MACDL
Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

President's Letter — *Fall 1992*

Dear Fellow MACDL Members,

You are probably aware of the efforts of the Missouri Bar to improve the public image of lawyers and the judiciary. The Missouri Bar commissioned a "Survey of Voter Knowledge and Attitudes" regarding the state judiciary, and the results have caused concern in some circles of the Bench and Bar.

I was recently asked by an administrator from the MoBar Center to assist in the public relations campaign on behalf of courts and lawyers. My first reaction was, "Me? You want me to help you defend Missouri judges? There must be some mistake." I figured that someone must have given him a list of the first and last people to call on for this task, and he was looking at it upside down. He assured me that there was no error, and that people who are supposed to know these things said that I was an appropriate person for the job.

Still skeptical, and suspecting a trap, I told him that if he would send me a copy of the survey, I would look it over and see what my conscience might allow me to do. After all, it has always been in my nature to seek out difficult tasks, and this seemed to qualify.

When I looked at the survey, a couple of items stood out (I mean besides the complete omission of any mention of gender or race issues). First, 67% of those surveyed think that justice in Missouri is won primarily by the rich. Since I happen to agree with them on this point, there was not much I could do for the courts on that score. However, I then saw that an overwhelming 79% of the voters believe that the courts are not strict enough in punishing criminals, and only 1% felt they were too strict. It was clear to me that only a significant information gap could explain how 67% of us could understand that the system unfairly treats its poor litigants, while 79% think that criminals are treated too leniently. I mean, aren't we talking about the same group of litigants here?

I did some research and called the MoBar administrator back to find out if he had come to his senses, or if he still wanted my help. I told him that I had found that 79% of the voters seem to be think the courts were soft on crime. He agreed that was a problem, and let on as if the judges would be grateful if I could write something that would set the record straight. So I prepared a little piece setting out most of the facts that all seasoned criminal defense lawyers already know:

1. The United States has the highest incarceration rate of any country in the world; South Africa is second with an incarceration rate that is nearly 25% lower than ours, and the former Soviet Union rates a distant third place.[1]

2. African-American men are five times more

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MACDL thanks you for your support and looks forward to serving you in the coming year.....

(President's Letter continued)

likely to be incarcerated in America than Black men in South Africa.[1] An African-American child born today is more likely to be murdered or incarcerated than attend college.

3. Between 1980 and 1989, the prison population doubled, while the crime rate actually dropped 3.5%over the same period.[3] Experts on criminal justice policy have concluded that the rise in our prison population is the result of harsher criminal justice policies rather than a consequence of rising crime.[4]

4. Half of our prisoners are sentenced for petty crimes that pose little threat to public safety.[5]

5. Missouri's sentencing practices are following the national trend; population is dramatically increased, but violent offenders are a shrinking portion of the total.[6]

6. Missouri still allows the execution of children and mentally retarded people.[7]

I sent the piece down to the MoBar Center, and it was enthusiastically received. The administrator thanked me for helping to improve the public image of Missouri Courts. You're welcome, I think.

[1] The United States incarcerates 455 of every 100,000 people; South Africa's rate is 311 per 100,000, and in the last year of the Soviet Union's existence, the rate was 268 per 100,000. Mauer, "Americans Behind Bars: One Year Later," The Sentencing Project (Washington, DC, 1992).

[2] The U.S. incarceration rate for Black males is a staggering 3,370 per 100,000, compared to 681 per 100,000 in South Africa. Id.

[3] Federal Bureau of Investigation, "Crime in the United States: Uniform Crime Reports 1989" (1990).

[4] Mauer, "Americans Behind Bars," Criminal Justice (May, 1990).

[5] Austin and Irwin, "Who Goes to Prison?" National Council on Crime and Delinquency (1990).

[6] According to information provided by the Missouri Department of Corrections, Missouri prison population grew from 9,623 in 1985 to 15,878 in 1992. The crimes that experienced the largest increase are drugs (188% increase), traffic (157% increase), property damage (94% increase) and fraud (93% increase).

[7] Bangladesh, Pakistan, Rwanda, Barbados are the only nations that admit to permitting the execution of children; Iran and Iraq are suspected of this practice. Spillane, "The Execution of Juvenile Offenders: constitutional and International Law Objections," 60 UMKC L. Rev. 113 (Fall, 1989).

Sean D. O'Brien

MACDL STRIKE FORCE

by Bruce Houdek

The Missouri Association of Criminal Defense Lawyers has established a Strike Force to assist member attorneys who are the subject of or threatened with contempt, sanctions, forfeiture of fees and subpoenas for confidential records in connection with representation in criminal matters. Members of the Strike Force are the past presidents of the association: Charlie Atwell (K.C.), Bernie Edelman (St. Louis), Jerry Handley (K.C.), Marty Kerr (Independence), Jim Speck (K.C.), J. D. Williamson (Independence), Robert Duncan (K.C.), David Godfrey (St. Louis), Thomas Howe (St. Louis), Hugh Kranitz (St. Joseph), Bruce Simon (Kansas City) and Robert Welch (Independence).

Strike Force member Bruce Simon successfully appealed (by Petition for Writ of Prohibition in the Western District of the Missouri Court of Appeals) a fine and two-day jail term imposed on a Jackson County Public Defender staff attorney.

Any member of MACDL who is subjected to such threats or punishments may contact Bruce Houdek at 816/842-2575, or any other member of the Strike Force for assistance.

CLE UPDATE

by J. R. Hobbs

The Missouri Association of Criminal Defense Lawyers, in cooperation with The Missouri Bar Association, is pleased to announce that the Annual Fall Criminal Practice Institute occurred during October at various locations, and was a successful venture. Presentations were made in St. Louis, St. Joseph, Cape Girardeau, Kansas City, Columbia and Springfield. The program qualified for 6.0 hours of Missouri MCLE credit for the reporting year 7/1/92 to 6/30/93.

Additionally, the Missouri Association of Criminal Defense Lawyers and The Missouri Bar Association are planning the Annual Meeting and Seminar, entitled "Defending Criminal Cases", to be held in Clayton, Missouri on Friday and Saturday, April 16-17, 1993. We anticipate that we will have at least three presenters from the National Association of Criminal Defense Lawyers, and expect nearly 300 attendees for this program. The topics are being developed for this program. Any member who has suggestions should contact Larry Schaffer (816/373-5590), Larry Fleming (314/863-3400) or J. R. Hobbs (816/221-0080).

RICKY GRUBBS EXECUTED

by Sean D. O'Brien

Although I first became involved in capital litigation in 1983, I recently experienced for the first time the execution of a client. Ricky Lee Grubbs was killed by the State of Missouri at 9:35 p.m., Wednesday, October 21, 1992. He was the 26th person to be executed in 1992, and the 183rd person to be executed since Furman v. Georgia. Ricky's death is somewhat of a milestone for America--we have now executed more people this year than in any year since 1962. I was involved in the last-ditch appeal to prevent Ricky's execution, and I need to share that with you.

When the Missouri Capital Punishment Resource Center was appointed on Ricky's case less than a month before his execution, we immediately commenced an intensive investigation. We gathered every document that we could find on Ricky since birth, and we contacted all of his family we could be find. Cedric Brown, an attorney who works with me at the Resource Center, found a great deal of compelling mitigating evidence for Ricky that had never been sought out by any of the attorneys who had represented him before. Ricky was one of 18 children who grew up in poor household. Several siblings and neighbors signed detailed affidavits describing the family's living conditions, presenting a tragic picture of how poverty affects families. Ricky's brothers and sisters also disclosed very private details of physical and sexual abuse that the children suffered at the hands of their father. In the first grade, Ricky was placed in special education classes for mentally retarded children. He made failing grades in school and finally dropped out in the 7th grade.

