MACDL
Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

President's Letter Summer 1992

Dear Fellow MACDL Members:

It looks like our clients will once again figure big in Presidential politics—George Bush's opening media volley lists crime as one of the three big issues that confront the nation. This time he faces a challenger, Bill Clinton who has presided over executions—including that of Ricky Rector, a non compos mentis African-American man who had lobotomized himself during a suicide attempt. When the candidates argue about who is going to be tougher on crime as President, it will get ugly. The war on crime has already turned into a war on poor people, with several of our major cities declaring "homeless free zones"—not a low-income housing or shelter project, but an area where it is a crime to be homeless. You move along or go to jail. At this moment, Congress is deadlocked over a crime package that would be the most draconian law in the history of mankind. The Democrats are backing a bill that creates 53 federal crimes that are punishable by death, while the Republicans have proposed a bill with a similar number of capital crimes that also in effect abolishes the writ of habeas corpus. The U.S. is already the world leader in the incarceration and execution of its citizens.

These issues are vitally important to our membership. If you disagree, think about this: If death penalty cases were staffed according to American Bar Association standards (i.e. two attorneys per case), there is enough death penalty litigation going on right now in the state of Missouri for every single MACDL member to be responsible for a death penalty case. (I happen to know that nearly every MACDL Board member, officer and Past President now has a client facing the death penalty.) If either crime bill passes, you will be fortunate to avoid being appointed on a capital case. But if you don't do it, who will?

Many of our members remember not too long ago when Missouri's public defender fund went bankrupt. This year, the federal appointed counsel fund went dry on July 1, and next year's fund is projected to run out in April. Our prisons are already bursting at the seams. Yet our leaders are still courting voters with promises of more prosecutions, longer jail terms, and faster executions. And as with all poor workmen who can't get the job done, they are blaming their tools—the courts and the Bill of Rights. So the first folly—draconian legislative and executive policies—is compounded by a second—the packing of the courts with right-wing ideologues who are systematically dismantling the Bill of Rights. Who will

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President's Letter

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tell the people that we cannot afford, fiscally or morally, to continue our present course? If not MACDL, then who?

These are the questions I ask myself when I think about where MACDL needs to go in the next year. I just returned from Snowmass, Colorado, where I represented MACDL at the National Association of Criminal Defense Lawyers Affiliates Council meeting, and all criminal defense organizations across the country are concerned about these very issues. MACDL has chosen to be part of the NACDL network, and in the next year you will see some tangible results of our affiliation with NACDL. The technical and advisory support will improve the quality of our newsletter and membership services, just as it has already done for our CLE programs. A few other goals that are attainable in the up-coming year include the establishment of a MACDL Speaker's Bureau to educate the public on civil rights issues and criminal justice policies, the regular publication of a high quality newsletter, the publication of a membership directory and handbook, and a drive to push our membership over 500. We will continue to provide strike force representation to members in need (see our latest victory, State ex rel Tannenbaum v. Clark, summarized in the case law update). We will continue to produce the best criminal law CLE programs in the state. We will continue to be a voice of reason in the Missouri General Assembly, and we will return to Washington this spring to participate in the NACDL Fly-in. As a long-term goal, MACDL should establish a permanent headquarters with a full-time administrative staff. I believe our growth has brought us to the point where this will be necessary to establish and maintain high quality membership services and communication.

Finally, an important goal for the upcoming year is to give MACDL members an equal opportunity to contribute to our organization. Our organization has evolved to its present state on the hard work of a handful of people who have actively served on the Board of Directors. To grow as an organization and as a political force, we must spread the responsibility, opportunity and recognition among our membership—our greatest resource. I am proud of the fact that there is more gender and ethnic diversity at gatherings of criminal defense lawyers than among any other group of lawyers I have seen. I have appointed a number of members to committees that have traditionally been staffed only by directors, and nothing says that I can't add new people who want to contribute talent, ideas and energy to MACDL. If you want to serve on the strike force, the publications committee, the membership committee, the legislative committee, the speakers bureau, or help in any other capacity, or if you just have an idea you want to share, give me a call or drop me a line.

I look forward to hearing from you!

Sean D. O'Brien
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Newsletter Update

by Elizabeth Carlyle

We hope that you have noticed a difference in the style and content of this issue of the MACDL newsletter. Sean O'Brien has established a publications committee and has asked me to coordinate the newsletter function. Heretofore, our newsletter has been produced largely through the excellent work of our capable executive secretary, Francie Hall. Francie is the only paid staff MACDL has, and she has a full-time day job, so she is one hardworking lady. Sean and I hope that by involving more of the members in the newsletter to take some of the burden from Francie, we can expand and improve the newsletter.

Here are some of our ideas:

• several more regular columns in addition to the legislative update, president's page, F.Y.I. and criminal law update columns. (Note that with this issue, the criminal law update expands to include federal cases.

• a space to publish your office changes so all of us will know where you are and what you're doing.

• a regular repository for your funny stories. We hear enough sad stories as criminal defense lawyers that we need to cherish whatever humor we can find.

• articles by people who are not criminal defense lawyers but whose views are of interest to our members. In this issue, you will see an article by a federal probation officer. Other possibilities include expert witnesses in various fields, jury consultants, judges and even (shudder) prosecutors!

• We hope in the near future to expand the size and format of the newsletter so we can print longer, more in depth articles. For now, our publication guidelines are pretty simple. We prefer articles of no more than five double spaced pages. If they're longer than that, we may have to abridge or serialize them. If you can, please send us a disk with your article in WordPerfect or compatible format for IBM, in addition to a printed copy; we'll return the disks if you put your name and address on them. We'll edit as needed for length and style. If you want to see the edited text before publication, please let us know when you submit the article. We publish quarterly. Our next deadline is October 15, 1992. The address for submissions is Elizabeth Carlyle, 200 S. Douglas, Lee's Summit, MO 64063.

Of course, our success depends on our members. For this issue, our board of directors were specifically asked to contribute and came through nobly. But contribute your ideas, aspirations and thoughts to our publication. If you know anyone who's not a defense lawyer who might have something to contribute, please feel free to ask them to do so. I'd like to hear from you if you have a regular column you'd like to write, or if you'd like to submit an article for one-time publication. If you want to call us, please feel free: Elizabeth Carlyle, (816) 524-0339; Marian Ervin, (913) 648-3220; Barbara Greenberg, (314) 862-3535; Dee Wampler (417) 887-1155.

We also hope that you will encourage nonmember criminal practitioners to join MACDL. In these times, if we don't all hang together, we shall assuredly all hang separately. Our aim is to provide a newsletter which you can use as a selling point to recruit new members, and by adding members, we will be able to support a more professional-looking and extensive newsletter.

I am excited about the newsletter, and about our organization, and hope you are too. Let's work together to make them great!

"Let's Make a Federal Case Out of This"

Never having practiced in Federal Court before with a new assignment can be somewhat intimidating. What should I do, who can I trust, and how can I best represent my client under the United States Sentencing Guidelines? Who is a Career Offender, a minimal participant, an organizer, and how many criminal history points will my client be assessed for those DUI's? What should I advise my client who denies guilt, but wishes to plead guilty? Will he be awarded Acceptance of Responsibility? These are some of the questions that immediately spring to mind after even a brief exposure to the Guidelines as promulgated by the Sentencing Reform Act of 1984. First utilized in 1987, the current Guideline Manual consists of 440 pages and is reissued each Fall with a substantial number of changes, supplements, and notations sufficient to cause any attorney to step back in shock and disbelief.

The purpose of this short article is to provide a starting point for all who might end up in what could easily become another nightmarish legal quandary for the uninitiated. First of all, I am not an attorney, don't want to be and never will be. I do, however, work with attorneys who practice law on both sides of those issues which eventually wend their way into Federal Court. Therefore, I believe I can provide some simple answers to that most difficult of all questions, "Where do I begin federally?".

Right off the bat get your hands on a copy of the most recent edition of Federal Criminal Code and Rules as well as a copy of the United States Sentencing Guideline Manual which was in effect when your client allegedly committed the instant offense. With these two volumes in hand you are on your way to getting to the bottom of things. West Publishing produces the criminal code and the guideline manual can be obtained from the U.S. Government Printing Office. Before going any further, read Chapter One of the guideline manual to get a feeling for why the guidelines were established and how to use the manual. Follow the instructions and find the guidelines that best describes that section of law your client has allegedly violated. Try to work through the case using the Chapter One outline. When you realize that you are in over your head, you are on the right track. Now it is time to talk to someone who has a bit more familiarity with the subject.

Who might that be? The Assistant United States Attorney is one source. He can certainly discuss your calculations and compare his worksheet with yours. Don't forget that he's on the other side of the issue at hand. Alright, who else? The Assistant Public Defender's office is another fountain of information. The members of both of these offices are very proficient in the application of the guidelines as they effect your client. Yet another source exists, independent of the offices previously mentioned. The United States Probation Office is responsible for conducting your client's presentence investigation, calculating the guidelines for the offense, as well as recommending a sentence to the Court. It is certainly appropriate to approach the USPO for guidance, or to check your own calculations. After obtaining advice from the three groups mentioned above, you are much closer to arriving at a point where you can provide effective counsel to your client in an arena in which you are not too comfortable.

