of the sentence. This does exclude any defendant that has received a placement under § 559.115, RSMo Supp. 2004. *See* § 558.016.8.

Note: House Bill 353, 93rd Gen. Assembly, 1st Reg. Sess. (Mo. 2005) (passed and awaiting signature of the Governor at the time of publication of this deskbook) deletes subsection 8 of § 558.016.

As stated above, § 558.021.1 sets forth the procedures that must be followed in order for the court to find that a defendant is a prior offender, a persistent offender, a dangerous offender, a persistent sexual offender, or a predatory sexual offender:

1. The indictment or information must plead all essential facts that warrant this finding.

2. Evidence must be introduced that establishes sufficient facts pleaded to warrant the finding beyond a reasonable doubt.

3. The court must make findings of fact that warrant a finding beyond a reasonable doubt that the defendant is a prior offender, a persistent offender, a dangerous offender, a persistent sexual offender, or a predatory sexual offender.

During the hearings the defendant has the right of confrontation and cross-examination and to present evidence. Section 558.021.4. The defendant also has the right to waive proof of the facts. Section 558.021.5; *see State v. Lawson*, 86 S.W.3d 183 (Mo. App. S.D. 2002).

Sections 195.275–195.296, RSMo 2000, provide for extended terms of imprisonment for a defendant who has been found to be a "prior drug offender" or a "persistent drug offender" as defined in § 195.275, RSMo 2000. All prior pleas of guilty and prior findings of guilty must be pleaded and proven as required by § 558.021. Section 195.275.2.

D. (§27.21) Limitations on Probation or Parole—Minimum Prison Terms

With the exception of §§ 565.020, 558.018, 571.015, RSMo 2000; § 559.115, RSMo Supp. 2004; and Chapter 195, RSMo, § 558.019, RSMo Supp. 2004, sets forth the minimum prison terms for all classes of felonies. The "minimum prison term" means the time the defendant is required to serve before becoming eligible for parole, conditional release, or other early release by the Department of Corrections. Section 558.019.5.

With the exception of a defendant who has pleaded guilty to or been found guilty of a dangerous felony as defined in § 556.061, RSMo Supp. 2004, and other laws to the contrary notwithstanding, a defendant who has pleaded guilty to or been found guilty of a felony and is committed to the Department of Corrections must serve the following minimum prison term:

- If the defendant has one previous commitment to the Department of Corrections for a felony offense, the defendant must serve 40% of the sentence or until the defendant attains 70 years of age and has served at least 30% of the sentence imposed, whichever occurs first.

- If the defendant has two previous commitments to the Department of Corrections for felonies unrelated to the present offense, the defendant must serve 50% of the sentence or until the defendant attains 70 years of age and has served at least 40% of the sentence imposed, whichever occurs first.

- If the defendant has three or more previous commitments to the Department of Corrections for felonies unrelated to the present offense, the defendant must serve 80% of the sentence or until the defendant attains the age of 70 and has served at least 40% of the sentence imposed, whichever occurs first.

- Any defendant who has pleaded guilty to or been found guilty of a dangerous felony as defined in § 556.061(8) and is committed to the Department of Corrections must serve 85% of the

sentence or until the defendant attains 70 years of age and has served at least 40% of the sentence imposed, whichever occurs first.

"Dangerous felony" is defined in § 556.061(8) as follows:

> the felonies of arson in the first degree, assault in the first degree, attempted forcible rape if physical injury results, attempted forcible sodomy if physical injury results, forcible rape, forcible sodomy, kidnaping, murder in the second degree, assault of a law enforcement officer in the first degree, domestic assault in the first degree, elder abuse in the first degree, robbery in the first degree, statutory rape in the first degree when the victim is a child less than twelve years of age at the time of the commission of the act giving rise to the offense, statutory sodomy in the first degree when the victim is a child less than twelve years of age at the time of the commission of the act giving rise to the offense, and abuse of a child pursuant to subdivision (2) of subsection 3 of section 568.060, RSMo;

To determine the minimum prison term to be served by a defendant, the following calculations should be used: a life sentence is 30 years; any sentence alone or in the aggregate with other consecutive sentences for crimes committed at or near the same time that is over 75 years is 75 years. Section 558.019.4.

Section 559.115.8 prohibits probation being granted to a defendant convicted under the following:

- Section 565.021, RSMo 2000, murder, second degree
- Section 566.030, RSMo 2000, forcible rape
- Section 566.060, RSMo 2000, forcible sodomy
- Section 566.032, RSMo 2000, statutory rape, first degree
- Section 566.062, RSMo 2000, statutory sodomy, first degree
- Section 566.067, RSMo 2000, child molestation, first degree, when classified as a "B" felony (Note: House Bill 353, 93rd Gen. Assembly, 1st Reg. Sess. (Mo. 2005) (passed and awaiting signature of the Governor at the time of publication of this deskbook) changes this to an "A" felony)
- Section 568.060, RSMo 2000, abuse of a child, "A" felony

Other statutory provisions that set a minimum prison term or restrict a defendant's eligibility for probation or parole include the following:

- Section 565.020.2, murder, first degree—the punishment is death or life imprisonment without eligibility for probation, parole, or release except by act of the Governor.

- Section 558.018.3, persistent sexual offender—the punishment is at least 30 years without probation or parole.

- Section 558.018.6, predatory sexual offender—the punishment is life imprisonment with eligibility for parole with minimum sentences set forth in § 558.018.7.

- Section 558.018.8 further prevents a defendant found to be and sentenced as a persistent sexual offender or a predatory sexual offender from having furlough unless otherwise provided by law.

- Chapter 195, RSMo, Drug Regulations—the attorney needs to check the statutes in this chapter; they contain a number of provisions that restrict or prevent a defendant's eligibility for probation or parole. Sections to be particularly aware of include:

  - § 195.291, RSMo 2000, Prior and persistent offenders—imprisonment for distribution, delivery, manufacture, or production
  - § 195.292, RSMo 2000, Prior drug offenders—unlawful distribution to a minor or unlawful purchase or transport with a minor—imprisonment for
  - § 195.222, RSMo Supp. 2004, Trafficking drugs, first degree—penalty
  - § 195.296, RSMo 2000, Prior offenders—trafficking drugs, first degree—penalty
  - § 195.223, RSMo Supp. 2004, Trafficking drugs, second degree—penalty
  - § 195.295, RSMo 2000, Prior and persistent offenders—trafficking drugs, second degree—penalty

E. (§27.22) Classification of Inchoate Offenses—Attempt and Conspiracy

Chapter 564, RSMo, provides for attempt to commit an offense and conspiracy to commit an offense. Section 564.011, RSMo 2000, sets forth the classifications for these offenses.

F. (§27.23) Concurrent or Consecutive Sentences

Rule 29.09 and § 558.026.1, RSMo 2000, give the court discretion to decide if multiple sentences of imprisonment are to run concurrently or consecutively. If the court fails to state either concurrently or consecutively in its judgment, the sentences run concurrently. But if the

defendant's multiple sentences are imposed for rape, forcible rape, sodomy, forcible sodomy, or an attempt to commit any of these offenses or for other offenses committed during or at the same time as these offenses, the sentences imposed "for the other offenses may run concurrently, but the sentence of imprisonment for the felony of rape, forcible rape, sodomy, forcible sodomy or an attempt to commit any of the aforesaid shall run consecutively to the other sentences." Section 558.026.1.

For cases interpreting whether sentences are mandated to be consecutive or concurrent, see:

- *Williams v. State*, 800 S.W.2d 739 (Mo. banc 1990)
- *Roller v. State*, 84 S.W.3d 525 (Mo. App. S.D. 2002)
- *State v. Taylor,* 67 S.W.3d 713 (Mo. App. S.D. 2002)

If a defendant who is on probation, parole, or conditional release is sentenced to imprisonment in a subsequent criminal case, the court in the subsequent case must state how the new sentence or sentences will run with the previous sentence or sentences that the defendant received the probation, parole, or conditional release on. Section 558.026.2. Further, the court may cause a defendant's sentence to run concurrently with any sentence the defendant is serving or is to serve in another state or in a federal correctional facility. Section 558.026.3.

Section 558.019.5, RSMo Supp. 2004, provides that the Board of Probation and Parole may alter consecutive sentences imposed by a judge under certain conditions. If the defendant has been sentenced to consecutive sentences imposed at the same time under a common scheme or plan, the Board:

> shall be authorized to convert consecutive sentences to concurrent sentences, when the board finds, after hearing with notice to the prosecuting or circuit attorney, that the sum of the terms results in an unreasonably excessive total term, taking into consideration all factors related to the crime or crimes committed and the sentences received by others similarly situated.

Id.

G. (§27.24) Credit for Jail Time

A defendant's sentence of imprisonment begins when the defendant is received into the Department of Corrections or other ordered place of confinement. If the defendant has been confined in a jail, a prison, or other custody during the period after the offense occurred and before the

defendant's sentence of imprisonment begins, the defendant is usually entitled to a credit for the time of the confinement if it was related to the offense the defendant will be starting the sentence of imprisonment for. Section 558.031.1, RSMo 2000. There are restrictions or limitations on the credit for the confined time. "Such credit shall be applied only once when sentences are consecutive." Section 558.031.1(1). The credit will only be applied if the defendant was in custody in the state of Missouri (unless the custody was compelled exclusively by a Missouri order). Section 558.031.1(2). Further, the sentencing court may, in its discretion, give the defendant credit toward the sentence for any period of probation or parole. *See* §§ 559.100.2 and 559.036.3, RSMo 2000.

Other restrictions or limitations apply when a defendant escapes from custody by interrupting the jail time credit to be applied, § 558.031.3, or when a sentence is vacated and a new sentence imposed for the same offense, § 558.031.4. In the case of a vacated sentence, all of the time that the defendant has served under the vacated sentence is to be credited to the new sentence unless the time has already been credited to another sentence under § 558.031.1.

A brief history of the courts' interpretations of § 558.031 should be looked at. In 1992, the Supreme Court ruled in *State ex rel. Jones v. Cooksey*, 830 S.W.2d 421, 425 (Mo. banc 1992), that a sentencing court does not have jurisdiction to determine the amount of jail time to be credited to a defendant but that it was the Department of Corrections that makes that determination. In 1995, there was an amendment to the statute. In 1999, in *Goings v. Missouri Department of Corrections*, 6 S.W.3d 906 (Mo. banc 1999), the Supreme Court heard the appeal of a denial of a declaratory judgment action in which the defendant had asked to be given credit for jail time served. The defendant, Goings, while incarcerated in the Department, challenged the Department's denial of credit for certain time served. The Supreme Court found that Goings was entitled to credit because the time served was "related to" the current offense and that the "statute's use of the very broad term 'related to' instead of, for example, 'caused by' or 'the result of' compels the conclusion that his custody can be related to both offenses [prior sentence and current sentence] and the statutory credit will nevertheless apply." *Id.* at 908. *Goings* was the first time the Supreme Court had allowed a declaratory action.

In another declaratory action, the Western District found § 558.031.1(1) to mean that:

> a defendant who is in jail pending the disposition of one charge and against whom a detainer is filed for another charge, "is then entitled to a credit for the time the detainer was in effect on the sentence resulting from the detained crime as well as credit against the sentence resulting from the offense for which he was originally jailed."

Roy v. Mo. Dep't of Corrections, 23 S.W.3d 738, 744–45 (Mo. App. W.D. 2000) (quoting *State ex rel. Lightfoot v. Schriro,* 927 S.W.2d 467, 470 (Mo. App. W.D. 1996) (quoting *State ex rel. Blackwell v. Sanders,* 615 S.W.2d 467, 469 (Mo. App. E.D. 1981))); *see also*:

- *Monroe v. Mo. Dep't of Corrections*, 105 S.W.3d 915 (Mo. App. W.D. 2003)
- *Belton v. Moore*, 112 S.W.3d 1 (Mo. App. W.D. 2003)
- *State ex rel. Gater v. Burgess*, 128 S.W.3d 907 (Mo. App. W.D. 2004)

But see *State v. Faruq,* 110 S.W.3d 409 (Mo. App. S.D. 2003), in which the court denied relief to Faruq on his request that the appellate court order his immediate discharge because he had been incarcerated past the maximum amount of time for the offenses he was convicted of. Although the court agreed with Faruq's determination, it stated, "[N]otwithstanding the apparent accuracy of Appellant's claim regarding his latest possible release date it is clear we have no authority to calculate or credit Appellant's time served for the purpose of ordering his immediate discharge. This is within the exclusive purview of the department of corrections." *Id.* at 412.

It should be noted that, when bringing a declaratory action, the cause should be against the Department of Corrections or other entity where the defendant is in custody and not a sentencing judge. *See Stinson v. Sharp,* 80 S.W.3d 852 (Mo. App. S.D. 2002).

H. (§27.25) Conditional Release

Section 558.011.1, RSMo Supp. 2004, states the authorized terms of imprisonment, including the prison and the conditional release terms. Conditional release is defined in § 558.011.4(2) to mean "the conditional discharge of an offender by the board of probation and parole, subject to conditions of release that the board deems reasonable to assist the offender to lead a law-abiding life, and subject to the supervision under the state board of probation and parole." A mandatory condition of release is that the defendant not commit any other federal or state crimes. The Board of Probation and Parole has discretion in imposing other conditions that it deems "reasonably necessary" to assist the defendant in avoiding further violation of the law.

Under § 558.011.4(1), the conditional release terms for those defendants sentenced to a term of imprisonment for a felony other than a dangerous felony as defined in § 556.061, RSMo Supp. 2004, and other than for sentences that involved the defendant's fourth or subsequent commitment to the Department of Corrections, are as follows:

- "One-third for terms of nine years or less;
- Three years for terms between nine and fifteen years;
- Five years for terms more than fifteen years;"

The prison term is the remainder of such term and is subject to extension by the Board of Probation and Parole under § 558.011.5, which provides that the date of the conditional release may be extended up to a maximum of the entire imprisonment sentence. These extensions are based on the defendant failing to follow the rules and regulations of any division of the Department of Corrections or the defendant committing an act in violation of the rules and regulations. All decisions by the Board on the extension are final.

Note: Under H. B. 353, 93rd Gen. Assembly, 1st Reg. Sess. (Mo. 2005) (awaiting signature by the Governor at the time of publication of this deskbook) new § 217.735, RSMo, will apply to conditional releases if the defendant has pleaded guilty to or been found guilty of an offense under:

§ 566.030, RSMo 2000;
§ 566.032, RSMo 2000;
§ 566.060, RSMo 2000;
§ 566.062, RSMo 2000;
§ 566.067, RSMo 2000;
§ 566.083, RSMo Supp. 2004;
§ 566.100, RSMo 2000;
§ 566.151, RSMo Supp. 2004;
§ 566.212, RSMo Supp. 2004;
§ 568.020, RSMo 2000;
§ 568.080, RSMo 2000; or
§ 568.090, RSMo 2000,

against a victim who was less than 14 years old if the defendant is a prior sex offender (been found guilty of an offense contained in Chapter 566, RSMo). If applicable, the defendant will be supervised (electronically monitored) for the duration of the defendant's natural life (possible exception if 65 years or older).

VII. Probation

A. (§27.26) In General

Sections 559.600–559.615, RSMo 2000, deal with matters involving probation. Probation is the process in which a defendant has pled guilty to or been found guilty of a crime and the court releases the defendant without imprisonment or other incarceration. Probation is distinguished from parole, which is the release by a court or the Board of Probation and Parole after the defendant has served a portion of the sentence that was imposed.

Following the imposition of the sentence the court may grant probation whereby the execution of the sentence is stayed during the defendant's probation period, or the court may grant probation following a suspension of imposition of sentence. A defendant has no right to probation as it is "a privilege which may be granted or withheld in the discretion of the sentencing court." *Smith v. State,* 517 S.W.2d 148, 150 (Mo. 1974); *see also State v. Stout,* 960 S.W.2d 535 (Mo. App. E.D. 1998). Once probation is granted, however, the defendant has a right to continued probation until the probation is taken away by due process of law. *Smith,* 517 S.W.2d at 150.

Under § 559.012, RSMo 2000, the defendant may be placed on probation by the court for a specified period of time if the court determines that institutional confinement is not necessary for the protection of the public and that the defendant is in need of guidance, training, or other assistance that can be effectively administered through probation supervision.

If the court determines that probation is to be granted, the probation remains conditional and subject to revocation. The court may also extend a period of probation, but no more than one extension may be ordered. The total time of any probation term, including the extension, cannot exceed the maximum term as follows:

> (1) A term of years not less than one year and not to exceed five years for a felony;
> (2) A term not less than six months and not to exceed two years for a misdemeanor;
> (3) A term not less than six months and not to exceed one year for an infraction.

Section 559.016, RSMo 2000.

Note: House Bill 353, 93rd Gen. Assembly, 1st Reg. Sess. (Mo. 2005) (awaiting signature by the Governor at the time of publication of this deskbook) amends § 559.016.3 by allowing the court to extend the total time a defendant may be on probation by one additional year if the defendant admits the violation of the probation or if the court finds that the defendant violated the probation. It effectively extends the maximum term of probation listed above by one year if the probation is found to have been violated.

The term of probation commences on the day it is imposed. Further, all terms of probation are to run concurrently, whether the probation terms were imposed at the same time or at different times, and the terms must run concurrently with any other federal or other state jail, prison, probation, or parole term for another offense that the defendant is subject to (unless otherwise specified by the Missouri court). Section 559.036.1, RSMo 2000.

Under § 559.021, RSMo Supp. 2004, the sentencing court has discretion to set the conditions for probation. These conditions must include those that are deemed "reasonably necessary" to ensure that the defendant will not violate the law again. Section 559.021.1. The court may also order conditions that the court believes will allow the victim, a dependent of the victim, or society to be compensated. These conditions include:

- restitution to the victim or a dependent of the victim; and
- a specified amount of free work for a public or charitable purpose.

Note: Under H.B. 353, 93rd Gen. Assembly, 1st Reg. Sess. (Mo. 2005) (passed and awaiting signature of the Governor at the time of publication of this deskbook), new § 559.105, RSMo, provides for restitution to a victim under § 569.080.1(2) or § 570.030.3(3)(a).

Section 559.021.2. If the court sets a condition of free work as part of the defendant's probation, the defendant has the right to refuse the probation. In that case, the court would decide the extent or duration of the sentence or other disposition to be imposed and render judgment accordingly. Section 559.021.3.

The court may also require that the defendant post a bond as a condition of probation. The bond is to ensure that the defendant will appear in court as directed by the court during the term of probation and not

depart without leave of the court. Section 559.100, RSMo 2000. Further, the court may require that the defendant be supervised by the Board of Probation and Parole and follow the directions and regulations of the Board. Section 217.750.1, RSMo Supp. 2004.

If the defendant has entered a plea of guilty or been found guilty of a felony offense under Chapter 195, RSMo, except when a statutory prohibition against probation or parole applies, the court is under a mandatory duty to "order the person to begin a required educational assessment and community treatment program within the first sixty days of probation as a condition of probation." Defendants who are placed on probation after a period of incarceration under § 559.115, RSMo Supp. 2004, may not be required to participate in these educational assessment and community treatment programs. Section 559.633.1, RSMo 2000.

The bottom line is that the court has vast discretion in the conditions of probation, and the defendant "is subject to all conditions attached to his release which are not illegal, immoral or impossible of performance." *State v. Brantley,* 353 S.W.2d 793, 796 (Mo. 1962).

Note: Under H.B. 353, 93rd Gen. Assembly, 1st Reg. Sess. (Mo. 2005) (passed and awaiting signature of the Governor at the time of publication of this deskbook), new § 217.735, RSMo, will apply to those defendants released on probation, parole, or conditional release, or who have served the full sentence without early release, if they have pleaded guilty to or been found guilty of an offense under:

§ 566.030, RSMo 2000;
§ 566.032, RSMo 2000;
§ 566.060, RSMo 2000;
§ 566.062, RSMo 2000;
§ 566.067, RSMo 2000;
§ 566.083, RSMo Supp. 2004;
§ 566.100, RSMo 2000;
§ 566.151, RSMo Supp. 2004;
§ 566.212, RSMo Supp. 2004;
§ 568.020, RSMo 2000;
§ 568.080, RSMo 2000; or
§ 568.090, RSMo 2000,

against a victim who was less than 14 years old if the defendant is a prior sex offender (been found guilty of an offense contained

in Chapter 566, RSMo). If applicable, the defendant will be supervised (electronically monitored) for the duration of the defendant's natural life (possible exception if 65 years or older). Also see similar provisions in new § 559.106, RSMo, in H.B. 353.

B. (§27.27) Pre-Sentence Investigation and Report

At the request of a trial court in all felony cases and certain class A misdemeanor cases, the Board of Probation and Parole is to conduct an investigation of the convicted defendant before the sentence is imposed. In all cases falling under § 558.019.6, RSMo Supp. 2004, in which probation is included in the recommended sentence but the prosecuting attorney or the circuit attorney is not recommending probation, before the defendant's sentencing, the Board must provide to the court a report on the available alternatives to incarceration. Further, if a pre-sentence investigation report is completed, it must include the available alternatives. Section 217.760.1, RSMo Supp. 2004.

The pre-sentence investigation report is to contain the following information:

> any prior criminal record of the defendant and such information about his or her characteristics, his or her financial condition, his or her social history, the circumstances affecting his or her behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, information concerning the impact of the crime upon the victim, the recommended sentence established by the sentencing advisory commission and available alternatives to incarceration including opportunities for restorative justice, as well as a recommendation by the probation and parole officer. The officer shall secure such other information as may be required by the court and, whenever it is practicable and needed, such investigation shall include a physical and mental examination of the defendant.

Section 217.760.2.

Under § 217.762.1, RSMo 2000, before the sentencing of any defendant convicted of a felony that resulted in serious physical injury or death to the victim, the Board of Probation and Parole must conduct a pre-sentence investigation unless the court orders otherwise. This pre-sentence investigation must include a victim's impact statement if the victim suffered physical, psychological, or economic injury. Section 217.762.2. If the court does not order the pre-sentence investigation, the prosecuting attorney may prepare a victim impact statement that is submitted to the court. Section 217.762.3. No matter which way the victim impact statement is submitted to the court, the court must consider it in determining the appropriate sentence and in entering any

order of restitution to the victim. Section 217.762.1 and .3. The items that must be included in a victim impact statement are detailed in § 217.762.4.

The defense attorney should obtain a copy of the pre-sentence investigation report before the sentencing hearing and discuss it with the defendant. The attorney will want to highlight the items in the report that help the defendant but downplay or present rebuttal evidence on the items that hurt the defendant. Sometimes there will need to be corrections made to the report or the attorney will want to add additional evidence on items that were not included in the report but that the attorney believes are important.

A word of caution—some attorneys do not prepare the defendant or the defendant's family for the pre-sentence investigation report. This is a mistake because there are many sentencing judges who rely strongly on the report. Preparation for this stage of the criminal trial should be started at the very beginning of the representation even if the attorney believes the defendant will not be convicted of the offense. Again, how defendants portray themselves throughout the proceedings will play a large part in the report. The defendant should be respectful and show concern for the victim and the impact that the offense has had on the victim (being careful not to admit to the crime unless the defendant has pled guilty). The defendant and the defendant's family should have a plan on where the defendant is going to live and what the defendant is going to do—employment, counseling or other treatment, steps to take so as not to offend again, etc. The Board of Probation and Parole likes for a defendant to admit to the crime or to take responsibility for it. This is a problem for the defense if the defendant is maintaining innocence. How the defendant handles this aspect is like treading on a tightrope. One wrong statement regarding responsibility for the crime could affect any appeals that may be planned. The Board will also want to know some of the defendant's history. This should all be discussed with the defendant and the defendant's family before meeting with the Board or answering any forms that may be sent for the defendant and the defendant's family to fill out.

C. (§27.28) Suspended Imposition of Sentence Not a Conviction

When a defendant has been found guilty of a felony or a misdemeanor, under § 557.011.2(3), RSMo 2000, the court may suspend the imposition of sentence, with or without placing the defendant on probation.

In the past, a suspended imposition of sentence (SIS) was a "means of relieving a person who is guilty of a crime from the stigma of a conviction when the court in its discretion feels that the ends of justice warrant the court's forbearance." *State ex rel. Peach v. Tillman,* 615 S.W.2d 514, 517 (Mo. App. E.D. 1981). But now the Missouri legislature has made it so that an SIS "carries with it the stain of certain undesirable attributes of a conviction." *State v. Lynch,* 679 S.W.2d 858, 861 (Mo. banc 1984). Under certain statutes containing the phrase "finding of guilty" or "found guilty" an SIS may be used just like any other conviction in which a sentence has been imposed. Some of the statutes are as follows:

- § 558.016, RSMo Supp. 2004, in which an SIS may be used to determine a defendant's status as a prior, persistent, and dangerous offender

- § 491.050, RSMo 2000, for use as a credibility issue in criminal cases

- § 577.051, RSMo Supp. 2004, in which an SIS is treated as a final disposition in alcohol- or drug-related driving offenses

Further, in *United States v. Ortega,* 150 F.3d 937 (8th Cir. 1998), it was held that the federal court was not bound by Missouri's laws on an SIS and that an SIS does qualify as a prior final felony drug conviction under 21 U.S.C. § 841(b). *See also United States v. Slicer,* 361 F.3d 1085 (8th Cir. 2004).

The defendant who receives an SIS does still have some statutory safeguards on the availability of the defendant's records. Under § 610.105, RSMo Supp. 2004, the defendant's official records on the SIS must be closed when the case is finally terminated except as provided in § 610.120, RSMo Supp. 2004, and except that the court's judgment or order or the final action taken by the prosecuting attorney may be accessed. Section 610.120 provides that the closed records are to be inaccessible to the general public except as provided in § 610.120 and § 43.507, RSMo 2000.

The attorney should be aware of how an SIS may affect the defendant. In some professions, an SIS could damage the defendant's occupation—e.g., a truck driver with a CDL license or a person who has to have a security clearance for employment purposes.

On a final note, a defendant may not appeal an SIS because it is not a final judgment. *See Lynch,* 679 S.W.2d 858; *Yale v. City of Independence,* 846 S.W.2d 193 (Mo. banc 1993); *State v. Kimberley,* 103 S.W.3d 850 (Mo. App. W.D. 2003).

D. (§27.29) Revocation and Method of Appeal of Revocation

The granting of probation to a defendant is considered a privilege and not a right. A defendant has no right to probation as it is "a privilege which may be granted or withheld in the discretion of the sentencing court." *Smith v. State,* 517 S.W.2d 148, 150 (Mo. 1974); *see also State v. Stout,* 960 S.W.2d 535 (Mo. App. E.D. 1998). Once probation is granted, however, the defendant has a right to continued probation until the probation is taken away by due process of law. *Smith,* 517 S.W.2d at 150. Under § 559.036.4, RSMo 2000, this requires that the defendant be given notice and an opportunity to be heard on the issues of whether the defendant violated the conditions of the probation and, if so, whether revocation of the probation is warranted after consideration of all the issues. *See State ex rel. Beaird v. Del Muro,* 98 S.W.3d 902 (Mo. App. W.D. 2003); *State ex rel. Boyle v. Sutherland*, 77 S.W.3d 736 (Mo. App. E.D. 2002). The burden of proof in a revocation of probation is preponderance of the evidence. *See State ex rel. Cooper v. Hutcherson,* 684 S.W.2d 857 (Mo. App. W.D. 1984).

Note: Under H.B. 353 , 93rd Gen. Assembly, 1st Reg. Sess. (Mo. 2005) (passed and awaiting signature of the Governor at the time of publication of this deskbook), amended § 559.036.5, RSMo, allows the court to immediately enter an order suspending a defendant's probation and to issue a warrant for the defendant's arrest upon a filing by the prosecuting attorney or a circuit attorney of a motion to revoke the probation or upon the court's own motion. The defendant's probation will be suspended until a ruling on the motion by the court or until the court otherwise orders the reinstatement of the probation.

The court has the power to revoke the defendant's probation at any time during the probation period set by the court. It also extends for a further period if it is reasonably necessary for the adjudication of matters arising before the period expires, but some affirmative manifestation of the intent to conduct a revocation hearing must occur before the expiration of the probation period, and every reasonable effort must be made to notify the defendant and conduct the hearing before the expiration. Section 559.036.6. This issue has been litigated several times in the Missouri courts. The general rule regarding probation revocation

is that no appeal may be taken and that errors in the probation revocation hearing should be contested by the appropriate writ. *See State v. Burnett,* 72 S.W.3d 212 (Mo. App. W.D. 2002); *State v. Stewart,* 14 S.W.3d 671 (Mo. App. E.D. 2000).

The court has the power to terminate a probation period and discharge the defendant at any time before the completion of the term of the probation. The court also has the authority to extend the probation period by one extension, but it cannot exceed the maximum term established in § 559.016, RSMo 2000. Section 559.036.2. Further, at any time during the probation period, the court may issue a notice for the defendant to appear before it to answer a violation charge, and it may also issue a warrant for the defendant's arrest. Section 559.036.5.

Note: House Bill 353, 93rd Gen. Assembly, 1st Reg. Sess. (Mo. 2005) (passed and awaiting signature of the Governor at the time of publication of this deskbook) amends § 559.016.3, RSMo, by allowing the court to extend the total time a defendant may be on probation by one additional year if the defendant admits the violation of the probation or if the court finds that the defendant violated the probation. It effectively extends the maximum term of probation listed above by one year if the probation is found to have been violated.

E. (§27.30) Shock Detention and Short-Term Shock Programs

A defendant in either a misdemeanor or a felony case who has been granted probation may be ordered by the court to serve a period of detention in a county jail, halfway house, honor center, workhouse, or other institution. This shock detention is in addition to other conditions the court may impose for the probation period. The period of detention in a misdemeanor case cannot exceed the shorter of 15 days or the maximum term of imprisonment authorized for the misdemeanor under Chapter 558, RSMo. The period of detention in a felony case cannot exceed 120 days. Any period of detention served by the defendant is to be credited against the prison or jail term served for the offense for which the detention was imposed if the probation of the defendant is later revoked. Section 559.026, RSMo Supp. 2004.

The court is authorized in § 559.115.2, RSMo Supp. 2004, to grant probation to a defendant any time up to one 120 days after the defendant has been delivered to the Department of Corrections. The court may request and receive from the Department information and a

recommendation regarding the defendant and the defendant's conduct during the incarceration period. Except as otherwise provided by statute, the court may place the defendant on probation in a program created under § 217.777, RSMo 2000, or on probation with any other conditions that the court is authorized by law to impose. If the court intends to grant the probation, it must notify the state in writing, and the state may then request a hearing in writing within 10 days of receipt of the notice. The hearing is to be conducted as soon as reasonably possible. If the state does not respond to the court's notice within the time allowed, the court may proceed with its own motion to grant the defendant probation. Section 559.115.6.

The court may recommend that the defendant be placed in a Department of Corrections 120-day program. Once the court's recommendation is received, the Department must determine:

- the defendant's eligibility for the program;
- the nature, intensity, and duration of the defendant's participation; and
- the availability of space for the defendant.

Section 559.115.3. If there is not space for the defendant in the recommended program, the court may place the defendant in a private program approved by the Department or the court with the expenses paid by the defendant or in an available program offered by another organization. Section 559.115.4. On completion of the shock incarceration program, the Board of Probation and Parole is to advise the court of the defendant's probationary release date 30 days before release. The court must follow the Board's recommendation unless it determines that probation is not appropriate. If the court determines that probation is not appropriate, the court may order execution of the defendant's sentence only after conducting a hearing on the matter within 90 to 120 days of the defendant's sentence. Section 559.115.3.

If the defendant is placed in the program, with some exceptions, the defendant must be released on probation if the Department of Corrections determines that the defendant has successfully completed the program. Upon the successful completion of the program, the Department must notify the court of the defendant's probationary release date 30 days before release. The court is to release the defendant unless the release constitutes an abuse of discretion. If the court finds that there is an abuse of discretion, the court may order the defendant's sentence to be executed only after conducting a hearing on the matter within 90 to 120 days of the defendant's sentence. If the court does not

respond after receiving notice of the defendant's successful completion of the program and of the probationary release date, the defendant is released on probation. On the other hand, if the Department determines that the defendant has not successfully completed the program, then after 100 days of incarceration, the court will receive from the Department a report on the defendant's participation in the program and the Department's recommendations for terms and conditions of the defendant's probation. The court then orders the release of the defendant on probation or orders the defendant to remain incarcerated to serve the sentence that was imposed. *Id.*

A defendant's first 120-day incarceration for participation in one of the programs before release on probation cannot be considered a previous prison commitment for the purpose of determining a minimum prison term under § 558.019, RSMo Supp. 2004. Section 559.115.7.

Some of the programs available for consideration by the court include the following:

Sexual offender assessment unit: In all cases, except when the defendant has been found to be a predatory sexual offender under § 558.018, RSMo 2000, the court is required to request that the defendant be placed in the sexual offender assessment unit of the Department of Corrections if the defendant has pleaded guilty to or has been found guilty of class B felony sexual abuse. Section 559.115.5.

Missouri post-conviction drug treatment program: This program includes both noninstitutional and institutional correctional programs for the monitoring, control, and treatment of certain drug abuse offenders. The Department of Corrections establishes the rules for the determination of how, when, and where an offender is to be admitted into or removed from this program. Details on this program may be found in § 217.785, RSMo 2000. The long-term program for chronic nonviolent offenders with serious substance abuse addictions may be found in § 217.362, RSMo Supp. 2004. This program ranges from 12 to 24 months. *Id.* The other drug program, the Offenders Under Treatment Program, is a 180-day institutional correctional program. *See* § 217.364, RSMo 2000.

Missouri regimented discipline program: This is a program of institutional correctional alternatives in discipline, exercise, and treatment. The Department of Corrections establishes the rules determining how and when a defendant can be admitted into or removed from the program. Eligibility requirements are found in § 217.378.3, RSMo 2000.

Section 559.115.8 lists those defendants not eligible for probation under this section.

F. (§27.31) Institutional Drug Treatment Programs

There are three drug treatment programs that a court may consider. All three of these programs have rules established by the Department of Corrections on how, when, and where a defendant may be admitted to or removed from the programs. These programs include:

Missouri post-conviction drug treatment program: This program includes both noninstitutional and institutional correctional programs for the monitoring, control, and treatment of certain drug abuse offenders and is a 120-day program. The defendants who are eligible for this program are those first-time defendants who have pled guilty to or been found guilty of violating the provisions of Chapter 195, RSMo, or whose controlled substance abuse was a precipitating or contributing factor in the commission of the offense and who are placed on probation. A defendant who fails to successfully complete the noninstitutional phase of the program may be assigned to an institutional phase. Details on this program are found in § 217.785, RSMo 2000.

Long-term program for chronic nonviolent offenders with serious substance abuse addictions: This program is found in § 217.362, RSMo Supp. 2004, and is for chronic nonviolent defendants with serious substance abuse additions who have not pleaded guilty to or been convicted of a dangerous felony as defined in § 556.061, RSMo Supp. 2004. It ranges from 12 to 24 months in addition to a term of incarceration. The execution of the defendant's term of incarceration is suspended until the defendant has completed this program. The Department of Corrections determines the nature, intensity, duration, and completion criteria of the education, treatment, and aftercare portions of this program.

Offenders Under Treatment Program: This drug program, found in § 217.364, RSMo 2000, is a 180-day institutional correctional program. Any nonviolent defendant who has not previously been remanded to the Department of Corrections and who has pled guilty to or been found guilty of violating the provisions of Chapter 195, RSMo, or whose substance abuse was a precipitating or contributing factor in the commission of the crime, is eligible. Also eligible is the non-violent defendant who has pled guilty to or been found guilty of a crime that did not involve the use of a weapon and who has not previously been remanded to the Department of Corrections. This program includes

education, treatment, and rehabilitation and is considered an intermediate sanction.

Patricia Harrison*

Chapter 28

PROBATION, PAROLE, AND OTHER ALTERNATIVE SENTENCES

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This chapter includes material previously prepared by Lawrence J. Fleming and Christen D. Shepherd.

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VII. (§28.40) Parole Guidelines

I. (§28.1) Introduction and Definitions

This chapter is intended to provide the practitioner with a basic overview of the law relating to probation and parole in Missouri and other alternatives to traditional institutional confinement.

The statutory definitions of probation and parole are as follows:

> "Probation", a procedure under which a defendant found guilty of a crime upon verdict or plea is released by the court without imprisonment, subject to conditions imposed by the court and subject to the supervision of the board.

Section 217.650(7), RSMo 2000.

> "Parole", the release of an offender to the community by the court or the state board of probation and parole prior to the expiration of his term, subject to conditions imposed by the court or the board and to its supervision.

Section 217.650(4).

Both Missouri courts and federal courts have generally regarded probation or parole as a "privilege" and not a "right." This privilege may be granted to or withheld from defendants or convicted persons in the discretion of the sentencing court or the Board of Probation and Parole (Board). *State v. Austin*, 620 S.W.2d 42 (Mo. App. E.D. 1981) (citing *Smith v. State*, 517 S.W.2d 148 (Mo. 1974)); *Watley v. Mo. Bd. of Prob. & Parole*, 863 S.W.2d 337 (Mo. App. W.D. 1992). Neither the parole statute nor the parole guidelines, nor statements by members of the Board, create a protected liberty in parole for due process purposes. *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133 (Mo. banc 1995); *Gale v. Moore*, 763 F.2d 341 (8th Cir. 1985); *Ingrassia v. Purkett*, 985 F.2d 987 (8th Cir. 1993).

II. Probation

A. (§28.2) Authority

The circuit courts in Missouri have the power to place on probation any person found guilty, either by trial or plea, of any offense over which the courts have jurisdiction, subject to certain limitations. *See* § 559.012, RSMo 2000; Rule 29.07(e). Those who are convicted of certain specified offenses, however, are statutorily excluded from consideration for probation. Section 559.100.1, RSMo 2000. *See* §28.3, *infra*.

The discretion vested in a judge with reference to granting probation is exceedingly broad and is generally not subject to review by any appellate court. *Ockel v. Riley*, 541 S.W.2d 535 (Mo. banc 1976). Several court of appeals' opinions, however, have held that the trial court's denial of probation may be reviewed if there is a showing of "extreme abuse of discretion." *See State v. Priesmeyer*, 719 S.W.2d 873 (Mo. App. W.D. 1986); *State v. Keller*, 685 S.W.2d 605 (Mo. App. S.D. 1985).

Nevertheless, in *State v. Austin*, 620 S.W.2d 42 (Mo. App. E.D. 1981), it was held that a trial court can deny probation even if there is a favorable pre-sentence investigation (PSI) report by the Board of Probation and Parole (Board). In *State v. Wood*, 668 S.W.2d 172, 175

(Mo. App. E.D. 1984), the appellate court stated that the sentencing court is not required to state reasons for denying probation.

B. (§28.3) Eligibility

Section 559.120, RSMo 2000, states that a defendant is eligible for probation if the court, "having regard to the nature and circumstances of the offense and to the history and character of the defendant," is of the opinion that: "(1) Traditional institutional confinement of the defendant is not necessary for the protection of the public, given adequate supervision; and (2) The defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through participation in a community-based treatment program." Section 559.012, RSMo 2000, is nearly identical to § 559.120.

The following individuals may not be eligible to be placed on probation:

- Those convicted of certain controlled substance offenses and certain persistent drug offenses under §§ 195.291, 195.292, 195.295, and 195.296, RSMo 2000, and §§ 195.214, 195.218, 195.222, and 195.223, RSMo Supp. 2004
- Those with certain sexual offender convictions, § 558.018, RSMo 2000
- Class X offenders under § 558.019, RSMo Supp. 2004

Similarly, those convicted of second degree murder and armed criminal action are statutorily excluded from consideration for probation. Section 559.115.8, RSMo Supp. 2004.

A pre-sentence investigation (PSI), unless waived by a defendant or unless the court directs otherwise, shall be made in all felony and class A misdemeanor cases *before* the granting of probation. Section 557.026.1, RSMo 2000; § 217.750.2, RSMo Supp. 2004; Rule 29.07(a)(1). Defendants generally waive the PSI by pleading guilty to a recommended disposition. But the court may still require one to be completed. Section 217.762, RSMo 2000, requires a PSI to be conducted in felony cases involving serious physical injury or death to the victim. This investigation must include a victim impact statement, which is defined in the statute. If the court does not order a report of this investigation, the prosecuting attorney may prepare a victim impact statement and present it to the court. *Id.* Section 217.760.2, RSMo Supp. 2004, requires that the following information

about the defendant be contained in the PSI and reported to the court:

- Criminal record
- Characteristics
- Financial, social, and behavioral history
- "[W]henever it is practicable and needed," a physical and mental examination

The PSI must also contain information on the:

- impact of the crime on the victim;
- recommended sentence established by the Sentencing Advisory Commission;
- available alternatives to incarceration; and
- recommendation of the reporter.

Id.

Further, in all felony cases when the Sentencing Advisory Commission recommends probation but the prosecuting attorney does not, a report shall be provided to the judge that includes available alternatives to incarceration. Section 217.760.1.

This PSI report and recommendation of the officer shall be made available to the defendant or the defendant's attorney before sentencing. Section 557.026.2. This report may also be made available to the state, at the discretion of the court, if it determines it is in the best interest of the state. Section 559.125.3, RSMo 2000. Generally, the court allows both sides to view the report before sentencing. All reports are to be kept by the clerk of the court and kept privileged except from the Board and the court. Section 559.125.2. The defendant shall not be obligated to make a statement to the officer in connection with the investigation, § 557.026.3, but the defendant's refusal will undoubtedly be placed in the report to the court.

C. (§28.4) Authorized Dispositions

Section 557.011.2(3) and (4), RSMo 2000, allows the court to give the offender a suspended imposition of sentence (SIS) or a suspended execution of sentence (SES) and place the person on a specific period of probation. *See State ex rel. Popowich v. Conley*, 967 S.W.2d 294, 297 (Mo. App. W.D. 1998). An SIS is not considered a conviction if the probation is successfully completed. If the probation is not completed,

the court may either revoke the probation, sentence the offender to a term of incarceration and execute that sentence, or suspend that sentence and grant a new term of probation. See §28.10 below for authority. In an SES, the court sentences the offender to a period of incarceration, suspends that time, and places the offender on a term of probation. If the offender's probation is revoked, the sentence ordered is already known and will be executed. This is considered a conviction regardless of whether the offender completes the probation successfully.

"The court shall designate a specific term of probation at the time of sentencing or at the time of suspension of imposition of sentence." Section 559.016.2, RSMo 2000. For a felony, a court may specify a term of one to five years. Section 559.016.1(1). For a misdemeanor, a court may specify a term of six months to two years. Section 559.016.1(2). For an infraction, a court may specify a term of six months to one year. Section 559.016.1(3).

Under § 559.036.1, RSMo 2000, the term of probation begins on the day it is imposed, and multiple terms of probation are deemed to run *concurrently* with each other and *concurrently* with any other probation or sentence, whether state or federal. But if probation is revoked, the sentences of multiple probation violations may, in the court's discretion, run concurrent or consecutive.

The court may also:

- impose a period of detention as a condition of probation, as authorized by § 559.026, RSMo Supp. 2004, § 557.011.2(5);
- enter a decree of forfeiture of property, § 557.011.5;
- suspend or cancel a license, *id.*;
- remove a person from office, *id.*; or
- impose any other civil penalty, *id.*

D. (§28.5) Judicial Limitations

Probation may not be granted between the time the transcript on appeal of the conviction has been filed in the appellate court and disposition of the case by that court. Section 559.115.1, RSMo Supp. 2004. Probation cannot be granted to persons convicted of second degree murder or of "any offense in which there exists a statutory prohibition against either probation or parole" (e.g., armed criminal action, certain sexual offenses, and certain controlled substance offenses). Section 559.115.8; *see also State ex rel. McCulloch v. Schiff*, 852 S.W.2d 392 (Mo. App. E.D. 1993).

E. Conditions

1. (§28.6) Generally

When the court places a defendant on probation, it may impose any conditions that it deems "reasonably necessary to ensure that the defendant will not again violate the law." Section 559.021.1, RSMo Supp. 2004. The probationer shall be given explicit written conditions of the probation and release.

There are eight "standard" or general conditions of probation. These conditions are printed in a document called the "White Book" and should be given to all probationers by the probation officer. This document is available at www.doc.missouri.gov/pdf/White%20book.pdf. Although special conditions made by the court are printed on court documents containing probation orders and are adopted by the Board in accordance with § 217.755, RSMo 2000, the general conditions are not. It should be further noted that, at any time during the probation term, the court may modify or enlarge the conditions of probation. Section 559.021.7; § 559.016.3, RSMo 2000.

Section 217.695.2, RSMo 2000, requires all persons convicted of a felony to register their address and employment and have fingerprints, photos, and, in some cases, DNA evidence collected. All of this information shall be retained by the Department of Corrections and sent to the chief law enforcement agency in the county of the probationer's residence. *Id*. Failure to do so can be a violation of probation. Moreover, § 589.400.2, RSMo Supp. 2004, requires certain sexual offenders to register with the chief law enforcement official in the county of residence. Failure to register is a class A misdemeanor. Section 589.425.1, RSMo Supp. 2004. All persons convicted of a felony deemed violent under Chapter 565, RSMo, or a sexual offense under Chapter 566, RSMo, shall submit a blood or other biological sample for DNA testing to either the Missouri Highway Patrol or the Department of Corrections. Section 650.055.1, RSMo Supp. 2004.

2. (§28.7) Special Conditions, Shock Probation, Substance Abuse

Courts also have the discretion to impose "special" conditions of probation designed to fit the individual circumstances of the defendant. Section 559.021.2, RSMo Supp. 2004, specifically

provides for restitution to the victim of the crime and the performance of community service as special conditions of probation. The defendant, of course, may refuse probation conditioned on the performance of free work, in which case the court can order the sentencing executed accordingly. Section 559.021.3. The court may also require the defendant to repay all or part of the value of the legal services rendered by the public defender. Section 600.093, RSMo 2000.

Additionally, some circuit judges may require a defendant on probation to report to the court on specific dates for the purpose of reviewing the progress of the defendant or to amend, modify, or eliminate special conditions previously imposed. *See* § 559.021.7.

The court may order house arrest under § 217.541, RSMo 2000. An offender who fails to return to the offender's place of residence or activity authorized by the statute can be charged with a class D felony. Section 217.542.2, RSMo 2000.

In alcohol-related cases, the court can impose a condition that the defendant submit to breath or blood alcohol testing at the request of any law enforcement officer without the need for probable cause. *State v. Fetterhoff*, 739 S.W.2d 573 (Mo. App. E.D. 1987). Section 577.600.1, RSMo Supp. 2004, permits the court to order an ignition interlock device to be installed as part of the sentence for a first-time alcohol-related offense. On a second alcohol-related offense, the court must order that an ignition interlock device be installed. *Id*.

When a person is convicted of a felony under Chapter 195, RSMo, and is eligible for probation, the court must order the offender to an educational assessment and commitment to a treatment program within the first 60 days of probation. Section 559.633.1, RSMo 2000. This is called the Required Educational Assessment and Community Treatment (REACT) program. All probationers are required to pay for the assessment and treatment programs. Section 559.633.2. Specific information concerning the costs and locations of the programs available to complete this condition are available at www.doc.missouri.gov/division/rehab/react.htm. This web site lists available treatment programs contracted by REACT. If the state is not recommending probation and the defense wishes to seek this from the court at sentencing, it is highly recommended that counsel contact various providers to

evaluate offenders before sentencing and use favorable acceptance letters at the sentencing hearing.

"Shock probation," under § 559.026, RSMo Supp. 2004, is commonly used to have an offender spend some time in detention as a condition of probation while avoiding a prison sentence when the execution or imposition of the sentence is suspended. In misdemeanor cases, the period of detention under "shock probation" cannot exceed "the shorter of thirty days or the maximum term of imprisonment authorized for the misdemeanor by chapter 558, RSMo." Section 559.026(1). In felony cases, shock probation cannot exceed 120 days. Section 559.026(2). If the probation is revoked, the time spent in detention as a condition of probation must be credited against any prison or jail term ultimately served. Section 559.026(3). If a probationer violates a condition of probation, the court may also order the offender to a period of detention of up to 48 hours. Section 559.026.

Time spent at a halfway house, honor center, workhouse, or other institution deemed a detention center for purposes of serving this shock probation shall be credited against time served if probation is revoked. Section 559.026(3). But alcohol treatment facilities have not been considered "detention"; consequently, there is no right to automatic credit for "time served" at these facilities. *Davis v. State*, 712 S.W.2d 50 (Mo. App. E.D. 1986); *Norman v. State*, 740 S.W.2d 369 (Mo. App. S.D. 1987).

Other special conditions may involve drug or alcohol treatment, counseling, vocational training, schooling, and job placement or restrictions on acquaintances or activities. Some courts have specifically required defendants to submit to drug surveillance techniques, including:

- urinalysis;
- attendance at Alcoholics Anonymous meetings;
- taking the medication Antibuse, if prescribed; and
- submission to lie detector examinations.

Repayment of medical care or incarceration or housing expenses may also be ordered as a condition of probation. Section 221.122, RSMo 2000.

3. (§28.8) Matters Considered in Setting Conditions

The court is permitted to consider matters outside the record in setting conditions of probation. *State v. Welsh*, 853 S.W.2d 466 (Mo. App. S.D. 1993). Further, the court is not bound by any particular evidentiary rules in setting the amount of restitution to be paid. *State v. Hollensbe*, 720 S.W.2d 14 (Mo. App. E.D. 1986). Unless the record clearly shows an abuse of discretion and probability of injury to the complaining party, the appellate court will not interfere with the discretion of the trial court in imposing conditions of probation.

F. (§28.9) Supervision

The sentencing court may order that probation be supervised or unsupervised. If the probation is supervised, all felony and certain class A misdemeanors are supervised by the Board. But the Board is not required to supervise any person convicted of a class B or C misdemeanor. The court may contract with private entities to supervise misdemeanor probation. Section 559.600, RSMo 2000. The Board may, however, in its discretion, supervise these cases. The cost of the contract supervision is to be paid by the defendant unless the court specifically exempts this payment for one of the reasons set out in § 559.604, RSMo 2000.

The probation officer assigned to a defendant is authorized to report to the court on all matters pertaining to the defendant's probation, and the probation officer may make recommendations to the court as the circumstances may require.

With certain limitations, the law allows jurisdiction over a probationer to be transferred from the court that imposed probation to a court having equal jurisdiction over offenders in any other part of the state, provided that both courts concur. Section 559.031, RSMo 2000. Sometimes this occurs when a defendant moves from the part of the state where probation was granted to another part of the state for reasons of employment, education, etc. Generally, the sentencing court retains jurisdiction, and the probation officer in the county of the defendant's domicile simply writes progress reports to the sentencing court. Additionally, under § 559.031, even if jurisdiction is transferred, the probation may not be "terminated" without the consent of the sentencing court.

G. (§28.10) Duration and Extension of Probation

Section 559.036.2, RSMo 2000, provides that "[t]he court may terminate a period of probation and discharge the defendant at any time before completion of the specific term . . . if warranted by the conduct of the defendant and the ends of justice." If the probationer violates probation, § 559.036.3 allows the court to (1) "continue [the defendant] on the existing conditions, with or without modifying or enlarging the conditions or extending the term" or (2) revoke the probation and order that any sentence previously imposed be executed or, if an SIS was ordered, impose a sentence. It is important to note that probation can only be revoked for a violation occurring during probation and not before probation was ordered. Section 559.036.6; *State ex rel. Popowich v. Conley*, 967 S.W.2d 294, 299 (Mo. App. W.D. 1998) (citing *United States v. Twitty*, 44 F.3d 410, 413 (6th Cir.1995)). If the court extends the term of probation, it may do so only one time. *See State ex rel. Heberlie v. Martinez*, 128 S.W.3d 616 (Mo. App. E.D. 2004). The total time of any probation term shall not exceed the maximum permitted by § 559.016.1, now RSMo 2000. *See* §28.4, *supra*. Moreover, § 559.036.3 states that "[t]he court may, upon revocation of probation, place an offender on a second term of probation. Such probation shall be for a term of probation as provided in section 559.016, notwithstanding any amount of time served by the offender on the first term of probation." Hence, the court may order a new term of probation for up to two more years in a misdemeanor and five more years in a felony.

When extending probation, the courts distinguish between SISs and SESs. In *State ex rel. Light v. Sheffield*, 768 S.W.2d 590, 592–93 (Mo. App. S.D. 1989), and *State ex rel. Connett v. Dickerson*, 833 S.W.2d 471, 475 (Mo. App. S.D. 1992), the court held that, when an imposition of sentence is suspended and that probation is subsequently revoked, if the trial court then imposes a sentence but suspends execution by entering a new term of probation, this is not considered a new term of probation because no prior sentence had been ordered. *Roach v. State*, 64 S.W.3d 884 (Mo. App. S.D. 2002), concludes that the amendment allows the court to extend the probation to a new term if an SIS is revoked but does not address whether this may also occur if an SES is revoked. *See also Martinez,* 128 S.W.3d at 616 (citing *State ex rel. Moyer v. Calhoun*, 22 S.W.3d 250 (Mo. App. E.D. 2000)).

The court's authority to revoke probation can extend beyond the period of probation if notice of the intent to revoke is given to the

defendant before the end of the probation term and if the probation has been suspended. The probation must be suspended before the term expires for the court to retain the jurisdiction to revoke the probation. *Wesbecher v. State*, 863 S.W.2d 2, 9 (Mo. App. E.D. 1993); *State ex rel. Brown v. Combs*, 994 S.W.2d 69, 71 (Mo. App. W.D. 1999); *State ex rel. Wright v. Dandurand*, 973 S.W.2d 161, 162 (Mo. App. W.D. 1998).

III. Parole

A. (§28.11) Authority

Once the defendant is committed to and enters the custody of the Department of Corrections (DOC), the defendant's release on parole becomes a matter for the Board of Probation and Parole (Board). But the court always retains jurisdiction for 120 days and, unless there is some statutory prohibition against probation, the court can order probation even if it did not specifically state at sentencing that it may do so. Section 559.115, RSMo Supp. 2004. And if the offender successfully completes a program in accordance with § 559.115.2, the court may grant probation before the 120 days.

The Board consists of seven full-time members appointed by the Governor to serve for six-year terms; not more than four of the members can be of the same political party. Section 217.665, RSMo Supp. 2004.

The Board is responsible for determining whether a person confined in an institution of the Division of Adult Institutions of the DOC should be paroled and for providing supervision and oversight to these parolees, to persons released on conditional release, and to persons placed on parole or probation by circuit courts. Sections 217.750, *et seq.*, RSMo 2000 and Supp. 2004. The Board also operates pre-release programs, treatment plans, and pretrial services, such as diversionary and recognizance programs, § 217.655, RSMo 2000, and conducts pre-sentence investigations, § 217.760, RSMo Supp. 2004; § 557.026, RSMo 2000; Rule 29.07(a). The Board is not required to supervise defendants convicted of class B misdemeanors unless it chooses to do so in its discretion. Section 217.750.2, RSMo Supp. 2004.

Section 217.690.1, RSMo Supp. 2004, requires that, to order parole, the Board must be of the opinion that the inmate can be released

"without detriment to the community or to himself." Section 217.690.2 further requires that:

> A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or a pardon. An offender shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen.

Section 217.670.2, RSMo 2000, provides that "[d]ecisions of the board regarding granting of paroles . . . shall be by a majority vote of the hearing panel members." Orders of the Board are not "reviewable except as to compliance with the terms of sections 217.650 to 217.810 or any rules promulgated pursuant" to them. Section 217.670.3.

The Board is required by law to publish a handbook containing "all rules, regulations, and suggestions governing the conduct of parolees." Section 217.675, RSMo 2000. This handbook (called a "Blue Book") is furnished to all parolees and to any employer of a parolee who requests it. *Id*. It should also be furnished to inmates who are scheduled for parole hearings, and it is essential that any attorney representing an inmate before the Board be familiar with the rules and regulations contained in it. A "Blue Book" may be obtained by calling the Board at 573/751-8488; it is also *available at* www.doc.missouri.gov/pdf/Blue%20book.pdf.

B. (§28.12) Parole Eligibility and Minimum Prison Terms

A prisoner may be paroled when, in the opinion of a majority of the Board, "there is reasonable probability that [the prisoner] can be released without detriment to the community or to himself." Section 217.690, RSMo Supp. 2004. This statute does not create a liberty interest protected by due process but rather gives the Board "almost unlimited discretion" in determining whether to grant parole. *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. banc 1995); *Epperson v. Mo. Bd. of Prob. & Parole*, 81 S.W.3d 540, 541 (Mo. App. W.D. 2002).

Further, the Board is not to order parole until the offender attains a high school diploma or its equivalent unless the Board finds that the offender has made an honest, good-faith attempt to do so or has actively participated in prison education programs. Section 217.690.10.

Certain "non-parolable offenses," however, do exist. Among these are:

- first degree murder, § 565.020, RSMo 2000;
- tampering with a victim or witness, § 575.270, RSMo 2000; and
- conviction as a persistent sexual offender, § 558.018, RSMo 2000.

Consider also:

- certain persistent drug offenders under §§ 195.214, 195.218, 195.222, and 195.223, RSMo Supp. 2004, and §§ 195.291, 195.292, 195.295, and 195.296, RSMo 2000;
- class X offenders sentenced to less than 25 years (§ 558.019, RSMo Supp. 2004); and
- persistent offenders convicted of unlawful use of a weapon under § 571.030, RSMo Supp. 2004.

Persistent domestic violence offenders under § 565.063, RSMo 2000, are ineligible for a suspended imposition of sentence or fine in lieu of imprisonment and are not eligible for parole or probation until they have served a minimum of six months' imprisonment.

Additionally, there are certain statutory minimum non-parole terms for offenses, such as:

- armed criminal action, § 571.015, RSMo 2000;
- pharmacy robbery, §§ 569.025, 569.035, RSMo 2000; and
- murder in the first degree, § 565.020.

Additionally, there are several statutory minimum prison terms of which counsel should be aware. These statutory restrictions apply to offenders convicted of offenses that have been identified on court-submitted sentence and judgment papers as being committed after August 28, 2003.

The provisions are as follows:

- Persons convicted of any of the "dangerous felonies" are required to serve a minimum prison term of 85% of the sentence imposed by the court unless the defendant attains age 70 and has served at least 40% of the sentence imposed.

See §§ 556.061, 558.019.3, RSMo Supp. 2004. These felonies are:

- arson in the first degree;
- assault in the first degree;
- attempted forcible rape if physical injury results;
- attempted forcible sodomy if physical injury results;
- forcible rape;
- forcible sodomy;
- kidnapping;
- murder in the second degree;
- assault of a law enforcement officer in the first degree;
- domestic assault in the first degree;
- elder abuse in the first degree;
- robbery in the first degree;
- statutory rape in the first degree when the victim is a child less than 12 years of age at the time of the act giving rise to the offense;
- statutory sodomy in the first degree when the victim is a child less than 12 years of age at the time of the act giving rise to the offense; and
- abuse of a child in accordance with § 568.060.3(2), RSMo 2000.

- All other offenders, except those remanded for drug offenses, are required to serve a minimum of 40% of the sentence if they have one prior remand, 50% if they have two prior remands, and 80% if they have three or more prior remands. Section 558.019.2(1)–(3).

- A "previous remand" is defined as "the sending back of a person to the Department. Each new commitment after an initial commitment to the Department is a remand." *Boersig v. Mo. Dep't of Corrs.*, 959 S.W.2d 454, 457 (Mo. banc 1997). *See Bratton v. Mitchell*, 979 S.W.2d 232, 234–35 (Mo. App. W.D. 1998). Prior commitments for boot camp are excluded, § 217.362.5, RSMo Supp. 2004; § 558.019.2, and commitments to the prison systems of other states or to the federal prison system are also excluded by the statutory language.

- A sentence of life is calculated for purposes of these provisions to be 30 years. Section 558.019.4(1).

- Sentences for offenses committed at or near the same time that exceed 75 years in aggregate are considered to be one 75-year sentence for purposes of applying the percentage computation. Section 558.019.4(2).

- The Board can "convert" consecutive sentences to concurrent sentences when the Board finds, after hearing with notice to the prosecutor, that the sentences are unreasonably excessive. Section 558.019.5.

- If imposition or execution of sentence is suspended, the court may order any or all of the following restorative justice methods:

  - Restitution
  - Offender treatment programs
  - Mandatory community service
  - Work-release programs
  - Community-based residential and nonresidential programs

  Section 558.019.8.

Before ordering parole, the Board is required to "interview" the inmate (this may be waived by the offender). Section 217.690.2. The previous statutory "parole eligibility" time of one-third of the sentence has now been replaced with § 217.690.3, which provides that the Board shall "adopt rules" with respect to parole eligibility. Under the latest (2003) rules, the Board has set the following criteria for "[m]inimum parole eligibility":

- For Class C and D offenses, the inmates shall not be eligible for parole until 15% of the maximum sentence has been served, and 25% of the maximum sentence if the sentence has been enhanced under § 558.016, RSMo Supp. 2004.

- For Class A and B offenses, the inmates shall not be eligible for parole until one-third of the maximum sentence has been served.

- For life sentences and for sentences of 45 years or more, the inmate may not be eligible until 15 years of the maximum sentence has been served.

- For inmates serving multiple life sentences or other sentences concurrent or consecutive to a life sentence, the Board may, because of the nature and length of the sentence, determine not to set a minimum eligibility date.

See www.doc.missouri.gov/pdf/Blue%20book.pdf.

C. Parole Hearings

1. (§28.13) When Scheduled

Parole hearings are generally conducted monthly where the offender is housed. Hearings for particular inmates are automatically scheduled according to the length of the inmate's sentence as follows:

Sentence Length Years	Months of incarceration (including jail time) to be Served Prior to Hearing
Less than 2 years	ASAP
2	ASAP
3	ASAP
4	ASAP
5	6
6	8
7	10
8	24
9	30
10	36
11–15	42
16–20	60
21–25	78
26–30	96
31–35	114
36–40	132
41–44	144
45 and over	156

See www.doc.missouri.gov/pdf/Blue%20book.pdf.

For inmates who have consecutive sentences, the "months prior to hearing" as to each sentence will be added to determine when the first parole hearing will occur. For inmates convicted of "dangerous felonies," the parole hearing will be scheduled for two years before the minimum mandatory prison term unless the regular hearing schedule would require them to serve more time before the hearing. Before the hearing, the inmate will meet with an institutional parole officer who will prepare a report to the Board. If denied parole, the offender should contact this person to discuss parole matters. An inmate may request that the parole hearing be postponed, but any such continuance of the hearing will be made for at least three months.

2. (§28.14) Procedure for Hearing

According to the "Blue Book" of the Board, *available at* www.doc.missouri.gov/pdf/Blue%20book.pdf, the following procedures are to be followed:

- The inmate will appear before the hearing panel.
- "The hearing panel shall consist of one member of the Parole Board and two (2) hearing officers appointed by the Board. 217.670 RSMo."
- The hearing will be recorded.
- "The hearing shall not be open to the general public. The records of all such hearings shall be treated as confidential and shall not be opened to inspection by the offender concerned, their representative or any other unauthorized persons. 217.670."
- An inmate who is serving a Missouri sentence in another state is under the same rules and regulations governing the granting of paroles and conditional releases as an inmate who is serving the sentence in a Missouri institution. The inmate may waive the right to a hearing on the Missouri sentence, and the Board will hear those cases *in absentia* upon receipt of a report from the appropriate authorities in the other state. If the inmate does not waive the appearance, the hearing will be continued until the inmate's return to the Missouri DOC.

- Other inmates may not be present at the hearing, but an inmate may have "a person of their choice" (who does not necessarily need to be an attorney) appear at the hearing to offer statements, provide additional information, or ask questions.

Additionally, under § 595.209, RSMo Supp. 2004, the victims must be notified of the parole hearing and be given the right to attend and present information. If so requested, the Board must also notify any prosecuting attorney or law enforcement agency involved in the case, who also has a right to attend and be heard. These persons may present their information to the Board with or without the inmate being present.

Unfortunately, Board decisions may be based on confidential information, and the inmate will not be granted access to the parole file to determine exactly what information or reports are contained in it. *See* §§ 217.075, 549.500, RSMo 2000; *see also Ingrassia v. Purkett*, 985 F.2d 987 (8th Cir. 1993) (procedural due process did not include right to review parole file despite contention that parole was denied to offender while it was granted to others similarly situated). But the court of jurisdiction may permit access to the information and reports in the Board decision file by the offender or the offender's attorney if it determines this to be in the best interest of the offender. *See* §§ 217.075, 549.500.

The Board will generally reach a decision within ten working days from the date of the hearing, and the inmate must receive prompt notice of that decision. The decision will either set a "presumptive release date either by parole or conditional release, or continue the offender for a reconsideration hearing." The Board, however, may also order the inmate's immediate release or transfer to one of the alternative treatment programs discussed in §§28.23–28.31 below.

If a parole is granted, the Board may set the conditions and issue an order reciting those conditions to the parolee. Section 217.705, RSMo 2000. The only limitations on these conditions are that they not be "illegal or impossible for the offender to perform." This can include requiring payment for the costs of housing during incarceration.

An inmate, however, will not actually be released until a "Parole Release Plan" has been investigated and approved by the Board. This release plan may involve the parolee's family, a recognized social agency, potential employers, or other support systems. It is often helpful to propose a detailed release plan at the time of the initial hearing and to support that plan with letters or other documentation by persons or entities constituting the support network. Moreover, the release will only occur if the offender has continued good conduct and has satisfied all mandated programs.

3. (§28.15) Appeals

An inmate may appeal a decision of the Board by filing a written appeal within 30 days after the notice of the decision is received by the inmate. An inmate is presumed to have received the Board's decision within 10 days of the date of notice. The appeal should be considered within 30 days of receipt by the Board. The Blue Book specifically tells all inmates "[i]t is expected that the inmate will consult with the institutional parole officer on all areas of concern regardless of whether or not they are appealable. Most questions can be satisfactorily resolved at this level." *See* www.doc.missouri.gov/pdf/Blue%20.pdf. If the inmate wishes to appeal to a higher court, a petition for a declaratory judgment has been held to be a proper action to determine a prisoner's entitlement to release under statutes and regulations. *See McDermott v. Carnahan*, 934 S.W.2d 285 (Mo. banc 1996).

D. (§28.16) Parole Guidelines

The Board has established a system for determining an inmate's "salient factor score" based on the inmate's:

- prior convictions;
- prior incarcerations;
- age;
- history of alcohol or drug abuse;
- prior paroles; and
- escapes.

Additionally, offenses have been classified by statutes as class A, B, C, or D offenses. The combination of these two factors establishes the guidelines as to how much time should be served before parole. Section 28.40 below sets out the guideline ranges that appear in the parole Board's 2003 rules. *See*

www.doc.missouri.gov/pdf/Blue%20.pdf. According to the "Blue Book" page 14, paragraph 16, "[t]he guidelines are only a tool to assist the Board in meeting the goals previously stated. Nothing in guideline policy can be read to mandate release." The most current year of the Board's rules is 2003.

The Board will give a statement to the inmate with the reasons for the decision. If the Board denies parole even though the salient factor score indicates that release is appropriate, chooses to extend the presumptive release date, denies good time credit release, or does not set a presumptive release date, the Board will usually give one of the following reasons:

- "Release at this time would depreciate the seriousness of the offense committed or promote disrespect for the law."

- "There does not appear to be a reasonable probability at this time that the offender would live and remain at liberty without violating the law" because of:

    - prior criminal history;
    - prior failures of probation, parole, or treatment programs;
    - drug abuse;
    - dangerous or persistent offender status;
    - short interval between offenses;
    - poor institutional adjustment;
    - failure to complete treatment; and
    - other reasons.

The courts have consistently held that the statutes and guidelines do not create mandatory criteria for parole but instead provide an aid for consideration by the Board in making a parole decision. Therefore, no liberty interest or due process right to parole exists just because non-mandatory guidelines have been met. *McKown v. Mitchell*, 869 S.W.2d 765, 769 (Mo. App. W.D. 1993); *see, e.g.*, *Blackburn v. Mo. Bd. of Prob. & Parole*, 83 S.W.3d 585 (Mo. App. W.D. 2002).

In *Gettings v. Missouri Department of Corrections*, 950 S.W.2d 7 (Mo. App. W.D. 1997), even though the inmate had an excellent salient factor score, parole was denied because of the seriousness of the offense. The appellate court upheld the Board's decision, finding that the statute gives the Board wide discretion and that the regulations are simply guidelines that do not remove the Board's discretion to

consider individual factors in each case. *Id*. at 9 (citing *Fults v. Mo. Bd. of Prob. & Parole*, 857 S.W.2d 388, 391–92 (Mo. App. W.D. 1993)). *Accord Cooper v. Mo. Bd. of Prob. & Parole*, 866 S.W.2d 135 (Mo. banc 1993); *Watley v. Mo. Bd. of Prob. & Parole*, 863 S.W.2d 337, 339 (Mo. App. W.D. 1992). It was also found in *Wheat v. Missouri Board of Probation & Parole,* 932 S.W.2d 835, 839 (Mo. App. W.D. 1996), that a prisoner does not have a liberty interest in parole once the prisoner completes the Missouri Sexual Offenders Program because the statute firmly commits all releases to the Board's discretion and to override their decision would undercut this discretion. It is also important to remember that the minimum mandatory prison sentences now required for repeat offenders under § 558.019, RSMo Supp. 2004, will supersede any parole guidelines. Also, an offender convicted of a C or D felony whose sentence was enhanced by the court to an extended prison term will be scored on the A or B felony matrix. Further, the guidelines shall not apply to:

- sentences of more than 30 years or less than 2 years;
- sentences received for crimes that occurred on inmate status;
- parole violations resulting in a new consecutive sentence; or
- a return to custody because of a technical parole violation.

Because of the great discretion and authority the courts grant the Board, decisions above the guidelines are not uncommon and are often rendered without any detailed explanation.

E. (§28.17) Parole From Consecutive Sentences

Consecutive sentences create a unique problem for potential parolees because the inmate must make parole on the first sentence before consideration is given to parole on the second (consecutive) sentence. For example, under consecutive sentences of 3 years each for a class D felony, an inmate may be required to serve 7 months of the first sentence before being considered for parole under the second sentence. Then the inmate may be required to serve 7 months under the second sentence for a total of 14 months. On the other hand, the maximum guideline sentence for concurrent 6-year sentences would be 13 months, and there would be no need for a subsequent hearing on a second sentence.

Obviously, it is best to try to avoid consecutive sentencing whenever possible. Defense counsel should never assume that the court is aware of the practical impact of the various sentences available to it. Before sentencing, counsel should be prepared to demonstrate these differences to the court.

F. (§28.18) Parole Violations

While a person is on parole or conditional release, the Board may issue a warrant for the person's arrest or notice to appear for violation of any condition of the parole or release. A parole officer may also arrest a parolee without warrant for such a violation, or the parole officer may deputize any other officer to arrest the parolee simply by giving the officer a written statement. Pending hearing on the violation, the parolee shall remain in custody without bond either at the penitentiary or at another detention facility. Section 217.720.1, RSMo 2000. The parolee, however, does have a right to a preliminary hearing on the violation charge as long as the parolee is in custody and has not waived a hearing. Section 217.720.2.

A report of the alleged violation is submitted to the Board. *Id*. The Board may then discharge the parolee from custody or may order a parole violation hearing. *Id*. After this hearing, the Board may continue parole, revoke it, or modify the conditions of the parole. The Board may grant the parolee credit toward the parolee's sentence for all, part, or none of the time the parolee serves on a subsequent sentence served outside the Missouri DOC, or of time between the issuance of the warrant and the parolee's subsequent return to the DOC. Time while the parolee was on parole (and before a warrant was issued) is counted toward the sentence. Section 217.720.3. Counsel should note that this is not necessarily true of time spent on court-ordered probation or parole. *See* § 559.100.2, RSMo 2000; *Roberts v. State*, 742 S.W.2d 633 (Mo. App. E.D. 1988); *Wuebbels v. State*, 770 S.W.2d 479 (Mo. App. S.D. 1989).

G. (§28.19) Paroles to Other States

A prisoner may also be paroled to answer a detainer or warrant. Section 217.725, RSMo 2000. The Interstate Compact for the Supervision of Parolees and Probationers under § 217.810, RSMo 2000, allows for transfer of both probation and parole to parole boards in other states. When the prisoner is serving the sentence in another state under this agreement, the prisoner may be paroled without a hearing. Section 558.026.3, RSMo 2000. The Board may also supervise persons placed on parole by boards or courts in other states under the agreement. Section 217.810.

H. (§28.20) Medical Parole

To be eligible for medical parole under § 217.250, RSMo 2000, an offender must meet at least one of the following requirements:

- Be afflicted with a disease that is terminal (death anticipated within six months)
- Be advanced in age to the extent that the offender is in need of long-term nursing care
- Have a medical situation where confinement will necessarily greatly endanger or shorten the offender's life

A request for medical parole is forwarded to the institution's primary care physician. That person determines if the offender meets medical parole criteria and submits a recommendation to the Board. The Board will make a decision without a personal hearing and forward a written response to the offender. The offender paroled under medical criteria is still subject to supervision and may be returned to the custody of the DOC if the offender returns to a suitable level of health.

I. (§28.21) Judicial Parole

Section 558.046, RSMo 2000, allows the sentencing court, upon petition, to reduce any sentence *at any time* if the crime involved alcohol or illegal drugs, the crime did not involve violence or threat of violence, and the convicted person has successfully completed a detoxification and rehabilitation program. This section, however, does not apply to prior offenders, persistent offenders, or persistent sexual offenders as defined in §§ 558.016 and 558.019, RSMo Supp. 2004, and § 558.018, RSMo 2000. Because § 558.046 gives the sentencing court total discretion to reduce a sentence or probation term, or parole, there is no final judgment to appeal, and the appellate courts have no power to review or revise this decision. *State v. Stout*, 960 S.W.2d 535, 537 (Mo. App. E.D. 1998) (citing *Smith v. State*, 517 S.W.2d 148, 150 (Mo. 1974), and *State v. Williams*, 871 S.W.2d 450, 452 (Mo. banc 1994)).

Section 558.016.8 allows an offender convicted of a nonviolent class C or class D felony with no prior prison commitments, after serving 120 days of the sentence, to petition the court to serve the remainder of the sentence on probation, parole, or other court-approved alternative sentence.

> No hearing shall be conducted unless the court deems it necessary. Upon the offender petitioning the court, the department of corrections *shall* submit a report to the sentencing court which evaluates the conduct of the offender while in custody, alternative custodial methods available to the offender, and *shall* recommend whether the offender be released or remain in custody. If the report issued by the department is favorable and recommends probation, parole, or other alternative sentence, the court *shall* follow the recommendations of the department if the court deems it appropriate. Any placement of an offender pursuant to section 559.115, RSMo, shall be excluded from the provisions of this subsection.

Section 558.016.8 (emphasis added).

In *State ex rel. Nixon v. Russell,* 129 S.W.3d 867, 870–71 (Mo. banc 2004), the Supreme Court focused on the mandatory language of § 558.016.8. The Court found that this statute was similar to § 217.362.3, RSMo Supp. 2004, the long-term substance abuse addiction program, in that it mandates the court to follow the recommendation of the Board unless the recommendation would be an abuse of discretion. The Court concluded in *State ex rel. Beggs v. Dormire*, 91 S.W.3d 605 (Mo. banc 2002), that, under § 217.362.3, the sentencing court could not use the offender's prior criminal history before his present custody as a basis that an abuse of discretion occurred in the DOC's recommendation. *Id.* at 607. The Court concluded that denial of probation was "an abuse of discretion" when there was no evidence from the offender's time in custody that the offender was unfit for probation. *Id.* Therefore, under § 558.016.8, the Court is to follow the recommendations of the Board if it deems it appropriate or may schedule a hearing to determine the appropriateness.

IV. (§28.22) Special Alternative Programs

The Missouri Board of Probation and Parole (Board) has a web site that lists available treatment programs, their locations, and how many beds are available. It is recommended that counsel review this site and contact the program staff for specific information.

A. (§28.23) Long-Term Substance Abuse Addiction Program

The stated purpose of the long-term substance abuse addiction program is to reduce relapse, reduce local and state prison overcrowding, and enforce treatment in the least restrictive setting. The program is presently open to adults, male or female, who are "chronic nonviolent offenders with serious substance abuse addictions who have not pleaded guilty to or been convicted of a dangerous

felony as defined in section 556.061, RSMo." Section 217.362.1, RSMo Supp. 2004.

The program involves assessment and treatment of substance abuse. Referrals to this program must be made by the court upon recommendation by the Board. The Department of Corrections (DOC) determines the "nature, intensity, duration, and completion criteria of the education, treatment, and aftercare portion" of the program. Section 217.362.2.

If an offender is eligible and space is available, the court may sentence the offender to this program, which must consist of institutional drug or alcohol treatment for 12 to 24 months in addition to a term of incarceration. *Id*.

Execution of the offender's term of incarceration shall be suspended pending completion of the program. Section 217.362.3. Therefore, the offender is sentenced to a term of years in accordance with § 217.362, and then execution is suspended only after the offender successfully completes the program and the court determines that release is appropriate. It is not a mandatory release like the "regimented discipline program" of § 217.378, RSMo 2000. But it is a mandatory prison sentence if the offender does not complete the treatment program.

"Upon successful completion of the program, the board of probation and parole shall advise the sentencing court of an offender's probationary release date thirty days prior to release." Section 217.362.3. The court shall follow the Board's recommendation unless it determines that placement would be an abuse of discretion. *Id*. A court's determination that probation is not appropriate must be based on evidence in a hearing. *State ex rel. Dane v. State*, 115 S.W.3d 879 (Mo. App. W.D. 2003). The court may look to evidence concerning the offender's conduct before sentencing but may not base its decision exclusively on that evidence. *Id.* at 879–80. Further, the court must find that the offender is unfit for probation before it can find that placement on probation would be an abuse of discretion. *State ex rel. Beggs v. Dormire,* 91 S.W.3d 605, 606 (Mo. banc 2002). If the program is not successfully completed, "or [ ] the offender is not cooperatively participating in the program, the offender shall be removed from the program and the court shall be advised. Failure of an offender to complete the program shall cause the offender to serve the sentence prescribed by the court and void the right to be considered for probation on this sentence." Section 217.362.4. *See Huffman v. Nixon,*

98 S.W.3d 553 (Mo. banc 2003) (statute's mandatory execution of sentence upon failure to complete program constitutional).

"An offender's first incarceration in a department of corrections program pursuant to this section [and] prior to release on probation shall not be considered a previous prison commitment" when "determining a minimum prison term pursuant to section 558.019, RSMo." Section 217.362.5.

But it is important to note that, according to *Searcy v. State*, 103 S.W.3d 201, 204 (Mo. App. W.D. 2003), if the offender wishes to challenge a guilty plea under Rule 24.035, the day the offender is delivered to the DOC triggers the 90-day time limit. So, a person cannot wait until denied probation at the end of the program to challenge the sentence or plea under Rule 24.035. The motion must be filed before the 90-day time limit. And, if the offender challenges the guilty plea before the court can rule on the potential release, this could substantially hurt the offender's chance of obtaining release.

B. (§28.24) 180-Day Offenders Under Treatment Program

The stated purpose of the 180-day Offenders Under Treatment Program is to provide assessment and treatment for certain substance abuse offenders and certain nonviolent offenders in a structured setting. Section 217.364.2, RSMo 2000. The program is presently open to adults, male or female, who are convicted of nonviolent crimes under § 217.010(11), RSMo 2000, and to nonviolent drug offenders under Chapter 195, RSMo.

The program involves:

- assessment;
- substance abuse education;
- training in employment skills;
- life skills;
- vocational guidance; and
- a release plan.

Within 30 days of the offender's successful completion of the program, the DOC notifies the Board, and the Board may, at its discretion, release the offender on parole. Section 217.364.4. If the program is not successfully completed, the Board is notified of the unsuccessful termination from the program, and the sentence imposed continues. Referrals to this program must be made by the DOC after the

offender has been sentenced to a term of years. Screening and releases are made by the Board, which determines eligibility for release and then notifies the court of its intent to parole. If there is a negative termination from the program, the offender's sentence simply continues as usual.

C. (§28.25) Regimented Discipline Program (Boot Camp)

The stated purpose of the regimented discipline program is to foster community responsibility through community restitution, discipline, and mandatory education. The program is presently open to 17- to 25-year-old males with first nonviolent felony convictions. To be eligible for the regimented discipline program, the offender must have violated the terms of felony probation, be subject to revocation, and have exhausted all other community alternatives. Section 217.378.3(1), RSMo 2000. Referrals to this program must be made by the courts, and releases are made by the courts.

The DOC files a report with the court within 120 days regarding the offender's progress. If the DOC reports that the offender has successfully completed the program, the court must order the release of the offender to probation before the expiration of the 120 days. If the program is not successfully completed, the DOC reports negative termination from the program to the court, and the originally imposed sentence continues. But according to *Reed v. State*, 114 S.W.3d 871, 874–75 (Mo. App. W.D. 2003), if an offender is not allowed to enter and complete the program, through no fault of their own, the court must allow the offender to withdraw their guilty plea as they were sentenced under the statute that mandated the offender's release if the offender successfully completed the program.

A commitment to the DOC program under this section does not constitute a prior remand when calculating a minimum prison sentence under § 558.019.5, RSMo Supp. 2004.

D. (§28.26) Missouri Post-Conviction Drug Treatment Program

The stated purpose of the Missouri Post-Conviction Drug Treatment Program is to reduce relapse, reduce local and state prison overcrowding, and enforce treatment in the least restrictive setting. The program is presently open to adults, male and female, who are first-time nonviolent felons when drug problems contributed to the offense.

The program involves assessment and substance abuse treatment. Referrals to this program must be made by the DOC, and releases are made by the court. Within 90–120 days, the DOC files a report with the court regarding the offender's progress in the institutional phase. Section 217.785.6, RSMo 2000. Upon successful completion of the program, the DOC continues non-institutionalized persons on probation and gives notice to the court. *Id*. For those who have been confined, the DOC releases them to probation in the community. If the program is not successfully completed, the offender who has been on probation is referred to an institutional treatment center. For those who have been confined, the court is advised, and the offender is brought before the court for revocation or other authorized dispositions. *Id*. "Time spent in the institutional phase of the program shall count as time served on the sentence." Section 217.785.7.

E. (§28.27) 120-Day Institutional Treatment Program

The stated purpose of the 120-day institutional treatment program is to provide drug and alcohol treatment programs in a disciplined and structured setting. The program is presently open to male and female adult nonviolent felony offenders with active substance abuse problems when prior treatment in the community was unsuccessful. It is commonly referred to as "the 120-day call back." An offender's first commitment to this program is not considered a "remand" under § 558.019, RSMo Supp. 2004. Section 559.115.7, RSMo Supp. 2004.

The program involves 12 weeks of substance abuse treatment. Referrals to this program must be made by the courts, and releases are also made by the courts. If the drug program is full, the court may place the offender in a private program approved by the DOC or the court (the expenses of the program to be paid by the offender) or in an available program offered by another organization. If the offender is convicted of a class C or class D nonviolent felony, the court may order probation while awaiting appointment to treatment. No person convicted of the following offenses shall be eligible:

- Murder in the second degree under § 565.021, RSMo 2000
- Forcible rape under § 566.030, RSMo 2000
- Forcible sodomy under § 566.060, RSMo 2000
- Statutory rape in the first degree under § 566.032, RSMo 2000
- Statutory sodomy in the first degree under § 566.062, RSMo 2000

- Child molestation in the first degree under § 566.067, RSMo 2000, when classified as a class B felony
- Abuse of a child under § 568.060, RSMo 2000, when classified as a class A felony
- Any offense for which there exists a statutory prohibition against either probation or parole

An offender who has been found to be a predatory sexual offender under § 558.018, RSMo 2000, is also ineligible.

Within 90 days, the DOC files a report with the court before successful completion or at the termination of the program. Upon successful completion of the program, the court must order the release of the offender to probation unless it determines that release would be an abuse of discretion. If the court determines that there is an abuse of discretion, the court must conduct a hearing within 90 to 120 days of the offender's sentence. Section 559.115.3, RSMo Supp. 2004. If the program is not successfully completed, the court may deny probation. If the DOC determines that an offender is not successful in a program, after 100 days of incarceration, the circuit court shall receive from the DOC a report on the offender's participation in the program. *Id*. The report shall also contain the DOC's recommendations for terms and conditions of an offender's probation. The court then makes a decision whether to release the offender on probation or execute the sentence. If the court orders release, it must notify the state in writing of its intent to grant probation to the offender. The state may, in writing, request a hearing within 10 days of receipt of the court's notification, and the court must grant a hearing as soon as reasonably possible. If the state does not seek a hearing, the court may grant probation.

F. (§28.28) Shock Incarceration Program

The stated purpose of the shock incarceration program is to provide assessment and release planning in a secure setting with monitored progress. The program is presently open to adult males. It is available for all felony offenses other than those prohibiting probation, and it is available to inmates eligible for 120-day probation consideration. An offender's first commitment to this program shall not be considered a "remand" under § 558.019, RSMo Supp. 2004. Section 559.115.7, RSMo Supp. 2004.

The program involves:

- assessment;
- employment skills;
- vocational guidance;
- substance abuse education;
- anger management; and
- release planning.

Referrals to this program must be made by the courts, and releases are also made by the courts. The DOC files a report with the court before successful completion or at the termination of the program. If the program is not successfully completed, the court may deny probation. If the court decides to grant probation, it must give notice to the state as in the institutional treatment program. The state is entitled to request a hearing within ten days of the notice and a hearing shall be ordered if requested.

G. (§28.29) Sex Offender Assessment Program (SOAP)

The purpose of the sex offender assessment program (SOAP) is to provide the court with a detailed assessment of treatment needs and community risks and, in appropriate cases, to recommend the offender for probation or incarceration. The program is presently open to adult males. It is available to sexual assault offenders under § 589.015, RSMo 2000, and it is also available to inmates eligible for 120-day probation consideration. If the offender has been convicted of class B felony sexual abuse, the court must refer the offender to this program. It is commonly known that most offenders who participate in the program will not be recommended for release after completion of the assessment. The program involves a specialized assessment of treatment needs and community risk. Upon successful completion of the program, the court may release to the community or continue incarceration at the court's discretion. If the program is not successfully completed, the court may deny probation. The court, however, is not required to do so. Referrals to this program must be made by the court, and releases are also made by the court. The DOC files a report with the court on the 65th day of program participation.

H. (§28.30) Missouri Sex Offender Program (MOSOP)

The stated purpose of the Missouri sex offender program is the prevention of further sexual assaults by the participants. The program is presently open to adult males and females. It is required,

to be eligible for parole, of all sexual assault offenders per § 589.015, RSMo 2000, who are incarcerated felons.

The program involves intensive specialized sex offender treatment, which entails approximately 12 months of therapy. Upon successful completion of the program, the offender is eligible for release on parole or conditional release. If the program is not successfully completed, release is delayed until a conditional release date. Referrals to this program must be made by the DOC, and releases are ordered by the Board. Treatment and supervision recommendations are sent to the Board upon release, and intensive supervision is provided thereafter.

In years 2001–2002, out of 587 offenders who attended the program, 357 successfully completed it. In 2003, out of 407 offenders who attended the program, 216 successfully completed it. (Editor's note: These statistics were updated through a telephone conversation with Jim LaBundy, Chief of Sex Offender Service, Department of Corrections, on April 19, 2005.) Moreover, those who failed were required to complete their entire sentence. The courts have consistently held that there is no liberty interest protected by due process in enrolling in the MOSOP by a date certain or before the offender's expected parole date. *Winslow v. Nixon*, 93 S.W.3d 795, 798–99 (Mo. App. E.D. 2002); *Wheat v. Mo. Bd. of Prob. & Parole*, 932 S.W.2d 835, 839 (Mo. App. W.D. 1996). And, with the new law requiring "sexually violent predators" (SVPs) to be indefinitely committed to the Department of Mental Health after completing their sentence, this area of law is ever growing, and it is very important to learn all aspects of §§ 632.475–632.510, RSMo 2000 and Supp. 2004. Any offender who does not complete MOSOP successfully will be automatically reviewed for potential commitment to the SVP program. When reviewed for SVP status, all statements made during MOSOP treatment can and will be used against the offender during SVP prosecution.

I. (§28.31) House Arrest

The "house arrest" program allows an inmate serving a sentence for a class C or D felony, who has one year or less remaining on the sentence before release on parole, to be confined in the inmate's own home. Sections 217.541.1, RSMo 2000. The prisoner is still considered an inmate of the DOC, and the prisoner is authorized to leave the place of residence only for educational or work programs. The Board

is required to supervise the prisoner, and the Board may do so by electronic surveillance. Section 217.543, RSMo 2000.

The offender is required to participate in work, education, or vocational programs and may leave the home to do so. Section 217.541.3, .4. The DOC has recently extended the house arrest program to include parole violators in felony cases and certain defendants on probation who have violated the terms of probation.

To be accepted in the house arrest program, a defendant must meet all of the following criteria:

- The defendant cannot have a felony charge pending.
- The defendant must not represent a physical danger to the community.
- The defendant must either be capable of maintaining employment or currently be receiving a disability stipend.
- A reasonable likelihood must exist that a treatment plan can be effectively administered in the community.
- Any violations involving probation or parole must be sufficient to warrant revocation.

If the officer has probable cause to believe the offender has violated the conditions of house arrest, a warrant may be issued and, upon arrest, the offender shall be held without bail. The director of the DOC may thereafter revoke the house arrest status and return the offender to custody to serve the sentence. Section 217.541.5.

In view of the massive overcrowding of Missouri prisons, this is an extremely attractive and viable program for nonviolent, employable offenders and one that should not be overlooked when parole is unavailable, denied, or likely to be revoked.

V. Release After Service of Sentence

A. (§28.32) Conditional Release

Conditional release is like parole; the prisoner is released from actual custody on such conditions as the Board of Probation and Parole (Board) deems reasonable and remains under the supervision of the Board. Section 558.011.4(2), RSMo Supp. 2004. If the prisoner violates those conditions, it is handled like a parole violation. Most prisoners are usually paroled before the conditional release date.

Persons sentenced to imprisonment for felonies other than "[d]angerous felon[ies]" as defined in § 556.061(8), RSMo Supp. 2004, and who did not have three or more prior remands are eligible for conditional release. This is something separate and apart from consideration for parole. The conditional release term is part of the sentence, but it is served as though the person were on parole. The conditional release term for a sentence of 9 years or less is one-third of the term. For a sentence of between 9 and 15 years, it is 3 years, and for a sentence of more than 15 years, it is 5 years. Section 558.011.4(1).

The Board may extend the prison term and, thus, shorten or eliminate the conditional release term. This extension may be made upon petition to the Board by the director of the DOC "when an offender fails to follow the rules and regulations" of the DOC and after a hearing on the issue. Section 558.011.4, .5. The hearing is conducted with the same procedures as a parole hearing under § 217.670, RSMo 2000. "The offender shall be present and may call witnesses in his or her behalf and cross-examine witnesses appearing against the offender." Section 558.011.5. "The decision of the board shall be final." *Id*.

It is important to remember that time served on conditional release does count as time served on the sentence unless the person "absconds" from supervision or receives another sentence. 14 C.S.R. § 80-2.040(2)(B). As with parole, consecutive sentences place an inmate at a disadvantage for conditional release because the first sentence must be served before conditional release is considered for the second sentence. The Board rules state, however, that in this situation "[t]he conditional release terms taken together shall constitute the time to be served on conditional release." 4 C.S.R. § 80-2.040(4).

B. (§28.33) Early Discharge

The Board, with the approval of the Governor, may make a final order discharging the prisoner before the expiration of the full term of the sentence, provided that the prisoner has been on parole or conditional release for at least three years. Section 217.730.2, RSMo Supp. 2004.

Applications for pardons, reprieves, and commutations are referred to the Board for investigation and recommendations. Section 217.800, RSMo 2000.

VI. Revocation Proceedings

A. (§28.34) Due Process Requirements

"The purpose of a probation revocation hearing is to decide whether the judiciary should rescind its granting of grace to lessen the impact of a criminal sentence." *State v. Sapp*, 55 S.W.3d 382, 384 (Mo. App. W.D. 2001).

The leading cases on "what process is due" in proceedings for the revocation of probation or parole are *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Missouri courts recognize these requirements. *Abel v. Wyrick*, 574 S.W.2d 411 (Mo. banc 1978). An excellent discussion of the constitutional law in this area is found in *Ex parte Moore v. Stamps*, 507 S.W.2d 939 (Mo. App. E.D. 1974), *State ex rel. Mack v. Purkett*, 825 S.W.2d 851 (Mo. banc 1992), and *Sapp*, 55 S.W.3d 382.

The due process requirements for probation revocation are substantially the same as those for parole revocation, and they are discussed together. But for a probation violation, a motion must be filed to invoke the court's jurisdiction. *State ex rel. Cochran v. Andrews*, 799 S.W.2d 919 (Mo. App. W.D. 1990). The court in *State ex rel. Connett v. Dickerson*, 833 S.W.2d 471 (Mo. App. S.D. 1992), held that, as long as the probationer is "notified" of the court's intent within the period of probation, the court can proceed to hold a revocation hearing even though a "motion" was not filed until the period of probation had expired.

All offenders should be given a "Red Book" by the probation or parole officer; the Red Book outlines their rights to a preliminary hearing and revocation hearing. This can be found at www.doc.missouri.gov/pdf/Red%20book.pdf.

B. (§28.35) Preliminary Hearing

The revocation process involves both a preliminary hearing and a final hearing. With certain exceptions, and unless waived by the defendant, the minimal due process requirements are as set out by the court in *Ex parte Moore v. Stamps*, 507 S.W.2d 939 (Mo. App. E.D. 1974). They include the following:

- The probationer or parolee "is to be afforded an informal preliminary hearing within a reasonably short period of time after an alleged violation or arrest." *Id*. at 949.

- This preliminary hearing must be held by a probation or parole officer other than the one assigned to the probationer to determine whether there is cause to believe that the probationer has violated one or more conditions of the probation. *See Ex parte Ryan v. Wyrick*, 518 S.W.2d 89 (Mo. App. W.D. 1974). The standard should be a "neutral" officer.

- The probationer or parolee should be given notice that the hearing will take place at a specified date and place and that its purpose is to determine whether there is probable cause to believe a probation violation has been committed.

- The notice should also state the specific probation or parole violations that are alleged to have occurred.

- At the hearing, the probationer or parolee is entitled to appear and speak on the probationer or parolee's own behalf and to bring documentary evidence of persons who may give relevant information to the hearing officer.

- The probationer or parolee is entitled to a "conditional" right to confront adverse witnesses (i.e., if it is reasonable to bring them in).

- At the conclusion of the hearing, the officer must make a written report of the hearing and a summary digest of what transpired and state whether there is sufficient cause to hold the probationer or parolee for a final decision by the Board of Probation and Parole (Board) or court.

- If the officer determines that there is probable cause to hold the probationer or parolee, this is sufficient to warrant continued detention.

- If probable cause is not found, the court or Board is not bound by the determination of the probation officer and may hold an independent hearing under certain conditions.

For parole violation proceedings, the requirements are statutorily set out in § 217.720, RSMo 2000. There are, however, certain exceptions

to the requirement that a preliminary hearing be held, e.g., if the parolee has a new conviction or has absconded. *Brandt v. Percich*, 507 S.W.2d 951, 957 (Mo. App. E.D. 1974); *State ex rel. Carlton v. Haynes*, 552 S.W.2d 710, 714 (Mo. banc 1977).

C. (§28.36) Final Hearing on Revocation

"A violation of the conditions [of probation] in not a criminal offense, and a proceeding to revoke obviously is not a criminal prosecution within the constitutional provisions." *State v. Sapp*, 55 S.W.3d 382, 383 (Mo. App. W.D. 2001) (quoting *State v. Brantley*, 353 S.W.2d 793, 796 (Mo. 1962), and citing *State v. Haynes*, 17 S.W.3d 617 (Mo. App. W.D. 2000)). The purpose of the "hearing is not to determine whether the probationer is guilty of the allegations which may possibly result in revocation of his probation but is for the purpose of determining whether or not termination of probation is 'warranted by the conduct of defendant and the ends of justice.'" *Sapp*, 55 S.W.3d at 383 (quoting *Abell v. State*, 606 S.W.2d 198, 203 (Mo. App. E.D. 1980), *cert. denied,* 451 U.S. 939 (1981) (Dowd, J., dissenting)). Therefore, the following are "minimal due process" requirements generally applied to the final hearing on revocation:

- The final hearing must be held within a reasonably short period after the preliminary hearing except in a situation when a person is serving a new sentence. *Moody v. Daggett*, 429 U.S. 78 (1976). In many jurisdictions, it is considered acceptable practice to wait several months for the hearing.

- Written notice of claimed violations must be provided to the probationer or parolee before the expiration of probation, as well as the date and time of final hearing. See *Stelljes v. State*, 72 S.W.3d 196, 200–01 (Mo. App. W.D. 2002), for an important discussion of what constitutes notice: some "manifestation of an intent to conduct a revocation hearing" before the expiration of the probationary term.

- Before the hearing, evidence must be disclosed to the probationer or parolee in general terms. *See State ex rel. Beaird v. Del Muro,* 98 S.W.3d 902 (Mo. App. W.D. 2003) (notice is required of both the nature of the charges and the evidence to be presented, and lack of this notice cannot be harmless error).

- The probationer or parolee has the right at the hearing to be heard in person, or, if necessary, by counsel, *Abel v. Wyrick*, 574 S.W.2d 411 (Mo. banc 1978), and to present witnesses or documentary evidence, *State ex rel. Boyle v. Sutherland*, 77 S.W.3d 736, 737 (Mo. App. E.D. 2002).

- The probationer or parolee has a qualified right to confront and cross-examine adverse witnesses.

- If probation or parole is revoked, the judge or parole officer must prepare a written statement as to the evidence relied on and the reasons for revoking probation, and the probationer or parolee must be provided a copy of the statement.

- The offender is entitled to be represented by counsel. If the offender cannot afford to hire counsel, counsel will be appointed. If the offer of counsel is waived, the offender must waive this right on the record. *Sutherland,* 77 S.W.3d at 737; *see also Mempa v. Rhay*, 389 U.S. 128 (1967); *Griffin v. State*, 601 S.W.2d 628 (Mo. App. E.D. 1980). Section 600.042.4, RSMo 2000, specifically requires public defenders to "provide legal services to an eligible person . . . [w]ho is detained or charged with a violation of probation or parole."

D. (§28.37) Quantum of Proof and Evidence

"The degree of proof necesary [sic] for parole or probation revocation is less than that required to sustain a criminal conviction. The hearing judge need only be reasonably satisfied that the terms of the parole have been violated . . . ." *State v. Wilhite*, 492 S.W.2d 397, 399 (Mo. App. S.D. 1973); *Ex parte Moore v. Stamps*, 507 S.W.2d 939, 949 (Mo. App. E.D. 1974).

The differences in standards of proof used in revocation hearings as opposed to regular criminal trials are illustrated by *State ex rel. Cooper v. Hutcherson*, 684 S.W.2d 857 (Mo. App. W.D. 1984). In *Hutcherson* the defendant was acquitted of rape by a jury employing the beyond-a-reasonable-doubt standard, but the defendant still had his probation revoked by the court under the preponderance-of-evidence standard.

Some jurisdictions have held that evidence obtained through an unreasonable search and seizure is admissible at a probation revocation hearing even though it would not be admissible at a

normal criminal trial. *United States v. Bazzano*, 712 F.2d 826 (3rd Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648 (E.D. La. 1970), *aff'd*, 438 F.2d 1027 (5th Cir. 1971), *cert. denied*, 404 U.S. 880 (1971).

As to the admission of hearsay evidence, the Supreme Court of Missouri has set out a balancing test for use in determining whether to admit hearsay at parole revocation hearings. Under this test, the parolee's right to confront witnesses is balanced against the grounds asserted by the state for not requiring confrontation. The factors to be considered include:

- an assessment of why the physical presence of the witness is undesirable or impractical;
- whether the hearsay sought to be admitted bears substantial indicia of reliability; and
- whether the parolee challenges the accuracy of the hearsay evidence during the course of the hearing.

State ex rel. Mack v. Purkett, 825 S.W.2d 851 (Mo. banc 1992). The same balancing test should presumably be used in probation violation hearings. An interesting case on this issue is *In re Carson*, 789 S.W.2d 495 (Mo. App. S.D. 1990), in which an unsigned lab report, looking like it had been prepared on a home computer and not stating any particular test performed, was held to be inadmissible hearsay concerning its finding of the presence of cocaine in urine. The court held that the report lacked indicia of reliability.

E. (§28.38) Ruling and Alternatives Available

A finding that violation of probation or parole has occurred does not necessarily mean that the violator will be incarcerated.

In *Gagnon v. Scarpelli*, 411 U.S. 778, 784 (1973), the Court quoted *Morrissey v. Brewer*, 408 U.S. 471, 479–80 (1972), as follows:

> The first step in a revocation decision thus involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?

In *Abel v. Wyrick*, 574 S.W.2d 411, 418 (Mo. banc 1978), the Supreme Court of Missouri relied on this case and further held that, if a

violation has been proved, alternative remedies should be explored before revocation.

Therefore, it is incumbent on a sentencing judge, or the Board in the case of parole, first to determine whether the individual has violated the terms of probation or parole. The decision-maker must then select the appropriate alternative. These alternatives are included in § 559.036, RSMo 2000 (with regard to probation), as follows:

- The court may continue the individual on probation with existing conditions, with or without modifying or enlarging the conditions.

- If the imposition of sentence was previously suspended, the court may impose any sentence available under § 557.011, RSMo 2000, and *then* place the defendant on probation with stated conditions (i.e., change a suspended imposition of sentence to a suspended execution of sentence).

- If the imposition of sentence was previously suspended, the court may revoke the probation and impose a sentence as aforesaid and then order execution of the sentence.

- The court may revoke probation and order that any sentence previously imposed be executed.

In any event, the court now has authority to mitigate any sentence of imprisonment by reducing the prison or jail term by all or part of the time the defendant was on probation. Section 559.036.3. The court, however, is not required to do so, *Wuebbels v. State*, 770 S.W.2d 479 (Mo. App. S.D. 1989), and rarely does so.

On the other hand, time spent on parole before revocation is statutorily required to be credited under § 217.730, RSMo Supp. 2004. See *Roberts v. State*, 742 S.W.2d 633 (Mo. App. E.D. 1988), which discusses the differences between probation and parole in this respect.

F. (§28.39) Post-Revocation Proceedings

In *State v. Wilhite*, 492 S.W.2d 397 (Mo. App. S.D. 1973), the court insisted that the sole question on review of revocation is whether the trial judge abused discretion in ordering revocation without due process. In *Green v. State*, 494 S.W.2d 356 (Mo. banc 1973), the

Supreme Court of Missouri determined that filing a habeas corpus petition and not a Rule 27.26 (now repealed) (or Rule 29.15) motion was the proper method to challenge revocation. Because the revocation of probation is not a final judgment rendered upon an indictment or information, no appeal may be taken from the revocation of probation. *State v. Stewart*, 14 S.W.3d 671 (Mo. App. E.D. 2000) (citing *Boyer v. State*, 646 S.W.2d 388, 388–89 (Mo. App. E.D. 1983), *State v. Henderson,* 750 S.W.2d 507, 516 (Mo. App. W.D. 1988), and *State v. Vansickle*, 774 S.W.2d 583 (Mo. App. E.D. 1989)). *See also Reiter v. Camp*, 518 S.W.2d 82 (Mo. App. W.D. 1974). But in *Brandt v. Percich*, 507 S.W.2d 951 (Mo. App. E.D. 1974), the court discussed possible grounds for review when the trial court gives no reason to the probationer for revocation and no written reasons or findings are filed when revocation occurs. *State v. Camden*, 514 S.W.2d 181 (Mo. App. S.D. 1974), specifically rules out the remedy of direct appeal, and *State v. Wilmoth*, 520 S.W.2d 185 (Mo. App. S.D. 1975), says the court of appeals is without jurisdiction if a direct appeal is filed. *See also State v. Ewing*, 522 S.W.2d 105 (Mo. App. W.D. 1975).

In *Stroder v. State*, 522 S.W.2d 77 (Mo. App. E.D. 1975), and *State v. Madison*, 519 S.W.2d 369 (Mo. App. E.D. 1975), the court decided that a writ of prohibition can also be brought to review the trial court's action, so there is a slight chance for appellate review, but, unfortunately, only on the revocation issue. As indicated by *Ockel v. Riley*, 541 S.W.2d 535 (Mo. banc 1976), the Court will not yet disturb the discretion of the judge on the other alternatives available once grounds for revocation have been established.

But when subject matter jurisdiction is at issue, a direct appeal may be allowed. *Kansas City v. Stricklin*, 428 S.W.2d 721, 724–25 (Mo. banc 1968) ("question of jurisdiction of the subject matter and the sufficiency of the pleadings . . . may be raised at any stage . . . and for the first time in the appellate court").

In habeas corpus proceedings challenging revocation of probation, the burden is on the petitioner to establish that the action of the trial court was arbitrary and a denial of due process. *State v. Gideon*, 510 S.W.2d 190 (Mo. App. S.D. 1974).

VII. (§28.40) Parole Guidelines

SALIENT FACTOR MATRIX

OFFENSE	SENTENCE	11-9 Excellent	8-6 Good	5-3 Fair	2-0 Poor
		(Time ranges shown in months)			
Class C&D	2	4	5-6	8-10	10-16
	3	5-7	8-9	12-15	15-24
	4	7-9	10-12	20-24	24-32
	5	9-11	12-15	25-30	30-40
	6	11-13	14-18	30-36	36-48
	7	13-15	17-21	35-42	42-56
Class A&B	5	20-25	25-30	30-35	35-40
	6	24-30	30-36	36-42	42-48
	7	28-35	35-42	42-49	49-56
	8	32-40	40-48	48-56	56-64
	9	36-45	45-54	54-63	63-72
	10	40-50	50-60	60-70	70-84
	11	44-55	55-66	66-77	77-96
	12	48-60	60-72	72-84	84-108
	13	52-64	64-76	76-88	88-120
	14	56-68	68-80	80-92	92-132
	15	60-72	72-84	84-96	96-144
	16	64-76	76-88	88-100	100-132
	17	68-80	80-92	92-104	104-144
	18	72-84	84-96	96-108	108-156
	19	76-88	88-100	100-112	112-168
	20	80-92	92-104	104-116	116-180
	21	84-96	96-108	108-120	120-192
	22	88-100	100-112	112-124	124-204
	23	92-104	104-116	116-128	128-216
	24	96-108	108-120	120-132	132-228
	25	100-112	112-124	124-136	136-240
	26	104-116	116-128	128-140	140-252
	27	108-120	120-132	132-144	144-264
	28	112-124	124-136	136-148	148-276
	29	116-128	128-140	140-152	152-288
	30	120-132	132-144	144-156	156-300

Computation of Salient Factor Score

Salient Factor Scale

1. Conviction and Confinement Measures

A. No prior convictions = 2
One prior conviction = 1
Two or more prior convictions = 0 _____

B. No prior incarcerations = 2
One prior incarceration = 1
Two or more prior incarcerations = 0 _____

C. Total prior incarceration time does not exceed five (5) years = 1
Prior incarceration time exceeds five (5) years = 0 _____

2. Stability Measures

A. Age at first commitment 18 or older = 1
17 or younger = 0 _____

B. No history of alcohol or drug abuse = 1
Alcohol or drug abuse history = 0 _____

C. Five (5) years conviction free prior to present offense = 1
Conviction within previous five (5) years = 0 _____

3. Performance and Behavior Measures

A. Has never had parole, probation or conditional release revoked = 1
Has had parole, probation or conditional release revoked = 0 _____

B. Has never escaped or attempted to escape = 1
Has escaped or attempted to escape = 0 _____

C. Has had no prior conviction for burglary = 1
Has had prior conviction for burglary = 0 _____

Total Score _____

Randall D. Eggert*

Chapter 29

APPEALS

I. (§29.1) Introduction

II. (§29.2) Direct Appeal

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B. (§29.4) Probation and Parole Actions Not Reviewable by Appeal
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VIII. (§29.14) Scope of Review

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B. (§29.16) Review Under the Plain Error Rule

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C. (§29.17) Appellant's Burden of Persuasion
D. (§29.18) Constitutional Error
E. (§29.19) Abuse of the Trial Court's Discretion

IX. (§29.20) Decision of Court

X. (§29.21) Post-Decision Proceedings

XI. Associate Circuit and Municipal Appeals

A. (§29.22) Associate Circuit Division Appeals
B. (§29.23) Municipal Division Appeals

I. (§29.1) Introduction

The general purpose of an appellate system is to create a superior tribunal that will review and correct, if necessary, the decisions of lower courts. Quite obviously, this works to the advantage of attorneys who are practicing criminal law because it provides clients with a review that is supposed to prevent injustice and protect a defendant from an arbitrary or unfair decision of a jury or judge.

When properly used, appellate courts may provide the only practical form of relief for:

- a defendant who is charged with a particularly volatile or brutal crime;
- a conviction that arose because of a hostile judge or jury; or
- an individual whose innocence rests on a technical interpretation or argument that was denied by the trial court.

Most pretrial motions denied by the trial court, such as those dealing with confessions or search and seizure issues, can only be successfully reversed through appellate procedures.

From another perspective, the decisions of an appellate court can be personally important to an attorney because it often gives the attorney the only opportunity to create exceptions to rules or statutes, establish substantive law, and have rules, statutes, and practices declared unconstitutional. It also provides the attorney with a significant trial asset because many opposing attorneys and even judges tend to handle a case more carefully when they know that the matter is being properly preserved by the defendant's attorney for appellate review.

Conversely, it comes as a great shock to some lawyers when they realize that their faults will be published and read by much of the legal community in the case reporter system if either their trial practice or their appellate practice is condemned by the appellate court.

II. (§29.2) Direct Appeal

Appellate jurisdiction is created through constitutional and statutory provisions, and it can be acquired and exercised only in the manner set forth by law. Appellate review is not an integral part of the legal system, and no defendant can demand an appeal either by due process or any inherent right. *Ex parte Abdu*, 247 U.S. 27 (1918); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The right of an appeal in criminal cases is purely statutory. *State v. Williams*, 871 S.W.2d 450, 452 (Mo. banc 1994); *Stelts v. Stelts* 126 S.W.3d 499 (Mo. App. S.D. 2004). A defendant who fails to invoke the right of appeal in accordance with the applicable statute or rule waives that right and may not later complain of the loss. *State v. Pepper*, 686 S.W.2d 53 (Mo. App. E.D. 1985).

A. (§29.3) Defendant's Right of Appeal

In Missouri, every person who has been found guilty of a crime is entitled to appeal and to have all contentions of error that are properly preserved for appellate review considered and ruled on. Rule 30.01(a); § 547.070, RSMo 2000.

A defendant, however, may waive the right to appeal under certain circumstances. For example, a defendant may waive the right to appeal or to a post-conviction remedy as part of a plea bargain. *State v. Reed*, 968 S.W.2d 246, 247 (Mo. App. E.D. 1998); *State v. Valdez*, 851 S.W.2d 20 (Mo. App. W.D. 1993). A defendant who escapes and remains at large forfeits the right to appeal from either the trial court or the motion court. *Kemper v. State*, 129 S.W.3d 439 (Mo. App. E.D. 2004); *Fogle v. State*, 99 S.W.3d 63, 65 (Mo. App. E.D. 2003). The relevant inquiry for an appellate court applying the escape rule is whether the escape adversely affected the criminal justice system. *State v. Sprester*, 26 S.W.3d 603, 604 (Mo. App. S.D. 2000). The escape rule also applies to any post-conviction relief motions filed by a defendant after the defendant attempts to escape. *Brown v. State*, 23 S.W.3d 930, 932 (Mo. App. S.D. 2000).

A defendant may have an appeal involuntarily dismissed by the appellate court for failure to properly prosecute it in accordance with Rule 30.14. The dismissal may be done on the court's own motion or upon motion of the respondent's attorney. This particular rule, however, does not apply to a defendant who has been sentenced to death. Rule 30.14(c).

In general, a defendant's right to appeal commences at the time that a final order or judgment is entered in the defendant's case. *State v. Ham*, 91 S.W.3d 676 (Mo. App. E.D. 2002). In criminal cases, a judgment is final for purposes of appeal when the judgment and sentence are entered. *Id.* In the average criminal case, the notice of appeal must be filed within ten days after the trial court has overruled the defendant's motion for a new trial and has granted the defendant allocution and entered a final judgment and sentence in accordance with Rules 29.07 and 29.11. Rule 30.03; *State v. Harris*, 863 S.W.2d 699 (Mo. App. S.D. 1993); *State v. Jones*, 477 S.W.2d 729 (Mo. App. E.D. 1972). Other forms of appealable orders include the following:

- A ruling on a motion to set aside a plea of guilty, Rule 29.07(d); *State ex rel. House v. White*, 429 S.W.2d 277 (Mo. App. W.D. 1968)

- A refusal to permit the withdrawal of a plea of guilty, *Hamilton v. State*, 865 S.W.2d 374 (Mo. App. E.D. 1993)

- A ruling denying a motion for *nunc pro tunc* entries correcting recitals in a judgment concerning the defendant's representation by an attorney, *State v. Young*, 235 S.W.2d 369 (Mo. 1950)

- A decision overruling a motion to vacate, set aside, or correct a sentence, *State v. Warren*, 344 S.W.2d 85 (Mo. 1961)

- A ruling on a motion to set aside a plea of guilty in municipal court, *White,* 429 S.W.2d 277

- A *nunc pro tunc* order attempting to add a sentence of imprisonment to a previous judgment of conviction and fine, *City of Ferguson v. Nelson*, 438 S.W.2d 249 (Mo. 1969)

- Denial of a motion to dismiss based on double jeopardy, *Abney v. United States*, 431 U.S. 651 (1977); *United States v. Dixon*, 913 F.2d 1305 (8th Cir. 1990)

Rule 30.01(a) authorizes an appeal only for those judgments that are "final"; therefore, a judgment and sentence must be entered in a criminal case before the appellate court has jurisdiction. *State v. Lynch*, 679 S.W.2d 858 (Mo. banc 1984). Orders that are not appealable include the following:

- A suspended imposition of sentence is not appealable because no sentence has been imposed. *State v. Uka*, 25 S.W.3d 624, 626 (Mo. App. E.D. 2000); *State v. Shambley-Bey*, 989 S.W.2d 681 (Mo. App. E.D. 1999).

