MACDL
Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

President's Letter Winter 1990

Dear Fellow MACDL Members:

As the current President of MACDL, I again welcome the opportunity to update you on the activities of your Association. The Board of Directors met in St. Louis on October 5, 1990 in conjunction with the Missouri Bar annual meeting and on December 5th in Kansas City. We discussed the many issues which reflect on the practice of criminal law in the State of Missouri. Plans are continuing to be formulated for the upcoming annual seminar, which is now set for April 19-20, 1991 in St. Louis. We also cosponsored the Public Defender Christmas party in Kansas City on December 5th. The annual seminar will be co-sponsored with the National Association of Criminal Defense Lawyers, and several nationally prominent criminal defense lawyers will be appearing to share their thoughts on the criminal practice. Anyone wishing to attend will find this seminar to be not only informative, but of the highest caliber. Please mark your calendars and plan to attend.

MACDL has co-sponsored a number of seminars in the State of Missouri, including the fall criminal practice seminar, which was put on at six locations within the State. The program was very well attended and extremely well received, and this hopefully will become an annual event for MACDL. A DWI seminar was put on in St. Louis on November 16, 1990, and over 80 lawyers had the opportunity to see three nationally known experts in the area of DWI. Don Nichols, who authors a nationally known treatise on DWI, appeared, as well as Tom Burr, a chemist and toxicologist, who assisted in the defense of Captain Hazelwood, the pilot of the Exxon Valdez, and who successfully appeared on behalf of Captain Hazelwood at his criminal proceedings in Alaska. Also appearing on the program was Gary Trichter, a nationally known lecturer and speaker in the area of DWI, who came from Texas to share his thoughts on representing the allegedly impaired driver.

With the upcoming legislative session about to begin, the chairman of our Legislative Committee, Dan Viets, is working with our lobbyist, Randy Scherr, to track any pre-filed legislation, and to target which bills should be looked at by our association. Further information will be provided to our membership as to which legislation needs your attention and the attention of the legislators whom

Continued on pg. 2

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President's Letter -- Continued from pg 1

you know and who represent your geographical area.

We continue to work on providing you with a quality publication, and will hope to have regular features in our newsletter which will be of interest and will provide valuable information to the criminal practitioners in the State of Missouri.

Our next Board of Directors meeting is March 8, 1991 in Columbia at 4:30 p.m., and anyone interested in attending is more than welcome.

We did have a number of members who stayed around to attend the Board of Directors meeting in St. Louis in October, and we welcome any member's participation in our Board meetings.

Should you know anyone who has any interest in becoming a member of MACDL, have them contact me, or provide me with their name so that we can solicit their membership.

I look forward to meeting with you at the annual seminar in April of 1991, and hope that you have a happy and healthy holiday season.

Bernard Edelman
President - MACDL

Congratulations to the following new members of the National Association of Criminal Defense Lawyers and thanks for joining through MACDL:

Tom Howe, St. Louis
Frank Anzalone, Clayton
D. Warren Hoff, St. Louis (P. D.)
Mary Clare McWilliams, Columbia (P. D.)
Max Mitchell, Sedalia
Sean O'Brien, Kansas City
Chris Sullivan, St. Louis

BE AN ADVOCATE!

Your colleagues would like to hear from you. MACDL wants to publish high quality articles, model motions, reviews, practice pointers, and comments concerning timely issues in criminal law and procedure. Please submit your letters, motions, and articles to:

Francie Hall
Executive Secretary
MACDL
P. O. Box 15304
Kansas City, MO 64106

If you are not currently a member of MACDL, take a moment to complete a photocopy of this form and mail it today.

