



# MACDL

## *Action Report*

*Newsletter*

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

### NEWSLETTER

#### REPORT FROM THE PRESIDENT

DEAR MEMBER:

Our apologies for the long lapse in newsletter publication. We're now back on track and look forward to communicating with you every other month. Any and all suggestions, letters to the editor, trial tips, etc. will be most welcome, and I encourage you to take the time to contribute.

MACDL's CLE Committee has been hard at work finalizing plans for mini-seminars in various locations during early February. The committee would welcome members' input in this area as well. Specific dates and program information will be sent out in the near future.

The next meeting of the Board of Directors is scheduled for November 20, 1987 in St. Louis. I welcome the newest members of MACDL's Board: Dorothy Hirzy, St. Louis Public Defender; Daniel Viets of Columbia; and J. R. Hobbs of Kansas City. I would also like to extend congratulations to Robert Trout of Blue Springs. While we'll miss Bob on the Board of Directors, we take pride and pleasure in His Honor's appointment to the bench of Division 108 in Independence.

Sincerely,

THOMAS P. HOWE, President

### NOVEMBER 1987

#### CLE REPORT

MACDL'S Continuing Legal Education Committee - Charlie Atwell, Sean O'Brien, Anne Hall and Dee Wampler - have been working with Mike Baker of the UMKC CLE Office to formulate a mini-seminar. Plans are being finalized for a February program to be held in three to five locations throughout Missouri. Topics will include the ramifications of new Supreme Court Rules 24.035, 29.07 and 29.15 (replacing the current Rule 27.26 effective 1/1/88). Details will be finalized at the November 20th Board Meeting, and brochures will follow.

#### RECENT MISSOURI DECISIONS

##### SUPREME COURT

##### ..... FAILURE TO INSTRUCT ON ENTRAPMENT:

State v. Raymond Wells, No. 68921, 6/16/87  
(St. Louis County). Defendant's (Cont. on pg. 2)

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**RECENT MISSOURI DECISIONS-SUPREME COURT (Continued from pg. 1)**

conviction of receiving stolen property is REVERSED AND REMANDED. He had produced evidence that, while working at Avis, he was encouraged to sell cars to an undercover officer buying stolen cars and parts. After initially refusing to do so, he eventually sold him three cars. The Court en banc, Higgins, C. J., held that because of such evidence the jury should have been instructed on his theory of entrapment.

**EASTERN DISTRICT**

**ORAL AMENDMENT DOES NOT ADVISE DEFENDANT OF CHARGE:**

State v. David Hughes, Jr., No. 50712, 6/9/87 (St. Louis County). Defendant was convicted of stealing over \$150 after the State orally amended the charge from stealing 3rd offense. Division One, Satz, J., REVERSED AND REMANDED, holding that oral amendment was not sufficient to properly apprise defendant of the charges against him.

**IMPROPER CROSS-EXAMINATION BY PROSECUTION:**

State v. Pleasant Hurst, No. 50800, 6/2/87 (Lincoln County). Defenddant's conviction of sodomy is REVERSED AND REMANDED. Division Five, C. Gaertner, J., holds the trial court erred in allowing the prosecutor to refer to alleged acts of misconduct in great detail on cross-examination of defendant because they were wholly unsupported by the evidence.

**BATSON HEARING REQUIRED:**

State v. Johnnie Williams, No. 50993, 6/2/87 (St. Louis County). Defendant appealed the denial without a hearing of his request for mistrial. He was convicted of 1st and 2nd degree burglary after

the prosecutor used her peremptory challenges to strike all blacks from the panel. Division One, Satz, J., REVERSED AND REMANDED WITH DIRECTIONS, holding defendant made an adequate record to require a hearing to determine if the prosecutor's strikes were to discriminate against him.

**FINDINGS REQUIRED FOR DENIAL OF 27.26 MOTION:**

Steven Toney v. State, 52124, 5/26/87 (St. Louis County). Holding that the trial court made inadequate findings of facts and conclusions of law when denying Toney's Rule 27.26 motion, Division One, Crist, J., has REVERSED AND REMANDED.

**SOUTHERN DISTRICT**

**FAILURE TO STRIKE JURORS PARTIAL TO POLICE TESTIMONY:**

State v. Leonard Bowling, No. 14685, 6/1/87 (Phelps County). Holding that the trial court erred in denying defendant's motion to strike a venireman for cause because she expressed uncertainty about whether she would give more consideration to the testimony of a police officer, Division One, Crow, J., has REVERSED AND REMANDED defendant's convictions for 1st degree robbery and armed criminal action.

State v. Elmer Stewart, No. 14592, 5/15/87 (Greene County). Defendant's convictions for DWI and driving with a revoked license are REVERSED AND REMANDED. Division Two, Hogan, J., holds it was an error not to excuse a juror who indicated she would accord greater weight to police testimony .

