MACDL
Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

President's Letter Spring 1991

Dear Fellow MACDL Members:

As my term comes to an end, I want to take the time to express my appreciation to the members of MACDL for giving me the opportunity to serve as President. It has been a rewarding experience and I look forward to working with the new President in order to carry forward the aims of our organization.

The Missouri Legislature continues to consider legislation which will impact heavily on the criminal practice in Missouri. MACDL has its lobbyist, Randy Scheer, tracking the bills of interest to our members and we will continue to provide MACDL members to appear on legislation which requires our attention.

The upcoming Annual Seminar on April 19-20, 1991, in St. Louis should be the finest program we have been associated with. The President of The National Association of Criminal Defense Lawyers, Alan Ellis, will be here along with four other speakers of national reputation. Last year's program was sold out, so I suggest that you send in your registration as quickly as possible.

Our membership rolls continue to grow and our membership will play an important part in the future in helping to shape the practice of criminal law in the State of Missouri. I urge you all to stay involved with our Association and to provide your assistance wherever you can.

A board meeting will be held in conjunction with the Annual Seminar, and all members are invited to attend. One of the main functions at that meeting will be to present a new slate of officers and board members for approval by the membership. Your attendance at that board meeting is requested in order to provide input into the selection process. The nominating committee will forward to the membership through the Newsletter their proposed slate of officers and board members.

See you at the April meeting in St. Louis.

Very truly yours,

Bernie

Bernard Edelman

"CLE Update; Defending Criminal Cases - April 19 - 20"

by J. R. Hobbs

MACDL, the Missouri Bar Association and the National Association of Criminal Defense Lawyers are happy to announce a jointly sponsored program entitled "Defending Criminal Cases" set for April 19th and 20th in St. louis, Missouri. The seminar will be held at he Hyatt Regency (formerly the Omni Hotel) located in the renovated St. Louis train station in downtown St. Louis, Missouri.

All of us associated with the Missouri Association of Criminal Defense Lawyers are excited about the program. It provides an opportunity to become acquainted with fellow criminal defense lawyers as well as an opportunity to learn both substantive and procedural tips from some of the region's and nation's finest criminal practitioners. "Defending Criminal Cases" is an annual program that has been put together for several years alternating between St. Louis and Kansas City.

This year Milton Hirsch, a noted speaker with the National Association of Criminal Defense Lawyers, will address recent developments in federal criminal law. Nancy Hollander is a highly respected criminal defense attorney in the southwest who has great expertise in narcotic defense work and in litigating all types of motions to suppress.

Additionally, Alan Ellis will give the key note luncheon address. Mr. Ellis is the current president of the

C.L.E. Update Continued

National Association of Criminal Defense Lawyers. Steve Bright is noted for his work in death penalty defense and has appeared before the United States Supreme Court. Stanley Greenberg has also been involved in cases of national notoriety and has represented defendants who faced so-called national security issues that affected their rights to a fair trial. All of our regional speakers are well known criminal defense attorneys within the State of Missouri. Their experience and knowledge is particularly useful for those who defend criminal cases in their region.

The material that will be presented by the speakers will assist both the experienced and non-experienced criminal practitioner on topics of criminal procedure and substantive law. This program will also benefit the civil practitioner who encounters cases with criminal law implications, as well as persons who are appointed to handle criminal cases from time to time. Finally, this jointly sponsored seminar is held in connection with the annual MACDL meeting, and is an opportunity to learn about the activities of that organization. ■

MACDL Membership Renewals

B. Janeen deVries, Kansas CIty
Jasper Edmundson, Poplar Bluff
Laura Higgins Tyler, Kansas City

The Challenge
by Tom Howe

Bob Duncan's article, I AM CONCERNED, in the last MACDL newsletter is certainly thought provoking, particularly the pessimistic outlook the article envisions for the future for those of us in the criminal defense field. The article brought back many memories of the "Good Old Days" to those of us of the same vintage as Bob.

For those who might not know Bob Duncan, who is from the Kansas City area, you should know that besides being a fun guy, he is a great criminal trial lawyer and is imbued with a deep love and sense of justice. I would like to think that Bob's comments are somewhat tongue in cheek because I cannot visualize Bob ever giving up the fight.

Rather than not having to worry about the problems, as Bob would have you believe he sees it for himself, I feel that the future presents a real challenge to all of us to do something about it. Included among the many things that Bob refers to are: the illegal activity of the undercover policeman and the abuse of the grand jury process to avoid preliminary hearings when a defendant might be discharged, or actually has been discharged at a preliminary hearing.

Today we have to be more imaginative and creative than ever before. Discovery in criminal cases has been the greatest improvement in criminal justice, at least in state court work and I would not trade it for all of the Good Old Days. However, too often criminal discovery is

Continued on page 6

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	
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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
Public Defender	50.00
Asst. Public Defender	25.00

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MACDL
P. O. BOX 15304
KANSAS CITY, MISSOURI 64106

Sentencing Memorandum From U.S.D.C., Western Division

The following Memorandum to Counsel was entered by Chief Judge Howard Sachs on 2/27/91 in U.S. v. Donzell Mayfield, No. 90-00010-10-CR-W-6. Bruce Simon, MACDL's President-Elect, suggests it is applicable to any narcotic sentencing in the Eighth Circuit, and the reasoning can be used in other jurisdictions.