MACDL - MEMBERSHIP APPLICATION

Annual Dues
(Circle the Appropriate Amount)

Sustaining Member	$200.00
Officers, Board Members & Past Presidents	
Regular Member:	
Licensed 5 Years or More	100.00
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Includes Full-time Professors at Accredited Law Schools, Members of the Judiciary, Full-Time Law School Students, Paralegals and Legal Assistants.	20.00
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I AM CONCERNED

by Robert Duncan

When I commenced the practice of law in 1959, in the good old days, the defense of a criminal case was a different ball game than it is today. There was no public defender's office and when counsel was appointed he worked without any hope of compensation. Most assistant prosecutors were part-time, as were most of the assistant attorneys general. There was no discovery whatsoever; counsel defended a case based upon the information or indictment and what knowledge he could glean from his client or perhaps a friendly witness or police officer. Search warrants were commonly issued on a complaint that stated "There is now at (address) property that was stolen in a **burglary**," with no further statement of probable cause. All appeals from felony convictions were to the Supreme Court, and if the appellant did not file a brief the Supreme Court reviewed all the issues raised in the defendant's motion for new trial. There was no post-conviction motion to vacate sentence. The death penalty could be imposed for murder, robbery and even statutory rape, and when the death penalty was sought there was no separate penalty stage of the trial. Computers were not used by the clerk's office, nor did law offices have FAX machines or word processors. Photocopy machines were in their infancy and carbon paper was used to make copies. There were no standard forms of instructions or of information and indictments - the attorneys had to prepare their own. When a defendant was charged with being a second offender, the jury heard the evidence regarding his prior convictions during the State's case in chief. Television had not yet educated a potential defendant that the police when they arrested him must give him a Miranda warning - Miranda had not yet been decided. Nor had television saturated potential jurors with prejudice. There was no demand for "victim's rights." Indeed, juries sometimes acquitted a young defendant of robbery because they felt that the minimum of five years was too stiff a sentence. Magistrate judges were commonly laymen. Marijuana was something that only musicians and actors used. Cocaine was a medicine.

Rights, however, are somewhat like taxes. Just as taxes once imposed never seem to disappear, a right once infringed upon is never restored. I am concerned. I am concerned about the direction that the criminal justice system is now heading. The police have adopted a "Hill Street Blues" mentality and their guiding principle seems to be "do it to them before they do it to you," and we know who the "them" is. A bad search warrant does not result in a suppression if the police officers acted in "good faith." Has anyone ever heard a police officer testify he acted in bad faith? The Fourth Amendment has almost disappeared. Undercover police officers commonly violate the law. Entrapment is not a winnable defense. New scientific methods such as DNA are being accepted by courts without any true scientific verification. Wiretaps, concealed mikes, pen registers, trap and trace and consensual recording are now legal. Fingerprint, hair, fiber, handwriting, blood, sperm and tool mark comparisons are

Continued on pg. 5

I Am Concened (continued)

readily accepted by courts and juries even when made by incompetent untrained "experts." When a fingerprint is found that is now your client's, that fingerprint suddenly becomes "of no value." It should be remembered that earlier in this century the Bertalian System of identification was used to obtain convictions. That system was later found to be totally invalid, but the defendants weren't released.

I am concerned. The grand jury process is abused. Grand juries are now mere rubber stamps for the prosecutor, and prosecutors often use a grand jury to avoid affording the defendant a preliminary hearing when the defendant is likely to be discharged; or they are used to secure a no true bill against a favored politician or police officer. Attorneys are required to testify before grand juries regarding the source of their attorney's fees. Immunity is granted to witnesses, even those already convicted of the offense about which they are required to testify. The Fifth Amendment is no longer an absolute right. "Drug profiles" afford an excuse for the stopping of innocent travelers and any action by a person can fit a drug profile which exists only in the mind of the officer. The right of confrontation has been substantially diminished. Prior inconsistent statement, which were traditionally used to establish that a witness was lying, are now admissible in many cases as substantive evidence even when the witness denies making the statement, thus affording the prosecution the ability to convict the defendant on either/or basis. A defendant, in cross-examining a witness with prior inconsistent statement, faces the dilemma that in doing so he is presenting the jury with substantive evidence. By the use of so-called other crimes evidence, the prosecution is allowed to bring up during the trial alleged prior misconduct of the defendant, including those upon which he has been acquitted or no charges were brought.

