

# FRONT LINE

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## Nixon calls for AMBER Alert program

**ATTORNEY GENERAL** Jay Nixon has called for a statewide voluntary AMBER Alert program to alert the public via broadcast media when a child is abducted.

He is working with the Missouri associations for sheriffs, police chiefs and broadcasters to develop guidelines to help communities get AMBER plans. Seventeen states and 43 metro areas, including St. Louis, Kansas City and Springfield, have an alert plan.

America's **Missing: Broadcast**

Emergency Response is a partnership of law enforcement agencies and broadcasters to send out an emergency alert when a child has been abducted and is believed to be in grave danger. It started in Texas to honor the legacy of 9-year-old Amber Hagerman, who was kidnapped and brutally killed in 1996.

Under the plan, television and radio stations interrupt programming to broadcast information about the abducted child using the

**SEE AMBER**, Page 2

Nixon says an AMBER Alert must encompass three strict criteria:

- Law enforcement confirms a child's abduction.
- Law enforcement believes circumstances surrounding the abduction indicate the child faces serious bodily harm.
- There must be enough descriptive information about the child, abductor or abductor's vehicle to believe an immediate alert will help the case.

## Seeking consent: Police don't first need to advise of right to refuse

**IN A SIGNIFICANT** case involving a suspicion-less encounter with bus riders and officers seeking consent to search, the U.S. Supreme Court made clear that valid consent is not dependent on officers informing individuals they have a right not to cooperate.

In *United States v. Drayton*, decided June 17, the court explicitly stated there is no requirement, in the context of seeking consent, that an officer inform someone that he can refuse to cooperate or refuse to give consent.

A uniformed officer boarded a Greyhound bus getting refueled and cleaned. The officer questioned passengers, asking some to identify their luggage, and in some cases asking permission to search.

The officer approached defendants

Drayton and Brown, who were traveling together. He displayed his badge and said they were conducting drug interdictions to deter illegal drugs and weapons and asked if they had any bags. Both men pointed to one bag.

After getting permission and checking the bag, the officer also got consent to search the two men; both had bundles of cocaine on them.

In a 6-3 ruling, the court held this encounter was consensual. Citing an earlier opinion, the court stated, "Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting

**SEE BUS**, Page 2

## Disciplined officer can assert due process claim

**IN A FEDERAL CIVIL RIGHTS** case involving a police officer suing his department for unfairly disciplining him, the 8th Circuit Court of Appeals ruled that such an allegation asserts a "substantive due process" claim.

In *Moran v. Clarke*, the court held that a department and its supervisors can be guilty of a civil rights violation if there is a conspiracy to make the officer the "scapegoat" for an incident that embarrassed his department.

In a case that generated a lot of negative publicity, officers were accused of beating a deaf suspect they incorrectly thought might be a burglar. Officer Moran responded to a call for

**SEE MORAN**, Page 2

## Illegal detention of driver results in evidence suppression

A Missouri Court of Appeals held that a request for a drivers license and registration — after the officer had determined the initial suspicion for the stop was unfounded — was an illegal detention and drugs found in the suspect's purse must be suppressed.

In *State v. Taber*, 73 S.W.3d 699 (Mo.App., W.D. 2002), a trooper saw a car pulling a trailer without plates. After stopping it, the trooper noticed the car had Kansas plates. He knew Kansas does not require plates for a trailer and the vehicles were not illegal.

Because the car already was stopped, the trooper told the driver why he had stopped her. He did not tell her she was free to leave but asked for her license and registration. She was carrying no license but gave an ID card. The driver had an outstanding warrant and, on arrest, drugs were found in her purse.

The court ruled the drugs must be suppressed because they were found in an illegal detention. The officer had reasonable suspicion to pull over the car but once he saw the Kansas license, that suspicion disappeared.

It was reasonable for the officer to explain why she had been stopped. Had he simply left once he saw the Kansas plate, the driver would have been confused about what to do.

The request for license and registration would have been permissible only if the driver knew she was free to leave without responding. The trooper thought the driver understood, but the court concluded a reasonable person under those circumstances would not necessarily know they could leave or decline the request. Had the trooper told the driver this, the encounter would have been based on consent and the search lawful.

### MORAN: CONTINUED FROM PAGE 1

assistance and asserted he never arrived until the suspect had been subdued. Nevertheless, Moran was accused by his department of assaulting the suspect. He was acquitted in a criminal trial but was punished administratively for using excessive force.

Moran sued the police board for a civil rights violation asserting that his substantive due process rights were violated when the department conspired to fabricate and “manufacture evidence in order to make him an innocent scapegoat for a devastating travesty that embarrassed the police department and ... may have been partially undertaken to protect other, more favored employees.”