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**WESTERN DISTRICT**  
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**ATTORNEY GENERAL OPINIONS**  
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**INSUFFICIENT EVIDENCE:**

State v. Bernard Boney, No. 38640, 5/26/87 (Buchanan County). Defendant's conviction for possession of a controlled substance is REVERSED for insufficient evidence.

**IMPROPER CROSS-EXAMINATION BY PROSECUTION:**

State v. Norman Goodman, No. 37570, 6/2/87 (Boone County). Defendant was convicted of kidnapping and sodomy. The State was permitted to cross-examine defendant about his prior inconsistent statements. Division Three, Gaitan, REVERSED AND REMANDED, holding that the line of questioning was improper inasmuch as the statements were prior inconsistent statements on collateral matters and the prosecutor was bound by

In a CONCURRING OPINION, Judge Lowenstein suggested the questions were improper and inadmissible, going beyond prior crime impeachment to the use of the prior crime to prove guilt.

Judge Manford DISSENTED, believing the prosecution laid a proper foundation for the admission of the evidence.

**NO APPOINTMENT OF COUNSEL:**

Rickey Vaughn v. State, No. 38793, 6/9/87 (Jackson County). The denial of Vaughn's 27.26 motion is REVERSED for violation of the rule which requires immediate appointment of counsel upon the filing of the motion without regard to the issues raised.

**POWERS OF MAYOR OF 3RD CLASS CITY:**

Opinion Letter No. 51-87, 6/4/87 (Requested by W.O. Howard). The mayor of a 3rd class city under Chapter 66, RSMo 1986, has authority to look at the city police department daily log book. Pursuant to Sec. 610.100-610.120, the mayor may look at closed arrest records only for purposes of prosecution, litigation, sentencing and parole consideration. Such mayor has power to remit fines and forfeitures and grant reprieves and pardons for offenses arising under city ordinances.

**RECENT MISSOURI LEGISLATION  
(EFFECTIVE 9/28/87)**

**CCS #3 HCS SS #2 SCS SB 230  
ALCOHOL DRUG AND PENALTIES**

Repeals sections 195.200, 302.060, 302.309, 302.312, 311.32S, and 577.041, relating to alcohol and drugs, and enacts fourteen new sections relating to the same subject, with an effective date for certain sections.

302.060 Clarifies language regarding the denial of a driver's license to a person convicted twice for driving while intoxicated or convicted of involuntary manslaughter while driving while intoxicated, and stipulates a revocation period of five years from the date of the second conviction for driving while intoxicated.

302.309 Provides for the reinstatement of licenses for those individuals who have lost their license whose convictions were more than five years apart.

577.041 Refusal of a drunk driving test can be used as evidence against the driver in a criminal case. (Recent legislation continued on page 4)

**Section 1:** The first new section of this bill provides for the revocation of driving privileges for any person under 21 years of who commits one of the following offenses:

- Any state alcohol related traffic offense;
- Any offense in violation of the laws of Missouri involving the possession or use of alcohol, committed while operating a motor vehicle;
- Any offense involving the possession or use of a controlled substance as defined in chapter 195;
- Any offense involving the alteration, modification or misrepresentation of an operator's or chauffeur's license in violation of section 311.328; and
- Any offense in violation of state law involving the possession or use of alcohol for a second time; except that a determination of guilt or its equivalent shall have been made for the first offense and both offenses shall have been committed by the person when the person was under eighteen years of age.

The court must forward to the director of revenue the order of revocation. If the person is less than sixteen years of age at the time of the offense, the court must hold the the order of revocation until thirty days before the person's sixteenth birthday- and then must forward the order to the director of revenue.

#### **SB 314 CAFETERIA BENEFIT PLAN**

Repeals section 33.103. relating to compensation of state employees, and enacts one new section relating to the same subject.

This act creates what is referred to as a "cafeteria benefit plan" for state employees. Under the provisions of this bill the commissioner of administration may establish a cafeteria plan, allowing employees to choose from among several benefits,

and provide a written copy of the plan to employees 120 days prior to its effective date. An employee's salary would be reduced in an amount equal to the cost of benefits chosen, thereby allowing the employee to purchase additional benefits beyond the standard state provided benefits using pre-tax dollars.

#### **CCS SB 328 STATUTORY BASIS FOR PATERNITY**

Repeals section 516.107 relating to the establishment of the parent and child relationship, and enacts twenty-four new sections relating to the same subject, with an emergency clause.

This legislation is entitled the "Uniform Parentage Act."

It creates presumptions as to the paternity of a child which can only be rebutted by clear and convincing evidence.

The bill provides for actions to establish paternity, states who may bring these actions, when they may be brought, and gives the circuit court jurisdiction in said actions; the rules of civil procedure govern.

The right to a jury trial is established. This bill had an emergency clause and became effective on 7/15/87.

