MACDL
Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

WINTER 1993-1994 **Vol. VI, NO. 1**

PRESIDENT'S LETTER

We truly live in strange times. The practice of criminal defense now includes midwifes, gladiators and two-week media-driven sentencing hearings. The encouraging news is that talented people are still doing good work and getting good results.

Congress is at it again. In September, Senators Biden and Brooks introduced omnibus crime legislation which will significantly impact the habeas corpus statute. I urge each of you reflect on the principles involved, and then to write to the *right honorables,* and also to your local representatives. Stress that a viable habeas corpus remedy and even a moderate/conservative approach to reform need not be mutually exclusive. Remind them that the **"Great Writ"** was never intended to provide an imprimatur of legitimacy for under-funded, ill-prepared or unqualified capital defense. Tell them of your own individual experiences with the quality of review of your clients' claims of actual innocence since Herrera. **Do it now.**

We owe a continuing debt of thanks to one of our founding members, Larry Fleming. In conjunction with our Fall CLE programs, Larry obtained permission from **NACDL** for us to reproduce their excellent "forfeiture" materials for distribution to our members. If you were unable to attend one of the fall seminars, contact Francie Hall to obtain these materials for a nominal charge. I am reminded weekly that we are making a difference. We receive invitations from virtually all current and hopeful elected Missouri officials and representatives. This means our ***MACDL*** **PAC** and our contributions do not go unnoticed. Your next statement for ***MACDL*** membership dues *[see p. 27 for **MACDL** membership application]* will include a request for voluntary contributions to our **PAC** fund. Make it a point to make a contribution this year.

Dan Viets, legislative chair, Randy Scherr, our lobbyist, and your Legislative Committee do a great job of identifying those candidates and office-holders who support our organization's positions.

We also receive numerous requests for amicus assistance on topics ranging from attorneys' fees in federal habeas corpus appointments to the timing of administrative assessment of points and the resulting suspension and/or revocation "overkill" by the Department of Revenue. Call me; ***MACDL*** can put you in touch with one of our members who can help.

At times, what we do seems like one long exercise of trying to find enough fingers to fill the holes in the dike. Keep plugging.

Best personal regards,

Jay D. DeHardt, President

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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.

(Submitted by Larry Schaffer; in use in Jackson County)

DRUG C.O.U.R.T. DIVERSION

INITIAL ELIGIBILITY DETERMINATION

Accused: _____ DOB: _____ SSN: _____

Charges: _____

STEP ONE

(Presumptive Qualifying Characteristics - Considerations for Eligibility)

Check Applicable Boxes

☐ An individual charged with any of the following offenses is presumed to be a drug user:
- Sale of Controlled Substance (see reverse side for disqualifying amounts)
- Possession or Attempt to Possess a Controlled Substance
- Fraudulent Prescriptions
- Possession of Narcotic Paraphernalia
- Prostitution

☐ The individual states to the police that he/she is a drug user

☐ The individual admits to bond investigator that he/she has used drugs within past 90 days

☐ The individual's family, friends, attorney, etc. state that he/she is a drug user

☐ The individual tests positive for drug use at time of arrest or while under bond supervision

☐ The individual has been convicted during the past two years of any of the offenses listed above

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STEP TWO

((Disqualifying Characteristics)

Any Box Checked Below Disqualifies the Individual for Diversion

☐ The individual is charged with a violent offense, crime against a person, or displayed weapon during the offense.

☐ The individual is charged with three or more felony counts (unless he/she has three or more provisional qualifying characteristics)

☐ The individual is currently under federal, state or county probation or parole supervision, and the present offense has occurred since the supervision was granted (unless the individual otherwise qualifies and the other authority [judge or parole board] specifically approves participation)

☐ The individual has a prior conviction for Murder First Degree, Murder Second Degree or Voluntary Manslaughter

☐ The individual has a prior conviction for a sexual offense

☐ The individual has been convicted of any one of the following offenses: Involuntary Manslaughter[1]; Robbery First Degree[1]; Armed Criminal Action[1]; Assault (over two if misdemeanor)[1]; Weapons Offenses (over two if misdemeanor)[1]

☐ The individual has two or more prior felony convictions (unless all are over five years old and then he/she must have three or more qualifying characteristics)

☐ ELIGIBLE FOR CONSIDERATION ☐ INELIGIBLE FOR DIVERSION

Diversion Acceptance Subject to Results of Assessment

Date: _____ Reviewer: _____

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[1]Unless defendant has been out of custody and crime-free for at least five years and has three or more qualifying characteristics.

SALE OF CONTROLLED SUBSTANCE

Individuals are presumed disqualified from Pretrial Diversion (The Drug Court) if the amount of drugs sold (per transaction) exceeds the amounts set out herein:

Substance	Equal or Less Than	Within Limits
Marijuana[2]	1/2 ounce	☐
Methamphetamine[2]	1 gram	☐
Cocaine Hydrochloride[2]	1 gram	☐
Cocaine Base[2]	1 gram	☐
LSD[2]	5 hits	☐
PCP	No Sale Amounts	☐
Heroin	No Sale Amounts	☐
Pure Methamphetamine (ICE)	No Sale Amounts	☐
Psilocybin[2]	1/2 ounce	☐
Miscellaneous Pills[2]:		
Dilaudid	2 Tablets	☐
Ritalin	2 Tablets	☐
Talwin	2 Tablets	☐
Ecstasy	2 Tablets	☐
Percodan	2 Tablets	☐
Valium	10 5-grain or 5 10-grain	☐

[2]Guns: Used, displayed or on or about his/her immediate person or control disqualifies the individual from pretrial diversion regardless of the amount of drug sold.

SAMPLE PLEADING: SUPPRESSION OF MAIL SEARCH

[Submitted for publication by Dee Wampler; prepared, with Dee's assistance, by David Nick of San Francisco.]

UNITED STATES DISTRICT COURT

U.S.A.,	)	
Plaintiff,	)	
v.	)	Case No. ____
	)	
JOHN S.,	)	
Defendant	)	

MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
MOTION TO SUPPRESS

Defendant, through counsel, submits this memorandum of points and authorities in support of his motion to suppress evidence obtained illegally on or about January 22, 1992, in violation of the Fourth Amendment to the Constitution of the United States and pursuant to 39 U.S.C., §3622.

Statement of Facts

Defendant is a 21-year-old youth. He has one prior misdemeanor conviction for possession of marijuana, for which he served one year of court probation.

The instant charges arise out of an alleged distribution of $2,000 worth of LSD, for which defendant faces a minimum mandatory sentence of 10 years.

On or about January 19, 1992, the Confidential Informant ("CI") in this case was contacted by Mr. S. During the course of the conversation, Mr. S. was asked whether he would be able to furnish the CI with an amount of LSD for $2,000. Mr. S. agreed to do so if the CI sent money and provided an address to which the LSD could be safely sent to the CI.

Consequently, $2,000 and instructions in the CI's handwriting arrived at Mr. S.'s address. Unbeknownst to Mr. S., the note and cash had been sent under instructions of and by the DEA. In fact, the post office box to which the drugs were to be sent had been opened by the DEA for the express purpose of intercepting packages sent there.

Mr. S. sent the package to the CI at the stated post office box in a first-class envelope.

When the package arrived, rather than taking it to the CI as agreed to by Mr. S., or obtaining a warrant to have it opened, the DEA officers themselves opened the package. This was done before the package was even verified by the CI as the one intended for him. There is no evidence that the CI ever gave permission for the DEA to open his package or to conduct an exploratory search of the contents of the package. For that matter, there was no consent by the CI to submit the contents to further searches by fingerprint or chemical analysis.

Once opened, the package revealed newspapers wrapped around an inner package. Removal of the newspapers revealed an inner plastic-sealed package, containing folder dividers. The officers then opened the plastic-sealed dividers and looked between them. Inside the dividers they found innocuous-looking sheets of paper. The paper was sent to a lab for testing. LSD was found. The surrounding newspapers were likewise sent to the lab to be tested for fingerprints. Mr. S.'s fingerprints were found.

All the above was done in the absence of a warrant or any stated exigency excusing the lack of a warrant. Also, there is no evidence of consent, by either Mr. S. or the CI, to open the package.

Argument

I.

All Searches of First-Class Mail Must be Pursuant to a Warrant.

The Fourth Amendment to the United States Constitution guarantees that people shall be secure in their effects from unlawful searches and seizures. Likewise, 39 U.S.C., §3626 provides that first-class packages shall not be opened by the government except by warrant. This statute states:

> No [first-class] letter shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service

for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee.