The police seem to have forgotten how to investigate a crime and now rely in most cases upon snitches. Any scumbag can receive a deal by which his sentence is reduced or he/she gains his/her freedom by merely agreeing to testify against a target chosen by law enforcement officials. These scumbags are often career criminals who are given new identities, relocated and released upon the world to continue their criminal career, often under the authority of law enforcement officers. Prosecution witnesses can legally be paid substantial sums. Many multiple-defendant cases are filed with little or no evidence, and convictions are obtained as a results of one of the defendant's caving in and agreeing to testify against the others. Money and property have now become evidence of guilt. Investments are now "money laundering," and property and money may be seized on the owner to established that he obtained the money or property lawfully, by the sweat of his brow. Where did due process go? Once the defendant is convicted, the amount of restitution is determined by the victim, generally without any real means of contesting that amount.

It was recently announced the 750,000 people are confined to jails and penitentiaries in the United States, including many who are old and/or ill. Many are receiving sentences of thirty and fifty years without the possibility of parole.

Continued on pg. 6

I Am Concened (Cont)

The federal guidelines, with little consideration for the particular defendant, establish that a particular crime calls for a particular sentence, often very long. Juries have been brainwashed into a "lock em up forever" mentality. The war on drugs, even though it is being fought by every state, local and federal agency, as well as by the employees of airlines, the phone company and numerous other private organizations, and even after the expenditure of billions of dollars, the seizure of tons of drugs and the confinement of alleged drug dealers upon extremely long sentences, has not succeeded. The price of drugs is lower today than before the war commenced. In my opinion, the war on drugs is a misnomer: it should be called the war on the constitution. That money can certainly better be spent on education, unemployment and housing, the lack of which is the true cause of the drug crisis. Unfortunately, the economic situation is such that we need a war economy in order for big business to get richer and , if we cannot have a Vietnam, we need a "war on drugs." After all, it is the poor who will suffer the ravages of such a war and it is the poor who will pay for it. I am concerned.

I do see two lights at the end of the tunnel:

1. Hopefully, the horrible decisions being rendered by appellate courts in fighting the war on drugs will be like those horrible decisions rendered by appellate courts during prohibition: once the war is over, those decisions will reside only in dusty law books.

2. Second, at my age I don't have to worry much about the future and can look back on the "good old days." ■

CALENDAR OF COMING EVENTS

MACDL BOARD MEETING
FRIDAY,
MARCH 8, 1991
COLUMBIA

MACDL ANNUAL MEETING AND SEMINAR
CO-SPONSORED
BY THE MISSOURI
BAR AND NACDL
FRIDAY/SATURDAY
APRIL 19-20, 1991
HYATT REGENCY
UNION STATION
ST. LOUIS

HABEAS CORPUS: THE STATE'S GREAT WRIT - OR IS IT?

by Burt Shostak

Representation of capital murder defendants in habeas corpus proceedings is neither for the faint of heart nor the impatient. All too often we, as appointed counsel, come within hours of beating back the grim reaper only after continuous bombardment of procedural road blocks set up by the state. Two favorite such road blocks are procedural default and exhaustion of remedies.

Procedural default occurs when a defendant does not comply with a state procedural rule. For example, failure to object to inadmissible evidence (a state procedural rule) prevents raising the admission of that evidence as an issue on appeal. Failure to exhaust remedies occurs when a defendant fails to present an issue to the state court for its determination, such as failure to raise an issue on appeal.

Oftentimes counsel in a federal habeas proceeding undertakes representation when a petition for relief has been filed by the defendant pro se or by one not familiar with all intricacies of federal habeas litigation. Consequently, we are first met with a petition which may not contain all of the grounds which should have been pleaded, and more than likely some of them have not been presented to the state court for its review. Hence, we are immediately met with the choice of either having to dismiss the petition or proceeding on the exhausted grounds only. See Rose v. Lundy, 455 U. S. 509, 520, 522 (1982); Graham v. Solem, 728 F. 2d 1533, 1538 (8th Cir.) cert. denied, 469 U. S. 842 (1984). The severity of the problem is demonstrated by the Eighth Circuit's recent description of the exhaustion doctrine in Smittie v. Lockhart, 843 F. 2d 295, 296 (8th Cir. 1988) (citations omitted):

> Federal courts must conduct a four-step analysis to determine whether a petition may be considered when its claims have not been presented to a state court .... First, the court must determine if the petitioner fairly presented "the federal constitutional dimensions of his federal habeas corpus claim to the state courts." .... If not, the federal court must determine if the exhaustion requirement has nonetheless been met because there are no "currently available, non-futile state remedies", through which the petitioner can present his claim. ... If a state remedy does not exist, the court next determines whether the petitioner has demonstrated "adequate cause to excuse his failure to raise the claims in state court properly." .... If the petitioner can show sufficient cause, the final step is to determine whether he has shown "actual prejudice to his defense resulting from the state court's failure to address the merits of the claim." ..... The petition must be dismissed unless the petitioner succeeds at each stage of the analysis.