About a month before the homicide, Ricky's mother died. He commenced a drinking binge that lasted through the time of the homicide. Ricky's wife was unfaithful to him, and the day before the homicide she filed for divorce. Ricky was not eating or sleeping regularly, and at the time of the homicide he and the victim, Jerry Thornton, were drinking together. In his confession, Ricky told the police that there was an argument, and Thornton moved toward him. Ricky got scared and beat him, tied him up and cut his throat. Ricky's brother participated in the offense, and is serving a life sentence in Pacific, Missouri.

Ricky's defense at trial was diminished mental capacity. The only evidence presented in support of the defense was that Ricky was drunk when the murder happened. Although Ricky was examined by a state psychiatrist who found him mentally competent, the issue of diminished mental capacity was not addressed.

Cedric took the affidavits, school records and other documents to the state's psychiatrist. After reviewing the materials, the psychiatrist signed an affidavit stating that he was not aware of any of the facts that Cedric uncovered, that he had never been contacted by any attorney who represented Ricky, either before or after the trial, and that based on the new information, it was impossible for Ricky to have deliberated upon his conduct.

It was also discovered that the prosecuting attorney in Caruthersville, Missouri, wrote a letter to Governor Ashcroft advising him that Ricky informed the local sheriff that a couple of prisoners in the local jail were plotting to kill the prosecutor. Ricky's cooperation thwarted their plan. Although the prosecutor asked the governor to consider this in exercising his clemency powers, he questioned Ricky's motives for cooperating. However, Ricky did not receive any consideration on his pending

charges for providing the information that saved the prosecutor's life.

Because these facts had not been discovered by Rule 27.26 counsel, or by the attorney representing Ricky on his first federal habeas, Ricky had to overcome the obstacles of procedural default and abuse of the writ. Legally, this means that he had a burden to show "cause", i.e. some objective factor that prevented him from uncovering this evidence in his Rule 27.26 motion or his first federal habeas. Neither Ricky's mental retardation nor the oversight of his appointed lawyers established cause. Therefore, the procedural issue in the case became whether or not "the ends of justice" required the court to hear the claim in spite of the State's defenses of procedural default and abuse of the writ. We relied on the language from Sawyer v. Whitley stating that the ends of justice, or "actual innocence" test, would be satisfied by negating an element of the offense - in Ricky's case, deliberation.

Ricky's execution was scheduled for 12:01 a.m. October 21, 1992. In the afternoon of October 20, United States District Court Judge Carol Jackson issued a temporary stay of execution to consider the affidavits, evidence and habeas corpus petition. The Attorney General appealed the stay to the Eighth Circuit Court of Appeals. At 8:10 p.m. a three-judge panel of the Eighth Circuit vacated Judge Jackson's order, and a little more than a hour later the Eighth Circuit *en banc* denied rehearing. Shortly after 10:00 p.m., Cedric went to Potosi to be with Ricky.

After the denial of the motion for rehearing *en banc*, I called the Governor's legal counsel to urge the Governor to intervene. I told him about the letter from the prosecutor in Caruthersville, and that the Courts were restrained by procedural barriers from even considering the constitutionality of Ricky's sentence. I was not allowed to speak with the Governor, but was told that he had already made up his mind that he would not "interfere with the legal process."

With less than an hour to go before the scheduled execution, Justice Blackmun entered an order staying the execution to permit the full court to consider a petition for writ of certiorari. Kent Gipson and I worked through the night preparing a petition, which was filed at 6:35 a.m. on Wednesday, October 21, 1992. The rest of the day was spent preparing and faxing supplemental suggestions into the Court. We filed our last pleading shortly before 5:00 p.m., and then we waited.

At 8:00 p.m. on Wednesday, I was advised by a clerk of the United States Supreme Court that the Court had voted to vacate Justice Blackmun's stay. Justice Blackmun, Stevens and Souter dissented.

I called the prison, and the guard in the death-watch cell put me on the phone with Ricky. I told him that the stay had been vacated. His first reaction was to ask what our next appeal would be. I told him there were no more appeals. Although we were in touch with him constantly through the last round of appeals, he did not seem to understand that his case had gone from the District Court to the U.S. Supreme Court in less than 24 hours. I finally had to tell Ricky in very blunt terms that his appeals were over, and that he would be executed very soon. I'm not sure he ever completely understood. He thanked me for the work that we had done on his case, and then he politely excused himself so that he could spend some time with his family. An hour and a half later, Cedric witnessed the execution.

Obviously there is much more to this story than what I can put into words. In the words of Justice Blackmun, Ricky Grubbs has joined Roger Keith Coleman and Warren McCleskey as "victims of the new habeas." Eighteen months ago, Ricky would have been forgiven for the mistakes of his attorneys, and there is no question in my mind that he would have received a new trial on the basis of the evidence that we presented to the court. Unfortunately, the courts have been actively restricting the Writ of Habeas Corpus, sacrificing justice for the sake of finality.

It would be easy for me to throw stones at the lawyers who represented Ricky at trial and in his later appeals, but I know them all, and I know them all to be good and dedicated lawyers. Unfortunately, not a single one specialized in the defense of capital cases, and the state court lawyers

were working under a burdensome caseload and a paucity of resources that virtually guaranteed failure. Therein lies the dilemma of defending capital cases: Only people who specialize in defending capital cases can do them right, but there are not enough resources to insure an adequate number of specialists. At the time of Ricky's trial, Missouri ranked 49th of the 50 states in per capita spending for indigent defense. Even though the Public Defenders now have a unit that specializes in defending capital cases, many of the attorneys in that unit make less than $30,000 a year, ridiculously disproportionate to the responsibility.

The state of Missouri has demonstrated a remarkable indifference to the moral necessity of providing effective representation in proceedings where the objective of the government is to take a human life. Even as I write this, Missouri is preparing to execute yet another mentally retarded man, Bobby Shaw. Although capital punishment is a field for specialists, it looks as though people facing execution will continue to rely on dedicated volunteers to provide legal representation. If you want to be one of those volunteers, call me--the hours are lousy, and the pay sucks, but it's the right thing to do--if you make the commitment to do it right.

TALK TO ME

by Charlie Rogers

Think about it from the juror's viewpoint: You'd rather not be there. You have work to do, work you like, know and are good at. But you show up, under the thinly veiled threat of being jailed for contempt. You watch a simplistic videotape and/or listen to a vague monologue from a judge. Then you wait, and wait some more. Finally, you are herded into a courtroom with a group of similarly situated strangers. Another judge reads you some incomprehensible legalese in a boring monotone, pausing midway only to make you stand up and swear to something - it's not quite clear what. Then the prosecutor starts asking questions, most of which sound like, "Everyone who wants to stand up in front of all these people and say you can't be fair, please raise your hands." Those few honest souls who do respond to the prosecutor are asked something like "So you are saying you can't be fair even if the judge orders you to?" Now it's almost lunchtime, and the defense lawyer stands up. You've heard about these shysters.

This is how it looks to the venirefolks every time we pick a jury. All of this happens before we get a chance to talk to them, and most of it is beyond our control. No wonder the "traditional" voir dire questions produce few if any illuminating responses. We have to get prospective jurors to talk to us in the artificial, threatening environment of the courtroom, and that is no easy task. It's time for a new approach to voir dire - an approach that uses the principles of empathic communication to find out how people feel about the "gut" issues that determine the outcome of a case.