Memorandum To Counsel

The following authorities and reasoning deal with the "Pinkerton theory" aspect of this and many other cases and will govern further sentencing proceedings absent persuasive briefing to the contrary. The court's views were earlier expressed, without this much elaboration, on February 25, 1991, in the Kenneth DuFrenne sentencing (part of the Bruton case, No. 90-00114-09-Cr-W-6).

Government counsel apparently argues that there is a sharp distinction between the "rule of vicarious liability, also known as the Pinkerton theory" and the Sentencing Guideline principle (in U.S.S.G. 1B1.3 (a) (1)) that co-conspirators should only be held for "reasonably foreseeable" conduct. United States v. Edmond, 746 F.Supp. 200, 205 (D. D., C. 1990). Where statutory quantities govern sentencing, the Government contends that foreseeability is eliminated in favor of Pinkertonian vicarious liability. Under the Government's theory, it apparently is considered only a prosecutorial act of grace that prevents a drug dealer's family member who knowingly passes along a telephone message to call a co-conspirator from being subject to mandatory minimum sentences of five or ten years, depending upon the size of the drug operation to which the family member is linked.

Developing case law seems, however, to emphasize the foreseeability aspect of the Pinkerton theory itself. United States v. Garcia, 909 F.2d 1346, 1350 n. 1 (9th Cir. 1990) (criticizing an Eleventh Circuit decision for alledgedly treating Pinkerton as a pure vicarious liability ruling); United States v. Martinez, 1991 U. S. App. Lexis 2690, 1991 WL 11485 (11th Cir.) (disclaiming the vicarious liability theory and noting [footnote 1] that Guideline commentary and the criticized case are "fully in accord" and that "the Pinkerton rationale . . . like the Guidelines, requires that the misconduct of co-conspirators be 'reasonably foreseeable as a necessary or natural consequence of the unlawful agreement' "); United States v. Cardenas, 917 F.2d 683, 686 (2d Cir. 1990) (Guideline application note "simply reflects the common law principle first articulated in Pinkerton v. United States, 328 U. S. 640, 647 (1946), that a conspirator may only be held liable for the substantive crimes of his co-conspirators if they were done in furtherance of the conspiracy and were known or reasonably foreseeable to him.").

At least one Eighth Circuit decision suggests that a trial court in this circuit

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Sent. Memorandum (continued)

would be engaging in brinksmanship if it were to sentence drug dealing conspirators for activities of co-conspirators that are unknown to them and beyond reasonable foreseeability. United States v. North, 900 F.2d 131 (8th Cir. 1990). While it is possible to distinguish that case on the theory that only a narrow conspiracy was alleged or tried, the Government seems to have thought it was prosecuting defendant North as a participant in an ongoing conspiracy of drug dealing engaged in by one Murphy, working with a changing cast of co-conspirators. The district judge declined to hold North responsible for quantities of drugs distributed by Murphy before North joined the activity; the appellate decision seeems to require that punishment be confined to matters within the general contemplation of the defendant. While much of the language of the opinion refers to criminal law liability the verdict was not at risk and only the sentencing decision was reversed.

This court has previously noted that Pinkerton is not a sentencing decision; even apart from the above cases, the court would be reluctant to hold that Congress intended to punish conspirators, planners and abettors more severely than a hypothetical primary substantive offender. Since the substantive offenders in a drug case are punished based on quantities they "knowingly or intentionally" possessed or distributed (21 U.S.C. 841(a)), it would seem that conspiracy punishment should reflect the actual plans and reasonable expectations of wrongdoers rather than purely vicarious responsibility. Nothing in 21 U.S.C. 846 seems to contemplate punishment for activites beyond the objectives of the particular defendant, even though, as in this case, the Terry Kelton conspiracy had aspects reaching well beyond the compartmentalized understanding of most of the co-conspirators.

The Challenge (continued from pg. 3)

not used to the extent that it could be used. One area that has been particularly neglected is the failure to make a request that tapes of the communications from police cars to the dispatchers be preserved for perusal and examination by the defense counsel.

As we all know, police reports are prepared when everything is over and they are written to reflect and coincide with the officer's version of what happened. I have seen these tapes of communications used effectively to destroy the alleged chronological order of events as recorded in the officer's report.

Police departments began recording their communications primarily for their own protection for such purposes as disproving a complaint that a call was not answered for an unduly long period of time. Most departments keep these recordings for a 60 to 90 days. If you are lucky enough to get into a case within that period, all it takes is a simple ex-parte request to the associate circuit judge to issue an order directing the police department to preserve the tape until further notice.

In another area, I feel that counsel should tell the jury trying the case, either in voir dire or in final argument, that a grand jury indictment is an ex-parte proceeding and that they are the first group to actually hear all of the evidence in the case.