#### **SS SCS HCS HB 113,501 & 668 OBSCENITY LAW CHANGES**

Repeals sections 542.281, 542.301, 568.100, 573.010, 573.020, 573.030, 573.040, 573.050, 573.060, 573.070, and 573.080, relating to certain crimes, and enacts thirteen new sections relating to the same subject, with penalty provisions and an emergency clause.

This bill makes numerous changes in the statutes dealing with pornography and obscenity and creates two new crimes.

Some of its major provisions include:

The crime of "possession of child pornography" is created: a first conviction is a class A misdemeanor, any subsequent conviction is a class D felony.

The crime of "coercing acceptance of obscene material" is created, a class D felony.

### **HCS SS SCS SB 39 HOUSE ARREST**

Repeals section 217.775, relating to probation, and enacts in lieu thereof three new sections relating to the same subject, with an emergency clause.

Would require the circuit court, before granting "shock probation," to notify the state in writing

the state to request a hearing within ten days of receipt of notice. Prohibits the granting of shock probation to anyone convicted of murder in the second degree.

This bill also creates a program of house arrest for those inmates serving sentences for class C or D felonies who have one year or less remaining prior to release on parole, conditional release, or discharge. Provisions are made for supervision and for the payment of costs, as determined by the Department of Corrections, by the inmate for the cost of his/her house arrest. The bill also creates the crime of "failure to return to house arrest," making it a class D felony.

This bill had an emergency clause and became effective 6/19/87.

### **HCS SB 40 COURTROOM INTERPRETERS AND TRANSLATORS**

Repeals sections 491.300 and 546.032, relating to handicapped persons, and enacts in lieu thereof two new sections relating to the same subject. This bill would specify that fees paid to courtroom interpreters and translators shall be available in

civil and criminal cases, and the amount of fee shall be determined by the court, and taxed against the state in criminal cases.

The bill also would extend the provisions which were repealed last August, for interpreters for the deaf, to municipal courts.

### **HCS SB 83 65 MPH SPEED LIMIT**

Repeals sections 304.009, 304.010, and 304.012, relating to the speed limit on certain roads and highways, and enacts two new sections relating to the same subject, with penalty provisions and an emergency clause.

This bill, which became effective on May 1, 1987, raises the speed limit on rural interstates to 65 mph for cars; 60 mph for trucks weighing in excess of 24,000 lbs.

### **HCS HB 598 CHILD VICTIM WITNESS PROTECTION LAW**

This bill repeals section 491.675, relating to the protection of certain child victims, and enacts twenty three new sections relating to the same subject, with penalty provisions.

This legislation alters the Child Victim Witness Protection Law to include the following provisions:

Upon the motion of the juvenile officer, the court may order that an in-camera videotaped recording of the testimony of an alleged child victim be made for use as substantive evidence at a juvenile court hearing at which a child is alleged to be a victim of abuse or neglect. There is an opportunity for cross-examination by the alleged perpetrator's attorney.

The act also requires any criminal case or juvenile court hearing involving a child witness or victim be given docket priority and extends the statute of limitations for sexual offenses involving children to ten years for felonies and five years for misdemeanors.

**PRIVATE SECTOR  
PRESENTENCE  
REPORTS**

With increasing frequency, criminal defense attorneys are utilizing private sector presentence investigation reports in their repertoire of defense services. There is growing acceptance of private presentence investigation reports by both State and Federal judges. With dwindling resources available for the singular purpose of incarceration, State and Federal judges are giving strong consideration to innovative alternatives to incarceration. Among the alternatives, we now see increasing use

of community service, home detention, innovations in drug and alcohol programming, and many more.

It is commonly held by ABA Standards for Criminal Justice: Sentencing Alternatives and Procedures, 18-6.3, that private sector presentence investigation reports are a valuable tool for the attorney during the sentencing phase. Defense attorneys have long recognized the value of such reports but the problem, heretofore, has been one of limited resources. In other words, competent private presentence investigation reports simply have not been available at the local (*cont.. below*)

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***(PRIVATE SECTOR REPORTS Continued)***

In the past, it has been successful defense strategy to have a private presentence investigation report but such a report becomes more important with the imminent changes in the Federal Criminal Code which go into effect November 1, 1987. We are on the eve of Federal Criminal Law marked by guideline sentencing, enhanced prosecutorial discretion, mandatory minimum sentences in some cases, and abolition of parole. With the onset of such far reaching changes, independent analyses of criminal defendants is a must which can be accomplished through private presentence report.

Midwest Business & Legal Investigations at Suite 213, 819 Walnut, Kansas City, Missouri, (816-556-9431), is currently engaged in preparation of private sector presentence investigation reports at the request of defense counsel and clients. The experience of this company has been at both the Federal and State level. Its owner, Ronald K. Ninemire, has 16 years of experience in working with State and Federal judges as a probation officer and is available to consult or to service any of the diverse investigative needs of the legal community.