There are four exceptions to this warrant requirement, none of which exist here. [Cite 43 C.F.R. 14308-15. See also Searches and Seizures Arrests and Confessions, William E. Ringel. Vol. I, p. 19-13 (1987).] In fact, in Walter v. U.S., 447 U.S. 649, 655 fn 5 (1979), the Supreme Court noted that "letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." See also Ex part Jackson, 96 U.S. 727 (1878), strictly requiring a warrant to search any first-class letter or parcel. The constitutional guarantee of the right of the people to be secure in their papers against unreasonable searches and seizures thus extends to their packages closed against inspection, wherever they may be.

In the case at hand, the package was mailed first-class to the CI. The package never reached the CI due to the DEA's interception of it. No exigency existed which would have prevented the officers from obtaining a warrant. In fact, it is clear from the reports of the case that the officers knew in advance the package was forthcoming. Therefore, under the Fourth Amendment as well as 39 U.S.C., §3626, the search of the package was illegal and all evidence obtained therefrom must be suppressed. U.S. v. Leeuwen, 397 U.S. 249 (1970).

II.

No Consent to Search the Package Was Given.

It is counsel's understanding from conversations with the prosecutor in this case that the government will argue that consent for the search of the package was given. However, it is clear from the police report that consent to search the package was not given, and even if it had been, the scope of the consent was clearly exceeded.

The mere fact that a government agent may lawfully be in possession of a package does not give him authority to search its contents. In Walter v. U.S., 447 U.S. at 654, the Supreme Court held that where "there was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances", evidence gained from a package had to be suppressed. In Walter, a package was mistakenly sent to "L'Eggs Products, Inc." rather than its intended recipient, "Leggs, Inc." The package contained films depicting obscene materials. Employees of the recipient company opened the package, found a box of film with pictures and explicit descriptions of the film's contents. One employee even attempted to view the content of the film by holding it up to the light. The recipient company turned the package over to the FBI. Thereafter, without making any effort to obtain a warrant or to communicate with the consignor or the consignee of the shipment, FBI agents viewed the films.

In recognizing that a sealed package sent via the mail cannot be opened without a warrant, the court recognized that an officer's authority to possess a package is distinct from his authority to examine its contents. The agents had authority to be in possession of the already opened package and films because a private party opened it first and handed them over. However, viewing the films with a projector was a further government search of the package, and was without a warrant. The fact that the package was unexpectedly opened by a third party before the shipment was delivered to its intended consignee does not alter the consignor's legitimate expectation of privacy against further searches by the government.

The facts in the case at hand are markedly similar. The agents opened the package immediately upon its arrival at the post office box. The package was never taken to the CI to corroborate that it was in fact the package he expected, or to obtain his permission to open and search it. No warrant was sought. Therefore, under Walter, the search was illegal and the package and its contents must be suppressed.

III.

The Scope of Any Possible Consent Was Exceeded.

Even had the CI consented to the package being seized by the agents, the scope of that general consent was clearly exceeded. This consent, if present, encompassed merely seizing the package; anything outside that clearly exceeded the scope of his consent. "Since the sole authority to search after the person has given consent derives from the consent itself, the scope of the search must be limited strictly to the terms of the consent." Searches and Seizures, William E. Ringel (1987), Vol. 1, §9.4. See also U.S. v. White, 706 F.2d 806 (7th Cir. 1983); U.S. v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971).

In the case at hand, even assuming, *arguendo*, that consent to seize the package was given, any opening clearly exceeded that consent. Nevertheless, the agents subjected the package to further searches. When it was first opened (the first search), newspapers were found. Rather than stop there and wait for further consent or a warrant, the agents opened the newspapers to reveal a sealed plastic package (the second search). They then opened the sealed inner package to reveal notebook dividers with sheets of paper in between (a third search). The agents then sent these sheets of paper to a lab for analysis (the fourth search). They also sent the newspapers to the lab for fingerprint analysis (a fifth search).

Regardless of any lack of exigency at any time, the officers never attempted to gain consent from the CI, or from Mr. S., and never applied for a warrant. Even assuming that a consent to seize was asked of the CI, the scope of that consent was clearly exceeded by the first, second, third, fourth and fifth searches. Any evidence, or fruits, of those searches must be suppressed.

Conclusion

The agents in the case unlawfully seized, opened and searched a first-class parcel without a warrant. No consent to do so was given by either the sender or intended receiver. All evidence derived from the parcel must therefore be suppressed.

How to Avoid Going Broke on Federal Appointments

by Edward A. Mallett

There is universal agreement that Criminal Justice Act compensation, at the rate of $40 per hour out-of-court and $60 per hour in-court to a maximum of $3,500 is grossly inadequate, unless the defendant wants to plead guilty on the first court appearance.

In this era of prosecutions arising from failed savings institutions, the appointed counsel is increasingly confronted with a mountain of paper, collected by the government under the guise of grand jury subpoenas and indiscriminately designated "relevant." Likewise, in narcotics and other wiretap cases, there are often hundreds of recorded conversations and a truckload of transcripts. Discovery is based on Federal Rule 16(a)(1)(C), which lets the defendant have access to business records in the government's possession "... which are material to the preparation of the defendant's defense ... or were obtained from or belonged to the defendant." However, in my experience, prosecutors assume we won't look at all the documents, or make time for a single, complete listening to the tapes and a proofreading of the transcripts. They glibly offer to schedule a few hours in the document room, or send one of the many defense lawyers a box of cassettes, confident we'll be overwhelmed and unable to cope.

The problem facing court-appointed counsel is how to access and use that mountain of information without going broke. There is often a good defense buried within, but the economic reality is that it costs more than $40 an hour to operate a law office. Thus, court-appointed counsel is threatened with financial ruin, and when a court agrees to waive the limit on pretrial hours, without raising the

hourly rate, the threatened deficit gets worse. A solution is provided by the court's power under 18 U.S.C. §3006(A)(e) to reimburse counsel who have secured "... other services necessary for adequate representation." All labor but the attorney's time is, in theory, compensable separately, and there is no statutory limit on the hourly rate for the non-lawyer employees.

The statute requires advance authorization. In other words, counsel must have authorization to employ these services before they are utilized, and counsel must have received assurance that the court will pay counsel for obtaining other services before the services are provided. On the plus side, the statute also says that requests for approved extraordinary services should be filed in an *ex parte* application.

Unlike the express statutory caps on attorney fees, the statute places no particular value on such "other services necessary for adequate representation." Therefore, when confronted by a massive volume of "relevant" evidence, counsel should request advance authorization, and employ whatever services are indicated by the facts. The words "investigator" and "paralegal services" are as good as any reach the financial resources needed to allow what the government collected as "relevant evidence" to be examined, indexed, organized and evaluated by competent paralegal and professional personnel, employed by the defense attorney.

The attached motions are intended to allow court-appointed counsel to work with confidence that, at the conclusion of the case, the $3,500 limit for attorney time will be waived, and the court's assurance that counsel will be compensated for personnel providing "other services" at a specific preset rate. For example, if the services of one paralegal are required continuously throughout the trial, then the attorney will be able to recover at the rate of $85 per hour ($60 plus $25) where the paralegal services have a preset value of $25 hourly.

A jury trial is all-consuming, involving work both night and day. Ten hours at $85 per hour for a five-day week works out to a little better than $20,000 a month. You won't get rich that way, but you can stay in business.

As a final comment: In an extended trial, such as the seven-month Interstate 30 Bank Fraud trial in Lubbock, counsel may obtain approval for interim payments so that, during each month of an extended trial, government checks will be forwarded for the previous month's attorney and paralegal time.

The following forms for motions and orders are based on relief recently granted in the Soutern District of Texas. I would appreciate knowing of any other methods which have been successful at expanding compensation for court-appointed lawyers.

* * *

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

U.S.A.)
vs.) Case No. ____
_____)

EX PARTE MOTION FOR WAIVER OF
MAXIMUM AMOUNT OF COMPENSATION

TO THE HONORABLE JUDGE OF SAID COURT:

INTO COURT comes the undersigned, court-appointed counsel, asking that this Court find that this case involves extended and complex representation, so that counsel may reasonably expect compensation in excess of the $3,500 limit provided by 18 U.S.C. §3006A(d)(2). As grounds:

I.

Counsel asks the Court to take judicial notice of the records of this case. This defendant is charged in ___ counts and, if convicted of all counts, is exposed to incarceration for ___ years and fines of $___.

II.

