Common Problems and Best Practices in Postconviction

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Things to keep in mind

- When Melinda was District Defender and met with a judge
  - How can your attorneys raise a claim that trial counsel failed to introduce a piece of evidence and then not lay the proper foundation for the evidence at the hearing
- Tim Forneris describing every MSPD training
  - Trainers bring new ideas and then people raise their hands and say, that won't work in my jurisdiction

Common Problems With Clients

- Communication and Trust
- Ideally
  - Early in-person or phone contact with all clients
- Realistically
  - Some in-person or phone contact is more important
    - Direct Appeals
    - 29.15's
    - 24.035
      - 1/3 should be voluntarily dismissed
      - 1/3 should give serious consideration to voluntarily dismissing
      - 1/3 should proceed
  - Assessing Cases where the client should dismiss and developing that trust

Client Questions and Answers

- Do I have a right to be present at the evidentiary hearing?
  - No, Rules 24.035(i) and 29.15(i)
  - "'A post-conviction relief proceeding is a civil, not criminal, proceeding. … The confrontation clause does not apply to a post-conviction relief hearing.'" *State v. Ramsey*, 874 S.W.2d 414 (Mo. App. W.D. 1994) (quoting *Leisure v. State*, 828 S.W.2d 872, 878 (Mo. banc 1992)).
- Can it get worse?
  - Yes, but there are some protections.
    - Limits on retaliatory sentencing
      - North Carolina v. Pearce, 395 U.S. 711 (1969)
        - But, different Judge, different jury, new facts, etc.
    - Limits on prosecutorial discretion
      - *State v. Buchli*, 152 S.W.3d 289, 309 (Mo. App. W.D. 2004)
        - Cannot punish defendants for exercising their constitutional rights
    - Can happen, and they would have to fight it

Client Questions and Answers

- Can my testimony at the postconviction hearing be used against me if I go back to trial?
  - Likely no: "We therefore hold that when a defendant testifies at a postconviction hearing in support of a motion alleging ineffective assistance of counsel where the defendant's testimony is indispensable in overcoming the heavy presumption of counsel's competence, that testimony may not be admitted against the defendant at a subsequent trial to prove its incriminating content on the ultimate issue of guilt, unless the defendant makes no objection." *State v. Samuels*, 965 S.W.2d 913, 920 (Mo. App. W.D. 1998)
- Can I get a different judge for my postconviction case?
  - Not without cause
  - "Rule 51.05, which permits a party in a civil action to seek one change of judge without cause, does not apply in postconviction proceedings." *State ex rel. White v. Shinn*, 903 S.W.2d 194, 196 (Mo. App. W.D. 1995) (citing *Thomas v. State*, 808 S.W.2d 364 (Mo. banc 1991),

Client Questions and Answers

- Can we control the remedy?
  - I cannot guarantee that
    - If the Judgment is in our favor, we likely cannot challenge the remedy the trial court crafts if it "is within the realm" of what was requested in the amended motion. *Shoate v. State*, 529 S.W.3d 869, 871 (Mo. App. W.D. 2017)
- Can I represent myself?
  - Yes, you have the right to self-representation, but there are risks. *Se Bittick v. State*, 105 S.W.3d 498 (Mo. App. W.D. 2003)
    - Like, you have no right to be present, so if you represent yourself, they do not have to bring you back, and you could automatically lose
- Can I raise a claim against probation counsel?
  - Not in a 24.035 or 29.15. The proper remedy is habeas corpus, because, "[r]ule 24.035 allows only challenges to the validity of judgments of conviction or sentences, and then only on specified grounds." *Snyder v. State*, 288 S.W.3d 301(Mo. App. E.D. 2009) (citing *Teter v. State*, 893 S.W.2d 405, 405 (Mo. App. W.D.1995)).

Advising Clients about Federal Habeas

- Federal Habeas often is their last opportunity to challenge their convictions
- Gives our clients something to do while waiting for an evidentiary hearing or waiting for the PCR appeal to be resolved
- Advice
  - You are going to have to represent yourself in federal habeas and the time limits are strict and tricky
  - I'm not saying we are going to lose your postconviction case, but this is about being better safe than sorry

Federal Habeas Process

- The Process
  - Prisoner files a petition.
    - Must contain certain information pursuant to Local Rule 9.2(b)
    - Either $5.00 filing fee or a request to proceed *in forma pauperis*
  - Government ordered to respond.
  - Must submit relevant transcripts, appellate briefs, state court opinions
  - Petitioner ordered to reply.
  - Court reviews petition, response, reply, relevant state court documents, and issues decision.
- Where to file the petition
  - Can be filed in either the district in which the petitioner is in custody or in the district in which the state court entered its judgment. 28 U.S.C. § 2241(d) (typically transferred to where the judgment was entered).

