Municipal Jail: The De Facto Mental Health Facility

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I. The Reality of Mental Health in Missouri Municipal Courts.

Across the nation, persons with mental illness and co-occurring substance abuse repeatedly circulate thru the criminal justice system causing significant challenges for municipalities. The Kansas City Municipal Court is not an exception to this epidemic and constraints of the municipal system make handling these defendants difficult, often resulting in municipal jails operating as de facto mental health facilities. A municipal jail is not a mental health facility by statute, but frequently becomes one when the lack of inpatient mental health and substance abuse treatment programs combine with society's unwillingness to force medication and provide locked facility treatment. Mentally ill individuals, oftentimes with co-occurring substance abuse and behavioral problems, present the Kansas City Municipal Court with serious challenges; these persons are in need of stabilization, a continuum of mental health care, and substance abuse treatment. They may also have behavior problems or criminal behavior traits that make managing treatment increasingly difficult. Many habitual offenders often require municipal courts to internally question the defendants' competency to stand trial however, according to an Attorney General Opinion, municipal courts in Missouri lack jurisdiction to address competency issues as permitted by statute to state courts.[1] Missouri statute currently provides jurisdiction to state courts to order competency evaluation when issues of competency of the accused are raised.[2] The Attorney General opinion is in response to a request for a ruling on the question "[Whether] municipal courts in Missouri have jurisdiction to commit individuals to facilities of the Department of Mental Health for evaluation or treatment pursuant to Sections 552.020 and 552.040 RSMo."[3]

Kansas City Municipal Court, the largest court by volume in Missouri, processes approximately 250,000 municipal ordinance violations each year. Of these, approximately 25,000 are general ordinance charges, e.g. assault, stealing, domestic violence, resisting arrest, prostitution, drug paraphernalia, trespassing, and disorderly conduct. As a large metropolitan area court, Kansas City Municipal Court handles cases involving defendants dealing with a number of complex issues. In Kansas City, cases that may be filed as state misdemeanor or felony charges in other jurisdictions, are referred to municipal court and prosecuted as ordinance violations including assault, drug paraphernalia, domestic violence assault, driving while intoxicated and driving while suspended.[4] Nationally, 76% of local jail inmates who have a mental health problem meet criteria for substance dependence or abuse, and 64% of defendants sentenced to municipal jails have a mental health problem.[5] In the Kansas City municipal jail, approximately 44% of persons indicated that they have a mental health problem and 52% report having an alcohol or drug problem.[6]

Mentally ill persons enter the criminal justice system in numerous ways but most commonly it begins with a request for police service. In Kansas City if the call for service or a 911 dispatch call for assistance requires the respondent to encounter a person with a mental illness or "emotionally disturbed person (EDP)"[7], the police officer is provided authority to assess the person's competency and to take that person into custody for a period not to exceed 96 hours if necessary.[8] The reality a police officer faces when confronted with an "emotionally disturbed person" does not always make this statutory alternative to incarceration a valid option. A police officer must determine whether a person is suffering from a mental disorder and determine if the "likelihood of serious harm by such person to himself or others is imminent."[9] Often an officer does not have a whole picture of the situation but regardless must take action in order to stabilize a potentially dangerous situation. A person's behavior may be erratic as a result of mental illness or substance abuse, or both, complicating the officer's determination. Further impeding an officer's ability to properly assess an "emotionally disturbed person" situation is the absence of a formal database that might assist an officer to determine if a person is suffering from a mental illness. This inability to categorize prior mental health issues is a result of health information privacy laws and civil rights concerns regarding criminal justice

information about a person's mental health status.[10] Often a mentally ill person is arrested on a municipal ordinance violation because it is the most efficient way to resolve an issue and avoid a larger potential problem. These circumstances often result in detention of an individual with mental illness and entrance into a municipal criminal justice system not entirely equipped to provide the treatment necessary to preserve justice and protect the community.