Submitted by:
Frederick W. Goman
U. S. Probation Officer
Western District of Missouri

Deferred Prosecution for Offenders with Substance Abuse Problems

In November of 1989, the voters of Jackson County passed the Anti Drug Sales Tax that generates $14 million a year in revenue. The portion of the program that has received the most publicity has been the enforcement arm. However, that emphasis tends to undermine the comprehensive nature of the plan which was not only intended to strengthen law enforcement but also to enhance the availability of drug treatment.

Treatment availability is being enhanced through a number of means, one of which is the Deferred Prosecution component. This office is located in the Jackson County Prosecutor's Drug Unit and is directed by Neil Hartel.

The Deferred Prosecution Program accepts defendants who are charged with a Class C or lower felony and have no more than one pending charge. The defendant must not be on State Probation and Parole supervision not have any felony convictions unless they are over five years old. A defendant having excessive municipal or state misdemeanor convictions may be denied entrance to the program.

Probably the most common misperception about who is eligible for this program is that the defendant must have been charged with a drug charge. Any defendant charged with a Class C or lower felony is eligible if there is evidence of drug use. This evidence can come from a number of sources including the defendant's own admission of use, information from the family, the circumstances of the offense.

The goal of the program is to provide those individuals who meet the criteria with treatment tailored to their needs. The first step is an independent assessment which is conducted by the National Council on Alcoholism and Drug Dependence. National Council uses an objective assessment tool to help them determine a recommended treatment program for each particular individual's needs. There are presently four treatment models: (1) residential; (2) intensive outpatient; (3) outpatient; and (4) educational.

After the recommendation of which type of treatment is appropriate, the defendant is referred to an appropriate treatment organization in the community. Since the County has purchased services with many treatment providers, clients are accepted into these programs regardless of their ability to pay.

At this point, approximately 50% of those in Deferred Prosecution are attending intensive outpatient treatment. Twenty percent have been referred to inpatient treatment; 20% are in outpatient counseling and the remaining 10% are in educational treatment. The Drug Sales Tax is funding about 25% of those treatment costs, and about 25% is being covered by treatment money available from other sources. The remainder is self pay, from either personal funds or insurance.

The length of the Deferred Prosecution Program is one year. While in the program, the clients submit written monthly reports to the Deferred Prosecution Unit. They are seen at the particular treatment agency. Any urine testing is also done there or, in addition, at a contract laboratory. Participants in this program are required to complete Community Service Restitution hours.

If the client successfully completes treatment, remains drug free, completes the community service hours and incurs no new law violations, he or she will be successfully discharged and the charge against them will be dismissed.

If you have any clients that you believe may fit these guidelines or have any additional questions, please contact:

Neil Hartel, Director
Deferred Prosecution
417 E. 13th Street
Kansas City, Missouri 64106
(816) 421-6613

Submitted By:

Molly Merrigan
Member of Deferred Prosecution Advisory Committee
Associate with Gerald M. Handley

Book Review: "THE FIRM"

Author: John Grisham

Reviewed by: James D. Worthington

Mitchell McDeere started with nothing but his drive for excellence and found the world in the palm of his hand. College quarterback; third in his Harvard Law class; married to breathtakingly lovely Abby; offers aplenty from New York and Chicago silk stocking law firms and now recruited by THE FIRM of Bendini, Lambert and Locke from Memphis, Tennessee. THE FIRM is intoxicating with its opulence, extremely high salary offer and unbelievable perquisites. While the foreshadowing is subtle, such as the braggadocio that no one has ever resigned from THE FIRM or that all partners retire as millionaires at early ages, the realities starkly dovetail into Mitchell's consciousness like an icy snowball to the nose when he finds that five partners have died mysterious deaths in five years. And security at THE FIRM is more than just tight. And the partner/supervisor for each new associate is more than just paternalistic guidance.

Some doubts and suspicions have crept into the recesses of Mitch's mind when he is suddenly and clandestinely approached by a man who claims to be with the FBI. Tarrance whispers how and why the last two partners died in a mysterious, suspicious diving explosion off Grand Cayman Island in the Caribbean and warns Mitch that THE FIRM has bugged his phone, his house and even his car.

This book lays out "the hook" within the first 50 pages and the book becomes a feverish drama/thriller for Mitchell McDeere, his vivacious wife Abby and for you the reader. Mitch begins to learn that he is not really working for a law firm and as we all discover what and who and how, he runs the gamut of emotion from shock to anger to fear to petrification.

This book is a page turner; the intrigue became an obsession for me and will for you too!

Why then is this fiction novel being reviewed for brethren and sisters of the defense bar?

1. Because the author is one of us;

2. Because the "hook" swallows each of us into the "every man" idea that we are or can be Mitchell McDeere;

3. Because we all need an occasional break from the stress and pressures of the sometimes precious, sometimes wretched lives we daily shield from the avaricious excesses of governments.

This novel will provide you the brief respite and genuine enjoyment to which each of you are justly entitled.

Enjoy!!!

Respectfully Submitted,
James D. Worthington

Published by Doubleday

BE AN ADVOCATE!

Your colleagues would like to hear from you. MACDL wants to publish high quality articles, model motions, reviews, practice pointers, and comments concerning timely issues in criminal law and procedure. Please submit your letters, motions, and articles to:

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

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What A Difference Three Decades Makes

by: Robert Duncan

When I got out of law school in 1959, very few lawyers would describe themselves as criminal defense lawyers. Criminal defense was not widely thought of as a reputable practice of law. Most lawyers avoided it like the plague. There used to be a lot of professional thieves and these professionals were invariably interesting and colorful people. They generally had stashed money to pay a bondsman and a lawyer and they generally used the same lawyer time after time, particularly if he was winning cases for them. Some of them continually ran one case behind and the lawyer could safely represent him on a new case without fee, because he knew full well the pro would be in trouble again and that he would pay you for the last case before you would enter your appearance on the next case. You did not have to caution them to not talk to the police as they probably knew their rights better than you. Quite often the police would not even bother attempting to question them.

The trial of a case then was far more interesting. You had no discovery, and all you received was a copy of the information or indictment with the witnesses listed. In fact, you were fortunate if your client was guilty because at least then he or she could tell you what happened. If you had an innocent client, he may not have had the slightest idea of what had occurred and you might have to rely upon the newspaper report for your trial preparation. This of course encouraged you to be friends with the police officers, so that you could talk to them and hopefully acquire some knowledge. The police investigation then usually consisted of only foot work. Seldom was a snitch involved and the use of police science was extremely limited. Trial was by the seat of your pants and the outcome often turned on the lawyer's ability as an orator or debater. Trials then were great fun. It even seems like the judges were more eccentric.

Today, the rules have changed and the substantive law is substantially more complicated. In the old days, the prosecutors had to prepare their own information and instructions. Today, we have pattern information, indictments, and instructions, and thus we seldom can obtain a reversal as a result of some error therein. In the old days, the burden was on the Court to give the proper instructions on defenses and lesser included offenses. Today, in order to preserve error on the failure to give such an instruction, the defendant must offer one.

The rules of evidence have changed. The right of confrontation somehow or the other has disappeared. Wiretap and peeping tom evidence is admissible. Practically every case involves a snitch who has been granted immunity or made some other deal. If he is not a snitch who claims to have participated in the crime with your client, he is one who has been in jail with your client and comes forth, of course on a promise that he will be released from jail and says that your client while in jail admitted to him that he was guilty.

Defenses to criminal acts for all intents and purposes have almost totally disappeared. The suppression of evidence as a result of an illegal search and seizure is now something discussed at seminars. If the officer acts in good faith or the defendant fits a profile or if

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Recent Decisions - Federal and Supreme Court Cases

by: Elizabeth Unger Carlyle

ARGUMENT OF COUNSEL

United States v. Jones, No. 91-1987 (8th Cir. June 9, 1992) The prosecutor's statement that "When a person is sworn in as an Assistant United States Attorney, they take an oath of office that they will do justice, they won't seek a conviction, they will do justice and try to be fair," was improper, but the error was harmless: "If the Government's case were not as strong, we might have concluded otherwise."

CAPITAL PUNISHMENT

Espinosa v. Florida, No. 91-7390 (U.S. June 29, 1992) Florida's capital punishment aggravating circumstance that the murder was "especially wicked, evil, atrocious or cruel" is unconstitutionally vague and cannot be considered by either judge or jury in deciding whether or not to assess the death penalty.

Sochor v. Florida, No. 91-5843 (U.S. June 8, 1992) Florida's capital punishment aggravating circumstance that the murder was committed in a "cold, calculated and premeditated manner" was unconstitutionally vague and therefore invalid under the Eighth Amendment. The Florida Supreme Court's holding that the sentence of death was "proportionate to the crime" even without this circumstance was not a proper harmless error analysis.