Federal Habeas Rules I

- Exhaustion
  - Petitioners must have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A).
    - Exceptions: (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
    - Petitioner is deemed to have not exhausted "if he has the right under the law of the State to raise, by any available procedure, the question presented." § 2254(c).
  - Basically, they must present the claim on direct appeal OR in post-conviction proceeding AND post-conviction appeal.
- Exception to exhaustion
  - To overcome procedural default, must show ***cause*** for the default and ***prejudice*** resulting from the alleged violation of federal law **OR** demonstrate that failure to consider the claims will result in a ***fundamental miscarriage of justice***. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).
  - Ineffective assistance of counsel at an initial-review collateral proceeding may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).
    - Applies to 24.035s, not 29.15s
    - Failure to preserve claim in post-conviction appeal cannot constitute cause. *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012).

Federal Habeas Rules II

- **One-year limitation** for federal habeas that starts from 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***;
  - Three others: date when the impediment created by state action is removed, date of the newly recognized constitutional right, date the factual predicate could have been known through due diligence

  28 U.S.C. § 2244 (d)(1)
  - A judgment becomes final when a petitioner's "time for seeking review with the State's highest court expire[s].". *Gonzales v. Thaler*, 132 S. Ct. 641, 653-54 (2012) (holding that
    - If a motion for rehearing or transfer to the Missouri Supreme Court is not filed, then the limitations period begins to run when the deadline for filing such a motion expires.
- Tolling of the Statute of Limitations
  - The time during which Petitioner had a ***properly filed*** state collateral review pending shall not be counted toward any period of limitation. 28 U.S.C. § 2244(d)(2).
  - So, the limitation period will run from the expiration of direct appeal up and until the prisoner files his Form 40 in state court.
  - Assuming the Form 40 was "properly filed," the limitations period is tolled until the post-conviction appeal concludes (mandate issued).

Federal Habeas Standard of Review

- Federal courts defer to and adopt factual conclusions made by the state courts unless the petitioner establishes by clear and convincing evidence that the state court findings are erroneous. 28 U.S.C. § 2254(e)(1)
- When a claim has been adjudicated on the merits in state court, Petitioner must show that the adjudication of the claim:
  - (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. § 2254(d)
- Review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. The record cannot be expanded. *Cullen v. Pinholster*, 563 U.S. 170 (2011).

Federal Habeas Red Flags and Resources

- 1 year statute of limitations
  - Tolled while direct appeal and properly filed PCR motion is filed
    - Watch out for untimely Form 40s in 29.15
    - Their time to file a federal habeas is not tolled, because it was not properly filed
    - They should file their federal habeas immediately and seek to "stay and abey"
- Federal Habeas forms you can send to your clients
  - U.S. Mo. W.D.
    - https://www.mow.uscourts.gov/district/prisoner-pro-se-office
  - U.S. Mo. E.D.
    - https://www.moed.uscourts.gov/representing-yourself-pro-se
- These cites also have resources for filing a federal 1983 action

Problem of Getting Files

- Subpoena the file
  - Rule 58.02 covers subpoenaing records from a non-party
    - If you get the agreement of the prosecutor, you do not have to have a court date and the non-party has to directly produce the documents to you
    - Warning: subpoenaing the file opens up the possibility of the prosecutor reviewing the file, because you "shall then offer to all other parties the opportunity to inspect or copy the subpoenaed items"
- File a motion for a Court Order requiring trial counsel to turn over the file
- Raise a claim of ineffective assistance of counsel for failure to provide you with the file
  - Rule 4-1.16(d) requires an ongoing duty of loyalty
  - "The client's files belong to the client, not to the attorney representing the client." *McVeigh v. Fleming*, 410 S.W.3d 287, 289 (Mo. App. E.D. 2013)
  - Is it a critical stage, I don't know
- Consider a Bar Complaint
  - Send them an email with a warning citing to the Rules