To combat this cyclical process, problem solving and treatment courts have evolved to address gaps in services to persons with mental illness and co-occurring substance abuse. Mental health courts, drug treatment courts, and veterans' courts were implemented in Kansas City to address unique problems presented by these individuals. Problem solving, therapeutic, treatment courts provide specialized dockets that combine substance abuse community mental health services with judicial monitoring in order to effectively address these persons revolving through the criminal justice system. Law enforcement officials have also revised protocols regarding persons with mental illness and often have crisis intervention trained (CIT) officers respond to a call for service involving persons with possible mental health issues. Even with the evolution of treatment courts and police procedures, gaps persist throughout the legal system. Persons seriously mentally ill, who are not actively or willingly participating in mental health services, and who continue to get arrested on new charges, may cycle in and out of the civil, probate and criminal justice systems. These defendants pose a safety risk to themselves and the community.

The interaction of mentally ill individuals and the criminal justice system requires an understanding of the distinct and separate functions of federal, state, and municipal court systems, state laws and constitutional guarantees. Persons with mental illness that become involved in the criminal justice system may be moving throughout many different and distinct court processes. The state provides civil commitment and guardianship proceedings through the probate court. The probate division of the circuit court may determine the incapacity of persons through the processes of the Probate Code. State law permits for formal transfer of state misdemeanor and felony criminal court cases to probate court for Chapter 552 RSMo 2013 proceedings. Federal and municipal courts function independently from the state civil commitment and guardianship proceedings and from state court criminal proceedings.

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A municipal judge, prosecutor and defense attorney have ethical responsibilities that prohibit direct referral of mentally ill defendants to probate court. Defendants charged in municipal court may be referred by a family member or caseworker to probate courts for civil commitment and guardianship proceedings. The referral system to the probate court and appointment of a guardian is difficult when the defendant is abusing drugs and alcohol, has behavioral problems and is reluctant to participate in treatment. Even if the individual has been referred and a guardian is appointed for the individual, the guardian faced additional problems. When no services are available for the guardian to consent to, and the individual is not willing to participate in community treatment, abusing drugs and alcohol and exhibiting behavioral problems, the individual will likely become involved in the criminal justice system.

The legal system is challenged by these individuals with mental illness, co-occurring substance abuse, and unwillingness to participate with treatment in the community. When a mentally ill person violates local, state and/or federal laws, there may be an interaction with court systems that may have different outcomes for the individual. Each court system is distinct and must work within the legal and statutory constraints of their systems. Legal standards and definitions of mental incapacity, disability, dangerousness and mental defect differ between the criminal, civil and probate courts. Further, the reluctance of courts and society to compel persons to locked psychiatric facilities, forced medication and the lack of funding for long term state mental health and substance abuse inpatient services has created a problem for communities throughout the United States. The ability to provide inpatient care for these individuals with serious problems barely exists in Missouri. It is those persons that ultimately make their way in the city jail.

II. Municipal Court and Competency to Stand Trial

Currently, Missouri statutes vest the power to require competency evaluations solely with state courts.[11] For many, the only realistic possibility of receiving

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treatment will depend upon the individual committing a crime sufficient to be processed in a state court. In municipal courts, once there has been an indication of mental illness and a question of competency to stand trial raised, few other alternatives exist other than to dismiss the case because the municipality is not equipped to proceed with prosecution against an incompetent person.

In Kansas City, defendants are charged with municipal ordinance violations that could also be filed as state misdemeanor and/or felony charge(s); but the state prosecutor and/or police may refer the case to the city for filing, thus the defendant appears in municipal court rather than state court. This charging decision to file a case as a city ordinance violation is a product of longstanding community and law enforcement practice in Kansas City. The result of these charging decisions are that criminal cases which would likely be filed as misdemeanors and or felonies in other jurisdictions are filed as municipal ordinance violations in Kansas City.