Potential witnesses are outside this District in places such as ___.

III.

The government has tendered to defendant documents the government expects to use at trial, and the box contains approximately 4,000 separate documents. There are about 29 additional boxes held by the government as "relevant" to the case. Government officials have been quoted in news reports as stating that this prosecution involves one of its significant federal criminal savings and loan investigations.

IV. (Alternate)

The government has tendered to defendant over 100 cassette tapes, each containing up to sixty minutes per side. All the conversations appear to be in Spanish. The government promises to create English language translations of selected conversations. Those transcripts must be proofread for accuracy by the defense, and some may be transcribed by the staff which the defense must employ to prepare the case.

V.

Counsel is a solo practitioner with a spouse, infant son, mortgage, two automobiles and the professional costss incident to his practice. His average personal and professional expenses exceed $____ per month. Any qualified lawyer the Court could appoint would likely have the same or similar burdens.

WHEREFORE, considering the foregoing, counsel believes he is entitled to a pretrial finding that this is extended and complex litigation so that he may reasonably anticipate receiving compensation exceeding $3,500 at the conclusion of the case, in an amount to be determined by the Court.

* * * * * * * * * * *

MACDL'S ANNUAL MEETING & SEMINAR WILL BE HELD APRIL 22-23, 1994 AT THE RITZ-CARLTON IN KANSAS CITY. DETAILS FORTHCOMING.

* * * * * * * * * * *

U.S.A.)
vs.) Case No._____
_____)

ORDER

On this day came on to be heard Ex Parte Motion for Waiver of Maximum Amount of Compensation, and the Court having considered the same, hereby waives the statutory maximum attorney fees allowed by 18 U.S.C. §3006A(d)(2). Counsel will submit an application for fees and expenses, supported by a memorandum, at the conclusion of his involvement in the case.

U.S. DISTRICT JUDGE

* * *

U.S.A.)
vs.) Case No. _____
_____)

EX PARTE MOTION FOR
PARALEGAL SERVICES

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Court-appointed counsel for defendant, filing this Ex Parte Motion for Approval of Paralegal Services pursuant to 18 U.S.C. §3006(A)(e), and in support thereof would show the Court the following:

I.

The defendant is charged in ___ counts in this indictment. If convicted of all felonies, the defendant is subject to a maximum penalty of ___ years incarceration and $___ in fines.

II.

The counts allege conspiracies, and that the defendant, as a principal, was aiding and abetting co-defendants, committing various bank fraud and related offenses. These allegations involve many witnesses and many thousands of documents. Defendant needs the services of a paralegal to review, summarize and organize documents in an orderly manner,

to prepare for trial and to be prepared to assist the presentation of an efficient trial.

III.

The government claims that the relevant evidence is found within 30 file boxes. The government has released one box from the total, containing proposed trial exhibits, but maintains the remainder are relevant.

IV.

The defendant does not have the funds himself with which to hire a paralegal, and these are clearly "services other than counsel," and are provided for by 18 U.S.C. §3006A(e). The defendant's court-appointed attorney requires the assistance of a paralegal in order to insure that the defendant receives effective assistance of counsel and a fair trial.

V.

The paralegal work may also support the court-appointed counsel for co-defendant and the Assistant Public Defender, to the extent possible without exacerbating the conflicts latent in this multi-defendant case.

VI.

The defendant requests that the Court authorize the defendant to hire the services of a paralegal and requests advance authorization to seek reimbursement for paralegal expenses at a rate of $25 per hour both out-of-court and, if necessary, in-court. Because this will be extended and complex litigation, defendant asks for prior authorization to spend in excess of $1,000 for paralegal assistance. The claim will be submitted for approval, supported by a memorandum, at the conclusion of the case.

WHEREFORE, the defendant respectfully asks that this motion be granted.

* * *

U.S.A.)
vs.) Case No. _____
_____)

ORDER

On this day came on to be heard Ex Parte Motion for Paralegal Services, and the Court having considered the same, hereby GRANTS counsel permission to employ paralegal services and to seek compensation at the rate of $25 per hour. The statutory maximum of $1,000 under 18 U.S.C. §3006A(e) is waived. Counsel will submit an application, supported by a memorandum, at the conclusion of his involvement in this case.

U.S. DISTRICT JUDGE

* * *

MISSOURI CASE LAW UPDATE

by Sean O'Brien

AGGRAVATING CIRCUMSTANCES - INVALID PRIOR CONVICTIONS

State v. Griffin, 848 S.W.2d 464 (Mo. 1993) - Manifest injustice necessitated a new sentencing hearing after the record of conviction for another Reginald Griffin was admitted during the sentencing stage of the trial. The court stated, "it is also likely that the admission of an incorrect criminal record of a defendant in the penalty phase of a capital crime is not harmless error." [Emphasis added.]

ARMED CRIMINAL ACTION

State v. Pogue, 851 S.W.2d 702 (Mo. App. 1993) -
Pogue was convicted of involuntary manslaughter and armed criminal action arising from a traffic fatality. His armed criminal conviction was based upon his alleged use of his automobile as a "dangerous instrument." The ACA conviction was reversed because, in order for an automobile to become a dangerous instrument, the operator must possess an intent and motive for the automobile to be an instrument of harm. "Mere recklessness in the operation of an automobile does not give rise to armed criminal action."

CONFRONTATION

State v. Sanders, 842 S.W.2d 170 (Mo. App. E.D. 1992)

The defendant was entitled to a new trial after the trial court erred in upholding an accomplice's invocation of the Fifth Amendment privilege against self-incrimination. The accomplice's voluntary and knowing guilty plea waived protection against compulsory process.

EVIDENCE - PRIOR CRIMES

State v. Bernard, 849 S.W.2d 10 (Mo. banc 1993)
Bernard's conviction was reversed because of the admission of testimony regarding prior sexual abuse committed by him, but with which he was never charged. In a lengthy discussion, the court adopted a new exception to the general rule that evidence of other crimes of the defendant is inadmissible. Evidence of other crimes will be admitted if "the charged and uncharged crimes [are] nearly identical and their methodology so unusual and distinctive that they resemble a signature of the defendant's involvement in both crimes." At 17. (But see, Robertson, Thomas and Limbaugh, concurring in part).

State v. Creason, 847 S.W.2d 482 (Mo. App. 1993)
It was improper for the trial court to permit the prosecutor to cross-examine defendant's character witness regarding a charge of sexually molesting his daughter 20-25 years earlier or physically abusing his son 20 years earlier. Questions regarding these incidents "transcended the limits of cross-examination of defendant's character witnesses." At 488.

HOMICIDE - DEATH OF FETUS

State v. Knapp, 843 S.W.2d 345 (Mo. banc 1993)
The Missouri Supreme Court determined that causing the death of an unborn child is causing the death of a "person" within the meaning of involuntary manslaughter. Because both statutes were passed the same day and in the same act, the court found that Section 1.205(2) RSMo 1986, which extends to the unborn child all rights available to "other persons," was clearly intended to apply to Section 565.024, the involuntary manslaughter statute. However, the court limited its holding and did not decide whether Section 1.205 applies to other statutes.

INDICTMENT AND INFORMATION

State v. Collins, 849 S.W.2d 228 (Mo. App. 1993)
Collins was improperly charged and convicted of the felony of driving while intoxicated as a persistent offender because the charges upon which the state relied to enhance the crime were more than 10 years old. In remanding with directions to set aside the felony conviction and sentence Collins on the misdemeanor driving while intoxicated, the court said that it would not provide the state with "a second chance to try its case by allowing it look for and prove additional convictions." At 230.

JURY INSTRUCTIONS - BURDEN OF PROOF

State v. Ervin, 848 S.W.2d 476 (Mo. 1993)
The Missouri Supreme Court reversed and remanded the judgment of second degree murder after finding jury instruction patterned on MAI-CR3d 310.50 creates a reasonable likelihood that the jury would believe that if the defendant was intoxicated, he was criminally responsible regardless of his state of mind. Due Process is violated because the instruction relieved the state of its burden of proof as to the requisite mental state.

JURY INSTRUCTIONS - PENALTY PHASE - ACCOMPLICE LIABILITY

State v. Isa, 850 S.W.2d 876 (Mo. banc 1993)
After determining that jury instruction submitted during the sentencing stage of the trial impermissibly tied the defendant to her co-defendant, the court reversed the death sentence and remanded for a new penalty phase. In addition to confusing the jury because of technical errors, the instruction added language from a guilt phase instruction rather than tracking the language of the applicable instruction.

