MACDL
Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

SPRING 1993 **Vol. V, No. 1**

Greetings:

As final preparations are being made for the Annual Meeting in St. Louis, it occurred to me that this is a good time to discuss the future of MACDL. At the annual meeting, we will bring on new board members, install a new slate of officers, appoint committees for the coming year, and focus on matters that are important to us and our clients. Since becoming a member of MACDL in 1981, I have watched each new administration start with a stronger foundation than the one before, and add something significant to the political force of MACDL and to the services it provides to members before passing the leadership to the next administration. With your help, I hope I manage to continue that tradition.

When I first joined MACDL as an assistant public defender, my impression was that I was joining a small but active group of like-minded professionals whose main purpose was the production of very good CLE programs for criminal defense practitioners. We presented annual programs using our own members as presenters, and we considered a turn-out of over 50 people to be a success. If we broke even financially, it was a phenomenal success. Meetings were always successful in the sense that we all had a great time, and came away from each program with at least some incremental knowledge or skill that we could use to benefit our clients or our practices. Although we put out occasional newsletters and discussed pending legislation, CLE was the mainstay of membership services.

Since then, times have changed, and MACDL has adapted to meet new challenges. In the prevailing political climate since 1980, prosecutors have enjoyed unprecedented influence and success in the legislature. Virtually every decision has been in favor of criminal litigants, and every meaningful constitutional right, even the right to counsel, has been the target of some attempted prosecutorial legislative fix. Civil forfeitures, limits on the attorney-client relationship, severe punishments and the creation of new crimes flourished in the last decade. MACDL responded to the demands placed upon it by establishing an active strike force, which includes the Past Presidents of the organization, a truly

(President's Letter, cont'd)

formidable group of lawyers who have come to the defense of members threatened with contempt citations and grand jury subpoenas. In the past year, MACDL has acted as counsel or Amicus Curiae for members in the Missouri Circuit Court and Court of Appeals, the Eighth Circuit Court of Appeals, and the United States Supreme Court.

Our newsletter has never looked better. Our quarterly case law updates on decisions important to the defense always include slip opinions not yet published in advance sheets, and the articles, sample motions and other contributions of our members are quite useful. We are committed to continuing this publication, and we have plenty of talent from which to draw.

In spite of all the enhancements to membership benefits over the years, our CLE committee continues to be the cornerstone of our services to our members. We don't dare hold our annual meeting at a facility unless it can accommodate three hundred people. The attendance at each of our regional fall seminars is very close to what we would have considered a successful annual meeting a few short years ago. As you can see from the program of our annual meeting being held April 16-17 in Clayton, Missouri, our own talent is augmented by a star-studded cast of defense lawyers of national repute.

All of these services are possible because of the steady growth of MACDL over the past decade. We can tap into a larger

membership base for resources, and we are coming into a period of financial security that will enable us to further enhance services. We have purchased a computer, and are in the process of automating our newsletter, dues billing system and mailing lists. Since we have outgrown our old billing system, I ask you to bear with us while we make this transition. We are bound to find an occasional glitch in our current membership and dues records. An additional benefit you will receive by this process is a membership directory and handbook to be distributed this summer. I expect it to be a valuable source of referrals for members. Also, on your next dues statement, you will have an opportunity to make a voluntary PAC contribution. (Contribution to the MACDL PAC is not a condition of membership).

Membership services will only get better as we take these steps to enhance our membership communication and our financial security and strength. Eventually, I see MACDL establishing a full-time headquarters with a permanent administrative staff. We have taken the first step in that direction. I am happy to extend to each of you an opportunity to share in our success. On the inside cover of this newsletter is a list of current officers and board members. I encourage you to contact any of us -- there are plenty of opportunities to be of service.

Sean D. O'Brien
President

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MACDL LEGISLATIVE REPORT

by Dan Viets

There are literally dozens of bills pending before the Missouri Legislature which could affect the practice of criminal defense law. The 1993 session began the first week of January and will continue through mid-May.

As the session proceeds, it becomes clearer which bills are likely to be in position to actually be enacted into law. The bills which are given early hearings before the various committees in the House and Senate are far more likely to pass out of committee, pass both houses of the legislature, and reach the Governor's desk for his signature or veto.

MACDL and our allies have enjoyed some early success this session. One of the most remarkable victories in recent years came about when both the House and Senate adopted a resolution rejecting the proposal that defendants lose their drivers' licenses as a consequence of drug convictions totally unrelated to driving.

That proposal was widely presumed to be destined for immediate passage by the legislature. Congress mandated a few years ago that each state must pass or reject by April 1, 1993 a law which would mandate at least a six-month drivers' license suspension as an added consequence of any misdemeanor or felony drug conviction. Although Governor Ashcroft had enthusiastically supported that proposal as well as other new punishments for drug offenses, the idea had gone down to defeat

on the final day of the session each of the last three years. With the deadline fast approaching, the bill was given an early hearing before the House Motor Vehicles Committee. The committee passed it out (with a single dissenting vote from a 30-year police veteran) and was taken up by the full House.

When it reached the full House, Rep. Chris Kelly of Columbia introduced a substitute resolution. The substitute resolution deplored the tendency of Congress to mandate spending and passage of legislation by the states. Rep. Kelly's resolution rejected the suspension of drivers' licenses for non-driving-related drug offenses and still prevented the loss of any federal highway funding.

The substitute resolution passed the House with a substantial majority and was taken up by the Senate shortly thereafter. Boone County Senator, criminal defense attorney and former president of the Missouri Prosecuting Attorneys' Association Joe Mosely sponsored the resolution in the Senate, and the Senate passed the resolution rejecting drivers' license suspensions with a single dissenting vote!

Governor Carnahan is expected to sign this legislation prior to April 1. The remarkable success we enjoyed on this issue seems to be indicative of a new mood of greater tolerance and a tendency to question the need for longer prison sentences and the continuing creation of new crimes.

Another of MACDL's priorities in the legislature is reform of the forfeiture laws. Presently the state has the authority to seek forfeiture of property of a citizen based merely on the suspicion that he has committed an offense. Proposed reforms include requiring a conviction of at least a felony offense, and restricting the transfer of forfeiture actions from state court (where all money must be used to support education) to federal court (where Missouri police and prosecutors receive a kickback of a percentage of the proceeds of forfeiture actions). These reforms are included in a bill which seems to be on a fast track toward passage, Senate Bill 180. SB 180 was passed by the full senate several weeks ago and is on its way to consideration in the House. SB 180 contains many revisions to the criminal statutes and is likely to be amended extensively before the session ends.

Presently SB 180 includes creating the crime of criminal transmission of HIV, permitting forfeiture of the property of children, defining stalking and adding it to the statutes relating to orders of protection, changing the definition of grounds for acquittal based on mental disease or defect, permitting deadly force to be used to repel burglars, creating new crimes involving the bootlegging of recordings, redefining the crime of peace disturbance, redefining prior and persistent DWI offenses, creating the crime of failing to return leased property, authorizing the creation of multijurisdictional enforcement groups (MEG units) for drug prohibition enforcement and creating the crime of stalking.

SB 180 also defines the crimes of indecent exposure, public indecency and promoting

indecent exposure. The definitions of these offenses are rather broad and would clearly prohibit the use of nude models in art classes, baseball players who scratch themselves during a game and skinny-dipping in a pond. This proposal defines nudity to include ". . . the showing of covered male genitals in a discernably turgid state." Clearly, some legislators are extremely concerned about the potential moral degradation of us citizens and are doing their best to protect us from ourselves.

SB 180 would also deprive any citizen of the right to a jury trial in the matter of an alleged infraction offense.

And, along with a very positive forfeiture law reform, SB 180 would also create a process for the expungement of records of arrests not resulting in convictions under certain circumstances.