When a person is arrested on a municipal ordinance violation, he or she may post bond. If the defendant is unable to post bond, they are held in detention until the next day for an arraignment. At arraignment, the municipal judge explains the charge and considers bond. The defendant may be released on the promise to return on a court date or detained and given a trial date within ten days. In order to make bond determination, the municipal court can consider two factors: court attendance and danger to an individual or to the community.[12]

If a municipal judge believes that a person may be incompetent to proceed, the court lacks jurisdiction to order an unwilling individual to the Department of Mental Health for evaluation and treatment pursuant to §552.020 RSMo 2013.[13] Missouri municipal courts are limited from committing a person to a state mental health facility for either pre-trial competency evaluation or post-trial commitment.[14] Faced with questions of competency to stand trial and an individual's unwillingness to consent to metal health evaluations, municipal judges are provided little other alternative than to dismiss the case and return the individual to the community.

In municipal court, questions regarding lack of capacity or competency to proceed as defined by § 552.020, RSMo. 2013, are often raised immediately prior to or during trial.[15] There is no statutory procedure in place to determine competency issues in municipal court cases. The determination that a defendant lacks capacity is a subjective decision made by the municipal court judge, city prosecutor or defense attorney. If the city prosecutor or municipal judge believe the defendant lacks capacity to understand the proceedings or assist in his or her defense, the case or cases are dismissed and the person is released from jail back into the community. Municipal courts also lack jurisdiction to order forced treatment and medication of an incompetent defendant. The U.S. Supreme Court has held that the 5th Amendment Due Process Clause prohibits involuntary administration of anti-psychotic drugs to a mentally ill defendant unless the defendant is facing serious criminal charges and only for the purpose to render the defendant competent to stand trial.[16] Oftentimes the most critically mentally ill and unstable individuals are released back into the community because they have been deemed incompetent to proceed with prosecution of the municipal ordinance violation(s). These repeat municipal offenders are commonly the most critically mentally ill and unstable individuals, whom also pose a greater safety risk to self and to the community.

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An additional scenario where competency may be an issue is under §552.030 RSMo 2013 where there is a lack of responsibility due to mental disease or defect and is a defense to a charge.[17] This section provides that a person is not responsible for criminal conduct if at the time of such conduct "as a result of mental disease or defect he 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".[18] Once the defense is raised, one of two things may happen. If the prosecutor accepts the defense, the court must proceed to order a commitment under §552.040 RSMo 2013. If the defense is not accepted the court must order a psychiatric evaluation. Unlike §552.020 RSMo 2013, the culpability of the person for the crime due to mental defect is for the trier of fact. It becomes a factual proof issue for both parties. If a person is found not guilty by reason of mental defect, the court must order commitment under §552.040 RSMo 2013. Again, as with §552.040, RSMo 2013, municipal courts may not order the psychiatric evaluation and cannot order the mandatory commitment under the state statute.

Any person, including treatment providers providing services to a person participating in a municipal treatment court, can petition the probate division of the circuit court in the county where the person is found for commitment to a mental health facility. The person may be committed if a determination of mental disability is found, or an alcohol or drug abuser, and because of that, presents a danger to himself or others.[19] If committed, the person is evaluated by mental health professionals to resolve if he suffers from a mental illness, or alcohol or drug abuse, and treatment is recommended. If the criteria for further involuntary treatment are met, that treatment may be provided; and hopefully, the person, upon release from the mental health facility, would be able to meaningfully participate in the municipal mental health treatment court.

However, gaps exist in services for persons committed pursuant to the state civil commitment statutes. For example, Missouri currently lacks any inpatient facilities designated by the Missouri Department of Mental Health to receive persons committed for thirty day alcohol and drug treatment under Chapter 632, RSMo 2013. Additionally, too few hospital beds are available to accept persons committed for mental health treatment under Chapter 632[20] if they are found to be dangerous to themselves or others because of mental

illness. This often leads to the early release of such patients back into the community, a community that lacks the jurisdiction and resources to involuntarily treat those patients. Further, a person may be mentally ill with behavioral and substance abuse problems, unwilling or unable to participate in the municipal treatment courts, but may not meet the dangerousness requirements for civil commitment.