- There is no right to appeal from a judgment of criminal contempt; the validity of these contempt judgments is tested by a writ of habeas corpus. *Thornton v. Doyle*, 969 S.W.2d 342 (Mo. App. E.D. 1998).

- There is no right to appeal a decision denying a defendant's petition seeking a reduction in an already imposed sentence; the denial of a petition requesting a reduction under § 558.046, RSMo 2000, is not a "final judgment" for purposes of appeal. *State v. Stout*, 960 S.W.2d 535, 536 (Mo. App. E.D. 1998).

- Rulings on interlocutory motions or preliminary matters are generally not reviewable by direct appeal. *State v. Anderson*, 862 S.W.2d 425 (Mo. App. E.D. 1993); *State v. Ellis*, 853 S.W.2d 440 (Mo. App. E.D. 1993).

Rule 29.07(b)(3) requires that the trial court notify the defendant at the time of sentencing of the right to appeal. Rule 29.08 pertains to death sentences, and Rule 29.11 pertains to after-trial motions for the preservation of error. Rules 29.15(j) and 24.035(j) deal with appeals from motions to vacate sentences.

B. (§29.4) Probation and Parole Actions Not Reviewable by Appeal

A significant area that is denied appellate review deals with probation and parole. A trial court's determination to grant or deny probation is generally not subject to appellate review; nor is any order revoking probation reviewable by direct appeal. *State v. Dunn*, 103 S.W.3d 886, 887 (Mo. App. E.D. 2003); *State v. Stewart*, 14 S.W.3d 671, 672 (Mo. App. E.D. 2000); *Winegar v. State*, 967 S.W.2d 265 (Mo. App. W.D. 1998). The remedy for review in such situations is habeas corpus. *State v. Gideon*, 510 S.W.2d 190 (Mo. App. S.D. 1974). A few cases have suggested that

denial of probation might be reviewed if there is a "showing of extreme abuse of discretion," but no such showing apparently has ever been made in Missouri. *State v. Priesmeyer*, 719 S.W.2d 873 (Mo. App. W.D. 1986); *State v. Keller*, 685 S.W.2d 605 (Mo. App. S.D. 1985).

C. (§29.5) State's Right of Appeal

Rule 30.02 gives the state the power to appeal an interlocutory decision by the trial court in such matters as the dismissal of an information or indictment or the quashing of an arrest warrant, suppression of evidence, or suppression of a confession. Sections 547.200.1 and 547.210, RSMo 2000. The state may also generally appeal any other type of decision except when the possible outcome of the appeal would result in double jeopardy to the defendant. *State v. Burns*, 994 S.W.2d 941, 942 (Mo. banc 1999); § 547.200.2; *see, e.g.*:

- *State v. Hellems*, 13 S.W.3d 302, 304 (Mo. App. E.D. 2000) (in a pretrial proceeding, jeopardy does not attach unless a question of the defendant's guilt or innocence is involved)

- *State v. Burns*, 998 S.W.2d 848, 850 (Mo. App. W.D. 1999) (the state, apart from the interlocutory exceptions listed in § 547.200.1, may only appeal a final judgment, which occurs when a trial court enters an order before trial that has the effect of foreclosing any further prosecution of the defendant on the particular charge)

- *State v. Smith*, 988 S.W.2d 71, 75 (Mo. App. W.D. 1999) (the state may appeal from a trial court's dismissal based on a finding that the state's opening statement was deficient)

- *State v. Morton*, 971 S.W.2d 335, 339 (Mo. App. E.D. 1998) (because the defendant was never sentenced, jeopardy did not attach, and the state could appeal the trial court's dismissal with prejudice of the defendant's case before sentencing)

The state may also appeal a dismissal based on want of a speedy trial. *State v. Brown*, 722 S.W.2d 613 (Mo. App. W.D. 1986).

The rule is strictly enforced against the state. *State v. Beaver*, 697 S.W.2d 573 (Mo. App. E.D. 1985); *State v. Pottinger*, 287 S.W.2d 782 (Mo. 1956). The state, for example, may appeal a decision suppressing evidence but may not complain on appeal of a trial court granting a motion *in limine* that is based on a rule of evidence. *State v. Dwyer*,

847 S.W.2d 102 (Mo. App. W.D. 1992). The ingenious prosecutor, however, may be able to seek additional appellate review in limited areas by using extraordinary writs. *See, e.g.*, *State ex rel. Corcoran v. Buder*, 428 S.W.2d 935 (Mo. App. E.D. 1968).

These extraordinary writs are also available to the defendant and can be used as both a tactical and a practical weapon. Appellate review may be required or advantageous although a final judgment has not been entered in a case. These writs are not usually looked on with great favor by appellate courts, but even the small success rate may prove attractive in certain cases. Included in the extraordinary writs are habeas corpus, mandamus, prohibition, and injunction.

In an appeal by the state on an interlocutory matter, the procedure is governed by Rule 30.02, which slightly modifies the general rules of procedure. For example, the notice of appeal must be filed within 5 days of the entry of the trial court's order. Section 547.200.4; *State v. Taylor*, 965 S.W.2d 257, 260 (Mo. App. E.D. 1998) (the 5-day period under § 547.200.4 began to run after the circuit court's vacation of the original order suppressing evidence and the entry of a new order still suppressing the evidence in the case). The record on appeal must be filed within 15 days of the filing of the notice of appeal in the circuit court, and the appellant's brief must be filed within 30 days of the filing of the record on appeal. The respondent's brief is due within 20 days of the appellant's brief, and a reply brief must be filed within 10 days of the respondent's brief. Rule 30.02(c).

An appeal taken by the state does not stay the operation of the order or judgment in favor of the defendant. Rule 30.17. If the judgment of the trial court is reversed, the defendant is rearrested on a new warrant. This rule does not apply to appeals by the state after a favorable ruling for a defendant in a Rule 24.035 or Rule 29.15 proceeding. In these cases, the defendant remains in custody until final disposition by the appellate court. Rule 30.17.

III. (§29.6) Bail and Execution on Appeal

Any person charged with a bailable offense is entitled to release on appeal until the appellate court has rendered a decision that affirms the trial court's conviction. Rule 33.01. The affirming court, by special order, may allow a defendant to remain on bond after affirmance pending after-affirmance motions—these types of special orders are rarely made.

The court may impose conditions of release during an appeal as authorized by Rule 33. As part of an application for conditional release, the defendant must file a signed and acknowledged application with the circuit clerk with a specific mailing address where all notices in connection with the case can be sent. Rule 30.16. A defendant may elect not to seek release on bond and simply commence service of the sentence pending the appeal.

A person sentenced to death or life imprisonment is not entitled to bond. MO. CONST. art. I, § 20. An appeal, however, does stay a sentence of death. Rule 30.15(a).

Each of the three districts of the court of appeals also has local rules concerning defendants who have been released on bond pending appeal. For example, the Western District requires that the defendant remain in the state of Missouri unless written permission has been obtained from the court. The Eastern District may require that a defendant report to the court on a regular basis. The local rules of each district should be reviewed by appellate counsel.

If the trial court has refused to set bail or if the defendant objects to the conditions of bail, including the amount, that have been set, the defendant may seek review by the appellate court. Rule 33.09(a) and (b). Violations of the conditions of bail by an appellant may be dealt with either by the trial court or by the appellate court. Rule 30.28.

IV. Notice and Form of Appeal

A. (§29.7) Time for Filing Notice

Under Rule 30.01(d), the notice of appeal in a criminal case must be filed within ten days after the judgment or order appealed from becomes final. In a criminal case the sentence is a final judgment. *See*:

- *State v. Nelson*, 9 S.W.3d 687, 688 (Mo. App. E.D. 1999) (the ten-day period for filing a notice of appeal begins to run at the time of imposition of a suspended execution of sentence and not after the defendant's probation has been revoked and the defendant has been incarcerated)

- *State v. Casebolt*, 994 S.W.2d 114, 118 (Mo. App. S.D. 1999) (a new trial order after the guilty verdict became "final" upon entry, thus requiring the state to file the notice of appeal within ten days)

- *State v. Bain*, 982 S.W.2d 706, 707 (Mo. App. E.D. 1998) (a judgment becomes final in a criminal case when the sentence is entered)

The notice of appeal must be accompanied by the filing fee because there can be no valid filing of such notice until the fee has been either paid or waived. *State v. Mitchell*, 128 S.W.3d 518, 519 (Mo. App. W.D. 2003). An indigent defendant may obtain leave of court to waive the filing fee. Rule 30.01(d).

When co-defendants have been jointly tried, they may also join in one appeal, or they may file separately. Rule 30.01(b). If a defendant has been convicted of several charges at the same time but was charged in separate indictments or informations, a separate notice of appeal must be filed for each charge unless the trial court has consolidated them for trial purposes. *State v. Clemmons*, 416 S.W.2d 68 (Mo. 1967).

When the defendant or the state has a right of appeal but the notice of appeal has not been timely filed, the party entitled may apply to the appropriate appellate court for a special order granting that party permission to appeal out of time. Rule 30.03. The application must be made within 12 months from the date of the final judgment. The appellate court, in its discretion, may grant the special order for any reasonable cause shown. Counsel should note, however, that the state has only 5 days in which to appeal an interlocutory matter, and this apparently will not be waived by the appellate courts. *State v. Beaver*, 697 S.W.2d 573 (Mo. App. E.D. 1985).

Another alternative when counsel has failed to file a timely notice of appeal is noted in *Jones v. State*, 445 S.W.2d 311 (Mo. 1969). In *Jones,* the defendant, after receiving a life sentence, requested his trial attorney to file an appeal, but the attorney decided on his own not to do so. Thirteen years after the original sentencing, the Supreme Court approved the filing of a post-conviction motion (then under Rule 27.26) to vacate the sentence. The trial court properly set aside the original sentence and re-sentenced the defendant in the post-conviction proceeding, and a timely appeal was filed from it. *See also State v. Stubblefield*, 996 S.W.2d 103, 108 (Mo. App. E.D. 1999) (writ of habeas corpus appropriate remedy if the defendant's counsel effectively abandons the defendant and fails to file the notice of appeal within ten days; the remedy under habeas corpus is to vacate the defendant's sentence and remand the case to the trial court for re-sentencing with the time for appeal to run from the date of the re-sentencing).

As a general rule, however, there can be no valid appeal when there has been an untimely notice of appeal, so the appellate court lacks jurisdiction to hear the matter. *State v. Parker*, 310 S.W.2d 923 (Mo. 1958); *State v. Morse*, 526 S.W.2d 432 (Mo. App. S.D. 1975); *Hagen v. Perryville Bd. of Aldermen*, 550 S.W.2d 797 (Mo. App. W.D. 1977).

B. (§29.8) Appointed Counsel on Appeal

Under Rule 31.02(c), an indigent defendant is entitled to an attorney on appeal just as that defendant was entitled to representation at the trial court level. *See also* § 600.042.3 and .4(1) and (2), RSMo 2000. The attorney may be the same person who represented the defendant during the trial or other counsel as selected at the discretion of the trial court.

Appointed counsel who has handled the trial matter, for good cause shown, may be permitted to withdraw while the case is pending either in the trial court or the appellate court. This counsel is required, however, to at least complete the mechanical aspects of filing the motion to proceed *in forma pauperis*, the affidavit and order to appeal *in forma pauperis*, the notice of appeal, and the motion to withdraw as counsel. Unless another attorney is appointed immediately, the trial counsel has a continuing obligation to order the transcript and to perfect the appeal until formally relieved of that responsibility by the trial or appellate court. If the trial court has approved the motion to appeal *in forma pauperis*, a copy of the court's order should be attached to the notice of appeal, and the court of appeals will then waive the filing fee.

C. (§29.9) Contents of Notice

The notice of appeal should be in the form of Supreme Court Form 8-A, Notice of Appeal, or 8-B, Unemployment Compensation Notice of Appeal, whichever is appropriate. At least two districts of the court of appeals require a supplemental document as well. The Western District requires an additional Criminal Case Information Form to be filed with the notice of appeal. Western District Special Rule XIV. The Eastern District requires the filing of additional documentation either at the time of the notice of appeal or within seven days after that. Eastern District Local Rule 300. Counsel should check the applicable local rules to determine the current requirements.

As a general rule, the notice of appeal will be construed relatively broadly and will confer jurisdiction on the appropriate appellate court. Typographical errors will not usually invalidate it if its contents are otherwise clear. For example, the notice of appeal may not necessarily be

invalid simply because the caption that was used showed the parties in reverse order. *State v. Todd*, 433 S.W.2d 550 (Mo. 1968), *cert. denied*, 394 U.S. 910 (1969). A typographical error concerning the nature of the crime for which the defendant was convicted also may be accepted by the court. *State v. Perkins*, 543 S.W.2d 805 (Mo. App. W.D. 1976). Counsel cannot rely on the indulgence of the court of appeals, however, concerning defects in the notice of appeal. *Id.* An excellent example of this occurred in *State v. Snider*, 536 S.W.2d 516 (Mo. App. S.D. 1976), in which the Court of Appeals for the Southern District dismissed an appeal when the defendant's notice referred to the "Circuit Court of Appeals."

If the death penalty has been imposed, notification of the filing of the notice of appeal must also be filed by mail with the Director of the Department of Corrections and Human Resources. Rule 30.01(i).

Rule 30.03 authorizes the filing of a notice of appeal out of time by either the defendant or the state, when they have the right to appeal, if, within 12 months after the judgment becomes final, a motion for leave to file the notice is filed and sustained in the appropriate appellate court. The granting of such an order is discretionary and will only be for good cause shown. The order granting such leave must specify the time within which the notice of appeal must be filed with the trial court. *Id.* If the leave is granted, the procedure for filing a notice of appeal must be complied with.

D. (§29.10) Appellate Jurisdiction

As noted earlier, the right of appeal must be exercised in compliance with the appropriate statutes, and no court is allowed to hear an appellate case when it has not been specifically granted jurisdiction. Appellate jurisdiction in Missouri is governed by MO. CONST. art. V, §§ 3 and 4. In general, the court of appeals has appellate jurisdiction in all cases except for those few within the exclusive jurisdiction of the Supreme Court of Missouri. Article V, § 3, of the Missouri Constitution grants jurisdiction to the Supreme Court of Missouri in those cases "where the punishment imposed is death." The Supreme Court hears death cases under the first degree murder statute. Section 565.020, RSMo 2000. See also Rule 30.18, which requires that all death penalty cases be heard en banc. The Supreme Court may also hear and decide a criminal case under the authority of MO. CONST. art. V, § 10, or for those reasons stated in *Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 196 (Mo. banc 1972); s*ee also State v. Richardson*, 515 S.W.2d 557 (Mo. banc 1974).

The Supreme Court has exclusive appellate jurisdiction in other areas related to criminal law, including any attack on the construction of the Missouri Constitution or the validity of any statute of the United States or authority exercised under the laws of the United States. MO. CONST. art. V, § 3.

If an appeal is taken to the Supreme Court under its original appellate jurisdiction, the notice of appeal or a separate jurisdictional statement must be filed within ten days and contain a concise explanation showing that jurisdiction is properly vested. Rule 30.01(f) and (g). If an appeal has been taken to the wrong appellate court, the appeal will be transferred to the proper court. MO. CONST. art. V, § 11; § 477.080, RSMo 2000. If a case has been improperly appealed or transferred by the court of appeals to the Supreme Court of Missouri, the Supreme Court nonetheless may hear the matter at its discretion based on judicial economy. *See Richardson,* 515 S.W.2d 557.

The primary problem posed in deciding in which appellate court to raise a constitutional question is whether the constitutionality of the statute or rule being challenged is based on its construction or on its application. *See, e.g.*, *Caesar's Health Club v. St. Louis County*, 565 S.W.2d 783 (Mo. App. E.D. 1978); *City of Florissant v. Rouillard*, 495 S.W.2d 418 (Mo. 1973). The Supreme Court will hear an attack on the construction of a statute but not necessarily on its application in a particular case. The Court's approach has been spelled out in *State v. Higgins*, 592 S.W.2d 151 (Mo. banc 1979), in which the Court considered a defendant's challenge to Missouri's mandatory life sentence for a first degree murder conviction. The Court rejected the Eighth Amendment claim on its jurisdiction by ruling that the decision would involve only the application of previously well-settled constitutional principles and not the actual construction of either the Missouri or the United States Constitution.

There are three districts of the Missouri Court of Appeals:

1. The Eastern District located in St. Louis
2. The Southern District located in Springfield
3. The Western District located in Kansas City

Each court handles the general appellate cases within its geographic area as assigned by the Supreme Court of Missouri. If any doubt exists concerning the appropriate court, counsel may check either with the clerk of the nearest district or with the circuit court where the matter was tried.

Although an appeal has been lodged in a particular court of appeals, the matter may still be transferred to the Supreme Court under MO. CONST. art. V, § 10. The Supreme Court may order a transfer, either before or after an opinion, because the case contains a question of general interest or importance or for the purpose of reexamining the existing law under the appropriate Supreme Court rule, or for any other reason provided by law. Rule 83.01. The court of appeals may also order the transfer of a case, after the issuance of an opinion, by the order of a majority of the participating judges. Rule 83.02. A case pending in the court of appeals can also be transferred when a participating judge dissents from the majority opinion and certifies that the opinion is contrary to any previous decision of the Supreme Court or of a court of appeals. Rule 83.03. A party may also request a transfer after an opinion has been filed in the court of appeals if the party's application for transfer filed with the court of appeals under Rule 83.02 has been denied. Rule 83.04.

V. (§29.11) Appellate Record

Because it is not a trial court, the appellate court must make its decision based on the transcript and record in the trial court as supplemented by the briefs and oral arguments of counsel. For this reason, it is extremely important that a transcript and legal file be properly completed and filed with the court. The court must take the record as it finds it, and it cannot speculate or guess on matters that are not before it. *State v. Cantrell*, 403 S.W.2d 647 (Mo. 1966); *City of Hannibal v. Winchester*, 360 S.W.2d 371 (Mo. App. E.D. 1962); *Garrett v. State*, 486 S.W.2d 272 (Mo. 1972).

Rule 30.04 requires that every appellant file a record on appeal with the appellate court involved. It is the duty of the appellant to ensure that all of the necessary documentation has been filed with the court. *State v. Cotton*, 32 S.W.3d 577, 579 (Mo. App. W.D. 2000) (it is the appellant's responsibility to provide the requisite record on appeal, which includes the transcript of the hearing from which the appellant appeals; if the appellant fails to provide the transcript, the appeals court must dismiss the appeal). For example, if the appeal contains a question concerning search and seizure, the record on appeal must contain a copy of the motion to suppress, the transcript of the evidentiary hearing, and a copy of the court's ruling. *State v. Hardin*, 21 S.W.2d 758 (Mo. banc 1929); *State v. Anderson*, 384 S.W.2d 591 (Mo. banc 1964); *State v. Campbell*, 465 S.W.2d 474 (Mo. 1971). A challenge to the jury selection process requires a transcript of the voir dire, the objections made, and the court's ruling. *State v. Crow*, 487 S.W.2d 461 (Mo. 1972).

The transcript should be ordered from the court reporter within 30 days after the filing of the notice of appeal, and a copy of the request should be filed with the clerk of the appellate court and served on the respondent. Rule 30.04(c). Unless the court has approved the appeal *in forma pauperis*, the court reporter will probably require a payment as a deposit for the transcript. The transcript must be certified by the court reporter as a true and accurate reproduction of the proceedings unless the parties agree in writing that the transcript is true and accurate. Rule 30.04(g). If there is a dispute regarding the accuracy or completeness of the transcript or record, the appellate court may order the correction or addition, or it may be corrected by stipulation. Rule 30.04(h).

If the trial proceedings were before an associate circuit judge, they were probably tape recorded rather than recorded by a court reporter. Upon receipt of the request for a transcript, the clerk of the court is required to forward the tape to the appellate court, which will arrange for a transcript to be prepared. Section 543.335, RSMo 2000.

The appellant must also order the legal file from the clerk of the trial court, who must certify its accuracy also, absent a stipulation between the parties. Rule 30.04(g). The transcript must be filed within 90 days from the date of the notice of appeal unless extended under Rules 81.19 and 30.04(f). A copy of the transcript and the index of the legal file should be filed with the clerk of the circuit court from which the appeal came. Rule 30.04(f). The respondent may file supplemented portions within the time the respondent's brief may be filed. Rule 30.04(c).

The contents of the transcript and legal file are set forth in Rule 30.04. The form of the record is set forth in Rule 30.04(d) and (e). The parties may stipulate that any part of the original exhibits may be omitted from the transcript and be separately filed with the appellate court. Rule 30.05. Exhibits must be properly packaged and filed or deposited with the court on or before the day that the case is set for hearing unless the clerk orders them filed earlier. Any such exhibits should be promptly removed from the custody of the clerk after the case has been finally decided. Rule 30.05; *see also* Rule 81.15.

In limited matters in which questions presented on appeal can be determined without a transcript, the parties may agree in writing to an abbreviated record, which may be in a narrative form. Rule 30.04(a).

An excellent discussion on the form and content of the appellate record on appeal is contained in MO. APPELLATE COURT PRACTICE (MoBar 5th ed. 2002). In essence, the record on appeal should contain all of the pleadings, motions, hearings, and judgments or decisions rendered by the trial court that the appellant seeks to have reviewed. Records in criminal cases will generally follow those in civil matters, but Rule 30.04(a) specifically requires that the criminal legal file must contain the:

- indictment or information;
- arraignment or waiver;
- plea;
- fact of the defendant's presence at trial;
- verdict;
- allocution;
- after-trial motion, if any, and the ruling on it;
- judgment;
- sentence; and
- notice of appeal.

VI. (§29.12) Briefs

The rules concerning the drafting and filing of criminal appeal briefs are found in Rules 30.06, 84.04, 84.05, and 84.06. These rules set out the essential requirements of criminal briefs for appellate purposes. Rule 84.04 notes that the appellant's brief must contain:

- a concise jurisdictional statement;
- a statement of facts;
- the points relied on; and
- an argument that follows the order of the points.

The respondent's brief should contain essentially the same matters, although the respondent is encouraged to adopt the appellant's statement of facts or correct any errors in them. *See Columbo v. Buford*, 935 S.W.2d 690, 692 (Mo. App. W.D. 1996) (discussing Rule 84.04(f)). Rule 84.04(i) notes that transcript and legal file references by page should be included, and Rule 84.06(b) sets forth certain page limitations.

Within 60 days after the record on appeal is filed, the appellant's brief is due. Ten copies must be filed with the court, and two copies must be served on opposing counsel. In a felony case, opposing counsel is the Attorney General. The respondent's brief is due within 30 days after the

filing of the appellant's brief. The court may either shorten or lengthen the periods set forth in Rule 84.05(a).

Rule 84.06 concerns the specific form of the brief to be filed. Rule 84.06(a) requires that the brief be on 8½ by 11 inch paper, be typed on one side, and comport to specific paper weight and page margins. Rule 84.06(b) requires that appellant briefs be no more than 31,000 words or 2,200 lines of text; the respondent's brief may not exceed 90% of the appellant's limits, and the reply brief may not exceed 25%. Rule 84.06(c) requires the lawyer or person acting pro se to certify that the brief comports to the requirements of Rules 55.03 and 84.06(b). If a person is unable to prepare a brief by computer software to submit to the court, the court will accept a commercially printed brief if it comports to the requirements of Rule 84.06(d). An indigent person may submit a typewritten brief under Rule 84.06(e).

Under Rule 84.06(f), the covers of the briefs and other documents should be in the following colors:

Court of Appeals:

- Appellant's Brief—White
- Respondent's Brief—Gray
- Second Briefs of Appellants in Cross Appeals—Light Brown
- Reply Briefs—Light Orange
- Amicus Curiae Briefs—Light Red

Supreme Court:

- Appellant's Brief—Light Blue
- Respondent's Brief—Cream or Buff
- Second Briefs of Appellants in Cross Appeals—Light Purple
- Reply Briefs—Yellow
- Amicus Curiae Briefs—Green

If a brief is prepared using a computer format as required by Rule 84.06(a), the parties must also file a floppy disk under Rule 84.06(g). Briefs may also be filed by electronic mail under Rule 84.06(h).

The failure of the appellant to comply with the rules may result in an outright dismissal of the appeal or the court's refusal to consider the particular point raised. *See*:

- *Kansas City v. Garza*, 493 S.W.2d 659 (Mo. App. W.D. 1973)
- *State v. Miceli*, 549 S.W.2d 113, 117 (Mo. App. E.D. 1977)
- *Riley v. State*, 545 S.W.2d 711 (Mo. App. S.D. 1976)
- *State v. Dennison*, 428 S.W.2d 573, 579 (Mo. 1968)
- *State v. Velas*, 537 S.W.2d 881 (Mo. App. S.D. 1976)

Rule 30.14 provides that, if the party fails to take further steps to secure review after filing a notice of appeal, the case may be placed on a dismissal docket and subsequently dismissed if the appellant fails to remedy the default after notice. The attorney for the state may file a motion requesting that the judgment of the trial court be affirmed if the matter has been placed on the dismissal docket. The rule does not apply in death cases. Rule 30.14(c).

The filing of exhibits is covered by Rule 30.05. Essential exhibits must be filed with the appellate court on or before the day of argument, or they will be considered immaterial. If the case is submitted to the court without oral arguments, the exhibits may be submitted within five days of submission of the case. Each of the districts of the court of appeals may have local rules concerning the filing of exhibits with the court. For example, the Western District requires that exhibits be submitted in one envelope with the number and style of the case on the front with an index and certification by the attorney. Therefore, a check of the local rules of the applicable district is required.

If the appellant intends to argue the objectionable nature of an exhibit, the exhibit must be submitted for an independent review by the court. For example, if the appellant is claiming that a photograph was prejudicial, the photograph must be submitted to the appellate court as an exhibit. Failure to do so results in a waiver of the objection. *State v. Hendrix*, 454 S.W.2d 40 (Mo. 1970).

The appellant will also need to review the local rules concerning oral argument because the appellant's brief may require a notation concerning it. For example, the Southern District requires that a party seeking oral argument must notify the opponent and must either note the request on the cover of the brief or file a separate pleading requesting the argument.

VII. (§29.13) Oral Argument

Oral argument provides attorneys an opportunity to highlight and enhance the points raised in the brief before the court of appeals. The benefits of oral argument include the following:

- Many individuals, even judges, learn more easily and quickly from an oral presentation than a written one. Oral arguments, therefore, give some judges a better understanding of a case, particularly when the point is unusually sophisticated or complicated.

- Oral arguments allow a judge to eliminate any confusion or questions that the judge might have concerning the case. Such questions might involve either ambiguous or confusing points or areas on which the record is incomplete.

- When arguing before the court, an attorney often can sense or be directed to those areas of the attorney's appeal that are of particular interest to the court. These matters can then be emphasized personally, and the opponent's objections to that particular area can be more directly confronted.

- Most appellate courts take a tentative vote at the conclusion of oral arguments. The personal presentation by an attorney gives that attorney an advantage at the time of the vote because the attorney's presentation is quite fresh and, the attorney hopes, has left the court with a favorable impression.

- In a few cases, the appellate court can be impressed by the attorney's personal urgency. The cold, hard facts of the record can be brought to life through the efforts of a skillful attorney, and the issues or the individuals contained in the case may gain greater consideration by the judge who is writing the opinion.

Counsel on appeal must always remember that the judges who hear oral arguments are as human and as susceptible to persuasion as the members of a jury at the trial level. Certainly, therefore, appellate attorneys should never fail to use their persuasive talents to their greatest extent.

In essence, therefore, counsel should never turn down the opportunity to orally argue the case to the appellate court and should be as thoroughly prepared for the oral argument as for the jury trial.

See Rule 30.19, Rule 84.12, and the local rules of the three districts of the court of appeals for time limits on oral argument.

Oral argument, however, may be waived by both parties with the consent of the court.

VIII. (§29.14) Scope of Review

Under Rule 84.04(d) and Rule 84.13(b), the appellant has the burden of stating the legal reasons for the claim of reversible error, which is error that materially affected the merits of the action. Failure to comply with Rule 30.06(c) will lead to possible dismissal of the appeal or the application of plain error review. Rule 84.14; *see*:

- *State v. Cella*, 32 S.W.3d 114, 119 (Mo. banc 2000)
- *State v. Evans*, 992 S.W.2d 275, 285 (Mo. App. S.D. 1999)
- *State v. Boyle*, 970 S.W.2d 835, 836 (Mo. App. E.D. 1998) (the appellate court has no duty to resort to the argument section of the appellant's brief to ascertain wherein and why the appellant is claiming the trial court erred)
- *State v. Dodd*, 944 S.W.2d 584, 587 (Mo. App. S.D. 1997)

Generally, appellate review of a trial court decision requires the reviewing court to defer to the trial court's factual findings and credibility determinations but to examine questions of law de novo. *State v. Werner*, 9 S.W.3d 590, 595 (Mo. banc 2000). Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings and conclusions of the motion court are clearly erroneous. *Green v. State*, 32 S.W.3d 208, 210 (Mo. App. S.D. 2000). A trial court's ruling on a motion to suppress is reversed only if it is clearly erroneous. *State v. Tackett*, 12 S.W.3d 332, 336 (Mo. App. W.D. 2000). A finding is clearly erroneous when the reviewing court, after a review of the entire record, is left with the definite and firm impression that a mistake has been made. *Peet v. State*, 22 S.W.3d 792, 794 (Mo. App. S.D. 2000). Concerning the review of a suppression ruling, the appellate court is limited to determining whether there was sufficient evidence to support the ruling. *State v. Hamilton*, 8 S.W.3d 132, 135–36 (Mo. App. S.D. 1999). Because the appellate court acts as a reviewing court, the burden of persuasion is different from that at trial. In most situations, the appellate court will examine the evidence in the light most favorable to the state, and the appellant must persuade the court of the error. *State v. Johnson*, 447 S.W.2d 285 (Mo. 1969); *State v. Adams*, 537 S.W.2d 201 (Mo. App. S.D. 1976); *State v. Oldham*, 546 S.W.2d 766 (Mo. App. W.D. 1977).

The appellate courts have been reluctant to describe precisely the burden of persuasion that the appellant must carry and choose, instead talking in terms of "unfairness," "prejudice," and "heavy burden of proof." *State v. Nolan*, 499 S.W.2d 240 (Mo. App. E.D. 1973); *State v. Leady*, 543 S.W.2d 788 (Mo. App. E.D. 1976); *State v. Gibson*, 502 S.W.2d 310 (Mo. 1973); *State v. Belleville*, 530 S.W.2d 392 (Mo. App. E.D. 1975). There is a presumption that errors during a criminal trial are prejudicial. *State v. Spencer*, 472 S.W.2d 404 (Mo. 1971); *State v. Allen*, 246 S.W. 946 (Mo. 1922). The courts, however, regularly find that the error was harmless or that it was an error without prejudice. *State v. Smith*, 477 S.W.2d 67 (Mo. 1972).

The appellate courts will also look most closely at the appellant's position in the matter and determine whether the appellant has standing to complain of the alleged error. This often can be viewed in several ways, including whether:

- the appellant was materially affected by the error;
- the appellant is estopped to complain of the error on appeal because of the appellant's action or inaction; or
- the appellant is raising inconsistent theories that do not conform to the evidence or to innocence.

The appellate courts set the following general precedents:

- It is basic law that an individual cannot complain on appeal of an error of that individual's own making. *State v. Nenninger*, 188 S.W.2d 56 (Mo. 1945); *State v. Rice*, 522 S.W.2d 656 (Mo. App. E.D. 1975); *State v. Crocker*, 275 S.W.2d 293 (Mo. 1955).

- An appellant cannot complain of action that was taken by agreement of all the parties. *State v. McVey*, 66 S.W.2d 857 (Mo. 1933); *State v. Ball*, 14 S.W.2d 638 (Mo. 1928); *Vidauri v. State*, 515 S.W.2d 562 (Mo. 1974).

- Instructions are often cited as error on appeal, and the law is well settled that a defendant cannot claim error when the instructions are given at the defendant's request. *State v. Swiney*, 296 S.W.2d 112 (Mo. 1956); *State v. Falbo*, 333 S.W.2d 279 (Mo. 1960); *State v. Crockett*, 419 S.W.2d 22 (Mo. 1967). Only the Supreme Court can declare that a MAI-CR instruction is erroneous, defective, or inadequate. *State v. Lindsey*, 630 S.W.2d 191 (Mo. App. S.D. 1982).

- A defendant may also waive evidentiary objections when the defendant has introduced evidence, such as hearsay, that is subsequently rebutted by the state. *State v. Nimrod*, 484 S.W.2d 475 (Mo. 1972); *Robertson v. State*, 464 S.W.2d 15 (Mo. 1971); *State v. Paige*, 446 S.W.2d 798 (Mo. 1969).

- A motion for new trial is essential to preserve any matter other than "plain error" for appellate review, and the court generally will not consider arguments unless presented to the trial court in such a motion. *State v. McMillan*, 593 S.W.2d 629 (Mo. App. S.D. 1980); *see also* Rule 29.11. The allegation in the motion for new trial must be on the same theory as the objection made at trial. *State v. Cheek*, 760 S.W.2d 162, 164 (Mo. App. S.D. 1988).

- If the defendant has received concurrent sentences, the appellate court may decline to review an error in a multi-count conviction that would affect only one of the counts and not affect the sentence imposed. *State v. Spicuzza*, 806 S.W.2d 719 (Mo. App. E.D. 1991); *State v. Supinski*, 779 S.W.2d 258 (Mo. App. W.D. 1989).

- An error may be deemed harmless or not prejudicial when the evidence of guilt is great and the defendant would have been convicted anyway. *State v. Degraffenreid*, 477 S.W.2d 57 (Mo. banc 1972).

- Errors that are beneficial to a defendant will be disregarded by the appellate court. *State v. W___ F. W___*, 721 S.W.2d 145 (Mo. App. S.D. 1986).

- Arguments that a particular sentence was too long or that the trial court abused its discretion as to sentencing generally are rejected as long as the sentence is within the statutory bounds. *State v. Gaye*, 532 S.W.2d 783 (Mo. App. E.D. 1975).

- In matters that are within the trial court's discretion, the appellant must make a "very strong showing" that the discretion was clearly abused. *State v. Ball*, 529 S.W.2d 901 (Mo. App. E.D. 1975); *State v. Cuckovich*, 485 S.W.2d 16 (Mo. banc 1972).

A. (§29.15) Preservation of Error for Appellate Review

An appellant who has failed to preserve the appellant's point or who has improperly done so will probably lack the prerequisites to assert that matter on appeal. The reviewing court will not consider on appeal matters that have been neither properly preserved nor properly presented for appellate review. Rule 30.20; *State v. Williams*, 521 S.W.2d 29 (Mo. App. E.D. 1975).

Some of the more common errors that have been improperly preserved for appellate review include the following:

- Alleged restriction in voir dire examination or improper examination cannot be reviewed when the transcript does not contain the examination itself. *State v. Crow*, 487 S.W.2d 461 (Mo. 1972); *State v. Ross*, 502 S.W.2d 241 (Mo. 1973); *State v. McCoy*, 458 S.W.2d 356 (Mo. 1970); *State v. Paige*, 446 S.W.2d 798 (Mo. 1969).

- Claims of prejudice or systematic exclusion of minorities from jury panels requires an excellent record and probably an evidentiary hearing as well. *State v. Aikens*, 507 S.W.2d 386 (Mo. 1974); *State v. Wallace*, 504 S.W.2d 67 (Mo. 1973); *State v. Brown*, 527 S.W.2d 15 (Mo. App. W.D. 1975).

- The defendant's request for a preliminary hearing or that the matter be remanded because of procedural problems at the preliminary hearing must be asserted before arraignment in circuit court. *State v. Brinkley*, 189 S.W.2d 314 (Mo. 1945); *State v. Caffey*, 438 S.W.2d 167 (Mo. 1969).

- Errors in oral argument will not be reviewed when the transcript does not include the argument so as to allow the appellate court to review it. *State v. Pryor*, 525 S.W.2d 413 (Mo. App. W.D. 1975); *State v. Gordon*, 527 S.W.2d 6 (Mo. App. W.D. 1975); *State v. Taylor*, 486 S.W.2d 239 (Mo. 1972).

- Exhibits that an appellant argues are objectionable must be filed with the appellate court for its own examination. *State v. Hendrix*, 454 S.W.2d 40 (Mo. 1970); *State v. Davis*, 515 S.W.2d 181 (Mo. App. W.D. 1974); Rule 30.05.

- If the appellant objects to the improper exclusion of evidence, a complete record must have been made in the trial court by means of an offer of proof setting out the nature of the evidence, its relevancy, and its materiality. *State v. Bibee*, 496 S.W.2d 305 (Mo. App. S.D. 1973); *State v. Johnson*, 485 S.W.2d 106 (Mo. 1972).

- The trial court's hostility, misconduct, or arguments must be included in the record, either by testimony or by the statements of counsel. *State v. Neal*, 476 S.W.2d 547 (Mo. banc 1972); *State v. Abbott*, 236 S.W.2d 592 (Mo. 1951); *State v. Weidlich*, 269 S.W.2d 69 (Mo. 1954).

- Any motion to suppress evidence or quash warrants must be included in the record along with a transcript of the evidentiary hearing held on the motion. *State v. Hardin*, 21 S.W.2d 758 (Mo. banc 1929); *State v. Anderson*, 384 S.W.2d 591 (Mo. banc 1964); *State v. Campbell*, 465 S.W.2d 474 (Mo. 1971).

- Deviation from the approved MAI-CR instruction raises a presumption of error, but both the MAI instruction and the given instruction must be included in the argument portion of the brief. *State v. Clifton*, 549 S.W.2d 891 (Mo. App. E.D. 1977); *State v. Thomas*, 526 S.W.2d 393 (Mo. App. W.D. 1975).

- A failure to timely request a hearing on a motion to suppress the evidence precludes consideration of the motion on appeal. *State v. Boyd*, 615 S.W.2d 436 (Mo. App. E.D. 1981). The defendant must also renew the motion by objection when the questioned evidence is introduced. *State v. Powers*, 613 S.W.2d 955 (Mo. App. S.D. 1981).

Perhaps the best rule of thumb that can be utilized by the appellate attorney is to review whether the objection to the evidence or error was:

- made at the earliest opportunity;
- renewed as necessary during the course of the trial; and
- preserved in the appellant's motion for new trial.

State v. Pennington, 24 S.W.3d 185, 188 (Mo. App. W.D. 2000) (claims of error not presented in a motion for a new trial are not preserved for appellate review); *State v. Parnell*, 21 S.W.3d 896, 900 (Mo. App. S.D. 2000) (failure to object at the earliest opportunity to the admission of evidence constitutes a waiver of the contention and allows for only plain

error review). A defect at any point in the proceedings may be fatal to the appellant's contention. *State v. Yowell*, 513 S.W.2d 397 (Mo. banc 1974); *State v. Brayfield*, 540 S.W.2d 233 (Mo. App. S.D. 1976).

B. (§29.16) Review Under the Plain Error Rule

The "plain error rule," which refers to Rules 29.12(b) and 30.20 together, is the single greatest tool that an appellate attorney has to overcome an improper or insufficient record before the trial court. An appellant who can show that the error complained of resulted in a "manifest injustice or miscarriage of justice" may properly have the point considered by the appellate court, although not raised or preserved for review or defectively raised or preserved.

Courts have made clear that the plain error rule should be used sparingly and that it does not justify a review of every trial error that has not been properly preserved for appellate review. *See*:

- *State v. Knese*, 985 S.W.2d 759, 770 (Mo. banc 1999)
- *State v. Bolds*, 11 S.W.3d 633, 638 (Mo. App. E.D. 1999)
- *State v. Evans*, 992 S.W.2d 275, 286 (Mo. App. S.D. 1999)
- *State v. Hudson*, 950 S.W.2d 543, 547 (Mo. App. W.D. 1997)

Under Rule 30.20, the appellate court will consider any allegation of error concerning the sufficiency of the information or indictment, verdict, judgment, or sentence, regardless of whether it was raised in the trial court or even properly preserved for review at the appellate level. Rules 29.12(b) and 30.20 both require a sound, substantial manifestation and a strong, clear showing that injustice or a miscarriage of justice will result. *See*:

- *State v. Wendell*, 542 S.W.2d 339 (Mo. App. S.D. 1976)
- *State v. Smothers*, 518 S.W.2d 187 (Mo. App. W.D. 1974)
- *State v. Howard*, 540 S.W.2d 86 (Mo. banc 1976)

The appellate court is more likely to invoke the plain error rule when there is a close evidentiary question or when the guilt of the defendant may be in doubt. *State v. Stockbridge*, 549 S.W.2d 648 (Mo. App. W.D. 1977); *State v. Potter*, 530 S.W.2d 268 (Mo. App. S.D. 1975). When guilt has been established by overwhelming evidence, it is extremely difficult to convince the appellate court that an injustice or miscarriage of justice has been committed. *Wendell,* 542 S.W.2d 339; *State v. Hurtt*, 509 S.W.2d 14 (Mo. 1974).

Cases in which the rule has been successfully argued include the following:

- Ineffective counsel was found when the court-appointed lawyer withdrew without having filed a motion for a new trial and subsequent counsel was not appointed until after the time had expired. *Nicholson v. State*, 524 S.W.2d 106 (Mo. banc 1975).

- The sufficiency of evidence can always be challenged under the plain error rule. *Potter,* 530 S.W.2d 268; *State ex rel. Ryan v. Holt*, 499 S.W.2d 821 (Mo. App. E.D. 1973); *State v. White*, 439 S.W.2d 752 (Mo. 1969).

- Admission of an officer's testimony relating to an exculpatory statement by a defendant during interrogation not preceded by *Miranda* warnings would be considered under the plain error rule not withstanding the failure to object. *State v. Martin*, 433 S.W.2d 565 (Mo. 1968).

- When evidence supports an asserted defense or a lesser-included offense, the trial court's failure to properly instruct on the issue constitutes plain error. *State v. Sturgell*, 530 S.W.2d 737 (Mo. App. E.D. 1975). But see *State v. Olson*, 636 S.W.2d 318 (Mo. banc 1983), which requires that a party must have requested such instruction.

- An improper comment by the state on the defendant's silence to accusations made by an alleged accomplice was plain error, although an objection was not properly made. *State v. Tomlin*, 542 S.W.2d 794 (Mo. App. S.D. 1976).

- The trial court's comment on the defendant's refused opportunity to take the witness stand resulted in a manifest injustice in *Howard,* 540 S.W.2d 86.

- The state's constant reference in closing argument to the defendant as a professional car thief and branding the defendant as a criminal when the defendant was not shown to have a prior criminal record required the invoking of the plain error rule. *Stockbridge,* 549 S.W.2d 648.

- The denial of a constitutional right to representation and legal counsel at critical stages of a proceeding may constitute plain error. *State v. Williams*, 419 S.W.2d 49 (Mo. 1967).

- The introduction of a confession that was obtained in clear violation of constitutional rights may be plain error that affects substantial rights. *State v. Beasley*, 404 S.W.2d 689 (Mo. 1966); *State v. Rapp*, 412 S.W.2d 120, 124 (Mo. 1967).

- An instruction that places the burden on the defendant to prove self-defense requires reversal under the plain error rule. *State v. Tindall*, 496 S.W.2d 267 (Mo. App. W.D. 1973).

- Plain error review of instructional error is warranted when the error so substantially affects the rights of an accused that manifest injustice results if it is left uncorrected. *State v. Hayes*, 23 S.W.3d 783, 788 (Mo. App. W.D. 2000).

- When the court failed to instruct the jury on the issue of excusable homicide and evidence of an accident was plain, substantial rights were violated, and reversal was warranted. *State v. Haygood*, 411 S.W.2d 230 (Mo. 1967).

C. (§29.17) Appellant's Burden of Persuasion

One of the major differences between trial practice and appellate practice is the burden that is placed on the respective parties. At the appellate level, the burden of the appellant has generally been referred to as "substantial" and "heavy." *See*:

- *State v. Nolan*, 499 S.W.2d 240 (Mo. App. E.D. 1973)
- *State v. Newhart*, 503 S.W.2d 62 (Mo. App. W.D. 1973)
- *United States v. Phillips*, 433 F.2d 1364 (8th Cir. 1970), *cert. denied*, 401 U.S. 917 (1971)
- *State v. Chase*, 444 S.W.2d 398 (Mo. banc 1969)

In general, all evidence, although conflicting, must be viewed and accepted in the light most favorable to the verdict that was rendered. *State v. Wilborn*, 525 S.W.2d 87 (Mo. App. E.D. 1975); *State v. Webb*, 527 S.W.2d 728 (Mo. App. E.D. 1975). Favorable evidence to the defendant or favorable inferences to the defendant's benefit are generally disregarded when the appellate court tests the sufficiency of evidence. *See*:

- *State v. Mason*, 506 S.W.2d 458 (Mo. App. E.D. 1974)
- *State v. Berry*, 526 S.W.2d 92 (Mo. App. S.D. 1975)
- *State v. Benfield*, 522 S.W.2d 830 (Mo. App. S.D. 1975)

In actual practice, however, the appellate courts may lighten the burden slightly when a substantial question exists on the sufficiency of evidence. *See*:

- *State v. Sneed*, 549 S.W.2d 105 (Mo. App. E.D. 1977)
- *State v. Bursley*, 548 S.W.2d 586 (Mo. App. W.D. 1976)
- *State v. Frazier*, 546 S.W.2d 782 (Mo. App. W.D. 1977)
- *State v. Miller*, 536 S.W.2d 524 (Mo. App. E.D. 1976)

Experience has also shown that the attorney who has an excellent trial record on appeal is also more likely to convince the court of prejudicial error when the matter has been brought to the attention of the trial court and some type of description or reference to the possible error has been made. *State v. Amos*, 490 S.W.2d 328 (Mo. App. W.D. 1973).

D. (§29.18) Constitutional Error

The court will look most closely at errors that have risen to a constitutional standard, although it is no guarantee of reversal. In *State v. Summers*, 506 S.W.2d 67 (Mo. App. W.D. 1974), error was found when the trial court improperly restricted and curtailed cross-examination of the state's major witness. The prosecutor's reference to the defendant's failure to testify is also looked on with disfavor and has been referred to as fundamental error. *State v. McNeal*, 517 S.W.2d 187 (Mo. App. E.D. 1974).

The United States Supreme Court has held on several occasions that a constitutional error can be held to be harmless only if it is found to be harmless beyond a reasonable doubt. *See, e.g., Harrington v. Cal.*, 395 U.S. 250 (1969). Other Supreme Court cases, including *Gideon v. Wainwright*, 372 U.S. 335 (1963), which deals with the right to counsel, hold that certain constitutional rights cannot be held harmless, regardless of the degree of error.

E. (§29.19) Abuse of the Trial Court's Discretion

One of the most difficult areas to challenge on appeal is a decision that involves the trial court's discretion. *See*:

- *State v. Edwards*, 31 S.W.3d 73, 77 (Mo. App. W.D. 2000) (the trial court is vested with broad discretion to admit evidence at trial, and the appellate court will reverse if this discretion was clearly abused)

- *State v. Maynard*, 954 S.W.2d 687, 691 (Mo. App. W.D. 1997) (the review of a trial court's ruling during closing argument is for abuse of discretion; under this standard, a trial court will be reversed only when the argument is plainly unwarranted)

- *State v. Coleman*, 954 S.W.2d 1, 4 (Mo. App. W.D. 1997) (an abuse of discretion exists when reasonable persons could not differ as to the propriety of the action taken by the trial court)

In some areas, such as probation or parole, the appellate courts simply refuse to review or revise a trial court's decision. *State v. Cody*, 525 S.W.2d 333 (Mo. banc 1975); *Smith v. State*, 517 S.W.2d 148 (Mo. 1974). The courts also will generally reject any challenge to enforce the uniformity of sentencing or any question concerning the severity of a sentence when it is within the bounds prescribed by statute. *State v. Gaye*, 532 S.W.2d 783 (Mo. App. E.D. 1975); *State v. Booker*, 517 S.W.2d 937 (Mo. App. E.D. 1974). A sentence based on mistaken information by the court will be reversed. *Wraggs v. State*, 549 S.W.2d 881 (Mo. banc 1977).

When the appellate court will at least review the question that has been presented, the appellant must shoulder the burden of showing that the court's discretion has been clearly abused and that plain prejudice can be shown to the appellant. *State v. Ball*, 529 S.W.2d 901 (Mo. App. E.D. 1975); *State v. Williams*, 492 S.W.2d 1 (Mo. App. W.D. 1973); *State v. Thompson*, 472 S.W.2d 351 (Mo. 1971).

In a few areas, such as the granting of a continuance, the trial court has great discretion, and the decision will not be disturbed unless the appellant can produce a "very strong showing" to induce the higher court to interfere. *State v. Cuckovich*, 485 S.W.2d 16 (Mo. banc 1972); *State v. Thomas*, 433 S.W.2d 537, 539 (Mo. 1968). The higher standard may also exist on questions concerning the credibility of witnesses. *State v. Williams*, 376 S.W.2d 133 (Mo. 1964); *State v. Medley*, 232 S.W.2d 519 (Mo. 1950), *cert. denied*, 340 U.S. 956 (1951).

The standards that have been mentioned above will give an indication of the standards of review that are applied by the appellate courts. Each standard may not be applicable in every case; the wording may be changed slightly to fit a particular factual situation, but the standards are generally used.

As to each error, appellant's counsel is directed to the annotated statutes and to the various digests for a comprehensive review of the particular

standard or wording used. Among the topics that should be considered are the following:

- Sufficiency of the information or indictment
- Availability of grand jury proceedings
- Voir dire proceedings
- Arguments and conduct of counsel and court
- Evidentiary questions
- Examination of witnesses
- Sufficiency of evidence
- Instructions
- Conduct and deliberations of the jury

IX. (§29.20) Decision of Court

When the judgment of the appellate court is rendered, there are several possible forms of relief that might be granted if the appellant has been able to avoid the affirmance of the trial court's decision. For example, the appellate court can:

- reverse the matter outright and order the defendant's discharge;
- reverse the matter and remand it for a new trial;
- remand the matter for further action by the trial court; or
- modify or reduce the sentence and judgment that was imposed.

The appellate courts will generally refuse to remand the matter for an evidentiary hearing on a subject that might be more properly disposed of by a post-conviction proceeding. *State v. Nebbitts*, 498 S.W.2d 762 (Mo. 1973); *State v. McKinney*, 475 S.W.2d 51 (Mo. 1971). The courts have been extremely reluctant to reduce or modify sentences on appeal. The passion and prejudice must so clearly appear from the record of the sentencing that the reviewing court can confidently say that the trial court unmistakably abused its discretion in imposing the sentence. *State v. Maxwell*, 502 S.W.2d 382 (Mo. App. E.D. 1973); *State v. Mucie*, 448 S.W.2d 879 (Mo. 1970). The court will be more likely to modify or change the sentence when statutory modifications have reduced the maximum penalties while the matter is on appeal. *State v. Hawkins*, 482 S.W.2d 477 (Mo. 1972). The court will also remand the sentencing procedure when the transcript fails to show if sentences were improperly made consecutive. *State v. McCollum*, 527 S.W.2d 710 (Mo. App. W.D. 1975).

When the state's case has been reversed for insufficient evidence, the defendant is discharged. Otherwise, there is double jeopardy. *Burks v. United States*, 437 U.S. 1 (1978); *State v. Montgomery*, 591 S.W.2d 412 (Mo. App. S.D. 1979). Cases that are reversed for technical reasons or for informations that are insufficient will be remanded. *State v. Hook*, 433 S.W.2d 41 (Mo. App. W.D. 1968).

The Supreme Court also has the right to remand the matter for factual findings but will generally not exercise it in direct appeals. Any deficiencies in fact or conclusions will be resolved against the appellant. In *Durham v. State*, 473 S.W.2d 397 (Mo. 1971), the appellate court remanded a matter for findings of fact and conclusions of law when the action was brought under former Rule 27.26. See, however, *State v. Tettamble*, 517 S.W.2d 732 (Mo. App. E.D. 1974), in which the appellate court remanded the matter for a hearing on the applicability of the then effective Second Offender Act.

In at least one case, the appellate court conducted its own "experiment," perhaps to avoid remanding a matter for a similar test. In *State v. Nierstheimer*, 500 S.W.2d 732 (Mo. App. S.D. 1973), the Southern District of the Missouri Court of Appeals was asked to determine whether a defendant had been improperly convicted because the state had failed to determine the weight of a marijuana cigarette delivered to a minor. The marijuana cigarette was not available for the appellate court to examine, so the court conducted its own experiment with factory-built, unfiltered cigarettes and a micro-analytical balance. Although there was no showing of weight similarity between marijuana and regular tobacco, the court of appeals determined that the marijuana cigarette weighed less than the statutory requirement and remanded the matter for re-sentencing.

The appellate court, when the decision is unanimous, may affirm the judgment of the trial court by the entry of a summary order. The appellate court, by local rule, may be required in such cases to attach a non-reported, non-citeable statement of its reasoning for the decision. Rule 30.25(b).

X. (§29.21) Post-Decision Proceedings

When a decision has been rendered by the appellate court, the losing party still has several forms of relief available. A motion for rehearing and for transfer to the Supreme Court can be filed with the court of appeals within 15 days of the date that the decision was rendered. Rules 30.26, 30.27, and 83.02. The matter may also be transferred by the

dissent of one of the judges or may be taken by the Supreme Court itself when a motion to transfer has been filed within 15 days of the denial of the rehearing motion in the court of appeals. Rules 83.02 and 83.03. A copy of the motion to transfer to the Supreme Court must be filed with the clerk of the court of appeals under Rule 83.06.

The purpose, procedure, and the form of such motions are more fully covered in MO. APPELLATE COURT PRACTICE ch. 10 (MoBar 5th ed. 2002).

If the Supreme Court of Missouri consents to hear the matter, counsel may decide to have the case heard on the briefs that have already been prepared and filed. Wiser practice would dictate, however, that amended briefs be filed that direct themselves to the specific points that were considered by the court of appeals. The clerk of the Supreme Court can also indicate in many cases particular areas of interest to the Supreme Court and may direct counsel to limit their arguments to those areas.

If relief is still denied by the state Supreme Court, the appellant has the right to file a petition for writ of certiorari to the Supreme Court of the United States. The writ must be filed within 60 days of the denial of the state Supreme Court. United States Supreme Court Rule 20; 28 U.S.C. § 2101. See 28 U.S.C. §§ 2101 *et seq.* and United States Supreme Court Rules 29–40 for the procedure in them. The extremely crowded dockets and numerous matters considered by the United States Supreme Court minimize the chance that the writ will even be granted by the Court. The remedy probably should be utilized, however, when the client may seek some type of post-conviction relief through the federal court system. It should be noted that the defendant does not need to seek transfer or certiorari in order to exhaust state remedies to allow for the filing of a federal habeas petition under 28 U.S.C. § 2254. Rule 83.04.

XI. Associate Circuit and Municipal Appeals

A. (§29.22) Associate Circuit Division Appeals

Convictions of misdemeanors before an associate circuit judge, whether by jury trial or bench trial, are now reviewed on appeal by the appropriate appellate court under the same procedures applicable to felony appeals. Section 543.335, RSMo 2000.

B. (§29.23) Municipal Division Appeals

A defendant convicted in a municipal court has an absolute right to a trial de novo. Rule 37.71. The notice of appeal must be filed within ten days of the entry of judgment, and there is no provision that allows the filing of an appeal out of time. Rule 37.71(a). The appeal is made to the circuit court in which the municipal court is situated or (in Kansas City) to the circuit court for the county in which the offense occurred. A defendant who satisfies any part of the defendant's punishment or fine waives the right to appeal the judgment. Rule 37.71(b). An appeal from the municipal court automatically grants a stay of execution. Rule 37.72. A defendant, however, may be required to post a bond as part of the appeal. Rule 37.15(b)(3). The trial de novo proceeds in the same manner as a trial for a misdemeanor. Rule 37.74.

A defendant has a right to a trial de novo even after a plea of guilty if the municipal judge is not licensed to practice law. Section 479.200.1, RSMo 2000. Some municipalities have their cases heard by an associate circuit judge. In those cases, the defendant has a right to appeal the matter to the circuit court where it will be heard by a different judge.

Kris T. Daniel*

Chapter 30

RETRIALS AND DOUBLE JEOPARDY

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Sections 30.2–30.8 are a revision of materials previously prepared by Ronald M. Sokol.

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I. (§30.1) Introduction

The purpose of this chapter is to provide counsel with practical information regarding specific issues pertaining to retrial and a basic working guide on the complex issue of double jeopardy.

II. Strategic and Tactical Considerations of Retrial

A. (§30.2) Anticipation of the Possibility of a New Trial

During the course of the original trial, counsel should anticipate the possibility of a mistrial or new trial. Rule 26.03 provides for the continuing duty of a subpoenaed witness to attend the trial "until the case is disposed of or he is finally discharged by the court." If there is any possibility that a witness under subpoena for the first trial may not be located or amenable to service of process in the event of a new trial, counsel should refuse to agree to the final discharge of the witness until final resolution of the case has been reached.

If the first trial is a jury trial, unless prohibited from doing so by the trial court, counsel should interview some or all of the jurors at the first trial to discover the strengths and weaknesses of both sides of the case. In the interview process, counsel may find that evidence highly material to resolution of the issue has been misunderstood by the jury or that relatively inconsequential evidence or occurrences during trial have swayed jurors in their resolution of the issue. Even experienced trial counsel can frequently be surprised by the reactions of jurors to

evidence adduced or evidence not adduced at trial and the effect it has on the decision of the jury.

B. (§30.3) Discovery

Rule 25.08 provides:

> If subsequent to complying with a request for disclosure or order of court, a party discovers information which he would have been required to disclose under the request or order, he shall furnish such additional information to opposing counsel, and if the additions are discovered during trial, the court also shall be notified.

Ordinarily on retrial, there should be no need to file an additional request for discovery because of the provisions of Rule 25.08. Matters learned during the first trial or the appeal process, however, frequently result in a change of strategy or in the obtaining of new or different evidence to be presented at the retrial. If the change of strategy or the new or different evidence to be adduced at retrial is a matter not previously disclosed under the discovery rule, counsel should immediately advise opposing counsel of any changes or additions in the case, and appropriate sanctions should be requested.

C. (§30.4) Protecting the Record

Pretrial motions from the first trial should be revised and renewed before the retrial. In the event of an appeal from the retrial, normally only the transcript of the retrial will be forwarded to the appellate court, and matters raised only in the record of the first trial may not be considered properly preserved for appellate review after the retrial. *Mullen v. Roberts & Roberts Real Estate, Inc.,* 550 S.W.2d 588 (Mo. App. W.D. 1977).

Matters ruled unfavorably to the proponent at the first trial should be called to the attention of the court, and new rulings on them should be reached before retrial. This strategy will help guard against the possibility of prejudice that may arise if the rulings are made before the jury, as well as prevent unnecessary delay.

Before retrial, counsel should also obtain protective orders to prevent the introduction of evidence ruled inadmissible at the first trial and to prevent the questions ruled improper from being asked within the hearing of the jury. If necessary, counsel should seek the aid of the court in admonishing opposing counsel to direct counsel's witnesses not to volunteer objectionable material during the retrial.

D. (§30.5) Change of Judge or Venue

Counsel should carefully consider, before retrial, whether to seek a change of judge or change of venue. This is particularly important if the first trial has been publicized or if the fact that there is to be a retrial because of a reversal of a prior conviction has received publicity. Counsel should also consider whether the original trial judge should rehear the matter either because of the judge's rulings or verdict at the first trial or because of the possibility that the original trial judge has been "stung" by the reversal on appeal.

A defendant may have one change of judge and one change of venue for prejudice in any criminal case pending in circuit court. Rule 32.09; *State v. Perkins*, 680 S.W.2d 331, 333 (Mo. App. S.D. 1984); *State ex rel. Johnson v. Green,* 452 S.W.2d 814, 816 (Mo. banc 1970). Rule 32.08(a), however, prohibits separate applications for change of venue and change of judge. Thus, a criminal defendant who desires both must bring them in a single application. *State ex rel. Davis v. Lewis*, 893 S.W.2d 817 (Mo. banc 1995).

After one change of judge, the successor judge is under a duty to remain as judge in the cause, but if the successor judge is biased against the defendant, counsel should file a motion for disqualification based on the bias. *State v. Hindman*, 543 S.W.2d 278, 282–83 (Mo. App. S.D. 1976). Under Rule 32.09(c), a judge must recuse "when fundamental fairness so requires." The decision of whether judicial bias threatens fundamental fairness is left to the court, and an appellate court will defer to that decision if there is no abuse of discretion. *State v. Cooper*, 811 S.W.2d 786, 790 (Mo. App. W.D. 1991); *see also State v. Williams*, 747 S.W.2d 635, 637 (Mo. App. W.D. 1988) (fact that the trial judge sentenced the defendant in a prior action was not alone sufficient to show judicial bias).

It would seem logical that the same reasoning would apply to changes of venue—i.e., if actual bias that is so pervasive that a fair trial is impossible can be shown in the county to which a change of venue has been taken, due process of law would require a second change of venue. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). *But see Williams,* 747 S.W.2d at 637 (the defendant, who presented no evidence of contents of media publicity regarding grand jury indictment and arrest, was not entitled to change of venue); *Peck v. Jadwin*, 704 S.W.2d 708, 711 (Mo. App. S.D. 1986) (allegations of a motion do not prove themselves).

If retrial is to be held in the same venue, counsel should inquire, during voir dire, into the exposure of the jury panel to any publicity. If it is possible that the answers during the voir dire process could poison other jurors, consideration should be given to requesting individual voir dire examination on that issue out of the hearing of the other jurors. *See State v. Storey*, 901 S.W.2d 886, 894 (Mo. banc 1995) (exposure to pretrial publicity was not inherently prejudicial, and a juror who can set aside an opinion previously formed may serve; thus, counsel was not ineffective for failing to move for change of venue).

E. (§30.6) Procurement and Use of Transcript of Prior Trial

Under Rules 25.03(A)(4) and 25.08, the defendant is entitled, without court order, to the transcript of a prior trial if the state has it in its possession or if it is available to the state. The true test of Rule 25.03(A)(4) requires an interpretation of just when the transcript is "available" to the state. The transcript of a former trial is always available from the court reporter at a price. The question then becomes: at what point must the state provide the transcript to an indigent defendant? In *Britt v. North Carolina,* 404 U.S. 226 (1971), the Supreme Court, using an equal protection rationale, stated that there were two relevant factors in deciding whether the state must bear the cost:

1. The value of the transcript to the defendant
2. The available alternative devices that would fulfill the same function as a transcript

Missouri decisions have excused the production of a transcript for the retrial of a case. *See*:

- *State v. Williams*, 669 S.W.2d 570 (Mo. App. E.D. 1984) (depositions provided to defense counsel by state and transcript of preliminary hearing available alternatives to serve same function as trial transcript)

- *State v. Holland,* 534 S.W.2d 258 (Mo. App. E.D. 1975) (availability of judge's notes and court reporter from first trial were sufficient alternatives)

- *State v. Jones*, 545 S.W.2d 659 (Mo. App. E.D. 1976) (no equal protection violation when indigent defendant was furnished portions of transcript requested, but state failed to furnish portions that could not be prepared within time available)

- *State v. Ambus*, 522 S.W.2d 306 (Mo. App. E.D. 1975) (request filed too late)

The moral is to request a transcript early; if it is denied, counsel should seek out the alternatives and make a good record if they are inadequate.

A trial court has wide discretion in determining what, if any, sanctions to impose when the state makes use of a transcript during cross-examination of a defendant that it failed to disclose under a discovery rule. In *State v. Wengler*, 755 S.W.2d 619, 620–21 (Mo. App. E.D. 1988), the court held that, in light of the circumstances, the trial court did not abuse its discretion in denying the defendant's motion for mistrial for use of an undisclosed transcript. The trial court had examined several factors, including:

- the period of time between the first and second trial;
- the degree to which the state's failure to disclose the transcript was deliberate;
- whether the defendant had the same counsel at both trials; and
- the effect of the failure to disclose on the outcome of the trial.

When a transcript of the first trial is available, both sides should have their witnesses review it to determine if there are any material changes to their former testimony. Any material changes must be reported to the other side under Rule 25.08.

While review of the transcript by a witness before retrial will help avoid a contradictory version of events, the cross-examiner may go into the extent of that review. Recitation of facts suggesting a very thorough review by the witness and the attorney who presents the witness's testimony may damage the witness's credibility by causing it to appear that the witness has been rehearsed and could not otherwise remember. An alternative to exhaustive review would be to allow the witness to read the former testimony and then ask the witness whether there is anything that the witness wishes to change. In that way, the appearance of coaching is avoided.

When there is a possibility that testimony from a prior trial will be used to impeach a witness, either an agreement from the parties or a ruling from the judge should be sought in pretrial conference allowing counsel to refer to the prior trial as a prior "hearing." This strategy will avoid letting the jury know that there has been a previous trial.

If no reporter's transcript is available, any person who heard prior testimony under oath may testify as to their memory of it as long as the testimony is otherwise admissible. *State v. Phillips*, 511 S.W.2d 841 (Mo. 1974). This can be particularly effective if the trial judge has taken good notes of testimony at the first proceeding and is able to give virtually verbatim recital.

1. (§30.7) Witness Other Than Defendant

The Missouri rule as to use of the transcript of former testimony of a witness is in *State v. Purl,* 183 S.W.2d 903 (Mo. 1944). The conditions under which such testimony is admissible include that:

- it was before a judicial tribunal;
- the witness was sworn and testified;
- the accused was present and had an opportunity for cross-examination;
- the parties and the issues are substantially the same in the case on trial; and
- the witness is unavailable after due diligence.

State v. Sumowski, 794 S.W.2d 643, 648 (Mo. banc 1990); *State v. Dreiling*, 601 S.W.2d 660, 662 (Mo. App. S.D. 1980).

Sufficient foundation regarding the unavailability of a witness is laid if the witness:

- is dead, *State v. Hudspeth*, 60 S.W. 136 (Mo. 1900);
- is beyond the reach of process, *State v. Harp,* 6 S.W.2d 562 (Mo. banc 1928) (the same as the witness being dead);
- is insane, *State v. Pierson*, 85 S.W.2d 48 (Mo. 1935); or
- refuses to testify, *State v. Phillips*, 511 S.W.2d 841 (Mo. 1974).

Unavailability is also established if the witness has fled to avoid process and obligation to testify, *State v. Lindsay*, 709 S.W.2d 499 (Mo. App. W.D. 1986), or if the witness invokes the Fifth Amendment privilege against self-incrimination, *State v. Mueller*, 872 S.W.2d 559 (Mo. App. E.D. 1994); *State v. Franks*, 685 S.W.2d 845 (Mo. App. E.D. 1984).

The witness must be unavailable after the exercise of due diligence to obtain the witness's presence. *State v. Brookins,* 478 S.W.2d 372 (Mo. 1972). Examples of the lack of due diligence are found in the following cases:

- *State v. Gallina*, 178 S.W.2d 433 (Mo. 1944) (Missouri resident traveling outside the state)
- *State v. Deyo*, 358 S.W.2d 816 (Mo. 1962) (third-party hearsay insufficient foundation that witness was out of the state)
- *State v. Kain*, 330 S.W.2d 842 (Mo. 1960) (subpoena left with mother not sufficient due diligence)
- *Brookins,* 478 S.W.2d 372 (witness in jail in other jurisdiction could have been procured by resort to 28 U.S.C. § 2241(c)(5))
- *State v. Lloyd*, 87 S.W.2d 418 (Mo. 1935) (prosecutor knew where out-of-state witness lived and presented no showing that the witness was unwilling to come testify)

Lack of due diligence has also been found when the defendant delayed in applying for a subpoena, *State v. Reed*, 640 S.W.2d 188 (Mo. App. W.D. 1982), and when the prosecution did not seek to utilize the uniform law to secure attendance of a witness from within or without the state, *State v. Gray*, 616 S.W.2d 102 (Mo. App. W.D. 1981).

Another important prerequisite, besides unavailability of the witness after due diligence, is the opportunity for the defendant to have confronted and cross-examined the witness. *Gray,* 616 S.W.2d 102. In determining the admissibility of prior testimony of an unavailable witness, the test is whether there was an opportunity for full and complete cross-examination of that witness at the time the testimony was given and not the use counsel made of that opportunity. *State v. Crow*, 755 S.W.2d 754 (Mo. App. E.D. 1988); *Lindsay,* 709 S.W.2d 499; *see also Mancusi v. Stubbs,* 408 U.S. 204 (1972) (guidelines enumerated for determining the adequacy of the former cross-examination). Missouri has held that, when the defendant had the opportunity but did not exercise the right, there is no bar to admission at a second trial. *State v. Logan,* 126 S.W.2d 256 (Mo. 1939).

A defendant can waive the right to confront and cross-examine a witness when the defendant procures the absence of the witness at trial. *State v. Brown,* 285 S.W. 995 (Mo. 1926). If the state has had an opportunity to cross-examine and confront a witness at an earlier trial of a co-defendant, the defendant may waive the right and introduce a properly authenticated transcript. *State v. Butler*, 153 S.W. 1042 (Mo. 1913).

Missouri has ruled that identity of parties, offenses, issues, and facts is necessary before use of the transcript of prior testimony is admissible. *State v. Brown*, 56 S.W.2d 405 (Mo. 1932).

Finally, the testimony must have been under oath, taken in a judicial tribunal, and authenticated. *Purl,* 183 S.W.2d 903; *State v. Baker*, 185 S.W.2d 644 (Mo. 1945).

2. (§30.8) Defendant's Prior Testimony

Generally, testimony by a defendant at a former trial is admissible at a subsequent trial as either an admission or a contradiction. *Rodden v. State*, 795 S.W.2d 393, 396 (Mo. banc 1990); *State v. Speyer*, 106 S.W. 505 (Mo. 1907). Even if the statement is not an admission of guilt, it may be used to establish some fact in the case. *State v. Thomas,* 1 S.W.2d 157 (Mo. 1927).

The defendant's prior trial testimony, however, will not be admissible against the defendant when there is a good possibility that it resulted from the state's use of an illegally obtained confession. *Harrison v. United States,* 392 U.S. 219 (1968). If the defendant has not been advised of the right to remain silent or the right to an attorney, the defendant's testimony will not be admissible. *Miranda v. Ariz.*, 384 U.S. 436 (1966); *State v. Blackburn,* 201 S.W. 96 (Mo. 1918). In addition, an attempt to plead guilty that is later withdrawn or rejected by the court is not admissible at a later trial. *Kercheval v. United States*, 274 U.S. 220 (1927); *State v. Meyers,* 12 S.W. 516 (Mo. 1889); Rule 24.02(d).

III. Double Jeopardy

A. (§30.9) Introduction

The Fifth Amendment to the United States Constitution provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment extends the double jeopardy prohibition to the states. *Benton v. Md.,* 395 U.S. 784 (1969).

A more restrictive concept of double jeopardy is embodied in MO. CONST. art. I, 19: "nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury." The Supreme Court of Missouri has stated that, by its plain language, the double jeopardy clause of the Missouri Constitution prevents retrial only if the defendant has been acquitted by a jury. *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992). The Court, however, has found "no readily discernible difference between the Fifth Amendment guarantee against double jeopardy and the common law guarantee as applied in this State." *State v. Richardson,* 460 S.W.2d 537, 538 (Mo. banc 1970), *overruled on other grounds*; *McTush,* 827 S.W.2d 184; *State v. Reed*, 770 S.W.2d 517, 519 n.4 (Mo. App. E.D. 1989) (there is no real difference between federal and state versions of the double jeopardy clause, and even if there were a variance, a defendant would be entitled to the more inclusive principle). Finally, the constitutional guarantee against double jeopardy is embodied in state statutes. *See* §§ 547.200.2 and 547.210, RSMo 2000.

The federal double jeopardy clause is threefold, in that it bars:

1. a second prosecution for the same offense after acquittal;
2. a second prosecution for the same offense after conviction; and
3. multiple punishments for the same offense.

N.C. v. Pearce, 395 U.S. 711, 717–18 (1969); *State v. Thompson*, 610 S.W.2d 629, 634 (Mo. 1981); *see State v. Noerper*, 674 S.W.2d 100, 102 (Mo. App. E.D. 1984).

Although the clause applies only to actions that are "essentially criminal," *Breed v. Jones*, 421 U.S. 519, 528 (1975), it does prevent a criminal defendant from being subjected to subsequent civil penalties that are "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *United States v. Halper*,

490 U.S. 435, 442 (1989); *see also Austin v. United States*, 509 U.S. 602 (1993) (civil forfeitures of property under 21 U.S.C. § 881(a)(4) and (7) constitute "punishment" under the double jeopardy clause); *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994) (the state legislature intended state drug tax to serve punitive goals; thus, double jeopardy bars criminal prosecution after payment of tax by defendant).

The double jeopardy clause is inapplicable to administrative hearings, including parole and probation revocation hearings. *See, e.g.*, *United States v. McGowan*, 960 F.2d 716, 718 (8th Cir. 1992).

B. When Jeopardy Attaches

1. (§30.10) Impaneling of Jury

Double jeopardy protects against successive prosecutions only if jeopardy attached in the first trial, that is, only if the defendant faced risk of conviction. Attachment occurs in a jury trial once the jury is impaneled and sworn, *State v. Stevenson,* 589 S.W.2d 44 (Mo. App. E.D. 1979), and in a bench trial at the introduction of evidence by the state, *State v. Shoemake*, 798 S.W.2d 191 (Mo. App. E.D. 1990); *State v. Clark*, 723 S.W.2d 17, 20 (Mo. App. E.D. 1986). *But see State ex rel. Lang v. Hodge*, 608 S.W.2d 432, 435 (Mo. App. E.D. 1980) (jeopardy attached when state had submitted all its evidence).

For purposes of a guilty plea, the Supreme Court of Missouri has held that double jeopardy attaches upon the entry of an unconditional guilty plea. *Peiffer v. State*, 88 S.W.3d 439 (Mo. banc 2002) (under circumstances of the case, tampering first degree was determined to be the lesser-included offense of stealing). Thus, if the government fails to terminate prosecution of the case before the entry of an unconditional guilty plea, the double jeopardy clause prohibits retrial on those same charges.

2. (§30.11) Preliminary Hearing

A preliminary hearing for a felony complaint, Rule 22.09, is in no sense a determination of guilt or innocence and does not place a defendant in jeopardy; thus, discharge of a defendant arising out of a preliminary examination does not bar further prosecution for the same offense. *State ex rel. Thomas v. Crouch*, 603 S.W.2d 532, 538 (Mo. banc 1980); *State v. Thomas*, 529 S.W.2d 379, 382 (Mo. 1975).

3. (§30.12) *Nolle Prosequi*

A *nolle prosequi*, before the time jeopardy attaches, does not bar future prosecution. *Lomax v. Armontrout*, 923 F.2d 574 (8th Cir. 1991). In addition, the courts have held that a *nolle prosequi* occurring after jeopardy traditionally attaches, if granted with leave of court, does not operate as an acquittal, and therefore jeopardy does not attach. The rationale for this exception was stated in *State v. Bally*, 869 S.W.2d 777, 779 (Mo. App. W.D. 1994) (citation omitted): "A court determines whether *nolle prosequi* is . . . consistent with 'the public interest in the fair administration of criminal justice.' This assuages the primary concern of double jeopardy analysis: preventing prosecutorial misconduct and overreaching."

C. Retrial Following Mistrial

1. (§30.13) "Manifest Necessity"

A defendant is not placed twice in jeopardy if the declaration of mistrial in the first proceeding was justified by "manifest necessity." Under the "manifest necessity" standard, re-prosecution is permitted when, "taking all the circumstances into consideration, there is a manifest necessity for the [mistrial declaration], or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. 579, 580 (1824). The United States Supreme Court has expressly refused to articulate a precise definition for "manifest necessity," stating that it is "a standard [which cannot] be applied mechanically" and must be applied based on the "particular problem confronting the trial judge." *Ariz. v. Wash.*, 434 U.S. 497, 503–05 (1978). Nevertheless, manifest necessity is generally recognized when:

- the mistrial is a result of a hung jury;
- the jury has been biased or unduly influenced; or
- the behavior of the defendant triggers the mistrial.

When the trial court declares a mistrial on its own motion and the defendant has not consented, the prosecutor has the burden of demonstrating that manifest necessity exists. *United States v. Dixon*, 913 F.2d 1305 (8th Cir. 1990); *United States v. Civella*, 547 F. Supp. 252 (W.D. Mo. 1982), *aff'd*, 688 F.2d 575 (8th Cir. 1982); *State v. Tiger*, 972 S.W.2d 385 (Mo. App. W.D. 1998). If the state can so persuade the court, retrial is not barred.

2. (§30.14) Mistrial Upon Motion of Defendant

Even without "manifest necessity," *see* §30.13, *supra*, the double jeopardy clause generally does not bar retrial if the defendant has requested, or consented to, the mistrial, *United States v. Dinitz*, 424 U.S. 600, 607–08 (1976), unless either the court or the prosecutor engaged in conduct intended to "goad" the defendant into making the request, *Or. v. Kennedy*, 456 U.S. 667, 674–76 (1982). The burden to prove that the request for or consent to the mistrial resulted from the government's improper conduct is on the defendant. *See State v. Willers*, 785 S.W.2d 88 (Mo. App. S.D. 1990).

A defendant's consent to a mistrial may be either express or implied, *State v. Tolliver*, 839 S.W.2d 296, 299 (Mo. banc 1992), with determination of consent turning on careful analysis of the facts of each case, *State ex rel. Reynolds v. Kendrick*, 868 S.W.2d 134, 136 (Mo. App. E.D. 1993). In *Tolliver*, the Supreme Court of Missouri held that the failure of defense counsel to object to the declaration of mistrial and to state her desire to proceed gave rise to an inference of consent. *Tolliver,* 839 S.W.2d at 299–300; *see also Kendrick,* 868 S.W.2d at 136–37 (consent to mistrial not inferred when defense counsel made no specific objection to mistrial but did express desire to continue trial after state requested recusal of trial judge); *State v. Holt*, 592 S.W.2d 759 (Mo. banc 1980) (failure of the defense counsel to object was not a waiver of double jeopardy claim when, after the foreman unintentionally disclosed that nine jurors stood in favor of conviction, counsel knew that if an objection to mistrial was sustained, the likely outcome of further deliberations would be a verdict adverse to his client).

3. (§30.15) Mistrial as Result of Hung Jury

The double jeopardy clause does not prohibit reprosecution following a declaration of mistrial due to a hung jury. *State v. Perry,* 643 S.W.2d 58, 61 (Mo. App. E.D. 1982). In fact, it has been held that a mistrial because of jurors' inability to agree on a verdict constitutes "manifest necessity." *State v. Verschueren,* 595 S.W.2d 770, 772–73 (Mo. App. W.D. 1980). In *State v. Holt*, 592 S.W.2d 759 (Mo. banc 1980), the Court held that the trial court's declaration of mistrial was manifest necessity after the jury foreman announced a hung jury and inadvertently indicated how many jurors favored conviction. To declare otherwise, the Court stated, would indicate "favoritism to the state" and would be "a clear signal [to the jury]

that the judge, who knew how they stood, thought they were on the right track." *Id.* at 772.

4. (§30.16) Right to Speedy Trial in Subsequent Prosecution

A defendant maintains the right to a speedy trial following entrance of a *nolle prosequi, see* §30.12*, supra,* or declaration of a mistrial in the first proceeding, *see* §§30.13–30.15, *supra. State v. Lawson*, 630 S.W.2d 185, 189 (Mo. App. E.D. 1982) (court recognized speedy trial claim when the state did not reprosecute the defendant until 7 months after entering *nolle prosequi* following declaration of mistrial because of a hung jury; *nolle prosequi* is the same as dismissal without prejudice); *accord State v. Mauldin*, 669 S.W.2d 58, 59 (Mo. App. E.D. 1984) (the defendant was entitled to dismissal of the charge because of the state's failure to bring him to trial within 60 days after the declaration of mistrial in the first trial). *But see State v. Anderson*, 687 S.W.2d 643, 646 (Mo. App. W.D. 1985) (there was no speedy trial violation when 92 of the 203 days that elapsed between the defendant's arraignment, under his reindictment, and the date of trial were excludable because of continuances granted in accordance with the defendant's requests).

D. Acquittal

1. (§30.17) On Verdict

A verdict of acquittal on the issue of guilt or innocence is final and constitutes an absolute bar to further prosecution. "'The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal,' for the 'public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation.'" *United States v. DiFrancesco,* 449 U.S. 117, 129 (1980); *Barnes v. State*, 9 S.W.3d 646 (Mo. App. E.D. 1999); *see also United States v. Dixon*, 913 F.2d 1305, 1310 (8th Cir. 1990). *But see United States v. Hiland*, 909 F.2d 1114 (8th Cir. 1990) (verdict not final for purposes of double jeopardy merely because it was read by jury foreman in open court when verdict was not accepted by court).

2. (§30.18) Insufficient Indictment or Information

The state cannot appeal a judgment for the accused, whether it is upon a verdict of acquittal or upon a determination of law, unless that right is explicitly conferred by statute and no double jeopardy can result. *State v. White*, 860 S.W.2d 805, 806 (Mo. App. S.D. 1993). Section 547.210, RSMo 2000, allows appeal by the state when an indictment or information is deemed insufficient. Section 547.200.2, RSMo 2000, provides, in pertinent part: "The state, in any criminal prosecution, shall be allowed an appeal in the cases and under the circumstances mentioned in section 547.210 and in all other criminal cases except in those cases where the possible outcome of such an appeal would result in double jeopardy . . . ."

Before enactment of § 547.200.2, the state could not appeal from a dismissal of an insufficient indictment when the dismissal was based on matters extraneous to the indictment. *State v. Coor*, 740 S.W.2d 350 (Mo. App. S.D. 1987), however, expanded the state's right to appeal when it held that the statute's language "in all other criminal cases" was broad enough to encompass cases in which an indictment or information was dismissed on matters outside the record. *Id.* at 354; *accord State v. Stein*, 876 S.W.2d 623, 625 (Mo. App. E.D. 1994) (the trial court was not required to dismiss stealing counts on double jeopardy grounds when earlier counts were dismissed because of a deficient indictment); *State v. Casaretto*, 818 S.W.2d 313, 315 (Mo. App. E.D. 1991) (an appeal by the state following the dismissal of an indictment does not offend double jeopardy). Thus, the state has a right to appeal those cases in which the indictment was dismissed on grounds outside the record unless the defendant would be placed in double jeopardy for the same offense. Whether double jeopardy has attached turns on the substance of the trial court's ruling, that is, whether the issue of the defendant's guilt or innocence was before the court. *State v. Reed*, 770 S.W.2d 517, 520 (Mo. App. E.D. 1989). If it was not, "jeopardy does not attach and defendant could not be placed in double jeopardy as a result of a subsequent appeal by the State." *Stein,* 876 S.W.2d at 625; *see also State v. Powell*, 783 S.W.2d 489 (Mo. App. W.D. 1990) (reversal of conviction because of a fatal variance between information and indictment does not preclude remand for a new trial based on the double jeopardy clause).

3. (§30.19) Conviction of Lesser Offense

A guilty verdict for a lesser-included offense, for double jeopardy purposes, is an implied acquittal of the greater offense, *Brown v. Ohio,* 432 U.S. 161, 169 (1977), at least when successful prosecution of the greater offense necessarily depends on reestablishment of all of the facts constituting the included offense, *Ill. v. Vitale*, 447 U.S. 410, 420 (1980). *See State v. McLemore*, 782 S.W.2d 127, 128 (Mo. App. E.D. 1989) (double jeopardy precluded the defendant's conviction of carrying a concealed weapon in violation of a state statute following conviction under a city ordinance of charge that shared the same facts); *State v. Sloan*, 786 S.W.2d 919 (Mo. App. W.D. 1990) (unlawful use of a weapon was the lesser-included offense of first degree assault charge; the defendant's separate convictions on both charges constituted double jeopardy when the defendant allegedly used the weapon in the assault).

An exception to the above rule exists when a defendant who is tried for both the lesser and the greater offenses in the same proceeding enters a guilty plea to the lesser offense over the state's objection. In such a case, the finality required for double jeopardy has not been reached because the guilty plea does not resolve the factual issue in the defendant's favor, and thus, the government may prosecute the greater offense. *Ohio v. Johnson*, 467 U.S. 493 (1984); *State v. Bally*, 869 S.W.2d 777 (Mo. App. W.D. 1994).

E. On Appeal

1. (§30.20) Insufficiency of Evidence

Double jeopardy is not offended by the retrial of a defendant who has succeeded in having a conviction reversed on appeal. *United States v. Ball*, 163 U.S. 662, 672 (1896); *State v. Akers*, 877 S.W.2d 147 (Mo. App. S.D. 1994). In *Burks v. United States,* 437 U.S. 1 (1978), the United States Supreme Court provided an exception to this rule when it held that the double jeopardy clause prohibits retrial when a defendant's conviction is overturned on grounds that the evidence at trial was legally insufficient to support a conviction. *Accord Or. v. Kennedy*, 456 U.S. 667, 671–76 (1982); *State v. Powell*, 783 S.W.2d 489, 490 (Mo. App. W.D. 1990); *cf. Tate v. Armontrout*, 914 F.2d 1022 (8th Cir. 1990) (sufficiency of the evidence, not sufficiency of the record, which is trial error, determines whether double jeopardy bars retrial).

Counsel should note, however, that a defendant may be retried on a lesser offense following reversal of a conviction of a greater offense because of insufficiency of the evidence to support the greater offense. *State v. O'Brien*, 857 S.W.2d 212 (Mo. banc 1993) (remanded for new trial on the charge of second degree felony murder following reversal of conviction for first degree murder).

2. (§30.21) Sentencing

The double jeopardy clause imposes no absolute prohibition against a more severe sentence on retrial after an original conviction or sentence has been set aside by an appellate court. *N.C. v. Pearce*, 395 U.S. 711 (1969); *United States v. DiFrancesco*, 449 U.S. 117 (1980) (no expectation of finality of sentence when the legislature specifically grants the government the right to appeal a sentencing determination). Two exceptions exist, however. First, in order to ensure the absence of vindictiveness and retaliation against a defendant who has succeeded in getting a conviction set aside, a harsher sentence cannot be imposed unless the judge finds just cause based on the conduct of the defendant following the original sentencing proceeding. *Pearce,* 395 U.S. at 726; *United States v. Evans*, 314 F.3d 329, 334 (8th Cir. 2002) (re-sentencing after sentence vacated on appeal). This prohibition does not apply, however, if the second trial is tried by a jury. *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973). Thus, when a defendant has received a minimum, or substantially less than maximum, sentence from the jury in a prior trial, it is advisable to waive jury sentencing on retrial, thus ensuring that the defendant will not receive a greater sentence on retrial unless the judge finds just cause.

The second exception applies in death penalty cases. In *Bullington v. Missouri,* 451 U.S. 430 (1981), the United States Supreme Court held that, when the defendant had been convicted of capital murder and sentenced to life without parole for 50 years in the original trial, the double jeopardy clause prohibited the state from seeking the death penalty on retrial after the first conviction was reversed. Under Missouri's bifurcated sentencing procedure, the failure to obtain a death penalty at the original trial "constitutes a decision . . . that the [state] has failed to prove its case." Jeopardy therefore attached, barring a second sentencing. *Id*. at 443. The *Bullington* decision was extended to judge sentencing in *Arizona v. Rumsey*, 467 U.S. 203 (1984).

In *Caspari v. Bohlen*, 510 U.S. 383 (1994), the Supreme Court distinguished *Bullington* and *Rumsey* from noncapital cases: "our reasoning in those cases was based largely on the unique circumstances of a capital sentencing proceeding"; "[T]he decisions of this Court 'clearly establish that a sentenc[ing *in a noncapital case*] does not have the qualities of constitutional finality that attend an acquittal.'" *Id*. at 392 (citing *Penn. v. Goldhammer*, 474 U.S. 28 (1985)). Relying on *Caspari*, the Supreme Court of Missouri has concluded that until *DiFrancesco,* 449 U.S. 117, is overruled, its authority is binding. Thus, in a noncapital case, there remains no double jeopardy obstacle to imposing a more onerous sentence on retrial after a defendant has succeeded in having an original conviction or sentence set aside. *State v. Cobb*, 875 S.W.2d 533, 536 (Mo. banc 1994) (double jeopardy rights did not prohibit the state from presenting evidence to determine the defendant's persistent offender status on remand for resentencing).

F. (§30.22) Multiple Charges—Identity of Offenses

The constitutional guarantee against double jeopardy includes protection against multiple punishments for the "same offense." *State ex rel. Westfall v. Campbell*, 637 S.W.2d 94, 96 (Mo. App. E.D. 1982). Thus, the ability of the state to proceed on multiple charges turns on whether any two of the offenses charged are the "same offense." This is so with regard to both a single prosecution involving multiple charges and punishments and multiple prosecutions for a single act or related series of acts.

1. (§30.23) Multiple Prosecutions

The established method for addressing whether double jeopardy bars successive prosecutions for a single offense was defined in *Blockburger v. United States*, 284 U.S. 299 (1932). *See also United States v. Dixon*, 509 U.S. 688 (1993) (*Blockburger* "same elements" test reaffirmed; double jeopardy does not prohibit government from establishing an essential element of a subsequent prosecution by proving conduct that constitutes an offense for which the defendant has already been prosecuted). Under this approach, two offenses are sufficiently distinguishable to allow the imposition of cumulative punishment if each offense contains an element not contained in the other. *Blockburger,* 284 U.S. at 304.

Section 556.041(1), RSMo 2000, appears to codify the *Blockburger* test. Under this statute, multiple convictions for offenses arising from the same conduct are prohibited when one offense is "included in the other." *Id.* An included offense is defined as one "established by proof of the same or less than all the facts required to establish the commission of the offense charged." Section 556.046.1(1), RSMo Supp. 2004. Thus, under either the Fifth Amendment or Missouri's multiple offense limitation statute, double jeopardy analysis "focuses upon the statutory elements of each offense, rather than upon the evidence actually adduced at trial." *State v. McLemore*, 782 S.W.2d 127, 128 (Mo. App. E.D. 1989); *see, e.g., State v. Burns*, 877 S.W.2d 111, 112 (Mo. banc 1994) (prosecution for possession of more than 35 grams of marijuana not barred after the defendant's acquittal in a prior prosecution for possession with intent to distribute when the element of intent to distribute is found only in the first crime).

A defendant may also be tried for and receive multiple convictions, without being subjected to double jeopardy, when different acts are committed to different victims during the same transaction. *See State v. Fitzgerald*, 781 S.W.2d 174, 187 (Mo. App. E.D. 1989). The corollary doctrine of collateral estoppel, discussed in §30.27 below, would apply.

2. (§30.24) Multiple Punishments in Single Prosecutions

The limitation on multiple charges and punishments for the same offense in a single prosecution was expressed in *Missouri v. Hunter*, 459 U.S. 359 (1983). Double jeopardy is not offended by the imposition of cumulative punishments when the legislature has specifically authorized cumulative punishment under two distinct statutes, "regardless of whether those two statutes proscribe the 'same' conduct." *Id.* at 368–69; *see also State ex rel. Bulloch v. Seier*, 771 S.W.2d 71 (Mo. banc 1989) (holding that cumulative punishments for the same offense can be assessed only if they arise in the same proceeding). Again, the inquiry turns on legislative intent; when intent is ambiguous, *Blockburger v. United States*, 284 U.S. 299 (1932), analysis applies. *See State v. Carter*, 889 S.W.2d 106 (Mo. App. E.D. 1994) (sentences imposed for convictions of second degree felony murder, first degree robbery, and armed criminal action do not subject a defendant to double jeopardy); *State v. Owens*, 849 S.W.2d 581 (Mo. App. W.D. 1993) (multiple punishments for second degree felony murder and the

underlying felony are expressly authorized by Missouri statute); *State v. McTush*, 827 S.W.2d 184 (Mo. banc 1992) (multiple punishments for both first degree assault and attempted first degree robbery are not barred by double jeopardy); *cf. State v. Morrow*, 888 S.W.2d 387 (Mo. App. S.D. 1994) (convicting a defendant of two counts of firing firearm into dwelling did not violate double jeopardy; basic inquiry was what, under the statute, the legislature intended to be the allowable unit of prosecution). *But see State v. Elliott*, 987 S.W.2d 418 (Mo. App. W.D. 1999) (multiple punishment for first degree assault and first degree robbery is not authorized; thus, conviction on both offends double jeopardy).

3. (§30.25) Conspiracy

Missouri has mandated that: "A person may not be charged, convicted or sentenced on the basis of the same course of conduct of both the actual commission of an offense and a conspiracy to commit that offense." Section 564.016.7, RSMo 2000. The statute, however, does not prohibit the state from charging both conspiracy and a substantive offense and proving both. *State v. Cornman*, 695 S.W.2d 443, 448 (Mo. banc 1985). It is designed to prohibit the state only from convicting a person for conspiracy when there has been a conviction from the substantive offense that was the object of the conspiracy. Comment to 1973 Proposed Code, 40 V.A.M.S. 426, 433.

In contrast, under federal law, it is not a violation of double jeopardy to charge and convict on both conspiracy and the substantive offense. *United States v. Young*, 634 F.2d 1136 (8th Cir. 1980).

4. (§30.26) Different Sovereigns

Under the doctrine of dual sovereignty, both the federal and state governments have concurrent jurisdiction to punish conduct that offends the laws of each. *Ex parte Jan.*, 246 S.W. 241 (Mo. banc 1922). Thus, the federal government and the state, or two state governments, can independently prosecute a person for the same conduct without violating the double jeopardy clause. *Hebert v. La.*, 272 U.S. 312 (1926); *State v. Glover,* 500 S.W.2d 271 (Mo. App. S.D. 1973). Local governments are not considered sovereignties; consequently, if the same conduct is proscribed by both the state and a municipality, or by two municipalities within the same state,

multiple prosecution is prohibited. *Waller v. Fla.,* 397 U.S. 387 (1970).

5. (§30.27) Collateral Estoppel

Under the corollary doctrine of collateral estoppel, "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436 (1970); *State v. Lewis,* 599 S.W.2d 94, 100 (Mo. App. W.D. 1980). The government, therefore, is barred from using evidence in a second trial that was used against the defendant in a prior trial if the government intends to prove facts that the first jury found against it. *See, e.g., State ex rel. Hines v. Sanders*, 803 S.W.2d 649 (Mo. App. E.D. 1991) (the prior acquittal on kidnapping charges had collateral estoppel effect with regard to issue of complainant's consent, thus barring subsequent trial for rape). The doctrine, however, does not preclude the government, in all circumstances, from introducing evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted. *Dowling v. United States*, 493 U.S. 342 (1990).

Collateral estoppel applies only if:

- the second trial involves the same parties as the first trial; and
- the issue the defendant seeks to foreclose has been previously determined by a valid and final judgment.

See State v. Hughes, 899 S.W.2d 92, 95 (Mo. App. S.D. 1994) (collateral estoppel did not preclude the state from introducing evidence suppressed by the trial court in first proceeding; ruling on a motion to suppress evidence is interlocutory and not binding on future proceedings). Both the state and the defendant may take advantage of the doctrine.

In Missouri, a finding of fact made by an administrative body has no collateral estoppel effect in a subsequent criminal proceeding. When criminal sanctions cannot be imposed as a consequence of the first proceeding, there is no basis for a constitutional double jeopardy challenge. *State v. Warfield*, 854 S.W.2d 9 (Mo. App. S.D. 1993).

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Chapter 31

POST-CONVICTION REMEDIES

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I. Introduction

A. (§31.1) Post-Conviction Relief Generally

The purpose of post-conviction relief is to correct those defects in a "final" criminal proceeding that are so severe that the conviction or sentence is void. The object of any post-conviction remedy is to discover in a reliable manner those cases in which a defendant has suffered a genuine deprivation of constitutional rights. *See* John M. Morris, *Postconviction Practice Under the "New 27.26,"* 43 J. MOBAR 435, 440 (1987). The Supreme Court of Missouri has stated that "Rule 29.15 motions have the dual purpose of adjudicating claims concerning the validity of the trial court's jurisdiction and the legality of the conviction or sentence while avoiding delay in the processing of prisoners' claims and preventing the litigation of stale claims." *Wilkes v. State,* 82 S.W.3d 925, 929 (Mo. banc 2002). There is no constitutional right to post-conviction review. *Day v. State*, 770 S.W.2d 692, 693 (Mo. banc 1989), *cert. denied*, 493 U.S. 866 (1989); *Bremmer v. State*, 787 S.W.2d 761, 762 (Mo. App. E.D. 1990). Most states, however, provide some type of post-conviction review. The federal courts also provide post-conviction remedies found at 28 U.S.C. § 2254 (writ of habeas corpus that challenges a state conviction on federal constitutional grounds) and 28 U.S.C. § 2255 (a federal motion challenging a federal conviction on federal constitutional grounds).

A wide variety of post-conviction relief procedures have historically been allowed in the various states. In Missouri, these remedies have included a:

- writ of habeas corpus, Rule 91;
- writ of error *coram nobis* (now abolished in Missouri);
- motion to vacate, set aside, or correct a sentence, Rule 24.035 or Rule 29.15;

- motion to correct an illegal sentence;
- motion to withdraw a plea of guilty, Rule 29.07; and
- motion to recall the mandate (recognized by Missouri caselaw—but limited in scope after revisions to Rules 29.15 and 24.035).

While the grounds for relief and scope of review under each of these procedures vary, they all seek to determine, within the scope of their inquiry, whether an individual has been afforded a fair hearing or has been deprived of their constitutional rights.

The American Bar Association has promulgated suggested standards for post-conviction relief. These standards set out six grounds for attacking judgments of conviction and, in addition, allow challenges to the legality of the custody or restraint, including claims that the sentence has been fully served or that there is unlawful revocation of parole or conditional release. *See* ABA Criminal Justice Standard 22-2.1, *available at* www.abanet.org/crimjust/standards/postconviction_blk.html#22-2.1.

The claims that may be enumerated under the Missouri state post-conviction rules are included within the ABA standards. The ABA standards, however, set forth additional claims for relief that are not included in the Missouri post-conviction rules. In addition to the enumerated claims that may be brought under Rules 29.15 and 24.035, ABA Standard 22-2.1 allows claims that:

- the conviction was under an unconstitutional statute;
- there is evidence not previously presented that requires vacation of the conviction or sentence; or
- there is a significant change in the law that was applied in the conviction or sentence.

Id.

A developing body of caselaw authorizes or requires financial assistance to capital prisoners pursuing state post-conviction remedies. *See, e.g., Gibson v. Ricketts*, 260 S.E.2d 877 (Ga. 1979), *cert. denied*, 445 U.S. 920 (1980); *State v. Davis*, 269 S.E.2d 461 (Ga. 1980), *cert. denied*, 449 U.S. 1057 (1980); *see also Mempa v. Rhay*, 389 U.S. 128 (1967); *Douglas v. Cal.*, 372 U.S. 353 (1963). As is discussed in §31.30 below, Missouri law provides for the appointment of counsel when a post-conviction motion is filed by an indigent movant.

B. (§31.2) Historical Perspective: Former Rule 27.26

Until 1988, Rule 27.26 governed post-conviction proceedings in Missouri. Rule 27.26 became effective on September 1, 1967, and largely preempted the field of post-conviction relief procedures in Missouri courts. It was the exclusive state procedure by which a prisoner in custody could collaterally seek to vacate, set aside, or correct a sentence for violations of constitutional rights, lack of jurisdiction, or a sentence in excess of the statutory maximum.

The purpose of a Rule 27.26 motion was to determine, in one proceeding, all claims that the original trial was in violation of any constitutional requirements or that the judgment was otherwise void. *Wright v. State*, 459 S.W.2d 370 (Mo. 1970). Rule 27.26 did not seek to suspend the rights available by writ of habeas corpus but prescribed the procedure to be followed in seeking to vacate, set aside, or correct the sentence. *Zigler v. State*, 467 S.W.2d 873 (Mo. 1971). The Rule, however, precluded the use of the writ of habeas corpus when relief under Rule 27.26 was available. *Wiglesworth v. Wyrick*, 531 S.W.2d 713 (Mo. banc 1976). A motion brought under Rule 27.26 was an independent civil action and was governed by the Missouri Rules of Civil Procedure.

Rule 27.26 was repealed, effective January 1, 1988, and Rules 24.035 and 29.15 were enacted in its place. Rules 29.15 and 24.035 apply to all proceedings in which the sentence was pronounced on or after January 1, 1988.

The general structure and language of former Rule 27.26 remained unchanged in Rules 29.15 and 24.035. John M. Morris, *Postconviction Practice Under the "New 27.26,"* 43 J. MOBAR 435 (1987). Probably one of the most stark differences between Rules 29.15 and 24.035 and former Rule 27.26 is the time deadlines for filing the motions. Under the new Rules, a movant must strictly comply with the times for filing set forth. *See* §§31.12–31.15, *infra*. Conversely, former Rule 27.26 did not have a time deadline for filing the original post-conviction motion. *See* Morris, 43 J. MOBAR at 436–38.

Another difference between the former Rule 27.26 and Rules 29.15 and 24.035 is the prohibition against successive motions. Morris, 43 J. MOBAR at 437. Rules 29.15 and 24.035 absolutely prohibit successive motions. Under former Rule 27.26, second or successive motions could not be brought if either (1) "the ground presented in the subsequent application was raised and determined adversely to

the applicant on the prior application" or (2) "the ground presented is new but could have been raised in the prior motion." Former Rule 27.26(d). The trial court was required under former Rule 27.26, however, to examine the successive motion to determine if it presented a cognizable new ground, and the court could not dismiss all subsequent motions merely because the relief requested was similar to that of a prior motion. *Warren v. State*, 473 S.W.2d 427, 428 (Mo. 1971). Motions under Rule 27.26 that were filed years after the original conviction, including successive motions, were some of the main considerations for the 1988 rule changes. Morris, 43 J. MOBAR at 435. Former Rule 27.26 did not provide for the appointment of counsel and offered no forms for pleadings. *See* Morris, 43 J. MOBAR at 436.

The general grounds for relief under Rules 24.035 and 29.15 are essentially unchanged from former Rule 27.26. Morris, 43 J. MOBAR at 435; *see also* Joel Pelofsky & Richard L. Purdon, *Rule 27.26: A Study in Post-Conviction Remedies*, 39 UMKC L. REV. 1 (1970) (discussing grounds for relief under former Rule 27.26).

Rules 29.15 and 24.035 have substantially evolved since 1988, with significant revisions in 1996, 2000, and 2002. Care should be taken to ensure that the correct versions of these rules are applied in criminal post-conviction proceedings.

C. (§31.3) Rules 29.15 and 24.035 Generally

Rule 29.15 provides the exclusive procedure for post-conviction relief by which a person convicted of a felony after trial may seek relief to vacate, set aside, or correct the judgment or sentence. The claims that may be raised under Rule 29.15 include the following:

- The conviction or sentence imposed violated the Constitution or laws of Missouri, including claims of ineffective assistance of trial and appellate counsel.
- The conviction or sentence imposed violated the United States Constitution, including claims of ineffective assistance of trial and appellate counsel.
- The court that imposed the sentence was without jurisdiction to do so.
- The sentence imposed was in excess of the maximum sentence authorized by law.

Rule 29.15(a).

Rule 29.15 is the exclusive procedure to seek relief for any of the enumerated claims. *Id.* A person seeking relief under this Rule must file the post-conviction motion in the sentencing court. A Rule 29.15 proceeding constitutes an independent civil action and is governed by Missouri law applicable to civil cases. *See State v. Athanasiades*, 857 S.W.2d 337 (Mo. App. E.D. 1993). The Missouri Rules of Civil Procedure govern Rule 29.15 proceedings insofar as those rules are applicable. Rule 29.15(a).

Rule 24.035 provides the exclusive procedure for post-conviction relief by which a person convicted of a felony on a plea of guilty and delivered to the custody of the Department of Corrections (DOC) may seek relief to vacate, set aside, or correct the judgment or sentence. Rule 24.035 is very similar to Rule 29.15. The claims that may be raised under Rule 24.035 include the following:

- The judgment of conviction or sentence imposed violated the Constitution or laws of Missouri, including claims of ineffective assistance of trial and appellate counsel.
- The judgment of conviction or sentence imposed violated the United States Constitution, including claims of ineffective assistance of trial and appellate counsel.
- The court imposing the sentence was without jurisdiction to do so.
- The sentence imposed was in excess of the maximum sentence authorized by law.

Rule 24.035(a).

Like Rule 29.15, the movant seeks relief under Rule 24.035 in the sentencing court. *Id.* Additionally, Rule 24.035 proceedings are independent civil actions and are governed by the Missouri Rules of Civil Procedure insofar as those rules are applicable. Rule 24.035(a).

D. (§31.4) Rules 29.15 and 24.035 Distinguished From Direct Appeal

Post-conviction proceedings under Rules 29.15 and 24.035 are not meant to be a substitute for a direct appeal. *State v. Tolliver*, 839 S.W.2d 296, 298 (Mo. banc 1992). Rule 29.15 cannot be used to obtain post-conviction review of a matter that should have been reviewed on direct appeal. *Id.* Rule 29.15 cannot be used to relitigate an issue that has already been decided on appeal. *State v. Six*, 805 S.W.2d 159, 167–68 (Mo. banc 1991), *cert. denied*, 502 U.S. 871 (1991). A

defendant cannot abandon an issue on appeal with the hope of reasserting it in a post-conviction proceeding. Constitutional claims that could have been raised on direct appeal, however, may not be deemed waived "where fundamental fairness requires otherwise and only in rare and exceptional circumstances." *Henderson v. State*, 786 S.W.2d 194, 197 (Mo. App. E.D. 1990); *Tolliver,* 839 S.W.2d at 298. Missouri courts emphasize that the post-conviction rules provide the exclusive procedure to vacate, set aside, or correct a judgment.

Rules 24.035 and 29.15 were substantially revised by the Supreme Court of Missouri in 1996. The revisions resulted in significant procedural changes in post-conviction practice under both Rules. One change involved the interplay between the direct appeal and the Missouri post-conviction proceeding.

Under the version of Rule 29.15 in effect before January 1, 1996, a 29.15 movant was required to file a 29.15 post-conviction motion within 30 days after the transcript was filed in the direct appeal of the underlying criminal case. Former Rule 29.15(b) (1995). The movant was also required to give the court of appeals notice that a 29.15 motion had been filed. Former Rule 29.15(b), (*l*) (1995). Upon that notice, the appellate court would suspend or stay the direct appeal until final resolution of the 29.15 proceeding in the circuit court. Former Rule 29.15(*l*) (1995). After the final disposition of the 29.15 proceeding, the movant was required to give the appellate court notice of entry of a judgment on the 29.15 motion within 10 days. *Id*. If an appeal was taken from the 29.15 judgment, the post-conviction appeal was consolidated with the direct appeal. *Id*. This consolidated or unitary appeals approach under the former Rules was adopted after a suggestion in a concurring opinion in *Flowers v. State,* 618 S.W.2d 655 (Mo. banc 1981) (Welliver, J., concurring). Judge Welliver outlined his suggestion to have post-conviction proceedings occur immediately after sentence was pronounced before appellate proceedings. *Id.* This suggestion served as the foundation for the consolidated appeals approach in the former version of Rule 29.15.

The consolidated appeals approach was short-lived. The Supreme Court of Missouri departed from it in its 1996 revisions to Rules 29.15 and 24.035. The current versions of Rules 29.15 and 24.035 return to the traditional approach of litigating post-conviction matters after the direct appeal has become final. *See* Rules 29.15(b), 24.035(b).

Under the current version of the Rules, the time deadline for filing the motion now depends on whether a direct appeal was taken of the underlying judgment or sentence being challenged. The current version of Rule 29.15 was amended in 2002 to allow the motion to be filed within 180 days of the date on which the defendant was delivered to the DOC in cases when there was no direct appeal filed. Rule 29.15(b).

If a direct appeal of the judgment or sentence being challenged in the 29.15 motion is taken, the motion must be filed within 90 days after the date the mandate of the appellate court is issued affirming the judgment or sentence. *Id.* If an appeal is taken and the appellate court remands the case, resulting in the entry of a new judgment or sentence, and another appeal is taken on the new judgment or sentence, the 29.15 motion must be filed within 90 days after the date that the appellate court issues the mandate affirming the new judgment or sentence. *Id.* If the movant did not take a second appeal on the new judgment or entry after remand, the 29.15 motion must be filed within 180 days of the later of the date the person is delivered to the custody of the DOC or the date that the new judgment or sentence was final for purposes of appeal. *Id.* Under this last provision, care should be exercised to ensure that the 29.15 motion is timely filed. The failure to file a post-conviction motion within the time provided by Rule 29.15 constitutes a complete waiver of any right to proceed under the Rule and a complete waiver of any claim that is cognizable in a 29.15 proceeding. *Id.* These rules now emphasize that the direct appeals process will be finalized before post-conviction motion proceedings commence.

If the circuit court sustains or overrules the 29.15 motion, the order is deemed a final judgment for the purposes of an appeal by the movant or the state. Rule 29.15(k). At that point, a separate appeal from the 29.15 ruling may be properly taken to the court of appeals.

The former version of Rule 24.035 did not contain any provisions related to direct appeals, presumably because a majority of guilty pleas constitute a waiver of appellate rights. Under former Rule 24.035, applicable before January 1, 1996, the 24.035 motion was simply due within 90 days of the date the movant was delivered to the custody of the DOC. Former Rule 24.035(b) (1995). The current version of Rule 24.035 contains similar provisions to those in Rule 29.15 regarding the impact of a direct appeal on the time for filing a 24.035 motion. *See* Rule 24.035(b). If an appeal is sought, the 24.035 motion must be filed within 90 days after the date the

mandate of the appellate court is issued affirming the judgment or sentence. Rule 24.035(b). If no appeal is sought, the 24.035 motion must be filed within 180 days of the date the defendant is delivered to the custody of the DOC. *Id.*

E. (§31.5) Scope of Remedy Under Rules 29.15 and 24.035

The constitutional errors for which Rules 29.15 and 24.035 provide relief remain the same as existed under former Rule 27.26 (repealed), despite the more expansive language in both new Rules that they constitute "the exclusive procedure" to obtain relief for claims "that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States." Rules 29.15(a), 24.035(a); *Allen v. State*, 792 S.W.2d 14, 15 (Mo. App. E.D. 1990); *Rainwater v. State*, 770 S.W.2d 368, 371 (Mo. App. W.D. 1989); *see also State v. Wheat*, 775 S.W.2d 155, 158–60 (Mo. banc 1989) (Blackmar, J., dissenting), *cert. denied*, 493 U.S. 1030 (1990).

The remedies available under Rule 29.15 or 24.035 are vacating, setting aside, or correcting the judgment or sentence. "If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of [constitutional] rights," "the court shall vacate and set aside the judgment and shall discharge the movant or resentence the movant or order a new trial or correct the judgment and sentence as appropriate." Rules 29.15(j), 24.035(j). The type of relief chosen is solely within the motion court's discretion. *Croney v. State*, 860 S.W.2d 17 (Mo. App. E.D. 1993). Obviously, vacating a sentence does not ensure the release of the confined individual. The case may be merely remanded for purposes of re-sentencing. If a new trial is ordered, the decision to retry the case, of course, is within the discretion of the prosecuting attorney, and the question of bond while awaiting retrial will be determined by the trial court.

The term "ineffective assistance . . . of appellate counsel" is expressly included as a ground for post-conviction relief in both Rule 29.15(a) and Rule 24.035(a). *See also Becker v. State,* 77 S.W.3d 27, 28 (Mo. App. E.D. 2002) (recognizing that, after the 1996 revisions, "a Rule 29.15 motion became the proper vehicle for raising a claim of ineffective assistance of appellate counsel"). Because both Rules provide the "exclusive procedure" to raise any enumerated claims for relief, claims of ineffective assistance of appellate counsel will be barred unless timely raised in a motion filed under Rule 29.15 or Rule 24.035.

The Rules have eliminated motions to recall the mandate raising claims of ineffective assistance of appellate counsel. But a motion to recall the mandate may be used to remedy a deprivation of the federal constitutional rights of a criminal defendant. *See, e.g., State v. Whitfield*, 107 S.W.3d 253, 265 (Mo. banc 2003). The Supreme Court of Missouri has affirmed that the motion to recall the mandate may also be used when a decision of a lower appellate court directly conflicts with a decision of the United States Supreme Court upholding the rights of the accused. *Id*.

The Supreme Court of Missouri has concluded that claims of ineffective assistance of trial counsel cannot be addressed in a defendant's direct appeal because of the language in Rule 29.15(a) that it constitutes the "*exclusive procedure*" by which persons convicted after a trial can seek relief from constitutional violations. *Wheat*, 775 S.W.2d at 157. The proper vehicle for raising ineffective assistance of trial counsel claims is the 29.15 or 24.035 motion.

F. Limitations of Remedies Under Rules 29.15 and 24.035

1. (§31.6) Procedural Default

Missouri courts have adopted a "procedural default" doctrine, which generally provides that a failure to raise a claim at the proper time in the original proceeding bars the claim in either a direct appeal or a collateral proceeding. Missouri courts have consistently held that the post-conviction rules cannot be invoked to review matters that were, or should have been, raised on direct appeal. *State v. Tolliver*, 839 S.W.2d 296, 298 (Mo. banc 1992); *Richardson v. State*, 773 S.W.2d 858, 860 (Mo. App. W.D. 1989). A defendant is procedurally barred from raising in a post-conviction motion claims that were available during trial and that could have been raised in direct appeal. *Rodden v. State*, 795 S.W.2d 393, 395 (Mo. banc 1990), *cert. denied*, 499 U.S. 970 (1991).

Constitutional claims that could have been raised in a previous direct appeal are deemed waived except "where fundamental fairness requires otherwise and only in rare and exceptional circumstances." *Henderson v. State*, 786 S.W.2d 194, 197 (Mo. App. E.D. 1990); *see also Sidebottom v. State*, 781 S.W.2d 791, 800 (Mo. banc 1989), *cert. denied*, 497 U.S. 1032 (1990). Challenges to the constitutionality of a criminal statute have been precluded in a 29.15 proceeding when there was a failure to raise the claim in the direct appeal. *State v. Loazia*, 829 S.W.2d 558, 571–72 (Mo.

