MACDL
Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

SUMMER 1993 **Vol. V, No. 2**

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment XIV, Section 1
United States Constitution

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The ***Action Report*** is published quarterly by the **Missouri Association of Criminal Defense Lawyers**. We welcome articles submitted by **MACDL** members. Please submit articles, letters to the editor, sample motions, etc. on 3.5" or 5.25" high density or double density disk, along with a hard copy; if not WordPerfect 5.1, please advise what program you've used. Mail to: Francie Hall, Executive Secretary, **MACDL**, 416 E. 59th Street, Kansas City, MO 64110.

PRESIDENT'S LETTER

by Jay DeHardt

Hello:

As I sit to write my first President's Letter, I am both grateful for and humbled by my predecessor's performance. MACDL owes a large debt to Sean O'Brien for the continued growth and progress of our organization in the past year. When you see Sean, remember to thank him personally for a very successful year.

I believe MACDL can be even more of a force for change, locally and nationally, in 1993. From my perspective as "career" treasurer of this organization for several years, I am excited that our membership has grown to the point where our financial situation allows us to have acquired computer hardware and software, to publish a first-class newsletter and to participate at the national level in NACDL.

My goals for this year will be to further enhance our national reputation and to emphasize and target women and minority criminal defense counsel for membership in our organization. I encourage each of you to develop a personal 30-second "commercial" and to recruit new members wherever they can be found. Simply put, our strength is in our numbers.

We need to be strong. The State of Missouri is preparing to execute a record number of death-sentenced individuals this year. According to the Missouri Capital Punishment Resource Center, we are at risk of losing as many as ten prisoners this year. In June alone, Chuck Mathenia, a moderately retarded inmate, is scheduled to be executed on the 4th, Bobby Lewis Shaw, a mildly retarded inmate with schizophrenia, on the 9th, Darrell Mease on the 18th; stays of execution have been dissolved for Walter Blair and Fred Lashley. At the front end of the pipeline, two death-sentenced prisoners, Thomas Ervin and Ralph Davis, have pending federal habeas corpus petitions and are unrepresented by counsel. Justifiable fear of the punitive financial impact of a capital appointment on a private practice is scaring away good counsel. Federal habeas corpus litigation is complex and, at times, overwhelming. A real tragedy built into our current system is that less than a handful of us once trained and experienced in this area ever agree to be appointed to a second or subsequent case. These death-sentenced individuals need and deserve committed and talented representation. Any other alternative is unthinkable. If the United States Supreme Court enforced the Constitution as originally written, it would be virtually impossible to carry out a death penalty. It is only by systematic judicial dismantling of habeas corpus that executions are becoming routine. MACDL should take an active role in preserving what little remains of the Great Writ and, to that end, I enclose a resolution recently forwarded to Governor Carnahan from your Board of Directors on behalf of Bobby Lewis Shaw. Call Sean O'Brien. Call me. Call Governor Carnahan. Keep up the good work.

Sincerely,

Jay DeHardt
President

* * *

RESOLUTION

The Missouri Association of Criminal Defense Lawyers (MACDL) is an organization of over 300 Missouri attorneys with expertise in criminal law, and who support the Bill of Rights and due process of law for all persons accused of crime.

WHEREAS, the Board of Directors of MACDL has reviewed the case of Bobby Lewis Shaw, a prisoner scheduled to be executed on June 9, 1993, and has concluded that his execution would violate the basic principles of justice to which this organization is dedicated; and

WHEREAS, the evidence is overwhelming that Mr. Shaw has mental retardation, brain damage and chronic undifferentiated schizophrenia; and

WHEREAS, the United States Supreme Court has held that the background, character and mental health of the accused are critical to the ability to make a "reasoned, moral response" to the offender and the crime, Lockett v. Ohio, 438 U.S. 586 (1978); Penry v. Lynaugh, 492 U.S.302 (1989); and

WHEREAS, Mr. Shaw was tried as a poor person, and did not receive the basic tools for an adequate defense, and as a result his mental conditions were not disclosed to the jury that convicted him of first degree murder and sentenced him to die; and

WHEREAS, upon being fully informed of Mr. Shaw's behavioral and mental health history, previously withheld from him, the state-employed psychiatrist has recanted his trial testimony that Mr. Shaw was mentally competent at the time of the offense; and

WHEREAS, Mr. Shaw does not have the mental capacity to assist in his appeals; and

WHEREAS, recent decisions of the U.S. Supreme Court, by placing upon him personally the burden of conducting a diligent investigation without providing him the resources with which to do it, McCleskey v. Zant, 111 S.Ct. 1454 (1991), and by binding him irrevocably to the mistakes of his lawyers, Coleman v. Thompson, 115 L.Ed. 2d 640 (1991), and by depriving him of a forum for the presentation of late-discovered mitigating evidence, Sawyer v. Whitley, No. 91-6382 (June 22, 1992), have deprived Mr. Shaw of any judicial remedy for the deprivation of due process inflicted upon him by the State of Missouri.

BE IT RESOLVED that the Missouri Association of Criminal Defense Lawyers urges Governor Mel Carnahan to commute the death sentence of Bobby Lewis Shaw to a sentence of life without parole.

Duly adopted by the Board of Directors of the Missouri Association of Criminal Defense Lawyers this 26th day of May, 1993.

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COMMUTATION FOR BOBBY SHAW

June 3, 1993

Dear MACDL Members:

Thanks in large part to your support, Governor Carnahan has commuted Bobby Shaw's sentence from death to life without parole. Governor Carnahan's legal counsel told me he was impressed by the significant number of attorneys who wrote on Bobby's behalf. Your letter, and the Board's Resolution, carried a lot of weight with the Governor.

My experience through this process informs me that we now have a Governor who may be sensitive to our needs on criminal justice issues, such as public defender funding. There may be some conservative backlash from his action on Bobby's case, so I think we should do what we can to defend his action and support him. It has been a long time (if ever) since we have had access to the Governor's office. I think it would be worthwhile to do whatever we can to solidify this relationship.

Thank you again for your help. I honestly believe that if MACDL had not acted, the Governor's decision might have gone the other way.

Sincerely,

Sean D. O'Brien

WHAT IS PRETEXTUAL SEARCH AND SEIZURE ACTIVITY AND DOES IT VIOLATE THE FOURTH AMENDMENT?

by Joe Locascio

In 1932, the U.S. Supreme Court declared that "[a]n arrest may not be used as a pretext to search for evidence." United States v. Lefkowitz, 285 U.S. 452, at 467. In that case, police used an arrest warrant as a basis to conduct a full scale, exploratory search of an office and files. Years later, the Court, in dictum, condemned the use of the power of arrest to circumvent the warrant requirement and further an independent criminal investigation. "The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." Abel v. United States, 362 U.S. 217, 226, (1960) (emphasis added). But in more recent times, the Rehnquist Court has slowly backed off the idea that the purposeful circumvention of the warrant requirement offends the Constitution. Instead, in dicta, the Court has forced an "objective" assessment of police conduct to determine compliance with the Fourth Amendment. See Scott v. United States, 436 U.S. 128 (1978). And the Missouri Supreme Court has followed the lead by adopting the view that "an officer's subjective motivation for making an arrest is immaterial where the police conduct, assessed objectively, falls within the requirements of the Fourth Amendment". State v. Mease, 842 S.W.2d 98 (Mo. banc 1992) (citations omitted and emphasis added). So, what is a pretextual search or seizure, and does one violate the Fourth Amendment?