III. The Inability of a Municipal Court to Determine if a Defendant is Competent to Stand Trial as a Violation of Due Process

Municipal courts in Missouri do not have jurisdiction to commit individuals to the Department of Mental Health for evaluation and treatment.[21] Municipal courts have limited jurisdiction and may not proceed with any matter unless the legislature has given them express authority to do so.[22] "Municipal courts in Missouri are courts whose jurisdiction is limited to enforcement of ordinances of that particular city." [23]

Missouri criminal, civil and probate proceedings are governed by state statute, and those statutes indicate the power to conduct those proceedings are held by the state, not municipalities. Costs provisions for these statutes require payment by the county in a misdemeanor, and by the state in felony cases.[24] No provision is made for the payment of costs from a city treasury to a state institution in cases involving violations of city ordinances.[25]

The prevailing Missouri legal opinion regarding a municipals judge's ability to mandate inpatient treatment is an Attorney General Opinion from 1978.[26] The opinion makes clear that treatment under § 552.020 or § 552.040, RSMo can only be triggered when a defendant is charged with state misdemeanor or felony charge(s).[27] The opinion specifies that criminal commitment proceedings are governed by statute and not ordinance, and reference to "any judge" in § 552.020, RSMo is not applicable to municipal court proceedings.[28] The statutory provisions provided under the criminal statute for mentally ill persons charged with a misdemeanor or felony also do not apply. §552.020.10(6) RSMo permits the transfer of the individual to the probate division for hearings under §475 RSMo to determine incapacity and guardianship and under §632.120 and 633.120, RSMo 2013 for commitment to a mental health facility as needed. However, the county prosecutor must present the evidence at any hearing regarding mental capacity to stand trial. Therefore, any order of the municipal court, prior to trial and a finding of guilt, purporting to authorize or require the detention of a citizen would be an illegal deprivation of due process in violation of Mo. Const. art. I, § 10 and the 5th and 14th Amendments to the U.S. Constitution.

Consistent with fundamental fairness and due process, an individual should not be held to stand trial, in any court, if he or she is found to be mentally incompetent. Competency to stand trial is a constitutional requirement.[29] It requires that a defendant be capable of understanding the charges against him or her in order to assist the attorney in preparing the best defense possible.[30] In *Miller v. State*[31] the court determined that a person who lacks mental capacity to understand the proceedings against him to act rationally in his own defense may not be submitted to criminal prosecution. Conviction of legally incompetent accused individuals violates due process.[32] In *Drope v. Missouri*[33] the Supreme Court of Missouri found that due process requires a psychiatric evaluation if the court has "reasonable cause"[34] to believe that the accused has a mental disease or defect excluding fitness to proceed, and a hearing if the psychiatric report is in question.[35] This determination of incompetency to stand trial is done "without traditional adversarial concern for burden of proof, reasonable cause to believe the accused suffers from mental disease or defect which affects fitness to proceed".[36] This due process requirement triggers once a legitimate question of competency raises, either by the parties or the court on its own motion.[37] The U.S. Supreme Court holds that a "defendant's fundamental right to be tried only while competent outweighs state's interest in efficient operation of its criminal justice system."[38] Unfortunately once the initial reasonable cause threshold is passed, municipal courts lack jurisdiction to conduct competency hearings and must dismiss the case to meet the due process requirements.

IV. Procedural Remedies for Municipalities

Certain municipalities may have the ability to adopt ordinances that specifically address the gaps between municipal courts and the civil commitment process. Missouri is one of many states that utilize a "home rule" charter, which is intended to allow localities to decide for themselves the form of local government that they desire and the scope of the local government's powers and to delegate autonomous power to local governments through constitutional grant not dependent on state legislative action.[39] Home rule municipalities may act on almost all issues, but they may also be preempted by the state.[40]

Essentially, a state statute occupying an applicable field does not automatically preempt a city from adopting an ordinance in the same field. The ability of the municipality to adopt an ordinance depends on an analysis concerning the nature of the matter the ordinance sets out to address. In a home rule charter city such as Kansas City, the city ordinance will be found valid if it is a matter of local concern, invalid if the matter is of state concern, or it could go either way in areas of mixed concern.[41]