At this time, the other crime bill which seems destined for serious consideration is SB 164. It includes provisions making it easier to charge children 15 years or over as adults for class A or B felonies, creates the "Missouri Post-Conviction Drug Treatment Program", redefines prior and persistent offenders and enhances the penalties for offenses committed by members of "criminal street gangs." The street gang provisions specifically exclude ". . . employees engaged in concerted activities for their mutual aid and protection or the activities of labor organizations or their members or agents."

Most significantly, the witness immunity provisions of this bill were amended out of the bill on the Senate floor. Clearly, there is widespread support for MACDL's position opposing the granting of immunity in exchange for testimony.

Many other important proposals are pending before the legislature at this time. Among these are bills in the House and Senate which would create a statutory defense for persons accused of marijuana possession who have a legitimate medical need to possess and use marijuana. Senate Bill 257 and House Bill 1423 both would permit doctors to prescribe marijuana for their patients for the treatment of glaucoma, chemotherapy side effects, muscle and nerve disorders, AIDS and other afflictions. The bills would also create the statutory affirmative defense of medical necessity for persons found in possession of marijuana and whose doctor certifies their legitimate medical need.

Now is the most crucial time of the entire year for members of MACDL to contact their state Senators and Representatives to express support for reform of the forfeiture laws, creation of arrest record expungement laws and opposition to continued exclusive reliance on imprisonment as a response to law violations. State legislators hear from relatively few of their constituents. When they hear from an attorney who actually practices under the laws they create, legislators usually take that input very seriously.

(Legislative Report, cont'd)

Please feel free to contact MACDL Legislative Committee Chair Dan Viets at 314/443-6866 or MACDL Lobbyist Randy Scherr at 314/636-2822 in Jefferson City for additional information regarding the Missouri Legislature.

[Ed. Note: Dan Viets, Chair of MACDL's Legislative Committee and soon to be President-Elect of MACDL, spends untold hours keeping current with day-to-day events in the Missouri legislature. He shares that knowledge with MACDL's board and, through this column, with MACDL members. We sincerely appreciate his efforts.]

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FEDERAL CASES: JANUARY 1993

by Elizabeth Unger Carlyle

CIVIL RIGHTS LITIGATION

Martinez v. Turner, No. 91-3714 (8th Cir. October 8, 1992)

It was error to dismiss, as frivolous, a prisoner's claim that he was placed in administrative segregation without due process. This claim arguably states a constitutional violation.

DOUBLE JEOPARDY

Bohlen v. Caspari, No. 91-3360 (8th Cir. October 16, 1992)

Double jeopardy protections apply to Missouri procedure for sentencing of persistent offenders and a defendant whose sentence is reversed for insufficient proof of prior convictions may not again be sentenced as a persistent offender on remand. The Missouri proceeding, which requires proof beyond a reasonable doubt, allegation of all essential facts in the charging document, and specific findings of fact, has protections similar to those in a criminal trial.

DUE PROCESS

United States v. Johnson, No. 92-1471 (8th Cir. December 15, 1992)

The government originally asserted that it planned to rely on two pre-indictment offenses to establish a continuing criminal enterprise count. Based on this assertion, one defendant took the stand and testified concerning these incidents. Then, late in the trial, the government announced that it would rely on only offenses charged in the indictment as predicates for CCE. Prejudice was shown by the defendant's reliance on the prosecution's representation, and a new trial was properly granted as to both defendants.

EFFECTIVE ASSISTANCE OF COUNSEL

Bolander v. Iowa, No. 91-3789 (8th Cir. November 5, 1992)

The defendant was denied effective assistance of counsel where trial counsel

failed to object to the admissibility of a taped statement of a co-defendant as hearsay. Where the disputed statement was the only direct evidence of premeditation, an element of first-degree murder under Iowa law, there was a reasonable probability that the outcome of the case was affected, and prejudice was shown under the Strickland standard.

FORFEITURES

United States v. One 1989 Jeep Wagoneer, No. 91-2764 (8th Cir. October 9, 1992)

The United States failed to prove as a matter of law that the corporate owner of a vehicle was not entitled to an innocent owner defense because of willful blindness. Evidence that the driver of the vehicle was known by the corporate principals, who were members of his family, to have had drug problems in the past was sufficient only to raise a question of fact as to willful blindness. Therefore, summary judgment was improper.

GENERAL SENTENCING ISSUES

United States v. Moore, No. 90-2534 (8th Cir. October 27, 1992)
Where the Bureau of Prisons determined that the defendants served seventy days in state custody for the same transaction which resulted in their federal conviction, and therefore were entitled to credit for that time against their federal sentences, the district court was without jurisdiction to deny the credit.

United States v. Prendergast, No. 91-3627 (8th Cir. November 6, 1992)

Drug and alcohol treatment and testing were improperly imposed as special conditions of supervised release where the defendant was convicted of wire fraud and there was no evidence that alcohol or drugs were a problem for the defendant or that his criminal activity involved alcohol or drugs. It was also error to defer the question of restitution until the defendant's release from prison; a restitution determination must be made at the time of sentencing and may be made a condition of supervised release.

United States v. Pazzanese, No. 92-2012 (8th Cir. December 7, 1992)

The defendant's prior conviction of the New York offense of criminal facilitation was not a "felony drug offense" conviction which would trigger the twenty year mandatory minimum of 21 U.S.C. §841(b)(1)(A). The offense does not specifically mention drug activity, and does not require the intent to commit the predicate offense. Therefore, although the defendant's guilty plea to this offense resulted in the dismissal of drug charges, the rule of lenity requires the shorter sentence.

HABEAS CORPUS

Bohlen v. Caspari, No. 91-3360 (8th Cir. October 16, 1992)

The rule that double jeopardy protections apply to Missouri persistent offender sentences is not a "new rule" for

retroactivity purposes, and relief is therefore available on collateral attack.

JURY INSTRUCTIONS

United States v. Barnhart, No. 92-1194 (8th Cir. November 10, 1992)

Reversible error occurred when the jury was instructed, over the defendant's objection, as to deliberate ignorance or willful blindness. To justify such an instruction, there must be evidence that the defendant was on notice of facts that suggest that criminal activity was probably afoot, and failed to investigate those facts. Here, the only information used to support the instruction was that the defendant's business had financial difficulties. This was insufficient for the inference of criminal activity. Harm was shown where the evidence against the defendant was not strong, and the weakening of the government's burden to show knowledge may have influenced the jury to convict.

United States v. One Star, No. 92-1893 (8th Cir. November 18, 1992)

The defendant was entitled to his requested instruction on involuntary manslaughter where there was some evidence that the death occurred during a scuffle when the victim was pushed by the defendant and fell on her knife. This opinion also deserves mention for Judge Beam's opening sentence, "All accounts of the events occurring the morning of January 12, 1991 are somewhat obscured by an alcoholic fog."

NEW TRIAL

United States v. Johnson, No. 92-1471 (8th Cir. December 15, 1992)

The trial court took the defendants' post-trial motions for severance and for mistrial under advisement. The defendants were convicted on May 10. On May 16, the trial court entered an order reserving hearing on all "pending matters" until May 29. The defendants' motions for new trial were filed on May 22 and May 24, outside the seven-day period prescribed by Fed. R. Crim. Pro. 33. However, the court will construe the extension provisions of Rule 33 liberally in the interest of justice and holds that the May 16 order was a proper extension of time under Rule 33, particularly where the government raises the timeliness issue only on appeal. The trial court had jurisdiction to rule on the motions for new trial.

