MACDL
Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

President's Letter Spring 1992

Dear Fellow MACDL Members:

Ok, I've been found out. You remember my last letter? The one about the Constitution being "all sail and no anchor"? Well, it was Macauley, the historian, not Tocqueville, who said it; but everything else still stands. Fortunately this trifling slip occurred so late in my term that there is no real likelihood of impeachment. Our new president will take office in less than 90 days. I'll tell you a secret about this office; it really runs itself. The work is done by Francie Hall, Dan Viets, J.R. Hobbs and all the others who are responsible for everything from elections to publishing newsletters, with brief stops for CLE programs and legislative tracking. This gives me the time to write newsletters, which I prefer to the more difficult trenchwork anyway. I have always liked words, so this chore is more pleasure than anything else.

We all deal in words professionally. In criminal law we often, perhaps unconsciously, are guilty of trafficking in euphemisms, perhaps to soften the often difficult reality of our professional dealings. This pervades our daily lives. For example, the innocuous word "adjustment" in the context of sentencing guidelines (see U.S.S.G. Chapter Three). Instead of telling our client it looks like he's going to be in prison until he's 102, we can gently murmur, "The Probation Department has determined that upward adjustments (there aren't many downward ones) raise your base offense by several levels". See how easy it is?

We aren't the only ones engaging in the excessive use of treacle. For example, I read in the paper a few days ago about a troubled financial institution which was busy telling the media everything was in order but the institution was undergoing "intense scrutiny" by various federal agencies. Maybe this makes them feel better, but I've got a hunch that "intense scrutiny" means "The FBI is here and they have a warrant".

Another pet phrase is "criminal liability". This refers to sufficient evidence to make a case or to maintain a conviction. This sounds better than saying to your client that the U.S. Attorney is preparing to ride through his village and burn his huts. A related phrase coming into vogue is "sentencing liability". I am sure we will see a lot more of this one. I think that the courts are splitting criminal cases into two discrete phases:

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WELCOME NEW MEMBERS

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Interested Attorneys:

Did you notice the West Missouri cases advance sheet February 25, 1992, that from now on all trial counsel in federal court are not allowed to withdraw and must remain as the appellate attorney; thus, it would appear that original down payment fees in federal court should also include an additional amount for handling the case on appeal, should your client be convicted and desire to appeal.

Submitted by Dee Wampler

MEMBERSHIP RENEWALS

ROBERT G. DUNCAN, KANSAS CITY
SUSTAINING MEMBER
LINDA MURPHY, CLAYTON

Presidents's Letter -- Continued from page 1

first the question of "criminal liability" to determine guilt. Then, if you lose that fight, "sentencing liability" to determine punishment. They aren't always the same; see, supra, "adjustments." What this phrase really means is that after the U. S. Attorney has ridden through your client's village and fired his huts, the Probation Depart-ment then comes along to carry off his women and dance on the bones of his children. Anent the idea of bifurcation in Federal proceedings; see **U.S. v. North, 900 F.2d 131** and **U.S. v. Rigsby, 943 F.2d 631.**

The unfortunate aspect of this linguistic hocus pocus is that the fellow who used to have the ultimate responsibility in these matters, and who did his work in a public forum with a record being made, has been all but eliminated, in part due to the acceptance of catch phrases and euphemisms which disguise the actual transaction. We have, in short, reduced the judicial role in these proceedings by enhancing the administrative authority of the U.S. Attorney and the Probation Department. We are fortunate in this District, and I believe in many other districts, that the U.S. Attorney and the Probation Department are both conscientious and well-intentioned but, no matter how much they try, they are still administrative departments with no real public scrutiny. Judges, on the other hand, did everything subject to public view, and with it, public praise or criticism. This is the one great advantage of judicial action, as opposed to administrative decision, and this is the greatest loss with the advent of sentencing guidelines.

Those of you who like old movies will occasionally see one with an actor named C. Aubrey Smith. This fellow had a craggy face, a hawk nose and a piercing stare, which features made him ideal for one of two roles: he invariably portrayed British military officers or, by virtue of some strange translation, American judges. The passage of the Sentencing Reform Act has relegated our judiciary to being the C. Aubrey Smiths of our system of justice. They are figureheads, reduced largely to playing a role orchestrated by others. The real power in criminal cases derives from other sources; these sources, unfortunately, are administrative. They are therefore closed to public scrutiny, closed to public criticism and closed to significant pressure for change. I suggest in this, my last formal communication with you, that this is wrong, and the sacrifice of judicial authority for administrative authority no matter how well meaning or benign, is a massive breach of our traditional system of justice.