In *Cape Motor Lodge v. City of Cape Girardeau*,[42] the Supreme Court of Missouri addresses the effect of statutory silence on a municipality's authority to act. In doing so, the Court lays out a test to determine when a city is preempted from enacting an ordinance where the state has created a statute or remains silent on the subject. The crux of the test surrounds whether there is a statute that expressly or implicitly prohibits the city from exercising that particular power which is determined by conflicts between the proposed ordinance and the current statute. The test to determine if a conflict exists is whether the ordinance permits what the state prohibits or prohibits what the statute permits and if an ordinance merely prohibits more than the state statue then the two measures are not in conflict.[43]

The Supreme Court of Missouri ruled that under Mo. Const. art. VI, § 19(a) home rule cities have all the power which

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the Missouri General Assembly has authority to give to any city.[44] Under Mo. Const. art. VI, § 19(a), the emphasis no longer is whether a home rule city has the authority to exercise the power involved, rather the question is whether the exercise of that power conflicts with the Missouri Constitution, state statutes, or the charter itself.[45] If there is a conflict between a constitutional or statutory provision and an ordinance then the state law provision will prevail.[46] In *Frech v. City of Columbia*[47] the court upheld a city ordinance empowering municipal judges to issue search warrants for administrative searches in conjunction with the city's code enforcement and licensing procedures for residential rental properties. The court found no limitation on the city's power to authorize municipal search warrants in state statutes regulating searches in criminal proceedings, Chapter 542, RSMo 2013, and no conflict with the court's constitutional responsibility for establishing court rules of practice and procedure.[48]

In Mo.Att'y Gen. Op. 178, *Hensley, December 8, 1978*, the opinion indicates the municipal courts do not have power to commit individuals pursuant to §552.020 or 552.040, RSMo 2013. The opinion does not address the ability of a municipality to take other remedial actions or if those actions may be precluded by state preemption. A municipality may have jurisdiction to enact ordinances that permit competency evaluations and procedures for municipal court similar to processes permitted by state courts. The opinion makes it clear that municipalities do not pay the costs associated for state psychiatric examination services and therefore lack jurisdiction to refer individuals for these services. Further, the Missouri Department of Mental Health no longer provides these services as a courtesy to the municipal court in Kansas City. With the state's reduction in psychiatric emergency department services and acute care beds, the result is that mentally ill individuals are now incarcerated in our local jail systems. The responsibility for these individuals has shifted from the state system of care to local communities.

If a municipality adopts an ordinance granting jurisdiction to municipal judges to act in a manner consistent with state statute, the financial burden attached to caring for those individuals will shift to the municipality. It is unlikely a municipality would be able to compel a state-run facility to accept transfer of individuals found in need of care or those seeking evaluation by order of a municipal judge. For many municipalities, the cost of evaluation, treatment, and care is a significant financial obligation to put upon an already thin municipal budget. However, there is a considerable amount of literature advocating that early intervention and mental health treatment will realize net gains in government expenditures over a period of time. Recently the Health Care Foundation of Greater Kansas City released a report in which it estimates the cost of mental illness in the greater Kansas City area.[49] The report indicates that the incarceration of mentally ill persons in Kansas City results in costs of $8.2 million to the criminal justice system.[50]

V. Promising Practices in Other Jurisdictions

Other jurisdictions have adopted policies which place greater authority in the hands of the municipality to assess and mental competency and deal with treatment. Ohio grants jurisdiction to municipal judges to order competency evaluations through statutory language.[51] In Seattle, the municipal court has the authority to order competency evaluations and has also established a special competency docket in order to provide a more stable evaluation process. The Seattle Municipal Mental Health Court has an initial competency assessment process that involves the public defender, a defense social worker, and a court-employed mental health professional. These assessments precede a formal competency evaluation. The Seattle Municipal Mental Health Court has also established stages of competency examination: initial competency assessment, transfer to inpatient unit for stabilization, jail based medication and treatment; and establishment of "Sell" hearings[52] to determine medication over objection and a return to court stage once the person has been restored to competency. There are three mental health courts within the Boston Municipal Court Department. Participation in the mental health court is for individuals who have been placed on pre-trial probation or post-disposition probation, and have serious mental health issues or co-occurring mental health and alcohol/substance abuse issues. When competency is an issue, after consultation with an attorney, participation may be available as a term of release.[53]