According to the dictionary, a "pretext" is "a false reason given to conceal the real reason for an action." The word denotes a disingenuous justification offered to conceal an ulterior purpose. When we think "pretext", we think of duplicity, ruse or subterfuge to hide the real reason or purpose. Simply speaking, we think of a cover story. When the Missouri Supreme Court, however, says police search and seizure activity will be "assessed objectively", it means that if a legitimate legal basis can be put forward for the search or seizure, any ulterior (real) purpose is irrelevant. If any "ulterior purpose" of the authorities is irrelevant, and if the only question is whether any legitimate sounding legal basis can be offered for the arrest or search, are "pretextual" searches and seizures any longer a violation of the Fourth Amendment? It appears, then, that use of the words "assessed objectively" works like a magic wand to convert a disingenuous arrest or search into a valid one when supported by any legal basis reasonable under the Fourth Amendment. Anyone or any place the police can legitimately arrest or search for one reason, can be arrested or searched for another, illegitimate reason, on the barest of suspicion or whim, or worse, out of spite or revenge. Anything goes so long as a legitimate-sounding cover story can be given for the search or seizure.

Is all hope lost for the idea that pretextual search and seizure activity is offensive to the Constitution? Maybe, maybe not. Let's look at what hope remains.

The U.S. Supreme Court has yet to resolve this incredibly important issue that affects virtually any exercise of police search and seizure authority. The Mease Court cited Scott, supra, to support the idea that only an objective review of the police conduct is justified under the Fourth Amendment. But only in dictum did the Scott Court declare that bad subjective intent alone does not turn an otherwise lawful search and seizure into a Fourth Amendment violation. 436 U.S. at 136-137. At no time has a majority of the modern Court held police purpose is totally irrelevant in determining compliance with the Fourth Amendment.

The real reason for the police search or seizure has not yet been written out of the Fourth Amendment equation. We must,

however, recognize that as human beings, police officers often have mixed reasons for their conduct. Although the trend is for the courts to give little regard for any ulterior police purpose, there is a good argument that the primary purpose of the search or seizure should be made to comply with the Fourth Amendment. After all, why should the police be allowed to obtain what they primarily want to obtain by circumvention of the Constitution when they could not obtain it by direct compliance? In Michigan v. Clifford, 104 S.Ct. 641 (1984), the Supreme Court found that since investigators returned to the scene of a fire after it had been extinguished to pursue an arson investigation, a warrant was required. Now retired Justice Powell, speaking for the Court, declared that when the primary objective of a search is to gather evidence of criminal activity, a criminal search warrant is required. When the primary object is merely to determine the cause and origin of a fire, the more lenient requirements for administrative search warrants will satisfy the Fourth Amendment. Proving, as a matter of fact and law, the primary purpose for the search and seizure activity would then allow the argument that that conduct must be consistent with the Fourth Amendment.

Another approach to the pretext problem is sort of a "but for" test: "but for" the ulterior purpose, would the officer have conducted the arrest or search. Under this approach, counsel should adduce any evidence available as to what would have occurred absent the ulterior purpose. If you are lucky, you may be able to show that an arrest, search or detainment would not have occurred absent the real motivating factor behind the activity.

If the Rehnquist Court follows through in its trend to write police purpose out of the Fourth Amendment, then as defense attorneys, we are only left with trying to establish that the bad faith search or seizure was in some manner "objectively" offensive. This can be done by attempting to establish that any standard operating procedure, which existed for the police officer, was not followed in conducting the search or seizure. For example, do standard procedures dictate an arrest for failure to signal a full search incident to arrest? Do standard procedures require that a vehicle be impounded (and thus searched) after the driver is arrested but when a licensed passenger can take custody of the car?

If no standard operating procedures exist, the next approach would be for the defense to demonstrate what a "reasonable officer" would have done faced with the facts and circumstances at the time. Unfortunately, it would seem the reasonable officer would try to find a way to circumvent the warrant requirement. Notwithstanding this, you may, for example, argue a reasonable officer would not make a full custody arrest of a driver who made an improper left turn. Thus no search of the car would be conducted and no subsequent interrogation for the unrelated offense would have occurred.

In conclusion, do not fail to move for suppression when the facts suggest a sham arrest or search. Adduce any available evidence on police purpose, including evidence of primary purpose; ask the officer directly what his sole, primary or mixed purpose was in conducting the arrest or search. Demonstrate that such a search or seizure would not have occurred but for the ulterior goal. Ask for any standard operating procedures dictating the officer's conduct when she is faced with these facts. Ask or demonstrate that officer typically does not handle these occurrences in this way and that this officer has never before done it this way. It is helpful to determine if the officer followed through with all the procedures she would have pursued without the ulterior goal: i.e., was a return filed on the warrant, did booking occur and was bond set on the minor (sham) offense? Finally, do not fail to argue that the pretextual arrest or search violates the Fourth and Fourteenth Amendments. Because, as surely as pretextual searches and seizures occur every day, it will take the United States Supreme Court to declare that circumvention of Constitutional safeguards is a violation of those safeguards, and that police must work within the Constitutional framework rather than around it.

As a public defender, Joe Locascio argued State v. Blair, 691 S.W.2d 259 (Mo.banc 1985) from the Sixteenth Judicial Circuit to the Supreme Court of the United States. He is now a sole practitioner in Kansas City.

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DEFENSE ATTORNEYS BEWARE: NEW TECHNIQUES BY PROSECUTORS IN RAPE CASES

by Joanne E. Beal

INTRODUCTION

On July 23, 1991 a jury found three members of the lacrosse team at St. John's University not guilty of raping a young Jamaican woman who was also a student at the university.[1] The victim accompanied one student to his home where she claimed the defendants sexually attacked her. The victim had been drinking at the time of the attack and her testimony had many inconsistencies. Her version of the incident, however, was largely corroborated by four eyewitnesses. A jury of six men and six women, consisting of nine whites, two blacks, and one Hispanic, acquitted all defendants in a verdict that has stirred considerable public outrage across the nation.[2] This public outrage provides an opportunity to reexamine the crime of rape in the United States. The likelihood of conviction is lower for defendants accused of rape than for defendants accused of other major crimes.[3]

The purpose of this article is to explain why there is a lower conviction rate in rape cases, what prosecutors are doing to increase the conviction rate, and what defense attorneys can do in response. The primary method by which prosecutors are attempting to increase the conviction rate is to focus during voir dire on myths about rape. The idea is to educate the jurors about these myths so their impact on the verdict is lessened. In the context of this article, the term "myth" is used to refer to ideas that individuals believe to be true but are actually false.

Long-held and pervasive cultural beliefs and biases are the basis for many myths about rape. Martha Burt points out the following examples of these myths in a study conducted in Minnesota involving a large group of individuals.[4] The first and probably most widely held myth about rape is that "women ask for it."[5] Indeed, a majority of the individuals in Burt's study agreed that "a [woman] who goes to the home or apartment of a man on the first date implies she is willing to have sex."[6] A second myth is that "only bad girls get raped."[7] At least fifty percent of the individuals in the study believed that "in the majority of rapes, the victim was promiscuous or had a bad reputation."[8] A third myth is that "any healthy woman can resist a rapist if she really wants to."[9] Another is that "women 'cry rape' only when they've been jilted or have something to cover up."[10] A majority of the individuals also agreed that this is the reason for at least fifty percent of reported rapes.[11] Finally, many people believe the myth that "rapists are sex-starved, insane, or both."[12] Many of these assumptions about rape show a willingness to blame the victim.