Obviously, it would be a disservice to the defendant to proceed only on a select few issues. However, there is a third possible alternative - move the federal court for a stay of proceedings in order that a state habeas proceeding under Rule 91 can be pursued and by all means move to keep the stay of execution in effect. There is authority for the federal court to retain remedies. Shaw v. Martin, 613 F. 2d 487 (4th Cir. 1980); Clarke v. Grimes, 374 F. 2d 550, 553 (5th Cir. 1967); Whitney v. Wainwright, 339 F. 2d 275, 276 (5th Cir. 1964). See also Kilgore v. Delo, Case No. 89-1892C(2) (E.D. Mo.); Neal v. Delo, Case No. 89-1893C(1) (E.D. Mo.).

Is state habeas a viable remedy? In the past, Rule 27.26 was the exclusive post-conviction remedy. That rule has since been replaced with Rule 29.15. The Missouri Supreme Court has recognized the fact that Rule 29.15 was not a bar to habeas relief, White v. State, 779 S.W. 2d 571 (Mo. 1989) and Kilgore v. State, 791 S.W. 2d 393 (1990). There has, however, been no clearly expressed statement from the Supreme Court of Missouri that habeas corpus is a remedy available by which constitutional challenges may be tested. Two federal district court decisions have held that the state habeas remedy is available. Fletcher v. Armontrout, 725 F.Supp. 1075, 1093 (W.D. Mo. 1989) and Evans v. Kemna, 724 F.Supp. 681 (W.D. Mo. 1989).

Greater insight into the question of the availability of state habeas will be gained from an opinion by the Eighth Circuit when it rules in Byrd v. Delo, No. 90-1491. In a panel opinion in that case filed October 19, 1990, the court upheld a dismissal of Byrd's second federal habeas petition, denied his motion to stay execution so that state relief under Rule 91 could be sought, and dissolved his stay of execution. Byrd immediately petitioned the Missouri Supreme Court for Rule 91 relief, which was denied in a matter of hours. Still within the time for the filing of a motion for rehearing, the Eighth Circuit then granted Byrd a rehearing and a stay of execution. The state then moved the Missouri Supreme Court to modify its order; it did so, this time dismissing Byrd's petition on procedural grounds. The state then moved the Eighth Circuit to dissolve the stay on the basis of the new Missouri Supreme Court ruling. The Eighth Circuit refused, as did the United States Supreme Court. Thus the issue of viability of the state habeas now appears to be before the Eighth Circuit.

Until order is brought out of the chaos born of the state's unwillingness to resolve issues on the merits, we must continue to fight for every opening to get relief on the merits. After all, if all the merits of all the issues are not addressed, how can we be certain we are not executing an innocent person simply as a result of procedural pitfalls? How else can you represent "those kinds of people"?

"SPEEDY" ACQUITTAL

by Dan Viets

A Springfield jury recently acquitted a woman of methamphetamine possession after deliberating for only 35 minutes, barely enough time to elect a foreman.

MACDL Board Member, Dee Wampler, persuaded the jury that his client had no knowledge of methamphetamine found in her locker in the maintenance facility of the Missouri State Highway Department. Wampler contended that his client had been set up because she had joined a class action law suit against the highway department for its failure to hire women for maintenance positions.

Assistant Greene County Prosecutor, Pat Merriman, sarcastically applauded the end of Wampler's closing argument, prompting Wampler to twice ask the judge to repremand the prosecutor.

Evidently the prosecutor's sarcasm was lost on the jury.

