MACDL
Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

President's Letter Summer 1991

Dear Fellow MACDL Members:

I received a solicitation the other day for a $50 donation to be used to defray the cost of a "memorial" to the Bill of Rights to be placed in the Federal Courthouse to commemorate the Bi-Centennial of the first ten Amendments to the Constitution.

My dictionary defines "memorial" as "something that keeps remembrance alive". How appropriate. The Bill of Rights does not need another brass plaque to commemorate it; what it needs is a homicide detective. The Fourth Amendment is in extremis and the Fifth Amendment is moribund. The only Amendment that I know for sure is safe is the Third Amendment which relates, as you know, to the quartering of troops in citizen's houses, but as of late I haven't had much occasion to use it in my practice.

I realize that our organization cannot effect much change in the judicial juggernaut which is responsible for putting the freedoms guaranteed by the Constitution in peril. It is ironic that at a time when our written Constitution is under assault there is a move afoot in Britain for a written "Bill of Rights" to protect against official abuses that were revealed recently in the overturning of roughly a dozen IRA convictions obtained over the past fifteen years due to police perjury and judicial indifference.

I am not certain that the vast body of citizens appreciates the erosion of our liberties until they are actually confronted with it. We, as lawyers, must.

The difficulty with the quiet surrender of what we perceive to be absolute rights is that each subsequent surrender becomes easier. The incredulity which we used to see on the faces of those people to whom we were explaining Federal sentencing guidelines in narcotics cases is mirrored today on the faces of white collar clients confronted with the provisions of the Financial Institution Restitution & Recovery Enforcement Act. The caution with which pretrial detention was approached by the Courts in pre-Salerno days has been replaced by willing acceptance in post-Salerno times. We can, by our organizational efforts and those of allied organizations, have an impact both in education of the public and directly on legislation. At the very least we can make noise, productive noise.

Continued on pg. 2

MACDL Officers:

President:
Bruce Simon
801 Walnut, Suite 600
Kansas City, MO 64106

President Elect:
Sean O'Brien
P. O. Box 22609
Kansas City, MO 64113

First Vice President:
Jay De Hardt
4600 Madison, Suite 1250
Kansas City, MO 64112

Second Vice President:
Daniel L. Viets
15 North 10th Street
Columbia, MO 65201

Treasurer:
Betty Jones
4600 Madison, Suite 1250
Kansas City, MO 64112

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

Board of Directors:

Anne Hall, Springfield
Patrick Eng, Columbia
Larry Fleming, St. Louis
Dorothy Hirzy, St. Louis
J. R. Hobbs, Kansas City
Susan Hunt, Kansas City
Bruce Houdek, Kansas City
Charles Rogers, Kansas City
Larry Schaffer, Independence
Lawrence Ferrell, Cape Girardeau
Bert Shostak, St. Louis
Dee Wampler, Springfield
James Worthington, Lexington
Richard Sindel, Clayton
Tim Warren, St. Joseph
Joseph Downey, Columbia

Lobbyist:

Randy Scherr
P. O. Box 1543
Jefferson City, MO 65102
(314) 636-2822

Presidents's Letter -- Continued from page 1

I would like to see during this next year an increased effort at educational efforts whenever the chance presents itself. I would like to see more of an effort directed at Bar members who do not understand what our organization does or do not feel that it benefits them. I would like to see our lobbying efforts continue but I would like to see more publicity given to those efforts by our members to the Bar. I would like to see expanded CLE programs directed at the bread and butter elements of the average practitioner but not at the expense of the very fine work that has been done on more specialized areas in the past. Hopefully, the end product will be a much larger membership, and this will make our voice much louder.

You see, the dictionary offers yet another definition of "memorial": "A statement of facts addressed to a government and often accompanied by a petition or remonstrance." This kind of memorial is one that we should all contribute to, and gladly.

Bruce W. Simon

In conjunction with the Missouri Bar meeting, MACDL's Board of Directors will host a hospitality suite at the Westin Crown Center in Kansas City on September 27, 1991.

A board meeting will begin at 4 p.m. --- MACDL members are cordially invited.

The Accused's Right of Discovery and Subpoena Power at a Preliminary Hearing

by Dee Wampler

The role preliminary hearings play in felony cases, once a criminal complaint has been filed by a prosecuting attorney, varies from county to county.

Unless a county has a sitting grand jury (which indicts by a majority of the grand jury returning a "true bill", after which a defendant proceeds directly to trial without preliminary hearing), most criminal cases are commenced by the prosecutor's criminal complaint with the accused being afforded the right to a preliminary hearing.

The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant the right to "effective assistance of counsel at every step in the proceedings"[1]. The preliminary hearing is a "critical stage" of the accusatorial process[2]. The right of competent counsel is afforded a defendant under the Sixth Amendment so that he may have "meaningful adversarial testing" of the state's case[3].

Given these pronouncements by the U.S. and Missouri Supreme Courts, it is clear that the preliminary hearing plays an important role. It is the first opportunity for a defense lawyer to actually cross-examine and confront witnesses against her client, to know and learn the names of police officers and medical technicians, and to view physical evidence and test the chain of custody.

Other jurisdictions have ruled that prosecution by criminal indictment, which forgoes the preliminary hearing stage, actually denies a defendant equal protection of law[4], and the defense lawyer has the right to inspect any written statements of testifying witnesses[5].