DUE PROCESS

Riggins v. Nevada, 112 S.Ct. 1810 (1992) Forcing a defendant to take antipsychotic medication before and during his trial violated the Due Process Clause of the Fourteenth Amendment. The government failed to show a legitimate state interest outweighing Riggins's liberty interest because it did not demonstrate that Riggins could not have been tried using less intrusive means. The fact that the medication affected Riggins's appearance, testimony, and ability to follow the proceedings and consult with counsel was sufficient to show harm; no showing that the outcome would have been different was required.

HABEAS CORPUS

Wright v. West, No. 91-542 (U.S. June 19, 1992) "A state court judgment of conviction is not res judicata on federal habeas with respect to federal constitutional claims,... even if the state court has rejected all such claims after full and fair hearing." (Conviction affirmed on the merits.)

EFFECTIVE ASSISTANCE OF COUNSEL

Johnson v. Armontrout, 961 F.2d 748 (8th Cir. 1992) Trial counsel's failure to adequately test the bias of the jurors and to request their removal was ineffective assistance of counsel under Strickland. Although Johnson called the

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problem to his lawyer's attention, the lawyer told him that only peremptory strikes could be used to remove the jurors and that only six such strikes were available. Prejudice was shown by the presence of two biased jurors without a showing that their absence would have changed the verdict because "Trying a defendant before a biased jury is akin to providing him no trial at all. It constitutes a fundamental defect in the trial mechanism itself." For the same reason, harmless error analysis was inappropriate.

Griffin v. Delo, 961 F.2d 793 (8th Cir. 1992) In this Missouri capital case, the Eighth Circuit granted leave to appointed counsel to withdraw and appointed new counsel after Griffin filed a pro se motion for rehearing arguing ineffective assistance of counsel. The case is now remanded so that the new attorney may raise additional issues not previously considered by the district court. While no substantive issues are decided in this opinion, it is striking because, uncharacteristically for federal courts, it declines to rely on procedural defaults to affirm a death sentence. It does set a 180 day deadline for the district court to finish with the case and send it back to the Eighth Circuit.

EVIDENCE

United States v. Simmons, No. 91-1368 (8th Cir. May 15, 1992) Missouri privilege law which protects probation records does not apply in federal criminal cases, and therefore the probation report of a confidential informant should have been disclosed; it was Brady material because it showed that the informant had dirty urine specimens shortly before she testified at trial. The failure to disclose this material denied the defendants the ability to impeach the witness for bias, but the error was harmless because the witness's testimony was corroborated.

United States v. Wang, No. 91-3193 (8th Cir. May 20, 1992) A new trial was properly granted where depositions were admitted at trial without adequate cross-examination. At the time of the deposition of the witnesses, who were illegal aliens, Wang was charged with conspiracy to harbor illegal aliens. However, the depositions were used in her trial for the substantive offense of harboring illegal aliens, which involves different elements than the conspiracy charge. Using an abuse of discretion standard, the Eighth Circuit found that the trial court properly ruled that the difference between the two crimes substantially affected cross-examination and could have affected the jury's decision.

United States v. Benson, 961 F.2d 707 (8th Cir. 1992) The admission of reports of an FBI agent and a probation officer containing accounts of statements allegedly made by Benson was improper because the reports were double hearsay. "The two interviews with Benson [described in the reports] were not reported verbatim and they were unsigned and unsworn by Benson." However, this error was harmless because the evidence of the defendant's guilt was overwhelming and the information in the reports was corroborated by other witnesses' admissible testimony.

JURY SELECTION AND COMPOSITION

Trevino v. Texas, 112 S.Ct. 1547 (1992) The defendant here properly preserved a Batson issue where: The case was tried before the decision in the Batson case; the defendant filed a motion

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Recent Decisions Continued from page 13

before jury selection seeking to prohibit the state from using its strikes in a discriminatory manner; after each peremptory challenge by the state of a black venire member, the defendant requested (but did not receive) the state's reasons for the strike. The defendant cited McCray and Swain in support of his position, and also raised the discriminatory strike issue in the Texas Court of Criminal Appeals, citing Swain and the Equal Protection Clause of the Fourteenth Amendment. This was sufficient to preserve the issue under Ford v. Georgia.

Morgan v. Illinois, No. 91-5118 (June 15, 1992) A capital defendant may challenge for cause any prospective juror who would automatically vote to impose a sentence of death and would disregard mitigating factors. Therefore, the defense is entitled to ask prospective jurors about their views on mitigating factors.

United States v. Holden, No. 91-3079EM (8th Cir. May 8, 1992) On a proper, timely request, a defendant in a criminal tax case is entitled to have the IRS disclose whether prospective jurors have been audited or investigated by IRS. 26 U.S.C. §6103(h)(5). However, the error was harmless here. The judge asked the jurors if any of them had been audited; eight responded that they had and did not serve on the jury. The defendant did not request more questions or ask the court to verify the jurors' responses to the voir dire questions. (Comment: I once filed a §6103(h)(5) motion and participated in an enlightening hearing about what constitutes an "investigation" by the IRS and on what information the IRS should or could disclose in response to this motion. I think the issue is a fruitful one in tax cases.)

Georgia v. McCollum, No. 91-372 (U.S. June 18, 1992) The Fourteenth Amendment to the United States Constitution prohibits defense counsel from using peremptory strikes to discriminate against prospective jurors on the grounds of race. The use of the strikes constitutes "state action" because it determines the composition of a governmental body, the jury.

Johnson v. Armontrout, 961 F.2d 748 (8th Cir. 1992) Johnson was denied his right to an impartial jury and to effective assistance of counsel where counsel failed to object to the fact that ten members of a jury which had previously convicted a co-defendant were included in the venire for Johnson's case, and four of those jurors actually served on Johnson's jury. At an evidentiary hearing, two jurors who sat on both juries testified that as a result of the evidence at the first trial, they were convinced of Johnson's guilt. The Eighth Circuit therefore declined to defer to the Missouri Court of Appeals finding that there was no evidence of bias because the court of appeals made no attempt at factfinding, basing its ruling on the fact that all venire members remained silent when questioned by the prosecutor about whether they could put aside the evidence presented at the previous trial. "We cannot say that an ambiguous silence by a large group of venire persons to a general question about bias is sufficient to support a finding of fact in the circumstances of this case... Due process requires the court to undertake sufficient voir dire questioning 'to produce in light of the factual situation involved in the particular trial, some basis for a reasonably knowledgeable exercise of the right to challenge.'"

SEARCH AND SEIZURE

United States v. Feiste, No. 91-1576 (8th Cir. April 15, 1992) State wiretap recordings were

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Recent Decisions Continued from page 14

properly suppressed, and the district court's order suppressing them was therefore affirmed. A Nebraska judge authorized a wiretap on December 31, 1987. The tapes were not sealed until 31 days after the last conversation and 29 days after the termination order. The government's explanation that the delay occurred because the FBI was checking the tapes for breakage was insufficient where there was no suggestion that any breakage was suspected, or that the agents believed the delay was reasonable under the law. See 18 U.S.C. §2518(8)(a).

SENTENCING GUIDELINES

United States v. Evans, No. 91-2481 (8th Cir. June 5, 1992) The sentence of defendant DeWitt was vacated based on the court's failure to follow the rule of Streeter and Prine that when a defendant is convicted of growing less than 50 plants of marijuana, the weight of marijuana used to determine the guideline offense level must be actual and cannot be determined by multiplying the number of plants by 100 grams.

United States v. Jones, No. 91-1987 (8th Cir. June 9, 1992) One defendant, Hooks, was entitled to a resentencing. He was convicted of conspiracy to distribute crack, but the jury verdict did not specify a quantity. Therefore, the trial court improperly refused to consider the statement in the PSR that the defendant could only be tied to .5 grams of crack, not to 50 grams as required for the mandatory minimum sentence. The case has good language about the varying liability of different conspirators for quantities involved in an overall conspiracy. The panel also suggests an en banc rehearing to reconsider the rule created in Foote that both prior convictions necessary for a mandatory consecutive sentence under 18 U.S.C. §924(c).

United States v. Montanye, No. 91-1703 (8th Cir. May 6, 1992) Although Montanye did not appeal his sentence, the Eighth Circuit reversed it anyway because the trial court's finding that he was accountable for all of the product of the laboratory was improper: "Montanye did not know how much or how little methamphetamine his co-conspirators would produce. Montanye never participated in the process of manufacturing or distributing the methamphetamine." His "thirty year sentence for a simple delivery of glassware constitutes a gross miscarriage of justice."