SEARCH AND SEIZURE

United States v. Williams, No. 92-2045 (8th Cir. December 28, 1992)

The trial court properly granted the defendant's motion to suppress evidence seized under a search warrant based on a false affidavit. The officer making the affidavit, acting upon information that a "Tony Williams" had checked into two motel rooms and paid cash, searched police files and found information connecting Tony Williams with various criminal activity. However, the person who actually rented the motel rooms was Charles Williams, the defendant here. He did not fit Tony Williams's description, but the officer made

no attempt to get a physical description of the man renting the motel rooms from the motel clerk and made no other attempt to determine whether that "Tony Williams" was the same person to whom the police file pertained, although he knew that the address listed for Tony Williams and the home address listed on the motel registration were different. The trial court's finding that after the Tony Williams information was set aside, the remaining information available to the magistrate was insufficient to establish probable cause was not clearly erroneous, and the suppression was upheld.

SENTENCING GUIDELINES

United States v. Moore, No. 91-3203 (8th Cir. October 8, 1992)

It was error to apply a four-level increase for leadership role over the defendant's objection without making findings of fact based on evidence.

United States v. Van Horn, No. 91-3854 (8th Cir. October 9, 1992)

Where the government agreed not to recommend an upward departure, but requested a departure after the court determined that the offense level was lower than that calculated by the probation department, there was a breach of the plea agreement requiring resentencing by a different judge.

United States v. Long, No. 91-3434 (8th Cir. October 20, 1992)

The trial court correctly relied on evidence that the defendant suffered from an extraordinary physical impairment which leaves him unusually vulnerable to prison victimization in departing downward from a guideline range of 46-57 months to a 60-month probation. The downward departure was therefore reversed on the government's appeal.

United States v. Monroe, No. 92-1979 (8th Cir. October 29, 1992)

Where the evidence that the substance possessed was crack, rather than powder, cocaine consisted only of testimony that it was an "off-white chunky substance" which field-tested as "most likely cocaine," and which infrared spectroscopy showed to contain cocaine or cocaine base and procaine or procaine base, remand for resentencing on the existing record was required to determine whether it was "more likely than not" cocaine base.

United States v. Lamere, No. 91-3566 (8th Cir. November 23, 1992)

Where the defendant was convicted of possessing and concealing counterfeit currency, it was error to enhance his sentence for obstruction of justice where the alleged obstruction was the same concealment which was the subject of the offense of conviction.

United States v. Gullickson, No. 92-1398 (8th Cir. December 8, 1992)

Where a consecutive sentence was not necessary to approximate the total sentence

that would have been imposed had the defendant been sentenced at the same time for his state and federal offenses, it was error for the court to impose a consecutive sentence. Sentencing Guidelines §5G1.3 may not be ignored in deciding whether sentences should be consecutive or concurrent.

United States v. Alexander, No. 92-1261 (8th Cir. December 9, 1992)

Remand was required for specific findings as to: how the court arrived at a total quantity of 22,000 pounds as the relevant conduct drug amount; and how the trial court determined that one defendant was accountable for 5,000 pounds.

SUFFICIENCY OF EVIDENCE

United States v. Johnson, No. 91-2945 (8th Cir. October 1, 1992)

There was insufficient evidence to prove a conspiracy to file false 1099 forms and to otherwise impede the IRS. While the evidence connected each defendant with the charged activity, there was no evidence linking them all to a single scheme: "They engaged in similar acts for similar reasons. Some were assisted by the same people. Some knew each other. But the evidence fails to indicate that there was mutual assistance or dependence between most of the defendants. The error was not harmless because no limiting instruction was given concerning imputation of conduct to members of different conspiracies.

United States v. Davis, No. 91-2162 (8th Cir. October 28, 1992)

The 1991 panel opinion in United States v. Hux that the manufacture of a satellite descrambler did not violate the federal Wiretap Act is overruled. The legislative history and language of the act are analyzed.

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FEDERAL PRESENTENCE INVESTIGATION REPORTS: A CAUTIONARY NOTE

In these days of sentencing determined by draconian guideline charts, there may be a temptation to ignore inaccuracies in those parts of the Presentence Investigation Report which do not affect the guideline calculation. However, in addition to presenting the judge with information and recommendations concerning sentencing, the Presentence Investigation Report serves an important function for the Bureau of Prisons. In this connection, the Bureau has noted, "The Bureau appreciates the court's diligence in ensuring the accuracy of the information contained in the Presentence Report, as Bureau staff rely heavily on information provided in it." U.S. Dept. of Justice, Federal Bureau of Prisons, "Facilities 1992", page 7.

The Presentence Investigation Report is used by the Bureau to determine a defendant's custody level and the location and type of institution designated. Other information in the report which will be used by the Bureau

includes the list of members of the defendant's immediate family, who will ordinarily be placed on the inmate's visitor list without investigation. Finally, the information concerning the offense will be used to determine eligibility for such perks as extended halfway house placements prior to release.

In the past year, I have encountered three situations in which such inaccuracies or unresolved issues have had, or threatened to have, a substantial impact on actions of the Federal Bureau of Prisons in classifying an inmate.

In the simplest instance, an inmate was denied contact with his common-law wife and child without a formal visitation investigation. Although the family members were listed on the inmate's Presentence Investigation Report, the information was listed as unverified. In fact, the probation officer did verify the information before sentencing, but the Presentence Investigation Report was never amended.

In the two other instances, the inmate's security classification and halfway house eligibility were affected by statements in the Presentence Investigation Report concerning conduct attributable to co-defendants rather than to the individual inmate. Although the sentence imposed correctly reflected the fact that the inmate was not accountable for the conduct, the Bureau nonetheless attempted to use the conduct to the inmate's detriment.

Because of these experiences, I have made for myself an ironclad rule to object to and clarify EVERYTHING in a Presentence Investigation Report before sentencing. Once the inmate is in the hands of the Bureau, correction of errors in the Presentence Investigation Report is made more difficult by the fact that the Bureau personnel, at least in my experience, are reluctant to accept input from defense counsel, preferring to rely exclusively on the United States Attorney. Therefore, the time to make sure the information in the report is correct is at or before sentencing.

One last suggestion: If findings are made at sentencing that amplify or contradict those in the report, it is helpful to make sure that they are reduced to writing and sent to the Bureau with the Presentence Investigation Report. Since the Probation Officer is responsible for seeing that the right documents get to the Bureau, this is best accomplished by conferring with the officer and obtaining a copy of any supplemental information for your file.

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RECENT MISSOURI CASES

by Sean O'Brien

COUNSEL - WAIVER

State v. Hunter, 840 S.W.2d 850 (Mo. 1992) -

Hunter, after being permitted to waive counsel, entered a plea of guilty to first degree murder and, at his request, was sentenced to death. The court found that, notwithstanding the trial court's failure to obtain a written waiver of counsel as re-

quired by Section 600.051.1 RSMo. (1986), the record was sufficient to support Hunter's waiver of counsel.

DISCOVERY

State v. Mease, No. 72846 (Mo. banc November 24, 1992) -

Where the prosecutor, two weeks before trial, disclosed an immunity agreement with a witness, defendant was not entitled to relief on the grounds of discovery violation where he made no attempt to obtain her deposition, seek a continuance or recess, or any other remedy.

State v. Richardson, 838 S.W.2d 122 (Mo. App. 1992) -

In an attempt to rebut the testimony of police officers, defense counsel on the second day of trial made a videotape of the crime scene and attempted to introduce it into evidence. The trial court excluded the videotape because the state was not notified of its existence pursuant to Rule 25.05. The court of appeals reversed and remanded for new trial because the videotape was not within the defendant's possession or control prior to trial, and there was no support for the state's claim that defense counsel purposefully postponed making the videotape to avoid discovery obligations. The court recognized that "trials are organic in nature; as testimony comes in, strategies may change."