Rape myths are reflected in juror reactions during rape trials. One reaction of juries is that they are more likely than judges to acquit defendants.[13] Also, jurors who believe the myths about rape tend to give more lenient sentences.[14] Juries as a whole are likely to have a prejudice against the prosecution in rape cases.[15]

The St. John's University rape trial mentioned earlier clearly illustrates the effects of such prejudice.[16] Jurors said they made lists of the inconsistencies they identified.[17] A holdout juror, however, was concerned that nobody listed the consistencies, which far outnumbered the inconsistencies.[18] He suggested that this might be due to juror bias favoring the defendants.[19]

Besides this prejudice against the prosecution, evidence suggests that juries tend to focus their attention on the victim's characteristics. One study concluded that factors relating to the consent of the victim influence jurors' perceptions of the victim's credibility more than their perceptions of the offender's credibility.[20] The victim's characteristics are the primary focus in cases involving the defenses of consent and denial, with consent cases showing the greatest focus on the victim.[21]

The same study also showed that jurors are more likely to convict the defendant when the victim did not have extramarital sex, did not use drugs or alcohol, did not know the defendant, and was white.[22] Thus, it appears that the jurors may perceive the victim more favorably when she possesses these characteristics. Another study suggested that jurors perceive the victim more favorably when the offender is a stranger than when he is an acquaintance.[23]

Jurors also focus on the demeanor of rape victims. After a traumatic event such as rape, many people experience grief reactions such as denial, guilt, anger, and depression.[24] These may occur at any time following the rape and may last for very long periods of time.[25] Such reactions influence jurors' perceptions of the victim's demeanor, particularly if it does not coincide with their perceptions of appropriate behavior.[26] The St. John's University case provides a good example of this effect.[27] One juror said that the victim's demeanor "just didn't coincide with what we felt a victim should behave like."[28] The complaint was that the victim was often combative and angry, and one juror said, "This girl didn't shed one freaking tear up there...."[29]

Some prosecutors use voir dire in an attempt to educate the jury to counteract the types of juror biases discussed above.[30] The key is apparently to find a juror who has all the "right" answers to the questions and educate the rest of the jury panel at the same time.[31]

The following are examples of questions prosecutors ask in attempting to eliminate juror bias against the prosecution:[32]

1. Do you think the testimony of one person is enough to convict a defendant of rape?

2. If there is no evidence of physical trauma such as bruises, does that mean there was no rape?

3. Is there any time when a woman has no choice but to submit to a rape?

There are two things a defense attorney should be prepared to do when a prosecutor attempts to ask these types of questions during voir dire. First, be ready to object if the prosecutor attempts to elicit a commitment from the juror prior to trial. Second, develop similar questions of your own that counteract the prosecutor's questions and restore the neutrality of the jurors' minds. Examples of such questions are:

1. If the only evidence of rape is one person's testimony, would you be willing to consider this fact when deciding if there was a rape?

2. If a rape case involves no evidence of physical trauma, would you be willing to consider this as evidence that there may not have been a rape?

3. If a woman did not fight back, would that a least raise some doubt in your mind about whether a rape occurred?

CONCLUSION

Myths about rape have a pervasive effect on the prosecution of rape cases. These myths generally tend to focus on characteristics of the victim, such as her actions before and after the alleged rape, her motive in bringing the rape charges, and her general reputation. Thus, when prosecutors attempt to overcome these myths during voir dire, be prepared to object and to utilize questions of your own to gain back the advantage.

1. John Leo, Acquittal and Injustice in Queens, U.S. NEWS & WORLD REPORT, Aug. 12, 1991, at 13; Nicholas Varchaver, Inside The St. John's Jury Room, MANHATTAN LAW., Sept. 1991, at 1.
2. Leo, supra note 1, at 13.¶
3. Id. at 79.
4. Martha R. Burt, Cultural Myths and Supports for Rape, 48 J. OF PERSONALITY & SOC. PSYCHOL. 217 (Feb. 1980).
5. Id.
6. Id. at 229.
7. Id. at 217.
8. Id. at 229.
9. Id. at 217.
10. Id.
11. Id. at 229.
12. Id. at 217.
13. Linda Brookover Bourque, DEFINING RAPE 107, 121 (1989); Valerie P. Hans & Niel Vidmar, JUDGING THE JURY 207 (1986).
14. Hans & Vidmar, supra note 15, at 212.
15. Bourque, supra note 15, at 121. ¶
16. See Varchaver, supra note 1.
17. Id.
18. Id.
19. Id.
20. Bourque, supra note 15, at 124.
21. Id. at 126.
22. Id.
23. James D. Johnson & Inger Russ, Effects of Salience of Consciousness-Raising Information on Perceptions of Acquaintance Versus Stranger Rape, 19 J. OF APPLIED SOC. PSYCHOL. 1182 (1989).
24. Nancy L. Buck, Grief Reactions and Effective Negotiation, 7 NEGOTIATION JOURNAL 69 (Jan. 1991).
25. Id.
26. Id. at 72.
27. See Varchaver, supra note 1.
28. Id. at 2.
29. Id. at 2, 4.
30. Interview with Tom Bath, former Assistant District Attorney in Olathe, Kan. (Oct. 18, 1991). Tom Bath received his J.D. from the University of Kansas in Lawrence in 1986. He prosecuted rape cases from 1986-1992 and was head of the sex crimes unit from 1988-92.
31. Id; Jeffrey T. Frederick, Effective Voir Dire, TRIAL, Aug. 1988, at 66.
32. Bath, supra note 33; Interview with Margaret Lutes, Assistant District Attorney of Shawnee County, in Topeka, Kan. (Oct. 3, 1991) (Telephone Interview Oct. 22, 1991). Margaret Lutes received her J.D. from Washburn Law School in Topeka, Kansas in 1987. She has been with the District Attorney's Office for three years and has prosecuted sex crimes for the past year and a half.

Joanne E. Beal is a recent graduate of Kansas University Law School. She is currently working for the firm of Wyrsch Atwell Mirakian Lee & Hobbs, and will join the staff of the Missouri Attorney General's Office in September.

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FEDERAL CASES MAY 1993

by Elizabeth Unger Carlyle

APPELLATE PROCEDURE

Ortega-Rodriguez v. United States, 113 S.Ct. 1199 (1993)
The fugitive dismissal rule does not bar appeals by absconders who are picked up before the appellate process begins. Rather, to warrant a dismissal, there must be some connection between escape and appeal which warrants dismissal.

United States v. Olano, No. 91-1306 (USSC April 26, 1993)
A federal district court's decision to allow alternate jurors to sit in on jury deliberations in violation of Fed. R. Crim. Pro. 24 is not plain error in the absence of a showing of prejudice, and the defendant waived his right to complain on appeal by failure to object at trial.

CAPITAL PUNISHMENT

Herrera v. Collins, 113 S.Ct. 853 (1993)
Actual innocence is not a basis for habeas corpus relief even when further proceedings are barred by state procedural rules, unless there is some independent constitutional error in the proceeding. Clemency proceedings are a constitutionally adequate forum for vindicating actual innocence.

Rust v. Hopkins, 984 F.2d 1486 (8th Cir. 1993)
Where the petitioner presented his standard of proof issue to the Nebraska Supreme Court at the first available opportunity, citing both federal and state constitutional grounds, and the court's summary denial did not constitute a plain statement of reliance on an independent

state procedural bar, consideration of the claim on federal habeas corpus was proper. Further, where state law entitled the petitioner to sentencing by a panel applying a reasonable doubt standard, and the panel used a lesser standard, the error was not cured by the appellate court's finding that sufficient evidence existed to satisfy the reasonable doubt standard. Reversed and remanded.

CIVIL RIGHTS LITIGATION

Sanders-El v. Wencewicz, 987 F.2d 483 (8th Cir. 1993)
A new trial was required in this 42 U.S.C. §1983 action where, over plaintiff's objection, defense counsel implied on several occasions that plaintiff was a hardened criminal. The evidence was close (a prior trial had ended in a hung jury) and the error was therefore not harmless.