JURY INSTRUCTIONS - RANGE OF PUNISHMENT

State v. Shaw, 844 S.W.2d 20 (Mo. App. W.D. 1992)
After finding that it had misinstructed the jury as to the permissible maximum sentence, the trial court sentenced the defendant to the maximum authorized by statute at the time of the crime. On appeal, the court held that a new trial was required. The trial court did not have the power to impose sentence in disregard of the jury verdict.

JURY SELECTION - DISCRIMINATION

State v. Aziz, 844 S.W.2d 531 (Mo. App. 1992)
Where the trial court summarily denied defendant's Batson challenge without requiring the prosecutor to give race-neutral explanations for the challenges, the decision of the Missouri Supreme Court in State v. Parker, 836 S.W.2d 930, 937 (Mo. banc 1992), required that the case be remanded for a hearing under Batson v. Kentucky. Even though Aziz was tried before the decision in Parker, the court of appeals applied Parker retroactively because the state of the law prior to Parker was confusing. Also see, State v. Clayton, 849 S.W.2d 259 (Mo. App. E.D. 1993).

State v. Sanders, 842 S.W.2d 916 (Mo. App. E.D. 1992)
The trial court erred in not requiring the state to come forward with reasonably specific and race-neutral explanations for its strikes during the jury selection process. The case was remanded for a hearing to determine whether the state exercised its peremptory challenges in a discriminatory manner. See also State v. Ivy, 851 S.W.2d 71; State v. Christian, 847 S.W. 2d 179 (Mo. App. E.D. 1993); State v. Tate, 845 S.W. 2d 154 (Mo. App. E.D. 1993).

MOTION TO MANDATE - INEFFECTIVE ASSISTANCE OF APPELLANT COUNSEL

State v. Williams, 844 S.W.2d 564 (Mo. App. 1992)
After his conviction of possession of cocaine under § 195.020 RSMo 1986 (repealed 1989), Williams was found by the court to be a persistent offender under § 558.016.2 RSMo 1986, and was sentenced by the court to an enhanced range of punishment as a Class X offender, meaning that Williams would have to serve 80% of his sentence before becoming eligible for parole. During his appeal, the statute under which he was tried and convicted was repealed, and in its place the Legislature enacted § 195.202 RSMo (Supp. 1991), which classifies cocaine possession as a Class C felony. Under § 1.160 RSMo (1986), Williams was entitled to be sentenced within the reduced range of punishment under the new statute. Because appellate counsel's failure to raise the issue of Williams' entitlement to the benefit of the reduced punishment constituted ineffective assistance of counsel, the court recalled its mandate, vacated Williams' sentence, and remanded the case to the trial court for resentencing.

RULE 24.035

McCoo v. State, 844 S.W.2d 565 (Mo. App. 1992)
Although not briefed by either party, the court found manifest injustice and miscarriage of justice where a circuit court denies relief in a post-conviction proceeding on the ground that the motion was untimely, and the record contains no support whatever for that finding. [The motion court dismissed McCoo's motion because it was not filed within 90 days of his arrival at the Missouri Department of Corrections, but appellate counsel filed a motion to remand, attaching thereto documents which show that he was received at the Department of Corrections on March 28, 1990, which, if accurate, would have rendered his June 1, 1990 Rule 24.035 motion timely.]

RULE 24.035/29.15

Lewis v. State, 845 S.W.2d 137 (Mo. App. W.D. 1993)
After the petitioner timely filed his post-conviction motion with only one copy, the clerk returned it with instructions to submit the

required two copies. Even though petitioner returned the two copies after the 90 day filing period, the motion was considered timely. The proper date of filing is the initial delivery of the motion to the clerk's office.

RULE 29.15 - EVIDENTIARY HEARING

State v. Webber, 844 S.W.2d 579 (Mo. App. 1992)
Where defendant's Rule 29.15 motion alleged that trial counsel was ineffective for failing to obtain the most recent medical records of the victim, and further alleged that the victim was being treated for schizophrenia at the time of trial, he pled sufficient fact which, if true, could alter the outcome of the trial. The motion court erred in dismissing the Rule 29.15 motion without an evidentiary hearing.

SUFFICIENCY OF THE EVIDENCE

State v. Dossett, 851 S.W.2d 751 (Mo. App. 1993)
Dossett was convicted of resisting arrest because she failed to stop for a police officer who pursued her with siren and flashing red lights. Because the driver in this situation does not know whether or not the officer intends to make an arrest, as opposed to only a routine stop, it is impossible to satisfy the requirement of the statute that the defendant know that an officer is making an arrest.

* * *

FEDERAL CASE LAW UPDATE

by Elizabeth Unger Carlyle ©1993

APPELLATE PROCEDURE

Dobbs v. Zant, 113 S.Ct. 835 (1993) (Murder)
After the district court and court of appeals had ruled that the defendant received effective assistance of counsel without benefit of a transcript of the penalty phase of the trial, the petitioner located the transcript, which contradicted the evidence before the court. The Court of Appeals denied petitioner's motion to supplement the record, and affirmed the conviction and death sentence. The Supreme Court held that where the petitioner showed that the delay in discovery of the transcript was not attributable to him, the motion to supplement the record should have been granted.

El-Tabech v. Gunter, 991 F.2d 1422 (8th Cir, 1993)
Where the district court granted relief on plaintiff's §1983 claim, and directed the defendants to submit a remedial plan within 90 days, the court of appeals had no jurisdiction to review the order. Because the actual scope of the relief has not been defined, there is no final order.

CAPITAL PUNISHMENT

Johnson v. Texas, 113 S.Ct. 2658 (1993) (Capital murder)
Texas's special issue structure requiring a finding on future dangerousness allows adequate consideration of the defendant's youth, and no special issue or instruction on that factor is required. Conviction and death sentence *affirmed*.

CIVIL RIGHTS LITIGATION

Cole v. Nebraska State Board of Parole, 997 F.2d 442 (8th Cir. 1993)
The plaintiff's allegation that he was wrongfully arrested without a warrant for a parole violation in violation of state law stated a cause of action under 42 U.S.C. §1983 against the officer who arrested him, and dismissal of this claim was improper.

Loggins v. Delo, No. 92-3406, 1993 WL 267369 (8th Cir. July 21, 1993)
Discipline of a prisoner for writing unflattering things about a prison official in an outgoing letter was improper. The letter did not threaten prison security. Where the plaintiff recovered on $102.50 in damages, an attorney's fee of $25,000 was proper. It was reduced from counsel's requested $35,000 because there was only partial success. Nonetheless, it was proper under Farrar v. Hobby because the

defendant did recover actual damages and injunctive relief, rather than nominal damages.

Hall v. Lombardi, 996 F.2d 954 (8th Cir. 1993)
Qualified immunity was properly denied to prison officials where the inmate plaintiff claimed that he had spent sixteen months in restrictive custody at times when he had been approved for release into a less restrictive status. The law requiring release was clearly established, and this fact precluded qualified immunity. Further, where there was some suggestion that supervising officials should have known of the problem, a factual issue precluding summary judgment exists.

Arnott v. Mataya, 995 F.2d 121 (8th Cir. May 28, 1993)
Denial of summary judgment on the ground of qualified immunity was proper in this civil rights case where factual issues existed as to the plaintiff's conduct. Under such circumstances, the issue of qualified immunity cannot be determined as a matter of law. Similarly, where the facts constituting probable cause for arrest are disputed, the question of probable cause is a jury issue which may not be determined on summary judgment.

El-Tabech v. Gunter, 992 F.2d 183 (8th Cir, April 30, 1993)
Where the district court granted relief on plaintiff's §1983 claim, and directed the defendants to submit a remedial plan within 90 days, the court of appeals had no jurisdiction to review the order. Because the actual scope of the relief has not been defined, there is no final order.

Foulks v. Cole County, Missouri, 991 F.2d 454 (8th Cir. 1993)
The district court's denial of qualified immunity from §1983 liability was affirmed. The plaintiff alleged that her son had been denied adequate monitoring and medical care following a head injury before his arrest. The allegations that the son had symptoms which had been ignored until his condition became so serious that it required surgery raise factual issues as to whether the defendants deliberately failed to care for the son. The defendants failed to establish the objective reasonableness of their actions in light of clearly established law.

COMPETENCY TO STAND TRIAL

Godinez v. Moran, 113 S.Ct. 2680 (1993) (Murder)
The competency standard for pleading guilty is the same as that for proceeding to trial: Whether the defendant has a rational understanding of the proceedings. No higher standard is required for waiver of the right to trial. Conviction and sentence *affirmed*.