Notwithstanding rulings of the Supreme Court and supporting cases from other staes, the preliminary hearing in Missouri has been relegated to a sometimes unimportant role. The state is given broad discretion in amending its criminal complaint at a trial on matters not even alleged at a preliminary[6]. The sole purpose of a preliminary hearing is the determination of the existence of probable cause to warrant the filing of a felony information. That a defendant may not have been shown to have committed the particular felony charged is of no consequence, as the rules seem to provide that the Associate Circuit Court Judge only find probable cause of the commision of "some felony"[7]. If the defendant is discharged at a preliminary hearing, double jeopardy does not bar the filing of a new complaint with another judge[8].

Missouri case law allows as an "incidental by-product" of preliminary hearing that cross-examination may be the basis for later impeachment of a witness at trial, but makes clear to defense attorneys that impeaching witnesses and fishing for discovery are not the purposes of a

Continued on page 5

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
Licensed 2 to 5 Years	50.00
Licensed Less than 2 Years	35.00
Provisional Member (Non Voting)	
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

NAME (Please Print) ____________________

ADDRESS ____________________ P. O. BOX ____________

CITY ____________________ STATE ____________ ZIP ____________

PHONE - AREA CODE (______) ____________________

YEAR OF ADMISSION TO BAR ____________________

Please return with your check to:

MACDL

P. O. BOX 15304

KANSAS CITY, MISSOURI 64106

The Accused...
Cont. from page 3

preliminary hearing[9].

Missouri cases hold that a preliminary hearing is not a part of the constitutional right to due process of law, and any error at a preliminary must result in "prejudice to the defendant and be a miscarriage of justice of manifest injustice"[10] in order to warrant reversal of a conviction.

The press is allowed attendance at a preliminary hearing, as there is the First Amendment right of access unless defendant makes a showing of "substantial" probability that his right to a fair trial will be prejudiced and that reasonable alternatives to closure cannot adequately protect the right[11].

Defense lawyers should always tape record preliminary hearings and use them for later impeachment at trials. The tough decision of whether to employ a court reporter and get an official transcript is a problem, especially if one of the state's witnesses later becomes unavailable for trial and/or takes the Fifth Amendment. In that case, the defense lawyer's transcript might be used by the state to establish its case[12].

The evidence presented at a preliminary hearing must be legally competent and cannot be based on hearsay alone[13], but courts allow reliance on some hearsay at a preliminary hearing[14].

If the defendant proceeds to trial without objecting to defects in the preliminary hearing, he waives such objections[15].

Supreme Court Rule 25.02 provides that discovery "may commence upon the filing of the indictment or information" (but note that discovery is not prohibited from occurring sooner.) Notwithstanding "may", many courts interpret this as "shall", which prohibits a defendant from viewing and photocopying the state's file prior to the preliminary hearing. Federal courts hold that they have "inherent authority to require disclosure beyond that specified by rules and statutes"[16].

The defendant should have the right of calling favorable witnesses. The U.S. Constitution requires that a defendant have the right to issue process in his favor "at all criminal proceedings..." Few rights are more fundamental than that of an accused to present witnesses in his own defense[17]. Criminal justice ends would be defeated if judgments were founded on partial or speculative presentation of the facts[18].

Defense counsel is not entitled to obtain copies of witnesses' statements at a preliminary[19] unless the witness uses his prior statement to refresh recollection.

Criminal discovery, like civil discovery, is not supposed to be a game, but an integral part of the quest for the truth and fair adjudication. To present defendant's version of the facts (his defense) so that the court can decide the truth, a defendant should always have the right to offer testimony of witnesses in his own behalf[20]. Some courts suspect that instead of subpoenaing favorable witnesses, defense lawyers will instead subpoena state's witnesses in order to get a free deposition and proceed with a fishing expedition. In an Illinois case[21], when the court quashed a subpoena duces tecum to obtain police reports at a preliminary hearing, the Illinois Supreme Court ruled it was prejudicial error and the conviction was

Continued on pg. 6

The Accused's Right of Discovery..... (continued from page 5) by Dee Wampler

reversed. The court held that the defendant should never be denied the right to subpoena power at a preliminary hearing.

No law or case authority has been found which prohibits a defendant from calling witnesses to testify at preliminary hearings for the purpose of showing an absence of probable cause or to produce evidence which would exonerate him. ■

1. Pal v. Alabama, 287 U.S. 45 (1932).
2. Coleman v. Alabama, 399 U.S. 1 (1970).
3. Leady v. State, 733 SW2d 502 (Mo. App. 1987); State v. Harvey, 692 SW2d 290 (Mo. Banc 1985).
4. Hawkins v. Superior Court, 586 P2d 916 (CA.1978).
5. State v. Mascarenas, 458 P2d 789 (NM. 1969).
6. State v. Morgan, 546 SW2d 207 (Mo. 1977); Johnson v. State, 485 SW2d 73 (MO. 1972).
7. State ex rel: Thomas v. Crouch, 603 SW2d 532 (Mo. banc. 1980).
8. State v. Stewart, 615 SW2d 600 (Mo. App. 1981).
9. Nero V. State, 579 SW2d 638 (Mo. App. 1979).
10. State v. Blackmon, 664 SW2d 644 (Mo. App. 1984); Collins v. Swensen, 443 F2d 329 (8th Cir. 1971); State v. Day, 506 SW2d 497 (Mo. App. 1974).
11. Press Enterprise Co. V. Riverside County Superior Court, 106 S. Ct. 1735 (1986).
12. State v. Frans, 685 SW2d 845 (Mo. App. 1984); State v. Holt, 592 SW2d 759 (Mo. banc. 1980).
13. Houston v. State, 593 SW2d 267 (TN. 1980).
14. Washington v. Clemmer, 339 F2d 715 (DC. 1964); Ross v. Sirica, 380 F2d 557 (DC. 1967).
15. State v. Small, 386 Sw2d 379 (Mo. App. 1965); State v. Taylor, 243 SW2d 301 (Mo. 1951).
16. Pennsylvania v. Ritchie, 480 U.S. 987 (1987).
17. Chambers v. Mississippi, 410 U.S. 284 (1973).
18. U.S. v. Nixon, 418 U.S. 683 (1974).
19. State v. Howell, 524 SW2d 11 (Mo. banc 1975).
20. Washington v. Texas, 388 U.S. 14 (1967).
21. People ex rel Fisher v. Carey, 380 NE2d 1150 (IL. 1978).
22. State v. Florence, 239 NW2d 892 (MN. 1976); modified by State v. Rud, 359 NW2d 573 (MN 1984). [The defendant may call witnesses whose testimony, if believed by a jury, would exonerate him. The defendant may not call witensses for discovery purposes, but may subpoena the victim or other state witnesses only upon a persuasive offer of proof that such testimony, taken in context of prosecution's evidence at trial, will lead to a dismissal of the charges.]

