MACDL
Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

President's Letter Winter 1991

Dear Fellow MACDL Members:

All right, all right. I know I should check my sources before attribution, but it is a beautiful Fall day with air as clear as, well, air, and I don't feel like it . Besides, I want to discuss an idea and not write a scholarly article. In any event, misattribution isn't as bad as plagiarism. Joe Biden did that and he is a United States Senator. I am only a lawyer in Missouri.

"Your Constitution," he said, "will never last. It is all sail and no anchor." Who said? Why, de Tocqueville, of course, and he said it over 150 years ago. Very well, you say, but even if he said it, apropos of what?

Original intent, of course. you know about original intent. It is that peculiar, but not new, philosophy of law enjoying what I hope will prove a limited currency these days. As I understand it, it is all anchor and no sail, requiring an analysis of any constitutional construction to be done in a strictly limited form based solely on actual expression in the Constitution. The idea is to determine what the "founding fathers" really meant in the context of constitutional interpretation at the time of its drafting.

The author of the nautical simile quoted above really raised the problem at the core of the idea of original intent; he criticized the flexibility of the Constitution as breeding instability and being subject to the vagaries of passing time and changing ideas.

Of course it was. The need for a strong central government as a substitute for the Articles of Confederation was recognized by the drafters of the Constitution. The nation then was imperiled by a lack of central authority, non existent credit, and the natural consequences of being a mere amalgam of 13 states, all pulling to and fro.

The founding fathers, among them James Madison, generally given credit for authorship of the Constitution were, in spite of kneebreeches and wigs, and the veneration that we have bestowed on them over time, a rum lot of pretty tough old seadogs. The country being led by the same fellows now venerated piously as founding fathers had just staged a successful mutiny against one of the premier powers of the world, and the beneficiaries of that uprising had no desire to see another tyrant on the quarterdeck. For that reason, before the Constitution could be ratified, certain changes were demanded from the foc'sle; these emerged as the Bill of Rights.

The notion of original intent is quite frankly one of all anchor and no sail. It is not a terribly original idea and it didn't emerge just yesterday. For example, look at Olmstead v. U.S., 72 L.Ed. 944 (1928). Here's a fine anchor of a case which held that electronic interception wasn't violative of the IV Amendment as there had been no physical trespass or seizure of persons or papers. Sound familiar? It should, because that is exactly what the IV Amendment holds.

This nonsense persisted until Katz v. U.S., 19 L.Ed.2d 576 (1967) which overturned Olmstead and in the process stated, well, look here: The IV Amendment protects reasonable expectation of privacy from Government snooping by any means, electronic or otherwise, absent a warrant. The founding fathers could not have known about advances in electronic communica-

Continued on pg. 3

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Presidents's Letter -- Continued from page 1

tions, but they clearly wanted to keep the Government's nose out of citizens' affairs without the prior determination of probable cause. That is what the IV Amendment really meant, said the Court. There is plenty of sail in that opinion, as there should be. But all it really did was take an accepted constitutional principle and apply it in the context of a modern technological development.

This isn't a new idea. McCullouch v. Maryland, 4 L.Ed 579 spoke of the acceptability of any appropriate means to an end consistent with "the letter and spirit of the constitution" and not prohibited by the constitution. There is a lot of sail in McCullouch. There is a fair amount of sail in Marbury v. Madison, 2 L.Ed 60 (1803), too, but this is interesting from a different perspective. The Madison in this case was our old friend James, serving then as the Secretary of State, later our fourth President. There is no record of Chief Justice Marshall or anyone else popping over, then or ever, to talk to Madison about the meaning of any particular phrase or to clarify a point of writing in the Constitution. This was entirely, according to Marshall in Marbury, the duty of the Supreme Court. It remains so to this day.

I think the idea of attempting to glean original intent as bounded by the actual Constitution is dangerously atavistic; see for example, Olmstead, supra. For that matter, our nation's founders never conceived of us as a democracy. What they created was a republic, which has largely devolved into a democracy as a result of changing needs and time and, not coincidentally, changing interpretations of the constitution. See for example, South Carolina v. Katzenbach, 15 L.Ed.2d 769 (1966), a nice compilation of voting rights analysis lending constitutional imprimatur to the Voting Rights Act of 1965 which resulted in the enfranchising of many people whom the constitution didn't even consider citizens, much less voting citizens, in 1789.

On the other hand, our earlier, more republican form of government gave us Thomas Jefferson. Our democratic devolution gave us Joe Biden. Hmmmm. Oh well, there's no question that the changes in our society were consistent with modern times. They were essential for our transformation from an agricultural society of 1789 to an industrialized one in 1991. Without these changes the nation would have ossified long ago. When you think about it, the changes have all been for the common good and the general welfare, which was what the founders sought to ensure, not only for themselves, but also for their posterity. So much for original intent.

I don't know about you, but I am mightily disturbed by the idea of original intent. The men who created our country gave us a stout ship, and I intend to do everything I can to "turn to" with as much of the crew as I can muster, and crowd her with every scrap of sail I can find.

Bruce W. Simon

Press Release

Charges against seven defendants arrested after an undercover drug operation in Callaway County have been dismissed.