App. E.D. 1992). Claims of trial error are not cognizable in post-conviction proceedings except when fundamental fairness requires and then only in rare and exceptional circumstances. *State v. Olds*, 831 S.W.2d 713, 722 (Mo. App. E.D. 1992). Mere trial errors are to be corrected by direct appeal rather than by post-conviction motion. *State v. Berry*, 798 S.W.2d 491, 497 (Mo. App. S.D. 1990). Claims of instructional error or constitutional objections to jury instructions are generally not cognizable in a post-conviction proceeding, absent exceptional circumstances. *State v. Six*, 805 S.W.2d 159, 168 (Mo. banc 1991), *cert. denied*, 502 U.S. 871 (1991). Missouri courts have also held that a claim of double jeopardy is not cognizable in a post-conviction proceeding when it could have been raised on direct appeal. *Tolliver,* 839 S.W.2d at 298.

In some situations, Rule 91 habeas relief may be available for procedurally defaulted claims. *See* §31.36, *infra*.

2. (§31.7) Probation Matters

A post-conviction movant cannot challenge the legality of a probation revocation in a post-conviction proceeding. *Solomon v. State*, 821 S.W.2d 133, 135 (Mo. App. S.D. 1992). Likewise, a post-conviction motion is not a proper method to challenge the effectiveness of counsel at a probation revocation hearing. *Wood v. State*, 853 S.W.2d 369, 370 (Mo. App. E.D. 1993). Claims for credit for jail time served are not cognizable in a Rule 24.035 proceeding. *Vance v. State*, 773 S.W.2d 128 (Mo. App. E.D. 1989).

3. (§31.8) Newly Discovered Evidence

Missouri courts have consistently held that claims of newly discovered evidence cannot be litigated in post-conviction proceedings. *Wilson v. State*, 813 S.W.2d 833 (Mo. banc 1991); *see also Clemmons v. State*, 795 S.W.2d 414, 418 (Mo. App. E.D. 1990), *cert. denied*, 500 U.S. 907 (1991); *Bremmer v. State*, 787 S.W.2d 761, 762 (Mo. App. E.D. 1990); *State v. Cummings*, 838 S.W.2d 4, 6 (Mo. App. W.D. 1992). This is so even when the newly discovered evidence indicates another person's guilt. *Bremmer,* 787 S.W.2d at 762. Any newly discovered evidence should be brought forth in a petition for writ of habeas corpus, in a motion to withdraw the guilty plea, or in a request for pardon from the Governor. *See Wilson,* 813 S.W.2d 833.

4. (§31.9) Claims of Innocence or Sufficiency of Evidence

The procedures set forth in Rules 29.15 and 24.035 are not available to relitigate the defendant's guilt or innocence. *E.g., State v. Plummer*, 860 S.W.2d 340, 354 (Mo. App. E.D. 1993). Challenges to the sufficiency of the evidence cannot to be litigated in post-conviction motions. *Richardson v. State*, 773 S.W.2d 858, 860 (Mo. App. W.D. 1989).

5. (§31.10) Sufficiency of Charging Document

In the past, Missouri courts viewed an insufficient indictment or information as jurisdictional, depriving the trial court of subject matter jurisdiction. *See, e.g., Puckett v. State*, 782 S.W.2d 454, 455 (Mo. App. E.D. 1990). The courts historically allowed a claim regarding the sufficiency of the charging document to be raised at any time, including for the first time on state post-conviction review. *Id.* This view changed in 1992, when the Supreme Court of Missouri ruled that an insufficient information or indictment does not deprive the trial court of subject matter jurisdiction. *State v. Parkhurst*, 845 S.W.2d 31 (Mo. banc 1992). Now, if a claim regarding the sufficiency of the charging document is raised for the first time after a verdict, the charging document "will be deemed insufficient only if it is so defective that (1) it does not by any reasonable construction charge the offense of which the defendant was convicted or (2) the substantial rights of the defendant to prepare a defense and plead former jeopardy in the event of acquittal are prejudiced." *Id.* at 35.

Care should be exercised by counsel to raise claims regarding the sufficiency of the charging document at the earliest possible stage in the proceedings and no later than the direct appeal stage. *See, e.g., Dodds v. State,* 60 S.W.3d 1, 6 (Mo. App. E.D. 2001) (a person who pleads guilty has the right to challenge the sufficiency of the indictment or information by direct appeal, and a post-conviction motion cannot substitute for a direct appeal). Matters that were or should have been raised in the direct appeal are not subject to review in a post-conviction proceeding except when fundamental fairness requires and in rare and exceptional circumstances. *Id.*

6. (§31.11) Search and Seizure Claims

In Missouri, it has generally been held that the determination of probable cause to stop and search is a trial and direct appeal matter that is not cognizable in a post-conviction motion. *State v. Jordan*, 793 S.W.2d 905, 907 (Mo. App. E.D. 1990); *see also Stone v. Powell*, 428 U.S. 465 (1976) (failure of the state courts to apply the exclusionary rule to Fourth Amendment claims is not reviewable in federal habeas corpus proceedings if the state has provided a full and fair hearing on the claim). When counsel failed to pursue or preserve a meritorious Fourth Amendment claim, the defendant may obtain relief by challenging counsel's effectiveness. In *Adams v. State*, 677 S.W.2d 408, 413 (Mo. App. W.D. 1984), counsel's failure to preserve a motion to suppress illegally seized evidence resulted in a new trial.

II. Jurisdiction to Assert a 29.15 or 24.035 Motion

A. Time for Filing

1. (§31.12) Rule 29.15

Rule 29.15 may be invoked only by a person who has been convicted of a felony after a trial. Rule 29.15(a). Unlike Rule 24.035, Rule 29.15 does not require the movant to be incarcerated or in state custody. *See Dougan v. State*, 118 S.W.3d 593 (Mo. banc 2003). A person seeking relief under Rule 29.15 must adhere to the strict deadlines for filing the motion as set out in the Rule. A failure to file the motion within the time periods provided in the Rule constitutes a complete waiver of any right to proceed under Rule 29.15, and a complete waiver of any claim that could be raised in a motion under Rule 29.15. Rule 29.15(b).

Under Rule 29.15, the time frames for filing a 29.15 motion depend on whether a direct appeal was taken of the judgment or sentence being challenged. If no appeal is taken, the 29.15 motion must be filed within 180 days of the date the person is delivered to the Department of Corrections (DOC). Rule 29.15(b). If an appeal of the judgment or sentence is taken, the motion must be filed within 90 days after the date the mandate of the appellate court is issued affirming the judgment or sentence. *Id.* If an appeal is taken and the appellate court remands the case,

resulting in the entry of a new judgment or sentence, and a new appeal is taken on the new judgment or sentence, the 29.15 motion must be filed within 90 days after the date the mandate of the appellate court is issued affirming the new judgment or sentence. *Id.* If the movant does not seek a second appeal on the new judgment or entry after remand, the 29.15 motion is due within 180 of the later of the date the person is delivered to the DOC or the date the new judgment or sentence was final for purposes of appeal. *Id.*

Under Rule 29.15, the direct appeal will be final before post-conviction proceedings. As noted more fully in §31.4 above, the former version of Rule 29.15 provided for an approach in which the post-conviction appeal and the direct appeal were consolidated. Under the former versions of the Rule, the direct appeal was suspended or stayed pending final resolution of the 29.15 process in the circuit court, and both appeals were consolidated at the appellate court level.

2. (§31.13) Rule 24.035

Rule 24.035 may be invoked only by a person who has been convicted of a felony on a plea of guilty and delivered to the custody of the DOC. Rule 24.035(a); *see also Dougan v. State*, 118 S.W.3d 593 (Mo. banc 2003) (confirming that Rule 24.035 is available only to those who have been delivered to the custody of the DOC). Like Rule 29.15, a person who seeks relief under Rule 24.035 must adhere to the strict deadline set forth in the Rule. A failure to file the motion within the time provided constitutes a complete waiver to proceed under the Rule and a complete waiver of any claim that could be raised in a motion filed under Rule 24.035. Rule 24.035(b).

The time frame for filing a 24.035 motion also depends on whether a direct appeal of the judgment or sentence was taken. If no appeal is taken, the motion must be filed within 180 days of the date the person is delivered to the custody of the DOC. Rule 24.035(b). If an appeal of the judgment and sentence was taken, the motion must be filed within 90 days of the date the mandate of the appellate court is issued affirming the judgment or sentence. *Id*. If, after the initial appeal, the appellate court remands the case resulting in a new judgment or sentence and a second appeal is taken from the new judgment or sentence, the motion must be filed within 90 days after the date of the mandate

from the appellate court in the new appeal from the new judgment or sentence. *Id.* If no second or subsequent appeal is taken from the new judgment or sentence after the initial appeal, the motion must be filed within 180 days of the later of the date the person is delivered to the DOC or the date the new judgment or sentence is final for purposes of appeal. *Id.*

3. (§31.14) Practice Under Both Rules

Under Rules 29.15 and 24.035, the motion and two copies must be filed with the clerk of the trial court. Rules 29.15(c), 24.035(c). A Missouri court has ruled that a failure of the movant to file two copies with the original motion is not defective because the sanction of waiver does not apply to a failure to file copies with the original motion. *Lewis v. State*, 845 S.W.2d 137, 139 (Mo. App. W.D. 1993). A motion is deemed filed when it is received by the circuit clerk of the proper court. *State v. Harris*, 827 S.W.2d 255, 256 (Mo. App. E.D. 1992); *State v. Simms*, 810 S.W.2d 577, 583 (Mo. App. E.D. 1991). A defendant's motion is considered filed not on the date it is mailed, but when it is lodged in the circuit clerk's office. *Harrell v. State*, 775 S.W.2d 228, 229 (Mo. App. E.D. 1989) (Rule 29.15); *Vollmer v. State*, 775 S.W.2d 230, 231 (Mo. App. E.D. 1989) (Rule 24.035); *Day v. State*, 864 S.W.2d 24, 25 (Mo. App. S.D. 1993); *Lewis,* 845 S.W.2d at 139. The date the clerk's office actually receives the motion is crucial in determining timeliness. *Jameson v. State,* 125 S.W.3d 885 (Mo. App. E.D. 2004).

A motion that was filed in the wrong district of the circuit of the trial court was, nevertheless, deemed properly filed under the post-conviction rules. *Klemme v. State*, 812 S.W.2d 569 (Mo. App. E.D. 1991). Missouri courts have declined to adopt a prison mailbox rule. Post-conviction motions are timely filed only when lodged in the court clerk's office of the proper court and *not* when mailed. *Daniels v. State*, 31 S.W.3d 121, 123 (Mo. App. W.D. 2000). The time deadlines will not be excused or waived even when it is demonstrated that the untimely filing of the motion was caused by the prison officials' dereliction of their duties with respect to inmate mail. *Matchett v. State*, 119 S.W.3d 558 (Mo. App. S.D. 2003). But when the movant produced a certified mail return receipt indicating that the circuit clerk's office signed for the packet sent by the defendant containing the motion, the motion was deemed timely filed even though the circuit clerk had no record of the motion being filed. *Broom v. State*, 111 S.W.3d

563 (Mo. App. W.D. 2003). Evidence that the clerk's office received a faxed motion and then file-stamped it within the time frames established proper filing, even if the faxed motion was not accompanied by a docket fee and exceeded the page restrictions in the local court rules for fax filings. *Jameson,* 125 S.W.3d at 886–87.

Missouri courts are unable to accept an untimely filed motion. *State v. Dooley*, 851 S.W.2d 683, 686 (Mo. App. E.D. 1993). Courts do not have the jurisdictional authority to grant additional time beyond that provided by rule. *State v. Six*, 805 S.W.2d 159, 170 (Mo. banc 1991), *cert. denied*, 502 U.S. 871 (1991). An untimely motion cannot be accepted by the court even if good cause is shown for the untimely filing. *State v. Wilkinson*, 861 S.W.2d 746, 750–51 (Mo. App. S.D. 1993) (no excuse for late filing of motion when appellate counsel did not inform defendant of the filing of the transcript on appeal before the date it was due); *State v. Ivy*, 851 S.W.2d 71, 73–74 (Mo. App. E.D. 1993) (no excuse for late filing even if defendant was subject to an administrative detention and prison officials removed his personal possessions including legal papers when confined).

It is important to note that the time period for filing a motion under Rules 24.035 and 29.15 (if no appeal is taken) runs not from the date of sentencing, but rather from the date of actual physical delivery to the Missouri DOC. *See, e.g., Edgington v. State*, 860 S.W.2d 389, 391 (Mo. App. W.D. 1993); *Stegmaier v. State*, 863 S.W.2d 924 (Mo. App. W.D. 1993); *Partridge v. State*, 848 S.W.2d 550 (Mo. App. W.D. 1993). A movant's initial delivery to the custody of the DOC starts the running of the time period, even if the defendant is later granted probation and released from custody. *Id.* at 551. When a defendant is convicted in Missouri but remains in custody out of state, the time period for filing the post-conviction motion will not run until the person is delivered to the Missouri DOC. *Bandy v. State*, 847 S.W.2d 93, 95 (Mo. App. W.D. 1992). If the exact date of delivery to the DOC cannot be determined, the motion cannot be dismissed as untimely. *Fandrich v. State*, 827 S.W.2d 270, 272 (Mo. App. E.D. 1992); *Clamme v. State*, 814 S.W.2d 334, 335 (Mo. App. S.D. 1991).

Counsel should be aware, however, that if an appeal is taken, the time limit for filing a Rule 29.15 motion is not dependent on the date of physical delivery of the movant to the DOC. In *Fincher v.*

State, 795 S.W.2d 505 (Mo. App. W.D. 1990), the defendant was convicted of murder, and the conviction was affirmed on appeal. The defendant was never delivered to the DOC, but rather remained incarcerated in Kansas for several years. Upon his delivery to the Missouri DOC several years later, he filed a Rule 29.15 motion. The court dismissed the motion, holding that the "after delivery" rule did not apply because a direct appeal was taken in the case. *Id.*

The Supreme Court of Missouri has upheld the time limits embodied in the Rules against constitutional challenge, ruling that the time limits constitute "reasonable," "mandatory," and "valid" procedures to govern post-conviction relief. *Day*, 864 S.W.2d at 25; *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989), *cert. denied*, 493 U.S. 866 (1989). The time limits of Rule 29.15 do not violate due process. *Matthews v. State*, 863 S.W.2d 388, 390 (Mo. App. S.D. 1993). The time limit provisions do not arbitrarily deny relief even absent provisions for late filings or showing good cause for the untimely filing. *Wilkinson*, 861 S.W.2d at 749; *Terrill v. State*, 792 S.W.2d 710, 711 (Mo. App. S.D. 1990). The time limitations serve the legitimate interest of avoiding delay in the processing of prisoners' claims and preventing the litigation of stale claims. *Day,* 770 S.W.2d at 695. The Supreme Court has also ruled that the time limits in Rule 24.035 did not violate the constitutional prohibitions against suspending the writ of habeas corpus, reasoning that Rule 24.035 is a new state remedy unknown to the prior law and, therefore, did not constitute a habeas corpus proceeding. *White v. State*, 779 S.W.2d 571, 572-73 (Mo. banc 1989); *see also Dayringer v. State*, 790 S.W.2d 522 (Mo. App. S.D. 1990) (Rule 29.15 decision).

If a trial court grants probation that is later revoked, the defendant may file a Rule 24.035 motion within 90 days of the date the defendant is physically delivered to the DOC. *Thomas v. State*, 808 S.W.2d 364, 365 (Mo. banc 1991); *see also McCampbell v. State*, 816 S.W.2d 681 (Mo. App. E.D. 1991) (time limitations for filing Rule 24.035 motion began to run when movant, who had been incarcerated in Florida, was physically delivered to Missouri DOC).

4. (§31.15) Amended Pleadings

Rules 29.15 and 24.035 have provisions regarding amendments to the post-conviction motion. If a movant files a motion pro se,

counsel will be appointed for the movant. Rules 29.15(e), 24.035(e). The appointed attorney must ascertain whether sufficient facts supporting the enumerated grounds are asserted in the motion and whether the movant has included all grounds known to the movant as a basis for attacking the judgment and sentence. Rules 29.15(e), 24.035(e). If the pro se motion does not assert sufficient facts or include all grounds, the appointed counsel shall file an amended motion. Rules 29.15(e), 24.035(3). If counsel determines that the amended motion is not required, counsel must file a statement with the circuit court setting out facts demonstrating what actions were taken to ensure that "(1) all facts supporting the claims are asserted in the pro se motion and (2) all claims known to the movant are alleged in the pro se motion." Rules 29.15(e), 24.035(e). This statement must be presented to the movant before filing. Rules 29.15(e), 24.035(e). The movant is entitled to file a reply to counsel's statement within ten days after the statement is filed in court. Rules 29.15(e), 24.035(e).

An amended motion must be signed by the movant or counsel. Rules 24.035(g), 29.15(g). The Rules prohibit the incorporation by reference of any material contained in previously filed motions. Rules 24.035(g), 29.15(g).

The time for filing an amended post-conviction motion, in cases when no direct appeal is taken, is within 60 days of the earlier of:

> (1) the date both a complete transcript consisting of the guilty plea and sentencing hearing has been filed in the trial court and counsel is appointed or (2) the date both a complete transcript has been filed in the trial court and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant.

Rules 24.035(g), 29.15(g).

When a direct appeal is taken, the amended post-conviction motion must be filed within 60 days of the earlier of "(1) the date both the mandate of the appellate court is issued and counsel is appointed or (2) the date both the mandate of the appellate court is issued and an entry of appearance is filed by any counsel that is not appointed but enters an appearance on behalf of movant." Rules 24.035(g), 29.15(g).

The motion "court may extend the time for filing the amended motion for one additional period not to exceed thirty days."

Rules 24.035(g), 29.15(g). Any response by the prosecutor to the motion must be filed within 30 days after the date an amended motion must be filed. Rules 24.035(g), 29.15(g).

Counsel is deemed appointed when the public defender's office is appointed and not when the individual attorney is designated. *Burgin v. State*, 847 S.W.2d 836, 839 (Mo. App. W.D. 1992). Additionally, the transfer of a case from one public defender's office to another because of a conflict of interest does not affect or toll the time limits for filing an amended motion. *State v. Leisure*, 810 S.W.2d 560, 575 (Mo. App. E.D. 1991).

An untimely amendment warrants denial of any claim in the amended pleading. *Day v. State*, 770 S.W.2d 692, 696 (Mo. banc 1989), *cert. denied*, 493 U.S. 866 (1989). Thus, any new grounds raised in the amended motion will be barred and procedurally waived if the amended motion is not timely filed. *Leisure,* 810 S.W.2d at 575. When an amended motion is not timely filed, the circuit court must conduct an inquiry to determine the cause for the untimeliness. *Sanders v. State*, 807 S.W.2d 493, 495 (Mo. banc 1991) (motion court is proper forum to hear claim that post-conviction counsel failed to file amended motion). Ineffective assistance claims, however, other than a failure to timely file an amended motion, cannot be heard in the motion court because of the prohibition against successive motions. *Id.* at 493.

The failure of post-conviction counsel to comply with the time requirements is deemed an "abandonment" of counsel. *State v. Ervin*, 835 S.W.2d 905, 918 (Mo. banc 1992). If the untimeliness of an amended motion is the result of counsel's inaction, the court will consider the amended motion as timely filed. *Id.*; *see also Sanders,* 807 S.W.2d at 494–95. When there is no record of any activity by appointed counsel, the motion court must make a *sua sponte* inquiry regarding performances of counsel. *Luleff v. State*, 807 S.W.2d 495, 498 (Mo. banc 1991). A record that does not indicate whether appointed counsel determined under Rule 29.15(e) that an amended motion should be filed creates a presumption that counsel failed to comply. *Luleff,* 807 S.W.2d at 498. If counsel has failed to act on behalf of the movant, the court shall appoint new counsel and allow time to amend the pro se motion if necessary. *Id.* The amended motion, however, will not be permitted if the untimeliness resulted from the negligence or intentional conduct of the movant. *Sanders,* 807 S.W.2d at 495. If the trial court is insufficiently informed of the reasons for the

delay, the court must make an independent inquiry as to the cause for the untimely filing. *Id.* The abandonment by an attorney does not excuse the untimely filing of an original post-conviction motion. *Smith v. State,* 21 S.W.3d 830, 831 (Mo. banc 2000).

B. (§31.16) Custody Requirement

Rule 29.15 does not have a specific requirement that the movant be in physical custody before a Rule 29.15 motion can be filed. *Dougan v. State,* 118 S.W.3d 593 (Mo. banc 2003); *Malone v. State*, 747 S.W.2d 695, 700-01 (Mo. App. E.D. 1988). Defendants who were incarcerated in other states following a Missouri conviction in a trial, therefore, may use the Rule as long as they obey the strict time limits for filing the motion. *See* John M. Morris, *Postconviction Practice Under the "New 27.26*, 43 J. MOBAR 435, 437 (1987). Because Rule 29.15 relief is available to any person convicted of a felony after trial and there is no custody requirement, the imposition of a fine only would not preclude a defendant from seeking relief under Rule 29.15. *State v. Geiler*, 866 S.W.2d 863, 864 (Mo. App. E.D. 1993).

In contrast to Rule 29.15, Rule 24.035 does require that the movant be convicted of a felony on a guilty plea and be "delivered" to the custody the Missouri DOC. Rule 24.035(a); *Dougan,* 118 S.W.3d 593. This appears to exclude persons receiving a suspended execution or imposition of sentence. A defendant should be entitled, however, to invoke Rule 24.035 if probation is revoked, as long as that defendant files the original motion within 90 days of physical delivery to the Missouri DOC. *Thomas v. State*, 808 S.W.2d 364, 365 (Mo. banc 1991). If a defendant goes directly to another state to finish sentences imposed before the Missouri sentence, the 90-day deadline for filing a Rule 24.035 motion begins to run when the defendant is physically delivered back to the Missouri DOC. *McCampbell v. State*, 816 S.W.2d 681 (Mo. App. E.D. 1991). A motion filed before the movant is physically delivered to the custody of the DOC is deemed prematurely filed. *Bandy v. State,* 847 S.W.2d 93, 95 (Mo. App. W.D. 1992). Premature motions should be dismissed without prejudice. *Id.* A premature motion does not evoke the prohibitions against successive motions set forth in Rule 24.035(*l*). *Id.*; *see also Edgington v. State*, 860 S.W.2d 389, 391 (Mo. App. W.D. 1993).

Because of the requirement that the movant be delivered to the DOC before the movant can proceed, Rule 24.035 is not available to challenge misdemeanor convictions. *See* Morris, 43 J. MOBAR at 437.

Rule 24.035(a) also appears to preclude the filing of a post-conviction motion in class C or D felonies when the defendant is not sentenced to prison but instead receives local jail time or a fine. Morris, 43 J. MOBAR at 441 n.25. Additionally, a person who receives probation is unable to pursue relief under Rule 24.035 unless the probation is revoked and the person is delivered to the DOC.

Defendants transferred to another state to serve out their Missouri sentence under the Interstate Corrections Compact, § 217.535, RSMo 2000, should be able to use Rule 24.035. *See Denny v. State*, 684 S.W.2d 78, 79–80 (Mo. App. W.D. 1985).

C. (§31.17) Successive Motions

The Rules absolutely bar second or successive motions. Rules 24.035(*l*), 29.15(*l*); *see also Kniest v. State,* 133 S.W.3d 70 (Mo. App. E.D. 2003). The prohibition against successive motions is absolute, even if the new grounds were not alleged in the prior motion and were unknown to the movant. *Thurman v. State*, 859 S.W.2d 250, 252 (Mo. App. W.D. 1993). This conclusive bar on successive motions creates great inequity for those persons who, having timely filed for post-conviction relief, face the requirement that the defendant show a reasonable probability that, but for counsel's unreasonable conduct, the defendant would have insisted on a right to trial. A motion filed prematurely fails to evoke the prohibition against successive motions. *Bandy v. State*, 847 S.W.2d 93, 95 (Mo. App. W.D. 1992); *Edgington v. State*, 860 S.W.2d 389, 391 (Mo. App. W.D. 1993). The ban against successive motions does not apply to a second 24.035 motion after a re-sentencing hearing (after direct appeal) when the second motion challenged only issues with respect to the re-sentencing hearing. *Kniest,* 133 S.W.3d at 71–72.

Claims of ineffective assistance of post-conviction counsel, other than claims of abandonment on the timely filing of amended motions, cannot be raised in a second motion because of the absolute prohibition against successive motions. *Sanders v. State*, 807 S.W.2d 493, 494–95 (Mo. banc 1991). An inquiry into counsel's failure to file an amended motion, however, does not present a problem under the prohibition against successive motions. *Id.* The appropriate forum to address claims regarding the failure of post-conviction counsel to comply with the time for filing motions is in the motion court. *Id.*

III. (§31.18) Grounds for Relief

The movant has the burden of proving the claims in a 29.15 or 24.035 proceeding by a preponderance of the evidence. Rules 29.15(i), 24.035(i). A motion filed under either Rule 29.15 or 24.035 must include every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence. Rules 24.035(d), 29.15(d). Further, a movant must declare in the post-conviction motion that all known claims for relief have been listed and must acknowledge that any claim for relief known to the movant but not listed in the motion is waived. Rules 24.035(d), 29.15(d).

Because the Missouri courts have rather narrowly construed the grounds for post-conviction relief cognizable under Rules 29.15 and 24.035, it is important that counsel preparing or assisting in the post-conviction motions be familiar with the few grounds that are available. Some court decisions discussing the most commonly raised types of claims are briefly addressed below in §§31.19–31.26. It is important to note that the grounds for relief that may be asserted in post-conviction motions did not materially change between former Rule 27.26 and the current Rules 29.15 and 24.035. Thus, some cases discussed in this section may have arisen under former Rule 27.26. *See* Joel Pelofsky & Richard L. Purdon, *Rule 27.26: A Study in Post-Conviction Remedies*, 39 UMKC L. REV. 1 (1970).

A. (§31.19) Jurisdictional Defects

An insufficient information or indictment does not deprive the trial court of subject matter jurisdiction. *State v. Parkhurst*, 845 S.W.2d 31 (Mo. banc 1992). Therefore, the post-conviction relief available to challenge an insufficient charge is quite limited. *See* §31.10, *supra*.

Other jurisdictional defects may be raised in a Rule 91 habeas corpus petition. *See* §31.36, *infra*.

B. (§31.20) Denial of Effective Assistance of Counsel

The Supreme Court of the United States squarely addressed the meaning of the Sixth Amendment right to effective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court focused on counsel's role in the adversarial process envisioned by the right to fair trial. The "benchmark" for judging claims of ineffectiveness is "whether counsel's conduct so undermined the proper functioning of

the adversarial process that the trial cannot be relied on as having produced a just," "reliable" result. *Id.* at 686–87.

1. (§31.21) Standard Applied

To prevail on a claim of ineffective assistance of counsel in a 29.15 motion, the movant must show:

- that counsel failed to exercise the degree of care, skill, and diligence of a reasonably competent attorney under similar circumstances; and
- that the alleged deficiency in trial counsel's performance prejudiced the movant.

Deck v. State, 68 S.W.3d 418 (Mo. banc 2002); *Cotton v. State*, 25 S.W.3d 507, 509 (Mo. App. E.D. 2000). The second prong of this test may be shown by establishing a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Fogle v. State,* 124 S.W.3d 509, 511 (Mo. App. S.D. 2004); *Deck,* 68 S.W.3d at 426. A showing of a "*reasonable probability*" does not, however, equate with proof that the errors were "outcome determinative." *Deck,* 68 S.W.3d at 426–27. To prevail on a claim for ineffective assistance of counsel, the movant must overcome the presumption that counsel's actions are a matter of trial strategy. *Barnett v. State,* 103 S.W.3d 765, 771 (Mo. banc 2003). Although another attorney may have employed a different strategy, or matters may have been handled differently by many, if not most, attorneys, this is not enough to establish ineffectiveness. *Id.*

When the ineffective assistance claim involves counsel's failure to call a witness to testify, the movant must show that the witness would have testified if called and that the witness's testimony would have aided the defense. *Cotton,* 25 S.W.3d at 509. When a 29.15 movant alleges facts that defense counsel failed to investigate and that counsel failed to call favorable witnesses and those facts were not refuted in the record, the movant is generally entitled to an evidentiary hearing on the 29.15 motion. *Id.*

2. (§31.22) Pretrial Conduct

Pretrial conduct by counsel that has been the basis of post-conviction motions includes:

- failing to investigate the facts or law of the case;
- failing to consult with the defendant; and
- giving incorrect or misleading advice before a plea of guilty.

There is no hard-and-fast rule that counsel must conduct an independent investigation in all cases, but investigation must be adequate under the circumstances. Counsel's basic duty to investigate remains intact under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court observed that strategic choices made after thorough investigation "are virtually unchallengeable." *Id.* at 690–91. Strategic choices based on less than complete investigation are reasonable "to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 691; *see also Moore v. State*, 827 S.W.2d 213, 215 (Mo. banc 1992); *Bonner v. State*, 734 S.W.2d 606, 607 (Mo. App. W.D. 1987). The defendant's statements or actions may be found to have a strong bearing on the reasonableness of the attorney's actions. *Strickland,* 466 U.S. at 691.

Claims that counsel has failed to meet with the defendant in preparation for trial must overcome the general rule that the adequacy of representation cannot be determined solely on the basis of the amount of time counsel spent interviewing the defendant. *Harris v. State*, 603 S.W.2d 16 (Mo. App. E.D. 1980); *Babcock v. State*, 485 S.W.2d 85, 89 (Mo. 1972); *Williams v. State*, 508 S.W.2d 211 (Mo. App. W.D. 1974).

Counsel's failure to investigate whether a state witness had made a deal with the federal government to testify against the defendant/movant in state court was ineffective assistance of counsel, especially when the defense lawyer admitted that he had a suspicion of such a deal but did not follow up on the issue. *State v. Jones*, 955 S.W.2d 5, 10–11 (Mo. App. W.D. 1997).

The failure of trial counsel to test hair samples found in the back seat of the victim's car when the victim was shot was viewed by the Supreme Court of Missouri as conduct outside the range of reasonably competent professional behavior, constituting ineffective assistance of counsel. *Wolfe v. State*, 96 S.W.3d 90, 94–95 (Mo. banc 2003).

In *Gennetten v. State*, 96 S.W.3d 143, 148–50 (Mo. App. W.D. 2003), defense counsel failed to investigate and interview the

chief of the burn unit at the hospital where the victim was treated. The court of appeals held that this failure constituted ineffective assistance of counsel because the witness was easy to locate and would have testified that the burns were consistent with accidental injuries. *Id.*

In the context of guilty pleas, the prejudice requirement to show ineffective assistance of counsel focuses on whether there was a reasonable probability that, but for counsel's errors, the movant would not have pleaded guilty. *Hao v. State*, 67 S.W.3d 661, 663 (Mo. App. E.D. 2002). For example, although neither the court nor defense counsel is obligated to inform a defendant about parole eligibility, erroneous advice regarding parole can affect the voluntariness of a guilty plea and provide a claim for relief under Rule 24.035. *Hao,* 67 S.W.3d 661. Another cognizable claim in the context of guilty pleas has been recognized when defense counsel fails to advise the defendant of the defendant's right to testify on the defendant's own behalf if the case had proceeded to trial. *Simmons v. State*, 100 S.W.3d 143, 147 (Mo. App. E.D. 2003).

3. (§31.23) Trial Conduct

To prevail on a claim for ineffective assistance of counsel, the movant must overcome the presumption that counsel's actions are a matter of trial strategy. *Barnett v. State,* 103 S.W.3d 765, 771 (Mo. banc 2003). Although another attorney may have employed a different strategy or matters may have been handled differently by many, if not most, attorneys, this is not enough to establish ineffectiveness. *Id.* The heavy presumption of "sound trial strategy" applies to counsel's conduct at trial, yet the presumption is rebuttable. In *Trimble v. State*, 693 S.W.2d 267, 273 (Mo. App. W.D. 1985), the defendant in a capital trial received ineffective assistance when his attorney failed to produce testimony regarding an incident during a recess in which the victim's mother allegedly gave money to the state's witnesses. In another case, counsel was deemed ineffective for failing to produce the defendant's mother to present his alibi, notwithstanding counsel's investigation of the witness before trial and her availability. *Perkins-Bey v. State*, 735 S.W.2d 170, 172 (Mo. App. E.D. 1987). The failure to object properly to errors at trial also may be deemed ineffective on the particular facts of the case. *See, e.g., Presley v. State*, 750 S.W.2d 602 (Mo. App. S.D. 1988), *cert. denied*, 488 U.S. 975 (1988); *Salkil v. State*, 736 S.W.2d 428 (Mo. App. W.D. 1987); *Kenner v. State*, 709 S.W.2d

536 (Mo. App. E.D. 1986). Other Missouri courts have indicated a hesitance to grant post-conviction relief on a lawyer's failure to object based on reasonable trial strategy. *See State v. Tokar,* 918 S.W.2d 753 (Mo. banc 1996) ("In many instances seasoned trial counsel do not object to otherwise improper questions or arguments for strategic purposes. It is feared that frequent objections irritate the jury and highlight the statements complained of, resulting in more harm than good.").

The Missouri Court of Appeals has held that defense counsel's failure to object to a motion to strike the defendant's entire trial testimony, based on the defendant's refusal to answer questions on cross-examination regarding his prior convictions, constituted ineffective assistance of counsel. *Schnelle v. State,* 103 S.W.3d 165, 174–75 (Mo. App. W.D. 2003). With regard to jury instructions, it has been held that trial counsel's failure to present to the court a properly worded instruction for a lesser-included offense constitutes ineffective assistance of counsel. *Patterson v. State*, 110 S.W.3d 896, 902–03 (Mo. App. W.D. 2003).

Claims of ineffective assistance regarding lawyer arguments are difficult in the post-conviction context. In *Yarborough v. Gentry,* 540 U.S. 1 (2003), the defendant claimed on federal habeas relief about his lawyer's closing argument that left out key facts and called the defendant a stinking thief and a jail bird. The United States Supreme Court held that, although the right to effective assistance of counsel extends to closing arguments, counsel has wide latitude in deciding how to present closing arguments. *Id.* at 5–6. Judicial review of a defense attorney's summation is highly deferential and even "doubly deferential" when it is conducted through the lens of federal habeas review. *Id.* at 6.

4. (§31.24) Posttrial Conduct

Rules 29.15 and 24.035 specifically require that all claims of ineffective assistance of appellate counsel be raised in the post-conviction motion. Rules 29.15(a), 24.035(a).

C. (§31.25) Prosecutorial Misconduct

Claims of trial error are generally not cognizable in post-conviction proceedings except when fundamental fairness dictates—and then only in rare circumstances. *State v. Schmidt*, 865 S.W.2d 761, 764 (Mo. App. E.D. 1993). If the errors are constitutional violations, they

are generally not cognizable in post-conviction proceedings unless exceptional circumstances are shown to justify not raising the issue on direct appeal. *State v. Clark*, 859 S.W.2d 782, 789 (Mo. App. E.D. 1993).

A claim that the state failed to disclose evidence is an allegation of trial error that is generally outside the scope of post-conviction relief. *Burgin v. State*, 847 S.W.2d 836, 839 (Mo. App. W.D. 1992). Another Missouri court held that the defendant's claims that the state used false testimony and failed to disclose evidence were outside the scope of post-conviction relief. *State v. White*, 790 S.W.2d 467, 474–75 (Mo. App. E.D. 1990). In *State v. Motley*, 805 S.W.2d 230 (Mo. App. E.D. 1991), the court held that a defendant convicted of murder was not entitled to relief under the post-conviction rules based on a claim that the prosecutor failed to disclose a "deal" between the prosecution and witness by which the witness would receive a reduced sentence on other pending charges. The court noted that the jury was aware of the witness's criminal record, his reluctance to testify, and the indefinite promises of the state. *Id.*

D. (§31.26) Issues Regarding Guilty Pleas and Factual Basis

Missouri continues to recognize claims of error affecting the voluntariness and understanding with which the defendant entered the guilty plea. The court of appeals has granted post-conviction relief when a guilty plea was accepted despite the lack of an underlying factual basis establishing the commission of a crime. *Jones v. State*, 758 S.W.2d 153, 155 (Mo. App. E.D. 1988). In *Long v. State*, 745 S.W.2d 724 (Mo. App. W.D. 1987), the court ordered a hearing on the defendant's claim that he wrongly believed that any sentence imposed following a probation revocation would not exceed the term of probation originally ordered. *See also Eakins v. State*, 734 S.W.2d 290, 293-94 (Mo. App. E.D. 1987).

A claim that the factual basis made during a guilty plea hearing does not sustain a conviction for the charged offense is a cognizable claim under Rule 24.035. *See, e.g., England v. State*, 85 S.W.3d 103, 106 (Mo. App. W.D. 2002); *Jones v. State*, 117 S.W.3d 209 (Mo. App. S.D. 2003). In *England* the court found that the factual basis made on a charge of first degree assault, which required proof of an "attempt to kill," did not establish that the defendant acted purposefully with the

specific intent to kill the victim of the assault. *England*, 85 S.W.3d at 106–07. In *Jones* the court concluded that the defendant's guilty plea to second degree assault lacked a sufficient factual basis when:

- the charge was not read or referred to at the plea hearing;
- the pre-sentence investigation report was not made part of the record; and
- there was no mention at the plea hearing of the defendant's actions, the victim's injuries, or the object used to cause those injuries.

Jones, 117 S.W.3d at 212–14.

A movant for post-conviction relief under Rule 24.035 can attack a guilty plea only on grounds that the plea was not knowingly and voluntarily made. *Moore v. State*, 853 S.W.2d 378, 380 (Mo. App. S.D. 1993). A disappointed hope of a lesser sentence does not make a plea involuntary. *McCall v. State*, 771 S.W.2d 357, 359 (Mo. App. E.D 1989). When a movant claims to have suffered from a mistaken belief about a sentence, the court will look at the record of the plea to determine whether that belief is reasonable. *Id.* Only when it appears that the belief is based on a positive representation on which the movant is entitled to rely will a court conclude the mistaken belief is reasonable. *Id.* In *McCall* the plea transcript was devoid of any fact that the movant would be eligible for parole, and the movant did not allege that any promises regarding parole were made. The movant was not entitled to post-conviction relief on the basis that the plea was involuntary because he erroneously believed he was eligible for parole. *Id.* at 358. A movant may be entitled to post-conviction relief when the prosecutor fails to fulfill a promise that induced the guilty plea. *See Girardier v. State*, 835 S.W.2d 498, 499 (Mo. App. E.D. 1992).

Many Rule 24.035 claims involve ineffective assistance of counsel claims. After the defendant has entered a guilty plea, the effectiveness of the defendant's counsel is relevant only to the extent it affects the voluntariness of the plea. *Hamilton v. State*, 865 S.W.2d 374, 375 (Mo. App. E.D. 1993). Thus, any claims of ineffectiveness of counsel are waived by the plea except to the extent that the claims affected the voluntariness of the plea. *Boxx v. State*, 857 S.W.2d 425 (Mo. App. E.D. 1993). To be entitled to an evidentiary hearing on an ineffective assistance claim, the movant must plead facts that, if true, would warrant relief. *Id.* at 427. Further, the allegations must not be refuted by the record and must have prejudiced the defendant. *Id.* In

addition, a defendant who assures the court that the defendant is satisfied with counsel and that counsel has done everything requested is later barred from obtaining post-conviction relief based on ineffective assistance of counsel. *Hamilton,* 865 S.W.2d at 375.

IV. (§31.27) Procedure Under Rules 29.15 and 24.035

The post-conviction rules declare that the Missouri Rules of Civil Procedure govern post-conviction proceedings insofar as applicable. Rules 29.15(a), 24.035(a). The Supreme Court of Missouri has interpreted some of the Rules of Civil Procedure that applied under former Rule 27.26 to be inapplicable under Rules 29.15 and 24.035. In *State v. Vinson*, 800 S.W.2d 444, 447 (Mo. banc 1990), the Supreme Court held that Rule 55.33(b), which permits issues to be tried by express or implied consent of the parties even when they do not appear in the pleadings, does not apply to Rules 29.15 and 24.035. The Court reasoned that recognizing claims that were not included in the amended motion conflicted with the mandate that defendants verify their amended motions to include all known claims and to waive any known claim not raised in the pleadings. *Id.*

The Supreme Court has also declared that the parties in a post-conviction proceeding have no peremptory right to recuse the trial court judge from the proceeding under Rule 51.05. *Thomas v. State*, 808 S.W.2d 364, 366–67 (Mo. banc 1991). The Court reasoned that recusal of the trial court judge inherently caused delay in the proceeding, both in processing the transfer of the case and in requiring a new judge to become familiar with the record of original proceedings. *Id.* Rule 44.01(a), concerning the calculation of time in determining deadlines, does apply to Rules 29.15 and 24.035. *See Clemmons v. State*, 785 S.W.2d 524, 527 (Mo. banc 1990), *cert. denied*, 498 U.S. 882 (1990).

Discovery under the post-conviction rules generally follows the rules applicable to civil procedure. *State v. Baker*, 859 S.W.2d 805 (Mo. App. E.D. 1993). At any hearing ordered by the motion court, the movant does not need to be present. Rules 24.035(i), 29.15(i). The court may order that the testimony of the movant be received by a deposition. Rules 24.035(i), 29.15(i).

A. (§31.28) Form of the Motion

The process is initiated by filing the original and two copies of the motion in the court that imposed sentence. The prescribed form applicable to Rules 24.035 and 29.15 appears in the forms following the Rules of Criminal Procedure (Form 40). *See* §31.58, *infra*. This sample provides directions for filing, which include the requirements that a person seeking to proceed *in forma pauperis* attach a supporting affidavit and that the motion include all grounds for relief that are known to the prisoner. The form provided is quite detailed and seeks to gather the relevant information about the conviction and the grounds on which relief is requested.

The motion to vacate under Rule 29.15 or 24.035 must include every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence. Rules 29.15(d), 24.035(d). Movants must declare in the motion that they have listed all claims for relief known to them and acknowledge their understanding that any claims for relief known to the movant that are not listed in the motion will be waived. Rules 29.15(d), 24.035(d).

If an amended motion is filed by counsel, it must be signed by the movant or counsel. Rules 29.15(g), 24.035(g). An amended motion cannot incorporate by reference materials contained in a previously filed motion. Rules 29.15(g), 24.035(g). The signature requirement for amended motions departs from the prior versions of the Rules, which expressly required that the movant verify an amended motion. Former Rules 29.15(f), 24.035(f) (1995); *Day v. State*, 770 S.W.2d 692, 696 (Mo. banc 1989), *cert. denied*, 493 U.S. 866 (1989).

Any response by the prosecutor to a post-conviction motion must be filed within 30 days after the date an amended motion must be filed. Rules 29.15(g), 24.035(g).

B. (§31.29) Clerk's Duties

When the clerk of the trial court receives a 29.15 or 24.035 motion for filing, the clerk must immediately deliver a copy of the motion to the prosecutor. Rules 29.15(c), 24.035(c). The clerk must also notify the sentencing judge and notify the court reporter to prepare and file the complete transcript of the trial if the transcript has not yet been prepared or filed. Rules 29.15(c), 24.035(c). If the motion is filed by an indigent pro se movant, the clerk must "forthwith send a copy of the

motion to the counsel who is appointed to represent the movant." Rules 29.15(c), 24.035(c).

C. (§31.30) Appointment of Counsel

Under both Rule 24.035 and Rule 29.15, the court will appoint counsel for any movant who is indigent and files a pro se motion. Rules 24.035(e), 29.15(e). Appointed counsel must then ascertain whether sufficient facts supporting the claims are asserted in the pro se motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. Rules 24.035(e), 29.15(e). If the pro se motion does not assert sufficient facts or include all claims known to the movant, appointed counsel—or private counsel who enters an appearance—must file an amended motion that sufficiently alleges the additional facts and claims. Rules 24.035(e), 29.15(e). If counsel determines that no amended motion should be filed, Rules 29.15 and 24.035 require counsel to file a statement setting out facts demonstrating what actions were taken to ensure that "(1) all facts supporting the claims are asserted in the pro se motion and (2) all claims known to the movant are alleged in the pro se motion." Rules 24.035(e), 29.15(e). This statement must be presented to the movant before filing. Rules 24.035(e), 29.15(e). The movant is entitled to file a reply to counsel's statement within ten days after the statement is filed in court. Rules 24.035(e), 29.15(e).

The time for filing an amended motion is discussed in §31.15 above. Care should be taken by appointed or retained counsel to ensure that the time deadlines for filing the amended motion under Rule 29.15(g) and Rule 24.035(g) are met. In addition, the court may extend the time for filing amended motions for one additional period not to exceed 30 days. Rules 29.15(g), 24.035(g). If a public defender is appointed by the court to represent a post-conviction movant, counsel is deemed appointed, and the time periods for filing an amended motion begin to run when the public defender's office is appointed rather than when the individual attorney is designated. *Burgin v. State,* 847 S.W.2d 836, 839 (Mo. App. W.D. 1992). The transfer of a post-conviction case from one public defender's office to another because of a conflict of interest will not affect or toll the time limits for filing the amended motion. *State v. Leisure*, 810 S.W.2d 560, 575 (Mo. App. E.D. 1991); *State v. Hill*, 808 S.W.2d 882, 893 (Mo. App. E.D. 1991).

The time limits for amendment place increased importance on counsel's diligence in conferring with the movant, examining the record, and filing a timely, verified amended motion. The failure to file a timely amendment alone supports denial of the claims raised in it. *Day v. State*, 770 S.W.2d 692, 696 (Mo. banc 1989), *cert. denied*, 493 U.S. 866 (1989).

When appointed counsel does not file an amended motion or files an untimely or unverified amended motion, a rebuttable presumption arises that counsel failed to perform the obligations imposed by Rule 29.15(e) if the record is silent as to the cause for the omission. *Luleff v. State*, 807 S.W.2d 495, 498 (Mo. banc 1991); *Sanders v. State*, 807 S.W.2d 493, 495 (Mo. banc 1991). The Supreme Court of Missouri has instructed circuit courts to take evidence to discern the cause for the lack of amended motions or the filing of untimely or unverified amended motions. *Id.* If the defect results from the post-conviction attorney's failure to fulfill the duties under Rules 29.15(e) and 24.035(e) and the movant is blameless for the defect at issue, the court must permit the movant an opportunity to correct the defect, even to the extent of permitting the defendant a chance to file an amended motion. *Sanders,* 807 S.W.2d at 495; *see also*:

- *McIntosh v. State*, 809 S.W.2d 449 (Mo. App. S.D. 1991) (remand to determine if counsel abandoned movant by filing untimely amended motion);
- *Kaup v. State*, 812 S.W.2d 558 (Mo. App. S.D. 1991) (remand to determine if counsel abandoned movant by filing unverified amended motion);
- *Walker v. State*, 812 S.W.2d 574 (Mo. App. E.D. 1991) (motion counsel compromised movant's right to meaningful review of his claims by failing to file an amended motion);
- *Bass v. State*, 808 S.W.2d 416 (Mo. App. S.D. 1991) (remand to determine why no amended motions filed in Rule 24.035 proceedings);
- *Tipton v. State*, 811 S.W.2d 60 (Mo. App. E.D. 1991) (remand to determine cause for counsel's failure to request in a timely manner extension of time to amend).

D. (§31.31) Withdrawal of Counsel

"For good cause shown, counsel may be permitted to withdraw upon the filing of an entry of appearance by successor counsel." Rules 24.035(f), 29.15(f). If appointed counsel is permitted to

withdraw, the court must cause new counsel to be appointed. Rules 24.035(f), 29.15(f).

E. (§31.32) Entitlement to Hearing

Rules 24.035 and 29.15 state that, if the court determines that the motion and the files and records of the case conclusively show that the movant is not entitled to relief, a hearing does not have to be held. Rules 24.035(h), 29.15(h).

To obtain an evidentiary hearing:

- the motion must cite facts, not conclusions, that if true would entitle the movant to relief;
- the factual allegations must not be refuted by the record; and
- the matters complained of must prejudice the movant.

See, e.g., Patel v. State, 108 S.W.3d 82, 84 (Mo. App. E.D. 2003); *Patterson v. State,* 92 S.W.3d 212, 214 (Mo. App. W.D. 2002). If the court files and the record conclusively show that the movant is not entitled to relief, a hearing shall not be held. *Fogle v. State,* 124 S.W.3d 509, 511 (Mo. App. S.D. 2004).

F. (§31.33) Conduct of Hearing

If the court grants a hearing, the hearing must be on the record and confined to the claims contained in the last timely filed motion. Rules 29.15(i), 24.035(i). "The court may continue the hearing upon a showing of good cause." Rules 29.15(i), 24.035(i). "The movant has the burden of proving the movant's claims for relief by a preponderance of the evidence." Rules 29.15(i), 24.035(i).

Defendants do not have the express right to attend the hearing. The Rules grant authority for the trial court to take the defendant's testimony by deposition. Rules 24.035(i), 29.15(i). Thus, the evidentiary hearing may be conducted without the presence of the movant and with the use of the movant's deposition. *Cain v. State*, 780 S.W.2d 66 (Mo. App. E.D. 1989). Because proceedings under Rules 29.15 and 24.035 are civil proceedings, the movant's Sixth Amendment right to confrontation is not invoked. *Leisure v. State*, 828 S.W.2d 872 (Mo. banc 1992), *cert. denied*, 506 U.S. 923 (1992).

G. (§31.34) Findings and Conclusions of Court

"The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held." Rules 24.035(j), 29.15(j). The court is not required to rule on claims raised in an untimely motion. *State v. Humphrey*, 789 S.W.2d 186 (Mo. App. E.D. 1990). The failure of the motion court to enter findings of fact and conclusions of law is error. *State v. Stanley*, 952 S.W.2d 327, 330 (Mo. App. S.D. 1997). There are numerous appellate court decisions that remand a 29.15 or 24.035 appeal because of insufficient findings of fact and conclusions of law entered by the motion court. *See, e.g., Blackmon v. State*, 102 S.W.3d 90, 92 (Mo. App. W.D. 2003) ("mere recital or statement that the files and record conclusively refute a claim for relief under the rule will not suffice"); *Smith v. State*, 118 S.W.3d 691 (Mo. App. W.D. 2003). If the motion court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of the rights given the movant by the Constitution of Missouri or the Constitution of the United States, the Rules require the court to vacate and set aside the judgment and to either:

- discharge the movant;
- re-sentence the movant;
- order a new trial; or
- correct the judgment or sentence.

Rules 24.035(j), 29.15(j).

H. (§31.35) Appeals

An order by the court sustaining or overruling a 24.035 or 29.15 motion is a final judgment for purposes of an appeal by the movant or the state. Rules 24.035(k), 29.15(k). Under the former versions of both Rules, the direct appeal was stayed pending final resolution of the post-conviction proceedings and was then consolidated with the appeal from the post-conviction proceedings once they were final. The 1996 amendments to Rules 29.15 and 24.035 abandoned the consolidated appeals approach in favor of the traditional approach in which post-conviction proceedings are litigated only after the direct appeal is final. *See* §31.4, *supra*.

If the motion court determines that a post-conviction movant is indigent, it must authorize an appeal *in forma pauperis* and furnish without cost a record of all proceedings for appellate review.

Rules 29.15(k), 24.035(k). When an appeal is taken, the circuit court should order the official court reporter to prepare the transcript necessary for appellate review. Rules 29.15(k), 24.035(k). If the motion court finds against the movant on the issue of indigence, upon request of the movant, the court must certify and transmit to the appellate court a transcript and legal file of evidence solely related to the issue of indigence to allow the appellate court to review that issue. Rules 29.15(k), 24.035(k).

In an appeal from a post-conviction proceeding under either rule, the appellate court will review the findings of fact and conclusions of law of the motion court under a clearly erroneous standard. Rules 29.15(k), 24.035(k). Findings of fact and conclusions of law under either Rule are clearly erroneous only if, after a review of the entire record, the reviewing court is left with the definite and firm impression that a mistake has been made. *State v. Thompson*, 955 S.W.2d 828, 831 (Mo. App. W.D. 1997).

A defendant who escapes or defaults on an appeal bond during the pendency of a post-conviction proceeding waives the right to pursue post-conviction relief as well as the appeal of its denial. *Sanders v. State*, 790 S.W.2d 497 (Mo. App. E.D. 1990); *State v. Gillispie*, 790 S.W.2d 519, 520 (Mo. App. S.D. 1990).

Review of the court of appeals' decision is possible, but a transfer to the Supreme Court of Missouri is discretionary. *See* Rules 83.01–83.06. Review by the United States Supreme Court is also possible under 28 U.S.C. § 1651(a) in an application for a writ of certiorari. Several factors must be considered before application for a writ of certiorari is made. First, counsel should consider the very small chance of a writ being granted. Second, there must be a final decision by the highest state court that would have reviewed the case in a nondiscretionary procedure. It can be assumed that, if the basis for the original appeal is the construction of state law or an issue involving the construction or application of the state constitution, the Supreme Court would follow the interpretation by the state court and deny the writ or allow it and find for the state.

V. (§31.36) State Habeas Relief Under Rule 91

Rule 91 governs the writ of habeas corpus in Missouri state courts. Rule 91.01(b) states that "[a]ny person restrained of liberty within

this state may petition for a writ of habeas corpus to inquire into the cause of such restraint." A habeas proceeding under Rule 91.01 is a civil action. Provisions under Rule 91 govern:

- where to file the petition;
- the contents and attachments to the petition;
- the answer;
- the pleadings; and
- the hearing.

Counsel should consult all Rules under Rule 91 for the procedures to be followed.

Since the adoption of Rules 29.15 and 24.035, there have been questions surrounding the applicability of Rule 91. Based on recent decisions of the Supreme Court of Missouri, it appears that Rule 91 is still a means by which a habeas petitioner may receive review of unexhausted claims.

The Missouri habeas Rules allow a person "restrained of liberty" within Missouri to petition for relief. Rule 91.01. The petitioner may seek review of the facial validity of the petitioner's confinement as well as review of prison conditions that constitute cruel and unusual punishment. *State ex rel. Haley v. Groose*, 873 S.W.2d 221 (Mo. banc 1994). The petitioner must demonstrate that the claims either have not been procedurally defaulted or were previously unknown to the petitioner. *White v. State*, 779 S.W.2d 571 (Mo. banc 1989). One exception to this general rule is the so-called "abandonment of counsel" circumstance. Habeas may be available when the petitioner's post-conviction counsel abandons the petitioner and causes the procedural default. *Kilgore v. State*, 791 S.W.2d 393 (Mo. banc 1990). Another exception involves claims based on newly discovered evidence; these claims may be pursued under Rule 91. *Wilson v. State*, 813 S.W.2d 833 (Mo. banc 1991).

Caselaw should also be consulted when filing or litigating a Rule 91 action. For example, in *State ex rel. Nixon v. Clark,* 926 S.W.2d 22 (Mo. App. W.D. 1996), the court analyzed the venue requirements of Rule 91, holding that a Rule 91 action naming the state director of the parole program, who was located in Jefferson City, was improperly filed in Kansas City, even though the petitioner was located in Kansas City and his parole officer was located in Kansas City.

The Supreme Court of Missouri has issued several relatively recent opinions regarding the availability of a Rule 91 writ of habeas corpus. In *Clay v. Dormire*, 37 S.W.3d 214 (Mo. banc 2000), the Court reemphasized that relief under the writ of habeas corpus has traditionally been very limited and that courts are not required to issue the extraordinary writ when other remedies are adequate and available. *Id.* at 217. The Court noted that a person cannot typically use the writ of habeas corpus to raise procedurally barred claims that could have been raised on direct appeal or in a post-conviction proceeding. *Id.* Very limited exceptions to this rule have been recognized when the person seeks to use the writ of habeas corpus to raise jurisdictional issues or in circumstances so rare and exceptional that a "manifest injustice" results. *Id.* Recognizing that prior caselaw had not clearly defined the term "manifest injustice," the Supreme Court of Missouri concluded that the term "manifest injustice" is the same as the term "miscarriage of justice" used in federal habeas cases. *Id.* This standard requires the petitioner to show that a constitutional violation has probably resulted in the conviction of a person who is actually innocent. *Id.* With the exception of the penalty phase in capital cases, manifest injustice under the "actual innocence" standard applies only to the issue of guilt or innocence and is of no avail to claims of error committed during the sentencing process. *Id.* at 218.

In *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210 (Mo. banc 2001), the Supreme Court of Missouri concluded that a state writ of habeas corpus may also be pursued if the petitioner demonstrates cause and prejudice for not raising the claims in a direct appeal or in state post-conviction proceedings. "[C]ause" ordinarily turns on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rules. *Id.* at 215. "[P]rejudice" must be shown by establishing that errors at trial worked to the movant's actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions. *Id.*

The Supreme Court of Missouri has also expanded the availability of the state writ of habeas corpus in cases when freestanding claims of actual innocence are raised. In *State ex rel. Amrine v. Roper,* 102 S.W.3d 541 (Mo. banc 2003), the Court held that the state writ of habeas corpus is an appropriate means for a defendant to assert a claim of actual innocence, independent of any constitutional violation at trial. The evidence of actual innocence must be shown by the petitioner under a heightened standard of clear and convincing evidence. *Id.* at 548.

In light of these cases, a petitioner may be able to raise a procedurally defaulted claim in a Rule 91 proceeding if the petitioner can assert either:

- a claim of actual innocence;
- a jurisdictional defect; or
- cause and prejudice for not raising the claim below.

Brown v. State, 66 S.W.3d 721 (Mo. banc 2002).

In *State ex rel. Green v. Moore,* 131 S.W.3d 803 (Mo. banc 2004), the Supreme Court considered a double jeopardy claim in a Rule 91 habeas corpus petition that was not raised in the direct appeal or in a post-conviction proceeding on the basis that the claim raised a jurisdictional defect that is a recognized exception to the procedural default rules. The Court also recently granted Rule 91 habeas relief on a procedurally defaulted claim when the petitioner demonstrated cause for failing to timely raise the claim in a post-conviction proceeding and prejudice as a result. *State ex rel. Taylor v. Moore,* 136 S.W.3d 799 (Mo. banc 2004). In *Moore*, the petitioner was advised that he could participate in a long-term drug treatment program but was later determined to be ineligible. The Supreme Court granted relief and indicated that the "cause" for not raising the issue in a post-conviction motion was that petitioner was not aware of the problems during the time period he had to file a post-conviction motion under Rule 24.035. *Id.*

VI. Other Missouri Post-Conviction Remedies

A. (§31.37) Writ of Error *Coram Nobis*

Until 1988, the writ of error *coram nobis* was another post-conviction remedy available under Missouri law. A writ of error *coram nobis* was used to attack the validity of a sentence that had already been served. *Bainter v. State*, 622 S.W.2d 802 (Mo. App. E.D. 1981). The writ of error *coram nobis* was an extraordinary writ, and it was not a writ of right. *Grice v. State*, 634 S.W.2d 502, 503 (Mo. App. E.D. 1982). A proceeding in the nature of a writ of error *coram nobis* was a civil proceeding even though the petitioner sought relief from a criminal conviction. *Williams v. State*, 658 S.W.2d 506, 507 (Mo. App. E.D. 1983).

Missouri abolished the writ of error *coram nobis* by civil rule in 1988. Rule 74.06(d); *Smeeton v. State*, 815 S.W.2d 147, 148 (Mo. App. S.D. 1991). Rules 29.15 and 24.035 now provide the "exclusive" remedy for post-conviction relief in Missouri. *Watkins v. State*, 784 S.W.2d 347 (Mo. App. S.D. 1990). Rule 74.06(d) also abolished writs of *coram vobis*, *audita querela*, and bills of review.

B. (§31.38) Motions to Withdraw Guilty Plea

The theory applied by the courts regarding pleas is that the entry of a guilty plea represents a "break in the chain of events which has preceded it in the criminal process." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Once a plea is entered, prior constitutional violations are only relevant insofar as they affect the voluntariness and understanding with which the plea is entered.

Rule 24.02 sets forth the specific advice that must be given to a defendant in open court before the court may accept a plea of guilty. Under Rule 24.02(c), the court must determine that a plea is made voluntarily and not as the result of force or threats or of promises apart from the plea agreement. The court cannot participate in any plea discussions, but the court may discuss the plea agreement after it has been reached with the attorneys, including any alternative that would be acceptable. Rule 24.02(d). If a plea agreement has been reached, the court shall require its disclosure on the record in open court or, on a showing of good cause, *in camera*. Rule 24.02(d)2. The court may accept or reject the plea agreement or may defer its decision until a pre-sentence investigation report is made. *Id.* If the agreement is rejected, the court must afford the defendant the opportunity to withdraw the plea. Rule 24.02(d)4.

Motions to withdraw a guilty plea are governed by Rule 29.07(d). A defendant does not have an absolute right to withdraw a guilty plea. *Scroggins v. State*, 859 S.W.2d 704, 706 (Mo. App. W.D. 1993). Under Rule 29.07(d), a motion to withdraw the plea may be made before sentence is imposed or when imposition of the sentence is suspended. Whether the guilty plea may be withdrawn is a matter within the sound discretion of the trial court. *State v. Mandel*, 837 S.W.2d 571, 573 (Mo. App. E.D. 1992). After a sentence is imposed, the court may set aside the judgment of conviction and permit the defendant to withdraw the plea only upon a showing that it is necessary to correct manifest injustice. Rule 29.07(d); *State v. Hasnan*, 806 S.W.2d 54, 55 (Mo. App. W.D. 1991); *Scroggins,* 859 S.W.2d at 706. The denial of a motion to withdraw a guilty plea cannot be raised in a post-conviction

motion because the denial of the motion to withdraw is an appealable order. *Hamilton v. State*, 865 S.W.2d 374, 376 (Mo. App. E.D. 1993). On appeal, the appellate court will review the denial of a motion to withdraw a guilty plea to determine whether the trial court abused its discretion or was clearly erroneous. *Scroggins,* 859 S.W.2d at 706.

"[M]anifest injustice" can generally be established successfully only when the record is adequate and when there are circumstances that would indicate a clear lack of either voluntariness or understanding on the part of the defendant. If a plea is voluntary and is made with an understanding of the charges against the defendant, there is no manifest justice. *Scroggins,* 859 S.W.2d at 707. If a defendant is misled or induced to enter the plea by fraud, mistake, misapprehension, coercion, duress, or fear, the defendant should be permitted to withdraw the plea. *Id.* An unawareness of certain facts at the time of the plea, however, does not necessarily render the plea unintelligent or involuntary. *Id.*

Care should be taken to distinguish "manifest injustice" grounds to be raised in a Rule 29.07(d) motion from any ground that could be cognizable under Rule 24.035. The provisions of Rule 24.035 state that it provides the "exclusive procedure" for a person to seek relief on the various claims enumerated in Rule 24.035(a), including constitutional claims. Courts have interpreted this exclusivity provision to bar any claims that are cognizable under Rule 24.035 from being asserted in a motion to withdraw the guilty plea under Rule 29.07(d). *Reynolds v. State*, 939 S.W.2d 451, 454–55 (Mo. App. W.D. 1996); *State v. Pendleton*, 910 S.W.2d 268, 271 (Mo. App. W.D. 1995). The significance of this interplay between Rules 24.035 and 29.07(d) is further amplified because of the filing requirements under both Rules—Rule 24.035 has strict filing requirements while Rule 29.07(d) imposes no time restrictions for filing a motion to withdraw the guilty plea.

Several Missouri courts have expressed concerns that Rule 29.07(d) may be utilized by post-conviction litigants to bypass the strict time requirements for filing a Rule 24.035 motion by simply characterizing a claim as manifest injustice under Rule 29.07(d). *Reynolds,* 939 S.W.2d at 455; *Pendleton,* 910 S.W.2d at 271; *State v. Ryan,* 813 S.W.2d 898, 902 (Mo. App. S.D. 1991). In all of these cases, the courts generally held that the claims of manifest injustice raised under Rule 29.07(d) were claims that were cognizable under Rule 24.035 and should have been raised in a timely filed motion under Rule 24.035. *Reynolds,* 939 S.W.2d at 455; *Pendleton,* 910 S.W.2d at

271; *Ryan,* 813 S.W.2d at 902. The practical effect of these decisions seems to have limited Rule 29.07(d) in that most claims of "manifest injustice" could simply be recharacterized by a court as a constitutional claim that was cognizable under Rule 24.035 and that should have been raised in a motion filed under that Rule. If a claim is raised as manifest injustice under Rule 29.07(d), counsel should be prepared to prove that the claim is not cognizable under Rule 24.035 and, thus, not time barred—e.g., a claim of newly discovered evidence.

There are some relatively recent court decisions that have allowed the withdrawal of guilty pleas when the defendant did not fully understand the nature of the plea agreement. In *State v. Thomas,* 96 S.W.3d 834 (Mo. App. W.D. 2002), the defendant sought to withdraw his guilty plea when the court did not follow the plea agreement and ordered the sentences to run consecutively as opposed to concurrently. Although the defendant was advised that the plea was "non-binding," the court determined that the plea was not knowingly and intelligently made in that it was not made clear to the defendant that he would not be allowed to withdraw his guilty plea if the court did not follow the agreement. *Thomas,* 96 S.W.3d at 835–36.

In *Dennis v. State,* 116 S.W.3d 552 (Mo. App. W.D. 2003), the parties reached a plea agreement for a 10-year sentence, but the court imposed a 15-year sentence. The defendant had signed a petition to enter a plea of guilty in which he acknowledged that the court was not bound by the plea bargain and that sentencing was solely within the discretion of the court. The plea petition also stated that, if the court did not follow the plea bargain, it would advise the defendant of his rights regarding withdrawing his plea. The court of appeals held that the defendant should be entitled to withdraw his plea. The petition did not clearly and properly advise the defendant that, if the court did not follow the plea agreement, he would not be allowed to withdraw his guilty plea. The court of appeals noted that it is essential to due process that a defendant understand the true nature of a plea agreement.

The courts have also allowed the withdrawal of a guilty plea when the defendant did not receive the benefit that was bargained for. In *Reed v. State,* 114 S.W.3d 871 (Mo. App. W.D. 2003), the parties had agreed to a seven-year sentence with a joint recommendation for the Regimented Discipline Program (boot camp). The sentencing court advised the defendant that, if he successfully completed the program, the court would call him back and place him on probation. Because of

overcrowding and an out-of-state detainer, the defendant was not allowed to participate in the boot camp program. The court of appeals held that the plea agreement had been breached and that the defendant should be allowed to withdraw his plea. *Id.* In this case, the plea was a binding plea, and it was not the fault of the defendant that he could not participate in the program. *Id.* It should be noted that, until a plea agreement is reached, nothing has occurred that is of constitutional significance for purposes of appellate or post-conviction review. *Rowland v. State,* 129 S.W.3d 507 (Mo. App. S.D. 2004) (failed plea negotiations do not implicate constitution).

VII. (§31.39) Federal Habeas Corpus Relief From State Court Convictions

Post-conviction relief in federal courts is generally governed by 28 U.S.C. §§ 2241–55. Under 28 U.S.C. § 2254, a person in state custody is allowed to seek a writ of habeas corpus in federal court. Prisoners in federal custody have similar post-conviction relief available under 28 U.S.C. § 2255, which allows a motion to vacate, set aside, or correct a federal conviction and sentence. The relief and procedures under 28 U.S.C. § 2255 are similar to the procedures and relief available under 28 U.S.C. § 2254.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, resulted in substantial changes to federal habeas corpus practice. Sections 31.40–31.56 below summarize some of the relevant provisions of the AEDPA. Counsel should be aware that there is a tremendous body of caselaw from habeas corpus cases filed before the enactment of the AEDPA. Care should be exercised to ensure that the provisions of the AEDPA, and recent caselaw construing the AEDPA, are reviewed.

The writ of habeas corpus is largely a civil remedy. *See, e.g., Fisher v. Baker*, 203 U.S. 174, 181 (1906). The Supreme Court has promulgated the Rules Governing § 2254 Cases in the United States District Courts, which is a detailed set of rules governing the application of and the procedure to be followed when a state prisoner seeks federal habeas corpus relief. These rules appear in Title 28 of the United States Code directly after 28 U.S.C. § 2254. The rules may apply in other applications for habeas corpus at the discretion of the district court. *See* Rule 1 of the Rules Governing § 2254 Cases. As with the Missouri state post-conviction rules, there are many procedural hurdles and doctrines in federal habeas practice. The

Rules Governing § 2254 Cases should be carefully consulted in habeas cases. Further, the Federal Rules of Civil Procedure may apply in habeas proceedings to the extent that they are not inconsistent with the Rules Governing § 2254 Cases. Rule 11 of Rules Governing § 2254 Cases.

A. General Considerations

1. (§31.40) Jurisdiction and Venue

The power to grant a writ of habeas corpus is conferred on the Supreme Court or any justice of the Supreme Court, on the district courts, and on circuit judges within their respective jurisdictions. 28 U.S.C. § 2241(a). The Supreme Court, any of its justices, or any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer it to a district court with proper jurisdiction to entertain it. 28 U.S.C. § 2241(b).

A prisoner is not entitled to a writ of habeas corpus under 28 U.S.C. § 2241 unless the prisoner shows that:

> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
> (5) It is necessary to bring him into court to testify or for trial.

28 U.S.C. § 2241(c).

There are specific habeas corpus provisions applicable to persons in custody in accordance with a judgment of a state court. 28 U.S.C. § 2254(a). "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus." *Id.* If a person is in state custody, the only ground that may be pursued is that "he is in custody in violation of the Constitution or laws or treaties of the United States." *Id.*

With respect to venue in 28 U.S.C. § 2254 cases that arise in a state with more than one federal judicial district, a prisoner in state custody may file the petition for writ of habeas corpus in either the district in which the prisoner is confined or in the district in which the prisoner was convicted and sentenced. 28 U.S.C. § 2241(d). Each district court shall have concurrent jurisdiction to entertain an application for a writ of habeas corpus. *Id.* The district court in which the petition is filed, in its discretion and in furtherance of justice, may transfer the case to the other district for hearing and determination. *Id.*

2. (§31.41) Statute of Limitations

Under the AEDPA, a one-year statute of limitations period applies to applications for a writ of habeas corpus submitted by a person in custody under a state court judgment. 28 U.S.C. § 2244(d)(1). The limitation period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)–(D).

In habeas cases involving a state conviction, the time during which a properly filed application for state post-conviction review that remains pending is not counted toward the statute of limitations. 28 U.S.C. § 2244(d)(2). If a petition for a writ of certiorari is filed after a direct appeal of the state court conviction, the judgment is deemed final for statute of limitations purposes when certiorari is denied. *See, e.g., Smith v. Bowersox,* 159 F.3d 345, 347 (8th Cir. 1998), *cert. denied,* 525 U.S. 1187 (1999). The time limitation is not tolled or stayed, however, if a petition for writ of certiorari is sought after a final state post-conviction judgment or ruling. *Ott v. Johnson,* 192 F.3d 510, 512–13 (5th Cir. 1999), *cert. denied,* 529 U.S. 1099 (2000).

Before 1996 and the AEDPA, there was no statute of limitations for filing a federal habeas petition. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

3. (§31.42) Exhaustion Limitations

Under the AEDPA, a habeas petition cannot be granted unless it appears that:

> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)(i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

The AEDPA allows a district court in its discretion to deny a habeas petition on the merits even if the petition contains non-exhausted claims. 28 U.S.C. § 2254(b)(2); *Hamill v. Ferguson*, 937 F. Supp. 1517, 1523 (D. Wyo. 1996). This provision departs from previous habeas law, which held that a district court should dismiss the petition without prejudice on non-exhaustion grounds if it contained some grounds that had been exhausted without resolving any of the claims on the merits. *See Rose v. Lundy*, 455 U.S. 509, 520–22 (1982) (adopting total exhaustion rule).

The AEDPA also changed the pleading requirements for the state in raising non-exhaustion as a defense in its answer. Under the AEDPA, the state will not be deemed to have waived an exhaustion defense or issue unless counsel for the state expressly waives the exhaustion requirement. 28 U.S.C. § 2254(b)(3). This is also a substantial departure from pre-AEDPA caselaw, which established that the state's failure to raise non-exhaustion in its answer was deemed a waiver of that defense. *See, e.g., Granberry v. Greer*, 481 U.S. 129 (1987).

4. (§31.43) Custody Requirement

As stated in §31.40 above, 28 U.S.C. § 2254 relief is available to a person in custody in accordance with a judgment of a state court, for the purpose of determining whether such custody is in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). Relief is also available to a person in custody in accordance with a judgment of either a state or federal

court who seeks to have a determination made that custody to which the inmate may be subject in the future, under a judgment of a state court, would be in violation of the Constitution, laws, or treaties of the United States. *Id.*

5. (§31.44) Ineffective Assistance of Post-Conviction Counsel

The AEDPA specifically states that ineffectiveness or incompetence of counsel during either federal or state collateral post-conviction proceedings is not a ground for relief in a federal habeas proceeding under 28 U.S.C. § 2254. 28 U.S.C. § 2254(i).

6. (§31.45) Standard of Review and Presumption of Correctness

The AEDPA changed the standards of review to be employed by a federal court in analyzing claims raised in a habeas petition. Before the enactment of the AEDPA, federal courts generally employed a de novo standard for reviewing legal claims in a habeas petition. Under the AEDPA, a habeas petition will only be granted if the prior adjudication of the claim on the merits in the state court proceeding either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2).

A federal habeas court may grant relief under the "contrary to" clause if the state court applies a rule that is different from the governing law provided in United States Supreme Court cases or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Williams v. Taylor,* 529 U.S. 362, 405–06 (2000). A federal habeas court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle but unreasonably applies it in a particular case. *Id.* at 407–10. An "unreasonable application" must be objectively unreasonable, which is different from incorrect. *Bell v. Cone,* 535 U.S. 685, 694 (2002).

In *Lockyer v. Andrade*, 538 U.S. 63 (2003), the United States Supreme Court held that the appellate court opinion was not "contrary to, or an unreasonable application of" established federal law determined by the Supreme Court when the Supreme Court's decisions were inconsistent and had not established a "clear or consistent path" for the lower courts to follow.

Under the AEDPA, a determination of a factual issue made by a state court will be presumed to be correct, and the habeas petitioner must rebut the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (codifying the "presumption of correctness" doctrine). A state court decision must be given the benefit of any doubt. *Holland v. Jackson,* 124 S. Ct. 2736, 2739 (2004). Whether a state court's decision was unreasonable must be assessed in light of the record the state court had before it. *Id*. at 2737–38; *Yarborough v. Gentry,* 540 U.S. 1, 6 (2003).

If the habeas petitioner fails to develop a factual basis for a habeas claim in the state court proceedings, the federal court is prohibited under the AEDPA from holding an evidentiary hearing on that claim unless the petitioner can show that:

- the claim relies on a new rule of constitutional law that was previously unavailable and that was made retroactive to cases on collateral review by the Supreme Court; or
- the claim relies on "a factual predicate that could not have been previously discovered through the exercise of due diligence."

28 U.S.C. § 2254(e)(2)(A)(i)–(ii). Under either prong, the petitioner must also show that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found" the petitioner guilty. 28 U.S.C. § 2254(e)(2)(B).

The Supreme Court clarified in *Williams v. Taylor*, 529 U.S. 420, 431 (2000), that the phrase "failed to develop" in the AEDPA does not equate with "did not develop" but instead means that there was a lack of diligence or some greater fault attributable to the petitioner or the petitioner's counsel. When a petitioner was unable to develop a factual issue in state court despite diligent effort, a federal court would not be prohibited from holding an

evidentiary hearing. In *Williams* the Court held that the defendant was entitled to an evidentiary hearing on certain claims because he was diligent in efforts to develop the facts supporting his claims in collateral state proceedings even though he was unable to fully develop the factual evidence despite his best efforts. *Williams*, 529 U.S. at 439–40.

7. (§31.46) Procedural Default

The procedural default doctrine is grounded in concerns of comity and federalism. *Coleman v. Thompson,* 501 U.S. 722, 730 (1991). The procedural default doctrine establishes that a federal habeas court will not consider the merits of any claims that have been procedurally defaulted in state courts. *Id.* at 750. A habeas petitioner who has failed to meet the state's procedural requirements for presenting the federal claims has deprived the state courts of an opportunity to address those claims in the first instance. *Id.* at 732. The procedural default doctrine applies whether the default in question occurs at trial, on appeal, or on state collateral attack. *Murray v. Carrier,* 477 U.S. 478, 490–92 (1986). To have a procedurally defaulted claim heard on the merits in a federal habeas corpus proceeding, the petitioner must demonstrate "cause" for the state-court default and "prejudice" from it. *Coleman,* 501 U.S. at 750.

The Supreme Court has issued several opinions regarding actual innocence in an attempt to further define the actual innocence or miscarriage of justice exception to procedural default, abuse of writ, and successive petition cases.

Claims of actual innocence based on newly discovered evidence have never been held to state a ground for habeas relief absent an independent constitutional violation. *Herrera v. Collins*, 506 U.S. 390 (1993). *Herrera* further explained the actual innocence exception, stating that a claim of actual innocence is not itself a constitutional claim, but instead is a gateway through which a habeas petitioner must pass to have successive, procedurally defaulted, or abusive claims considered on the merits. *Id.* at 404. The Court also held that a sufficiency of the evidence review for habeas purposes is limited to record evidence and does not extend to non-record or newly discovered evidence. *Id.* at 402.

In *Schlup v. Delo*, 513 U.S. 298 (1995), the Court further defined actual innocence. The Court distinguished substantive claims of

actual innocence from procedural claims, noting that *Herrera*, 506 U.S. 390, involved a substantive claim of actual innocence based on the Eighth Amendment, even though the conviction and sentence were fair and error-free. Schlup's claim of actual innocence, however, was procedural, based on his contention that his counsel was ineffective and that evidence was withheld in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Thus, Schlup's claim of actual innocence did not, by itself, provide a basis for habeas relief.

The *Schlup,* 513 U.S. 298, Court addressed the difference in standards set forth in *Carrier*, 477 U.S. 478 (required that constitutional violation has probably resulted in the conviction of a person who is actually innocent), and *Sawyer v. Whitley,* 505 U.S. 333 (1992) (must show clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner guilty). The Court held that the *Carrier*, and not the *Sawyer*, standard applies when the claimed injustice is that a constitutional error resulted in the conviction of a person who is actually innocent. *Schlup*, 513 U.S. at 323–24. To establish the requisite probability that constitutional violation has probably resulted in the conviction of someone actually innocent, the prisoner must show that it is more likely than not that no reasonable jury would have convicted the prisoner in the light of the new evidence. *Id.* at 327.

The United States Supreme Court further analyzed the procedural default doctrine in *Edwards v. Carpenter*, 529 U.S. 446 (2000). In *Edwards* the defendant entered an Alford plea to murder and robbery charges in exchange for the prosecutor agreeing that the plea could be withdrawn if the death penalty was imposed. The Ohio Court of Appeals affirmed the conviction and sentence. After pursuing a post-conviction motion pro se, the defendant sought to reopen his direct appeal, claiming that his original appellate counsel was constitutionally ineffective for failing to challenge the sufficiency of the evidence in the direct appeal. The state courts refused to reopen the appeal because the application was not timely under the appellate rules. The defendant filed a federal habeas petition, alleging both the sufficiency of the evidence claim and the ineffective assistance of counsel claim for appellate counsel's failure to raise sufficiency of the evidence. The United States Supreme Court held that the procedurally defaulted claim of ineffective assistance of counsel might serve as "cause" to excuse the procedural default of the

sufficiency of the evidence claim only if the habeas petitioner can also satisfy the "cause and prejudice" standards to excuse the default of the ineffective assistance claim. *Edwards*, 529 U.S. at 450–51. The ineffective assistance of counsel claim must have been presented to the state courts as an independent claim before it may be used to establish "cause" for a procedural default on other claims, such as sufficiency of the evidence. *Id.*

8. (§31.47) Successive Writs

Under the AEDPA, a claim that is presented in a second or successive petition that was also presented in a prior habeas petition must be dismissed by the district court. 28 U.S.C. § 2244(b)(1). A claim presented in a second or successive petition that was not presented before will be dismissed unless the petitioner can show that:

- the claim relies on a new rule of constitutional law that was made retroactive to cases on collateral review by the Supreme Court and was previously unavailable; or
- "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and the facts, if proven, "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found" the petitioner guilty.

28 U.S.C. § 2244(b)(2)(A)–(B). Thus, the AEDPA absolutely prohibits "same claim" successive petitions and substantially limits successive petitions raising new claims.

The AEDPA also addresses the procedures to be followed in order to file a successive petition. A petitioner seeking to file a second or successive petition must first obtain an order from the court of appeals authorizing the district court to consider the petition. 28 U.S.C. § 2244(b)(3)(A). The motion to file a successive petition will be determined by a three-judge panel, and the panel must either grant or deny the motion to file a second or successive petition within 30 days. 28 U.S.C. § 2244(b)(3)(B), (D). The court of appeals may authorize the filing if it determines that the petition makes a prima facie showing that the application satisfies the various requirements of 28 U.S.C. § 2244(b). 28 U.S.C. § 2244(b)(3)(C). The decision of the appellate court on the motion is not appealable and not subject to a petition for

rehearing or a writ of certiorari to the Supreme Court. 28 U.S.C. § 2244(b)(3)(E). The AEDPA does not prevent the filing of an independent habeas corpus action in the United States Supreme Court. *Felker v. Turpin*, 518 U.S. 651 (1996).

B. (§31.48) Grounds for Relief

As noted in §§31.40 and 31.43 above, the grounds for relief under 28 U.S.C. § 2254 are set out in 28 U.S.C. § 2254(a), which states that relief may be granted if the petitioner is in custody and can show a violation of:

- the federal constitution;
- federal laws; or
- treaties of the United States.

The Model Form for Use in Applications for Habeas Corpus Under 28 U.S.C. § 2254 in the Appendix of Forms to Rules Governing § 2254 Cases lists ten grounds for relief. They include the following:

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant [to] an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

This list, however, is not exhaustive, and the petition may be couched in terms of a violation of any federal constitutional right. For example, in *Jackson v. Virginia*, 443 U.S. 307 (1979), the United States Supreme Court held that a person convicted in state court on insufficient evidence was entitled to relief through federal habeas corpus. The federal court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

The United States Supreme Court has held that a prosecutor's various violations of *Brady v. Maryland*, 373 U.S. 83 (1963), would create a cognizable federal habeas claim. *Kyles v. Whitley*, 514 U.S. 419 (1995). The Court held that the net effect of the suppressed evidence favoring the petitioner raised a reasonable probability that its disclosure would have produced a different result at trial and required a new trial. *Id.*

In *Lackawanna County District Attorney v. Coss,* 532 U.S. 394 (2001), the United States Supreme Court held that a petition for a writ of habeas corpus under 28 U.S.C. § 2254 does not provide a remedy for a state prisoner to challenge an enhanced sentence based on an alleged unconstitutional prior conviction.

C. (§31.49) Retroactivity Considerations

The United States Supreme Court has held that, when one of its decisions results in a "new rule," that rule applies to all criminal cases still pending on direct review. *Griffith v. Ky.*, 479 U.S. 314, 328 (1987). When convictions are already final, there are different rules regarding retroactive application of "new rules" to cases on collateral review. A "new rule" that is substantive generally applies retroactively to cases in which the conviction is final on direct review. *See Schriro v. Summerlin,* 124 S. Ct. 2519, 2522 (2004); *Teague v. Lane,* 489 U.S. 288, 311 (1989). This applies when a constitutional determination has been made that places particular conduct covered by a criminal statute beyond the state's power to punish. *Saffle v. Parks,* 494 U.S. 484, 494–95 (1990). In these instances, the new rules apply retroactively because they carry a significant risk that a defendant has been convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose on the defendant. *Summerlin,* 124 S. Ct. at 2522–23.

A "new rule" that is procedural, however, generally does not apply retroactively. *Teague,* 489 U.S. at 311. New procedural rules do not produce a class of persons convicted of conduct that the law does not make criminal, but instead raise a possibility that someone was convicted with an invalidated procedure that may or may not have resulted in an acquittal. *See Summerlin,* 124 S. Ct. at 2523. Because there is a more speculative connection to innocence with respect to new procedural rules, a retroactive effect is only given to new "watershed rules of criminal procedure" that implicate the fundamental fairness

and accuracy of the criminal proceeding, without which the likelihood of an accurate conviction is seriously diminished. *Teague,* 489 U.S. at 311.

In *Summerlin,* 124 S. Ct. 2519, the Supreme Court held that the new rule announced in *Ring v. Arizona,* 536 U.S. 584 (2002) (that it violated the Sixth Amendment right to a jury trial for a court, and not a jury, to find the existence of an aggravating circumstance to support the death penalty) does not apply retroactively to cases already final. *Summerlin,* 124 S. Ct. at 2526. The holding in *Ring* was classified by the Supreme Court as procedural because it did not alter the range of conduct or the class of persons subject to death penalty in Arizona. *Id.* at 2523–24. The new rule only changed the method of determining whether a defendant engaged in specified conduct. *Id.* The Court also determined that the new procedural rule announced in *Ring* could not be classified as a "watershed rule."

D. (§31.50) Procedure

As mentioned in §31.39 above, federal habeas corpus actions are governed by the Rules Governing § 2254 Cases. These rules should be carefully reviewed before drafting the petition or at any stage of a habeas proceeding.

1. (§31.51) Petition

The form of the petition is governed by Rule 2 of the Rules Governing § 2254 Cases, which states that, if the petitioner is in the custody of a state officer, that state officer will be named as respondent. Rule 2(a) of the Rules Governing § 2254 Cases. If the petitioner may be subject to future custody, the respondent is to be the officer having present custody, if applicable, and the attorney general of the state whose judgment is being attacked. Rule 2(b) of the Rules Governing § 2254 Cases. Each petition can be directed at only a judgment or judgments of a single state court. Rule 2(d) of the Rules Governing § 2254 Cases. If the petition is defective (i.e., it does not substantially comply with the rules), the clerk of the court may return it, if the judge so directs, stating the reasons for the return. Rule 2(e) of the Rules Governing § 2254 Cases. A standardized form of the petition has been promulgated and is available from the clerk of the district court. The courts require that the petition be prepared on the preprinted form. The petition must specify all grounds for relief presently available to the petitioner that are known to the

petitioner or that should have been discovered by the exercise of due diligence. Rule 2(c) of the Rules Governing § 2254 Cases.

The petition is to be filed with the clerk of the district court and should be accompanied by two conformed copies. Rule 3(a) of the Rules Governing § 2254 Cases. At the time the petition is filed, it must be accompanied by (1) the filing fee prescribed by 28 U.S.C. § 1914(a) or (2) an affidavit and motion in accordance with 28 U.S.C. § 1915 to proceed *in forma pauperis* and a certificate of the penal institution indicating any funds held in the account of the petitioner. *Id.*

2. (§31.52) Initial Court Action

Once the petition has been filed, it is to be promptly presented to the judge who will either (1) dismiss it summarily if, on its face and in consideration of the attached exhibits, it appears that the petitioner is not entitled to relief or (2) if there is a prima facie showing of entitlement to relief, order the respondent to answer or take whatever steps the judge deems appropriate. Rule 4 of the Rules Governing § 2254 Cases. There is no need for the state to file a motion to dismiss, a motion for summary judgment, or a similar pleading. *See Browder v. Dir., Dep't of Corrs. of Ill.*, 434 U.S. 257 (1978). In any event, a copy of the petition will be served on the respondent and the attorney general of the state, who may respond if they so desire. Rule 4 of the Rules Governing § 2254 Cases.

Courts may appoint counsel for habeas petitioners if the appointment would serve the interests of justice. 18 U.S.C. § 3006A(g).

3. (§31.53) Answer

Rule 5 of the Rules Governing § 2254 Cases deals with the content of the answer. In its effort to simplify the use of 28 U.S.C. § 2254 and in apparent understanding that the petitioner is often incarcerated, the Rule places on the answering party the responsibility of:

- stating if all state remedies have been exhausted;
- stating what transcripts there are and when they can be made available;

- attaching to the answer the relevant portions of the transcripts; and
- if the petitioner is appealing from a decision of an appellate court, attaching a copy of the brief submitted and the opinion of the court.

Rule 5 of the Rules Governing § 2254 Cases.

4. (§31.54) Discovery

Federal habeas corpus petitioners are not afforded discovery rights under Federal Rule of Civil Procedure 33. *See Harris v. Nelson*, 394 U.S. 286 (1969). A judge, however, in the exercise of the judge's discretion and for good cause shown, may grant leave for a party to invoke the processes of discovery under the federal rules. Rule 6(a) of the Rules Governing § 2254 Cases. The court also has the discretion to appoint counsel for the petitioner if to so do would make the discovery process more effective. *Id.* Any request for discovery must be accompanied by a statement of the interrogatories or requests for admissions and a list of the documents sought. Rule 6(b) of the Rules Governing § 2254 Cases. The court may determine how discovery expenses will be met. Rule 6(c) of the Rules Governing § 2254 Cases. Any expansion of the record is left to the discretion of the court. Rule 7 of the Rules Governing § 2254 Cases.

5. (§31.55) Evidentiary Hearing

Rule 8(a) of the Rules Governing § 2254 Cases states that a judge, after a review of state court proceedings and of the expanded record, shall determine whether an evidentiary hearing is required. If a hearing is not required, the judge shall make disposition of the petition as justice shall require.

If an evidentiary hearing is held, it may be conducted by a district judge, or by a magistrate, who will then submit the proposed findings to the district judge; these findings are subject to objection by the parties within ten days. Rule 8(b)(2), (3) of the Rules Governing § 2254 Cases. A certificate of the state trial judge setting forth the facts occurring at trial is admissible in evidence, as are certain affidavits. *See* 28 U.S.C. §§ 2245, 2246.

E. (§31.56) Appeal

Before the AEDPA, a habeas petitioner was required to obtain a certificate of probable cause to appeal the denial of a habeas petition. *See Barefoot v. Estelle,* 463 U.S. 880 (1983) (petitioner must show a substantial denial of federal right). If a certificate of probable cause was granted, the entire case and all issues could generally be appealed.

The AEDPA requires that a certificate of appealability be obtained before appellate review of an order denying the habeas petition can be sought in cases involving a petitioner in state custody. 28 U.S.C. § 2253(c)(1). A certificate of appealability may be issued only if the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). In addition, the certificate of appealability must indicate the specific issues to be appealed that satisfy the substantial showing of the denial of a constitutional right standard. 28 U.S.C. § 2253(c)(3). Although not clearly indicated in the text of 28 U.S.C. § 2253, Federal Rule of Appellate Procedure 22(b) suggests that the district court should rule on the certificate of appealability in the first instance.

In *Slack v. McDaniel*, 529 U.S. 473 (2000), the Supreme Court addressed whether the certificate of appealability provisions of the AEDPA applied to cases pending when the AEDPA was signed into law. The Court held that the certificate of appealability provisions apply to any case in which a notice of appeal is filed after the effective date of the AEDPA, even if the habeas petition had been filed in district court before the enactment of the AEDPA. *Slack*, 529 U.S. at 477–78. The Court also held that the provisions regarding certificate of appealability do not prevent an appeal from a district court decision that rested on procedural, rather than constitutional, grounds. *Id.*

After the AEDPA and the *Slack* decision, a certificate of appealability will not be issued unless the applicant has made a showing of "the denial of a constitutional right." *Slack,* 529 U.S. at 482–83. Except for substituting the word "constitutional" for the word "federal," the certificate of appealability language in the AEDPA codified the certificate of probable cause standards articulated in *Barefoot*, 463 U.S. at 893. The applicant can show a denial of a constitutional right by showing that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed

further.'" *Slack*, 529 U.S. at 483–84; *see also Tennard v. Dretke,* 124 S. Ct. 2562, 2569 (2004). The Court also emphasized in *Slack* that a certificate of appealability may also be obtained if the district court disposes of a habeas petition on procedural grounds only as long as the petitioner can show that reasonable jurists would find it debatable whether the habeas petition states a valid claim of the denial of a constitutional right and that reasonable jurists would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 483.

VIII. (§31.57) Federal § 2255 Motions

A prisoner in custody under a federal court sentence can file a § 2255 motion in federal court. 28 U.S.C. § 2255. The petitioner must claim "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law." *Id.* The remedy sought is to vacate, set aside, or correct the sentence. *Id.* A § 2255 motion is similar to an application for writ of habeas corpus filed by a state prisoner under 28 U.S.C. § 2254. Many federal cases construing general habeas principles or analyzing grounds for relief may apply equally in 28 U.S.C. § 2254 and 28 U.S.C. § 2255 cases.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, included substantial amendment and revisions to 28 U.S.C. § 2255. Many of the changes are similar to the changes in the habeas corpus statutes.

The AEDPA created a one-year limitation period for filing a § 2255 motion. A motion made under 28 U.S.C. § 2255 must be filed within one year from the latest of:

> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

Under the AEDPA, a second or successive motion will be dismissed unless it raises:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Id.

The procedures set forth in 28 U.S.C. § 2244 regarding seeking approval in the appellate courts before a second or successive motion may be filed also apply to 28 U.S.C. § 2255 proceedings.

The AEDPA's provisions regarding the appellate process in 28 U.S.C. § 2254 cases also apply to 28 U.S.C. § 2255 proceedings. *See* 28 U.S.C. § 2253. In general, an appeal may not be taken from the denial of a § 2255 motion unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1), (c)(1)(B). A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

IX. (§31.58) Form 40, Motion to Vacate, Set Aside or Correct the Judgment or Sentence

Motion to Vacate, Set Aside or Correct the Judgment or Sentence

In the Circuit Court of _____ County,
State of Missouri

Full name of Movant	)	
v.	)	Case No. _____
State of Missouri,	)	(To be supplied by the Clerk
Respondent.	)	of the Circuit Court)

Instructions—Read Carefully

In order for this motion to receive consideration by the Circuit Court, it shall be in writing (legibly handwritten or typewritten), signed by the movant, and it shall set forth in concise form the answers to each applicable question. If necessary, movant may furnish an answer to a particular question on the reverse side of the page or an additional blank page. Movant shall make it clear to which question any such continued answer refers.

This motion must be filed in the Circuit Court which imposed sentence.

The movant is required to include in this motion every claim known to him for vacating, setting aside or correcting the conviction and sentence or it will be waived or abandoned. Be sure to include every claim.

Movants should exercise care to assure that all answers are true and correct.

If the motion is taken in forma pauperis, it shall include an affidavit setting forth information that establishes that movant will be unable to pay costs of the proceedings. When the motion is completed, the original and two copies shall be mailed to the Clerk of the Circuit Court from which the movant was sentenced.

Motion

1. Place of detention: _____
2. Name and location of court which imposed sentence:
   _____
   _____
3. The case number and the offense or offenses for which sentence was imposed:
   _____
   _____
4. (a) The date upon which sentence was imposed and the terms of the sentence:
   _____
   (b) The date upon which you were delivered to the custody of the department of corrections to serve the sentence you wish to challenge.
   _____
5. Check whether a finding of guilty was made:
   (a) After a plea of guilty _____ (b) After a plea of not guilty _____
6. Did you appeal from the judgment of conviction? _____
7. If you answered "yes" to (6), list
   (a) the name of the court to which you appealed:
   _____
   _____
   (b) the result in such court and the date of such result:
   _____
   _____
   (c) the date the appellate court's mandate issued.
   _____
   _____
8. State concisely all the claims known to you for vacating, setting aside or correcting your conviction and sentence:
   (a) _____
   _____
   _____
   (b) _____
   _____
   _____
   (c) _____
   _____
   _____

9. State concisely and in the same order the facts supporting each of the claims set out in (8), and the names and addresses of the witnesses or other evidence upon which you intend to rely to prove such facts:
   (a) _____
   _____
   _____
   (b) _____
   _____
   _____
   (c) _____
   _____
   _____
10. Prior to this motion have you filed with respect to this conviction:
   (a) Any motion to vacate judgment under Missouri Supreme Court Rule 24.035, 27.26 or 29.15? _____
   (b) Any petitions in state or federal courts for habeas corpus? _____
   (c) Any petitions in the United States Supreme Court for certiorari? _____
   (d) Any other petitions, motions or applications in this or any other court? _____
11. If you answered "yes" to any part of (10), list with respect to each petition, motion or application
   (a) the specific nature thereof:
      i. _____
      ii. _____
      iii. _____
   (b) the name and location of the court in which each was filed:
      i. _____
      ii. _____
      iii. _____
   (c) the disposition thereof and the date of such disposition:
      i. _____
      ii. _____
      iii. _____
   (d) if known, citations of any written opinions or orders entered pursuant to each such disposition:
      i. _____
      ii. _____
      iii. _____
12. Has any claim set forth in (8) been previously presented to this or any other court, state or federal, in any petition, motion or application that you have filed? _____

13. If you answered "yes" to (12), identify
    (a) the claims that have been previously presented:
        i. _____
        ii. _____
        iii. _____
    (b) the proceedings in which each claim was raised:
        i. _____
        ii. _____
        iii. _____
14. If you have filed prior proceedings in any state or federal court involving this same sentence but did not raise therein one or more of the claims you now list in (8), state which were not raised in the earlier proceedings and why they were not raised in those proceedings:
    (a) _____
    _____
    _____
    (b) _____
    _____
    _____
    (c) _____
    _____
    _____
15. Were you represented by an attorney at any time during the course of
    (a) your preliminary hearing? _____
    (b) your arraignment and plea? _____
    (c) your trial, if any? _____
    (d) your sentencing? _____
    (e) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
    (f) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
16. If you answered "yes" to one or more parts of (15), list
    (a) the name and address of each attorney who represented you
        i. _____
        ii. _____
        iii. _____
    (b) the proceedings at which each such attorney represented you
        i. _____
        ii. _____
        iii. _____

17. Are you now under sentence from any other court that you have not challenged? _____
18. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? _____

_____
Signature of Movant

I, _____, movant in this case, state that I have subscribed to the foregoing petition; that I know the contents thereof; that the above information is, to the best of my knowledge, true and correct; that I have listed every claim known to me for vacating, setting aside or correcting the conviction and sentence attacked in this motion; and that I understand that I waive any claim for relief known to me that I have not listed in this motion.

_____
Signature of Movant

Forma Pauperis Affidavit
(See instructions page 1 of this form)

_____
_____
_____
_____

_____
Signature of Movant

State of _____)
) ss.
County of _____)

I, _____, being first duly sworn upon my oath, depose and say that I have subscribed to the foregoing affidavit; that I know the contents thereof; and that the matters therein set forth are true.

_____
Signature of Affiant

Subscribed and sworn to before me this _____ day of _____, 20____.

_____
Notary Public

My commission expires:
_____
(month) (day) (year)

Bruce C. Houdek*

Chapter 32

ETHICAL CONSIDERATIONS

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*Mr. Houdek received his B.A., 1959, from Coe College and J.D., 1962, from the University of Missouri-Kansas City. He is a member of the firm of James, Millert, Houdek, Tyrl & Maloney in Kansas City.

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I. (§32.1) Introduction

The ethical requirements of the legal profession are set out in Rule 4 of the Missouri Rules of Professional Conduct. The Rules are available online at:

www.osca.state.mo.us

The primary purpose of the Rules of Professional Conduct and legal ethics is to maintain the integrity of the law profession and to protect the public. *In re Wendt,* 544 S.W.2d 3 (Mo. banc 1976); *In re Miller,* 568 S.W.2d 246 (Mo. banc 1978). Rule 4 consists of ten subdivisions, each with numbered subparts and lettered subdivisions. The Rules are prefaced by a preamble and a statement of the scope of the Rules providing a general orientation. Each of the Rules is followed by a Comment, which is intended as a guide to interpretation, but the text of the Rule is the authoritative requirement. The Comments are followed by Code comparisons to the ABA Model Code of Professional Responsibility. These Code comparisons have not been adopted and do not constitute a part of the Rules and comments.

The Code is supplemented by court interpretations and formal and informal opinions issued by The Advisory Committee and Missouri's Legal Ethics Counsel. But see the unpublished separate opinion of

Judge Blackmar in *In re EC 8-8, Rule 4* (Mo. banc Nov. 29, 1983), discussing formal and informal opinions. The Legal Ethics Counsel is available for contact by members of The Missouri Bar to obtain advice concerning questions of ethics that may arise on a day-to-day basis. The address and telephone numbers are as follows:

- 217 East McCarty
  Jefferson City, Mo 65101
- Telephone: (573) 638-2263
- Fax: (573) 635-8806

During 2003, the Legal Ethics Counsel issued 99 written informal advisory opinions and received over 1,547 oral contacts requesting ethical guidance. 60 J. MOBAR 324 (2004).

The informal advisory opinions of the Legal Ethics Counsel are available on The Missouri Bar website at www.mobar.org.

While the Code regulates the conduct of lawyers in professional contacts with the public, clients, courts, and other lawyers, fraudulent conduct by a lawyer outside of professional practice is sufficient to warrant disciplinary action. *In re Panek,* 585 S.W.2d 477 (Mo. banc 1979); *In re Kirtz,* 494 S.W.2d 324 (Mo. banc 1973); Rule 4-8.4.

The Supreme Court is vested with the authority to regulate practice in Missouri, MO. CONST. art. V, § 4, and it is the ultimate interpreter of the Code.

The Rules promulgated by the Supreme Court in Rule 4 have the same force and effect as a decision of the Court. *In re Wilson,* 391 S.W.2d 914 (Mo. banc 1965).

A lawyer's profession requires the utmost good faith and highest loyalty to the clients' interests; it is a highly fiduciary relationship. Breach of the duty constitutes a constructive fraud. *In re Oliver,* 285 S.W.2d 648 (Mo. banc 1956).

A lawyer has a duty to know what is going on in the case and must vigilantly follow its progress. *Gibson v. White,* 904 S.W.2d 22 (Mo. App. W.D. 1995).

A lawyer may not circumvent or violate disciplinary rules by engaging in illegal conduct or conduct involving moral turpitude,

dishonesty, fraud, or deceit. Rule 4-8.4. Bad taste or bad manners that do not rise to the level of immoral conduct, bring dishonor or disrepute upon The Missouri Bar or the judiciary, or adversely affect a client's rights do not constitute violations of the Rules of Professional Conduct. *In re Mills,* 462 S.W.2d 700 (Mo. banc 1971).

Failure to have read the Rules, however, does not constitute a defense to disciplinary proceedings. *In re Jones,* 431 S.W.2d 809 (Mo. banc 1966).

The "top ten" subjects of complaints concerning lawyers' conduct, in order of frequency, are as follows:

1. Communication
2. Diligence
3. Dishonesty, fraud, deceit, misrepresentation
4. Safekeeping property
5. Conflicts
6. Unauthorized practice of law
7. Excessive fees
8. Competence
9. Criminal activity
10. Advertising

While the domestic practice, by far, results in the most complaints, criminal practice is second. *Report of the Office of Chief Disciplinary Counsel*, 60 J. MOBAR 324 (2004).

A lawyer must:

- keep the client fully informed about the status of the matter under representation;
- promptly comply with requests for information; and
- provide explanations necessary to permit the client to make informed decisions.

In re Lechner, 715 S.W.2d 257 (Mo. banc 1986); *In re Stricker,* 808 S.W.2d 356 (Mo. banc 1991); Rule 4-1.4.

Failure to respond to a disciplinary complaint is also a violation of the Rules of Professional Conduct. *In re Stricker,* 808 S.W.2d 356; *In re Harris,* 890 S.W.2d 299 (Mo. banc 1994); Rule 4-8.1.

A lawyer has a duty to report professional misconduct involving a lawyer or a judge. Rule 4-8.3.

A lawyer may not:

- claim an ability to improperly influence a government agency or official;
- knowingly assist a judge or judicial officer in violation of the rules of judicial conduct; or
- manifest bias or prejudice based on sex, race, religion, national origin, disability, or age except when those matters are legitimate issues of advocacy.

Rule 4-8.4.

The most frequently encountered ethical problems in criminal practice have been gathered under three headings:

1. Duties of the prosecution and defense to the court and criminal justice system
2. Duties of defense counsel
3. Duties of the prosecutor

II. (§32.2) Duties of the Prosecution and Defense to the Court and Criminal Justice System

A lawyer's conduct should be dignified, respectful, and courteous, but the lawyer must also represent the client zealously with diligence and promptness. *In re Coe,* 903 S.W.2d 916 (Mo. banc 1995); Rules 4-1.3 and 4-3.5; Preamble to Rule 4, Rules of Professional Conduct.

A partner or supervisory lawyer is responsible for the acts and supervision of subordinates, including non-lawyer assistants. Rules 4-5.1, 4-5.2, and 4-5.3.

The Supreme Court has also adopted Rule 16, which provides for substance abuse intervention for members of The Missouri Bar. Participation in substance abuse intervention is not an alternative or substitute for disciplinary action. *In re Adams,* 737 S.W.2d 714 (Mo. banc 1987).

A. (§32.3) Contacts and Relations With Judges and Court Personnel

An attorney should not make ex parte communications with the court concerning a matter pending before it except when authorized. The attorney may not:

- make a false statement of material fact or law;
- fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
- fail to disclose controlling legal authority; or
- offer evidence known to be false.

Rules 4-3.3 and 4-3.5.

Disrespect in a letter to a district court judge's secretary, treated as disrespect toward the court, did not support a finding of contemptuous or contumacious conduct or that the lawyer was "not presently fit to practice law in the federal courts." Neither did it rise to the level of "conduct unbecoming a member of the bar." *In re Snyder,* 472 U.S. 634 (1985). The lawyer's comment arose from an appointment to represent criminal defendants and the amount of money claimed and documentation required regarding his fee. He was ordered suspended from practice for six months; that judgment was reversed.

B. (§32.4) Conduct in Court

It is unethical for a lawyer to:

- make false statements to the court;
- intentionally or habitually violate an established rule of procedure or evidence;
- disregard or advise a client to disregard a rule or ruling made by the court;
- falsify evidence or assist a witness in doing so;
- make frivolous discovery requests;
- elude to irrelevant matters or matters not supported by the evidence; or
- state a personal opinion as to the justness of a cause or the guilt or innocence of an accused.

Rules 4-3.3 and 4-3.4; *In re Oberhellmann*, 873 S.W.2d 851 (Mo. banc 1994); *In re Storment*, 873 S.W.2d 227 (Mo. banc 1994).

As officers of the court, lawyers have a duty to obey judicial orders and uphold the legal process and, absent a stay, obey the order and comply promptly pending appeal. *State ex rel. Picerno v. Mauer*, 920 S.W.2d 904 (Mo. App. W.D. 1996).

1. (§32.5) References to Opposing Counsel

A lawyer should not make unfair or derogatory personal references to opposing counsel and should be courteous and reasonable with respect to requests concerning procedural matters. *Bracken v. Koch,* 404 S.W.2d 201 (Mo. App. E.D. 1966); Rule 4-3.4.

Surreptitious photocopying of an opponent's work product violates Rules 4-8.4, 4-3.4, 4-4.4, and 4-5.3; counsel is disqualified under Rule 4-1.16. The court is authorized to impose sanctions, including default, for such conduct, and counsel and counsel's firm are disqualified from further representation in the case. All members of the firm are barred where one member is barred, and subsequent withdrawal from the firm does not cure any former firm member's disability. In *International Brotherhood of Electric Workers, AFL-CIO Local Union No. 1 v. Acme Electric Co.,* 652 F. Supp. 182 (E.D. Mo. 1986), the court also imposed sanctions to cover attorney fees and expenses in excess of $29,000. Conduct that may not cause disbarment may result in sanctions.

2. (§32.6) Examination of Witnesses

A lawyer must represent the client with zeal but may not unnecessarily degrade or needlessly harm a witness or other persons. Rule 4-4.4.

3. (§32.7) Perjured Testimony

A lawyer has an ethical obligation not to present perjured testimony. Rules 4-3.3, 4-3.4, and 4-4.1; *Smothers v. State,* 614 S.W.2d 20 (Mo. App. W.D. 1981).

4. (§32.8) Testimony by Defendant

A lawyer must advise a client who has admitted guilt against taking the witness stand to commit perjury; if the client refuses, the lawyer must attempt to withdraw. If withdrawal is refused, a record must be made with the court concerning the lawyer's

advice to the defendant not to testify but without revealing the client's admission of guilt. Counsel may only examine the client to identify the client as the defendant and permit the client to make a statement to the court without redirect examination after cross-examination. See Rule 4-3.3 cmt. for a discussion of alternatives.

5. (§32.9) Pleadings and Representations to the Court

Counsel may not file a pleading containing any false statement. *Limier v. Holes,* 178 S.W.2d 335 (Mo. 1944), *cert. denied,* 323 U.S. 744 (1944). Counsel must make full factual disclosures to the court and may not mislead it by any artifice or concealment. *State ex rel. A.M.T. v. Weinstein,* 411 S.W.2d 267 (Mo. App. E.D. 1967); Rule 4-3.3.

The court has authority to impose sanctions on both client and counsel for violation of the Rules of Civil Procedure and against counsel for violation of ethical rules or for needlessly increasing the cost of litigation. FED. R. CIV. P. 11; 28 U.S.C. § 1927; Rule 55.03; *Lupe v. R. Rowland & Co.,* 857 F.2d 482 (8th Cir. 1988); *Jones v. Kansas City Area Transp. Auth.,* 769 S.W.2d 145 (Mo. App. W.D. 1989). The Rules impose an objective standard of conduct. *State ex rel. Accurate Constr. Co. v. Quelled,* 809 S.W.2d 437 (Mo. App. E.D. 1991).

Sanctions are appropriate when counsel, in court pleadings, maligned the judiciary by making false accusations or accusations with reckless disregard of their truth or accuracy. *In re Howard*, 912 S.W.2d 61 (Mo. banc 1995).

Dismissal deprives the court of jurisdiction to impose sanctions for unprofessional conduct in the case. *State ex rel. McMullen v. Sat,* 759 S.W.2d 839 (Mo. banc 1988). See, however, the vigorous dissent by Justice Blackmar in *McMullen*.

While the foregoing references are to civil cases and rules, it should be assumed that the same result would obtain in a criminal proceeding.

An attorney signing a client's name to an affidavit and then notarizing that signature and executing a false certificate of service is subject to reprimand. *In re Wallingford,* 799 S.W.2d 76 (Mo. banc 1990).

A client is bound by an authorized oral waiver of the right to file a motion for new trial and to appeal made by counsel although the client later changes the client's mind. *State v. Riley,* 787 S.W.2d 314 (Mo. App. E.D. 1990).

6. (§32.10) Contra Authorities

When a lawyer knows of legal authorities in a controlling jurisdiction directly adverse to the client's position, counsel should be certain that the court is aware of that authority but may challenge its soundness and make a good faith argument for its extension, modification, or reversal. Rules 4-3.3 and 4-3.1; *Taylor v. Bolger Cartage Serv., Inc.,* 102 F.R.D. 172 (W.D. Mo. 1984).

7. (§32.11) Tampering

Tampering with or destroying evidence is a violation of the disciplinary rules, *In re Bear,* 578 S.W.2d 928 (Mo. banc 1979), and of §§ 575.100 *et seq*., RSMo 2000 and Supp. 2004. Rules 4-3.3 and 4-3.4.

8. (§32.12) Statements of Personal Beliefs

A lawyer may not make statements concerning personal beliefs or express personal opinions concerning the credibility of a witness or the guilt or innocence of an accused, except those based on an analysis of the admissible evidence. Rule 4-3.4.

9. (§32.13) Factual Statements and Questions of Counsel

A lawyer is not to make a factual statement that counsel does not believe will be supported by admissible evidence or question witnesses concerning inadmissible facts for the purpose of harassing or embarrassing the witness or for the purpose of placing matters before the jury that it should not properly consider. Rule 4-3.4.

C. (§32.14) Witnesses

A lawyer may not harass or intimidate a witness unnecessarily. Rules 4-4.3 and 4-4.4.

1. (§32.15) Obstruction of Access to Evidence

A lawyer may not obstruct another party's access to evidence, counsel another to do so, or assist another in doing so. Rule 4-3.4.

2. (§32.16) Expert Witnesses

An expert witness may be paid a reasonable fee for services but not a contingent fee. Rule 4-3.4 cmt.

3. (§32.17) Lay Witnesses

A nonexpert witness may not be paid any amount in excess of expenses incurred and financial loss in connection with testimony. Rule 4-3.4 cmt.

4. (§32.18) Represented Witnesses

Counsel may not communicate on the subject matter of the case with persons who are known to be represented in the same matter by another lawyer without consent of that lawyer. Rule 4-4.2.

Corporate managers and employees whose actions may be imputed to the organization may not be contacted by adverse counsel without permission from corporate counsel. *State ex rel. Pitts v. Roberts*, 857 S.W.2d 200, 202 (Mo. banc 1993); *United States ex rel. O' Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998); *see also* Garrett Hodes, *Ex Parte Contacts With Organizational Employees in Missouri*, 54 J. MOBAR 83 (1998).

In *Smith v. Kansas City Southern Railway*, 87 S.W.3d 266 (Mo. App. W.D. 2002), the court held that Rule 4-4.2 prohibits *ex parte* contact with *current* employees of a represented organization who fall into three specified categories:

1. Persons having managerial responsibility on behalf of the organization

2. Persons whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability

3. Persons whose statement may constitute an admission on the part of the organization

But this prohibition does not bar contacts with unrepresented *former* employees of the organization.

5. (§32.19) Medical Witnesses

Consideration should be granted to physicians called as witnesses.

D. (§32.20) Disclosure of Evidence

Defense counsel and the prosecution must disclose evidence to the opposite party that they have an obligation to disclose. Rule 4-3.8; Rule 25.

E. (§32.21) Statements to the Press

The prosecutor or defense counsel cannot make any statements to the press concerning:

- the defendant's character or prior record;
- the possibility of a plea;
- the existence of or contents of confessions or admissions;
- test results;
- the identity of witnesses; or
- the merits of the case.

Rule 4-3.6.

The prosecutor may state for publication:

- matters of public record;
- that the investigation is in progress;
- the general nature of the investigation;
- a request for assistance in the investigation or apprehension of the defendant; and
- warnings of danger.

Id.

A public statement by a lawyer alleging purposely dishonest conduct by a judge known by the lawyer to be untrue or made with reckless disregard of the truth or falsity of the statement is a violation of the Rules of Professional Conduct. A claim that a judge made an honest error is not a violation of the Rule. The court may restrict lawyers'

First Amendment right to free speech. *In re Westfall,* 808 S.W.2d 829 (Mo. banc 1991).