Sterling v. United States, 985 F.2d 411 (8th Cir. 1993)
Where the inmate plaintiff submitted documents showing that he was unaware that his case had been transferred and did not intentionally neglect to prosecute it, the district court's order dismissing the case for want of prosecution was vacated and the case remanded for an evidentiary hearing on the issue of the inmate's diligence.

Gentile v. Missouri Department of Corrections and Human Resources, 986 F.2d 214 (8th Cir. 1993)
While the district's court grant of summary judgment against the 42 U.S.C. §1983 plaintiff was affirmed, the court clarified the correct procedures to be followed by the district court in light of the previous decision in Dowdy v. Bennett. A decision on in forma pauperis status should be made on the basis of the complaint before issuance and service of process. Personal investigation of the case by the magistrate is improper. Nor is it proper for the magistrate's decision to be based on informal hearings and unsworn statements. The summary judgment here was saved only by the fact that the defendants' motion for summary judgment was supported by affidavits from the witnesses who had previously given unsworn testimony.

Pettengill v. Veasey, 983 F.2d 130 (8th Cir. 1993)
Where a 42 U.S.C. §1983 plaintiff requested a jury trial, it was error for a magistrate judge to resolve credibility issues against him and dismiss his case without taking all facts alleged and inferences supporting those facts as true. Judgment reversed, remanded for trial.

Slone v. Herman, 983 F.2d 107 (8th Cir. 1993)
Qualified immunity was properly denied where the plaintiff's suit alleged that prison officials had failed to release him after the sentencing court ordered his release. It was not objectively reasonable for the defendants to deny release because they disagreed with a court order which had become final.

Buckner v. Hollins, 983 F.2d 119 (8th Cir. 1993)
Qualified immunity was properly denied where a correctional employee failed to intervene in the beating of a prisoner on prison premises.

Quinn v. Nix, 983 F.2d 115 (8th Cir. 1993)
Prison officials' order that inmates cut their hair had no legitimate penological purpose and violated the inmates' liberty and equal protection rights. Damages and injunction were properly awarded.

DETAINERS

Fex v. Michigan, 113 S.Ct. 1085 (1993)
The time limit contained in interstate agreement on detainers for bringing prisoner to trial after his request for disposition of charges does not start until the request is actually delivered to the court and prosecutor in the jurisdiction which lodged the detainer.

DOUBLE JEOPARDY

United States v. Allen, 984 F.2d 940 (8th Cir. 1993)
Where the district court entered a mistrial order *sua sponte* over the defendant's objection on the grounds of the government's failure to

grant discovery, double jeopardy precluded retrial. No reversible error had occurred with respect to the objecting defendant, and it was not clear that a mistrial would have benefitted him.

DUE PROCESS

Crosby v. U.S., 113 S.Ct. 748 (1993)
A trial in absentia pursuant to Fed. R. Crim. Pro. 43 is only proper if the defendant is present at the beginning of trial. Here, the defendant failed to appear for trial after arraignment and plea. This scenario makes it difficult to infer a knowing and voluntary waiver of the right to be present, and the government's interest in continuing the proceedings has more force after trial begins.

United States v. Gullickson, 982 F.2d 1231 (8th Cir. 1993)
Where the government agreed, in response to a Roviaro motion, to produce an informant for interview by the defense, and violated that agreement without showing that it was unable to comply, the defendant was entitled to a new trial. The informer gave crucial testimony at trial.

United States v. Feldewerth, 982 F.2d 322 (8th Cir. 1993)
The defendant entered into a non-prosecution agreement. Upon a finding by a magistrate, based in part on the hearsay statements of a confidential informer, that the defendant had breached the agreement, the defendant was prosecuted. The government refused to produce or reveal the identity of the informant. Because the informant's information was crucial to the government's ability to meet its burden to prove breach of the agreement, the denial of confrontation was error. Convictions reversed.

EFFECTIVE ASSISTANCE OF COUNSEL

Lockhart v. Fretwell, 113 S.Ct. 838 (1993)
The failure to make an objection based on a court decision which, while giving grounds for objection at the time of trial, is later overruled is not ineffective assistance of counsel. In this situation, the defendant can show no prejudice under Strickland.

Houston v. Lockhart, No. 90-2592 (8th Cir. January 8, 1993)
The habeas corpus petitioner was entitled to an evidentiary hearing on his ineffective assistance of counsel claim where he claimed that favorable polygraph evidence was not introduced at trial despite an agreement between the defense and the prosecutor that such evidence was admissible. Although Arkansas law permits the use of such results only upon written agreement, it is arguable that defense counsel should have done more to try to have them admitted.

Rogers v. United States, No. 92-2590 (8th Cir. March 19, 1993)
An evidentiary hearing was required where the movant in a motion under 28 U.S.C. §2255 alleged that his trial counsel was ineffective for failing to allege a violation of Fed. R. Crim. Pro. 11 in his appeal.

EVIDENCE

Ring v. Erickson, 983 F.2d 821 (8th Cir. 1993)
(The court's order granting rehearing en banc was vacated on January 7, 1993, and this opinion became final.) Habeas corpus relief was granted where the admission of two out-of-court statements by a minor later found to be incompetent to testify violated the defendant's right to confrontation. No firmly rooted hearsay objection, or adequate indicia of reliability, justified the admission of the statements.

FEDERAL CRIMINAL PROCEDURE

Negonsett v. Samuels, No. 91-5397 (2/24/93)
Crimes by Indians against Indians on reservations may be prosecuted in Kansas courts if the crime violates Kansas law even if the offenses are also covered by Indian Major Crimes Act.

Zafiro v. U.S., 113 S.Ct. 933 (1993)
severance under Fed. R. Crim. Pro. 14 is not a matter of right upon a showing of mutual

exclusivity of defenses, but must be granted only if there is a serious risk that a joint trial would compromise a specific right of the requesting defendant or would prevent the jury from making a reliable judgment about his guilt or innocence.

Crosby v. U.S., 113 S.Ct. 748 (1993)
A trial in absentia pursuant to Fed. R. Crim. Pro. 43 is only proper if the defendant is present at the beginning of trial. Here, the defendant failed to appear for trial after arraignment and plea. In this situation, it is difficult to infer a knowing and voluntary waiver of the right to be present, and the government's interest in continuing proceedings has more force after trial begins.

FORFEITURES

United States v. Parcel of Land Known as 92 Buena Vista Ave., Rumson, N.J. 113 S.Ct. 1126 (1993)
A property owner who lacks knowledge that funds he received as a gift and used to buy a house were traceable to illegal drug deals is entitled to assert the "innocent owner" defense. The "relation back" doctrine of 21 U.S.C. §881(h) does not vest ownership in the government at the moment of the crime or of the home purchase, but merely refers to relation back after forfeiture is decreed.

GENERAL SENTENCING ISSUES

United States v. Nelson, No. 92-1793, 92-1794 (8th Cir. March 2, 1993)
Where the trial court, at sentencing, ordered that the defendant's fine be paid as a condition of supervised release, and then issued an amended judgement without notice or hearing making the fine payable in full immediately, reversal of the amended judgment and repayment of the fine collected from the defendant were ordered.

United States v. Wind, No. 92-1331 (8th Cir. March 4, 1933)
Where restoration of civil rights after prior convictions did not expressly provide that the defendant could not possess firearms, the prior convictions were not available for a sentence enhancement under 18 U.S.C. §924(e)(1) for a defendant convicted of unlawful possession of a firearm by a felon. A good discussion of rights restoration and state statutes.

United States v. Stevens, 986 F.2d 283 (8th Cir. 1993)
The trial court's order revoking probation for nonpayment of restitution was reversed and the case was remanded for a fuller statement of reasons why the trial court rejected alternatives to imprisonment.