State v. Varner, 836 S.W.2d 44 (Mo. App. 1992) -

The state violated its discovery obligation by failing to disclose prior to trial its intention to present evidence that the defendant had used a "crow name" when first stopped by a store's private investigator for investigation of shoplifting. In holding that the state was obliged to give notice of the defendant's statement, the court noted that "Rule 25.03(a) requires the prosecutor to disclose all information within its possession or control. *(Our emphasis)* The duty to disclose includes what is known to the prosecuting attorney or may be learned by reasonable inquiry. *(Our emphasis).*" At 45.

DOUBLE JEOPARDY

State v. Goode, ___ S.W.2d ___, No. 17276 (December 4, 1992) -

The trial court erred in overruling Goode's motion to dismiss one of two resisting arrest counts because both charges were based on a continuing course of conduct which was uninterrupted. Goode was thereby subjected to double jeopardy.

State v. Tolliver, 839 S.W.2d 296 (Mo. banc 1992) -

After a mistrial not requested by the defendant, but not objected to by him, neither the state nor the federal double jeopardy clause bars a second trial. During the first trial, the court *sua sponte* declared a mistrial because the prosecutor violated a court order sustaining defendant's motion in limine. After retrial, Tolliver filed a Rule 29.15 motion alleging that his retrial violated the

double jeopardy clauses of the United States and the Missouri Constitutions. The Supreme Court ruled that the double jeopardy claim is not cognizable in a proceeding under Rule 29.15, and set aside the order of the motion court granting relief. On appeal, the court ruled that the double jeopardy clause was not violated by Tolliver's retrial because defense counsel's request that the mistrial "be with prejudice" amounted to implied consent to the order granting the mistrial.

EVIDENCE

State v. Chiles, ___ S.W.2d ___, No. 45519 (Mo. App. November 24, 1992) -

It was error to admit evidence of Chiles' past convictions of similar crimes because they were not relevant to the present charges of first degree sexual abuse.

EVIDENCE - RAPE SHIELD ACT

State v. Murray, ___ S.W.2d ___, Nos. 58287/60750 (Mo. E.D. September 22, 1992) -

The trial court erred in excluding evidence of prior consensual sexual relations between Murray and the victim because such evidence is admissible under Section 491.015.3 RSMo. where there is no corroborating evidence of the alleged victim.

EX POST FACTO

State v. Sanders, ___ S.W.2d ___, No. 53783 (Mo. App. E.D. November 10, 1992) -

The trial court erred in sentencing Sanders as Class X offender because the first degree murder was committed before the effective date of the Class X offender statute.

EVIDENCE - UNCHARGED MISCONDUCT

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

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

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

Where a dentist was charged with first degree sexual assault based on his having placed the victim under nitrous oxide and then allegedly fondled her breast, the testimony of three other women that he had done similar things to them was not logically relevant to prove that he was guilty of the offense charged. Even though this was a

jury-waived case, it was clear that the court relied on the improper evidence in convicting Sladek. Therefore, the conviction was reversed and remanded for new trial.

HABEAS CORPUS

State v. White, 838 S.W.2d 140 (Mo. App. 1992) -

Pursuant to a plea agreement, White pled guilty to three counts of rape. Upon learning that he had a brain tumor affecting his ability to control his conduct, White filed an untimely Rule 24.035 motion. In White v. State, 779 S.W.2d 571 (Mo. banc 1989), the Supreme Court dismissed the Rule 24.035 motion, but suggested that he petition for a writ of habeas corpus. White then filed a petition for a writ in the St. Louis County Circuit Court, and in July 1990, was ordered discharged, subject to the state's right to file appropriate charges within 180 days. The state refiled the five original counts.

White appeals with respect to two counts, alleging that the three year statute of limitations had run. The court rejected this argument, holding that "a habeas corpus proceeding as here pursued, is indeed a part of the collateral review process," thereby tolling the running of the statute of limitations. In response to White's argument that the order of the St. Louis County Circuit Court granting the writ prevented the Clay County Circuit Court from bringing him to trial on those charges, the court stated that "until further direction, in a habeas proceeding substituting for post-conviction relief . . . , the court of the underlying conviction has the power to vacate its judgment and sentence once the writ is issued, even though issued by a court other than the convicting court."

INEFFECTIVE ASSISTANCE OF COUNSEL

State v. Mease, No. 72846 (Mo. banc November 24, 1992) -

Where trial counsel consulted a psychiatrist and a psychologist who informed him that defendant was not suffering from any mental disease or defect excluding responsibility, and Rule 29.15 counsel offered the testimony of another psychologist who concluded that Mease suffered from a "delusional disorder" and could not have been cool or rational, trial counsel "made reasonable efforts to investigate the mental status of the defendant and . . . should not be held ineffective for not shopping for a psychiatrists who would testify in a particular way." Similarly, trial counsel was not ineffective for failing to call mental health professionals on the question of statutory mitigating circumstances.

INFORMATION AND INDICTMENT

State v. Keith, 839 S.W.2d 729 (Mo. App. 1992) -

Keith was convicted for a Class A Misdemeanor of violating an *ex parte* order of protection. The allegation that Keith "had

contact with and disturbed the peace of Susan Keith" did not sufficiently state the elements which constitute a violation under Section 455.085.7 RSMo. (Supp. 1991) because it fails to allege that Keith either abused her or entered onto the premises of her dwelling unit.

State v. Nicholson, 839 S.W.2d 593 (Mo. App. 1992) -

The information was insufficient to charge Nicholson for felonious escape from custody because the allegation that the defendant, while being in custody after arrest "for possession of a control substance" did not specifically state that he was arrested for a felony. Furthermore, the evidence was insufficient to support a conviction for escape from custody because the state did not prove beyond a reasonable doubt that an arrest had occurred because there was no substantial evidence proving "either Mr. Nicholson's actual restrain by Officer Dodd or that he had submitted to her 'show of authority'. . . ." At 596.

INTERROGATION

State v. Mease, No. 72846 (Mo. banc November 24, 1992) -

Mease was arrested in Arizona. While awaiting extradition to Missouri, the Taney County prosecutor and Missouri Highway Patrol investigators went to Arizona to question Mease about homicide offenses. Mease stated that he wished to speak with an attorney. The interrogation terminated, and Mease was subsequently extradited to Missouri. After arriving in Springfield, Missouri, a state trooper, driving him to Taney County, asked Mease if he had employed an attorney. Mease replied, "No, but I guess I'll have to." The trooper then asked if Mease had made a statement, to which he replied, "No, I'm going to sleep on it, then I may." After Mease was taken before a judge and arraigned on murder charges, troopers continued questioning him and he eventually signed a Miranda waiver and confessed on videotape to the homicides. The Missouri Supreme Court ruled that because Mease "initiated the discussion by his spontaneous comments," there is no sixth amendment violation of his right to counsel.

JUDGMENT

State v. Dieter, 840 S.W.2d 887 (Mo. App. 1992) -

A judgment rendered before the time expired for the defendant to file a motion for new trial under Missouri Rule 29.11 was premature and void. The appeal was dismissed and the case remanded to the trial court with directions to afford defendant an opportunity to file a motion for new trial or waive his right to do so.

(Recent Missouri Cases continued on page 18.)