CLE Update

Watch for details -- COMING SOON -- on MACDL's Fall Program of seminars around the state.

The following dates and locations could be confiremd at press time.

Springfield October 11
St. Joseph October 18
Cape Girardeau October 25
Kansas City October 31
Columbia November 15
St. Louis November 22

Topics and speakers will be announced shortly.
Co-Sponsored, of course, with the Missouri Bar Association.

NEW MEMBERS

MARY J. BELLM, OLATHE, KS*
THOMAS M. BRADSHAW, KANSAS CITY
JENNIFER BREWER, OVERLAND PARK, KS*
ELIZABETH UNGER CARLYLE, LEE'S SUMMIT
THOMAS D. CARVER, SPRINGFIELD
WILLIAM J. FLEISCHAKER, JOPLIN - SUSTAINING MEMBER
ELENA M. FRANCO, KANSAS CITY
BARBARA GREENBERG, ST. LOUIS
JAMES G. GREGORY, O'FALLON
RANDALL B. JOHNSTON, FULTON
KEITH LUDWIG, CHILLICOTHE*
GERALD F. MCGONAGLE, KANSAS CITY*
T. DALE NICKLAS, KANSAS CITY*
DAVID S. RAUZI, KANSAS CITY
PATRICK E. RICHARDSON, GREEN CITY
CHARLES M. ROGERS, KANSAS CITY* - SUSTAINING MEMBER
THOMAS M. SHEA, MOBERLY
GARY L. SMITH, LEBANON
FRANK YANKOVIZ, MONETT*

**Public Defender*

MISSOURI CRIMINAL CASE LAW UPDATE

by Sean O'Brien
Missouri Capital Punishment Resource Center

Williams v. State, 800 S.W.2d 739 (Mo. banc 1990). The Supreme Court interpretated §-558.026.1 RSMo. (1986) to permit sentences for sex offenses to run concurrently with non-sex offenses that are committed at the same time. The court ruled that "the statute establishes two kinds of offenses for sentencing purposes — the listed offenses and 'other offenses.' It states clearly what the court must do if the defendant is convicted of an offense in each class. It does not, however, say in explicit language what must be done if there are multiple convictions of those offenses listed. We believe that the ambiguity must be resolved, not so much through a rule of lenity as in favor of according the trial court maximum discretion." The Missouri Supreme Court vacated the sentence and remanded the case for resentencing. Also see State v. Burgess, 800 S.W.2d 743 (Mo. banc 1990).

State v. Talbert, 800 S.W.2d 748 (Mo. App. 1991). The trial court denied Talbert's Rule 29.15 motion without a hearing. The court held that the allegations in the post-conviction motion were not refuted by the record, and that they stated facts, not conclusions, and that if the allegations were true, they could alter the outcome of the trial. Therefore, the trial court erred in dismissing the Rule 29.15 motion without an evidentiary hearing.

State v. Blaney, 801 S.W.2d 447 (Mo. App. 1990). Blaney was convicted of attempted burglary in the second degree. During his trial, a photo array was introduced into evidence which included mug shots of the defendant. Blaney's attorney objected on the grounds that the photographs were obviously police identification photographs which implied that he was involved in other crimes. Blaney also objected to the prosecutor's request to pass the photographs to the jury because there was a set of initials on the back of the photograph that implied that he had been identified by people in addition to the witnesses who testified at trial. The court granted a new trial, stating:

> The knowledge that appellant had been identified in connection with another crime can readily be seen as the factor which tipped the scales against appellant on the decisive issue of intent. The evidence that appellant intended to steal is not so strong that we can declare the error in passing the photographs to the jury harmless (at p. 451).

State v. Hunter, 802 S.W.2d 201 (Mo. App. 1991). Hunter was convicted of tampering in the first degree and sentenced to three years. This case is noteworthy because of its treatment of the claim that the prosecutor used its peremptory challenges in a discriminatory fashion in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Five black jurors qualified for the panel from which peremptories were made. The state used three of its six peremptories to remove blacks, resulting in two black people serving on the petit jury. In response to Hunter's Batson challenge, the trial court did not require the state to put forth race neutral reasons for its peremptories because it found there was no prima facie case of discriminatory use of the peremptory challenges. The court stated:

> In such cases, this court would not expect the trial court to waste judicial time by requiring neutral explanations for strikes and extensive findings and conclusions on the lack of such discrimination. We, thus, hold that race neutral explanations from the state are only required where the surrounding circumstances are either neutral on the question of racial discrimination or point to its presence.
>
> Because the petit jury that was selected was roughly representative of the number of

Continued on page 9

Criminal Law Update Cont.

blacks on the whole jury panel (16.5% on the petit jury and 22% on the jury panel), the trial court's determination that there was no prima facie case of discrimination established was affirmed. This holding highlights the importance of arguing or proving any extraneous information available that would expose the racial bias of the particular prosecutor involved.