I wish to thank the membership for its support in the past year and encourage your continued support for the coming years. There is another phrase from Hollywood that is appropriate to the end of my term: "That's alright, officer, I'll go quietly."

Bruce W. Simon

Editor's Note:
On behalf of myself, MACDL's officers and board: Thank you Bruce, for your untiring commitment to the rights of criminal defendants, criminal defense lawyers (see p. 4 -- MACDL Strike Force article) and to the state-wide organization (MACDL) committed to both.

Francie Hall

FYI by Francie Hall (continued)

During the recent trial Dee, using an enlargement of her press release, questioned Ms. MacPherson and advised the jury he did not believe "the Good Lord had caused [him] to become a criminal defense attorney to defend the United States Constitution and the Bill of Rights and people like the jury of unethical prosecuting attorneys like Cynthia MacPherson."

The jury agreed, acquitting Dee's client after 40 minutes of deliberation.

Dee is grateful to the fellow criminal defense practitioners who willingly assisted him in a time of need. MACDL is proud of lawyers like Dee Wampler.

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The NACDL Inmate Access Committee is seeking information about attorney visitation restrictions and harassment at penitentiaries, especially in the federal system.

Please send reports about specific, unreasonable restraints on access to counsel. Also, send copies of prison rules and lists property items inmates may bring or receive. Address comments to : Sheryl J. Lowenthal, 2600 Douglas Road, Suite 911, Coral Gables, FL 33134 (305/442-1731) or J. Stephen Salter, 2205 Morris Avenue, Birmingham, AL 35203 (205/251-666).

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On a somber note, this issue of the Action Report is dedicated to the memory of two men: Jim "Sundance" Lyons, 1945-1992, a graduate of Rockhurst High School and College who served as an assistant prosecutor in Jackson County before joining the defense bar (and MACDL). Jim also spent endless hours working with Kansas City baseball programs for youth.

Pat Hall (aka "The Brow"), 1950-1992, an assistant Jackson County prosecutor for over fifteen years, was noted for being fair and even-handed while vigorously representing the state. His integrity was beyond reproach. Pat once asked for mistrial on learning the police had withheld important evidence from a defendant. Pat was a Lon Hocker Award winner, Missouri Prosecutor of the Year, very active in Boy Scouts and St. Elizabeth Church.

These two men believed in our adversarial system of justice in spite of its flaws, and worked to improve it because of them. Both believed intrinsically in the rights of an accused to due process of law and effective assistance of counsel. Neither saw himself as an idealist or a crusader. It was just their job to defend/prosecute honestly, fairly, ethically; they did it well. They believed in the Constitution and the orderly administration of justice. Both knew the blind goddess represents an unattainable ideal, not day-to-day reality in the trenches of criminal law. But then, "man's reach must exceed his grasp, else what's a heaven for ?" For Pat and Jim, we trust. They will be sorely missed and long remembered.

The Drug Package Profile

by Dee Wampler

The U.S. Postal Service, in cooperation with the Drug Enforcement Administration and local officials, have developed a "Drug Package Profile" to stop drug trafficking through the mails.

In the early 1980's, Hawaii postal authorities noticed up to 600 suspicious parcels monthly being mailed to the mainland. It had been determined that most of Hawaii's illicit drug flow through the mails originated on that island[1] and an effort was made to catch marijuana growers using the mail to distribute their produce[2].

Faced with a virtual deluge of suspicious packages heading towards drug-crazed consumers, the government decided that the Fourth Amendment notion of being "secure" in your "personal effects" must give way to society's interest in law enforcement to win the war on drugs[3]. Some possessory interest is still retained in deposited mail which cannot be unreasonably interfered with without running afoul of the Fourth Amendment. Trafficking in drugs, however, was found to be "highly organized and conducted by sophisticated criminal syndicates"[4]; also, felons are not entitled to "overnight delivery" of the mails.[5]

The Express Mail Profile or Drug Package Profile[6] was developed by the U.S. Postal Service to detect mailed parcels likely to contain illegal drugs. The "profile" incorporates the following characteristics:
(1) size and shape of the package,
(2) package heavily taped to close and seal all openings,
(3) handwritten labels,
(4) unusual return names and addresses,
(5) unusual odors coming from the package,
(6) fictitious return addressee,
(7) destination of parcel[7],
(8) multiple packages sent to same address, but to different persons[8],
(9) packages mailed to arrive for delivery on a repeated basis[9].

