Missouri Criminal Law Update

Chris Koster, Attorney General

JULY CASE LAW UPDATE...

This month, we have two cases from the United States Supreme Court — one on collecting DNA evidence and another on the refusal to answer questions during a non-custodial interrogation. We also have one case from the Missouri Supreme Court on ineffective assistance by post-conviction counsel, and one case from the Missouri Court of Appeals, Southern District, on the limits of protections for child witnesses.

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Attorney General

DNA COLLECTION

MARYLAND V. ALONZO KING, UNITED STATES SUPREME COURT, CASE NO. 12-207 (JUNE 3, 2013)

KEY FACTS – Law enforcement arrested King (and ultimately charged him) with two counts of felony assault. Under Maryland's DNA collection statute, law enforcement took a buccal swab from King for DNA analysis. Later, there was a CODIS hit on King's DNA from an earlier rape. King challenged the use of his DNA to connect him to the rape on the basis that the initial collection of DNA was an unreasonable warrantless search.

COURT RULING – The mandatory taking of a buccal swab from an arrestee is substantially similar to the mandatory taking of fingerprints from an arrestee. Assuming the validity of the original arrest, a person in custody for a serious offense has a diminished expectation of privacy which makes the taking of a DNA sample by a buccal swab a reasonable infringement of that expectation of privacy.

CAUTIONARY NOTE – Missouri's statute on DNA collection is not exactly the same as Maryland's. The Missouri statute covers arrests for burglary and all felonies under Chapter 565, 566, 567, 568, and 573. The Supreme Court did not go into detail on what qualifies as a serious offense. As such, you may need to examine the basis for the defendant's arrest if the defense attempts to claim it was not a serious offense.

SILENCE AS EVIDENCE

GENEVEVO SALINAS V. TEXAS, UNITED STATES SUPREME COURT, CASE NO. 12-246 (JUNE 17, 2013)

KEY FACTS – During a murder investigation, police officers asked Salinas to accompany them to the police station for an interview. The interview was a voluntary, non-custodial interview, and officers did not read Salinas his Miranda rights. For most of the interview, Salinas was cooperative and answered questions. However, Salinas did not respond when asked whether the shells recovered at the crime scene would match his shotgun. The State later charged Salinas with that murder. During the State's case-in-chief, the prosecution introduced evidence about Salinas's failure to answer this question.

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SILENCE AS EVIDENCE

GENEVEVO SALINAS V. TEXAS, UNITED STATES SUPREME COURT, *CASE NO. 12-246 (JUNE 17, 2013)*

COURT RULING – If a defendant has not been advised of his rights and does not expressly invoke his right to remain silent, his silence during a non-custodial interview can be used as evidence during the State's case-in-chief.

CAUTIONARY NOTE – This opinion is a plurality opinion, but the concurring opinion would allow the State go further. The rule announced in the case puts law enforcement in a potential catch-22. If law enforcement does not advise a person of his Miranda rights, they run the risk that a court might find that the interview was custodial, thereby barring all statements. If law enforcement does advise the person of his Miranda rights, the refusal to answer a question is only admissible in rebuttal, if at all. The best practice remains the cautious approach of advising a potential suspect of his Miranda rights even though this practice would give up the potential benefit of being able to introduce the suspect's refusal to answer certain question into evidence at trial.

ABANDONMENT BY POST-CONVICTION COUNSEL

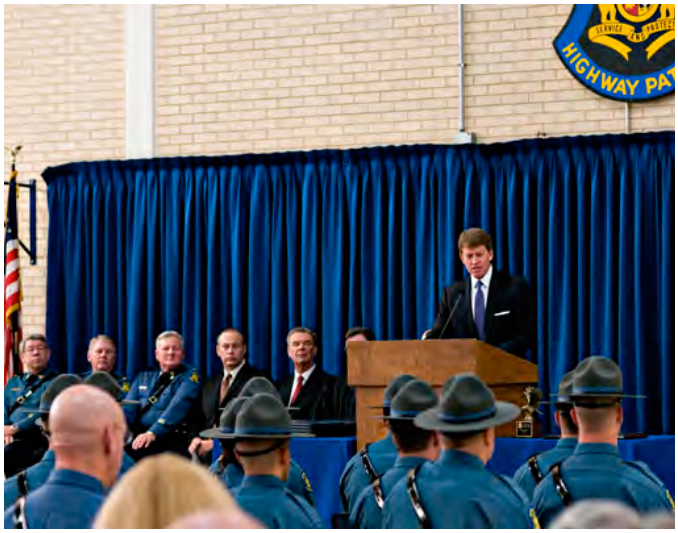
SHEENA EASTBURN V. STATE OF MISSOURI, MISSOURI SUPREME COURT,

CASE NO. 92927 (JUNE 25, 2013)

KEY FACTS – Back in the 1990s, Eastburn filed a Rule 29.15 motion challenging her conviction for murder in the first degree. Post-conviction counsel timely filed the ultimate motion on which a hearing was held. In 2010, Eastburn filed a motion to "re-open" her post-conviction case, asserting that she had been abandoned by post-conviction counsel and that her conviction was the product of manifest injustice. Specifically, Eastburn alleged that post-conviction counsel should have filed additional claims (including an allegation that because she was under 18, her sentence to life without parole was invalid). The local prosecutor stipulated to the case being re-opened, but the parties dispute what was meant by that stipulation.

COURT RULING – Ineffective assistance by post-conviction counsel is not "abandonment." In the absence of abandonment, an inmate may not file a late or second amended motion. Regardless of what terminology was used by the parties, a court may not re-open a Rule 29.15 proceeding or permit a successive petition. A motion court is permitted to authorize a late filing only when the original or amended motion was untimely as a result of abandonment by post-conviction counsel.

CAUTIONARY NOTE – Eastburn re-emphasizes that Missouri does not recognize ineffective assistance of post-conviction counsel as a basis to set aside an earlier judgment on a post-conviction motion or to allow a successive post-conviction motion. Eastburn, however, does not expressly consider the impact of recent United States Supreme Court rulings on ineffective assistance of post-conviction counsel in the context of federal habeas petitions. As such, it remains unclear what impact, if any, those rulings will have on Missouri's post-conviction proceedings.



CHILD WITNESSES

STATE V. JOSE BENITEZ, MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT, CASE NUMBER SD32063 (JUNE 10, 2013)

KEY FACTS – The State charged Benitez with statutory sodomy. At trial, the State requested that the victim be allowed to testify behind a one-way screen (which would allow the jury and the defendant to see the victim, but avoid the victim having to see the defendant). Trial counsel objected to using the screen without specific evidence that the child needed the screen based on fear of the defendant. The State did not introduce such evidence, but the trial court allowed the use of the screen.

COURT RULING – Without evidence showing that that the child would be traumatized by the presence of the defendant, it is not permissible to use a mechanism that infringes on the right of the defendant to confront a witness face-to-face. In this case, the violation of defendant's confrontation rights was harmless.

CAUTIONARY NOTE – There are specific statutory and constitutional requirements governing the various procedures found in Chapter 491 (Sections 491.075, 491.675 to 491.705, and 491.725) designed to protect child witnesses. It is important to be familiar with those requirements so that you can make a proper record when it is necessary to use one of those protections.

For additional information on these cases please contact Sue Boresi, Chief Counsel, Public Safety Division at 573-751-4418; Shaun Mackelprang, Chief Counsel, Criminal Division at 573-751-0272; or Terrence Messonnier, Assistant Attorney General, Public Safety at 816-889-5031.