Hopkins v. State, 802 S.W.2d 956 (Mo. App. 1991). Hopkins entered a plea of guilty to passing a bad check. The trial court sentenced him to three years imprisonment, but stayed the execution of sentence and placed him on five years probation, the probation term to begin when Hopkins completed a prison term that he was currently serving on an unrelated conviction. After returning to the penitentiary to finish the other sentence, Hopkins filed a Rule 24.035 motion challenging the guilty plea in the probation case. The trial court denied the motion without a hearing because he had not been delivered to the custody of the Department of Corrections as required by Rule 24.035. The Court of Appeals held that the court was correct in determining that Hopkins did not have a right to proceed under Rule 29.15, but that the appropriate disposition of a prematurely filed motion is a dismissal without prejudice. To challenge his guilty plea under Rule 24.035, Hopkins would have to wait until his probation is revoked and he is delivered to the Department of Corrections to serve that sentence. However, the opinion leaves the door open for a person in Hopkins' position to petition for habeas corpus under Rule 91.

State v. Wommack, 803 S.W.2d 170 (Mo. App. 1991). This is yet another case in which a person convicted of a drug offense was sentenced under the penalty provisions that were in effect at the time of the offense, rather than under the reduced range of punishment that became effective in September of 1989. Even though there was no objection at trial or at sentencing, the Court of Appeals found that it was plain error to sentence Wommack in violation of Revised Statutes of Missouri, §-1.160, which entitles him to the benefit of the reduced range of punishment in effect at the time of his trial.

State v. Houston, 803 S.W.2d 195 (Mo. App. 1991). Houston's conviction of possession of methamphetamine was reversed because the trial court failed to exclude for cause a venireperson who, because of his involvement in a drug awareness program sponsored by the Telephone Pioneers of America, admitted that he would probably be biased. In response to the state's argument that the juror was rehabilitated by the court's questioning, the court stated, "It does not save Mr. Scott as a qualified juror that he answered, to the court's rather coercive leading question, that he 'believed' he could follow the law and the instructions." Id. at 197.

State ex rel. Morton v. Anderson, 804 S.W.2d 25 (Mo. banc 1991). Morton was charged with several counts of passing bad checks arising out of transactions that occurred in November of 1986. Morton moved to dismiss, asserting that the statute of limitations, §556.036.2(1), had run due to the failure to file an information within three years of the offense. The trial court denied the motion, and Morton sought a writ of prohibition from the Missouri Supreme Court. The court held:

> Our cases have held that a prosecution commences for purposes of the statute of limitations when an information is filed or an indictment returned, and not when the complaint is filed.
>
> * * *
>
> Only after a preliminary hearing, in which the magistrate finds probable cause to believe the prisoner is guilty, may an information be filed in a felony case.

Because the running of the statute of limitations deprived the court of jurisdiction, the preliminary rule in prohibition was made absolute.

State v. Harger, 804 S.W.2d 35 (Mo. App. 1991). In a rape case, the defendant argued that he was entitled to see the victim's records from a drug rehabilitation center in order to determine if she had admitted taking cocaine prior to the alleged sexual assault. The court ruled that the restriction placed upon the dis-

Continued on page 10

Criminal Law Update Cont. from page 9

closure of such records by the Drug Abuse Prevention, Treatment and Rehabilitation Act, 42 U.S.C. §290, authorized the court to conduct an in camera inspection of the victim's records for relevant statements. The Court of Appeals remanded the case to the trial court to conduct an in camera examination of the records in question and, if relevant statements are discovered, to conduct a hearing to determine if the defense was prejudiced by the denial of access to the records. If so, the defendant should be granted a new trial. If not, the defendant is to be resentenced.

State v. Williams, 804 S.W.2d 408 (Mo. App. 1991). Williams was convicted of attempted first degree robbery and was sentenced to 15 years. Williams contended that the trial court should not have received into evidence evidence of three instances of fraudulent use of a credit card that occurred on the same day as the charged offense. The Court of Appeals found that the credit card offense bore no common scheme relationship to the attempted robbery, and that the testimony of other witnesses provided overwhelming evidence of Williams' identity, stating, "If the identity of the accused is established by other evidence and is therefore no longer an issue, it is improper to admit evidence of other crimes on the theory of proving identity. . . . It is not proper to admit details of separate and distinct crimes for the purpose of showing identity."

State ex rel. Hines v. Sanders, 803 S.W.2d 649 (Mo. App. 1991). Hines was prosecuted for kidnapping and armed criminal action based on an incident that occurred on November 22, 1987, in which he allegedly kidnapped a woman at gunpoint and raped and sodomized her. He was tried and acquitted on the charge of kidnapping, and subsequently was prosecuted for two counts of rape and one count of sodomy arising out of the same incident. Hines sought a writ of prohibition based on a collateral estoppel and double jeopardy bar to the second trial. Because the court agreed with Hines' collateral estoppel argument, it did not reach the double jeopardy claim. Following Ashe v. Swenson, 397 U.S. 436 (1970), the court held that "under the facts of the case, to prove the element of forcible compulsion in the rape and sodomy charges against Hines, the state would have to prove operative facts the first jury found absent." The preliminary writ of prohibition was made permanent.