The charges were dismissed after Officer William Yowell, who had worked undercover in Callaway County in 1990 and 1991 admitted he lied under oath three times in unrelated proceedings in Marion County.

In a drug sale case where the undercover officer's credibility is the strength of the case, we must have witnesses who can be believed. I do not want to be in the position of endorsing the credibility of an officer whom I know has lied under oath.

In this situation, the officer worked undercover in four counties other than Callaway. When he was asked in Marion County testimony about his relationship with a female confidential informant, he lied. Later, to his credit, this person came forward to reveal he had lied.

The subject of his lie had nothing to do with the Callaway cases and perhaps nothing to do with those cases in which he lied. His testimony in the

Continued on Page 7

FYI

by Francie Hall

MACDL is proud to be one of 52 state/local affiliates of the National Association of Criminal Defense Lawyers. Charlie Atwell (K. C.), past president and active Board member of MACDL, was recently elected by NACDL's Council of Affiliates to the National Board of Directors. Charlie joins MACDL Board member Burt Shostak (St. Louis) on the National Board. The Hon. David Russell, Associate Circuit Judge in Clay County and past MACDL president, served as president of NACDL in 1985-86. We're fortunate to be represented so ably at the national level by members of our state defense bar.

NACDL gains credibility and respect daily speaking and lobbying for the rights of criminal defendants. NACDL also assists defense lawyers whose presence and/or fee records have been subpoenaed by grand juries. NACDL has instituted a Federal Forfeiture Abuse Task Force (see form on page 8.). With NACDL's generous assistance, MACDL's recent CLE programs have included Jeff Weiner (Miami), current NACDL president; Nancy Hollander (Albuquerque), NACDL president elect; Alan Ellis (Mill Valley, CA), immediate past president of NACDL; Larry Posner (Denver) and Stan Greenburg (L.A.), both on NACDL's Board.

Your membership in MACDL strengthens the voice of the defense bar on both the state and national levels. Strength and unity in defense of individual liberties are increasingly important as the opposition grows more powerful. Thank you for your support. Feel free to address any questions about membership in MACDL or NACDL to me at P. O. Box 15304, K.C., MO 64106

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J. D. Williamson (Independence), past president of MACDL, is president elect of the Kansas City Metropolitan Bar Association. J. D.'s wisdom and energy have been (and, we trust, will continue to be) invaluable to MACDL. We know that he'll do a fine job at the head of KCMBA.

MACDL Board member and hard-working CLE chair J. R. Hobbs (Kansas City) also serves on the Missouri Bar's Criminal Justice Committee.

Past MACDL president Hugh Kranitz (St. Joseph) has served on Missouri Bar's Board of Governors for several years.

Lawrence Ferrell (CapeGirardeau) has resigned his seat on the MACDL Board of Directors because he has accepted a position as Assistant United States Attorney. MACDL is therefore soliciting applications from anyone interested in filling this vacancy on the Board. To nominate yourself or another, please contact me in writing at P. O. Box 15304, Kansas City, MO 64106 by January 15, 1992.

Finally, I was contacted recently by Karen Jaffe of the CBS news program "48 Hours". She's looking for "interesting" criminal cases coming up for trial in the next few weeks. If you think your case qualifies and you'd like to be on television, call me at 816/274-6800; I'll be happy to give the information to Ms. Jaffe.

On behalf of the officers and directors of MACDL, I wish you all a joyful and peaceful holiday season.

Trial Tips -Closing Argument

by Larry Schaffer

In a small town in a county in south Missouri one of the local n'er-do-wells, John Jones, was on trial for the crime of Burglary in the Second Degree.

Now John was a man known to all as a person eminently qualified to have committed the burglary, however, the State's case was not all that strong. John had been seen in the vicinity of the burglarized house a few hours before the burglary was discovered. John had also been found in possession of some of the stolen goods. John admitted to having been near the property. He even allowed as how he might have seen the people who actually did it. Unfortunately, he could not identify them. He came into possession of the stolen goods by picking them up from a path where they lay strewn.

In any event, the case was duly tried and the jury adjourned to deliberate. After an hour or two, the jury returned. The Judge asked the foreman, William Johnson whether of not the jury had reached a verdict. He answered "yes". The Judge then asked Mr. Johnson to stand and "publish" the verdict. Mr. Johnson complied.

"We the jury find the defendant, John Jones, not guilty!", he read. After a short pause, however, he turned to the defendant and, on behalf of the jury, said, "but John, don't you ever do that again!".

As you know, MAI-CR3d 302.04 says (in pertinent part):

A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. The law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you will find him guilty. If you are not so convinced, you must give him the benefit of the doubt and find him not guilty."

MAI-CR3d 302.04 (1-1-87).

"Careful and impartial consideration of all the evidence in the case" and "firmly convinced that the defendant is guilty of the crime charged" may be phrases with which you have no problem, however, as for me, I am just a little tired of arguing esoteria! I suggest that the use of an anecdote, either the one set out above, or some other, equally down-to-earth, can be very effective in "bringing to life" such philosophical concepts as "burden of proof" and "beyond a reasonable doubt". Merely deciding to use an anecdote, however, does not end the issue.