F. (§32.22) Contact With Jurors

Extrajudicial communication with venirepersons or jurors before or during a trial is improper. Reasonable communications with jurors after the trial is appropriate but may not be used to influence their actions in a future case.

Some jurisdictions have local rules that prohibit posttrial juror contact without prior court approval.

G. (§32.23) Court Appointments

Members of The Missouri Bar have a duty to provide defense for indigent criminal defendants, and they will be excused only in extenuating circumstances or for good cause. *State ex rel. Wolff v. Ruddy,* 617 S.W.2d 64 (Mo. banc 1981). A lawyer appointed to represent a defendant should not seek to be excused because of the repugnance of the subject matter or proceeding or a belief that the defendant is guilty. Rules 4-6.1 and 4-6.2.

H. (§32.24) Criminal Violations

Section 575.020, RSMo 2000, defines the offense of "concealing an offense" as follows:

> 1. A person commits the crime of concealing an offense if:
> (1) He confers or agrees to confer any pecuniary benefit or other consideration to any person in consideration of that person's concealing of any offense, refraining from initiating or aiding in the prosecution of an offense, or withholding any evidence thereof; or
> (2) He accepts or agrees to accept any pecuniary benefit or other consideration in consideration of his concealing any offense, refraining from initiating or aiding in the prosecution of an offense, or withholding any evidence thereof.
> 2. Concealing an offense is a class D felony if the offense concealed is a felony; otherwise concealing an offense is a class A misdemeanor.

The Criminal Code, Chapter 575, RSMo, also defines the following offenses against the administration of justice:

- § 575.030, RSMo 2000, Hindering prosecution
- § 575.040, RSMo 2000, Perjury
- § 575.050, RSMo 2000, False affidavit

- § 575.060, RSMo Supp. 2004, False declarations
- § 575.080, RSMo Supp. 2004, False reports
- § 575.100, RSMo 2000, Tampering with physical evidence
- § 575.110, RSMo 2000, Tampering with a public record
- § 575.120, RSMo Supp. 2004, False impersonation
- § 575.130, RSMo 2000, Simulating legal process
- § 575.250, RSMo 2000, Disturbing a judicial proceeding
- § 575.260, RSMo 2000, Tampering with a judicial proceeding
- § 575.270, RSMo 2000, Tampering with a witness
- § 575.280, RSMo 2000, Acceding to corruption
- § 575.290, RSMo 2000, Improper communication
- § 575.300, RSMo 2000, Misconduct by a juror
- § 575.310, RSMo 2000, Misconduct in selecting or summoning of juror
- § 575.320, RSMo 2000, Misconduct in the administration of justice

A defense or prosecuting attorney could be guilty of any of these offenses either directly or by way of conspiracy, § 564.016, RSMo 2000, or aiding and abetting, § 562.041, RSMo 2000.

III. Duties of Defense Counsel

A. Employment and Fees

1. (§32.25) Solicitation—Communication Concerning a Lawyer's Services

Lawyers may not make false or misleading statements concerning services. Statements are misleading if they:

- contain material misrepresentations of fact or law;
- fail to state facts;
- create unjustified expectations;
- compare the services offered with those of other lawyers; or
- contain other misleading materials.

Rule 4-7.1.

Written communications to persons known to need legal services may be made under certain circumstances. Rule 4-7.3.

2. (§32.26) Advertising

Advertising is permitted. Rule 4-7.2.

Failure to take affirmative steps to advise callers to a law office that a Yellow Pages advertisement was in error violated Rule 4-7.1 relating to false and misleading advertising. *In re Kinghorn,* 764 S.W.2d 939 (Mo. banc 1989).

3. (§32.27) Competence

A lawyer should not accept employment when the lawyer is not competent to fully handle the matter involved. Otherwise, with the client's agreement, an attorney who is competent in the field must be associated, or counsel must adequately prepare and become competent to handle the matter. Rule 4-1.1.

Acceptance of employment in a case pending in a court to which the lawyer is not admitted without engagement of competent co-counsel and permission of the client constitutes acceptance of employment when counsel is not competent. *In re Hardge,* 713 S.W.2d 503 (Mo. banc 1986); Rule 4-1.1.

4. (§32.28) Fulfillment of Duties

A lawyer may not neglect or procrastinate in handling a client's affairs. *In re Alpers,* 574 S.W.2d 427 (Mo. banc 1978); *In re Maloney,* 620 S.W.2d 362 (Mo. banc 1981); *In re Lang,* 641 S.W.2d 77 (Mo. banc 1982); Rule 4-1.3; *see also In re Tessler,* 783 S.W.2d 906 (Mo. banc 1990); *In re Staab,* 785 S.W.2d 551 (Mo. banc 1990).

It is the duty of counsel to advise the client of the strength of the state's case. *Green v. State,* 777 S.W.2d 295 (Mo. App. S.D. 1989).

Counsel has a duty to know court rules and monitor orders in the client's case. *Midwest Materials Co. v. Vill. Dev. Co.,* 806 S.W.2d 477 (Mo. App. S.D. 1991).

5. (§32.29) Communication With Client

Counsel must communicate with and advise the client concerning the status of the matter and explain it sufficiently to permit the

client to make informed decisions. Proffered plea bargains in criminal cases should be promptly communicated. Rule 4-1.4.

6. Fees

a. (§32.30) Amount

Fees must be reasonable and based on considerations set out in Rule 4-1.5. A lawyer is subject to discipline for accepting a retainer and failing to account for and return the unearned portion of it. *In re Sullivan,* 494 S.W.2d 329 (Mo. banc 1973). Convincing a client to pay an excessive fee or initiating actions that are designed to unnecessarily increase the fee without benefit to the client violates Rule 4-1.5(a). *In re Kinghorn,* 764 S.W.2d 939 (Mo. banc 1989).

b. (§32.31) Contingent Fees

Contingent fees in criminal cases are against public policy and unethical. Rule 4-1.5(d)(2).

c. (§32.32) Fee Splitting—Other Lawyers

A fee may be split between two lawyers with the consent of the client, but the division must be based on services performed and responsibilities assumed. A simple recommendation by other counsel without further duties and responsibilities does not justify fee splitting. *McFarland v. George,* 316 S.W.2d 662 (Mo. App. E.D. 1958); Rule 4-1.5.

d. (§32.33) Fee Splitting—Nonlawyers

Legal fees may not be split with nonlawyers, and it is a misdemeanor to do so. Section 484.150, RSMo 2000; Rule 4-5.4. A lawyer may compensate a lay person for recommending the lawyer's employment with appropriate disclosure of the payment. Rule 4-7.1.

e. (§32.34) Collection and Fee Disputes

A lawyer should seriously consider submitting a fee dispute to The Missouri Bar Fee Dispute Resolution Committee. Rule 4-1.5 cmt.

Demanding full payment in advance is not unethical. A lawyer should refrain from suing a client for a fee unless fraud or gross imposition will result. If property is taken, it should be noted that a conveyance from a client to counsel is presumptively fraudulent and that the lawyer has the burden of proving it to have been fair and equitable. *In re Miller,* 568 S.W.2d 246 (Mo. banc 1978).

7. (§32.35) Former Prosecutors

A lawyer may not accept private employment on a matter for which counsel had responsibility as a public employee. It is improper for a prosecuting attorney, after retirement from office, to defend any case that was in the office before retirement. Lawyers in the same firm may not engage in such representation unless the former prosecutor is screened from participation and receives no portion of the fee, and the government agency is advised. Rule 4-1.11; MO. ADVISORY OPINIONS, C.ofInt.-2, Formal Opinion 37 and C.ofInt.-9, Formal Opinion 65 (withdrawn 12-31-94) (MoBar 1995). A former prosecutor may not accept employment to seek a parole for a defendant whom that prosecutor prosecuted. MO. ADVISORY OPINIONS, C.ofInt.-7, Formal Opinion 59 (MoBar 1995).

8. (§32.36) Expenses

A lawyer may advance litigation expenses as long as the client remains ultimately liable. Rules 4-1.8(e)(1) and 4-7.2.

9. (§32.37) Substitute Counsel

A lawyer may not accept employment in a matter in which the client has counsel without the consent of that counsel or withdrawal or termination. Rule 4-4.2.

B. (§32.38) Loyalty to the Client

A lawyer has a duty to represent a defendant with zeal and loyalty. Counsel must fully advise the client of all relevant considerations and alternatives, and their effects, including the probable outcome of the case and adverse consequences. *Evans v. State,* 477 S.W.2d 94 (Mo. 1972); *In re Stricker,* 808 S.W.2d 356 (Mo. banc 1991). Counsel may continue to represent the defendant even though the client has not elected to accept the lawyer's advice as long as counsel does not

engage in, or assist the client in engaging in, illegal or unethical conduct or assume frivolous positions. A defendant has the right to decide:

- what plea should be entered;
- whether to waive the jury;
- whether to testify; and
- whether to appeal.

Rule 4-1.2; *Jones v. Barnes,* 463 U.S. 745 (1983). When a defendant makes decisions against the advice of counsel, it is wise to make a full record with the court to avoid a subsequent claim of incompetence or a malpractice claim by a convicted client.

Trial counsel is the agent of the defendant and is vested with wide latitude to determine trial strategy. The client is bound by counsel's decisions with the exceptions noted. While counsel is present and representing the defendant, the defendant may not proceed pro se as well. *State v. Hurt*, 931 S.W.2d 213 (Mo. App. W.D. 1996).

When the client insists that groundless points be raised on appeal, counsel should present the points without detail and disassociate from it. *State v. Zeitvogel,* 649 S.W.2d 945 (Mo. App. W.D. 1983); *Anders v. Cal.*, 386 U.S. 738, 744 (1967) (stated that appointed counsel who find an appeal to be frivolous must advise the court and request permission to withdraw by supplying a brief that points out anything in the record that could support an appeal). The United States Supreme Court, however, has ruled that a client does not have a constitutional right to have frivolous issues presented. *Barnes,* 463 U.S. 745.

Unwelcome sexual advances by a lawyer to a client constitute illegal conduct involving moral turpitude. *In re Littleton,* 719 S.W.2d 772 (Mo. banc 1986); Rule 4-8.4; *see In re Howard*, 912 S.W.2d 61 (Mo. banc 1995).

1. (§32.39) Development of Evidence and Requirement of Proof

Any reasonable doubt concerning a client's intent should be resolved in the client's favor; a lawyer should assist in development of favorable evidence and require proof of all elements in a criminal case. Rule 4-3.1.

2. (§32.40) Conflict With Current Law

Defense counsel may argue permissible constructions of the law that are favorable to the client without regard to whether that construction may in fact prevail if the construction is supported by a good faith argument for extension, modification, or reversal of the current law. Rule 4-3.1.

But contentions that have been firmly and uniformly rejected by state and federal courts cannot be justified under the Rule by simply rehashing the arguments that have already been rejected in the bare hope that the courts might someday change their position; such contentions can support Rule 55.03(b) sanctions. *State v. Simmons*, 955 S.W.2d 752, 770–72 (Mo. banc 1997).

3. (§32.41) Mental Disability of Client

A lawyer who reasonably believes that the client suffers a mental disability prohibiting the client from acting in the client's own best interest may seek appointment of a guardian or take other protective action on behalf of the client. Rule 4-1.14.

4. (§32.42) Criminal Conduct by Client

Counsel may never encourage or aid the client in the commission of a criminal act or advise a client how to violate the law and avoid punishment. A lawyer may not assist or participate in illegal conduct. Rule 4-1.16.

Counsel may reveal the client's intention to commit a crime and information necessary to prevent it if the lawyer believes that conduct is likely to result in imminent death or substantial bodily injury. Rule 4-1.6. Counsel should attempt to dissuade the client and advise the client of the duty of disclosure.

5. (§32.43) Obtaining Advantage

It is not unethical for defense counsel to obtain disposition of a charge in municipal court with the intent of barring by double jeopardy a felony charge in circuit court. *Weaver v. Schaaf,* 520 S.W.2d 58 (Mo. banc 1975).

C. (§32.44) Privilege—Confidences

A lawyer must observe the confidences and secrets of the client. Rule 4-1.6. A client should be advised of the attorney-client privilege at the beginning of representation and of the prejudicial effects of the client's failure to state the truth to counsel. The relationship is highly fiduciary. *Jo B. Gardner, Inc. v. Beanland,* 611 S.W.2d 317 (Mo. App. W.D. 1980). The attorney-client privilege must be asserted unless it is waived. Rule 4-1.6(a). It is for the benefit of the client, not the lawyer. *State ex rel. Great Am. Ins. Co. v. Smith,* 574 S.W.2d 379 (Mo. banc 1978).

The privilege does not apply to information received by a government-paid lawyer from government employees and personnel. *In re: Lindsay (Grand Jury Testimony)*, 148 F.3d 1100 (D.C. Cir. 1998).

1. (§32.45) Disclosure

Client confidences may be disclosed to other lawyers in the firm and to nonlawyer personnel, but they may not be disclosed to other lawyers without consent. Rule 4-1.6 cmt. A lawyer may reveal confidences of a client when required by law or court order, in certain instances to prevent a crime, or with consent. *See* Rule 4-1.6.

Disclosure of a defendant's statement to the prosecution when the statement is not a part of plea bargain discussions is not protected under FED. R. EVID. 410 or Rule 24.02(d)5. *See Rachlin v. United States*, 723 F.2d 1373, 1377 (8th Cir. 1983).

2. (§32.46) Waiver

A defendant waives the attorney-client privilege by raising the issue of ineffective assistance of counsel, *Jackson v. State,* 540 S.W.2d 607 (Mo. App. E.D. 1976), or by raising the issue of mental competence to proceed, *Underwood v. State,* 553 S.W.2d 869 (Mo. App. E.D. 1977). The privilege does not apply to communications between defendant and counsel when they were made in the presence of third parties, even a judge. *Jackson,* 540 S.W.2d 607.

Counsel did not violate the attorney-client privilege when the defendant, at sentencing, claimed incompetence of counsel

because of counsel's failure to call requested alibi witnesses, which counsel explained by stating to the court that the defendant had tacitly admitted guilt and, therefore, counsel did not call alibi witnesses requested by the defendant because they might perjure themselves. *Pieron v. State,* 793 S.W.2d 618 (Mo. App. E.D. 1990).

3. (§32.47) Duration

The duty to preserve a client's confidences continues after sentencing and after employment is concluded. *State v. Risinger,* 546 S.W.2d 563 (Mo. App. S.D. 1977); MO. ADVISORY OPINIONS, Confi.-2, Formal Opinion 51 and Un.Pr.-18, Formal Opinion 52 (MoBar 1995). The privilege survives the death of the client. *Swindler & Berlin v. United States*, 524 U.S. 399 (1998).

Attorney-client relationship and privilege are established when advice and assistance of an attorney are sought and received in matters pertinent to the profession and the client has a reasonable belief that the attorney is in fact providing representation even if the attorney advises the client that the attorney cannot represent the client. *See State v. Longo,* 789 S.W.2d 812 (Mo. App. E.D. 1990).

D. (§32.48) Conflict of Interest

A lawyer defending a client must be able to exercise professional judgment independently of all other considerations and must avoid conflicts of interest among counsel, the client, and other clients. Rule 4-1.7. When one partner is disqualified by a conflict of interest, all attorneys in the firm are disqualified. *Humble Oil & Refining Co. v. Am. Oil Co.,* 224 F. Supp. 909 (E.D. Mo. 1963). Once the conflict of interest is shown, prejudice to the defendant/client is assumed. *Douglas v. State,* 630 S.W.2d 162 (Mo. App. W.D. 1982). The circuit court has inherent power to regulate the conduct of attorneys concerning withdrawal, employment, or other matters in which a conflict of interest may exist. *State ex rel. Headrick v. Bailey,* 278 S.W.2d 737 (Mo. banc 1955); Rule 4-1.8.

Defendant's trial counsel is not disqualified when a partner is a part-time municipal judge in the city where the charges arose. *State ex rel. Moreland v. Ladd,* 807 S.W.2d 671 (Mo. banc 1991).

Prohibition is the proper remedy to test the validity of a court order disqualifying counsel. *Id.*

1. (§32.49) Co-Defendants

If one lawyer proposes to represent two defendants in the same case, a full explanation must be made and their waiver obtained. The question should be brought to the attention of the court and a record made. Rule 4-1.8(g). There is no conflict of interest when an attorney who formerly represented a defendant in an unrelated criminal case advised a state witness against the former client to refuse to answer questions during cross-examination. *State v. Blair,* 638 S.W.2d 739 (Mo. banc 1982). In federal court, a hearing must be held to determine the existence of a conflict and formulate necessary remedies. FED. R. CRIM. P. 44(c). Prudence would suggest that the same procedure be followed in state court.

2. (§32.50) Client Versus Client

A conflict of interest exists when one client is called to testify against another client of the same attorney without a waiver from both. *State v. Cox,* 539 S.W.2d 684 (Mo. App. E.D. 1976); *State v. Risinger,* 546 S.W.2d 563 (Mo. App. S.D. 1977); Rules 4-1.8(b) and (g), 4-1.9, and 4-2.2.

When an attorney represents co-defendants and one defendant offers to testify in favor of the co-defendant and thereby incriminates him- or herself, a conflict of interest arises, and the attorney has a mandatory duty to inform the other client of the availability of that evidence and let that client make the decision whether to present the testimony and whether to continue with the attorney or retain other counsel. *Millican v. State,* 733 S.W.2d 834 (Mo. App. S.D. 1987); *see also Henderson v. State,* 734 S.W.2d 254 (Mo. App. S.D. 1987).

3. (§32.51) Lawyer as a Witness for a Client

A lawyer may not accept or continue employment in defense of a client when counsel will be called as a witness except when:

- the testimony may relate to an uncontested issue;
- the testimony would address the value of legal services rendered in the case; or
- it would work a substantial hardship on the client for the lawyer to be required to withdraw.

Rule 4-3.7; *see State Farm Mut. Auto. Ins. Co. v. Decaigney*, 927 S.W.2d 907, 912 (Mo. App. W.D. 1966).

An attorney can be disqualified from representation if the attorney is an unsworn witness at trial because of personal knowledge and involvement in matters at issue in the trial. *United States v. Locascio*, 6 F.3d 924 (2nd Cir. 1993). In some circumstances, the disqualification can be resolved by redaction of the attorney's name from documents, curative instructions, limitations on cross-examination of witnesses, and a waiver by the defendant.

A defendant can waive conflict of interest when the defendant's own counsel may be called as a defense witness. Considerations to be weighed and procedure to be followed when defense counsel may testify are detailed in *State ex rel. Fleer v. Conley,* 809 S.W.2d 405 (Mo. App. E.D. 1991).

4. (§32.52) Fee Paid by Third Party—Disclosure of Client Identity

When a client's fee is to be paid by a third party, a full disclosure must be made to the client, and the third party must understand that the lawyer's sole duty will be to the client. The lawyer must exercise professional judgment without consideration of the interests of the third party. Rules 4-1.6, 4-1.7 cmt., and 4-1.8(f). Disclosure of the identity of the third party paying the fee may be required.

An attorney cannot be compelled to disclose client identity and fee information when there is a strong probability that providing the information would incriminate the client. Otherwise, the identity is disclosable on a subpoena from the government. *United States v. Sindel,* 53 F.3d 874 (8th Cir. 1995).

5. (§32.53) Relationships Between Prosecutor and Defense Counsel

Lawyers related as parent, child, sibling, or spouse may not act as prosecutor and defense counsel in the same case except upon full disclosure and consent by the client. Rule 4-1.8(i). *But see* MO. ADVISORY OPINIONS, C.ofInt.-3, Formal Opinion 46 and C.ofInt.-4, Formal Opinion 47 (withdrawn 12-31-94) (MoBar 1995).

Deliberate misrepresentations to opposing counsel constitute a violation of the Rules of Professional Conduct. *In re Stricker,* 808 S.W.2d 356 (Mo. banc 1991); Rules 4-3.4 and 4-4.1.

6. (§32.54) Personal and Financial Interests of Defense Counsel

The defendant must be fully advised of and defense counsel must carefully consider any conflict of interest that may arise between the personal and financial interests of defense counsel and the interests of the defendant. Rule 4-1.8.

7. (§32.55) Special Prosecutors—Court Officers

A regularly salaried special assistant attorney general or part-time prosecutor may not represent criminal defendants. *State v. Crockett,* 419 S.W.2d 22 (Mo. 1967). A licensed attorney serving as a juvenile officer may not represent defendants. MO. ADVISORY OPINIONS, C.ofInt.-19, Formal Opinion 105 (MoBar 1995).

8. (§32.56) Publication Rights

Defense counsel should not propose, discuss, or obtain publication rights to the client's story prior to final conclusion of the matter giving rise to employment. Rule 4-1.8(a), (d), and (j).

E. (§32.57) Withdrawal

Defense counsel may withdraw only with leave of court and must take all steps appropriate to protect the defendant's rights, cooperate with new counsel, deliver all the client's papers and property to new counsel, and refund unearned compensation. Rule 4-1.16.

1. (§32.58) Mandatory Withdrawal

A lawyer must withdraw when discharged by the client, when personal physical or mental condition prohibits competent representation, or when continued employment will result in violation of a disciplinary rule. Rule 4-1.16(a).

2. (§32.59) Permissive Withdrawal

A lawyer may withdraw if the client persists in fraudulent or criminal conduct, the lawyer's services may perpetrate a crime or

a fraud, the client's objective is repugnant or imprudent, the client does not fulfill obligations to the lawyer, or representation constitutes an unreasonable financial burden on the lawyer. Rule 4-1.16(b).

If ordered by the court, the lawyer shall continue representation notwithstanding requirements or grounds for withdrawal. Rule 4-1.16(c).

IV. (§32.60) Duties of the Prosecutor

It is the duty of the prosecutor to see that justice is done, *State v. Brooks,* 513 S.W.2d 168 (Mo. App. E.D. 1973), and not merely to seek convictions. The prosecutor's office is a quasi-judicial position and must seek to afford a defendant a fair trial without attempts to excite prejudice or hatred against the defendant. *State v. Stockbridge,* 549 S.W.2d 648 (Mo. App. W.D. 1977). The prosecutor must not institute charges that are not supported by probable cause and should not file or continue to prosecute a case that is obviously unfair or use the position or the economic power of the state to harass parties or bring about unjust results. A lawyer who is a public official may not accept anything of value for the purpose of influencing official action.

The prosecutor must also ensure that the accused has the right to obtain counsel, shall not seek waiver by an unrepresented accused of important pre-trial rights, shall make timely disclosures of favorable evidence, and shall exercise control over investigators and law enforcement personnel to prohibit them from making extrajudicial statements that the prosecutor could not make. Rule 4-3.8.

A. (§32.61) Conflicts of Interest

A prosecutor is bound by the same requirements concerning conflicts of interest as defense attorneys; however, the state, the prosecutor's client, is not capable of waiving the conflict.

1. (§32.62) Former Clients

It is improper for a prosecutor who had represented a defendant concerning a charge to participate in the former client's prosecution. *State v. Burns,* 322 S.W.2d 736 (Mo. 1959).

2. (§32.63) Appeals

A newly elected prosecutor may perfect and argue an appeal of a case that was defended prior to assuming office. MO. ADVISORY OPINIONS, C.ofInt.-8, Formal Opinion 64 (withdrawn 12-31-94) (MoBar 1995).

3. (§32.64) Condemnation

A prosecuting attorney may not represent a defendant landowner on a condemnation proceeding by the State of Missouri. MO. ADVISORY OPINIONS, C.ofInt.-15, Formal Opinion 84 (MoBar 1995). But a part-time prosecutor may represent a landowner in a condemnation proceeding brought by a third-class city. Op. Att'y Gen. 39 (1954).

4. (§32.65) Municipal Court

Neither prosecuting attorneys nor their partners may represent a defendant in municipal court in either the county where the prosecutor serves or any other county. MO. ADVISORY OPINIONS, C.ofInt.-23, Formal Opinion 110 (MoBar 1995).

5. (§32.66) Assistant Attorney General

An assistant attorney general or special assistant attorney general on regular salary may not represent any party other than the state of Missouri in proceedings before Missouri courts or state agencies. MO. ADVISORY OPINIONS, C.ofInt.-16, Formal Opinion 91 (MoBar 1995).

6. (§32.67) City Prosecutor

A city prosecutor may not represent a defendant in a criminal proceeding that arises out of a factual situation that occurred within the boundaries of the city that the prosecutor represents. MO. ADVISORY OPINIONS, C.ofInt.-20, Formal Opinion 107 (MoBar 1995).

7. (§32.68) Other Counties

A prosecuting attorney in one county may not defend cases in another county. *See* MO. ADVISORY OPINIONS, C.ofInt.-23, Formal Opinion 110 (MoBar 1995).

8. (§32.69) Dissolutions

A prosecuting attorney in private practice may represent parties in proceedings for dissolution of marriage. If a conflict arises, it must be resolved by the court. MO. ADVISORY OPINIONS, C.ofInt.-21, Formal Opinion 108 (MoBar 1995). It is not proper for a prosecuting attorney to represent a party in a dissolution proceeding when the adverse party is being prosecuted for nonsupport. MO. ADVISORY OPINIONS, C.ofInt.-1, Formal Opinion 32 (MoBar 1995).

9. (§32.70) Prosecutor's Partners

It is a misdemeanor for the partners of a prosecutor to appear in or defend a criminal case in a Missouri state court. Section 484.170, RSMo 2000.

10. (§32.71) Civil Matters

Lawyers holding public office cannot use their position to obtain influence in favor of themselves or a client. Rules 4-7.1 and 4-7.5. A prosecuting attorney may not accept employment in a civil case when the official investigation or prosecution of the opposite party gives the prosecutor a position of advantage or undue influence in the civil action. A prosecutor may not profit from information gained during the performance of official duties and may not accept employment after retirement in any matter that was investigated or passed on in the office. *See* MO. ADVISORY OPINIONS, C.ofInt.-1, Formal Opinion 32 (MoBar 1995). Criminal charges may not be threatened or presented to obtain advantage in civil matters. *See generally* Rule 4-8.4; MO. ADVISORY OPINIONS, C.ofInt.-1, Formal Opinion 32 (MoBar 1995).

11. (§32.72) Former Public Defenders

A former public defender who becomes a prosecutor may not prosecute any case that was assigned to the public defender's office during employment there. *State v. Boyd,* 560 S.W.2d 296 (Mo. App. W.D. 1977).

The entire staff of the Missouri Attorney General's office was not disqualified from defending in a capital habeas corpus proceeding when one staff member had previously represented the defendant in other attacks on the defendant's conviction and a screening

mechanism could be employed to permit the Attorney General staff to proceed. *Blair v. Armontrout,* 916 F.2d 1310 (8th Cir. 1990).

B. (§32.73) Private Prosecutors

Interested citizens may not employ a private prosecutor to assist and participate in the prosecution of a criminal case. *State v. Harrington,* 534 S.W.2d 44 (Mo. banc 1976).

C. (§32.74) Disclosure

A prosecutor has a duty to disclose evidence to the defendant that tends to negate the guilt, mitigate the degree of the offense, affect the credibility of an important witness, or reduce punishment. *State v. Abernathy*, 525 S.W.2d 414 (Mo. App. W.D. 1975); Rule 4-3.8. This obligation is not affected by the nature of the offense or public outrage. *State v. Brooks,* 513 S.W.2d 168 (Mo. App. E.D. 1973). The prosecutor should not intentionally avoid pursuit of evidence merely because of a belief that the information might damage the prosecution or aid the defendant.

D. (§32.75) Correction of Witnesses

A prosecutor has a duty to correct errors in testimony, *State v. Neal,* 526 S.W.2d 898 (Mo. App. E.D. 1975), and false evidence that affects the credibility of a crucial state witness, *State v. Allen,* 530 S.W.2d 415 (Mo. App. W.D. 1975). *See also United States v. Foster*, 874 F.2d 491, 494-95 (8th Cir. 1988); *United States v. Nelson*, 970 F.2d 439, 443 (8th Cir. 1992) (inconsistencies in a witness's testimony at trial and a report that the defendant requested in discovery did not establish that the prosecutor knew the testimony was false).

E. (§32.76) Contact With Defendants

A prosecutor may have contact with a defendant who initiates that contact with the office, discharges previous counsel, and waives all *Miranda* rights. *State v. Chandler,* 605 S.W.2d 100 (Mo. banc 1980).

F. (§32.77) Prosecutor as a Witness

A prosecutor may not testify on principal factual issues that involve credibility and continue prosecution of a case. *State v. Hayes,* 473 S.W.2d 688 (Mo. 1971); *State v. White,* 99 S.W.2d 72 (Mo. 1936). The

prosecutor is disqualified and must seek appointment of a special prosecutor. *State ex inf. Fuchs v. Foote*, 903 S.W.2d 535 (Mo. banc 1995). A prosecutor may not appear before a grand jury as both a witness and a prosecutor but may explain legal matters and the elements of the offense. *United States v. Singer,* 660 F.2d 1295 (8th Cir. 1981).

G. (§32.78) Promises

The promise of a prosecutor is binding on the state and other prosecutors. *State v. Allen,* 530 S.W.2d 415 (Mo. App. W.D. 1975).

H. Morley Swingle*

Chapter 33

FORFEITURES IN CRIMINAL CASES

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I. (§33.1) Introduction

No area of criminal law has had more extensive changes in the past two decades than the law of forfeitures in criminal cases. When the prosecutor is seeking a forfeiture, the prosecution or defense of a criminal defendant involves not only the handling of the underlying criminal charge, but also the representation of one side or the other in a concurrent civil action for forfeiture of the defendant's property because of its involvement in criminal activity. Although forfeiture in Missouri traditionally applied primarily to drug cases, the passage of the Criminal Activity Forfeiture Act (CAFA), §§ 513.600–513.645, RSMo 2000 and Supp. 2004, in 1986 extended it to virtually any type of crime. Legislative revisions and appellate decisions since that time have established guidelines for the handling of forfeiture cases.

Before 1993, a prosecutor had complete discretion whether to refer a case to federal authorities for forfeiture under federal law, or whether to seek forfeiture under either the CAFA effective March 17, 1986, or under the provisions of Chapter 195, RSMo, which had been in effect since 1957 but pertained only to drug cases. In 1993, the legislature cut down on prosecutorial discretion, specifying that CAFA applies to all forfeitures filed in state court, even those initiated under Chapter 195, and placing limitations on the procedures for referring forfeitures to federal authorities. Section 513.647, RSMo Supp. 2004; § 513.649, RSMo 2000.

This chapter provides an overview of Missouri forfeiture law for both prosecutors and defense counsel and provides sample forms for lawyers practicing in the field.

II. (§33.2) Double Jeopardy

Initially, it might seem a violation of double jeopardy to punish a person both in a criminal case and in a civil forfeiture case by forfeiting the applicable property. In 1996, however, the United States Supreme Court held that double jeopardy does not usually prevent a forfeiture of property simply because the person has already been punished by the criminal law. The Court recited a detailed historical background of forfeiture law going back to 1789 and concluded: "Since the earliest years of this Nation, Congress has authorized the Government to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the same underlying events." *United States v. Ursery*, 518 U.S. 267, 274 (1996). *Ursery* was quickly followed in Missouri. *State v. Scott*, 933 S.W.2d 884, 887 (Mo. App. W.D. 1996).

III. (§33.3) Criminal Activity Forfeiture Act (CAFA)

The Criminal Activity Forfeiture Act (CAFA), §§ 513.600–513.645, RSMo 2000 and Supp. 2004, became effective March 17, 1986. It vastly broadened forfeiture law in Missouri, but it also added time deadlines and procedural restrictions not present under earlier forfeitures under Chapter 195, RSMo. Section 513.607.1, RSMo Supp. 2004, suggests that a civil forfeiture under this law should be known as a "CAFA" forfeiture proceeding.

A. (§33.4) Applicability—Type of Property

The CAFA can be used to forfeit any type of property. By its terms, it applies to "[a]ll property of every kind . . . used or intended for use in the course of, derived from, or realized through criminal activity." Section 513.607.1, RSMo Supp. 2004. It extends beyond drug cases to apply to virtually any sort of crime. Section 513.605(3), RSMo Supp. 2004, specifically lists by chapter the Missouri criminal activity to which it applies, including virtually all crimes in the Criminal Code plus certain liquor crimes, security regulation crimes, drug offenses, witness crimes, and vehicle licensing crimes.

To forfeit property, the prosecution must show a "nexus" between the property and the criminal activity. *State v. Sledd*, 949 S.W.2d 643, 647 (Mo. App. W.D. 1997). In other words, the state must present sufficient evidence that the defendant either derived the property from criminal activity or used it in criminal activity. *State ex rel. Boling v. Malone*, 952

S.W.2d 308, 312 (Mo. App. W.D. 1997); *State ex rel. MacLaughlin v. Treon*, 926 S.W.2d 13, 16 (Mo. App. W.D. 1996).

B. (§33.5) Applicability—Felony Requirement

Originally, the CAFA applied to both misdemeanor and felony cases. Now it applies only to felonies. "[N]o property shall be forfeited unless the person charged is found guilty of or pleads guilty to a felony offense substantially related to the forfeiture." Section 513.617.1, RSMo 2000.

C. (§33.6) Applicability—Conviction Requirement

In the past, prosecutors could proceed with civil forfeiture actions in state court even when they had decided, for some reason, not to proceed with the underlying criminal charge. Since 1993, however, a prosecutor may not obtain a forfeiture unless the defendant has been found guilty or has pleaded guilty to a felony. Section 513.617, RSMo 2000. Property of a person arrested but not subsequently charged is not subject to forfeiture. Section 513.617.1; *State v. Residence Located at 5708 Paseo*, 896 S.W.2d 532 (Mo. App. W.D. 1995).

In addition to state convictions, a felony conviction from federal court can serve as the basis for the state court forfeiture. *State v. Dillon*, 41 S.W.3d 479 (Mo. App. E.D. 2000). The trial judge in state court can even take judicial notice of the federal proceedings. *Id.*

The requirement that no property can be forfeited unless the person charged has been found guilty or pled guilty to a felony offense substantially related to the forfeiture was dramatically reaffirmed in *State v. Eicholz*, 999 S.W.2d 738 (Mo. App. W.D. 1999). In *Eicholz* a defendant in a forfeiture case was killed in a methamphetamine lab explosion shortly before his criminal drug possession case was scheduled for trial. The appellate court ruled that, even though the civil forfeiture case had already been filed and even though the prosecution had already taken an interlocutory judgment of default while the defendant was alive, the forfeiture action had to be dismissed because the defendant had escaped conviction in the criminal case by dying. Although this defense is effective, it is not one that most defendants will choose to employ.

Unlike forfeitures under the CAFA, a forfeiture action under § 542.301, RSMo Supp. 2004, for a weapon, tool, or device used to commit a felony does not require that the owner of the property be convicted of a felony. *Chandler v. Hemeyer*, 49 S.W.3d 786 (Mo. App. W.D. 2001).

D. (§33.7) Time Deadlines

Unlike forfeiture provisions previously used under Chapter 195, RSMo, the CAFA contains strict time deadlines. These time deadlines are mandatory, rather than merely directory. *State v. Hendrix*, 944 S.W.2d 311, 313 (Mo. App. W.D. 1997). Failure to meet them will result in dismissal of the forfeiture action. *State v. Eberenz*, 805 S.W.2d 359 (Mo. App. E.D. 1991); *State v. Hampton*, 817 S.W.2d 470 (Mo. App. W.D. 1991).

Police who have seized property for forfeiture must report the seizure to the prosecuting attorney or Attorney General within four days of the seizure. The prosecutor or Attorney General must then file the civil petition within ten days of receiving the report from the officer. Section 513.607.6(2), RSMo Supp. 2004. Police departments and prosecutors' offices should have procedures in place to make sure that seizure reports are properly and promptly forwarded to the prosecutor's office and that forfeiture decisions by the prosecution are promptly relayed back to the police. *Putman v. Smith*, 98 F.3d 1093, 1096 (8th Cir. 1996).

The method for calculating these short time deadlines is governed by Rule 44.01. Consequently, because the period of time during which the police must report to the prosecutor is less than seven days, intermediate Saturdays, Sundays, and legal holidays are excluded from the computation. *Hendrix*, 944 S.W.2d at 313.

The ten-day time frame in which the prosecutor must act begins running when the "report of seizure" is received. It does not begin running just because an officer filed a probable cause statement with the prosecutor requesting a criminal charge arising out of the same incident. This is so because the purpose of a probable cause statement differs from the purpose of a report of seizure, and the facts contained in each document may differ. One does not necessarily accomplish the purpose of the other. *See State v. Sims*, 124 S.W.3d 486 (Mo. App. W.D. 2003).

No state or local law enforcement agency may hold property seized solely for forfeiture unless a petition for forfeiture has been filed within the statutory time limits, unless a time extension has been granted by order of the court. Section 513.617.4, RSMo 2000. The court may extend the time for filing the petition for up to 10 days for each order, but cumulative extensions may only total 30 additional days. *Id*.

When the property has not been seized before the filing of a forfeiture petition, the prosecution may commence a forfeiture action at any time

up to five years after the crime was committed. Section 513.630, RSMo 2000.

Another time deadline is a provision specifying that "[a]ny party may bring one motion to dismiss at any time and such motion shall be heard and ruled on within ten days." Section 513.612, RSMo 2000. This ten-day requirement is not mandatory. *State v. Scott*, 933 S.W.2d 884, 885 (Mo. App. W.D. 1996). Nevertheless, prosecutors should be particularly careful to see that any motions to dismiss are immediately brought to the attention of the court.

E. (§33.8) Court Procedure

The procedure to follow in a CAFA case will depend on whether the property was seized before the civil action. The action may be brought by either the prosecuting attorney of the county where the property is located or by the Attorney General's office.

1. (§33.9) Petition

Regardless of whether the property has already been seized, the prosecutor will always need to file a petition for forfeiture. The petition may be either an *in rem* action against the property or an *in personam* action against a person, or both. An *in rem* action should only be brought when the property has been abandoned or is unclaimed; otherwise, the petition should be filed as an *in personam* action. Section 513.607.3, RSMo Supp. 2004.

a. (§33.10) Before Seizure (Writ of Seizure)

"If the petition is filed before seizure, it shall state what property is sought to be forfeited, that the property is within the jurisdiction of the court, the grounds for the forfeiture, and the names of all persons known to have or claim an interest in the property." Section 513.607.6(1), RSMo Supp. 2004.

When a petition is filed before seizure, the "court shall determine ex parte whether there is reasonable cause to believe that the property is subject to forfeiture and that notice to those persons having or claiming an interest in the property prior to seizure would cause the loss or destruction of the property." *Id.*

If the court finds both that the property is subject to forfeiture and that prior notice would cause its loss or destruction, the

court shall issue, without further hearing, a writ of seizure directing the sheriff or other authorized law enforcement agency where the property is found to seize it. *Id*. This procedure is normally followed only in cases involving motor vehicles, cash, or other transportable personal property. The United States Supreme Court has held that, unless extraordinary exigent circumstances exist, the Due Process Clause requires the government to afford notice and a meaningful opportunity to be heard before seizing real estate subject to civil forfeiture. *United States v. Good Real Prop.,* 510 U.S. 43 (1993).

If the court finds only that the property is subject to forfeiture but not that prior notice would cause its loss or destruction, the court shall order service on all persons known to have or claim an interest in the property before a further hearing on whether a writ of seizure should issue. *Id*.

"If the court finds that reasonable cause does not exist to believe the property is subject to forfeiture, it shall dismiss the proceeding." *Id*.

b. (§33.11) After Seizure

If the property has already been seized by the law enforcement officer, somewhat different procedures apply.

The officer may seize the property "without a writ of seizure if the seizure is incident to a lawful arrest, search, or inspection and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized." Section 513.607.6(2), RSMo Supp. 2004.

When an officer seizes property without a writ under the CAFA, the officer is to report the seizure to the prosecuting attorney or the Attorney General within four days of the seizure. *Id*. The prosecutor or Attorney General shall then file a petition for forfeiture within ten days after receiving the notice of seizure. *Id*. "The burden of proof will be on the investigative agency to prove all allegations contained in the petition." *Id*.

2. (§33.12) Stay of Civil Proceeding Until Conviction

Although the prosecution is required to file its petition for forfeiture within the short statutory time deadlines if the property has been

seized, the law specifically requires that the court shall stay the civil case until such a time as there has been a conviction or plea. Section 513.617.2, RSMo 2000. The court is to order the property released to the defendant when the defendant has filed a bond in an amount adequate to secure the property and the court imposes such other conditions it deems reasonable and necessary to prevent the property from being made unavailable for disposition by the court. *Id*.

3. (§33.13) No Publication Requirement

Unlike Chapter 195, RSMo, the CAFA does not specifically require notice by publication. Such notice would only be necessary if otherwise required by the Rules of Civil Procedure. For example, service by publication may be ordered on any party whose whereabouts cannot be determined or if there are unknown parties. Section 513.607.6, RSMo Supp. 2004; § 506.160, RSMo 2000; Rule 54.12.

4. (§33.14) Lien Notices

The prosecution may file a CAFA lien notice in the official records of any one or more counties. The notice creates:

> [F]rom the time of its filing, a lien in favor of the state on the following property of the person named in the notice and against any other names set forth in the notice:
>
> (1) Any real property situated in the county where the notice is filed then or thereafter owned by the person; and
>
> (2) Any beneficial interest situated in the county where the notice is filed then or thereafter owned by the person.

Section 513.640.5, RSMo 2000.

"No filing fee or other charge shall be required as a condition for filing the CAFA lien notice." Section 513.640.1.

The lien notice is to include:

- the name of the person against whom the civil proceeding has been brought;
- the present residence and business addresses of the person named in the lien notice, if known;

- a reference to the civil proceeding stating that a CAFA forfeiture proceeding has been brought against the person named in the notice, the name of the county or counties where the action has been brought, and the case number of the civil proceeding, if known;
- a statement that the notice is being filed pursuant to the CAFA;
- the name and address of the investigative agency filing the notice (prosecutor or Attorney General); and
- the name of the individual signing the lien notice.

Section 513.640.2.

The CAFA requires the Attorney General's office to prepare a sample form for the lien notice. Section 513.640.2. A sample lien notice form is at §33.46 below.

A CAFA lien notice applies only to one person, and a separate notice should be filed for any other person the prosecution desires to be subject to the notice. Section 513.640.3.

The prosecution is required to provide the person named in the CAFA lien notice with a copy of the notice as soon as practicable, but the failure to furnish a copy of the notice will not invalidate or otherwise affect the notice. Section 513.640.4.

The lien commences and attaches as of the time the CAFA lien notice is filed, and it continues until expiration, termination, or release. Section 513.640.6. The lien created in favor of the state is "superior and prior to the interest of any other person in the real property or beneficial interest if the interest is acquired subsequent to the filing of the notice." *Id*.

A lien notice will last six months, and it may be renewed one time before judgment. Section 513.645.1, RSMo 2000. After judgment in favor of the state, the CAFA lien notice will last a period of six years, and the state will be entitled to only one renewal of the CAFA lien notice after judgment. *Id*.

If no civil proceeding is instituted after the filing of the CAFA lien notice, an acquittal or dismissal of the criminal proceeding terminates the CAFA lien notice. Section 513.645.3.

"If no civil proceeding is then pending against the person named in a CAFA lien notice, any person named in a CAFA lien notice may institute an action against the investigative agency filing the notice . . . seeking a release or extinguishment of the notice." Section 513.645.4.

5. (§33.15) *Lis Pendens*

In conjunction with the civil forfeiture proceeding involving real estate, the prosecution may file, without prior court order, in any county, a *lis pendens*. Section 513.640.7(1), RSMo 2000. "[A]ny person acquiring an interest in the subject real property or beneficial interest subsequent to the filing of lis pendens shall take the interest subject to the civil proceeding and any subsequent judgment of forfeiture." Section 513.640.7(2).

Similarly, if a CAFA lien notice has been filed, the prosecution:

> [M]ay name as defendants, in addition to the person named in the notice, any persons acquiring an interest in the real property . . . subsequent to the filing of the notice. If a judgment of forfeiture is entered in the proceeding in favor of the state, the interest of any person in the property that was acquired subsequent to the filing of the notice shall be subject to the notice and judgment of forfeiture.

Id.

Because the purpose of a *lis pendens* is to give notice of a pending lawsuit, it seems clear that the filing of a lien notice accomplishes the same result, and it would not be necessary for the prosecution to do both. When the CAFA lien notice is filed after seizure, each fact required to be stated in a *lis pendens* is already contained in the CAFA notice. Section 527.260, RSMo 2000; § 513.640.

6. (§33.16) Intervention and Innocent Parties

The CAFA contains several provisions concerning intervention and the rights of innocent parties.

The rights of an innocent party are not subject to forfeiture. An innocent party has a right or claim to the property superior to any right claimed by the state or county. Section 513.615, RSMo 2000.

An innocent party is defined as "one who did not have actual knowledge that the property was used or intended for use in the

course of, derived from or realized through a criminal activity." *Id.* For example, a father whose son had used the father's truck to commit a robbery was allowed to successfully fight a forfeiture action against the truck by showing that he had bought the truck new, still had title to it, still carried insurance on it, still used it three times per week, and had no prior knowledge that his son was going to use it to commit the robbery. *State v. Beaird*, 914 S.W.2d 374 (Mo. App. S.D. 1996). On the other hand, a live-in girlfriend who intervened in a forfeiture action against her boyfriend did not convince the court that she had a right to the $18,000 seized in close proximity to drugs when it was proven that at the time of the seizure she had disclaimed any knowledge of or interest in the cash. *State v. Dillon*, 41 S.W.3d 479 (Mo. App. E.D. 2000).

To enforce a claim to the property, the innocent party must intervene in the forfeiture action before its final disposition. Section 513.615. A person seeking to intervene as an innocent party must prove an ownership interest in the property. *State v. 1973 Fleetwood Mobile Home*, 802 S.W.2d 582 (Mo. App. W.D. 1991).

Certain parties are automatically protected as necessary parties to the forfeiture action. A lienholder who is named in records of ownership kept by the state (such as the certificate of title of a motor vehicle) is a necessary party to the action unless the lien has been released, and lienholders have no obligation to intervene to protect their rights. *Id.* The court will determine the validity of the lien and protect it. *Id.*

Similarly, when the prosecution files the CAFA proceeding, it is required to name in its petition any persons known to have or claim an interest in the property. Section 513.607.6(1), RSMo Supp. 2004.

After the petition is filed or the property is seized, every person known to have or claim an interest in the property shall be served, if not served previously, with a copy of the petition and a notice of seizure. Section 513.607.7.

Any person claiming an interest in the property may become a party to the action at any time before judgment, whether or not named in the petition. Section 513.610.1, RSMo 2000.

Any person claiming a valid interest in the property, upon motion, shall:

> [B]e allowed by the court to take possession of the property upon posting bond with good and sufficient security in the amount of the property's value conditioned to pay the value of any interest in the property found to be subject to forfeiture or the value of any interest of another not subject to forfeiture.

Id.

A person who has been allowed by the court to take possession of the property while awaiting hearing is not allowed to remove the property from the jurisdiction of the court without court order. *Id*.

The court, upon such terms and conditions as it prescribes, may order that the property be sold by an innocent party who holds a lien on it at any time during the proceedings. Section 513.610.2. "Any proceeds from such sale over and above the amount necessary to satisfy the lien . . . shall be paid into court pending final judgment in the forfeiture proceeding." *Id*. This pre-judgment sale is not to be ordered, however, unless the obligation upon which the lien is based is in default. *Id*.

The court, pending final judgment in the forfeiture proceeding, "may make any other disposition of the property as may be provided by the laws of this state which is in the interest of justice." Section 513.610.3.

The court is also required to protect the rights of innocent parties in the disposition-of-property stage of the proceedings. Section 513.620, RSMo 2000. Thus, the court may order the outright transfer of the property to any innocent party having an interest in it equal to or greater than the value of the property, or, when the innocent party's interest does not exceed the value of the property, the court may allow the innocent party to retain the property upon payment or approval of a plan for payment into court of the value of any forfeited interest in the property. *Id*.

7. (§33.17) Right to Jury Trial

Unlike previous forfeitures under Chapter 195, RSMo, either party may demand a jury trial. Section 513.612, RSMo 2000.

8. (§33.18) Proof of Facts

Testimony is not always required in forfeiture proceedings. The necessary facts can often be established by an answer admitting

them, by stipulation, or, in some cases, by the transcript of a guilty plea proceeding in which the necessary statutory requirements are met. *State ex rel. Bridges v. Henderson*, 723 S.W.2d 572 (Mo. App. S.D. 1987).

The trial court in a civil forfeiture case can take judicial notice of its file in the underlying criminal case regardless of whether the prosecutor has offered the file into evidence. *Chandler v. Hemeyer*, 49 S.W.3d 786 (Mo. App. W.D. 2001); *State ex rel. Callahan v. Collins*, 978 S.W.2d 471 (Mo. App. W.D. 1998). Judicial notice may also be taken of proceedings in federal court when a federal prosecution is the underlying criminal conviction. *State v. Dillon*, 41 S.W.3d 479 (Mo. App. E.D. 2000).

Summary judgment procedures are often used by prosecutors in forfeiture cases. Rule 74.04. Summary judgment is only appropriate when there is no genuine issue as to any material fact. *State v. Cox*, 784 S.W.2d 244 (Mo. App. E.D. 1989). Summary judgment is particularly appropriate when the defendant has already pled guilty to or been found guilty of the underlying crime. *State v. Hendrix*, 985 S.W.2d 878 (Mo. App. W.D. 1998); *State v. Daniels*, 789 S.W.2d 243 (Mo. App. W.D. 1990).

Collateral estoppel can apply to bar a defendant who admitted during a guilty plea in the underlying criminal charge that the cash seized constituted proceeds from the criminal activity from later claiming in the forfeiture proceeding that the cash was not criminal proceeds. *Hendrix*, 985 S.W.2d 878. Collateral estoppel can apply not just when the defendant has pled guilty, but also when the defendant was convicted at trial. A defendant convicted in a bench trial of possession of marijuana (for knowingly possessing marijuana found in the glove compartment of the car he was driving) was barred by collateral estoppel from contesting in the civil forfeiture case the issue of whether he had known the marijuana was in the glove compartment. *Daniels*, 789 S.W.2d 243.

The trial court is not usually required to order the appearance of an imprisoned defendant at the civil forfeiture hearing; the test is whether the inmate would be substantially and irreparably prejudiced by failure to attend the trial on the merits of the civil proceeding. *State v. Scott*, 933 S.W.2d 884, 886 (Mo. App. W.D. 1996).

9. (§33.19) Burden of Proof

The burden of proof in a forfeiture action is on the investigative agency to prove all allegations in its petition. Section 513.607.6(2), RSMo Supp. 2004. In drug cases, however, a statutory presumption exists that any money found in "close proximity" to controlled substances, imitation controlled substances, drug paraphernalia, or records pertaining to controlled substances is forfeitable; in those cases, the burden of proof shifts to the defendant to rebut the presumption. Section 195.140.2(2), RSMo Supp. 2004. *See*:

- *State ex rel. Cook v. Saynes*, 713 S.W.2d 258 (Mo. banc 1986);
- *State v. Dillon*, 41 S.W.3d 479 (Mo. App. E.D. 2000);
- *State v. Eicholz*, 999 S.W.2d 738 (Mo. App. W.D. 1999);
- *State ex rel. Callahan v. Collins*, 978 S.W.2d 471 (Mo. App. W.D. 1998);
- *State v. Meister*, 866 S.W.2d 485 (Mo. App. W.D. 1993).

10. (§33.20) Disposal of Property

Since 1998, all proceeds from state court forfeitures go into a "school building revolving fund" that aggregates forfeiture proceeds from around the state for allocation to individual school districts. Sections 513.620, 513.623, 166.131, RSMo 2000; § 166.300, RSMo Supp. 2004; *Ensor v. Dir. of Revenue*, 998 S.W.2d 782 (Mo. banc 1999). Prior statutory authorization for other dispositions of the property was held unconstitutional under article IX, § 7, of the Missouri Constitution. *Reorganized Sch. Dist. No. 7 Lafayette County v. Douthit*, 799 S.W.2d 591 (Mo. banc 1990). This provision specifies that "the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the state . . . shall be distributed annually to the schools of the several counties according to law." MO. CONST. art. IX, § 7.

a. (§33.21) Statutory Language—Disposition of Property

As to disposition of the property, the CAFA provides that the judgment may include any of the following orders:

- Illegal contraband may be destroyed.
- The property may be transferred to an innocent party if that party's interest in the property is equal to or greater than the value of the property.

- An innocent party whose interest is less than its value may still be allowed to retain the property if a payment plan is approved for paying off the forfeited interest in the property.
- The property may be sold at a judicial sale.
- The court may make any other disposition of the property, as may be provided by the laws of Missouri, that is in the best interests of justice and adequately protects innocent parties.

Section 513.620, RSMo 2000.

Significantly, the clear proceeds of any sale of the property, after satisfaction of the interests of innocent parties and the payment of reasonable costs of the CAFA proceeding, "shall be distributed pursuant to section 7 of article IX of the Constitution of the state of Missouri." Section 513.623, RSMo 2000. In other words, after payment of costs, the clear proceeds must go to the school fund. Section 513.623 specifically states that the "reasonable costs" of the forfeiture proceeding may include reasonable storage costs as assessed by the court. It has been held that publication costs incurred by the prosecution would be considered costs subject to reimbursement from the proceeds, whereas the time spent by the police officers in seizing the property and in preparing for their courtroom testimony at the forfeiture hearing would not be reimbursable. *State v. Williams*, 872 S.W.2d 669 (Mo. App. W.D. 1994).

b. (§33.22) Destruction of Contraband

The CAFA provides that the court may order "[d]estruction of contraband, the possession of which is illegal." Section 513.620(1), RSMo 2000. Obviously, this could apply to drugs, weapons, or other items illegal to possess. Similarly, Chapter 195, RSMo, still contains a provision allowing for the forfeiture of illegal drugs. Section 195.140, RSMo Supp. 2004.

c. (§33.23) Judgment

In addition to the usual findings and orders contained in a civil judgment, the judge should include a specific finding that the seized property has not been used in plea bargaining to obtain a guilty plea or to affect sentencing recommendations. Section 513.617.3, RSMo 2000.

F. (§33.24) Transferring Forfeiture to Federal Authorities

Until 1993, police officers seeking to have the proceeds of forfeitures paid into the budget of their department rather than having the money go to the school fund could simply send the forfeiture to federal authorities for forfeiture under federal law. This was a popular and prevalent practice because a large percentage of money forfeited federally is always returned to the law enforcement agency making the seizure. Statutory law now limits the cases that can be transferred for federal forfeiture and sets out specific procedures to follow when doing so. Adhering to the procedures is mandatory, and the general doctrine that forfeiture laws are to be construed strictly against the state applies to these transfers. *Karpierz v. Easley*, 31 S.W.3d 505 (Mo. App. W.D. 2000); *State v. Sledd*, 949 S.W.2d 643, 648 (Mo. App. W.D. 1997).

At the outset, it should be noted that seizures made by federal authorities in the course of their own investigations unquestionably may be handled as federal cases. Issues arise, however, when state or local officers seize property and want to refer its forfeiture to federal authorities.

Section 513.647.1, RSMo Supp. 2004, specifically provides that "[n]o state or local law enforcement agency may transfer any property seized . . . to any federal agency for forfeiture under federal law until the prosecuting attorney and the circuit judge of the county in which the property was seized first review the seizure and approve the transfer to a federal agency . . . ." The prosecutor and the circuit judge should not approve the transfer unless it "reasonably appears" that the activity giving rise to the investigation or seizure "involves more than one state" or unless "it is reasonably likely to result in federal criminal charges being filed, based upon a written statement of intent to prosecute from the Unites States attorney with jurisdiction." Section 513.647.1.

The language about it being "reasonably likely" that federal criminal charges would be filed is a change made in 2001, replacing previous language calling for a finding that "the nature of the investigation or seizure would be better pursued under federal forfeiture statutes." Formerly, it was possible for a local agency to obtain an order for transfer of the forfeiture proceeding to federal authorities by proving that the local sheriff's department was a small one without the "investigative abilities or manpower" to investigate a case of significant magnitude and that the investigation would be better handled by federal authorities. *State v. Gray*, 21 S.W.3d 847, 851 (Mo. App. E.D. 2000) (a large-scale marijuana growing operation). In light of the changes in the

statute, however, it would now be better to plead and prove that the federal authorities were taking over both the civil forfeiture and the criminal prosecution.

Proving that more than one state is involved can be relatively easy in drug cases when the prosecution is aided by the statutory recognition Congress has given to the fact that a violation of controlled substances laws, by definition, involves multi-state activity. 21 U.S.C. § 801(3). Accordingly, a defendant was convicted of a drug charge in federal court based on interstate commerce even though his marijuana patch was located solely in California despite his claim that "no reasonable basis" existed "to assume that plants rooted in the soil [of California] affect interstate commerce." *United States v. Visman*, 919 F.2d 1390, 1392 (9th Cir. 1990).

Section 513.647.1 also makes it clear that property cannot be transferred for federal forfeiture unless the violation involved would be a felony under Missouri or federal law. A state court conviction is not required, however, to transfer property for federal forfeiture proceedings. *Sledd*, 949 S.W.2d at 648.

Before the transfer to federal authorities, the prosecutor must file "with the court a statement setting forth the facts and circumstances of the event or occurrence which led to the seizure of the property and the parties involved, if known." Section 513.647.2. Although the statute does not specifically require it, an appellate case instructs the prosecutor to expressly state in the application for transfer exactly which Missouri statute or federal statute has been violated; unlike most civil cases, it is sometimes not enough to simply plead the facts. *Sledd*, 949 S.W.2d at 649–50. Another appellate case, however, held that a petition is sufficient to state a cause of action when it merely cites the applicable chapter number, coupled with a reference to the offense being a felony. *Gray*, 21 S.W.3d 847. Until the 2001 amendment to § 513.647, the petition's reference to federal authorities required a recital of "how or why" the nature of the investigation or seizure would be better pursued under federal forfeiture statutes. *Sledd*, 949 S.W.2d at 651. Under the new law, however, the application should plead that it is reasonably likely that a federal criminal charge will be filed based on a written statement from the local United States Attorney.

The court is required to certify the filing and to notify the property owner by mail of the right to challenge the transfer of the property to federal authorities. Section 513.647.2. If, within 96 hours after the filing of the prosecutor's statement, the property owner files a petition showing

by a preponderance of the evidence that the property should not be transferred to the federal government for forfeiture, the court shall delay the transfer until a hearing can be held. *Id*. If the court orders a delay in the transfer, the hearing must be held within ten days after the filing of the petition unless the court decides, for good cause shown, to grant a continuance. *Id*. If a hearing is held, the prosecution must prove "by a preponderance of the evidence that the investigation or seizure involved more than one state or that the nature of the investigation or seizure would be better pursued under the federal forfeiture statutes . . . . *Id*.

Any property seized by state or local officers who are "detached to, deputized or commissioned by or working in conjunction with" a federal agency may not automatically be turned over to federal authorities without going through the same steps that would have been required if the local officer been working independently of the federal authorities. Section 513.649, RSMo 2000. It is clear that local police cannot simply "call in the feds" later that same day to avoid going through the transfer process; rather, the local prosecutor and judge must approve the transfer using the procedures set out in § 513.647.1. *Karpierz*, 31 S.W.3d 505. The fact that the local police officer who seized the property was also deputized as a federal agent does not take the case outside the requirements of Missouri's CAFA. *Id*. at 509.

When the court approves the transfer and the local agency eventually receives part of the proceeds through federal forfeiture, the money must only be used "for the investigation or prosecution of criminal activity, the execution of court orders arising from such activity, the enforcement of drug-related crimes, training, drug education, and the safety of both the citizens and law enforcement officers." Section 513.651, RSMo 2000.

Law enforcement agencies receiving money from federal forfeitures are also required to secure an independent audit of their federal seizures and the proceeds from them and to supply copies of the audit to their governing body, the Department of Public Safety, and to the state auditor. The cost of the audit is to be paid out of the proceeds of the forfeitures. Section 513.653, RSMo Supp. 2004.

A local law enforcement officer who has improperly transferred money to federal authorities without first going through the steps required under the CAFA may be vulnerable to a civil suit for assumpsit for money had and received. *Karpierz v. Easley*, 68 S.W.3d 565 (Mo. App. W.D. 2002). Whether sovereign immunity applies is unclear. *See State ex rel. Mo. State Highway Patrol v. Atwell*, 119 S.W.3d 188 (Mo. App. W.D. 2003). It has been held that, when a sheriff's department is involved, the deputies

themselves and not the sheriff's department are the legal entities capable of being sued. *White v. Camden County Sheriff's Dep't*, 106 S.W.3d 626 (Mo. App. S.D. 2003).

Law enforcement officers who are obeying a judge's order to transfer property to federal authorities are protected by judicial immunity even if the judge made a mistake. *White*, 106 S.W.3d at 633. As the *White* court stated: "[I]t is simply unfair to spare the judges who give orders while punishing the officers who obey them."

The special statute of limitations for a CAFA proceeding under § 513.630, RSMo 2000, does not apply to a civil action by the property owner against the law enforcement officers; rather, the regular time limitations under Chapter 516, RSMo, apply. *Yahne v. Pettis County Sheriff Dep't*, 73 S.W.3d 717 (Mo. App. W.D. 2002).

G. (§33.25) Prosecutor to File Annual Report

Prosecuting attorneys and the Attorney General are required to file annual reports with the Missouri Department of Public Safety listing, for every seizure reported to that office:

- the date, time, and place of seizure;
- the property seized;
- the estimated value of the seized property;
- the people from whom the property was seized;
- any criminal charges filed; and
- the dispositions of both the criminal charges and the forfeiture proceedings.

Section 513.607.8, RSMo Supp. 2004.

H. (§33.26) Forfeitures Under City Ordinances

Attempts to forfeit property under municipal ordinances may become more frequent in the future. At least one Missouri city has passed a municipal ordinance allowing the city attorney to institute a forfeiture action on a vehicle used to commit an alcohol-related traffic offense. Springfield, Missouri, Code § 106-207. This ordinance was passed after the enactment of a specific Missouri statute allowing a charter city with a population of more than 100,000 to pass such an ordinance. Section 82.1000, RSMo 2000. Similarly, cities with populations over 400,000 located in more than one county are allowed to enact ordinances prescribing and imposing forfeitures for the breach of city ordinances.

Section 82.300.1, RSMo Supp. 2004. No appellate courts have yet ruled on the applicability of either the CAFA or article IX, § 7, of the Missouri Constitution to these municipal ordinances.

IV. (§33.27) Chapter 195, RSMo, Forfeitures

In 1993, the legislature repealed the provision in Chapter 195, RSMo, that had set out procedures for forfeiting drugs and money or proceeds from drug transactions. Chapter 195 still provides that these items may be forfeited, but it specifies that the forfeiture proceedings under Chapter 195 shall be conducted under the same procedures followed under the Criminal Activity Forfeiture Act, §§ 513.600–513.645, RSMo 2000 and Supp. 2004. Section 195.140.2(3), RSMo Supp. 2004. Thus, the longer statute of limitations previously available under Chapter 195 no longer applies, notice by publication is not required in every case, and the prosecution cannot avoid a jury trial by proceeding under Chapter 195.

A. (§33.28) Drugs and Money May Be Forfeited

Chapter 195, RSMo, still provides that controlled substances, imitation controlled substances, and drug paraphernalia that have been seized shall be forfeited. Section 195.140.1, RSMo Supp. 2004.

Likewise, everything of value furnished, or intended to be furnished, in exchange for a controlled substance, imitation controlled substance, or drug paraphernalia, and all proceeds traceable to such an exchange, or money intended to be used in such an exchange, shall be forfeited. Section 195.140.2(1).

B. (§33.29) Presumption of Forfeitability and Burden of Proof

Chapter 195, RSMo, is still helpful in drug-related forfeiture cases because of its language that any money, coins, and currency found in close proximity to forfeitable controlled substances, imitation controlled substances, drug paraphernalia or records of drug transactions are presumed to be forfeitable as being involved in the drug activity. Section 195.140.2(2), RSMo Supp. 2004. The burden of proof is on the defendant to rebut the presumption. *Id.*; *State ex rel. Cook v. Saynes*, 713 S.W.2d 258 (Mo. banc 1986); *State v. Dillon*, 41 S.W.3d 479 (Mo. App. E.D. 2000); *State v. Eicholz*, 999 S.W.2d 738 (Mo. App. W.D. 1999); *State ex rel. Callahan v. Collins*, 978 S.W.2d 471 (Mo. App. W.D. 1998); *State v. Meister*, 866 S.W.2d 485 (Mo. App. W.D. 1993). Even innocent parties who intervene, such as parents whose car has been used by their

children to transport marijuana, have the burden of proving their lack of knowledge. Section 195.180.2, RSMo 2000; *State ex rel. Reid v. Kemp*, 574 S.W.2d 695 (Mo. App. E.D. 1978).

C. (§33.30) Drug Buildings as Nuisances

Any room, building, or structure used for the "illegal use, keeping or selling" of a controlled substance is a "public nuisance." Section 195.130.1, RSMo 2000. The Attorney General, circuit attorney, or prosecuting attorney may bring, in addition to a criminal prosecution, a suit in equity to enjoin the public nuisance. Section 195.130.2. The court may order that the premises shall not be occupied or used for up to one year. *Id*. Defendants may include the persons conducting the illegal drug activity, as well as the owners, lessees, officers, agents, inmates, or employees aiding or facilitating the nuisance. Section 195.130.3. The building's owner or occupant or both may also be charged with the class C felony of keeping or maintaining a public nuisance. Section 195.130.4.

V. (§33.31) Other Statutory Forfeitures

In addition to the forfeiture measures contained in Chapter 195, RSMo, and in the Criminal Activity Forfeiture Act (CAFA), §§ 513.600–513.645, RSMo 2000 and Supp. 2004, other forfeiture provisions exist in certain specific situations.

A. (§33.32) Firearms Under § 571.095, RSMo

In addition to the CAFA, which can obviously apply to weapons, § 571.095, RSMo 2000, is available as an option for a prosecutor who wishes to petition the court for an order of forfeiture of a firearm.

Upon conviction of a felony perpetrated in whole or in part by the use of a firearm, the court, in addition to the criminal penalties, may order the confiscation and disposal of firearms and ammunition used in committing the crime or found in the possession or immediate control of the defendant at the time of the defendant's arrest. Section 571.095.

This forfeiture order may be entered by the sentencing court as a part of the sentencing. It does not require a separate civil action.

One possible issue is whether this provision could be used to forfeit a gun when the defendant received a suspended imposition of sentence because the word "conviction" is specifically used in § 571.095, and a

suspended imposition of sentence is not technically a conviction. *State v. Lynch*, 679 S.W.2d 858 (Mo. banc 1984).

B. (§33.33) Weapons, Tools, Devices, and Substances Under § 542.301, RSMo

Another statute available to prosecutors for use in forfeitures is § 542.301, RSMo Supp. 2004, which deals with weapons, tools, devices, and substances used to commit felonies. The statute specifically states, however, that it does not apply to motor vehicles, aircraft, or watercraft, and it does not apply to items used to commit the crime of possession of burglary tools. Section 542.301.1(2). A video game machine used to commit the felony of promoting gambling was considered a "tool[ ]" or "device" subject to forfeiture under § 542.301. *Chandler v. Hemeyer*, 49 S.W.3d 786 (Mo. App. W.D. 2001). Cash, however, is not a "tool" or "device" under § 542.301. *State v. One Hundred Fifty-Two Thousand, Seven Hundred Sixty, and 00/100 Dollars ($152,760.00) in United States Currency*, 87 S.W.3d 374 (Mo. App. S.D. 2002).

Under § 542.301.2, the prosecutor shall file a motion in the court that would have had jurisdiction to hear a motion to suppress, praying for an order directing the forfeiture of the property. The court is required to give notice to all interested persons and to conduct a hearing. Section 542.301.3. If the evidence is clear and convincing, the court can order the property forfeited and order its destruction or sale. Section 542.301.4.

The proceeds of sales under § 542.301 are to go into the county treasury. Section 542.301.5. This provision of the statute may be unconstitutional under the same analysis used in *Reorganized School District No. 7 Lafayette County v. Douthit*, 799 S.W.2d 591 (Mo. banc 1990). No case, however, has yet specifically addressed that issue.

"If the property is perishable the judge may order it sold at a public sale or destroyed, as may be appropriate, prior to a hearing," with the proceeds to be held in lieu of the property. Section 542.301.6.

Because § 542.301 uses the word "committing" instead of "convicted," a conviction or guilty plea is not required before property can be forfeited under this statute. *Chandler*, 49 S.W.3d 786.

Any person claiming the right to possession of the property may file a motion requesting the court to "declare the property not subject to forfeiture and order it delivered to the moving party." Section 542.301.2. In *State v. McAllister*, 767 S.W.2d 362 (Mo. App. E.D. 1989), the court of

appeals reversed a trial court that had ordered, without a hearing, the return to the defendant of money seized by the police at the time of his arrest. The *McAllister* court noted that "[t]here is a clear statutorily established procedure for dealing with property seized by law enforcement officers" in §§ 195.140 and 542.301, now RSMo Supp. 2004. *McAllister*, 767 S.W.2d at 364.

C. (§33.34) Seized and Unclaimed Vehicles Under § 304.155, RSMo

A law enforcement officer may have a motor vehicle towed to a place of safety if:

- it has been left unattended on a highway right-of-way for more than 48 hours;
- it was illegally left standing on any highway or bridge in a position that obstructs traffic;
- it has been abandoned;
- it was reported stolen;
- the person driving it was arrested and taken into custody;
- it is subject to towing because of its owner's outstanding traffic tickets;
- it has been left unattended in violation of a posted sign or in a place where it causes a safety hazard; or
- it has been abandoned on a body of water.

Section 304.155.1(1)–(8), RSMo Supp. 2004. Unless some forfeiture action has been instituted or the vehicle is otherwise being held as evidence, the owner of the vehicle, or the holder of a valid security interest on it, may reclaim it upon proof of ownership by paying all reasonable towing and storage charges. Section 304.155.8. The person doing the towing and storage is given a statutory lien on the vehicle and may obtain title to it after 30 days if certain statutory procedures are followed. Section 304.156.7, RSMo Supp. 2004.

D. (§33.35) Unclaimed Seized Property Under § 542.301, RSMo

Section 542.301.1, RSMo Supp. 2004, contains provisions for the disposal of unclaimed property seized by the police. Section 542.301.1(1)(a) requires a person claiming the property to file a written motion with the court within one year of the seizure. The motion does not need to be filed by the defendant in a criminal case, but it may be filed by anyone claiming an interest in the property. *State v. Meeks*, 59 S.W.3d 531 (Mo. App. E.D. 2001). If a motion is filed, the court will conduct a hearing and

order the delivery of the property to the appropriate person when it is no longer needed as evidence. Section 542.301.1(1)(c). If the property is not claimed within one year, it may be ordered sold at a public sale, with the proceeds paid into the county treasury. Section 542.301.1(1)(d).

This provision does not apply to property seized from a person at the time of arrest when all charges have been dismissed and the property was never proven to have been stolen. *State v. Johnson*, 956 S.W.2d 941 (Mo. App. W.D. 1997).

Cash was not properly considered unclaimed property when a driver in a traffic case initially claimed that the money was not his after a drug dog alerted positive on it but subsequently changed his mind about not knowing anything about it and began pestering the police department for its release. He was never charged or convicted of any crime in connection with the money. It was simply inaccurate to claim it was unclaimed. *State v. One Hundred Fifty-Two Thousand, Seven Hundred Sixty, and 00/100 Dollars ($152,760.00) in United States Currency*, 87 S.W.3d 374 (Mo. App. S.D. 2002).

Because disposal of unclaimed property is not penal in nature, it seems probable that paying these funds into the county treasury does not violate article IX, § 7, of the Missouri Constitution. No case, however, has yet specifically addressed this issue.

E. (§33.36) Obscene Materials

A prosecuting attorney may seek the forfeiture of obscene material seized under a search warrant by filing a motion in the circuit court of the county in which the seizure occurred. "If the evidence is clear and convincing that the material is obscene" and that "it was being held or displayed for sale, exhibition, distribution or circulation to the public, the judge shall declare it to be obscene," order it forfeited to the state, and order its destruction. Section 542.301.7, RSMo Supp. 2004. The CAFA also applies to forfeitures in pornography and related offenses. Section 513.605(3)(h), RSMo Supp. 2004.

F. (§33.37) Vehicles and Personal Property in Cigarette Offenses

Cigarettes, motor vehicles, paraphernalia, equipment, or other tangible personal property used to violate cigarette tax laws, found in the place where the cigarettes are found, may be seized by law enforcement

officers and forfeited in an action filed by the prosecuting attorney or the Attorney General. Section 149.055, RSMo 2000.

G. (§33.38) Vehicles, Boats, or Buildings in Liquor Offenses

Many different items may be forfeited under various liquor code statutes. Real or personal property, vehicles, boats, or structures knowingly used or occupied for the manufacture, sale, or storage of intoxicating liquor in violation of liquor laws may be sold to pay all fines and costs assessed for liquor law violations. Section 311.740, RSMo 2000. A civil action may be brought by the prosecuting attorney or Attorney General for an injunction ordering that a room, house, building, boat, vehicle, structure, or place used to violate the liquor laws not be occupied or used for a period of time up to one year. Section 311.750, RSMo 2000. Contraband liquor may be forfeited in a civil action brought by the prosecuting attorney or Attorney General, and the liquor may be sold at public or private sale, subject to approval of the circuit court. Section 311.840, RSMo 2000. The CAFA also applies to liquor offenses, but only to certain felony violations. Section 513.605(3)(m), RSMo Supp. 2004.

H. (§33.39) Gambling Houses

Any room, building, or other structure regularly used for unlawful gambling may be declared a nuisance in an equity suit brought by the prosecuting attorney or Attorney General, and the court may order that the premises not be occupied for up to one year. Section 572.090, RSMo 2000. Any gambling device, gambling record, or money used as bets or stakes may be forfeited to the state, with the money to be paid into the county school fund. Section 572.120, RSMo 2000. The CAFA also applies to gambling offenses. Section 513.605(3)(l), RSMo Supp. 2004.

I. (§33.40) Prostitution Houses

Any room, building, or other structure regularly used for prostitution may be declared a public nuisance in an equity suit brought by the prosecuting attorney or Attorney General, and the court may order that the premises not be occupied or used for up to one year. Section 567.080, RSMo 2000. The CAFA also allows forfeitures in prostitution offenses. Section 513.605(3)(g), RSMo Supp. 2004.

VI. (§33.41) Federal Forfeiture

Many federal forfeiture laws are on the books, some as old as the Republic, some brand new. The most powerful provisions were passed in 1970, but they were not extensively used until the 1980s. A detailed review of the federal forfeiture provisions is outside the scope of this chapter. The reader is referred to a lengthy treatise on the subject: DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (Matthew Bender & Co. 1999).

VII. (§33.42) Ethics and Plea Negotiations

Both cases and statutes hold that a prosecutor may not make a plea bargain in a criminal case using the forfeiture of the property in the civil case as one of the bargaining chips. Section 513.617.3, RSMo 2000; *State v. Hendrix*, 944 S.W.2d 311 (Mo. App. W.D. 1997). Nothing in § 513.617 should prohibit or prevent the parties from "contemporaneously resolving criminal charges and a CAFA proceeding arising from the same activity," but seized property shall not be used "in bargaining to defer prosecution of criminal charges, obtain a guilty plea or affect sentencing recommendations." Section 513.617.3. "No state or local government agency . . . may accept any monetary payment or other thing of value in exchange for the release of property seized for forfeiture or for the settlement of any criminal charges." *Id.* The judge in the forfeiture action is required to make a specific finding that the property has not been used in bargaining to defer prosecution of criminal charges, to obtain a guilty plea, or to affect sentencing recommendations. Section 513.617.3.

VIII. (§33.43) Settlements Must Be Approved by Court

The Criminal Activity Forfeiture Act, §§ 513.600–513.645, RSMo 2000 and Supp. 2004, provides that, once it is filed, no case may be settled or otherwise compromised without the express approval of the terms of the settlement by the court in which the action is pending. Section 513.617.3, RSMo 2000.

IX. (§33.44) Forfeitures of Property of Juveniles

In 1993, the legislature made it clear that the forfeiture laws under both the Criminal Activity Forfeiture Act, §§ 513.600–513.645, RSMo 2000 and Supp. 2004, and § 195.140, RSMo Supp. 2004, apply to property owned by or in the possession of children. Section 195.146, RSMo 2000. Until passage of this statute, the law on this question had been somewhat uncertain. *See* Lance C. Bretsnyder, *Drug Money, Juveniles and Forfeitures*, 46 J. MOBAR 107 (1990).

X. (§33.45) Conclusion

Because of the changes aimed at curtailing forfeiture proceedings, much of the fun has gone out of forfeiture cases for prosecutors. As to property of little value, most prosecutors conclude that the game is not worth the candle. As to large amounts of cash or other valuable property, most law enforcement authorities seek federal forfeiture. The bulk of the recent Missouri appellate law focuses on whether proper procedures were followed for transfer of the seized property to federal authorities for forfeiture actions. Nevertheless, state forfeiture law remains a topic lawyers practicing criminal law need to understand.

XI. Forms

A. (§33.46) Lien Notice Under CAFA (Real or Personal Property)

Criminal Activity Forfeiture Act (CAFA) Lien Notice
IMPORTANT! This Notice May Affect Your Rights and Interest in the Property Described Below.

1. NOTICE IS HEREBY GIVEN TO:

_____

(Name of person, partnership, corporation or other entity against whom the civil proceeding has been brought)

_____

(Residing at the above address)

_____

(Doing business at the above address)

2. A civil proceeding has been brought against the person/entity named above pursuant to the Criminal Activity Forfeiture Act (CAFA), as set forth in the Revised Statutes of Missouri, §§ 513.600 through 513.653. The county/counties where the proceeding has been brought is/are _____ _____. The case number of the proceeding(s) is/are _____. The property affected is fully described in the proceeding(s) described above and incorporated herein by reference.

3. This notice, among other effects, creates a lien in favor of the State of Missouri as set forth in the Revised Statutes of Missouri, § 513.640.5 and may impose legal obligations, subject to punishment as a Class C Misdemeanor, upon trustees as set forth in the Revised Statutes of Missouri, § 513.640.8(2). This notice may have other effects on your rights and interests in the property subject to the proceedings described above.

4. This notice is being filed pursuant to the Criminal Activity Forfeiture Act.

5. The name and address of the investigative agency filing this notice is:

_____

(Name)

_____
(Address)

Filed for Record _____

Date: _____ Signature
Time: _____
Place: _____

B. Forfeiture of Real Estate

1. (§33.47) Petition for Forfeiture of Real Estate

[Caption]

Petition Under CAFA
(Criminal Activity Forfeiture Act)

The Plaintiff, State of Missouri, by _____, Prosecuting Attorney of _____ County, Missouri, for its cause of action states to the Court as follows:

1. Section 513.607, RSMo Supp. 2004, provides that all property of every kind "used or intended for use in the course of, derived from, or realized through criminal activity is subject to civil forfeiture," which proceeding may be instituted by the Prosecuting Attorney of the county in which the property is located or seized.

2. _____ is the Prosecuting Attorney of _____ County, Missouri.

3. The property sought to be forfeited is a 30.25 acre tract of real estate in _____ County, within the jurisdiction of this Court, more specifically described as follows:

   [legal description]

4. The tract of real estate consists of a house, a barn, and some outbuildings, and part of the property is wooded. It is currently the home of Paul Bert Doe and Marjorie L. Doe, who live on the property as residents of _____ County, Missouri.

5. Marjorie L. Doe inherited a 1/3 interest in the property in 1976. She owns the property as a tenant in common with Gilbert Roe (her brother) and Lester E. Roe (her half-brother). Each of them inherited a 1/3 interest in the property from Effie M. Roe, their deceased aunt.

6. Paul Bert Doe is the husband of Marjorie L. Doe.

7. No other person other than Marjorie L. Doe, Gilbert Roe, Lester E. Roe, or Paul Bert Doe has any interest in the property.

8. The interest of Marjorie L. Doe and Paul Bert Doe in the real estate is subject to forfeiture because the property was used in the course of criminal activity. Specifically, Paul Bert Doe and Marjorie L. Doe have each sold marijuana on the property.

9. On November 3, 2002, Paul Bert Doe sold a baggie of marijuana and a marijuana bud to an informant in the house on the property in a transaction monitored by the Missouri State Highway Patrol.

10. On November 8, 2002, Paul Bert Doe sold 242.4 grams of marijuana in the house on the property to two undercover Missouri State Highway Patrol officers.

11. On January 2, 2003, Paul Bert Doe sold 59.7 grams of marijuana in the house on the property to two undercover Missouri State Highway Patrol officers.

12. On January 2, 2003, Marjorie L. Doe sold 39.1 grams of marijuana in the house on the property to two undercover Missouri State Highway Patrol officers.

13. On May 20, 2003, in a conversation with undercover Missouri Highway Patrol officers held on the property, Marjorie L. Doe stated that she and Paul were growing marijuana again, that it should be ready in September, and that it was already "about this high." The troopers "put in an order" for about ten pounds.

14. Paul Bert Doe and Marjorie L. Doe had actual knowledge that the property was being used in criminal activity and, in fact, were actively participating in this criminal activity.

15. The most recent documentation on file at the Cape Girardeau County Recorder's Office is the Decree of Distribution in the Estate of Effie M. Roe, Estate No. 2907, in Cape Girardeau County Probate Court, showing Marjorie L. Doe, Gilbert Roe, and Lester E. Roe each receiving 1/3 interest in the property.

16. Gilbert Roe lives at _____.

17. Lester E. Roe is believed to live at _____.

18. Section 513.620, RSMo 2000, provides that the Court may, after judgment of forfeiture, make an order that the forfeited property be:

    a. destroyed if it is contraband;
    b. retained by an innocent party having an interest in it upon payment or approval of a plan for payment into Court of the value of any forfeited interest in the property;
    c. the subject of a judicial sale;
    d. transferred to any innocent party having an interest in it equal to or greater than the value of the property; or
    e. disposed of in any way provided by the laws of Missouri that is in the interest of justice and adequately protects innocent parties.

19. The property being forfeited was not used in bargaining to defer prosecution of criminal charges, obtain a guilty plea, or affect sentencing recommendations.

Wherefore, the State requests that the Court enter its order finding that the property has been used in criminal activity, forfeiting the property, and ordering that the forfeited property be disposed of in one of the methods described above, and for such other relief as the Court deems just and proper.

[signature block]

State of Missouri)
) ss.
County of _____)

_____, of lawful age, having been duly sworn, on [his/her] oath states that [he/she] is the Prosecuting Attorney of _____ County, Missouri, that [he/she] has read the foregoing Petition and that the facts stated in it are true and correct according to [his/her] best knowledge and belief, and that [he/she] is authorized to make this affidavit as Prosecuting Attorney.

_____
[signature]

Subscribed and sworn to before me, _____, a Notary Public in and for Missouri, this _____ day of _____, 20____.

_____
Notary Public

2. (§33.48) *Ex Parte* Order of Court

[Petition for forfeiture has been filed but property has not been seized and no reason exists to believe it would be lost or destroyed upon notice to defendant.]

[Caption]

Order

The Court, having conducted an *ex parte* examination of the Petition under the Criminal Activity Forfeiture Act filed herein, hereby finds reasonable cause to believe that the property described in the Petition is subject to forfeiture; the Court further finds that there is no reasonable cause to believe that prior notice would result in loss or destruction of the real estate.

Wherefore, it is ordered that service be made on all persons known to have or claim an interest in the property before a further hearing on whether a Writ of Seizure should issue.

Dated this _____ day of _____, 20____.

_____
Circuit Court Judge

3. (§33.49) Writ of Seizure (Usually Not Applicable to Real Estate)

[Petition for forfeiture has been filed but property has not been seized and reason exists to believe property would be lost or destroyed upon notice to defendant.]

[Caption]

Writ of Seizure

To the Sheriff of _____ County, Missouri [or any other "authorized law enforcement agency" where the property is found].

Whereas on _____, 20____, this Court determined that there is reasonable cause to believe that the property described below is subject to forfeiture in accordance with the Criminal Activity Forfeiture Act, § 513.607, RSMo Supp. 2004, and

Whereas this Court finds that there is reasonable cause to believe that notice to those persons having or claiming an interest in the property before seizure would cause the loss or destruction of the property.

Now, therefore, you are commanded to seize the following property:

[Insert the full legal and conventional description, e.g., street address, sufficient to preclude guessing or mistake; this description should match the one in the petition for forfeiture, the CAFA Lien Notice, and the *lis pendens* (if any).]

by day or night and take with you, if needed, the power of your county. If the above-described property or any part of it is found, seize it [and take it into your possession (tangible portable property)], making a complete and accurate inventory of the property so [seized] [taken] by you in the presence of the person from whose possession the property is [seized] [taken], if that is possible, and giving to this person a receipt for the property together with a copy of this Writ and of the following:

Notice

Any person claiming an interest in [this] property may become a party to [this] action [for forfeiture] at any time before judgment . . . . Any party claiming a valid interest in the property shall, upon motion, be allowed by the Court to take possession of the

> property upon posting bond with good and sufficient security . . . . Such a party taking possession shall not remove the property from the jurisdiction of the Court except in accordance with Court order.

Or, if no person is found in possession of the property, leaving the receipt and the copy and notice on the premises, and that you thereafter return [the property so taken by you, together with] a duly verified copy of the inventory of it and with your return to this writ, to this Court to be herein dealt with in accordance with law. Witness my hand and seal of this Court on this ____ day of _____, 20____.

[Judge]

4. (§33.50) Answer of Lienholder

[Caption]

Answer of Defendant Deep Pocket Savings and Loan Association

To Petition Under CAFA

Defendant, Deep Pocket Savings and Loan Association, by and through its attorneys, separate and apart from the other Defendants named in this action, for its answer to Plaintiff's Petition under the Criminal Activity Forfeiture Act states to the Court as follows:

1. Defendant admits the allegations of Paragraphs _____ of the Petition.

2. Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations made in Paragraphs _____ of the Petition.

3. Defendant states that it is an innocent party as defined by § 513.615, RSMo 2000, and that it had no actual knowledge that the property in question was used or intended for use in the course of, derived from, or realized through criminal activity.

4. Further answering, Defendant states that on or about July 21, 2002, Defendants Paul Bert Doe and Marjorie L. Doe, his wife, made, executed, and delivered to this Defendant their adjustable rate promissory note, dated on that date, whereby they promised to pay to the order of this Defendant the principal sum of $11,000.00 payable in monthly installments beginning on September 1, 2002. A true and correct copy of the adjustable rate promissory note is attached, marked Exhibit "A," and specifically incorporated by reference.

5. On or about July 21, 2002, in order to secure the repayment of the money borrowed from this Defendant, Defendants Paul Bert Doe and Marjorie L. Doe made, executed, and delivered to this Defendant their Deed of Trust, dated July 21, 2002, in which they irrevocably granted and conveyed to a trustee, in trust, the following described property located in _____ County, Missouri:

[legal description]

which has the address of _____. The Deed of Trust is recorded in the office of the Recorder of Deeds for _____ County, Missouri, in Book _____ at Page _____. A true and correct copy of the Deed of Trust is attached, marked Exhibit "B," and specifically incorporated by reference.

6. There is a balance owing on the indebtedness, as of _____, in the amount of _____ and the installment payments due on the indebtedness are current as of the date of the filing of this Answer.

7. The fair market value of the real property in question, as of the date of the filing of this Answer, is approximately _____ _____.

Wherefore, having fully answered, Defendant Deep Pocket Savings and Loan Association of Southeast Missouri prays that the Court make and enter its order determining that it is an innocent party as defined by § 513.615 because it had no actual knowledge that the property in question was used or was intended for use in the course of, derived from, or realized through a criminal activity.

Defendant Deep Pocket Savings and Loan Association further requests that the Court enter its order:

- transferring the real property in question to this Defendant; or
- providing for such disposition of the property as may be provided by the laws of Missouri, that is in the interests of justice and that adequately protects the interests of this Defendant,

for its costs herein expended, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

[signature block]

5. (§33.51) Answer of Defendant

[Caption]

Answer to Petition Under CAFA

Paul Bert Doe and Marjorie L. Doe by and through their attorney, for their answer to Plaintiff's Petition Under the Criminal Activity Forfeiture Act state to the Court as follows:

1. Defendants admit the statements contained in paragraphs _____ of the petition.

2. Defendants do not have sufficient information to admit or deny the statements contained in paragraphs _____ of the petition.

3. Defendants specifically deny the statements in paragraphs _____ of the petition.

4. Defendants state that they were innocent parties as defined by § 513.615, RSMo 2000, and that neither of them had actual knowledge that the property in question was used or intended for use in the course of, derived from, or realized through criminal activity.

Wherefore, having fully answered, Defendants respectfully pray this Court to dismiss this Petition with prejudice at Plaintiff's cost and for such other and further relief as the Court deems just and proper.

[signature block]

6. (§33.52) Interlocutory Judgment

[Caption]

Interlocutory Judgment

Now on this _____ day of _____, 20____, this cause coming on for trial, comes the plaintiff, State of Missouri, by its attorney, _____, Prosecuting Attorney of _____ County, Missouri, and Defendant Gilbert Roe comes by stipulation filed by his attorney _____, and Defendants Marjorie L. Doe, Paul Bert Doe, and Lester E. Roe, though having been duly served, did not appear and are in default.

The parties, waiving a jury, submit the cause to the Court upon the Petition herein and the evidence and proof adduced, and the Court makes the following findings of fact and conclusions of law:

1. Defendant Marjorie L. Doe was personally served with her summons in this case on August 28, 2003, and is in default, having never filed an answer or any other response.

2. Defendant Paul Bert Doe was personally served with his summons in this case on August 28, 2003, and is in default, having never filed an answer or any other response.

3. Defendant Gilbert Roe was personally served with his summons on September 11, 2003, and is represented in this cause by _____.

4. Lester E. Roe was personally served with his summons in this case on December 15, 2003, and is in default, having never filed an answer or any other response.

5. Section 513.607, RSMo Supp. 2004, provides that all property of every kind "used or intended for use in the course of, derived from, or realized through criminal activity is subject to civil forfeiture," which proceeding may be instituted by the Prosecuting Attorney of the county in which the property is located or seized.

6. _____ is the Prosecuting Attorney of _____ County, Missouri.

7. The property hereby forfeited is a 30.25 acre tract of real estate in _____ County, within the jurisdiction of this Court, as follows:

[legal description]

8. The 30.25 acre tract of real estate consists of a house, a barn, and some outbuildings, and part of the property is wooded. It had been the home of Paul Bert Doe and Marjorie L. Doe, who lived on the property as residents of _____ County, Missouri.

9. Marjorie L. Doe inherited a 1/3 interest in the property in 1976. At that time, she owned the property as a tenant in common with Gilbert Roe (her brother) and Lester E. Roe (her half-brother). Each of them inherited a 1/3 interest in the property from Effie M. Roe, their deceased aunt.

10. Paul Bert Doe is the husband of Marjorie L. Doe.

11. The interest of Marjorie L. Doe and Paul Bert Doe in the real estate is subject to forfeiture because the property was used in the course of criminal activity. Specifically, Paul Bert Doe and Marjorie L. Doe have each sold marijuana on the property.

12. On November 8, 2002, Paul Bert Doe sold 242.4 grams of marijuana in the house on the property to two undercover Missouri State Highway Patrol officers. He pled guilty to this offense of felony sale of marijuana on October 18, 2004.

13. On January 2, 2003, Marjorie L. Doe sold 39.1 grams of marijuana in the house on the property to two undercover Missouri State Highway Patrol officers. She pled guilty to this offense of felony sale of marijuana on October 18, 2004.

14. Paul Bert Doe and Marjorie L. Doe had actual knowledge that the property was being used in criminal activity and, in fact, were actively participating in this criminal activity.

15. Paul Bert Doe was convicted or pled guilty to a felony offense substantially related to this forfeiture, specifically: He pled guilty to the felony of manufacturing marijuana on October 18, 2004, for growing marijuana on the property on August 28, 2003.

16. Marjorie L. Doe was convicted or pled guilty to a felony offense substantially related to this forfeiture, specifically: She pled guilty to the felony of manufacturing marijuana on October 18, 2004, for growing marijuana on the property on August 28, 2003.

17. On August 28, 2003, law enforcement officers executed a search warrant on the property described in paragraphs 3 and 4 above. A large quantity of marijuana and drug paraphernalia were located in the house, growing on the property, and growing on adjacent property. Specifically, a patch of 13 sinsemilla marijuana plants, ranging from 5 to 9 feet tall, was found approximately 100 to 150 yards behind the Doe residence. The plants had been manicured, and the plants had been coated with a white substance. A well-worn footpath leading from the marijuana patch back to the Doe's residence was located. Cigarette butts were found in the patch and along the pathway. A single marijuana plant was found growing in a wooded area about 30 yards from the front of the farmhouse. A trail led from the plant back to the front yard of the house. A third marijuana patch was located in a clearing near the northwest corner of the property. This patch contained 29 cultivated sinsemilla marijuana plants. They ranged from 6 to 8 feet tall. The stalks of these plants were all coated with a white substance. A path was located leading from the marijuana patch back to the area of the house and outbuildings. In the Doe home were found bottles of rabbit and deer repellent, which was the same white substance that had been found coated on the marijuana plants growing in the marijuana patches. Also found in the home were one pair of gold colored scales on a shelf on the wall, one baggie of marijuana under a couch cushion, and one plastic baggie containing numerous marijuana seeds in a cabinet shelf.

18. Section 513.620, RSMo 2000, provides that the court may, after judgment of forfeiture, make an order that the forfeited property be:

    a. destroyed if it is contraband;
    b. retained by an innocent party having an interest in it upon payment or approval of a plan for payment into Court of the value of any forfeited interest in the property;
    c. the subject of a judicial sale;
    d. transferred to any innocent party having an interest in it equal to or greater than the value of the property; or

e. disposed of in any way provided by the laws of Missouri that is in the interest of justice and adequately protects innocent parties.

19. Defendant Gilbert Roe is an innocent party under § 513.615, RSMo 2000, and his rights in the property are not subject to forfeiture.

20. Lester E. Roe is an innocent party under § 513.615, RSMo 2000, and his rights in the property are not subject to forfeiture.

21. No one other than Gilbert Roe has intervened in this forfeiture proceeding.

22. The property being forfeited was not used in bargaining to defer prosecution of criminal charges, obtain a guilty plea, or affect sentencing recommendations.

Wherefore, it is ordered, adjudged, and decreed that:

1. The real estate has been used in criminal activity.
2. Marjorie L. Doe and Paul Bert Doe are in default.
3. All interest of Marjorie L. Doe and Paul Bert Doe in the real estate is hereby forfeited.
4. Gilbert Roe and Lester E. Roe are innocent parties whose rights in the property are not subject to forfeiture.
5. This judgment is interlocutory in nature and a final judgment designating the disposition of the property after judgment shall be entered on the _____ day of _____, 20____, or at any later time ordered by the court.

_____
Judge

7. (§33.53) Order of Sale

[Caption]

Order of Sale

Cause taken up this _____ day of _____, 20____. The Court makes the following findings of fact:

1. The Court previously entered an Interlocutory Judgment on [date], forfeiting the interest of Marjorie L. Doe and Paul Bert Doe and finding that Gilbert Roe and Lester E. Roe are innocent parties whose interests in the real estate are not subject to forfeiture with regard to the following described 30.25 acre tract of real estate located in _____ County, Missouri, to-wit:

   [legal description]

2. Gilbert Roe and Lester E. Roe, the innocent parties owning an interest in the above-described real estate, have not requested that their interest in the above-described property be retained.

3. Partition in kind of the real estate cannot be made without great prejudice to Plaintiff and to the innocent parties.

4. Judicial sale of the real estate is appropriate in order to ensure that Plaintiff receives compensation for the interest in the real estate forfeited to it and to ensure that the innocent parties receive compensation for their interest in the real estate.

It is, therefore, ordered that the Sheriff of _____ County, Missouri, sell the above-described real estate situated in that county at public auction to the highest bidder, upon the following terms. The high bidder shall be required to execute a written contract for the purchase of the property, pay $500 earnest money in deposit, and pay the balance of the bid at such time as the successful bidder is provided with an updated abstract reflecting good and marketable title vested in Plaintiff and the innocent parties.

It is further ordered that the Sheriff, after deduction of all necessary expenses of sale, including surveys, appraisal, updating of the abstract, advertisement costs, and court costs, disburse the proceeds of the sale to the owners of the real estate according to their respective interests.

So ordered:

_____
Judge

8. (§33.54) Notice of Sheriff's Sale

Notice of Sheriff's Sale

Whereas, the Circuit Court of _____ County, Missouri, has in accordance with § 513.620, RSMo 2000, ordered a judicial sale of the following described 30.25 acres of real estate located in _____ County, Missouri, in which Marjorie L. Doe and Paul Bert Doe formerly owned an interest, to-wit:

[legal description]

Now, therefore, in accordance with the Order of the Court, the undersigned Sheriff will sell the property described at public venue to the highest bidder at the south front door of the _____ County Courthouse, in _____, Missouri, on [date], at _____ o'clock a.m.

The terms of the sale will require the successful bidder to pay $500 down as earnest money, require the sellers to provide the successful bidder with marketable title evidenced by an abstract of title at the sellers' expense and free of liens, with a closing on or before [later date than sale].

_____
Sheriff

9. (§33.55) Contract for Sale of Real Estate

Contract for Sale of Real Estate

This Contract made and entered into this _____ day of _____, 20____, by and between the State of Missouri and Gilbert Roe and Lester E. Roe, through their court-appointed agent, Sheriff (Sellers) and _____ (Buyer(s)).

Witnesseth:

1. That Sellers agree to sell and Buyer(s) agrees to buy, on the following terms and conditions, the real estate situated in _____ County, Missouri, and described as follows:

   [legal description]

2. The purchase price is _____, and is payable as follows:

   A. Five Hundred Dollars and no/100 ($500) of the purchase price in cash as earnest money, the receipt of which is hereby acknowledged by Sellers.
   B. The balance in cash in full at closing.

3. Sellers will furnish title, merchantable in fact.

4. Sellers shall, within ten days of the signing of this contract, deliver to Buyer(s) an abstract of title to the premises, prepared and certified to date by a competent abstractor and showing merchantable title of record in Seller. Buyer(s) shall have ten days from receipt of the abstract to deliver to Seller in writing any objections to title, and any objections to defects appearing in the abstract not so made, except liens of record, shall be deemed waived. Any defects in title shall be corrected by Seller within ten days from receipt of notice of such defects. If such defects cannot be corrected within this time, this contract shall be void and the money paid by Buyer(s) shall be returned to Buyer(s) and the abstract to Seller.

5. Taxes for the year _____ shall be prorated between the parties as of the date of closing.

6. This transaction shall be closed at the _____ County Prosecuting Attorney's office, _____, on or before _____ in the afternoon on _____, 20____, unless sooner closed.

7. If Sellers keep and perform all of the conditions of this contract and Buyer(s) fails to perform, the earnest money shall be retained by Sellers as liquidated damages, it being agreed that actual damages are difficult, if not impossible, to ascertain.

8. This contract shall be binding on the parties and their heirs, administrators, successors, and assigns.

In witness whereof, the parties have executed this contract in duplicate originals the day and year first above written.

Sellers

By: Sheriff _____

Court-Appointed Agent

_____

Buyer

10. (§33.56) Sheriff's Deed

To All Whom These Properties Shall Come:

I, _____, Sheriff of _____ County, in the State of Missouri, send greeting:

Whereas, on the _____ day of _____, 20____, the Circuit Court of _____ County, Missouri, in a suit then pending in the Court, in which the State of Missouri was Plaintiff and Marjorie L. Doe, Paul Bert Doe, Gilbert Roe, and Lester E. Roe were Defendants, forfeited the interest of Marjorie L. Doe and Paul Bert Doe in the hereinafter-described property to the State of Missouri, and thereafter on _____, 20____, ordered that I, the Sheriff of _____ County, Missouri, proceed to advertise and sell the hereinafter-described property, according to law, for the benefit of Plaintiff and the innocent Defendants, Gilbert Roe and Lester E. Roe; all of which facts and orders of the Court fully appear from the records of the Court in case number _____; and,

Whereas, a certified copy of the Order of Sale, dated the _____ day of _____, 20____, was duly made out by the Clerk of the Court and provided to me, the Sheriff; and

Whereas, in obedience to the Order of Sale, I, the Sheriff of _____ County, did cause the real estate to be advertised for sale in the _____, a newspaper printed and published in the County of _____, Missouri, containing a particular description of the real estate to be sold, and stating the time, place, and terms of sale; and

Whereas, in obedience and conformity to the Order of Sale and the advertisement, I, the Sheriff of _____ County, did on the _____ day of _____, 20___, at _____ a.m., proceed to offer and expose to sale the real estate at public auction, to the highest bidder, at the south courthouse door, in the Courthouse in the City of _____, County of _____, State of Missouri, and having so offered and exposed the same for sale and _____, being the best, highest, and last bidder therefor, became purchaser of the hereinafter-described real estate for the price and sum of _____ Dollars; and

Whereas, _____ _____ has fully paid to me in cash the full amount of [his/her] bid for the real estate hereinafter described;

Now, therefore, I, _____, Sheriff of _____ County, Missouri, for and in consideration of the premises, and the sum of _____ Dollars, to me in hand paid, do assign, transfer, convey, and set over unto _____, their heirs and assigns, the following-described real estate located in _____ County, Missouri, to-wit:

[legal description]

To have and to hold, with its appurtenances, forever, as fully and effectively as I, the Sheriff of _____ County, by the power and authority in me vested in the premises, as such can sell and convey it.

In testimony whereof, I, the Sheriff of _____ County, have hereunto subscribed my name and affixed my seal, this _____ day of _____, 20____.

_____
Sheriff

State of Missouri)
) ss.
County of _____)

In the Circuit Court of
_____ County, Missouri

Be it remembered that, on this _____ day of _____, 20____, before the Honorable _____, Judge of the Circuit Court for the County of _____, _____ came into open court, being personally known to the Judge to be the same person whose name is subscribed to the foregoing instrument, as having executed it, and also being known to be the Sheriff of _____ County, Missouri, and there, in open court, before the Judge, acknowledged the instrument to be [his/her] act and deed for the purpose therein mentioned, this certificate of the acknowledgement being ordered by the Court to be endorsed by the Clerk of this deed.

In testimony whereof, I, _____, Clerk of the Court, have hereto set my hand and affixed the seal of the Court.

Done at my office in _____ County, Missouri, on the _____ day of _____, 20____.

Circuit Clerk

_____

11. (§33.57) Confirmation of Sale and Final Judgment

[Caption]

Confirmation of Sale and Final Judgment

Now on this _____ day of _____, 20____, the Court takes up the above-captioned cause and makes the following findings and orders:

1. All findings, conclusions, and orders in the interlocutory judgment in this cause entered on [date], and incorporated herein by reference are hereby made permanent.

2. Defendant Marjorie L. Doe was personally served with her summons in this case on [date], and is in default, having never filed an answer or any other response.

3. Defendant Paul Bert Doe was personally served with his summons in this case on [date], and is in default, having never filed an answer or any other response.

4. Defendant Gilbert Roe was personally served with his summons on [date], and is represented in this cause by _____.

5. Defendant Lester E. Roe was personally served with his summons in this case on [date], and is in default, having never filed an answer or any other response.

6. Section 513.607, RSMo Supp. 2004, provides that all property of every kind "used or intended for use in the course of, derived from, or realized through criminal activity is subject to civil forfeiture," which proceeding may be instituted by the Prosecuting Attorney of the county in which the property is located or seized.

7. _____ is the Prosecuting Attorney of _____ County, Missouri.

8. The property hereby forfeited is a 30.25 acre tract of real estate in _____ County within the jurisdiction of this Court, as follows:

[legal description]

9. The 30.25 acre tract of real estate consists of a house, a barn, and some outbuildings, and part of the property is wooded. It had been the home of Paul Bert Doe and Marjorie L. Doe, who lived on the property as residents of _____ County, Missouri.

10. Marjorie L. Doe inherited a 1/3 interest in the property in 1976. At that time, she owned the property as a tenant in common with Gilbert Roe (her brother) and Lester E. Roe (her half-brother). Each of them inherited a 1/3 interest in the property from Effie M. Roe, their deceased aunt.

11. Paul Bert Doe is the husband of Marjorie L. Doe.

12. The interest of Marjorie L. Doe and Paul Bert Doe in the real estate is subject to forfeiture because the property was used in the course of criminal activity. Specifically, Paul Bert Doe and Marjorie L. Doe have each sold marijuana on the property.

13. On November 8, 2002, Paul Bert Doe sold 242.4 grams of marijuana in the house on the property to two undercover Missouri State Highway Patrol officers. He pled guilty to this offense of felony sale of marijuana on October 18, 2004.

14. On January 2, 2003, Marjorie L. Doe sold 39.1 grams of marijuana in the house on the property to two undercover Missouri State Highway Patrol officers. She pled guilty to this offense of felony sale of marijuana on October 18, 2004.

15. Paul Bert Doe and Marjorie L. Doe had actual knowledge that the property was being used in criminal activity and, in fact, were actively participating in the criminal activity.

16. Paul Bert Doe was convicted or pled guilty to a felony offense substantially related to this forfeiture, specifically: He pled guilty to the felony of manufacturing marijuana on October 18, 2004, for growing marijuana on the property on August 28, 2003.

17. Marjorie L. Doe was convicted or pled guilty to a felony offense substantially related to this forfeiture, specifically: She pled guilty to the felony of manufacturing marijuana on October 18, 2004, for growing marihuana on the property on August 28, 2003.

18. Section 513.620, RSMo 2000, provides that the court may, after judgment of forfeiture, make an order that the forfeited property be:

    a. destroyed if it is contraband;
    b. retained by an innocent party having an interest in it upon payment or approval of a plan for payment into Court of the value of any forfeited interest in the property;
    c. the subject of a judicial sale;
    d. transferred to any innocent party having an interest in it equal to or greater than the value of the property; or
    e. disposed of in any way provided by the laws of Missouri that is in the interest of justice and adequately protects innocent parties.

19. Defendant Gilbert Roe is an innocent party under § 513.615, RSMo 2000, and his rights in the property are not subject to forfeiture.

20. Lester E. Roe is an innocent party under § 513.615, RSMo 2000, and his rights in the property are not subject to forfeiture.

21. No one other than Gilbert Roe has intervened in this forfeiture proceeding.

22. The property being forfeited was not used in bargaining to defer prosecution of criminal charges, obtain a guilty plea, or affect sentencing recommendations.

23. On _____, 20____, after having published appropriate Notice in the _____, a newspaper of general circulation in _____ County, Missouri, the Sheriff of _____ County, Missouri, conducted a public sale at the Courthouse in _____, Missouri, as ordered by this Court on _____, 20____, and thereafter entered into a contract for sale of real estate with _____, the highest bidder at the sale, and thereafter executed [his/her] Sheriff's Deed on the _____ day of _____, 20____, to _____.

24. The State of Missouri has incurred expenses and costs in this action in the form of _____ in Court costs; _____ in newspaper publication fees; _____ for surveying fees; _____ for abstract preparation fees; _____ in recorder's fees; and _____ in payment of delinquent taxes.

Wherefore, it is ordered, adjudged, and decreed that:

1. The real estate has been used in criminal activity.

2. Marjorie L. Doe and Paul Bert Doe are in default.

3. All interest of Marjorie L. Doe and Paul Bert Doe in the real estate is hereby forever permanently forfeited.

4. Gilbert Roe and Lester E. Roe are innocent parties whose rights in the property are not subject to forfeiture.

5. The Sheriff's Deed conveying the real estate from the State of Missouri, Gilbert Roe, and Lester E. Roe, by their agent, _____, Sheriff of _____ County, Missouri, to _____, buyer, is approved and confirmed, and the buyer, _____, is vested with fee simple title to the real estate.

6. This judgment shall be recorded in the land records of the Office of Recorder of Deeds of _____ County, Missouri, and shall evidence fee title in the buyer, _____.

7. The costs and expenses incurred by the State of Missouri shall be paid out of the proceeds of the sale, and the remaining balance of _____ is hereby ordered paid into the county school fund.

_____
Judge

C. Forfeiture of Vehicle

1. (§33.58) Petition

[Caption]

Petition Under CAFA
(Criminal Activity Forfeiture Act)

Plaintiff, State of Missouri, by _____, Prosecuting Attorney of _____ County, Missouri, for its cause of action states to the Court as follows:

1. Section 513.607, RSMo Supp. 2004, provides that all property of every kind "used or intended for use in the course of, derived from, or realized through criminal activity is subject to civil forfeiture," which proceeding may be instituted by the Prosecuting Attorney of the county in which the property is located or seized.

2. _____ is the Prosecuting Attorney of _____ County, Missouri.

3. The property sought to be forfeited is a 1983 Chevrolet Camaro, Z-28, two-door automobile, charcoal colored, VIN #_____, titled to Billy B. Weed, Route 2, _____, Missouri.

4. The automobile is presently within the jurisdiction of this Court and is being stored in _____ County, Missouri.

5. The vehicle was seized in accordance with § 513.607, RSMo Supp. 2004, by Missouri State Highway Patrolman I.B. Tuff on July 30, 2003. The circumstances of the seizure are as follows: [describe sufficient facts showing when and where the seizure took place, including facts showing that the seizure was incident to a lawful arrest, search, or inspection].

6. The persons known to claim an interest in the vehicle are as follows: The only person to claim an interest in the car is the owner, Billy B. Weed, Route 2, _____, Missouri, who was driving the car at the time of his arrest.

7. The seizure of the car by Trooper Tuff on July 30, 2003, was done incident to a lawful arrest, search, or inspection, and the officer had probable cause to believe that the property was subject to forfeiture and would be lost if not seized.

8. Within four days of the seizure, Trooper Tuff reported the seizure to the Prosecuting Attorney, the report being made on _____.

9. This petition was filed within ten days of the date the officer formally reported the seizure to the prosecutor.

10. The date and place of the seizure by Trooper Tuff are as follows: July 30, 2003, on Highway 55 in _____ County near the 109 mile marker.

11. The property to be forfeited has not been used in bargaining to defer prosecution of criminal charges, to obtain a guilty plea, or to affect sentencing recommendations in any criminal case.

12. (A Writ of Seizure should issue for the vehicle in accordance with § 513.607, RSMo Supp. 2004, because the vehicle has been used in criminal activity in _____ County, Missouri, in that the vehicle has been used for the criminal activity of _____, and because of its mobility, reasonable grounds exist to believe that notice to those persons having or claiming an interest in the vehicle before seizure would cause loss or destruction of the property.) [NOTE: If the vehicle has not yet been seized, this paragraph will be used, paragraphs 7, 8, 9, and 10 will be omitted, and the "Wherefore" paragraph will be changed accordingly.]

Wherefore, the State of Missouri requests that the Court enter its order finding that the vehicle has been used in criminal activity, forfeiting the vehicle, and ordering that the forfeited vehicle be disposed of in accordance with §§ 513.620 and 513.623, RSMo 2000.

[Signature Block]

2. (§33.59) Lien Notice

See §33.46, *supra*.

3. (§33.60) Writ of Seizure

See §33.49, *supra*.

4. (§33.61) Answer of Defendant

[Caption]

Defendant's Answer Under CAFA

Defendant, for its Answer to Plaintiff's Petition Under CAFA, states to the Court as follows:

1. Defendant admits the allegations of paragraphs _____ of the petition.

2. Defendant lacks sufficient information to admit or deny the allegations contained in paragraphs _____ of the petition.

3. Defendant denies the allegations contained in paragraphs _____ of the petition.

4. Defendant further answers that [he/she] is an innocent party as defined in § 513.615, RSMo 2000, and that [he/she] had no actual knowledge that the property in question was used or intended for use in the course of, derived from, or realized through criminal activity.

5. Defendant further answers that the State of Missouri has failed to meet the time deadlines prescribed by § 513.607, RSMo Supp. 2004, in that the seizing officer failed to report the seizure to the prosecutor within four days of the seizure and the prosecutor failed to file the petition within ten days of receiving the officer's report.

Wherefore, having fully answered, Defendant prays that the Court dismiss this petition with prejudice at Plaintiff's cost, and for such other and further orders as the Court deems just and proper.

[Signature Block]

5. (§33.62) Answer of Lienholder

See §33.50, *supra*.

6. (§33.63) Judgment

[Caption]

Judgment of Forfeiture and Disposition of Property

Now on this _____ day of _____, 20____, the Court takes up the State's Petition under the Criminal Activity Forfeiture Act; the State appears by _____, Prosecuting Attorney of _____ County, Missouri; Defendant appears in person and by attorney, _____. The Court hereby enters the following findings and orders:

1. Section 513.607, RSMo Supp. 2004, provides that all property of every kind "used or intended for use in the course of, derived from, or realized through criminal activity is subject to civil forfeiture," which proceeding may be instituted by the Prosecuting Attorney of the county in which the property is located or seized.

2. _____ is the Prosecuting Attorney of _____ County, Missouri.

3. The property hereby forfeited is a 1983 Chevrolet Camaro Z-28, two-door automobile, charcoal colored, VIN #_____, titled to Billy B. Weed, Route 2, _____, Missouri.

4. The automobile is presently within the jurisdiction of this Court and is being stored in _____ County, Missouri.

5. The vehicle was seized in accordance with § 513.607, RSMo Supp. 2004, by Missouri State Highway Patrolman I.B. Tuff on July 30, 2003. The seizure was incident to a lawful arrest, search, or inspection as follows: [describe sufficient facts].

6. The only person to claim an interest in the car is the owner, Billy B. Weed, Route 2, _____, Missouri, who was driving the car at the time of his arrest.

7. The seizure of the car by Trooper Tuff on July 30, 2003, was done incident to a lawful arrest, search, or inspection, and the officer had probable cause to believe that the property was subject to forfeiture and would be lost if not seized.

8. Within four days of the seizure, Trooper Tuff reported the seizure to the Prosecuting Attorney, the report being made on July 31, 2003.

9. This petition was filed within ten days of July 31, 2003.

10. The date and place of the seizure by Trooper Tuff are as follows: July 30, 2003, on Highway 55 in _____ County near the 109 mile marker.