Parton v. Armontrout, 983 F.2d 881 (8th Cir. 1993)
An inmate was denied parole because he refused to complete the Missouri Sex Offender Program, which was held to violate the Ex Post Facto clause as applied to him. He was then released on parole, and has now complied with the special parole requirements. However, because his release was delayed for two years by the ex post facto violation, he is now entitled to credit for two additional years of parole and to be considered for discharge from parole.

HABEAS CORPUS

Herrera v. Collins, No. 91-7328 (1/25/93)
A claim of actual innocence does not provide a basis for habeas corpus relief which overrides a procedural bar unless there is an independent constitutional error. State clemency proceedings are a constitutionally adequate forum for presenting a claim of innocence.

Withrow v. Williams, 113 S.Ct. 1745 (1993)
The rule of Stone v. Powell barring review of state Fourth Amendment violations on federal habeas corpus if the petitioner has a full and fair opportunity to present his claim in state court does not apply to Miranda violations in state cases.

Brecht v. Abrahamson, 113 S.Ct. 1710 (1993)
The appropriate standard for habeas corpus review of a "trial type" constitutional error in a state conviction is whether the error had a substantial and injurious effect or influence in

determining the verdict, not whether the error was harmless beyond a reasonable doubt. A violation of the rule forbidding impeachment of the defendant with his post-arrest, post-Miranda warning silence is an error of this type.

Rogers v. United States, No. 92-2590 (8th Cir. March 19, 1993)
An evidentiary hearing was required where the movant in a motion under 28 U.S.C. §2255 alleged that his trial counsel was ineffective for failing to allege a violation of Fed. R. Crim. Pro. 11 in his appeal.

Rust v. Hopkins, 984 F.2d 1486 (8th Cir. 1993)
Where the petitioner presented his standard of proof issue to the Nebraska Supreme Court at the first available opportunity, citing both federal and state constitutional grounds, and the court's summary denial did not constitute a plain statement of reliance on an independent state procedural bar, consideration of the claim on federal habeas corpus was proper. Further, where state law entitled the petitioner to sentencing by a panel applying a reasonable doubt standard, and the panel used a lesser standard, the error was not cured by the appellate court's finding that sufficient evidence existed to satisfy the reasonable doubt standard. Reversed and remanded.

Ring v. Erickson, 983 F.2d 821 (8th Cir. 1993)
(The court's order granting rehearing en banc was vacated on January 7, 1993, and this opinion became final.) Habeas corpus relief was properly granted where the admission of two out-of-court statements by a minor later found to be incompetent to testify violated the defendant's right to confrontation. No firmly rooted hearsay objection, or adequate indicia of reliability, justified the admission of the statements.

Houston v. Lockhart, No. 90-2592 (8th Cir. January 8, 1993)
The habeas corpus petitioner was entitled to an evidentiary hearing on his ineffective assistance of counsel claim where he claimed that favorable polygraph evidence was not introduced at trial despite an agreement between the defense and the prosecutor that such evidence was admissible. Although Arkansas law permits the use of such results only upon written agreement, it is arguable that defense counsel should have done more to try to have them admitted.

SEARCH AND SEIZURE

United States v. Marshall, 986 F.2d 1171 (8th Cir. 1993)
Evidence of a gun discovered in the search of a vehicle which the defendant had been driving should have been suppressed where the gun was discovered during an improper inventory search. Officers discovered the vehicle had unpaid parking tickets, stopped the driver, arrested him and impounded the vehicle. Although an inventory search is permissible in these circumstances, it must be conducted pursuant to standard, established police procedures. None were shown here. Reversed for judgment of acquittal where this was the only evidence showing possession.

United States v. Jacobs, No. 92-21790 (8th Cir. March 1, 1993)
A Franks v. Delaware violation, necessitating suppression of evidence, occurred when the police failed to inform the magistrate before whom the application for a search warrant was presented that, while the first drug detection dog had exhibited an "interest" in the package, this did not amount to an "alert," and a second dog had shown no interest at all. With this information included in the affidavit, the existence of probable cause would clearly have been lacking. The Leon good faith exception is not applicable to Franks violations.

SENTENCING GUIDELINES

United States v. Dunnigan, 113 S.Ct. 1111 (1993)
The obstruction of justice enhancement, as applied to defense perjury at trial , is constitutional. The enhancement does not unduly burden the defendant's right to testify.

Stinson v. U.S., No. 91-8685 (USSC, May 3, 1993)
Sentencing Guidelines commentary which explains or interprets the guidelines is binding on courts even if contrary to prior judicial interpretation, unless the commentary violates the constitution or is a plainly erroneous reading or inconsistent with the language of the guideline. The Eleventh Circuit erred in holding that a statement in the commentary that possession of a firearm by felon was not a crime of violence was not binding on the court.

United States v. Yankton, No. 92-1404, 92-1482 (8th Cir. March 1, 1993)
Denial of the obstruction of justice enhancement was proper where the defendant never admitted perjury, and the district court found that no perjury had occurred. Further, the occurrence of pregnancy following a rape is not a "serious bodily injury" justifying an upward adjustment under Sentencing Guidelines §2A3.1(b)(4). However, an upward departure might be appropriate because of the pregnancy.

United States v. Brown, No. 92-2248 (8th Cir. April 2, 1993)
Remand for resentencing was required where the trial court apparently believed that a downward departure for any reason required a government motion. Where the issue here was the overstatement of the criminal behavior by the guideline range, a departure could have been made without government motion.

United States. v. Starr, 986 F.2d 281 (8th Cir. 1993)
Where the defendant objected to increases in the guideline offense level for more than minimal planning and misrepresentation of charitable status, and the government did not attempt to prove conduct referred to in the presentence report as supporting those increases, that conduct could not be relied on by the court. The increase for misrepresentation was reversed, and the case remanded for resentencing.

United States v. Cox, 985 F.2d 427 (8th Cir. 1993)
The use of the obstruction of justice enhancement to a guideline sentencing range was improper where there were discrepancies between the defendant's grand jury testimony and his post-plea debriefing statements, but the government did not show how the defendant's incomplete statements at the grand jury impeded the grand jury's deliberations, and did not show that the defendant's grand jury statements constituted perjury. Further, the downward adjustment for acceptance of responsibility should be reconsidered on resentencing in light of the unavailability of the obstruction of justice enhancement.

United States v. Norquay, 987 F.2d 475 (8th Cir. 1993)
Tribal court convictions obtained when the defendant was not represented by counsel in the tribal court may not form the basis for an upward departure from the guideline sentencing range. Remanded for determination of whether or not the convictions at issue here were uncounseled; if so, they may not be used as the basis for a departure.

United States v. Rogers, 982 F.2d 1241 (8th Cir. 1993)
District court must determine the quantity of drugs which were known to each defendant or reasonably foreseeable to him in order to determine the sentencing guidelines offense level. It is improper to impute all amounts involved in a conspiracy to a convicted conspirator without a particularized determination. Remanded for resentencing.

United States v. Mahler, 984 F.2d 899 (8th Cir. 1993)
Where the court's determination of the amount of money attributable to the defendant in a money laundering case was based on statements in the presentence report, and the report was based on grand jury testimony from confederates which was neither quoted nor summarized, the court's finding was erroneous. The statements in the PSI did not have "sufficient indicia of reliability to support [their]

probable accuracy." Remanded for new sentencing hearing.

SUFFICIENCY OF EVIDENCE

United States v. Goodman, 984 F.2d 235 (8th Cir. 1993)
The defendant's conviction for mail fraud was reversed for insufficient evidence where the statements made, while confusing, were not false. A "shrewd advertising scheme" is not mail fraud.

Elizabeth Unger Carlyle was elected to MACDL's Board in April of this year. After several years in Texas, she now practices in Lee's Summit (not Blue Springs, as erroneously reported in the Spring Action Report). Elizabeth also offers invaluable assistance in the evolution of this newsletter as a member of MACDL's Publications Committee.