When using an anecdote you must first ask yourself, "Can I tell this anecdote in closing argument?". You must also ask, "Am I 'arguing outside the evidence'?".

There ARE judges who, even in this scenario, might sustain an objection to arguing outside the evidence. There is a simple way to circumvent even those judges, however.

If you preface your anecdote with something like: You know, we lawyers get together on occasion. At seminars; at conventions; around the courthouse. When we do, sometimes the subject turns to cases we have tried ... or heard about. On one occasion, not too long ago, I became aware of a case that is supposed to have happened down in south Missouri some years ago.

This introduction will serve to alert the jury (and more importantly the judge) that you are merely "arguing". It will further alert the judge and jury that you are using the anecdote as analogy. The story may or may not be true but, even if it isn't, it contains a moral applicable to the case you're arguing.

Having decided to use an anecdote and having comfortably circumvented the State's anticipated objection, it is still not enough simply to tell the anecdote and let it "lie there". USE IT! Try an elaboration something like this: What could

Continued on page 7

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.

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Please return with your check to:
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P. O. BOX 15304
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Press Release Continued from page 3

Callaway cases is not specifically questioned. Nevertheless, it is so important that we all be able to rely on the witnesses who have acted in undercover roles that we should not proceed in cases where the officer's credibility is so clearly subject to question.

For further information, contact Robert Sterner, (314) 642-0714, Callaway County P.A's Office, Fulton, Missouri 65251

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MACDL Board member, Pat Eng (Columbia), submitted the above letter. Pat adds that there is another officer in the same drug operation in Callaway County whose testimony was so unbelievable that Judge Conley dismissed a probation violation based on his testimony. That officer's name is Donald Elkins who, at the time of that hearing in front of Judge Conley, was a Callaway County Sheriff's Deputy.

Trial Tips - Closing Argument

Continued from page 5.

better demonstrate the concept of "reasonable doubt" than Mr. Johnson's aside to defendant Jones? In fact, ladies and gentlemen, in their own, simple way, that southern Missouri jury exemplified two of the best aspects of the American criminal justice system and the Constitution... reasonable doubt and trial by jury! Who should be more qualified to actually put the concept of "reasonable doubt" into effect than a Missouri jury?

I suggest you continue with something like this: In the State of Missouri we have an attitude... a philosophy... a standard by which we live. A standard for which we have become famous! We value this philosophy, this standard, so highly that we have even put it on our license plates! Do you know what it is? Can you remember? Of course! SHOW ME! We are the SHOW-ME State!

Conclude with, among other things: As Missourians, what are we saying when we say "show me!"? When we say it as a jury we are simply saying "prove it!". We are saying we are not going to do something just because you want us to do it! We are not going to do something just because you think we should do it! We are not going to do something just because you tell us to do it! WE ARE NOT GOING TO CONVICT THIS DEFENDANT UNLESS YOU PROVE TO US THAT HE IS GUILTY BEYOND A REASONABLE DOUBT!. SHOW US!

Everywhere around us there are analogies to be drawn, concepts to be developed, and arguments to be made on behalf of our clients. If you would like to adopt any or all of it, please BE MY GUEST. On behalf of all of us at MADCL, I hope it helps. I HOPE YOU WIN! If YOU do, we ALL do! Good luck!

Witness Preparation by Gerald Handley

What a marvelous country we live in! In what other country could we not only be celebrating the 200th Anniversary of the Bill of Rights but also allowing the appointed, anointed and elected leaders of our country to demonstrate to our children that they not only believe in this document but also are willing to enjoy its use.

For example I offer the following:

"The lord told me it's flat none of your business" . . . Jimmy Swaggard from the pulpit to his congregation following his arrest for solicitation. October 1991

"I've never discussed Roe v. Wade." Justice Clarence Thomas to an inquiry at the Senate Judiciary Panel Confirmation Hearings. October 1991

"Ollie," said the President, "you have to understand, I just didn't know". President Ronald Regan to Oliver North. November 25, 1986

What do all of these men

Continued on pg. 17

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

CALL FOR INFORMATION

FEDERAL FORFEITURE LAW ABUSES

THE NACDL FORFEITURE ABUSE TASK FORCE IS ATTEMPTING TO GATHER "HORROR STORIES" OF FORFEITURE ABUSES FOR UPCOMING CONGRESSIONAL HEARINGS AND FOR PASSING ON TO THE MEDIA FOR FEATURES THEY ARE DOING WITH INCREASING FREQUENCY. THE FOCUS AT THIS TIME ARE CASES PROSECUTED AS FEDERAL FORFEITURE MATTERS AND ABUSES BY FEDERAL AGENCIES AND/OR FEDERAL COURTS, WHETHER OR NOT THE INITIAL SEIZURE WAS DONE BY LOCAL, STATE OR FEDERAL AGENTS, AGAINST INNOCENT AND/OR UNINVOLVED CLAIMANTS OR THIRD PARTIES. IF YOU HAVE OR HAD SUCH A CASE OR CASES, PLEASE COMPLETE THE FORM BELOW AND SEND IT AND ANY ATTACHMENTS TO THE FOLLOWING PERSON; USE A SEPARATE FORM FOR EACH CASE:

IF YOUR PRIMARY OFFICE IS IN THE 1st, 2nd, 3rd, 4th, 5th or 6th FEDERAL CIRCUIT, SEND YOUR RESPONSES TO:

STEPHEN B. SHANKMAN, ESQ.
SUITE 800, ONE MEMPHIS PLACE
200 JEFFERSON AVENUE
MEMPHIS, TENNESSEE 38103
FAX (901) 575-8717

IF YOUR PRIMARY OFFICE IS IN THE 7th, 8th, 9th, 10th, 11th or D.C. FEDERAL CIRCUIT, SEND YOUR RESPONSES TO:

CARLEEN R. ARLIDGE, ESQ.
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SUITE 850
SAN JOSE, CALIFORNIA 95113
FAX (408) 288-7261

Attorney's Name _____

Address _____

Telephone / FAX _____

Type Of Property Involved _____

District Court District _____ Circuit _____

Type ___Administrative___ / ___Judicial___ ___Criminal___ / ___Civil___

Date Of Seizure _____ Seizing Agency _____

Docket/Seizure No._____ Status ___Pending___ / ___Concluded___

If Concluded, How Was It Concluded (i.e. Motions, Trial, Settlement) _____

Were Charges Filed Against Claimant Or Related Persons? _____

Would Your Client Be Willing To Appear Before A Congressional Committee? ___Yes___ / ___No___ Be Interviewed By The Media? ___Yes___ / ___No___
Alternatively, Would Your Client Be Willing To Have Her/His Case Described To Congress? ___Yes___ / ___No___ To The Media? ___Yes___ / ___No___

Please Attach A Brief Explanation Of Why You Believe Criminal Charges Were Or Were Not Filed And A Brief Description Of The Facts And The Abuses.

MISSOURI CRIMINAL CASE LAW UPDATE

by Sean O'Brien
Missouri Capital Punishment Resource Center

State v. Shanks, 809 S.W.2d 413 (Mo. App. 1991). Defendant was convicted of attempted kidnapping and resisting arrest. The Court of Appeals found the evidence was insufficient for the conviction of resisting arrest. After Shanks was arrested and handcuffed, he was placed in the police car to be taken to the station. Upon arrival at the station, he jumped over a fence and ran away. He was apprehended a short time later. Because the arrest had been fully effectuated and Shanks was in custody, the elements of the crime of resisting arrest under 575.150 were not proven.

State v. Grant, 810 S.W.2d 591 (Mo. App. 1991). Grant's robbery conviction was reversed because the prosecuting attorney displayedto the jury a pistol unconnected with the offense charged, and usedthe pistol to have his witness demonstrate how the robbery occurred. "Lethal weapons unrelated to the offense for which an accused is charged have prejudice seldom attached to other demonstrative evidence."

State v. Brooks, 810 S.W.2d 627 (Mo. App. 1991). In a prosecution for forcible rape, the prosecutor produced a witness who testified that the defendant raped her in Chicago three years prior to the rape for which he was on trial. The state argued that evidence of the prior uncharged rape was admissible to show defendant's "common scheme or plan" because in both instances he gained entrance to the victim's home by performing home repairs. The court of appeals reversed the conviction because the evidence was prejudicial, and not admissible as part of a "common scheme or plan." In deciding the point, the court discussed the extent to which another crime committed through a similar *modus operandi* might be admissible to show identity of the perpetrator or a common scheme or plan on the part of the defendant. The court also discussed the apparent distinction between the treatment of such evidence in cases involving adult victims as opposed to child victims of sexual assault. Such

Continued on page 10

evidence is more likely to be admitted when the victim is a child.

State v. Fondren, 810 S.W.2d 685 (Mo. App. 1991). Appellant moved for post-conviction relief under Rule 29.15. The Public Defender's Office was appointed to represent him, but no amended motion was filed. The Eastern District Court of Appeals,pursuant to Luleff v. State, 807 S.W.2d 495 (Mo. banc 1991), remanded the case to the circuit court to determine whether Fondren was abandoned by the Public Defender's Office. If so, the court was to order new counsel appointed to represent appellant and grant additional time within which to file a Rule 29.15 motion.Interesting question: Who will represent him at that hearing?

Brown v. State, 810 S.W.2d 716 (Mo. App. 1991). Where the court's order denying Rule 29.15 relief under Rule 24.035 stated only that, "The court finds that the motion, files and record of the case conclusively show that movant is entitled to no relief," the court failed to comply with the requirement of Rule 24.035(i) that it supply sufficiently specific findings of fact and conclusions of law so that meaningful appellate review is possible.