Why you should litigate the trial file

- Publicly Shame the Attorney
  - This will prevent problem attorneys from disregarding file requests
- If raised as IAC, request relief be that you get to file a second amended motion raising the newly discovered claims
- Potentially establish "cause" for a State Habeas Claim
  - "'To demonstrate cause, the petitioner must show that an effort to comply with the State's procedural rules was hindered by some objective factor external to the defense.'" *State ex rel. Clemons*, 475 S.W.3d at 76 (quoting *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 337 (Mo. banc 2013)). Missouri Courts have found cause established when there is "an issue unknown or ***not reasonably discoverable*** to the inmate during the period in which he could file for relief under Rule 24.035." *Brown v. Gammon*, 947 S.W.2d 437, 440 (Mo. App. W.D. 1997) (citing *Merriweather v. Grandison*, 904 S.W.2d 485, 489 (Mo. App. W.D. 1995).
  - Federal habeas recognizes an exception for failure to raise a claim under similar "cause and prejudice" standard used in Missouri
  - Cause can be established is a reasonably diligent investigation failed to uncover the evidence. *See* McCleskey v. Zant, 499 U.S. 467, 498, 111 S. Ct. 1454, 1472, 113 L. Ed. 2d 517 (1991); *Shaw v. Delo*, 971 F.2d 181, 184 (8th Cir. 1992)
  - This also requires you document all of your attempts to get the file

Pleading

- If you have a good claim, plead it every possible way
  - Example: plea agreement with a lid of 25 years but the prosecutor informs the trial court there is a lid of 25 years and a floor of 20 years
    - IAC for failure to object
      - No strategy for failing to object
      - Unreasonable strategy for failing to object
    - Prosecutorial misconduct
    - Standalone claim the plea was unknowing, involuntarily, and unintelligent
    - Sentencing court had a misunderstanding of the range of punishment
  - Know your audience
    - If you are trying to get a prosecutor to concede the claim, call it prosecutorial error instead of misconduct
    - Counsel is going to read the amended motion, if their testimony is necessary don't make them defensive

Evidentiary Hearings

- Make it as easy as possible for the motion court to follow along
- Do not waste the court's time
  - Do not give the court a reason to feel you are wasting the court's time
  - Make the hearing as efficient as possible
  - It is a bench trial, not a jury trial
  - But, know what you have to prove and prove it

Exhibit Lists and Witness Lists

HEARING EXHIBIT LIST FOR MOVANT
JUDGE ROBB, DIVISION III

ROBERT ROGERS,
Movant,

Case No. 17BU-CV01066
Attorney: Damien de Loyola
920 Main Street
Suite 500
Kansas City, MO 64015

vs.

STATE OF MISSOURI,
Respondent.

Attorney: Kristina Zeit
411 Jules Street
Room 132
Saint Joseph, MO 64501

Exhibit No.	Description of Exhibit	Off'd	Admit'd	Not Admit'd	Notes/Witness
1	*State v. Rogers*, 14BU-CR00919-01, Transcript				
2	Dr. Heather Pace, CV				
3	Transcript of Mary Ann Barber Deposition				
4	Police Report, Officer Powell				
5	Eric Powell - Deposition				
6	Mary Ann Barber Mosaic Life Records				
7					
8					
9					
10					

Witnesses List:

1. Dr. Heather Pace
2. Sergeant Eric Powell
3. Vinny Weille
4. Shariece Canady

Words:

1. Levothyroxine
2. Ranitidine
3. Venlafaxine
4. Chlorpromazine

Exhibit Preparation

- Premark your exhibits
  - Electronic Exhibit Stickers
    - https://exhibitsticker.com/
    - PDF stamp
    - Benefits
      - Always retain the original
      - Can switch exhibit numbers quickly
- Copies
  - Copy of all exhibits to the Judge
  - Copy of all exhibits for witnesses
  - Copy of all exhibits for you
  - Copy of all exhibits for Prosecutor
  - Copy of Exhibit List to the Court Reporter

Exhibits at the Hearing

- Try to get them all into evidence up front
  - Just ask the prosecutor
    - Give them copies up front
    - Tell them that you usually just get exhibits in up front
    - If you get them all in up front either file your exhibit list or read into the record what the exhibits are
- Know what you can automatically admit
  - Have the Court take judicial notice of the underlying criminal file and transcript
    - If the Court does not, have it take judicial notice of specific documents
    - Provide Courtesy Copies of important documents
      - Or, admit them as exhibits