The Challenge (Cont)

Also, in argument I think defense counsel should acknowledge that crime is one of the biggest problems of the day, including the drug problem, but that the war on drugs as it is being waged today is a total failure. Get a little philosophical in your discussion and allude to the real problems that Bob refers to such as poverty and lack of opportunity as the real reasons for the crime problem of the day. Tell the jury that warehousing people in penitentiaries is not the answer and that money used for that purpose could be much better spent in solving the real problems of crime. Tell them you understand their feelings, but that the taking away of our rights is not the answer, as McCarthyism so well proved in the days of the phony communist scare. I also feel that the criminal defense bar has been remiss in not filing 42 U. S. 1983 claims in some of the more aggravated cases of police conduct such as false arrest, excessive use of force and illegal search warrants. Realistically you have to pick the right case, but there are many of them out there. No one is more qualified than the criminal defense lawyer who has some in-depth knowledge of police practices.

Recently in St. Louis County we had a situation where a small community police department embarked on a mission to solve the drug problem. Led by their chief, officers ventured out into areas outside their jurisdictional limits to effect arrests and to execute illegally obtained search warrants. Their actions were so bizarre that they came to the attention of the FBI, which ultimately arrested the chief for posing as a DEA agent in a county many miles

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CALENDAR OF COMING EVENTS

MACDL ANNUAL MEMBERSHIP MEETING

Friday, April 19, 1991
5:00 PM
ST. LOUIS

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

MISSOURI CRIMINAL LAW UPDATE

by Sean O'Brien

Webster v. State, 796 S.W.2d 79 (Mo. App. 1990).
Denial of 29.15 motion without a hearing remanded where there was no indication that appointed counsel took "affirmative steps on behalf of movant," i.e., no entry to appearance or amended motion was filed.

State v. Hutchinsen, 796 SW.2d 100 (Mo. App. 1990).
State appealed order granting motion to suppress "all objects seized at the scene of the arrest." The court rejected the state's position that the officer was entitled to conduct a limited search under Terry v. Ohio, 3922 U.S. 1 (1968), during a traffic stop for what the officer believed was erratic driving. The officer's testimony did not support a reasonable belief based on specific articulable facts that the suspect was armed or dangerous.

State v. Tipton, 796 S.W.2d 109 (Mo. App. 1990).
State appealed order granting motion to suppress marijuana and other paraphernalia found during a warrantless entry and search of the defendants' residence. Interestingly, the trial court sustained the motion to suppress because the prosecutor failed to produce any witnesses at the hearing, thereby failing in his burden of persuasion and going forward with the evidence under 542.296.6, RSMo (1986). The Court of Appeals interpreted this statute to "include evidence the defendants had no standing to make the complaints registered."

State v. Lindhorst, 796 S.W.2d 442 (Mo. App. 1990).
The state appealed the trial court's order dismissing a misdemeanor charge of possession of intoxicating liquor by a minor. Where the dismissal was based on a finding that the defendant was not a minor, it amounted to an acquittal and the state had no right to appeal under 547.200 and 547.210 RSMo (1986).

State v. Urban, 796 S.W.2d 599 (Mo. banc 1990).
Appellant was convicted of child abuse under 568.060 RSMo (1986), based on nude photographs taken of his wife and her grandson. A previous trial based on the same conduct resulted in a guilty verdict under one count and an acquittal under another count, but the trial court granted a new trial either because the information failed to state an offense (the mental state, knowingly, was omitted) or because the evidence did not support the charges made. If the information did not state an offense, the trial court had no jurisdiction to proceed and should have dismissed the case. If the evidence did not support the charge, the court should have entered a judgment of acquittal. Instead, the court ordered a new trial, and the defendant was tried under an amended information filed after the trial, a "procedure [which] is not known to Missouri criminal procedure." Because the amended information was broad enough to include conduct charged

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under the count on which the defendant was acquitted, dismissal and discharge were mandated under Grady v.Corbin, ___ U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). State v. Douglas, 797 S.W.2d 532 (Mo. App. 1990). The sixth amendment confrontation clause is violated where the state, in a rape case, introduced evidence that the complainant's hymen was absent, but used the rape-shield law (491.015 RSMo) to prohibit the defense from showing that prior to the medical examination she had had intercourse with another.

State v. Wright, 797 S.W.2d 811 (Mo. App. 1990). Appellant was convicted of possession of less than 35 grams of marijuana and sentenced to three years. Between the date of the offense and the time of trial, 195.200 (fixing punishment at up to one year in jail or up to five years in prison and/or a fine up to $1,000) was repealed and replaced by 195.202 RSMo (Supp. 1989), which makes possession of less than 35 grams a Class A misdemeanor. The court ruled that under 1.160 RSMo, Wright was entitled to be sentenced under the more lenient range of punishment, but rejected his argument that he was entitled to a new trial. (Cf. State v. Bevins, 328 Mo. 1046, 43 S.W.2d 432 (1931) and State v. Hall, 670 S.W.2d 193, 194 (Mo. App. 1984). Also see Rule 29.04).