DOUBLE JEOPARDY

United States v. Dixon, 113 S.Ct. 2849 (1993)
Using the "same elements" test of Blockburger v. United States, 284 U.S. 299, 304 (1932), subsequent prosecution of the defendant for a drug offense after he had been held in contempt for violating a court order that he commit no offense was barred by the Double Jeopardy Clause. However, subsequent prosecutions for assaultive offenses which had different elements than the violation of the court order offense were not barred. The additional "same conduct" standard of Grady v. Corbin is overruled.

United States v. Lester, 992 F.2d 174 (8th Cir 1993)
The defendant has no right to a dismissal because an indictment violates the Justice Department's Petite policy. While the government may have a right to a dismissal under Petite, the defendant does not.

EVIDENCE

United States v. Alonzo, 991 F.2d 1422 (8th Cir. 1993)
Post-arrest statements to officers were not admissible as co-conspirator statements because they were not made in furtherance of the conspiracy. The government's argument under FED. R. EVID. 801(c) that the statements were not offered for truth but rather to explain the subsequent actions of the agents has some merit, but this could have been accomplished without the use of the hearsay statements and

the court should have required this. Because one of the statements was crucial to the government's case, the error was not harmless and reversal was required.

United States v. Whitted, 994 F.2d 444 (8th Cir. 1993)
Reversible error occurred when a physician was permitted to testify to his opinion that a person he examined had been sexually abused. The person had also admitted consensual sexual activity to the doctor. Therefore, the diagnosis was based not on medical evidence but on the doctor's belief that the complainant was telling the truth, which is inadmissible. Although the defendant failed to preserve error, the court found plain error under Fed. R. Crim. Pro. 52(b) because the case against the defendant was not strong and hinged on the credibility of the victim.

Hoversten v. Iowa, No. 92-2402, 1993 WL 255968 (8th Cir. July 13, 1993)
Where the trial court made no case-specific findings that the use of a one-way mirror was necessary to protect the child witness, it was inappropriate for the habeas court to do so, and habeas relief was properly granted.

FEDERAL CRIMINAL PROCEDURE

United States v. Groene, No. 92-3235, 1993 WL 255543 (8th Cir. July 13, 1993)
The trial court's procedure in permitting jurors to ask oral questions of witnesses was affirmed. However, the court added, "We believe, however, that if juror questions are allowed, the trial court should carefully weigh using a procedure that requires these questions to be submitted in writing or out of the hearing of (and without discussion with) other jurors, since the practice employed here seems to us to carry serious risks of prejudice to the defendant and even, in a proper case, to the government." A downward departure was also reversed.

Neary v. United States, No. 92-2309, 1993 WL 239920 (8th Cir. July 6, 1993)
The defendant's waiver of the right to have the government file an information under 18 U.S.C. §851(a) prior to the entry of his plea of guilty in order to have him sentenced as a repeat offender was ineffective where it was not shown on the record that the waiver was knowing and voluntary, nor that the waiver was part of an unwritten plea agreement. This error may be remedied under 28 U.S.C. §2255 because trial counsel was ineffective in permitting the defendant to make the waiver and in failing to appeal the sentence. Further, the obstruction of justice enhancement may have been improper because the alleged false statements to the probation officer were not material, and an evidentiary hearing was required on the allegation that counsel was ineffective for failing to raise the issue on appeal. Finally, the cause was remanded for a determination as to why the Bureau of Prisons denied the defendant credit for a five-month period he spent in jail after he was sentenced on his state charges and before he received his federal sentence.

FIRST AMENDMENT

El Vocero de Puerto Rico v. Puerto Rico, 113 S.Ct. 2004 (1993) (preliminary hearing)
A territory's requirement of a private preliminary hearing, unless otherwise requested by the defendant, violates the First Amendment right to a free press. Closing of trials must take place on a case-by-case basis with a specific First Amendment analysis.

GENERAL SENTENCING ISSUES

Austin v. United States, 113 S.Ct. 2801 (1993)
The Eighth Amendment prohibition against excessive fines applies to civil forfeitures. Here, where the defendant was convicted of one count of possession with intent to distribute cocaine, remand was required to determine whether forfeiture of his home and business was excessive. The forfeitures are punitive in nature and are tied directly to criminal offenses. However, no criteria are given for determining excessiveness of the forfeiture.

Alexander v. United States, 113 S.Ct. 2766 (1993)
Under the Eighth Amendment, the court must consider whether forfeiture of the defendant's businesses and $9,000,000 in racketeering profits was an "excessive fine."

United States v. Abanatha, No. 92-2916 EA, 1993 WL 274038 (8th Cir. July 26, 1993)
The convictions and sentences in this case were affirmed. However, the inclusion in the Presentence Investigation Report of information which was given by one defendant under an agreement that it would not be used against her was improper: "We direct that this practice be stopped." Since the District Court did not consider the immunized information, there was no prejudice shown.

Logan v. Lockhart, 994 F.2d 1324 (8th Cir. 1993)
Where the defendant was serving a life sentence concurrent to the challenged sentence, but could become eligible for parole if he was given executive clemency, it was improper to refuse to review his convictions under the concurrent sentence doctrine.

United States v. Stoural, 990 F.2d 372 (8th Cir. 1993)
Where the defendant was convicted of conversion of collateral pledged to the FmHA, it was improper for the court to impose conditions of probation forbidding him to use or possess alcoholic beverages, to submit to and pay for alcohol testing, and to submit to warrantless searches and seizures for alcohol. These conditions were not reasonably related to the offense or to the defendant's history and characteristics, and were unreasonably burdensome deprivations of his liberty.

United States v. Vidrickson, No. 92-2512EA, 1993 WL 143358 (8th Cir. May 7, 1993)
Where the Presentence Investigation Report stated that the payment of a fine would be a hardship if the defendant were imprisoned, the district court should have made more specific inquiry and findings as to the value of the defendant's assets before assessing a $7,500 fine. Remanded for reconsideration of the amount of the fine.

HABEAS CORPUS

Dobbs v. Zant, 113 S.Ct. 835 (1993) (Murder)
After the district court and court of appeals had ruled that the defendant received effective assistance of counsel without benefit of a transcript of the penalty phase of the trial, the petitioner located the transcript, which contradicted the evidence before the court. The Court of Appeals denied petitioner's motion to supplement the record and affirmed the conviction and death sentence. The Supreme Court held that where the petitioner showed that the delay in discovery of the transcript was not attributable to him, the motion to supplement the record should have been granted.

United States v. Wilson, 997 F.2d 429 (8th Cir. 1993)
Although the defendant's claim that his supervised release term exceeded the maximum provided by law was procedurally defaulted, he was entitled to relief under 28 U.S.C. §2255. That section expressly authorized relief for sentences exceeding the legal maximum and to fail to grant relief would create manifest injustice.

Neary v. United States, No. 92-2309, 1993 WL 239920 (8th Cir. July 6, 1993)
The defendant's waiver of the right to have the government file an information under 18 U.S.C. §851(a) prior to the entry of his plea of guilty in order to have him sentenced as a repeat offender was ineffective where it was not shown on the record that the waiver was knowing and voluntary, nor that the waiver was part of an unwritten plea agreement. This error may be remedied under 28 U.S.C. §2255 because trial counsel was ineffective in permitting the defendant to make the waiver and in failing to appeal the sentence. Further, the obstruction of justice enhancement may have been improper because the alleged false statements to the probation officer were not material, and an evidentiary hearing was required on the allegation that counsel was

ineffective for failing to raise the issue on appeal. Finally, the cause was remanded for a determination as to why the Bureau of Prisons denied the defendant credit for a five month period he spent in jail after he was sentenced on his state charges and before he received his federal sentence.

Orndorff v. Lockhart, No. 91-3510, 1993 WL 258913 (8th Cir. July 15, 1993)
In determining harm where the state court has not applied the Chapman harmless error standard, the habeas corpus court should use the Chapman standard rather than the standard announced by the Supreme Court in Brecht v. Abrahamson. Here, the issue was whether the use of hypnotically enhanced testimony was harmless as to sentencing (the defendant received the death penalty). Where the case for imposition of the death penalty on the defendant Orndorff was the weakest in the case, and the variations between the pre- and post-hypnotic statements were most significant as to him, the court could not conclude beyond a reasonable doubt that the testimony did not contribute to the death sentence. Remanded for new sentencing proceeding or reduction of sentence to life without parole.