Types of Exhibits that are Automatically Admissible

- If it is available on Case.Net
  - § 490.130 Records of proceedings of any court of this state contained within any statewide court automated record-keeping system established by the supreme court shall be received as evidence of the acts or proceedings in any court of this state without further certification of the clerk, provided that the location from which such records are obtained is disclosed to the opposing party.
- § 490.130 court records from other jurisdictions
  - Must be "attested by the clerk thereof, with the seal of the court annexed, if there be a seal, and certified by the judge, chief justice or presiding associate circuit judge of the court to be attested in due form"
- § 490.220 government reports
  - All records and exemplifications of office books, kept in any public office of the United States, or of a sister state, not appertaining to a court, shall be evidence in this state, if attested by the keeper of said record or books, and the seal of his office, if there be a seal.
- § 490.220 business records affidavits
  - Must serve the opposing party with the records and affidavit at least seven days prior to the hearing
    - Weekend days count in the computation: "When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation." Rule 44.01(a)

Use Aids to the Court

Exhibit Guide – *Umar Muhammad v. State* – 1616-CV17331

Open DVDs in VLC, sound does not work in Windows Media Player

Exhibit 1 – DVD of interview of Ali Anwar
Description of shooter from 6:00-6:30 (VLC time bar)
Tall, short hair, he has all hair up here [motioning facial hair], black hood, hood was up

Exhibit 2 – DVD of dashcam of Umar Muhammad being stopped by police
Umar Muhammad walking in front of the dashcam early in the morning on the day of the shooting
No facial hair
12:32:05-12:32:10 (in video timer)

Exhibit 3 – DVD of Umar Muhammad's interrogation from the day of the shooting
Umar Muhammad comes into the interrogation room at 8:55 (VLC time bar)
No facial hair
Good view of the side of his face without shadow 30:50 (VLC time bar)

Exhibit 4 – DVD of Seneca Keith's interrogation from the day of the shooting
Seneca Keith walks into the interrogation 4:55 (VLC time bar)
Has facial hair

Exhibit 5 – DVD of Tyra Anderson's Interview
After the shooting, Ms. Anderson is looking at Seneca and hears him say "Bitch ass nigger, got you, got you" 3:40-3:50 and 4:45-4:55 (VLC time bar)

Exhibit 6 – Anwar Ali's deposition
Describing Muhammad Hussain as running towards the men on the sidewalk saying he was going to bring the Hammer/Thor down on them
Page 27, lines 9-22
Page 37, line 20 to page 38, line 10
Page 38, line 21 to page 39, line 6

- Make it as easy as possible for the Court to review the important parts of your exhibits
- Summarize large exhibits
- Response to an objection
  - It is just an aid to the Court to allow this Court to more easily review the exhibits
  - If everything contained in the aid already is in evidence, the aid is admissible. *Elam v. Alcolac*, Inc., 765 S.W.2d 42, 190 (Mo.App. W.D. 1988)