State v. Hedrick, 797 S.W.2d 823 (Mo. App. 1990). *(Slip opinion reviewed in Winter issue.)*

State v. Block, 798 S.W.2d 213 (Mo. App. 1990). Appellant was convicted in two separate counts for driving under the influence of alcohol. On one count, the evidence showed that he was involved in an accident, a witness to the accident smelled alcohol on him and when he was arrested two hours and 20 minutes later, the trooper believed he was drunk. On the second count, appellant was found asleep behind the wheel of a car that was sitting in the ditch. He failed a "field sobriety test." As to Count I, there was no evidence that Block was drunk at the time of the accident, and as to Count II, there was no evidence that Block "operated" the car, so both convictions were reversed for insufficient evidence.

State v. Singleton, 799 S.W.2d 120 (Mo. App. 1990). Singleton was convicted of two counts of "offering to commit violence to a correctional officer." Singleton appealed from the conviction and from the dismissal of his Rule 29.15 motion. Singleton filed a timely, verified pro se motion alleging ineffective assistance of counsel under Rule 29.15. Court appointed counsel filed an unverified amended motion, and wrote a letter to the court discussing a date for a hearing on the motion. The court summarily entered a dismissal without an evidentiary hearing, relying on Quinn v. State, 776 S.W.2d 916 (Mo. App. 1989). The court held that under Klaus v. State, 782 S.W.2d 455 (Mo. App. 1990), the court should have ruled the unverified motion a nullity and taken up Singleton's pro se motion. Furthermore, the court should have held an evidentiary hearing even though one was not requested on the pro se motion because the record contained the letter from counsel mentioned above and

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also a pro se request by Singleton to be present at the hearing. Therefore, the order of dismissal of the pro se Rule 29.15 motion was reversed and the cause was remanded for an evidentiary hearing.

State v. Strothers, 798 S.W.2d 723. Strothers was convicted of second degree burglary. This case challenges his conviction and the denial of his Rule 29.15 motion seeking post-conviction relief. The court reversed the conviction on the grounds that the trial court admitted into evidence a transcript containing admissions that Strothers allegedly made on an audio tape. Apparently the tape was locked in an evidence room and some cop who was out of town had the key. The court held that the admission of the transcript violated the best evidence rule, and that the state failed to lay a proper foundation for secondary evidence by showing that "(1) the original is unavailable; (2) for some reason which is not the proponent's fault; and (3) the secondary evidence is trustworthy." (Court's emphasis.) In response to the state's argument that appellant was not prejudiced because the transcript was cumulative to the interrogating officer's testimony, the court stated:

"The transcript gave an indicia of reliability to Sitton's testimony. The jurors could have concluded that by the transcript being admitted into evidence, it was an accurate transcription of what was said on the tape. That may have been more important to the jury that what Sitton said he recalled that appellant told him. Obviously, the state thought it would affect its case, as they diligently strove for its admission. We conclude that it is highly possible that the transcript was prejudicial to appellant."

At p. 725. Because the appeal was ruled in Strothers' favor, the judgment denying the 29.15 motion was vacated at moot, and the appeal therefrom was therefore dismissed.

Tettamble v. State, 798 S.W.2d 489 (Mo. App. 1990). Appellant was convicted of burglary in the first degree, and filed a Rule 29.15 motion alleging that his trial attorney was ineffective for failing to call certain alibis witnesses. The hearing court found that "trial counsel . . . was not, in any manner, ineffective during the time he represented the defendant" and trial counsel "exercised customary skill and diligence and there was no prejudice to defendant as a result of his representation." The court of appeals held that this finding was insufficient to address all of the specific facts pleaded by appellant in his 29.15 motion, and that they did not "provide a basis for this court to adequately review the motion court's decision on those issues." The judgment was reversed and the cause was remanded for specific findings of fact and conclusions of law responsive to the issues in the motion.

State ex rel. Cochran v. Andrews, 799 S.W.2d 921 (Mo. App. 1990). A probationer charged with violating the conditions of her probation moved to disqualify the circuit judge within 30 days after the prosecutor filed a motion to revoke her probation. The Circuit judge denied her request, and she

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Criminal Law Update Cont. from page 10

sought a writ to prohibit the judge from proceeding except to effect the change of judge. In a detailed discussion, the appellate court held that pursuant to Rule 51.05, a probationer has 30 days from the filing of a motion to revoke probation within which to obtain an automatic change of judge provided she has not already exercised her right to disqualify the judge in the case. The preliminary writ was made absolute. Judge Shangler, in a dissenting opinion, does not question the right of the probationer to obtain a change of judge; he suggests that the 30-day limit under Rule 51.05 began to run from the date her previous appearance before the court at a "probation review" hearing.

State v. Stolzman, 799 S.W.2d 927 (Mo. App. 1990). The opinion of Judge Prewitt, dissenting from an opinion upholding the legality of an automobile search, is worth reading.