The suspicious package is removed from conveyor belts of mainstream mail, and placed in a special area for a sniffing dog. If the doge alerts to the package, a search warrant is obtained, the package is opened and its contents analyzed; a controlled delivery may be made. Mail sent to Federal Express and UPS is sometimes accidentally damaged, revealing the contents; officials are then notified.

A signalling device is often placed in the package and a controlled delivery by DEA and local authorities is made. After delivery, the recipient is surveilled and usually leaves home to make a final delivery and pick up cash payments. Alternatively, the recipient may simply be arrested upon accepting delivery of the package.

The profile must not contain completely arbitrary data, and is information gleaned from national investigations of narcotic mailings.

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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
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The Drug Package Profile

Continued from page 7.

The Postal Service has its own rules, supposedly regulating itself, to prevent arbitrary seizures. They devised the process of "mail cover", by which a record is made of data appearing on the outside of mail to obtain information pertaining to the commission of a crime. But even if agency regulations are not complied with, courts still uphold the profile.[11] In one case,[12] a postal employee violated a postal rule against disclosure of information on the outside of mail, but it did not warrant suppression of evidence since his violation was "neither heinous nor willful". The inspector had reason to learn of the contents of the packages from prior contraband shipped by the same sender. There were three searches:
(1) the private UPS person and postal inspector;
(2) who did a field test on the contends;
(3) full scientific lab work done by another police officer. Only the latter was condemned.

If a package is opened by private citizens, the Fourth Amendment affords no protection. If police gain lawful possession of the package through the action of a private party, such as UPS or Federal Express, there is no invasion of the defendant's privacy, since no governmental action is involved. If government agents then exceed the scope of the private search to a greater degree, then this subsequent search will be suppressed.[13] A full chemical test on drugs turned over by a private person goes beyond a private search and violates the Fourth Amendment[14]. The full chemical test may reveal other information in which the defendant has a privacy interest. A client has no constitutional right of privacy in the outward appearance of a package or in its general description, and cannot claim an intrusion[15]. Of course, the fact that profiles are necessarily broad and subject innocent mail to random seizures (a result forbidden by the Fourth Amendment)[16] has been given little attention by the courts. As long as the package is opened by non-governmental employees, the Fourth Amendment affords no protection.

Courts are wrestling with the amount and length of delay. If the delay is "reasonably brief," it is permissible. Delays considered reasonable include nine and one-half hours,[17] "the following day,"[18] nineteen hours,[19] twenty-nine hours,[20] and one and a half days.[21] One district court disallowed a seven-day delay of a mailed package.[22]

As to the type of search, a few courts determine whether agents pursued the least intrusive course of action, ("the least-intrusive means test"), but most consider whether the government, in its search, acted reasonably under the totality of the circumstances[23] ("The reasonably available test").

Among factors to be considered in determining reasonableness are:

(1) *Timeliness*: The brevity of the detention.
(2) *Diligence*: The diligence of police in minimizing the intrusion.
(3) *Information*: The information provided to the suspect, if any, regarding the detention and return of his package.[24]

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MISSOURI CRIMINAL CASE LAW UPDATE

by Sean O'Brien
Missouri Capital Punishment Resource Center

State v. Simmons, 815 S.W.2d 426 (Mo. banc 1991). Simmons was entitled to a new trial because the trial court failed to sever a separate homicide count which was improperly joined because it was not part of a common scheme or plan as required under § 565.004.1. The court applied the rule that where joinder is improper as a matter of law, prejudice is presumed and severance is mandated.

State v. Hudson, 815 S.W.2d 430 (Mo. App. 1991). It was erroneous for the trial judge to rule on Hudson's Batson challenge solely on the basis of the number of peremptory strikes used by the prosecutor to remove persons of the defendant's race from the panel, the number of blacks on the original panel and the resulting composition of the petit jury; the court should also have required the prosecutor to explain the reasons for his peremptory challenges. The case was remanded to the trial court for an evidentiary hearing on the issue of whether the prosecutor used his peremptory strikes in a discriminatory manner. [Note — the court applied a plain error standard of review because the trial attorney moved for a mistrial on the basis of the prosecutor's discrimination rather than moving to quash the jury.]