First, consider a questionnaire. It's a lot less threatening to write down a response than to raise your hand and talk in front of fifty strangers. Judges should like questionnaires - they save lots of in-court time. File a motion for jury questionnaire well in advance of trial, and attach a proposed questionnaire to your motion. See if your prosecutor will join in the motion - she might have questions to include in the questionnaire. Attach affidavits to the motion - from lawyers, psychologists, sociologists or ordinary citizens who have been through jury selection - showing that jurors would be less embarrassed and more open and honest if sensitive or private questions were asked in writing instead of in open court. Get a hearing on the motion at least a couple of weeks before the trial setting. Be ready to take the logistical hassle of the questionnaire away from the court staff by making your support staff available to distribute and collect the questionnaires and make copies for you and the prosecutor. Although questionnaires may be passed out, completed and returned immediately before voir dire begins, it is preferable to send them out in advance, to be returned by a specific date (maybe the Monday before the trial). This gives the lawyers time to digest the responses, agree on some cause or hardship challenges, and prepare voir dire

questions to follow up on the questionnaire responses. During the voir dire itself (with or without a questionnaire), we must create an atmosphere of openness, one which enables jurors to honestly disclose their perceptions, feelings and behavior. To create such an atmosphere, we must communicate three core elements to our jurors: empathy, respect and congruence. Empathy is our ability to hear, understand and share the world the juror lives in. Respect is our acceptance of that world without judging it - unconditional positive regard. Congruence is our genuineness - we must express on the outside what we feel on the inside. Our nonverbal message must match our words. If we are not genuine, we cannot expect genuineness from the prospective jurors we talk with.

Empathy, respect and congruence can be communicated through four types of interaction with jurors: self-disclosure means sharing with the jurors the kind of information about ourselves that we ask them to share with us. For instance, in a case where racial bias might be involved, we should let the jurors know about things in our background that made us racially biased and how we feel about and deal with our bias. Self-disclosure also means we must let jurors know when we feel they are not being frank - "I've been in situations where I didn't think I could be totally honest. I have the sense you might be feeling that way now. Tell me about it." Open-ended questions are those which give the jurors freedom to respond rather than freedom not to respond. We shouldn't ask, "Do you have any opinions about ..." It is too easy to answer, "No." We must ask instead, "What opinions (thoughts, feelings) do you have about ..." or, "How do you feel about ..." Once a juror responds to an open-ended question, we should use reflection to let the juror know we heard the response. We can feed the response back to the juror, or summarize the content and/or feeling of the response for the juror. The key to reflection is active listening - we can't be so busy thinking about what we're going to say next that we miss what the juror is saying. Clarification is like reflection, except that we express an element of doubt as to what the juror is saying. We follow the clarification with an open-ended question to urge the juror to keep talking.

Open-ended questions encourage jurors to respond honestly, unlike leading questions, which compel a specific response. There is a place in voir dire for leading questions, however. Once open-ended questions have revealed the basis for a challenge for cause, leading questions should be used to lock in the response beyond any hope of prosecutorial or judicial rehabilitation: "You obviously feel strongly about that. ... I suppose nothing I could say would change your mind. ... And nothing anyone else could say, either. ... Not the prosecutor, not the judge." Similarly, leading questions can be used to rehabilitate a favorable juror if the prosecutor failed to firmly cement the basis for a challenge for cause.

Attorney voir dire is one of the most powerful weapons we have practicing in Missouri state courts. Creative use of jury questionnaires and empathic communication skills will help us get jurors to talk to us. And that will help us pick jurors who have the kind of feelings and opinions that qualify them to shield the citizens we represent from the terrifying might of the government.

HOW TO SAVE YOUR CLIENT WHILE SAVING THE COURT TIME

by Inese A. Neiders

Trial courts have great latitude and discretion in structuring voir dire. Rosales-Lopez v. United States, 451 U.S. 182 (1981). Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able to follow the court's instructions and evaluate the evidence cannot be fulfilled. Rosales-Lopez, supra. The entire voir dire should be directed to determine whether, for any reason, a juror has a bias of mind in favor or against either party such that his impartiality as to guilt would be impaired.

The most cost-effective and time-saving approach to jury selection is the questionnaire. Jury

questionnaires are increasingly being used in both civil and criminal cases. Most often questionnaires are used in capital cases, but also frequently in cases of white collar crime, rape, police brutality and pornography. In the civil arena, questionnaires are most often used in asbestos cases, but sometimes this method is appropriate for medical malpractice and product liability cases. The "Agent Orange" questionnaire is a classic.

Major reasons for using a questionnaire are:

1. It streamlines jury selection. Courts, clients and lawyers save time often wasted in unnecessary repetition of questions. The questionnaire can be distributed to jurors and filled out before voir dire is conducted in court. Each juror's questionnaire can be photocopied prior to trial for each of the parties and the judge. These are used by all parties solely for the purpose of jury selection.

2. The questionnaire allows a greater number of questions to be asked of each juror, resulting in greater accuracy in the use of challenges. More potential biases may be uncovered, so more competent voir dire can be conducted.

3. The questionnaire permits jurors to consider their answers more carefully. They do not have to respond immediately to questions, but can think about their answers. This is critical if jurors are repressing unpleasant memories of, for example, being victimized.

4. The questionnaire permits greater uniformity, as each juror is presented with each question in the same manner.

5. The questionnaire gives the jurors a sense of privacy, like individual in-court voir dire. Jurors can answer without being required to do so in a very public and formal setting. This permits more personal responses. Jurors won't have to state that they dislike the prosecution or the defense in open court.

6. The questionnaire also permits the lawyers and judge to assess the literacy level of jurors because the answers are written. This is a measure of the jurors' ability to relate to complex ideas which they may not confront in their daily lives, such as legal issues or expert testimony.

7. Recall of oral materials declines quickly, particularly over the first 24 hours. Written responses assist the lawyers' recall.

8. The questionnaire provides better information for jurors not in the box. In many counties, most of the jurors are almost ignored. Those in the box receive most of the attention. In fact, jurors are often overlooked when they raise their hands if they are in the back of the courtroom.

9. The questionnaire provides more unbiased juror responses than oral voir dire because the lawyer cannot influence the jurors by the way s/he asks the questions.

10. The questionnaire provides a way to measure each juror's own biases and ideas rather than those of the other jurors. When questioned in a group, jurors often give the same responses as others. By answering in writing in advance, they cannot be contaminated by the opinions and biases of other jurors.

11. The questionnaire reduces the jurors' opportunity to contrive to be seated or excused. A juror with reasons for being excused must state them without having heard which excuses work (or don't) for others.

12. The questionnaire can incorporate complex and reliable "lie scales" measures. Historically, they have done so. This is critical for such issues as race and ethnicity.

13. The questionnaire can incorporate open-ended questions, multiple-choice or forced-choice questions. Generally it makes such questions easier to rate.

14. The questionnaire approach makes it difficult for jurors to figure out whether the defense or the prosecution is asking the questions. Therefore, they do not know with whom to be upset when they do not like the more personal questions or realize some questions are designed to measure their prejudices. This is important because some of the most critical questions are sensitive and may evoke bias among jurors.

15. The questionnaire approach is less expensive than other jury selection approaches such as surveys and mock juries. Therefore, more criminal defendants will be

able to utilize it. In situations where courts allocate funds for jury selection, the costs will be lower for the community.

16. This approach "evens the playing field" for the lawyers. Because of the additional information obtained, defense lawyers will not be at as much of a disadvantage if they have not tried a case in the county of trial.

17. Finally, this approach is fair to both the defense and the prosecution. Both have access to the information generated by the instrument. Most important, the client can see where he or she stands with the jury. In U.S. v. John Ray Bonds, a case handled by Gordon Friedman and Terry Gilbert (89 Cr 120 (N.D. Ohio), one defendant was influenced to enter a plea of guilty by the jury's responses to the questionnaire. In another case, the prosecutor may have been influenced to drop charges by the fact that the defense was so prepared with the use of a jury questionnaire.

I do not recommend this procedure for every criminal case. It is critical in cases involving very high penalties, those involving extensive pretrial publicity or located in areas that are noted for discrimination or volatile ethnic relations, or involving sensitive issues like child sexual abuse or the "battered wife syndrome", or involving some group which may have negative connotations or when a client has extreme or unique characteristics that may prejudice others against him even when the evidence is not overwhelmingly negative.