United States v. Simmons, No. 91-1368 (8th Cir. May 15, 1992) One defendant, Bowers, was granted resentencing. The trial court must base its findings on drug quantity on reliable evidence, although the evidence need not be admissible. Here, the district court deferred to the PSR, which was vague as to the source of the information concerning quantity, and made no findings as to the reliability of the sentencing evidence. One sentencing witness suffered from memory impairment because of cocaine use and had perjured herself at trial by stating she no longer used drugs. Her "testimony and interview lack sufficient indicia of reliability to serve as a basis for calculating the quantity of cocaine base that properly could have been attributed to Bowers." (Comment: It is extremely rare that an appeals court holds sentencing evidence to be too unreliable to use. Keep this one in your guidelines file.)

United States v. Granados, No 90-2940 (8th Cir. April 15, 1992) The case was remanded for the court to make specific findings concerning defen-

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Recent Decisions Continued from page 15

dant Mora's ability to pay the $20,000 fine imposed. The mere conclusory statement in the PSR that the defendant has assets to pay the fine is insufficient to support a determination to that effect by the trial court. "It is an incorrect application of the guidelines to impose a fine which the defendant has little chance of paying." In imposing a fine, the trial court must make specific findings as to the factors enumerated in Sentencing Guidelines §5E1.2.

United States v. Benson, 961 F.2d 707 (8th Cir. 1992) Benson did get some relief on his sentence. The court held that the trial court's findings as to the obstruction of justice enhancement were insufficient. While the court need not make specific fact findings that the defendant perjured himself to justify the enhancement, the enhancement may not "be based solely on [defendant's] failure to convince the jury of his innocence." Here, the court failed to perform an independent evaluation of Benson's testimony but relied on the jury's verdict to make its finding, and the case was therefore remanded for resentencing.

SPEEDY TRIAL

Doggett v. United States, No. 90-857 (U.S. June 24, 1992) A delay of eight and one-half years between indictment and arrest, during which the defendant was neither incarcerated nor aware of the indictment, violated the Sixth Amendment right to a speedy trial.

SUFFICIENCY OF EVIDENCE

United States v. Goodner Brothers Aircraft, Inc., No. 91-2466 (8th Cir. June 4, 1992) Where the defendants' pollution convictions under the RCRA could have been based on the jurors' application of the "mixture rule," which was a void regulation of the EPA, the convictions were required to be reversed. An improperly promulgated regulation is void ab initio, and it is immaterial that the decision voiding it was issued after trial.

United States v. Montanye, No. 91-1703 (8th Cir. May 6, 1992) Montanye's conviction for attempted manufacture of methamphetamine was reversed for insufficient evidence, because there was no showing that he ever possessed or intended to possess precursor chemicals. His possession and delivery of laboratory glassware, by itself, "does not constitute a substantial step towards making methamphetamine." (His conviction for conspiracy was affirmed.)

Palmer v. Clarke, 961 F.2d 771 (8th Cir. 1992) When evaluating sufficiency of evidence for double jeopardy purposes, the court must generally consider both admissible and inadmissible evidence. However, if the inadmissible evidence was admitted because of prosecutorial misconduct, the use of this evidence in a sufficiency analysis may violate double jeopardy, and Palmer should have been permitted to develop facts in support of his claim of prosecutorial misconduct. Furthermore, the submission of previously unavailable claims in a subsequent petition for writ of habeas corpus will not constitute abuse of the writ. (This is a capital case from Nebraska which was reversed twice. The Eighth Circuit remanded for consideration of a double jeopardy claim after Palmer's second trial but did not stay state proceedings; Palmer was tried and convicted again during the pendency of the appeal.) ■

LEGISLATIVE UPDATE

by: Dan Viets

Governor's Drug Bill 3 Time Loser

MACDL and its allies scored a third consecutive major victory in defeating the so-called "anti drug" bill in the closing minutes in the 1992 legislative session. The bill would have added several new additional punishments to even the most insignificant drug-related offenses.

The bill provided for the loss of drivers' licenses for anyone convicted of even a misdemeanor marijuana or drug paraphernalia possession offense. That loss of license would have been for a six-month period.

The bill also provided for the loss of professional licenses or occupational certificates issued by the state for anyone convicted of a felony offense. The bill also would have inflicted the loss of eligibility for student loans, public housing and various other benefits.

The bill went through numerous and substantial changes during its legislative evolution. At the end of the session, it had been amended in many ways which made the bill far less harmful. However, its ultimate defeat was an even greater victory than passage in its amended form would have been.

The legislation regarding loss of drivers' licenses will almost certainly be reintroduced in the 1993 session. The federal government has required states to consider and adopt or reject legislation requiring drivers' license suspensions for drug related offenses by the spring of next year. The legislature does not need to adopt the suspension provision to avoid losing federal highway funding, but must consider the matter and vote it up or down.

Recently the state of Maryland became the first state to explicitly reject the suspension proposal. The state of California and many others are seriously debating whether to reject or adopt the suspension idea. The other punishments proposed in the bill are not mandated or otherwise encouraged by the federal government. They are proposals which fail to recognize the underlying cause of drug abuse.

This legislation would have continued the punitive approach which has been widely discredited by professionals in counselling and treatment as well as by many in law enforcement. The Governor has failed to significantly enhance resources available for counselling and treatment which are the only approaches likely to reduce drug problems.

Depriving a person who may have a drug problem of the opportunity to earn an honest living was certainly one of the most counter-productive aspects of this legislation. Preventing an individual from practicing his or her profession or occupation is more likely to aggravate exiting drug-related problems.

To deprive citizens of the opportunity to further their education through college loans is also an obviously counter-productive approach to solving drug abuse problems. The election of a new governor this November will likely result in a somewhat different approach to drug law enforcement from the Governor's office in the 1993 session. ■

A PRIMER ON FORFEITURE

by: Bruce Simon

I was peacefully eating breakfast one morning in late February when an article in the Kansas City Star caught my eye. The gist of the article was a quote from the U.S. Attorney's office to the effect that the Government had not lost a civil forfeiture case locally. This struck me as odd because I knew that I had won at least one, a case which received some publicity at the time of the initial seizure, which involved the taking of the Claimant's property in the amount of $150,000 from the Union Station in Kansas City.

I was piqued by the Government's unjustified claim of a perfect record since it is so seldom anymore that the Government loses anything; and I decided to share my procedures with our membership to increase the frequency of the Government's losses. (I also called the Kansas City Star, a correction was printed on February 28, 1992 which stated that a District Court's ruling was being appealed, it was not yet considered a defeat by the U.S. Attorney's office. Using this rationale, I have a lot of clients in jail who are not yet convicted, but that is beside the point.)

Forfeiture usually follows the same basic steps:

The property is seized from your client and delivered to the appropriate agency for the commencement of forfeiture proceedings.

Once the property is delivered to the agency and is in federal custody, you should file a motion pursuant to Federal Rules of Criminal Procedure 41(e) for the return of the property. You probably won't get anywhere with that motion except to accelerate the forfeiture proceedings, which is what it is calculated to do, see In Re Harper, 835 F.2d 1273 (8th Circuit 1988) and U.S. v. $8850, 461 U.S. 555, 76 L.Ed.2d 143 (1983).

You will then receive a letter from the agency advising you of the seizure and setting forth the requisite amount of the bond. When you get this letter, send a cashier's check for the amount of the bond and a verified claim of ownership to the appropriate agency. Do not rely on the alternative administrative procedure described in the notice which is something akin to asking the cat politely to disgorge the canary. Once you make a demand by letter and notify the authorities of your pending motion under Rule 41(e), the case will be referred to the U.S. Attorney's office for commencement of judicial procedures. You, for your part, should be preparing to pounce.

Once the government has filed the forfeiture case in federal district court, you must then file another proof of claim under Admiralty and Maritime Rule, 28 U.S.C. Supp C(6) within ten (10) days after the execution of process. That's right, another claim. I know you filed an original, but since we are going to rely on a technical defense under the Admiralty Rule, we don't want to be the first one to make a mistake. By the way, the Admiralty Rules are located at 28 U.S.C. Supplemental Rules For Certain Admiralty And Maritime Claims.

The forfeiture petition, governed by 19 U.S.C. 1602-1619, which, curiously enough, relates to U.S. Customs regulations, will specify the basis of the forfeiture. Since the thrust of this article is civil narcotics forfeitures, that will be found in some provision of 21 U.S.C.

881. If you are the scholarly type, you may also want to read 21 U.S.C. 853, which relates to criminal forfeitures under Title 21. There are other provisions whereby freezing, forfeiture or other action may be taken and if you are really interested, you might look under 12 U.S.C. 1818 or 18 U.S.C. 1964.

Now that you have filed your second proof of claim and process has ben served, you will have two cases pending: first, your original claim under Rule 41(e) and, second, the Government's forfeiture proceedings under 21 U.S.C. 881. There will have been, somewhere in the Government's process, an affidavit issued requesting the Magistrate to issue an order arresting the subject res, be it money, property or whatever. This affidavit will be incorporated in the Government's Complaint for Forfeiture. It would probably make sense to have both actions transferred to the same District Judge. However, once the forfeiture petition is properly filed, the 41(e) motion is probably not viable, see U.S. v. Elias, 921 F.2d 870 (9th Circuit 1990). You are primarily interested now in the forfeiture proceedings as the purpose of the 41(e) motion was to get the Government to move smartly to file its complaint. If you don't do that, the Government will sit on your client's assets biding its own good time. There is another reason for haste, too; the Government will continue its investigation of your clients while they hold the property. The more time you give them, the more they will undoubtedly discover and the stronger their case will be before the complaint is filed. In other words, by keeping their feet to the fire, you control, to some extent, the scope of their proof at the pleading stage, which is important to the next step.