VI. Conclusion

The movement of mentally ill persons out of state mental health institutions and into jails and prisons is a function of two events: the de-institutionalization of mentally ill persons to community-based less restrictive mental health treatment, and the reduction of funding for state inpatient psychiatric and substance abuse treatment facilities. This constructs our current crisis situation where seriously mentally ill persons, oftentimes also requiring substance abuse treatment and possessing behavioral problems, revolve through the jail systems. Deficient inpatient stabilization care options, lack of funding for substance abuse treatment, and the inability to force medication compliance have created a legal quagmire for judges, prosecutors and defense attorneys. Seemingly a municipality, like Kansas City, could be authorized to adopt new city ordinances that would enable the municipality to better address the needs of those lacking mental competency to stand trial. One option is to create a mental health wing in the jail to provide treatment, mental health stabilization and a continuum of care in the community post release. Another possibility would be the creation of a formalized process to transfer persons from municipal courts to the state probate divisions to determine incapacity and guardianship for commitment to a mental health facility. There are creative solutions to the problem. Providing more tools to municipalities to address the incarceration of mentally ill persons will hopefully result in a safer community for everyone.

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Notes

1. Thanks are due to the following individuals who provided their insight and expertise to this article: Sean O'Brien, Professor; University of Missouri-Kansas City School of Law; Bruce Eddy, Jackson County Mental Health Levy; and the Honorable Daniel Wheeler. Several other beneficial suggestions have been incorporated in the article without further attribution. The authors are responsible for any mistakes or omissions which may remain.
2. Section 552.020 RSMo. 2014. (1) 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 as the incapacity endures. (2) Whenever a judge has reasonable cause to believe that the accused lacks mental fitness to proceed he shall, upon his own option or upon motion filed by the state...by order of record, appoint one or more private psychiatrists or psychologists...for purposes of performing the examination in question, to examine the accused.
3. Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*.
4. The City of Kansas City, Missouri encompasses approximately 315 square miles and is located within four counties: Cass County, Clay County, Platte County and Jackson County. The majority of cases referred to the Kansas City, Missouri Municipal Court are from Jackson County.
5. Bureau of Justice Statistics Special Report. *Mental Health Problems of Prison and Jail Inmates,* September 2006; Doris J. James and Lauren Glaze.
6. Resource Development Institute. (2011, May) *Prevalence of Mental Illness in the Kansas City Regional Correctional Center, March 2011*; Kansas City, MO.
7. "Emotionally Disturbed Person" a police term to describe a person believed to have a mental illness.
8. "...a peace officer may take a person into custody for detention for evaluation and treatment for a period not to exceed ninety-six hours only when such mental health coordinator or peace officer has reasonable cause to believe that such person is suffering from a mental disorder and that the likelihood of serious harm by such person to himself or others is imminent unless such person is immediately taken into custody." § 632.305.3 RSMo, 2013
9. *Id.*
10. The Health Insurance Portability and Accountability Act (HIPAA) enacted to protect the privacy of individually identifiable health information and the wrongful disclosure of health information. *See* 42 U.S.C. § 1320d-6.
11. Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*.
12. Missouri Supreme Court Rule 37.15(b) If an arresting officer has not released a person, the court shall order the person released upon the person's written promise to appear unless the court finds:
(1) The promise alone is not sufficient reasonably to assure the appearance of the person; or
(2) The person poses a danger to a crime victim, the community or any other person.
13. Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*.
14. *Id.*
15. RSMo 552.020, 2013. 1. 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.
16. *Sell v. United States*, 123 S. Ct. 2174, 2185 (2003).
17. §552.030.1 RSMo 2013.
18. *Id.*