The questionnaire is only one tool to measure attitudes. It does not resolve all jury selection problems, but may provide a way to ensure that jurors who are seated are competent.

ED. NOTE: Inese Neiders, Ph.D., is a jury consultant based in Columbus, Ohio. The author wishes to thank William Kunstler, Ronald Kuby, Terry Gilbert, K. Ron Bailey and Ralph Bass for the use of an excerpt from their motion for individual sequestered voir dire in United States v. Yee, 89 Cr 9720 (N.D. Ohio) in the first paragraph of this article. Dr. Neiders welcomes your questions and comments. She can be reached at 614/263-6558.

AVOIDING THE "THIRTY-DAY HARD WALK": DWI RESTRICTED LICENSE FORMS

by Timothy R. Cisar

This article includes some forms which have been developed over time and which I have used successfully to keep my clients on the road during the "thirty day hard walk" period of the trial de novo petition with regard to the driving while intoxicated administrative hearing. Two judges have signed the temporary driving privilege order and a couple of other judges have indicated that they would sign it. No judge has yet signed the temporary restraining order. However, with the temporary order signed, I have not pushed the issue either.

The premise behind Count I of the Petition for Trial De Novo is found in paragraph 8, which still needs some refining. It springs from a "harmonious reading of MO. REV. STAT. §302.525 and MO. REV. STAT. §302.535.

Section 302.525 essentially tells the Director of Revenue that he cannot issue a restricted driving privilege during the first thirty days of the trial de novo period, referencing §302.535. However, §302.535.3 is the paragraph which deals with what the Director of Revenue may do with restricted privileges during the trial de novo. Section 302.535.2 deals with the court's power to order the Director of Revenue to issue a restricted privilege under certain circumstances, if these two sections are harmonized.

My argument is that obviously the legislature had §302.535 on the books when it rewrote §302.525. My first thoughts were that these two were conflicting. However, a careful reading of §302.535.2 reveals that the court has the power to order the Director of Revenue to issue a restricted license to the client.

I have been assured that the Director of Revenue will take issue with this tactic. I would simply like to keep him busy on all fronts, not just in my neck of the woods. Should anyone have any questions, please do not hesitate to contact me.

[C A P T I O N]

ORDER APPROVING APPLICATION FOR
LIMITED DRIVING PRIVILEGES

Upon Application for Limited Driving Privileges of _____, plaintiff, praying for the privilege of operating a motor vehicle in connection with her/his business, occupation or employment under the provisions of RSMo Section 302.535.2, 1986, as amended, is presented to the Court on the _____ day of _____, 19__. The evidence is heard and the Court duly doth find:

1. Plaintiff, prior to suspension or revocation of her/his license, was a duly licensed operator of a motor vehicle in the State of Missouri.

2. Plaintiff has filed a Petition For Trial De Novo of her/his administrative suspension.

3. Plaintiff is required to operate a motor vehicle in connection with her/his business, occupation or employment, and that to deny her/him the limited privilege of operating a motor vehicle would be an undue hardship on plaintiff in earning a livelihood.

WHEREFORE, IT IS BY THE COURT ORDERED, ADJUDGED AND DECREED that _____ is granted the limited privilege of operating a motor vehicle upon the highways under the provision of RSMo Section 302.535.2, 1986, in connection with her/his business, occupation or employment only and pursuant to said Section. The Department of Revenue is hereby ordered to also issue a limited driving privilege for said purpose. This limited driving privilege is for the period of time during which plaintiff's Petition For Trial De Novo is pending and terminates upon disposition of said petition.

This Order does not exempt the plaintiff from the requirement of the Director of Revenue to surrender the driver's license or licenses. A copy of this Order will be used by the plaintiff in lieu of the driver's license during the period designated above.

A certified copy of this Order shall be delivered to the Driver's License Division of the Department of Revenue, State of Missouri, and plaintiff will keep a copy on her/his person while operating a motor vehicle under this Order.

Dated this _____ day of _____, 19___.

_____
JUDGE

PETITION FOR TRIAL DE NOVO
COUNT I

COMES NOW plaintiff, _____, by and through counsel, pursuant to Section 302.535 RSMo and, for her cause of action, informs the Court as follows:

1. Plaintiff is now and at all times hereinafter concerned has been a resident of the County of _____, State of Missouri, now residing at _____.

2. Defendant is now and at all times hereinafter concerned has been the Director of Revenue for the Missouri Department of Revenue, State of Missouri. The actions complained of herein have been undertaken by defendant in his capacity as the said Director of Revenue for the State of Missouri.

3. That on or about the _____ day of _____, 19__, in _____ County, Missouri, plaintiff was arrested for driving while intoxicated, and the arresting officer, acting on behalf of plaintiff, served plaintiff with a Notice of Suspension of driving privileges for allegedly driving a motor vehicle while the alcohol concentration in her blood was .13% or more by weight.

4. The proposed revocation of plaintiff's operator's license is improper and not supported by the record in that plaintiff has not been convicted by Courts of competent jurisdiction for a sufficient number of prior alcohol-related enforcement contacts within the time required to warrant the imposition of the penalty by defendant.

5. The proposed action by defendant is improper and illegal in that there is no basis upon which defendant may assess the penalty against plaintiff since the alleged prior alcohol-related enforcement contact of plaintiff does not in fact constitute convictions for traffic offenses which would warrant or support the imposition of this penalty.

6. Records made available to defendant by the Department of Revenue reflect the alleged prior alcohol-related enforcement contact of plaintiff is improper and without foundation in that no court of proper jurisdiction convicted plaintiff for any of the offenses.

7. The proposed revocation is not supported by a preponderance of the evidence, in that there is no substantial or creditable evidence that plaintiff was arrested upon probable cause to believe plaintiff was driving a motor vehicle while the alcohol concentration in plaintiff's blood or breath was 0.113% or more by weight of alcohol in plaintiff's blood.

8. Plaintiff has need of the restricted driving privilege set forth in RSMo Section 302.535.2 for the purpose of driving in connection with plaintiff's occupation and employment. Plaintiff is employed at _____. Plaintiff has no prior alcohol-related enforcement contacts during the immediately preceding five years. Plaintiff's driving record is set forth on the attached Exhibit "A" and incorporated herein by this reference. Plaintiff has complied with the financial responsibility laws of

Chapter 303 RSMo by maintaining insurance in the minimum amounts as set forth on the attached Exhibit "B" and incorporated herein by this reference.

WHEREFORE, plaintiff prays that the revocation of plaintiff's operator's license aforesaid and his privilege to operate motor vehicle in the State of Missouri for a period of thirty (30) days be set aside; that this Court, pursuant to RSMo Section 302.535.2, issue an order granting plaintiff a restricted driving privilege for the purpose of driving in connection with plaintiff's employment, said privilege terminating on the date of disposition of the petition for trial de novo; and for such other relief as this Court deems just and proper.

COUNT II

COMES NOW plaintiff, _____, by and through counsel, and for Count II of this action informs the Court as follows:

9. Plaintiff hereby realleges and restates all allegations contained in paragraphs 1 through 8 of Count I of this petition as though fully set forth herein.

10. Pursuant to RSMo Section 302.525.2(1)(Supp. 1991), the proposed suspension of plaintiff's driver's license is for a period of thirty days. Further, pursuant to said statute, defendant will refuse to and has refused to issue plaintiff a restricted driving privilege pending the appeal process set forth in Count I of this petition until plaintiff has completed thirty days of said suspension.

11. By refusing to issue a restrictive license during the appeals process set forth above, defendant is effectively chilling plaintiff's right of appeal and is denying plaintiff her right to due process under the law. Further, said statute violates both the Missouri and United States Constitutions in that it denies plaintiff her right to due process under the law.