Admiralty Rule C requires a responsive pleading within twenty (20) days after service of process. You, however, are not going to file an answer, at least not if you have read this article and done your homework. What you are going to file is a Motion to Strike the Government's pleading under Admiralty Rule E(2)(a) and Federal Rule Civil Procedure 12. You see, Admiralty complaints are not like regular civil actions. I covered with you earlier about how fussy Admiralty Rules were with respect to crossing all the t's and dotting the i's, but his will work to your advantage.

Admiralty Rule E(2)(a) discusses the complaint and says in relevant part: "In actions to which this Rule is applicable, the complainant shall state the circumstances from which the claim arises with such particularity that the Defendant or Claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading."

In other words, strict factual pleadings are required on the part of the Government. Now, here is where the plot thickens.

In 1978, the provisions of 21 U.S.C. 881 were amended to add paragraph 6, which provides for the forfeiture of proceeds of a drug transaction. That is to say, money, see U.S. v. Real Property and Residence, 921 F.2d 1551 (1991). The legislative history of this act uses the words "substantial connection" in this paragraph. There may be somewhat different standards with respect to non-monetary assets, such as real estate, aircraft, automobiles, etc., but if you are like me, you are far more interested in money than the other assets, although the provisions of Admiralty Rule E (2)(a) are applicable in all cases.

I am willing to bet you that in your case, the Government seized the res in question from your client personally, and the seizure was not the product of a lengthy investigation.

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Forfeiture --Continued

During the limited time available after your 41(e) Motion is filed, they will not be able to frame their affidavit and commence an investigation sufficient to meet the requirements of Rule E(2)(a) and your Motion to strike the complaint will be granted, see U.S. v. $38,000 in Currency, 816 F.2d 1538 and U.S. v. $39,000 in Canadian Currency, 801 F.2d 1210 (1986). The Canadian Currency case is the seminal case in this area, and it provides an interesting analysis of various aspects of forfeiture law.

The beauty of this approach is that in the proper case, one never moves into discovery, and discovery is the bane of all forfeiture cases. How in the world can your client really explain what he is doing at the airport with $100,000 or more in cash? Especially if he has never held a job? And particularly if he has never filed a tax return? All of these embarrassing areas are closed to inquiry in a proper case in which Motion to Strike the Complaint has been filed.

In connection with that, it is imperative that the Claimant exercise proper judgment. For example, if there is in the government's affidavit evidence of narcotics, see U.S. v. $93,651.61, 730 F.2d 571, or admissions of the usual foolish type, see U.S. v. $4,255,000, 762 F.2d 895, one would probably not be able to succeed with a Motion to Strike and, for that reason, one should probably decline the representation. In short, in order to avoid wasting time and getting buried by the discovery process, you should probably confine your representation to those cases in which the Government will be unable to carry its preliminary burden in the affidavit and complaint. If you are confronted with a case where there is clearly sufficient evidence to require a responsive pleading by your client, it is the opinion of this writer that you will lose, as once the Government opens discovery, it is a short step to the gallows.

In connection with this, it is also the opinion of the writer that a retainer should be charged and these cases should not be undertaken on a purely contingent basis. It will take between 50 to 75 hours to prepare, brief, and argue the Motion to Strike, with the rest of the preliminary work that must be done. This doesn't make allowances for those cases in which the Government, not wishing to consider itself defeated, takes an appeal. A substantial retainer will focus your efforts on significant cases and will compensate you for your time and knowledge. You may credit the retainer against an eventual contingent recovery if you like.

If you follow the above primer and get a lucky break or two, you may know the pleasure of writing a brief to the Court of Appeals with a red cover, see Federal Rules of Appellate Procedure 32(a). Believe me, it makes a nice change in the usual routine.

■

The Marijuana Growers Profile

by: Dee Wampler

Missouri courts and 10 other states have recently considered what could loosely be labeled the Marijuana Growers Profile. If you observe blanket-covered windows, locate excessive electric bills, learn of mail-order-purchased grow lights, and discover the subscription or presence of the High Times magazine, and do careful and painstaking surveillance of the neighborhood, judges are willing to approve search warrants to give you a peek inside the property.

Missouri Law

In the most recent decision State vs. Miller, (1991)[1], a search warrant was issued for the suspect's home by Missouri State Highway Patrol Corporals Greg D. Kindle and Joe Swearingen:

1. They learned the suspects had received two shipments of hydroponic growing equipment and "grow lights" from Worms Way and Hamilton Technology Corporation;

2. The suspects sub-scribed to High Times, a magazine that specializes in marijuana growing products and technology;

3. There were two buildings in addition to the residence with electrical lines connected to one of the houses;

4. The local utility company revealed the suspects had an "unusually high wattage" of electricity in the past 2 years, more than twice the average usage of other neighborhood houses;

5. A surveillance of the home did not indicate any large machinery that might use an increased amount of electricity;

6. Troopers observed two large dogs and a "Beware of Dog" sign;

7. One suspect had 2 felony convictions for first degree tampering and leaving the scene.

The Patrolmen believed the suspects were purchasing indoor gardening equipment to grow marijuana, and the use of the dogs is common among marijuana growers as warning devices and deterrents to trespassers and police.

The Troopers discovered growing equipment, plant material, smoking pipes, marijuana and chemicals.

The official court opinion did not recognize a "Marijuana Growers Profile", observing and one of the above facts would not establish probable cause. But, viewing the affidavit in a "practical, common sense" fashion the court found a "substantial basis for concluding that probable cause existed" and upheld the warrant.

The state need not prove marijuana was, in fact, being grown. "Only the probability of criminal activity," not actual proof, is the standard of probable cause, Gates vs. U.S.[2]

Earlier in 1990, Corporals Kindle and Swearingen struck again in State vs. Shuck.[3] Corporal Kindle, in cooperation with DEA officials, learned a suspect had received two shipments of merchandise from Superior Growers Supply, Inc.,[4] via UPS. DEA Headquarters in Washington, D C, has a

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marijuana desk and keeps track of all marijuana growing equipment and marijuana seed selling companies who advertise in the High Times magazine.

Corporals Swearingen and Kindle checked the suspect's residence and observed the windows covered by blankets, and the utility company reported a wattage usage of up to four times as much electricity as nearby neighbors.

The Troopers alleged in their search warrant affidavit that blankets are often used to conceal grow lights operated 24 hours a day and High Times magazine specializes in marijuana growing products and technology to promote the growing of marijuana (and the concealment of such activity from law enforcement officers and the legalization of marijuana).

The court upheld the search warrant believing the issuing judge had more than substantial basis for concluding a search would uncover evidence of "wrongdoing".

One judge dissented, stating that horticulturists and African violet growers would no longer be safe from unwarranted intrusions; the Superior Growers Supply company sells legal merchandise and advertises a product, not an illegal act; and it is not against the law to hang blankets in the windows.

Law From Other States

In a 1991 Colorado case,[5] defendant was charged with conspiracy to manufacture drugs. The jury was told of drug paraphernalia, chemical kits and packages, and the presence of High Times magazine (labeled a "counter-culture magazine") which had advertisements for the production of methaqualone. The state argued the chemicals, paraphernalia, and presence of the magazine were sufficient for a conviction. The jury disagreed, but it is noteworthy the magazine received prominent mention.

In a South Dakota Case,[6] the court considered a forfeiture case where money and paraphernalia were sought to be forfeited. The court reversed the forfeiture believing the mere presence of a High Times magazine is not in and of itself sufficient evidence to sustain the forfeiture. A lone dissenting judge argued that the material from High Times was "explicit in its description of the purpose for which these devices are sold" and would have upheld the forfeiture.

In Pennsylvania,[7] a court considered a conviction for delivering drug paraphernalia. The defendant had displayed some marijuana pictures and emblems purchased through High Times. The court protected the selling of the magazine, fearing a "chilling effect" on the desire of retailers to carry the magazine. The court held the advertising of products could not result in a finding of other items being labeled as drug paraphernalia, reaffirming our high respect for the freedom of the press and the First Amendment.

In Georgia,[8] a defendant was convicted of cultivation of marijuana. Police had observed him at nighttime using binoculars, had taken into account his 1975 conviction for cultivation of marijuana on the same property, a confidential informant had seen grow lights, and the police had an anonymous tip that marijuana was growing in the greenhouse in a structure behind the home. There had been a large kilowatt usage increase for several months.