State v. Bradley, 811 S.W.2d 379 (Mo. banc 1991). Although an unverified Rule 29.15 motion fails to invoke the jurisdiction of the court, Malone v. State, 798 S.W.2d 149, 151 (Mo. banc 1990), the verification requirement is satisfied even where the movant fails to declare that he has listed all grounds for relief known to him and that he waives all unlisted grounds. Therefore, the circuit court had jurisdiction to decide Bradley's post-conviction relief motion despite the defect in the verification clause. Where appointed counsel failed to file a timely amended 29.15 motion, the case was reversed and remanded to the motion court to determine whether counsel abandoned Bradley within the meaning of Sanders v. State, 807 S.W.2d 493 (Mo. banc 1991). If so, Bradley would be appointed new counsel "who will proceed anew according to the rule." Furthermore, the motion court was to consider whether counsel should be referred to the Bar Committee for discipline.

State v. Blue, 811 S.W.2d 405 (Mo. App. 1991). Blue alleged that his trial attorney was ineffective for failing to call his grandmother as a witness. The grandmother would have testifiedthat the mother of the rape victim called her on the telephone to say that her daughter fabricated the

rape and sodomy charges against Blue. The motion court, without conducting an evidentiary hearing, ruled against Blue on the grounds that the failure to call the grandmother was a valid strategy decision. The court of appeals reversed and remanded with directions to conduct an evidentiary hearing, stating, "In absence of an evidentiary hearing, there is no basis for determining the trial counsel's reason for failure to call a witness." Also see State v. Talbert,800 S.W. 2d 748 (Mo. App. 1990).

State v. Pullen, 811 S.W.2d 463 (Mo. App. 1991). Where the prosecutor used peremptory challenges to exclude six blacks, so that only one black person served on the jury, the defendant was entitled to have his case remanded for an evidentiary hearing under Batson v. Kentucky, 476 U.S. 79 (1986). However, he was not entitled to relief on his claim that the prosecutor's use of nine peremptory challenges to exclude females from the jury violatedBatson. It is interesting to note that since Pullen is white, he raised his claim first as a fair cross-section argument, but was permitted to shift on appeal to the equal protection argument in order to take advantage of the opinion in Powers v. Ohio, ___ U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

State v. Hyzer, 811 S.W.2d 475 (Mo. App. 1991). This is a great case because it says the cops have to clean the stems and seeds out of your pot before they weigh it to determine what grade of felony the possession of marijuana charge will be. §558.011.1 (3) RSMo. (1986) defines marijuana as not including "the sterilized seed of the plant which is incapable of germination." § 195.010 (26) RSMo. Supp. (1990) provides that marijuana does not include "the mature stocks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination ..." Since the forensic chemist testified that he was not asked to remove the stems and seeds from the pot before measuring it, and he further testified that the sample did in fact contain seeds that were probably not capable of germination, the evidence did not establish beyond a reasonable doubt that the weight of the

Continued on page 12

Criminal Law Update Cont. from page 11

controlled substance exceeded five grams. Therefore, the trial court erred when it failed to instruct the jury on the class C felony of selling five grams or less of marijuana. Also see State v. Bethel, 569 S.W. 2d 270 (271-72) (Mo. App. 1978).

State v. Cooper, 811 S.W.2d 786 (Mo. App. 1991). I have always talked in jest about having represented clients whose sentences violate the rule against perpetuities. It finally happened in this case when Judge Hutcherson in Clay County sentenced Cooper to a life sentence, and then ordered it to run "consecutive to all other sentences imposed prior to or after this sentence including any sentence in Cause No. CR187-1465." The Court of Appeals held the sentence to be improper because it "purports to be consecutive to all future sentences and thus violates our interpretation of 558.026.1 and . . . [Richmond v. State, 484 S.W.2d 280 (Mo.1972)]," which requires that a sentence must be definite andcertain in order to be valid.

Wiles v. State, 812 S.W.2d 549 (Mo. App. 1991). Wiles filed a motion under Rule 24.035 to set aside his plea of guilty to ten felony offenses. During the guilty plea, the prosecuting attorney misstated the range of punishment for the offenses to which he was pleading guilty, and neither the court nor the defense attorney corrected the prosecutor's misstatement. The hearing court deniedhis motion because the sentence that he assessed was within the range of punishment for the offense. The case was reversed and remanded for an evidentiary hearing on the issue of whether Wiles knew the correct maximum punishment for the offenses in question and, if not, whether there is a reasonable probability that, but for counsel's failure to provide correct information, appellant would not have pleaded guilty.

Kaup v. State, 812 S.W.2d 558 (Mo. App. 1991). The appellant's motion under Rule 24.035 should not have been dismissed for lack of a properly verified amended petition without first conducting a hearing to determine whether appointed counsel performed "as required by Rule 24.035(e)." If not, and movant was not at fault, the court shall appoint new counsel upon remand and allow time to amend the motion as permitted under Rule 24.035, and proceed anew

Continued on page 13

Criminal Law Update Cont. from page 12

according to the rule.

Klemme v. State, 812 S.W.2d 569 (Mo. App. 1991). Klemme's motion under Rule 24.035 was dismissed as untimely because it was initially filed in the incorrect geographical district of Marion County. (Marion County is split into two geographical districts for purposes of venue.) As a result, appellant's pro se motion was filed in the correct circuit court one day after the deadline under Rule 24.035 (b). Because under 478.720 RSMo. (1986), the circuit clerk should have transferred the motion to the proper district. The filing was timely and Klemme's motion was remanded to the circuit court for further proceedings under Rule 24.035.