12. That this conduct and its threatened continuation has effectively deprived plaintiff of her legal right to have the Administrative Court's decision reviewed by the Circuit Court, which constitutes irreparable injury for which plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays judgment as follows:

A. That this Court by its Order permanently enjoin defendant from adhering to RSMo Section 302.525 (Supp. 1991) and otherwise from failing to issue temporary restricted driving permits to plaintiff during the appellate process in her dispute of arrest and suspension for driving while intoxicated.

B. That pending final determination of this cause the Court grant a preliminary injunction to the same effect.

C. That because the conduct sought to be restrained is continuing and constitutes immediate danger of irreparable injury to plaintiff's rights pending this Court's granting of a preliminary injunction, this Court grant a temporary restraining order to the same effect.

D. For such other and further relief as the Court may deem just and proper and for plaintiff's costs herein incurred and expended.

_____
Attorney for Plaintiff

State of Missouri)
) SS
County of Jackson)

_____, of lawful age, being duly sworn on oath, states that the facts stated herein are true according to her best knowledge and belief.

_____

Subscribed and sworn to . . .

_____
Notary Public

CERTIFICATION

I hereby certify that I am the attorney for the above-named plaintiff and that efforts were made to give defendant notice of the filing of the foregoing petition and application to this Court for the granting of a temporary restraining order by telephoning Robert Childress.

I further certify that this Court should grant a temporary restraining order in this cause without notice because if a temporary driving permit is not issued plaintiff, effectively is forced to serve the punishment of her suspension without a chance to appeal the Department of Revenue's decision.

Dated this ___ day of _____, 19__.

_____
Attorney for Plaintiff

* * *

INJUNCTION BOND

KNOW ALL MEN BY THESE PRESENTS, that plaintiff as principal does acknowledge herself to be firmly bound unto defendant, in the sum of $_____, for the payment of which she binds herself, her heirs, executors, administrators and assigns to be levied of her goods and chattels and in furtherance of which she deposits with this Court $_____ in cash on this condition, however, to-wit:

THAT WHEREAS, the Honorable _____ entered his order temporarily restraining the said defendant from performing certain acts in said order described, a copy of which is attached as Exhibit "A" and incorporated by reference herein.

NOW, THEREFORE, if the plaintiff shall prosecute his action without undue delay, abide by the decision made in this action and pay all sums of money, damages and costs that may be adjudged against her, if the injunction or temporary restraining order be dissolved, then in such even this bond and the obligations contained herein shall be void. Otherwise it shall remain in full force and effect in accordance with law and all sureties herein submit themselves to the jurisdiction of this Court.

IN WITNESS WHEREOF, the undersigned has set his hand this _____ day of _____, 19__.

_____
JUDGE

* * *

TEMPORARY RESTRAINING ORDER

This matter having come on for hearing on plaintiff's verified petition and motion, and the Court having read the petition and motion and the certification of plaintiff's attorney as to efforts made to give defendant notice and the reasons notice should be required, and having heard the statement of counsel and being fully advised in the premises, finds that plaintiff's petition states a claim for relief and that there will be irreparable damage unless this order is issued.

NOW, THEREFORE, it is ordered, adjudged and decreed that defendant and all persons acting in conjunction with him or on his behalf, and all others who are members of the class aiding, abetting and assisting the defendant specifically named herein, and all other individuals who may gain actual knowledge of this order, be and hereby are restrained and enjoined from:

1. Refusing to issue plaintiff a restricted driver's license pending the hearing of plaintiff's request for a trial de novo regarding the proposed suspension of plaintiff's driver's license.

This order shall be effective as to all persons and they are bound thereby from and after receipt of it through service or otherwise, and shall remain in effect for a period of ten (10) days from date.

IT IS FURTHER ORDERED that plaintiff give bond to be approved by the Court in the amount of $_____, conditioned that all damages and costs of defendant be paid in the event the foregoing order be dissolved without the issuance of a preliminary injunction thereon.

IT IS FURTHER ORDERED that the motion for preliminary injunction be set for hearing on the ____ day of _____, 19__, at ___.m. in Division ___ of the Circuit Court of _____ County, Missouri, at _____, and that defendant show cause before me on said day why a preliminary injunction should not be granted restraining defendant from the matters in this restraining order described.

And let a copy of this order be served on the named defendant at least forty-eight (48) hours before the time fixed for hearing the motion as aforesaid.

JUDGE

AMICUS DEFENDER

ANNOUNCING a new service for MACDL members. Friend of the defender is designed to be a PRACTICAL PROBLEM SOLVER! If you have a criminal defense problem (substantive, procedural, tactical, whatever) that you simply cannot seem to find an answer for, you can now submit that problem (in writing ... as soon as possible) to MACDL. We will fax your problem to our Board of Directors (all of them). If any of them feels s/he has an answer or suggestion which might be helpful, s/he will send it to you as soon as possible. Then, we would very much appreciate receiving feedback from you. We intend to publish success stories in future issues of the MACDL ACTION REPORT.

Remember: YOU ARE NOT ALONE! Direct correspondence or fax to Larry A. Schaffer, Truman Law Building, 14701 East 42nd Street, Independence, MO 64055 (FAX: 816/373-2112).

RECENT MISSOURI CASES

by Sean D. O'Brien

CONFRONTATION - CHILD WITNESSES

State v. Jankiewicz, 831 S.W.2d 195 (Mo. banc 1992)-

In a prosecution for the rape and sodomy of a 2 year old girl, it was error for the trial court to admit the out-of-court statements of the child without conducting an adequate hearing on the reliability of those. Pursuant to Idaho v. Wright, 497 U.S. 805 (1990), such an inquiry "must be stated with a presumption that the statements are inadmissible . . . ."

HARMLESS ERROR

State v. Brown, 833 S.W.2d 436 (Mo. App. 1992) -

It was error for the trial court to allow into evidence statements of an unidentified telephone caller. Error can be treated as harmless where the competent evidence of defendant's guilt is overwhelming. Here, although the evidence of guilt is substantial, it was not so compelling as to overcome the presumption of prejudice applicable to criminal cases. (At 440).

JURY INSTRUCTIONS

State v. Harnar, 833 S.W.2d 25, (Mo. App. 1992) -

It was plain error for the trial court to give a verdict director instruction in a sodomy prosecution which omitted the definition of deviate sexual intercourse.

JURY SELECTION - DISCRIMINATION

State v. Parker, No. 74517, 51 Crim. L. Rptr. 1415 (Mo. filed July 21, 1992) -

A Batson challenge is timely if it is raised before the venire is excused and the jury sworn.

RULE 29.15

State v. Olds, 831 S.W.2d 713 (Mo. App. 1992) -

It was error for the motion court to fail to render findings of fact and conclusions of law on Olds' claim that trial counsel was ineffective for failing to strike jurors who said they would have troubling hearing the case due to the number of charges made against him.

Trehan v. State, ___ S.W.2d ___, No. 17464 (Mo. App. S.D. June 15, 1992) -

It was error for the motion court to deny Trehan's Rule 24.035 motion without an evidentiary hearing on the issue of whether motion counsel complied with his responsibilities under Rule 24.035(e) or whether counsel abandoned Trehan. Also see, White v. State, ___ S.W.2d ___, No. 60715 (Mo. App. E.D. July 14, 1992).