* * *

Ed. Note: Sean O'Brien, Immediate Past President of MACDL and Director of the Missouri Capital Punishment Resource Center, has provided recent Missouri case summaries for this publication for some time. Recently, Sean has been more than usually overwhelmed by life and death matters, e.g., obtaining commutation for Bobby Shaw; we congratulate him for his successful labors, and understand why he was unable to summarize recent Missouri decisions for us in this issue.

* * *

NACDL LEGISLATIVE FLY-IN

NACDL's Second Annual Legislative Fly-In brought nearly 150 NACDL members from 33 states to Washington, DC on March 30-31 to lobby Congress on many issues of importance to the criminal defense bar. MACDL was represented by Sean O'Brien, Russ Millin, Dave Everson, Charlie Atwell, Larry Fleming and Leo Grifford. They met with Alan Wheat, Lara Battles (Legislative Director for Rep. Ike Skelton), Andrew Schatkin, Jacqueline McGreevy, Jeffrey Ballabon (Legislative Counsel for Sen. John Danforth) and Brent Franzel (Legislative Counsel for Sen. Kit Bond), among others. In over 120 individually scheduled meetings with members of Congress or their staffs, NACDL members discussed the CJA funding crisis; the criminal justice agenda for the 103rd Congress and the Clinton administration; forfeiture reform; proposed legislation to expand the use of Form 8300; the repeal of mandatory minimums; overturning the Supreme Court's ruling in Herera; and other issues. The Fly-In introduced many senators and representatives to NACDL and to a criminal defense bar perspective that gave the solons a new slant on old issues.

Newly confirmed Attorney General Janet Reno stopped by NACDL's Congressional Reception. Ms. Reno's appearance was doubly appreciated, given the Justice Department's longstanding and open hostility to the criminal defense bar. Senate Majority Leader George Mitchell and House Subcommittee on Civil and Constitution Rights Chair Don Edwards also attended the Congressional Reception and addressed the members.

NACDL Legislative Committee Co-Chairs John Flannery and Marshall Stern were elated that the number of Fly-In participants nearly tripled over last year. They both see the 103rd Congress and the Clinton administration as a new beginning, a chance to work together with Congress and the Department of Justice to protect the rights of individuals.

* * *

MISSOURI LEGISLATIVE REPORT

by Dan Viets

The 1993 session of the Missouri General Assembly adjourned on Friday, May 14. As always, many changes in the criminal law were enacted during the session. As is often true, some of the most significant matters are the

proposals which did not pass into law this year. The perennial effort to pass a witness immunity statute was again defeated. Also, as reported in the last issue of the ***MACDL Action Report,*** the proposal to require the suspension of drivers' licenses as a consequence of drug offenses unrelated to driving was defeated for the fourth (and probably final) time this session.

Most criminal law changes are contained in two omnibus bills which passed during the final days of this session. What follows is a brief overview of some of the changes contained in those two bills.

Senate Bill 180 in its final form contains the greatest number of criminal law changes. Among these is a requirement that the fingerprints of juveniles between 14 and 17 be taken when a juvenile is taken into custody. The drug forfeiture proceedings provided for under Section 195.145 are repealed and all forfeiture proceedings will be conducted pursuant to the CAFA statutes, 513.600 to 513.680. Other very significant forfeiture reforms in this bill include the requirement that a defendant be found guilty or plead guilty to a felony offense substantially related to the forfeiture before any forfeiture can take place. This change will eliminate the frequent practice of forfeiting property from defendants who are not convicted and in some cases not even charged, and will prevent forfeiture proceedings altogether against defendants who are charged only with misdemeanor offenses.

The new law also prohibits using seized property in plea bargaining of criminal charges, and prohibits the taking of payment in exchange for the release of seized property.

Another important forfeiture law reform is included in the final form of House Bill 562. That provision restricts the transfer of forfeiture cases from state courts to federal courts. The new law requires that any such transfer be first approved by a circuit judge and the prosecutor. The law states that the judge shall not approve any such transfer ". . . unless it reasonably appears the activity giving rise to the investigation or seizure involves more than one state or the nature of the investigation or seizure would be better pursued under federal forfeiture statutes."

These reforms of the forfeiture laws are a major victory for MACDL and our allies.

Unfortunately, S.B. 180 also includes a provision which may result in the imprisonment of an even greater number of poor and minority defendants. It raises the offense of distribution of a controlled substance within 1000 feet of public housing or other governmental assisted housing to a Class A felony. This provision, which received very little debate prior to its adoption, may be the worst aspect of the criminal law changes enacted this session. The United States already ranks first in the world in imprisonment of its own citizens, and we imprison more than four times as many of our black citizens as does South Africa.

The new law also deprives citizens of the opportunity for a jury trial on any infraction charge.

It also changes the language relating to the defense of mental disease or defect from ". . . did not know or appreciate . . ." to ". . . was incapable of knowing and appreciating the nature, quality or wrongfulness of his conduct" and eliminates the phrase ". . . or was incapable of conforming his conduct to the requirements of the law."

The new law permits the use of deadly force when one reasonably believes such force is necessary to protect oneself or another against serious physical injury through robbery, burglary or arson. And "when entry into the premises is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering physical violence to any person or being in the premises . . ." Apparently a perceived threat to a "being" other than a human being will now justify the use of deadly force!

The law permits the prosecutor to collect a reasonable service charge along with the face amount of a bad check, in addition to the "administrative handling cost" permitted under existing law. The prosecutor is also granted the authority to expend the administrative handling cost money without an appropriation from the county commission or any other elected governing body.

Several new offenses are created under provisions related to "bootleg" video or audio recordings, and penalties for violations are increased.

The penalties for the crime of peace disturbance are increased dramatically for repeat offenders. Second and subsequent offenses become Class A misdemeanors. A third or subsequent conviction now carries a minimum fine of $1,000, and a maximum fine of $5,000! Those who sought passage of this amendment have stated they intend it to be used against abortion clinic protesters. Unfortunately, it will also apply to any other individual unlucky enough to be convicted of repeat offenses of peace disturbance, no matter how long in the past the prior offenses occurred.

Several changes are made to the animal abuse statutes, including provisions permitting the killing of an animal found by a licensed veterinarian to be diseased or disabled, if the owner failed to post bond after being notified of the animal's impoundment.

Selling tickets to "any public sporting event" for a price greater than that printed on the ticket has been raised from an infraction to a misdemeanor. The fine for a first offense is $50 to $300 or imprisonment up to 15 days; for a second offense, not less than $300 nor more than $500, or imprisonment from 60 days to six months; and for third and subsequent offenses, fines of not less than $500 nor more than $1,000, or imprisonment from six months to one year. Apparently there is no prohibition on ticket scalping for anything other than public sporting events.

The new law permits either party in a criminal case to move that the court determine whether the services of the Public Defender may be utilized by a defendant.

The law also authorizes the formation of Multijurisdictional Enforcement Groups (MEGs). The law states that any MEG officer has the power of arrest, within the scope of a MEG investigation, anywhere in the state.

Prior and persistent DWI offenses are redefined in such a way as to return the law to its interpretation prior to the Stewart decision of the Missouri Supreme Court last summer. In other words, second DWI offenses will now be chargeable as Class A misdemeanors, and third and subsequent offenses will now again be chargeable as felony offenses.

The law also requires an arresting officer to take the license of any suspect who refuses to take a breath, blood or urine test at the time of the arrest. It also permits a person petitioning for a hearing on an alleged refusal to request the court to stay the revocation until the petition for review can be heard.