State v. Kumming, 812 S.W.2d 571 (Mo. App. 1991). Following the rule in Wilson v. State, ___ S.W.2d ___ (Mo. banc No. 73285, decided July 23, 1991), the fact that appellant's pro se motion was not properly verified was cured by the filing of a properly verified, timely amended motion.

Walker v. State, 812 S.W.2d 574 (Mo. App. 1991). Pursuant to Luleff v. State, 807 S.W.2d 495 (Mo. banc 1991), appellant was entitled to have his cause remanded for a hearing to determine whether his attorney's failure to file a timely amended motion under Rule 29.15 constituted abandonment.

State v. Cooper, 811 S.W.2d 786 (Mo. App. 1991). For the second time, Division 1 in Clay County was reversed for imposing a sentence to run consecutive to all other sentences "imposed prior to or after this sentence . . ."

State v. Wilborn, 812 S.W.2d 913 (Mo. App. 1991). Where the jury instruction permits the jury to convict Wilborn of sodomy if it found that he "inserted his fingers . . . in the rectum of [the victim]," the sodomy conviction was reversed. However, the court found that the double jeopardy clause did not prevent a retrial on that count.

State ex rel. Musick v. Dickerson, 813 S.W.2d 75 (Mo. App. 1991). Where defendant was placed on probation for five years, and imposition of sentence was suspended, the court could not, at the expiration of the five year term, revoke his probation, impose sentence, and suspend the sentence pending a new probationary term of five years.

Hight v. State, 313 S.W.2d 368 (Mo. App. 1991).

Continued on page 14

Criminal Law Update Cont. from page 13

Where counsel appointed under Rule 24.035 filed a timely, but unverified, amendedmotion which stated no new grounds for relief, the circuit court's order dismissing the Rule 24.035 motion would be reversed and remanded for a hearing under Sanders v. State, 807 S.W.2d 493 (Mo.banc 1991).

Rios v. State, 813 S.W.2d 366 (Mo. App. 1991). Where counsel appointed under Rule 24.035 failed to file a timely amended motion, the circuit court's judgment denying relief was reversed and the cause remanded to the trial court for hearing under Sanders v. State, 807 S.W.2d 493 (Mo. banc 1991). Accord, see Washia v. State, 813 S.W.2d 953 (Mo. App. 1991); State v. Ojed, 814 S.W.2d 9 (Mo. App. 1991); Heistand v. State, 814 S.W.2d 19 (Mo. App. 1991).

Clamme v. State, 814 S.W.2d 355 (Mo. App. 1991). The denial of petitioner's 24.035 motion was reversed and remanded for a hearing to determine the date that movant was delivered to the Department of Corrections, whether his motion under Rule 24.035 was timely filed, and whether he received ineffective assistance of counsel as described in Luleff v. State, 807 S.W.2d 495 (Mo. 1991).

State v. Dunn, Slip op. No. 73569 (Mo. banc, October 16, 1991). Defense counsel objected to testimony by a police officer that he went to a particular address based on information received from an informant. The hearsay objection was overruled, after which the officer stated that an informant told him the defendant had been at his house earlier with some marijuana for sale. The Supreme Court ruled that the hearsay objection did not preserve the point for appellate review because, even though the objection was overruled, defense counsel should have sought a conference outside the hearing of the jury to "determine the nature of the [witness'] response," and because she did not request, after the question had been answered, that the statement be stricken and the jury instructed to disregard it. Thus, the contemporaneous objection rule in Missouri has now been expanded to mean before, during, and after the commission of trial error.

LEGISLATIVE UPDATE -- by Dan Viets

Governor's Crime Commission Recommends New Legislation

The Missouri General Assembly will convene its 1992 session the first week of January. Pre-filing of bills begins December 1, 1991.

Among those bills filed are certain to be many inspired by the report of the Governor's Commission on Crime. The Committee was established ten years ago under Governor Kit Bond. Each year the Commission holds hearings around the state and invites input from concerned citizens. This year's hearings occurred between September 9 and October 9.

Unfortunately, those who are invited to testify at these hearings do not represent a cross-section of Missouri's citizens. Those who testified at this year's hearings included prosecutors, police chiefs, highway patrolmen, marshals, and politicians. Not one private defense attorney, public defender or civil libertarian was invited to take part in these hearings.

The Commission itself is made up primarily of law enforcement officials, "anti-crime activists" and politicians.

Thus, it is no surprise that the recommendations of the Commission are to further undermine the constitutional rights of criminal defendants and those who represent them. The Commission's recommendations are largely for more of the same. Its report calls for more prosecutors, more policemen, more prisons and more punishment generally. Only token acknowledgement is made of the potential to reduce crime through increased education and employment or to the use of alternatives to incarceration.

In order for us to counteract the effect of this highly biased report, MACDL members should begin now to contact their elected representatives in the legislature. Many of our legislators will be asked to sign on to various "anti-crime" bills during the next few weeks. It is critically important that those legislators hear from people who question the wisdom of continuing the same failed approach to crime reduction.