11. The Court finds that each person whose interest is being forfeited pled guilty to or was found guilty of a felony offense substantially related to this forfeiture. Specifically, _____ _____.

12. The Court finds that the property being forfeited was not used in bargaining to defer prosecution of criminal charges, to obtain a guilty plea, or to affect sentencing recommendations.

13. The Court finds all issues in favor of Plaintiff and against Defendant.

It is hereby ordered, adjudged, and decreed that the vehicle has been used in criminal activity, that the vehicle is hereby forfeited, and that the vehicle is to be sold by judicial sale, with the clear proceeds of the sale, after payment of the reasonable costs of this proceeding, including storage costs, to be paid to the county school fund.

_____
Judge

D. (§33.64) Petition for Forfeiture of Money

[Caption]

Petition Under CAFA
(Criminal Activity Forfeiture Act)

Plaintiff, State of Missouri, by _____, Prosecuting Attorney of _____ County, Missouri, for its cause of action states to the Court as follows:

1. Section 513.607, RSMo Supp. 2004, provides that all property of every kind "used or intended for use in the course of, derived from, or realized through criminal activity is subject to civil forfeiture," which proceeding may be instituted by the Prosecuting Attorney of the county in which the property is located or seized.

2. _____ is the Prosecuting Attorney of _____ County, Missouri.

3. The property sought to be forfeited consists of $410 in various bills of United States currency found under the bed of Audrey Jean Smoker at her house at 913 Hickory Street in the City of _____, County of _____, State of Missouri, on _____.

4. The cash is presently within the jurisdiction of this Court and is being stored at the _____ County Sheriff's Department.

5. The cash was seized in accordance with § 513.607, RSMo Supp. 2004, by Detective Robert Sniffer of the _____ Police Department on July 30, 2003. The circumstances of the seizure are as follows: [describe sufficient facts showing when and where the seizure took place, including facts showing that the seizure was incident to a lawful arrest, search, or inspection; include facts showing the close proximity of the cash to drugs or drug paraphernalia].

6. _____ is a controlled substance under the laws of the State of Missouri.

7. _____ constitutes drug paraphernalia under § 195.010(17), RSMo Supp. 2004.

8. Under § 195.140.2(1), RSMo Supp. 2004, money that is used or intended to be used to facilitate any violation of §§ 195.010 to 195.320, RSMo 2000 and Supp. 2004 (including drug possession, sale, or purchase), shall be forfeited.

9. Under § 195.140.2(2), RSMo Supp. 2004, any money or currency found in close proximity to forfeitable controlled substances or drug paraphernalia is presumed to be forfeitable.

10. Each person whose property is sought to be forfeited is being charged with a felony offense substantially related to this property, as follows: _____.

11. The only person known to claim an interest in the cash is the owner, Audrey Jean Smoker, 913 Hickory Street, _____, Missouri.

12. The seizure of the cash by Detective Sniffer on July 30, 2003, was done incident to a lawful arrest, search, or inspection, and the officer had probable cause to believe that the property was subject to forfeiture and would be lost if not seized.

13. Within four days of the seizure, Detective Sniffer reported the seizure to the Prosecuting Attorney, the report being made on July 31, 2003.

14. This petition was filed within ten days of July 31, 2003.

15. The date and place of the seizure by Detective Sniffer are as follows: July 30, 2003, at 913 Hickory, in the City of _____, Missouri.

16. The property to be forfeited has not been used in bargaining to defer prosecution of criminal charges, to obtain a guilty plea, or to affect sentencing recommendations in any criminal case.

Wherefore, the State of Missouri requests that the Court enter its order finding that the cash has been used in, intended for use in, or derived from criminal activity, forfeiting the cash, and ordering that the clear proceeds of the forfeited cash, after payment of the reasonable costs of this action, be turned over to the county school fund.

[Signature Block]

E. (§33.65) Forfeiture of Weapon Under § 571.095, RSMo

[Caption in criminal case]

Order Forfeiting Firearm

Now on this _____ day of _____, 20____, the Court makes the following findings and orders:

1. On [date], Verdetta P. Magnum pled guilty to two felonies perpetrated in whole or in part by the use of a firearm, specifically carrying concealed a .38 caliber revolver, and knowingly shooting a firearm into a motor vehicle. She was thereafter sentenced and convicted of the offenses.

2. These felonies were committed in _____ County, Missouri, on or about [date].

3. The .38 caliber Rossi revolver, Serial Number _____, and ammunition in it were seized by the _____ Police Department.

4. Section 571.095, RSMo 2000, provides that the Court may, upon convicting a person for committing a felony perpetrated in whole or in part by the use of a firearm, in addition to the penalty provided by law for the offense, order the confiscation and disposal of the firearm and ammunition used in the commission of the crime.

Wherefore, it is ordered, adjudged, and decreed that the .38 caliber Rossi revolver, Serial Number _____, used by Verdetta P. Magnum in committing her felony offenses on [date], be forfeited to the _____ Police Department for such use or disposal as they deem appropriate.

_____
Judge

F. (§33.66) Forfeiture of Weapon Under § 542.301, RSMo

[Caption in criminal case]

Order

Now on this _____ day of _____, 20____, the Court takes up the Motion for Order for Disposition of Weapon Used in Felony and makes the following findings and orders:

1. On [date], Randy Dirtball pled guilty to the felony of shooting a firearm into a dwelling house for events that occurred on or about [date], in which Randy Dirtball knowingly shot a firearm into a mobile home located at _____, Missouri.

2. Section 542.301.1(2), RSMo Supp. 2004, provides that weapons used by the owner or with the owner's consent as a means for committing a felony "shall be forfeited to the state of Missouri." Section 542.301 provides that the prosecuting attorney shall file a motion with the Court praying for an order directing the forfeiture of the property and that, if the evidence is clear and convincing that the weapon was used to commit a felony, the Court shall declare it forfeited and shall order its destruction or sale.

3. The weapon involved in this case is a .38 caliber Smith and Wesson brand model 67-1 stainless steel revolver bearing serial number _____. The revolver was found in the center of the seat of the truck driven by Randy Dirtball minutes after he had shot into the victim's mobile home. Andy Examiner of the Southeast Missouri Regional Crime Laboratory has examined the gun and the lead projectile removed from a cabinet in the mobile home and has concluded that the gun did fire the projectile. Randy Dirtball pled guilty to the offense, a felony.

4. The weapon is presently in the custody of the _____ Police Department.

Now, therefore, it is ordered, adjudged, and decreed that the evidence is clear and convincing that the weapon described above was used to commit a felony and is of a kind subject to forfeiture under § 542.301, RSMo Supp. 2004, and the Court hereby forfeits the gun to the State of Missouri to be destroyed or sold; if the gun is sold, the proceeds shall be paid into the school fund.

_____

Judge

G. (§33.67) Statement of Prosecutor Seeking Transfer of Seized Property to Federal System

[Caption]

Statement of Grounds for Transfer of Property for Federal Forfeiture

_____, Prosecuting Attorney of _____ County, Missouri, upon [his/her] oath, makes the following statement to the Court:

1. Section 513.647, RSMo Supp. 2004, provides that no state or local law enforcement agency may transfer any property it seizes to any federal agency for forfeiture until the prosecuting attorney and a circuit judge first review the seizure and approve the transfer to a federal agency.

2. Property seized by local law enforcement agencies shall be transferred to a federal agency for forfeiture if it reasonably appears that the activity giving rise to the investigation or seizure involves more than one state or that it is reasonably likely that federal criminal charges will be filed in connection with the activity based on a written statement of intent to prosecute from the U.S. Attorney with jurisdiction.

3. No transfer may be made unless the violation of law involved would be a felony under Missouri or federal law. The violation involved is a class ___ felony under § _____, RSMo.

4. On [date], state or local law enforcement officers seized property involved in the commission of a felony offense or offenses as follows: [describe the facts and circumstances of the event or occurrence that led to the seizure of the property and the parties involved, if known].

5. It reasonably appears that the activity giving rise to the investigation or seizure involves more than one state or that it is reasonably likely that federal criminal charges will be filed in connection with the activity based on a written statement of intent to prosecute from the U.S. Attorney with jurisdiction.

6. Section 513.647, RSMo Supp. 2004, provides that, after the prosecutor files a statement setting forth the facts and circumstances of a seizure [he/she] wishes transferred to a federal agency, the Court shall certify the filing and shall notify the property owner, by mailing notice to the owner's last known address, that the property is subject to being transferred to the federal government, and shall further notify the property owner of the right to file a petition stating legitimate grounds for challenging the transfer, which petition must be filed within 96 hours after the filing of the statement by the prosecutor. If a petition is filed showing by a preponderance of the evidence that the property should not be transferred to the federal government for forfeiture proceedings, the Court shall delay the transfer until a hearing may be held. The hearing is to be held within 10 days after the filing of the petition unless the court deems, for good cause shown, that a continuance should be granted.

7. The last known names and addresses of all parties known to claim an interest in the property are as follows: [describe].

Wherefore, the prosecuting attorney files this statement with the Court, and requests that the Court certify the filing and send the notice to all parties described above, and that the Court subsequently find that the property may be transferred to a federal agency for the institution of federal forfeiture proceedings.

[Signature]

H. (§33.68) Certificate of Judge Regarding Transfer of Seized Property to Federal System

[Caption]

Certificate

Now on this _____ day of _____, 20___, the Court, having taken up the Statement of the Prosecuting Attorney of _____ County, Missouri, in an ex parte proceeding, makes the following findings and conclusions of law:

1. Section 513.647, RSMo Supp. 2004, provides that no state or local law enforcement agency may transfer any property it seizes to any federal agency for forfeiture until the prosecuting attorney and a circuit judge first review the seizure and approve the transfer to a federal agency.

2. Property seized by local law enforcement agencies shall be transferred to a federal agency for forfeiture if it reasonably appears that the activity giving rise to the investigation or seizure involves more than one state or that it is reasonably likely that federal criminal charges will be filed in connection with the activity based on a written statement of intent to prosecute from the U.S. Attorney with jurisdiction.

3. No transfer may be made unless the violation of law involved would be a felony under Missouri or federal law. The violation involved is a class ___ felony under § _____, RSMo.

4. On [date], state or local law enforcement officers seized property involved in the commission of a felony offense or offenses as follows: [describe the facts and circumstances of the event or occurrence that led to the seizure of the property and the parties involved, if known].

5. It reasonably appears that the activity giving rise to the investigation or seizure involves more than one state or that the nature of the investigation or seizure would be better pursued under federal forfeiture statutes.

6. Section 513.647, RSMo Supp. 2004, provides that, after the prosecutor files a statement setting forth the facts and circumstances of a seizure the prosecutor wishes transferred to a federal agency, the court shall certify the filing and shall notify the property owner, by mailing notice to the owner's last known address, that the property is subject to being transferred to the federal government, and shall further notify the property owner of the right to file a petition stating legitimate grounds for challenging the transfer, which petition must be filed within 96 hours after the filing of the statement by the prosecutor. If a petition is filed showing by a preponderance of the evidence that the property should not be transferred to the federal government for forfeiture proceedings, the Court shall delay the transfer until a hearing may be held. The hearing is to be held within 10 days after the filing of the petition unless the Court deems, for good cause shown, that a continuance should be granted.

7. The last known names and addresses of all parties known to claim an interest in the property are as follows: [describe].

8. Notice is to be mailed to each of the parties described above this same date.

9. The prosecutor filed [his/her] statement seeking transfer on [date].

[Judge]

I. (§33.69) Notice Issued by Judge Regarding Transfer of Seized Property to Federal System

[Caption]

TO: Name and address

Notice is hereby given that this Court, on _____ _____, 20___, issued its certificate finding that certain property in which you allegedly have an interest may be subject to forfeiture through a federal agency because of its involvement in criminal activity and that the activity giving rise to the investigation or seizure of this property involved more than one state or that it is reasonably likely that federal criminal charges will be filed in connection with the activity based on a written statement of intent to prosecute from the U.S. Attorney with jurisdiction.

A copy of the Court's certificate is attached to this notice and incorporated herein by reference.

As the alleged property owner, you have the right to file a petition stating any legitimate grounds known to you challenging the transfer of the forfeiture action from state court to federal court.

If you wish to challenge this transfer of the forfeiture action from state court to federal court, you must file your petition within 96 hours of the date the prosecutor filed [his/her] statement with this court; thus, it must be filed within 96 hours of [date].

If you do not file a timely petition challenging the transfer, the forfeiture action will be transferred to a federal agency. If you do file a timely petition challenging the transfer, a hearing will be conducted within ten days of the filing of your petition to decide whether the forfeiture proceeding should be sent to federal authorities rather than keeping it in state court.

Dated this ____ day of _____, 20____.

[Judge]

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Chapter 34

ALTERNATIVE SENTENCING COURTS

I. (§34.1) Introduction

II. (§34.2) Alternative Sentencing in Missouri

III. (§34.3) The Ten Key Components

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B. (§34.5) Key Component #2
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A. (§34.16) Judge
B. (§34.17) Court Coordinator
C. (§34.18) Prosecuting Attorney
D. (§34.19) Defense Counsel

*Judge Carpenter received her B.A., 1973, and J.D, 1980, from the University of Missouri-Columbia. She is a Circuit Judge in Boone County.

E. (§34.20) Treatment Providers
F. (§34.21) Law Enforcement
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I. (§34.1) Introduction

Drug court, treatment court, problem solving court, diversion court, alternative disposition court, therapeutic court—all these terms have been used to describe a program that administers an intensively court-supervised, treatment-based alternative to incarceration for the offender who is addicted to drugs or alcohol.

The participants may be adults, juveniles, or families. The program may target first time offenders, probationers, or felons returning to the community from the Missouri Department of Corrections. The participants may have abused or may be addicted to drugs or alcohol. The participant's offense may be a misdemeanor or a felony and may be drug-driven or drug-related. A treatment court may be established to focus on offenders with mental illness, be restricted to veterans of the armed forces, or include only persons convicted of DWI. The scope of a treatment court is

limited only by the stated goals of the court and the support of the community that it serves.

The primary goal of a treatment court is to stop the abuse of drugs and alcohol and related criminal activity. The means to achieve that goal is court-ordered and court-supervised treatment. The program is administered by a team of professionals; the judge serves as the leader. Information is shared between the court, law enforcement, treatment providers, case managers (usually probation officers), and legal counsel for both the state and the participant. An atmosphere of trust and cooperation is established, with clear and certain rules. Drug testing is frequent, random, and observed. For participants who are successful in their obligations to the court and in treatment, the rewards may be great. Dismissal of criminal charges, early release from probation, reunification with family, gaining employment, and educational opportunities are frequent results. Participants may be empowered to have some control over their lives for the first time.

The reward for the community is less criminal activity, a safer environment, less money spent for incarceration, and the return or addition of a responsible member of society.

II. (§34.2) Alternative Sentencing in Missouri

Jackson County implemented Missouri's first adult drug court in October 1993. It was one of the first 12 drug courts in the United States after Miami, Dade County, Florida, originated the drug court concept in 1989.

The Missouri legislature passed legislation in 1998 that provides, in part, that "[d]rug courts may be established by any circuit court pursuant to sections 478.001 to 478.006 to provide an alternative for the judicial system to dispose of cases which stem from drug use. A drug court shall combine judicial supervision, drug testing and treatment of drug court participants." Section 478.001.1, RSMo Supp. 2011.

Section 478.003, RSMo Supp. 2011, provides, in part, that:

> In any judicial circuit of this state, a majority of the judges of the circuit court may designate a judge to hear cases arising in the circuit subject to the provisions of sections 478.001 to 478.006. In lieu thereof and subject to appropriations or other funds available for such purpose, a majority of the judges of the circuit court may appoint a person or persons to act as drug court commissioners.

Additional legislation was passed in 2001 to establish a Drug Court Coordinating Commission, composed of eight members. Section 478.009, RSMo Supp. 2011. The legislation also established a Drug Court Resources Fund to be administered by the Commission. The Commission shall:

> periodically meet at the call of the chair: evaluate resources available for assessment and treatment of persons assigned to drug courts or for operation of drug courts; secure grants, funds and other property and services necessary or desirable to facilitate drug court operation; and to allocate such resources among the various drug courts operating within the state.

Section 478.009.1.

DWI courts were authorized by legislation passed in 2010. *See* § 478.007, RSMo Supp. 2011. This statute was paired with Supreme Court of Missouri Operating Rule 26 to provide guidance for the establishment of the court and with § 302.309(9), RSMo Supp. 2011, to allow the issuance of a limited driving privilege to participants and graduates of a DWI court who would not be otherwise eligible to apply.

The number of alternative sentencing courts is in constant flux as drug courts, mental health courts, re-entry courts, DWI courts, veterans treatment courts, and other problem-solving courts based on the original drug court model are implemented both in Missouri and nationwide. The National Association of Drug Court Professionals, www.nadcp.org, distributes an annual publication titled *Painting the Current Picture: A National Report of Drug Courts and Other Problem-Solving Court Programs in the United States*. This publication summarizes data and research, as well as recent developments such as best practices. Current copies are available at:

www.ndci.org/publications/painting-current-picture

The Missouri Drug Courts Coordinating Commission issues a monthly report of statistical data for the state. It includes both entry and exit data for all treatment courts and additional information such as the number of drug-free babies born to participants:

www.courts.mo.gov/page.jsp?id=271

As of the February 29, 2012, report, there were 141 treatment court programs in Missouri with 3,402 participants. These courts include:

- 89 adult drug courts;
- 13 juvenile drug courts;
- 14 family drug courts;
- 21 DWI courts;
- 1 re-entry court; and
- 3 veterans treatment courts.

As of February 29, 2012, there have been a total of 11,234 treatment court graduates in Missouri. Missouri leads the country in number of drug courts per capita.

III. (§34.3) The Ten Key Components

The Ten Key Components define drug courts. In 1997, a group of drug court professionals working with the Drug Courts Program Office, Office of Justice Programs, U.S. Department of Justice, published a monograph, *Defining Drug Courts: The Key Components*, available at:

www.dwicourts.org/sites/default/files/nadcp/KeyComponents.pdf

designed to share information about what the earliest drug court professionals had learned about how to start and maintain a drug court. After years of implementation and research on the efficacy of the Ten Key Components, it remains an invaluable reference for anyone who works with treatment courts. The Ten Key Components have been

modified and adapted for other specialty courts such as tribal healing courts, mental health courts, DWI courts, and veterans treatment courts. The Ten Key Components from the monograph are listed below in italics in §§34.4–34.13, followed by discussion.

A. (§34.4) Key Component #1

Drug courts integrate alcohol and other drug treatment services with justice system case processing.

The philosophy of drug courts is that to affect drug and alcohol addiction, long-term treatment is necessary. A truism of drug court is, if you are not in treatment, you are not in drug court.

Coordinating what may be coerced treatment with the criminal justice system is unique to a drug court. An arrest may be a significant event in the life of a potential participant, and immediate direction into treatment at a time when remorse is high can have a great impact. Coerced treatment is likely to be just as effective as voluntary treatment, based on research published by the University of North Carolina Press, R.L. Hubbard et al., *Drug Abuse Treatment: A National Study of Effectiveness* (1989). The unique relationship in a drug court between treatment providers and the court after consents to release information have been executed by the participants results in shared information used by both to aid in the recovery process of the offender.

B. (§34.5) Key Component #2

Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process right.

The success of drug courts with substance-abusing offenders is well documented and receives much attention. Less attention is given to the remarkable accomplishments of the many prosecutors and members of the defense bar who are

willing and able to redefine their roles within the parameters of the drug court model.

Once a participant enters the program, the focus is on the participant's success. Success is defined as abstaining from drug and alcohol use and absence of further criminal behavior. The prosecutor maintains a responsibility to protect the public safety. The defense counsel protects the due process rights of the participant. The prosecutor and the defender both participate in the screening of offenders for inclusion in the program. It is understood that positive drug tests or admissions of use while in the program will not result in new charges being filed by the prosecutor. Conversely, the public defender can recognize that a sanction such as a short jail stay may be in the best interest of a noncompliant participant who might otherwise be facing a sentence in the Missouri Department of Corrections.

C. (§34.6) Key Component #3

Eligible participants are identified early and promptly placed in the drug court program.

An efficient drug court team can accomplish this component because the prosecutor, the defense counsel, and the court are all part of the team screening a defendant for eligibility and working with the treatment providers to get the defendant engaged in treatment as soon as possible. Streamlining this process is an ongoing goal of the team.

D. (§34.7) Key Component #4

Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.

The approach of the drug court is comprehensive. In addition to treatment, many other aspects of the participants' lives receive attention. The team becomes aware of educational goals or deficits, housing, transportation, employment, child care, other health issues, and related co-occurring problems such as mental illness. Recovery from drug and alcohol

addiction is more than not using. Substantial changes may need to be made in some or all of these other areas to support the decision to avoid drugs and criminal activity. The awareness and involvement of the community is key in addressing these areas. Cooperation with all social service agencies operating in the jurisdiction can support the success of the participant in helping to meet these additional needs. For example, a person who has neglected personal health for years while in active addiction may now need help to find dental care, prenatal care, or treatment for ongoing conditions such as hepatitis or tuberculosis. Clearing up old issues such as a suspended driver's license or a ban from public housing can be directed by the drug court with help from other support services. Addressing family issues such as past due child support can help reunify families and relieve the state from continued financial aid.

E. (§34.8) Key Component #5

Abstinence is monitored by frequent alcohol and other drug testing.

Reliable drug testing is the core of the drug court. The court must be able to rely on the accuracy of its testing because that is the benchmark of a participant's success. Guidelines and protocols must be established and adhered to. The procedures for collection and testing must be clear and well followed. Testing must be frequent, random, and observed. Testing must be comprehensive enough to detect the participant's drug of choice as well as other substances of abuse.

A typical drug court procedure is to:

- designate several colors;
- assign a color to each participant;
- require each participant to call a toll free phone number daily within a certain time period; and

- require the participant to provide a urine sample if the participant's color is the one designated by the recorded phone message.

Failure to provide a sample on the days required, within the time period, is considered a positive test result and sanctioned accordingly.

F. (§34.9) Key Component #6

A coordinated strategy governs drug court responses to participants' compliance.

Drug addicts are not created in a day. Recovery is not accomplished that quickly either. Relapse is not condoned or excused, but it is not unexpected. The response of the drug court to relapse must be viewed in the context of the phase of recovery, and the value of learning from relapse cannot be ignored. Similarly, failure to comply with other requirements of the program—such as maintaining employment, having stable housing, attendance at treatment, and completion of community service—may result in a sanction response from the court. A distinction between a therapeutic response to relapse and a sanction for failure to comply with the court's directives is essential. Treatment should not be punishment, but noncompliance must be addressed with an appropriate response. Conversely, compliance, progress, and accomplishments should be recognized and rewarded. A system of sanctions and incentives is necessary to respond to noncompliant behavior as well as to compliance and success. These rewards or sanctions should be swift and sure. Many addicts, rightly or wrongly, feel that they have never been treated fairly. A participant who is required to know the rules from the beginning and sees those rules enforced promptly and with no exceptions is much more likely to comply because of the perception of fairness and personal investment in the process.

G. (§34.10) Key Component #7

Ongoing judicial interaction with each drug court participant is essential.

Presiding over a drug court is a unique role for most judges and one that can be very rewarding. The judge is the leader of the team and is the one person who links the court system to the treatment system. Many, if not all, of the participants have never had a personal relationship with any authority figure. The power of the direct communication between the judge and the participant cannot be overestimated. The judge:

- sees the participant frequently;
- lets the participant know the expectations of the court; and
- applies sanctions and incentives as necessary.

Successful drug court participants nearly always assert that the personal attention from the judge was one of the main contributors to their success.

H. (§34.11) Key Component #8

Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.

It is not advisable or even possible to determine the success or failure of a drug court by relying on anecdotal evidence. Comprehensive data must be collected from the inception of the program, and that data must be evaluated by an independent evaluator. Goals need to be established and a method outlined to determine if the goals are being met. Both performance goals and outcome goals should be monitored. The continued success of a drug court program is reliant on being able to prove to funding authorities, as well as the community it serves, that the program is meeting its goals and is doing so in a cost-effective manner.

I. (§34.12) Key Component #9

Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.

Optimally, all members of the drug court team should receive training before the startup of the court. Treatment providers need to understand the procedures of the court; court personnel need to be provided basic information about drug and alcohol abuse treatment. Everyone needs to have a working knowledge of psychopharmacology and drug testing. Expectations of cooperation between different disciplines can only be accomplished after cross-training that educates each team member about the procedures and philosophies of the others. Common goals and philosophies of drug courts need to be reached. The confidentiality and ethical requirements of the drug court, as well as each team member, should be made clear to all. The team members will not remain static. A manual should be created so that, when one team member is replaced, some existing guidelines and training are available for the new team member.

J. (§34.13) Key Component #10

Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.

A drug court not only includes the members of the team who work with the participants on an ongoing basis but members of the community who might form an advisory board or steering committee. Having the cooperation and support of law enforcement is vital. Faith-based organizations, educators, service clubs, and social service agencies can all be stakeholders and provide invaluable services and advice. Members of the drug court team should be available to provide information about the court through community forums and informational meetings.

The Ten Key Components form the outline of a best-practices manual for a drug court. A prosecutor from Oklahoma with

many years' experience in the field has described a drug court simply as a program that follows the Ten Key Components. A court that does not adhere to those guidelines may be something, but it is not a drug court.

IV. (§34.14) Planning and Implementation

Frequently, an individual such as a judge or prosecuting attorney becomes convinced that there should be a drug court or other alternative sentencing court in that person's jurisdiction. From that initial decision to the existence of a fully functional court requires planning, buy-in, and support from both within and outside the court system.

The team concept is a fundamental premise of alternative sentencing courts. Several different teams may be a part of the process.

Inviting appropriate stakeholders to an informational meeting is a good first step. Forming a steering committee from the community may ensure the collaboration necessary to begin and maintain a successful program. After the court is established, the steering committee may continue to meet on a quarterly or semiannual basis to help maintain good communication with the community and to continue to provide political, legal, and philosophical support.

As mentioned above in §34.1, the alternative treatment courts utilize a team of professionals who are responsible for the day-to-day operation of the program. The judge, program coordinator, prosecuting attorney, defense counsel, treatment provider, law-enforcement officer, and probation officer are the typical team members.

An extended alternative treatment court team may include housing specialists, employment agencies and job training programs, educational advisors, health care providers, and any other community resources who may contribute to the success of the court and its participants.

With a team in place, the work of defining the court may begin. Establishing a mission statement to clarify the goals and values of the court is a vital first step. An independent evaluator is crucial to help identify measurable goals and objectives and to establish a system to collect and preserve data. Data collection systems have been developed and are widely available for no cost. The National Drug Court Institute website at www.ndci.org is a source for the monograph *Local Drug Court Research: Navigating Performance Measures and Process Evaluation*, which is available at:

www.ndci.org/sites/default/files/ndci/Mono6.Local Research.pdf

The National Drug Court Resource Center website at www.ndcrc.org contains a library link to further information on this topic and much more.

Other decisions to be made by the team before becoming operational are to determine the eligibility criteria for admission to the program and to select the appropriate court model. From the original pre-plea diversion model, alternative sentencing courts have adapted to include diversion with stipulation of facts, post plea but pre-adjudication, probation, probation revocation, and re-entry and mixed model or hybrid courts, which include some or all of the above models. Each jurisdiction should develop a court model that serves the needs of the target population and will receive acceptance from and the support of the community it serves.

Additional planning should include developing criteria for graduation for successful participants and for what will be the cause of unsuccessful termination from the program. Length of clean time is one of the most common graduation criteria, in addition to successful completion of other program requirements. Termination from the program should be the last resort after a series of graduated sanctions have been imposed.

Almost all alternative sentencing courts employ a phase structure as the participant moves through both the treatment

and the court process. Phase movement is frequently recognized by the team with an incentive in addition to the changes in requirements imposed in each phase. The phase structure, as well as a schedule of rewards and sanctions, should be clear and available to the participants.

All the work listed above should be memorialized in writing. A handbook that defines the team member roles, as well as a participant handbook, should be prepared and kept up to date as policies and procedures are added, amended, or deleted. A memorandum of understanding should be completed among all of the agencies represented on the team and should be updated on a regular basis.

Lastly, visiting an operational alternative sentencing court may be the best way to see how all this preparation comes together in team staffing and the courtroom. Missouri has numerous established courts available for visits and observation. OSCA (Office of State Courts Administrator) can provide contact information for available visiting opportunities. Contact information for OSCA is:

Office of State Courts Administrator
2112 Industrial Drive
Jefferson City, MO 65109
573/751-4377
www.courts.mo.gov/page.jsp?id=233

V. (§34.15) Team Member Roles

Observing an alternative sentencing court in a staff meeting before entering the courtroom can provide a valuable lesson as to the role of each member. In a well-balanced team, it is not always immediately obvious who the various members are. Although the judge is the acknowledged leader of the team, judicial styles vary widely, and the identity of the judge is not always immediately apparent. All the team members should feel able to contribute to the discussion of each participant and to be knowledgeable, not only about the individual, but about all aspects of the treatment and supervision being applied.

A. (§34.16) Judge

As the leader of the team, the judge is frequently the face of the team in the community. Speaking about the program at community functions and other educational opportunities usually falls to the judge. Creating liaisons with other governmental agencies, such as county commissioners and law enforcement, educating the public, and building collaborative relationships are common duties as the team leader. The judge also assumes the unique role in the courtroom of directly communicating with the participants. The relationship between the judge and a participant is often credited by successful graduates as one of the most influential parts of the program. Key Component #7, *see* §34.10, *supra*, recognizes the importance of the interaction between judge and participant. An effective alternative sentencing judge is one who is well educated in areas that may be outside the scope of the traditional judicial role, such as psychopharmacology, addiction, treatment plans, mental health diagnosis and medications, and motivational interviewing. Lastly, the alternative sentencing judge should be working on creating a court program that can continue after that judge is gone—a program that has become institutionalized.

B. (§34.17) Court Coordinator

The court coordinator may wear many hats, including:

- organizing the dockets;
- supervising or performing data collection and entry;
- screening potential participants;
- drafting and managing the budget;
- assisting the judge in the courtroom;
- providing guidance and assistance to participants and to other team members;

- maintaining manuals, handbooks, and other forms and documents;
- helping develop court procedures;
- organizing and disseminating drug test results;
- accessing resources; and
- coordinating the daily functions of the court.

Often, the coordinator is the only full-time employee of the program, as the other team members make room for their alternative court duties in the course of their "normal" employment.

C. (§34.18) Prosecuting Attorney

In the original diversion court model, the prosecutor was the "gatekeeper" and had tight control over who was admitted to the program. As court models have evolved, the prosecutor remains a vital member of the team. Key Component #2, *see* §34.5, *supra*, addresses the role of the prosecutor as the member who is vigilant regarding public safety while working within the structure of the team. A variety of information and expertise is the hallmark of a healthy team, and the presence of the prosecutor contributes to that end.

D. (§34.19) Defense Counsel

Usually the public defender, but, occasionally, a private defense attorney, the team defender may assist in:

- identifying potential participants;
- balancing points of view; and
- acting as the protector of the due process rights of the participants.

As Key Component #2, *see* §34.5, *supra*, emphasizes, both of the legal representatives on the team should set aside their

traditional adversarial roles and work with the team to ensure the best possible result for the participant while remaining within the framework distinguished by public safety concerns and due process constraints.

E. (§34.20) Treatment Providers

Because most alternative sentencing courts are concerned with participants who suffer from drug or alcohol abuse or addiction, treatment providers are of paramount importance. Some jurisdictions have access to a variety of potential treatment providers who offer services that range from medical and social detoxification, residential, outpatient, individual therapy, group sessions, gender-specific treatment, anger management, mental health treatment, on-site day care, and transportation. Other jurisdictions, particularly in rural areas, may be very limited in their options. Alternative sentencing courts in Missouri and the United States have been very creative in fashioning treatment programs from what is available to meet the needs of their clients. Ongoing communication both to and from treatment providers, attendance at both staff meetings and court, and keeping participants engaged in treatment are required from the treatment provider who becomes affiliated with an alternative sentencing court.

F. (§34.21) Law Enforcement

The presence of law-enforcement officers on a team can provide a wealth of knowledge about participants that might not otherwise be detected. Establishing a healthy relationship with the local police department, sheriff's department, and other law-enforcement agencies has multiple benefits. Many law-enforcement personnel are originally skeptical about the alternative sentencing programs. Once they see the court process in action, they usually end up as some of the strongest supporters of the concept. The experience of seeing multiple repeat offenders completing the program and getting out of the cycle of multiple arrests and convictions helps achieve this goal. Jail costs and related law-enforcement costs go down. Law enforcement can provide information to the team

about undesirable housing and peer affiliations. They can serve as trackers to help discover what participants may be doing when they do not think that they are being observed, whether that behavior is positive or negative. Having the cooperation of the local jail can make the imposition of short jail time sanctions much smoother. Community policing is a goal of many law-enforcement agencies, and participating in alternative sentencing helps them accomplish that goal.

G. (§34.22) Probation Officers

The intense supervision required for a successful alternative sentencing court is, in great part, provided by probation officers. Case management is the glue that holds together all the services provided to the participants of the program. Community supervision can:

- contribute to public safety;
- enhance the drug refusal skills of the participants;
- identify environmental threats by conducting field visits;
- detect impending signs of relapse; and
- help enforce the community obligations of the participants.

Working hand in hand with treatment, a comprehensive structure of supervision is provided that holds participants accountable and also ensures that both good and bad behavior is quickly detected and that an appropriate response is administered.

VI. (§34.23) Addiction and Treatment

Although the alternative sentencing court team will include drug-and-alcohol-abuse treatment experts and providers, it is essential for all members of the team, including the lawyers and the judge, to understand the basic principles of addiction

and treatment. Working within the criminal justice system, it does not take long to recognize the prevalence of drug or alcohol involvement among persons charged with criminal offenses. Treatment has always been recognized as a tool for supervision, but the court has often lacked the authority to mandate and enforce compliance with treatment plans. Getting an offender into a treatment program and compelling them to stay in treatment has been proven to be effective in reducing recidivism. Coerced treatment is as effective, if not better, than voluntary treatment, and the length of time spent in treatment, even when coerced, is directly related to positive results.

Team members need to understand the difference between substance abuse and dependence or addiction. Not all abusers are dependent, and a reliable clinical screening is vital to determining the treatment plan appropriate for each offender. Various assessment tools are available to help determine not only if an offender is appropriate for the program but also the level and type of treatment that will be most effective. Alternative sentencing programs in Missouri and across the country have been evolving from treating low-risk, low-needs offenders to accepting high-risk, high-needs offenders with general success.

People who are not familiar with addiction find it very difficult to understand why those who are addicted are unable to stop using when they have so much at stake, such as their liberty and livelihood. Even many addicts start a treatment program with the idea they are just not "strong enough to quit" and that it is all a matter of exerting more will power. The science of addiction has taught us about the neurological changes made in the brain by continued abuse of drugs and alcohol. Use of mind-altering substances, combined with habits developed over time and with possible co-occurring psychological disorders, makes stopping the abuse of drugs and alcohol much more complicated than the application of sheer will power.

Addiction is a chronic disease that is prone to relapse. Comparisons are often made by treatment providers to the diseases of hypertension and diabetes. They are also chronic diseases that can be affected and managed by proper treatment but which many people find difficult to do because the treatment plans require significant behavioral change as well as medical management. Treatment plans attempt to provide:

- motivation for change;
- insight into the disease; and
- the teaching of new behavioral skills.

A number of evidence-based treatment practices are employed by treatment providers involved with alternative sentencing courts. They include:

- motivational interviewing;
- motivational enhancement therapy;
- cognitive behavioral therapy;
- contingency management;
- relapse prevention therapy;
- criminal thinking awareness and modification; and
- the use of self-help recovery programs.

Self-help recovery, more commonly known as 12-step programs such as Alcoholics Anonymous or Narcotics Anonymous, is not treatment in a formal sense but provides a support system of peers that has been proven effective for decades. Courts should be aware that mandating attendance at certain 12-step programs without a more secular alternative may cause First Amendment issues to arise.

Another treatment issue that has become recognized as evidence based and, therefore, a best practice, is medication-assisted treatment. Long resisted by many in the treatment community as well as the criminal justice system, it is now supported by such organizations as the National Institute on Drug Abuse, as well as the National Association of Drug Court Professionals and the Missouri Association of Drug Court Professionals. Again, all alternative sentencing court

professionals should be made aware of the best practices and develop a policy for each court regarding medication-assisted treatment.

As each participant is admitted to the court program, a clinical screening should be performed to determine the level of care needed. These screenings could range from detoxification (both medical and social), inpatient treatment, intensive outpatient or day treatment, or outpatient treatment. This screening is a function of the treatment provider and not the judge or other team member. Altering a treatment program level of care as a punishment or reward for behavior is not appropriate.

It should be remembered that treatment plans should consider clinical needs, future risks, and the resources of the client as well as the court. Not all jurisdictions have the ability to choose from multiple providers or from all levels of care. Treatment plans should be revisited and modified as various goals are met or there is lack of success. The entire team should receive training on cultural and gender issues to ensure both competence and sensitivity to areas that may have an impact on whether treatment is appropriate and effective for each participant.

When discussing addiction and appropriate treatment, it is impossible to ignore the importance of being aware of possible co-occurring mental health disorders. The prevalence of mentally ill substance abusers in alternative treatment courts is high, and treatment for abuse or addiction only will not meet the needs of the offender who has a mental health disorder. Many early drug courts attempted to exclude participants who carried a diagnosis of mental illness until further research and education made it clear that the numbers were too large to dismiss and a coordinated treatment plan could be effective for these offenders.

The selection of treatment providers who will work with the alternative sentencing team is not the end of the process. Ongoing education about evidence-based practices, review of treatment plans, screening participants for co-occurring

disorders, consideration of efficacy of medication-assisted treatment, and oversight of facilities should be ongoing. A valuable resource for the courts is the National Registry of Evidence-based Programs and Practices at:

www.nrepp.samhsa.gov/

VII. (§34.24) Drug Testing

Key Component #5, *see* §34.8, *supra*, states the need for a reliable testing protocol. Drug testing is a therapeutic tool that provides a deterrent to future drug use. It identifies to the court which clients are remaining abstinent and provides a basis for positive rewards. Conversely, it identifies clients who continue to use or who relapse, which allows rapid response and intervention. Testing also serves as an adjunct to treatment.

Paul Cary, the Director of the Toxicology Laboratory at University of Missouri Health Care, is recognized as a national expert in drug testing. He has developed ten principles of a good drug-testing program, which are found in Chapter 6 on page 137 of the 2011 edition of the NDCI (National Drug Court Institute's), *The Drug Court Judicial Bench Book,* available at:

www.ndcrc.org/sites/default/files/14146_ndci_benchbook_v6.pdf

These ten principles are listed below, followed by comments (in italics) by the author of Chapter 34:

1. "Design an effective drug-detection program, place the policies and procedures of that program into written form (drug court manual), and communicate the details of the drug-detection program to the court staff and clients alike."

   Typically, this is a system based on the assignment of a color and a call-in system that requires participants to make a daily phone call to determine if they must provide a test sample that day.

2. "Develop a client contract that clearly enumerates the responsibilities and expectations associated with the court's drug detection program."

   Samples of client contracts are found at the NDCRC's (National Drug Court Resource Center's) website, www.ndcrc.org, *under Trending Library Topics.*

3. "Select a drug-testing specimen and testing methodology that provides results that are scientifically valid, forensically defensible, and therapeutically beneficial."

   Urine testing remains the most common type of testing for a number of reasons, including availability of sample, cost, established cutoff levels, and uniform forensic criteria.

4. "Ensure that the sample-collection process supports effective abstinence monitoring practices including random, unannounced selection of clients for sample collection and the use of witnessed/direct-observation sample-collection procedures."

   Testing should always be random, frequent, and observed.

5. "Confirm all positive screening results using alternative testing methods unless participant acknowledges use."

   Confirmation of initial test is the best practice because of the potential of incarceration as a sanction.

6. "Determine the creatinine concentrations of all urine samples and sanction for creatinine levels that indicate tampering."

   Diluted urine samples that are negative should not be interpreted as indications of no drug use.

7. "Eliminate the use of urine levels for the interpretation of client drug-use behavior."

   See Paul Cary, *Urine Drug Concentrations: The Scientific Rationale for Eliminating the Use of Drug Test Levels in Drug Court Proceedings*, IV NDCI DRUG CT. PRAC. No. 1 (2004), *available at*:

   www.ndcrc.org/sites/default/files/urine_drug_concentrations_2.pdf

8. "Establish drug-testing result interpretation guidelines that have a sound scientific foundation and that meet a strong evidentiary standard."

   See Paul Cary, *The Marijuana Detection Window: Determining the Length of Time Cannabinoids Will Remain Detectable in Urine Following Smoking, A Critical Review of Relevant Research and Cannabinoid Detection Guidance for Drug Courts*, IV NDCI DRUG CT. PRAC. FACT SHEET No. 2 (2006), *available at*:

   www.ndcrc.org/sites/default/files/thc_detection_window_1.pdf

9. "In response to drug-testing results, develop therapeutic intervention strategies that promote behavioral change and support recovery."

   Test results should trigger both a treatment response and an intervention strategy; enhanced treatment should not be used as a sanction.

10. "Understand that drug detection represents only a single supervision strategy in an overall abstinence-monitoring program."

    Observation of behavior, attitudes, and lifestyle can also be contributing factors to determining abstinence or lack thereof.

Referring to the websites of both the NDCI (www.ndci.org) and the NDCRC (www.ndcrc.org) can provide comprehensive, up–to-date information about all aspects of drug testing.

VIII. (§34.25) Responses to Behavior: Incentives and Sanctions

The concept of promoting behavior change through a system of rewards and sanctions can only be effective if based on reliable monitoring of that behavior. An intervention by the court based on inaccurate information can be disastrous to the program. Failing to recognize positive accomplishments can be just as harmful as missing and responding to negative actions. Community supervision that includes home visits, employment verification, monitoring curfews, enforcing travel and area restrictions, and contact outside traditional business hours is also necessary to ensure reliable and comprehensive monitoring.

Another result from the best practice of screening to determine the risk-and-needs profile of participants is the ability to help determine effective incentives and sanctions for that individual. Abusers and addicts respond differently. The application of certain principles can make responses to behavior more effective:

1. Sanctions should not be painful, humiliating, or injurious. Certainty of a response to behavior is more important than the severity of the sanction. Maintaining a perception of fairness is the key to the delivery of a sanction. Not all offenders consider incarceration as the harshest sanction. Punishment motivates those with the most to lose. Employment, children, and community connections are threatened by incarceration, and most will work hard to avoid those losses. Offenders who do not have those ties can respond in negative ways. Again, addicts and abusers respond differently and should be managed by determining what goals are proximal—i.e., may be accomplished in the short term as compared to distal

goals, which are long range. Punishment early in the program for failure to achieve what should be a distal goal can have the opposite of the desired effect. An example of this concept is the goal of abstinence from controlled substances. For an addict, this would be a distal goal. For an abuser, abstinence is a proximal goal.

2. Responses are in the eyes of the behaver. Graduated sanctions, as well as graduated incentives, have been shown to be most effective in the drug court context.

3. Responses must be of sufficient intensity. "Zero tolerance" is not an effective response to noncompliant behavior. It is frequently seen as a challenge by participants with personality disorders, and it not only fails to modify behavior but results in unwarranted termination. Sanctions should be delivered for every infraction.

4. Responses should be delivered for every target behavior.

5. Responses should be delivered as close to the behavior as possible.

6. Undesirable and desirable behavior must be reliably detected. Participants should be provided with written guidelines when they begin the program. Failure to inform of targeted behaviors and the consequences of noncompliance can result in a behavior known as learned helplessness, which most usually ends with failure in the program. Using a participant handbook, a phase system, and behavioral contracts, as well as using the courtroom as a classroom, can all help participants have realistic expectations of the responses to their behavior.

7. Responses must be predictable and controllable.

8. Responses may have unintentional side effects. The messenger is part of the message.

9. Behavior does not change by punishment alone. Punishment is most effective when used with positive reinforcement.

10. The method of delivery of the response is as important as the response itself. Attempts should be made to use motivational interventions such as open-ended questions.

Responses to behavior should include fairness, certainty, and immediacy. Reinforcement is favored over punishment. The way that the response is delivered by the judge is as important as the response.

"All behavior is followed by a consequence, and the nature of that consequence modifies the organisms tendency to repeat the behavior in the future." B.F. Skinner.

IX. Constitutional Issues

A. (§34.26) First Amendment

Although alternative sentencing courts have not been in existence that long, it has become "traditional" for one of the requirements for participation to be attendance at various 12-step self-help programs such as AA (Alcoholics Anonymous) or NA (Narcotics Anonymous). Attending meetings, working the steps, and obtaining a sponsor are encouraged. Citing the Establishment Clause of the First Amendment, "Congress shall make no law respecting an establishment of religion or prohibiting the full exercise thereof," courts around the country have consistently held that a mandatory requirement to participate in AA or NA is unconstitutional. *Kerr v. Farrey*, 95 F.3d 474, 479–80 (7th Cir. 1996). But the court may still lawfully make these referrals if a secular alternative is available. Such programs as Smart Recovery, Agnostic AA, and Rational Recovery fit the bill. The First Amendment Speech and Association Clause also come into play in alternative

sentencing court. Participants are frequently restricted from traveling to and from specific locations or associating with certain individuals. If it can be shown that the restrictions are narrowly drawn and are reasonably related to the purpose of the court, these restrictions have been upheld. *Johnson v. State*, 547 So.2d 1048, 1048 (Fla. App. 1989); *People v. Beach*, 147 Cal. App. 3d 612, 195 Cal. Rptr. 381, 385 (Cal. App. 1983).

B. (§34.27) Fourth Amendment and Related Issues

Alternative sentencing courts frequently require participants to sign waivers to allow warrantless searches of their person and property. The validity of these waivers is based on the same basis applied to probationers, which is reasonable suspicion. *Griffin v. Wis.*, 483 U.S. 868, 868 (1987). If the participant is on pre-adjudication status, the constitutionality of the search may be questionable. Related to this concept is the requirement of random drug testing. The courts have consistently upheld the requirement of drug testing as long as it is found to be reasonable. *United States v. Jordan*, 485 F.3d 982, 982 (7th Cir. 2005). Prohibition of alcohol use while in an alternative sentencing court has also been upheld when shown that it is reasonably related to protecting the public or the defendant's reformation. *People v. Beal*, 70 Cal. Rptr. 2d 80, 80 (Cal. App. 1997).

C. (§34.28) Due Process

As referenced in Key Component #2, *see* §34.5, *supra*, it is the role of the defense counsel on the team to ensure the due process rights of the participant. To make that process possible, procedural guidelines should be developed by the team and implemented at various stages, including probation revocation, termination from the program, and the imposition of certain sanctions.

Consistent with findings in the courts of multiple jurisdictions, it is recommended by the National Drug Court Institute as a best practice to allow the same due process to alternative court participants who are facing termination as

to probationers in a probation-violation hearing. *People v. Anderson*, 833 N.E.2d 390, 390 (Ill. App. 2006). The court should provide:

- a written notice of the violation;
- disclosure of the evidence; and
- an opportunity to be present and testify at a hearing, confront and cross-examine witnesses before a neutral court officer, and have a written finding of the evidence relied on for the revocation.

In some cases, the probation violation itself may fulfill the requirement of a termination hearing. A participant who self-terminates does not require a hearing. *State v. Varnell*, 155 P.3d 971, 971 (Wash. App. 2007). The option of waiving a hearing should be made known to the participant by providing a written waiver form.

The right to counsel at a probation violation hearing is not a requirement of federal law but is required by Missouri state law. *Moore v. Stamps*, 507 S.W.2d 939 (Mo. App. E.D. 1974); *In re Carson*, 789 S.W.2d 495 (Mo. App. S.D. 1990).

Due process is also a concern in the drug-testing arena. The court should make sure that it is relying on testing protocols that meet the scientific standards of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593–94 (1993), and *Frye v. United States*, 293 F. 1013, 1013 (D.C. Cir. 1923). Best practices would recommend that any test result being used as a basis for a jail sanction should be confirmed. Confirmation costs may be taxed to the participant.

Judicial impartiality and due process are addressed in Rule 2.03—Canon 2, regarding *ex parte* communications. Comment [4] of Rule 2-2.9 states:

> A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

D. (§34.29) Equal Protection

Fourteenth Amendment issues in the alternative sentencing court are usually based on decisions of eligibility for the program. Deciding to admit or exclude a participant requires a rational-basis equal-protection test. *Lomont v. State*, 852 N.E.2d 1002, 1002 (Ind. App. 2006). Another equal protection argument is whether the unavailability of a drug court in a certain jurisdiction violates rights under the Fourteenth Amendment. The holding in *State v. Harner*, 103 P.3d 738, 738 (Wash. 2004), was that the decision not to fund a drug court was related to fiscal resources and community obligations and not a violation of equal protection rights. Inability to meet the requirements of an alternative sentencing program because of severe medical issues and the necessity of multiple medications has also been a valid reason for exclusion. *Evans v. State*, 667 S.E.2d 183, 183 (Ga. App. 2008). Other disqualifications that have limited admission to drug courts have been justified, including several cases dealing with illegal alien status. *People v. Cisneros*, 100 Cal. Rptr. 2d 784, 784 (Cal. App. 2000); *People v. Espinoza*, 132 Cal. Rptr. 2d 670 (Cal. App. 2003).

X. (§34.30) Confidentiality

An overview of the topic of confidentiality as it relates to a treatment court requires familiarity with two major federal statutes:

1. HIPAA (Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936

2. Drug Abuse Prevention, Treatment, and Rehabilitation Act, Pub. L. No. 92-255, 86 Stat. 65, enacted in 1972 and found at 42 C.F.R. chapter I, subchapter A, part 2

HIPAA is the topic of fairly widespread misunderstanding. The purpose of HIPAA was to improve health care administration by establishing standards and a requirement for the electronic transmission of some health information. These standards included a privacy rule to prevent certain entities from disclosing health information without consent. Drug courts are not one of the entities. But it is a best practice of alternative sentencing courts to use consent forms that meet the requirements of HIPAA. Sample forms are available at the website of the National Drug Court Resource Center, www.ndcrc.org.

A drug or alcohol treatment program cannot release any information if that program receives any federal funding. 42 C.F.R. ch. I, subchapter A, pt. 2. There is a two-step analysis to determine if any agency is subject to 42 C.F.R. If the program involves substance abuse education, treatment, or prevention and it is regulated or assisted by the federal government, it is covered by 42 C.F.R. Because this is such a broad definition, it is wise to follow the requirements of these federal confidentiality laws in an alternative sentencing court. Without the receipt of such information regarding treatment progress, the court would not be able to conform to Key Component #1, *see* §34.4, *supra*. The federal confidentiality laws apply to all records relating to the identity, diagnosis, prognosis, or treatment of any patient in a substance abuse program.

Protected information may be shared through various exceptions. The first exception is a properly executed written consent. Again, various consent forms may be found at www.ndcrc.org. There must be an advisement before the signing of the consent form. Ten elements of the consent form are:

1. name of the disclosing program;

2. name of the receiving person or program;

3. name of the patient;

4. purpose of the disclosure;

5. description of the information to be disclosed;

6. the patient's right to revoke the consent;

7. the program's ability to make conditions based on the agreement to sign the consent;

8. date or event of the expiration;

9. signature of the patient; and

10. date signed.

The second exception is permitted disclosure without consent, which includes medical emergencies, reporting crimes on program premises against staff, and outside evaluators, researchers, and auditors.

Finally, mandatory disclosures without consent are required in the event of child abuse or neglect or information as to cause of death.

A subpoena or search warrant is not sufficient to obtain protected information. A valid court order may be issued by the court after notice and hearing.

Best practices in the area of confidentiality include:

- designating a team member as the responsible representative to ensure compliance;

- making sure files are safeguarded and kept in confidential locations not accessed by the public;

- establishing a written policy and procedures;

- requiring ongoing training for all;

- staff and team members;

- reviewing and updating consent forms; and
- assuming all confidentiality laws apply to the court program.

XI. (§34.31) Ethical Considerations

All the professionals who join together to form an alternative sentencing court team bring with them their own ethical principles and constraints. Combining these with the ethical practices imposed on the judge results in a high standard in a dignified forum. Because alternative sentencing courts are somewhat unique and also may have a high profile in the community, maintaining the highest ethical standards is recommended.

Four areas that may raise concerns are:

1. judicial independence and impartiality in a collaborative setting;
2. the close relationships that may develop between participants and team members;
3. direct contact between participants and team members and direct contact between participants and the judge; and
4. cultivating community support and partnerships with the court.

Guidance and support can be found by referring to the American Bar Association's Model Code of Judicial Conduct (the Canons), available at:

www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html

and, more specifically, to Rule 2, Code of Judicial Conduct, of the Supreme Court of Missouri (discussed below), available at:

www.courts.mo.gov/page.jsp?id=703

Rule 2.03—Canon 1 requires a judge to uphold the integrity and independence of the judiciary. Key Component #6, *see* §34.9, *supra*, and Key Component #2, *see* §34.5, *supra*, might seem to create a challenge to this directive. Maintaining a "coordinated strategy" to respond to a client's compliance and "forging partnerships" in the community may be accomplished without a loss of independence or integrity, but care must be taken to ensure that there is an understanding regarding the role of the judge. A judge may have a team of professionals providing information and specific technical knowledge, but it is the final decisions of the judge that govern all responses to behavior in the alternative treatment court setting. It is important to make sure that all team members and participants remember that they are still working in the setting of a court and will be held accountable for their actions accordingly. Further, the judge may represent the court in a public forum, always making sure not to participate in conversations or activities that are not appropriate.

There are differences between personal engagement and impartiality. The personal engagement of the judge in a drug court setting is sometimes the key to the success of the program. Participants value their time with the judge and flourish from the attention that they receive from an authority figure, which might very well be the first time that has been experienced by them. But this attention must be even-handed, providing the same level of encouragement and concern to all participants.

Many alternative sentencing court judges actively participate in events such as picnics, bowling, ball games, or even community service projects with the team and participants. The key question to always keep in mind is how the observation of any of those activities will be perceived by the

community and whether confidence in the integrity of the judiciary may be compromised. Rule 2-4.1—Canon 4.

An additional area of concern may be raising funds on behalf of the court program. Canon 4 also addresses this issue and that judges are prohibited from personally soliciting funds to support the court. Rule 2-4.2—Canon 4.

Finally, Comment [4] of Rule 2-2.9—Canon 2 addresses the issue of *ex parte* communication in the context of "therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others."

XII. (§34.32) Conclusion

To even the casual reader, it should be apparent that establishing an alternative sentencing court, or joining one that already exists, requires a breadth of knowledge that is quite different from any other organization in the criminal justice system. The overview presented in this chapter may be supplemented by referring to the numerous publications referenced in the text. It is also useful to remember there are many well-established alternative sentencing court programs in Missouri, and visitors from other courts are always welcome to observe and learn. The Office of State Courts Administrator can provide contact information for existing courts and direction in choosing a court or team member who may provide additional guidance.

2012 Cumulative Supplement to

Chapter 34

ALTERNATIVE SENTENCING COURTS

There is no supplement to this chapter because this was a new chapter in 2012.

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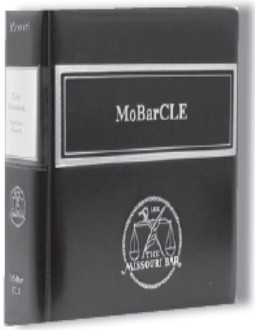

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2012 Cumulative Supplement

Preface

The Missouri Bar wishes to acknowledge the valuable assistance of the lawyers who reviewed the various chapters for the purpose of supplementation. The name or names of lawyers who prepared a particular chapter supplement are shown on the first page of the chapter supplement.

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2012 Cumulative Supplement to

Chapter 1

ARREST AND CUSTODIAL DETENTION

Supplemented
§§1.2
1.5
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II. Basic Concepts

A. (§1.2) Arrest

During the 2007–2008 term of the U.S. Supreme Court, the Court found that an arrest made in violation of state law, but with probable cause, did not violate the Fourth Amendment. *Va. v. Moore*, 553 U.S. 164 (2008). Two Portsmouth, Virginia, police officers arrested Moore after hearing over the police radio that a man known as "Chubs" Moore was driving with a suspended license. Under Virginia law, driving with a suspended license under the circumstances that Moore was arrested under was not an arrestable offense. The officers were required by state law to issue a citation and a summons to Moore but were prohibited from arresting him. Despite this, Moore was searched incident to his arrest, and the officers found contraband in his vehicle.

Later, the Virginia Supreme Court found the search to be in violation of the Fourth Amendment because the officers were only allowed to issue a summons to the defendant and not to arrest him, and none of the warrantless arrest exceptions were available. *Moore v. Commonwealth of Va.*, 636 S.E.2d 395 (Va. 2006). The U.S. Supreme Court found that there was no historical basis for a state or federal statute concerning arrest to be incorporated into a Fourth Amendment reasonableness analysis. *Moore*, 553 U.S. 164. The Court held that an arrest based on probable cause when even a minor crime was committed in the officer's presence was sufficient to pass scrutiny under the Fourth Amendment. *Id.* at 172.

Even if a state law surpasses constitutional requirements of the Fourth Amendment, "the Constitution's protections concerning search and seizure remain the same." *Id.* It is "not the province of the Fourth Amendment to enforce state law." *Id.* at 178. Because the arrest was lawful under the federal Constitution, the search incident to the arrest was lawful as well.

D. (§1.5) Investigatory Detention

In *Brendlin v. California*, 551 U.S. 249 (2007), the U.S. Supreme Court held that a stop of a vehicle constitutes a seizure of passengers, as well as the driver, for Fourth Amendment purposes. The question of whether a passenger was seized had only been addressed in dicta before the Court's decision in *Brendlin*. *Id.* By its very nature, a traffic stop inhibits the travel of a passenger in a vehicle just as much as its driver, and any attempt by a passenger to leave is likely to prompt immediate police action preventing any person's attempt to leave the vehicle or area of the stop. *Id.* It is unreasonable for a passenger to believe that the passenger would be free to leave the scene of a vehicle stop without advance permission from the police officer conducting the stop. *Id.*

In *Michigan v. Long*, 463 U.S. 1032 (1983), the *Terry* stop—*Terry v. Ohio*, 392 U.S. 1 (1968)—resulted in the seizure of a pistol beneath the passenger seat. Therefore, not only does the lawful *Terry* stop include a pat-down search that reasonably may include the glove compartment, but the search may also include areas in which a weapon may be placed or hidden, including, as in *Long*, the passenger compartment.

In the context of a suspect who is armed and dangerous, it was permissible, after a lawful stop, to:

- seize evidence that was in plain view;
- arrest the passenger when the plain-view evidence equaled probable cause that the passenger committed a crime; and
- later search the passenger compartment because it was within the passenger's immediate area of control.

United States v. Hensley, 469 U.S. 221 (1985). The scope of the stop must be carefully tailored to the underlying justification

of the stop, and the investigatory detention must be temporary and last only long enough to "effectuate the purpose of the stop." *Fla. v. Royer*, 460 U.S. 491, 500 (1983).

2. (§1.7) Automobile Stops

Whether a person has been arrested and, if so, the reason for that arrest have a major impact on the constitutionality of later police action in light of the U.S. Supreme Court's decision in *Arizona v. Gant*, 556 U.S. 332 (2009). In *Gant*, the Court made it clear that, once a person is arrested and securely in custody, a warrantless search of the passenger compartment of a vehicle incident to arrest is no longer justified because the arrestee no longer has immediate access to the vehicle or its contents. *Id*. Once an arrestee has been restrained and no longer has access to the vehicle, the concern over the arrestee's access to a weapon or evidence that may be destroyed within the vehicle no longer exists, and a warrantless search of the vehicle is no longer justified. *Id*. The rule now is that police may search a vehicle incident to a recent occupant's arrest only if:

- the arrestee is within reaching distance of the passenger compartment at the time of the search; or

- it is reasonable to believe that the vehicle contains evidence of the offense for which the arrestee was arrested.

Id.

3. (§1.8) Traffic Checkpoints

In general terms, the reasonableness of a checkpoint, as a seizure less intrusive than an arrest, depends on weighing the balance between the public interest in preventing criminal activity and the right to be free from unwarranted police interference. *State v. Damask*, 936 S.W.2d 565 (Mo. banc 1996). Three elements are weighed:

"(1) the gravity of the State's interest served by the checkpoint;

(2) the checkpoint's effectiveness in advancing the public's interest; and

(3) the degree to which the checkpoint interferes with or intrudes upon the motorists."

Id. at 571.

The central principle is ensuring that the motorists' "'reasonable expectation of privacy is not subject to arbitrary invasions solely at the discretion of' law enforcement." *Id*. (quoting *Brown v. Tex.*, 443 U.S. 47, 51 (1979)).

III. After Arrest

B. (§1.11) *Miranda* Warnings

In *State v. Gaw*, 285 S.W.3d 318 (Mo. banc 2009), the Supreme Court dealt with the issues of whether:

- a "midstream" *Miranda* warning—*Miranda v. Ariz.*, 384 U.S. 436 (1966)—made during the course of custodial interrogation violated the defendant's rights; and

- statements made after the issuance of *Miranda* warnings in that situation should be suppressed.

Citing the plurality opinion of the U.S. Supreme Court, in *Missouri v. Seibert*, 542 U.S. 600 (2004), the Supreme Court of Missouri adopted Justice Kennedy's approach, holding that a defendant's confession or statements made after a *Miranda* warning were inadmissible when law enforcement deliberately tries to circumvent the protections of *Miranda* by eliciting a confession or statements before giving *Miranda* warnings, followed by further questions designed to get an arrestee to repeat the confession or prior statements. *Gaw*, 285 S.W.3d

at 323. In *Gaw*, the defendant was arrested for possession of marijuana by the Missouri State Highway Patrol following a single-car accident. The defendant was also determined to be under the influence of alcohol at the time and later charged with and convicted of felony driving while intoxicated as a chronic offender. Before his arrest, Gaw told the arresting officer that he was not the driver but that either his girlfriend or a friend of hers had been driving. After Gaw's arrest, the arresting officer questioned Gaw further about the accident, and Gaw admitted that he had been driving. Gaw did not receive *Miranda* warnings until after he had been placed into the arresting officer's patrol car and was being transported to the station for booking. After receiving *Miranda* warnings, Gaw again admitted to being the driver when questioned about the accident. The trial court deemed the first confession inadmissible but admitted Gaw's confession that he'd been driving made after he had received *Miranda* warnings. The Supreme Court upheld Gaw's conviction based on the record, which included the arresting officer's testimony that he had not deliberately acted in a way that was calculated to circumvent the protections of *Miranda*. The Supreme Court further held that, when there is no deliberate attempt to circumvent *Miranda* protections, the U.S. Supreme Court's decision in *Oregon v. Elstad*, 470 U.S. 298 (1985), is controlling, and the analysis will turn solely on whether any statement made after *Miranda* warnings are given was knowingly and voluntarily made. *Gaw*, 285 S.W.3d at 319–21.

C. Remedies for Improper Police Conduct

1. (§1.12) Exclusionary Rule Generally

The Supreme Court of Missouri held in 2011 that no exception to the exclusionary rule applied to an arrest made under a municipal court warrant when the arresting officer became aware that the person he had stopped was not the person reported in an anonymous tip and the officer was unaware of the warrant before the stop. *See State v. Grayson*, 336 S.W.3d 138 (Mo. banc 2011). In *Grayson*, officers received an anonymous tip regarding a specifically named driver in an intoxicated

condition in a red Ford pickup truck at a certain location. An officer responded but did not find the driver or a red Ford pickup. He continued to patrol the area and spotted a red Mazda pickup truck about a half mile away from the location provided in the tip and believed that the driver looked like the person named. He followed the red Mazda and saw no signs of intoxication but decided to conduct a stop anyway. Upon approaching the driver's side of the Mazda, the officer recognized that the driver was not the subject of the tip but was Grayson, whom he knew on sight. Instead of releasing Grayson from the stop, he further detained him on the basis that he knew Grayson had recently had some arrests and decided to run a check to determine whether there were any outstanding warrants for Grayson's arrest. The Supreme Court upheld the trial court's suppression of methamphetamine found in the back seat of the patrol car after Grayson's arrest and transport to jail on the municipal court warrant, stating that the mere fact that Grayson was driving a red truck did not amount to reasonable suspicion giving the officer reason to stop Grayson. *Id.* at 145. Further, despite the fact that the officer articulated a belief that the driver of the Mazda resembled the subject of the tip, whom he knew, once the officer recognized the driver to be someone else, the reason for an investigative stop ended absent a reasonable suspicion that Grayson had committed any violations. *Id.*

The main exceptions to the exclusionary rule are:

- attenuation;
- independent source;
- inevitable discovery; and
- good faith.

Attenuation occurs when the "causal chain" between an illegal arrest and later statements is broken. *Brown v. Tex.*, 422 U.S. 590, 602 (1975).

Wong Sun v. United States, 371 U.S. 471, 486 (1963), requires the statement to be "sufficiently an act of free will to purge the primary taint." *Miranda* warnings alone—*Miranda v. Ariz.*, 384 U.S. 436 (1966)—cannot always attenuate the taint of an unconstitutional arrest, making the statements sufficiently a "product of free will." *Brown*, 422 U.S at 603.

The independent source doctrine applies to the Fourth, Fifth, and Sixth Amendments. *Murray v. United States*, 487 U.S. 533 (1988). The key to the independent source doctrine is making sure that the police are in the same position that they would have been in if no police error or misconduct would have occurred and not in a worse position. *Id.*

The doctrine "permits the introduction of evidence initially discovered during, or as consequence of, an unlawful search, but later obtained independently from lawful activities untainted by the initial illegality." *Id.*

The inevitable discovery rule applies to the Fourth, Fifth, and Sixth Amendments and maintains the same rationale that the independent source doctrine maintains in making sure that the police are in the same position that they would have been if not for the police error or misconduct and not in a worse position. *Nix v. Williams*, 467 U.S. 431, 443 (1984). But its application is different:

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense.

Id. at 444.

The good-faith exception precludes the Fourth Amendment exclusionary rule from barring "the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a

detached and neutral magistrate but ultimately found to be invalid." *United States v. Leon*, 468 U.S. 897, 897 (1984). Evidence from a search can only be suppressed if it "can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id*. at 919.

IV. Methods of Arrest

B. (§1.15) With Warrant

Probable cause to believe that a crime has been committed is not enough by itself to affect a routine felony arrest without a warrant in a private home. *State v. Cook*, 273 S.W.3d 562 (Mo. App. E.D. 2008).

A warrantless arrest within a suspect's home is too substantial an invasion, absent exigent circumstances, even when clear probable cause exists and is precisely the type of governmental invasion into private homes that the Fourth Amendment to the U.S. Constitution protects against. *Payton v. N.Y.*, 445 U.S. 573 (1980). Factors justifying a warrantless arrest within a private home include:

- a clear showing of probable cause that the suspect committed a grave offense or particularly violent crime;
- a reasonable belief that the suspect is armed;
- strong reason to believe that the suspect is within the residence;
- whether law enforcement officers are in pursuit of a fleeing felon;
- the likelihood that the suspect will escape or destroy evidence absent swift apprehension;

- whether taking the time to obtain a warrant would endanger life; and

- whether entry, though not consented to, was made peaceably.

Cook, 273 S.W.3d at 570–71. These factors are not exclusive but provide judges with guidance in making a determination of whether a warrantless arrest within a home was lawful. *Id.* at 570.

In *Payton*, 445 U.S. at 589–90, the U.S. Supreme Court held that the police cannot make a warrantless entry into a suspect's house to make a routine felony arrest, even if probable cause exists: "Absent exigent circumstances [or consent], that threshold [of a dwelling] may not reasonably be crossed without a warrant."

VII. Effects of Custody

A. (§1.23) 24-Hour Rule

The Missouri General Assembly amended § 544.170, now RSMo Supp. 2011, in 2005 by removing the 20-hour requirement for release without the filing of charges or the issuance of a warrant and making the 24-hour rule a rule of general applicability. The 2005 amendment removed the 24-hour exception to the 20-hour rule for the following charges:

- First-degree murder under § 565.020, RSMo 2000
- Second-degree murder under § 565.021, RSMo 2000
- First-degree assault under § 565.050, RSMo 2000
- Forcible rape under § 566.030, RSMo Supp. 2011
- Forcible sodomy under § 566.060, RSMo Supp. 2011
- First-degree robbery under § 569.020, RSMo 2000
- Distribution of drugs under § 195.211, RSMo Supp. 2011

Section 544.170 (emphasis added) now requires that:

> [a]ll persons arrested and confined in any jail or other place of confinement by any peace officer, without warrant or other process, for any alleged breach of the peace or other criminal offense, or on suspicion thereof, shall be discharged from said custody within *twenty-four hours* from the time of such arrest.

But if the suspect is "charged with a criminal offense by the oath of some credible person, and [is to] be held by warrant to answer to such offense," the rule does not apply. *Id.* Secondly, the suspect "shall be permitted at any reasonable time to consult with counsel or other persons acting on the confinee's behalf." Section 544.170.2.

The penalty for violating § 544.170 remains a class A misdemeanor. Violations include the following:

- Refusal to release a suspect entitled to release
- Refusal to allow the suspect to consult with counsel or other persons
- Falsely charging a suspect with the intent to avoid the provisions of § 544.170

Section 544.170.3. A transfer of a suspect to "the custody or control of another" is also subject to the class A misdemeanor penalty. *Id.*

While there is no longer a 20-hour limit and the 24-hour limit is a rule of general applicability, the ruling of *Roberts v. State*, 476 S.W.2d 490 (Mo. 1972) (cited in the original chapter), that a suspect's confession is not per se invalid based solely on confinement beyond the applicable time period—in *Roberts*, the 20-hour statutory limit—remains valid precedent.

B. (§1.24) Racial Profiling

The most recent report by the Missouri Attorney General available at the time of publication of this supplement is the Executive Summary for 2010 Missouri Vehicle Stops compiled by the MoAG (Missouri Attorney General). It is available at:

http://ago.mo.gov/VehicleStops/2010/

The 2010 Executive Summary indicates continuing disparity between the proportions of stops versus the proportion of the population of minorities. The statistics in Table 1 of the 2010 report show African Americans continue to be stopped at a higher rate than Caucasians. *Id*. The Disparity Index (proportion of stops/proportion of population) for Caucasians remains .95, which is the same level as reported in the MoAG Executive Summary on 2007 Missouri Vehicle Stops report at the time that this chapter was last supplemented. 2010 Executive Summary. In contrast, the index for African Americans showed an increase from 1.58 to 1.61. *Id*. Though the index for Hispanics indicated an even lower underrepresentation than Caucasians at .78, the percentage of search rate for Hispanics remained higher than the percentages for both African Americans and Caucasians. *Id*. Hispanics were searched in 12.07% of stops, whereas African Americans and Caucasians were searched in 10.55% and 5.67% of stops respectively. *Id*. The contraband hit rates for African Americans and Hispanics showed minor decreases and remained within 0.1 percentage point of the 2007 data, while Caucasians showed an increase of 1.42 percentage points for contraband hits, meaning Hispanics and African Americans are still more likely to be searched, but Caucasians are even more likely than previously to possess contraband. *Id*.

C. (§1.25) Breathalyzer Tests

Most recently, the Supreme Court of Missouri upheld the suppression of a blood-alcohol test when blood was drawn without a warrant upon the order of police over the objection of the defendant after refusal to submit to a breathalyzer in

State v. McNeely, 358 S.W.3d 65 (Mo. banc 2012). The opinion held the nonconsensual and warrantless blood draw in this case to be a violation of the defendant's rights under the Fourth Amendment to the U.S. Constitution. *Id.* at 67. The fact that blood-alcohol levels naturally dissipate after drinking ceases did not itself establish a per se exception to the warrant requirement because of exigent circumstances. *Id.*; *see also Schmerber v. Cal.*, 384 U.S. 757 (1966) (the naturally decreasing blood-alcohol levels coupled with the officer's need to investigate the accident scene and procure medical attention for persons in the vehicle created a unique set of fact-specific, exigent circumstances obviating the warrant requirement).

Because of the 2005 amendment to § 544.170, now RSMo Supp. 2011, discussed in §1.23 of this supplement, the statutory right to assistance of counsel is in § 544.170.2 and not § 544.170.3, as previously cited in the original chapter.

Paul J. D'Agrosa*

2012 Cumulative Supplement to

Chapter 2

RELEASE FROM CUSTODY

This is a reprint of the 2008 supplement to Chapter 2 with some editorial changes. The reader should not assume from the absence of supplementary materials for the 2012 supplement that no developments have occurred in the subject matter of this chapter.

The reader should always check original and fully current sources.

Supplemented:
§§2.2
2.10
2.16
2.22
2.24

*Mr. D'Agrosa's biographical information appears on page 2–1 of the original chapter.

I. Background

B. (§2.2) Ensuring Defendant's Appearance

House Bill 1549 was passed into law and became effective August 28, 2008. H.B. 1549, 94th Gen. Assembly, 2nd Reg. Sess. (Mo. 2008). This law is comprehensive in its scope with regard to immigration issues. But for purposes of this chapter, H.B. 1549 amended § 544.470, now RSMo Supp. 2011. A presumption now exists that a person is not bailable if that person is unable to verify that that person is lawfully present in the United States. The statute, which was amended again in 2011, is set forth below with the new 2008 text in bold and the new 2011 text in italics:

1. If the offense is not bailable, *if the individual is not granted electronic monitoring, or if the individual* does not meet the conditions for release, as provided in section 544.455, the *individual* shall be committed to the jail of the county in which the same is to be tried, there to remain until such *individual* be discharged by due course of law.
2. **There shall be a presumption that releasing the person under any conditions as provided by section 544.455 shall not reasonably assure the appearance of the person as required if the circuit judge or associate circuit judge reasonably believes that the person is an alien unlawfully present in the United States. If such presumption exists, the person shall be committed to the jail, as provided in subsection 1 of this section, until such person provides verification of his or her lawful presence in the United States to rebut such presumption. If the person adequately proves his or her lawful presence, the circuit judge or associate circuit judge shall review the issue of release, as provided under section 544.455, without regard to previous issues concerning whether the person is lawfully present in the United States. If the person cannot prove his or her lawful presence, the person shall continue to be committed to the jail and remain until discharged by due course of law.**

II. Personal Recognizance

E. St. Louis County

1. (§2.10) Recognizance Office

With some exceptions, there is a general standing order in St. Louis County that those individuals charged with a class C or class D felony will automatically qualify for a 10% cash bond. See the St. Louis County Department of Justice Services' website for information on bonds:

www.stlouisco.com/YourGovernment/County Departments/JusticeServices

III. Surety Bond, Property Bond, or Deposit of Cash

C. Cash Deposit

1. (§2.16) Generally

In 2012, the bonding fee in St. Louis County is $20. See the St. Louis County Department of Justice Services' website for information on bonds:

www.stlouisco.com/YourGovernment/County Departments/JusticeServices

V. Miscellaneous

A. (§2.22) Appearance Bond

Replace the first sentence of the first paragraph in the original section with the following:

The police may hold a person in custody for up to 24 hours without a warrant while they investigate. Unless a warrant is applied for and issued within the 24-hour period, the person must be released. Section 544.170, RSMo Supp. 2011.

Delete the citation to Rule 22.06 *in the first paragraph of the original chapter.*

Replace all references to 20 hours *in the first paragraph of the original section with the following*:

24 hours

C. (§2.24) Summons Instead of Bond

Replace the citation to Rule 22.03 *in the fourth paragraph of the original section with the following*:

Rule 22.04

Replace the citation to Rule 22.04 *in the original section with the following*:

Rule 22.03

Replace the citation to Rule 22.03 *in the original section with the following*:

Rule 22.04

James H. Worthington*

2012 Cumulative Supplement to

Chapter 3

3

INVESTIGATION AND MARSHALLING THE FACTS OTHER THAN FORMAL DISCOVERY

Supplemented:
§§3.1
3.7
3.11
3.17
3.28
3.29
3.31

I. (§3.1) Client Contact

Client contact also occurs frequently in a court in addition to in a jail or prison facility, as stated in the original chapter.

*Mr. Worthington's biographical information appears on page 3–1 of the original chapter. He is a past president of the Lafayette County Bar Association.

Replace the third bulleted item in the first set of bullets in the original section with the following (new text is in italics):

- To enter into no discussion of facts *with anyone*, even with a seemingly harmless cellmate. A cellmate can become the proverbial professional witness with very little pressure, leverage, or quid pro quo (usually a "deal" offered by the prosecuting attorney). Do not, under any circumstances, take any chances! *This includes family members*.

Replace the third bulleted item in the second set of bullets in the original section with the following (new text is in italics):

- Discuss making bond and *what reasonable conditions might be imposed on a bond*. Talk about the differences between a cash and a surety bond and the advantages, disadvantages, and possibilities of a motion for either bond reduction, a recognizance bond, or a ten percent cash posting under Chapter 544, RSMo (if a ten percent cash bond is posted, the bond assignment form, *see* §3.36, *infra*, can be used to secure payment of attorney fees or a portion of them).

C. Specific Problems

3. (§3.7) Retainers

Counsel can also check a court's website to see if a copy of a client's complaint or information can be obtained there.

7. (§3.11) Offense Charged

Often, it is difficult to obtain the charges from the clerk's office in time for the first meeting, and often, the client loses the complaint, charges, information, or indictment. But counsel can and should check Case.net, the Missouri State Courts Automated Case Management System, to obtain an unofficial charge with the applicable statute or statutes or call the clerk of the court to obtain a copy.

This will aid counsel with the initial interview. The website for Case.net is:

www.courts.mo.gov/casenet/base/welcome.do

13. (§3.17) Do You Ask Client About "Guilt"?

Counsel's avoidance of this ultimate fact may well be questioned, at least in the mind of the public. Why does counsel not want to know this ultimate fact? *See*:

- ABA Standards for Criminal Justice, Defense Function Standard 4-7.5(a)*, available at*:

  www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html#7.5

- Missouri Supreme Court Rules Governing the Missouri Bar and the Judiciary, Rule 4-3.3, Candor Toward the Tribunal, and Rule 4-8.4, Misconduct, *available at*:

  www.courts.mo.gov/page.jsp?id=667

Replace the bulleted items after "Second, Comment, Offering Evidence, available at www.abanet.org/cpr/mrpc/rule_3_3_comm.html, states:" with the following:

> [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.
>
> [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

III. Driving While Intoxicated Cases

A. (§3.28) Client Interview

Section 577.023.1(2)(b), RSMo Supp. 2011, holds that two prior pleas of guilty or findings of guilt may render the pending charge a felony instead of a misdemeanor. Specifically, the statute classifies offenders with prior DWI convictions into four different categories:

1. Prior offender—one prior plea of guilt or finding of guilt

2. Persistent offender—two prior pleas of guilt or findings of guilt

3. Aggravated offender—three prior pleas of guilt or findings of guilt

4. Chronic offender—four or more prior pleas of guilt or findings of guilt

Section 577.023.1.

This is significant for two reasons:

1. Any plea of guilty or finding of guilt over an individual's life may be used to enhance future DWI charges. This includes SIS (suspended imposition of sentence) and convictions.

2. The range of punishment on a DWI begins as a B misdemeanor and increases with each later plea of guilty or finding of guilty to a possible B felony.

Turner v. State, 245 S.W.3d 826 (Mo. banc 2008), states that a prior DWI that received an SIS in municipal court cannot be used to enhance the current charges. This is no longer the case because the Missouri legislature quickly closed this loophole, *see* H.B. 1715, 94th Gen. Assembly, 2nd Reg. Sess. (Mo. 2008), but *Turner* stands for the point that a careful reading of the statute is important and can create innovative ways to attack a case.

Additional cases holding that the defendant's actions resulted in a refusal to take the breathalyzer test include the following:

- *Fick v. Dir. of Revenue*, *State of Mo.,* 240 S.W.3d 688 (Mo. banc 2007)

- *Warner v. Mo. Dir. of Revenue*, 240 S.W.3d 745 (Mo. App. W.D. 2007)

- *Jones v. Dir. of Revenue, State of Mo.*, 237 S.W.3d 624 (Mo. App. E.D. 2007)

- *Guhr v. Dir. of Revenue*, 228 S.W.3d 581 (Mo. banc 2007), *overruled by White v. Dir. of Revenue*, 321 S.W.3d 298 (Mo. banc 2010)

Additional cases holding that the defendant's actions did not result in a refusal of the test include the following:

- *Furne v. Dir. of Revenue*, 238 S.W.3d 177 (Mo. App. W.D. 2007)

- *Scholes v. Dir. of Revenue, State of Mo.*, 228 S.W.3d 62 (Mo. App. W.D. 2007)

Counsel should research cases involving whether the court has ruled that an individual refused or did not refuse to take a breathalyzer. A complete listing and detailing of all cases do not fall within this chapter's scope. A case that counsel should be familiar with is *White*, 321 S.W.3d 298, which discusses *burden of proof* versus *burden of persuasion*. The difference between the two can make the difference of whether the Missouri Director of Revenue wins the case.

B. (§3.29) Right to Counsel

Yet, the Supreme Court of Missouri, in *Spradling v. Deimeke*, 528 S.W.2d 759 (Mo. 1975), held that, notwithstanding the arrested person's right to counsel, that person does not have the constitutional right to consult with or to have counsel present before deciding whether to submit to a breath test or to condition the consent to that test on counsel being present. *See also*:

- *Stenzel v. State, Dep't of Revenue*, 536 S.W.2d 163 (Mo. App. E.D. 1976)

- *McMurray v. Dir. of Revenue, State of Mo.*, 800 S.W.2d 820, 821–22 (Mo. App. E.D. 1990)

- *Albrecht v. Dir. of Revenue*, 833 S.W.2d 40 (Mo. App. E.D. 1992)

- *Staggs v. Dir. of Revenue*, 223 S.W.3d 866 (Mo. App. W.D. 2007)

D. (§3.31) Bibliography Regarding DWI

- LAWRENCE E. TAYLOR & STEVEN OBERMAN, DRUNK DRIVING DEFENSE (Aspen Publishers, 7th ed. 2010)

Gregory W. Vleisides*
Jennifer L. Benedict**

2012 Cumulative Supplement to

Chapter 4

4

INDICTMENTS, INFORMATIONS, AND GRAND JURY PROCEEDINGS

Supplemented:
§§4.2
4.4
4.8
4.10
4.11
4.16

*Mr. Vleisides's biographical information appears on page 4–1 of the original chapter. He is a principal in the law firm of Vleisides, O'Leary, LLC, with offices in Missouri, Kansas, and Illinois.

**Ms. Benedict received her B.S., 1992, from Missouri State University and J.D., 1996, from the University of Missouri-Kansas City. She is the owner of the Jennifer Benedict Law Office, LLC, in Independence and is a trial lawyer practicing civil, criminal, and domestic law.

II. Qualifications and Selection of Grand Jurors

A. (§4.2) General Statutory Provisions

Correct the citation to "Section 404.425," following the bulleted list in the original section, to:

Section 494.425

Insert the following paragraph before the last paragraph of the original section:

The grand jury may also appoint a clerk to preserve the minutes of the proceedings and the evidence given before it. Section 540.100, RSMo 2000. Once the grand jury is discharged from further service, the minutes kept by the clerk shall be given to the prosecuting or circuit attorney. *Id.*

C. (§4.4) Challenges to Grand Jury Selection

Effective July 1, 2004, a master jury list must be the result of a "random selection of names from a minimum of two government records including, but not limited to, personal property tax list, voter's registration list, and driver's license records." Section 494.410.2, RSMo Supp. 2011. The master jury list and records used in its compilation are to be retained for five years by the Board of Jury Commissioners. Section 494.410.4.

> To establish a prima facie claim that a grand jury pool did not represent a fair cross-section of the community, as required by the equal protection clause of the Fourteenth Amendment, defendant needed to:
>
> - identify a recognizable, distinct class,
> - show substantial under-representation of that class of persons in jury pools over a significant period of time, and
> - prove that the jury selection process is susceptible of abuse or is not racially neutral.

Ringo v. Roper, 472 F.3d 1001 (8th Cir. 2007), *cert. denied,* 552 U.S. 977 (2007).

III. Indictments and Informations

C. (§4.8) Form and Purpose of the Indictment or Information

Also holding that the purposes of an indictment or information are to inform the accused of the charges so that the accused can prepare an adequate defense and to prevent retrial on the same charge in case of an acquittal are:

- *State v. Kroenung*, 188 S.W.3d 89 (Mo. App. S.D. 2006)
- *State v. Collins*, 154 S.W.3d 486 (Mo. App. W.D. 2005)

E. (§4.10) Motions to Dismiss and Sufficiency of the Accusation

An indictment that fails to contain an essential element may be held insufficient after a guilty plea has been entered by the defendant. *State v. Hicks*, 221 S.W.3d 497 (Mo. App. W.D. 2007).

For additional cases that are not so particular about the pleading of detail, especially in sexual abuse cases, see:

- *State v. Miller*, 250 S.W.3d 736 (Mo. App. S.D. 2008)
- *Brooks v. State*, 242 S.W.3d 705 (Mo. banc 2008)
- *Hicks*, 221 S.W.3d 497

The court in *Miller* held that, among other findings, the defendant was "adequately informed of the charges to enable him to prepare his defense at trial" and, therefore, was not prejudiced by the trial court's denial of his motion for an amended bill of particulars. *Miller*, 250 S.W.3d at 742.

F. (§4.11) Bill of Particulars

State v. Adams, 229 S.W.3d 175 (Mo. App. S.D. 2007), held that the "trial court did not abuse its discretion in failing to grant Appellant's motion relating to [his] purported request for a bill of particulars" because the document that the appellant submitted did not contain enough information to be

able to determine that it was a request for a bill of particulars and the 67 questions and answers contained in the document showed that the appellant was "clearly" aware of the "nature and cause of the charges against him."

Two cases also supporting that discovery, including depositions, may supply the facts of the crime to the accused are:

- *State v. Carlock*, 242 S.W.3d 461 (Mo. App. S.D. 2007)
- *State v. Williams*, 126 S.W.3d 377 (Mo. banc 2004)

V. Secrecy of Proceedings

A. (§4.16) Modified by Statute

Also discussing the grand jury system being premised on secrecy is:

- *United States v. McDougal*, 559 F.3d 837 (8th Cir. 2009)

Thomas M. Bradshaw*
Chadler E. Colgan**

2012 Cumulative Supplement to

Chapter 5

REPRESENTING CLIENTS BEFORE INVESTIGATIVE BODIES

5

Supplemented:
§§5.3
5.9
5.25
5.32
5.35
5.37
5.39A (New Section) Selective Waiver

*Mr. Bradshaw's biographical material appears on page 5–1 of the original chapter. He is of Counsel with White Goss Bowers March Schulte & Weisenfels, a Professional Corporation in Kansas City.

**Mr. Colgan received his B.A., 1997, from the University of Missouri-Kansas City and J.D., 2000, from Washburn University. He is a senior associate with White Goss Bowers March Schulte & Weisenfels, a Professional Corporation in Kansas City.

II. Grand Jury Investigations

B. (§5.3) Consideration Before Accepting Representation

The U.S. Attorneys' Manual is now available at:

www.justice.gov/usao/eousa/foia_reading_room/usam/

C. Conducting One's Own Investigation

6. (§5.9) Grand Jury Witness Tampering

The term of imprisonment has been changed from 10 years to 20 years. 18 U.S.C. § 1512.

F. Witness Preparation

2. (§5.25) Nature of Grand Jury Proceedings

Under Federal Rule of Criminal Practice 6(d), interpreters may be present when needed.

G. Asserting the Fifth Amendment Privilege Against Self-Incrimination

5. (§5.32) Immunity

The U.S. Attorneys' Manual is now available at:

www.justice.gov/usao/eousa/foia_reading_room/usam/

6. (§5.35) Right of Witness to Transcript of Own Grand Jury Testimony

The Court of Appeals for the District of Columbia Circuit has held that witnesses have the right to review their grand jury testimony transcript. *In re Grand Jury*, 490 F.3d 978 (D.C. Cir. 2007). In *Grand Jury*, two witnesses sought to review their grand jury testimony that occurred several months previously. *Id.* at 984. The witnesses wanted the

testimony to aid their counsel in advising them and also to review issues related to recantation under 18 U.S.C. § 1623. The district court denied the request, advising that the witnesses "had [not] shown a particularized and compelling need that outweighed the interests in maintaining grand jury secrecy." *Id*. The court of appeals reversed the district court's ruling and ordered that the two witnesses be allowed to review transcripts of their own grand jury testimony "in private at the U.S. Attorney's Office or a place agreed to by the parties or designated by the district court." *Grand Jury*, 490 F.3d at 990. The court of appeals reasoned that grand jury witnesses have a "strong interest" in being able to review prior testimony, but the government had "little good reason" to prevent review of the testimony. The court of appeals did not rule on whether the witnesses were entitled to have a copy of the transcript. *Id*.

III. Investigations by Administrative Bodies

B. Problem of Parallel Civil and Criminal Investigations

1. (§5.37) Shared Information

Change the citation in the last paragraph of the original section from Federal Rule of Criminal Procedure 6(e)(3)(C)(iv) *to the following*:

Federal Rule of Criminal Procedure 6(e)(3)(E)(iv)

3. (§5.39A) Selective Waiver (New Section)

Selective waiver is the concept of a corporation that is under investigation disclosing protected material to governmental agencies without waiving the attorney-client privilege and work product protections. *In re Quest Commc'ns*, 450 F.3d 1179 (10th Cir. 2006). The issue arises when third-party civil litigants attempt to compel

the production of documents from defendants that have previously produced the documents to law enforcement or governmental regulatory agencies.

The Eighth Circuit was the first court to recognize selective waiver in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc). In *Diversified*, the company created an independent audit committee and retained outside counsel to investigate and report on alleged misconduct by the company. *Id.* at 607. Outside counsel prepared a report, which was presented to the board of directors. The Securities and Exchange Commission also obtained a copy of the report via an administrative subpoena. *Id.* at 611. A customer of the company filed suit and sought to obtain a copy of the report prepared by outside counsel and the board of directors minutes in which outside counsel presented the report. *Id.* at 596–601. The district court ordered that the materials be turned over, and an Eighth Circuit panel affirmed the district court. *Id.* at 602–03. On rehearing en banc, the full Eighth Circuit reversed and ruled that there was only a limited waiver of the privilege and that to hold otherwise would hinder the "developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers." *Id.* at 611.

Jurisdictions are split on their views of selective waiver. Therefore, an analysis of the caselaw in the applicable jurisdiction is required. These decisions are fact specific. But the opinions recognize various factors that give direction to counsel as to how to best protect their corporate clients when they are faced with this situation. In *Teachers Insurance & Annuity Ass'n of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638, 646 (S.D.N.Y. 1981), the court suggested that the use of a "protective order, stipulation or other express reservation of the producing party's claim of privilege as to the materials disclosed" would be beneficial in protecting the disclosed material. *But see Bowne of New York City, Inc. v. AmBase Corp.*,

150 F.R.D. 465 (S.D.N.Y. 1993) (recognizing subsequent disagreement with *Teachers Insurance* holding). Also, establishing a "common interest" or "joint defense" when disclosing the materials may provide an exception to waiver because the disclosure advances the representation of the party and attorney preparation. *See Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414 (3rd Cir. 1991). Finally, counsel should limit disclosure and not allow distribution of the protected materials beyond the investigative agency.

Robert L. Fleming*

2012 Cumulative Supplement to
Chapter 6

PRELIMINARY HEARINGS

Supplemented:

§§6.1	(New Title)	Preliminary Hearing Distinguished From Probable Cause Hearing on Arrest
6.2		
6.3		
6.4		
6.6		
6.7		
6.8		
6.12		
6.14		
6.16		
6.17		
6.18		
6.19		
6.20		
6.23		
6.28		

*Mr. Fleming's biographical information appears on page 6–1 of the original chapter. He is an Assistant State Public Defender assigned to the 14th Judicial Circuit in Howard County and the 9th Circuit in Chariton County.

I. Background

A. (§6.1) Preliminary Hearing Distinguished From Probable Cause Hearing on Arrest (New Title)

The time limit for detention without a charge or a warrant is 24 hours. Section 544.170.1, RSMo Supp. 2011.

Replace the first sentence of the second paragraph of the original section with the following:

The right to a preliminary hearing is established in § 544.250, RSMo 2000, and Rule 22.09.

Replace the last sentence of the original section with the following:

Preliminary hearings are further discussed in:

- I MO. CRIMINAL PRACTICE ch. 7 (MoBar 4th ed. 2005 and Supp. 2012)
- ROBERT H. DIERKER, 28 MISSOURI PRACTICE, CRIMINAL PRACTICE HANDBOOK ch. 4 (West 2010)
- 5 AM. JUR. *Trials* 27, 33, *Pretrial Procedures and Motions in Criminal Cases* (1966 and Supp. 2011)

B. (§6.2) Initiation of Felony Proceedings

Replace the statutory citations at the end of the original section with:

§§ 544.240, 544.250, 544.410, and 544.420, RSMo 2000, and § 540.031, RSMo Supp. 2011

C. (§6.3) Legal Purpose of Hearing

Add the following sentence to the end of the second full paragraph of the original section:

For instances when "a" different felony is charged in the subsequent information than in the original complaint, see §6.7 of this chapter.

D. (§6.4) Right to Counsel

For an interesting discussion regarding the right to have unbiased and conflict-free counsel, see *State ex rel. Burns v. Richards*, 248 S.W.3d 603 (Mo. banc 2008) (a former defense counsel who became a prosecutor charged a former client in a "substantially related" matter).

For further discussion of the preliminary hearing as a discovery tool, see *State v. Aaron,* 218 S.W.3d 501 (Mo. App. W.D. 2007), and §6.8 of the original chapter.

Add the following citation at the end of the first sentence of the original section:

U.S. CONST. amend. VI; MO. CONST. art. I, § 18(a).

Replace the citation to § 561.031.2 *in the final paragraph of the original section with the following*:

§ 561.031.1(2), RSMo Supp. 2011

II. Procedure

B. (§6.6) Change of Judge

See *State v. McDaniel*, 236 S.W.3d 127, 134–36 (Mo. App. S.D. 2007), which held that the judge at the preliminary hearing for the case could serve as the judge for the trial; it is the defendant's right, which can be waived under § 478.240.2(2), RSMo Supp. 2011.

For an excellent and detailed discussion of assignment of judges and rights to and procedures for change of judge, see Robert H. Dierker, 28 *Missouri Practice, Criminal Practice Handbook* ch. 18 (Westlaw 2012).

C. (§6.7) Conduct of Hearing

Cross-examination of prosecution witnesses is specifically provided for in Rule 22.09(b). A preliminary hearing is sufficiently like a trial to require public (and particularly, media) access. *El Vocero de P.R. (Caribbean Int'l News Corp.) v. P.R.*, 508 U.S. 147 (1993). Also, regarding issues of confrontation of witnesses, see *Crawford v. Washington*, 541 U.S. 36 (2004), and *State v. Hill*, 247 S.W.3d 34 (Mo. App. E.D. 2008), and the discussion in §6.12 of this supplement.

In the analysis of whether the charges in the prosecution's information are "new" or "different offenses," the defendant's substantial rights should be protected and not prejudiced, and a case-by-case scrutiny is warranted. *See* § 544.250, RSMo 2000; Rule 23.08; *State v. Simpson,* 846 S.W.2d 724 (Mo. banc 1993).

III. (§6.8) Preliminary Hearing as a Discovery Tool: Pretrial Discovery

On page 6–11 of the original chapter, the fifth sentence of the original section should read as follows:

It should be noted that § 595.209.1(1), RSMo Supp. 2011 (new text in italics), allows for victims of certain crimes "to be present at all criminal justice proceedings [including the preliminary hearing] . . . even if the victim is called to testify *or may be called to testify* as a witness in the case."

V. Discovery

A. (§6.12) No Entitlement to Discovery

Although Rule 22.09(b) provides for cross-examination of witnesses, if the preliminary hearing occurs before disclosure of police reports and witness statements, full and complete "confrontation" may be problematic. *Compare Crawford v. Wash.*, 541 U.S. 36 (2004), *with State v. Turner*, 242 S.W.3d 770 (Mo. App. S.D. 2008) (reading from testimony at a preliminary hearing does not raise a confrontation clause issue, even when defense counsel was different between the preliminary hearing and the trial and even when discovery was not yet provided to the defense at the time of the hearing).

VI. Motions Filed in Preliminary Hearing

A. (§6.14) When to File Motions

As in drug cases, when a motion to suppress evidence in accordance with an unlawful search and seizure should automatically be filed, counsel should strongly consider a motion *in limine* in sex cases when the prosecution intends to offer evidence of *modus operandi* or "propensity" (other crimes) evidence. *See State v. Voorhees*, 248 S.W.3d 585 (Mo. banc 2008).

VII. Sequestration and Exclusion of Witnesses

A. (§6.16) "The Rule"

In the second paragraph of the original section and after the citation to § 595.209.1(1), *the quote should read as follows (new text is in italics)*:

"to be present at all criminal justice proceedings [including the preliminary hearing] . . ., even if the victim is called to testify *or may be called to testify* as a witness in the case."

B. (§6.17) Defense Witnesses

Change the citation to Rules 25.12–25.15 *in the last paragraph of the original section to the following*:

Rules 25.12–25.18

C. (§6.18) Should Defendant Testify?

At a preliminary hearing, the defendant is entitled to present evidence and cross-examine the state's witnesses. Rule 22.09(b). Although, as a general rule, the defendant should never testify and may not want to present any evidence at a preliminary hearing, there is a limited exception when there is irrefutable evidence (re identity) that the defendant could not have committed the felony—i.e., the defendant was in prison or jail somewhere else or incapacitated in a medical facility. The author has had each happen, exactly once.

Because any prior inconsistent statements made by the defendant at the preliminary hearing can be used as substantive evidence at trial, so can admissions made by the defendant, however innocuous they may seem at the time of the preliminary hearing. *State v. Garner*, 103 S.W.3d 866 (Mo. App. S.D. 2003).

For an example of the myriad ways testimony by witnesses about statements made by a defendant can be problematic for defense counsel thereafter, see *Garner v. State*, 144 S.W.3d 926 (Mo. App. S.D. 2004).

VIII. (§6.19) Recording a Preliminary Hearing: The Right to a Transcript

A witness may be impeached by statements made at a preliminary hearing. The problem is how to do this effectively when no record has been made of the preliminary hearing. Counsel may be the only witness in these circumstances. This can cause counsel to become a witness in the case and poses legitimate ethical problems. *State ex rel. Fleer v. Conley,*

809 S.W.2d 405 (Mo. App. E.D. 1991). Counsel may want to have an investigator present who can testify to inconsistent statements.

Absent a motion and agreement beforehand, counsel invites objection.

Recorded testimony may also be used if it is inconsistent with trial testimony by the witness. *State v. Irby*, 254 S.W.3d 181 (Mo. App. E.D. 2008).

In connection with confrontation issues under *Crawford v. Washington,* 541 U.S. 36 (2004), see §§6.7 and 6.12 of this supplement.

Replace the last two sentences of the first paragraph in the original section with the following:

In all other cases, there is no requirement that a record and transcript be prepared, but a record and transcript may be made of the hearing on motion of and at the expense of the accused, and the court cannot deny the motion, *State ex rel. Steeley v. Oswald*, 147 S.W.3d 81 (Mo. banc 2004), when a certified stenographer is used or the parties agree to:

- the method and verification of accuracy of any transcript; and
- equal access to the transcript.

IX. Waiver of Preliminary Hearing

A. (§6.20) Waiver Generally Not Advisable

When a preliminary hearing is waived in return for a plea agreement, which is nonbinding on the court until accepted and approved, a blown plea or withdrawal of the agreement does not entitle the accused to the preliminary hearing that was waived. *State ex rel. Ballenger v. Franklin*, 114 S.W.3d 883 (Mo. App. W.D. 2003).

Replace the next-to-last sentence of the first paragraph of the original section with the following:

But there are times when a waiver may be advised or useful. See §§6.21, 6.22, and 6.23 below for examples of these situations.

D. (§6.23) Waiver as Tool of Plea Bargaining

As discussed in the original chapter, a preliminary hearing that allows the prosecutor to hear evidence that alerts the prosecutor to the possibility of more serious charges is something to be avoided, if possible. This is also true of preliminary hearings on sexual offenses. Frequently, new information comes out through a complaining witness, indicating to the prosecution that additional (or more serious) charges are available or supported. Counsel may wish to consider whether, under all of the circumstances involved in a particular case, waiver of a preliminary hearing—and, later on, recorded depositions after achieving intimate familiarity with all the discovery in the case—may be warranted or advisable.

In light of the discussion of the role of preliminary hearing testimony in overcoming Confrontation Clause objections to missing witness statements in §6.12 of this supplement, especially in domestic violence cases when complaining witnesses "blow hot and cold," defense counsel may want to consider waiving a preliminary hearing when it seems likely that the state will not be able to produce the complaining witness in the future.

XI. Forms

B. (§6.28) Waiver of Appearance at Preliminary Hearing

Replace the citation to § 561.031.2 *in the form in the original section with the following*:

§ 561.031.1(2), RSMo Supp. 2011

Kristina Starke Olson*

2012 Cumulative Supplement to

Chapter 7

DISCOVERY BY RIGHT OR THROUGH COURT ACTION

Supplemented:
§§7.4
7.6
7.8
7.9
7.10
7.14
7.15
7.18
7.21
7.23
7.24
7.26
7.30
7.31
7.32

7

*Ms. Olson's biographical information appears on page 7–1 of the original chapter. She is an Assistant Public Defender for the Missouri State Public Defender in St. Charles County.

III. (§7.4) Statutory Provisions

Section 491.075, RSMo Supp. 2011, was amended in 2008 to include under its scope the statements of children under 14 years of age who are the victims of an offense under Chapter 565, 566, 568, or 573, RSMo.

Section 577.020.6, now RSMo Supp. 2011, was amended in 2006 to limit what is deemed "full information" that the state must disclose on a chemical test for the alcohol or drug content of a person's blood. Full information includes:

- details about the test administered;
- the time of the collection;
- the numerical results;
- the status of any permit of the person performing the test; and
- the date of performance of the most recent required maintenance of a breath-testing instrument.

"Full information does not include manuals, schematics, or software of the instrument used . . . or any other material that is not in the actual possession of the state." *Id.*

IV. Missouri Rules of Criminal Procedure

A. (§7.6) Rule 25.01

Furthermore, the state's failure to provide discovery before the preliminary hearing will not preclude it from using the transcript of a witness's testimony from that hearing at trial if the witness becomes unavailable. *State v. Aaron*, 218 S.W.3d 501, 511 (Mo. App. W.D. 2007). Defense counsel's opportunity to cross-examine the witness at the preliminary hearing, despite not having received discovery at that point, is sufficient under the Confrontation Clause. *Id.* at 517.

C. (§7.8) Rule 25.03

The defendant cannot complain that the state failed to disclose information mandated by Rule 25.03 unless there is a timely discovery request in the court's file. Rule 25.03(B). *See State v. Bescher*, 247 S.W.3d 135, 139–40 (Mo. App. S.D. 2008) (appellate court could not determine whether the state's failure to disclose a firearm examiner's bench notes violated Rule 25.03 when there was no discovery request on record).

Other than Rule 25.03(C), the state has no obligation to disclose evidence it does not possess. *See State v. Deason*, 240 S.W.3d 767, 774 (Mo. App. S.D. 2007) (the state's disclosure of the defendant's handwritten note on the second day of trial, shortly after the prosecutor learned of it and received it from a state witness, did not require sanctions); *see also State v. Middlemist*, 319 S.W.3d 531, 540 (Mo. App. S.D. 2010) (a defendant cannot fault the state with failing to produce bank records that the defendant could have obtained through subpoena).

1. (§7.9) Witnesses and Their Statements

Even though the state's failure to disclose a witness's recorded statement before trial "clearly violate[s] discovery rules," the nondisclosure will not require reversal of a defendant's conviction unless the defendant can "prove that the late disclosure resulted in fundamental unfairness." *State v. Jamison*, 163 S.W.3d 552, 558 (Mo. App. E.D. 2005). Exclusion of the evidence is not the only sanction available to the trial court; it may also order disclosure of the information, grant a continuance, or enter "other orders it deems just under the circumstances." *Id.* at 559. Therefore, when the state failed to disclose its witness's recorded statement to the defense, an adequate remedy was for the trial court to restrict the state's use of the tape for impeachment purposes. *Id.* Because there was overwhelming evidence of the defendant's guilt, including the witness's trial testimony, "unaided by the tape," the defendant was not entitled to a new trial. *Id.* at 557.

2. (§7.10) Statements of the Defendant or Co-Defendant

In *State v. Kehner*, 776 S.W.2d 396 (Mo. App. E.D. 1989), discussed in the original section, the Eastern District reversed for a new trial because the state's claim that it had no duty to disclose the existence of the rebuttal witness was not compelling. But in *State v. Dorsey*, 156 S.W.3d 791, 803 (Mo. App. S.D. 2005), the court held that the state's failure to disclose that the defendant had made inculpatory statements to another inmate before trial did not require reversal. Rather, the Southern District found that the trial court's decision to admonish the jury to disregard any questions and answers concerning the inmate and its refusal to let the inmate testify were adequate remedies.

The defendant cannot claim prejudice from the state's late disclosure or nondisclosure of the defendant's inculpatory statements when the defendant was aware that the statements existed because the defendant wrote or initialed them. *See, e.g., State v. Robinson*, 298 S.W.3d 119, 124 (Mo. App. E.D. 2009) (letters were authored by the defendant); *State v. Holden*, 278 S.W.3d 674, 679–80 (Mo. banc 2009) (sex offender registration records were initialed by the defendant).

6. (§7.14) Physical Evidence

As with items the state uses in cross-examination but that it does not intend to introduce into evidence, as discussed in the original section, items that the state introduces in rebuttal do not have to be disclosed. *See State v. Slater*, 193 S.W.3d 800, 806 (Mo. App. W.D. 2006) (the state did not have to disclose that the officer found scuff marks on the door of the burglarized home when that information was only offered in rebuttal).

Nor is the state required to produce discovery records pertaining to material previously disclosed if the information in those records was not new. *See State v. Delancy*,

258 S.W.3d 110, 115 (Mo. App. E.D. 2008) (the state did not have to disclose call records from a cell phone when it had previously disclosed that the phone and the call records were contained in the phone).

7. (§7.15) Records of Witnesses' Prior Convictions

The state is not required to disclose that a witness received an SIS (suspended imposition of sentence) because an SIS is not a conviction. *Rogers v. State*, 265 S.W.3d 853, 855 (Mo. App. S.D. 2008).

D. (§7.18) Disclosure to Defendant by Court Order for Good Cause

If the trial court denies a defendant's motion for discovery under this rule, the defendant may seek relief by filing a writ of mandamus with the court of appeals. *See, e.g., State ex rel. Sanders v. Crane*, 326 S.W.3d 131 (Mo. App. S.D. 2010) (writ of mandamus was granted ordering the trial court to order the state to produce a plastic bag allegedly handled by the defendant in order for the defendant to have the bag tested for fingerprints).

E. Disclosure by the Defendant to the State

2. (§7.21) List of Witnesses and Copies of Statements

If the trial court decides to exclude an unendorsed witness's testimony, defense counsel should make an offer of proof, in either question-and-answer format or by counsel summation of the proposed testimony, demonstrating why the testimony was admissible and the role that the excluded evidence would have played in the defendant's case. *State v. Cox*, 248 S.W.3d 720, 722–23 (Mo. App. S.D. 2008). Without an offer of proof, it is difficult for an appellate court to assess if the trial court's sanction resulted in fundamental unfairness to the defendant. *Id.* at 722.

4. (§7.23) Mental Disease or Defect

Rule 25.05(A)(4) only requires the defense to disclose an intent to rely on a defense of mental disease or defect *excluding responsibility*. The Supreme Court of Missouri held in *State v. Walkup*, 220 S.W.3d 748, 757 (Mo. banc 2007), that the defense does not have to disclose an intent to rely on a defense of diminished capacity.

5. (§7.24) Alibi Defense

But in *State v. Hopper*, 315 S.W.3d 361 (Mo. App. S.D. 2010), the appellate court found that a new trial was required when the trial court excluded a defendant's alibi witnesses disclosed just two weeks before trial when defense counsel demonstrated good cause for the late disclosure.

G. (§7.26) Disclosure by Defendant to State Upon Order and for Good Cause

Significantly, the court does not have the authority under this provision to order the defendant to submit to a mental evaluation to determine the defendant's mental state at the time of the alleged offense unless the defendant is raising a defense of "not guilty by reason of mental disease or defect excluding responsibility." *State ex rel. Thurman v. Pratte*, 324 S.W.3d 501, 504 (Mo. App. E.D. 2010).

I. Depositions

1. (§7.30) By the Defendant

In *State v. Rushing*, 232 S.W.3d 656, 659 (Mo. App. S.D. 2007), the state disclosed to the defense that the alleged victim in a statutory sodomy case had made new allegations of sexual abuse against the defendant. But when defense counsel sought to retake the girl's deposition, the trial court granted the state's motion for a protective order blocking the deposition entirely. *Id.* at 661. On appeal, the defendant claimed that the court's order denied him "the

opportunity of discovery so as to prepare a meaningful defense against the new allegations." *Id*. The Southern District agreed, finding that, because the trial court "made no finding that good cause existed to quash [the victim's] deposition, nor did the court articulate any reason for its order from which the existence of good cause could be inferred," its decision to block the deposition rendered the defendant's trial fundamentally unfair. *Id*. at 662.

2. (§7.31) By the State

Courts have held that a witness's military deployment to another country obviates the requirement that the state show a good faith effort to obtain the presence of the witness at the hearing or trial. *See*, *e.g.*, *State v. Artis*, 215 S.W.3d 327, 335 (Mo. App. S.D. 2007).

J. (§7.32) Sanctions

See also *State v. Cook*, 339 S.W.3d 523, 528 (Mo. App. E.D. 2011), which held that the court is not required to *sua sponte* grant relief for a discovery violation when the defendant has requested none.

Robert W. Russell*

2012 Cumulative Supplement to

Chapter 8

JURISDICTION, VENUE, AND DISQUALIFICATION OF JUDGES

Supplemented:
§§8.25
8.30
8.33
8.38
8.50

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II. Venue

F. (§8.25) Change of Venue—General Standard

A court must transfer the case to another county if a proper change of venue motion under Rule 32.03(c) is made. The state may not transfer the case within the county to another location where court is held within the county. *See Matthews v. State*, 175 S.W.3d 110 (Mo. banc 2005) (the court's failure to transfer the case to another county was improper, but counsel's failure to object to the court's refusal to transfer was not ineffective assistance of counsel).

*Mr. Russell's biographical information appears on page 8–1 of the original chapter.

I. (§8.30) Application for Change of Venue

Only a defendant may request a change of venue. The court may not, on its own motion, change venue. *State ex rel. Devlin v. Sutherland*, 196 S.W.3d 593, 594 (Mo. App. E.D. 2006).

L. (§8.33) Order for Removal

Rule 32.09(c) does not permit the court to order a change of venue on its own motion. *State ex rel. Devlin v. Sutherland*, 196 S.W.3d 593, 594–95 (Mo. App. E.D. 2006).

III. Disqualification of Judges

C. (§8.38) Disqualification With or Without Cause

"The mere fact that rulings are made against a party does not show bias or prejudice on the part of the judge." *State v. McDaniel*, 236 S.W.3d 127, 136 (Mo. App. S.D. 2007) (quoting *Robin Farms, Inc. v. Bartholome*, 989 S.W.2d 238, 247 (Mo. App. W.D. 1999)).

There is no requirement that the motion specify by name the judge to be disqualified. *State v. Rulo*, 173 S.W.3d 649, 651 (Mo. App. E.D. 2005).

I. (§8.50) Probation Revocation

A probation revocation is a civil matter and not a criminal proceeding. *State ex rel. Manion v. Elliott*, 305 S.W.3d 462, 464 (Mo. banc 2010). It is a civil action, and therefore, a request for change of judge is governed by Rule 51.05 as opposed to Rule 32.07. *Id.* A request for change of judge must be filed within 60 days from the service of process or 30 days from the designation of the trial judge, whichever time is longer. Rule 51.05(b).

Rebecca J. Grosser*

2012 Cumulative Supplement to
Chapter 9

SEARCH AND SEIZURE

Supplemented:
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9.21A (New Section) Anticipatory Search Warrants
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The author acknowledges the research assistance of Michael Schwalbert.

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IV. Coverage of the Fourth Amendment

A. (§9.6) What Is a Search

Attaching a global positioning system tracking device to the undercarriage of an individual's vehicle and later monitoring of the vehicle constitutes a search. *United States v. Jones*, 132 S. Ct. 945 (2012).

A defendant consented to provide a DNA sample for the purpose of assisting with a murder investigation in Illinois. *State v. Bowman*, 337 S.W.3d 679, 685 (Mo. banc 2011). The Supreme Court ruled that the later use of the DNA sample by St. Louis County authorities for a Missouri investigation did not violate the defendant's Fourth Amendment rights. *Id.* The Court noted, "Fourth Amendment analysis focuses on the intrusiveness of the initial search, not on the subsequent use of information obtained from that search." *Id.*

Reasonable expectation of privacy was found in the unpaved portion of a driveway in *United States v. Wells*, 648 F.3d 671 (8th Cir. 2011). In finding the area to be curtilage, the court considered that:

- the unpaved driveway ran alongside the home;
- the lighted outbuilding was just behind the residence and only a few feet from it;
- the officers walked 50 feet and through a 12-foot-wide gap in the fence;

- along the way, the officers walked past the paved walkway to the residence leading to both the front door and the carport door; and

- at all times, the officers were flanked on three sides by fencing, which enclosed the lot on its sides and back.

Id. at 676–78. The court further concluded the "knock and talk" was unreasonable because the officers made no attempt to contact the defendant at the doors that they walked past nor did they have any reason to believe at 4:00 a.m. that the defendant could be contacted in the backyard. *Id.* at 680; *see also State v. Bates*, 344 S.W.3d 783 (Mo. App. S.D. 2011) (court found backyard to be curtilage); *State v. Kruse*, 306 S.W.3d 603 (Mo. App. W.D. 2010) (court found backyard to be curtilage when officers arrived at the defendant's residence after midnight, no exterior lights were on to welcome the public to enter the premises, the entrance to the residence was in the front yard, "no trespassing" signs would ordinarily have been understood to assert privacy interest on entire property, the backyard could not be seen from the road and was not in plain view, and the backyard and back door were enclosed by trees on three sides and the home on the fourth side; entry was improper).