Use Aids to the Court

	Clay County First-Degree Robbery Cases							
Exhibit No.	**Case Number**	**Name**	**Charges**	**Sentence**	**Total Sentence**	**Type of Case**	**Crim History**	**Judge**
6	12CY-CR03049-01	Brown, Jarod	Rob 1, ACA (dismissed)	25, SES, 5 prob	25	Guilty Plea		Alexander
7	12CY-CR02351	Butler, Lance	Rob 1, ACA	30 (rob), 20 (ACA)	50	Jury Trial	Prior/Persistent	Chamberlain
8	06CY-CR05570-01	Yow, James	Rob 1	12	12	Guilty Plea		Gabbert
9	08CY-CR01835-01	Morris, Charles	Rob 1	10, SES, 5 prob	10	Guilty Plea		Gabbert
10	08CY-CR03808	Mohamed, Anwar	Rob 1	10	10	Guilty Plea		Harman
11	09CY-CR04839	Thompson, Timothy	Rob 1	25	25	Guilty Plea		Alexander
12	08CY-CR01691-01	Perez, Ramon	Rob 1, Attmp Rob 1	25, 15	25	Guilty Plea		Gabbert
13	07CR105003258	Cooley, Michael	Rob 1	12	12	Bench Trial	Has multiple priors Rob 1s	Gabbert
14	7CR106000405-01	Warren, Damon	Rob 1, Rob 1, Rob 1	12, 12, 12	12	Guilty Plea		Maloney
15	7CR197000566	Washington, James	Rob 1	20	20	Jury Trial	Prior/Persistent	Bills
16	7CR101003655	Garrett, Coy	Murder 1, Rob 1	Life w/out, Life	Life w/out	Guilty Plea		Harman
17	7CR105001807-01	Donovan, Jesse	Rob 1, ACA	15, 3	15	Guilty Plea		Maloney
18	7CR105004112-01	Donovan, Jesse	Rob 1	15	15	Guilty Plea		Maloney
19	08CY-CR01727	Ransom, Michael	Rob 1, ACA, Rob 1, ACA	15, 7, 15, 7	15	Guilty Plea	Has a prior Rob 1	Gabbert
20	11CY-CR02885	Brown, Daniel	Rob 1, ACA , Rob 1, ACA	25, 25, 25, 25	50	Jury Trial	Has a prior Rob 1, ACA	Gabbert
21	12CY-CR04439	Hubbard, Deandre	Rob 1, ACA	15, 3	18	Guilty Plea		Gabbert
22	09CY-CR03132	Tabors, Anthony	Forc Rape, Rob 1, ACA, Assault 1, ACA, Assault 1, ACA	Life w/out	Life w/out	Jury Trial	Prior/Persistent	Gabbert
23	7CR106001233-01	Shepherd, David	Rob 1	10	10	Guilty Plea		Maloney
24	10CY-CR01473	Hill, Lionel	Rob 1, Rob 1, Rob 1, Rob 1	14, 14, 14, 14	14	Guilty Plea		Alexander
25	09CY-CR04465-01	Williams, Lemuel	Rob 1	10	10	Jury Trial		Alexander
26	12CY-CR02533-01	Bradley, Taylor	Rob 1	10	10	Guilty Plea		Gabbert
27	09CY-CR03144	Burton, Taurian	Forc Rape, Rob 1, ACA, Assault 1, ACA, Assault 1, ACA	Life cc 50	Life cc 50	Jury Trial	Has a prior	Alexander
28	7CR195000302	Offield, Rowdy	Rob 1	10	10	Guilty Plea		Maloney
29	7CR100002709	Foster, Steven	Rob 1, ACA	18, 6	18	Guilty Plea		Harman
30	7CR103001399	Harris, Paul	Rob 1	18	18	Guilty Plea		Maloney
31	7CR103003316	Bartels, Michael	Rob 1	15	15	Guilty Plea		Maloney
32	7CR103001433	Norwood, Anthony	Rob 1	20	20	Guilty Plea		Maloney