State v. Schleeper, 806 S.W.2d 459 (Mo. App. 1991). Schleeper was convicted of assault in the first degree. After filing a timely notice of appeal and a timely Rule 24.035 motion, he escaped from the Missouri Department of Corrections and was at large for two or three days before being captured. The state moved to dismiss the appeal, invoking the escape rule which "operates to deny the right of appeal to one who, following a conviction, has attempted to escape justice." Accordingly, the court of appeals dismissed Schleeper's appeal.

State v. Peek, 806 S.W.2d 504 (Mo. App. 1991). The defendant was involved in a fight with a man and a woman, as a result of which he was convicted of two counts of assault in the first degree, two counts of armed criminal action and one count of attempted rape. The victims, a man named Terry and his girlfriend, Karen, were visiting with Peek at his residence. They claimed that without warning or provocation, Peek attacked Upshaw with a knife, inflicting multiple serious stab wounds, and then attacked Gatewood with a hammer, rendering her unconscious. When she awoke, Peek was on top of her and both were naked from the waist down. Peek's version was that Terry attacked him when he tried to eject Terry and his girlfriend from the premises. While he was fighting with Terry, Karen jumped on Peek's back three times. The third time, he struck her with a hammer that he had forcibly taken away from Terry during the fight. The court submitted a self-defense instruction as to the assault on Terry, but refused such an instruction as to the assault on Karen because she was much smaller than the defendant and he had no knowledge that she was armed. The court of appeals remanded the case for a new trial on the counts charging assault and armed criminal action against Karen, stating,

"Whether [Karen] herself intended or was capable of doing great physical harm to defendant, her engagement in the battle increased the danger to defendant from [Terry] and defendant would be justified in removing that increased danger. The reasonableness of defendant's belief in the necessity of using deadly force is generally a question for the jury."

State v. Wells, **804 S.W.2d 746 (Mo. banc 1991).** Wells was convicted of first degree murder and armed criminal action and sentenced to death on Count I and life imprisonment on Count II. After his trial, he filed a motion under Rule 29.15, alleging that his trial counsel was ineffective for failing to cross-examine or impeach a key state's witness with a letter that she had sent admitting that she knew Wells was innocent of the murder, and that it was committed by another person. The circuit court granted Wells' motion on the grounds that trial counsel was ineffective for failing to investigate the existence of the letter, and that Wells was prejudiced by her failure. The Missouri Supreme Court affirmed the order granting a new trial, stating, "the failure to pursue a single important item of evidence may demonstrate ineffective assistance and prejudice sufficient to warrant a new trial." Citing Hayes v. State, 711 S.W.2d 876 (Mo. banc 1986). The affirmance of the order granting Rule 29.15 relief rendered the direct appeal issues moot.

State v. Watkins, **804 S.W.2d 859 (Mo. App. 1991).** Watkins was convicted of first degree tampering and leaving the scene of a motor vehicle accident and sentenced to eight years. The conviction for leaving the scene of an accident was reversed because the information failed to allege that the accident involved property damage in excess of $1,000.00, nor was there any evidence to support a finding of monetary damage in that amount. This result was required even though the court noted that "It is quite possible, even probable, that the damage to the vehicles involved substantially exceeded $1,000.00. One additional question to the owner of the car would in all probability have established the monetary damage." Because the state made no request for the submission of the lesser included misdemeanor offense, there was no basis for ordering a retrial of that offense.

State v. Post, **804 S.W.2d 862 (Mo. App. 1991).** This case has a couple of interesting aspects to it. First, it has probably the juiciest allegations of juror misconduct during sequestration on record. The second aspect of the case is the procedure by which the juror misconduct was allowed to be litigated by the appellate court. First the juicy part.

While the jury was sequestered, at least five deputy sheriffs not assigned to the case visited the hotel rooms of the deputies who were assigned to the jury. The unauthorized deputies mingled with some of the sequestered jurors, playing cards, drinking beer and chatting. At least one deputy made comments about the case in the presence of the jurors. In addition, a female St. Louis police officer visited her boyfriend, who was a deputy assigned to the sequestered jury. She socialized with the jury, and ate dinner with them on one occasion. One of the unauthorized deputies became so well acquainted with the alternate juror that they had "sexual contact" in the juror's hotel room. Another deputy sheriff who was assigned to the jury boasted to other members of the sheriff's office that he was having sex with a member of the jury during the trial. The court of appeals stated:

We find the law enforcement officers' conduct to have been outrageous. No one should be on trial for any crime, much less murder, in such a lackadaisical atmosphere.

The second aspect of the case, though not as juicy, is much more significant. While the defendant's appeal was pending in the court of appeals, but after the running of the time within which a motion under Rule 29.15 could be filed, the defendant filed in the court of appeals a motion to remand for new trial by reason of newly discovered evidence of juror misconduct. The court of appeals ordered the trial court to conduct a hearing and make findings on the allegations in the motion, and to cause to be filed in the court of appeals a transcript of the proceeding. The court cited State v. Davis, 698 S.W.2d 600 (Mo. App. 1985); State

Continued on page 12

Update Cont. from pg. 15

emergency clause so that it is already in effect.

Always on the lookout for opportunities to create new crimes, the legislature has declared that it shall be a Class A misdemeanor to violate a new law regulating the manner in which submerged or embedded abandoned shipwrecks may be salvaged or excavated.