State v. Waller, 816 S.W.2d 212 (Mo. 1991). In a manslaughter case, the trial court prohibited defense evidence of the victim's prior acts of violence, known to the defendant at the time of the incident, to support defendant's assertion that he acted justifiably in reasonable apprehension of bodily harm. The court of appeals affirmed the conviction, following State v. Buckles, § 636 S.W.2d 914 (Mo. banc 1982), and then transferred the case to the Supreme Court for reexamination of the law. The Missouri Supreme Court reversed and remanded the case for a new trial, announcing the following new rule of evidence regarding the admissibility of prior acts of violence by the victim:

> Where justification is an issue in a criminal case, the trial court may permit a defendant to introduce evidence of the victim's prior specific acts of violence of which the defendant had knowledge, provided that the acts sought to be established are reasonably related to the crime with which the defendant is charged. ... The defendant must lay a proper foundation before the evidence can be admitted. Other competent evidence must have raised the question of self-defense. ... The defendant must show that he was aware of the specific act or acts of violence. ... The incidents must not be too remote in time and must be a quality such as to be capable of contributing to the defendant's fear of the victim. ... Where acts are too remote in time or of a quality substantially different from the act that the defendant accuses the victim of committing, the trial court may decline to admit the proof into evidence. ... The trial court must caution the jury that the evidence is to be considered solely with regard to the reasonableness of the defendant's apprehension that the victim was about to inflict bodily harm upon the defendant, and not for the purpose of establishing that the victim probably acted in conformity with prior acts of violence.

At p. 216. In announcing the new rule, the court cautioned the trial courts to use discretion in placing reasonable limits on the extent to which prior violent acts may be proved.

State v. Wilson, 816 S.W.2d 301 (Mo. App. 1991). On the morning of his felony stealing trial, Wilson showed up without an attorney. The public defender was allowed to withdraw from his case because he had posted a bond in excess of their eligibility guidelines. The trial court found that Wilson had sufficient time to hire an attorney, and forced him to defend himself pro se. The court of appeals found that under the circumstances, the morning of trial "waiver" of counsel was invalid because it was not make knowingly and intelligently. Because denial of the right to counsel can never be harmless error, the court granted relief under the plain error rule.

McCampbell v. State, 816 S.W.2d 681 (Mo. App. 1991). Where a defendant pled guilty,

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and was thereafter delivered to the State of Florida to serve a prison sentence in that state, the time limit for the filing of a pro se motion under Rule 24.035 did not commence until the date on which he was returned to Missouri after completing his sentences in Florida. Also see Thomas v. State, 808 S.W.2d 364 (Mo. banc 1991).

State v. Watson, 816 S.W.2d 683 (Mo. App. 1991). Watson was charged with Count I of burglary, Count II of kidnapping, and Count III of armed criminal action based on the kidnapping. The jury returned verdicts of not guilty on Counts I and II, but guilty on Count III, armed criminal action. The trial court stated that it could not receive the inconsistent verdicts, and sent the jury back with new verdict forms as to Counts II and III, and instructed it to "reread actually the verdict form itself as to Count III . . ." and to "deliberate further and return verdicts just as those sets of forms I have sent back with you." The jury returned verdicts of guilty on both kidnapping and armed criminal action. The court held that the trial court erred in not accepting the verdict of "not guilty" of kidnapping, which would thereby render the armed criminal action verdict a nullity. [Interesting note — the trial court suspended the imposition of sentence on the kidnapping charge and sentenced the defendant only on armed criminal action. The Court of Appeals noted that the kidnapping count is therefore not a final judgment for purposes of appeal.]

State v. Lynch, 816 S.W.2d 692 (Mo. App. 1991). Lynch was convicted of forcible rape. During a noon recess, two of the defendant's sisters overheard a juror talking about the case in a local cafe. The juror said, "These proceedings are taking too long, we could have already convicted the guy and gone home by now." The court did not expressly deny the defendant's motion for mistrial, but did deny the motion for new trial based on juror misconduct. The trial court did not conduct any further inquiry into the matter. Because the report of the comment was on its face credible, and the court conducted no further hearing on the question, it was reversible error for the court to deny the motion for mistrial.

State v. Robertson, 816 S.W.2d 952 (Mo. App. 1991). Where appellant filed a timely Rule 29.15 motion, and the public defender was appointed to represent him, but no amended Rule 29.15 motion was filed, and where the record was silent as to the reason for not filing an amended motion, the case was remanded to the circuit court for a hearing under Sanders v. State, 807 S.W.2d 493 (Mo. banc 1991).