DEFENDING CRIMINAL CASES

PROGRAM AND FACULTY

Moderators: **J.R. Hobbs**, Kansas City; **Larry A. Schaffer**, Independence; **Lawrence J. Fleming**, St. Louis

FRIDAY, APRIL 16, 1993

8:15 - 8:45	Pick up materials; late registration if space available
8:45 - 9:00	Welcome Speaker: **Sean D. O'Brien**, Kansas City, Missouri President, Missouri Association of Criminal Defense Lawyers
9:00 - 9:50	New Tactics and Developments in Defense of D.W.I. Cases Speaker: **Lawrence R. Catt**, Professor, Springfield, Missouri
9:50 - 10:40	The Zen of Opening Statements and Closing Arguments Speaker: **Cynthia W. Lobo**, Washington, D.C. National Association of Criminal Defense Lawyers
10:40 - 10:55	Refreshment Break
10:55 - 12:00	A New Look at Ethical Considerations in Criminal Practice Involving the Attorney/Client Privileg Speaker: **David "B.B." Helfrey**, St. Louis, Missouri
12:00 - 2:00	Luncheon — Cash Bar — Annual Awards Ceremony — Luncheon Address Speaker: **Nancy Hollander**, Albuquerque, New Mexico President, National Association of Criminal Defense Lawyers
2:00 - 2:50	High Tech Demonstrative Evidence — Smart Weapons for Criminal Lawyers Revisited Speaker: **E.X. Martin**, Dallas, Texas National Association of Criminal Defense Lawyers
2:50 - 3:50	Demonism, Dementia and DNA Evidence Speaker: **Randall J. Schlegel**, Kansas City, Missouri
3:50 - 4:00	Refreshment Break
4:00 - 5:20	Direct and Cross-Examination of God (i.e. Experts) Speaker: **Tony L. Axam**, Atlanta, Georgia
5:30 - 6:00	Missouri Association of Criminal Defense Lawyers Annual Board Meeting (All Attendees Invited
6:00	Cash Bar

SATURDAY APRIL 17, 1993

8:00 - 9:00	Coffee and Rolls, Courtesy of Prime Consultants, Inc., Springfield, Missouri
9:00 - 10:00	Review of Recent Developments in United States Supreme Court Decisions Speaker: **Milton C. Hirsch**, Miami, Florida National Association of Criminal Defense Lawyers
10:00 - 10:50	A Dialogue as to How to Comply With the Federal Grand Jury Subpoena and Investigation Speakers: **David E. Everson, Jr.** and **J.R. Hobbs**, Kansas City, Missouri
10:50 - 11:00	Refreshment Break
11:00 - 12:00	Obtaining and Maintaining Bond in a Federal Criminal Case Speaker: **Christopher C. Harlan** Federal Public Defender Western District of Missouri
12:00 - 1:00	Round Table Discussions (Attendees may submit tactical problems and issues from municipal, state, or federal cases they are handling for suggestions and advice.) Round Table Moderator: **Burton H. Shostak**, St. Louis, Mo. Panelists: **Norman S. London**, St. Louis, Mo. **Milton C. Hirsch**, Miami, Florida **Linda Murphy**, Clayton, Mo. **Richard H. Sindel**, Clayton, Mo. **James R. Wyrsch**, Kansas City, Mo.

WHY YOU SHOULD ATTEND THIS PROGRAM

The 1993 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:

- Cynthia W. Lobo of Washington, D.C., on opening statements and closing arguments.
- E.X. Martin of Dallas, Texas, on using high technology in your demonstrative evidence.
- Tony L. Axam of Atlanta, Georgia, on presenting and cross-examining experts.
- Milton C. Hirsch of Miami, Florida, with his excellent discussion of recent U.S. Supreme Court decisions.
- And a special address by Nancy Hollander of Albuquerque, New Mexico, President of NACDL.

A block of rooms at the Holiday Inn, Clayton Plaza has been set aside for MACDL. To make room reservations call the Holiday Inn, Clayton Plaza at 314/863-0400 **by April 1, 1993**, and indicate that you will be attending the MACDL program. A credit card deposit will be required. Room rates are $53.00.

✄ -

DEFENDING CRIMINAL CASES

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JURY INSTRUCTIONS

State v. Shaw, ___ S.W.2d ___, No. 45029 (Mo. App. W.D. September 29, 1992) -

Where the court misdirected the jury as to range of punishment, the defendants were entitled to a new trial.

State v. Sutherland, ___ S.W.2d ___, No. 57423/60477 (Mo. App. E.D. October 20, 1992) -

Where there was no direct evidence of guilt presented at trial, it was error to fail to grant Sutherland's request for a circumstantial evidence instruction.

State v. Weems, 840 S.W.2d 222 (Mo. banc 1992) -

Weems was convicted of murder in the first degree, robbery in the first degree and armed criminal action for the murder of Roy Vales. Weems gave the police an audiotaped statement in which he stated that, after spending the night with Vales, he awoke to find Vales on top of him attempting to have sex with him. He pushed him off and ran from the room, armed himself with a hammer, and returned to the bedroom to retrieve his clothing. According to the statement, they argued, Vales punched him in the head with his fist, and Weems hit Vales with a hammer. They struggled, and Weems yanked a cord from a lamp and wrapped the cord around Vales' neck and pulled on it until Vales let go. Weems fled, after first taking $40 from Vales' wallet and a key to Vales' car.

Because there was evidence that Vales was the aggressor in his initial attempt to sodomize Weems, it was for the jury to determine whether there was a real or apparently real necessity for Weems to kill Vales in self-defense. Furthermore, because the jury was not allowed an instruction on self-defense, its decision upon the "purpose" of the use of physical force as submitted in the robbery count was likewise tainted. Thus, retrial was required as to all counts.

JURY INSTRUCTIONS--BURDEN OF PROOF

State v. Erwin, No. 74887 (Mo. February 23, 1993) (en banc) -

Seventeen-year-old Erwin was convicted of second degree murder in the shooting death of his young friend after an evening of heavy drinking and watching war movies. The defense at trial was based on diminished mental capacity due to an alcohol blackout; the appeal was based on the exclusion of expert testimony on the subject and on a challenge to MAI-CR3d 310.50, which instructs the jury that intoxication is not a defense. Although the court ruled that the expert's testimony was not admissible under the Frye test, it reversed and remanded for a new trial on the instruction issue. A reasonable juror might interpret the instruction to mean that if the juror believed the defendant to be intoxicated, then the defendant is criminally responsible regardless of his state of mind. The instruction therefore violates the due process clause as applied in Sandstrom v. Montana, 442 U.S. 510 (1979). In so ruling, the

court side-stepped the issue of whether § 562.071.1 RSMo impermissibly limits the right of the defense to prove the defense of diminished mental capacity.

JURY INSTRUCTIONS - LESSER INCLUDED OFFENSES

State v. Mease, No. 72846 (Mo. banc November 24, 1992) -

Where the state's evidence established that the defendant began his preparations for committing the homicide days in advance, and hid in a blind for several hours lying in wait for the opportunity to kill the victim, "no rational factfinder could conclude that the defendant committed this homicide but that he did not deliberate on the killing." In spite of lay testimony that Mease was paranoid, crazy with fear of the victim, and insanely obsessed during the time of the murder, the evidence was insufficient to support an instruction on the lesser included offense of second degree murder. (Note: No expert testimony on the defendant's state of mind was presented).

JURY INSTRUCTIONS - MITIGATION

State v. Mease, No. 72846 (Mo. banc November 24, 1992) -

It was not error for the trial court to refuse an instruction listing nonstatutory mitigating circumstances because the jury is instructed that it may consider "any circumstances which you find from the evidence in mitigation of punishment."

JURY SELECTION - DISCRIMINATION

State v. Camden, 837 S.W.2d 33 (Mo. App. 1992) -

Where the state used a preemptory challenge to exclude the only African-American member of the venire panel, it was error to deny defendant's Batson objection without requiring the prosecutor to offer a race neutral explanation for the preemptory strike. The court noted that in State v. Parker, 836 S.W.2d 930 (Mo. banc 1992), the court set forth a new procedure dispensing with the requirement that a defendant make a *prima facie* case of discrimination under Batson v. Kentucky before the prosecutor is obliged to provide race neutral explanations for the challenged strikes. All that is required to trigger the state's responsibility is a timely objection by the defense.