West v. United States, 994 F.2d 444 (8th Cir. 1993)
Where the movant alleged that he and his counsel did not have adequate time to examine and challenge the Presentence Investigation Report, and the government did not refute those claims, a question of fact as to effective assistance of counsel at sentencing precludes summary dismissal of the 28 U.S.C. §2255 motion.

Hoversten v. Iowa, No. 92-2402 (8th Cir. July 13, 1993)
Where the trial court made no case-specific findings that the use of a one-way mirror was necessary to protect the child witness, it was inappropriate for the habeas court to do so, and habeas relief was properly granted.

JURY INSTRUCTIONS

Sullivan v. Louisiana, 113 S.Ct. 2078 (1993) (Murder)
A constitutionally deficient reasonable doubt instruction requires reversal, and the error is not subject to harmless error analysis. This is because the error is in the verdict itself, and therefore an appellate court could not conclude that the jury verdict would have been the same.

NEW TRIAL

United States v. LaFuente, 991 F.2d 1406 (8th Cir. 1993)
The denial of a motion for new trial was reversed, and an evidentiary hearing was ordered, where the defendant's claim of newly discovered evidence that a witness had attended ex parte conferences in chambers without her attorney present constituted "a serious allegation concerning the district court" for which the government had offered no controverting affidavits. Other proposed new witness testimony should also be evaluated in an evidentiary hearing. The government's use of subpoenas to compel attendance at pretrial conferences and payment of witness fees for appearances at pretrial conferences was improper, and now that there is evidence of twelve such subpoenas and sixteen such payments in the record, the due process issue should be redetermined by the district court. Bagley issues, including whether the existence of material witness warrants and protective custody should have been disclosed, were also preserved.

SENTENCING GUIDELINES

United States v. Oppedahl, No. 92-3438, 1993 WL 246005 (8th Cir. July 9, 1993)
Denial of the obstruction of justice enhancement was proper where the only evidence supporting it was a statement by the defendant, before his arrest, that he would kill a customer if he "narked" on his supplier. Unbeknownst to the defendant, the customer and the defendant were under investigation at that time. Such statements, made without knowledge of the investigation, do not qualify

as "willful" obstruction of justice, under the rule of lenity.

Neary v. United States, No. 92-2309, 1993 WL 239920 (8th Cir. July 6, 1993)
The defendant's waiver of the right to have the government file an information under 18 U.S.C. §851(a) prior to the entry of his plea of guilty in order to have him sentenced as a repeat offender was ineffective where it was not shown on the record that the waiver was knowing and voluntary, nor that the waiver was part of an unwritten plea agreement. This error may be remedied under 28 U.S.C. §2255 because trial counsel was ineffective in permitting the defendant to make the waiver and in failing to appeal the sentence. Further, the obstruction of justice enhancement may have been improper because the alleged false statements to the probation officer were not material, and an evidentiary hearing was required on the allegation that counsel was ineffective for failing to raise the issue on appeal. Finally, the cause was remanded for a determination as to why the Bureau of Prisons denied the defendant credit for a five month period he spent in jail after he was sentenced on his state charges and before he received his federal sentence.

United States v. Marshall, No. 92-3398, 1993 WL 263420 (8th Cir. July 19, 1993)
The downward departure of the trial court is reversed but, in an extended dictum, the court outlines a possible challenge to the Sentencing Guidelines marijuana plant conversion ratio (1 plant = 1 kilo of marijuana) which the defendant might want to make on remand. The issue is whether this ratio is arbitrary and capricious, and the panel here believes the question is open in the Eighth Circuit.

United States v. Cornelius, No. 92-3720, 1993 WL 283346 (8th Cir. July 30, 1993)
In order to be sufficient under Boykin v. Alabama, a guilty plea proceeding must contain an express waiver of their right to confront witnesses, the right against self-incrimination, and the right to a jury trial. Where the transcript of the plea proceeding here did not contain such waivers, and the government failed to supply evidence of the waivers from other sources, the plea should not have been used to determine armed career criminal status under 18 U.S.C. §924(e)(1). Remanded for resentencing.

United States v. Garrido, 995 F.2d 808 (8th Cir. 1993)
Remand for resentencing was required where the trial court failed to make the necessary determination that drugs seized at the one defendant's house were in furtherance of the conspiracy and foreseeable to two defendants who were not present.

United States v. Ravoy, 994 F.2d 1332 (8th Cir. 1993)
The "vulnerable victim" (Sentencing Guidelines §3A1.1) enhancement was improper where the people victimized did not have any special vulnerability, such as handicap, age, youth or mental impairment. Further, it was error to impose consecutive terms of supervised release in excess of the statutory maximum.

United States v. Montanye, 996 F.2d 190 (8th Cir. 1993) reversed United States v. Montanye, No. 91-1703 (8th Cir. May 6, 1992), previously reported in this column.

United States v. Bell, 991 F.2d 1445 (8th Cir. 1993)
It was proper to use the Sentencing Guidelines in effect when the offense was committed, rather than those in effect when defendant was sentenced. Retroactive application of harsher guidelines than those in effect when the offense was committed violates the *ex post facto* clause. The case distinguishes the sentencing guidelines from the parole guidelines because the parole guidelines did not significantly restrict the parole commission's discretion, but the guidelines are far more mandatory.

United States v. Greene, 995 F.2d 793 (8th Cir. 1993)
Where the entry of a judgment of acquittal on one count of a multi-count indictment did not affect the guideline range, remand for resentencing was still required where the trial

court might have sentenced the defendant differently within the applicable range had the voided count not been considered.

United States v. Coleman, 990 F.2d 419 (8th Cir. 1993)
The case is remanded for specific factual findings by the district court as to why it attributed all of the marijuana found at a site which appellant visited only twice to him for sentencing purposes, and why the court denied a two-level reduction for minor participant status.

United States v. Ransom, 990 F.2d 1011 (8th Cir. April 5, 1993)
Where the district court relied on the defendant's alleged perjury before the grand jury in imposing the obstruction of justice enhancement, but the government did not present evidence to support the claim of perjury, remand was required for the government to attempt to prove specific instances of perjury. The court reiterated that challenged statements in the Presentence Investigation Report are not evidence.

United States v. Termini, 992 F.2d 879 (8th Cir. 1993)
In an aside at the end of the opinion, the court suggests that the district court revisit the issue of acceptance of responsibility in light of the provision allowing the adjustment where a defendant goes to trial to test "the applicability of a statute to his conduct." Sentencing Guidelines §3E1.1, Comment, n.2.

SUFFICIENCY OF EVIDENCE

United States v. Selwyn, No. 92-2800, 1993 WL 242119 (8th Cir. July 2, 1993)
Where the defendant, a postal maintenance worker, was indicted for the offense of embezzling mail, the evidence was insufficient in that the government did not show that he came into possession of the mail lawfully. Lawful possession is not created by mere access to the object taken.

United States v. Bear Stops, 997 F.2d 390 (8th Cir. July 6, 1993)
The trial court erred in severely limiting evidence that the complainant was molested by persons other than the defendant. This evidence was offered to rebut prosecution evidence that the complainant's behavior was consistent with sexual abuse. Further, it was improper to prohibit the defense from cross-examining the complainant's mother concerning an alternative explanation for the child's bloody underwear. The error was not harmless in that the underwear was the only physical evidence of the assault.

United States v. Porter, 994 F.2d 470 (8th Cir. 1993)
The evidence was insufficient to convict the defendant of perjury based on "irreconcilably inconsistent" statements under oath. The defendant's statements in the second proceeding, a habeas corpus hearing, where "vague, evasive or unresponsive," but not "irreconcilably inconsistent" with his earlier statements at the guilty plea hearing, and the questions asked at the two hearings were not identical.

United States v. Termini, 992 F.2d 879 (8th Cir. 1993)
The evidence was insufficient to convict the defendant, a route man who collected proceeds from legal and illegal video games, of money laundering. The mere fact that he returned the collected funds with a marked record of their various sources did not put him on notice that the illegal source of some of the funds would be concealed by his superiors.

United States v. Robbins, 997 F.2d 390 (8th Cir. 1993)
Convictions for transferring assets of the bankruptcy estate were reversed for insufficient evidence where the finding that the assets in question were part of the bankruptcy estate was based on the "confusion of assets" doctrine. While this doctrine will permit the inclusion of assets in an estate in a civil bankruptcy proceeding, it is inadmissible in a criminal case because it shifts the burden of proof from the government to the bankrupt.