RULE 29.15 - EVIDENTIARY HEARING

State v. Meyers, 832 S.W.2d 318 (Mo. App. 1992) -

Rule 29.15 movant was entitled to a hearing on his allegation that he did not testify at a motion to suppress hearing because his attorney advised him that his testimony at a hearing on the motion to suppress would expose his criminal record to the jury during trial. It was therefore error for the motion court to deny Meyers' timely request for a hearing on this allegation. **[Note: Judge Karohl would have ruled that a hearing was necessary to resolve this issue and should have been held whether requested or not].**

RULE 29.15 - HEARING

State v. McCauley, 831 S.W.2d 741 (Mo. App. 1992) -

It was error for the motion court to deny McCauley's motion for an evidentiary hearing on his claim that counsel was ineffective for failing to call three witnesses who would have corroborated the defense, especially where the sole evidence in support of the defense came from the testimony of the defendant and his girlfriend, which was subject to impeachment.

RULE 29.15 - UNTIMELY *PRO SE* MOTION

Bullard v. State, ___ S.W.2d ___, No. 45894 (Mo. App. WD August 25, 1992) -

At Bullard's sentencing, trial counsel was allowed to withdraw because of Bullard's allegation that counsel was ineffective during his trial. Bullard retained an attorney to commence the direct appeal and to pursue his claim of ineffectiveness of counsel against the trial attorney. Although retained counsel briefed the appeal, no Rule 29.15 motion was filed. Following the appellate court's opinion, Bullard retained a third attorney who filed a Rule 29.15 motion accompanied by Bullard's affidavits stating that appellate counsel misinformed him about the procedures for litigating his claim of ineffective assistance of trial counsel under Rule 29.15. The court ruled that the logical intent of Luleff and Sanders requires the motion court to address the question of whether counsel abandoned the movant by failing to file the original Rule 29.15 motion. Also see, State v. Warner, 810 S.W.2d 621 (Mo. App. 1991). ". . . once counsel is appointed or retained, the movant has a right to and will rely on the attorney's guidance and counsel."

SELF-INCRIMINATION

State v. Weicht, ___ S.W.2d ___, No. 16877 (Mo. App. S.D. June 25, 1992) -

Weicht was granted a new trial because the court failed to exclude testimony of a police officer that Weicht failed to make an exculpatory statement during questioning.

SENTENCING

State v. Hill, ___ S.W.2d ___, No. 43312 (Mo. App. W.D. August 11, 1992) -

The trial court erred in sentencing Hill as a persistent sexual offender under Section 558.018 because there is no basis in the record for determining whether a prior federal offense constituted a crime that would trigger the provisions in Section 558.018.

STATUTE OF LIMITATIONS

Longhibler v. State, 832 S.W.2d 908 (Mo. banc 1992)-

A voluntary plea of guilty waived any statute of limitations defense that might apply.

SUFFICIENCY OF THE EVIDENCE

State v. Nicholson, ___ S.W.2d ___, No. 44154 (Mo. App. W.D. June 30, 1992) -

The evidence was insufficient to prove that Nicholson escaped from custody after being arrested because he never submitted to the custody of the officer and was not physically restrained.

State v. Walker, 832 S.W.2d 953 (Mo. App. 1992) -

Where the state failed to establish that the defendant knew or should have known that his license was revoked, the evidence was insufficient to support a conviction for driving on a revoked license.

EVIDENCE - UNCHARGED MISCONDUCT

State v. Atkinson, 835 S.W.2d 517 (Mo. App. 1992) -

In a prosecution for exhibiting a deadly weapon in an angry or threatening manner, the defendant called his "living companion" as defense witness. She was impeached with allegations she made against the defendant in a petition for an order of protection alleging that he hit her with his fist and threatened and harassed her. The prejudicial effect of such evidence outweighed the probative value, and the case was reversed and remanded for new trial.

State v. Sladek, 835 S.W.2d 308 (Mo. banc 1992) -

Where a dentist was charged with first degree sexual assault based on his having placed the victim under nitrous oxide and then allegedly fondled her breast, the testimony of three other women that he had done similar things to them was not relevant to prove that he was guilty of the offense charged. Even though this was a jury-waived case, it was clear that the court relied on the improper evidence in convicting Sladek. Therefore, the conviction was reversed and remanded for new trial.

JURY SELECTION - DISCRIMINATION

State v. Parker, ___ S.W.2d __ (Mo. banc 1992) (No. 74517 decided July 21, 1992) -

Once a defendant makes a timely Batson objection with regard to a specific venireperson struck by the state, and identifies the cognizable racial group to which the venireperson belongs, the trial court must require the state to offer race neutral explanations for the challenged strikes. The court must then decide from the totality of facts and circumstances whether the defendant has established purposeful discrimination. The proper way to preserve a Batson issue is to object to the striking of a particular venireperson or venirepersons.

State v. Starks, 834 S.W.2d 197 (Mo. banc 1992) -

Where the prosecutor used four out of six peremptory strikes to remove African-American venirepersons, and one peremptory strike to remove an African-American from the alternate jury panel, the defendant made a prima facie case of race discrimination under Batson v. Kentucky even though the resulting jury consisted of seven African-Americans and five white jurors.

POST-ARREST SILENCE

State v. Weicht, 835 S.W.2d 485 (Mo. App. 1992) -

During his interrogation, the defendant made limited statements that did not refer to any specifics of the alleged criminal act. It was improper for the prosecutor to elicit over objection testimony that the defendant failed to provide an exculpatory statement, and the error was compounded by the prosecutor's argument calling the jury's attention to the defendant's post-arrest silence.

RULE 29.15

Spicuzza v. State, 834 S.W.2d 881 (Mo. App. 1992) -

Where the record did not reveal that appointed counsel filed an amended motion, the denial of defendant's Rule 29.15 motion was vacated and remanded for determination of whether appointed counsel abandoned the movant.

Trehan v. State, 835 S.W.2d 427 (Mo. App. S.D. 1992) -

Where post-conviction appointed counsel simply incorporated an inadequate *pro se* motion into the amended motion, the court presumes that he failed to comply with the rule requiring the ascertainment of facts to be plead in the amended motion.

White v. State, 835 S.W.2d 529 (Mo. App. 1992)-

Remanded for hearing on abandonment by counsel.

RULE 27.26

Bentzen v. State, 834 S.W.2d 844 (_____) -

Where the court reporter filed several affidavits with the court of appeals swearing that the notes and recordings of the evidentiary hearing of Bentzen's Rule 27.26 motion had been lost, the denial of the motion was reversed and the matter was remanded for another hearing.

SEARCH AND SEIZURE

State v. Kovach, ___ S.W.2d ___, S.D. No. 17749 (filed September 4, 1992) -

The trial court erred in denying Kovach's motion to suppress evidence and his statement because the search of Kovach's van for weapons was unreasonable, and the detention of Kovach during the search was also unreasonable.

SENTENCING

State v. Jackson, 836 S.W.2d 1 (Mo. App. 1992)-

Even though defendant's illegal possession of PCP occurred on July 23, 1988, he was entitled to be sentenced under the reduced range of punishment subsequently enacted in the Comprehensive Drug Act of 1989 by operation of Section 1.160(2) RSMo.

State v. Richardson, ___ S.W.2d ___, E.D. No. 60763 (filed August 18, 1992) -

The trial court erred in refusing to admit a video tape of the crime scene, and further erred in sentencing Richardson as a persistent offender subject to mandatory service of 60% of his sentence pursuant to Section 558.019 because that statute does not apply to Richardson in that he was not convicted of a Class A, B or dangerous felony.

RECENT DECISIONS - FEDERAL AND SUPREME COURT CASES

by Elizabeth Unger Carlyle

DUE PROCESS
JURY SELECTION AND COMPOSITION

SPEEDY TRIAL

ARGUMENT OF COUNSEL

United States v. Johnson, No. 91-3719 (8th Cir. July 10, 1992) Prosecutorial misconduct occurred when the prosecutor argued that the jury stood as a bulwark against the continuation of drug dealing. This was an emotional appeal to the jury outside the facts of the case. Harm was shown where the evidence was not overwhelming, there was no direct evidence that the defendant participated in the charged transaction, no curative instruction was given, and the public has a great fear of the drug problem.