State v. Parker, 836 S.W.2d 930 (Mo. banc 1992) -

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

Confronted for the first time with the issue of when a Batson claim must be raised in Missouri in order to be timely, the court held that "effective review will be facilitated . . . by requiring all parties to raise Batson prior to the venire's discharge." At 937. The court rejected the state's desire that it adopt a timeliness rule that would require Batson claims to be made after the state make it's preemptory strikes, but before a defendant exercises his preemptory strikes.

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

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

MERGER

State v. Vineyard, 839 S.W.2d 686 (Mo. App. 1992) -

Under the "single larceny rule," it was error to charge defendant in separate counts with stealing cigarettes and $300 cash, in spite of the fact that the cigarettes and the cash belonged to separate owners, because acts of stealing occurred on the same night and in the same room. Because defendant's actions constituted a "single criminal episode" he should have been charged with one count of stealing irrespective of the multiplicity of ownership of the property. At 690.

PRETRIAL MOTIONS

State v. Murray, ___ S.W.2d ___, Nos. 58287/60750 (Mo. E.D. September 22, 1992) -

The trial court erred in denying Murray's motion to suppress evidence because, pursuant to Rule 24.05, the motion filed one week before trial was timely.

POST-ARREST SILENCE

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

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

PROBATION - REVOCATION

Wilkerson v. State, 840 S.W.2d 240 (Mo. App. 1992) -

Wilkerson filed a Rule 24.035 motion challenging his guilty plea. On appeal, for first time, he also alleged that the court lacked jurisdiction to revoke his probation because

the revocation order was entered 8 years and 4 months after movant was placed on probation. Grating relief, the court stated that "in this civil proceeding, the apparent abandonment by appointed counsel is particularly troublesome where neither the motion court nor the parties considered a jurisdictional issue readily apparent from the minutes of proceedings of the trial court."

RULE 24.035

Jones v. Williams, 837 S.W.2d 371 (Mo. App. 1992) -

A motion under Rule 24.035 is not the proper remedy to force the Department of Corrections to give credit for time previously served toward a sentence. Although no mention is made of the habeas corpus remedy, the court cited to a number of cases that hold that a petition for writ of habeas corpus is the appropriate remedy for asserting a claim of credit for jail time.

RULE 27.26

Bentzen v. State, 834 S.W.2d 844 (Mo. App. 1992) -

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

RULE 29.15

Butler v. State, 841 S.W.2d 192 (Mo. App. 1992) -

Where movant failed to file a timely Rule 29.15 motion, he waived his right to proceed under Rule 29.15, and the court was obliged to dismiss the motion, notwithstanding the failure of the state to request dismissal.

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

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

State v. Pullen, No. 73098 (Mo. December 18, 1992) -

The timely filing of a properly verified amended motion under Rule 29.15 cures the absence of verification in a *pro se* motion.

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

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

State v. Shaw, 839 S.W.2d 30 (Mo. App. 1992) -

Shaw filed an unverified *pro se* Rule 29.15 motion on July 12, 1989. On September 8, 1989, a public defender entered his appearance and was granted 30 days to file an amended motion. On October 19, 1989, the motion court dismissed the *pro se* motion on the grounds it was not verified, and no verified amended motion had been filed. Afterward, on March 28, 1990, the transcript on appeal was filed in the court of appeals. Shaw then filed a verified *pro se* Rule 29.15 motion with the court and a request for an evidentiary hearing. The court dismissed the second Rule 29.15 motion on the ground that it was a successive motion prohibited by Rule 29.15(k). The court held that the motion court erred when it dismissed his first prematurely filed *pro se* motion on the ground that the time to file a verified motion had passed.

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

Remanded for hearing on abandonment by counsel.

RULE 29.15 - EVIDENTIARY HEARING

Webster v. State, 837 S.W.2d 585 (Mo. App. 1992) -

Where movant alleged that trial counsel was ineffective for failing to call Lamont Brown, an alleged eye witness to the murder who would have testified that movant did not commit the crime, it was error for the hearing court to deny relief on this claim without holding an evidentiary hearing.

RULE 29.15 - SCOPE

State v. Hunter, 840 S.W.2d 850 (Mo. 1992) -

Hunter plead guilty, requested the death penalty, and was sentenced to death by the trial court. In his consolidated appeal addressing both the statutory sentencing issues under Chapter 565 relating to his sentence of death and the issues presented in his Rule 29.15 motion, the court rigidly enforced the rule that a claim of trial error may not be considered in a proceeding for post-conviction relief. The court relied on this rule to justify its refusal to consider additional evidence relating to Hunter's waiver of counsel, the trial court's consideration of a presentence investigation in sentencing Hunter to death, and other claims of error that are cognizable on appeal.

SEARCH AND SEIZURE

State v. Figgins, 839 S.W.2d 630 (Mo. App. 1992) -

The trial court entered an order suppressing Figgins' confession based on his assertion of the right of counsel, and also suppressed physical evidence, including the defendant's shoes, on the grounds that it was seized without consent. The court of appeals reversed the order of the trial court suppressing the statement and part of the

physical evidence, but sustained the order suppressing the evidence of the defendant's shoes because the finding of the trial court that the shoes were taken from Figgins without his consent was supported by substantial evidence.

State v. Franklin, ___ S.W.2d ___, No. 74851 (Mo. October 27, 1992)

The state appealed a trial court order suppressing evidence based on an illegal search. A police officer received a radio dispatch regarding an armed party in a black Fiero in the 4200 block on East 60th Terrace in Kansas City. He saw Franklin driving a Fiero on 61st Street, followed him, stopped him, cuffed him and searched Franklin and the car for weapons. No weapon was found. When Franklin declined to produce a driver's license, he was arrested. A search of his person produced a marijuana cigarette, and an inventory vehicle search revealed two additional marijuana cigarettes and a bag of cash containing $37,500. The court affirmed the order suppressing the evidence because the police officer lacked reasonable suspicion to make an investigatory stop. The record contained no evidence of a dispatch issued on the basis of reasonable suspicion, and the detaining officer did not personally observe, independent of the dispatch, any behavior that would justify the stop.

State v. Kovach, 839 S.W.2d 303 (Mo. App. 1992) -

Where defendant was a passenger in a van, and the van was pulled over by a trooper for travelling 79 mph on I-44, a traffic stop was warranted. Furthermore, the trooper's initial search for weapon in the van prior to the issuance of the speeding summons was also warranted. However, a follow-up which resulted in Kovach's detention and the discovery of marijuana was unlawful, and the evidence should have been suppressed.

State v. Mease, No. 72846 (Mo. banc November 24, 1992) -

The cases of State v. Blair, 691 S.W.2d 259 (Mo. banc 1985), and State v. Moody, 443 S.W.2d 802 (Mo. 1969), holding that it is appropriate to make a subjective inquiry into the police officer's motives in making an arrest, even though the arrest is objectively lawful, are overruled. Thus, where defendant was arrested on the basis of warrants which were based upon probable cause and otherwise valid, the arresting officers were acting in good faith reliance on those warrants. Because Mease was in violation of an agreement which lead to deferred prosecution of a weapons charge, and because he wanted to talk to Mease regarding the homicides, the Taney County prosecution requested that the warrant be issued. Under the new rule announced by the court, the Stone County prosecutor's subjective motivation may not be considered in determining the validity of the arrest warrants.

(Recent Missouri Cases continued on page 24.)

SENTENCING

Heicht v. State, 841 S.W.2d 278 (Mo. App. 1992) -

Since the Class X offender provision of 558.019 does not apply to Class C felonies, it was error for the trial court to sentence appellant as a Class X offender for the offense of possession of a controlled substance. Since the sentence was within the statutory range of punishment, the court of appeals merely corrected the judgment and sentence by ordering that Section 558.019 is inapplicable.