MISSOURI CRIMINAL LAW UPDATE

By Sean O' Brien

State v. Milliorn, 794 S.W.2d 181 (Mo. banc 1990). The state appealed from the trial court's order suppressing drugs and money found on the defendant's person by a Missouri Highway Patrol trooper. The trial court disbelieved the trooper's testimony that he was able to smell marijuana in the defendant's vehicle, which undermined the trooper's claim of probable cause. In affirming the trial court, the Supreme Court emphasized the state's burden to show by a preponderance of the evidence that the motion to suppress should be overruled. See 542.296 RSMO. (1986). The court also rejected the prosecutor's argument that the inevitable discovery rule applied because the marijuana would have been discovered in the course of the inventory of the vehicle's contents. In rejecting this argument, the court emphasized the need for standard procedures in the local police department for conducting inventory searches, and the lack of any evidence by the state regarding routine inventory procedures for impounded vehicles. Also see the concurring opinion by Judge Higgins, which takes the broader view that an inventory search under the circumstances of the case would not have been valid.

State v. Keil, 794 S.W.2d 289 (Mo. App. 1990). The defendant was convicted of four counts of sodomy, one count of which was based on the defendant having put his finger in the victim's rectum. The court reversed the conviction on that count because the definition of deviate sexual intercourse requires that the genitals of either person be involved.

In closing argument, the prosecutor referred to defense attorneys as "vultures." The trial court sustained defense counsel's objection and instructed the jury to disregard the statement, but overruled a motion for mistrial. In upholding the decision not to grant a mistrial, the court nevertheless said that "the use of the word was intemperate and unprofessional."

Pelton v. State, 794 S.W.2d 301. The movant sought post-conviction relief from a conviction of second degree robbery, alleging that his attorney advised him that he could be held liable as a principal for acting as an accessory after the fact. Pelton's 24.035 motion was denied without a hearing. In reversing and remanding the case for an evidentiary hearing, the court of appeals held that the allegation, if proven by a preponderance of the evidence, would entitle Pelton to relief.

State v. Kiesau, 794 S.W.2d 309. The state appealed from an order of the Circuit

Court of Ozark County suppressing evidence in four felony cases. The state failed to prepare and file a transcript of the suppression hearing, and the court of appeals ordered the appeal dismissed. In doing so, the court discussed the right of the state to file an interlocutory appeal.

State v. Simpson, 793 S.W.2d 182 (Mo. App. 1990). The defendant's conviction for attempted robbery first degree, assault in the first degree and armed criminal action was reversed due to the trial court's failure to exclude a venireperson who believed "that police officers are less likely to lie under oath than the average citizen." See State v. Draper, 675 S.W.2d 863 (Mo. banc 1984).

Lindsay v. State, 790 S.W.2d 521 (Mo. App. 1990). Lindsay's motion under Rule 27.26 was denied by the circuit court after an evidentiary hearing. The court reversed and remanded the judgment for entry of findings of fact and conclusions of law as required by Fields v. State, 572 S.W.2d 477 (Mo. banc 1978). The circuit court's order simply stated that there was "absolutely nothing in the trial transcript or evidence presented on this motion to support movant's contintions [sic]." The court of appeals held that "the cursory judgment fails to afford this court any basis for meaningful review. The judgment failed to resolve the factual disputes in the evidence. Under Fields, this court is not allowed to imply findings from the judgment."

State v. Richardson, 791 S.W.2d 885 (Mo. App. 1990). The defendant was convicted of unlawful use of a weapon and sentenced to four years. The prosecutor cross-examined the defendant about a prior conviction for unlawful use of a weapon. In doing so, the prosecutor stated, "you have spent time, . . . in the jail because you blew a hole that big around in the door in a home . . . with another human being on the other side of the door." The defense lawyer's objection was sustained, and the jury was instructed to disregard the remark. Thereafter, the prosecutor repeated the reference to the hole being blown in the door, and an objection was again sustained, but a motion for mistrial was denied. The prosecutor thereafter cross-examined the defendant about the fact that the gun involved in the charged offense had been stolen 10 hours before the defendant was found possessing it. The conviction was reversed because the prosecution improperly emphasized the details of the prior conviction, and because the prosecutor introduced evidence that the defendant stole the gun used in the crime for which he was on trial. The court emphasized the fact that the prosecutor continued to question the defendant about the details of the earlier conviction after the court had sustained an objection to the same conduct.