As is often the case, the bills which did not pass but are likely to be resurrected in 1992, consumed much of our attention and resources. Chief among these were the "omnibus drug and crime" bills. Sponsored in the House by Representative Vernon Scoville and in the Senate by Senator Harold Caskey, these bills went through a tortuous evolution of amendments and substitutes which prevented many legislators from knowing with certainty what they were voting on. These bills were backed by the Governor and appeared certain to pass until very late in the session.

They included dozens of new provisions for additional punishments for even the most minor of misdemeanor drug-related offenses. Considering the revelations about Supreme Court nominee Clarence Thomas' past marijuana use, it is ironic that the Bush and Ashcroft administrations are promoting legislation which would deprive persons convicted of drug offenses of their right to practice law or engage in any of dozens of other occupations which are licensed or certified by the state.

These bills would also inflict loss of driver's licenses, student loans, and public housing eligibility on people convicted of mere possession of illegal drugs. Caskey's bill would also have created a witness immunity program and would have expanded the term of imprisonment for Class C felonies from seven to ten years.

This legislation seemed likely to pass up until the very final seconds of the 1991 session. The bill was actually defeated in a House vote on the morning of the final day of the session and then further amended and passed by the house only a few minutes before adjournment.

The bill was then sent to the Senate and Senator Caskey was waving it in the air attempting to obtain recognition and call for a vote on the bill when the Speaker declared that the 6:00 p.m. deadline had arrived and the session ended. Representatives Ken Jacob and Chris Kelly of Columbia, and Elbert Walton of St. Louis deserve our gratitude for their role in preventing the passage of this bill.

Among the many amendments to this bill is one which would have changed the prohibition of public display of explicit sexual material, to material "pornographic for minors." It would also have removed the state preemption of laws governing promotion of pornography, outlawed bare breasts and buttocks in bars, and prohibited the sale of vibrators! Apparently there are no limits to the degree of government interference with our private lives that some legislators are willing to advocate.

The vibrator prohibition was removed from later versions of the bill. Perhaps the sponsor had seen the wisdom of the argument that "when vibrators are outlawed, only outlaws will have vibrators."

Other legislation which was defeated, in part due to our efforts, would have again permitted state forfeitures to benefit

the police and prosecutors. Several versions of this idea were debated, but in part due to a powerful series of articles in the St. Louis Post exposing abuse and corruption of police forfeitures in the St. Louis area during the final weeks of the session, these proposals were defeated. MACDL board member, Jim Worthington, persuaded the State Supreme Court last year that the state Constitution requires forfeiture money to go to the schools and not to the police.

Unfortunately, several good bills also went down to defeat. Some of these are certain to be considered again next year.

A bill to prohibit the infliction of the death penalty on mentally retarded persons has a chance of passage next year. This bill may be studied by an Interim House Committee on Criminal Justice which will be meeting this summer and fall.

MACDL has also supported a bill to permit counsel at Grand Jury proceedings and another bill to require destruction of closed criminal records. We also supported bills this year which would have created a presumption of probation for certain first offenders and a bill to create an ombudsman for grievances against the Department of Corrections.

MACDL worked this year in conjunction with a number of organizations who share our concern for the Constitution. These included the American Civil Liberties Union, the Missouri Association for Social Welfare, the Missouri Coalition for Alternatives to Imprisonment, and others. We have arranged for witnesses to testify at hearings, worked with legislators in the bill drafting process, and informed our members and the general public of legislation which threatens our liberty.

A state commission is presently examining the "disparities" in sentencing which are thought by some to exist throughout our state. This group is examining the differences in sentences imposed for similar crimes which may correlate with race, income, or geographic factors.

It could be catastrophic for the criminal justice system if this commission should recommend to the state legislature that a system of "sentencing guidelines" similar to the federal system be adopted in Missouri. The federal sentencing guidelines have almost eliminated judicial discretion in sentencing and have made federal prosecutors virtual dictators in the federal courts. We must resist any suggestion that a similar system be adopted in our state.

Our members are our greatest potential resource in the legislative process. All of you should make an effort to get to know your State Representatives and Senators. Now is a good time to communicate to our elected representatives that continued reliance on greater punishment while neglecting adequate funding for education and other social services will only continue the vicious cycle of increasing criminality.

All of us should be active and vocal in local and state politics.

There is no more appropriate way to commemorate the 200th anniversary of the adoption of our Bill of Rights.

Special Message from the President: Urgent Action Needed to Save Habeas Corpus

by Bruce W. Simons

On its 200th anniversary, the Bill of Rights is faced with its most serious threat since the McCarthy era. The Senate has passed a habeas corpus "reform" bill which virtually eliminates the jurisdiction of the federal court to enforce the Bill of Rights on behalf of state prisoners. Included in the bill are provisions that repeal the existing statutory right to counsel in habeas corpus for indigent prisoners under a sentence of death, impose time limits not only on the filing of habeas petitions, but on the time within which the court must rule, reduce funding for capital punishment resource centers by 50% (because if the bill goes into effect, they will not be needed), and provides that the federal court shall not issue a writ of habeas corpus as to any claim which was "fully and fairly litigated" in state court, regardless of whether the state court reached the correct decision on the merits. Those of you who have represented habeas petitioners in federal court understand the frustrations of dealing with the myriad of procedural defenses available to the state. Imagine a habeas corpus act which gives the state a procedural defense on claims you have properly exhausted in state court! If the Senate's version of habeas corpus passes in the House, the Fourteenth Amendment will be stripped of its most effective tool for enforcement.