On July 5, the entire 8th Circuit held that Moran's claims did state a substantive due process violation.

This case is important because plaintiffs have been trying for years to establish federal civil rights liability against police by asserting substantive due process claims. The U.S. Supreme Court has held that a claim arises only if police violate a constitutional right by engaging in behavior that “shocks the conscience.” Few claims meet this standard and, as a result, plaintiffs have been unsuccessful in expanding police liability beyond common claims.

But an officer has succeeded in expanding the potential liability under the due process claim. While fabricating evidence to convict an innocent man would be conduct that “shocks the conscience,” it is unclear what constitutional right was at issue. As a general proposition, there is no constitutional right to police employment.

### AMBER: CONTINUED FROM PAGE 1

Emergency Alert System.

The program works because of the speed at which information can be disseminated. “An abducted child's greatest enemy is time,” Nixon said. U.S. Department of Justice stats show 74 percent of abducted, murdered children are killed within three hours.

“This program requires fast, efficient and united effort by law enforcement and a willingness to work together and cross all jurisdictional lines,” Nixon said.

### BUS: CONTINUED FROM PAGE 1

questions to them if they are willing to listen.” Neither the fact that the bus was a confined area, the display of a badge, nor questions asked created a coercive atmosphere where a citizen would feel compelled to answer.

Telling someone cooperation is not required is a factor to determine whether consent was voluntarily given and, indeed, providing that information weighs heavily in favor of consent being voluntary. But it is not a requirement for consent to be voluntary.



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**UPDATE: CASE LAW****U.S. SUPREME COURT**

Slip opinions can be found at [www.supremecourtus.gov/opinions](http://www.supremecourtus.gov/opinions).

**DEATH PENALTY, RETARDATION****Atkins v. Virginia**

No. 008452, June 20, 2002

It is cruel and unusual punishment to execute persons who are mentally retarded. While the court did not adopt a specific definition of retardation, it cited with approval definitions very similar to the one adopted in Missouri (see Section 565.030.6, RSMo Supp. 2001).

**CAPITAL CASE, PUNISHMENT PHASE****Ring v. Arizona**

No. 01-488, June 24, 2002

The court extended its *Apprendi v. New Jersey* decision to capital cases, holding that statutory aggravating circumstances must be found by a jury. In New Jersey, the punishment phase was tried before a trial court that found aggravating and mitigating circumstances.

**SEXUAL ASSAULT TREATMENT****McKune v. Lile**

No. 00-1187, June 10, 2002

The Kansas Sexual Abuse Treatment Program, an 18-month program, serves the vital penological purpose of rehabilitation, and offering inmates minimal incentives to participate does not amount to compelled self-incrimination under the Fifth Amendment.

**ASSISTANCE OF COUNSEL****Alabama v. Shelton**

No. 00-1214, May 20, 2002

A suspended sentence that may result in deprivation of liberty may not be imposed unless the defendant was accorded assistance of counsel in the prosecution for the crime charged.

**MISSOURI SUPREME COURT**

Opinions for the Missouri Supreme Court and Court of Appeals can be found at [www.osca.state.mo.us](http://www.osca.state.mo.us).

**SELF-DEFENSE INSTRUCTION****State v. Reginald Westfall**

No. 84078, Mo.banc, May 28, 2002

The court committed reversible error in refusing the defendant's tendered self-defense instruction over the use of deadly force in a first-degree assault case. Since there was a factual dispute as to whether the defendant's causing several strikes across the victim's face and neck with a carpet knife constituted serious physical injury rather than non-deadly injury, the court erred in tendering the defense version of the instruction. By not tendering the instruction, the court removed the question of fact from the jury.

**EVIDENCE, LEGAL ADMISSIBILITY****State v. Cornealious M. Anderson**

No. 84035, Mo.banc, May 28, 2002

The court erred in admitting a Beretta brochure for semi-automatic handguns because it was not legally relevant to the defendant's trial for first-degree robbery and armed criminal action. The brochure's probative value was minimal since the victim generally described how to load the gun, which could have applied to many other handguns. The admission was not so prejudicial to cause an unfair trial since the brochure was inconsequential at trial.

**WESTERN DISTRICT****CONSTRUCTIVE POSSESSION****State v. Dayna M. Hendrix**

No. 59338, Mo.App., April 17, 2002

The court reversed a conviction of trafficking cocaine base because the state failed to prove the defendant was in constructive possession of the drug found in a clock. The defendant's statement was not incriminating and she did not show a consciousness of guilt by attempting to avoid association with a co-defendant.

**DISCOVERY, BRADY VIOLATION****State v. Theodore W. White**

No. 58462, Mo.App., April 30, 2002

The court declined to apply the escape rule to dismiss an appeal where the defendant left the country for 11 months following the verdict in a child molestation case but prior to sentencing. Given the allegations the state withheld exculpatory evidence and the defendant learned of such evidence following the verdict, the appellate court exercised its discretion to deny application of the rule.