Thurston v. State, 791 S.W.2d 893. This was an appeal from the denial of an evidentiary hearing of the defendant's Rule 29.15 post-conviction relief motion. The trial judge testified at the hearing that he told Thurston's mother that the defendant should have tried to negotiate a plea because, "you go to trial as a persistent or prior offender and get convicted, I'm more than likely going to give you a max-type sentence and I'm going to run them consecutive. That's been consistent with me for 12 years now." In reversing the conviction and sentence, and remanding the case for re-sentencing, the court of appeals stated, "a practice which discourages the Fifth Amendment right not to plead guilty, which deters the Sixth Amendment right to demand a jury trial and which chills assertion of these constitutional rights by penalizing those who choose to exercise them is patently unconstitutional." United States v. Jackson, 390 U. S. 570, 581 (1968). The opinion contained some very good language about the duty of the trial court to give each defendant individualized sentencing consideration and the unconstitutionality of the policy announced by the judge.

State v. Hooker, 791

S.W.2d 934 (Mo. App. 1990). The defendant was convicted of the crime of sodomy under an allegation that he "inserted his finger into the anus of [the victim]." Because he was not charged with any sexual act involving the genitals of either party, the court reversed the conviction and ordered the defendant discharged.

State v. Ware, 793 S. W. 2d 412 (Mo App. 1990). Defendant was convicted of first degree murder and forcible rape. The court reversed the conviction for first degree murder in a death-waived case based on the following closing argument of the prosecutor in the guilt phase of the trial:

"Now you know, [defense counsel] talked to you about what [the victim] was entitled to. [The victim] was entitled to her life. She wasn't entitled to by hung (sic) from a mirror of a dump truck. That man (indicating) is entitled to life in prison, that's what he is entitled to. It's more than [the victim] has to look forward to. That's what he should get. That's what punishment for murder first degree is: life imprisonment."

The court sustained defense counsel's objection, but refused to instruct the jury to disregard the statement. The court found that to be prejudicial error, stating , "arguments which suggest that the jury determine guilt, or the level of guilt, on the basis of a desired punishment have been consistently treated as improper and prejudicial."

State v. Courter, 793 S.W.2d 386. The defendant's conviction for sodomy was reversed because of the admission of evidence of the defendant's past sexual conduct. The opinion contains a lengthy discussion about the use of separate incidents of the defendant's sexual misconduct in sex offenses.

Rodden v. State, 795 S.W.2d 393 (Mo. banc 1990). In this affirmance of the denial of a 27.26 motion, the Missouri Supreme Court takes us on a nostalgic trip down memory lane by reviewing the reasonableness of post-conviction procedures under Rule 27.26 and directly contrasting them with the new interpretations of Rules 29.15 and 24.035.

State v. Lang, 795 S.W.2d 598 (Mo. App. 1990). The defendant was convicted of first degree burglary. The court of appeals reversed for the failure of the trial court to exclude a juror who equivocated on his ability to follow the court's instructions with respect to the burden of proof.

State v. Stepter, 794 S.W.2d 649 (Mo. banc 1990). The defendant's conviction for first degree murder was reversed because of the trial court's failure to instruct the jury on the lesser included offense of second degree murder. The opinion contains some very good discussion about the evidentiary support which required the court to give the instruction.

City of Excelsior Springs v. Redford, 795 S.W.2d 123 (Mo. App. 1990). The defendant's conviction was reversed because the information describing the offense as "stealing/shoplifting" was insufficient to state the essential facts of the offense charged.

State v. Hedrick, Western District Court of Appeals No. 42273 (opinion filed September 25, 1990). The defendant was convicted of two counts of sodomy and one count of first degree sexual abuse based on alleged sexual abuse of his 10-year-old natural daughter. The trial court sustained the prosecutor's motion in limine to exclude evidence of a long history of conflict among the defendant, the victim's mother and custodial parent, and the defendant's mother, with respect to the victim's custody, support and visitation. The court detailed the excellent offer of proof made by trial counsel, and found that it was reversible error for the trial court to exclude the evidence. The court stated, "especially in the case of young child witnesses in sex offense cases does an accused need a fairly wide latitude in developing the subtle influences and pressures which may be at work upon the child to produce a fabricated or distorted account. It is axiomatic that 'no charge is more easily made or

more difficult to disprove than a sex charge, particularly if made by a young child. . . . ' " The opinion contains an excellent discussion of practical and legal aspects of dealing with child testimony in sex abuse cases. This case is must-reading for any attorney defending a child sex case.