The legislature has enacted a series of regulations regarding what are referred to in the law as "adult cabarets", establishments in which persons appear in a state of nudity in the performance of their duties. Nudity is defined as the human genitals or pubic area with less than fully opaque covering, or the female breast with less than a fully opaque covering on any part of the nipple. The law permits each county, or city not within a county, to require a background check on all employees of an adult cabaret to determine whether they have been convicted of or have plead guilty to any misdemeanor or felony involving prostitution, drug possession or trafficking, money laundering, tax evasion or illegal gambling. There is no indication of what action, if any, should be taken if an employee is found to have been involved in such activity. Nonetheless, the law permits the local government to inflict a sales tax of up to 10% of the gross receipts of any adult cabaret to pay for such background checks if the tax is passed by

voters. It also permits local government to establish a minimum age limit for admission (without specifying what that age limit should be), to require security personnel on the premises, to require random testing for the presence of illegal substances in the blood or urine of all employees (without specifying what action, if any, should be taken if such substances are discovered), to prohibit any live public nudity within ten feet of any person observing such nudity, and to prohibit appearing in a state of nudity in any adult cabaret altogether (which, by definition, would prevent it from being an adult cabaret).

The provisions amending drunk driving laws and the new nudity laws are deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and therefore are declared an emergency act in full force and effect upon passage and approval. As of June 2, Governor Carnahan had not yet signed this legislation, but he is expected to do so shortly.

SB 180 also permits any "peace officer", conservation agent or state water patrol agent engaged in "fresh" pursuit (not necessarily hot pursuit) to arrest and hold an individual anywhere in the state. Fresh pursuit must be initiated from within the pursuing officer's jurisdiction; it terminates once the officer loses contact with the person and is outside his jurisdiction.

The crime of misconduct in administration of justice is expanded to include any law enforcement officer who orders or suggests to an employee of St. Louis County that such employee should issue a certain number of traffic citations unless that employee is assigned exclusively to traffic control.

SB 180 permits any sheriff of a first class county not having a charter form of government to employ an attorney to advice and represent him. The sheriff shall set the compensation for the lawyer, and the lawyer shall be employed at the pleasure of the sheriff.

Finally, SB 180 states that if any fourth class city, town or village receives more than 45% of its total revenue from traffic violation fines, all revenue in excess of that 45% shall be sent to the director of the Missouri Department of Revenue for deposit to the state school monies fund.

Copies of the full text of Senate Bill 180 and other criminal justice legislation can be obtained by contacting the Senate Bill Room at 314/751-3824; copies of House bills by contacting the House Bill Room at 314/751-3659.

In the next issue of the ***MACDL Action Report***, we will review other relevant legislation passed in the 1993 session.

Dan Viets, President-Elect of MACDL, continues to serve this year as Chair of MACDL's Legislative Committee.

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AMENDMENTS TO FEDERAL RULES

by Elizabeth Unger Carlyle

The Criminal Law Reporter recently published the text of amendments to the Federal Rules of Appellate Procedure and Federal Rules of Criminal Procedural. These amendments will take effect December 1, 1993, unless Congress acts. They are published at 53 CrLR 2057, May 5, 1993. Not all of the amendments are discussed here.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4(b) is amended to allow for notice of appeal to relate forward to denial of post-trial motions. Previously, a notice of appeal filed before action on post-trial motions was premature and ineffective. This sometimes caused a trap for the unwary, who assumed that since notice of appeal had been filed earlier, it did not need to be refiled. The amended rule also allows for notices of appeal

by inmates to be timely when deposited in internal prison mail on or before deadline, codifying Houston v. Lack.

Rule 12(b) is amended to require filing of a representation statement naming each party represented by an attorney. Some confusion had arisen concerning whether a notice of appeal was effective as to a particular party. New provisions concerning the notice of appeal now require the naming of each party taking an appeal, and a new form for notice of appeal is provided. This statement makes clear to the court who the attorney for each party is.

Rule 25 is amended to allow all papers filed by inmates to be deemed timely filed when deposited in internal prison mail by the filing date, and provides for a certificate for proof of such deposit. The rule thus extends Houston v. Lack, which applied to notice of appeal only, to all inmate filings. The amendment also allows the districts to enact local rules to permit electronic filing of documents.

Rule 28 is amended to require briefs to include a concise statement of the standard of review for each error asserted. This has been a good practice for a long time; it is now required.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16(1)(E) is added, requiring the government, on request by the defense, to disclose a written summary of the expert evidence it intends to use in its case in chief, including witnesses' opinions, the basis of and reasons for those opinions, and the qualifications of the experts. This should assist in avoiding trial by surprise.

Rule 17(1)(C) is added to allow reciprocal discovery of experts from the defendant when the defendant requests discovery under Rule 16(1)(E). It corresponds to other reciprocal discovery provisions in the rules.

Rule 26.2 is amended to provide for government production of witness statements at hearings on sentencing, probation revocation or modification, and detention, as well as at evidentiary hearings on motions filed under 28 U.S.C. §2255. The amendment provides for excision of privileged material on request by the government and for preservation of the excised material for appellate purposes. Conforming amendments to Rules 32(e) (sentencing), 32.1 (probation revocation), 46(i) (detention), and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. §2255 provide that if a party elects not to disclose witness statements, the testimony of the witness whose statements are not disclosed shall not be considered.

Rule 26.3 is added, providing that before entering a mistrial on its own motion, the court must allow each party the opportunity to comment or object. This should avoid some situations where the court entered a mistrial and the defendant later objected on appeal that the mistrial was not proper.

* * *

MACDL CLE Report

by Larry Schaffer

On Friday and Saturday, April 16-17, some 300 criminal defense lawyers attended MACDL's annual seminar, **Defending Criminal Cases**, co-sponsored by The Missouri Bar. After a stirring welcome by President Sean O'Brien, Larry Catt of Springfield entertained the audience with a thorough nuts-and-bolts approach to DWI defense. Cindy Lobo of Washington, D.C. was amusing and informative discussing opening statements and closing arguments.

At Friday's luncheon, Pat Berrigan of the Public Defender Capital Unit in Kansas City and Irl Baris of St. Louis were recognized by MACDL for their outstanding efforts on behalf of the criminally accused. Presentation speeches by Sean O'Brien and Burt Shostak respectively made it abundantly clear that Pat and Irl exemplify the best of our breed.

Nancy Hollander, President of the National Association of Criminal Defense Lawyers, inspired us after Friday's luncheon with her

interesting approach to the liberation of "drug puppies". If you have a drug case based on canine evidence, contact NACDL (202/872-8688) for copies of the materials Nancy has produced in her amazingly successful attempts to suppress "drug puppy" evidence.

On Friday afternoon, E.X. Martin of Dallas knowledgeably demonstrated some uses of high tech demonstrative evidence. Tony Axam of Atlanta was dynamic as he recounted his examination of a polygraph expert and provided specific helpful pointers on how to handle experts generally. Randy Schlegel of Kansas City enlightened us with his imaginative explication of DNA evidence.

At MACDL's Annual Meeting Friday afternoon, the slate proposed by the Nominating Committee was unanimously elected by the membership, to-wit:

President:	Jay DeHardt
President-elect:	Dan Viets
Vice President:	J.R. Hobbs
1st V.P.:	James Worthington
2nd V.P.:	Dee Wampler
Board members:	Charles R. Brown
	Elizabeth Unger Carlyle
	Larry Fleming
	Bruce Houdek
	Marco A. Roldan
	Charles Rogers
	Larry Schaffer

On Saturday, Milton Hirsch of Miami managed to insert humor into his early morning presentation on recent U.S. Supreme Court decisions. Then MACDL board members David Everson and J.R. Hobbs engaged in an educational dialogue on complying with federal grand jury subpoenas and investigations. Chris Harlan, a Federal Public Defender for the Western District of Missouri, followed with information on obtaining and maintaining bonds in federal criminal cases.