State v. Patrick, 816 S.W.2d 955 (Mo. App. 1991). Patrick was convicted of possession of marijuana, a class A misdemeanor, and possession, with intent to use, of drug paraphernalia. When Patrick's guilty plea fell through, the court immediately proceeded with a bench trial, despite his lawyer's immediate filing of a hand-written document demanding a trial by jury. The Court of Appeals reversed and remanded for new trial stating, "No where in the constitution, statutes, rules or reported cases do we find a deadline for an accused to demand a jury trial in a misdemeanor case." At 957.

State v. Hampton, 817 S.W.2d 470 (Mo. App. 1991). The time limits under CAFA (§ 513.600 to .645 RSMo. (1986)), which requires law enforcement officers to report seizures to the prosecutor within three days of the seizure, and which requires the prosecutor to file a petition for forfeiture within five days of receiving notice, are mandatory. The failure to comply with either time limit will result in dismissal of the forfeiture petition. (But see Judge Fenner, dissenting.)

Nolan v. State, 817 S.W.2d 551 (Mo. App. 1991). Where the hearing court in proceedings under rule 24.035 did not enter findings of fact and conclusions of law on all issues presented, Nolan was entitled to have his case remanded to the motion court for further findings.

State v. Clay, 817 S.W.2d 565 (Mo. App. 1991). Where Rule 29.15 counsel filed an untimely, unverified amended Rule 29.15 motion, Clay was entitled to have his case remanded to the motion court for a determination of whether the failure resulted from his own negligence or intentional conduct, or from the inattention of counsel.

State v. Hill, 817 S.W.2d 584 (Mo. App. 1991). Hill was entitled to a new trial on the charge of tampering in the first degree based on his possession of a stolen automobile because the trial court excluded the attempting to define reasonable doubt. The prosecutor's improper

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The Drug Package ontinued from page 13

conduct can almost always imagine some alternative means where police objectives might have been better accomplished. As Ralph Waldo Emerson put it " 'reasonably' is a mutual cloud, which is always and never the same."[27]

Courts seem to quickly conclude that such mailed package intrusions are insignificant, go unnoticed, and have only a deminimis impact on any protected property interest.[28]

Mailed packages are subject to inspection under applicable federal postal regulations.[29] ■

Notes:

1 The Pilot project with two postal inspectors was dubbed "Operation Pele," commenced in October, 1983.

2 U.S. vs. Dass, 849 F.2d 414 (9th Cir. 1988).

3 U.S. vs. Terpak, 666 F.Supp. 1424 (D.C. HI 1987).

4 U. S. vs. Mendenhall, 446 U. S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)

5 U. S. vs. LaFrance, 702 F.Supp. 350 (D.C. ME 1988).

6 U. S. vs Hill, 701 F. Supp. 1522 (D.C. KS 1988); U.S. vs. Lux, 905 F.2d 13 79 (10th Cir. 1990)

7 The Postal Inspection Service has delivered completed data that Los Angeles is a source city, and Kansas City is a popular destination.

8 U.S. vs. Hill, supra.

9 U.S. vs. Cantrell, 762 F.Supp. 875 (DC KS 1991).

10 39 CFR, Section 233.3 (c) (1).

11 U.S. vs. Sklar, 721 F.Supp. 7 (D.C. MA 1989).

12 U.S. vs. Clark, 695 F. Supp. 1257 (MA 1988).

13 U.S. vs. Donnes, 50 Cr.L. 1122 (10th Cir. 1991).

14 U.S. vs. Mulder, 808 F.2d 1346 (9th Cir. 1987); State vs. Von Bulow, 475 A.2d 995 (RI 1984).

15 U.S. vs. Choate, 576 F.2d 165 (9th Cir. 1978); U.S. vs. Huei, 593 F.2d 14 (5th Cir. 1979).

16 Reid vs. Georgia, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980).

17 U.S. vs. Van Leeuwen, 379 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 599 (1984).

Notes Continued on page 21.