State v. Allen, Western District Court of Appeals No. 42317 (opinion filed October 30, 1990). The defendant was convicted of leaving the scene of an accident arising from the death of a small child in a hit-and-run accident. Part of the state's case consisted of evidence that the defendant burned a car that was similar to one involved in the hit-and-run, presumably to destroy evidence. The defendant's brother testified that the car was burned by the witness and the defendant's other brother, and that the defendant was not involved in the burning of the car or the decision to burn the car. On cross-examination, the prosecutor advised the witness that his testimony amounted to an admission that he was involved in a crime of concealing evidence, and that he could be prosecuted for the crime. He then Mirandized the witness in the presence of the jury, and asked if he wished to consult a lawyer. After consulting with a court appointed lawyer, the witness asserted his Fifth Amendment privilege. The prosecutor then moved to strike the witness's testimony, and the motion was granted. The court instructed the jury to disregard all of the testimony of the witness. The court of appeals reversed the conviction, holding that it was improper for the prosecutor to intimidate the witness, and that the striking of the testimony violated the defendant's Sixth Amendment right to compulsory process. The opinion contains some good language directed to prosecutors who intimidate defense witnesses:

"The prosecutor's professed concerns about attempting to safeguard the constitutional rights of Tommy Allen are not well-taken. The method employed by the prosecutor in this case, ostensibly to protect the rights of the witness, has been properly condemned by the court [in State v. Brown, 543 S.W.2d 56 (Mo. App. 1976)]. A prosecutor is not allowed to intimidate a witness into not testifying and then benefit by having exculpatory evidence stricken, this deprives the defendant of due process."

MACDL Welcomes

New Members:

Joseph R. Aubuchon, Union
Pat Berrigan, Kansas City (Public Defender)
Ella Boone, Jackson (Public Defender)
Joe Don Butcher, Independence
Joel Elmer, Kansas City (Public Defender)
Marc Fried, Hillsboro (Public Defender)
Susan Hogan, Columbia (Public Defender)
Tim Hogan, St. Louis (Public Defender)
Robert Lohr, Clayton
Larry Maples, Joplin (Public Defender)
Max Mitchell, Sedalia
C. John Pleban, St. Louis
James Pope, Springfield (Public Defender)
Madonna Reeves, Kansas City
Guy Richardson, Poplar Bluff
N. Scott Rosenblum, St. Louis

(New Members Continued)
Ronald D. White, Rolla
Stephen Willibey, Chillicothe (Public Defender)
Stephen Wilson, JacksonWilliam D. Rotts, Columbia
James M. Tobin, Kansas City

Membership Renewals:

K. Louis Caskey, Kansas City
Donald Cooley, Springfield
Jay DeHardt, Kansas City
David Godfrey, St. Louis
Allen Harris, St. Louis
Murray Marks, St. Louis
Andrew Wood, Neosho
Richard Zerr, St. Charles
William B. Collins, Lee's Summit
Ronald L. Hall, Kansas City

LEGISLATIVE UPDATE

by Dan Viets

The 1991 session of the Missouri General Assembly will convene the first week of January. Now is a crucial time in the legislative process since bills are being filed almost daily throughout the month of December.

MACDL will be monitoring the filing of these bills now and throughout the legislative session. Our legislative representative in Jefferson City will compile weekly reports on the filing and the progress of bills which may affect the practice of criminal defense law in Missouri.

MACDL will also be working to increase the appropriations for the Missouri Public Defender system and to permit the hiring of additional public defenders.

Each year dozens of bills are filed which can have a tremendous impact on the rigths of criminal defendants and those who represent them.

It is MACDL's goal to become more effective each year in fighting to preserve the rights of those accused of crime. In order to do this, we need your help.

Now is an excellent time to contact your State Representative and your State Senator. This is the best time to establish a working relationship with the people who represent you in our state's capitol.