In another Georgia case,[9] the state was attempting to seize cash and narcotics paraphernalia taken from the defendant's residence by the

Georgia Bureau of Investigations. Seized were several issues of High Times, which contained 40 different varieties of marijuana described in the magazine as the "Fortune 500 of Dope". The paraphernalia and magazines were ordered destroyed and the seizure of the money was approved.

In Kansas,[10] a Kansas State Penitentiary inmate filed a Writ of Habeas Corpus to obtain relief from the prison's blanket ban on his subscription to High Times magazine, claiming "unconstitutional censor-ship". The court gave prison authorities wide discretion in the internal management of prison matters (censorship and restriction of inmate mail has long been allowed).

However, the court said the magazine offers a variety of articles on military involvement and drug law enforcement, discussions of issues at criminal law seminars about the ethics of undercover surveillance, reports on the experiences of users of psychedelic drugs, tips on cultivating marijuana plants, and news items relating to drug enforcement. The magazine advertises products which may be used in cultivating marijuana and other drug related topics. Not all of the articles advocate or encourage drug use, and a few of the articles actually contain "straightforward news reports." The court decided High Times magazine was not an inherently evil publication and did not justify a blanket ban on a prison inmate's subscription, the magazine being protected by the First Amendment.

In another Georgia case,[11] a search warrant was issued for the defendant's house. Pages of High Times magazine were posted on the walls and door of defendant's room. Also found were pipes, razor blades, scales and cigarette rolling papers. The defendant was not present and was at work at the time that the search warrant was served on his bedroom. The conviction was affirmed, the court holding the evidence was admissible to show the defendant intended to knowingly possess cocaine.

Operation Green Merchant

The Marijuana Growers Profile received nationwide notoriety when Operation Green Merchant first broke in October 1989 when DEA agents raided gardening centers and private homes in 46 states. By February 1991, the following facts became clear:

1. 443 arrests of private citizens occurred for marijuana cultivation;
2. Over 50,795 marijuana plants were seized;
3. 875 pounds of packaged marijuana seized;
4. 2.25 pounds of meth seized;
5. 358 indoor grow sites seized;
6. 16 store owners arrested;
7. $9,208,928 in assets seized;
8. 19 stores closed down, 7 stores forfeited;
9. 16 store owners arrested.

The goal was to shut down the nation's burgeoning indoor marijuana cultivation industry.

The DEA subpoenaed UPS shipping records from a number of stores which advertised in the High Times magazine making the link that consumers who purchased indoor gardening supplies from the stores and mail order houses (who advertised in High Times and the now defunct, Sinsemilla Tips) were using gardening equipment to illegally produce marijuana. Operation Green Merchant was born.

Conclusion

Starting with bank robbers and auto theft profiles many

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Marijuana -- Continued from page 23

years ago, the Hijackers Profile in the 1960's, and the Drug Courier and Drug Package Profiles of this decade, the use of specific information (gained through investigation of hard working police officers), plus their special knowledge and expertise (from years of special training and study) will equate to success in the courtroom—the conviction of cultivators and manufacturers of marijuana.

Since the 1969 U. S. Supreme court admonition in Chimel vs. California, police must obtain search warrants to get advance court approval of their searches. Knowledge of important case law and previous court rulings will aid you in this great endeavor. ■

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4 4870 Dawn Avenue, East Lansing, MI.

5 People vs. Hoffman, 566 P.2d 393 (CO 1982); also see People of Illinois vs. Upton, 151 IL App. 3rd 1075, 105 IL Dec. 86., 503 N.E.2d 1102 (IL App. 1987).

6 State vs. Three Iso-Two Devises, 296 N.W.2d 510 (SC 1980).

7 Cochran vs. Commonwealth of Pennsylvania, 450 A.2d 756 (PA 1982).

8 State vs. Mason, 111 Idaho 916, 728 P.2d 1325 (ID App. 1986).

9 Jewell vs State, 200 GA App. 203, 407 S.E.2d 763 (GA 1991).

10 Mahan vs. Maschner, 11 KS App. 2d 178, 717 P.2d 1059 (KS App. 1986).

11 Dickerson vs. State, 200 GA App. 366, 408 S.E.2d 137 (GA App. 1991).

Once Upon A Time

by Charlie Rogers

I was fortunate to attend a training program recently on using the techniques of story telling in opening statements. The program, put together by Anne Hall and presented by the Public Defender System, featured a professional storyteller and a university professor of oral interpretation as well as Don Fiedler, an Omaha attorney with a national reputation. I was so impressed with the message of this program that I want to share it with my MACDL colleagues.

A recently published study by two psychologists[1] showed how jurors view what happens in a trial in terms of a "story model". They try to construct a story which explains the behavior of the people involved in the case. They want to make sense of it, and they do so in terms of a narrative story. Jurors interpret the evidence in light of that story, and reach the verdict they find consistent with that story.

As an advocate, opening statement is your first, best chance to influence the story your jurors construct. Primacy is crucial. If you wait until after the prosecution evidence, or if you make a perfunctory noncommittal opening statement, your chance at primacy is gone forever. The jurors will hear and interpret testimony in the context of the story they are constructing. If the only help they have in making sense of it is from the prosecution, the prosecution version will infect the story they construct. On the other hand, a strong opening statement gives you the opportunity to construct a story for the jurors and thus guide the way they perceive all the rest of the case.

Think of the stories you have heard or read which enthralled you. What did they have in common? Stories all have a definite structure. Good stories use words to create visual images which correspond to our experience of the real world. Delivery is crucial to the success of a story told aloud. These are the elements of effective story telling, but they all depend on lots of work and preparation.

A persuasive, believable story must fit together and should follow the basic story structure of beginning, middle, end. This is not to say that devices such as the flashback should never be used - they can be very effective. However, they should be used in the context of a broader structure. There are really two things you need to do at the beginning of the story: introduce the characters, and set the scene or define the problem which gives rise to the action of the story. The action should rise, becoming more intense, and reach a climax. The problem outlined in the story should be resolved at the end. It should wrap things up neatly and consistently with your theory of defense.

Tell your story with word pictures. Use image words. Don't use lawyer words or cop words. Make the words fit each movement of the narrative. What do the words make you see in your inner eye? Is it real, consistent, believable? Those are the words you should use. By the way, although this entire article is about telling a story in opening statement, you should never use the word "story". It connotes imagination, fiction or even falsehood. What you are telling the jurors is what happened to get your innocent client in the situation where he's depending on them for justice. It's not made up, but you should tell it as if it were a story.

The best story will not be persuasive unless your

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Once Upon A Time Continued

delivery is effective. Start off relaxed. Use a moment of silence to get attention. Then begin talking from the diaphragm, with your head up and your eyes open wide. Show subtle, genuine facial expressions and use natural, flowing gestures. Some body movement, consistent with the action of the story, is effective, but don't pace back and forth throughout your narration. Make eye contact in a natural, not regimented fashion. Use silence for emphasis during your narrative. Organize your points in trilogies - groups of three. Use your voice to suit your words and the feelings you are creating. Use "trilogies of speech" - if you imagine a voice volume scale of 1 to 10, use levels 4-5-6 or 5-6-7 together. These are especially effective when combined with word or concept trilogies.

Start now to plan the opening statement for your next trial from the viewpoint of the storyteller. Find out the facts, know the facts, and arrange the facts into a coherent, believable story. Make that story the basis of your defense. Tell that story to the jury effectively in your opening statement. Watch the jurors use that story to return a favorable verdict. Try it, you'll like it... and so will your client!

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[1] Pennington & Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519 (1991)

MISSOURI CRIMINAL CASE LAW UPDATE

by Sean O'Brien

Missouri Capital Punishment Resource Center

ARGUMENT

State v. Evans, 820 S.W.2d 545 (Mo. App. 1991) -

Evans' conviction was reversed and remanded because of the prosecutor's deliberate and prejudicial statement during closing argument that if defendant were innocent, the prosecutor would not bring a charge.

State v. Whitfield, ___ S.W.2d ___, No. 72360 (Mo. App. filed July 21, 1992) (en banc) -

Where defendant's two prior homicides occurred almost 20 years before the current homicide, it was error for the prosecutor to refer to the defendant as a "mass murderer" and a "serial killer" repeatedly during the closing argument. (Because the case is reversed on other grounds, the court did not determine whether there was prejudicial error). The court also found the prosecutor's personal reference to defense counsel's credibility and references to the scripture during closing argument "troubling."

CONFRONTATION

State v. Naucke, 829 S.W.2d 445 (Mo. App. 1992) (en banc) -

Pursuant to RSMo. § § 491.680 and 491.685, the 4 year old complaining witness in a sodomy case was deposed

outside the presence of the defendant, and the videotaped deposition was usedagainst the defendant at trial after the court found that the child witness was unavailable due to emotional or psychological trauma if required to testify in the personal presence of the defendant. Although the majority was not troubled by the use of the phrase "face-to-face" confrontation under Art. I, § 18 of the Missouri constitution, Judges Robertson, Blackmar and Rendlen dissented on this basis.