State v. Luna, 800 S.W.2d 16 (Mo. App. 1990).
Luna was convicted of second degree murder based entirely on circumstantial evidence. The court reversed the conviction and ordered Luna discharged because of insufficient evidence. In reaching the conclusion that the evidence failed to exclude every reasonable hypothesis of innocence, the court discussed each circumstance asserted by the state as supporting the verdict and explained how it was irrelevant or equally consistent with Luna's innocence.

State v. Randy Allen, 800 S.W.2d 82 (Mo. App. 1990). *(Slip opinion reviewed in Winter issue).*

State v. Williams, 800 S.W.2d 118 (Mo App. 1990).
Defendant was sentenced as a "class X" offender under 558.019 RSMo 1986. The court remanded for re-sentencing because two of the three prior convictions relied upon by the state were based on burglaries committed on the same day and possibly in close physical proximity to one another. Therefore, they did not satisfy the requirement that the state prove that the prior convictions were "committed at different times." The sentencing court was given directions to hold a hearing on the question of whether the burglaries were committed at different times.

State v. Sparlin, 800 S.W.2d 161 (Mo. App. 1990).
A defendant entered a plea of guilty to a charge of driving while intoxicated, and the prosecutor responded by offering a "verbal nolle prosequi." The court felt it was bound to accept the plea offer, and sentenced the defendant. The prosecutor appealed. The Court of Appeals dismissed the appeal because it did not fall within the prosecutor's right to appeal under sections 547.200.2 and .210 RSMo 1986. The prosecutor's attempt to verbally dismiss the charge did not deprive the court of jurisdiction to hear the plea. Obviously, there was more going on in this case than meets the eye.

LEGISLATIVE UPDATE -- Legislature Considers HarshNew CriminalLaws

by Dan Viets

The Missouri General Assembly is now in the midst of its 1991 session. Before adjournment in mid-May, the legislature will probably pass some version of the two omnibus anti-drug bills now pending.

House Bill 445 has been passed by the House of Representatives and sent to the Senate for consideration. House Bill 445 would permit members of the Highway Patrol to request search warrants and serve search warrants anywhere in the state. It also adds steroids and various other substances to the controlled substances schedules.

This bill would mandate the loss of professional licenses or registration of anyone convicted of a felony drug offense. The period of suspension or revocation would be up to the board or licensing authority.

It would make marijuana possession under 35 grams a felony if the Court finds the defendant is a prior or persistent drug offender. It would also deprive students of eligibility for state-funded scholarhsips if they have pleaded guilty to or been convicted of a felony drug offense.

The bill creates the new crime of money laundering and enhances the period of incarceration for those convicted of crimes defined as "criminal street gang" activity.

Also, the drivers license of any person convicted of any drug offense would be suspended or revoked under this bill.

This bill also creates a scheme for "taxing" controlled substances. The bill begins by defining as a "dealer" any person who possesses more than 35 grams of marijuana or various amounts of other controlled substances. It then imposes an extremely high "tax" on substances possessed by "dealers" and doubles the "tax" if a "dealer" has not paid the "tax" when he is apprehended.

Failure to pay the "tax" also becomes a separate Class D felony offense under this proposal.

In the Senate, Bill 181 and 259 are now under consideration. Senate Bill 181 and 259 (which are now combined into a single proposal) contains 80 pages with literally dozens of changes in the law. Not all of these relate to drugs. For instance, in addition to most of the same proposals contained in House Bill 445, Senate Bill 181 and 259 would create the new offense of possessing or otherwise being connected with a "hoax bomb".

It also creates a requirement for reporting of cash currency transactions of $3,000 or more.

This bill would also permit Associate Circuit Judges, with consent of both parties, to hear pleas of guilty, order presentence investigations and sentence defendants in felony cases where a preliminary hearing has been waived. This bill would make it a Class A misdemeanor to carry, conceal or convey any amount of any controlled substance in a vehicle. Obviously, in many cases, this would impose additional penalties for an act which is already a criminal offense.

Witness immunity would also be authorized by Senate Bill 181 and 259. This would permit the Court to require a witness to testify in a manner that might prove incriminating after a grant of immunity to the witness. This bill would also permit warrants issued anywhere in the state to be executed in any other part of the state. In jury selection in multiple defendant cases, "...all defendants shall join in their challenges or the Court in its discretion may allocate the allowable peremptory challenges among the defendants as the ends of justice require."

This bill also creates the new crime of taping a live broadcast performance with the intent to sell that *(cont)*

Update Continued

recording.

This bill proposes to permit prosecuting attorneys and their investigators to be exempt from several provisions of the unlawful use of weapons statute. Prosecutors and their investigators would not be subject to the prohibition against carrying a concealed weapon; discharging a firearm into a house, train, or motor vehicle or any building or structure; discharging a firearm within 100 yards of a school, courthouse or church; discharging a firearm at random or on or across a public highway; or carrying a firearm or other weapon into a church or school or election precinct or other government building.

This bill would also permit lab reports to be admittted into evidence without the necessity of testimony from the chemist who prepared the report.

These two bills clearly have the greatest potential impact on the practice of criminal defense law of all legislation currently pending.