A few decades ago, a large part of our legislature was made up of practicing attorneys. Today that is no longer the case.

Because there are so few attorneys in the legislature, the need for input from those who do practice law is greater than ever before. You will probably find that your state legislators are very pleased to hear from someone who actually has to work with the laws that they make.

Although at this point we cannot be certain which bills will be introduced, it is fair to assume that there will be the usual attempts to pass new measures which will make our jobs more difficult.

It would be quite appropriate for us to remind our State Legislators that it is not necessary to wage war on the Constitution in order to fight crime.

Rather than attempting to deprive criminal defendants of their rights, it will be far more productive in the long run if our legislators will devote needed funding to the areas which may help to prevent crime from occurring.

The most effective way to fight crime is not to continue to warehouse more and more of our citizens in our state prisons. Rather our legislators must place higher priority on adequate funding of education, employment, and drug abuse prevention and treatment.

Last fall our state's Division of Alcohol and Drug Abuse calculated that we spend less in Missouri per capita on drug prevention than any other state or United States territory! Yet money seems to be no object when it comes to spending more money on prosecution and imprisonment of people who have drug problems.

In June, the Department of Corrections sent a letter to all circuit judges in the state telling them that our state will be completely out of institutional bed space before July of 1991 if the current pattern of growth continues. The letter went on to say, "We have long contended that our prison bed space should be reserved for our more dangerous offenders; those who present a physical danger to the citizens of Missouri. We are finding, however, that our bed space is being absorbed by short-term property and drug offenders.

Imprisoning

more people for drug offenses means that more dangerous and violent prisoners have to be released earlier. Most legislators and members of the public do not seem to comprehend this fact.

But on an encouraging note, the Kansas City Star reported on Thursday, November 22 that only 14% of Kansas City area residents called for "stricter laws" as a response to the problems of substance abuse. Perhaps the public is waking up to the fact that longer prison sentences do not translate into reduced crime.

If you would like more information on how to lobby your legislators, including copies of the Department of Corrections letter to circuit judges and the Kansas City Star survey, please feel free to contact my office at:
(314) 443-6866.

LEGENDS AND THE LAW

by Robert Duncan

The history of the United States is replete with legends that are commonly accepted as true but, when examined in light of historical fact, become nothing but myth. For example: Lizzie Borden was acquitted of taking her axe and giving her father forty whacks. Billy the Kid and Jesse James are known throughout the world as heroes, yet they were common killers and thieves. Probably the America's most famous lawmen, Bat Masterson and Wyatt Earp, were little more than gamblers and hired killers who hid behind their badges. Probably the two most famous trial judges, Judge Roy Bean, famous for his "law west of the Pecos", and Judge Parker, "the hanging judge in Indian Territory", were also killers.

Peter Minuet did pay $24.00 in beads to the Indians for the island of Manhattan, but was the victim of perhaps the first American con game: the Indians he paid did not own Manhattan. Abraham Lincoln freed the slaves, but only in those areas of the United States that were then under the control of the Confederates. Patrick Henry may have announced "give me liberty or give me death," but he took no part in fighting the Revolutionary War.

The play "Our American Cousin", which Lincoln was viewing at Ford Theatre at the time he was shot, was an English play, and not a very good one. The Civil War actually started in "Bleeding Kansas" where the slavers were in battle with the abolitionists over whether Kansas would be a free or slave state. The abolitionists won, but that did not eliminate racial prejudice in Kansas; see Brown vs. Board of Education, which outlawed segregated schools in the United States. The Board of Education in question was, of course, in Topeka, Kansas.

Traditionally, the best way to be paid for anything was by cash. Receiving such cash today, however, may be illegal; paying with cash brings upon you the suspicion of being a drug dealer.

Those who have the misfortune to defend a person charged with child abuse run into the myth that children won't lie, which totally ignores the fact that one of the most famous legends in the history of the United States is that George Washington cut down a cherry tree and admitted it to his father because he "could not tell a lie." The reason that legend has become so popular is that if it is true he was probably the last child to not lie.

Of course, the greatest myth of all is that the Constitution of the United States has some meaning, and has an effect upon law enforcement and the courts.

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