CONTEMPT

State et rel. Tannenbaum v. Clark, ___ S.W.2d ___, No. 45864 (W.D. Mo. filed July 28, 1992) -

Where the trial court attempted to interrogate a defendant about an altercation that occurred in jail the morning of trial, but was interrupted by defense counsel's persistent assertions of the client's fifth and sixth amendment rights to remain silent and have the assistance of counsel, counsel's conduct was within the limits of proper and zealous advocacy, and cannot constitute a contempt of court. The Court of Appeals prohibited the circuit court from enforcing his contempt order that the defense counsel serve two days in the Jackson County Jail and pay a fine of $100.

Counsel in this case was defended by the MACDL Strike Force. Mr. Bruce Simon, Immediate Past President, entered his appearance on behalf of MACDL and the alleged contemnor.

DISCOVERY

State v. Whitfield, ___ S.W.2d ___, No. 72360 (Mo. filed July 21, 1992) (en banc) -

The defendant was prejudiced by the state's failure to make timely disclosure of a ballistics expert and a coat that was admitted into evidence to corroborate the testimony of a key witness. Even though the defense was aware of the existence of the witness and the coat, the defense attorney was surprised by the last minute decision to use this evidence and was not prepared to rebut or cross-examine the wit-nesses.

DUI - ENHANCEMENT OF PUNISHMENT

State v. Stewart, ___ S.W.2d ___, No. 74473 (Mo. filed June 30, 1992) (en banc) -

Stewart was charged as a prior and persistent offender with driving while intoxicated. The trial court sentenced Stewart as a prior offender to one year in the county jail. The state appealed the court's failure to find Stewart to be a persistent offender. The Court ruled that Section 577.023.1(2) requires two or more offenses within 10 years of the previous conviction, not two convictions prior to the one for which enhancement is sought. Therefore, persistent offender status requires three DUI offenses prior to the one being prosecuted. The court also made the rule retroactive, so that it applies to any pending case, including those on appeal.

EVIDENCE

State v. Bost, 820 S.W.2d 516 (Mo. App. 1992) -

Defendant's voluntary manslaughter conviction was reversed because the trial court excluded evidence of the victim's prior specific acts of violence of which the defendant had knowledge on the issue of whether the defendant acted in self-defense.

State v. Brown, ___ S.W.2d ___, No. 40504 (W.D. Mo. filed June 2, 1992) -

The trial court erred in admitting testimony of an anonymous telephone call because the testimony was hearsay and did not fall under any recognized exception to the hearsay rule.

EX POST FACTO

State v. Jolley, 820 S.W.2d 734 (Mo. App. 1991) -

Application to the defendant of § 558.019, subjecting him to a minimum term of imprisonment, violated the ex post facto provisions of the Missouri and the United States Constitutions because the offense occurred before the effective date of the statute.

FORFEITURE

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.)

GRAND JURY

State v. Eyman, 828 S.W.2d 883 (Mo. App. 1992) -

The presence of the county sheriff, a deputy sheriff, and the prosecutor's secretary breached the secrecy requirement of the grand jury process. The presence of an unauthorized person in the presence of the grand jury when it conducts business results in dismissal of the indictment.

HABEAS CORPUS

State ex rel. Singh v. Purkett, 824 S.W.2d 911 (Mo. banc 1992) -

In 1977, Singh was sentenced to 10 years in the Missouri Department of Corrections pursuant to a conviction for manslaughter. He was thereafter acquitted by reason of insanity of an unrelated homicide. Pursuant to the insanity acquittal, he was committed to the custody of the Director of The Department of Mental Health. In October, 1990 he was conditionally released from the Department of Mental Health, but was immediately returned to the Department of Corrections to serve the balance of the manslaughter sentence. The Supreme Court ordered his discharge from the custody of the Department of Corrections on the grounds that he should have received credit for his Department of Mental Health time toward the service of his manslaughter sentence.

INEFFECTIVE ASSISTANCE OF COUNSEL

Moore v. State, 827 S.W.2d 213 (Mo. 1992) (en banc) -

Trial counsel's failure to obtain a blood test in a prosecution for rape amounted to ineffective assistance. Scientific evidence that the defendant could not have been the source of semen found on the victim's bed sheet gave rise to a reasonable probability that a different result may have obtained.

State v. McKee, 826 S.W.2d 26 (Mo. App. 1992) -

Trial counsel's failure to challenge for cause two venire persons who stated that they would be "bothered" by the defendant's failure to testify deprived the defendant of his constitutional right to a fair and impartial jury and the effective assistance of counsel.

State v. Twenter, 818 S.W.2d 628 (Mo. banc 1991)-

Virginia Twenter was convicted of first degree murders of her father and step-mother. She was sentenced to death for the murder of her step-mother. Her motion under Rule 29.15 was granted by the circuit court on both guilt phase and penalty phase issues. The state appealed. The Missouri Supreme Court

reversed the trial court's order granting relief on guilt phase issues, thereby affirming Twenter's convictions for first degree murder. However, the court found that the motion court's disbelief of trial counsel's explanation for not offering certain mitigating evidence in the penalty phase of trial was not clearly erroneous. The court begrudgingly allowed the circuit court's order granting a new penalty phase trial to stand. (All state post-conviction lawyers should read this case.)

INFORMATION

State v. Quigley, 829 S.W.2d 117 (Mo. App. 1992) -

A complaint charging the defendant with "driving while revoked" omitted a culpable mental state, an essential element of the offense. The judgment was reversed and remanded with directions to dismiss the case.

JURORS - CHALLENGES FOR CAUSE

State v. Boyd, 826 S.W.2d 99 (Mo. App. 1992) -

Where a juror refused to agree "that if the state doesn't prove its case" the defendant should be acquitted, it was error to deny a challenge for cause of that juror. State v. Gary, 822 S.W.2d 448 (Mo. App. 1991) - It was prejudicial error for the trial court to refuse to remove a juror who said that in deciding the believability of a witness, he would "tend to be a little prejudiced on the police side."

State v. Schnick, 819 S.W.2d 330 (Mo. banc 1991) -

A venireperson who expressed bias in favor of the credibility of police officers was not qualified to serve as a juror; Schnick was prejudiced by the failure to have a full panel of qualified jurors before making his peremptory challenges.

JURORS - MISCONDUCT

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 rule on the motion for mistrial, but denied 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, Lynch received a new trial.

JURY INSTRUCTIONS

State v. Tilley, 826 S.W.2d 1 (Mo. App. 1991) -

Tilley's conviction of first degree assault was reversed and remanded for a new trial because the instructions submitting the defense of self-defense, MAI-CR3d 306.06, defining the term "reasonable belief", omitted the admonition that the existence of a reasonable belief "depends upon how the facts reasonably appeared." The jury might not understand that a person could have the right to act in self-defense based upon reasonable appearances that prove to be false.

State v. Wallace, 825 S.W.2d 626 (Mo. App. 1992) -

Where defendant was charged and convicted of resisting arrest by flight, as though it were a Class D felony, his conviction was reversed and remanded because resisting arrest by flight is a Class A misdemeanor.

JURY SELECTION

State v. Henke, 820 S.W.2d 94 (Mo. App. 1991) -

Henke was entitled to a new trial because the Sheraton County Board of Jury Commissioners failed to comply with the mandatory procedure for jury selection. Jury venire candidates did not receive the statutory jury summons and qualification forms, and candidates were disqualified for reasons not enumerated in the statute (such as residents of nursing homes and students attending college).

JURY SELECTION - DISCRIMINATION

State v. Kalter, 828 S.W.2d 690 (Mo. App. 1992) -

Where the state used six of its six strikes to eliminate African-Americans from the jury, a prima facie case of race discrimination existed and the prosecutor must provide sufficient race neutral reasons to explain its strikes. Even though Kalter is white, he has standing to assert the right of black venire persons to be free from discrimination in the jury selection process.

JURY SELECTION - GENDER DISCRIMINATION

State v. Pullen, ___ S.W.2d ___, No. 56820 (E.D. Mo. App. filed June 9, 1992) -

The principals underlying Batson v. Kentucky, 476 U.S. 79 (1986), prohibit the use of peremptory challenges based on potential jurors' gender. [Contra see State v. Clay, 770 S.W.2d 673 (Mo. App. W.D. 1989)].

JURY - WAIVER

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.

MOTION TO RECALL THE MANDATE

State v. Simpson, ___ S.W.2d ___, No. 15001 (S.D. Mo. App. filed July 14, 1992) -

During federal habeas proceedings challenging her guilty plea and sentence in the murder of her mother, the state argued that she had not exhausted state remedies because she failed to filed a motion to recall the mandate in the Missouri Court of Appeals. See Simpson v. Camper, 927 F.2d 392 (8th Cir. 1991). The Missouri Court of Appeals granted her motion to recall the mandate and found that it was plain error, resulting in a manifest injustice, for the sentencing court to refuse to allow her to withdraw her guilty plea before sentencing. (In addition, the court declined to apply the escape rule to deny her appeal).