A computer check of a vehicle's license plate is not a search because people have no subjective expectation of privacy, and even if they do, it is not reasonable. *State v. Loyd*, 338 S.W.3d 863, 866 (Mo. App. W.D. 2011) (citing *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1151 (9th Cir. 2007)). The court further adopted the reasoning of *Diaz-Castaneda* by noting that a license plate check is nonintrusive and similar to a check of a vehicle identification number, which is located inside a vehicle but observable from the outside. *Loyd*, 338 S.W.3d at 866.

B. What Is a Seizure?

1. (§9.7) Seizure of Property

United States v. Va Lerie, 424 F.3d 694 (8th Cir. 2005), examines more fully the meaningful-interference-with-one's-possessory-interest-in-property test asserted in *United States v. Jacobson*, 466 U.S. 109, 113 (1984) (cited in the original chapter). Va Lerie, a passenger on a Greyhound bus, checked a bag onto the bus's baggage compartment. *Va Lerie*, 424 F.3d at 696. When the bus stopped to refuel, a law enforcement officer examined the bus's luggage compartment and discovered a new piece of luggage with a luggage tag displaying only Va Lerie's name. The officer ran a computer check of the luggage's claim number and learned that the one-way ticket had been purchased that day with cash. Under Greyhound policy, the luggage was removed from the bus to a room inside the terminal. *Id.* at 697. Va Lerie was paged to the ticket counter and asked to accompany a plainclothes officer to the room where his luggage had been taken. The officer accompanied Va Lerie to the room, where Va Lerie identified the luggage as his. Law enforcement officers sought and received from Va Lerie consent to search the bag. Officers located five baggies containing cocaine in the luggage. In finding that no seizure occurred, the court focused on three factors:

1. A brief, temporary removal of checked luggage did not delay Va Lerie's travel or impact his freedom of movement. This occurred only after Va Lerie consented to the search of his luggage.

2. Law enforcement's removal of Va Lerie's luggage from the bus "did not affect the timely delivery of the luggage."

3. One's possessory interest in checked luggage includes the expectation that the carrier will remove the luggage to and from the baggage compartment.

Id. at 708.

V. Justification for Searches and Seizures

B. (§9.10) Justification for Seizure: Plain View

The court ruled that a multi-family dwelling's back staircase that was shared by all of the tenants and did not lead directly to the defendant's residence was not curtilage. *United States v. Brooks*, 645 F.3d 971 (8th Cir. 2011). In finding that this area was not curtilage, the court also noted the shared nature of the area, its visibility from public areas of the building, and that the gates to the back of the building were open and unlocked when officers arrived. *Id.* at 975–76. Because this area was not curtilage, officers had a right to be in the staircase, and the seizure of a firearm that was in plain view was appropriate. *Id.* at 976.

C. (§9.11) Justification for Seizure: Persons

The brief detention of a vehicle containing passengers who were recently arguing in Wal-Mart and purchasing items associated with the manufacture of methamphetamine, including camping fuel in January, was deemed reasonable under the principles of *Terry v. Ohio*, 392 U.S. 1 (1968). *State v. Brand*, 309 S.W.3d 887, 895–96 (Mo. App. W.D. 2010).

Officers who believed that the defendant had an outstanding warrant for his arrest were justified in detaining him to confirm the warrant status. *State v. Johnson,* 316 S.W.3d 390 (Mo. App. W.D. 2010). The reasonable suspicion for the initial stop was based on information acquired by an officer within the two weeks before the stop, even if the officer could not remember the precise source of information. *Id.* at 397–98.

The probable cause standard is sufficient to support a warrantless arrest, even for minor offenses. *State v. Mondaine*, 178 S.W.3d 584 (Mo. App. E.D. 2005). Mondaine was arrested for trespass in the first degree, a class B misdemeanor, after officers observed him sitting on the steps of a building with clearly displayed "no trespassing" signs. *Id.*

at 586. Under a search incident to his arrest for trespass, the officers located heroin on Mondaine's person. Mondaine argued that, while the officer may have had probable cause for his arrest, the arrest was, nevertheless, unreasonable because of the nonviolent, minor nature of the offense. *Id.* at 588. Because this argument was rejected by the U.S. Supreme Court in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), other states have afforded their citizens greater protections. But § 544.216, RSMo 2000, expressly permits arrest for any law violation, and Missouri's Constitution does not provide greater protection than that of the Fourth Amendment to the U.S. Constitution. *Mondaine*, 178 S.W.3d at 588–89.

D. (§9.12) Justification for Seizure: Vehicles

A seizure that is based solely on an uncorroborated anonymous tip is unreasonable. *State v. Grayson,* 336 S.W.3d 138 (Mo. banc 2011).

During a traffic stop, an officer may develop reasonable, articulable suspicion justifying an expanded investigation beyond that necessary to conclude the purpose of the initial detention. *United States v. Payne,* 534 F.3d 948 (8th Cir. 2008). In *Payne,* officers responded to a 4:30 a.m. residential alarm on a dead-end street in an area known for criminal activity. *Id.* at 950. Upon concluding their investigation, the officer observed a vehicle without a front license plate traveling down the roadway. As the vehicle drove by, the officer shined his light into the vehicle, and one of the passengers covered his face. The vehicle turned around at the dead end and drove back up the road. The officer followed this vehicle a short distance before conducting a traffic stop. When the officer made contact with Payne, the driver, he also observed three passengers, including the owner. The officer obtained identifying information from Payne, but Payne was unable to provide his driver's license. The officer returned to his vehicle and contacted the dispatcher. The dispatcher utilized MULES (Missouri Uniform Law Enforcement System) and relayed to the officer that Payne was known to be armed and dangerous and had a "hit." MULES shut down

before confirming the hit's details. The officer returned to Payne and asked him to exit the vehicle. When Payne stepped out of the vehicle, the officer noticed a weapon between the driver's door and seat and two 9mm magazines near the driver's seat. The officer conducted a pat-down of Payne and discovered that Payne was wearing a gun holster. The officer returned to the vehicle, moved the driver's seat, and discovered an unlatched gun case on the floor behind the driver's seat. The officer opened the gun case and found two loaded handguns. It was later discovered that the vehicle's front license plate was present but improperly secured by wire to the grill on the passenger side of the vehicle. The entire stop lasted approximately 39 minutes. *Id.* at 951. The court determined that, although the officer's initial stop was based on a mistaken fact, this mistake was reasonable under the circumstances, and the stop was therefore supported by probable cause. *Id.* Furthermore, during each phase of the stop, the officer acquired additional information permitting additional investigation and continued detention. *Id.* at 952. The court deemed it important to note that, while the duration of the traffic stop was approximately 39 minutes, each phase of the investigation was conducted without delay. *Id.*

Courts repeatedly look not only at the length of the detention but also at the necessity for the delay. *See, e.g.*:

- *State v. Pesce,* 325 S.W.3d 565 (Mo. App. W.D. 2010) (reasonable investigation of a traffic violation is not required to conclude after the driver's license and registration check is completed by the police, and consent given during the time necessary to complete a computer check was deemed reasonable)

- *State v. Waldrup*, 331 S.W.3d 668 (Mo. banc 2011) (investigatory stop of a vehicle that extended to a *Terry* stop (*Terry v. Ohio*, 392 U.S. 1 (1968)) of the defendant/passenger and radio check of a passenger that took a total of 15 minutes was reasonable)

- *State v. Woods*, 284 S.W.3d 630 (Mo. App. W.D. 2009) (a 15-minute wait for a canine unit's arrival when the dog was requested 8 minutes after the stop was initiated and completed 4 minutes after the canine's arrival was not "a burdensome period of inactivity")

- *State v. Brand*, 309 S.W.3d 887 (Mo. App. W.D. 2010) (a traffic stop was not concluded because the officer had not returned the passengers' identifications to them and the defendant was still in the officer's patrol vehicle when the officer immediately asked additional questions and the defendant offered to allow the officer to search the vehicle; continued detention was reasonable)

Contrast with *State v. Stover*, No. WD 70594, 2010 WL 5070868 (Mo. App. W.D. Dec. 14, 2010), *transferred*, No. SC 91760 (Mo. Aug. 30, 2011) (argued Jan. 4, 2012) (a 20-minute detention was unnecessary and unreasonable when the officer was trying to develop reasonable suspicion before requesting the canine unit, which did not arrive for 25 minutes), and *Grayson,* 336 S.W.3d 138 (continued detention based on a hunch that the driver had a criminal history was improper seizure).

An anonymous tip that a possible drunk driver is traveling on a certain road in a certain direction is not sufficient for an officer to formulate reasonable suspicion, based on articulable facts, to justify a traffic stop. *State v. Roark*, 229 S.W.3d 216 (Mo. App. W.D. 2007).

Although an officer may have determined that a violation of the law has occurred, until a warning or citation is issued, the traffic stop has not concluded. *State v. Cox*, 248 S.W.3d 1 (Mo. App. W.D. 2008). In *Cox*, the officer initiated a traffic stop to investigate the window tinting of Cox's vehicle, which appeared to be in violation of state law. *Id.* at 3. After measuring the tint, the officer observed a package of beer in the car. *Id.* at 6. The officer, therefore, asked Cox other questions, including whether he had drunk any alcohol and if there were drugs in the vehicle. Cox voluntarily offered to

allow the officer to search the vehicle. Although the officer had already determined that Cox was in violation of the window-tint law, the court concluded that he was still investigating the traffic violation when he began questioning Cox about the beer. The court held that the subsequent questions were related and did not extend the duration of the traffic stop; the stop was, therefore, reasonable.

An encounter with law enforcement does not become consensual if, after the traffic stop is complete, the officer re-engages the driver in conversation without specific, articulable facts to support reasonable suspicion that the driver was involved in criminal activity. *State v. Ross*, 254 S.W.3d 267 (Mo. App. E.D. 2008). Although the officer advised the driver that he was free to go and returned his license, as the driver was returning to his vehicle, the officer exited his vehicle and called out to the driver by name. *Id.* at 271. The driver asked the officer if he thought that his passenger should drive. The officer indicated that he thought so and proceeded to ask the driver a series of questions about drugs and drug trafficking, culminating with a request to search the driver's vehicle. The driver initially consented orally, but before signing the written consent form, indicated that he would need to speak to his passenger first. *Id.* at 271–72. The officer ordered the driver to wait while the officer spoke to the passenger. *Id.* at 272. The officer took the passenger back to sit in the patrol car and advised both the passenger and the driver that they were not free to leave. Approximately one hour later, a canine unit arrived on the scene. The court found that the continued encounter was not consensual because a reasonable person would not feel free to terminate the encounter. *See also State v. Sund*, 215 S.W.3d 719 (Mo. banc 2007).

VI. Search Warrant

A. (§9.14) Background and Purpose

Officers obtained a warrant to search Darr's home, looking for three specific articles reportedly utilized during child sex crimes that took place at Darr's home. *United States v. Darr,*

661 F.3d 375, 376–77 (8th Cir. 2011). The most recent incident occurred seven months before the search. *Id.* at 377. Darr challenged the search warrant, stating that it was not based on probable cause because it was based on stale information. *Id.* at 378. The court stated that there is no time-specific formula for staleness, but based on the everyday nature of the items sought, as well as Darr's recent attempts to contact the children, found it reasonable to believe that the items sought would still be in the residence. *Id.*

Even reviewing the affidavit in a common-sense, rather than hypercritical manner, the fact that illegal substances were observed at a particular location at some unidentified time in the past, without more, does not establish probable cause required to search the premises. *State v. Wilbers*, 347 S.W.3d 552 (Mo. App. W.D. 2011) (items were ultimately admissible under the good faith exception).

The court found that, even if an affiant included additional facts in the materials for a search warrant, the affidavit was not intentionally misleading. *State v. Wolfe*, 344 S.W.3d 822, 832–33 (Mo. App. S.D. 2011). Even if this additional information was included, the affidavit would still support probable cause to issue a warrant. *Id.*

When an informant signed an affidavit for a search warrant under the penalty of perjury, a police officer's affidavit relying on that informant's statements was sufficient to support a finding of probable cause to issue a search warrant. *State v. Henry*, 292 S.W.3d 358 (Mo. App. W.D. 2009).

F. (§9.19) Particularly Describing What Is to Be Seized

General language to seize evidence of "[r]ape, [s]odomy and [a]ssault on a 15 year old white male" was deemed too general to support a search under a warrant. *State v. Tolen*, 304 S.W.3d 229, 232–33 (Mo. App. E.D. 2009). But because the warrant also authorized the search and seizure of "quantities of marijuana and paraphernalia related to the use of marijuana," the seizure of evidence of crimes of statutory sodomy discovered during the lawful search was permissible. *Id.*

G. (§9.20) Manner of Execution and Scope of Search

Failure of the Missouri Highway Patrol to execute a search warrant before notifying the county sheriff as directed, but not mandated, by statute, § 43.200, now RSMo Supp. 2011, does not alone demonstrate prejudice justifying exclusion of evidence. *State v. Walker*, 330 S.W.3d 122 (Mo. App. E.D. 2010).

When executing a search warrant, officers are justified in reasonably detaining the occupants of the residence during the search. In *Muehler v. Mena*, 544 U.S. 93, 100 (2005), the Court held that officers acted reasonably in handcuffing potentially dangerous occupants for two to three hours during the execution of a search warrant for weapons and evidence of gang membership. Even the detention of occupants of a different race than the individuals named in a valid search warrant can be reasonable. *Los Angeles Cnty., Cal. v. Rettele*, 550 U.S. 609 (2007). In *Rettele*, the officers executing the search were unaware that the individuals named in the warrant had moved out three months earlier. *Id.* at 611. After ordering the residents out of bed naked, officers quickly realized that the residents posed no threat to them. The residents were allowed to dress and leave the bedroom within three to four minutes. The deputies then realized they had made a mistake, apologized, and left within five minutes. In determining that the officers acted reasonably, the Court balanced the need for officer safety with the brief interference with the occupants' liberty.

I. (§9.21A) Anticipatory Search Warrants (New Section)

An anticipatory search warrant, one requiring a condition precedent to occur before execution, is valid under the Fourth Amendment to the U.S. Constitution. *United States v. Grubbs*, 547 U.S. 90 (2006). In *Grubbs*, officers obtained a warrant to search Grubbs's home, permitting execution only after a controlled delivery of child pornography to that residence. The affidavit described the triggering condition and the controlled delivery and explained that execution would not occur unless and until the pornography had been received

by the resident and taken into the home. *Id.* at 94. Obviously, if execution were to occur before the occurrence of the triggering condition, there is no probable cause to believe that the items sought in the warrant would be located. *Grubbs* argued that anticipatory search warrants are, thus, invalid because they are issued without probable cause. *Id.* at 94–95. The Supreme Court rejected this argument, stating that all warrants are, in a sense, anticipatory in that the probable cause requirement "looks to whether the evidence will be found when the search is conducted." *Id.* at 95. The Court found that anticipatory warrants are valid as long as the issuing judge determines that, at the time of issuance, there is probable cause to believe that the items sought in the warrant will be at the named location when the warrant is executed. *Id.* at 96. It is not necessary that the triggering condition be named in the warrant itself. *Id.* at 99.

VII. Warrant Requirement and Its Exceptions

B. (§9.23) Exceptions to the Warrant Requirement

The warrantless search of a vehicle was deemed not to violate the Fourth Amendment after the defendant abandoned the vehicle and fled from the police on foot, leaving the car open with keys in the ignition and the motor running in a public area. *United States v. Smith*, 648 F.3d 654 (8th Cir. 2011).

A government employee may have a reasonable expectation of privacy in text messages on a pager provided by the government. *City of Ontario*, *Cal.*, 130 S. Ct. 2619 (2010). But the government may conduct searches to retrieve work-related materials or investigate violations of workplace rules without violating the Fourth Amendment. *Id.* at 2630–31.

1. (§9.24) Exigent Circumstances

The U.S. Supreme Court again examined the exigent circumstances in *Michigan v. Fisher*, 130 S. Ct. 546 (2009). The Court upheld the officer's warrantless entry into

Fisher's home to investigate a disturbance call when, upon arrival, they observed his home in chaos, blood leading from the vehicle into the residence, the entrances barricaded, and a cut to Fisher's hand. *Id.* at 547. The Court ruled that "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception," reasoning that "[t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties." *Id.* at 549 (quoting *Brigham City, Utah v. Stuart*, 547 U.S. 398, 406 (2006)).

Officers were justified in entering a home and conducting a protective sweep for burglars or injured residents under the exigent circumstances exception in response to an activated security system alarm and, upon arrival, finding the front door unlocked and ajar and receiving no response to knocks. *State v. Warren*, 304 S.W.3d 796, 802–03 (Mo. App. W.D. 2010). Once inside the home, the seizure of items that were discovered in plain view was not subject to exclusion. *Id.* at 803.

The natural dissipation of alcohol in the blood does not meet the exigent circumstances test to justify a warrantless blood draw. *State v. McNeely*, 358 S.W.3d 65 (Mo. banc 2012). "Officers must reasonably believe that they are confronted with an emergency where the delay in obtaining a warrant would threaten the destruction of evidence." *Id.* at 74 (quoting *Schmerber v. Cal.*, 384 U.S. 757, 770 (1966)). The existence of special facts is determined on a case-by-case basis but includes accident investigation or medical necessity that would delay law enforcement's request of a suspect to submit to blood alcohol testing. *McNeely*, 358 S.W.3d at 74.

Exigent circumstances did not exist to justify a warrantless entry into a backyard to search for the subject of an arrest warrant because the officers had sufficient time to secure a search warrant. *State v. Kruse,* 306 S.W.3d 603, 611–12 (Mo. App. W.D. 2010).

When officers were permitted to wait in the living room for the arrival of the homeowner but no consent was given to search the remainder of the home, later entry into the garage was not justified under exigent circumstances. *State v. Cromer*, 186 S.W.3d 333 (Mo. App. W.D. 2005). The Western District reasoned that, because the officers were at the home under a "knock and talk," the pursuit exigency was not applicable. *Id.* at 345. Furthermore, because the two individuals who had entered the home while the police officers were waiting were not aware that the police were inside, there was little likelihood that they would destroy evidence, nor did the police have a reasonable belief that evidence was being destroyed. Finally, the officers admitted that they did not have a reasonable basis to believe that they were in danger from the individuals in the garage. Therefore, no exigent circumstances existed to justify the officers' entry into the garage.

Police officers are justified under exigent circumstances to enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury; their subjective intent, even if that is to collect evidence or make an arrest, is irrelevant. *Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006).

2. (§9.25) Automobile Exception

When officers were directed to the alley that the defendant had just utilized in flight from a robbery, the officers observed the defendant get out of a vehicle with cash in his hands, and the defendant then struggled with the officers, the warrantless search of the vehicle was reasonable when a knife and clothing matching the description of that involved in the robbery were observed through the open door of the vehicle. *State v. Richardson*, 313 S.W.3d 696, 700 (Mo. App. S.D. 2010).

After a small amount of marijuana was located in the passenger compartment of a vehicle under a search

incident to arrest, a search of the trunk of the vehicle was justified, even if the search did not take place immediately after the arrest. *State v. Irvin*, 210 S.W.3d 360 (Mo. App. W.D. 2006).

C. Exceptions to Warrant *and* Probable Cause Requirements

2. (§9.27) Consent

By calling 911 and requesting assistance, an individual is consenting to police entry into the home, which may lead to additional investigation. *Mayes v. State*, 349 S.W.3d 413, 418–19 (Mo. App. S.D. 2011).

Consent after a defendant initially invoked his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), but later reinitiated conversation with police was deemed valid. *State v. Ashby*, 339 S.W.3d 600 (Mo. App. E.D. 2011).

An undercover detective's invited entry into a defendant's home and business does not constitute a search or seizure. *State v. Allison*, 326 S.W.3d 81 (Mo. App. W.D. 2010).

Consent was deemed freely and voluntarily given when two officers spoke to the resident, did not display weapons, and one officer followed the resident into a bedroom to obtain a marijuana pipe. *State v. Allen*, 277 S.W.3d 314, 316 (Mo. App. S.D. 2009). The resident provided the pipe to the officer, then consented to the search of a drawer, and consented to a search of the entire residence after locating "cut" in the same drawer. *Id.*

Consent to search can be implied from an individual's conduct, but an individual deemed incapable of giving actual consent because of intoxication is also incapable of giving valid implied consent to search. *United States v. Castellanos*, 518 F.3d 965 (8th Cir. 2008).

Consent to search is not valid if another occupant of the premises is present and refuses to consent. *Ga. v.*

Randolph, 547 U.S. 103 (2006). But if multiple occupants are present, officers do not need to obtain consent from all present occupants, and consent is valid from one occupant unless another co-occupant objects during the search. *United States v. Hilliard*, 490 F.3d 635 (8th Cir. 2007). Consent can be obtained from another occupant, even if one co-occupant has refused, if the refusing co-occupant is absent. *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008). The previous refusal does not need to be conveyed before obtaining consent. *Id.*

A third party who rented a motel room can consent to search of a room occupied by another, but the occupant can refuse, invalidating the initial consent. *United States v. Williams*, 521 F.3d 902 (8th Cir. 2008).

3. (§9.28) Special Needs: In General

When state law requires parolees to consent to warrantless, suspicionless searches, not only do parolees lack a legitimate expectation of privacy, but these searches serve a valid "overwhelming" governmental interest in supervising parolees and protecting the public from recidivists. *Samson v. Cal.*, 547 U.S. 843 (2006).

4. (§9.32) Protection of Officers and Preservation of Evidence

Exigent circumstances include the need to prevent the destruction of evidence and permit police officers to conduct an otherwise impermissible search without first obtaining a warrant. *Ky. v. King*, 131 S. Ct. 1849 (2011).

In *King*, police officers followed a suspected drug dealer to an apartment complex. *Id.* at 1854. They smelled marijuana outside an apartment door, knocked loudly, and announced their presence. As soon as the officers began knocking, they heard noises coming from the apartment; the officers believed that these noises were consistent with the destruction of evidence. The officers announced their intent to enter the apartment, kicked in

the door, and found King and others. They saw drugs in plain view during a protective sweep of the apartment and found additional evidence during a later search. *Id.* By knocking on the door and announcing their presence, the officers did not create the exigency. *Id.* at 1863. The entry into the apartment was lawful under the exigent circumstances exception. *Id.*

a. (§9.33) Search Incident to Arrest

The search of an automobile incident to an arrest is appropriate only when "the arrestee is within reaching distance of the passenger compartment of the vehicle at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Ariz. v. Gant*, 556 U.S. 332, 351 (2009). Otherwise, police must obtain a warrant or demonstrate another exception to the warrant requirement. *Id.*

This decision narrows the previous holding of *New York v. Belton*, 453 U.S. 454 (1981). *Gant*, 556 U.S. at 348. But those vehicle searches incident to arrest conducted in reliance on *Belton* and before *Gant* are not subject to the exclusionary rule. *Davis v. United States*, 131 S. Ct. 2419, 2248–49 (2011); *State v. Johnson*, 354 S.W.3d 627 (Mo. banc 2011).

The court of appeals found that a warrantless, nonconsensual breath test performed incident to arrest was reasonable in a non-DWI case. *State v. Dowdy*, 332 S.W.3d 868 (Mo. App. S.D. 2011).

b. (§9.34) Protective Frisk

Walking in a high-crime area, wearing a sweatshirt on a September day that began at 50 degrees but warmed to 68 degrees by late afternoon, and intently watching a police cruiser drive by does not rise to the level of reasonable suspicion so as to justify being stopped on the street and frisked. *United States v. Jones*, 606 F.3d 964 (8th Cir. 2010).

An officer on routine patrol in a high-crime area who sees an individual adjust his pants has no reasonable suspicion to justify continued detention when the officer sees no bulge or weapon. *State v. Norfolk*, No. ED 95468, 2011 WL 5541791 (Mo. App. E.D. Nov. 15, 2011), *transferred*, 366 S.W.3d 528 (Mo. banc 2012).

After conducting a patdown, the officer was not justified without probable cause to direct the defendant to empty his pockets. *State v. Gambow*, 306 S.W.3d 163 (Mo. App. S.D. 2010). Further search and seizure of a metal container previously contained within the defendant's pockets without a warrant or consent constituted an unreasonable search. *Id.* at 164.

Under the "plain-feel" doctrine, an officer must reasonably believe that the item felt poses a danger to the officer's safety; an officer is not justified to retrieve an object, much less open that object, even if that object "could" contain contraband. *State v. Kelley*, 227 S.W.3d 543 (Mo. App. S.D. 2007).

5. (§9.36) Other Detentions and Searches Based on Safety Needs

It was reasonable for an officer to make initial contact with a roadside motorist who, at 2:00 a.m., had parked his car with the bright lights on and was checking the vehicle's tires. *State v. Schroeder,* 330 S.W.3d 468 (Mo. banc 2011).

VIII. Challenging a Search or Seizure

A. (§9.37) Standing

There was no right to vicariously assert an employer's rights to a seized computer because the individual had no reasonable expectation of privacy. *State v. Faruqi*, 344 S.W.3d 193, 205 (Mo. banc 2011).

A defendant, who did not own the property and was not living in the home nor paying rent to the owner because the home had been condemned, had no reasonable expectation of privacy and therefore lacked standing to challenge a warrantless search. *State v. Snow*, 299 S.W.3d 710 (Mo. App. W.D. 2009).

A passenger in a vehicle who would not feel free to leave is therefore also seized during a traffic stop and entitled to challenge the validity of the stop. *Brendlin v. Cal.*, 551 U.S. 249 (2007).

B. (§9.38) Exclusionary Rule

The exclusionary rule is not automatically triggered for recordkeeping errors. *Herring v. United States*, 555 U.S. 135 (2009). Police arrested Herring on what they believed to be an outstanding warrant for his arrest. *Id.* at 137–38. A search of Herring incident to the arrest located drugs and a gun. *Id.* at 137. It was later discovered that the warrant had been recalled, but this information had not been entered into the computer system. *Id.* at 138. To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it and sufficiently culpable that the deterrence is worth the price paid by the justice system. *Id.* at 144. The Court reasoned that the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct or, in some circumstances, recurring or systemic negligence, but in this instance, does not apply to mere negligent recordkeeping errors. *Id.* at 144, 147–48.

When an affidavit is silent as to when the contraband had been observed, and the court found probable cause lacking to support the warrant, the good faith exception was triggered because the affidavit was not so lacking in "indicia of probable cause that it would be entirely unreasonable for a reasonably well-trained officer to rely on it." *State v. Wilbers,* 347 S.W.3d 552, 562 (Mo. App. W.D. 2011). The error was attributed to the issuing court and not to the officer. The court noted that exclusion of the seized evidence was "not worth the [social] cost." *Id.* (quoting *Herring*, 555 U.S. at 144 n.4).

When a state provides more protection than that of the Fourth Amendment to the U.S. Constitution, violations of state law do not mandate suppression of the evidence as long as the warrantless search is reasonable under the Fourth Amendment. *Va. v. Moore*, 553 U.S. 164 (2008).

When items were seized from the garage of a residence that officers were not given consent to enter, and the entry was not justified by exigent circumstances, those items must be suppressed. *State v. Cromer*, 186 S.W.3d 333, 348 (Mo. App. W.D. 2005).

1. (§9.39) Limits on Application of Exclusionary Rule

The purposes of the knock-and-announce rule are the:

- safety of the officer;
- protection of property; and
- preservation of the privacy and dignity of the occupant.

Therefore, violations of the rule do not mandate application of the exclusionary rule. *Hudson v. Mich.*, 547 U.S. 586 (2006). But an unannounced *warrantless* entry mandates exclusion of the items seized, absent an entry justified by exigent circumstances. *State v. Gibbs*, 224 S.W.3d 126 (Mo. App. W.D. 2007).

2. (§9.40) Exceptions to Exclusionary Rule: Inevitable Discovery and Independent Source

Officers received information that the defendant had engaged in crimes of a sexual nature involving children. *State v. Oliver*, 293 S.W.3d 437, 440–41 (Mo. banc 2009). When officers arrived to investigate the crime, the defendant's wife let the officers in. *Id.* at 441. The defendant answered some questions, took the officers to his home office, and showed them a computer, disks, and a camera

involved in the crime. The defendant refused to consent to a search, and the officers began the process to obtain a search warrant. As directed, the defendant left the residence, and after he did so, the wife gave consent to search the camera, disks, and computer. The officers seized these items and, later that day, obtained a warrant to search the contents of the items. *Id.* Although the items were seized without a warrant, the Court stated that the officers relied on the wife's consent in seizing the items. *Id.* at 443. Even if the wife's consent was not valid, or if the officers had not relied on her consent, the admissibility of the items is not affected because the evidence would have inevitably been discovered under a search warrant. *Id.*

The court refused to apply the exclusionary rule when officers intruded upon curtilage with bondsmen when the state argued that, if the bondsmen had entered into the backyard without law enforcement, the bondsmen would have reported the marijuana plant to police. *State v. Bates,* 344 S.W.3d 783, 789–91 (Mo. App. S.D. 2011).

The independent-source rule does not provide an exception to the fruit-of-the-poisonous-tree doctrine unless the source is entirely "separate and distinct" from the Fourth Amendment violation. *State v. Renfrow*, 224 S.W.3d 27 (Mo. App. W.D. 2007), *overruling State v. Neher*, 726 S.W.2d 362 (Mo. App. W.D. 1987), and *Settle v. State*, 679 S.W.2d 310 (Mo. App. W.D. 1984).

3. (§9.41) Fruits of the Poisonous Tree and Purging the Taint

An officer lacked probable cause to arrest a minor for possession of alcohol because the juvenile defendant was merely present in the vehicle, no alcohol was found near the defendant, and the defendant did not display signs of visible intoxication. *State v. J.D.L.C.*, 293 S.W.3d 85, 89 (Mo. App. W.D. 2009). After the arrest, the officers transported the defendant to the jail and obtained a breathalyzer sample. *Id.* at 87. The breathalyzer was

obtained in close temporal proximity to the illegal arrest, and it is unlikely that, absent the illegal arrest, the breathalyzer test would have been obtained at all. *Id.* at 89. Therefore, the breathalyzer cannot be purged of the primary taint and was deemed fruit of the poisonous tree. *Id.*

When a law enforcement officer completed a traffic stop but re-engaged the driver without reasonable suspicion, the items discovered during the warrantless search of the vehicle's trunk were fruit of the poisonous tree, requiring suppression. *State v. Sund*, 215 S.W.3d 719 (Mo. banc 2007); *State v. Dixon*, 218 S.W.3d 14 (Mo. App. W.D. 2007).

Gerald M. Handley*
Cynthia A. Dryden**
Jason T. Umbarger***

2012 Cumulative Supplement to
Chapter 10

IDENTIFICATION

Supplemented:

§§10.31		
10.34A	(New Section)	Mitochondrial
10.34B	(New Section)	Paternity
10.37	(New Title)	Discovery and Trial Issues
10.38		
10.39		
10.40		

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*Mr. Handley's biographical information appears on page 10–1 of the original chapter.

**Ms. Dryden's biographical information appears on page 10–1 of the original chapter.

***Mr. Umbarger reviewed this supplement and found that no changes were needed to the 2008 supplement written by Mr. Handley and Ms. Dryden. He received his B.S., 1996, from Missouri State University and M.B.A. and J.D., 2000, from the University of Missouri-Kansas City. Mr. Umbarger practices in Springfield.

III. Identification by Scientific Evidence

A. DNA Evidence

1. DNA Admissibility

a. (§10.31) Standard

In criminal cases, the Supreme Court of Missouri has kept the *Frye* standard—*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)—and has not applied the admissibility and reliability tests from either § 490.065, RSMo 2000, or *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

> Despite application of the test for admission of expert testimony in civil cases articulated by section 490.065, RSMo 2000, and discussed in *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 160 (Mo. banc 2003), Missouri courts, in criminal cases, still follow the test articulated in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), for the admission of scientific evidence.

State v. Daniels, 179 S.W.3d 273, 281 (Mo. App. W.D. 2005).

If the Supreme Court of Missouri would change to a new admissibility standard that would include a reliability assessment in criminal cases, there would be a major impact on the litigation of DNA cases. Trial courts would have the opportunity to rule on pretrial admissibility challenges to DNA evidence based on the manner in which the DNA test was conducted in each particular case.

b. Types of DNA Tests

(4) (§10.34A) Mitochondrial (New Section)

Mitochondrial DNA is inherited only through the maternal line; therefore, all maternal relatives will share the same mitochondrial DNA profile. Post-conviction proceedings in *Storey v. State*, 175 S.W.3d 116 (Mo. banc 2005), included the admission of the results of mitochondrial DNA testing. The mitochondrial DNA testing was performed by past counsel, and those test results did not exclude Mr. Storey. The Court noted that, "Although mitochondrial DNA is not a reliable indicator, it is gaining acceptance as an exclusion method. *See United States v. Beverly*, 369 F.3d 516, 531 (6th Cir. 2004)." *Storey*, 175 S.W.3d at 144 n.4.

(5) (§10.34B) Paternity (New Section)

In *State ex rel. Sanders v. Sauer*, 183 S.W.3d 238 (Mo. banc 2006), the state brought criminal nonsupport charges against Mr. Perkins, and the trial court granted defense counsel's request for paternity testing. The state then sought a writ of prohibition against the judge to prevent the paternity testing. In a criminal nonsupport case, the state does not have to prove actual paternity but needs to prove "beyond a reasonable doubt that a [paternity] judgment was entered establishing that the child was 'legitimized by legal process.'" *Id.* at 240. In *Sauer*, the Division of Family Services filed a paternity case against Mr. Perkins. In response, Mr. Perkins filed an entry of appearance, waived service, and filed a stipulation to take blood tests but failed to appear four separate times to give blood. A default judgment and child support order was entered against Mr. Perkins, and he did not appeal. The Supreme Court held that Mr. Perkins's "inability to contest paternity

is his own fault" and that the child had been legitimized by the legal process, within the meaning of § 568.040.1(2), now RSMo Supp. 2011. *Sauer*, 183 S.W.3d at 240.

In comparison, the Supreme Court of Missouri determined that Mr. Salazar could not be convicted of criminal nonsupport when the child support payments were based on a default paternity administrative order. *State v. Salazar*, 236 S.W.3d 644, 647 (Mo. banc 2007). Because such an administrative order lacks any type of judicial review, it is not a final judgment of the circuit court, and there is "no 'legal process' that judicially determined Salazar's parentage." *Id.*

The admission of a paternity test result was hearsay, but the error was harmless because admission of the report was not "outcome determinative." *State v. Tabor*, 219 S.W.3d 769, 773 (Mo. App. S.D. 2007).

2. (§10.37) Discovery and Trial Issues (New Title)

Destruction of the Sample—Protective Orders

Frequently, DNA testing labs use the entire biologic sample to perform a DNA test. *State v. Ferguson*, 20 S.W.3d 485 (Mo. banc 2000). In *Ferguson*, the defendant failed to object before the testing began. The defendant raised an initial objection after the testing was complete and the evidentiary sample was consumed. *Id.* at 496. The Supreme Court followed the U.S. Supreme Court's reasoning in *Arizona v. Youngblood*, 488 U.S. 51, 109 (1988), and held, "In cases where the testing agency finds it necessary to consume the only sample of evidence in the testing procedure, admission of the test results does not violate due process in the absence of bad faith on the part of the state." *Ferguson*, 20 S.W.3d at 496. To avoid a similar situation, a motion for a protective order

can be filed under Rule 25.11. A protective order allows the court to determine how much of the remaining evidence sample is available to the parties and whether the sample could be split between the parties. As an additional remedy, a party could petition the courts to allow a scientific observer, who may not interfere but may watch as the DNA testing is performed. *Commonwealth v. Evans*, 778 N.E.2d 885 (Mass. 2002) (the defendant's observer was allowed to watch the performance of the DNA test).

Discovery Issues

When a new scientific test becomes available, new discovery issues inevitably arise. Computers have become an integral part of the latest STR (short tandem repeat) test. Computerized STR-DNA testing creates raw electronic data. Computers are used in STR testing to collect, sort, type, and label the STR test results. To analyze STR test results, the raw data is modified as it is put through a number of computer programs. Discovery of the raw data allows the opposing party to compare the raw data against the interpreted results. *See*:

- JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS (Elsevier Academic Press 2nd ed. 2005)

- *State v. Butterfield*, 27 P.3d 1133 (Utah 2001) (articles and descriptions of STR-DNA analysis)

- William C. Thompson et al., *Evaluating Forensic DNA Evidence: Essential Elements of a Competent Defense Review, Part I*, 27 THE CHAMPION 24–28 (2003)

Discovery of electronic data first became an issue in civil matters. *See* FED. R. CIV. P. 34 (computer data is considered a "document" under the rule and failure to make raw data available was a violation of discovery);

Crown Life Ins. Co. v. Craig, 995 F.2d 1376 (7th Cir. 1993). In 2001, the Illinois Supreme Court adopted Illinois Supreme Court Rule 417, which specifically requires that all software programs and electronic files relating to DNA be produced. This issue has rarely reached the appellate courts. *See State v. Haigns*, 121 Wash. App. 1019 (2004) (unpublished opinion). While Missouri has no specific raw-data discovery rules, parties may make a discovery motion under Rule 25.04 or 25.06 to obtain this raw data. The raw data from other types of scientific tests in Missouri have been held to be discoverable. *State ex rel. Svejda v. Roldan*, 88 S.W.3d 531 (Mo. App. W.D. 2002) (the defendant must turn over raw data from psychological tests in discovery). A number of Missouri trial courts have sustained motions for the discovery of raw electronic data in STR-DNA cases, including the following:

- *State v. Glass, Callaway Cnty.*, No. 01CR-168994-01 (Callaway County 13th Judicial Cir. Jan. 8, 2010) (Missouri State Highway Patrol Crime Lab)

- *State v. Pittman*, No. 2102CR-06567-01 (St. Louis County Court Sept. 9, 2004) (St. Louis County Crime Lab)

In 2006, the ABA (American Bar Association) adopted standards on DNA evidence. ABA Standards for Criminal Justice: DNA Evidence (3rd ed. 2007). The standards outline the evidence necessary for an adequate review of the state's DNA testing. The ABA standards explicitly require prosecuting attorneys to disclose the raw electronic data created during DNA testing.

A full and complete copy of the ABA Standards can be found at:

www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dnaevidence.html

Endorsement of DNA Witnesses

The Southern District of the Missouri Court of Appeals determined that the trial court abused its discretion when it permitted the state, over objection, to endorse a DNA expert one week before trial and denied the defendant's motion for continuance. *State v. Gray*, 230 S.W.3d 613, 618 (Mo. App. S.D. 2007). Mr. Gray did not have "time in which he could reasonably be expected to secure services of an expert to verify or contradict the DNA testing and evidence the state presented at trial." *Id*. The court found that:

> By not having been timely endorsed as a witness, albeit she was known to the state as an important contributor to its case, defendant was not alerted as to the need to secure independent testing to obtain evidence that might be contrary to the testimony [the state's DNA expert] provided or learn information that might have been helpful for purposes of cross-examination.

Id. at 617.

In *State v. Tripp*, 168 S.W.3d 667 (Mo. App. W.D. 2005), there was no manifest injustice or miscarriage of justice when the trial court allowed the state's DNA expert to testify after disclosing the lab reports merely two weeks before trial. *Id.* at 680. In *Tripp*, the issue was not preserved for appellate review and defense counsel:

> fails to make any showing or argument regarding what additional questions he would have posed . . . nor does he articulate which [of his expert's] conclusions he was rendered unable to confront [the state's expert] with because the discovery had not been received in a more prompt and thorough manner. Put another way, Tripp has failed to make any real showing of prejudice regarding this issue.

Id. at 675.

Trace Amounts of DNA—Sufficiency

The Supreme Court of Missouri took transfer of *State v. Freeman*, No. 28150, 2008 WL 142299 (Mo. App. S.D. Mar. 18, 2008) (*Freeman I*), and affirmed the Southern District's holding. *State v. Freeman*, 269 S.W.3d 422 (Mo. banc 2008) (*Freeman II*). In *Freeman I*, the Southern District reversed Mr. Freeman's murder first degree conviction for insufficient evidence and remanded the case for a judgment of acquittal. The only direct evidence linking Mr. Freeman to the murder was a miniscule amount of DNA: 0.0125 one billionth of a gram. *Freeman I*, 2008 WL 142299, at *5–*6. The court summarized the testimony from the DNA expert regarding transfer of DNA:

> DNA can transfer. One can transfer one's own DNA by shaking hands or touching someone else, i.e., skin-to-skin transfer. Transfers of one's DNA can occur by skin contact with an object, such as skin to clothing. Transfer can also occur in the other direction. The DNA of someone who has previously worn that clothing can transfer to the skin of someone who later wears that clothing. . . . Transfer can occur between two people or a person and an object without any physical contact. For example, saliva, mucus or sweat is propelled from one's body, by a natural movement or reflex such as talking or coughing, sneezing or swinging an arm, and deposits itself on another person or their clothing.

Id. at *5. The DNA testing also revealed the presence of at least one or maybe up to three additional, unknown DNA contributors to the items tested. *Id.* at *8. Additionally, the state could not say what type of DNA was left at the scene—whether it was blood, saliva, semen, or skin cells. *Id.* at *13.

3. (§10.38) Laboratory Reports as Hearsay

The Supreme Court of Missouri held that admission of a laboratory report as a business record to prove an element of a crime violates the Confrontation Clause of the U.A. Constitution. *State v. March*, 216 S.W.3d 663 (Mo. banc 2007), *abrogating State v. Taylor*, 486 S.W.2d 239 (Mo. 1972). *But see State v. Rice*, 249 S.W.3d 245

(Mo. App. E.D. 2008); *State v. Tabor*, 219 S.W.3d 769 (Mo. App. S.D. 2007) (the admission of lab reports without testimony of the person who performed the test was determined to be harmless error).

4. (§10.39) DNA Profiling Systems

The Missouri State Highway Patrol is responsible for establishing rules and protocols to implement the provisions of the DNA Profiling System. In a pro se challenge to the validity of Missouri's DNA Profiling System in *Cooper v. Gammon*, 943 S.W.2d 699 (Mo. App. W.D. 1997), Cooper challenged the validity of being confined to administrative segregation because of his refusal to give a blood sample under § 650.055, now RSMo Supp. 2011. The court held that:

- the statute did not violate *ex post facto* prohibitions;
- the taking of blood was not an unreasonable search and seizure;
- the statute was not an impermissible intrusion on the inmate's privacy rights;
- the statute did not violate the inmate's privilege against self-incrimination; and
- the statute did not violate substantive due process.

Cooper, 943 S.W.2d at 702–03. Before 2002, every jurisdiction upheld similar DNA profiling systems despite the rights enumerated in *Cooper*. Beginning in 2003, a few lower courts determined that the taking of DNA for DNA profiling systems violated the Special Needs Doctrine under the Fourth Amendment to the U.S. Constitution. Eventually, all of the lower court rulings were overturned. *See*:

- *United States v. Miles*, 228 F. Supp. 2d 1130, 1140 (E.D. Cal. 2002), *rev'd and remanded*, 130 Fed. Appx. 108 (9th Cir. 2005) (not published in the Federal Reporter)

- *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003), *rev'd and remanded*, 379 F.3d 813 (9th Cir. 2004)

- *United States v. Weikert*, 421 F. Supp. 2d 259 (D. Mass. 2006), *rev'd and remanded*, 504 F.3d 1 (1st Cir. 2007)

5. (§10.40) Post-Conviction DNA Testing

Statute—§ 547.035, now RSMo Supp. 2011

See the original section for a discussion of § 547.035.

DNA Testing Permitted Even if Criminal Defendant Pled Guilty

In 2004, the Supreme Court of Missouri ruled that post-conviction DNA testing was permitted, even if a criminal defendant pleads guilty. *Weeks v. State*, 140 S.W.3d 39, 45–46 (Mo. banc 2004). In *Weeks*, the Court held that "a person who pleaded guilty is not somehow 'more' guilty, or less deserving of a chance to show actual innocence, than one who went to trial." *Id.* at 46.

Was DNA Testing Reasonably Available?

Whether DNA testing was reasonably available to the defendant is not a matter of when the first DNA testing was performed in the United States, but it is a subjective test "subject to a reasonable availability standard." *Id.* at 48. In *State v. Kinder*, 122 S.W.3d 624 (Mo. App. E.D. 2003), only the restriction-fragment-length-polymorphism (known as RFLP) method of DNA testing was available at the time of trial. Since Kinder's conviction, polymerase-

chain-reaction (known as PCR) DNA testing began. The creation of a new type of DNA testing is not enough, by itself, to prove that DNA testing was not reasonably available to the movant at the time of trial. *Id.* at 632–33.

Identity at Issue—DNA Test Would Exonerate

In *State v. Fields*, 186 S.W.3d 501, 503 (Mo. App. S.D. 2006), Mr. Fields was not entitled to post-conviction DNA testing under § 547.035.2(4) because identity was not at issue at his trial. Further, Mr. Fields failed to show how any DNA testing result would exonerate him. *Fields*, 186 S.W.3d at 503.

Evidence to Be Tested

Missouri's post-conviction DNA-testing statute limits the items that a criminal defendant can test. Only items of evidence "secured in relation to the crime" can be tested to obtain relief under § 547.035.2(2). *Hudson v. State*, 190 S.W.3d 434, 435 (Mo. App. W.D. 2006). A court cannot grant a motion for post-conviction DNA testing if the movant does not put in the motion any specific evidence that was collected in the case and that could be DNA tested. *State v. Tyler*, 103 S.W.3d 245, 248–49 (Mo. App. E.D. 2003).

Findings of Fact and Conclusions of Law

A trial court's denial of post-conviction DNA testing requires the court to issue findings of fact and conclusions of law. In *Clayton v. State*, 164 S.W.3d 111 (Mo. App. E.D. 2005), the motion court erred when it denied an evidentiary hearing on Mr. Clayton's pro se motion for post-conviction DNA testing without issuing findings of fact and conclusions of law.

Randall D. Eggert*

2012 Cumulative Supplement to
Chapter 11

STATEMENTS OF A DEFENDANT

Supplemented:
§§11.2
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*Mr. Eggert's biographical information appears on page 11–1 of the original chapter.

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II. Discovery of the Existence of a Statement

A. (§11.2) Formal Discovery

Add the following citation at the end of the first sentence of the second paragraph in the original section:

State v. Taylor, 298 S.W.3d 482, 502 (Mo. banc 2009).

Add the following citation at the end of the second sentence of the second paragraph in the original section:

Taylor, 298 S.W.3d at 502.

Add the following text at the end of the original section:

Sanctions are governed by Rule 25.18:

> If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to make disclosure of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances. Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

In *State v. McMullin*, 136 S.W.3d 566, 570 (Mo. App. S.D. 2004), the court found that application of the sanctions in Rule 25.18 is not mandatory and that a "'trial court's denial of a requested sanction is an abuse of discretion only where the admission of the evidence results in fundamental unfairness

to the defendant.'" *McMullin*, 136 S.W.3d at 570 (citing *State v. Kilgore*, 771 S.W.2d 57, 66 (Mo. banc 1989)).

1. (§11.3) Prosecution

Add the following text at the end of the original section:

The prosecution is not excused from informing a defendant that it intends to use a defendant's statement on the ground that the prosecution did not actually have that statement in its possession before trial. *State v. Childers*, 852 S.W.2d 390, 391–92 (Mo. App. E.D. 1993).

III. Raising the Issue

A. (§11.5) Necessity for Hearing

Add the following text at the end of the original section:

The defendant must either orally, or in writing, request a *Denno* hearing. *See Jackson v. Denno*, 378 U.S. 368 (1964) (discussed in the original section). "A trial court is not required to hold a *Denno* voluntariness hearing on its own motion." *State v. Floyd*, 347 S.W.3d 115, 123 (Mo. App. E.D. 2011). If the defendant fails to make such a motion, it will be waived. *Id.*

C. (§11.8) Waiver

Add the following citation at the end of the second paragraph of the original section:

See State v. Rasheed, 340 S.W.3d 280, 287 (Mo. App. E.D. 2011) ("boilerplate" objections raised in a motion to suppress a defendant's statements were insufficient to preserve the issue for appeal).

Add the following citations and text at the end of the first sentence of the third paragraph of the original section:

State v. Nylon, 311 S.W.3d 869, 884 (Mo. App. E.D. 2010). In *State v. Dravenstott*, 138 S.W.3d 186, 195 (Mo. App. W.D. 2004), the court found that a plain error review of the trial court's refusal to suppress the defendant's statement was not warranted when the defendant's counsel made a specific objection on constitutional grounds to how the statement was obtained, even if the defendant had not filed a pretrial motion to suppress.

Add the following citations at the end of the second sentence of the third paragraph of the original section:

> *State v. Fincher*, 359 S.W.3d 549, 553 n.3 (Mo. App. W.D. 2012); *State v. Johnson*, 284 S.W.3d 561, 582 (Mo. banc 2009).

D. (§11.9) Finality of Pretrial Ruling

Add the following citation at the end of the first paragraph of the original section:

> *State v. Mateo*, 335 S.W.3d 529, 534 (Mo. App. W.D. 2011).

Add the following text at the end of the second paragraph of the original section:

In affirming the trial court's judgment that the defendant "was not entitled to have the jury instructed in the manner set forth in Instruction No. X," *State v. Salnave*, 185 S.W.3d 704, 710 (Mo. App. S.D. 2006), cites *State v. Wilson*, 105 S.W.3d 576, 586 (Mo. App. S.D. 2003) (discussed in the original section), which held that, before an instruction can be given, the defendant must present evidence that would support the contention that the statements were not made voluntarily or freely.

E. (§11.10) Preserving Objections for Appeal

Add the following citations and text at the end of the first paragraph of the original section:

State v. Rasheed, 340 S.W.3d 280, 287 (Mo. App. E.D. 2011) (a boilerplate motion to suppress does not preserve a specific claim on appeal); *see also*:

- *State v. Mateo*, 335 S.W.3d 529, 534 (Mo. App. W.D. 2011)
- *State v. Cain*, 287 S.W.3d 699, 704 (Mo. App. S.D. 2009)
- *State v. Dravenstott*, 138 S.W.3d 186, 195 (Mo. App. W.D. 2004)
- *State v. Walton*, 899 S.W.2d 915, 920–21 (Mo. App. W.D. 1995) (citing *State v. Schnick*, 819 S.W.2d 330, 336 (Mo. banc 1991), in stating that, "In ruling on the admissibility of a defendant's statements, the court need not make a particular formal finding.")

IV. Grounds for Objection and Suppression

A. (§11.12) Involuntariness

Add the following citation at the end of the second sentence of the first paragraph of the original section:

see also State v. Ruff, 360 S.W.3d 880, 886–87 (Mo. App. S.D. 2012).

Add the following citation at the end of the fourth sentence of the first paragraph of the original section:

Ruff, 360 S.W.3d at 886–87.

Add the following paragraph at the end of the first paragraph of the original section:

When a defendant challenges the admissibility of the defendant's statement on the ground that it was involuntary, the government bears the burden to show voluntariness by a preponderance of the evidence. *State v. Johnson*, 207 S.W.3d 24, 45 (Mo. banc 2006).

Evidence of the defendant's physical or emotional condition alone, absent evidence of police coercion, is insufficient to demonstrate that a confession was involuntary. *Id.* at 45.

Add the following citations at the end of the second sentence of the second paragraph of the original section:

> *see also State v. Dixon*, 332 S.W.3d 214, 218 (Mo. App. E.D. 2010); *State v. Phillips*, 319 S.W.3d 471, 477 (Mo. App. S.D. 2010).

1. (§11.13) Actions of Interrogators

Add the following text at the end of the first sentence of the first paragraph of the original section:

Section 544.170, RSMo Supp. 2011, was amended in 2005 to require "twenty-four hours" from the time of arrest to either charge or release the suspect. Section 544.170.1.

Add the following text at the end of the first paragraph of the original section:

A direct or implied promise of leniency does not, by itself, indicate that the confession was involuntary but is simply one factor to consider under the "totality of the circumstances" as to whether the confession was extracted by the promise. *State v. Dixon*, 332 S.W.3d 214, 218 (Mo. App. E.D. 2010). *State v. Jackson*, 248 S.W.3d 117, 123 (Mo. App. S.D. 2008), held that a police officer's false statement to the defendant about why the defendant was being taken to jail was not coercive. In *State v. Mateo*,

335 S.W.3d 529, 537–38 (Mo. App. W.D. 2011), a police statement to the defendant that "if [you] don't have anything to hide, [you] shouldn't need an attorney" is not "'will-breaking' coercion" when the defendant was told that he did have the right to have an attorney present.

2. (§11.14) Inherent Weaknesses of Defendant

Add the following text at the end of the first paragraph of the original section:

Voluntariness depends on the absence of police coercion and not on the mental ability of the defendant alone. *State v. Barriner*, 210 S.W.3d 285, 300 (Mo. App. W.D. 2006); *see also State v. Blackmun*, 875 S.W.2d 122, 134 (Mo. App. E.D. 1994) ("A statement which is induced by psychosis or a mental disease which destroys a defendant's volition and makes him confess is not involuntary within the meaning of the due process clause."); *State v. Skillicorn*, 944 S.W.2d 877, 890 (Mo. banc 1997) (evidence of the defendant's physical or emotional condition alone, absent evidence of police coercion, is insufficient to demonstrate that the confession was involuntary), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. banc 2008).

Add the following citation at the end of the second paragraph of the original section:

> *see also State v. Dixon*, 332 S.W.3d 214, 218 (Mo. App. E.D. 2010).

B. *Miranda v. Arizona*: Fifth Amendment Right to Counsel

1. Were Warnings Required?

a. (§11.17) Question of Custody

Add the following text at the end of the third paragraph of the original section:

A court, in determining whether a person is in "custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966) (*Miranda*), examines, under the totality of the circumstances in the case, "whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *United States v. Czichray*, 378 F.3d 822, 826 (8th Cir. 2004) (quoting *Cal. v. Beheler*, 463 U.S. 1121 (1983)); *State v. Hill*, 247 S.W.3d 34, 48 (Mo. App. E.D. 2008).

After *United States v. Griffin*, 922 F.2d 1343 (8th Cir. 1990), and its adoption by the Supreme Court of Missouri in *State v. Werner*, 9 S.W.3d 590 (Mo. banc 2000) (both cases are discussed in the original section), courts struggled, as noted later in this section, with whether to conduct a review of the totality of the circumstances in the case to determine if the defendant was in custody, or to simply apply a ritualistic approach adding up the *Griffin* factors, without analysis, to determine if custody had occurred. In *Czichray*, the Eighth Circuit rejected a "ritualistic" approach in applying the *Griffin* factors in determining whether, under the totality of the circumstances, a person was in custody when that person gave a statement. As the court stated:

> When the [*Griffin*] factors are invoked, it is important to recall that they are not by any means exclusive, and that "custody" cannot be resolved merely by counting up the number of factors on each side of the balance and rendering a decision accordingly. Exploring the nuances of such vague factors as "voluntary acquiescence," "strong

> arm tactics," and "police-dominated atmosphere" in order to place them on one side or the other of a balancing scale may tend to lose sight of the forest for the trees. The ultimate inquiry must always be whether the defendant was restrained as though he were under formal arrest. And the court must consider whether the *historical facts*, as opposed to the one-step-removed *Griffin* factors, establish custody. The debatable marginal presence of certain judicially-created factors that ostensibly tend to "aggravate the existence of custody" cannot create the functional equivalent of formal arrest where the most important circumstances show its absence.

Czichray, 378 F.3d at 826; *see also United States v. LeBrun*, 363 F.3d 715 (8th Cir. 2004) (examining the totality of circumstances in the case to determine custody without specifically referring to the *Griffin* factors). In *United States v. Brave Heart*, 397 F.3d 1035 (8th Cir. 2005), the *Griffin* factor ritualistic approach was again criticized:

> As our recent opinion in *Czichray* makes clear, the indicia of custody identified in *Griffin* are by no means exhaustive and should not be applied ritualistically, counting indicia which contribute to custody against those which detract. 378 F.3d at 827. Such an approach ignores the strength of certain indicia, particularly "the most obvious and effective means of demonstrating that a suspect has not been taken into custody"-an express advisement that the suspect is not under arrest and that his participation in any questioning is voluntary. *Id.* at 826 (quoting *Griffin*, 922 F.2d at 1349).

Brave Heart, 397 F.3d at 1039; *see also United States v. Ollie*, 442 F.3d 1135 (8th Cir. 2006).

As a result, the Supreme Court of Missouri, relying on *LeBrun*, did not address the *Griffin/Werner* factors in *State v. Glass*, 136 S.W.3d 496, 508–11 (Mo. banc 2004), in determining whether, under the totality of circumstances, custody had occurred. Therefore, a court can examine any factor, listed or unlisted in prior court decisions, that may impact the totality of circumstances analysis, and the court is not required to "weigh" the factors to determine if custody has

or has not occurred. *State v. Hill*, 247 S.W.3d 34, 47 (Mo. App. E.D. 2008).

In all fairness, even before *LeBrun* and *Glass*, the Supreme Court of Missouri had made it clear in *Werner* that the list of "factors" to be weighed was not "exhaustive."

Delete the last sentence in the third paragraph of the original section.

Add the following text at the end of the original section:

Also, simply because a defendant is in jail or prison does not make that person in "custody" requiring a *Miranda* warning. *See Howes v. Fields*, 132 S. Ct. 1181, 1183–84 (2012) (a prisoner was not in "custody" within the meaning of *Miranda* when the prisoner was free to end questioning at any time and return to his cell); *see also State v. Brown*, 18 S.W.3d 482, 485 (Mo. App. E.D. 2000).

b. (§11.18) Question of Interrogation

Add the following text at the end of the first paragraph of the original section:

See *State v. Ream*, 223 S.W.3d 874, 876 (Mo. App. S.D. 2007), which held that questions about the defendant's employment status during booking of the defendant in jail do not constitute interrogation under *Miranda*.

In *State v. Sardeson*, 220 S.W.3d 458, 464–69 (Mo. App. S.D. 2007), the court held that the defendant was not under interrogation or in custody before being advised of his *Miranda* rights because he:

- agreed to questions voluntarily;
- arranged for his own transportation to the place where he was questioned;
- had the right to leave at any time;
- had no restrictions on his movements during the questioning; and
- was not in custody during the questioning, even though the officers conducting the questioning thought of the defendant as a suspect and hoped to obtain a confession.

Add the following citation at the end of the last paragraph of the original section:

State v. Baldwin, 290 S.W.3d 139, 144 (Mo. App. W.D. 2009).

2. (§11.19) Were Warnings Properly Given?

Add the following citation at the end of the last paragraph of the original section:

see also State v. Mateo, 335 S.W.3d 529, 536–37 (Mo. App. W.D. 2011).

3. (§11.20) Was There a Proper Waiver?

After an individual has been advised of his or her rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966), no statement may be used against the individual unless the individual made a knowing, intelligent, understanding, and voluntary waiver of those rights. The government bears the burden of proving that the confession was voluntary. *State v. Greer*, 159 S.W.3d 451, 457 (Mo. App. E.D. 2005).

Whether a confession is voluntary depends on "whether the totality of the circumstances created a physical or psychological coercion sufficient to deprive the defendant of a free choice to admit, deny or refuse to answer the examiner's questions." *State v. Simmons*, 944 S.W.2d 165, 173 (Mo. banc 1997). In determining whether a confession resulted from improper mental coercion, courts consider, with no one factor being dispositive, the defendant's:

- age;
- experience;
- intelligence;
- gender;
- education; and
- infirmity or unusual susceptibility to coercion, if any.

Id. Whether a waiver is knowing and intelligent depends on the facts and circumstances of each case and is based on the totality of the circumstances, taking into account the background, experience, and conduct of the defendant. *State v. Bucklew*, 973 S.W.2d 83, 90 (Mo. banc 1998); *see also Greer*, 159 S.W.3d at 457.

a. (§11.21) Waiver After Assertion of Right to Silence: The Problem of Multiple Interrogations

Add the following text at the end of the third paragraph of the original section:

As discussed in the original section, once the accused indicates a desire to remain silent, the interrogation must cease, even if the accused previously waived that right. Interrogation can resume if the accused later waives the right to remain silent. Conversely, it is not necessary for the police to re-*Mirandize* a person after that person has waived *Miranda* rights when there are breaks in the interrogation. *State v. Carollo*, 172 S.W.3d 872, 875 (Mo. App. S.D. 2005) (*Miranda* warnings do not need to be given each time an accused is questioned or simply because there is a

time delay between the interrogation and when the warnings were read).

Oregon v. Elstad, 470 U.S. 298 (1985) (discussed in the original chapter), was not violated when police engaged in discussions with the defendant to establish a rapport and to gain the defendant's trust *before Mirandizing* him to question him about his criminal conduct. *State v. Hughes*, 272 S.W.3d 246, 256–57 (Mo. App. W.D. 2008).

Elstad was significantly affected by a later case that arose in Missouri. In *Missouri v. Siebert*, 542 U.S. 600 (2004), the U.S. Supreme Court affirmed the decision of the Supreme Court of Missouri in *State v. Siebert*, 93 S.W.3d 700 (Mo. banc 2002), which had suppressed the defendant's statements obtained after what has been commonly referred to as a "two-step" interrogation process. In *Siebert*, the police intentionally interrogated a murder suspect without providing the suspect with her *Miranda* warnings. The suspect made admissions involving the murder. The police then took a 20-minute break in the interrogation, allowing the suspect a smoke and coffee break. After the break, the police gave the suspect her *Miranda* warnings and, after obtaining her waiver, took the suspect's statement again, using the first statement in the interrogation. The suspect then confessed to the murder.

The Supreme Court of Missouri, in a four-three split, held that the practice of intentionally withholding *Miranda* to obtain an incriminating statement to then be used in a second interrogation after a *Miranda* waiver was obtained was an "end run" around the *Miranda* requirements and had the effect of making *Miranda* meaningless. *Siebert*, 93 S.W.3d at 707.

The U.S. Supreme Court, in a plurality decision, affirmed the holding of the Supreme Court of Missouri. Justice Kennedy's concurring opinion, which gave the

Supreme Court its five votes for a majority, was a much narrower holding than the four-justice plurality, which would have adopted an objective test that would have considered five factors in determining whether a "midstream" *Miranda* warning was effective. Justice Kennedy, instead, used a "subjective" test of the officer's intent in determining that the difference between *Elstad* and *Siebert* was the intentional or "deliberate" nature of withholding *Miranda* in *Siebert* with what Kennedy felt was the unintentional nature of the failure to give a *Miranda* warning in *Elstad*. *Siebert*, 542 U.S. at 621–22 (Kennedy, J., concurring); *see also State v. Wilson*, 169 S.W.3d 870, 880 (Mo. App. W.D. 2005). In *State v. Gaw*, 285 S.W.3d 318, 323–24 (Mo. banc 2009), the Supreme Court adopted Justice Kennedy's subjective "deliberate violation" test as opposed to the objective test suggested by the *Siebert* plurality.

b. (§11.22) Waiver After Assertion of Right to Counsel: The Problem of Multiple Interrogations

Replace the last sentence in the first paragraph of the original section with the following:

The invocation of the right to counsel under the Fifth Amendment protections in *Miranda* is not offense specific, meaning that, once a suspect invokes the right to counsel for interrogation regarding one offense under *Miranda*, the police may not re-approach the suspect regarding any offense unless counsel is present. *McNeil v. Wis.*, 501 U.S. 171, 175–76 (1991); *Ariz. v. Roberson*, 486 U.S. 675 (1988). This is in contrast to an invocation of the right to counsel under the Sixth Amendment—*see* §§11.25 and 11.26, *infra*—which is offense specific and allows for the police to re-approach a suspect to interrogate the suspect about other offenses not factually related to the offense for which the suspect had invoked the Sixth Amendment. *Tex. v. Cobb*, 532 U.S. 162, 168 (2001); *McNeil*, 501 U.S.

at 175–76; *see State v. Umphfrey*, 242 S.W.3d 437, 443 (Mo. App. E.D. 2007).

Add the following text at the end of the second paragraph of the original section:

State v. Harrison, 213 S.W.3d 58, 68–69 (Mo. App. S.D. 2006), also supports the holding in *Edwards v. Arizona*, 451 U.S. 477 (1981) (discussed in the original section), that once a suspect invokes the right to counsel, re-interrogation is permissible only if:

- the suspect initiates the second interrogation; and
- the waiver during the second interrogation is knowing and intelligent under the totality of the circumstances.

See also State v. Myers, 291 S.W.3d 292, 296–97 (Mo. App. S.D. 2009).

State v. Bremenkamp, 190 S.W.3d 487, 492–93 (Mo. App. S.D. 2006), relied on *State v. Farris*, 125 S.W.3d 365 (Mo. App. W.D. 2004) (discussed in the original section), in holding that a 26-day break in custody between arrests "dissolved" the defendant's prior invocation of her *Miranda* rights in the questioning for a subsequent offense.

C. (§11.24) Fruits of the Poisonous Tree

Add the following item at the end of the bulleted list in the last paragraph of the original section:

- *State v. Williams*, 334 S.W.3d 177, 182 (Mo. App. W.D. 2011) (a statement made after the illegal-car-stop-detained defendant was fruit of the poisonous tree and should be suppressed).

D. *Massiah v. United States*: Sixth Amendment Right to Counsel

1. (§11.26) Scope of *Massiah*

Add the following text at the end of the original section:

State v. Dykes, 238 S.W.3d 737, 741–42 (Mo. App. E.D. 2007), distinguished *Texas v. Cobb*, 532 U.S. 162 (2001) (discussed in the original section), in finding that the state's attorney deliberately violated the defendant's Sixth Amendment rights when the attorney asked the defendant questions, before the trial, about various bad acts of the defendant, which, while not related to the crime for which the defendant was on trial, could be and were used by the state's attorney to impeach the defendant when he testified at trial.

In *Kansas v. Ventris*, 556 U.S. 586, 593–94 (2009), the Supreme Court held that a defendant's statement, admittedly taken in violation of the Sixth Amendment, as interpreted by *Massiah*, may nevertheless be admitted to impeach the defendant's inconsistent testimony at trial.

3. (§11.28) Waiver of *Massiah* Rights

As discussed in the original section, under the Sixth Amendment right to counsel, the police may not interrogate a defendant in the absence of counsel and after indictment or arraignment unless the defendant has waived that right. But see *State v. Harrison*, 213 S.W.3d 58, 72 (Mo. App. S.D. 2006), which held that statements made by the suspect during a meeting that the suspect had arranged with the police were voluntary statements and admissible against the suspect at trial.

E. (§11.29) Statements of Juveniles

Add the following text at the end of the original section:

See *State v. Greer*, 159 S.W.3d 451, 459–60 (Mo. App. E.D. 2005), which held that a juvenile is only entitled to have a parent, legal custodian, or guardian present during interrogation and to confer with these individuals, not that these persons will actually give the juvenile suspect any particular advice. The right to confer is usually satisfied when the adult is present during the reading of rights and questioning and is not antagonistic to the child's interest, such that the juvenile could look to that person for advice. In *State v. Burris*, 32 S.W.3d 583, 589–90 (Mo. App. S.D. 2000), a 15-year-old juvenile suspect's rights under § 211.059.1(3), now RSMo Supp. 2011, were not violated by a failure to tell him that he could have a parent, legal custodian, or guardian present during questioning when:

- the police notified the suspect's mother before the interrogation;
- she conferred with the suspect; and
- the suspect's legal custodian, his school principal, was present during the interrogation.

Spontaneous, unprompted statements by the juvenile made before the office had provided the juvenile with the warnings contained in § 211.059.1(3) are admissible. *In re A.G.R.*, 359 S.W.3d 103, 111–12 (Mo. App. W.D. 2011).

V. Procedural Burdens

A. (§11.31) Burden of Proof

Add the following citations at the end of the second sentence of the first paragraph of the original section:

> § 542.296.6, RSMo Supp. 2011; *State v. Ingram*, 341 S.W.3d 800, 803–04 (Mo. App. E.D. 2011); *State v. Dickson*, 252 S.W.3d 216, 223 (Mo. App. S.D. 2008); *State v. Jackson*, 248 S.W.3d 117, 119 (Mo. App. S.D. 2008).

VI. Introduction of Statements at Trial

A. (§11.34) Need for Corroboration

Add the following citation at the end of the first sentence of the first paragraph of the original section:

> *State v. Pratte*, 345 S.W.3d 357, 360 (Mo. App. S.D. 2011).

Add the following citation at the end of the second sentence of the first paragraph of the original section:

> *State v. Cannafax*, 344 S.W.3d 279, 286 (Mo. App. S.D. 2011).

Add the following citation at the end of the third sentence of the first paragraph of the original section:

> *Cannafax*, 344 S.W.3d at 286.

Add the following citation at the end of the fourth sentence of the first paragraph of the original section:

> *Cannafax*, 344 S.W.3d at 286.

B. (§11.35) Rule of Completeness

Add the following citation at the end of the original section:

> *State v. Watling*, 211 S.W.3d 202, 206 (Mo. App. S.D. 2007) (under the circumstances, statements given were admissible under the rule of completeness doctrine)

C. (§11.36) Establishing Foundation

For additional caselaw regarding the foundation necessary to introduce the defendant's statement as evidence, see *State v. Hensley*, 83 S.W.3d 681, 690 (Mo. App. S.D. 2002), and *State v. Brown*, 18 S.W.3d 482, 484 (Mo. App. E.D. 2000).
Delete the last sentence in the original section.

D. (§11.37) Tape Recorded or Videotaped Statements

Whether a sufficient foundation has been established for a video or audiotape exhibit is a decision within the broad discretion of the trial court. The party offering a videotape in evidence must show that it is an accurate and faithful representation of what it purports to show. The foundation may be established through the testimony of any witness who is familiar with the subject matter of the tape and competent to testify from personal observation, which in this type of case is usually the police officer taking the statement. *State v. Minner*, 256 S.W.3d 92, 97 (Mo. banc 2008).

State v. Williams, 948 S.W.2d 429, 432 (Mo. App. E.D. 1997), held that the defendant "was not prejudiced by the admission of the videotaped deposition testimony of the burglary victim."

VII. (§11.38) Role of Jury

Also supporting the supposition that a jury makes the ultimate decision regarding voluntariness after proper instructions is *State v. Salnave*, 185 S.W.3d 704, 708 (Mo. App. S.D. 2006).

There must be sufficient evidence presented by a defendant that the defendant did not make the statement, or did not understand what he or she was saying when making the statement, to support the submission of Instruction 310.06, and absent that evidentiary basis, the instruction should not be submitted to the jury. *Salnave*, 185 S.W.3d at 708.

VIII. (§11.39) Use of Suppressed Statements at Trial

In *Michem v. State*, 250 S.W.3d 749, 755 (Mo. App. W.D. 2008) (citations omitted), the Western District held that:

> The State may not use the defendant's silence as either substantive evidence of guilt or for impeachment if the silence occurred after being arrested and informed of *Miranda* warnings because to do so violates due process. However, the prosecutor may use pre-*Miranda* warnings, post-arrest silence to impeach a defendant's testimony "when a neutral expectancy of an exculpatory statement exists as a result of a defendant's testimony and defendant's silence is probative of inconsistencies in that testimony."

IX. (§11.40) Appeal of Suppression Ruling and Post-Conviction Relief

Add the following item at the end of the bulleted list in the fourth paragraph of the original section:

State v. Ruff, 360 S.W.3d 880, 885 (Mo. App. S.D. 2012) (a trial court decision will not be reversed on appeal unless the decision was clearly erroneous, leaving the court with a definite and firm impression that a mistake was made; the review is limited to determining whether the decision was supported by substantial evidence); *see also State v. Jackson*, 248 S.W.3d 117, 121 (Mo. App. S.D. 2008).

Tina M. Crow Halcomb*

2012 Cumulative Supplement to

Chapter 12

MISCELLANEOUS MOTIONS (OTHER THAN TO SUPPRESS), PROCEEDINGS, AND WRITS

This is a reprint of the 2008 supplement to Chapter 12 with some editorial changes. The reader should not assume from the absence of supplementary materials for the 2012 supplement that no developments have occurred in the subject matter of this chapter.

The reader should always check original and fully current sources.

This chapter was reviewed in 2008 by Tina M. Crow Halcomb, who determined that no supplement was needed at that time.

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*Ms. Halcomb's biographical information appears on page 12–1 of the original chapter. She is the principal with the firm of Tina M. Crow Halcomb, LLC, in Jefferson City.

Susan M. Elliott*

2012 Cumulative Supplement to
Chapter 13

MOTIONS TO DISMISS

Supplemented:
§§13.6
13.11
13.27
13.29
13.37
13.39
13.41
13.42
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13.52
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13.75
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13.78

*Ms. Elliott's biographical information appears on page 13–1 of the original chapter. She is an attorney with the Office of the Public Defender, Commitment Defense Unit in Kansas City.
The author acknowledges the research assistance of Ryan Winters.

I. Introduction

F. (§13.6) Timeliness of Appeal by State

Interlocutory appeal by the state is authorized when the trial court enters an order or judgment that:

- quashes an arrest warrant;
- determines that a defendant lacks mental capacity to proceed; or
- suppresses evidence or a confession or admission by a defendant.

Section 547.200.1, RSMo 2000.

Although the timing of the trial court orders effectively denied the state its statutory right to appeal a ruling on a motion to suppress, the Double Jeopardy Clause precluded appellate review of the trial court's judgment of acquittal, which was entered simultaneously with the court's order granting the appellant's motion to suppress. *State v. Seuferling*, 238 S.W.3d 217, 219 (Mo. App. W.D. 2007).

The state can appeal a judgment of acquittal granted by the trial court after the jury returns a guilty verdict. If the court enters a judgment of acquittal at any time before the jury's verdict, an appeal by the state would not be permitted. *State v. Magalif*, 131 S.W.3d 431, 433 (Mo. App. W.D. 2004).

II. Grand Jury Violations

B. Statutory Violations in Jury Selection

1. (§13.11) Failure to Follow Statutory Procedure

A defendant challenging an indictment because the grand jury is not representative of a cross-section of the community

is entitled to disclosure of demographic data maintained by the circuit clerk of the court relating to grand jury lists. *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606, 608 (Mo. banc 1980).

The test for evaluating a claim of improper jury selection is whether there has been substantial compliance with the jury selection statutes. A substantial failure to comply is one that either rises to the level of a constitutional violation or actually prejudices the defendant. *State v. Williams*, 247 S.W.3d 144 (Mo. App. S.D. 2008).

III. Lack of Jurisdiction

A. (§13.27) Over the Subject Matter

If a state cedes jurisdiction over federal property located in the state, the United States has exclusive jurisdiction to hear cases involving offenses committed on that federal property. A defendant convicted of burglary and property damage at a U.S. post office was discharged because the state court had no jurisdiction over the subject matter. *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695 (Mo. banc 2010).

IV. Improper Venue

A. (§13.29) General Venue Principles

In *State v. Taylor*, 238 S.W.3d 145 (Mo. banc 2007), the Supreme Court ruled that the state is not required to prove venue at a criminal trial, abrogating:

- *State v. Burns*, 48 Mo. 438 (1871)
- *State v. Lingar*, 726 S.W.2d 728 (Mo. banc 1987)
- *State v. Bradford*, 462 S.W.2d 664 (Mo. 1971)
- *State v. Garrett*, 416 S.W.2d 116 (Mo. 1967)

The Court stated that venue is not jurisdictional and is not an element of an offense.

V. Defects in Information

B. (§13.37) Defects in Preliminary Examination

A defendant is entitled to have a record made of the preliminary hearing at the defendant's own expense. *State ex rel. Steeley v. Oswald*, 147 S.W.3d 81 (Mo. banc 2004).

VI. Defects in Contents of Charges

B. Failure to Allege an Offense

1. (§13.39) Basic Requirements of Criminal Charge

An information charging a defendant with assault of a law enforcement officer in the first degree was defective because it did not contain the essential element of "serious" physical injury. *Griffin v. State*, 185 S.W.3d 763 (Mo. App. E.D. 2006).

3. (§13.41) Remedy for Insufficiency

An appellant's conviction for assault in the third degree for poking the victim in the chest with a finger was declared a nullity by the appeals court when the appellant was not charged with those actions. Instead, the appellant had been charged with assault in the first degree for striking the victim with the appellant's hands and feet. A conviction based on an offense that is not properly charged is a nullity because a trial court acquires no jurisdiction over a noncharged offense. *State v. Collins*, 154 S.W.3d 486, 489–90 (Mo. App. W.D. 2005).

Charges may be amended orally, but a judgment based on a guilty plea is reversed on appeal when the record:

- does not comply with the requirements of Rule 23.01(b); and

- does not indicate that the appellant was advised of the nature of the charges as required by Rule 24.02(b)(1).

State v. Hicks, 221 S.W.3d 497, 504–05 (Mo. App. W.D. 2007).

4. (§13.42) Technical Charging Requirements

Rules 21.02 and 21.04 require that an affidavit of probable cause be attached to an information, and the affidavit must support a finding of probable cause to believe that a crime was committed. When a defendant was charged with promoting obscenity in violation of § 573.030, now RSMo Supp. 2011, the affidavit was inadequate because it did not include a statement describing the contents of the adult movies that the defendant sold. *State v. Crump*, 223 S.W.3d 915 (Mo. App. S.D. 2007).

D. (§13.46) Sufficiency—Miscellaneous Requirements

In child sex abuse cases, a statement of the exact dates and times when the charged offense occurred is not necessary. A time frame covering three months is sufficient to withstand a motion to dismiss. *State v. Sprinkle*, 122 S.W.3d 652, 659 (Mo. App. W.D. 2003).

The state cannot charge a registered sex offender with living within 1,000 feet of a school or day care facility as prohibited by § 566.147, now RSMo Supp. 2011, if the conviction that caused the offender to have to register occurred before the effective date of the statute because it would violate Article I, § 13, of the Missouri Constitution. *F.R. v. St. Charles Cnty. Sheriff's Dep't*, 301 S.W.3d 56 (Mo. banc 2010).

F. (§13.48) Multiplicity

Congress intended the allowable unit of prosecution to be an incident of possession, regardless of whether the defendant possessed more than one gun or met the requirements of

more than one classification in 18 U.S.C. § 922(g), the federal statute defining criminal liability for possession of a firearm. *United States v. Richardson*, 439 F.3d 421 (8th Cir. 2006) (the defendant was convicted for being a felon in possession of a firearm and a drug user in possession of a firearm), *overruling United States v. Peterson*, 867 F.2d 1110 (8th Cir. 1989).

VII. Prosecutorial Misconduct

A. (§13.50) General Misconduct

Even if a conviction is reversed because of prosecutorial misconduct that is not discovered until after trial, for the misconduct to prevent retrial after a guilty verdict, the defense must prove that the misconduct was undertaken not just to prevent acquittal but to prevent acquittal that the prosecutor believed was likely to occur in the absence of the misconduct. *State v. Barton*, 240 S.W.3d 693, 702 (Mo. banc 2007).

Prosecutorial misconduct that is not discovered until after trial is not grounds for dismissal on double jeopardy grounds unless the appellant proves that the misconduct was committed intentionally to:

- prejudice the defendant's case; and
- deny the defendant a fair trial.

State v. Barriner, 210 S.W.3d 285, 309–10 (Mo. App. W.D. 2006).

C. (§13.52) Vindictive Prosecution

A presumption of prosecutorial vindictiveness applies when there is a realistic likelihood of vindictiveness, judged by weighing the prosecutor's stake in deterring the exercise of the right being asserted and the prosecutor's actual conduct. If a realistic likelihood is shown, the burden shifts to the state to rebut this motivation. *State v. Potts*, 181 S.W.3d 228 (Mo. App. S.D. 2005).

IX. Statute of Limitations

A. (§13.54) Statutory Provisions

Section 556.037, RSMo Supp. 2011, was amended July 14, 2011, to provide that prosecution for sexual offenses involving a person 18 years of age or under must be commenced within 30 years (previously 20 years) after the victim reaches the age of 18 years, but prosecution for forcible or attempted rape or sodomy or for kidnapping may start at any time.

F. (§13.59) Other Interpretations

When the state charged a defendant with two counts of ACA (armed criminal action) more than three years after the offenses occurred, the convictions were vacated because ACA is an ungraded felony with a three-year statute of limitations. *State v. Donelson*, 343 S.W.3d 729 (Mo. App. E.D. 2011).

A conviction was reversed because the rule of lenity requires that the statutes of limitation be interpreted most favorably to the defendant. *State v. Graham*, 204 S.W.3d 655 (Mo. banc 2006).

X. Denial of Speedy Trial

B. (§13.61) *Barker v. Wingo* Analysis of Speedy Trial Violations

Missouri courts consider prejudice to the defendant as the most significant factor in a determination of whether speedy trial rights have been violated. *State v. Newman*, 256 S.W.3d 210, 216 (Mo. App. W.D. 2008).

But a speedy trial claim may stand absent particularized prejudice. *Doggett v. United States*, 505 U.S. 647 (1992), *cited with approval in State ex rel. Garcia v. Goldman*, 316 S.W.3d 907 (Mo. banc 2010). The U.S. Supreme Court stated that "affirmative proof of particularized prejudice is not essential to every speedy trial claim" because "excessive delay

presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify." *Doggett*, 505 U.S. at 655. The indictment against Garcia for a shooting that occurred ten years earlier was dismissed for violating his right to a speedy trial without proof of actual prejudice when the defendant lived openly without trying to conceal his identity and Missouri police made no serious attempt to find him.

A defendant's pro se declaration that the defendant was ready for trial does not trigger the protections of the speedy trial statute, § 545.780, RSMo 2000, when the defendant is represented by counsel. It is counsel's prerogative to announce when the defense is ready for trial under the statute. But a represented defendant may file a pro se motion for a speedy trial under the defendant's constitutional rights, and the court must determine on the record whether the defendant's constitutional right to a speedy trial has been violated. Unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the state's criminal justice system are limited and that each case must await its turn. The right to a speedy trial is an important right that the courts are duty-bound to honor, even in the face of heavy trial dockets and competing demands for trial. *State ex rel. McKee v. Riley*, 240 S.W.3d 720, 727 (Mo. banc 2007).

G. (§13.66) Disposition of Detainers

Sections 217.450 and 217.460, RSMo Supp. 2011, of UMDDL (Uniform Mandatory Disposition of Detainers Law), §§ 217.450–217.485, RSMo 2000 and Supp. 2011, were amended in 2009. Section 217.450 no longer states that failure of the Director of the Missouri Department of Corrections to notify an offender that a detainer has been placed against the offender within a year of the time that the Director received the detainer is grounds for dismissal with prejudice of the charges that are the basis for the detainer. Instead, it states that this failure is not grounds for dismissal unless the court also finds that the offender has been denied the constitutional right to a speedy trial. Section 217.450.3. Similarly, § 217.460

states that, if a detainer is not brought to trial within 180 days, the case will not be dismissed unless the court also finds that the offender's speedy trial rights have been violated.

Any complaint that the trial court erred because it lacked jurisdiction to proceed on the basis of noncompliance with UMDDL is waived by entering a guilty plea. *Greene v. State*, 332 S.W.3d 239 (Mo. App. W.D. 2010), *relying on Webb ex rel. J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009) (limitations on the availability of a remedy stated within a statute do not deprive a court of jurisdiction over the subject matter); *Schmidt v. State*, 292 S.W.3d 574 (Mo. App. S.D. 2009). *Schmidt* addressed the issue of whether § 217.460 deprived a court of "jurisdiction" if the statutory requirements of UMDDL are not followed. The court noted several appellate decisions that had described this noncompliance as "jurisdictional" defects, e.g.:

- *State v. Teague*, 175 S.W.3d 167 (Mo. App. S.D. 2005);
- *Tabor v. State*, 161 S.W.3d 862 (Mo. App. S.D. 2005);
- *State v. Sederburg*, 25 S.W.3d 172 (Mo. App. S.D. 2000);
- *Carson v. State*, 997 S.W.2d 92 (Mo. App. S.D. 1999); and
- *O'Neal v. State*, 925 S.W.2d 480 (Mo. App. W.D. 1996),

and stated that this analysis was no longer valid in light of *Webb*. *Schmidt*, 292 S.W.3d at 576 and 577 n.2.

A defendant must make a request for a speedy trial from a Missouri Department of Corrections facility to invoke the defendant's right to a trial within 180 days under UMDDL. A request from a county detention center does not invoke rights under UMDDL. *Burgess v. State*, 228 S.W.3d 43 (Mo. App. W.D. 2007).

The 180-day requirement under UMDDL may be extended by the court for "good cause shown" in open court by the defendant's counsel. *State ex rel. Wolfrum v. Wiesman*, 225 S.W.3d 409 (Mo. banc 2007).

The 180-day period required by § 217.460 excludes any delay of trial attributed to the defendant's affirmative action or agreement. *State ex rel. Garrett v. Dally*, 188 S.W.3d 111, 116 (Mo. App. S.D. 2006).

It is within the discretion of the trial court to determine if good cause exists to extend UMDDL time limit based on the unavailability of a witness when the materiality of the witness's testimony and future availability is shown. *State v. Nichols*, 207 S.W.3d 215, 221–22 (Mo. App. S.D. 2006).

The court does not lose jurisdiction and the statute is tolled if the defendant agrees to a trial date beyond the 180-day statutory period. *State v. Jackson*, 155 S.W.3d 849 (Mo. App. W.D. 2005).

A delay resulting from a crowded docket is not considered good cause to extend the 180-day period under UMDDL. *State v. Laramore*, 965 S.W.2d 847, 850 (Mo. App. E.D. 1998).

XI. Double Jeopardy

B. Tests for Double Jeopardy

1. (§13.69) Same Elements Test

Failure to yield and resisting arrest have different elements, and the former offense is not a lesser-included offense of the latter. *State v. Daws*, 311 S.W.3d 806, 807–08 (Mo. banc 2010). The court held that the state did not violate the Double Jeopardy Clause when it prosecuted the defendant on both charges successively, overruling *State v. Clark*, 263 S.W.3d 666 (Mo. App. W.D. 2008). In *Clark*, the court held that the underlying behavior of the offense of failing to yield formed the first two elements of resisting arrest, so failing to yield was a lesser-included offense of resisting arrest.

2. (§13.70) Unit of Prosecution and Rule of Lenity Tests

In assault cases, separate offenses can arise from a single set of facts each time that the defendant forms the intent to attack the victim. *State v. Harris*, 243 S.W.3d 508, 511 (Mo. App. W.D. 2008). When a defendant has time to reconsider the defendant's actions, "each assault separated by time" constitutes a separate offense. *Id.*

When the defendant cut the throat, breast, and leg of the victim, it constituted double jeopardy to convict the defendant of first-degree assault and two counts of second-degree domestic assault because his injuries occurred in one quick continuing attack. The convictions for second-degree domestic assault were vacated. *State v. Garnett*, 298 S.W.3d 919 (Mo. App. E.D. 2009).

D. (§13.75) Prosecution by Separate Sovereigns

The guarantee against double jeopardy prevents the government from prosecuting for a greater offense after having prosecuted the person for a lesser-included offense. Because the municipality is a creature of the state, the guarantee against double jeopardy prohibits the state from prosecuting for a greater offense after the municipality has prosecuted a person for a lesser-included offense. *State v. Clark*, 263 S.W.3d 666 (Mo. App. W.D. 2008), *overruling on other grounds recognized by State v. Reando*, 313 S.W.3d 734 (Mo. App. W.D. 2010).

F. (§13.77) When Double Jeopardy Precludes Retrial

Double jeopardy attaches once the trial court has accepted a guilty plea without qualification. *State v. Creamer*, 161 S.W.3d 420, 425 (Mo. App. W.D. 2005). *But see State v. Williams*, 353 S.W.3d 685 (Mo. App. W.D. 2011) (double jeopardy does not attach if the judge does not accept a guilty plea without qualification).

The Double Jeopardy Clause precludes remand for a second trial when a conviction is reversed because the appellate court finds that evidence at the first trial was legally insufficient. *State v. Self*, 155 S.W.3d 756, 764 (Mo. banc 2005).

The double jeopardy bar will attach even to a preverdict acquittal that is patently wrong under the law. *Smith v. Mass.*, 543 U.S. 462, 473 (2005).

Double jeopardy bars retrial if a mistrial is declared *sua sponte* by the court over the defendant's objection, unless there was "manifest necessity" for a mistrial. *State ex rel. Kemper v. Vincent*, 191 S.W.3d 45, 49–50 (Mo. banc 2006).

When a jury informs the trial court that it is unable to reach a unanimous verdict, the court's declaration of a mistrial does not prohibit retrial because the mistrial is based on a manifest necessity. *State v. Fassero*, 256 S.W.3d 109, 111–15 (Mo. banc 2008).

The appropriate remedy for surprise that occurs in the middle of a trial is to order a continuance and not to declare a mistrial. A mistrial granted instead of a continuance without the defendant's consent was not based on a manifest necessity, and a retrial was prohibited by double jeopardy. *State v. Wrice*, 235 S.W.3d 583, 586–87 (Mo. App. E.D. 2007).

G. (§13.78) Rulings on Particular Charges

Whether possession of more than one photo of child pornography can be charged as one count or as multiple counts may depend on whether the act of possession occurs on the same or different days for each photo. *See, e.g.*:

- *State v. Liberty*, No. SC 91821, 2012 WL 1931229 (Mo. banc May 29, 2012) (charging a defendant under § 573.037, RSMo Supp. 2011, with eight counts of possession of "any obscene material" on the same day for having eight pictures is double jeopardy)

- *State v. Roggenbuck*, No. WD 72045, 2011 WL 5525340 (Mo. App. W.D. Nov. 15, 2011), *transfer denied* (charging a defendant with possession of "any obscene material" on different days is not double jeopardy)

Convictions for possession of a controlled substance with intent to distribute and possession of a controlled substance violate double jeopardy. *State v. Cunningham*, 193 S.W.3d 774, 778 (Mo. App. S.D. 2006).

When the defendant was charged and convicted of possession of ammunition in North Carolina "and elsewhere," he could not be convicted of the same offense in New York at a later date. *United States v. Olmeda*, 461 F.3d 271, 283–85 (2nd Cir. 2006).

The guarantee against double jeopardy was violated when the defendant was convicted of three separate assaults for an altercation that lasted about one minute and in which there was no separation in time or space during which the defendant had an opportunity to reconsider his actions. *State v. Harris*, 243 S.W.3d 508 (Mo. App. W.D. 2008).

Kevin P. O'Brien*

14

2012 Cumulative Supplement to

Chapter 14

DEFENSES

Supplemented:
§§14.6
14.20
14.51
14.55
14.80
14.118
14.120
14.121

II. Defenses to All or Most Offenses

A. Lack of Culpable Mental State

1. In General

e. (§14.6) Corporations:

In *State v. Salter*, 250 S.W.3d 705, 710–11 (Mo. banc 2008), the defendant, the president of a corporation employing five or more people, failed to carry workers' compensation insurance and was charged with violating § 287.128.5, now RSMo Supp. 2011. The defendant

*Mr. O'Brien's biographical information appears on page 14–1 of the original chapter.

argued that he could not be found guilty because his conduct did not involve a voluntary act triggering criminal liability for the actions of a corporation. *See* § 562.056, RSMo 2000. The Court held that a "voluntary act" includes an omission to perform an act of which the actor is physically capable.

B. Bad Act or Conduct Not Criminal

4. (§14.20) Statute Repealed or Declared Unconstitutional

Language in § 1.160, RSMo 2000, that gave the benefit of a reduction in sentence or punishment to a defendant before sentencing has been deleted. *See* § 1.160, RSMo Supp. 2011. Procedural law changes take effect immediately, and a defendant will benefit from them before sentencing. The substantive law of the case is determined as of the time of the incident.

IV. Defenses to Specific Offenses

A. Homicide and Assaults

1. Justifiable Homicide

a. (§14.51) Self-Defense and Defense of Another

The Missouri legislature made substantial modification to § 563.031, now RSMo Supp. 2011, in 2007. This section defines the limitations of the right to defend self and others. Before 2007, Missouri only allowed the use of deadly force in defense of one's self or another in the case of a reasonable belief that the person or another was in danger of rape, sodomy, kidnapping, or serious physical injury. The revised § 563.031, sometimes referred to as the Castle Doctrine, specifically allows use of deadly force against an aggressor who unlawfully enters a house or vehicle. The law places no duty on a person to retreat in the person's home or vehicle.

In addition to expanding the availability of deadly force, § 563.074, RSMo Supp. 2011, a statute effective August 8, 2007, provides an absolute civil defense to individuals who use force in accordance with the provisions of § 563.074. Section 563.074.1. Section 563.074.2 requires courts to tax costs and attorney fees in any legal action arising from the defendant's conduct to the plaintiff.

e. (§14.55) Defense of Premises

Section 563.036, RSMo, was repealed in 2007.

D. Sex Offenses

5. (§14.80) Evidence Issues

Many of the hearsay statements of children that have been allowed under various statutory and common law exceptions are limited by the U.S. Supreme Court ruling in *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* found that witnesses' testimonial out-of-court statements are barred under the Confrontation Clause unless the witnesses are unavailable and the defendants had a prior opportunity to cross-examine the witnesses, regardless of whether the statements are deemed reliable by the court. Testimonial hearsay can roughly be viewed as statements made in furtherance of official investigations. This would include statements to police officers and other governmental agents.

F. Other Offenses

3. (§14.118) Pornography

Chapter 573, RSMo, which regulates the possession and distribution of pornography, has been repeatedly amended since 2008. The majority of Missouri laws relating to the promotion of pornography and the possession or promotion of child pornography are now either strict liability offenses or offenses that have a knowing *or reckless mens rea* requirement. This is a

change from previous versions that required an accused to either know of the content and character of the questioned material or to act knowingly with regard to possession of illegal material.

5. (§14.120) Disorderly Conduct, Breaches of the Peace, Etc.

Section 577.023, RSMo Supp. 2011, defines the level of offense and penalty enhancements for offenders repeatedly convicted of DWI. Before 2006, DWIs could only be used to enhance a potential punishment if they had occurred within the previous ten years. The 2005 amendments to § 577.023:

- allow priors accrued over an offender's lifetime to be used for purposes of enhancement;
- increase the penalties for repeat offenders; and
- institute mandatory sentences.

In *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008), the Supreme Court held that prior offenses that resulted in a suspended imposition of sentence in municipal court could not be used to enhance punishment. But the General Assembly closed this loophole with an amendment to § 577.023.16, which became effective immediately upon the Governor's signature on July 3, 2008.

Section 577.023 has been amended to allow all prior convictions or findings of guilt, whether in state or municipal court, to be used to enhance the offense level for DWI. These changes have basically eliminated any benefit that had been realized by pleading guilty to the offense of driving with a blood alcohol content in excess of .08%.

Section 478.007, RSMo Supp. 2011, provides for the creation of DWI courts, which have special jurisdiction to restore the driving privileges of repeat DWI offenders.

6. (§14.121) Weapons Offenses

Section 571.030, RSMo Supp. 2011, has been amended to allow individuals to possess firearms while intoxicated as long as they do not discharge or handle the firearm in an otherwise negligent manner.

Earl F. Seitz*

2012 Cumulative Supplement to

Chapter 15

MENTAL FACTORS

Supplemented:
§§15.4
15.6
15.9
15.11
15.12
15.20
15.24
15.35

III. Criminal Proceedings Involving Mental Illness

A. Definition of Mental Disease and Its Constitutionality

1. (§15.4) Section 552.010, RSMo

In *State v. Walkup*, 220 S.W.3d 748 (Mo. banc 2007), defense counsel attempted to offer, in the defense of a first-degree murder charge, expert witness testimony that the defendant had mental disorders that would have

*Mr. Seitz's biographical information appears on page 15–1 of the original chapter.

made it less likely that the defendant would have deliberated before killing his girlfriend.

The state objected that it was not admissible because the defendant had not notified the state of a defense under Chapter 552, RSMo.

The Supreme Court held that the psychologist's expert testimony was admissible under § 552.015.2(8), now RSMo Supp. 2011, on the issue of whether Walkup had the requisite state of mind—deliberation, which is an element of the offense of first-degree murder—and reversed the judgment of the circuit court. This "diminished capacity" evidence is not subject to the same procedural requirements as is evidence of mental disease or defect excluding responsibility for which the defendant is required to give advance notice. *Walkup*, 220 S.W.3d 748.

B. Mental Disease or Defect Excluding Fitness to Stand Trial

1. (§15.6) Accused's Capacity to Understand Proceeding and Assist in the Defense

In a case heard before the Circuit Court of St. Louis, after the jury found the defendant guilty and at the sentencing hearing, the defendant's counsel asked for an order evaluating the defendant under § 552.020, now RSMo Supp. 2011.

Two licensed psychologists, Dr. Richard Scott and Dr. Michael Armour, later evaluated the defendant. The doctors filed reports with the trial court and testified at a hearing regarding the defendant's competency. Both psychologists have been considered experts in forensic psychology in numerous jurisdictions.

Both filed reports with the trial court, and both testified that the defendant was mentally retarded and that the defendant's ability to reason was significantly impaired to the point that he was rendered unable to assist defense counsel. The state offered no rebuttal evidence.

The trial court found the defendant competent to stand trial. On appeal, the Eastern District of the Missouri Court of Appeals reversed the trial court judgment "because the preponderance of the evidence established defendant was not competent to stand trial and we remand for the entry of a mistrial and an order committing defendant to the Department of Mental Health (DMH) until such time he is found to be competent." *State v. McCurry-Bey*, 298 S.W.3d 898 (Mo. App. E.D. 2009).

4. (§15.9) Provision for Examination

In *State ex rel. Thurman v. Pratte*, 324 S.W.3d 501 (Mo. App. E.D. 2010), the defendant, who was subject to the death penalty, provided an expert's report to the state that he was mentally retarded. The defendant filed no notice of intent to rely on a defense of not guilty by reason of mental disease or defect excluding responsibility under §§ 552.020 and 552.030, now RSMo Supp. 2011.

The state then sought a mental examination of the defendant. The court ordered the examination under § 552.030. The defendant sought a writ of prohibition.

The court held that the state can obtain a mental evaluation of a defendant only if the defendant claims incompetency, pleads not guilty by reason of mental disease or defect, or files a notice of intent to rely on that defense under §§ 552.020 and 552.030, which the defendant had not done. The defendant only claimed that he was mentally retarded. Section 565.030.4, RSMo Supp. 2011, provides that a mentally retarded defendant is not eligible for the death penalty, but this is distinct from a plea of not guilty by reason of mental disease under § 552.030. Section 552.030 deals with criminal responsibility for the offense. Section 565.030.4 deals with punishment and not guilt. Therefore, because § 552.030 does not authorize the trial court to order a mental evaluation, the court granted a writ of prohibition.

In *State v. Wilkerson*, 330 S.W.3d 851 (Mo. App. W.D. 2011), the defendant refused to meet with his attorney

before trial. At the initial trial, the defendant was nonresponsive and spoke nonsense talk. The court entered an order finding reasonable cause to believe that the defendant had a mental disease or defect excluding fitness to proceed and ordered a mental exam under § 552.020.3. The defendant refused to meet with the examiner, and the report was *not done*. The defendant was tried again and convicted. The conviction and sentence were reversed because there is no precedent that stands for the proposition that the mandatory requirements of § 552.020.3 are rendered discretionary by a defendant's single refusal to be examined and participate in the process. The court suggested that the examiner could have sought to see the defendant again or use other sources such as medical records and witness interviews.

6. (§15.11) Requirement for Hearing

In *State v. Williams*, 247 S.W.3d 146 (Mo. App. S.D. 2008), the defendant's counsel filed a motion for mental examination the day before trial but did not ask for an evidentiary hearing on the motion. The trial court denied the motion, stating:

> This Court has had the opportunity to observe the defendant Mr. Williams during court appearances. At all times he has behaved in a proper manner. The defendant had requested a speedy trial. This case was set for trial in January, it was continued and over the defendant's objection. He certainly appeared lucid and at that time wanted the case to go to trial. It was reset for March and once again was continued and over the defendant's own objection because he was wanting a speedy trial. He has appeared here in court today. He has been able to [-] appears to at least confer with counsel. He has been respectful in court. I don't see any basis for an examination.

Id. at 149.

The court of appeals held that the court did not abuse its discretion in denying the motion for mental examination.

7. (§15.12) Issue Raised by Defense

If the defendant never asserted the affirmative defense of not guilty by reason of mental disease or defect, the trial court erred in misapplying § 552.030.2, RSMo Supp. 2011, by finding the defendant not guilty by reason of mental disease or defect excluding responsibility. In *State v. Lewis*, 188 S.W.3d 483 (Mo. App. W.D. 2006), the defense raised the issue of mental disease or defect negating culpable mental state under § 552.015.2(8), now RSMo Supp. 2011, by filing notice to rely on that defense.

In *Lewis*, the defendant had undergone two mental evaluations, with both evaluations concluding that he suffered from a mental disease or defect that prevented him from knowing and appreciating the nature, quality, or wrongfulness of his conduct at the time of the alleged crime. But on the issue of competency to stand trial, one examiner concluded that he was competent, while the other found that he was not.

The Western District held that the not-guilty-by-reason-of-mental-disease-or-defect defense in § 552.030.1 is an affirmative defense that must be initiated and proven by the defendant but that the negative defense under § 552.015.2(8), which allows evidence of a defendant's mental disease or defect "[t]o prove that the defendant did or did not have a state of mind which is an element of this defense," is different. The defendant has the burden to raise the issue, but "the 'burden is on the state to prove the existence of the culpable mental state beyond a reasonable doubt.'" *Lewis*, 188 S.W.3d at 488 (quoting MAI-CR 3d 308.03 (1998)).

"In order to use evidence of mental disease or defect to negate a required culpable mental state, it is not necessary that the defendant assert the affirmative defense of lack of responsibility by reason of mental disease or defect." *Lewis*, 188 S.W.3d at 489 (quoting MAI-CR 3d 308.03 (1998)).

> Thus, it cannot be argued fairly that the introduction of evidence of mental disease or defect automatically invokes both defenses, the proposition the trial court was apparently relying on when it ruled that the appellant was [not guilty by reason of insanity] as to the charged offense, even though he never asserted that affirmative defense at trial and repeatedly advised the court that he did not want to rely on that defense.

Lewis, 188 S.W.3d at 489.

In reversing the trial court's judgment, the Western District held that, because the defendant never asserted the affirmative defense of not guilty by reason of mental disease or defect, the trial court finding him not guilty by reason of mental disease or defect was error.

IV. Mental Disease or Defect at Time of Criminal Conduct

C. (§15.20) Timeliness of Notice of Defense

A defendant is not required to give notice of the diminished capacity defense under § 552.015.2(8), now RSMo Supp. 2011. *State v. Walkup*, 220 S.W.3d 748, 750 (Mo. banc 2007).

In *Walkup*, the defendant attempted to offer evidence from Dr. Sisk, a psychologist who would have testified that the defendant suffered from mental disorders that made it less likely that he would have deliberated before killing his girlfriend. The defendant did not attempt to offer the testimony of Dr. Sisk pertaining to a defense of not guilty by reason of mental disease or defect under § 552.030, now RSMo Supp. 2011. The state's objection to Dr. Sisk's testimony was sustained by the trial court.

The Supreme Court reversed because notice is not required for a diminished capacity defense. *Walkup*, 220 S.W.3d at 758.

Brock v. State, 242 S.W.3d 430 (Mo. App. W.D. 2007), again stated that Missouri *does not recognize* any right to a competency determination in postconviction proceedings, Rule 29.15, before the court decides the motion on its merits.

At the evidentiary hearing for the defendant's Rule 29.15 motion, the defendant's counsel advised the court that his client believed that his food was drugged and that a computer chip had been installed in his head during a dental visit. The court delayed the hearing so counsel could file a written motion for mental examination but later denied the motion for mental examination without explanation. *Brock*, 242 S.W.3d at 432.

F. Acceptance of or Acquittal on Grounds of Mental Disease or Defect

2. (§15.24) Petition for Release

In *State v. Rottinghaus*, 310 S.W.3d 319 (Mo. App. W.D. 2010), the defendant appealed the denial of his application for unconditional release under § 552.040, now RSMo Supp. 2011, arguing that the burden of proof was on the state to prove that he was suffering from a mental disease that makes him presently dangerous to himself or others.

The court in *Rottinghaus* stated that the burden of persuasion is controlled by the decision reached in *State v. Aaron,* 218 S.W.3d 501, 511 (Mo. App. W.D. 2007) (MO. CONST. art. V, § 2), in which the Supreme Court said:

> A verdict of not guilty by reason of insanity establishes that the person committed a criminal act and that he or she committed the act because of mental illness. When a criminal defendant establishes that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society. So long as the . . . presumption of continuing mental illness has not been broken following an acquittal by reason of insanity, the burden of proof need not shift to the state.

Rottinghaus, 310 S.W.3d at 325 (quoting *Greeno v. State*, 59 S.W.3d 500, 504 (Mo. banc 2001)).

V. Mental Illness During Service of Sentence or Before Execution and Related Proceedings

E. (§15.35) Unconditional or Conditional Release From State Mental Hospital, Hearings, and Escape—Procedures for Release

For a defendant to be unconditionally released, the court must find that the defendant is no longer suffering from a mental disease or defect *and* determine that the person is not likely to suffer from a mental disease or defect in the reasonable future rendering that person dangerous to the safety of himself or herself or others. "The indigent is "entitled to have an examination that is professionally independent of any influence by those having custodial control." In order to fulfill this requirement, the judge "should convince himself that the court-appointed psychiatrist, despite any prior personal or professional relationship, can function" in an independent capacity." *Grass v. State of Mo.*, 134 S.W.3d 34, 35 (Mo. banc 2004) (quoting *State ex rel. Hoover v. Bloom*, 461 S.W.2d 841, 844 (Mo. banc 1971)).

This is particularly so when the MoDMH (Missouri Department of Mental Health) has opposed release previously and the psychiatrist is a director within MoDMH. *Grass* "does not show that the trial judge determined the professional's capacity to function in an independent capacity. In fact, the order entered by the court simply indicates that the court 'asks (begs) the state to take care of' conducting the examination." *Grass*, 134 S.W.3d at 35.

In *State v. Larrington*, 280 S.W.3d 179 (Mo. App. W.D. 2009), the defendant was successful on his petition for unconditional release under § 552.040, now RSMo Supp. 2011. The state appealed the court's decision.

The court of appeals reversed the decision, setting out that the application for unconditional release is governed by § 552.040.7, which requires the trial court to consider the following factors in addition to any other relevant evidence in determining if the committed person should be unconditionally released:

> (1) Whether or not the committed person presently has a mental disease or defect;
> (2) The nature of the offense for which the committed person was committed;
> (3) The committed person's behavior while confined in a mental health facility;
> (4) The elapsed time between the hearing and the last reported unlawful or dangerous act;
> (5) Whether the person has had conditional releases without incident; and
> (6) Whether the determination that the committed person is not dangerous to himself or others is dependent on the person's taking drugs, medicine or narcotics. . . .

The defendant's treating psychiatrist, Dr. Ponce, testified that Mr. Larrington was diagnosed with schizophrenic disorder, bipolar type, but that his condition was in remission when he was medicated. Dr. Ponce testified that if Mr. Larrington did not take his medication, he would decompensate psychologically and present a danger to himself and others. The primary issue at trial was whether Mr. Larrington would take his medications if unconditionally released.

The defendant twice, while on conditional release previously, had stopped taking his medication and was returned to Fulton State Hospital.

The court found that the defendant did not provide clear and convincing evidence that Mr. Larrington was not likely to be dangerous in the reasonable future, and the judgment was reversed. *See also State v. Gratts*, 112 S.W.3d 12 (Mo. App. W.D. 2003).

Thomas E. Marshall*
Janet M. Thompson**

2012 Cumulative Supplement to
Chapter 16

16

PLEA BARGAINING

Supplemented:
§16.6
16.9
16.10
16.14
16.17

II. Constitutional Requirements and Applicable Law

E. (§16.6) Miscellaneous

During guilty plea negotiations, the state may propose that a defendant waive the defendant's rights to postconviction relief in exchange for a plea offer that is more favorable in terms of degree of offense or length of sentence. In *Cooper v. State*, 356 S.W.3d 148 (Mo. banc 2011), Cooper had waived his right

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**Ms. Thompson received her A.B., 1978; M.A., 1980; J.D., 1984; and LLM, 2002, from the University of Missouri-Columbia. She clerked for the Hon. David J. Dixon on the Missouri Court of Appeals, Western District, upon graduation from law school and joined the Missouri State Public Defender System in 1986. She joined the Capital Trial Division in 2000.
This supplement includes material previously prepared by Kent E. Gipson.

to file any future motion for postconviction relief in exchange for the state's recommendation of a particular term of years on two counts, to run concurrently with a suspended execution of the sentences and a probationary term. When Cooper later violated his probation, it was revoked, and the sentences were ordered executed. The Supreme Court addressed Cooper's claim that his waiver of postconviction rights was unknowing, unintelligent, and involuntary because of the defense counsel's potential conflict of interest in advising him to waive those rights. The Court noted that Cooper only alleged a potential conflict of interest, not an actual conflict, and that Cooper had relied on Missouri Advisory Committee Formal Opinion 126 (2009) for the proposition that, without the presence of additional unconflicted counsel, such a waiver cannot be voluntary and intelligent.

Formal Opinion 126 expressly states as follows:

> It is not permissible for defense counsel to advise the defendant regarding waiver of claims of ineffective assistance of counsel by defense counsel.
>
> . . . .
>
> We believe that it is inconsistent with the prosecutor's duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice for a prosecutor to seek a waiver of post-conviction rights based on ineffective assistance of counsel or prosecutorial misconduct.

The Supreme Court acknowledged the language of Formal Opinion 126 but noted that discipline had never "been sought against an attorney for violating Advisory Committee opinion 126." *Cooper*, 356 S.W.3d at 156. The Court further noted that violating a professional rule of discipline does not necessarily equate to a constitutional violation. The Court concluded that, because Cooper received substantial benefit in exchange for his waiver of postconviction relief and because he neither alleged nor proved an actual conflict of interest that would have rendered his waiver unknowing, involuntary, and unintelligent, his postconviction relief motion should be dismissed.

The waiver of postconviction relief may be an important part of a negotiated plea agreement. The authors suggest that, despite *Cooper*, defense counsel should remain aware of the ethical obligation to conduct themselves in accordance with the Rules of Professional Conduct as they negotiate such an agreement. The best practice in this situation is to obtain the assistance of separate, unconflicted counsel who can advise the defendant about any proposed waiver of the defendant's postconviction remedies.

The defendant must be mentally competent to plead guilty and to knowingly and voluntarily waive the right to trial. Allowing a mentally incompetent person to plead guilty is a *per se* due process violation. *Hubbard v. State*, 31 S.W.3d 25, 38 (Mo. App. W.D. 2000); *Thomas v. State*, 249 S.W.3d 234, 238 (Mo. App. E.D. 2008). *Hubbard* noted that:

> the suspicion or actual presence of some degree of mental illness or need for psychiatric treatment does not equate with incompetency to stand trial [or plead guilty]. In fact, an accused may be mentally retarded in some degree and still be competent to stand trial or enter a knowing, intelligent plea of guilty.

Hubbard, 31 S.W.3d at 34 (quoting *Henderson v. State*, 977 S.W.2d 508, 511 (Mo. App. S.D. 1998)). The test to determine whether a defendant is competent to plead guilty is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as [a] factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402 (1960). Thus, even if a defendant suffers from a mental or intellectual disability, the defendant may, nonetheless, be competent to plead guilty.

III. Practical Considerations for Defense Attorneys

C. (§16.9) Diversion Programs and Other Community-Based Alternatives

The popularity of diversionary programs has grown exponentially in almost every part of Missouri. Before negotiating a plea agreement, the wise practitioner should determine what alternatives are available in a particular circuit in order to best address the client's interests.

D. (§16.10) Associate Circuit Division and Preliminary Hearings

In deciding whether to waive a preliminary hearing under a plea offer from a prosecuting attorney, in consultation with the defendant, defense counsel should consider whether the advantage of using the preliminary hearing as a discovery tool is outweighed by the potential disadvantages of creating additional adverse publicity and of memorializing testimonial statements and thus eliminating a potential Confrontation Clause challenge to those statements. Some jurisdictions have explicitly held that preliminary hearings offer an adequate opportunity for confrontation. *State v. Lopez*, 974 So.2d 340 (Fla. 2008). Statements made at a preliminary hearing thus may survive a challenge under *Crawford v. Washington*, 541 U.S. 36 (2004).

H. (§16.14) Plea Bargaining Alternatives

A PSI (pre-sentence investigation), as well as an SAR (sentencing assessment report), may provide useful tools in arguing for a desired range of punishment. Distinct from the PSI, the SAR may recommend a mitigated sentence, a presumptive sentence, and an aggravated sentence. Defense counsel should inform the defendant that the recommendations of the SAR are advisory, and the trial court is not bound by them. *Spicer v. State*, 300 S.W.3d 249, 250 (Mo. App. W.D. 2009); § 558.019.7, RSMo Supp. 2011. The

trial court's discretion in sentencing is only limited to the extent that the sentence must be within the statutory range of punishment. *Spicer*, 300 S.W.3d 249*; State v. Lynch*, 131 S.W.3d 422, 427 (Mo. App. W.D. 2004).

V. Particular Problems and Strategic Dilemmas

A. (§16.17) Dealing With an Unsympathetic Prosecutor, Judge, or Both

In the original section, it was suggested that, if the defendant is "obviously guilty," a viable strategy might be to take that defendant to jury trial solely on the issue of punishment. Because the essence of a plea bargain is for each side to obtain something of value, defense counsel should carefully consider the advisability of entering into such an agreement in the specific context of a case in which the prosecutor offers a plea to first degree murder and jury sentencing without a waiver of the death penalty. *State v. Worthington*, 8 S.W.3d 83 (Mo. banc 1999); *State v. Dorsey*, 318 S.W.3d 648 (Mo. banc 2010); and *State v. Shafer*, 969 S.W.2d 719 (Mo. banc 1998), reveal that such a decision often does not inure to the benefit of the defendant.