There are various other bills proposed which will affect criminal defense. There are proposals to count municipal DWI convictions as prior convictions for purposes of enhancement. (H.B. 145) Another proposal would expand the "abuse and lose" law to include municipal or county alcohol offenses. (H.B.488)

House Joint Resolution 7 would amend the State Constitution to again permit proceeds of forfeitures in drug cases to go to law enforcement rather than public schools as is now required by the State Constitution.

House Joint Resolution 8 would amend the State Constitution to permit courts to deny bail altogether in cases where a suspect is believed to pose a danger to the alleged victim, a witness or the community.

House Bill 188 would prohibit the execution of mentally retarded persons. House Bill 103 would permit supervised probation for persons convicted of first offense DWI. Senate Bill 194 would relieve public defenders of the obligation to represent defendants in municipal cases. Interestingly, a bill which would legalize the regulated and taxed sale and consumption of controlled substances has been filed for the second year. House Bill 567 would amend Chapter 195 to permit the consumption of controlled substances by adults in private. It would impose a sales tax of 25% on the sale of all controlled substances and that money would be used by the schools to fund drug abuse prevention and education.

Now is the most critical time for you to contact your State Senator and Representative. The legislature is going to be acting on many of the proposals described above in the next few weeks.

Please call or write your elected representatives now. There is no more crucial time for you to exercise your prerogative and obligation as a citizen and an attorney to make yourself heard in the legislative process. You may contact Sen. Caskey at (314) 751-4116 and Rep. Scoville at (314)751-2117.

If you would like copies of these bills, please contact Dan Viets at (314) 443-6866 or Randy Scherr at (314) 636-2822 in Jefferson City.

The Challenge (Continued from page 7)

distant from his own county. There are several 1983 claims pending on this situation. If enough of these 1983 claims or cases are filed, I am sure the insurance industry will have some salutary influence on city fathers to keep a better eye on their police departments.

Most importantly, many of the problems Bob speaks of can best be addressed or answered and solved by the voice of our great organization. We have come a long way. We are being recognized as a voice of reason in a troubled world. A distinguished Judge who served as a speaker in one of our seminars said to me that he had considered himself a fairly tough minded Judge but that he was concerned with much of what he was seeing today. He said that he regarded our organization as a much needed force in the preservation of the criminal justice system.

WELCOME! MACDL NEW MEMBERS

S. Richard Beitling, Kansas City
Preston L. Cain, Kansas City
Caterina M. Ditraglia, St. Louis*
Joseph W. Downey, Columbia*
David E. Everson, Kansas City
Don Gafken, Joplin (Paralegal)
Kristine Allen Grady, St. Louis*
Milt Harper, Columbia
Victor W. Head, Monett*
Shaun P. Kenney, Kansas City*
Roger S. Lahr, St. Louis
Kevin Locke, Kansas City
Lorri McCoy, Columbia*
Charles M. McKeon, Kansas City
Nancy McKerrow, Columbia*
Sharlie Pender, Kansas City
Daniel J. Ross, Kansas City
Kimberly J. Shaw, Jackson*
Grant Whitlow Smith, Jefferson City
Jon Van Arkel, Springfield*
Steven K. Wickersham, Kansas City

**Public Defender*

DEFENDING CRIMINAL CASES 1991

Send this form with your check, payable to The Missouri Bar, for the amount due, or pay by VISA/MasterCard (see form below), to: CLE Department, The Missouri Bar, P.O. Box 119, Jefferson City, Missouri 65102, FAX 314/635-2811.

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[ ] Check Enclosed [ ] Credit Card (Info. Below)
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Signature _____
(Required for Credit Card Purchases)

REGISTRATION — PROGRAM AND COURSE MATERIALS (458):
[ ] $175 — Program and course materials, lunch, lawyer (6/1) or nonlawyer (6/3)
[ ] $150 — MACDL Members, program and course materials, lunch
[ ] Missouri State Public Defender

(Join MACDL at the time you register for this program and receive one year membership in MACDL for one-half the regular dues rate and the membership discount rate on the registration fee for this program.)

[ ] I want to become a member of MACDL

PROGRAM DATES AND LOCATION:

[ ] **ST. LOUIS**
Hyatt Regency
One St. Louis Union Station
April 19-20, 1991

DEFENDING CRIMINAL CASES

The Missouri Bar — Missouri Association of Criminal Defense Lawyers — National Association of Criminal Defense Lawyers

Seminar Price: $175 (including luncheon) for private practitioners
$150 (including luncheon) MACDL members

Location: Hyatt Regency (Old St. Louis Train Station), St. Louis, Missouri

PROGRAM TOPICS AND FACULTY

Moderators: Burton Shostak, *St. Louis;* J.R. Hobbs, *Kansas City;* Larry Schaffer, *Independence*