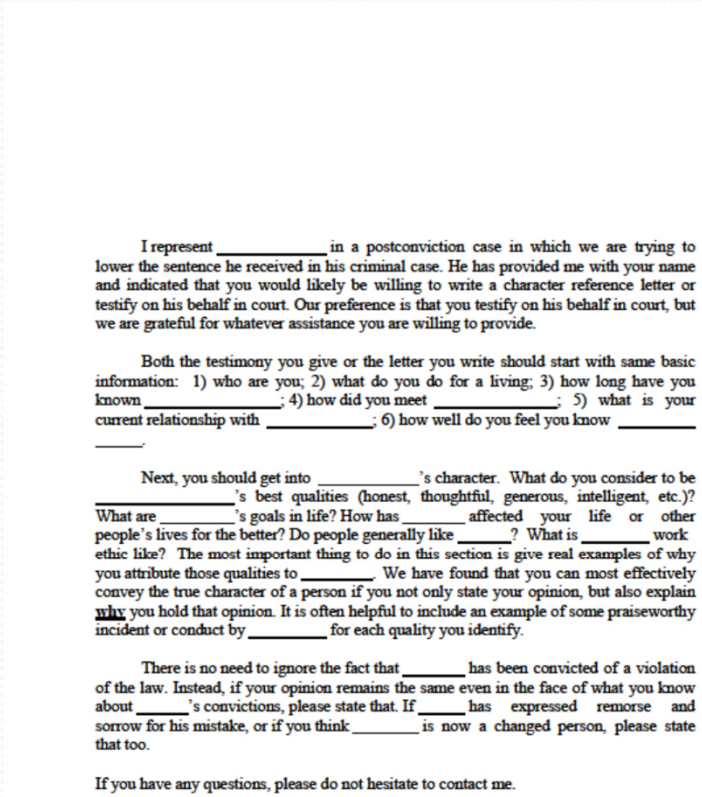
In addition to an aid to the Court

- If you have records too voluminous to introduce, you can summarize them
  - A summary of voluminous records is admissible if (1) the competency of the underlying records is established, and (2) such records have been made available to the opposing party for purposes of cross-examination. *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 616 (Mo. banc 2006); *see also Sigrist by and Through Sigrist v. Clarke*, 935 S.W.2d 350, 356 (Mo. App. S.D. 1996) ("Generally, a summary of records is admissible where the records upon which the summary is based are voluminous, are admissible and are available to the opposing party for inspection."). *Nooter Corp. v. Allianz Underwriters Ins. Co.*, 536 S.W.3d 251, 293 (Mo. App. E.D. 2017)

Witness Preparation

- Do prepare your witnesses
- Prepare clients well in advance
  - Typically our clients are testifying towards one ultimate big “Why” question
    - They need a good answer
    - Give them the project of writing out an outline answer to the “why” question
- Strategically prepare your attorney witnesses

Prepare your mitigation witnesses



I represent _____ in a postconviction case in which we are trying to lower the sentence he received in his criminal case. He has provided me with your name and indicated that you would likely be willing to write a character reference letter or testify on his behalf in court. Our preference is that you testify on his behalf in court, but we are grateful for whatever assistance you are willing to provide.

Both the testimony you give or the letter you write should start with same basic information: 1) who are you; 2) what do you do for a living; 3) how long have you known _____; 4) how did you meet _____; 5) what is your current relationship with _____; 6) how well do you feel you know _____ _____.

Next, you should get into _____'s character. What do you consider to be _____'s best qualities (honest, thoughtful, generous, intelligent, etc.)? What are _____'s goals in life? How has _____ affected your life or other people's lives for the better? Do people generally like _____? What is _____ work ethic like? The most important thing to do in this section is give real examples of why you attribute those qualities to _____. We have found that you can most effectively convey the true character of a person if you not only state your opinion, but also explain why you hold that opinion. It is often helpful to include an example of some praiseworthy incident or conduct by _____ for each quality you identify.

There is no need to ignore the fact that _____ has been convicted of a violation of the law. Instead, if your opinion remains the same even in the face of what you know about _____'s convictions, please state that. If _____ has expressed remorse and sorrow for his mistake, or if you think _____ is now a changed person, please state that too.

If you have any questions, please do not hesitate to contact me.

- Mitigation witnesses should be asked emotionally complex questions that are difficult to explain
- They need time to be able to do this

Attorneys Switching Statements

- Use email to communicate with witnesses
- Get affidavits
  - Only helpful, not hurtful
  - Blame your boss or the Public Defender system
  - Blame the long time it takes to resolve postconviction cases
- Have your investigator speak with them or sit in on conversations
- You can question people about previous statements they made to you
- Calling yourself as a witness
  - Rule 4-3.7
    - (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
      - (3) disqualification of the lawyer would work substantial hardship on the client.
    - Concern is with confusing the trier of fact – bench trial
    - Likely have to show you're the only witness with this information. *See State v. Mason*, 862 S.W.2d 519, 521 (Mo. App. E.D. 1993)
    - Non-participating assistant prosecutor as a witness was fine. *State v. Johnson*, 702 S.W.2d 65, 71 (Mo. banc 1985)

Questioning Witnesses

- Write out your questions
  - At least have an outline written out
- If you did not automatically get in your exhibits
  - Write out your foundation
- Exercise discretion with your standard questions
  - I always asked how long an attorney has been practicing
  - "We refuse to say that trial counsel's choice of strategy to recommend that Pagel not testify due to these two reasonable concerns was beyond the wide range of strategic and reasonable choices available to trial counsel. This is even more true here where trial counsel had over twenty years of criminal defense experience."
  - *Pagel v. State*, 486 S.W.3d 384, 389 (Mo. App. W.D. 2016)