At the conclusion of the original section, the author noted that a "trial on punishment" tactic would be impacted as Missouri courts interpret the scope of admissible evidence in a bifurcated, noncapital sentencing proceeding under § 557.036.3, RSMo Supp. 2011.

The Western District of the Missouri Court of Appeals held that the same rules of evidence apply to a noncapital sentencing phase as to the guilt phase. Therefore, hearsay evidence that does not fall within a settled exception is inadmissible in a noncapital sentencing proceeding. *State v. Berry*, 168 S.W.3d 527, 539–40 (Mo. App. W.D. 2005).

In *State v. Clark*, 197 S.W.3d 598, 600 (Mo. banc 2006), the Supreme Court held that evidence of prior criminal conduct,

even when the defendant had been acquitted, is admissible if proven by a preponderance of the evidence. *Id.* at 601. But in *State v. Fassero*, 256 S.W.3d 109 (Mo. banc 2008), the Court reversed a sentence when the state had introduced a pending indictment of the defendant on a similar charge without any supporting live testimony because the charge alone could not qualify as "history and character" under the statutory language.

The trend toward admitting a wide variety of evidence in a bifurcated noncapital sentencing proceeding has continued. In *State v. Snow*, 299 S.W.3d 710, 719 (Mo. App. W.D. 2009), the court noted that the threshold for admitting character evidence under § 557.036.3 is "very low." In fact, the court stated that the court has discretion to admit "whatever evidence it deems to be helpful to the jury in assessing punishment." *Id.* at 719 (citing *Clark*, 197 S.W.3d at 600).

Because the trend is to admit any evidence of prior crimes and bad acts if supported by admissible live testimony, a "trial on punishment" strategy is now a riskier proposition. Unless the client is "squeaky clean," this tactic could easily backfire.

Richard G. Callahan*

2012 Cumulative Supplement to

Chapter 17

FINAL TRIAL PREPARATION BY THE STATE

17

Supplemented:
§§17.3
17.5
17.12

III. (§17.3) Police and Laboratory Reports

Not only is it important to determine what physical evidence was delivered to the laboratory, it is also important to determine what types of tests were conducted on the physical evidence and what tests were considered but not performed. Discussions with the lab technicians will help counsel avoid situations in which the defense counsel has legitimate grounds for vigorous cross-examination because the lab failed to conduct certain tests.

*Judge Callahan's biographical information appears on page 17–1 of the original chapter. He is the United States Attorney for the Eastern District of Missouri

V. (§17.5) Witnesses

Replace the text in the original section with the following text:

A second important reason for reviewing the charging document is to ensure that all necessary witnesses have been endorsed. A good safety rule is to always include the endorsement of a custodian of records from the local police department and the local laboratory in case certain live witnesses become unavailable, and the matter can be proved up through business records. Similarly, when emergency medical technicians and health care witnesses are expected to testify, the medical records custodian should also be endorsed in case medical witnesses suddenly become unavailable. The golden rule is to endorse everyone who is remotely connected to the case. If, on the day of trial, the prosecutor does not want the defense attorney, during voir dire, to read a list of an inordinate number of witnesses whom everybody but the venire panel recognizes will not be called, the prosecutor can always delete witnesses at that time. It is always easier to delete witnesses on the day of trial than it is to endorse them.

If the deposition of a witness has been taken, the prosecutor should review the record of the deposition to determine what use of the deposition might be made if the witness becomes unavailable. While the rules for the defense use of a deposition in lieu of live testimony in the event that a witness becomes unavailable are liberally construed, the prosecutor may only use a deposition in the event of a witness's unavailability if the defendant was personally present at the deposition or the defendant personally waived the right to be present. *See* Rule 25.16.

XII. (§17.12) Voir Dire

Replace the last two sentences of the original section with the following text:

Depending on time, the importance of a case, and the office's resources, the prosecutor may want to utilize various search engines for internet research on the venire panel, including the Missouri judiciary's Case.net system, available at:

> www.courts.mo.gov/casenet/cases/searchCases.do?searchType=name

These searches involve public records and are permissible because these venues are equally available to the defense. The use of nonpublic resources such as the criminal-arrest records maintained by law enforcement should not be used for venire-panel research.

Dee Wampler*
Joseph S. Passanise**

2012 Cumulative Supplement to

Chapter 18

FINAL TRIAL PREPARATION FOR THE DEFENSE

18

Supplemented:
§§18.4
18.14
18.19
18.36

III. Pretrial Considerations

A. (§18.4) Trial Setting

Delete the last sentence of the first paragraph and replace the second paragraph of the original section with the following text:

Counsel should always check Case.net to make certain that all of counsel's motions have been filed, called up, and ruled upon. Case.net is available at:

www.courts.mo.gov/casenet/cases/searchCases.do?searchType=name

*Mr. Wampler's biographical information appears on page 18–1 of the original chapter. He received his B.S., 1962, from the University of Missouri-Columbia.
**Mr. Passanise's biographical information appears on page 18–1 of the original chapter.

IV. Trial Strategy

A. (§18.14) Pretrial Motions

Replace the checklist of potential motions for state defense criminal trial motions in the original section with the following list:

State Defense Criminal Trial Motions

1. Motion for Bill of Particulars
2. Motion to Dismiss
3. Demand for Speedy Trial
4. Motion for Court-Ordered Disclosure
5. Motion for Disclosure of Specific Object
6. Motion for Disclosure of Impeaching Information (Brady)
7. Motion to Remand for New Preliminary Hearing
8. Motion to Dismiss for Pre-Indictment Delay
9. Motion to Dismiss for Failure to State a Crime
10. Motion to Dismiss for Illegal Issuance of Arrest Warrant
11. Motion to Dismiss for Destruction of Evidence
12. Motion to Dismiss for Disjunctive Pleading
13. Motion to Dismiss for Failure to Grant a Speedy Trial
14. Motion to Suppress Search Warrant
15. Motion to Suppress Warrantless Search
16. Motion to Suppress Statements
17. Motion to Suppress Lineup
18. Motion *in Limine* to Exclude Expert Testimony
19. Motion to Suppress Photographic Array
20. Motion *in Limine* to Suppress Certain Evidence
21. Motion for Protective Order
22. Motion to Quash Misdemeanor or Felony Convictions
23. Motion to Suppress Evidence of Prior Bad Acts
24. Motion for Entry to Premises
25. Motion for Advanced Copy of Jury List
26. Motion to Order Venire Questionnaire
27. Motion for Medical Authorization
28. Motion for Psychiatric Exam and Mental Exam
29. Motion to Reduce Bond
30. Motion to Reveal Names and Addresses of Witnesses (Informant)

31. Motion to Reveal Plea Bargain of Informants
32. Motion for Allowance of Issuance of Defendant *Subpoena Duces Tecum* at Preliminary Hearing
33. Motion for Discovery of Juvenile, Welfare, and DFS Records
34. Motion for Commission to Take Out-of-State Depositions
35. Notice of Claim of Unconstitutionality
36. Motion for Return of Property and Legal Suggestions
37. Motion to Reshuffle Jury Panel
38. Motion to Dismiss for Governmental Misconduct
39. Defendant's General Legal Suggestions or Trial Brief
40. Motion to Suppress Statements on Grounds of Marital Privilege/Physician-Patient Privilege
41. Motion for Mistrial
42. Motion for Directed Verdict at the Close of Plaintiff's Evidence
43. Motion for Directed Verdict and Judgment of Acquittal at the Close of All of the Evidence
44. Motion for New Trial
45. Motion to Dismiss for Lack of Probable Cause Finding
46. Motion for Jury to Take Notes
47. Request for Hearing under § 491.075, RSMo
48. Motion for Discovery of All Computer Discs
49. Motion for Discovery of all State's Evidence
50. Motion to Dismiss for Prosecutor Misconduct

D. (§18.19) Opening Statement

Replace the first two sentences of the second paragraph in the original section with the following text:

In preparing the opening statement, counsel should ask the court to allow counsel to informally record the prosecutor's opening statement or obtain a copy from the court reporter. Counsel should remember that it is essential that the jury pay attention to defense counsel's remarks if the defense is to get a favorable verdict at the conclusion of the trial.

V. Mechanics of Defense

J. (§18.36) List of Exhibits

Delete the last sentence of the original section.

Rose Ann Feldman*

2012 Cumulative Supplement to
Chapter 19

MISDEMEANORS

Supplemented:
§§19.1
19.5
19.7
19.17 (New Section) New Misdemeanors

19

I. (§19.1) Introduction

The Missouri Criminal Code is in the process of being updated. There has been no major revision since 1979. As of the date of publication of this supplement, the legislation has not passed. The update of the Criminal Code includes a new classification of misdemeanor, the class D misdemeanor. Also, any attempt to commit a misdemeanor is classified as a class C misdemeanor. Proposed changes to the Criminal Code can be seen in their entirety at:

www.mobar.org/legislative.aspx?id=2848

*Ms. Feldman's biographical information appears on page 19–1 of the original chapter.

V. (§19.5) Arrest and Appearance

Effective August 28, 2005, § 544.170, now RSMo Supp. 2011, was amended, increasing the number of hours from 20 to 24 that the police can hold someone arrested for a misdemeanor without a warrant.

VII. (§19.7) Statute of Limitations

Replace the fifth paragraph in the original section with the following:

Section 556.037, RSMo Supp. 2011, was revised in 2011, extending the time limitation for prosecution of a sexual offense from 20 years to 30 years. There are several sexual offenses under Chapter 566, RSMo, that are classified as misdemeanors. *See* §§ 566.068 and 566.095, RSMo 2000, and §§ 566.090, 566.093, 566.111, 566.147, 566.148, and 566.149, RSMo Supp. 2011. When a sexual offense is alleged, prosecution must now be commenced within 30 years after the victim reaches the age of 18 years. Section 556.037.

XVI. (§19.17) New Misdemeanors (New Section)

Section 566.148, RSMo Supp. 2011, makes it a misdemeanor for certain offenders to be physically present within 500 feet of a child care facility.

Section 565.090, RSMo Supp. 2011, was amended effective August 28, 2008, making harassment by means of electronic communication, or "cyber harassment," a class A misdemeanor—unless committed by an adult (21 years of age or older) against a child (17 years of age or younger); then it is a class D felony.

Section 565.225, RSMo Supp. 2011, was also amended in 2008, making stalking by means of electronic communication a class A misdemeanor—unless it is committed by an adult against a child—both defined above—then it is a class D felony.

Paul K. Parkinson*

2012 Cumulative Supplement to
Chapter 20

TRIALS

Supplemented
§§20.2
20.3
20.4
20.7
20.10
20.12
20.13
20.14
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20.19
20.20
20.22
20.24

20

*Judge Parkinson received a B.S.E., 1977, from Truman State University; a J.D., 1980, from the University of Missouri-Kansas City; and an LL.M., 1981, from the University of Miami-Florida. He served as Associate Circuit Judge for the 41st Judicial Circuit in Macon County and is currently in private practice in Macon.

II. (§20.2) Jurisdiction

Add the following paragraph after the fourth paragraph of the original section:

Counsel should take note of the 12 local Circuit Court Rules (the 9th, 10th, 18th, 25th, 30th, 32nd, 33rd, 36th, 37th, 39th, 41st, and 45th Circuits) that allow, with the consent of all parties, the associate circuit judge who took a preliminary hearing waiver to stay with the case. The Rules are either under Rule 6, dealing with judges, or Rule 67, dealing with criminal cases. This does not appear to violate § 478.240, RSMo 2000 (cited in the original section). In the 30th Circuit, when there is a waiver, the judge who accepted the waiver is automatically assigned to the case, with an exception in Webster County. In the 32nd Circuit (Rule 6.2.2) and the 33rd Circuit (Rule 6.2.2), the judge is allowed to stay, even if the preliminary hearing was not waived but heard, an apparent violation of § 478.240.2(2).

III. (§20.3) Pleadings

Add the following paragraph after the third paragraph of the original section:

Once a case is disposed of at the associate level (for felonies: preliminary hearing held, preliminary hearing waived, or case dismissed; for misdemeanors: plea, trial, or case dismissed), the complaint has been completed. It is then necessary for the prosecuting attorney to file an information with the circuit court, though they may be identical in their content.

Add the following paragraph after the last paragraph on page 20–6:

Section 552.030, RSMo Supp. 2011 (cited in the original section), was amended in 2011 to remove the reference to mentally retarded and the mentally ill and now refers to "persons with an intellectual disability or developmental

disability or mental illness." Section 552.030.3. The substance of the statute was not changed.

Add the following paragraph after the first paragraph on page 20–7:

The ability of the trial judge to raise mental fitness could also call into question the defendant's right against self-incrimination because the questions related to the defendant's mental state at the time of the alleged offense would require the defendant to discuss the offense itself.

Replace the last sentence of the next to last paragraph on page 20–8 with the following sentence:

In that event, *after informing the defendant what the court intends to do if the defendant persists in a plea of guilty,* the court is required by Rule 24.02(d)4 to permit an accused to withdraw a guilty plea entered under the rejected plea bargain *and proceed to trial*.

Add the following paragraph after the first paragraph on page 20–9:

The followed practice under an Alford Plea (discussed in the original section) seems to be the waiver of a trial and an acceptance of the sentence without an admission of guilt because the latter is not a constitutional requirement for the imposition of a criminal penalty. The defendant can even express innocence—there is no difference between the refusal to admit the commission of a criminal act and an outright denial—but there must be a factual basis for charges in order for the judge to sentence the defendant. The defendant's usual response is that the facts of the case could support a finding of guilt. *N.C. v. Alford*, 400 U.S. 25 (1970); *Jenkins v. State*, 788 S.W.2d 536 (Mo. App. S.D. 1990) (both cases are cited in the original section).

IV. (§20.4) Ethical Considerations

Add the following paragraph after the first paragraph on page 20–12:

See *Berger v. United States*, 295 U.S. 78 (1935), for a discussion of the ethical duties of a prosecutor.

VI. (§20.7) Trials on Multiple Counts

Add the following paragraph after the third paragraph on page 20–14:

State v. Hobbs, 826 S.W.2d 851 (Mo. App. E.D. 1992), is also an excellent case to review for speedy trial issues.

Add the following paragraph before the first full paragraph on page 20–16:

See *State v. Johnson*, 753 S.W.2d 576 (Mo. App. S.D. 1988), which distinguished *State v. Wood*, 613 S.W.2d 898 (Mo. App. W.D. 1981) (cited in the original section), as being decided before the amendments to both § 545.885, now RSMo 2000 (amended in 1984), and Rule 24.07 (amended in 1986). The court stated:

> If, in the instant case, we continued to adhere to the rule that severance, if requested, is mandatory any time evidence of one crime would not be admissible as proof of another crime if the two were tried separately, we would effectively emasculate the 1984 amendments to §§ 545.140 and 545.885. Bearing in mind that an accused has neither a federal nor state constitutional right to be tried on only one offense at a time, State v. Baker, 524 S.W.2d 122, 126[3] (Mo. banc 1975), that appellant does not attack the constitutionality of either § 545.140 or § 545.885, and that appellant's only asserted ground for severance was that evidence of the Spirit Originals break-in would not have been admissible at a trial of counts III, IV and V had those counts been tried separately from counts I and II, we hold that the trial court did not abuse its discretion in denying appellant's motion for severance.

Johnson, 753 S.W.2d at 586.

Add the following paragraph after the first full paragraph on page 20–16:

State v. Smith, 682 S.W.2d 861 (Mo. App. E.D. 1984) (cited in the original section), was criticized in *State v. Shubert*, 747 S.W.2d 165 (Mo. App. W.D. 1988), because, in *Smith*, the judge felt that he had to find a prejudicial effect of the denial of a motion to sever. The *Shubert* court said:

> We would hold, in contrast to the opinion in *Smith,* that because improper joinder is a matter of law, severance is mandated where counts were improperly joined. This follows because, by definition, improper joinder links unrelated crimes, evidence of which will be adduced at trial. The consequence is necessarily prejudicial to the accused. It need not be separately alleged or proved.

Id. at 168.

VIII. Rights of Defendants

A. (§20.10) Rights of Defendant During Trial

Add the following paragraph at the end of the original section:

The presence of the defendant at depositions has been addressed by a 2004 amendment to Rule 25.14 (cited in the original section), which now states, in part, as follows:

> The court shall order the deposition if it finds, after a hearing, that the deposition is necessary to preserve testimony.
>
> The order shall require the defendant to attend the deposition or to personally waive the right to be present and the right of confrontation in writing or in open court. The order shall contain provisions necessary to fully protect the defendant's rights of personal confrontation and cross-examination of the witness.

Defense attorneys used to not allow their defendants to be present at depositions in order to argue against their later use as there was no "confrontation." Now it is clear that, if the defendant waives the right to attend, the defendant is also waiving any confrontation issues.

C. (§20.12) Right to Be Personally Present

Add the following paragraph after the third paragraph on page 20–23:

For a more recent case on the right of a defendant to waive the right to be present at trial, see *State v. Johns*, 34 S.W.3d 93 (Mo. banc 2000).

Add the following paragraph after the fourth paragraph on page 20–23:

In *Scurr v. Moore*, 647 F.2d 854 (8th Cir. 1981), the court identified the disruptive conduct during a trial as more of a forfeit of the right to be present than a waiver. See also *United States v. Ward*, 598 F.3d 1054 (8th Cir. 2010), in which the court said that the constitutional right to be present at trial includes the right to be an irritating fool in the presence of a jury of the defendant's peers. In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court said that the right to be present can be regained as soon as the defendant demonstrates the willingness to conduct himself or herself with decorum.

Add the following paragraph after the list of bulleted items on page 20–24:

The U.S. Supreme Court has clarified that physical confrontation is not required. *Douglas v. State of Ala.*, 380 U.S. 415 (1965). In *Guinan v. State*, 769 S.W.2d 427 (Mo. banc 1989), the Supreme Court of Missouri criticized *State ex rel. Turner v. Kinder*, 740 S.W.2d 654 (Mo. banc 1987) (cited in the original section), by pointing out the statutory change made to § 561.031, now RSMo Supp. 2011, which allows the use of two-way audio-video communication for almost everything but the trial itself.

D. (§20.13) Right Against Self-Incrimination

Add the following paragraph after the citation "Id. at 12 (citations omitted)" *on page 20–25*:

State v. Chunn, 657 S.W.2d 292 (Mo. App. E.D. 1983) (cited in the original section), was overruled by *State v. Neff*, 978 S.W.2d 341 (Mo. banc 1998), which stated that a mistrial resulting from an isolated reference to a defendant's failure to testify is extreme. An admonition to the jury will suffice.

Add the following paragraphs after the last full paragraph on page 20–25:

See *State v. Barnum*, 14 S.W.3d 587 (Mo. banc 2000), in which the Court said that the use of descriptors such as "uncontradicted" and "undisputed" by a prosecutor does not violate a defendant's rights under § 546.270, RSMo 2000. The court in *State v. Spencer*, 50 S.W.3d 869 (Mo. App. E.D. 2001) (citing *Neff*, 978 S.W.2d at 344), said that direct reference to the defendant's failure to testify occurs when the prosecutor uses words such as "defendant," "accused," and "testify" or their equivalent. An indirect reference is one reasonably apt to direct the jury's attention to the defendant's failure to testify. When an objection is made and overruled, a direct reference will almost always require a reversal; but an indirect reference will only require reversal if there was a calculated intent to magnify that decision so as to draw the jury's attention to it. But in addition to the type of reference made, the appellate court must also consider the context in which the comment was made. The prejudicial impact of such a statement is a matter within the sound discretion of the trial court. The prejudice that can occur from these comments can normally be cured by an instruction to the jury.

Also note that the defendant has the right to raise the issue, and if so, the prosecutor may discuss the issue on those terms. *State v. Wright*, 978 S.W.2d 495 (Mo. App. W.D. 1998).

Add the following paragraph before the first full paragraph on page 20–26:

State v. Powell, 682 S.W.2d 112 (Mo. App. E.D. 1984) (cited in the original section), also points out a question concerning the defendant's right to not testify is not evidence, so if there is no answer because of a timely objection, such a question presents

no error. This premise is included in the instructions to the jury. *See* MAI-CR 3.02 (2011). The lack of objection in *State v. Green*, 798 S.W.2d 498 (Mo. App. S.D. 1990) (cited in the original section), can be cured by plain error if the prejudice resulted from the evidence and the record shows that a manifest injustice or a miscarriage of justice resulted.

E. (§20.14) Right to Trial by Jury

Add the following paragraph after the seventh paragraph of the original section:

Section 543.200, RSMo 2000, allows either the defendant or the prosecuting attorney to demand a jury trial, and if not demanded, then it will be tried by the court. Contrast this with the provisions of § 546.040, RSMo 2000, and Rule 27.01 (both cited in the original section), which require felony trials to be by a jury unless waived by the defendant, whose right cannot be superseded by the prosecuting attorney demanding a jury trial.

G. (§20.16) Bifurcated Trials

Add the following paragraph after the second full paragraph on page 20–32:

State v. McLaughlin, 265 S.W.3d 257 (Mo. banc 2008), illustrated that *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003) (cited in the original section), was superseded by statute when § 565.030.4, now RSMo Supp. 2011, was amended in 2001 to delete what had been the second finding the jury was required to make concerning the presence of additional nonstatutory aggravators.

Add the following paragraphs before the last paragraph of the original section:

Some cases that have come down since the amendment to § 557.036, now RSMo Supp. 2011 (cited in the original section), include the following:

- *State v. Edwards*, 228 S.W.3d 88 (Mo. App. E.D. 2007) ("However, because the sentencing guidelines do not address the specifics of Defendant or his offense, they are beyond the scope of evidence allowed during the penalty-phase.")

- *State v. Collins*, 290 S.W.3d 736 (Mo. App. E.D. 2009) (quoting *State v. Emery*, 95 S.W.3d 98, 102 (Mo. banc 2003) ("[A] defendant 'waive[s] his statutory right to a jury-recommended sentence where he allow[s] the judge to determine his sentence without raising his right to have the jury recommend a sentence.'"))

- *State v. Jaco*, 156 S.W.3d 775 (Mo. banc 2005)

- *State v. Chapman*, 167 S.W.3d 759 (Mo. App. E.D. 2005) (statute does not require that the guilt phase and the sentencing phase be by the same jury)

- *State v. Clark*, 197 S.W.3d 598 (Mo. banc 2006) (the trial court did not err by allowing the state to introduce evidence of Clark's prior acquittals during the penalty phase of the trial)

- *Vaca v. State*, 314 S.W.3d 331 (Mo. banc 2010) ("[T]he submission of mental health history, subject to counsel's strategic judgment, is a viable defense during a bifurcated sentencing phase.")

- *State v. Washington*, 249 S.W.3d 255 (Mo. App. W.D. 2008) ("[A] defendant has a due process right to be personally present at the time of sentencing and to be heard on the pronouncement.")

H. (§20.17) Right to Counsel

Add the following paragraph after the first paragraph of the original section:

The Court in *Scott v. Illinois*, 440 U.S. 367 (1979), said it was not inclined to extend *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (cited in the original section), to the case when the

defendant is charged with a statutory offense for which imprisonment upon conviction is authorized but not actually imposed.

Add the following paragraph after the fourth paragraph of the original section:

The inquiry as to the defendant's decision to waive the right to counsel needs to be made by the judge with a good record. *State v. Garth*, 352 S.W.3d 644 (Mo. App. E.D. 2011). Among the discussions that the record needs to reflect is that the trial court did inform the defendant of:

- "*the elements of the charged offense;*
- *the range of punishment; and*
- *the possible defenses and mitigating circumstances*."

In addition, the trial court needs to inform the defendant that the defendant would be at an extreme disadvantage by appearing pro se.

Add the following paragraph after the fifth paragraph of the original section:

The waiver must be voluntary and continuous. But see *State v. Richardson*, 304 S.W.3d 280 (Mo. App. S.D. 2010), in which the court indicated that it was okay for the judge to deny a late request for counsel if the waiver complied with § 600.051, RSMo 2000, and all other factors were in order.

Add the following paragraph after the sixth paragraph on page 20–35:

In *Hickey v. State*, 328 S.W.3d 225, 230 (Mo. App. E.D. 2010), the court said that "to establish an actual conflict, counsel must have done something or failed to do something that was then lost to the movant, and that was detrimental to the movant's interests and advantageous to another's interests." See also *Cuyler v. Sullivan*, 446 U.S. 335 (1980), in which the Supreme Court said that multiple representations are

presumed okay unless there is a reason to believe that a problem exists.

J. (§20.19) Doctrine of Fundamental Unfairness

Add the following paragraph after the list of bulleted items in the original section:

See *State v. Carlisle*, 995 S.W.2d 518 (Mo. App. E.D. 1999), in which the court examines several instances of unfairness.

IX. (§20.20) Reception of Evidence

Add the following paragraph after the first full paragraph on page 20–39:

"Rulings on preliminary motions to limit or exclude testimony are interlocutory only; the motion itself does not serve as a continuing objection, and unless the movant's objection is renewed when the evidence objected to is offered, nothing is preserved for appellate review." *State v. Guy*, 770 S.W.2d 362 (Mo. App. S.D. 1989).

Add the following paragraph after the third full paragraph on page 20–40:

The case cited by *State v. Danner*, 490 S.W.2d 298 (Mo. App. W.D. 1973), in the original section is *State v. Stanford*, 297 S.W. 73 (Mo. 1927). If the judge makes it clear that the attorney does not need to continue to make the objection, it is not necessary to object each time that the matter objected to is raised.

XI. (§20.22) Defense Evidence

Add the following paragraphs at the end of the original section:

Practice dictates that most defense attorneys prefer to give their opening statements at the beginning of the case to instill reasonable doubt from the beginning, and it is rare to wait until the opening of the defense case.

The defense is not required to give an opening statement, but the prosecution is. Rule 27.02(f). If the prosecutor does not give an opening statement, it is error, but it may not be reversible if the defense was aware of the evidence that the state intended to present in support of the charge and the accused's ability to fairly meet the accusation was not inhibited. *State v. Hood*, 680 S.W.2d 420 (Mo. App. S.D. 1984).

XIII. (§20.24) Should the Defendant Testify?

Add the following paragraph after the first full paragraph on page 20–45:

MAI-CR 308.14 (1987) reads as follows:

> RIGHT OF DEFENDANT OR SPOUSE TO REFRAIN FROM TESTIFYING
>
> 1. Under the law, a defendant has the right not to testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify.
> 2. Under the law, the (husband) (wife) of a defendant has the right not to testify. No inference of any kind may be drawn from the fact that the (husband) (wife) did not testify.

Add the following paragraph after the third full paragraph on page 20–47:

It should be noted that, in *State v. Edwards*, 173 S.W.3d 384 (Mo. App. E.D. 2005) (cited in §20.3 of the original chapter), it was made clear that the defendant cannot be denied the right to testify during the penalty phase of the trial.

Add the following paragraphs after the third full paragraph on page 20–48:

State v. Scott, 459 S.W.2d 321 (Mo. 1970) (cited in the original section), clarified that the limitation on the use of prior convictions is to make sure that such evidence is available only for impeachment and evidence of guilt. *State v. Washington*, 383 S.W.2d 518 (Mo. 1964), also allowed revealing the punishment assessed for prior convictions and again

emphasized that they are available strictly for impeachment purposes.

Municipal cases are actions to recover debts to the city for the infraction and are not criminal offenses. *Stokes v. Wabash R. Co.*, 197 S.W.2d 304 (Mo. 1946).

Add the following paragraph before the first full paragraph on page 20–49:

State v. Brooks, 694 S.W.2d 851 (Mo. App. E.D. 1985), in addition to confirming that a suspended imposition of sentence will not prevent disclosure, stated that, even if probation is over and the records closed under § 610.105, RSMo Supp. 2011, and § 610.106, RSMo 2000, the plea of guilty can be used. The court in *Brooks* read those sections of Chapter 610, RSMo, as having so many exceptions to the closed records provision that they do not offer any significant amount of confidentiality.

Add the following paragraph after the first full paragraph on page 20–49:

State v. Spinks, 125 S.W.2d 60 (Mo. 1930) (cited in the original section), also stands for the proposition that the mere charge of an unrelated offense cannot be used, even if the defendant is testifying.

Add the following paragraph after the second full paragraph on page 20–49:

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993) (cited in the original section), was overruled, in part, by *State v. Vorhees*, 248 S.W.3d 585 (Mo. banc 2008):

> The trial court erred in admitting evidence that on a prior occasion Vorhees committed a sexual offense with a minor that was similar to the charged offense. When offered to corroborate an alleged victim's testimony, evidence of a signature *modus operandi*—like the propensity evidence in *Ellison* and its precedent cases—violates the Missouri constitution's guarantee that a defendant will be tried only for the crime charged.

Id. at 592.

Add the following paragraphs before the first full paragraph on page 20–50:

Section 566.025, RSMo 2000, as it is written, applies to victims under the age of 14 years involved with sexual or family offenses under Chapters 566 and 568, RSMo. But the statute, as it existed in 1998, was found to violate Missouri Constitution Article I, §§ 17 and 18(a). *State v. Burns*, 978 S.W.2d 759 (Mo. banc 1998). In 2000, the statute was amended to read as follows (italics indicate the added portions; redactions are not shown):

> In prosecutions *pursuant to this chapter or chapter 568, RSMo, of a sexual nature* involving a victim under fourteen years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed other charged or uncharged crimes *of a sexual nature* involving victims under fourteen years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he *or she* is charged *unless the trial court finds that the probative value of such evidence is outweighed by the prejudicial effect*.

But this amendment did not satisfy the Supreme Court of Missouri and was still found to violate the Constitution. *State v. Ellison*, 239 S.W.3d 603 (Mo. banc 2007). In *Ellison*, the Court's conclusion was, "Evidence of a defendant's prior criminal acts, when admitted purely to demonstrate the defendant's criminal propensity, violates one of the constitutional protections vital to the integrity of our criminal justice system." *Id.* at 608.

Sean D. O'Brien*
Lindsay J. Runnels**

2012 Cumulative Supplement to
Chapter 21

VOIR DIRE AND JURY SELECTION

Supplemented:
§§21.1
21.4
21.6
21.10
21.12
21.17
21.19
21.21
21.22
21.23
21.34

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*Mr. O'Brien's biographical information appears on page 21–1 of the original chapter. He is an Associate Professor at the University of Missouri-Kansas City School of Law.

**Ms. Runnels received her B.A., 2003, from the University of Missouri and J.D., 2009, from the University of Missouri-Kansas City with an emphasis in litigation. She received the John Oliver Award, which is given annually to UMKC's most outstanding graduate in the area of criminal law. Her practice focuses on criminal investigation and postconviction representation.

I. Introduction

A. (§21.1) Purpose

This supplement discusses recent developments that modify or explain in further detail principles discussed in the original chapter. It is not an exhaustive survey of all cases regarding voir dire. The outline and section numbers below correspond to the original chapter.

II. Authorities

B. (§21.4) Statutory

A defendant is entitled to injunctive or appellate relief if it is shown that the jury is not empanelled in strict adherence to § 494.465, RSMo 2000.

While § 494.465 requires a defendant to assert a claim of nonconformity with the jury selection statutes before the jury is sworn and while the statutory language is mandatory, a defendant may nevertheless be permitted to pursue a claim in a motion for postconviction relief under Rule 29.15 when the alleged jury violation occurred without the defendant's actual or constructive knowledge. In *Preston v. State*, 325 S.W.3d 420 (Mo. App. E.D. 2010), Preston was entitled to postconviction relief under Rule 29.15 because an "opt out" procedure that allowed eligible persons to decline jury service by paying $50 and performing six hours of community service constituted a fundamental and systematic failure to comply with the statutory jury selection requirements under §§ 494.400–494.505, RSMo 2000 and Supp. 2011.

III. Motions to Quash Jury Panel

A. (§21.6) In General

The constitutional and statutory framework governing jury selection in Missouri depends heavily on random selection of members of the jury pool as the best method for ensuring that

the resulting panel of qualified jurors represents a fair cross-section of the community. The decision in *Hudson v. State*, 248 S.W.3d 56 (Mo. App. W.D. 2008), demonstrates that, in the age of digital processing of information, counsel and the courts must be alert for possible glitches that result in unintended violations of jury selection procedure. In *Hudson*, a Jackson County case, after prospective jurors were summoned to the courthouse for jury duty, the circuit court computer generated lists of jurors to be sent to various divisions for trial. No one noticed that the venire panel for Hudson's trial had been sorted by the computer in reverse-chronological order by date of birth, resulting in a petit jury selected from a pool of jurors between the ages of 36 and 72 years old.

Because "[t]he jury selection process substantially failed to comply with Hudson's statutory right to a trial by randomly selected jury members," *id.* at 60, the defendant was entitled to relief "even in the absence of a clear showing of actual prejudice or a constitutional violation," *id.* (quoting *State v. Sardeson*, 174 S.W.3d 598, 601 (Mo. App. S.D. 2005)).

V. Challenges

A. (§21.10) For Cause

The Supreme Court of Missouri clarified the standard of review for failure to strike a juror for case in *Joy v. Morrison*, 254 S.W.3d 885 (Mo. banc 2008), as a result of Missouri caselaw conflating the standard of review applicable to conduct and control of voir dire (an appellate court will interfere with the exercise of the trial court's considerable discretion only when the record shows a manifest abuse of discretion *and* a real probability of injury to the complaining party) and the standard of review for cases involving the qualifications of jurors (an appellate court will reject the trial court's determination only upon a clear showing of abuse of discretion). *State v. Olinghouse*, 605 S.W.2d 58, 68, 69 (Mo. banc 1980); *see also State v. Betts*, 646 S.W.2d 94 (Mo. banc 1983); *State v. Smith*, 649 S.W.2d 417, 422 (Mo. banc 1983). The Court noted that since *Smith* was decided, many cases cite the *Smith* standard

to establish that a showing of real probability of injury is required in juror qualifications cases. *Joy*, 254 S.W.3d at 888. The Court explained that the correct showing is articulated in *State v. Christeson*, 50 S.W.3d 251, 264 (Mo. banc 2001), which does not require a showing of a real probability of injury in juror qualification cases. The Court ruled that, to the extent *Betts*, *Smith*, and their progeny require a showing of real probability of injury with respect to the trial court's ruling on the qualification of a potential juror, they are overruled.

2. (§21.12) Rights of the Accused

In *James v. State*, 222 S.W.3d 302 (Mo. App. W.D. 2007), the defendant argued that his trial counsel was ineffective for failing to strike a venireperson for cause after she indicated that she would draw an adverse inference from a defendant's failure to testify in his own defense. "Review of denial of relief under Rule 29.15 is limited to determining whether the motion court's findings and conclusions are clearly erroneous." *Id.* at 304 (quoting *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006)). "Findings and conclusions are clearly erroneous if, after review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *James*, 222 S.W.3d at 304 (quoting *Moss v. State,* 10 S.W.3d 508, 511 (Mo. banc 2000)). The court determined that the venireperson's responses were more than sufficient to suggest that she might have a problem avoiding drawing a negative inference from the defendant's failure to testify and that the trial court would have been required to strike her for cause had such a request been made. *James*, 222 S.W.3d at 306; *see also State v. Stanley*, 124 S.W.3d 70, 77 (Mo. App. S.D. 2004) ("[A] trial judge has a duty to make its own independent inquiry whenever a venireperson equivocates about his or her ability to be fair and impartial."). "The failure to challenge for cause a venireperson who admits to a prejudice against the defendant is ineffective absent an acceptable explanation." *James*, 222 S.W.3d at 307 (quoting *State v. McKee*, 826 S.W.2d 26, 28 (Mo. App. W.D. 1992)). Finding

no acceptable explanation for allowing the venireperson to remain on the jury, the court vacated the defendant's conviction and sentence and remanded for a new trial. *James*, 222 S.W.3d at 307–08.

5. Making the Record and Review

b. (§21.17) Timely Objection

Trial counsel has a duty to challenge a biased juror for cause and can be found ineffective for failing to do so. In *White v. State*, 290 S.W.3d 162 (Mo. App. E.D. 2009), a venireperson indicated his prejudice against the defendant and his inability to be fair. When trial counsel fails to strike a biased venireperson who ultimately serves as a juror, a postconviction court will presume that the defendant is prejudiced by counsel's oversight. *See Strong v. State*, 263 S.W.3d 636, 648 (Mo. banc 2008); *Hultz v. State*, 24 S.W.3d 723, 726 (Mo. App. E.D. 2000). The presumption of prejudice may be overcome if trial counsel articulates a reasonable trial strategy for failing to strike a biased venireperson who is thereafter seated as a juror. *James v. State*, 222 S.W.3d 302, 307 (Mo. App. W.D. 2007). But when "trial counsel . . . fails to articulate a reasonable strategy for having the admittedly biased juror on the panel, counsel has failed to exercise the customary skill and diligence of a reasonably competent attorney." *Pearson v. State*, 280 S.W.3d 640, 645 (Mo. App. W.D. 2009). The court in *White* noted that *Strong* "was indisputably clear that, when counsel's errors result in the empanelling of a biased juror, the defendant has been deprived of his right to a fair and impartial jury, and *Strickland* prejudice is therefore presumed." *White*, 290 S.W.3d at 166 n.1 (citing *Strong,* 263 S.W.3d at 648). Because there were no follow-up questions addressing the venireperson's assertions that he could not be fair, there was not an opportunity to give an unequivocal assurance of impartiality. Neither the state, defense counsel, nor the trial court rehabilitated

the venireperson, and the court determined that he was not qualified to serve as a juror. *White*, 290 S.W.3d at 166.

d. (§21.19) Challenge After Trial

A juror's concealment of facts relevant to that juror's qualifications to serve gives rise to a presumption of bias warranting a new trial. *Massey v. Carter*, 238 S.W.3d 198 (Mo. App. W.D. 2007). When a party shows that a juror failed to disclose information in response to a question that unequivocally triggers a duty to answer, it is error for the trial court to decline to conduct a hearing on the issue. *Campise v. Borcherding*, 224 S.W.3d 91, 96–97 (Mo. App. E.D. 2007).

f. (§21.21) Record for Review

The duty of appellate courts to review trial court judgments "presupposes a record and evidence upon which this court can perform this function with confidence in the reasonableness, fairness and accuracy of its conclusion." *State v. Clark*, 263 S.W.3d 666 (Mo. App. W.D. 2008)*, overruling on other grounds recognized by State v. Reando*, 313 S.W.3d 734 (Mo. App. W.D. 2010). If the absence of a complete transcript "thwarts meaningful appellate review," *Clark*, 263 S.W.3d at 674, the remedy is reversal of the judgment and remand for a new trial. But when, in *Clark*, the appellant could not submit a complete transcript in spite of his diligent efforts, he was not entitled to relief when he could not show that he was prejudiced by the absence of a voir dire transcript. In the absence of specific allegations of error during the voir dire process, the allegation of "potential prejudice [was] insufficient to carry Clark's burden." *Id.* It appears that the problems in *Clark* arose from the use of electronic recording of the trial proceeding in lieu of a qualified court reporter.

B. Peremptory Challenges

1. (§21.22) In General

In *Miller-El v. Dretke*, 545 U.S. 231 (2005), the Court reiterated that the rule in *Batson v. Kentucky*, 476 U.S. 79 (1986), discussed in the original section, provides all litigants an effective remedy against discriminatory use of peremptory challenges. In *Miller-El*, the prosecution used peremptory challenges to exclude 91% of the eligible African-American venire members, which the Court found to be "remarkable" evidence of race discrimination. *Miller-El*, 545 U.S. at 240. Discrimination in the use of peremptory challenges "invites cynicism respecting the jury's neutrality" and "undermines public confidence in adjudication." *Id.* at 238 (citations and quotation marks omitted). In addition to the statistical pattern of the prosecutor's use of peremptory challenges, the Court found that the failure to strike similarly situated nonblack jurors tends to prove purposeful race discrimination. *Id.* at 241. The Court also inferred discriminatory intent from:

- the prosecutor's mischaracterization of a black venireperson's testimony, *id.* at 244;
- the failure to engage in meaningful voir dire examination about the subject that allegedly justified the peremptory strike, *id.* at 246; and
- the prosecutor's request to shuffle the venire panel, *id.* at 253.

The Court found that, when the "whole of the *voir dire* . . . casts the prosecution's reasons for striking [a black juror] in an implausible light," it was simply implausible, based on the entire record, that race had nothing to do with the prosecutor's strikes. *Id.* at 252.

Further, the Court found that "the appearance of discrimination is confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries at the time Miller-El's jury was selected." *Id.* at 253. The lower courts' ruling that the prosecutor did not discriminate against African-Americans who qualified to serve on Miller-El's jury was an unreasonable application of clearly established federal law, and habeas corpus relief was, therefore, mandated under 28 U.S.C. § 2254(d).

Missouri courts are following the U.S. Supreme Court's analysis. In *State v. Livingston*, 220 S.W.3d 783, 789–90 (Mo. App. W.D. 2007), the prosecutor's attempted "race-neutral" justification for peremptory challenges was rejected when:

- the prosecutor failed to strike similarly situated white jurors;
- the prosecutor misrepresented the record in justifying his challenges; and
- the trial court had disallowed other peremptory strikes by the prosecutor in the same case after finding that "race-neutral" explanations were pretextual.

Similarly, in *State v. McFadden*, 216 S.W.3d 673, 675 (Mo. banc 2007), the Court found that a prosecutor's peremptory challenges were discriminatory when he claimed that he struck a black woman because she was hostile to his questioning and that she had "crazy red hair." The prosecutor's reasons were not race neutral because the record showed that the venireperson was not hostile but "merely exasperated by the State's interrogation concerning [her] license." *Id.* Further, judging her by her hair color reflected "a limited cultural view" and was not a legitimate basis for striking her. *Id.* at 677.

2. (§21.23) Discriminatory Use of Peremptory Challenges—*Batson v. Kentucky*

In *State v. Washington*, 288 S.W.3d 312 (Mo. App. E.D. 2009), the defendant raised a *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge to the state's peremptory strikes, stating that all of the state's six strikes, other than the alternate, were African-American. The prosecutor explained one of the strikes by stating that the venireperson was wearing dreadlocks and that this suggested he was individualistic. The defense counsel failed to challenge the state's proffered race-neutral explanation. On appeal, the defendant argued that the prosecutor's explanation was merely a pretext for racial discrimination. The court explained that a litigant is not permitted to broaden the objection presented to the trial court and is not permitted to rely on a different theory than the one offered at trial. *Washington*, 288 S.W.3d at 314 (citing *State v. Clark*, 280 S.W.3d 625 (Mo. App. W.D. 2008)). Although the defense counsel raised an initial objection to the state's peremptory strike of the venireperson, counsel did not challenge the state's proffered reason for striking the venireperson, whether on grounds that the explanation was not race neutral or that the explanation was merely a pretext for racial discrimination. The court noted that a defendant's failure to challenge a state's race-neutral explanation in any way waives any future complaint that the state's reasons were racially motivated and leaves nothing for the court to review. *Washington*, 288 S.W.3d at 317 (citing *State v. Taylor*, 944 S.W.2d 925, 934 (Mo. banc 1997)). *But see State v. McFadden*, 216 S.W.3d 673, 677 (Mo. banc 2007).

For a recent study regarding *Batson* and the use of peremptory strikes, see Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 10 (2010), available at:

http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf

8. (§21.34) Making the Proper Record and Objections as to Jurors Peremptorily Struck—Sufficient Time for Making Strikes

In *Strong v. State*, 263 S.W.3d 636 (Mo. banc 2008), Mr. Strong alleged in a motion filed under Rule 29.15 that his trial counsel was ineffective for failing to object to the prosecutor's peremptory strike of a qualified juror that was admittedly based primarily on the venireperson's religious beliefs. During voir dire, defense counsel challenged the prosecutor's peremptory strikes of African-American venirepersons Ms. Stevenson and Mr. Bobo, relying on *Batson v. Kentucky,* 476 U.S. 79 (1986). The trial court asked the state to prove race-neutral reasons for the strikes. With respect to Ms. Stevenson, the prosecutor explained that he removed her for several reasons, including that the prosecutor questioned her ability to apply the death penalty because of her references to religion. The trial court found these reasons to be race neutral. With respect to Mr. Bobo, an assistant dean of a seminary, the state asserted that, "I don't want religious people, very religious, and I would have to assume because he's the dean of a seminary that he is a very religious person." *Strong*, 263 S.W.3d at 645. The trial court found these reasons to be race neutral. The defense counsel did not raise religion-based *Batson* challenges to the strikes. The defendant first claimed in his direct appeal that striking Ms. Stevenson and Mr. Bobo violated Article I, § 5, of the Missouri Constitution. In its decision on direct appeal, the Court found that the defendant failed to preserve the claim for appellate review because it was not raised before the trial court. *Id*. at 645 (citing *State v. Strong*, 142 S.W.3d 702, 713 (Mo. banc 2004)). On appeal from his denial for postconviction relief, Mr. Strong asserted that his counsel was ineffective for failing to raise religion-based Batson challenges. Because the failure to preserve error for appellate review is not cognizable in a Rule 29.15 motion, the Court dismissed that claim and also noted that a trial counsel's race-based *Batson* challenges did not preserve a claim for religion-based

discrimination. *Strong*, 263 S.W.3d at 647. Further, the Court noted that, in this case, the errors were not structural as Mr. Strong argued, and because he did not demonstrate prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), the Court did not need to decide whether the prosecutor's peremptory strikes were constitutionally prohibited. *Id.* at 647.

Counsel should take notice of the importance of raising all constitutional violations, both state and federal, in challenging peremptory strikes during voir dire so that they are not considered waived during an appellate review. Race-based *Batson* challenges are but one challenge to an improper strike of a qualified venireperson.

Linda Lemke*

2012 Cumulative Supplement to
Chapter 22

OPENING STATEMENTS

Supplemented:
§§22.3
22.4
22.5
22.6
22.12

II. (§22.3) Purpose and Scope

"Venue is not 'jurisdictional.' Venue is not an element of the offense. An objection to venue must be presented, and ruled on, prior to trial." *State v. Taylor*, 238 S.W.3d 145, 146 (Mo. banc 2007). Therefore, venue does not need to be included in the opening statement.

III. (§22.4) Test of Sufficiency

The only time that the trial court may direct a verdict after the prosecutor's opening statement is when:

> it clearly and affirmatively appears from the statement that the charge against accused cannot be sustained under any view of the evidence consistent with it, and only when the opportunity to correct or embellish the statement has been given to the prosecutor subsequent to accused's motion to direct a verdict.

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State v. Gray, 423 S.W.2d 776, 786 (Mo. 1968); *State v. Smith*, 988 S.W.2d 71, 76 (Mo. App. W.D. 1999). Defense counsel may strategically decide not to object to an inadequate opening statement when the prosecutor can easily remedy the deficiency. *Coday v. State*, 179 S.W.3d 343, 360–61 (Mo. App. S.D. 2005). To quickly correct a faulty opening statement, a prosecutor can use the verdict director for the crime and simply recite to the jury the evidence that will support each element of the offense. *State v. Bauers*, 702 S.W.2d 896, 899 (Mo. App. E.D. 1985); *State v. Jones*, 255 S.W.2d 801, 805 (Mo. 1953), *other holding in case abrogated by statute as recognized by State v. Kelly*, 851 S.W.2d 693, 695 (Mo. App. E.D. 1993); *State v. Whites*, 538 S.W.2d 70, 72 (Mo. App. S.D. 1970).

IV. (§22.5) What the Prosecutor's Opening Statement Can Include

See, in general, *State v. Cable*, 207 S.W.3d 653, 660 (Mo. App. S.D. 2006), as support that the prosecutor's opening statement can include evidence that the state intends to introduce, including evidence that is arguably admissible but may later be excluded if made in good faith.

Add the following to these paragraphs in the original section:

1.a. *State v. Aubuchon*, 394 S.W.2d 327, 331 (Mo. 1965); *State v. Foster*, 557 S.W.2d 651, 652 (Mo. App. W.D. 1977).

1.c. *State v. McKeever*, 101 S.W.2d 22, 28–29 (Mo. 1936).

1.d. *State v. Knight*, 206 S.W.2d 330, 333 (Mo. 1947).

2. Call the defendant a drug dealer if the facts will show this—stating that the defendant committed the charged crime is not argument. *State v. Smallwood*, 230 S.W.3d 662 (Mo. App. E.D. 2007).

7. It may not be precisely accurate to say without qualification that dramatics may be employed in an opening statement. However, the trial court does have some discretion and it is not manifest in these circumstances that the state's attorney so overstepped the bounds of propriety that this court should grant a new trial.

State v. Edmonds, 347 S.W.2d 158, 164 (Mo. 1961). *Compare State v. Rhodes*, 988 S.W.2d 521, 528–29 (Mo. banc 1999) (a prosecutor acting out the crime during closing argument while asking the jurors to put themselves in the place of the victim required a reversal of sentence).

V. (§22.6) What the Prosecutor's Opening Statement Cannot Include

Add the following to these paragraphs in the original section:

6. *State v. Graves*, 27 S.W.3d 806, 811 (Mo. App. W.D. 2000) (the prosecutor could not mention the defendant's post-arrest silence in the prosecutor's opening statement).

7. An overruled objection to a direct reference to a defendant's right to testify will almost always require reversal on appeal. An indirect reference requires reversal only when the prosecutor intended to magnify the defendant's decision. *State v. Wheeler*, 219 S.W.3d 811, 815–16 (Mo. App. S.D. 2007). Therefore, prosecutors should avoid all comments on a defendant's right to testify in the opening statement, and defense counsel should seriously consider objecting to such a reference, even though it may highlight the defendant's decision.

VI. Suggestions on Strategy

F. (§22.12) Main Witnesses

In *Mitchell v. Kardesch*, 313 S.W.3d 667, 678–79 (Mo. banc 2010), the rule prohibiting impeaching witnesses by asking them about specific instances of misconduct was overruled. *Mitchell* also explains, in detail, the rules about impeaching witnesses with extrinsic evidence of the witnesses' prior false allegations. *Id.* at 679–82. If, at the pretrial hearing, the trial court has found this evidence admissible, counsel should consider describing the past false accusations to the jury in the opening statement.

S. Paige Canfield*

2012 Cumulative Supplement to
Chapter 23

EVIDENCE

Supplemented:
§§23.2
23.36A (New Section) Admission of Cell Phones and Text Messages

I. Judicial Notice

B. (§23.2) Matters Judicially Noticed

A court may, on its own motion, take judicial notice of its own records in prior proceedings that are between the same parties on the same basic facts involving the same general claims for relief. *State v. Dillon*, 41 S.W.3d 479, 482 (Mo. App. E.D. 2000) (the issue was the degree of specificity that must be articulated by the trial judge to indicate that judicial notice of a previous proceeding has been taken).

*Ms. Canfield's biographical information appears on page 23–1 of the original chapter.

V. Demonstrative Evidence

H. (§23.36A) Admission of Cell Phones and Text Messages (New Section)

See *State v. Smith*, 330 S.W.3d 548 (Mo. App. S.D. 2010), an enticement of a child and an attempted statutory rape case, in which both the cell phone and photographs of the text messages were admitted into evidence.

But in *State v. Harris*, 358 S.W.3d 172, 175 Mo. App. E.D. 2011), the Eastern District:

- criticized the "lax requirements for foundation" in *Smith*;
- reasoned that text messages were more analogous to the contents of a letter and required those rules of admissibility to be applied; and
- stated that the proponent of such evidence must present some proof that the messages were actually authored by the person who allegedly sent them.

Sean D. O'Brien*
Lindsay J. Runnels**

2012 Cumulative Supplement to
Chapter 24

INSTRUCTIONS

Supplemented:
§§24.1
24.5
24.6
24.9
24.10
24.11
24.14
24.15
24.17
24.20

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I. (§24.1) Introduction

This update is intended to call counsel's attention to cases modifying or explaining in further detail the law discussed in the original chapter. It is not an exhaustive compilation of all decisions affecting jury instructions. The supplement follows the organization, headings, and section numbers used in the original chapter.

IV. Mechanics of MAI-CR 3d

A. (§24.5) Verdict Director

In *State v. Williams*, 329 S.W.3d 700 (Mo. App. S.D. 2011), mandatory instruction MAI-CR 3d 304.12, Verdict Possibilities: One Defendant—Multiple Counts—Separate Verdicts, was not tendered to the trial court or requested by either party. The jury found the defendant guilty on all three counts of first-degree statutory rape as well as the count of first-degree statutory sodomy. The jury acquitted the defendant of one count of first-degree sodomy. Because the defendant did not request MAI-CR 3d 304.12, it was not properly preserved for review and, therefore, subject only to plain error review under Rule 30.20. The defendant argued that the failure to submit MAI-CR 3d 304.12, requiring the jury to consider each offense separately, should be considered structural error, which requires automatic reversal without any requirement to demonstrate actual manifest injustice or a miscarriage of justice. The court disagreed, stating that, generally, instructional error is not considered structural error. *See, e.g., State v. Carson,* 941 S.W.2d 518 (Mo. banc 1997). Review for plain error is within the discretion of the court. The analysis under such a review is as follows:

1. Did the trial court commit evident, obvious, and clear error affecting the defendant's substantial rights?

2. If so, did the plain error actually result in manifest injustice or a miscarriage of justice?

State v. Smith, 293 S.W.3d 149, 151 (Mo. App. S.D. 2009). The court in *Williams* concluded that the failure to tender MAI-CR 3d 304.12 was clear error affecting the defendant's substantial rights but that no manifest injustice occurred because the jury received separate verdict directors for each of the five counts against the defendant and the jury returned a split verdict, indicating that the jury considered each count individually and, thus, conformed to the procedure outlined in the omitted instruction. The importance of requesting instructions, even those that are mandatory, cannot be overstated.

The factual scenario presented by *State v. Celis-Garcia*, 344 S.W.3d 150 (Mo. banc 2011), is commonly referred to as a multiple-acts case in which there is evidence of multiple, distinct acts, each of which could serve as the basis for a criminal charge, but the defendant is charged with those acts in a single count. *See* 75B AM. JUR. 2D *Trial* § 1511 (2011). The Court determined that, despite evidence of multiple, separate incidents of statutory sodomy, the verdict directors failed to differentiate between the various acts in a way that ensured the jury unanimously convicted the defendant of the same act or acts. The verdict directors allowed the jury to find the defendant guilty of first-degree statutory sodomy if the jury believed "that between [specific dates] . . . the defendant or [her boyfriend] placed her or his hand on [the child's] genitals . . . ." *Celis-Garcia,* 344 S.W.3d at 156. This broad language allowed each individual juror to determine which incident that juror would consider in finding the defendant guilty of statutory sodomy. The Court determined that a defendant's right to a unanimous verdict would be protected in a multiple-acts case by either:

- the state electing the particular criminal act on which it will rely to support the charge; or

- the verdict director specifically describing the separate criminal acts presented to the jury and the jury being instructed that it must agree unanimously that at least one of those acts occurred.

Id. at 158; *see also State v. Jackson*, 146 S.W. 1166, 1168 (Mo. 1912). The approved instructions do not include an instruction requiring the jury to agree on the same, specific criminal act in a multiple-acts case. The state argued that MAI-CR instructions do not require differentiation among multiple, separate criminal acts that could each constitute the charged offense unless the defendant requests or the court elects to do so on its own motion. *See* MAI-CR 304.02, Notes on Use 6. The Court determined that the modification permitted by the Notes on Use is insufficient to protect a defendant's right to a unanimous jury verdict in a multiple-acts case because the Notes on Use:

- is written in permissive rather than mandatory language; and

- limits the details identifying separate offenses to location and does not take into consideration timing or other distinguishing characteristics.

Most significantly, Note 6 does not require that the jury unanimously agree on the same criminal act that serves as the basis for the conviction. *Celias-Garcia*, 344 S.W.3d at 158. The Court determined the verdict directors were erroneous because they permitted the jury to convict the defendant of two counts of sodomy without identifying the acts that the jurors agreed she committed. The verdict director must not only describe the separate criminal acts with specificity, but the court also must instruct on at least one of the specific criminal acts described in the verdict director. To the extent that MAI-CR and its Notes on Use conflict with this substantive law, they are not binding. *State v. Carson*, 941 S.W.2d 518, 520 (Mo. banc 1997).

It is error to give separate verdict directors that would authorize multiple convictions for a single offense. In *State v. Garnett*, 298 S.W.3d 919 (Mo. App. E.D. 2009), the defendant was convicted of one count of domestic assault in the first degree, two counts of domestic assault in the second degree, and three counts of armed criminal action, all arising from an incident in which the defendant stabbed his girlfriend in the

throat, hands, leg, stomach, and breast. Relying on Missouri's separate- or several-offense rule for double jeopardy and the unit of prosecution test, the court determined that the evidence indicated that the injuries were inflicted in one quick, continuing attack and that the record did not contain any evidence to support the inference that the defendant and the victim stopped struggling for any period of time that would have afforded the defendant an opportunity to reconsider his actions. The court reversed the defendant's convictions for second-degree domestic assault and the accompanying armed criminal action convictions and vacated all corresponding sentences because those convictions subjected him to multiple convictions and punishments in violation of his right to be free from double jeopardy. *Id*. at 924.

1. (§24.6) Punishment

Punishment may be enhanced using a prior violation of § 565.072, RSMo Supp. 2011 (domestic assault in the first degree), and § 565.073, RSMo 2000 (domestic assault in the second degree), for offenses committed on or after August 28, 2007. Punishment may be enhanced using prior convictions from other states under § 565.063, RSMo Supp. 2011, for offenses committed on or after August 28, 2009. If the state charges that the defendant is a prior or persistent domestic violence offender, evidence of the prior pleas or findings of guilt must be pleaded and proved to the court outside the presence of the jury, and the court must enter its findings. Counsel should be aware that the use of findings or pleas of guilty to assault in the first degree or to assault in the second degree (or to equivalent offenses in other states) to support a finding that the defendant is a domestic violence offender—and thus subject to an enhanced punishment—could raise serious, complex, and as yet unresolved constitutional questions if the state is relying on facts outside the certified judgment to prove the domestic relationship between the defendant and the victim in the prior conviction or plea. *See Apprendi v. N.J.*, 530 U.S. 466 (2000) (any fact that increases the maximum penalty for a crime must be charged in the indictment, submitted

to the jury, and proven beyond a reasonable doubt); *Shepard v. United States,* 544 U.S. 13 (2005); *see also* § 565.063.3–.13; MAI-CR 3d 319.72 Notes on Use 5. If the defendant is found to be a prior or persistent domestic violence offender, the issue of punishment is not submitted to the jury. Section 565.063; *see* MAI-CR 3d 319.72 and 319.73 and corresponding Notes on Use.

The author does not suggest the above-referenced statutes are an exhaustive list of recently amended statutes that enhance punishment. Counsel is advised to conduct applicable research to determine whether statutory developments affect the law on which the case will be submitted.

B. (§24.9) Definitions

When possession is an element of the charged offense, it must be defined in the verdict director. In *State v. Farris*, 125 S.W.3d 382 (Mo. App. W.D. 2004), the defendant was charged with attempt to manufacture methamphetamine. The prosecutor's case was based on Farris's presence in a car that smelled strongly of ether and contained tools and supplies used to manufacture methamphetamine. A five-gallon bucket containing anhydrous ammonia and a Tupperware container with methamphetamine residue were found by the side of the road near the location of Farris's arrest. Finding that the evidence was sufficient to submit the charge to the jury, the court, nevertheless, granted a new trial because the verdict director failed to define "possession." The trial court denied the defendant's motion to define possession, relying on the Notes on Use to MAI-CR 3d 325.06.2, which do not require or authorize a definition. But in charging Farris with an attempt to manufacture methamphetamine, the prosecutor specified that Farris's substantial step toward the commission of the offense was his possession of items used in the manufacture of methamphetamine. Thus, possession became an element of the crime charged. Although the Notes on Use do not authorize the definition, the court noted that "MAI-CR and its Notes on Use are 'not binding' to the extent they conflict with the substantive law." *Farris*, 125 S.W.3d at 391 (quoting *State*

v. Carson, 941 S.W.2d 518, 520 (Mo. banc 1997)). Under the circumstances, because it did not define "possession," the verdict director failed to contain each element of the crime charged or "require [the] jury to find every fact necessary to constitute essential elements of [the] offense charged." *Id.* at 393. Because Farris's liability was based on joint, constructive possession of paraphernalia for manufacturing methamphetamine, it was plain error to fail to instruct the jury on the definition of possession.

There are several new and revised definitions in the January 1, 2011, revisions to MAI-CR 3d that reflect recent statutory changes and modifications. The additions and modifications to existing definitions are too numerous to cover in this supplement. and the author advises counsel to refer to the 333.000 Series in the 2011 MAI-CR 3d supplement.

C. (§24.10) Converse Instructions

A converse instruction based on MAI-CR 3d 308.02 "enables a defendant to select from a verdict director the element or elements that he wishes to emphasize." MAI-CR 3d 308.02, Notes on Use 2 (9-1-01). In particular, MAI-CR 3d 308.02, Notes on Use 4(D), provides, in pertinent part, "Where the verdict director states in one paragraph a culpable mental state that applies to elements contained in another paragraph, a separate converse instruction can combine the culpable mental state with a particular element from another paragraph."

In *State v. Davenport*, 174 S.W.3d 666 (Mo. App. S.D. 2005), a defendant charged with statutory sodomy in the first degree tendered an instruction conversing the mental element of the charge, i.e., that he acted "with the purpose of arousing or gratifying the sexual desire of any person." *Id.* at 668. Because the instruction did not "specifically converse the mental element of the offense as Defendant was entitled to do," *id.* at 670, the trial court's refusal of the tendered instruction was prejudicial error requiring a new trial.

D. (§24.11) Lesser-Included Offenses

The failure to submit lesser-included offenses is probably the most frequent cause of instructional error. While the rules seem simple enough, the issue often arises in complex or unusual fact scenarios, such as accessory liability. In *State v. Smith*, 229 S.W.3d 85 (Mo. App. W.D. 2007), the defendant was charged as an accessory to first-degree robbery and armed criminal action. There was no question that the principal actor, Scott, committed first-degree robbery by threatening a cashier at Harold's Supermarket with a gun to get her to open the store's safe. Smith was outside in the car and was in possession of cash from the robbery at the time of his arrest. But Smith was never in the store, and there was no evidence establishing that he knew that Scott was armed with a gun or that Smith knew he would threaten or intended to threaten the clerk. Based on all the evidence, the jury could have concluded that Smith's own mental state was more commensurate with second-degree robbery or stealing. The court ruled:

> While the jury may have reasonably inferred from the evidence that the appellant knew about the use of the gun in the robbery, that is irrelevant to the issue of instructing down. With respect to instructing down, the critical issue is whether the jury could have reasonably inferred from the evidence that he did not have the requisite intent to convict him of robbery in the first degree, such that it could have acquitted him of that offense and convicted him of the lesser-included offense of robbery in the second degree. Because the evidence was sufficient for the jury to have reasonably inferred therefrom that the appellant did not know anything about the gun used in the robbery, such that it could have acquitted him of robbery in the first degree on that basis, the trial court, provided there was also evidence on which the appellant could have been convicted of second-degree robbery, was required to instruct down on second-degree robbery and committed reversible error in failing to do so.

Id. at 97. This result was required by § 562.051, RSMo 2000, which states, "Except as otherwise provided, when two or more persons are criminally responsible for an offense which is divided into degrees, each person is guilty of such degree as is compatible with his own culpable mental state and with his own accountability for an aggravating or mitigating fact or

circumstance." It is important, therefore, to be cognizant of circumstances in which an actor's *mens rea* may differ from that of an accomplice in a way that justifies submission of a lesser-included offense.

It is also important to note that the instruction on lesser-included charges can affect multiple counts if one offense is predicated on another, such as felony murder. In *State v. Whiteley*, 184 S.W.3d 620 (Mo. App. S.D. 2006), the defendant was convicted of first-degree robbery and felony murder. Whiteley had been hired by Hamilton to cut grass and brush from Hamilton's property. When Hamilton failed to pay him, Whiteley and a friend, Earl Sanders, went to Hamilton's residence and demanded money. Whiteley punched Hamilton in the face several times and went back to his truck to retrieve a club. Hamilton retreated, armed himself with a gun, and shot and killed Sanders. Whiteley was charged and convicted of first-degree robbery and felony murder. The trial court refused to instruct the jury on the lesser-included crime of assault in the third degree, a misdemeanor. The court ruled that the jury could reasonably find that Whiteley did not use force to take property "of another" because he felt that he was owed money by Hamilton. Based on this testimony:

> the jury could have believed that defendant was not attempting to take property of another; that he was attempting to receive payment of a debt he was owed. Based on this evidence, the jury could have concluded that although defendant's attempts at 'self-help' were excessive, they did not constitute attempted robbery.

Id. at 624. Therefore, a jury might have acquitted Whiteley of robbery and convicted him of third-degree assault for punching Hamilton in the face. Because the felony murder charge was based on the robbery conviction and could not be established if Whiteley were guilty only of misdemeanor assault, the court vacated that conviction as well and remanded for a new trial.

Another case turning on the issue of *mens rea* is *State v. Cole*, 248 S.W.3d 91 (Mo. App. S.D. 2008), in which the defendant was charged with endangering the welfare of a child in the first degree and with second-degree murder, both of which

require a "knowing" mental state, i.e., that the defendant knew that her conduct was practically certain to "create[ ] a substantial risk to the life, body or health of a child less than seventeen years old," § 568.045.1(1), RSMo Supp. 2011, or to cause the death of the victim, § 565.021, RSMo 2000. The conduct supporting the charges against Cole consisted of placing her three-year-old son "in direct contact with Edward Michael Griffin, a person whom defendant had previously seen physically abuse" the child, who died of a head injury inflicted by Griffin. The court reasoned that the jury could have found that, by allowing Griffin to discipline her child, the defendant "failed to be aware that there was a substantial and unjustifiable risk that her acts created a substantial risk to the life, body, and health of William." *Cole*, 248 S.W.3d at 94. Therefore, it was plain error for the trial court to fail to allow the jury to consider the lesser-included offenses of endangering the welfare of a child in the second degree and voluntary manslaughter.

These cases underscore the principle that "[d]oubts concerning whether to instruct on a lesser included offense should be resolved in favor of including the instruction, leaving it to the jury to decide." *Id.* (citing *State v. Hineman*, 14 S.W.3d 924, 927 (Mo. banc 1999)).

E. (§24.14) Defenses

Submission of the issue of self-defense in homicide and assault cases seems to be a persistent problem area. Because the law of self-defense must accommodate a wide variety of circumstances—such as initial aggressor, fear of imminent use of force, duty to retreat, chronic domestic violence, and other factors—the pattern instruction must be adapted to account for many aspects of the self-defense doctrine. The cases below illustrate some of the problems that have arisen recently.

When an assertion of self-defense includes a fear of unlawful force from multiple assailants, MAI-CR 3d 306.06 must be modified to fit the circumstances giving rise to the defendant's fear of the imminent use of unlawful force. In *State v. Beck*,

167 S.W.3d 767 (Mo. App. W.D. 2005), the defendant claimed that he was being held by Matthew Snarr from behind while two of Snarr's friends approached him carrying a baseball bat and a metal pipe in a threatening manner, so he stabbed Snarr to get away. The jury acquitted Beck of first-degree assault but found him guilty of second-degree assault. The instruction submitting the issue of self-defense advised the jury:

> In order for a person lawfully to use force in self-defense, he must reasonably believe he is in imminent danger of harm from the other person [and] if the defendant reasonably believed he was in imminent danger of harm from the acts of Matthew Snarr and the defendant used only such force as reasonably appeared to be necessary to defend himself, then he acted in lawful self-defense.

Id. at 771. The prosecutor seized on this language to argue that the acts of Snarr's compatriots were irrelevant to Beck's claim of self-defense:

> First, the prosecutor stated: "I would suggest you read the Court's instruction to you on self-defense. It only relates to what Matthew Snarr did, not what anybody else—what the defendant claims somebody else did." Second, during the State's final argument, the prosecutor stated: "[The appellant], under the law, whether we like it or not, is entitled to react only against what Matthew Snarr did, not what some other people supposedly did."

Id. Although the defense counsel failed to object to either the instruction or the prosecutor's argument, the court of appeals found that submitting the instruction was plain error, even though it accurately tracked the language of MAI-CR 3d 306.06. Finding no other cases addressing the proper way to instruct juries on the issue of the defendant's fear of harm from multiple assailants, the court turned to the statutory language defining self-defense. The court noted that "MAI-CR 3d 306.06 does not track the language of § 563.031.1[, now RSMo Supp. 2011], with respect to the defendant's defending against what he 'reasonably believes to be the use or imminent use of unlawful force.'" *Beck*, 167 S.W.3d at 771. Borrowing language from MAI-CR 2d 2.41.1[3], the court concluded:

> Hence, we believe that to correctly instruct the law of self-defense, MAI-CR 3d 306.06 should be revised to drop the "imminent danger of harm" language presently used, in favor of the "unlawful force" language of § 563.031, much as MAI-CR 2d 2.41.1 (1-1-79) did in paragraph 2[1], which reads, in pertinent part:
>
> > (If the defendant was not the initial aggressor in the encounter with [*name of victim*] and if) (If) the defendant reasonably believed it was necessary to use such physical force as he used in order to protect himself from what he reasonably believed to be the (use) (imminent use) of unlawful force by [*name of victim*], then the defendant acted in lawful self-defense and must be acquitted.

Beck, 167 S.W.3d at 783–84. Because MAI-CR 3d 306.06 "erroneously instructed on a proof element of the State's case," *Beck*, 167 S.W.3d at 788, the court found plain error and ordered a new trial.

Counsel should also remember that the evidence may be sufficiently ambiguous to support more than one theory of defense. In *State v. White*, 222 S.W.3d 297 (Mo. App. W.D. 2007), the defendant asserted the defense of accident to the charge of second-degree murder. On appeal, he alleged as plain error that the trial court should have instructed the jury on the issue of self-defense as well because there was evidence that the shooting occurred while the defendant and the deceased were struggling over a gun. The jury should have been instructed on both accident and self-defense "because any conflict in the evidence is to be resolved by a jury properly instructed on the issues." *Id*. at 300.

Counsel should be alert for statutory developments that affect the law on which the case will be submitted. The Missouri General Assembly modified the law of self-defense to justify the use of deadly force "against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter a dwelling, residence, or vehicle lawfully occupied by such person." Section 563.031.2(2). The legislature has further made it explicitly clear that, "A person does not have a duty to retreat from a dwelling, residence, or vehicle where the person is not unlawfully entering or unlawfully remaining." Section 563.031.3. MAI-CR 3d 306.06 was revised to reflect these changes. MAI-CR 3d 306.06 now covers the basic use of

force in self-defense. The use of force relative to dwellings, residences, and vehicles is covered by MAI-CR 3d 306.11. Further, § 563.011, RSMo Supp. 2011, was amended to include new or modified definitions of "deadly force," "dwelling," "premises," and "residence" to accommodate the expansion of the justification defense. When there is evidence supporting this defense, the instruction must be given whether requested or not. *See* MAI-CR 3d 306.06, Notes on Use 2.

1. (§24.15) Special Negative Defenses

In *State v. Hiltibidal*, 292 S.W.3d 488 (Mo. App. W.D. 2009), the defendant testified in his own defense that the victim was the initial aggressor, that the victim bashed a beer bottle over his head and attempted to gouge out his eye, and that he was in "defensive mode" and tried to leave the situation. The victim testified that the defendant was the initial aggressor. The victim was hospitalized and treated for three broken ribs, swollen fingers, and other injuries. The defendant did not request a self-defense instruction and no such instruction was given by the trial court. The court noted that the law requires that the court do so *sua sponte* when the issue is raised by the evidence. *Id*. at 493. Regardless of whether the defendant requested the instruction at trial, if "substantial evidence" is presented to support the giving of an instruction on self-defense, it is error to fail to give the instruction. *See State v. Avery*, 120 S.W.3d 196, 200 (Mo. banc 2003). Self-defense is included in the MAI-CR 3d 306.00 series entitled "Instructions Required Whether Requested or Not." The trial court must give the instruction regardless of whether the evidence supporting the justification defense is inconsistent with the defendant's testimony or theory of the case. *State v. White*, 222 S.W.3d 297, 300 (Mo. App. W.D. 2007). The court in *Hiltibidal* reversed the conviction and, relying on *White*, determined the failure to submit a self-defense instruction will generally constitute reversible error if the defense is supported by the evidence. The evidence is viewed in the light most favorable to the defendant when considering whether the trial court erred in failing to instruct the jury on a justification defense.

A trial court's failure to give mandatory instructions is presumed prejudicial unless the state clearly establishes that the error did not result in prejudice. Missouri courts have repeatedly found manifest injustice or miscarriage of justice in the failure to instruct, or properly instruct, on self-defense. *Hiltibidal,* 292 S.W.3d at 494. *But see State v. Marshall*, 302 S.W.3d 720, 725 (Mo. App. S.D. 2010) (reviewed appellant's claim of error under the more deferential standard of plain error because the defendant waived his right to a self-defense instruction by offering the instruction and then withdrawing it before the jury commenced deliberations).

F. (§24.17) Cautionary Instructions

In *State v. Avery*, 275 S.W.3d 231 (Mo. banc 2009), the Court addressed cautionary instruction MAI-CR 3d 310.50 relating to voluntary intoxication. The defendant was convicted of voluntary manslaughter and armed criminal action. The defendant claimed that she acted in self-defense and defense of premises. The defendant did not admit any wrongdoing or try to defend against the charges by claiming that she was intoxicated. The state introduced evidence of the defendant's consumption of alcohol on the night in question. The defendant argued that none of the state's witnesses opined that she was intoxicated, nor did they provide any testimony that she was impaired. The state tendered MAI-CR 3d 310.50, and it was given to the jury over the defendant's objection. The defendant relied on *State v. Bristow*, 190 S.W.3d 479 (Mo. App. S.D. 2006). The *Bristow* court held that proof of alcohol consumption alone was not sufficient to trigger the giving of MAI-CR 3d 310.50, noting: "We are persuaded [that Bristow] is correct when he asserts that there must be evidence showing some level of impairment resulting from an intoxicated condition before MAI-CR 3d 310.50 is proper." *Bristow*, 190 S.W.3d at 484. *Avery* overruled *Bristow* to the extent it holds that, in addition to alcohol consumption, there must be direct evidence of impairment, instead leaving the decision of whether an instruction is supported by the evidence to the trial court's discretion. *Avery*, 275 S.W.3d at 235.

VI. (§24.20) Appellate Review

In *State v. Neal*, 328 S.W.3d 374 (Mo. App. W.D. 2010), the defendant was charged with first-degree robbery. But the prosecutor erroneously tendered MAI-CR 323.04, the verdict director for robbery in the second degree, and the trial court submitted the instruction without objection by the defendant. Contrary to § 569.020, RSMo 2000, the verdict director submitted to the jury did not require the jury to find that the defendant "threaten[ed] the immediate use of a dangerous instrument against any person" in order to reach a verdict of guilt. *Neal*, 328 S.W.3d at 381. The court determined that the state's use of an incorrect jury instruction totally relieved the state of its burden of proof as to a contested element of the crime. *Id.* at 383. Even if every instance in which an element of an offense is omitted from a jury instruction is not plain error, "where a verdict director effectively omits an essential element of the offense, such instruction rises to the level of plain error if the evidence in the case fails to establish the existence of the omitted element 'beyond serious dispute.'" *Id.* (citing *State v. Farris*, 125 S.W.3d 382, 394 (Mo. App. W.D. 2004)). Although the evidence was sufficient to convict the defendant of robbery in the first degree, the omission from the verdict director of the additional element that the defendant threatened the use of a dangerous instrument resulted in manifest injustice and a miscarriage of justice. While the court in *Neal* noted that the general rule is that the remedy for instructional error is to remand the case for a new trial, such a remedy would result in a windfall to the defendant, even though it was the state that submitted the improper instruction, putting the defendant's counsel in the awkward position of deciding whether to object to the state's submission of a lesser offense than the crime charged.

While it was plain error to convict the defendant of robbery in the first degree, it was not error to convict him of the lesser-included offense of robbery in the second degree. By failing to object to the instruction of the lesser-included offense, the defendant consented to the submission of the lesser charge. The court determined that the appellate remedy should not exceed the scope of the wrong and, thus, found that the state

should not be granted a windfall by allowing it a second opportunity to convict the defendant of the higher charge of robbery in the first degree. Likewise, the defendant should not receive a windfall of a new trial based on his failure to object to the improper instruction. The court remanded for sentencing on robbery in the second degree.

Timothy R. Cisar*

2012 Cumulative Supplement to
Chapter 25

CLOSING ARGUMENT

This chapter was reviewed by Timothy R. Cisar, who determined that no supplement is needed at this time.

Note: The best advice on this subject is to give the closing argument in voir dire.

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Joseph W. Luby*
Laura E. O'Sullivan**

2012 Cumulative Supplement to
Chapter 26

AFTER-TRIAL MOTIONS

Supplemented:
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*Mr. Luby's biographical information appears on page 26–1 of the original chapter.

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This supplement includes material prepared by Dean Ellen Y. Suni for the previous supplement. Dean Suni's biographical information appears on page 9–1 of the original chapter.

II. Motions for Judgment of Acquittal

F. (§26.9) Scope of Appellate Review

In assessing whether the state has presented a submissible case, an appellate court must determine "whether there is sufficient evidence from which a reasonable juror may have found the defendant guilty beyond a reasonable doubt." *State v. Johnson*, 244 S.W.3d 144, 152 (Mo. banc 2008). The court will defer to the jury's superior position to evaluate the credibility of witnesses and their testimony. *Id.*

III. Motions for New Trial

Q. Preservation of Points for Appeal

2. Preservation Requirements—Specific Areas

g. (§26.41) Newly Discovered Evidence

The Supreme Court of Missouri recently clarified that an appellate court has the discretion to dismiss an appeal, and to remand for consideration of an otherwise untimely motion for new trial, when newly discovered evidence otherwise satisfies the criteria for obtaining a new trial. *See State v. Terry*, 304 S.W.3d 105, 109–12 (Mo. banc 2010). "An appellate court has the inherent power to prevent a miscarriage of justice or manifest injustice by remanding a case to the trial court for consideration of newly discovered evidence presented for the first time on appeal." *Id.* at 109 (citing *Benton v. State*, 128 S.W.3d 901, 904 (Mo. App. W.D. 2004)). In *Terry*, the defendant was convicted of statutory rape. The alleged victim was pregnant at the time of trial and testified that she had not had sex with anyone except the defendant. After the deadline had passed for moving for a new trial, the alleged victim gave birth, and a DNA test on the baby revealed that Terry was not the father. Even though the DNA evidence did not completely exonerate Terry,

it at least demonstrated that the alleged victim lied about a material fact.

Terry rejected two limitations imposed previously by lower courts. *Terry*, 304 S.W.3d at 110–11. First, the newly discovered evidence does not need to *totally exonerate* the defendant. Second, relief is not, per se, unavailable simply because the new evidence merely *impeaches* a state witness, even though the court noted that Terry's new evidence was more than impeaching because it "shows that a material portion of the witness' testimony was perjured." *Id.* at 111.

On the issue of impeachment, *Terry* was distinguished by the Eastern District of the Missouri Court of Appeals in *State v. Nylon*, 311 S.W.3d 869 (Mo. App. E.D. 2010). The court in *Nylon* refused the *Terry* remedy because the newly discovered evidence showed that certain police witnesses may have lied on search warrant applications or during testimony in other cases, but there was no evidence that the officers testified falsely in the case at hand. Although Nylon's new evidence "does have considerable impeachment value," the court explained that "it does not rise to the level of the evidence in . . . *Terry*." *Nylon*, 311 S.W.3d at 878. *Contra State v. Cook*, 307 S.W.3d 189, 192 (Mo. App. E.D. 2010) (granting the *Terry* remedy because the complaining witness wholly recanted the witness's testimony against the defendant, who was convicted of child molestation and statutory sodomy).

Even when "newly discovered evidence" arises too late for a motion for new trial, the defendant remains able to litigate the claim in question in post-conviction proceedings under Rule 29.15. In *McQuary v. State*, 241 S.W.3d 446, 450 (Mo. App. W.D. 2007), for example, the court allowed the defendant to assert a claim of juror bias in his Rule 29.15 motion. On voir dire, one of the jurors failed to disclose his relationship with the state's primary witness. The particular bias:

- was not known to the defendant when he moved for new trial;
- was outside the record through no fault of the defendant; and
- could not have been considered on direct appeal.

Id. at 453–54. The court, therefore, remanded for full consideration of the claim.

Distinguishable from cases like *McQuary* are claims of innocence discovered during an appeal of a circuit court's denial of Rule 29.15 relief. These claims are outside the scope of *Terry*, which appears to be limited to direct appeals. *See Ferguson v. State*, 325 S.W.3d 400, 406 (Mo. App. W.D. 2010). These later-discovered claims are more soundly brought in habeas corpus under Rule 91. *Ferguson*, 325 S.W.3d at 406.

IV. Motions for Reduction of Punishment

B. (§26.43) Purpose

Despite the broad and open language of Rule 29.05, the courts of appeals are now unanimous in holding that the rule serves only to allow a trial court to reduce a sentence recommended by a jury. It does not allow a court to reduce its own sentence in a court-tried or court-sentenced case; likewise, it does not allow a circuit court to reduce any lawful sentence after judgment, including a sentence that matches a jury's recommendation. *See*:

- *State ex rel. Scroggins v. Kellogg*, 311 S.W.3d 293, 296 (Mo. App. W.D. 2010)
- *Weir v. State*, 301 S.W.3d 136, 138 (Mo. App. W.D. 2010)

- *State v. Childers*, 192 S.W.3d 496, 497 n.4 (Mo. App. E.D. 2006)

- *State v. Smith*, 633 S.W.2d 253, 254 (Mo. App. S.D. 1982)

F. Scope of Review

4. (§26.50) Death Penalty as Cruel and Unusual Punishment

The U.S. Supreme Court has held that the death penalty for the offense of raping a child constitutes cruel and unusual punishment, at least absent the actual or intended death of the victim. *Kennedy v. La.*, 554 U.S. 407 (2008). The Court has also held that the Eighth Amendment forbids the imposition of a life-without-parole sentence on a juvenile for a nonhomicide offense. *Graham v. Fla.*, 130 S. Ct. 2011 (2010). The Supreme Court of Missouri ruled that *Graham* does not forbid this sentence for a juvenile convicted of first-degree murder. *State v. Andrews*, 329 S.W.3d 369 (Mo. banc 2010). Nevertheless, the U.S. Supreme Court has since ruled that the Eighth Amendment forbids the imposition of mandatory life-without-parole sentences for juvenile offenders convicted of murder. *See Miller v. Ala.*, 132 S. Ct. 2455 (2012).

In death-penalty cases, the Supreme Court of Missouri has somewhat broadened the scope of its proportionality review under § 565.035.3, RSMo 2000. The Court will now compare the case at hand to similar cases in which death was not imposed, despite the prosecution's request for death at trial. *State v. Dorsey*, 318 S.W.3d 648, 659 (Mo. banc 2010).

V. Motions for Conditional Release Pending Appeal

C. (§26.53) Right to Release Pending Appeal

Under § 547.170, RSMo Supp. 2011, the list of offenses for which release is unavailable has been broadened and now includes:

- any sexual offense under Chapter 566 or 568, RSMo, in which the victim is under the age of 17 years; and
- any pornographic offense involving a minor under §§ 573.023, 573.025, 573.035, 573.037, and 573.040, RSMo Supp. 2011.

VI. Post-Conviction DNA Testing

B. (§26.61) Significance of Post-Conviction DNA Testing

According to the website of the Innocence Project, post-conviction DNA testing has resulted in the exoneration of 297 people in the United States as of August 27, 2012:

www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php

D. (§26.63) What Are Procedural Requirements for Motion?

In *Belcher v. State,* No. WD 68990, 2008 WL 2573255 (Mo. App. W.D. June 30, 2008), the court addressed the question of whether the "mere signature" of the movant was sufficient to meet the "under oath" requirement and determined that more was required. To meet the statutory requirement, it appears that the oath must be administered by an appropriate official. But the failure to meet the requirement can be remedied with a corrected or amended petition. *Belcher v. State,* 299 S.W.3d 294 (Mo. banc 2009).

The requirement that movants "allege facts" was addressed in *State v. Ruff*, 256 S.W.3d 55 (Mo. banc 2008), which is discussed in §26.65 of this supplement.

F. (§26.65) What Must Motion Allege? What Must Motion Court Find in Order to Grant Relief?

In *State v. Ruff*, 256 S.W.3d 55 (Mo. banc 2008), the Supreme Court addressed the requirement that a movant "allege facts" in a motion seeking DNA testing. Section 547.035.2, RSMo Supp. 2011. The state contended that the allegations in the motion were conclusory and did not contain sufficient facts. The Court stated that the adequacy of a movant's pleadings "must be considered in light of the purpose of section 547.035: to provide inmates an opportunity to have potentially exculpatory DNA tests performed on evidence." *Ruff*, 256 S.W.3d at 58. The Court further noted that "[t]hese inmates are unlikely to have access to specific facts without the assistance of counsel" and required that allegations made by movants seeking DNA testing be construed liberally, with reasonable inferences in their favor. *Id*. When the movant's pleading tracked the statutory language and made those allegations of fact that would be known to an incarcerated inmate, that pleading was sufficient, given the state's admission to some of the facts in its brief and the resulting lack of prejudice.

1. (§26.66) There Is Evidence Upon Which DNA Testing Can Be Conducted, § 547.035.2(1), RSMo

When the movant in *State v. Ruff*, 256 S.W.3d 55, 57–58 (Mo. banc 2008), stated in his motion that "[t]here is 'DNA' or other testable evidence covered by RSMo section 547.035 within the custody of the city, county, state or federal entities that can be tested" and went on to "list[ ] seven possible items that he believes can be tested, including blood, hair, saliva, and, most importantly, semen," this requirement was met, especially considering the admission by the state in its brief "that vaginal swabs

were collected, and that 'the semen in the vaginal swabs was probably from the rapist.' Resp't. Appeal Br. at 18." In *Ruff*, the Court ordered testing despite any showing by the movant that the biological material still existed. Thus, if the state is relying on the destruction or other unavailability of the material sought to be tested as a basis to deny testing, it is suggested that it should include that information in its response to an order to show cause. Although *Ruff* did not discuss *State v. Westcott*, 121 S.W.3d 543, 547 (Mo. App. W.D. 2003) (cited in the original section), which apparently required that the movant allege that the evidence sought to be tested is "currently available for testing," it appears that *Ruff* implicitly rejected this requirement.

2. (§26.67) The Evidence Was Secured in Relation to the Crime, § 547.035.2(2), RSMo

This requirement was addressed in *Hudson v. State*, 190 S.W.3d 434 (Mo. App. W.D. 2006), in which the court rejected the movant's attempt to have testing of biological material of a suspected "alternative perpetrator" to compare the DNA profile from that individual to the profile taken from evidence recovered at the crime scene. The court held that testing was restricted to "evidence that existed at the time of the crime," *id.* at 440, and that the statute "was not intended as a procedure for considering 'newly discovered evidence,'" *id.*, even when the results are desired "for the sole purpose of comparing the results to DNA testing that was done in the case to establish the identity of the perpetrator," *id.* at 441.

4. (§26.72) Identity Was an Issue in the Trial, § 547.035.2(4), RSMo

In *State v. Ruff*, 256 S.W.3d 55 (Mo. banc 2008), the Supreme Court addressed when identity would be found to be an issue at trial. Rejecting the state's argument that identity was an issue only when the movant had claimed "mistaken identity," the Court held that "[t]he phrase

'identity at issue' encompasses 'mistaken identity,' but it also includes all cases in which the defendant claims that he did not commit the acts alleged—as opposed to cases where the defendant admits his actions but puts forth an affirmative defense." *Id.* at 57. Thus, when, as in *Ruff*, a movant claims either that the movant was not the perpetrator or that no crime had occurred, the movant has demonstrated that identity is an issue.

In *Belcher v. State*, 364 S.W.3d 658 (Mo. App. W.D. 2012), the court further defined the phrase "identity at issue." In addition to the forcible rape charge in the case, Belcher was separately charged in another county with related offenses. After taking his case to trial in the other county and asserting an alibi defense, he was convicted. Only after this loss at trial, he entered a plea of guilty to forcible rape. In finding that Belcher met the "identity-at-issue" requirement, the court pointed to the following supporting facts:

- Belcher went to trial in a related case.
- Belcher presented alibi testimony in related case.
- The defense cross-examined the state's witnesses.
- Belcher initially entered a not guilty plea in the rape case.
- Belcher's plea of guilty occurred after trial and conviction in related offenses.

Id. at 663.

Alternatively, when a defendant claims a defense of consent, entrapment, necessity, or insanity, identity will not be found to be an issue in the case. *Id.* (citing *Weeks v. State*, 140 S.W.3d 39, 47 n.8 (Mo. banc 2004)); *see also*:

- *State v. Fields*, 186 S.W.3d 501, 503 (Mo. App. S.D. 2006) (the defense was that the defendant was in an intoxicated or drugged condition that prevented him from forming requisite intent, and the movant did not contest that he shot the victim; identity was not an issue at trial)

- *Phillips v. State*, 178 S.W.3d 679, 682 (Mo. App. S.D. 2005) (suggesting that identity is not an issue when the defense is self-defense)

- *State v. Waters*, 221 S.W.3d 416, 418 (Mo. App. W.D. 2006) (failing to find that identity was an issue when the movant "claimed as alternative defenses that the victim fabricated the story or that there was consensual sexual contact")

5. (§26.73) A Reasonable Probability Exists That the Movant Would Not Have Been Convicted if Exculpatory Results Had Been Obtained Through the Requested DNA Testing, § 547.035.2(5), RSMo

With regard to the propriety under § 547.035, RSMo Supp. 2011, of ordering third-party testing, see *Hudson v. State*, 190 S.W.3d 434, 439–42 (Mo. App. W.D. 2006), which is also discussed in §26.67 of this supplement.

In *Hudson*, the court also addressed the evidence that could be considered in determining whether a reasonable probability existed that the movant would not have been convicted if exculpatory DNA results had been obtained. The court refused to consider additional evidence and circumstances offered by the movant, stating that "the statute does not allow anything but the test results to be considered in determining whether there would have been a different result in [the movant's] case." *Id.* at 445. The court suggested that, to meet this standard, DNA would have to be a "silver bullet." *Id.* at 444.

The court in *State v. Fields*, 186 S.W.3d 501, 503 (Mo. App. S.D. 2006), reiterated that a movant must allege how the requested testing would lead to exoneration and that a movant "is not entitled to DNA testing when he fails to explain how the testing of the items would exonerate him."

In *Belcher v. State*, 317 S.W.3d 101 (Mo. App. S.D. 2010), the court denied the defendant's request for post-conviction DNA testing, citing overwhelming evidence against the defendant as well as a reasonable likelihood that a second perpetrator participating in the crime could be the donor of any DNA on the scene.

In the crime-spree related case, *Belcher v. State*, 364 S.W.3d 658 (Mo. App. W.D. 2012), the court denied DNA testing, citing the conviction in the separate *Belcher* case, alleging offenses from the same crime spree and that court's denial of DNA testing. Because the victim testified that two perpetrators committed the crimes together, DNA results of any biological evidence tested would not eliminate the defendant as a participant in the crime. Additionally, the court found that *Belcher* was collaterally estopped from arguing an alibi defense to the events for which his conviction has been affirmed; therefore, he could not assert an alibi defense that would establish his innocence. *Id.* at 665.

G. (§26.74) Procedural Considerations and Hearing

Hudson v. State, 190 S.W.3d 434 (Mo. App. W.D. 2006), addressed the evidence that could be considered. See the discussion in §26.73 of this supplement.

Under § 547.035, RSMo Supp. 2011, counsel does not need to be appointed if the movant is not entitled to a hearing. *State v. Fields,* 186 S.W.3d 501, 504 (Mo. App. S.D. 2006).

Section 547.035.8 requires that the court "shall issue findings of fact and conclusions of law whether or not a hearing is held." Several movants, with mixed success, have challenged

the trial court's failure to issue findings and conclusions. The court in *Clayton v. State*, 164 S.W.3d 111, 115 (Mo. App. E.D. 2005), took the requirement seriously, finding that "there is no ambiguity in the requirement" and that it is "not a mere formality." It held that the findings and conclusions must be sufficient to allow for "meaningful appellate review." *Id.* The court expressed concern that "[a]bsent findings explaining the motion court's actions we cannot discern the reasons for the . . . decision and we are left with conclusory statements and nothing to review." *Id.* Finding that it could not determine the basis for the motion court's order, the court reversed the denial of testing and remanded for issuance of findings of fact and conclusions of law. *Id.* at 116.

The court's adoption of the state's proposed findings of fact and conclusions of law verbatim do not deprive the movant of due process. *Belcher v. State*, 364 S.W.3d 658, 664 (Mo. App. W.D. 2012).

In ruling on the trial court's failure to provide adequate findings and conclusions, the court also considered the state's claim that findings and conclusions were not required because the five exceptions to the requirement of findings and conclusions that apply in cases under Rules 29.15 and 24.035 justified the absence of findings and conclusions in *Clayton*. *Clayton*, 164 S.W.3d at 115–16. Assuming arguendo that the exceptions apply in § 547.035 cases, the court found none of them applicable in *Clayton*. *Id.* But other courts have used those exceptions to justify a trial court's failure to issue findings and conclusions and refused to remand to the trial court. *See State v. Waters,* 221 S.W.3d 416, 418–19 (Mo. App. W.D. 2006) (exception for defective motion).

H. (§26.75) Testing Protocols and Cost of the Testing

Section 650.058.2(1), RSMo Supp. 2011, provides that a movant whose testing confirms guilt will be responsible for the costs of testing.

I. (§26.76) What Happens if Testing Is Unfavorable to Movant?

Section 650.058.2, RSMo Supp. 2011, addresses consequences for DNA testing that confirms guilt. It continues to provide for payment of the cost of the test and for consequences under § 217.262, RSMo 2000.

K. (§26.78) What Happens if Movant Is Released?

Compensation is governed by § 650.058.1(1)–(4), RSMo Supp. 2011. Section 650.058.3 governs who may bring an action, and § 650.058.4 grants a right of expungement to the successful movant.

T. Todd Myers

2012 Cumulative Supplement to
Chapter 27

SENTENCING

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I. Introduction

B. (§27.2) Sentencing a Province of the Court

Senate Bill 628, 96th General Assembly, Second Regular Session (Mo. 2012), was effective August 28, 2012. This ominibus crime bill substantially alters the authority of the SAC (Missouri Sentencing Advisory Commission) under § 558.019, RSMo. The SAC is no longer mandated to establish a system of recommended sentences nor to make, publish, and distribute its recommendations. Finally, the SAC is expressly prohibited from issuing a recommended sentence in a specific pending case. The exact application of this statutory change is unknown. Based on the author's conversation with staff of the Missouri Board of Probation and Parole, it is anticipated that a Sentencing Assessment Report, to be issued after August 28, 2012, will not contain a recommended sentence term of years. But there will be information relating the percentage of individuals given probation or an executed prison sentence for the specific charged offense over the past ten-year period.

Before Senate Bill 628, the SAC published the Recommended User Sentencing Guide annually. At the time of the publication of this supplement, its website was still active:

> www.mosac.mo.gov (click on Biennial Reports & User Guides for the Recommended User Sentencing Guide)

The guide contains an automated recommended sentencing guideline that will calculate the recommended sentence after a series of questions about the crime and defendant. What information this resource will continue to provide is unknown. But counsel may want to check the website before a plea or sentence to learn what information the SAC will provide. Counsel should note that any SAC-recommended sentence is merely advisory and that the sentencing court can give it whatever weight it so chooses. *Spicer v. State*, 300 S.W.3d 249 (Mo. App. W.D. 2009).

C. (§27.3) Role of the Jury

The bifurcation of the criminal jury trial has been upheld against constitutional attacks claiming that it violates due process, separation of powers, and the constitutional prohibition of *ex post facto* laws; § 557.036, now RSMo Supp. 2011, is a procedural law and not a substantive law. *State v. Jaco*, 156 S.W.3d 775 (Mo. banc 2005).

Since the enactment of bifurcated trials, issues have arisen regarding what evidence is admissible at this stage of the trial. Generally, the trial court has broad discretion to admit whatever evidence it deems helpful to the jury in assessing punishment. *State v. Fassero*, 256 S.W.3d 109 (Mo. banc 2008). The following rules apply during the sentencing phase of a bifurcated trial:

- Hearsay is not admissible unless a recognized exception applies. *State v. Berry*, 168 S.W.3d 527 (Mo. App. W.D. 2005).

- The defendant has an absolute right to testify. *State v. Edwards*, 173 S.W.3d 384 (Mo. App. E.D. 2005).

- The jury is not to be advised on issues of probation or parole. *State v. Prosser*, 186 S.W.3d 330 (Mo. App. E.D. 2005).

- The jury is not to be advised on the Missouri SAC's recommended sentences. *State v. Edwards*, 228 S.W.3d 88 (Mo. App. E.D. 2008).

- Evidence may be presented regarding treatment programs in the Missouri Department of Corrections. *State v. Hedges*, 193 S.W.3d 784 (Mo. App. E.D. 2006).

- The state may introduce direct evidence of uncharged prior bad acts, including evidence regarding crimes for which the defendant was previously acquitted. The state has the burden of proving these prior bad acts by a preponderance of the evidence. Examples of admissible prior bad acts include:

- prior rape, *State v. McArthur*, 343 S.W.3d 726 (Mo. App. E.D. 2011);
- drug dealing, *State v. Snow*, 299 S.W.3d 710 (Mo. App. W.D. 2009); and
- prior homicide(s), *State v. Clark,* 197 S.W.3d 598 (Mo. banc 2006), *cert. denied*, 127 S. Ct. 1141 (2007).

See also United States v. Watts, 519 U.S. 148 (1997). Note that evidence of prior bad acts is not admissible in the form of court documents indicating that charges were filed but did not result in a conviction. *Fassero*, 256 S.W.3d 109.

- The defendant may present expert testimony regarding the mental health and psychological diagnosis of the defendant. *Vaca v. State*, 314 S.W.3d 331 (Mo. banc 2010).

The jury will not make any recommendation regarding the sentence when the defendant has been convicted of being a prior, persistent, aggravated, or chronic DWI offender. Section 577.023.15, RSMo Supp. 2011.

D. (§27.4) Improper Jury Verdicts

If there is a new trial on the punishment phase of a criminal case, the jury at the second trial is not limited to the maximum sentence imposed by the jury at the first trial. The new jury may assess its own punishment, and double jeopardy is not implicated. *State v. Edwards*, 228 S.W.3d 88 (Mo. App. E.D. 2007).

II. Time of Sentencing

B. (§27.6) Motion for New Trial

A final judgment cannot be rendered until the defendant's time to file a motion for new trial has expired or, if filed, until it has been ruled on. *State v. Langston*, 229 S.W.3d 289 (Mo. App. S.D. 2007).

III. Procedure for Sentencing

B. (§27.8) Allocution

See also *State v. Johnson*, 245 S.W.3d 288 (Mo. App. W.D. 2008), for another case in which the court held that failure to grant allocution after a defendant's motion for new trial has been heard does not invalidate the judgment or sentence.

C. (§27.9) Judgment Ripe for Appeal

When a defendant is to be resentenced by a motion court but the resentencing has not occurred before the appeal is filed, the motion court's judgment is not interlocutory. In *Brooks v. State*, 242 S.W.3d 705 (Mo. banc 2008), the Supreme Court overruled the following cases to the extent that they hold to the contrary:

- *Barringer v. State*, 12 S.W.3d 765 (Mo. App. S.D. 2000)
- *Williams v. State*, 954 S.W.2d 710 (Mo. App. S.D. 1997)

For a 2008 case holding that a suspended imposition of sentence is not considered a final judgment and cannot be appealed, see *State v. Hubbard*, 245 S.W.3d 918 (Mo. App. E.D. 2008).

D. (§27.10) Notice of Right to Appeal (New Designation)

The trial court must appoint counsel to file the notice of appeal unless the defendant expressly waives the right to counsel on this issue. The fact that a defendant proceeded to trial pro se does not eliminate the right to counsel to perfect the notice of appeal. *Smiley v. State*, 196 S.W.3d 674 (Mo. App. S.D. 2006).

E. (§27.11) Examination of Defendant as to Post-Conviction Relief and Assistance of Counsel (New Designation)

Although a defendant does not have a constitutional right to counsel during post-conviction relief actions, Rules 24.035(e) and 29.15(e) require the court to appoint counsel if the defendant is indigent. *State v. Hunter*, 840 S.W.2d 850 (Mo. banc 1992), *cert. denied*, 509 U.S. 926 (1993), *reh'g denied*, 510 U.S. 929 (1993).

F. (§27.12) Setting of Appeal Bond (New Designation)

Additional crimes under §§ 544.671 and 547.170, RSMo Supp. 2011, for which a defendant is not entitled to an appeal bond are:

- First degree statutory sodomy, § 566.032, RSMo Supp. 2011
- Sexual assault, § 566.040, RSMo 2000
- Forcible sodomy, § 566.060, RSMo Supp. 2011
- First degree statutory sodomy, § 566.062, RSMo Supp. 2011
- Deviate sexual assault, § 566.070, RSMo 2000
- Sex abuse, § 566.100, RSMo 2000

- Any sexual offense under Chapter 566, RSMo, when the victim is less than 17 years of age at the time the crime was committed

- Any sexual offense under Chapter 568, RSMo, when the victim is less than 17 years of age at the time the crime was committed

- Any pornographic offense involving a minor as set forth in §§ 573.023, 573.025, 573.037, and 573.040, RSMo Supp. 2011

IV. Limitations on the Authority of the Court

A. (§27.13) Statutory and Constitutional Limitations

Note: *State v. Lachterman*, 812 S.W.2d 759 (Mo. App. E.D. 1991) (cited in the original section), was overruled on other grounds by *State v. Bernard*, 849 S.W.2d 10, 16 (Mo. banc 1993).

A defendant must be sentenced in accordance with the law that was in effect at the time the defendant committed the offense that the defendant is being sentenced for. But if there was a change in the law creating the offense that would give the defendant a lesser punishment, the defendant is entitled to be sentenced under the new law. *State v. Banks*, 259 S.W.3d 49 (Mo. App. W.D. 2008) (transfer to the Supreme Court for rehearing was denied May 27, 2008).

When the written sentence varies from the oral sentence imposed on a defendant, the oral pronouncement controls unless the record shows that the written sentence is not materially different from that of the oral pronouncement or that the court had no discretion to enter a sentence different from the written sentence. *State v. Collins*, 188 S.W.3d 69 (Mo. App. E.D. 2006). Further, if the oral pronouncement is ambiguous, the court can examine the entire record to determine what the sentence was. *Johnson v. State*, 938 S.W.2d 264 (Mo. banc 1997).

B. (§27.14) Conformity to a Plea Bargain Agreement

If a defendant's plea of guilty significantly depends on a promise by or an agreement with the prosecuting attorney, the promise or agreement will be considered an inducement or consideration for the plea. If it is breached by the prosecuting attorney, the defendant is entitled to specific performance of the promise or agreement or is entitled to withdraw the plea of guilty. But the defendant's reliance must be reasonable. If there is no reasonable basis for the defendant's reliance, the defendant is not entitled to relief. *State v. Banks*, 259 S.W.3d 49 (Mo. App. W.D. 2008) (transfer to the Supreme Court for rehearing was denied May 27, 2008).

Normally, when a defendant absconds from justice, the escape rule would prevent the defendant from having a right to appeal or to file a post-conviction motion for relief. But when the escape occurs after sentencing and the escape and the recapture do not have any effect on the way that the defendant's sentence is to be carried out after the defendant's return to custody, the escape rule does not apply. In *Allen v. State*, 219 S.W.3d 273, 276 (Mo. App. S.D. 2007), the defendant entered into a plea agreement with the prosecuting attorney whereby he would be sentenced to 5 years in MoDOC (Missouri Department of Corrections) with a 120-day recall after successful completion of an institutional treatment program. The defendant entered his plea of guilty under the agreement, and the court accepted it. The defendant failed to turn himself into MoDOC when it was time. Upon his recapture, the sentencing court refused to honor the agreement and sentenced the defendant to 5 years in MoDOC. The defendant filed his Rule 24.035 motion, and the appellate court found that the escape rule did not apply because the plea agreement and original sentencing did not contain any requirement that the defendant turn himself into MoDOC on a specific date to receive the benefit of the plea agreement; therefore, the escape did not affect the way that the defendant's sentence was to be carried out.

In *State ex rel. Goldesberry v. Taylor*, 233 S.W.3d 796, 799 (Mo. App. W.D. 2007), the defendant entered a plea of guilty to the misdemeanor charge of operating a vehicle in a careless and imprudent manner and operating a motor vehicle without maintaining financial responsibility. The sentencing court accepted the plea and sentenced the defendant with fines. The prosecuting attorney was not present for the hearing, nor was the victim notified of the hearing. Thereafter, the prosecuting attorney sought to have the defendant's plea of guilty set aside under Rule 29.07(d). The sentencing court set aside the plea and later sentenced the defendant to jail time contingent on the outcome of the defendant's writ of prohibition. The appellate court held that Rule 29.07(d) was intended for the protection of a defendant and that victims' rights provisions are not a basis for invoking the rule and setting aside a plea.

A plea agreement is not violated when the court grants the defendant probation according to the agreement, the probation is later revoked, and a sentence is imposed. The defendant will not be allowed to withdraw the plea of guilty. *Adams v. State*, 210 S.W.3d 387 (Mo. App. E.D. 2006).

A good case to read relating to plea agreements, *Alford* pleas (*N.C. v. Alford*, 400 U.S. 25 (1970)), and statements made in presentence investigative reports is *State v. Creamer*, 161 S.W.3d 420 (Mo. App. W.D. 2005).

C. (§27.15) Exhaustion of Jurisdiction With Entry of Judgment

Rule 29.07(d) does not authorize the court to set aside a sentence and re-sentence a defendant. If a court is going to set aside a judgment, it must do so within 30 days and find that:

- the facts in the information or indictment do not constitute an offense; or
- the court does not have jurisdiction.

State ex rel. Moore v. Brown, 270 S.W.3d 447 (Mo. App. S.D. 2008).

VI. Imprisonment

A. (§27.18) Authorized Imprisonment for Classified Offenses

The criminal instructions for jury sentencing are found in the 305.00 Series of the Missouri Approved (Jury) Instructions—Criminal.

B. (§27.19) Unclassified Sentencing Provisions

Many of the unclassified felonies are sex offenses. The range of punishment for some of these offenses was changed in 2009. For example, forcible rape of a child less than 12 years old can now be punished by life imprisonment without the possibility of probation or parole. Section 566.030, RSMo Supp. 2011. The sex offenses have been amended numerous times, and because of overlapping statutes of limitations, an offense may be charged today that occurred many years ago. Generally, the applicable range of punishment will be determined by the range of punishment in effect at the time that the crime was committed. Because most of the punishments have been enhanced over the years, it is imperative that counsel research to determine the range of punishment effective at the time of the crime.

C. (§27.20) Extended Term for Persistent or Dangerous Offenders

Section 558.016, RSMo Supp. 2011, sets forth the definitions for:

- prior offender;
- persistent offender;
- dangerous offender; and
- persistent misdemeanor offender.

The definitions for "persistent offender" and "persistent misdemeanor offender" contain the phrase "committed at different times." This phrase is not defined in the statutes,

but in *State v. Sanchez*, 186 S.W.3d 260, 263–64 (Mo. banc 2006), the Court determined that, if the prior felonies or misdemeanors are committed as part of a continual course of conduct in a single episode, they are not committed at different times.

Under § 558.016.7, a persistent or dangerous offender is subject to enhanced punishment by the maximum sentence being extended on class B, C, and D felonies to the next higher level. But the classification of the felony and the minimum sentence for that felony remain the same and are not affected by the statute. *Dobbs v. State*, 226 S.W.3d 269 (Mo. App. S.D. 2007).

A defendant convicted as a persistent misdemeanor offender is not subject to enhanced punishment, but the conviction makes the defendant subject to sentencing by the court and not a jury. *State v. Manley*, 223 S.W.3d 887 (Mo. App. W.D. 2007).

Section 565.063.1(3) and (4), RSMo Supp. 2011, defines prior and persistent domestic violence offenders. The prior convictions used in the determination of whether a defendant is a prior or persistent domestic violence offender must be under Missouri law. Prior convictions that are not under Missouri law cannot be used. Section 565.063 limited the definition of a domestic assault offense to four different crimes under Missouri law. *State v. St. John*, 186 S.W.3d 847 (Mo. App. W.D. 2006). In 2009, § 565.063 was amended, removing the specific references to Missouri domestic violence offenses. It appears that this amendment eliminated the requirement for a Missouri prior offense that was addressed in *St. John*.

Section 577.023, RSMo Supp. 2011, defines repeat DWI offenders as prior, persistent, aggravated, or chronic offenders and provides for enhanced punishment for repeat offenses. Enhancing punishment based on municipal DWI convictions has been the subject of many appeals. *See State v. Miller*, 153 S.W.3d 333 (Mo. App. S.D. 2005); *State v. Haskins*, 950 S.W.2d 613 (Mo. App. S.D. 1997). In *Turner v. State*, 245 S.W.3d 826, 829 (Mo. banc 2008), the defendant entered a

plea of guilty to DWI, was found to be a persistent offender, and was sentenced to three years in MoDOC (Missouri Department of Corrections). The defendant filed his Rule 24.035 motion challenging the persistent offender finding, alleging that the SIS (suspended imposition of sentence) he received in municipal court should not have been included. The Supreme Court found a conflict between § 577.023.1 and .2(a) and § 577.023.14. It specifically found that § 577.023.1 and .2(a) allows for enhanced punishment for municipal convictions of intoxication-related traffic offenses but that § 577.023.14 does not include a plea of guilty or a finding of guilty followed by an SIS in municipal courts. The Court further found that, when there is ambiguity in the statutes, the rule of lenity must be applied and that the statute is to be interpreted in favor of the defendant—the prior SIS in the municipal court could not be used to enhance the punishment under § 577.023.

But the General Assembly acted quickly and, in 2008, closed the loophole recognized in *Turner*. Section 577.023.16 now reads as follows (emphasis added):

> Evidence of a prior plea of guilty or finding of guilty in an intoxication-related traffic offense shall be heard and determined by the trial court out of the hearing of the jury prior to the submission of the case to the jury, and shall include but not be limited to evidence of convictions received by a search of the records of the Missouri uniform law enforcement system maintained by the Missouri state highway patrol. After hearing the evidence, the court shall enter its findings thereon. A plea of guilty or a finding of guilty followed by incarceration, a suspended imposition of sentence, suspended execution of sentence, probation or parole or any combination thereof in any intoxication-related traffic offense *in a state, county or municipal court* or any combination thereof, shall be treated as a prior plea of guilty or finding of guilty for purposes of this section.

Section 306.118, RSMo Supp. 2011, also created in 2008, is very similar to § 577.023 but relates to intoxication-related boating offenses.

The DWI statutes were amended in 2009, 2010, 2011, and 2012. The amendments place several limitations on the court's discretion at sentencing. Generally, a court cannot grant an SIS. Sections 577.010 and 577.023, RSMo Supp.

2011. Additionally, the court is ordered to impose the following sentence minimums:

- Prior Offender—minimum 10 days shock or 240 hours community service
- Persistent Offender—minimum 30 days imprisonment or 480 hours community service
- Aggravated Offender—minimum 60 days imprisonment
- Chronic Offender—not eligible for probation or parole until serving a minimum of two years imprisonment

In certain instances, an exception applies if the defendant participates in a DWI court authorized under § 478.007, RSMo Supp. 2011.

D. (§27.21) Limitations on Probation or Parole—Minimum Prison Terms

The provisions of §§ 559.115.7 and 217.362.5, RSMo Supp. 2011, regarding parole eligibility do not alter a substantive law. *Jones v. Fife*, 207 S.W.3d 614, 616 (Mo. banc 2006).

Upon a plea of guilty or finding of guilt for armed criminal action, a sentencing court should apply § 571.015, RSMo 2000, and not § 558.019, RSMo Supp. 2011, in determining the amount of time a defendant must serve before being eligible for early release. Further, changes in the law with regard to minimum prison terms for a sentence for armed criminal action can be applied retroactively. *Talley v. Mo. Dep't of Corr.*, 210 S.W.3d 212, 216 (Mo. App. W.D. 2006); *see also Edwards v. State*, 215 S.W.3d 292 (Mo. App. S.D. 2007).

Punishment under § 559.115 (shock detention) or § 217.362 (long-term treatment) is not considered a prior prison commitment for purposes of determining minimum prison terms. But if the defendant's probation is revoked and the defendant is committed to MoDOC, the defendant's receipt by MoDOC will count as a prior prison commitment. *Coldiron v. Mo. Dep't of Corr.*, 220 S.W.3d 371 (Mo. App. W.D. 2007).

A defendant will be considered to have amassed two MoDOC commitments if the defendant is received by MoDOC on the same day and time under sentences imposed for unrelated offenses. *Gilles v. Mo. Dep't of Corr.*, 200 S.W.3d 50 (Mo. App. W.D. 2006).

Section 559.115 does not prohibit probation from being granted in any offense. But it does prohibit the court from granting probation after 120 days for the offenses specified in subsection 8.

Senate Bill 628, 96th General Assembly, Second Regular Session (Mo. 2012), effective August 28, 2012, entirely revised § 568.060, RSMo, regarding abuse and neglect of a child. Included in these changes are mandatory prison sentences. The following statutory minimum sentences now apply to convictions under this section:

- C felony—not eligible for probation or parole until the defendant has served no less than 1 year
- B felony—not eligible for probation or parole until the defendant has served not less than 5 years of the sentence
- A felony—not eligible for probation or parole until the defendant has served not less than 15 years of the sentence

S.B. 628 (to be codified as § 568.060.5 and .6).

F. (§27.23) Concurrent or Consecutive Sentences

A sentence for armed criminal action does not have to run consecutively with the sentence for the underlying felony. *State v. Freeman*, 212 S.W.3d 173 (Mo. App. S.D. 2007).

See *Harper v. State*, 256 S.W.3d 220 (Mo. App. W.D. 2008), for a ruling that the later plea or sentencing court, and not the original sentencing court, controls the manner in which a sentence or sentences are to be executed—consecutive or concurrent—on a suspended sentence.