United States v. Madkins, 994 F.2d 540 (8th Cir. 1993)
The evidence was insufficient to show the defendant's possession of a weapon where, when the police arrived, he was outside the car working under the hood, and another person got into the driver's seat of the car and reached for the weapon. His presence as a passenger in the car could only be inferred, and there were no facts from which his knowledge of the weapon under the front seat could be inferred.

VENUE

United States v. Greene, 995 F.2d 793 (8th Cir. 1993)
The conviction for manufacture of marijuana (!) was reversed, and a judgment of acquittal ordered, where the evidence failed to show that the offense took place in the district of indictment. The only evidence was testimony that the defendant had located seven marijuana fields which had been marked with pinholes, and a map which had pinholes both inside and outside the district.

* * *

MISSOURI LEGISLATIVE REPORT

by Dan Viets

Flooding Causes Reconsideration of Women's Prison Facilities

The flood of '93 has had many unforeseen effects. Among them is the hastened demise of the Renz Women's Prison in Jefferson City. The Missouri Legislature recently met in special session to consider how to respond to various flood-related problems, and appropriated $750,000 to study alternatives to the Renz facility.

Governor Carnahan and his Director of the Department of Corrections, Dr. Dora Schriro, asked the legislature to appropriate this money to permit a thorough study of the best way to provide additional prison space for female offenders. The debate has made clear that the Renz facility will never again be occupied. Renz had been among the most miserable of Missouri's prisons. The fact that the flood damaged it sufficiently to prevent it from being reoccupied is probably in the best interest of Missouri's female prisoners.

The debate now centers on how to provide additional space for the women displaced from Renz.

Presently, most of those women are being housed at Church Farm for men, at the Chillicothe Women's Prison and at the Fulton Reception & Diagnostic Center.

Approximately 900 women are incarcerated in Missouri. (Male prison population is over 16,000.) The proportion of women inmates, while relatively small, is steadily increasing.

The Missouri Association for Social Welfare, a prisoners' rights advocacy group based in Jefferson City, has recommended to Gov. Carnahan that Church Farm be renovated and converted to a women's facility, and that a portion of the male population be released in order to accommodate the reduction in men's space that would result. We hope the legislature will consider this recommendation.

Among other alternatives under consideration is the conversion of the Tarkio College campus in the northwest corner of the state to a women's prison. This proposal is receiving strong political support from certain representatives from the Tarkio area. Both Gov. Carnahan and Dr. Shriro are opposed to this option because the majority of prisoners are from eastern Missouri; imprisoning them in the northwest corner of the state would make it difficult for them to maintain contact with their families, and would also complicate the problems of transporting them.

Now would be an excellent time for criminal defense attorneys to contact state senators and representatives and urge them to consider alternatives to constructing more prison cells. Call or write your representatives and urge them to question the necessity of building more prisons; suggest that the state begin actively

pursuing alternatives to incarceration which are far less costly in terms of dollars (and human potential). Suggest that the state reduce the great number of nonviolent offenders serving prison time.

Further Criminal Law Changes Enacted by the '93 Legislature

In addition to the various criminal law changes reviewed in the last issue of the ***MACDL ACTION REPORT***, several changes took effect August 28, all part of House Bill 562:

One provision permits evidence in aggravation and mitigation of punishment in death penalty cases; whether such evidence is admitted is within the discretion of the court.

HB 562 also amends §195.146 to specifically state that forfeiture may apply to property owned by or in the possession of children, even though children are not "arrested" in the technical sense of the term. The new law states that taking a child into custody will be the equivalent to an arrest for the purposes of forfeiture.

The law also permits carrying firearms, and other activity involving firearms, generally illegal, by federal judges and federal probation officers in the state.

A number of provisions have been enacted relating to so-called "criminal street gangs", defined as "... any ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary objectives the commission of one or more ..." criminal acts. The legislation provides that anyone who commits a misdemeanor in violation of this law **shall** be punished by imprisonment in a state correctional facility for one, two or three years. Strangely, the law states that it shall not apply to "... employees engaged in concerted activities for their mutual aid and protection, or the activities of labor organizations or their members or agents."

The law also creates a new crime: flying while intoxicated. It is unlawful for any person with .04 BAC, or within eight hours of consumption of an alcoholic beverage, to operate an aircraft or be a member of a flight crew.

The law permits expungement of arrest records under certain (very limited) circumstances. An arrest record may be expunged if a court determines that the arrest was based on false information, there is no probable cause to believe the individual committed the offense, no charges will be pursued, the subject has no prior felony convictions and the action to expunge is commenced within three years from the date of the arrest. Expungement may be sought by filing a petition for expungement in the circuit court of the county where the subject was arrested. It is a crime for any person to knowingly fail to expunge a record which has been ordered expunged by a court. Failure to do so is a class "B" misdemeanor. Any person who knowingly uses expunged arrest information for financial gain is guilty of a class "D" felony.

Legislation to be introduced and considered during the 1994 session, which commences the first week of January, is now being discussed and formulated. Thus, now is the ideal time to contact your state legislators. Early input has a much greater chance of affecting the ultimate form of legislation . We should let our elected representatives know that we believe incarceration is a very costly, often counter-productive, practice. Let's encourage active pursuit of alternatives to imprisonment and resistance of the impulse to "get tough on crime" by enacting ever-longer prison sentences.

Questions or comments? Call Dan Viets, Chairman of MACDL's Legislative Committee, at 314/443-6866, or Randy Scherr, lobbyist, at 314/636-2822.

* * *

NACDL NOTE

Dear Colleagues:

I have had the honor of being appointed by NACDL President John Henry Hingson to serve

on a committee which addresses prosecutorial and related police misconduct. All too often, those of us involved in the defense of the criminally accused encounter prosecutors and law enforcement officials who feel that winning at all cost, by fair means or foul, is perfectly acceptable. This "ends justifies the means" mentality is dangerous, as it undermines the very fabric of our society.

A clear and simple way to combat this nefarious shift in the process is to expose it. Bringing these activities to light can help curtail them. To this end, the National Association of Criminal Defense Lawyers requests your help in identifying verifiable incidents where police have lied, the prosecutor knew it and no action was taken. Our interest is not in the proverbial "fish story". We want actual, verifiable, documentable cases of misconduct. For example, in southwest Virginia a prosecutor certified in writing to the court that she had provided all evidence required by the court in its discovery order; during trial it was revealed that a major piece of evidence, which the state was obligated to turn over to the defense, was being concealed. This is a clear example of what we seek.

Please send me details of similar experiences. Feel free to contact me by mail, phone or fax.

Marvin D. Miller
1203 Duke Street
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* * * *

WHY A JURY OF TWELVE?

by James D. Worthington
(with apologies to G. K. Chesterton)

At its annual conclave in St. Louis last September, members of the Missouri Bar Association met to take stock of ourselves (individually and collectively) as well as the current human and legal condition of Missouri residents. Justice Clarence Thomas [whose career Christopher Hitchens so aptly described in ***THE NATION*** (11/91) as "lustre-free"] was a featured speaker. Thomas, of course, was a protege of our own Senator Danforth, and an assistant A.G. under Ashcroft. His speech affirmed my belief that he will never come close to filling the shoes of his predecessor, Mr. Justice Thurgood Marshall.

At the same meeting, the Missouri judiciary proposed a plan to reduce, from twelve to eight (or even six), the number of jurors called to sit in judgment upon a defendant in a criminal case. I pondered the proposal, and hypothesized being called for jury duty. The call seemed sudden and arbitrary. I was put into the jury box because I live in Lafayette County and my name begins with W. Looking around, I saw crowds and processions of citizens, all of whom lived in Lafayette County and whose names were of varying alphabetical commencement.

We settled down with rollicking ease (for we were a bold, devil-may-care lot), and an inaudible oath was administered by a man resembling an army surgeon in his second childhood. We understood, however, that we were to **WELL AND TRULY** try the case between the State of Missouri and the prisoner at the bar, neither of whom had put in an appearance as yet.

Just when I was wondering whether the State and the defendant were, perhaps, coming to an amicable understanding in some adjoining tavern, the prisoner's head appeared above the dock; he was accused of stealing bicycles, and was the living image of a great friend of mine.

We twelve did well and truy try the affair of the bicycles, and came to the conclusion, after a brief but reasonable discussion, that the State was not in any way implicated. Then we passed on to a woman charged with neglecting her children; she looked as if someone or something had neglected her.