We need to remind our elected officials that December of 1991 marks the 200th anniversary of the ratification of the Bill of Rights. This is a time when patriotic Americans should be working to preserve and protect the hard-won freedoms enshrined in our nation's Constitution. It is not a time when we should be attempting to further erode or erase the precious liberty which is the essence of America.

In addition to contacting your elected representatives, you should consider making a generous contribution to the MACDL Political Action Committee. Contributions to our PAC may be addressed to 15 North Tenth Street, Columbia, Missouri 65201. For more information regarding legislative affairs, feel free to call me at (314)443-6866.

Copies of the full report of the Governor's Crime Commission are available from the Missouri Attorney General's office.

Next year, let's be sure the Governor's Crime Commission hears from Americans who recognize that the greatest threat to our liberty comes from those who, though well-intentioned, argue that we must sacrifice our freedom in order to curb crime.

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MACDL maintains a full time lobbyist and legislation tracking program at Jefferson City. This service is made possible by members' dues and PAC contributions. The Officers and Board of Directors appreciate your contributions to these programs and extend thanks to their members for making this financially possible.

Special Message from the President: Regarding Habeas Corpus

by Bruce W. Simons

In the summer newsletter, I urged MACDL members to contact Missouri congressional representatives to prevent the adoption of legislation that would virtually eliminate the writ of habeas corpus. The response was overwhelming. By a vote of 218-208, the Administration's "Habeas Bill from Hell" (proposed on the floor as the Hyde Amendment) was defeated in the House of Representatives.

The Missouri representatives who were responsive to the efforts of The Missouri Bar and MACDL are William Clay, Joan Kelly Horn, Richard Gephart and Allen Wheat. It took exceptional courage for these people to vote to save habeas corpus because the Administration once again resorted to Willy Horton tactics, arguing that a vote against the Hyde Amendment is a vote for murderers and other criminals. Our own Attorney General said that the only issue in the crime bill was whether we can execute killers "in one year or ten." In part because the crime bill (which revived the death penalty for over 50 federal offenses) contained provisions which preserved the Writ of Habeas Corpus, Senate conservatives filibustered the crime bill so that it did not pass. President Bush had promised to veto the bill anyway.

The battle over habeas corpus is far from over. House and Senate leaders are now squabbling over who should sit on a joint conference committee which will draft a single compromise of the crime bill. That debate may delay the formation of a conference committee until after the first of the new year. In an election year, the temptation to tinker with the Bill of Rights for political gain will be overwhelming. Your calls and letters will be more important than ever in the coming months.

I hasten to point out that the vote in the House did not break down strictly according to party lines. Although the vast majority of Republicans in the House supported the Hyde Amendment, so did 55 Democrats. In fact, the Hyde Amendment would have passed absent the opposition of nine key Republican representatives. I wish this were a sign of the beginning of the end of politicians from either party seeking to curtail civil liberties for political gain; unfortuantely, it is probably only the beginning.

The representatives who voted to preserve habeas corpus should be commended for their intelligence and courage. I suggest that you write to the representatives who voted to protect the Writ of Habeas Corpus, thank them for their support, and urge them to continue their opposition to the Administration's efforts to abolish the Writ of Habeas Corpus. As for the Representatives and Senators who voted with the Administration, it is not too late to educate them. Your letters are important!

Witness Preparation
continued from pg. 7

have in common?

a) They've all been involved in the legal system.
b) They've all broken the law.
c) They are all liars.
d) All of the above.

Recently I read an article in Newsweek Magazine written by Sam Benson titled "Why I Quit Practicing Law". Hopefully some of you saw it, but for those who didn't, the article caused me to reflect on a few things.

While Mr. Benson had only practiced law for two years prior to his resignation from the profession, he was quoted as stating"I was tired of the chicanery. And I was tired of the misery I caused other people." I for one was happy that he resigned.

In reflecting on his statement it is apparent that Mr. Benson never represented an individual whose liberty was at stake nor had he had the opportunity to see the rewards that you and I see on a frequent basis. It is true that the rules have been made tougher and that from time to time we are aware that this is not an era of the Warren Court. Those who are privileged to have never known the need to depend on people with our skills and vision to help them through the maze of the criminal justice system could have their views radically changed should they or other friends or family be focused upon by the criminal justice system.

In a recent article by Tom Wicker styled "For Whom The Bell Tolls", Wicker, a noted commentator on politics and its application to the daily lives of the citizens of this republic, discussed harmless error as interpreted by Chief Justice Rehnquist.

Mr. Wicker discussed how, it you confessed to a crime only because the policeman beat the daylights out of you (viz. Rodney King), this would be a coerced confession which, prior to this term, couldn't be used against you. C. J. Rehnquist and four of his colleagues (who I doubt ever represented an accused) found that this was harmless error (if there was enough other evidence to convict you).