DEFENDING CRIMINAL CASES

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

Program and Faculty

Moderators: **J. R. Hobbs**, Kansas City; **Larry Schaffer**, Independence

FRIDAY, APRIL 24, 1992

8:15 - 8:45	Pick up materials; late registration if space available
8:45 - 9:00	Welcome Speaker: **Bruce Simon**, Kansas City, Missouri President, Missouri Association of Criminal Defense Lawyers
9:00 - 9:50	Federal and Missouri Evidence Revisited 1992 Speaker: **Elizabeth Unger Carlyle**, Lee's Summit, Missouri
9:50 - 10:40	Smart Weapons for the Criminal Defense Lawyer – Using Technology to Level the Playing Field Speaker: **E. X. Martin**, Dallas, Texas National Association of Criminal Defense Lawyers
10:40 - 10:55	Refreshment Break
10:55 - 12:00	Ethical Considerations in Criminal Practice Speaker: **Martin Kerr**, Independence, Missouri
12:00 - 2:00	Luncheon - Cash Bar - Annual Awards Ceremony - Luncheon Address Speaker: **Neal Sonnett**, Miami, Florida Past President, National Association of Criminal Defense Lawyers
2:00 - 2:50	Defending Hand-to-Hand Deliveries Speaker: **Robert C. Fogelnest**, New York, New York National Association of Criminal Defense Lawyers
2:50 - 3:50	Representing the Accused in the Mega Trial and Related Issues Speaker: **Byron Fox**, Kansas City, Missouri
3:50 - 4:10	Refreshment Break
4:10 - 5:00	Effective Appellate Advocacy in Criminal Cases Speaker: **Claudia York**, Kansas City, Missouri
5:00 - 5:30	Missouri Association of Criminal Defense Lawyers Annual Board Meeting (All Attendees Invited)
5:30	Cash Bar

SATURDAY, APRIL 25, 1992

9:00 - 10:00	Review of Recent Developments in United States Supreme Court Decisions Speaker: **Milton Hirsch**, Miami, Florida National Association of Criminal Defense Lawyers
10:00 - 10:50	Federal Sentencing Issues Speaker: **Charles Atwell**, Kansas City, Missouri
10:50 - 11:00	Refreshment Break
11:00 - 12:00	Round Table Discussion (Attendees may submit tactical problems and issues from municipal, state, or federal cases they are handling for suggestions and advice.) Round Table Moderator: **Larry Schaffer**, Kansas City, Missouri Panelists: **Milton Hirsch**, Miami, Florida; **Charlie Rogers**, Kansas City, Missouri; **J. D. Williamson**, Independence, Missouri; **James Wyrsch**, Kansas City, Missouri; **Bruce Simon**, Kansas City, Missouri

WHY YOU SHOULD ATTEND THIS PROGRAM

The 1992 edition of this annual institute again offers an outstanding educational opportunity for lawyers with an extensive criminal practice. The faculty includes nationally known practitioners as well as outstanding Missouri criminal lawyers. The program will give you up-to-date information on recent developments in criminal law as well as how-to-do-it tips from the pros.

The program will feature these speakers prominent in the National Association of Criminal Defense Lawyers:

- **E. X. Martin** of Dallas, Texas, on smart weapons for the criminal defense lawyer
- **Robert C. Fogelnest** of New York, New York, on defending hand-to-hand deliveries
- **Milton Hirsch** of Miami, Florida, discussing Supreme Court decisions
- And a special address by **Neal Sonnett** of Miami, Florida, Past President of NACDL

A block of rooms at the Adam's Mark Hotel has been set aside for MACDL. To make room reservations call the Adam's Mark at 816/737-0200 by March 23, 1992 and indicate that you will be attending the MACDL program. A credit card deposit will be required. Room rates are $75 single; $85 double.

DEFENDING CRIMINAL CASES

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

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PROGRAM DATE AND LOCATION:

[ ] **KANSAS CITY**
Adam's Mark Hotel
I-70 and Blue Ridge Cutoff
April 24-25, 1992

LEGISLATIVE ACTION ALERT -- by Dan Viets

As the Missouri Legislature nears the midway point of its 1992 session many issues of great interest to criminal defense practitioners are pending. At this point, no bill on our agenda has been passed but a number of them are winding their way through the legislative process.

Many of the issues with which we are concerned have become inextricably intertwined due to the parliamentary maneuverings of the General Assembly. We are faced with the dilemma of bills which contain provisions we find both very important to pass and very important to prevent from passing.

The prosecutors' "wish list" has been introduced in both the Senate and the House. The House bill began as HB 1261 and the Senate bill as SB 461. Each of these bills contain a number of changes in procedures related to criminal practice which will make life easier for prosecutors and tougher for defendants and their representatives. Both of these bills have been extensively amended since they were first introduced, however.