Questioning with the Transcript or other Evidence

- It should be in evidence
  - You do not have to refresh their recollection
- Tell them what occurred
  - I'm sure you recall during the trial that Dr. Morlan testified that children cannot make up sexual abuse allegations unless they have experienced it (this is on page 972), did you have any strategic reason for not objecting to this?
  - On page 972, the transcript shows that Dr. Molan testified that children cannot make up sexual abuse allegations unless they have experienced it, did you have any strategic reason for not objecting to this?
  - Can you read lines 5-13 on page 972 of the transcript, do you agree that Mr. Molan testified that children cannot make up sexual abuse allegations unless they have experienced it?
    - Did you have any strategic reason for not objecting to this?
  - Objection to the form of questioning
    - Alright, I was just trying to move us along, but we can slow things down
    - Slow it down, then do it again on the next topic

Common Objections

- Speculation
  - When your client or counsel is testifying about what they would have done had they known a different fact:

> Ford is correct that where, as here, no warning is given, then evidence of what a person would have done had a warning been given inherently is hypothetical in character. Yet, to show causation, a plaintiff must show that the absence of a warning was the proximate cause of the injury. As a matter of logic, to accomplish this a plaintiff must show that she did not have the information the warning would have imparted already and that, if she had the information, it would have affected her conduct. This creates a "Catch–22" in which the plaintiff must prove what she would have done had a warning been given to prove causation, but evidence on this issue must be precluded as speculative.
>
> This dilemma is avoided in Missouri and other states by the use of a presumption that had an adequate warning been given, it would have been heeded. For that reason, the trial court did not err in holding during the direct examination of Ms. Moore that her testimony as to what she might have done had a warning been given was speculative. Arnold, 908 S.W.2d at 763.
>
> The heeding presumption is a rebuttable one, however. Tune, 883 S.W.2d at 14. Here, Ford chose to try to rebut it by obtaining concessions from Ms. Moore on cross-examination that she really did not look for warnings and that she would have driven the vehicle once purchased. She agreed that she did not look specifically at this manual or at prior vehicle manuals with the purpose of seeing whether there was a seat weight limit.
>
> The Moores did not attempt to question Ms. Moore further about whether she would have looked for or heeded the warning on redirect, after such evidence became relevant once Ford tried to rebut the presumption. Nonetheless, earlier portions of her testimony that did come in without objection, set out at length above, supported the Moores' position that she would have heeded a warning about the risks the seats posed for persons of greater than normal weight. It would be up to a jury to weigh all of this testimony. A jury may find persuasive the implication from Ford's questions that the Moores' testimony was self-serving and should not be accorded much weight. But a jury instead might find it entirely credible. Such a credibility determination is for the jury.
>
> *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 762–63 (Mo. banc 2011)

Common Objections

- Hearsay
  - "Hearsay is defined as 'any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value.'" State v. Reynolds, 456 S.W.3d 101, 104 (Mo.App.W.D.2015) (quoting State v. Sutherland, 939 S.W.2d 373, 376 (Mo. banc 1997)).
  - Explaining why your client did something – effect on the listener
    - "'[T]estimony of what another said, when offered in explanation of conduct rather than as proof of the facts in the other's statement, is not inadmissible hearsay.'" *State ex rel. Scherschel v. City of Kansas City*, 470 S.W.3d 391, 400 (Mo. App. W.D. 2015) (quoting *State v. Leisure*, 796 S.W.2d 875, 880 (Mo. banc 1990)).
  - That trial counsel said something – not hearsay, just establishing it was said
    - "'[E]vidence is hearsay only if its evidentiary value depends on drawing an inference from the truth of the statement. If the relevance of the statement lies in the mere fact that it was made, no reliance is placed on the truth of the statement or the credibility of the out-of-court declarant, and the statement is not hearsay.'" *State v. Sutherland*, 939 S.W.2d 373, 377 (Mo. banc 1997) (quoting John C. O'Brien & Roger L. Goldman, Federal Criminal Trial Evidence 345 (1989)
- Relevance
  - The claim in the amended motion alleges X, this evidence is relevant to establishing X. A determination of it's relevance at the underlying trial is a finding distinct from this evidentiary hearing.
- Refreshing recollection improperly
  - If you are asking them about an exhibit, like the transcript

Getting Hometowned

- Know the local rules
- Review the Court's website
- Introduce yourself to the judge
  - Tell the clerk this is your first time appearing in front of the judge
  - Don't talk about the case
- Ask for feedback from the judge
  - Come with specific questions
  - Ask their staff when it would be appropriate to get the feedback (after the ruling, in a few weeks, etc.)
- Introduce yourself to the court reporter
  - Ask court reporters if they have any tips for you before
  - Ask Court reporter for feedback after the hearing

Top Things Court Reporters Like (for us really top 4)

1. Name spellings: Business card from the attorney and having the witness spell their name. That's awesome and helps us so much. Is it Cathy, Kathy, Cathie -- you get the idea!