FRIDAY, APRIL 19, 1991

8:15 - 8:45	Pick up Materials; Late Registration if Space Available
8:45 - 9:00	Welcome **Speaker: Bernard Edelman,** *St. Louis, MO* *President, Missouri Association of Criminal Defense Lawyers*
9:00 - 9:50	Review of Recent Developments in United States Supreme Court Decisions **Speaker: Milton Hirsch,** *Miami, FL* *National Association of Criminal Defense Lawyers*
9:50 - 10:40	The Art of Cross-Examination in a Criminal Case **Speaker: Robert Beaird,** *Kansas City, MO*
10:40 - 10:55	**Refreshment Break**
10:55 - 12:00	Litigating Motions to Suppress **Speaker: Nancy Hollander,** *Albuquerque, NM* *National Association of Criminal Defense Lawyers*
12:00 - 2:00	Luncheon — Cash Bar — Annual Awards Ceremony — Luncheon Address **Speaker: Alan Ellis,** *Mill Valley, CA* *President, National Association of Criminal Defense Lawyers*
2:00 - 2:50	Criminal Defense Advocacy in the 90's **Speaker: Steve Bright,** *Atlanta, GA*
2:50 - 3:00	**Refreshment Break**
3:00 - 4:00	Grand Jury Representation, Immunity and Related Issues **Speaker: Tom Cox,** *Kansas City, MO*
4:00 - 4:50	Prosecution to Defense: One Person's Look at Converting From Prosecutor to Defender **Speaker: Larry Hale,** *St. Louis, MO*
5:00 - 5:30	Missouri Association of Criminal Defense Lawyers Annual Board Meeting (All Attendees Invited)
5:30	**Cash Bar**

SATURDAY, APRIL 20, 1991

9:00 - 10:00	Defending Bank Fraud Cases **Speaker: Arthur Margulis,** *St. Louis, MO*
10:00 - 10:50	Effective Closing Arguments **Speaker: Stanley Greenberg,** *Los Angeles, CA* *National Association of Criminal Defense Lawyers*
10:50 - 11:00	**Refreshment Break**
11:00 - 12:00	Round Table Discussion (Attendees may submit tactical problems and issues from cases they are handling for suggestions and advice.) **Round Table Moderator: Donald L. Wolff,** *St. Louis, MO* **Panelists: James Worthington,** *Lexington, MO* **Stanley Greenberg,** *Los Angeles, CA* **Arthur Margulis,** *St. Louis, MO* **Sean O'Brien,** *Kansas City, MO* **Irl Baris,** *St. Louis, MO*

"Escape" Rule in Missouri: Procedural Denial of Appellate Review

by James D. Worthington and T. Chris Williams

The advance sheets of Missouri are filled with horror stories of the newest Sword of Damocles used by the Missouri Appellate Courts to deny defendants fundamental, constitutional remedies - the sword is called "The Escape Rule". The Escape Rule is a doctrine invoked by an appellate court that "Operates to deny the right to appeal to one who, following a conviction, has attempted to escape justice." State v. Wright, 763 S.W.2d 167, 168 (Mo. App., 1988).

In 1876, the United States Supreme Court announced a new procedural rule in Smith v. United States, 94 U.S. 97 that a fugitive defendant could have his appeal dismissed by virtue of being an escapee at large since the defendant couldn't be made to respond to the court's judgment and thus, the result of the appeal couldn't be enforced. In 1887, the U. S. Supreme Court expanded that rule in Bonahan v. Nebraska, 125 U. S. 692 by showing that the doctrine could equally apply to a defendant who was not seeking a new trial but rather was seeking an acquittal on a fundamental ground and thus, the Supreme Court made it clear that the inability of the court to enforce an adverse judgment on appeal alone was sufficient reason to dismiss the entire appeal. The Court, intimated, in both opinions, that if the defendant were to return, the appeal could be reinstated.

The doctrine remained relatively dormant until Molinaro v. New Jersey, in 1970, 396 U. S. 365, wherein Mr. Molinaro escaped from custody after his conviction and after he had filed his notice of appeal. The Supreme Court made the dismissal "effective immediately and gave no indication the appeal could be reinstated under any circumstances".

The first Missouri case to adopt the rule is State v. Carter, 90 Mo. 431, 11 S. W. 979 (1889). Missouri likewise held the doctrine to be relatively dormant until it began issuing new rulings relying upon this doctrine in the 1980s, such as the Sinclair case which appears at 708 S. W. 2d 333 (1986), State v. Kearns, 732 S. W. 2d 553 (Mo. App., 1987) and then the big leap forward in State v. Wright cited above. I am embarrassed to say that I was one of two appellate counsel representing the defendant before the Missouri Supreme Court and before the United States District Court of the Western District of Missouri seeking to protect her rights and remedies in post-conviction motions. After the case was adversely ruled against her by the Missouri Court of Appeals, Western District, I helped to file the Motion for Transfer to the Supreme Court and the points and arguments therein, which were denied, and

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Escape Rule (Continued)

then the motion with the Federal Court.

Rationale for the Escape Rule

There is no case which definitively sets out all the rationales for the rule but, by reading through several of the Federal cases as well as the Missouri cases, it becomes clear that the Court is concerned with the following issues in some relative proportion:

1. Respect for the judicial system;

2. The cost of bringing the defendant back to justice;

3. The potential prejudice to the State of Missouri or governmental unit of delay, such as by the loss of memory of witnesses or actual loss of witnesses. Obviously, this involves the question of the length of the delay; and

4. The nature of the error asserted on appeal. That is, whether the defendant is asking for a new trial or simply for an acquittal in the appellate court.