The court reversed the defendant's conviction when the state knowingly withheld exculpatory evidence that the victim's mother, a corroborating witness, was engaged in an intimate relationship with the investigating officer. The defendant and mother were involved in divorce proceedings and the officer stood to benefit financially from evidence of the defendant's marital misconduct in a divorce. The evidence was material for impeaching the mother as a witness under the Brady rule.

**EVIDENCE SUFFICIENCY, ROBBERY****State v. Ronnell M. Escoe**

No. 59836, Mo.App., April 30, 2002

There was sufficient evidence to convict the defendant of first-degree robbery for forcibly stealing a purse although he threw it on the ground when the victim said there was no money and asked for it. When he took the purse, there were reasonable inferences he intended to permanently deprive the victim of it.

**HEARSAY, CHILD STATEMENTS****State v. Mary Bass**

No. 59447, Mo.App., May 22, 2002

The court properly admitted hearsay statements under Section 491.075.1 of the victim's 8-year-old brother although he was not the victim of the qualifying offense. Although the second section of the statute requires the child to be a victim, the first does not.

## **UPDATE: CASE LAW**

### **SOUTHERN DISTRICT**

#### **DANGEROUS INSTRUMENT**

##### **State v. Michael A. Carpenter**

No. 24398, Mo.App., April 22, 2002

There was sufficient evidence of the defendant's guilt of second-degree assault of an officer when the defendant struck a deputy with handcuffs, cutting nearly the length of his face. The cuffs qualified as a dangerous instrument.

#### **SUFFICIENT EVIDENCE, METH MAKING**

##### **State v. William Potter**

No. 24145, Mo.App., April 24, 2002

There was sufficient evidence of the defendant's guilt of manufacturing meth. Evidence strongly suggested he lived in a garage-home of which he had regular access to, use or control. This supported the inference he knew and, at the least, had constructive possession of meth-making items. Items, found within 10 feet of the home, fell within the curtilage during the exercise of a search warrant.

#### **CONSTRUCTIVE POSSESSION**

##### **State v. Rodney Johnson**

No. 24496, Mo.App., June 3, 2002

There was insufficient evidence of the defendant's guilt of possession of a controlled substance when a large amount of marijuana was found during a traffic stop inside the "factory voids" in a rented vehicle. His nervousness was not sufficient additional evidence to support the conviction.

#### **INSTRUCTIONS, SELF DEFENSE**

##### **State v. Andrew D. Reynolds**

No. 24078, Mo.App., April 24, 2002

In a prosecution for second-degree murder, the trial court erred in refusing a self-defense instruction for the lesser included offense of voluntary manslaughter. Although the court gave instructions for the murder charge, there was conflicting evidence about the altercation, and failure to give the instruction on the lesser charge affected the jury's ability to give a verdict on that basis.

#### **SEIZURE, EXIGENT CIRCUMSTANCES**

##### **State v. Charles Lee Rutter**

No. 23851, Mo.App., April 25, 2002

The warrantless search of the defendant's home was constitutional since deputies were looking for other victims and perpetrators as well as weapons. The court also applied the inevitable discovery doctrine in that the observations would have been discovered through lawful means, especially since a warrant was lawfully obtained only hours after the initial search. The trial court did not err in refusing to allow the defendant to present evidence on the self-defense theory of acts of violence committed against the defendant by a third person to show the defendant reasonably feared the victim. The defendant who testified that his only knowledge of an assault came from the victim was brief, and provided little detail to show the defendant had reason to fear the victim.

#### **TRAFFIC STOP**

##### **State v. Veronica Mendoza**

No. 24191, Mo.App., May 3, 2002

The court reversed the defendant's conviction for possession of a controlled substance because the search was not based on a valid traffic stop — the officer lacked probable cause or reasonable suspicion to stop. The traffic laws did not specifically proscribe the defendant's actions, which would not justify issuance of a warning. This was not the appropriate proceeding to address the defendant's claim of racial profiling.

### **EASTERN DISTRICT**

#### **SUFFICIENCY, SALE OF A SUBSTANCE**

##### **State v. Karel M. Sammons**

No. 78920, Mo.App., May 28, 2002

The court reversed the defendant's conviction for one of two counts of delivery or sale of a controlled substance and transferred the case to the Missouri Supreme Court. After completing one sale, the defendant took the money for a second sale and never returned on a controlled buy. While a sale may include an offer, there was no evidence the defendant possessed or had access to any substance for the attempted buy. While there was an inference the defendant stole the money, there was insufficient evidence of sale. The court suggested that MAI-CR 325.04 may be in error.