The program closed with a round-table discussion which included questions submitted by the audience. Burt Shostak moderated panelists Norm London of St. Louis, Jim Wyrsch of Kansas City, Milton Hirsch of Miami, Richard Sindel of St. Louis and Burt Shostak. As always, the discussion was lively and informative.

Our thanks, once again, to Cecil Caulkins, Education Director of The Missouri Bar, and his staff for their assistance, expertise and support as co-sponsors of MACDL's seminars. We are also very grateful for the time and energy invested in MACDL's spring CLE program by the fine local and national attorneys who participated in the seminar.

Dates and locations of MACDL's fall CLE programs are being finalized, and will be available soon. Meanwhile, J.R. Hobbs (816/221-0080) or I (816/373-5590) would welcome your comments on past seminars and your input for future ones.

Larry Schaffer has ably co-chaired MACDL's CLE Committee with J.R. Hobbs for several years. We are grateful that he and J.R. will continue serving in this capacity for the coming year.

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THE DIFFERENCE BETWEEN 'LOOK' AND 'SEARCH'

by Dee Wampler

As the war on drugs intensifies, more and more police officers are investigating drug cases, stopping vehicles, confronting pedestrians, plane, train and bus passengers, and conducting searches for illegal drugs.

In 1987, the Court first considered the novel question of a state trooper who asked for permission to "look" into a van. He looked, but also reached in, pulled out and opened a knapsack in which he found marijuana. The Court had little trouble finding the so-called "consent to look" was not a free, intelligent, voluntary consent to "search". The Court

suppressed the marijuana in State v. Lorenzo, 743 S.W. 2d 529 (Mo.App. 1987).

Two 1992 cases cast doubt on whether Lorenzo is still good law. In State v. Hyland, 840 S.W.2d 219 (Mo.banc 1992), a Missouri Highway Patrolman stopped a vehicle for speeding. He noticed the driver was nervous and saw no personal belongings in the car. After limited questioning, he decided the driver's travel plans were unusual. He asked permission to look inside a suitcase sealed with duct tape. The driver removed the tape and opened the case, revealing articles of clothing. The trooper stuck his hand under the clothes and found a brick of "vegetable matter" wrapped in cellophane. He arrested Hyland for possession of marijuana.

The Court allowed the search, reasoning the consent was "commensurate in scope with the permission given." Hyland protested his "consent to look" did not mean "consent to search" and inspect the contents. The Court considered "objective reasonableness" -- what would the typical reasonable person have understood by the exchange between the officer and the suspect? [Florida v. Jimeno, ___U.S.___, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 (1991)].

In State v. Howard, 840 S.W.2d 250 (Mo.App. 1992), officers obtained permission to enter a motel room and noticed a large number of cotton balls on the top of a dresser and a nearby gym bag. They asked permission to "look" into the bag. Although the opinion is not clear on exactly what was said, the Court held the officer placed no restriction on the search nor the purpose of the search. He made it clear he was looking for drugs, since cotton balls are frequently used when smoking crack cocaine. The Court approved the search.

Cases from other jurisdictions should be considered. In People v. Thiret, 685 P.2d 193 (Co. 1984), police asked if the defendant minded if they "looked around the house". When they proceeded with a full-scale search, it was suppressed. In U.S. v. McBean, 861 F.2d 1570 (11th Cir. 1986), when a trooper asked, "Do you mind if I look in the car?", the Court held this "cannot be read as requiring that one must voice objection to prevent or limit a search to which he never acquiesced in the first place" and disallowed the search. But in U.S. v. Shaidez, 906 F.2d 377 (8th Cir. 1990) and U.S. v. Matia, 841 F.2d 837 (8th Cir. 1968), the Court said the words "look through" were vague and it was incumbent on the accused to voice an objection.

In the leading case, U.S. v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971), police asked for permission to "look", but actually wanted a general exploratory search. The Court suppressed the search, stating a consent search is reasonable only if "kept within the bounds of the actual consent." [Quoting Honig v. U.S., 208 F.2d 215 (8th Cir. 1953).] Any claimed "consent" must be given knowingly, intelligently and voluntarily. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938); Bumper v. North Carolina, 391 U.S. 548, 88 S.Ct. 1788 (1968).

Dee Wampler, MACDL's Second Vice President, practices with Wampler Wampler & Catt in Springfield, and is a frequent contributor to the Action Report.

* * *

F.Y.I.

by Francie Hall

PUBLIC DEFENDERS & MACDL

At our annual meeting and seminar in St. Louis this past April, it was brought to my attention that many public defenders do not understand the relationship between MACDL and the Missouri Public Defender System. Because public defenders are able to attend MACDL seminars at no cost to themselves, many assume they are members of MACDL. This is not so. The Missouri Public Defender System and MACDL entered into a contract in 1986, renewed annually, whereby the P.D. System pays a yearly fee to MACDL. In return, MACDL

guarantees to provide each Missouri public defender with the opportunity to accrue at least the fifteen hours of continuing legal education required by Supreme Court Rules. The P.D. System pays MACDL to provide CLE for its attorneys -- assuming they attend the programs MACDL sponsors in conjunction with the Missouri Bar. However, public defenders are not automatically members of MACDL. MACDL does have special, and very reasonable, dues categories for public defenders: $50.00 per year for heads of offices, $25.00 for assistant P.D.'s. For that nominal sum, P.D.'s receive our quarterly newsletter and our soon-to-be-published membership directory. Should the need arise (heaven forbid), they can call upon assistance from MACDL's Strike Force, comprised of past presidents of this organization.

NACDL & MACDL

MACDL is one of sixty-seven affiliates of the National Association of Criminal Defense Lawyers; our relationship with NACDL assists us greatly in bringing you seminar presenters of the caliber of Nancy Hollander, current President of NACDL, Cynthia Lobo, Milton Hirsch, E.X. Martin and Tony Axam, to name the speakers who most recently flew to Missouri, for expenses only, to share their expertise. Dues paid by public and private defenders alike contribute to the support of such MACDL activities as maintaining a day-to-day presence and awareness in Jefferson City through the services of our lobbyist, Randy Scheer, and Dan Viets, chair of MACDL's Legislative Committee.

MACDL'S PAC

A separate MACDL PAC fund makes contributions to candidates for state offices. In fact, our registration form (see inside back cover) now includes an option for a voluntary donation to the PAC at the time you join or renew your membership. We do make a difference. I invite you to join MACDL, and encourage you to do so now.

If you have further questions, feel free to contact Jay DeHardt, MACDL President (816/531-0509), any officer, board member or past president (see inside front cover), or me (816/274-6800).

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Next Meeting of MACDL Board of Directors: Friday, August 6, 1993, 4:00 p.m., 903 E. Ash, Columbia, Missouri.

* *

Francie Hall has been employed part-time as MACDL's Executive Secretary since 1986. In her day job, she works for Spike Lynch at Blackwell Sanders Matheny Weary & Lombardi in Kansas City.

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NEW MEMBERS & MEMBERSHIP RENEWALS

Delores Berman, St. Louis - *Public Defender*
Pat Berrigan, Kansas City - *Public Defender*
Steven Dioneda, St. Louis
Garry L. Helm - *Presiding Judge, Independence Municipal Court*
Kevin Locke, Kansas City
Arthur S. Margulis, St. Louis
William S. Margulis, St. Louis
Nancy Lebrecht Martin, Joplin - *Public Defender*
Joseph Locascio, Kansas City
Cheryl Rafert, Webster Groves - *Public Defender*
J. Reuben Rigel, St. Louis - *Public Defender*
Rick Steinman, St. Charles - *Assistant Professor, Lindenwood College Criminal Justice Dept.*
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