The cases are legion saying that a defendant has no constitutional "right" to an appeal. Those cases are wrong logically. In my opinion, the law is never decided until it is decided correctly and a defendant should have a right to take his case on appeal and have the issues presented there for determination. This is fundamental since we are fully aware of the vagaries and exigencies of trial practice before the various courts of record, not only throughout Missouri but throughout the states and the nation.

However, even absent that point being in favor of the defendant, it is shocking to the conscience that courts should so cavalierly use a procedural rule such as this to deny to a defendant fundamental rights guaranteed in the Constitution. The appellate process simply guarantees many of those other constitutional rights such as the right to be free from unreasonable search and seizure, the right to have an attorney, the right to remain silent and not be a witness against yourself, the right to confrontation and cross-examination, the right to compel witnesses, the right to be advised of the charges against you with specificity, etc.

Recommendation

Thus, the first and foremost recommendation I make is that the escape rule should be abolished as an intellectual embarrassment and an affront to the sensibilities of every scholar, jurist and citizen who can read the clear and unequivocal mandates of the United States and Missouri Constitutions. The fundamental rights should not be cavalierly swept under the rug in a rush to "economize" the court's perceived procedural docket requirements or the need for rules of appropriate fealty to the sensibilities of the Court. It is shocking to note that while some of the original defendants in these cases were gone as long as ten (10) years, thereby initiating the issue of prejudice to the government, now the Missouri advance sheets have an escape case in almost every issue, and some of these defendants have been gone or have failed to appear for as short a period of time as weeks or months. This just does not hold water logically under the "prejudice" issue.

Alternative Recommendation

Alternatively, the

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Escape Rule (Continued)

courts of Missouri should clearly make an effort to use their discretionary powers when they are faces with cases where the defendants have ALLEGEDLY escaped. The way to do that is to hold a hearing with prior notice in order to provide due process of law under the Fifth and Fourteenth Amendments to the U. S. Constitution. That hearing would, at the very least, provide constitutional protections to the defendant by giving a full, fact-finding opportunity for the court to make a determination as to whether or not there has been an escape and, if so, which of the rationale apply and in what depth so as to make a flexible balancing test considering which factors exist necessitating dismissal of an appeal.

In the Wright Case, there were requests for hearings, which were denied. There were affidavits showing that Ms. Wright did not escape from anything. She was out on bond. During the time on bond she, through her trial attorney, asked for continuances of every single event from original arraignment in the associate court through preliminary hearing, through arraignment in the circuit court, through trial dates; all those requests for continuance were granted while she lived and worked in Chicago at the address indicated on the bond papers. She did not leave her employment. She did not leave her home. When time came for sentencing after the trial she requested a continuance which was denied.

With no expense to the State of Missouri for producing her, she walked into the Lafayette County courtroom less than five months after the last of those court hearings. She simply took care of her business in Chicago and reportedly prepared to "face the music".

Nonetheless, the Court Judge and Court Clerk were shocked to see her even though no efforts had been expended by anyone to get her back by force. It seems to me that the five-month delay is extremely small compared to the delay occasioned when the state files an appeal on one of its unsuccessful cases, such as a motion to suppress which is granted in favor of the defendant followed by an interlocutory appeal which can take years. A hearing court could make a determination as to whether the defendant has been absent for any period of time and, if so, whether that absence occasioned any kind of "disrespect for the system of justice". Of Course, that rationale should also be stricken, as we are not dealing with a futile system here.

I respectfully submit these suggestions for the consideration of my brethren in the Missouri Association of Criminal Defense Lawyers. A more complete 117-page analysis of the Federal and Missouri cases is available if you should want it.

Mail your request, along with $15.00 to help defray copying and postage expense, to:
Francie Hall
MACDL
P.O. Box 15304
Kansas City, MO 64106

MACDL's 1991 ELECTORAL SLATE

MACDL's Annual Meeting will be held at 5:00 p.m. on April 19 at the seminar in St. Louis. All members are cordially invited to attend. The main item of business will be the election of four officers and five members of MACDL's Board of Directors for the 1991-92 term. MACDL'S nominating committee, chaired by Charlie Atwell and including Tom Howe, Charlie Rogers, Larry Schaffer and Larry Ferrell, recommends the following slate to fill these positions:

President:	**Bruce Simon, Kansas City**
President-Elect:	**Sean O'Brien, Kansas City**
First Vice President:	**Jay DeHardt, Kansas City**
Second Vice President:	**Dan Viets, Columbia**
Board of Directors:	**Pat Eng, Columbia**
	Anne Hall, Springfield
	J. R. Hobbs, Kansas City
	Rick Sindel, St. Louis
	Dee Wampler, Springfield

Should any MACDL members wish to nominate someone other than those named above, our by-laws provide for nomination by certified letter to MACDL's Executive Secretary, Francie Hall, 2300 Main, Suite 1100, Kansas City, MO 64108

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