SENTENCING GUIDELINES

United States v. Candie, No. 91-2576 (8th Cir. August 26, 1992) A remand for resentencing was required where the court made no finding as to whether it credited witness testimony as to the drug quantity. The court is not bound to accept uncontroverted evidence.

United States v. Wollenzien, No. 91-1951 (8th Cir. August 12, 1992) The case was remanded to district court for specific findings as to whether the defendant should be given probation. The PSI did not include a probation option because its calculation of the offense level made the defendant ineligible, but the court placed the defendant in an eligible range, and the defendant asked for no incarceration.

United States v. Bluske, No. 90-5518 (8th Cir. July 2, 1992) Where the defendant made specific objections to the PSI, it was error to rely on the conclusions therein without determining the basis for the opinion expressed.

United States v. Bost, No. 91-2447 (8th Cir. July 6, 1992) It was error to enhance the defendant's sentencing guideline offense level for weapons when the weapons were seized at the defendant's residence and store 2 1/2 months after the last overt act of the conspiracy. No connection was shown between the weapons and the drug sales, and there was no evidence the weapons were even present at the time of the sales.

United States v. Edgar, No. 91-2480NE (8th Cir. July 9, 1992) The sentencing guidelines amount of loss calculation in this bankruptcy fraud and conspiracy case should not have included compensation for the business owner, the attorney defendant's client, who went to work for the new owner; the proper measurement is the amount of debt, not the amount of the concealed payment. A Byzantine guidelines case.

United States v. Holt, No. 91-2357MN (8th Cir. July 14, 1992) It was improper for the trial court to adopt the finding of the PSI that a two level enhancement for obstruction of justice was proper after the defendant made a written objection to the PSI. The PSI is not evidence, and once an objection is made, evidence must be introduced to support the court's findings on disputed issues. Citing United States v. Streeter, 907 F.2d 781 (8th Cir. 1990).

United States v. Hayes, No. 91-3843SI (8th Cir. July 24, 1992) It was error for the sentencing guideline offense level to reflect the entire quantity of crack found in a package handled by the defendant when he did not know that the package contained a large amount of drugs and that his cousin, for whom he picked it up, was going to distribute the crack. Remanded for further factual findings as to reasonableness of belief in smaller quantity.

United States v. Posters 'N' Things Ltd, No. 91-2426 (8th Cir. July 13, 1992) The trial court's downward departure below the guidelines was affirmed where the court found that the case was mainly a money laundering and paraphernalia case, rather than a case involving the aiding and abetting of manufacture of drugs. The defendant's only involvement was as a seller of diluent.

EFFECTIVE ASSISTANCE OF COUNSEL

United States v. Bluske, No. 90-5518 (8th Cir. July 2, 1992) A prejudicial conflict of interest occurred where an attorney represented two defendants, one of whom was cooperating, and told the non-cooperating defendant not to talk to the cooperating defendant.

Rayes v. Johnson, No. 91-1350 (8th Cir. July 15, 1992) It was reversible error to refuse to appoint substitute counsel for the plaintiff in a 42 U.S.C. §1983 prison suit, claiming the plaintiff's fingers were broken when guards slammed a door on his hand, and interference with treatment. The original court-appointed counsel withdrew before trial because of a conflict of interest. The claim was not frivolous or malicious, and stated a prima facie case, the plaintiff was unable to effectively represent himself because of limited access to legal materials, typewriter, telephone and copy machine, and the lawsuit involved complex claims and conflicting testimony. In the absence of any reason given by the trial court for refusing counsel, the order was an abuse of discretion.

CIVIL RIGHTS LITIGATION

Gordon v. Faber, No. 91-3731 (8th Cir. August 31, 1992) A 42 U.S.C. §1983 judgment against an Iowa prison officer was affirmed. Making prisoners go outside in sub-freezing weather with no hats or gloves for at least one hour was an Eighth Amendment violation. Damages were assessed at $75 per prisoner.

Brown-El v. Delo, No. 91-1394 (8th Cir. July 10, 1992) Summary judgment in favor of the Missouri State Penitentiary in this 42 U.S.C. §1983 action. The plaintiff alleged that he was placed in administrative segregation without a hearing. Where the record showed no non-punitive reason for segregation, a hearing was required and therefore summary judgment was improper.

Thompson v. Reuting, No. 91-1752NE (8th Cir. July 7, 1992) In this damage action for wrongful detention, it was reversible error to submit the issue of probable cause for the stop of the defendant to the jury; there was no factual dispute and the issue was thus a pure question of law. The stop was illegal as a matter of law where the evidence showed only that the officers were responding to a "suspicious vehicle" call in a high crime, low-traffic area, and could not tell who was in the car. Remanded for damages determination.

Rayes v. Johnson, No. 91-1350 (8th Cir. July 15, 1992) It was reversible error to refuse to appoint substitute counsel for the plaintiff in a 42 U.S.C. §1983 prison suit, claiming the plaintiff's fingers were broken when guards slammed a door on his hand, and interference with treatment. The original court-appointed counsel withdrew before trial because of a conflict of interest. The claim was not frivolous or malicious, and stated a prima facie case, the plaintiff was unable to effectively represent himself because of limited access to legal materials, typewriter, telephone and copy machine, and the lawsuit involved complex claims and conflicting testimony. In the absence of any reason given by the trial court for refusing counsel, the order was an abuse of discretion.

DOUBLE JEOPARDY

United States v. Holt, No. 91-2357MN (8th Cir. July 14, 1992) The continuing criminal enterprise conviction must be vacated because the defendant was also convicted of conspiracy, and the two are the same offense for double jeopardy purposes.

EVIDENCE

Ring v. Erickson, No. 91-2488MN (8th Cir. July 9, 1992) The Confrontation Clause was violated by the admission of two videotaped statements of child witnesses. No firmly rooted exception to the hearsay rule was shown; the medical treatment exception did not apply where the mother took the child to the doctor only because of the sexual abuse claim, and there was no showing the child knew the person to whom the statement was given was a doctor. Therefore, particularized guarantees of truthfulness were required to overcome the confrontation objection, and none were shown.

SEARCH AND SEIZURE

Thompson v. Reuting, No. 91-1752NE (8th Cir. July 7, 1992) The stop was illegal as a matter of law where the evidence showed only that the officers were responding to a "suspicious vehicle" call in a high crime, low-traffic area, and could not tell who was in the car. Remanded for damages determination.

SUFFICIENCY OF EVIDENCE

United States v. Bell, No. 91-2584SI (8th Cir. July 9, 1992) In this 28 U.S.C. §2255 action, the court held it was improper to use a 1975 state conviction after which the defendant had his rights restored for enhancement under §924(e)(1). The restoration of rights did not except the right to possess firearms, and therefore was not a "conviction" under 18 U.S.C. §921(a)(20).

HABEAS CORPUS

McCoy v. Lockhart, 7/10/92, No. 91-2856 (8th Cir. July 10, 1992) The Supreme Court decision in Sawyer applies to non-death cases. Therefore, to permit consideration by the federal court of an issue defaulted in state court, the defendant must show that the relief on the defaulted issue would result in a not guilty verdict; the trial court improperly applied the "probable actual innocence" standard.

APPELLATE PROCEDURE

United States v. Posters 'N' Things Ltd, No. 91-2426 (8th Cir. July 13, 1992) The government waived the right to complain on appeal that the court had not imposed a mandatory minimum sentence where no objection was made at trial, and the waiver finding would not result in a miscarriage of justice. (The mandatory minimum would have required a 120 month sentence; the actual sentence was 108 months.)