While my eye took in appearances and my brain passed criticisms, my heart felt a barbaric pity and fear which men have never been able to utter, but which is the power beind half the poems of the world. Ordinarily I do not speak

of these dark emotions, but I mention them now because they led me to a curious realization of truth: I saw with indescribable clarity what a jury really is and why we must never let it go.

The trend of our era is toward training and specialization. We train soldiers to fight better, singers to sing better, athletes to play better, etc. The principle is espoused by many legal experts who would supplant the untrained jury with a trained judge, or who believe a smaller number of jurors would perform just as well as twelve.

In a reasonable world, this might be a reasonable expectation, but true experience reveals that the four or five things most essential to know are all paradoxes. That is, we consider them plain truths, yet we cannot easily state them without verbal contradictions. For example, the more a person looks at a thing, the less he can see it, and the more a person learns, the less she knows about it. The Fabian argument of the expert, that the trained person is the one to trust, would be unanswerable if it were really true that a person who studied a thing and practiced it every day went on seeing more and more of its significance. But he does not; he actually loses perspective sees less and less of its significance.

It is a terrible thing to mark a man out for the vengeance of men. It is a thing to which one can grow accumstomed, as to other terrible things. The horrible thing about legal officials, judges, magistrates, barristers, detectives and police, even the best, is not that they are wicked Isome are very good), not that they are stupid (some are very intelligent); it is simply that they have become accustomed to doing and seeing what they do and see.

Strictly, they do not see the prisoner in the dock; all they see is the usual person in the usual place. They do not see the awful court of judgment; they see only their own workshop. Therefore, the instinct of Judeo-Christian civilization has most widely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets. People shall come in who can see the court and the crowd, the coarse faces of the police and the prisoners, the wasted faces of the wastrels, the unreal faces of the gesticulating counsel, and see it all as one sees a new picture or a ballet hitherto unvisited.

Our civilization has decided, rightly, that determining a person's guilt or innocence is a thing too important to be entrusted to trained men. It wishes for light upon that awful matter, it requires people not who know law but who can feel the things I felt in that jury box. When society needs a library catalogued or a solar system discovered, or any trifle of that kind, it calls on its specialists. But when it wishes anything really serious done, it collects twelve regular people standing round. The same thing was done, if I remember right, by the founder of Christianity.

* * * *

DEATH ROW DILEMMAS

by Anna Quindlen

[Kansas City STAR 5/28/93, reprinted with permission, ©THE NEW YORK TIMES]

Nobody's likely to see Gary Graham as a choirboy, not after he admitted a violent armed robbery spree that included shootings and pistol whippings when he was only 17.

But nobody saw Gary Graham kill Bobby Lambert outside the Safeway in Houston in May 1981, either, except for a lone witness sitting almost 40 feet away in her car. She couldn't pick Graham's picture out of a photo lineup, but she picked him out of a police lineup the next day, perhaps because his was the only face that appeared in both.

None of the other eyewitnesses were able to identify him; one woman, who stood in the supermarket checkout line next to the killer, says it was definitely not Graham, Yet she was never called to testify at his trial.

Neither were alibi witnesses, perhaps because, as the investigator who worked on the case said, he and the public defender "assumed Gary was guilty from the start."

All of which may soon put Gary Graham, who insists he's no killer, on the list of the questionably executed.

It seems unfair to single out one story, since there are many who are part of the group. Some, like Clarence Brandley, have come close to eating their last meal before being set free. Others, like Jimmy Wingo, are already dead despite doubts cast on their guilt.

A study in the *STANFORD LAW REVIEW* several years ago estimated conservatively, based on state admissions of error or the identification of other suspects, that 23 innocent people have been executed in the 20th century in America. The number will surely grow larger as the executions go on.

Who will take responsibility for this? No one. That's clear in a moving new book, a naked examination of conscience called ***DEAD MAN WALKING***. It was Sister Helen Prejean's decision as a young woman to go to work for the individual she calls "the Executed Criminal," a/k/a Jesus Christ, that eventually led her to act as a spiritual adviser for inmates and to witness their executions.

She describes a process in which all involved carry out their duties but no one claims the act, from the judges who concentrate on the law, to the guards who shave heads and legs so the current will flow more smoothly, to the electrician who checks the circuits to the chair.

She describes the families of the victims, enraged by her intercession but oddly and unexpectedly unfulfilled by the execution. She describes how the state head of corrections in Louisiana replies, "Never in a million years," when she asks if he will watch. And yet he oversees what he turns his eyes from, as, Sister Helen says, do we all.

She writes of her first execution: "No smell of burning flesh (the plexiglas shields witnesses from the smell). No sight of his face (the mask conceals his face, his eyes). And with his jaw strapped shut like that, he could not cry out."

The death penalty was supposed to be a panacea for the worst crime problems of the United States. But it's no deterrent, and it is based not on the cold-bloodedness of the crime, but on color and cash.

Many death row inmates are indigents represented at trial by public defenders so overworked [and underpaid] . . . or so convinced of their client's guilt that appeals lawyers find countless mistakes and missed opportunities in the trial record. And a study of the death penalty in one part of Georgia showed that prosecutors sought it in 1 in 3 murders of whites, but that the number dropped to 1 in 17 when the victim was black.

For more than a decade, since he was a teenager, Gary Graham has been what Camus once called "a thing waiting to be handled by capital punishment capital of the nation, he waits for ... [his date with] ... lethal injection. [Fifty-six others have been] executed in that state since the death penalty was reinstated in 1982.

"Who killed this man?", Sister Helen asks about the first man she saw executed, and she answers as the system would: "Nobody." That's how prosecutors and proponents see it, as though the criminal killed himself by his crimes.

But if Gary Graham, and others like him, are innocent of the crimes that brought him to death row, then that is something else again. Killing a guilty person is called capital punishment. Killing an innocent one can be called a mistake, or it can be called murder. The responsibility is everyone's.

* * *

F.Y.I

by Francie Hall

Response to our our fall dues mailing was good (as you can see from the list of membership renewals below). However, many of you have put the renewal notice in a pile "to be dealt with later". Rather than search for it, just use the Membership Application Form on p. 27 and mail your check today.

With this issue of the *Action Report*, we begin a new service, free to members: classified ads. Contact me by mail (P.O. Box 15304, K.C., MO 64106) or phone (816/274-6800 or 816/353-6205 [home]) to submit an ad.

Since our newsletter is mailed with a third-class bulk permit, undeliverable issues are not returned. However, dues notices were sent first-class, and several came back. If you have a new address for anyone on the list below, let me know or just send them a copy of the Membership Application Form. Thanks.

John Almsick, St. Charles; Cristy Baker, Poplar Bluff; David Bear, Columbia; Roger Brown, Jefferson City; Patrick Cronan, Columbia; H. T. Diekemper, St. Louis;Richard Dowd, Clayton; Dennis Eckold, Kansas City; Donald Hager, Farmington; Allen Harris, St. Louis; D. J. Kerns, St. Louis; Douglas Koski, Clayton; Pamela Lambert, Columbia; Lawrence Lee, St. Louis; Patrick Lester, St. Louis; Richard Martin, Kansas City; Nancy McKerrow, Columbia; Mark McSweeney, Clayton; Al Mendelson, Kansas City; John Newsham, Clayton; James Nangle, Jr., St. Louis; Robert Officer, Clayton; Dale Roberts, Columbia; Gregory Robinson, Columbia; Michael Segobiano, Bridgeton; Cynthia Short, Kansas City; Nancy Stenn, Clayton; Scott Walter, Clayton; Annette Williams, Clayton; Gary Wilson, Springfield

MACDL's Annual Meeting & Seminar is scheduled for April 22-23, 1994 at the Ritz-Carlton in Kansas City. Mark your calendars now; detailed information will be mailed shortly.

Finally, our own Charlie Atwell was profiled in ***THE CHAMPION*** last month, and Elizabeth Unger Carlyle is published in this month's issue of the **NACDL** magazine. And, as you can see from the ad on p. 26, Dee Wampler has published a book which, if you could just get your clients to reach it, would make your lives a lot easier! We're proud of Charlie, Elizabeth and Dee.

WELCOME, NEW MEMBERS

Jerome (Rusty) Antel, Columbia
M. Shawn Askinosie, Springfield
John P. Burnett, Kansas City
Michael Gross, St. Louis
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Irene C. Karns, Columbia
S. Dean Price, Springfield
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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, K.C., 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
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____ **Check here and add $10.00 to the amount of your dues check to contribute to MACDL's PAC Fund.** ***(Note: A PAC contribution is not a requirement of membership in the Missouri Association of Criminal Defense Lawyers.)***

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