In the House, HB 1261 has been combined with HB 964 and those bills have been further amended. This has resulted in a bill which calls for greater restrictions on civil liberties but also, in its present form, would prohibit the execution of mentally retarded defendants.

On the Senate side, SB 461 has been combined with three other bills, each of which have been further amended. This bill now contains many proposals we find offensive, but also contains many positive reforms of the forfeiture laws.

The issue of forfeiture reform is a major theme in the Capitol this year, thanks largely to two series of St. Louis Post Dispatch articles which exposed incredible abuses of the forfeiture laws by law enforcement officials in St. Louis and incidents like the recent forfeiture of a Corvette in Kansas City for the alleged possession of 2 grams of marijuana by its owner. There is strong feeling in both the Senate and the House that forfeiture reform must be adopted, and the criminal procedure bills provide a vehicle for this.

There are several issues related to forfeiture reform. MACDL Board member Jim Worthington successfully represented the Odessa School District before the Missouri Supreme Court two years ago and established that the State Constitution means what it says in regard to all forfeiture proceeds going to the schools, not to the prosecutors as had previously been the case.

Now, of course, the police and prosecutors are back at the Legislature asking for constitutional amendments which would again permit them to have a share of the bounty.

Other proposed reforms in the state forfeiture process include a proposal to require state law enforcement officials to use state law and not the federal courts when pursuing a forfeiture. State law enforcement has been attempting to evade the State Constitution by "referring" forfeiture cases to United States Attorneys.

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The federal authorities have been willing to kick back a large percentage of forfeiture proceeds to local police.

Other issues in the forfeiture area include the question of whether forfeitures will proceed in state court only after conviction for a criminal offense. There are also proposals to eliminate forfeitures based on misdemeanor offenses.

Because the forfeiture issues have been co-mingled with so many other proposals in the criminal law field, it is necessary for us to address the issues rather than the bills when we contact state legislators.

There is no more important time for us to contact state Senators and state Representatives. If there is any doubt in your mind who your present senator and representative are, contact your local county clerk. Feel free to contact state legislators at their homes on weekends as well as at their offices at the State Capitol.

Legislators hear from an amazingly small number of citizen constituents. Their daily mail consists largely of computer generated messages from corporations and other organized interest groups. A single letter from a constituent which is truly an individually addressed letter can have a significant impact on the vote of a state legislator.

Please act now to prevent the passage of legislation which will have a negative impact on civil liberties and on the lives of our clients.

MACDL's influence on the Legislature becomes greater each year. This is clearly evident in the evolution of the bills described above and others.

It had been widely expected that the so-called "user penalty" legislation inflicting multiple new punishments on drug offenders would be easily passed. That was the same expectation which prevailed in each of the last two Legislative sessions. We have managed to prevent the passage of the "user penalty" legislation each of the past two years, but only on the last day of the session!

These issues can come down to extremely close votes. Your communication with your state legislators can make a very important difference.

The "user penalty" legislation has been effectively stalled in both the Senate and the House at this time. The bill, which is backed by the Governor, would inflict the loss of drivers licenses for drug offenders, even when the offense has nothing to do with a motor vehicle. The legislation would also deprive Missouri citizens, as a consequence of drug convictions, of state-funded student loans, deprive them of eligibility for public housing and deprive them of any occupational licenses or certificates issued by the State.

This legislation has been substantially modified since its earlier, and far more vicious, incarnation when it initially came before the Senate Judiciary Committee.

It is quite possible that this legislation can again be stopped, but only if MACDL members take the initiative to contact their state legislators and do so quickly.

The Legislature seems quite willing to continue to further invade the privacy of Missouri citizens. One proposal which would have made it a crime to perform an abortion was narrowly defeated in

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a recent Committee vote. However, it is quite possible that that legislation will be proposed from the floor of either House at any time.

Another proposed bill would expand the definition of "deviant sexual conduct". The Legislature currently defines deviant conduct as any contact between the genitals of one person and the hand, mouth, anus or various other body parts of another. The proposal would expand that to define as deviant contact between the genitals of one person and an instrument held by another person.

If bills such as those described above become law it will be because we have failed to exercise our civic responsibility to take an active part in the legislative process.