United States v. Cornelius, 7/2/92, No. 91-3351SI (8th Cir. July 2, 1992) In a case which attempts to define the scope of the district court's power on remand for resentencing, the court held that the trial court had interpreted its earlier mandate too narrowly. The earlier opinion merely vacated the trial court's finding that the defendant was not an armed career criminal and held that breaking and entering was a proper felony for that status. This ruling did not foreclose the trial court's consideration of other issues and evidence on the armed career criminal issue, and the trial court can consider any relevant evidence on the issue.

FIRST AMENDMENT

Video Software Dealers Assoc. v. Webster, No. 91-2797WM (8th Cir. July 2, 1992) An injunction against the enforcement of MO. REV. STAT. §573.090 was affirmed. The article, which prohibited possession and distribution of certain violent videotapes, contained no definition of violence, was not narrowly tailored, and was vague. Further, in a case involving first amendment issues, strict liability for distributors not shown to have knowledge of content was improper.

CAPITAL PUNISHMENT

Otey v. Hopkins, No. 92-2733 (8th Cir. August 4, 1992) In this Nebraska death penalty case, the state's motion to vacate the stay of execution was denied. The petitioner's claim that the Nebraska commutation process was unconstitutional is neither successive nor abusive, since it was previously unavailable. The district court found that the claim was not frivolous and that a more complete record was needed.

Gainor v. Rogers, No. 91-1708 (8th Cir. August 20, 1992) Denial of a motion for summary judgment for the defendant in a 42 U.S.C. §1983 action is affirmed. Qualified immunity is avail only if the defendant did not violate clearly established law. The plaintiff's allegations defeat the immunity claim, and the issue of fact as to the truth of those allegations is for the jury to determine.

United States v. Rosnow, No. 91-2945 (8th Cir. August 13, 1992) A conviction for conspiracy to file false IRS forms was reversed. The evidence showed only unrelated multiple conspiracies but no overall conspiracy, and a prejudicial variance resulted.

United States v. Smith, No. 91-3591 (8th Cir. August 14, 1992) It was error to impose a special condition of supervised release that the defendant not conceive more children unless he was supporting his present children. The condition was not reasonably related to the crime of conviction (attempted possession of heroin with intent to distribute.)

United States v. Filker, No. 91-2889 (8th Cir. August 10, 1992) The government's failure to raise an offense level issue in the trial court waives the issue on appeal where, as here, no gross miscarriage of justice will result. (The sentence was 18 months; the government was arguing for a 33 month minimum.

Burton v. Armontrout, No. 91-2831WM (8th Cir. September 21, 1992) Injunctive relief was properly awarded to inmates of the Jefferson Co. Correctional Center, who were not notified that the sewage they were cleaning up at the center was contaminated with infectious waste. A constitutional violation was established by showing of exposure without protective clothing.

Jamison v. Lockhart, No. 91-3451 (8th Cir. September 24, 1992) This habeas corpus case was remanded for a hearing on the "cause" for the defendant's failure to raise a conflict of interest issue in state court. Trial counsel, who did not move to suppress the defendant's confession, was allegedly the attorney for the city of Blytheville. The prosecution witnesses were Blytheville officers. The defendant says the "cause" is that existence of the conflict caused trial counsel not to raise the conflict issue. On rem, the court is to determine whether counsel really was the attorney for Blytheville, and when defendant discovered this. The court should also consider "fundamental injustice" (the Murray exception) to the cause and prejudice rule if no cause is found.

United States v. Rowley, No. 91-3308 (8th Cir. September 23, 1992) It was error to give a two level enhancement in the defendant's sentencing guidelines offense level as a leader based on the defendant's use of his cousin's address and the sophistication of his marijuana farm. There was no showing that the cousin was involved in the offense, and no showing the defendant's wife was either. There could be no leadership role because the defendant had no one to lead.

United States v. Galloway, No. 90-3034 (8th Cir. September 17, 1992) Uncharged conduct can constitutionally be used to figure a sentencing guidelines offense level. "When uncharged conduct is alleged as relevant conduct to substantially increase the sentencing range, district judges are authorized to require the United States Attorney to undertake the burden of presenting evidence to prove that conduct."

United States v. Wise, No. 90-1070 (8th Cir. September 17, 1992) Confrontation with adverse witnesses is not required in ordinary sentencing guidelines cases. This requirement is appropriate only in "tail which wags the dog" cases, where a departure dwarfs the guideline sentence. The information used at sentencing must meet the reliability standard of Sentencing Guidelines §6A1.3(a). The PSI is still not legally sufficient for factual findings where there has been an objection by the defendant. The government must produce on evidence in that situation. To the extent that Fortier and Streeter conflict on the confrontation issue, the are overruled. NOTE: This case abandons an Eighth Circuit standard which was one of the most liberal in the country.

United States v. Gordon, No. 91-3642EM (8th Cir. September 8, 1992) The case was remanded for resentencing where the trial court improperly failed to group heroin sales, and thought the defendant could get 27-33 months for each count. The actual total exposure was 27-33 months, period. The trial court seemed to think it was giving the defendant a break by sentencing at the high end of the guideline range (33 months) and running the sentences concurrent. This suggests that the sentence might have been different if the calculation had been correct, so remand is appropriate even though the actual sentence was within the correct guideline range.

United States v. Westerman, No. 91-2715 (8th Cir. September 8, 1992) The defendant should have been sentenced as a minimal rather than a minor participant, where the evidence showed that the defendant didn't really understand what the others were doing, but simply waited with the truck while others acted.

McIntyre v. Trickey, No. 89-2700 (8th Cir. September 4, 1992) Under the Felix standard, which limits the Supreme Court's double jeopardy ruling in Grady v. Corbin, the defendant still was placed in double jeopardy when he was prosecuted for

stealing a car after he had been convicted of tampering based on the unauthorized use of the same vehicle. This is not the "multilayered conduct as to time and place" of Felix but is more like the situation in Brown v. Ohio.

UPCOMING EVENTS

THE NEXT MEETING OF MACDL'S BOARD OF DIRECTORS WILL BE HELD FRIDAY, JANUARY 29, 1993 AT 4:00 P.M. AT PAT ENG'S OFFICE, 903 EAST ASH, COLUMBIA, MISSOURI.

MACDL'S ANNUAL MEETING AND SEMINAR ARE SCHEDULED FOR APRIL

HAPPY

HOLIDAYS

FROM THE OFFICERS AND DIRECTORS OF MACDL

"BE IT EVER SO HUMBLE . . ."

A Texas Court of Appeals recently held that the county jail was a "habitation" for the purposes of a criminal trespass statute. (In case you were wondering how someone can trespass at a jail, the defendant wanted to visit someone, was denied admission because he lacked proper identification, got angry and refused to leave.) Olaniyi-oke v. State, 827 S.W.2d 537 (Tex. App. - Houston [1st Dist.] 1992).

* * * *

Thanks to all who contributed to this newsletter. Special thanks to Susy Hensel of the Missouri Capital Punishment Resource Center, who spent untold hours helping us reformat the MACDL Action Report. We have a ways to go, but hope you agree our publication is improving.

We welcome all contributions from any MACDL member or criminal-law-related non-member. Please send contributions to Elizabeth Carlyle, 200 S. Douglas, Lee's Summit, MO 64063. Include a WordPerfect disk if possible. We'll return the disk if you put your name and address on it.

Deadline for submissions to the winter newsletter is January 22, 1993.

* * * *

"The Wisconsin Supreme Court... held that the fourth amendment did not bar a search of a probationer's house, a holding perhaps properly characterized as one more chunk of ice thrown into the gathering, rapidly moving, and deeply chilled current of cases that lap at freedom's bank, but the United States Supreme Court refused to allow itself to be pulled into that current. It stayed on the bank... As the Supreme Court stayed on shore, we likewise do, for we are not so intrepid as to jump to the icefloe eschewed by the Supreme Court." People v. Flagg, 577 N.E.2d 815, 817 (Ill. App. 5th Dist. 1991)

* * * *

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
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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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