State v. Sumlin, 820 S.W.2d 487 (Mo. banc 1991) -

The Supreme Court granted Sumlin's motion to recall the mandate based on ineffective assistance of appellate counsel for failing to argue that the amended drug sentencing provisions under Chapter 195 should have been applied in Sumlin's case. The case was remanded for a jury determination of the amount of cocaine possessed by Sumlin so that it could determine which statutory range of punishment applied in his case.

PROSECUTORIAL MISCONDUCT

State v. Ross, 829 S.W.2d 948 (Mo. 1992) (en banc) -

It was a violation of Disciplinarian Rule 1.11(a) for an attorney to prosecute a person whom his firm represented in a related civil case. Under the circumstances, appellant is not required to show prejudice to be entitled to the reversal of his conviction.

RULE 29.15 / 24.035

Banks v. State, 826 S.W.2d 112 (Mo. App. 1992) -

Where the record did not reveal whether appointed counsel complied with the requirements of Rule 24.035(e), the denial of Banks' Rule 24.035 motion was reversed and the case remanded for a hearing under Luleff v. State, 807 S.W.2d 495 (Mo. banc 1991).

Carr v. State, 819 S.W.2d 84 (Mo. App. 1991) -

At Carr's trial, his attorney agreed that the prosecution could read into evidence a deposition of a witness who asserted his fifth amendment privilege when called at Carr's trial. At his 29.15 hearing, Carr testified that he did not agree with or authorize his attorney's waiver of his right to confront and cross-examine the witness. Although this matter was not pled in the *pro se* motion, the court treated it as though it were, "thus eliminating the need for a *Luleff* remand." Because the trial court failed to make findings of fact and conclusions of law on this issue, the denial of 29.15 relief was reversed and the cause remanded to the motion court for findings of fact and conclusions of law on this issue.

Hutchinson v. State, 821 S.W.2d 916 (Mo. App. 1992) -

Where counsel's amended Rule 29.15 Motion was not signed or verified by the movant, the case would be remanded for a hearing under Luleff v. State, 807 S.W.2d 495 (Mo. banc 1991).

Leasure v. State, 821 S.W.2d 84 (Mo. App. 1991) -

Where movant's amended Rule 24.035 Motion written by counsel was unverified and unsigned by movant, and possibly untimely, the case is remanded for a hearing pursuant to Luleff v. State, 807 S.W.2d495 (Mo. banc 1991).

Loewe v. State, 818 S.W.2d 726 (Mo. App. 1991) -

Where counsel failed to file an amended motion pursuant to Rule 29.15(e), the case was remanded to the circuit court to determine whether counsel's failure was the result of movant's action or inaction.

McCampbell v. State, 816 S.W.2d 681 (Mo. App. 1991) -

Where a defendant pled guilty, 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).

McCoo v. State, ___ S.W.2d ___, No. 17366 (Mo. App. E.D. June 5, 1992) -

The trial court plainly erred in denying McCoo's Rule 24.035 motion as untimely filed because the record fails to indicate when McCoo was delivered to the Department of Corrections.

Meyers v. State, 820 S.W.2d 77 (Mo. App. 1991) -

The denial of Meyers' Rule 24.035 motion was reversed and the case was remanded to the motion court for a hearing under Luleff v. State, 807

S.W.2d 495 (Mo. banc 1991).

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.

Poole v. State, 825 S.W.2d 669 (Mo. App. 1992) -

Because the motion court's findings of fact and conclusions of law were "to abbreviated for meaningful appellate review," the order denying Poole's Rule 29.15 motion would be remanded for further proceedings. The appellate court also made it clear that the hearing court was free to hear additional evidence on any ground.

Pruneau v. State, 825 S.W.2d 54 (Mo. App. 1992) -

Where the final day for the filing of an amended Rule 24.035 motion fell on a Sunday, the amended motion filed on the following Monday was timely under Civil Rule 44.01(a).

Spradling v. State, 825 S.W.2d 63 (Mo. App. 1992) -

The public defender's office was appointed to represent Spradling in his Rule 25.035 hearing, but during the time within which to file an amended motion, the public defender filed "a notice of conflict," and two additional attorneys assumed representation of the movant. Neither attorney filed an amended motion. The case was reversed and remanded to the circuit court for hearing to determine whether the failure to file the amended motion is due to the movant's negligence or intentional failure to act, or if the failure of the amended motion is the fault of counsel.

State v. Bilyeu, ___ S.W.2d ___, No. 17476 (W.D. Mo. App. June 12, 1992) -

Bilyeu's Rule 29.15 motion was not untimely where he received a special order pursuant to Rule 30.03 to file a notice of appeal out of time and file his motion within 30 days of the filing of the transcript on appeal.

State v. Ervin, ___ S.W.2d ___, No. 72593 (Mo. filed July 21, 1992) (en banc) -

Where counsel appointed under Rule 29.15 asked for an extension within which to file the amended motion beyond the jurisdictional deadline on the grounds that the delay was "precipitated entirely by a burdensome caseload," and where the record is barren of any indication that Ervin had any part in causing the delay, the motion court was not required to conduct an inquiry under Sanders v. State, 807 S.W. 493 (Mo. banc 1991), but could proceed to rule on the merits of all of the claims in the amended motion, including those filed late.

State v. Hutton, 825 S.W.2d 889 (Mo. App. 1992) -

The denial of defendant's Rule 29.15 motion was reversed and remanded for an evidentiary hearing on the issue of whether counsel denied defendant his constitutional right to testify.

State v. Lanasa, 827 S.W.2d 261 (Mo. App. 1992) -

Pursuant to Luleff v. State, 807 S.W.2d 495 (Mo. banc 1991), the case was remanded to determine the reason for motion counsel's failure to file an amended motion.

State v. Miller, 821 S.W.2d 553 (Mo. App. 1991) -

The defendant filed a premature *pro se* motion under Rule 29.15, and the court dismissed it before the transcript on appeal was filed. The court reversed the order denying the Rule 29.15 motion remanded with instructions to appoint counsel and permit

the filing of an amended Rule 29.15 motion.

Vinzant v. State, 819 S.W.2d 100 (Mo. App. 1991) -

29.15 counsel moved to withdraw before filing an amended motion on Vinzant's behalf. The court, without ruling on the motion to withdraw, dismissed the motion without an evidentiary hearing. The Court of Appeals remanded for a hearing under Luleff v. State, 807 S.W.2d 495 (Mo. banc 1991).

Whitehead v. State, 820 S.W.2d 715 (Mo. App. 1991) -

The denial of Whitehead's 29.15 motion was vacated and remanded for a hearing under Luleff v. State, 807 S.W.2d 495 (Mo. banc 1991).

SELF-INCRIMINATION

State v. Eyman, 828 S.W.2d 883 (Mo. App. 1992) - Eyman was arrested by law enforcement officers for the purpose of taking him to the grand jury to compel his testimony. He was handcuffed and transported to the grand jury where he was compelled to testify before the grand jury, the prosecuting attorney, the prosecuting attorney's secretary, the county sheriff and a deputy. No *Miranda* warnings were given. The use of Eyman's grand jury testimony at trial violated his rights under the fifth, sixth and fourteenth amendments to the U.S. Const. art. I and Art. 1, § 19 of the Mo. Const. The report referred to the police conduct here as a "heinous violation of the accused's [constitutional rights]." The court concluded, "the facts presented here are repugnant to Americans, who, when they observe similar events in other, less democratic societies, call them anathema and condemn the authorities and systems that permit their occurrence." *Id.* at 886.

SENTENCING

State v. Askew, 822 S.W.2d 497 (Mo. App. 1991) -

Defendant was entitled to resentencing because his status as a prior offender could not be based on a felony conviction that is more than 25 years old.

State v. Ferguson, 822 S.W.2d 466 (Mo. App. 1991) -

Where the record indicated that the sentencing court may have been under the erroneous assumption that the sentences he imposed for rape and sodomy were subject to the mandatory consecutive sentencing requirements of Sec. 558.026 RSMo. 1968, the case was remanded for resentencing.

State v. Griffin, 818 S.W.2d 278 (Mo. banc 1991) -

Griffin was convicted of first degree murder and sentenced to death. The state introduced into evidence an exhibit that purported to be a conviction of the defendant, but in reality was a record of conviction of a different person named Reginald Griffin. Because the jury found this conviction to be a non-statutory aggravating circumstance and relied upon it in imposing the death penalty, the court found a manifest injustice requiring a new penalty phase trial. "It is ... likely that the admission of an incorrect criminal record of a defendant in the penalty phase of a capital crime is not harmless error."

STATUTE OF LIMITATIONS

State v. Casaretto, 818 S.W.2d 313 (Mo. App. 1991) -

The *ex post facto* clause of the United States Constitution was not violated by extending the statute of limitations for sexual offenses where the statute was extended before it could lapse in Casaretto's

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