If you want to become more active in opposing legislation hostile to civil liberties, please contact my office at (314) 443-6866 or MACDL's lobbyist in Jefferson City, Randy Scherr, at (314) 636-2822. ■

1992 ELECTORAL SLATE

MACDL's Annual Meeting will be held at 5:00 p.m. on April 24 at the seminar in Kansas City. All members are encouraged to attend. The main item of business will be the election of five officers and six members of MACDL's Board of Directors for the 1992-93 term. MADCL's nominating committee, chaired by Charlie Atwell, recommends the following slate to fill these positions:

President: Sean O'Brien, Kansas City
President-Elect: Jay DeHardt, Kansas City
Vice President: Dan viets, Columbia
First Vice President: J. R. Hobbs, Kansas City
Second Vice President: James Worthington, Lexington

Board of Directors: Linda Murphy, Clayton
Michael Gorla, Clayton
Burt Shostak, St. Louis
Susan Hunt, Kansas City
David Everson, Kansas City

At press time, one board position remains open. The committee will present a nominee for that position at the annual meeting. Should any MACDL member wish to nominate someone other than those named above, our by-laws provide for nomination by certified letter to MACDL's Executive Secretary, Francie Hall, 2300 Main, Suite 1100, Kansas City, MO 64108

NOTICE

SUBJECT: Public Hearings of the Committee to Review the Criminal Justice Act

The United States Judicial Conference Committee to Review the Criminal Justice Act will hold public hearings to receive the views of all interested persons regarding the current effectiveness of the Criminal Justice Act (CJA), 18 U. S. C. § 3006A. The Committee has been directed to assess and report on the current effectiveness of the CJA's program for furnishing defense services at government expense to financially eligible federal criminal defendants. The Committee's review will encompass all issues directly related to the organization, structure and procedures associated with the delivery of federal defense services, and the appointment and compensation of federal defenders and private panel attorneys. Based in part on these hearings, the Committee is expected to recommend legislative, procedural and operational changes which would enhance the quality of those services.

The hearings will be held in the following cities (and encompass the circuits indicated), beginning at 10:00 a.m. on the following dates:

Atlanta, Georgia — Friday, February 28, 1992; 4th, 5th and 11th Circuits

Chicago, Illinois — Friday, March 13, 1992; 6th, 7th and 8th Circuits

Boston, Massachusetts — Friday, March 27, 1992; 1st, 2nd, 3rd and D.C. Circuits

Denver, Colorado — Friday, April 10, 1992; 9th and 10th Circuits

In addition, the Committee has scheduled a hearing in Indianapolis, Indiana, on Thursday, May 14, 1992, in conjunction with the NACDL conference.

The Committee would like to hear from persons and organizations about their CJA-related experience, including problems encountered and proposed solutions.

Persons wishing to participate in the Committee's hearings should call (202) 786-6625 or write the Committee to Review the Criminal Justice Act, Washington, D.C. 20544, as soon as possible. The Committee will try to accommodate all persons and organizations wishing to appear. Written statements will be accepted (at the above address) in lieu of oral testimony for those persons unable to appear.

Judge Edward C. Prado, Chair
United States Judicial Conference

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18 U.S. vs. Marterll, 654 F.2d 1356 (9th Cir. 1981).

19 Sequra vs. U.S., 468 U. S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 282 (1970).

20 U.S. vs. Dass, 849 F.2d 414 (9th Cir. 1988).

21 U.S. vs. Lux, supra.

22 U.S. vs. Terpak, supra.

23 U.S. vs. Dass, supra.; U.S. vs. LaFrance, supra.; U.S. vs. Sanders, F.2d 882 (6th Cir. 1983).

24 U.S. vs. West, 731 F.2d 90 (1st Cir. 1984); U.S. vs. Place, 462 U.S. 696, 709, 103 S.Ct. 2637, 2645, 77 L.Ed. 110 (1983).

25 U.S. vs. Veillette, 778 F.2d 899 (1st Cir. 1985); U.S. vs. Pono, 746 F.2d220 (DC ME 1990).

26 U. S. vs. Sharpe, 470 U.S. 675, 105 S. Ct. 1568, 84 L.Ed.2d 605 (1988).

27 Sierra Club vs. Sec'y of the Army, 820 F.2d 513 (1st Cir. 1987).

28 U.S. vs. Villette, supra.

29 Santana vs. U.S., 329 F2d 854 (1st Cir. 1964); Domestic Mail Manual, 115.22 (b).

DEFENDING CRIMINAL CASES

April 24-25, 1992

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