19. Chapters 630-632 RSMo (2013).
20. Chapter 632 RSMo (2013).
21. Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*.
22. State ex rel. Kelly v. Trimble, 247 S.W. 187 (Mo. 1922).
23. Kansas City v. Henderson, 468 S.W.2d 48, 50 (Mo. 1971).
24. "Of particular note is Section 552.080 which specifies that costs of examinations, reports, and expert testimony are to be paid by the county in misdemeanor cases of the state in felony cases. Significantly, no provision is made for the payment of costs from a city treasury to a state institution in cases involving violations of city ordinances." Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*
25. Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*.
25. *Id.*
26. *Id.*
28. "While at first blush the term 'any judge' might seem to include municipal court judges, a further reading of the statute precludes this conclusion. The statute plainly indicates its inapplicability to municipal court proceedings, where the state is not a party, but its repeated and consistent references to "the state". See also section 552.020(6) and (8); Section 552.030(2) and (4)." Mo. Att'y Gen. Op. 178, *Hensley, December 8, 1978*.
29. United States v. DiGilio, 538 F.2d 972, 989 (3d Cir. 1976).
30. *Id.*
31. Miller v. State, 498 S.W.2d 79, 87 (Mo. App 1973).
32. State v. Wilkerson, 330 S.W.3d 851, 855 (Mo.App. W.D. 2011). In *Wilkerson*, 330 S.W.3d 851, the appellate court found that the trial court erred when it adjudicated the defendant's competency to stand trial without a mental health examination because due process requires that a defendant may not be tried unless he is competent to stand trial. Wilkerson, an inmate at the Tipton Correctional Center, was charged with endangering a correction employee and refused to cooperate with the mental examination. The trial proceeded without the examination and the defendant was convicted. The court held that the purpose of § 552.020, RSMo is to protect the constitutional due process rights of criminal defendants not to be tried while legally incompetent.
33. Drope v. Missouri, 95 S. Ct. 896 (1975).
34. *Drope*, 95 S. Ct. at 904.
35. *Id.*
36. State v. Bradshaw, 593 S.W.2d 562, 568 (Mo.App. W.D. 1979)
37. *Id.*
38. Cooper v. Oklahoma, 116 S. Ct. 1373, 1384 (1996).
39. The Missouri Constitution requires adoption of home rule charter. MO. CONST. ART. VI, § 19. The charter is a limitation on authority rather than a grant of authority. See, *e.g.,* Tietjens v. City of St. Louis, 222 S.W.2d 70 (Mo. 1949); *see also*, Skaggs v. City of Kansas City, 264 S.W.3d 694 (Mo.App. W.D. 2008)
40. State ex rel. Petti v. Goodwin-Raftery, 190 S.W.3d 501, 505 (Mo. App. E.D. 2006).

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the ordinance was content neutral as the restriction applied to where the speech took place, not the type of message and therefore concluded that Reed was not applicable. Id. citing Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015).
2. Although the court found that the ordinance was content based under *Reed*, it proceeded to analyze the ordinance under the four prong *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York* framework utilized for commercial speech. *See* De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay, 10-CV-2262, 2015 U.S. Dist. LEXIS 117926, *53 (E.D.N.Y. Sept. 3, 2015). ML

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The Board dismissed Ms. Miller's appeal regarding proper steps. Ms. Miller was correct that there was no public meeting regarding the crematorium, but the Act does not require one and notice was eventually published in the local.

Finally, the Board was satisfied that the use was compatible with the surrounding land use, and the strictly controlled regulations under which the crematorium will be allowed to operate.

Board Failed to Provide Sufficient Reasons for Dismissing Appellant's Reasonable Apprehension of Bias Concern

***Faulkner v. City of Mount Pearl,* 2015 CanLII 56308 (NL SCTD) http://canlii.ca/t/gl1tn**

The City of Mount Pearl ("City") issued a development permit to Karwood Contracting Limited ("Karwood") for construction of "affordable seniors housing". Sections 4.12 and 4.13 of the *Mount Pearl Development Regulations, 2010* authorize the City to approve applications and issue development permits. Section 4.13.2. authorizes the City to attach conditions to a permit. The Appellant appealed to the Eastern Newfoundland Regional Appeal Board arguing that the permit did not comply with the Municipal Plan and that two City Councillors were in a conflict of interest. The Board dismissed the appeal.