G. (§27.24) Credit for Jail Time

For another case determining that the circuit court has the discretion to award credit for time served on probation, see *Donaldson v. Crawford*, 230 S.W.3d 340 (Mo. banc 2007).

H. (§27.25) Conditional Release

If counsel advises a defendant about collateral consequences such as conditional release dates and the defendant relies on that advice in entering a plea of guilty, the plea may be held invalid. *Pettis v. State*, 212 S.W.3d 189 (Mo. App. W.D. 2007). Counsel should be very careful in advising or guaranteeing a defendant about release dates.

Under the 2006 revisions to § 217.735, now RSMo Supp. 2011, there is now the potential for lifetime supervision for an individual convicted of an offense under Chapter 566 or Chapter 558, RSMo, when the victim is less than 14 years old and the defendant is a prior sex offender.

VII. Probation

A. (§27.26) In General

In 2012, the Missouri legislature enacted the Justice Reinvestment Act. *See* H.B. 1525, 96th Gen. Assembly, 2nd Reg. Sess. (Mo. 2012). Included in newly created § 217.703, RSMo, of this Act is the creation of earned compliance credits for probationers of many offenses. A defendant on probation for a Chapter 195, RSMo, offense or most C or D felonies is entitled to a shortened probationary period for good behavior. For each month that a probationer is in compliance with the conditions of probation, the probationer can reduce the term of probation by 30 days. For example, a 5-year period of probation could be reduced to 2½ years. But the probationary period cannot be reduced to less than a 2-year period. A defendant is not entitled to earned compliance credits if on probation for:

- an A or B felony;
- aggravated stalking;
- sexual assault;
- deviate sexual assault;
- assault in the second degree with a deadly weapon or dangerous instrument;
- sexual misconduct involving a child;
- endangering the welfare of a child in the first degree through sexual conduct;
- incest;
- invasion of privacy; or
- abuse of a child.

H.B. 1525 (to be codified as § 217.703.1(2)).

A defendant on probation for certain offenses is presumed to be entitled to earned compliance credits unless the court, on its own motion or a motion of the prosecuting attorney, makes a finding that the defendant is ineligible to earn compliance credits because of the nature or circumstances of the offense or the history and character of the defendant. The offenses for which this hearing may apply are:

- involuntary manslaughter in the first degree;
- involuntary manslaughter in the second degree;
- assault in the second degree other than with a deadly weapon or dangerous instrument;
- domestic assault in the second degree;

- assault of a law enforcement officer in the second degree;
- statutory rape in the second degree;
- statutory sodomy in the second degree;
- endangering the welfare of a child in the first degree; or
- an unlawful use of a weapons offense under Chapter 571, RSMo, which is not otherwise excluded.

H.B. 1525 (to be codified as § 559.036.4(1)(a)).

It is advisable that counsel addresses the applicability of earned compliance credits in the plea agreement. Arguably, a defendant who agreed to a five-year period of probation has waived the right to claim the earned compliance credits. If there is no plea agreement, it is advisable to address the issue with the sentencing court, especially if the offense is one that may involve a hearing regarding the nature of the offense and character of the defendant.

A trend in conditions of probation is the participation in an applicable specialty court. Missouri statutes authorize the use of specialty courts for certain offenses—i.e., drug court and DWI court, § 478.001, RSMo Supp. 2011. Furthermore, each circuit has the ability to create specialty courts to deal with specific classifications of cases or defendants—i.e., veterans court. A defense attorney should research what options are available to determine if the client is eligible for participation in a specialty court. The specialty cour programs allow for probation in instances when probation may not otherwise be granted.

B. (§27.27) Pre-Sentence Investigation and Report

The term pre-sentence investigation and report (referred to as a PSI) is no longer used. In 2005, the Missouri Sentencing Advisory Commission and the Board of Probation and Parole revised the method being used to provide information to the

court for sentencing. The new report, the SAR (Sentencing Assessment Report) still complies with the statutory requirements for a PSI. But the goal of the SAR is to provide more focused information as to the nature of the offense, the offender's characteristics and risk status, a management plan for the offender in the community, and the Commission's sentencing recommendation. See Michael A. Wolff, *Missouri's Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95 (2006), for further information on this shift in philosophy.

C. (§27.28) Suspended Imposition of Sentence Not a Conviction

The courts now recognize that an SIS (suspended imposition of sentence) does "routinely" have collateral consequences to criminal defendants and that the guilty plea that is the basis for the SIS does have an effect on professional licenses and may require a defendant to register under certain conditions, such as registering as a sex offender. *State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158, 161 (Mo. banc 2007).

A 2007 case that holds that an SIS is not a final judgment for purposes of appeal and further finds that there is no "original sentencing" with an SIS is *Edwards v. State*, 215 S.W.3d 292 (Mo. App. S.D. 2007).

D. (§27.29) Revocation and Method of Appeal of Revocation

Section 559.036, RSMo Supp. 2011, was amended in 2005. The prosecutor or circuit attorney can file the motion to revoke at any period during the probation, and the court can extend the period of probation up to one year. Section 559.036.2.

The terminology used by the court in a probation revocation hearing will determine the court's authority to act. If the court is to "extend" the period of probation, the court is limited to one extension for a one-year period. But if the court

"revokes" the probation, the court can place the defendant on a second term of probation for up to five years. This second term of probation is not affected by the amount of time served on the first term of probation. *Id.*; *see Bowers v. State*, 330 S.W.3d 832 (Mo. App. W.D. 2011); *State ex rel. Heberlie v. Martinez*, 128 S.W.3d 616 (Mo. App. E.D. 2004).

If the court intends to grant any time served on probation toward the sentence, that must occur at the time of the probation revocation. The court loses jurisdiction to act after the defendant has been remanded to MoDOC (Missouri Department of Corrections). *State ex rel. Scroggins v. Kellogg*, 335 S.W.3d 38 (Mo. App. W.D. 2011).

Additional subsections were added to § 559.036 in 2012 as part of the Justice Reinvestment Act. *See* H.B. 1525, 96th Gen. Assembly, 2nd Reg. Sess. (Mo. 2012). If the court determines that revocation of probation is appropriate, the court is now generally mandated to sentence the defendant to MoDOC for a 120-day program when the offense is a C or D felony or a Chapter 195, RSMo, offense. H.B. 1525 (to be codified as § 559.036.4(1)). The exceptions to this general rule are that:

- the violation is for:
    - absconding;
    - a laws violation;
    - a weapons violation;
    - a violation of a no contact provision; or
- the defendant has already been placed in one of the programs by the court for the same underlying offense or during the same period of probation.

Id.

Additionally, the court, on its own motion or motion of the prosecutor, may find that a defendant on probation for one of the following offenses does not qualify:

- involuntary manslaughter in the first degree;
- involuntary manslaughter in the second degree;
- aggravated stalking;
- assault in the second degree;
- sexual assault;
- domestic assault in the second degree;
- assault of a law enforcement officer in the second degree;
- statutory rape in the second degree;
- statutory sodomy in the second degree;
- deviate sexual assault;
- sexual misconduct involving a child;
- incest endangering the welfare of a child in the first degree;
- abuse of a child;
- invasion of privacy; or
- unlawful use of a weapon under Chapter 571, RSMo.

H.B. 1525 (to be codified as § 559.036.4(1)).

E. (§27.30) Shock Detention and Short-Term Shock Programs

Programs within MoDOC change. Currently, the regimented discipline program is not offered. Additionally, the long-term drug-treatment program has been reduced to a year-long program.

Patricia Harrison*

2012 Cumulative Supplement to

Chapter 28

PROBATION, PAROLE, AND OTHER ALTERNATIVE SENTENCES

Supplemented:
§§28.1
28.2
28.3
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28.21A (New Section) Credit for Time Served
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Jessica Sindel, a third-year law student at Saint Louis University, assisted with this supplement.

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I. (§28.1) Introduction and Definitions

In *Delay v. Missouri Board of Probation & Parole*, 174 S.W.3d 662 (Mo. App. W.D. 2005), the court further affirmed the decision in *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133 (Mo. banc 1995) (cited in the original section), and extended it to incarcerated individuals who had received a parole hearing under the now-repealed statute that created a liberty interest. *Delay*, 174 S.W.3d at 665. "[T]he legislature that creates a statutory entitlement . . . is not precluded from altering or terminating the entitlement[;] . . . any . . . liberty interest in the use of the old parole statute was extinguished by enactment of the new law." *Id.* (quoting *Cavallaro*, 908 S.W.2d at 136). The court explicitly states that "what the legislature gives it can also take away." *Delay*, 174 S.W.3d at 665. Furthermore, the court rejected the argument that the Board violated the constitutional prohibitions against *ex post facto* laws because Delay failed to show "that the new statute increased his punishment for his crime or changed the definition of his crime." *Id.*; *see also Ridinger v. Mo. Bd. of Prob. & Parole*, 189 S.W.3d 658 (Mo. App. W.D. 2006) (a new statute that did not "shorten a defendant's sentence or alter the law creating the offense" applies retroactively).

II. Probation

A. (§28.2) Authority

The 2006 amendment to § 559.100, now RSMo Supp. 2011, increased the number of sections that limit who can be placed on probation. The additional limiting statutes are:

- § 566.030, RSMo Supp. 2011 (forcible rape and attempted forcible rape)
- § 566.060, RSMo Supp. 2011 (forcible sodomy)
- § 566.067, RSMo Supp. 2011 (child molestation)
- § 566.151, RSMo Supp. 2011 (enticement of a child)
- § 566.213, RSMo Supp. 2011 (sexual trafficking of a child under the age of 12 years)
- § 589.425.3, RSMo Supp. 2011 (failure to register as a sex offender)

B. (§28.3) Eligibility

In 2006, the term of imprisonment for a person determined to be a persistent sexual offender was changed from "not less than thirty years" to "*imprisonment for life* without eligibility for probation or parole." Section 558.018.3, now RSMo Supp. 2011 (emphasis added).

Further, "'imprisonment for life' shall mean imprisonment for the duration of the person's natural life" and not 30 years, as a life sentence is defined in § 558.019.4, RSMo Supp. 2011.

See *Huck v. State*, 341 S.W.3d 136 (Mo. App. E.D. 2011), for a discussion of the difference between persistent and predatory sexual offender and the court's discretionary role in sentencing.

In *Graham v. Florida*, 130 S. Ct. 2011 (2010), the U.S. Supreme Court found that the cruel-and-unusual-punishment provision of the Eighth Amendment was violated if a juvenile offender (under the age of 18 years) receives a sentence of life without parole for nonhomicide offenses. The Court found that the sentencing court must give juvenile offenders a meaningful opportunity to seek release.

The following language has been deleted from § 558.019.5:

> Except that the board of probation and parole, in the case of consecutive sentences imposed at the same time pursuant to a course of conduct constituting a common scheme or plan, shall be authorized to convert consecutive sentences to concurrent sentences, when the board finds, after hearing with notice to the prosecuting or circuit attorney, that the sum of the terms results in an unreasonably excessive total term, taking into consideration all factors related to the crime or crimes committed and the sentences received by others similarly situated.

Section 558.019.5 now reads, "For purposes of this section, the term 'minimum prison term' shall mean time required to be served by the offender before he or she is eligible for parole, conditional release or other early release by the department of corrections."

If the victim is less than 12 years old, the term of imprisonment is life without eligibility for probation or parole for at least 30 years "*unless* the defendant has reached the age of seventy-five years and has served at least fifteen years of such sentence." Section 566.030.2(2), RSMo Supp. 2011 (emphasis added). Section 558.019.4 does not apply. Section 566.030.3. Section 566.030.4 states that no person who is found guilty of forcible rape or an attempt to commit forcible rape is eligible for an SIS (suspended imposition of sentence) or an SES (suspended execution of sentence).

In *State v. Sanchez*, 217 S.W.3d 923 (Mo. App. S.D. 2007), the court addressed the discrepancy between § 557.026, RSMo 2000, which requires a presentence investigation report in felony cases, and Rule 29.07(a)(1), which gives the court discretion to order a presentence investigation, by finding that the Rule takes precedence over the statute. In *Sanchez*, the court found that the trial court did not err in not allowing a new presentence investigation report at resentencing because the trial court allowed the defense counsel to present evidence of the defendant's behavior while in prison and other positive changes in his life. In contrast, see *State v. Rowan*, 201 S.W.3d 82 (Mo. App. E.D. 2006), in which the sentencing court erred in not allowing evidence of good behavior in prison when making its sentencing decision.

C. (§28.4) Authorized Dispositions

In *State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158 (Mo. banc 2007), the Court discussed the practical effect of an SIS and how it impacts those convicted of sex offenses by still requiring them to register as sex offenders, even though it is not considered a conviction because the offender has not been sentenced. In *Kauble*, the defendant pled guilty, received an SIS, and completed his probation, but later the statute that he pled to was found to be unconstitutional. The defendant tried to withdraw his guilty plea, but because the case had ended and there was no conviction to appeal, the Court found that it had no authority to allow the withdrawal of his plea and SIS. The Court found that his name should be removed from the sex offender registry, but because there was no party who denied the request, the Court could not order his removal. If the department that maintained the registry denied a request to remove the defendant's name, the defendant could then bring an action. The Court quotes *Yale v. City of Independence*, 846 S.W.2d 193, 195 (Mo. banc 1993), which discusses the legislative intent of an SIS to "allow a defendant to avoid the stigma of a lifetime conviction and the punitive collateral consequences that follow," giving judges a tool for handling offenders worthy of the most lenient treatment but also discusses how the practical effect of this sentence is changing with collateral consequences. *Kauble*, 216 S.W.3d at 161.

In *Doe v. Keathley*, 344 S.W.3d 759 (Mo. App. W.D. 2011), Doe pled, in 1992, to sexual abuse in the first degree and was given an SIS with five years' probation, which he finished early in 1995. He later registered as a sex offender under Missouri's sex offender registration law, §§ 589.400–589.425, now RSMo 2000 and Supp. 2011, in 1995. But the Supreme Court of Missouri held that, under Article I, § 13, of the Missouri Constitution, Missouri's law could not constitutionally be applied to offenders convicted before the state statute's effective date. *Doe v. Phillips*, 194 S.W.3d 833, 852 (Mo. banc 2006). Since then, the Supreme Court recognized that the federal SORNA (Sex Offender Registration and Notification Act), Pub. L. No. 109-248, 120 Stat. 587, enacted in 2006:

- independently mandates sex-offender registration for individuals convicted of sex offenses before SORNA's effective date; and

- is not subject to the Missouri Constitution's prohibition on retrospective laws.

Doe v. Keathley, 290 S.W.3d 719, 720 (Mo. banc 2009). The Eighth Circuit has held in numerous cases that Missouri state court criminal dispositions that resulted in a term of probation and an SIS constitute prior "convictions" under 21 U.S.C. § 841. *United States v. Ortega*, 150 F.3d 937, 948 (8th Cir. 1998) (quoting *United States v. Cisneros*, 112 F.3d 1272, 1281 (5th Cir. 1997), and collecting other cases); *see also, e.g.*:

- *United States v. Henderson*, 613 F.3d 1177, 1185 (8th Cir. 2010)

- *United States v. Davis*, 417 F.3d 909, 913 (8th Cir. 2005)

- *United States v. Slicer*, 361 F.3d 1085, 1087 (8th Cir. 2004)

- *United States v. Franklin*, 250 F.3d 653, 665 (8th Cir. 2001)

Therefore the Supreme Court of Missouri required Doe to register as a sex offender under the federal law. *Doe*, 290 S.W.3d at 720–21; *see also Doe v. Replogle*, 344 S.W.3d 757 (Mo. App. W.D. 2011).

In *State v. Baxter*, 284 S.W.3d 648 (Mo. App. E.D. 2009), the jury found the defendant guilty under § 566.151.3, now RSMo Supp. 2011, of attempting to commit enticement of a child, which has a sentence of "not less than five years and not more than thirty years" imprisonment without eligibility for parole, probation, conditional release, SIS, or SES for a period of five calendar years. Rejecting the defendant's argument that the statute was vague and ambiguous, the

court interpreted the statute in conjunction with § 559.100.1, now RSMo Supp. 2011, which allows the circuit courts to place on probation or to parole persons convicted of any offense over which they have jurisdiction, except in statutes that specifically do not allow it such as § 566.151. The court relied on the Missouri Sentencing Advisory Commission, which lists § 566.151 among those offenses that prohibit probation for a certain period of time.

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(follow 2007–2008 User Guide)

In *United States v. Craddock*, 593 F.3d 699 (8th Cir. 2010), the court found that the defendant was properly sentenced to the enhanced 20-year mandatory minimum under 21 U.S.C. § 841(b)(1)(A) for a prior conviction for the sale of a controlled substance that resulted in an SIS because an SIS under § 557.011.2(3), now RSMo Supp. 2011, qualified as a prior conviction under federal law.

In *State v. Lazar*, 182 S.W.3d 578 (Mo. App. E.D. 2005), the court rejected the defendant's argument that the written order of an SES was inconsistent with the trial court's oral pronouncement that it was "'not going to impose' a sentence" based on a reading of the whole record, which revealed the court's intent to sentence the defendant but not make him serve the sentence at that time.

In *Etenburn v. State*, 341 S.W.3d 737 (Mo. App. S.D. 2011), the court remanded the case to the circuit court to correct the written judgments to reflect the plea court's oral pronouncement of sentence.

Under § 610.122(4), RSMo 2000, an SIS cannot be expunged from a record. In *In re Dyer*, 163 S.W.3d 915 (Mo. banc 2005), the Court agreed that the state has a legitimate interest in maintaining accurate and complete criminal histories; therefore, denying expungement of an SIS is rational.

See also *Bell v. State*, 996 S.W.2d 739 (Mo. App. S.D. 1999), and *State ex rel. Wright v. Dandurand*, 973 S.W.2d 161

(Mo. App. W.D. 1998), which discuss trial courts' authority to extend probation beyond statutory parameters.

In *State ex rel. Doe v. Moore*, 265 S.W.3d 278 (Mo. banc 2008), the Court concluded that it was not an abuse of discretion for the sentencing court to modify the conditions of probation, specifically that the probationer:

- must register as a sex offender;
- be evaluated by a physician at the direction of probation and parole; and
- must attend and successfully complete sex offender treatment,

as, in its discretion, it deems such new conditions reasonably necessary to ensure that the defendant will not again violate the law. *See* §§ 559.021 and 559.100, RSMo Supp. 2011.

D. (§28.5) Judicial Limitations

An individual who has been convicted of "child molestation in the first degree pursuant to section 566.067[, RSMo Supp. 2011,] when classified as a class A felony" is ineligible for probation. Section 559.115.8, RSMo Supp. 2011. This was changed from a class B felony in 2005.

E. Conditions

1. (§28.6) Generally

The May 2012 edition of the White Book (standards of probation), discussed in the original section, is available at:

http://doc.mo.gov/documents/prob/White%20Book.pdf

The number of standards or general conditions of probation has been increased from 8 to 11.

Section 559.016.3, now RSMo Supp. 2011, previously stated the following:

> The court may extend a period of probation, however, no more than one extension of any probation may be ordered. Total time on any probation term, including any extension, shall not exceed the maximum term as established in subsection 1 of this section.

It now reads as follows (emphasis added):

> The court may extend a period of probation, however, no more than one extension of any probation may be ordered except that the court may extend the total time on probation *by one additional year by order of the court if the defendant admits he or she has violated the conditions of his or her probation or is found by the court to have violated the conditions of his or her probation.* Total time on any probation term, including any extension, shall not exceed the maximum term as established in subsection 1 of this section *plus one additional year if the defendant admits or the court finds that the defendant has violated the conditions of his or her probation.*

Section 589.400.2, RSMo Supp. 2011 (emphasis added), was amended in 2008 to read as follows:

> Any person to whom sections 589.400 to 589.425 apply shall, within three days of conviction, release from incarceration, or placement upon probation, register with the chief law enforcement official of the county or city not within a county in which such person resides unless such person has already registered in that county for the same offense. Any person to whom sections 589.400 to 589.425 apply if not currently registered in their county of residence shall register with the chief law enforcement official of such county or city not within a county within three days. The chief law enforcement official shall forward a copy of the registration form required by section 589.407 to a city, town, village, or campus law enforcement agency located within the county of the chief law enforcement official, if so requested. Such request may ask the chief law enforcement official to forward copies of all registration forms filed with such official. The chief law enforcement official may forward a copy of such registration form to any city, town, village, or campus law enforcement agency, if so requested.

Section 589.425.1, RSMo Supp. 2011, was completely rewritten in 2008 and now reads as follows:

> A person commits the crime of failing to register as a sex offender when the person is required to register under sections 589.400 to 589.425 and fails to comply with any requirement of sections 589.400 to 589.425. Failing to register as a sex offender is a class D felony unless the person is required to register based on having committed an offense in chapter 566, RSMo, which was an unclassified felony, a class A or B felony, or a felony involving a child under the age of fourteen, in which case it is a class C felony.

In *Doe v. Phillips*, 194 S.W.3d 833, 852–53 (Mo. banc 2006), the Court determined that Megan's Law (registration of sex offenders) is not overbroad but struck down the section that required offenders to register for crimes committed *before* the enactment of the law (January 1, 1995) as a violation of the state's constitutional prohibition of laws "retrospective in operation."

Section 650.055.1, now RSMo Supp. 2011, previously read, in part, as follows:

> Every individual who pleads guilty or nolo contendere to or is convicted in a Missouri circuit court, of a felony or any offense under chapter 566, RSMo, or has been determined beyond a reasonable doubt to be a sexually violent predator under sections 632.480 to 632.513, RSMo, shall have a blood or scientifically accepted biological sample collected for purposes of DNA profiling analysis.

It now reads, in part, as follows (emphasis added):

> Every individual, in a Missouri circuit court, *who pleads guilty to or is found guilty of a felony* or any offense under chapter 566, or who is seventeen years of age or older and who is arrested for burglary in the first degree under section 569.160, or burglary in the second degree under section 569.170, or a felony offense under chapters 565, 566, 567, 568, or 573, or has been determined to be a sexually violent predator pursuant to sections 632.480 to 632.513, or is an individual required to register as a sexual offender under sections 589.400 to 589.425, shall have a fingerprint and blood or scientifically accepted biological sample collected for purposes of DNA profiling analysis.

2. (§28.7) Special Conditions, Shock Probation, Substance Abuse

In *State v. Gregory*, 176 S.W.3d 721 (Mo. App. E.D. 2005), the court dismissed an appeal filed by the defendant based on the denial of his motion to modify the terms of his probation. The court found that, because "[p]robation is not part of the sentence. . . . there is no right to appeal a ruling on a motion to modify conditions of probation." *Id*. at 722 (citation omitted) (citing *State v. Dunn*, 103 S.W.3d 886, 887 (Mo. App. E.D. 2003); § 559.021.7, now RSMo Supp. 2011 (allows a court to "modify or enlarge the conditions of probation at any time before the expiration or termination of the probation term" but does not authorize an appeal from the denial of a motion to modify probation)). The Court held that the defendant's remedy, if any, is by writ.

In *State ex rel. Johnston v. Berkemeyer*, 165 S.W.3d 222 (Mo. App. E.D. 2005), the court found that §§ 559.026 and 559.115, now RSMo Supp. 2011, authorized the trial court to order detention or imprisonment as a condition of probation if that condition is ordered at sentencing. But in *Berkemeyer*, when the court ordered a sentence of 30 days in jail, re-sentenced the defendant after 7 days to an SES, and placed him on probation, the court exceeded its jurisdiction, and the order placing him in the community was for parole under § 217.730, now RSMo Supp. 2011, and not probation.

G. (§28.10) Duration and Extension of Probation

Section 559.036, now RSMo Supp. 2011, was amended extensively in 2005 to allow the probation court to extend the term of probation one time only *except* that the court may extend the term by one additional year if the defendant admits that the defendant has violated the condition of probation or is found by the court to have violated the condition of probation. Section 559.036.2. Section 559.036.5 (now § 559.036.7, H.B. 1525, 96th Gen. Assembly, 2nd Reg. Sess. (Mo. 2012)) allows the circuit attorney or prosecuting

attorney to file a motion to revoke probation, or the court may issue a notice to the probationer to appear to answer a charge of a violation. Upon the prosecutor's filing or on the court's own motion, the court may immediately enter an order suspending the period of probation and may order a warrant for the defendant's arrest. The probation remains suspended until the prosecutor's motion is ruled on or until the court orders that the probation be reinstated.

In *Erves v. Browersox*, No. 4:03CV 692 RWS(LMB), 2006 U.S. Dist. LEXIS 60129 (E.D. Mo. Sept. 12, 2006), the federal district court rejected the conclusion of *Roach v. State*, 64 S.W.3d 884 (Mo. App. S.D. 2002), discussed in the original section, and, instead, applied the conclusion reached in *Bonanno v. State*, 44 S.W.3d 879 (Mo. App. W.D. 2001). *Browersox*, 2006 U.S. Dist. LEXIS 60129, at *8. *Bonanno* found that the sentencing court was not limited by the statute that was in effect when the defendant was sentenced but, rather, that the amendments could be used to place an additional term of probation. *Id.* at *9. *Browersox* rejected the petitioner's argument along with the three other courts that heard his writ. Furthermore, the petitioner's writ was based solely on state law governing probation and parole, and thus, federal law interpretation is inappropriate. *Id.*

In *State ex rel. White v. Davis*, 174 S.W.3d 543 (Mo. App. W.D. 2005), the court granted the habeas corpus writ because the trial court improperly amended its original order of an SIS with no special conditions to an SIS with placement in the 120-day institutional treatment program under § 217.785, now RSMo Supp. 2011, in that the court did not revoke the defendant's probation and then suspend execution of the new sentence, thereby placing him on a new term of probation. Hence, the defendant's probation had expired, and the court had no authority to revoke his probation at a later date. *Davis* has an excellent discussion of extraordinary writs and how to best use them in litigation.

See *Starry v. State*, 318 S.W.3d 780 (Mo. App. W.D. 2010), in which the court found that the trial court exceeded its authority by revoking probation after it had expired.

See *State ex rel. Whittenhall v. Conklin*, 294 S.W.3d 106 (Mo. App. S.D 2009), in which the court found that the trial court exceeded its authority when it held a probation violation hearing three years after probation had expired based on the judge's repeated delays in holding hearings.

See §28.36 of this supplement for discussions of *State ex rel. Breeding v. Seay*, 244 S.W.3d 791 (Mo. App. S.D. 2008), and *Petree v. State*, 190 S.W.3d 641 (Mo. App. W.D. 2006).

See §28.39 of this supplement for a discussion of *Norfolk v. State*, 200 S.W.3d 36 (Mo. App. W.D. 2006).

III. Parole

A. (§28.11) Authority

The 2009 edition of the Blue Book (procedures governing paroles), discussed in the original chapter, is available at:

http://doc.mo.gov/documents/prob/Blue%20Book.pdf

B. (§28.12) Parole Eligibility and Minimum Prison Terms

The 2009 edition of the Blue Book (procedures governing paroles), discussed in the original chapter, is available at:

http://doc.mo.gov/documents/prob/Blue%20Book.pdf

In *Johnson v. Missouri Department of Corrections*, 166 S.W.3d 110 (Mo. App. W.D. 2005), the court found that the general minimum prison term provisions of § 558.019, now RSMo Supp. 2011, do not apply to a sentence for armed criminal action regardless of whether the application would result in an increase or decrease of the minimum time served because the legislature intended to exclude this offense by giving it its own statutory minimum standards in § 571.015, RSMo 2000. See also *Talley v. Missouri Department of Corrections*, 210 S.W.3d 212 (Mo. App. W.D. 2006), in which the court held that armed criminal action is no longer subject to the

statutory minimums of § 558.019.2 that apply to dangerous felonies.

Section 217.690.10, RSMo, is now § 217.690.11, RSMo Supp. 2011, and § 217.690.3 is now § 217.690.4.

In *State ex rel. Lute v. Missouri Board of Probation & Parole*, 218 S.W.3d 431 (Mo. banc 2007), the Court discussed § 217.690, which delineates the separate function of the Missouri Parole Board (Board of Probation and Parole) by providing, "When *in its opinion* there is a reasonable probability that an offender in a correctional center can be released without detriment to the community or to himself, the board *may in its discretion* release on parole such person except as otherwise prohibited by law." Section 217.690.1 (emphasis added). The parole function, then, is solely within the province of the Parole Board, and parole decisions are matters solely for the Parole Board's discretion.

The Parole Board has full discretion to deny parole if it believes that granting parole would dismiss the seriousness of the crime. *See Kaczynsk v. Mo. Bd. of Prob. & Parole*, 349 S.W.3d 354 (Mo. App. W.D. 2011).

The guidelines under which the Parole Board is to determine the parole eligibility of an offender are in 14 CSR § 80-2.010. With the exceptions of the mandatory minimum sentences set forth in statutes or § 80-2.010, offenders can be paroled virtually any time during their sentence at the discretion of the Parole Board under conditions set by the Parole Board. This also means that the Parole Board can deny parole to an offender throughout the offender's entire sentence.

The term "minimum prison term" was previously defined in § 558.019.5 to mean:

> time required to be served by the offender before he or she is eligible for parole, conditional release or other early release by the department of corrections. Except that the board of probation and parole, in the case of consecutive sentences imposed at the same time under a course of conduct constituting a common scheme or plan, shall be authorized to convert consecutive sentences to

> concurrent sentences, when the board finds, after hearing with notice to the prosecuting or circuit attorney, that the sum of the terms results in an unreasonably excessive total term, taking into consideration all factors related to the crime or crimes committed and the sentences received by others similarly situated.

The term is now defined to mean "time required to be served by the offender before he or she is eligible for parole, conditional release or other early release by the department of corrections." Section 558.019.5.

Section 571.030, RSMo Supp. 2011, has been amended.

See *State v. St. John*, 186 S.W.3d 847 (Mo. App. W.D. 2006), for a discussion on the parole of persistent domestic violence offenders.

Child kidnapping and parental kidnapping have been added to the list of dangerous felonies. Section 556.061(8), RSMo Supp. 2011.

In *Carroll v. Missouri Board of Probation & Parole*, 113 S.W.3d 654 (Mo. App. W.D. 2003), the court addressed the findings of *Boersig v. Missouri Department of Corrections*, 959 S.W.2d 454 (Mo. banc 1997), discussed in the original chapter, and emphasized, "Parole is the 'release of an offender to the community by the court or the state board of probation and parole prior to the expiration of his term.'" *Carroll*, 113 S.W.3d at 657. The court, in considering what a remand is, must look to the fact that, while parole was given based on an original conviction, the individual was released into the community and, if found to have violated the parole, would in fact be remanded back to the custody of the MoDOC (Missouri Department of Corrections). *Id.*

In *Coldiron v. Missouri Department of Corrections*, 220 S.W.3d 371 (Mo. App. W.D. 2007), the court found that a new case that ultimately revokes a probation sentence is not "related" to a previous case for purposes of calculating parole under § 558.019.2(2) and (3), which requires previous prison sentence commitments counted toward the minimum prison term to be "unrelated to the present offense." The *Carroll*

court emphasized that the purpose of the statute is to "punish . . . a repeat offender for his latest offense on the basis of a demonstrated propensity for misconduct." *Carroll*, 113 S.W.3d at 657–58.

In *Dudley v. Agniel*, 207 S.W.3d 617 (Mo. banc 2007), the Court held that the 2003 amendment to § 559.115.7, now RSMo Supp. 2011, can be applied retroactively because the statute is a parole eligibility statute that does not change the offender's punishment. *See also*:

- *Garr v. Mo. Bd. of Prob. & Parole*, 211 S.W.3d 191 (Mo. App. W.D. 2007)
- *Lumley v. Crawford*, 213 S.W.3d 712 (Mo. App. W.D. 2007)
- *Jones v. Fife*, 207 S.W.3d 614 (Mo. banc 2006)

Dade v. Missouri Board of Probation & Parole, 194 S.W.3d 382, 386 (Mo. App. W.D. 2006), held that, because § 559.115.7 only exempts from § 558.019 an offender's first incarceration in a 120-day program "*prior to release on probation*," then "an incarceration *following* a probation revocation counts as a qualifying prison commitment for purposes of section 558.019.2 even though the corresponding original 120-day callback itself is excluded as such a commitment under section 559.115.7." *See*:

- *Coldiron*, 220 S.W.3d 371
- *Ridinger v. Mo. Bd. of Prob. & Parole*, 189 S.W.3d 658, 664 (Mo. App. W.D. 2006) (2003 amendment to § 217.362.5, now RSMo Supp. 2011, under which first placement in the regimented disciplinary program does not count as a first remand, applies retroactively because it does not shorten a defendant's sentence or alter the law creating the offense)
- *Wolfe v. Mo. Dep't of Corr.*, 199 S.W.3d 219 (Mo. App. W.D. 2006) (under § 558.019.4(1), a life sentence

equals 30 years, even if a consecutive sentence begins after the life sentence is to be served)

- *Canale v. Dep't of Corr.*, *State of Mo.*, 194 S.W.3d 364 (Mo. App. W.D. 2006) (MoDOC was correct in its calculation, and the trial court erred in granting a writ)

- *Harrell v. Mo. Dep't of Corr.*, 207 S.W.3d 690 (Mo. App. W.D. 2006)

- *Bantle v. Dwyer*, 195 S.W.3d 428 (Mo. App. S.D. 2006) (§ 217.362.5 applies retroactively; the court reiterated its holding in *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988), that, for an amendment to violate *ex post facto* laws, it must change a matter of substance that alters substantial personal rights and disadvantages the offender affected by it)

- *Miller v. Mo. Dep't of Corr.*, 212 S.W.3d 163 (Mo. App. W.D. 2006)

- *Sredl v. Mo. Dep't of Corr.*, 209 S.W.3d 31 (Mo. App. W.D. 2006)

- *Evans v. Mo. Bd. of Prob. & Parole*, 192 S.W.3d 540 (Mo. App. W.D. 2006)

- *Nieuwendaal v. Mo. Dep't of Corr.*, 181 S.W.3d 153 (Mo. App. W.D. 2005) (amendments to § 559.115.7 apply retroactively because it is a procedural statute that does not affect substantive rights)

- *State v. Rowan*, 165 S.W.3d 552 (Mo. App. E.D. 2005)

- *Irvin v. Kemper*, 152 S.W.3d 358 (Mo. App. W.D. 2004) (§ 1.160, now RSMo Supp. 2011, did not prevent the amendments to § 559.115.7 from applying retroactively because they did not reduce or lengthen the offender's sentence)

- *Powell v. Mo. Dep't of Corr.*, 152 S.W.3d 363 (Mo. App. W.D. 2004)

C. Parole Hearings

1. (§28.13) When Scheduled

The 2009 edition of the Blue Book Appendices, discussed in the original section, is available at:

www.doc.mo.gov/documents/prob/BlueBookAppendices5-06.pdf

The 2009 Blue Book Appendix A is as follows:

Parole Hearing Schedule			
Sentence Length (Years)	Months of Incarceration (including jail time) to be Served Before Hearing		
2	2		
3	3		
4	4		
5	5		
6	6		
7	7		
	C&D* Enhanced	A&B Felonies	
	Non-Violent, Drugs, DWI	Non-Violent, Drugs, DWI	All Other Crimes
8	10	12	24
9	12	18	30
10	14	24	36
11–15	18	30	42
16–20	28	48	60
21–25	NA	66	78
26–30	NA	84	96
31–35	NA	102	114
36–40	NA	120	132
41–44	NA	132	144
45 and over	NA	144	156

*Enhanced C&D felonies apply to offenders sentenced as a persistent offender (RSMo. 558.016)

2. (§28.14) Procedure for Hearing

The 2009 version of the Blue Book (procedures governing paroles), discussed in the original chapter, is available at:

http://doc.mo.gov/documents/prob/Blue%20Book.pdf

The confidentiality statements in the Blue Book, as revised in 2009, are: "Parole hearings shall not be open to the general public. 217.670 RSMo[.] Probation and Parole records are confidential and considered closed records. 549.500 RSMo."

Section 595.209.1(6), RSMo Supp. 2011, has been amended to allow victims, upon written request, to be shielded from the view of the offender in order to be present at the probation or parole hearing and give the victim the right to have counsel or a representative be present and speak for the victim in court.

D. (§28.16) Parole Guidelines

In *Winslow v. Nixon*, 93 S.W.3d 795 (Mo. App. E.D. 2002), the court criticized the notation in *McKown v. Mitchell*, 869 S.W.2d 765, 768–69, 769 n.6 (Mo. App. W.D. 1993), discussed in the original chapter, "that the use of the word 'shall' in statutes creates a legitimate expectation, and thus a liberty interest protected by due process, when certain other circumstances are satisfied." *Winslow*, 93 S.W.3d at 799. Instead, *Winslow* relies heavily on *Sandin v. Connor*, 515 U.S. 472 (1995), which states that a statutory liberty interest may be created when "a restraint either exceeds the prisoner's sentence in a sufficiently unexpected manner or imposes an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Winslow*, 93 S.W.3d at 799. The court found that Winslow's inability to participate in the MOSOP (Missouri Sex Offender Program) was not atypical or significant because:

> First, there is no indication that Winslow is the only sex offender imprisoned at FCC who is unable to participate or complete the MOSOP. . . . Second, such a hardship is not significant because . . . MOSOP is not penal in nature. . . . The only effect of [the sex offender] not completing [the] MOSOP has been to extend his possible early release date [and not to include additional punishment].

Id. at 800.

See *Ladd v. Mo. Prob. & Parole*, 299 S.W.3d 33 (Mo. App. W.D. 2009), holding that the judicial review provisions of the Missouri Administrative Procedure Act, Chapter 536, RSMo, do not apply to the Parole Board's decision-making process.

E. (§28.17) Parole From Consecutive Sentences

See *Wolfe v. Missouri Department of Corrections*, 199 S.W.3d 219 (Mo. App. W.D. 2006).

In *Edger v. Missouri Board of Probation & Parole*, 307 S.W.3d 718 (Mo. App. W.D. 2010), in determining how to calculate consecutive sentences for parole eligibility, the court acknowledged that the operation of conditional release is specifically dictated by statute, while parole is almost entirely left to the discretion of the Parole Board. Section 558.011.4, now RSMo Supp. 2011, specifies the time tables under which an offender is entitled to be conditionally released although a conditional release date can be extended if the procedures of § 558.011.5 are followed. "With the exceptions of the mandatory minimum sentences set forth in statutes or 14 CSR 80-2.010, offenders can be paroled virtually any time during their sentence at the discretion of the Parole Board under conditions set by the Board." *Edger*, 307 S.W.3d at 721. Likewise, the Parole Board can deny parole to an offender throughout the offender's entire sentence.

Because the legislature explicitly provided in § 217.690, RSMo Supp. 2011, "a method for calculating parole eligibility for an offender with consecutive sentences by adding together the minimum terms for parole eligibility for each consecutive sentence," the Court concluded the Parole Board must follow this statute. *Edger*, 307 S.W.3d at 721.

I. (§28.21) Judicial Parole

Subsection 8 of § 558.016, RSMo Supp. 2004, cited in the original section, has been deleted. But shortly after it was adopted, the Supreme Court, in *State ex rel. Nixon v. Russell*, 129 S.W.3d 867 (Mo. banc 2004), held that the provision in § 559.016.8, allowing an offender to petition for early parole, applied only to offenders sentenced before June 27, 2003. The Court found that § 1.160, now RSMo Supp. 2011, was not violated because the statutory provision did not repeal or amend any previously existing statute but, rather, just changed the location or circumstances under which the sentence was to be served. *See also Bantle v. Dwyer*, 195 S.W.3d 428 (Mo. App. S.D. 2006); § 558.016, RSMo Supp. 2011.

In *Dobbins v. State*, 187 S.W.3d 865 (Mo. banc 2006), the Court found that counsel was ineffective when he advised the defendant to enter an open guilty plea believing that the defendant could petition for early release under § 558.046, RSMo 2000, when, in fact, individuals with prior drug convictions are ineligible for early release.

J. (§28.21A) Credit for Time Served (New Section)

Section 558.031, RSMo 2000, authorizes MoDOC to grant credit for time served toward calculating the parole eligibility time. But § 559.100.2, RSMo Supp. 2011, grants authority to the circuit court to, "in its discretion, credit any period of probation or parole as time served on a sentence." *See*:

- *Donaldson v. Crawford*, 230 S.W.3d 340 (Mo. banc 2007) (emphasized that the sentencing court, rather than MoDOC, can give credit for time served on probation in its discretion under § 559.100.2)

- *State ex rel. Scroggins v. Kellogg*, 335 S.W.3d 38 (Mo. App. W.D. 2011) (the court declined to extend *Donaldson*; the court rejected a circuit court decision to give credit for time served on probation seven years after the sentence was issued, concluding that

§ 559.100.2 permits a sentencing court to afford credit for time spent on probation and parole only at the time of execution of a sentence as a result of a probation revocation and does not *expressly* authorize a court to take further action following the execution of sentence as a result of the revocation of probation or parole)

- *Dworaczyk v. Mo. Dep't of Corr.*, 250 S.W.3d 436 (Mo. App. W.D. 2008) (MoDOC has no authority to grant credit to the parole violator's sentence because, with court-ordered probation or parole, it is solely in the discretion of the circuit court to award that credit following a violation)

- *Davison v. Mo. Dep't of Corr.*, 141 S.W.3d 506 (Mo. App. W.D. 2004) (credit not required when time served for a parole violation is for unrelated offenses)

- *Lynch v. Mo. Dep't of Corr.*, 267 S.W.3d 796 (Mo. App. E.D. 2008) (the court found that the inmate was entitled to credit for time served in the county jail before receiving his federal sentence because the federal time was related to the state offense)

- *Monroe v. Mo. Dep't of Corr.*, 105 S.W.3d 915 (Mo. App. W.D. 2003) (discussing parole revocations and credit for time served for parole violations when the violation is a new charge)

- *Mudloff v. Mo. Dep't of Corr.*, 53 S.W.3d 145, 150 (Mo. App. W.D. 2001) (an inmate serving a sentence in Illinois was not eligible for credit for time served while awaiting trial on a disposition of detainers in Missouri because he could not post bail because of serving the sentence for the case in Illinois and was not "awaiting trial on" the pending case because time served on a different case will not be credited toward time spent on a new case)

- *Goings v. Mo. Dep't of Corr.*, 6 S.W.3d 906 (Mo. banc 1999) (time spent in custody following revocation of parole for prior offenses, but before sentencing for current offense, was "related to" the sentence for current offense and, thus, could be credited to the sentence for the current offense if sentences are to run concurrent)

- *Davis v. State*, 829 S.W.2d 610 (Mo. App. E.D. 1992)

- *Viers v. State*, 755 S.W.2d 617 (Mo. App. W.D. 1998) (discussion of consecutive offenses)

- *State v. Williams*, 978 S.W.2d 454 (Mo. App. E.D. 1998) (the sentencing court has no authority to give credit for time on bond, even if conditions on the bond restrict the defendant to the defendant's home; these restrictions do not amount to serious curtailment of the freedom of movement and personal liberty because §§ 558.031 and 559.100.2 limit credit toward service of a sentence to time in prison, jail, or custody or periods of probation or parole)

- *Bates v. Mo. Dep't of Corr.*, 986 S.W.2d 486 (Mo. App. W.D. 1999) (house arrest is not equivalent to jail as required by § 558.031)

- *Mashek v. State ex rel. Mitchell*, 940 S.W.2d 1 (Mo. App. W.D. 1997) (the defendant was not entitled to credit for time while free from custody on bail because the purpose of § 558.031 is to ensure that an accused indigent who awaits trial does not serve a longer term for the same sentence than an accused able to meet bail)

- *Anderson v. Crawford*, 309 S.W.3d 863 (Mo. App. W.D. 2010) (the court found that a prisoner's posting of an appeal bond did not free him to such a degree that he could be held to forfeit his right to credit for time served)

- *Noltkamper v. Gammon*, 260 S.W.3d 866 (Mo. App. W.D. 2008) (§ 559.100 is expressly listed as an exception to § 558.031 and takes precedence when a defendant seeks credit for any period of probation or parole as time served on a sentence, and therefore, the sentencing court has discretion to grant the defendant credit for time served on probation and MoDOC does not have the authority to grant additional credit for time served on probation)

IV. Special Alternative Programs

A. (§28.23) Long-Term Substance Abuse Addiction Program

In *State ex rel. Taylor v. Moore*, 136 S.W.3d 799 (Mo. banc 2004), the defendant was entitled to habeas relief from his ineligibility for the LTDP (Long Term Drug Program) because his guilty plea was conditioned on the mistaken belief that he qualified for the program, which was later discovered to be untrue because he had a previous conviction of a dangerous felony, and the sentencing court failed to determine this before sentencing.

The facts in *Shaw v. State*, 125 S.W.3d 918 (Mo. App. W.D. 2004), are similar to the facts in *Taylor* except that the defendant in *Shaw* filed a Rule 24.035 motion, and the appellate court remanded to the motion court to make findings on the claim that the defendant's due process rights were violated when the trial court failed to notify the Missouri Department of Corrections before sentencing him to an LTDP.

In *White v. State*, 314 S.W.3d 359 (Mo. App. S.D. 2010), the court found that the plea counsel was not ineffective for failing to get the defendant prescreened for the LTDP because the judge ultimately concluded that it was the defendant's history with the criminal justice system that persuaded the court that application of the § 217.362, now RSMo Supp. 2011, program was not appropriate in this case.

In *Conley v. State*, 301 S.W.3d 84 (Mo. App. S.D. 2010), the court found that it was not error when the court sentenced the defendant to the LTDP and the defendant's disqualification from the treatment program was because of his own volitional conduct and not because of some factor beyond his control.

E. (§28.27) 120-Day Institutional Treatment Program

If a victim is less than 12 years old, the term of imprisonment for the perpetrator is life without eligibility for probation or parole for at least 30 years unless the defendant has reached the age of 75 years and has served at least 15 years of the sentence. And § 558.019.4, RSMo Supp. 2011, dealing with felony convictions, does not apply. Section 566.030.2(2), RSMo Supp. 2011. Section 566.030.3 states that no person who is found guilty of forcible rape or an attempt to commit forcible rape is eligible for a suspended imposition of sentence or a suspended execution of sentence.

Section 566.060, RSMo Supp. 2011, has been amended to include the conditions discussed in the preceding paragraph.

Section 566.032.2, RSMo Supp. 2011, has been amended to include not only statutory rape in the first degree but also an attempt to commit statutory rape in the first degree.

Section 566.062.2, RSMo Supp. 2011, has been amended to include not only statutory sodomy in the first degree but also an attempt to commit statutory sodomy in the first degree.

Section 566.067, RSMo Supp. 2011, has been amended to include the child victim who is under 12 years of age.

In *Allen v. State*, 219 S.W.3d 273 (Mo. App. S.D. 2007), the defendant failed to turn himself in after being sentenced to the 120-day institutional treatment program. The appellate court found that the trial court loses jurisdiction "after entry of judgment . . . to alter or change its judgment, but [is not precluded from] enforcement of the judgment as entered."

Id. at 277 (citing *Duly v. Heflin*, 873 S.W.2d 932, 934 (Mo. App. W.D. 1994)). Therefore, the trial court exceeded its jurisdiction in rescinding its order regarding the movant's eligibility for parole under § 559.115, now RSMo Supp. 2011, and executing his sentence. *Allen*, 219 S.W.3d at 277 (citing *Johnston v. Berkemeyer*, 165 S.W.3d 222, 224 (Mo. App. E.D. 2005)). *Allen* distinguished its ruling from the holding in *Cupp v. State*, 982 S.W.2d 304 (Mo. App. S.D. 1998), because the defendant in *Cupp* agreed that his release was subject to the condition that, if he failed to appear as ordered, the § 559.115 provision of his sentence would be withdrawn. *Allen*, 219 S.W.3d at 279–80.

In *State ex rel. Mertens v. Brown*, 198 S.W.3d 616 (Mo. banc 2006), the Court granted a writ of mandamus ordering that the defendant be released on probation because the sentencing court failed to comply with § 559.115, which requires a hearing within the first 120 days of an offender's sentence if the court intends to deny probation to an offender who successfully completed the program.

In *State v. Ferrell*, 317 S.W.3d 688 (Mo. App. S.D. 2010), the court emphasizes that the proper vehicle to challenge a denial of probation under § 559.115 is a writ (there is no right to appeal because probation was not a part of the sentence stemming from the final judgment).

In *State ex rel. Dorsey v. Wilson*, 263 S.W.3d 790 (Mo. App. E.D. 2008), the court found that § 559.115.3 requires that, if the trial court finds release of an offender to be an abuse of discretion, the trial court must hold a hearing within 90 to 120 days of the offender's sentence before ordering the execution of the offender's sentence. The trial court in *Dorsey* failed to hold a timely hearing and, thus, was required to release Dorsey on probation.

G. (28.29) Sex Offender Assessment Program (SOAP)

In *State v. Bryan*, 335 S.W.3d 1 (Mo. App. S.D. 2010), the court allowed the defendant to withdraw his guilty plea when he pled guilty and agreed to enter into the SOAP program

and, if successfully completed, would be released on probation for five years. Through no fault of his own, he was unable to enter the SOAP and receive an assessment. Therefore, the defendant was unable to complete his part of the plea agreement and obtain an early release.

But see *Wilhite v. State*, 339 S.W.3d 573 (Mo. App. W.D. 2011), in which the court found that the defendant's guilty plea agreement was not breached when he was not placed in a facility in which a sex offender assessment unit was housed.

H. (§28.30) Missouri Sex Offender Program (MOSOP)

In *Care & Treatment of Boone v. State*, 147 S.W.3d 801 (Mo. App. E.D. 2004), the court found that MOSOP did not violate the offender's Establishment Clause rights or his First Amendment free exercise rights.

V. Release After Service of Sentence

A. (§28.32) Conditional Release

Child kidnapping and parental kidnapping have been added to the list of dangerous felonies in § 556.061(8), RSMo Supp. 2011.

14 CSR § 80-2.040 was rescinded March 30, 2008.

See *State ex rel. Lute v. Missouri Board of Probation & Parole*, 218 S.W.3d 431 (Mo. banc 2007), for an extensive discussion concerning the difference between parole and conditional release.

But see *Kaczynski v. Missouri Board of Probation & Parole*, 349 S.W.3d 354 (Mo. App. W.D. 2011), which found that the holding in *Lute* is limited to the specific facts when parole was considered after clemency by the Governor.

In *Cooper v. Holden*, 189 S.W.3d 614 (Mo. App. W.D. 2006), the court denied the defendant's writ of habeas corpus,

finding that the 1978 version of § 558.011, now RSMo Supp. 2011, did not create an entitlement to conditional release and that the amendment to the statute that modified that language was merely a procedural change because it only changed the powers given to the Missouri Parole Board (Board of Probation and Parole). Because the defendant did not have a conditional release date at the time that the statutory changes took effect, no personal substantive rights were violated.

See *Lanham v. Missouri Department of Corrections*, 232 S.W.3d 630 (Mo. App. S.D. 2007), for a discussion of how there is no substantive right to a conditional release under § 558.011.4 because the statutory scheme gives the Parole Board wide discretion, and § 558.011.5 makes it obvious that conditional release under § 558.011.4 is not automatic.

VI. Revocation Proceedings

C. (§28.36) Final Hearing on Revocation

The court in *Saunders v. Bowersox*, 179 S.W.3d 288 (Mo. App. S.D. 2005), addressed two important issues:

1. Section 559.036, RSMo Supp. 2011 (now § 559.036.6, H.B. 1525, 96th Gen. Assembly, 2nd Reg. Sess. (Mo. 2012)), requires a hearing to be set with no unreasonable or prejudicial delay and that notice be given to the probationer of the intent to revoke and suspend the probation. In *Bowersox*, the court only entered an order suspending the probation on the first case and not the second. The court was without jurisdiction to revoke the probation on the second case because the probation period had lapsed.

2. The court emphasized that, because probation revocation hearings are civil proceedings, the civil rules of judgments will apply; the court will look to the plain and ordinary meaning of the document and,

> if unambiguous, will not look outside the four corners of the written document for interpretation. Because the order in *Bowersox* did not specifically address the second case, even though the court intended to revoke the probation of both cases, the court exceeded its jurisdiction in revoking the probation after the period had lapsed.

In *State ex rel. Breeding v. Seay*, 244 S.W.3d 791, 796 (Mo. App. S.D. 2008), a relator was charged with a violation of his probation, and the hearing to revoke probation was set five months after the date his probation was to expire. The court reaffirmed the Supreme Court of Missouri's conclusion in *State ex rel. Carlton v. Haynes*, 552 S.W.2d 710, 714 (Mo. banc 1977), that "'no unreasonable delay should occur in affording the probationer a hearing.'" *Seay*, 244 S.W.3d at 795. *Seay* concluded that the delay was caused by unnecessary continuances, and not taking advantage of the earlier dates caused the court's jurisdiction to be lost and the relator's probation to have been completed.

The court in *State ex rel. Whittenhall v. Conklin*, 294 S.W.3d 106 (Mo. App. S.D. 2009), found that the trial court exceeded its authority when it held a probation revocation hearing three years after expiration of probation because of the judge's repeated delay of hearings, which extended probation.

See *State ex rel. Zahnd v. Shafer*, 276 S.W.3d 368 (Mo. App. W.D. 2009), in which the trial court exceeded its authority when it modified the defendant's sentence during a probation revocation hearing.

In *Bowers v. State*, 330 S.W.3d 832 (Mo. App. W.D. 2011), the court found that a docket entry is a valid means of entering a final judgment.

The court in *Petree v. State*, 190 S.W.3d 641, 643 (Mo. App. W.D. 2006), found that the petitioner has the burden of showing that the petitioner was prepared and ready to proceed at an earlier court date, and failure to show this preparedness did not meet the burden of proving that the delay was unreasonable.

Section 559.036.3 allows the court to revoke probation after a violation of probation is found and then place the offender on a second term of probation. But in *State ex rel. Heberlie v. Martinez*, 128 S.W.3d 616, 617 (Mo. App. E.D. 2004), the judge had revoked the offender's probation three times and placed him on second, third, and fourth probation terms. The court found that the third and fourth probation assignments were in violation of the statute.

In *State ex rel. Poucher v. Vincent*, 258 S.W.3d 62 (Mo. banc 2008), the Supreme Court held that the sentencing court exceeded its authority when it made a *nunc pro tunc* order changing the original concurrent sentence to a consecutive sentence after the probation was revoked. A *nunc pro tunc* order is to be used for clerical errors or omissions and not to impose a new sentence after a revocation proceeding.

E. (§28.38) Ruling and Alternatives Available

Section 559.036, RSMo Supp. 2011, was amended in 2005 and again in 2012. *See* §28.10 of this supplement; H.B. 1525, 96th Gen. Assembly, 2nd Reg. Sess. (Mo. 2012).

F. (§28.39) Post-Revocation Proceedings

In *Norfolk v. State*, 200 S.W.3d 36 (Mo. App. W.D. 2006), the court distinguishes the facts from *Green v. State*, 494 S.W.2d 356 (Mo. banc 1973) (discussed in the original chapter), in that, in *Norfolk*, the movant was discharged from probation. *Norfolk*, 200 S.W.3d at 38. The lower court in *Norfolk* claimed that the order terminating probation was not valid because it "was not in the court's handwriting or signed by the judge." *Id.* at 40. Rule 74.01 only requires these elements for orders that are appealable, and there is no right to appeal from an order to terminate probation; thus, the requirements of Rule 74.01 are inapplicable. *Norfolk*, 200 S.W.3d at 74. The court further noted that an unsigned docket entry is just as valid to terminate probation as a formal order, and often these docket entries are the common method of ruling on probation issues, including termination. Because the docket entry in *Norfolk* was not a judgment, the rule is not relevant. *Id.*

Randall D. Eggert*

2012 Cumulative Supplement to
Chapter 29

29

APPEALS

Supplemented:
§§29.2
29.3
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*Mr. Eggert's biographical information appears on page 29–1 of the original chapter.

II. (§29.2) Direct Appeal

Also supporting that supposition that appellate review is not an integral part of the legal system and that no defendant can demand an appeal either by due process or any inherent right is *State v. Simmons*, 213 S.W.3d 156, 157 (Mo. App. E.D. 2006); *see also State v. Tyler*, 349 S.W.3d 430, 432 (Mo. App. W.D. 2011).

A. (§29.3) Defendant's Right of Appeal

In *Jackson v. State*, 241 S.W.3d 831 (Mo. App. E.D. 2007), the court held that the defendant freely waived his right to appeal; post-conviction relief was denied. *See also Cooper v. State*, 356 S.W.3d 148, 154 (Mo. banc 2011).

Add the following text after the third sentence in the second paragraph of the original section:

Another case in which the defendant's right to an appeal was waived based on the escape rule is *State v. Vaughn*, 223 S.W.3d 189 (Mo. App. E.D. 2007).

In criminal cases, § 547.070, RSMo 2000, allows appeals from final judgments, which occur when the court enters a judgment of conviction and sentence. *State v. Larson*, 79 S.W.3d 891, 893 (Mo. banc 2002). See also *State v. Triplett*, 355 S.W.3d 543, 548 (Mo. App. W.D. 2011) (quoting *State v. Smothers*, 297 S.W.3d 626, 631 (Mo. App. W.D. 2009)), which states:

> The exception appears to be limited to those rare situations in which a dismissal without prejudice is based on an assertedly deficient claim . . . or where the basis of the dismissal without prejudice places a substantial cloud on a party's right to further litigate an issue or claim . . . If the judgment precludes the litigant from maintaining the action in the forum chosen, it is a final judgment irrespective of whether it is denominated "with prejudice" or "without prejudice."

Change the citation to Rule 30.03 *in the original section to*:

Rule 30.01(a) and Rule 81.04(a)

Add the following citation at the end of the first bullet point in the fourth paragraph after the citation to White, 429 S.W.2d 277, *in the original section*:

> *State v. Hotze*, 250 S.W.3d 745, 746 (Mo. App. E.D. 2008) (suspended imposition of sentence is not appealable)

Add the following citation at the end of the second bullet point in the fourth paragraph after the citation to Hamilton, 865 S.W.2d 374, *in the original section*:

> *Walters v. Walters*, 181 S.W.3d 135, 141 (Mo. App. W.D. 2005) (judgment of criminal contempt is not appealable)

Add the following citation at the end of the third bullet point in the fourth paragraph after the citation to Young, 235 S.W.2d 369, *in the original section*:

> *See State v. Lawrence*, 139 S.W.3d 573, 575–76 (Mo. App. E.D. 2004) (*nunc pro tunc* is final for appeal purposes the day that it is entered)

Add the following citation at the end of the fifth bullet point in the fourth paragraph after the citation to White, 429 S.W.2d 277, *in the original section*:

> *City of Joplin v. Klein*, 345 S.W.3d 351, 353 (Mo. App. S.D. 2011)

Add the following citation at the end of the seventh bullet point in the fourth paragraph after the citation to Dixon, 913 F.2d 1305, *in the original section*:

> *State v. Brumm*, 163 S.W.3d 51, 55 (Mo. App. S.D. 2005)

Add the following citation to the end of the first sentence of the fifth paragraph after the citation to Lynch, 679 S.W.2d 858, *in the original section*:

> *State v. Storer*, 324 S.W.3d 765, 767 (Mo. App. S.D. 2010).

Add the following citation at the end of the first bullet point in the fifth paragraph after the citation to Shambley-Bey, 989 S.W.2d 681, *in the original section*:

State v. Moore, 352 S.W.3d 392, 398 (Mo. App. E.D. 2011).

Add the following citation at the end of the second bullet point in the fifth paragraph after the citation to Thornton, 969 S.W.2d 342, *in the original section*:

Smith v. Pace, 313 S.W.3d 124, 129 (Mo. banc 2010).

Add the following citation at the end of the third bullet point in the fifth paragraph after the citation to Stout, 960 S.W.2d 535, *in the original section*:

Mazur v. State, 285 S.W.3d 820, 822 (Mo. App. S.D. 2009).

Change the citation to Rules 29.15(j) and 24.035(j) *to*:

Rules 29.15(k) and 24.035(k)

B. (§29.4) Probation and Parole Actions Not Reviewable by Appeal

See also *Counts v. State*, 341 S.W.3d 911, 914 (Mo. App. S.D. 2011). But the jurisdiction of the court to either impose or revoke probation may be the subject of an appeal or post-conviction relief motion. *Stelljes v. State*, 72 S.W.3d 196, 199 (Mo. App. W.D. 2002) (raised in a Rule 24.035 motion).

C. (§29.5) State's Right of Appeal

Add the following citation at the end of the first paragraph in the original section:

State v. Connell, 326 S.W.3d 865, 867 (Mo. App. W.D. 2010).

Add the following citation at the end of the fourth bullet point in the first paragraph in the original section:

State v. Bibb, 922 S.W.2d 798, 801 (Mo. App. E.D. 1996) ("Jeopardy does not attach when the court's dismissal is based on a pretrial matter and the state has the right to retry the defendant.")

Add the following citation at the end of the third paragraph in the original section:

State v. Eisenhour, 40 S.W.3d 916, 918 (Mo. banc 2001) ("Generally, a remedial writ is the proper route to review interlocutory orders in a criminal case."); *see also State v. Puckett*, 146 S.W.3d 19, 22 (Mo. App. E.D. 2004).

Add the following citation at the end of the fourth paragraph in the original section:

See State v. Burns, 339 S.W.3d 570, 572–73 (Mo. App. W.D. 2011); *State v. Moad,* 294 S.W.3d 83, 88 (Mo. App. W.D. 2009).

Change the citation to Rule 30.02(c) *to*:

Rule 30.02(b) and (c)

III. (§29.6) Bail and Execution on Appeal

Change the citation to Rule 33.01 *to*:

Rule 33.01(a)

IV. Notice and Form of Appeal

A. (§29.7) Time for Filing Notice

Delete the first sentence in the first paragraph in the original section and add the following:

Rule 30.01(a), referring to Rule 81.04, requires that the notice of appeal in a criminal case must be filed within ten days after the judgment or order appealed becomes final.

Add the following citation at the end of the third bullet point in the original section:

State v. Arnold, 230 S.W.3d 353, 354 (Mo. App. E.D. 2007)

Replace the citation to Rule 30.01(d) a*t the end of the second full paragraph in the original section with*:

Rule 30.01(a); Rule 81.04(f); *State v. Moore*, 352 S.W.3d 392, 398 (Mo. App. E.D. 2011).

There was no authority to waive the five-day rule on the filing of an interlocutory appeal by the state because the five-day filing period is strictly enforced. *State v. Faudi*, 141 S.W.3d 83, 84–85 (Mo. App. E.D. 2004).

If a notice of appeal is untimely, the appellate court is without jurisdiction and must dismiss the appeal. *State v. Carter*, 202 S.W.3d 700, 706–07 (Mo. App. W.D. 2006).

B. (§29.8) Appointed Counsel on Appeal

Under § 547.360.6, RSMo 2000, counsel can withdraw for good cause shown upon "the filing of an entry of appearance by successor counsel." If the counsel withdrawing was appointed by the court, the court will appoint new counsel.

C. (§29.9) Contents of Notice

Change the citation to Rule 30.01(i) *to*:

Rule 30.01(c)

D. (§29.10) Appellate Jurisdiction

Change the citation to § 565.020 *to*:

Section 565.035

Change the citation to Rule 30.01(f) and (g) *to*:

Rules 81.04(a) and 81.08(b)

V. (§29.11) Appellate Record

In *State v. Hackler*, 122 S.W.3d 132, 135 (Mo. App. S.D. 2003), the Southern District dismissed the defendant's appeal because of the defendant's failure to comply with the required appeal procedures and to provide a complete record.

See Rule 81.16(d), which provides that exhibits filed with the court of appeals must be removed within 30 days after the case has been decided, or they will be destroyed by the court.

VI. (§29.12) Briefs

*Replace the reference to "*a floppy disk*" in the sixth paragraph of the original section with the following*:

an electronic copy, such as a diskette or CD-ROM, which can be read by a commonly used word processor

Add the following bullet citations after the seventh paragraph in the original section:

> *Smith v. Bowersox*, 330 S.W.3d 103, 106 (Mo. App. S.D. 2010); *Prosser v. State*, 243 S.W.3d 496, 497 (Mo. App. E.D. 2008)

Add the following citation after the first sentence of the eighth paragraph, which ends with ". . . the default after notice," *in the original section*:

> Rule 30.14(a).

Add the following citation after the second sentence of the eighth paragraph, which ends with ". . . placed on the dismissal docket," *in the original section*:

> Rule 30.14(b).

*Add the following after "*argument*" in the second sentence of the ninth paragraph in the original section*:

or within ten days of the request of the clerk of the court, whichever is earlier,

Add the following citation after the fifth sentence of the ninth paragraph, which ends with ". . . certification by the attorney," *in the original section*:

W.D. MO. SPEC. R. IV.

Add the following citations after the first sentence of the tenth paragraph, which ends with '. . . review by the court," *in the original section*:

Rule 81.12(a); Rule 81.16(a).

Add the following citation at the end of the tenth paragraph in the original section:

See State v. Laptad, 585 S.W.2d 263, 265 (Mo. App. S.D. 1979).

Add the following citation at the end of the last paragraph in the original section:

S.D. MO. SPEC. R. 1(b).

VII. (§29.13) Oral Argument

Add the following citations after the end of the third paragraph in the original section:

E.D. MO. SPEC. R. 395(a) and (b); S.D. MO. SPEC. R. 1(c); W.D. MO. SPEC. R. I.

VIII. (§29.14) Scope of Review

State v. Burns, 359 S.W.3d 558, 560 (Mo. App. W.D. 2012), articulates that appellate review of the trial court decision requires the reviewing court to defer to the trial court's fact-finding and credibility determinations but that review of questions of law is *de novo*.

State v. Minor, 256 S.W.3d 92, 94 (Mo. banc 2008), supports the supposition that, in most situations, the appellate court will examine the evidence in the light most favorable to the state, and the appellant must persuade the court of the error.

State v. Ostdick, 351 S.W.3d 758, 769 n.10 (Mo. App. W.D. 2011), supports the proposition that, concerning the review of a suppression motion, the appellate court is limited to determining whether there was sufficient evidence to support the ruling.

The court in *State v. Goodin*, 248 S.W.3d 127, 133 (Mo. App. S.D. 2008), held that, because the defendant did not preserve the error with a timely objection, he was not entitled to any presumption that the error was prejudicial.

The erroneous exclusion of evidence in a criminal case creates a rebuttable presumption of prejudice. The state may rebut this presumption by proving that the error was harmless beyond a reasonable doubt. *State v. Walkup*, 220 S.W.3d 748, 756 (Mo. banc 2007).

Add the following citation after the end of the second paragraph in the original section:

> *State v. Walker*, 330 S.W.3d 122, 127 (Mo. App. E.D. 2010).

Add the following bullet point after the fifth paragraph, "The appellate courts set the following general precedents," *in the original section*:

- Preservation of evidentiary questions for appeal require a specific objection at the time that the evidence was sought to be admitted, along with the same objection being carried forward on appeal. Any grounds that are not raised in the objection are considered waived, and the party is prevented from raising the ground for the first time on appeal. *State v. Middlemist*, 319 S.W.3d 531, 542 (Mo. App. S.D. 2010).

Add the following citations at the end of the first bullet point after the fifth paragraph in the original section:

> *State v. Hohensee*, 353 S.W.3d 445, 447 (Mo. App. S.D. 2011) (plain error review is not warranted because the defendant may not take advantage of invited error as a basis for overturning the judgment in the case); § 545.030.1(16), RSMo 2000; *State v. Johnson*, 901 S.W.2d 60, 62 (Mo. banc 1995).

Add the following citation at the end of the first sentence in the third bullet point after the fifth paragraph in the original section:

> Section 545.030.1(16).

Add the following citations at the end of the third bullet point after the fifth paragraph in the original section:

> *State v. Fanning*, 939 S.W.2d 941, 944 (Mo. App. W.D. 1997); *State v. Stallings*, 812 S.W.2d 772, 779 (Mo. App. E.D. 1991).

Add the following citations at the end of the first sentence of the fifth bullet point after the fifth paragraph in the original section:

Rule 30.20; *State v. Bryant*, 362 S.W.3d 46, 50 (Mo. App. S.D. 2012).

Add the following citations at the end of the fifth bullet point after the fifth paragraph in the original section:

State v. Seay, 256 S.W.3d 197, 200 (Mo. App. E.D. 2008); *State v. Lloyd,* 205 S.W.3d 893, 900 (Mo. App. S.D. 2006); *see also* Rule 28.03.

Delete the sixth bullet point after the fifth paragraph in the original section because the "concurrent sentence rule" was abrogated by *State v. Reynolds*, 819 S.W.2d 322, 325–27 (Mo. banc 1991).

Add the following citations at the end of the seventh bullet point after the fifth paragraph in the original section:

State v. Davis, 318 S.W.3d 618, 642 (Mo. banc 2010); *State v. Rose*, 86 S.W.3d 90, 103 (Mo. App. W.D. 2002).

Add the following citations at the end of the ninth bullet point after the fifth paragraph in the original section:

State v. Mort, 321 S.W.3d 471, 485 (Mo. App. S.D. 2010); *State v. McClanahan*, 954 S.W.2d 476, 482 (Mo. App. W.D. 1997) ("[S]entences that, in the opinion of the defendant, are excessive may be reviewed by the trial court when the defendant requests in an after-trial motion to reduce the sentence imposed. . . . an appellate court has authority to reduce the sentence only upon a showing of an abuse of discretion appearing clearly in the record. The appellate court will not interfere with the trial court's decision absent a showing that 'passion and prejudice so clearly appears from the record that the appellate court can confidently say the trial court abused its discretion by declining to reduce the punishment.'") (citations omitted)).

Add the following citations at the end of the tenth bullet point after the fifth paragraph in the original section:

> *State v. Benedict*, 319 S.W.3d 483, 486 (Mo. App, S.D. 2010); *State v. Lucas*, 218 S.W.3d 626, 630 (Mo. App. S.D. 2007).

A. (§29.15) Preservation of Error for Appellate Review

Failure to substantially comply with the rules of appellate procedure preserves nothing for appellate review and constitutes grounds for the dismissal of an appeal. *State v. Chappell*, 64 S.W.3d 881, 883 (Mo. App. S.D. 2002); *see also State v. Middlemist*, 319 S.W.3d 531, 542 (Mo. App. S.D. 2010).

Add the following citation at the end of the first bullet point after the second paragraph in the original section:

> *Evans v. State*, 70 S.W.3d 483, 486 (Mo. App. W.D. 2002).

Add the following citations at the end of the second bullet point after the second paragraph in the original section:

> *State v. Mason*, 272 S.W.3d 257, 260 (Mo. App. W.D. 2008) (failure to timely object to the systematic exclusion of minorities in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), will waive the right to raise the issue on appeal); *State v. Gaston*, 761 S.W.2d 645, 648 (Mo. App. E.D. 1988).

*Replace the word "*oral*" with "*closing*" in bullet point four and add the following citations at the end of the fourth bullet point after the second paragraph in the original section*:

> *State v. Wilson,* 343 S.W.3d 747, 752 (Mo. App. E.D. 2011) (generally, plain error review is rarely granted as to comments made during closing argument); *State v. Silinzy*, 621 S.W.2d 114, 116 (Mo. App. E.D. 1981).

Add the following citation at the end of the sixth bullet point after the second paragraph in the original section:

State v. Curry, 357 S.W.3d 259, 265 (Mo. App. E.D. 2012).

Add the following citation at the end of the seventh bullet point after the second paragraph in the original section:

City of Plattsburg v. Davison, 176 S.W.3d 164, 170 (Mo. App. W.D. 2005).

Add the following citations at the end of the eighth bullet point after the second paragraph in the original section:

State v. Cella, 32 S.W.3d 114, 119 (Mo. banc 2000); *Bagby v. State*, 784 S.W.2d 877, 881 (Mo. App. S.D. 1990).

Add the following citations at the end of the ninth bullet point after the second paragraph in the original section:

Rule 84.04(a); *State v. Wilkins,* 229 S.W.3d 204, 210 (Mo. App. S.D. 2007).

Add the following citations at the end of the tenth bullet point after the second paragraph in the original section:

State v. Gray, 926 S.W.2d 29, 33 (Mo. App. W.D. 1996) ("Here, the defendant did not develop any evidence with reference to the merits of the motion's allegations. The defendant did not request a hearing on the matter and, from our review of the record on appeal, failed to even present an argument in favor of his motion. He did not object when the state presented testimony from Officer Wood that a confidential informant was with him when he bought the drugs. Furthermore, the defendant did not renew his motion at any time during trial. A careful examination of the whole record shows that the defendant failed to develop a record supporting his burden."); *see also State v. Baldwin*, 290 S.W.3d 139, 144 (Mo. App. W.D. 2009).

B. (§29.16) Review Under the Plain Error Rule

Plain error review under Rule 30.20 is used sparingly and is limited to those cases in which there is a strong, clear demonstration of manifest injustice or miscarriage of justice. *State v. Spry*, 252 S.W.3d 261, 266 (Mo. App. S.D. 2008); *State v. Fincher*, 359 S.W.3d 549, 553 (Mo. App. W.D. 2012).

When a defendant's guilt is established by overwhelming evidence, no injustice or miscarriage of justice will result from a refusal to invoke the plain error rule. *State v. Smallwood*, 230 S.W.3d 662, 664 (Mo. App. E.D. 2007); *State v. Hadley*, 357 S.W.3d 267, 273 (Mo. App. E.D. 2012).

Add the following citation at the end of the second bullet point after the fifth paragraph in the original section:

> *State v. Keeth*, 203 S.W.3d 718, 723 (Mo. App. S.D. 2006)

Add the following citation at the end of the fourth bullet point after the fifth paragraph in the original section:

> *State v. Marley*, 257 S.W.3d 198, 201 (Mo. App. W.D. 2008).

Add the following citation at the end of the fifth bullet point after the fifth paragraph in the original section:

> *State v. Jackson*, 155 S.W.3d 849, 853 (Mo. App. W.D. 2005) (the prosecutor's statement that, "You don't even really even have to worry about whether you're making the right decision if you find him guilty because it's already been decided," required plain error review and the reversal of the defendant's conviction).

Add the following citation at the end of the sixth bullet point after the fifth paragraph in the original section:

> But see *State v. Dees*, 916 S.W.2d 287, 296 (Mo. App. W.D. 1995) (citing *State v. Kempker*, 824 S.W.2d 909, 911 (Mo. banc 1992)), which held that even a direct comment

on the defendant's failure to testify, although erroneous, is not enough to justify a finding of plain error; the prejudice from such comments can normally be cured by an instruction to the jury; the court held, "[b]y failing to object, the defendant denied the judge the opportunity to avoid prejudice by means of an instruction and thereby waived his or her right to raise this issue as error on appeal."

Add the following citation at the end of the seventh bullet point after the fifth paragraph in the original section:

Jackson, 155 S.W.3d at 853 (the prosecutor's statement that, "You don't even really even have to worry about whether you're making the right decision if you find him guilty because it's already been decided," required plain error review and the reversal of the defendant's conviction).

Add the following citation at the end of the eighth bullet point after the fifth paragraph in the original section:

State v. Wilson, 816 S.W.2d 301, 303–04 (Mo. App. S.D. 1991).

Add the following citation at the end of the ninth bullet point after the fifth paragraph in the original section:

State v. Wade, 866 S.W.2d 908, 910 (Mo. App. W.D. 1993).

Add the following new bullet point at the end of the original section:

- Introduction of the defendant's confession without the government proving the *corpus delicti* of the crime charged is plain error. *State v. Crenshaw*, 59 S.W.3d 45, 49 (Mo. App. E.D. 2001).

C. (§29.17) Appellant's Burden of Persuasion

Add the following citations to the bulleted list of citations after the second paragraph of the original section:

- *State v. Brown*, 360 S.W.3d 919, 922 (Mo. App. W.D. 2012)
- *State v. Miner*, 256 S.W.3d 92, 94 (Mo. banc 2008)

D. (§29.18) Constitutional Error

If the error rises to a federal or state constitutional violation, prejudice is presumed, and the judgment of guilt may only be affirmed if the state shows that error was harmless beyond a reasonable doubt. *State v. Taylor*, 219 S.W.3d 769, 773 (Mo. App. S.D. 2007).

State v. Dees, 916 S.W.2d 287, 296 (Mo. App. W.D. 1995), also supports the supposition that, regarding the right to counsel, violation of certain constitutional rights cannot be held harmless, regardless of the degree of error.

E. (§29.19) Abuse of the Trial Court's Discretion

An abuse of discretion is a ruling that is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration by the trial court. *Johnson v. McCullough*, 306 S.W.3d 551, 555 (Mo. banc 2010).

The Eastern District held in *State v. McKinzie*, 968 S.W.2d 160, 161 (Mo. App. E.D. 1998), that it could not review the merits of the case because "there is no right to appeal a trial judge's decision to deny probation." *See also State v. Person*, 288 S.W.3d 802, 803 (Mo. App. E.D. 2009).

In *State v. May*, 640 S.W.2d 186, 187 (Mo. App. S.D. 1982), the Southern District held that:

> The trial court had authority to impose the sentence. It proceeded in a proper and authorized manner and whether it made a mistake in reciting the statutes under which it was proceeding makes no difference as the result is the same. Counsel was not ineffective because whether §§ 558.016 and 558.021 authorized increasing the sentence was immaterial when there was a statute that did allow it. Counsel's failure "to inform the court or otherwise demonstrate that he was aware of the inapplicability" of those sections would not have changed the result when the trial court was authorized to proceed as it did.

See also State v. Loveall, 105 S.W.3d 569, 574 (Mo. App. S.D. 2003).

Add the following citation after the third paragraph of the original section:

State v. Parker, 274 S.W.3d 551, 553 (Mo. App. W.D. 2008).

Add the following text after the first sentence in the fourth paragraph of the original section:

State v. Millsap, 244 S.W.3d 786, 791 (Mo. App. S.D. 2008), held that the trial court had the discretion to grant or deny a motion for continuance and that the Southern District would not overturn that decision unless there was a "strong showing of abuse."

The Western District deferred to the circuit court's determinations of witness credibility in *State v. Cox*, 248 S.W.3d 1, 5 (Mo. App. W.D. 2008).

IX. (§29.20) Decision of Court

Add the following citation after the first sentence in the second paragraph of the original section:

See Garner v. State, 62 S.W.3d 716, 719 (Mo. App. W.D. 2001).

Add the following citation after the second sentence in the second paragraph of the original section:

State v. Mort, 321 S.W.3d 471, 485 (Mo. App. S.D. 2010).

Delete the third sentence in the second paragraph of the original section and add the following:

The defendant will only receive the benefit of changes under a new law in the statutory penalties for the defendant's criminal conviction up to the time of the defendant's sentencing. Changes to the statutory penalties by a new law during the pendency of the defendant's appeal cannot be considered. Section 1.160, RSMo Supp. 2011; *State v. Graham*, 13 S.W.3d 290, 292 (Mo. banc 2000).

Add the following citation after the second paragraph of the original section:

State v. Polson, 145 S.W.3d 881, 897–98 (Mo. App. W.D. 2004).

Add the following citations after the second sentence in the third paragraph of the original section:

State v. Self, 155 S.W.3d 756, 764 (Mo. banc 2005). *But see State v. O'Brien*, 857 S.W.2d 212, 221 (Mo. banc 1993) (a defendant can be retried on a lesser-included offense on remand, and this will not violate double jeopardy).

Add the following citations after the third paragraph of the original section:

State v. Beam, 334 S.W.3d 699, 702 (Mo. App. E.D. 2011); *see also State v. Roe*, 6 S.W.3d 411, 416–17 (Mo. App. E.D. 1999) (when the appellate court found that the judge had improperly instructed a jury on the elements of first-degree murder but not as to second-degree murder, the state could "elect" to accept the verdict on second-degree murder and not have the case remanded for a new trial)

Delete the first sentence of the fourth paragraph of the original section and replace with the following:

The appellate court has the right to remand the matter for specific factual findings necessary to resolve the appeal. *State v. Triplett*, 355 S.W.3d 543, 550 (Mo. App. W.D. 2011).

X. (§29.21) Post-Decision Proceedings

Add the following citation after the second sentence in the first paragraph of the original section:

Rule 84.17.

Replace Rule 83.06 *at the end of the first paragraph of the original section with the following*:

Rule 83.05(f)(3)

XI. Associate Circuit and Municipal Appeals

B. (§29.23) Municipal Division Appeals

Replace the citation to Rule 37.15(b)(3) *with the following*:

Rule 37.15(c)(3)

Lora E. Cooper*

2012 Cumulative Supplement to

Chapter 30

RETRIALS AND DOUBLE JEOPARDY

30

Supplemented:
§§30.3
30.14

II. Strategic and Tactical Considerations of Retrial

B. (§30.3) Discovery

Rule 25.18 provides:

> If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to make disclosure of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances. Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

State v. Simonton, 49 S.W.3d 766 (Mo. App. W.D. 2001); *State ex rel. Jackson Cnty. Prosecuting Attorney v. Prokes*, 363 S.W.3d

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In part, this is a revision and update of materials previously prepared by Kris T. Daniel.

71 (Mo. App. W.D. 2011) (the appellate court upheld the trial court's sanction excluding all of the state's evidence in a murder trial that was based on the state's egregious violations of the discovery rules).

III. Double Jeopardy

C. Retrial Following Mistrial

2. (§30.14) Mistrial Upon Motion of Defendant

Both the Western District of the Missouri Court of Appeals and the Supreme Court of Missouri have examined, but failed to hold, whether *Oregon v. Kennedy*, 456 U.S. 667 (1982) (cited in the original section), should be extended to prohibit retrial when a prosecutor engages in misconduct that is intended to subvert double jeopardy protection and that should have resulted in a mistrial but was not discovered until after trial. *See State v. Barton*, 240 S.W.3d 693 (Mo. banc 2007); *State v. Barriner*, 210 S.W.3d 285 (Mo. App. W.D. 2006).

But the Western District now seems to accept as settled the premise that prosecutorial misconduct should prohibit retrial, even when the defendant is baited into requesting a mistrial. *State v. Lee*, 344 S.W.3d 865 (Mo. App. W.D. 2011). In *Lee*, a police officer testified about prior contacts with the defendant, even though his answer was not responsive to the defense question. The trial court specifically found that the prosecutor had no involvement in the illicit statement and dismissed the case with prejudice as a sanction, reasoning that the officer's conduct was the same as prosecutorial misconduct as an agent of the state. The Western District agreed that prosecutorial misconduct could bar retrial, even on the defendant's motion for mistrial, as set out in *Oregon*, but did not in the case at bar because police misconduct is not the same as prosecutorial misconduct.

James R. Wyrsch*
Nathan J. Owings**
Greg Mermelstein***
Elizabeth Unger Carlyle****

2012 Cumulative Supplement to
Chapter 31

POST-CONVICTION REMEDIES

31

Supplemented:
§§31.1
31.6
31.8
31.13
31.14
31.15
31.20
31.22
31.24
31.25

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*Mr. Wyrsch's biographical information appears on page 31–1 of the original chapter.

**Mr. Owings received his B.A., 2001, from Truman State University and J.D., 2004, from Washington University in St. Louis. He is an associate with Wyrsch Hobbs & Mirakian, P.C., in Kansas City.

***Mr. Mermelstein received his B.A., 1983, and J.D., 1986, from the University of Missouri-Columbia and M.A., 1988, from Georgetown University. He is a Division Director with the Missouri State Public Defender's office in Columbia.

****Ms. Carlyle received her B.A. from St. John's College, Annapolis, Maryland, and J.D. from Northeastern University, Boston. She is the principal of the Law Office of Elizabeth Unger Carlyle.

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I. Introduction

A. (§31.1) Post-Conviction Relief Generally

The constitutionality of a statute is not a claim that is cognizable in a Rule 24.035 proceeding. *Ross v. State*, 335 S.W.3d 479 (Mo. banc 2011). These claims must be raised at the earliest opportunity and not in a post-conviction proceeding after a guilty plea. *Id.*

F. Limitations of Remedies Under Rules 29.15 and 24.035

1. (§31.6) Procedural Default

Double jeopardy does not have to be pleaded in an original Rule 29.15 motion. In *Hill v. State*, 181 S.W.3d 611 (Mo. App. W.D. 2006), the defendant's 29.15 motion was denied. He did not raise double jeopardy at trial, on appeal, or in his original 29.15 motion. But the claim was cognizable on appeal because it is a constitutional right that goes to the power of the state to bring a defendant into court. *Id.* at 616.

A movant can waive the movant's post-conviction rights as part of a plea bargain if the record clearly demonstrates that the movant was properly informed of the movant's

rights and that the waiver was knowing, voluntary, and intelligent. *Cooper v. State*, 356 S.W.3d 148 (Mo. banc 2011). But the plea agreement to waive post-conviction rights does not waive the right to argue that the decision to enter the plea agreement was not knowing, voluntary, and intelligent. *Id.* A challenge to the knowing, voluntary, and intelligent decision may be raised in a state habeas corpus petition. *Id.* If a movant can show that counsel had an actual conflict of interest that adversely affected counsel's performance, a waiver is not valid. *Id.* In *Krupp v. State*, 356 S.W.3d 142 (Mo. banc 2011), the movant had a jury trial and agreed to enter an agreement at sentencing that contemplated a waiver of post-conviction rights in exchange for a favorable sentence. The pleading only alleged a potential conflict of interest. *Id.* A post-conviction motion challenging a waiver because of a conflict of interest should be dismissed if it fails to allege an actual conflict of interest by counsel. *Id.*

Counsel should be aware that, under Formal Opinion 126 of the Advisory Committee of the Supreme Court of Missouri, issued May 19, 2009:

> It is not permissible for defense counsel to advise the defendant regarding waiver of claims of ineffective assistance of counsel by defense counsel. . . .
>
> . . . .
>
> [I]t is inconsistent with the prosecutor's duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice for a prosecutor to seek a waiver of post-conviction rights based on ineffective assistance of counsel or prosecutorial misconduct.

In *Ewing v. Denney*, 360 S.W.3d 325 (Mo. App. W.D. 2012), the court granted the defendant an out-of-time appeal. Mr. Ewing had hired counsel for his appeal, which he believed was pending. But counsel failed to perfect or prosecute the appeal. Mr. Ewing did not discover this until after the deadline for filing a Rule 29.15 motion. The court held that, because the failure to file a timely 29.15 motion was the result of ineffective assistance

of appellate counsel, Mr. Ewing had shown "cause" and was entitled to state habeas corpus relief. *Ewing*, 360 S.W.3d at 331.

In *Maples v. Thomas*, 132 S. Ct. 912 (2012), the Supreme Court decided that, when a defendant had been abandoned by his state post-conviction counsel, his failure to file a state appeal did not constitute a bar to federal habeas corpus review. The court held that its ruling did not disturb the general rule that when a petitioner's post-conviction attorney misses a filing deadline, the petitioner is bound by the oversight through the well-settled principles of agency law. *Id.* at 922. But the Court found that the case was a "markedly different situation" than normal in that the attorney abandoned his client without notice, thereby destroying the principal-agent relationship, which resulted in a showing of good cause for failure to file a state appeal. *Id. Maples* presents a crack in the wall of procedural default, which previously could never be penetrated by errors of post-conviction counsel.

A second, wider crack was opened later in the same term in *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012). In *Martinez*, the Court held that, when a state's rules require that issues of ineffective assistance of counsel be raised for the first time in post-conviction proceedings, the failure to preserve those issues because of ineffective assistance of post-conviction counsel can be "cause" in a federal habeas corpus case to excuse the procedural default, allowing the issues to be considered in federal court. Missouri requires that ineffective assistance of counsel issues be brought in Rule 29.15 proceedings. *State v. Wheat*, 775 S.W.2d 155, 157–58 (Mo. banc 1989). Thus, *Martinez* applies to Missouri cases. But counsel should note that the *Martinez* opinion left in place the bar in *Coleman v. Thompson*, 501 U.S. 722, 754 (1991), which held that errors of post-conviction *appeal* counsel cannot be "cause" in federal court to excuse a state procedural default.

3. (§31.8) Newly Discovered Evidence

In *Ferguson v. State*, 325 S.W.3d 400 (Mo. App. W.D. 2010), the movant filed a motion for remand while his post-conviction motion was still pending, claiming newly discovered evidence. The newly discovered evidence consisted of his codefendant recanting his trial testimony. Newly discovered evidence is not cognizable in a post-conviction action absent proof of knowingly perjured testimony. *Id.*

In *McQuary v. State*, 241 S.W.3d 446 (Mo. App. W.D. 2007), the defendant learned while his direct appeal was pending that a juror failed to disclose knowledge of a state witness. The movant attempted to raise the issue on direct appeal but was denied. He raised the issue in a Rule 29.15 petition. The state opposed, claiming that it was litigated on direct appeal. The court found that the issue was cognizable because the denial to address the issue by the court of appeals was not an adjudication on the merits. *Id.* Furthermore, constitutional violations can be addressed under Rule 29.15 if "exceptional circumstances" are shown justifying why the issue was not raised on direct appeal. *McQuary*, 241 S.W.3d at 452–53.

II. Jurisdiction to Assert a 29.15 or 24.035 Motion

A. Time for Filing

2. (§31.13) Rule 24.035

In *Bond v. State*, 326 S.W.3d 828 (Mo. App. E.D. 2010), the defendant received a 120-day shock incarceration and then was released on probation. Later, his probation was violated, and his sentence was ordered executed. *Id.* A defendant who receives a 120-day shock time as a condition of probation is "delivered" to the custody of the Missouri Department of Corrections for purposes of the post-conviction limitations period when first incarcerated for shock time. *Id.* at 830–31.

The date that the defendant is delivered to the Department of Corrections does not count in calculating whether the defendant has filed a post-conviction motion within 180 days under Rule 24.035(b). *Phelps v. State,* 351 S.W.3d 269 (Mo. App. W.D. 2011).

3. (§31.14) Practice Under Both Rules

Numerous Rule 24.035 and Rule 29.15 movants filed their pro se motions late. *Dorris v. State*, 360 S.W.3d 260 (Mo. banc 2012). The state failed to raise the untimeliness issue, but the court discovered it. Dismissing the motions, the Court held that, unlike ordinary statutes of limitations, time limits under Rule 24.035 or 29.15 cannot be waived because the post-conviction rules are concerned with upholding the "finality" of judgments, not just ensuring speedy filing of claims. *Id.* at 268.

An attorney-client relationship can be created before the appointment of the public defender or an entry of appearance based on the substantive nature of the contact with a defendant. *McFadden v. State*, 256 S.W.3d 103, 107–08 (Mo. banc 2008). In *McFadden*:

- the public defender advised the defendant of when to file his Rule 29.15 motion;
- the defendant sent the motion to the public defender (at her express direction) two weeks before the deadline; and
- the public defender failed to file the motion in a timely manner.

Id. at 109. Under the specific facts of the case, the Court found that the defendant was abandoned by counsel, and he was permitted to reopen his post-conviction proceeding and file his initial Rule 29.15 motion out of time. *Id.*

4. (§31.15) Amended Pleadings

In *Smith v. State*, 240 S.W.3d 756 (Mo. App. S.D. 2007), counsel for the defendant did not submit an amended petition, nor did he file a statement in lieu of an amended motion under Rule 24.035(e). But counsel did conduct an evidentiary hearing and a deposition of the movant's testimony. *Id.* at 758. Regardless, the court found that the movant was entitled to an abandonment hearing because failure to comply with Rule 24.035(e) results in a presumption of abandonment. *Id.* at 761.

In 1990, a movant's prior counsel filed an amended Rule 29.15 motion that was dismissed because it was unverified. *Dudley v. State*, 254 S.W.3d 109 (Mo. App. W.D. 2008). (Counsel should note that the rules regarding verification have since changed.) In *Dudley*, the movant claimed that his prior counsel abandoned his post-conviction claim, *Id.* Although Rule 75.01 provides that the circuit court retains control over judgments for only 30 days after the entry of judgment, abandonment by post-conviction counsel is an exception to this rule. *Id.*

The court of appeals therefore held that the circuit court has jurisdiction to hear the claim though the court of appeals did not express an opinion on whether the actions of prior counsel constituted abandonment. *Id.*

In *Morgan v. State*, 295 S.W.3d 232 (Mo. App. E.D. 2009), the court found that prior counsel filing an unsigned, unverified Rule 29.15 amended motion on behalf of the movant in 1993 constituted abandonment, but the movant was not prejudiced because the motion court decided the case on the merits. Normally when there is abandonment, the proper remedy is to remand for appointment of new counsel and a new amended motion. *Morgan*, 295 S.W.3d 232. But this was not necessary because no new issues were raised in the amended motion and, all of the issues were already addressed on the merits. *Id.*

III. Grounds for Relief

B. (§31.20) Denial of Effective Assistance of Counsel

Counsel can be found ineffective for affirmatively misadvising a movant about parole eligibility if the movant would not have pleaded guilty if the movant had known that the movant was not eligible for parole. *Coke v. State*, 229 S.W.3d 638 (Mo. App. W.D. 2007). Also, in *Webb v. State*, 334 S.W.3d 126 (Mo. banc 2011), counsel advised a client that he would serve 40% of his sentence when the movant would actually have to serve 85%. This affirmative misadvice warranted an evidentiary hearing. The court in *Webb* also noted that there is a difference in an attorney's failure to inform (which is not ineffective) and giving affirmative misinformation (which is ineffective). *Id.*

In *Missouri v. Frye*, 132 S. Ct. 1399 (2012), and *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), the Supreme Court held that ineffective assistance of counsel in the plea bargaining process required relief. In *Frye*, the defendant was not timely advised of a plea offer and ultimately accepted a less favorable offer. In *Lafler*, the defendant rejected a plea offer because of the erroneous advice by counsel and went to trial.

But the Southern District of the Missouri Court of Appeals holds that a Missouri movant making a claim such as that raised in *Lafler* (the defendant went to trial rather than pleading guilty) cannot do so in a Rule 29.15 proceeding. *Williams v. State*, 344 S.W.3d 878, 883 (Mo. App. S.D. 2011). *Williams* held that, because that claim does not concern the fairness of the underlying trial, it is not "cognizable" in a Rule 29.15 motion. Although the *Williams* opinion does not explain the distinction, it would appear to treat differently those cases in which the defendant entered a plea of guilty and complains of ineffective assistance of counsel in the plea bargaining process from cases in which the defendant refused a plea bargain and went to trial as a result of ineffective assistance of counsel.

Because *Lafler* has established that there is a federal constitutional violation when trial counsel erroneously advises a client to plead not guilty, it is suggested, despite *Williams*, that these claims be raised in Rule 29.15 motions to avoid unintentional waiver of the right to assert the claim.

2. (§31.22) Pretrial Conduct

Counsel was ineffective for failing to investigate the defendant's possible incompetence. *Bolden v. State*, 171 S.W.3d 785 (Mo. App. W.D. 2005); *see also Thomas v. State*, 249 S.W.3d 234 (Mo. App. E.D. 2008).

4. (§31.24) Posttrial Conduct

Rule 24.035 movants can allege ineffectiveness with regard to sentencing without seeking vacation of their guilty plea. *Cherco v. State*, 309 S.W.3d 819 (Mo. App. W.D. 2010). The standard for ineffectiveness at sentencing is whether there was a reasonable probability that the movant's sentence would have been lower absent the attorney's action. *Id.*

C. (§31.25) Prosecutorial Misconduct

In *Buchli v. State*, 242 S.W.3d 449, 451 (Mo. App. W.D. 2007), the court recognized a *Brady* claim—*Brady v. Md.*, 373 U.S. 83 (1963)—as grounds for relief under Rule 29.15. In *Buchli*, the prosecutor failed to disclose the entire contents of a surveillance video when the accuracy of the time stamp of the tape was at issue. *Buchli*, 242 S.W.3d at 452. In addition, the court found that a general allegation of a *Brady* claim with allegations of fact to support it was sufficient. *Id.* at 453. A defendant does not need to allege every fact. *Id.*

In *State ex rel. Jackson County Prosecuting Attorney v. Prokes*, 363 S.W.3d 71 (Mo. App. W.D. 2011), the court sanctioned the state for *Brady* violations against defendant Richard Buchli. The sanction was significant in that the trial court excluded all of the state's evidence against Buchli.

The justification for the ruling was that the discovery violations and the delay caused by the state's misconduct was prejudicial to Buchli's right to a fair trial. *Id.*

A defendant's due process rights are violated when the prosecutor presents contradictory prosecutorial theories during the defendant's and separate co-defendant's trials. *Bankhead v. State*, 182 S.W.3d 253 (Mo. App. E.D. 2006). The prosecutor in Bankhead used two different theories to prosecute and convict three different defendants in three different trials. Bankhead filed a Rule 29.15 motion, and the court found that "'[t]he state's use of inconsistent prosecutorial theories violated [Bankhead's] due process rights in a way that rendered his conviction fundamentally unfair.'" *Id.* at 260 (quoting *Smith v. Groose*, 205 F.3d 1045, 1046 (8th Cir. 2000)).

A *Brady* claim was cognizable in a Rule 29.15 action, even though *Brady* claims are trial error, because there was no evidence that the movant knew of the claim on the direct appeal, and even if the movant did know, the *Brady* evidence would not have been part of the record on appeal. *Dudley v. State,* 304 S.W.3d 158 (Mo. App. W.D. 2009).

D. (§31.26) Issues Regarding Guilty Pleas and Factual Basis

In a Rule 24.035 case, the movant claimed that he told counsel that he was "mentally retarded" and, therefore, incompetent to plead. *Thomas v. State*, 249 S.W.3d 234 (Mo. App. E.D. 2008). The trial record was not sufficiently specific to refute the movant's claim of mental retardation. These types of cases do not lend themselves well to the *Strickland v. Washington*, 466 U.S. 668, 687 (1984), outcome test because whether the movant would have pleaded guilty is irrelevant. The movant only needs to demonstrate a "reasonable probability" that he lacked competency "sufficient to undermine confidence in the outcome." *Id.* at 716–17.

Group guilty pleas increase the opportunity of mistakes and confusion. *Roberts v. State*, 276 S.W.3d 833 (Mo. banc 2009).

These pleas are not automatically invalid but are not preferred procedure and should be used sparingly. *Id.*

In *Samuel v. State*, 284 S.W.3d 616, (Mo. App. W.D. 2009), the movant pleaded guilty and was sentenced to 12 years but claimed that the defense counsel had promised him that he would only be sentenced to 5 years. Because the record revealed only that the movant was advised of his statutory exposure to a 5–15 year sentence and the court did not inquire as to whether any promises had been made to him regarding the plea, he was entitled to a hearing. *Id.*

A movant is entitled to an evidentiary hearing when the post-conviction motion asserts facts that cannot be ascertained from the record and, if found to be true, require relief. *Collins v. State*, 335 S.W.3d 595 (Mo. App. E.D. 2011). The court remanded in order to conduct an evidentiary hearing on a post-conviction ineffective counsel claim that the movant was grossly misinformed about the terms of his plea agreement, including time-served credit. *Id.* at 597.

As noted in §31.20 of this supplement, in *Missouri v. Frye*, 132 S. Ct. 1399 (2012), and *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), the Supreme Court held that ineffective assistance of counsel in the plea bargaining process required relief. In *Frye*, the defendant was not timely advised of a plea offer and ultimately accepted a less favorable offer. In *Lafler*, the defendant rejected a plea offer because of erroneous advice by counsel and went to trial.

IV. Procedure Under Rules 29.15 and 24.035

A. (§31.28) Form of the Motion

The defendant's failure to sign a motion does not automatically require dismissal. Under Rule 55.03(a), if the omission is promptly corrected after being brought to the attention of the party or counsel, the motion will not be stricken. *Penn v. State*, 209 S.W.3d 533 (Mo. App. E.D.

2006); *see also Glover v. State*, 225 S.W.3d 425 (Mo. banc 2007) (even though the movant failed to sign his pro se motion and this was not discovered until the appeal was pending, this defect was not jurisdictional and could be corrected on appeal by having the movant file a properly signed motion with the circuit court, with a certified copy sent to the appellate court, notifying the appellate court that the motion has been signed).

G. (§31.34) Findings and Conclusions of Court

In *Grimes v. State,* 260 S.W.3d 374 (Mo. App. W.D. 2008), the trial court failed to issue findings of fact and conclusions of law. Even though the claims were refuted by the record, Rule 24.035(j) requires the court to issue findings and not just summarily deny the claims. *Id.*

The post-conviction court is required to make findings adequate for appellate review. *Smith v. State*, 343 S.W.3d 766 (Mo. App. W.D. 2011); *Smith v. State*, 342 S.W.3d 899 (Mo. App. E.D. 2011).

In *Gerlt v. State,* 339 S.W.3d 578 (Mo. App. W.D. 2011), after the motion court issued findings denying relief, the movant appealed, claiming that the motion court's findings were inadequate under Rule 24.035(j) for meaningful appellate review. But the movant failed to file a motion to amend the judgment under Rule 78.07(c), which provides, "In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." This court expressly held that Rule 78.07(c) applies to post-conviction proceedings. Because the movant failed to file a motion to amend judgment, the issue was not preserved.

H. (§31.35) Appeals

Failing to file an appeal from a denial of a Rule 29.15 motion does not constitute abandonment and will not justify the reopening of Rule 29.15 proceedings. *Gehrke v. State*,

280 S.W.3d 54 (Mo. banc 2009). In so holding, the court reasoned that, unlike the filing of an amended post-conviction motion, filing a notice of appeal requires no specific legal knowledge. The court also noted that the movant had a year after the notice of appeal was due to discover and correct the error.

VI. Other Missouri Post-Conviction Remedies

A. (§31.37) Writ of Error *Coram Nobis*

Writs of error *coram nobis* have been abolished, despite § 547.080, RSMo 2000. *Hutson v. State*, 272 S.W.3d 420 (Mo. App. E.D. 2008). Rule 74.06(d) abolished these writs. *Hutson*, 272 S.W.3d at 421. A Supreme Court rule controls over a contradictory statute unless the legislature specifically annuls or amends the rules in a bill limited to that purpose. *Id.*

B. (§31.38) Motions to Withdraw Guilty Plea

An appellate court lacks jurisdiction to hear an appeal by the state of a grant of a Rule 29.07(d) motion when a suspended imposition of sentence is imposed. *State v. Norris,* 231 S.W.3d 296 (Mo. App. W.D. 2007). The proper remedy is by a writ of mandamus. *Id.*

VII. Federal Habeas Corpus Relief From State Court Convictions

A. General Considerations

2. (§31.41) Statute of Limitations

The federal limitations period of one year is not tolled if a petitioner files a petition for writ of certiorari in the U.S. Supreme Court based on the denial of state post-conviction remedies. *Lawrence v. Fla.*, 459 U.S. 327 (2007). Further, unless the petitioner has sought

discretionary review of the petitioner's direct appeal decision with the highest state court with jurisdiction, the petitioner is not entitled to file a petition for writ of certiorari and is not entitled to tolling of the federal statute of limitations for the 90-day period during which certiorari can be filed. *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012); *see also Riddle v. Kemna*, 523 F.3d 850 (8th Cir. 2008).

3. (§31.42) Exhaustion Limitations

A district court, in its discretion, may stay a mixed petition—i.e., a petition that has both exhausted and unexhausted state court claims—if there is good cause for the petitioner's failure to exhaust state court claims. *Rhines v. Weber*, 544 U.S. 269 (2005); *see also Day v. McDonough*, 547 U.S. 198 (2006).

8. (§31.47) Successive Writs

See *Burton v. Stewart*, 549 U.S. 147 (2007) (per curiam); *Panetti v. Quarterman*, 551 U.S. 930 (2007).

C. (§31.49) Retroactivity Considerations

The Supreme Court effectively declared the U.S. sentencing guidelines unconstitutional in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Booker v. United States*, 543 U.S. 220 (2005). Federal criminal practitioners should be aware of these decisions and, if they are not, should immediately acquaint themselves with their ramifications. With respect to federal habeas petitions, the U.S. Supreme Court has yet to rule whether the rule announced in *Booker* is retroactively applicable on collateral review under the *Teague* standard—*Teague v. Lane*, 489 U.S. 288 (1989). All circuits that have addressed the issue, including the Eighth Circuit, have found that *Booker* is not applicable retroactively on collateral review. *See Never Misses A Shot v. United States*, 413 F.3d 781 (8th Cir. 2005).

Several recent U.S. Supreme Court decisions concerning unconstitutional sentences have generally been held retroactive. They include:

- *Atkins v. Va.*, 536 U.S. 304 (2002) (the death penalty is unconstitutional for mentally retarded persons)

- *Roper v. Simmons*, 543 U.S. 551 (2005) (the death penalty is unconstitutional for offenses committed by persons under the age of 18 years)

- *Graham v. Fla.*, 130 S. Ct. 2011 (2010) (life without parole sentence for nonhomicide offenses unconstitutional for offenses committed by persons under the age of 18 years)

Under this principle, the 2012 case of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (a mandatory life-without-parole sentence for homicide is unconstitutional for offenses committed by persons under the age of 18 years), will, likely, also be held retroactive.

Even though the U.S. Supreme Court may deem a new constitutional rule to not be retroactive on federal habeas review, state courts are free to apply the rule retroactively to grant post-conviction relief. *Danforth v. Minn.*, 552 U.S. 264 (2008).

D. Procedure

3. (§31.53) Answer

Rule 5(b), The Answer and the Reply, of the Rules Governing § 2254 Cases, was amended to require the answer to state "whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations."

E. (§31.56) Appeal

In *Bowles v. Russell*, 551 U.S. 205 (2007), the defendant filed a federal habeas petition and was denied relief. The district court extended the period that the defendant could file his appeal by three days. *Id.* at 207–08. The defendant filed his appeal during the extra time given to him by the district court. *Id.* The Supreme Court held that the district court did not have the power to extend the time for appeal. *Id.* at 214. The defendant argued that, under *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), and *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964) (per curiam), a district court could extend the time upon a showing of "excusable neglect," commonly referred to as the "unique circumstances" rule. *Bowles*, 551 U.S. at 213–14. The Supreme Court in *Bowles* expressly overruled *Harris Truck* and *Thompson*, stating that time limits on appeals are jurisdictional and that the court has no authority to create equitable exceptions to a jurisdictional requirement. *Id.*

Grant J. Shostak*

2012 Cumulative Supplement to
Chapter 32

ETHICAL CONSIDERATIONS

Supplemented:
§§32.1
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*Mr. Shostak received his J.D. from the University of Missouri School of Law. He is the Program Director for Graduate Criminal Justice Degrees and an assistant professor at Lindenwood University in St. Charles. Mr. Shostak is a past president of the Missouri Association of Criminal Defense Lawyers.

I. (§32.1) Introduction

The Missouri Rules of Professional Conduct are now available at www.courts.mo.gov.

Rule 4 now consists of nine subdivisions instead of the ten subdivisions cited in the original chapter.

Delete the last two sentences of the second paragraph of the original section.

II. (§32.2) Duties of the Prosecution and Defense to the Court and Criminal Justice System

The standards of attorney conduct cited in *In re Coe*, 903 S.W.2d 916 (Mo. banc 1995) (cited in the original section), were cited approvingly in *In re Madison*, 282 S.W.3d 350 (Mo. banc 2009), in which the Court stated that an attorney must zealously represent a client's legitimate interests while maintaining a professional and courteous attitude towards those involved in the legal system.

A. (§32.3) Contacts and Relations With Judges and Court Personnel

Replace the prohibitions of attorney communications set out in the original section with the following:

The attorney may not:

- make a false statement of material fact or law;
- fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- fail to disclose controlling legal authority; or
- offer evidence known to be false.

Rules 4-3.3, 4-3.5, and 4-4.1.

B. Conduct in Court

4. (§32.8) Testimony by Defendant

For a detailed discussion of possible ways that an attorney may deal with client perjury, see *Nix v. Whiteside,* 475 U.S. 157 (1986), and *United States v. Long*, 857 F.2d 436 (8th Cir. 1988).

5. (§32.9) Pleadings and Representations to the Court

Correct the citation to Limier v. Holes, 178 S.W.2d 335 (Mo. 1944), *in the original section with the following citation and text*:

Leimer v. Hulse, 178 S.W.2d 335 (Mo. 1944). The principles stated in *Hulse* were cited approvingly in *Turner v. State*, 979 S.W.2d 222 (Mo. App. S.D. 1998

G. (§32.23) Court Appointments

See *State ex rel. Missouri Public Defender Commission v. Waters,* No. SC 91150, 2012 WL 3104427 (Mo. banc July 31, 2012), concerning the issue of whether the public defender's office can refuse to accept new appointed cases after it has determined that it has reached its maximum caseload. The Court held that the trial court exceeded its authority when it appointed the public defender to represent an indigent defendant, even though the public defender's office could not provide effective representation because of its excessive caseload.

H. (§32.24) Criminal Violations

For a discussion of criminal contempt of court, see *Smith v. Pace*, 313 S.W.3d 124 (Mo. banc 2010).

III. Duties of Defense Counsel

A. Employment and Fees

1. (§32.25) Solicitation—Communication Concerning a Lawyer's Services

Replace the text in the original section with the following text:

Lawyers may not make false or misleading communications about their services. Communications are false if they contain a material misrepresentation of law or fact. They are misleading if they:

- omit facts that cause the statement to be materially misleading;
- are likely to create an unjustified expectation about the outcome of the matter;
- proclaim past results without stating that past results are not a guarantee of future results and that all cases are different;
- lead the potential client to believe that the lawyer can obtain results through violations of the law or the Rules of Professional Conduct;
- compare a lawyer's services to those of other lawyers;
- advertise for a specific case in which the lawyer is not experienced or competent;
- suggest an area of practice in which the lawyer routinely refers the matters to other lawyers without stating so;

- contain a paid testimonial or endorsement without identifying that payment was made;
- contain a portrayal of a lawyer, client, victim, scene, or event without indicating that it is a portrayal;
- list an address for an office only staffed part time or by appointment only without stating so; or
- indicate that legal services are provided on a contingency fee basis without stating that the client may be liable for costs or expenses if that is so.

Rule 4-7.1.

5. (§32.29) Communication With Client

In *Missouri v. Frye*, 132 S. Ct. 1399 (2012), the Supreme Court held that the right to effective assistance of counsel extends to consideration of plea offers that lapse or are rejected and that defense counsel has a duty to communicate formal plea offers of the prosecution to the defendant.

6. Fees

c. (§32.32) Fee Splitting—Other Lawyers

For a further discussion concerning splitting of fees, see *Nielson v. McCloskey*, 186 S.W.3d 285 (Mo. App. E.D. 2005), and *Risjord v. Lewis*, 987 S.W.2d 403 (Mo. App. W.D. 1999).

d. (§32.33) Fee Splitting—Nonlawyers

Replace the last sentence of the original section with the following sentence:

A lawyer may compensate a layperson for endorsing the lawyer with appropriate disclosure of the payment. Rule 4-7.2(c).

e. (§32.34) Collection and Fee Disputes

Replace the first paragraph of the original section with the following text:

When dealing with a fee dispute, a lawyer should seriously consider participating in an appropriate fee dispute resolution program. Rule 4-1.5(f).

8. (§32.36) Expenses

Delete the reference to Rule 4-7.2 *at the end of the original section.*

B. (§32.38) Loyalty to the Client

State v. Zeitvogel, 649 S.W.2d 945 (Mo. App. W.D. 1983) (discussed in the original chapter), was overruled in *Shelton v. State*, 724 S.W.2d 274 (Mo. App. W.D. 1986). If a defendant's counsel presents a point on appeal, it must be presented in compliance with the appellate rules of procedure. *Id*.

D. Conflict of Interest

2. (§32.50) Client Versus Client

Replace the citation to Rule 4-2.2 *in the original section with*:

Rule 4-1.18.

5. (§32.53) Relationships Between Prosecutor and Defense Counsel

Replace the citation to Rule 4-1.8(i) *in the original section with*:

Rule 4-1.7 cmt.

8. (§32.56) Publication Rights

Replace the citation to Rule 4-1.8(a), (d), and (j) *in the original section with*:

Rule 4-1.8(d)

IV. Duties of the Prosecutor

C. (§32.74) Disclosure

In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court stated that a prosecutor has a duty to learn of favorable evidence to the defense known by agents acting on behalf of the government.

H. Morley Swingle*

2012 Cumulative Supplement to
Chapter 33

FORFEITURES IN CRIMINAL CASES

Supplemented:
§§33.24
33.26
33.29

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III. Criminal Activity Forfeiture Act (CAFA)

F. (§33.24) Transferring Forfeiture to Federal Authorities

The provisions of § 513.647, RSMo Supp. 2011, of Missouri's CAFA (Criminal Activity Forfeiture Act), §§ 513.600–513.645, RSMo 2000 and Supp. 2011, barring a state or local law enforcement agency from transferring any seized property to a federal agency for forfeiture unless the prosecutor and judge of the county where the property was seized first review and approve the transfer, do not prevent federal DEA (Drug Enforcement Administration) agents from seizing currency under a federal seizure warrant, even when it is being seized

*Mr. Swingle's biographical information appears on page 33–1 of the original chapter.

from a police department after state time deadlines for forfeiture have passed. *In re Seizure Warrant for $374,100 in U.S. Currency in Custody of the Kansas City Police Dep't*, 825 F. Supp. 2d 1002 (W.D. Mo. 2011). The federal forfeiture proceeding is not tainted by any failure to comply with state laws as long as federal laws were followed. "The seizure of the currency by the DEA pursuant to a federal warrant deprives the state courts of Missouri of jurisdiction." *Id*. at 1004.

H. (§33.26) Forfeitures Under City Ordinances

Even when a city ordinance does not specifically say that a felony conviction is required before forfeiture can take place, the requirements of CAFA mandating a felony conviction may still apply. In *City of Springfield v. Gee*, 149 S.W.3d 609 (Mo. App. S.D. 2004), the court granted summary judgment against the prosecution because the defendant had been convicted only of a misdemeanor DWI, rather than a felony.

IV. Chapter 195, RSMo, Forfeitures

B. (§33.29) Presumption of Forfeitability and Burden of Proof

Yet another case has confirmed that § 195.140.2(2), RSMo Supp. 2011, establishes a presumption that any money found in close proximity to illegal drugs is presumed forfeitable, and the burden of proof rests on the defendant to rebut that presumption. *See Ware v. State*, 128 S.W.3d 529 (Mo. App. E.D. 2003).

2012 Cumulative Supplement to

Chapter 34

ALTERNATIVE SENTENCING COURTS

There is no supplement to this chapter because this was a new chapter in 2012.

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