Now days, the Supreme Court says you can be arrested without a warrant (by mistake) and thrown into jail. The police who heretofore had to charge you or release you (usually within 24 hours) can now hold you for 48 hours. Justice O'Connor hasn't considered the implication of an innocent person being locked up for two days and nights in a tank with drunks, prostitutes, drug addicts and perhaps a rapist or murderer. I suggest that this is one area where we may educate the general public and show them that the direct result of some of this law-and - order mentality can result in unreasonable treatment for innocent people.

Mr. Wicker is correct in his analysis that this crowd has interpreted the public's desire for tougher laws for the accused and prisoners. Americans may find out (and they are likely to) that these rulings actually make it easier to get tough on them. And that's not harmless error (Tom Wicker, N.Y. Times In The Nation).

Where does that leave us as practicing lawyers? I think we can, as a group and as individual attorneys, not take the low road of Mr. Benson and quit practicing law, but instead refocus ourselves on the daily aid we bring to the people of this country who need someone between them and those who would disregard their rights without thought as to the impact on them or their children in the future. We need to consider a public position on those issues which the public can identify with.

Maybe one thing that came out of the Thomas confirmation hearings was an uplifting of the public's attention on how easy it is for a person to be accused and how it affects the accused. While I for one have great reservations about the intellectual integrity of Clarence Thomas, I do believe that he is a different person today because of these accusations and I am hopeful that in some case in the future it will make a difference.

"REVERSAL OF FORTUNE" by Alan M. Dershowitz

Reviewed by: James D. Worthington
Lexington, Missouri

The saga of the Claus Von Bulow Trials (there were 2) and travails as told by attorney and law professor Alan Dershowitz is a professorial work by this renowned instructor from Harvard Law School who continues to believe mightily in fundamental constitutional precepts at a time when our "kinder and gentler nation" has turned mean, vicious, vituperative, vitriolic and vindictive; nay, downright ugly in its Presidential Administrations, Justice Department and Supreme Court interpretations of that constitution and its "guarantees" of basic, inalienable human rights and freedoms. From the United States Attorney General who espouses a belief that "all defendants are guilty or they wouldn't be charged in the first place" to Supreme Court majorities who find that two full days (48 hours) in jail for a suspect without ever being charged with any crime, or "coerced" confessions are to be accepted and even revered rather than scourged and scorned, the storm clouds roll in daily. Sometimes I wonder whether my psyche can withstand another Advance Sheet horror ("Supreme Nightmare in Washington, D. C." or "Freddy Kruger Lives in Jefferson City"); then along comes this refreshing breath of fresh air to revive my spirits and renew my drive for and faith in mankind by a rousing Knute Rockne peptalk.

Dershowitz paints broad pictures of the first trial, the appeal and the second trial of Claus Von Bulow with some minutia and sprinkles in explanations of the legal machinations for those not educated in law. And Dershowitz, with the advantage of 20/20 hindsight and with some flair for media hype, describes in detail the first trial testimony of all witnesses, including the explosive testimony of Mrs. Sunny Von Bulow's maid (Maria Schrallhammer) and her two children (Alexander and Annie). He also describes the able, talented and egotistical Harold Price Fahringer, the defense lawyer from New York, who conducted the defense of Claus in that first trial. Dersh points to two major strategic decisions which seemed to seal the GUILTY verdict in that first trial. First, Fahringer stipulated to the presence of insulin on the alleged weapon and second, he seemed cavalier in his disdain for and disinterest in obtaining the personal,

Continued on page 19

"REVERSAL OF FORTUNE" by Alan M. Dershowitz - - Continued

handwritten notes of attorney Richard Kuh, who conducted a private investigation that pointed the incriminating finger at Claus; that investigation was commissioned by Sunny's two children, who were antagonistic to Claus and whose financial interests were in direct juxtaposition to Claus's. There is even the possibility that they could have committed the crime and deliberately framed Claus, although that theory is never flushed out in any substantial detail.

Dershowitz describes the unique group method and manner of the appeal preparation and presentation. Dersh used the student population of Harvard Law School to great mutual advantage for Claus, for himself as appeal counsel and for the practical experience of his students. To us, as defense and appeal counsel here in Missouri, the descriptions may provide insight and ingenuity for our next trial or appeal. Admittedly, Brother Dershowitz had the luxury of an unlimited expense account from the wealthy Von Bulow. Nevertheless, the methods and examples are instructive.

The discovery of the full, precise content of the Kuh notes is explosive, whereas the expert testimony regarding the insulin and needle is only exciting to people like us trial lawyers who truly enjoy this kind of discovery minutia.

The appeal victory lacks drama, just as our cases reach denouement with the oral argument and not with the cold, written opinion that arrives unannounced and unexpected in a plain brown envelope months later.

And the result of the second trial seems somewhat foregone due to the precision of discussions of the first trial and appeal. But the story, as told by Dershowitz, renders to us, as defense lawyers, some interesting examples of trial strategy, ordering of witnesses, differing methods of cross-examination and the structures thereof, and, of course, final argument. There are also some interesting discussions about oral arguments in the appellate process.

In spite of the limitations described, I recommend this book to each of you. But I caution that the movie with Glenn Close, Jeremy Irons and Ron Silver is a poor, Grade D imitation of the book and lacks any real excitement, story line or drama.

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