Although death penalty cases are the primary target of this legislative effort, the bill applies to all state prisoners seeking habeas relief. If such a bill had been in effect when the Eighth Circuit decided the Constitutionality of the death sentences imposed upon James Chambers, Rayfield Newlon and Kenneth Kenley, it would have been powerless to prevent their executions and order the state to provide these men with Constitutional trials because the claims upon which relief was granted were raised and litigated in state post-conviction proceedings. Nationwide, federal courts have found violations of the United States Constitution in 40% of the convictions and sentences they have reviewed in the last 15 years. Under the Senate bill, the federal court would not have been allowed to grant relief in any of those cases.

The Senate bill also contains unconscionable time limits that would apply to death penalty habeas corpus proceedings. The District Courts would be required to rule on a petition within 110 days after it is filed, and the Circuit Court of Appeals must rule within 90 days of the notice of appeal. You don't have to have a great deal of experience in the litigation of capital cases to know that these time tables are wholly unrealistic, especially when a human life hangs in the balance.

The Missouri Bar has joined the American Bar Association in fighting to preserve Habeas Corpus. In a position paper adopted May 9, 1991, and communicated to the Missouri Congressional Delegation by Bar President Doreen Dodson on May 29, 1991, the Missouri Bar Board of Governors "strongly opposed" the "fully and fairly litigated" provisions of the Senate bill, stating, "The Missouri Bar

favors preserving the jurisdiction of the federal court to remedy violations of federal constitutional rights." Nevertheless, our Senators bowed to pressure from the Bush Administration and voted for these extreme measures. The National Association of Criminal Defense Lawyers, the American Civil Liberties Union, the National Legal Aid and Defenders Association and the NAACP Legal Defense Fund have also committed their voices and resources to saving the writ of habeas corpus. The Kansas City Star and the St. Louis Post-Dispatch have printed editorials opposing this bill. It would be a tragic dereliction of our duty under our charter if we fail to lend our voices to this cause.

It is incumbent upon this organization and its individual members to act to protect our clients' access to a forum that is removed from state politics for the protection of rights guaranteed under the United States Constitution. Mainstream lawyers are calling the Bush Administration's legislative initiative "the Habeas Bill from Hell," and that is exactly what it is. I urge each and every one of you to call and write your Congressional Representatives and tell them that you oppose any form of "fully and fairly litigated" restrictions on the Writ of Habeas Corpus, that you support funding for capital punishment resource centers, and that you support the habeas corpus reforms advocated by the American Bar Association. Address your mail to Senators at the United States Senate, Washington, DC 20510, and to Representatives at the United States House of Representatives, Washington, DC 20515, or call them at their Washington Offices:

Senator
John C. Danforth,
202-224-6154

Senator
Christopher Bond,
202-224-5721

Representative
William (Bill) Clay,
202-225-7014

Representative
Joan Kelly Horn,
202-225-2561

Representative
Richard A. Gephardt,
202-225-2671

Representative
Ike Skelton,
202-225-2876

Representative
Alan Wheat,
202-225-4535

Representative
Thomas Coleman,
202-225-7014

Representative
Melton (Mel) Hancock,
202-225-6536

Representative
Bill Emerson,
202-225-4404

Representative
Harold Volkmer,
202-225-2956

Many of these people will be riding the fence on this issue, and your call will push them in the right direction. Some of these people are against us on these issues, and your call may change or soften their opposition. Some of these people are already in our corner, and your call will strengthen their resolve.

What is at stake here is nothing less than the jurisdiction of the federal court to enforce the Bill of Rights against state police action. We cannot afford to sit idly by while it happens.

I urge you to act now.

Selected U.S. Supreme Court Cases October Term, 1990 (Revised 6-28-91)

California v. Hodari, ___ U.S. ___, 113 L.Ed.2d 690 (1991). No "seizure" within the meaning of the 4th Amendment occurred where the suspect jettisoned his dope while fleeing from a police officer's request to stop.

Powers v. Ohio, No. 89-5011 (April 1, 1991). The Equal protection Clause is violated when the state uses peremptory challenges to in a discriminatory manner, even when the defendant is white.

Florida v. Jimeno, No. 90-622 (May 23, 1991). Consent to search a car validated a warrantless search of a rolled-up paper bag full of cocaine found in the car.

Michigan v. Lucas, No. 90-149 (May 20, 1991). The confrontation clause is not violated where the defendant is prohibited from cross-examining a complaining witness in a rape case regarding past sexual conduct with the accused where the defense has failed to comply with a rape-shield statute requiring that it notify the state of his intent to use such information.

Lankford v. Idaho, No. 88-7247 (May 20, 1991). Lankford was convicted of first degree murder; the prosecution said it would not seek the death penalty, and did not provide notice of aggravating circumstances. The trial court sentenced him to death anyway. The Idaho Supreme Court ruled that the defense should have known that the prosecutor's waiver was not binding on the trial court. The U.S. Supreme Court found that the death sentence violated the 8th and 14th Amendments due to the lack of notice to the defense, and remanded the case for a new sentencing hearing. [Four justices would have affirmed the death sentence!]

Parker v. Dugger, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 812 (1991). The Eighth and Fourteenth amendments were violated where the Florida Supreme Court failed to conduct a meaningful, independent appellate review of Parker's death sentence. The case was remanded to reconsider whether the judge override of the jury's verdict of life was proper under Florida law.