The Appellant is now appealing the Board's decision. The Appellant argues that the Board erred in law or exceed its jurisdiction by failing to find that two City Councillors were in a conflict of interest and the proposed development contravened s. 5.14 of the *Mount Pearl Municipal Plan, 2010* ("Municipal Plan").

HELD: Referred back to the Board on the issue of reasonable apprehension of bias.

DISCUSSION: The Board did not make an error in law or jurisdiction when it held that the conditional permit did not contravene s. 5.14 of the Municipal Plan. Nor did the Board fail to provide the Appellant a fair opportunity to be heard.

The decision was unreasonable, however, insofar as the Board failed to provide sufficient reasons as to why it rejected the Appellant's position that the involvement by two City Councilors did not give rise to reasonable apprehensions of bias. By virtue of common law and following the principle found in *Stroud v. Newfoundland and Labrador (Central Regional Appeal Board)*, 2010 NLTD 25 the grounds of appeal may include an allegation of a reasonable apprehension of bias on the part of a City Councillor. This authorizes an appeal board to overrule a decision of a municipal body when such a municipality "acts with bad faith or improper bias or fails to follow procedural guidelines that permit proposals to be appropriately considered." The Appellant is entitled to consideration of his concerns of the two City Councillors in question. ML

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41. State ex rel. Mink v. Wallace, 84 S.W.3d 127 (Mo.App. E.D. 2002).
42. Cape Girardeau, a Missouri constitutional home rule city, entered into an agreement with Southeast Missouri State University to construct a multiuse center located on the university's campus, financed by general obligation bonds from special taxes on hotels and motels. In response, a group of hotel and restaurant owners filed suit seeking a declaration that the ordinance authorizing the agreement between the city and university was invalid because the city had no authority to enter into the agreement. Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208 (Mo. 1986).
43. *Id.*
44. The Court held that the ordinance did not violate Mo. CONST. ART. VI, § 19(a) because the state law provisions and charter did not expressly or implicitly prohibit the city from entering into agreements with a state university. *Id.*
45. *Id.*
46. In *City of Kansas City v. Carlson*, the court upheld an ordinance that prohibited smoking in closed public places and places of employment with some exceptions for hotels and casinos. A sports bar and billiard parlor in Kansas City was cited by the city for allowing patrons to smoke. The bar owner contended that the city's ordinance conflicted with Missouri's Indoor Clean Air Act (ICAA) which excluded bars from its definition of public places and therefore affirmatively allowed smoking while the city's ordinance prohibited it. The city maintained that the ICAA did not permit smoking in bars and billiard parlors. Rather, the city contested, that the ICAA left those places unregulated, which created no conflict with municipal ordinances. The court found that a plain reading of the state statute did not support the bar owner's contention that it authorized those places be exempted to permit smoking or made them immune from local smoking regulation. Rather, the court found, the ICAA simply excluded those places therefore meeting its conditions of compliance. City of Kansas City v. Carlson, 292 S.W.3d 368 (Mo.App. W.D. 2009).
47. Frech v. City of Columbia, 693 S.W.2d 813 (Mo. 1985).
48. *Id.*
49. Health Care Foundation of Greater Kansas and the HSM Group, Ltd., (2012, February) *The Costs of Untreated Mental Illness in Greater Kansas City, Executive Report*; Kansas City, MO.
50. *Id.*
51. "In a criminal action in a court of common pleas, a county court, or a municipal court, the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial." OHIO REV. CODE ANN. § 2945.37(B) (West 2014).
52. *Sell*, 123 S. Ct. 2174
53. http://www.mass.gov/courts/programs/specialty-courts/ ML