State v. Bulloch, 838 S.W.2d 510 (Mo. App. 1992) -

Where at the time of sentencing, the trial court did not express himself either "verbally or by written order" to elucidate his intent to run the sentences consecutively, the court did not have the power to enter a "*nunc pro tunc* order that appellant's sentences run consecutively."

State v. Flenoid, 838 S.W.2d 462 (Mo. App. 1992) -

It was error for the trial court to sentence Flenoid as a Class X offender because the minimum term provisions Section 556.019 apply only to Class A and B felonies of dangerous felonies as defined under Section 556.061(8) RSMo (Cum. Supp. 1989). Even though Flenoid's sentence was enhanced by reason of his prior drug offenses to a term of years authorized for a Class A felony, "only the sentence was enhanced to a term authorized for a Class A felony under that section; the underlying conviction was not enhanced to a Class A felony."

State v. Hill, 839 S.W.2d 605 (Mo. App. 1992) -

Hill was convicted of rape and sentenced to 30 years without parole as a persistent sex offender under Section 558.018. The prior sex offense alleged was that Hill pled guilty to a federal offense of "assault with intent to commit rape." Because there was nothing before the sentencing court to demonstrate the acts that Hill committed during the commission of the federal offense, there was nothing in the record "from which the trial court could have determined that the acts committed by Hill during the course of the federal offense were sufficient to have constituted a crime that would trigger 558.018." The sentence on the rape count was vacated and remanded with direction to hold a hearing on the persistent sex offender issue.

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

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

State v. Newman, 839 S.W.2d 314 (Mo. App. 1992) -

Where defendant was charge with three counts of sodomy, one count of deviate

sexual assault, and two counts of indecent exposure, and the trial court apparently believed that Section 558.026.1 required him to run all sentences consecutively, a remand was necessary for the court to exercise its discretion to run at least some of the sentences concurrently.

STATUTE OF LIMITATIONS

State v. Spraggins, 839 S.W.2d 599 (Mo. App. 1992) -

Where defendant was charged with burglary and misdemeanor stealing, the court did not have the jurisdiction to convict defendant of the misdemeanor stealing charge where the one year statute of limitations had run.

★ ★ ★ CITATION UPDATES ★ ★ ★

State v. Ervin, 835 S.W.2d 905 (Mo. banc 1992).

State v. Simpson, 836 S.W.2d 75 (Mo. App. 1992).

State v. Whitfield, 837 S.W.2d 503 (Mo. banc 1992) (previously reported as State v. Whitfield, No. 72360 (Mo. July 21, 1992). (Reversing Whitfield's conviction for first degree murder and sentence of death based on discovery violations that occurred by the prosecution's use of a surprise key witness).

State ex rel. Tannebaum v. Clark, 838 S.W.2d 26 (Mo. App. 1992) (previously reported as State ex rel. Tannebaum v. Clark, No. WD45864 [Mo App. WD July 28, 1992]).

* * * * *

THE CONCURRENT SENTENCE DOCTRINE: A DOCTRINE IN DECLINE

by Chris Carpenter

Consider this hypothetical scenario: You represent a client who has been convicted on four counts of an indictment and sentenced to concurrent prison terms on each count. On appeal, you challenge the convictions on all four counts, particularly relying on one count as your best argument for reversal. When the Court of Appeals renders its opinion, you and your client are stunned to discover that the court has declined to review three of the four counts on their merits, including the count that you felt incorporated your strongest legal argument. As you read the opinion, you realize that the "concurrent sentence doctrine" is the rationale by which the appeals court has just made an end run around your client's best hope of reversal. The doctrine "treats as redundant the review of more than one count of a multiple count conviction with concurrent sentences where the conviction of one count was reviewed and found valid and the unreviewed convictions would not reduce incarceration or have adverse legal consequences for the appellant." State v. Reynolds, 819 S.W.2d 322, 323 (Mo.banc 1991).

In Missouri, the Supreme Court has sounded the final death knell for the concurrent sentence doctrine in State v. Reynolds, 819 S.W.2d 322 (Mo.banc 1991). In Reynolds, the defendant was convicted of separate counts of burglary in the first degree and armed criminal action, and sentenced to 30 years imprisonment on the burglary count to run concurrently with a 10 year sentence on the armed criminal action count. Reynolds appealed to the Missouri Court of Appeals for the Eastern District. The court declined review of the armed criminal action conviction, employing the concurrent sentence doctrine after affirming the burglary conviction. The Missouri Supreme Court ordered transfer of the case solely for the purpose of reviewing the viability of the concurrent sentence doctrine.

The concurrent sentence doctrine was introduced into American Jurisprudence in Claassen v. United States, 142 U.S, 140 (1891) as an adaptation of the English common law rule barring review of separate counts of a general sentence when any of the counts is deemed good. (Reynolds, 819 S,W,2d at 323). The Supreme Court extended the English common law rule in Pierce v. United States, 252 U.S. 239 (1920) by making it applicable to concurrent sentences; thus, as a hybrid of borrowed common law, the concurrent sentence doctrine was born. After Pierce, the United State Supreme Court in Hirabayashi v. United States, 320 U.S. 81 (1943) defined and applied the concurrent sentence doctrine in its purest form. In the twenty-five years after Hirabayashi, the doctrine flourished in the federal courts, until its vitality was called into doubt by the United States Supreme Court in Benton v. Maryland, 395 U.S. 784 (1968). Although the Supreme Court chose not to abrogate the doctrine in Benton, it did hold that the doctrine posed no jurisdictional bar to review when applicable, but is only a discretionary "rule of judicial convenience." In its present form, the concurrent sentence doctrine is to be applied at the court's discretion, guided by the potential for adverse legal consequences to a petitioner should unreviewed convictions remain intact.

Since Benton, the United States Supreme Court has applied the concurrent sentence doctrine only once, in Barnes v. United States, 412 U.S. 837 (1973). In cases subsequent to Barnes, though, the Court has seriously questioned the continuing validity of the doctrine in dictum. See Mariscal v. United States, 449 U.S. 405 (1981). Based on the dictum in prior cases, it appears the doctrine is unlikely to bar review of a conviction in the high court.

However, the federal circuit courts of appeal pose a different scenario. The courts of appeal of various circuits have referred to the doctrine numerous times since Benton, with the Fifth Circuit being the strongest proponent, utilizing the doctrine over 156 times. On the other side of the scale, the District of Columbia Circuit has mentioned the doctrine on only three occasions. The Eighth Circuit falls between the two extremes with use of the term in 49 cases. Within the last eight years, one circuit expressly rejected the doctrine (United States v. DeBright, 730 F.2d 1255 (9th Cir. 1984), while other circuits have questioned its validity. (United States v. Ruffin, 575

F.2d 346, 361 (2d Cir. 1978); O'Clair v. United States, 470 F.2d 1199 (1st Cir. 1972); Davie v. United States, 447 F.2d 480 (7th Cir. 1971); United States v. Bass, 794 F2d 1305, 1311 (8th Cir. 1986); United States v. Montoya, 767 F.2d 428, 432 (10th Cir. 1982). So, with the exception of the Fifth Circuit, the possibility of a circuit court of appeal utilizing the doctrine is increasingly unlikely.

As recognized in the state of Missouri, the concurrent sentence doctrine rests its validity on United States v. Moore, 555 F.2d 658, 661 (8th Cir. 1977). The first Missouri court to adopt the doctrine into Missouri jurisprudence was the Court of Appeals, Western District in State v. Davis, 624 S.W.2d 72 (Mo.App. 1981). The Davis court relied on Moore as authority for the doctrine, without making any reference to the United States Supreme Court case's use of the doctrine or the Missouri Supreme Court case that first made mention of the doctrine in dicta, see State v. Morgan, 592 S.W.2d 796 (Mo.banc 1980). In the decade following Davis, the concurrent sentence doctrine was mentioned in six cases, and employed in four of those cases to forego review of additional convictions.