Ford v. Georgia, No. 87-6796 (February 19, 1991). The Georgia Supreme Court made up a new procedural requirement for the enforcement of claims under Batson V. Kentucky, and applied it retroactively to bar Ford's Batson claim. The U.S. Supreme Court unanimously reversed and remanded the case for a determination of the merits of the Batson claim because the state procedural rule was not an independent, adequate state ground for the decision where it had not been a "firmly established and regularly followed state practice." James v. Kentucky, 466 U.S. 341 (1966); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

McClesky v. Zant, No. 89-7024 (April 16, 1991). The Court substantially overhauled the test for whether a habeas petitioner abuses the writ by filing a successive habeas corpus petition. The Court announced the following new rules:

The test for whether petitioner has abused the writ is the same as the test for whether to excuse a procedural default under Wainwright v. Sykes, 433 U.S. 72 (1977). (Petitioner must show cause and prejudice for his failure to raise the issue in a timely manner.);

If a petitioner cannot show cause, he may overcome the abuse of the writ defense if he can show the ends of justice require the court to entertain the claim. Kuhlmann v. Wilson, 477 U.S. 436 (1986)(plurality opinion) (the ends of justice test requires a "colorable showing of factual innocence");

The "deliberate bypass" standard of Faye v. Noia, 372 U.S. 391 (1963), is replaced by the test of "whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process..." (emphasis added)

The court placed an affirmative duty on habeas petitioners to "conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." (emphasis added).

Constitutionally ineffective assistance of

counsel is cause under the cause and prejudice test.

Hernandez v. New York, No. 89-7645 (May 28, 1991). The equal protection clause was not violated by the prosecutor's using peremptory challenges to exclude Hispanics from the jury because the state court was not clearly erroneous in determining that the prosecutor's explanation that they might "second-guess" the court-appointed interpreter was "race-neutral."

Yates v. Evatt, No. 89-7691 (May 28, 1991). In Yates v. Aiken, 484 U.S. 896 (1985), Yates' case was remanded to the South Carolina Supreme Court for reconsideration in light of Francis v. Franklin, 471 U.S. 307 (1985) based on an instruction that "malice is implied or presumed from the use of a deadly weapon." The South Carolina Supreme Court found that the error was harmless because the could have found Yates guilty in spite of the erroneous instruction. The U.S. Supreme Court found that the court erroneously applied the harmless error rule of Chapman v. California, 386 U.S. 18 (1967), and that the error was not harmless beyond a reasonable doubt.

California v. Acevedo, No. 89-1690 (May 30, 1991). The automobile exception to the warrant requirement now includes locked containers found in a car where the probable cause focuses solely on the container. (The police saw Acevedo putting the parcel of dope in the trunk; there was no independent basis to search the car.)

Mu'Min v. Virginia, No. 90-5193 (May 30, 1991). The 6th and 14th Amendments do not require allowing a defendant on voir dire to inquire into specific knowledge that jurors may have obtained from exposure to pretrial publicity.
]
McNeil v. Wisconsin, No. 90-5319 (June 13, 1991). An accused's assertion of his right to counsel at a bail hearing does not preclude subsequent interrogation by police on an unrelated offense; it is not an invocation of the right to counsel established in Miranda v. Arizona, 384 U.S. 436 (1966), or Edwards v. Arizona, 451 U.S. 477 (1981).

Coleman v. Thompson, No. 89-7662 (June 24, 1991). Where a death sentenced prisoner failed to file a timely notice of appeal from the denial of his state habeas, and the state appellate court summarily dismissed his out-of-time appeal, the claims asserted therein were procedurally barred under Ylst v. Nunnemaker. Furthermore, ineffective assistance of appellate post-conviction counsel is not "cause" which excuses the default.

Ylst v. Nunnemaker, No. 90-68 (June 24, 1991). The rule of Harris v. Reed (creating a presumption that a claim is not procedurally defaulted if a state court ruling appears to rest primarily on, or is interwoven with, federal law) does not apply to summary rulings in post-conviction proceedings where the last reasoned opinion explicitly imposes a procedural default. The federal habeas court must "look through" the summary opinion and apply a rebuttable presumption that the order is consistent with the "last reasoned opinion."

Schad v. Arizona, No. 90-5551 (June 21, 1991).

1. The due process clause was not violated where the jury instructions permitted the jury to find the mental state necessary for first degree murder by finding that the murder was premeditated or in the alternative that it was committed during the course of a felony.

2. In a trial for first degree murder, where the defendant may be sentenced to death, Beck v. Alabama does not require that the jury be instructed as to a lesser-included charge of "robbery-murder" (felony murder) where the jury is given the option of returning a verdict of second degree murder if the evidence supports a conviction of conventional second degree murder.

Payne v. Tennessee, No. 89-5721 (June 27, 1991). The holdings in Booth v. Maryland, 482 U.S. 496 (1987), and South v. Gathers, 490 U.S. 805 (1989), that the 8th Amendment bars evidence and argument relating to the victim and the impact of the victim's death on the victim's family, are overruled. The opinion does not overrule the holding in Booth that the 8th Amendment is violated by the admission of testimony of the family members characterizing the crime and giving opinions about the crime, the defendant and the sentence.

Harmelin v. Michigan, No. 89-7272 (June 27, 1991). Harmelin's mandatory sentence of life without parole for possession of over 650 grams of cocaine did not violate the 8th Amendment on the grounds that it denied him individual consideration of mitigating factors surrounding the crime and the defendant. It may be cruel, but it is not unusual. ■

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

BULK RATE
U. S. POSTAGE
PAID
PERMIT NO. 1917
K.C., MO

Please verify the information on the above mailing label.
Use the address change form below to make any corrections.

ADDRESS CHANGE / CORRECTION

(Please send a photocopy of this entire page in order to keep your newsletter intact.)

Name ______________________ *County* ______________________

Street ____

City ______________________ *State* __________ *Zip* __________

Phone ______________________ *Fax* ______________________