2. If a witness is difficult to understand, the attorney repeating the answer back helps everyone -- the Judge, the jury, and the court reporter. Mumbling answer from the witness. Great attorneys say, "So you're telling me that you were standing on the corner when the shot was fired?' Now everyone knows what the witness answered.

3. In voir dire, the attorney will refer to the venireperson by number. This helps us immensely! And they will make sure the court reporter has a line of sight to the venireperson who is responding.

Top Things Court Reporters Like (for us really top 4)

4. Make a copy of exhibits and documents that they will be reading from and provide a copy to the reporter. We appreciate it so much when you're reading from something (usually at a pretty good clip!) and we can follow along on our written copy. Also helps with terms that we might not have heard.

5. Speak slowly! Most of what attorneys do is educating and persuading. It helps everyone in the courtroom to understand your point of view and your information.

Top 5 Things Court Reporters Hate

1. Read cases and don't give cites. I have no way to know what the spelling is of the case that is rattled off -- Putz versus Doofus, that is actually Poutch versus D'Oofus. Give me the citation when you read the case!

2. Speak at super sonic speed and when requested to slow down say "Oh, I've been told I talk too fast. Just throw something at me and I'll try." And then proceed to speak even faster. Seriously, if I can't hear/understand you, I'm pretty sure the Judge isn't either and the Judge is counting on reading my transcript later to see what you said. So SLOW DOWN!!! Also, so far my request for a foot-pedal activated taser has been denied, but since my hands are too busy to throw something at you, that's where I see this going. Help everyone out and slow down!

3. One at a time. And NEVER talk on top of the Judge. Your response will not be in the transcript but the Judge's comments will be written. So if that's your great point for appeal, let the Judge finish and then speak. And witnesses are great at jumping in and answering your question before you've finished asking it. Be in control and ask the witness to wait for the rest of the question. Helps the jurors process where you're going and makes a clean appellate record.

Top 5 Things Court Reporters Hate

4. Turn your back when you're speaking and drop your voice. If you have to have your back to me, please speak louder! While it's great that the jury hears you, it's also important for the reporter to hear what you've said. Most judges will stop you a few times but after that you get the record you're making. What can't be heard, can't be taken down.

5. Click your pen and fiddle with change. Whisper to the jury. Pound on the podium. The reporter needs to hear you! It might be dramatic but it isn't an effective way to make a record. If you must, pound the podium and then speak. Never whisper! People lose hearing as they age and most won't be able to understand/process/hear you if you do that. Clicky pens and change in pockets are very distracting.

Communicating with Trial Offices

- Excellent way to get to know the local judges
- If you see something, say something
  - If the Judge does not know the law, tell the trial office so it gets out in the open
  - Incorrect warnings about postconviction

If you win

- Make the sure the judgments are sent to the correct DOC facility
  - Wherever they are in custody
  - Women who are out of custody, Women's Eastern Reception and Diagnostic at Vandalia
  - Men who are out of custody, Fulton Reception and Diagnostic
- Warn trial counsel about being ready with a retaliatory prosecution or retaliatory court sentencing
  - *North Carolina v. Pearce*, 395 U.S. 711 (1969) (retaliatory sentencing)
  - *State v. Buchli*, 152 S.W.3d 289, 309 (Mo. App. W.D. 2004) (prosecutorial vindictiveness)
- Be careful with time credit
  - Switching from consecutive to concurrent can result in a loss of time credit
    - "Subsection four grants credit only where time has been served 'under the vacated sentence.' Thus, the provision would not mandate credit unless Mr. Pettis had actually served time on the vacated sentence. A consecutive sentence is one which follows another in time. Black's Law Dictionary 304 (6th ed.1990). Because Mr. Pettis was serving a life sentence, until this sentence was finished, he could not serve time under the consecutive sentence. Without the punishment having been exacted, there is no corresponding requirement for credit." *Pettis v. Missouri Dept. of Corr.*, 275 S.W.3d 313, 319 (Mo. App. W.D. 2008) (citing § 558.031.4)
  - Do a stipulation that states everyone is in agreement as to the anticipated time credit