Noting this record, the Missouri Supreme Court in Reynolds recognized that the Missouri Courts of Appeals had not applied the doctrine while examining the possible adverse legal consequences to the appellant of unreviewed convictions as suggested by the United States Supreme Court in Benton. From the beginning of the opinion, the court made manifest its dissatisfaction with the doctrine as "an anomalous extension of a common law practice of federal criminal procedure already in discard."Reynolds, 819 S.W.2d at 323. The court then embarked on a lengthy discussion about the doctrine's history in federal and Missouri jurisprudences, concluding the scrutiny by expressly overruling all prior Missouri cases sanctioning the use of the concurrent sentence doctrine and overtly rejecting the doctrine "as a practice of judicial discretion to avoid review of criminal convictions." Reynolds, 819 S.W.2d at 323-327. The court catalogued possible adverse legal and civil consequences such as enhancement of punishments in future prosecutions, "the use of the convictions for impeachment at a future trial, [t]he impact on pardon and parole, attendant social stigma, loss of civil rights, ineligibility for licensing under state laws regulating professions and occupations, and other disabilities . . . ." Id. at 324. Not convinced that the need for judicial economy or convenience can ever outweigh the possibility of adverse collateral legal and civil consequences, the court expressly rejected the concurrent sentence doctrine in Missouri jurisprudence. There was no dissent on this point.

The concurrent sentence doctrine as a rule of "judicial convenience" is largely in discard in the federal courts, but still remains as a constitutional, viable tool to be used at the discretion of a federal appellate court, should it choose to do so, with the exception being the Ninth Circuit Court of Appeals which has expressly rejected the doctrine. In Missouri, there is no doubt that the doctrine is no longer viable in light of Reynolds.

It is troublesome that any court of appeals, state or federal, traditional bulwarks of justice, would forego review of an appellant's conviction or convictions under the guise of "judicial convenience". It is encouraging, though, to know that Missouri appellate courts no longer throw their hat into the shrinking ring of state and federal jurisdictions that employ the doctrine rather than affording an appellant the benefit of the doubt.

For the defense attorney, Reynolds may hold great meaning. Reynolds is not a decision that will gain a great deal of recognition, and for the attorney who happens before an appellate judge who is unaware of the decision, Reynolds will be substantial basis for having a decision reversed in the Missouri Supreme Court should the doctrine be employed.

Attorneys appearing before the Eighth Circuit should take note that the doctrine has been recognized and employed by the Eighth Circuit. Although the Eighth Circuit makes infrequent use of the doctrine, it remains as a potential barrier to review of "superfluous" convictions. Reynolds provides a persuasive argument and reasoned legal analysis for rejection of the doctrine in any jurisdiction, including the Eighth Circuit which has already questioned its continuing validity. United States v. Bass, 794 F.2d 1305, 1311 (8th Cir. 1986).

The real brunt of Reynolds will be borne by Missouri Appellate judges who can no longer use the doctrine as a form of "judicial convenience" to avoid uncomfortable issues or numerous attacks on various convictions. Benefitted by Reynolds will be the unsuspecting criminal appellant who would have had to live with the adverse legal consequences of convictions that might have been upset but for the doctrine, but now will be entitled to full review on appeal.

*(Ed. note: Chris Carpenter is a third-year law student at UMKC and a law clerk with the Kansas City, Missouri firm of **Wyrsch Atwell Mirakian Lee & Hobbs.**)*

* * * * *

Upcoming Events

OUR BIGGEST EVENT OF THE YEAR -- **MACDL's** ANNUAL MEETING AND SEMINAR - WILL COMMENCE FRIDAY MORNING, APRIL 16, AT THE HOLIDAY INN, CLAYTON, MISSOURI. DON'T MISS NATIONAL SPEAKERS FROM THE **NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**: CURRENT PRESIDENT NANCY HOLLANDER, E.X. MARTIN, TONY AXAM, CYNTHIA LOBO AND MILTON HIRSCH.

MAKE YOUR RESERVATIONS NOW, AND PLAN TO ATTEND THE ANNUAL MEMBERSHIP MEETING AT 5:30 P.M. APRIL 16.

*See pages 16-17 of this issue for further details regarding **DEFENDING CRIMINAL CASES**, presented by the **Missouri Association of Criminal Defense Lawyers** and **The Missouri Bar.***

Bill of Rights Advocacy

MACDL is sponsoring a new program to send **MACDL** members to speak at schools, clubs and other organizations on the importance of the Bill of Rights. Our hope and belief is that, if our members meet with groups and give them examples from their own practices of how the Bill of Rights protects individual freedoms for all of us, we will foster a greater appreciation of the Constitution of these United States of America. For too long, prosecutors and politicians have bashed and trashed defense counsel for trying to protect the rights of the accused; we have been too quiet. **MACDL**'s Education Committee is soliciting the help of members, and will contact groups which might be interested in a speaker.

Are you interested? Motivated? Inspired, even? David Everson chairs the committee. Contact him at 816/842-8600 (FAX: 691-3495). Also on the **MACDL Education Committee**: Nancy Kickham, 314/621-5070; Dan Viets, 314/443-6866; and J. D. Williamson, 816/836-3900. Make a call -- make a difference.

NOTICE OF ELECTION

The **MACDL** Board of Directors, at its meeting in Columbia, Missouri on March 5, 1993, voted to accept the report of the nominating committee submitting the following candidates for officer and board positions:

President:	Jay DeHardt *Kansas City*
President-elect:	Dan Viets *Columbia*
Vice President:	J.R. Hobbs *Kansas City*
1st V.P.:	James Worthington *Lexington*
2nd V.P.:	Dee Wampler *Springfield*
Board of Directors:	Larry Fleming *St. Louis* Bruce Houdek *Kansas City* Larry Schaffer *Independence* Charles Rogers *Kansas City* Marco Roldan *Kansas City* Elizabeth Unger Carlyle, *Blue Springs* Charles Brown *Kansas City*

The election will be held at the annual meeting of the **Missouri Association of Criminal Defense Lawyers** at 5:30 p.m. April 16, 1993, at the Clayton Plaza Holiday Inn, Clayton, Missouri.

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Welcome New Members and Membership Renewals

* * * * *

Ella Boone, Jackson
Public Defender
Tom Bradshaw, Kansas City
Roy Brown, Kearney
Tom Carver, Springfield
Jay DeHardt, Kansas City
Sustaining Member
Caterine Ditraglia, St. L.
Public Defender
James R. Hall, Oak Grove
Tom Howe, St. Louis
Sustaining Member
Dean Price, Springfield
Public Defender
Pat Richarson, Green City
Robert Richart, Joplin
John Schneider, Univ. City
Chris Sill-Rogers, K.C.
Madeleine Thorpe, K.C.
Public Defender
F. A. White, Jr., K.C.
Mark Wooldridge, Boonville

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MACDL Membership Application

If you are not currently a member of MACDL, please take a moment to complete a photocopy of this form and mail it today, with your check, to: Francie Hall, Executive Secretary, MACDL, P. O. Box 15304, Kansas City, MO 64106.

Annual Dues: (Circle applicable amount)

Sustaining Member:	
Officers, Board Members & Past Presidents:	**$200.00**
Regular Member:	
Licensed 5 years or more:	**$100.00**
Licensed less than 5 years:	**$ 50.00**
Public Defender (Head of Office)	**$ 50.00**
Asst. Public Defender	**$ 25.00**
Provisional (Nonvoting) Member:	
(Law Professors, Judges, Law Students, Paralegals & Legal Assistants)	**$ 20.00**

Name _____

Address _____

City _____ State _____ Zip _____

Phone _____ Fax _____ Yr Admitted to Bar _____

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

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