MACDL
Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

SPRING 1994 **Vol. VI, NO. 2**

PRESIDENT'S LETTER

Last week I presided over my last MACDL Board of Directors meeting and, I suspect, like many outgoing presidents of organizations, experienced a combination of satisfaction and regret.

I am satisfied that MACDL is made up of as fine a group of people as I have ever known. Looking around Pat Eng's library table last Friday, I saw not only a magnificent six-foot submarine sandwich, but also seventeen people who had committed valuable time and traveled great distances, not to create billable time or make money, but to further the great cause of criminal defense.

I am also satisfied that your CLE Committee has another outstanding spring program planned, with national and local defense talent at a first-class location. All of our members should make a special effort to come to Kansas City next month; you won't be disappointed.

Finally, I am satisfied that MACDL is taking a major step forward in becoming a local force in Jefferson City and developing a national identity with NACDL. We have significantly stepped up our legislative effort. Our incoming president, Dan Viets, as Legislative Chairman, has put together a very active committee. They have spent many hours tracking the proposed legislation in which MACDL is interested and in handling our lobbying efforts. MACDL will also send a four-person delegation to the NACDL Legislative Fly-In in Washington, D.C. on May 4th and 5th.

I regret that the "Great Writ" of habeas corpus is all but unrecognizable, that the IRS thinks it appropriate to compel us to violate the attorney-client privilege, that Frank Morgan did not live to see the FBI soundly spanked, and that this year passed so quickly. Thanks to Francie Hall and Betty Jones for running the show, and to all of you for he privilege.

Best personal regards,

Jay D. DeHardt, President

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Register now for MACDL's Annual Meeting & Seminar, April 22-23, at the Ritz Carlton in Kansas City.
See Pages 10-11 for reprint of registration form.

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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.

MISSOURI LEGISLATIVE REPORT

by Dan Viets

As the mid point of the 1994 session of the General Assembly approaches, the level of activity is increasing. Several bills related to criminal justice have passed one house and are awaiting committee assignment for hearing in the other house. It is possible at this point to have a significant impact on the course of this legislation if you will contact your elected representatives. Your state representative and senator hear from relatively few "real people" who are not paid representatives of some special interest group. There are relatively few lawyers in the legislature these days. Therefore, your input as a practicing attorney can have even greater impact on these issues.

The contents of various bills change from week to week. Committees combine bills or rewrite them in such a way that the various specific issues addressed can change from time to time. Therefore, when contacting your senator and representative, it is best to address specific issues rather than referring to a certain bill number.

Capital Punishment for the Mentally Retarded: There bills filed in both the senate and house which would prohibit the execution of persons found to be mentally retarded. These bills have been heard in committee and are among the very highest priorities for MACDL this session. It is hoped that they will pass with sufficient support expressed by members of the public.

Alcohol-Related Offenses: Among the issues of active consideration at this time is a proposal to create the crime of driving with any "measurable and detectible" amount of alcohol in the blood of a person under the age of 21. The proposed penalties for this offense are essentially equal to those for driving while intoxicated. It would seem appropriate that the penalties would be closer to those for being a minor in possession of alcohol if there is not evidence that the young person's driving ability is significantly impaired.

Some of the bills proposing this actually inflict DWI penalties on persons who have as little as .01% blood alcohol content. Some experts have stated that the human body can produce a reading that high through natural processes without consuming any alcoholic beverages.

Also under consideration are bills which would reduce the level of blood alcohol content for various offenses from 10% to .08%. At this time, these bills do not appear to be moving as quickly as the ones which deal with people under 21.

The perennial proposal to authorize Courts to require the use of "ignition interlock devices" as a condition of having a hardship license has been around for years and does not seem to be gathering greater support, but rather appears to be an attempt by the company who manufactures these devices to sell more of them.

Juvenile Justice Legislation: There are many bills under active consideration which would make it easier, or in some cases mandatory, to certify juveniles for trial as adults. Some of these bills propose to require trial as an adult for the commission of any "dangerous" offense, some propose adult adjudication for any second offense which would be a felony if committed by an adult, and others propose requiring trial as an adult for any crime involving a firearm.

There is also a proposal to establish maximum security facilities for juveniles accused of dangerous felonies.

Drug Taxes/Expungement: There are proposals to permit the City of St. Louis to pass a drug sales tax similar to that enacted in Kansas City a few years ago. Bills are filed in the house proposing imposition of a stamp tax on prohibited substances. One of these bills is actually filed by Karen McCarthy of Kansas City, who is generally sympathetic to civil liberties concerns. The constitutionality of a similar tax in Montana was recently argued

before the U.S. Supreme Court. Comments of several justices suggest the tax will be held unconstitutional.

A bill filed by Rep. Ken Jacob of Columbia would authorize expungement of drug convictions after ten years without further criminal convictions.

Concealing Firearms: Sen. Harold Caskey continues to actively advocate that Missourians be authorized to carry concealed firearms. He has attempted to amend this onto various crime-related legislation before the senate.

Witness Immunity: There are proposals in both houses of the legislature to authorize prosecutors to request and judges to order that witnesses provide testimony which otherwise might be self-incriminating if the court grants immunity to the witness. The defeat of this legislation is among **MACDL**'s highest priorities. We have a core of support among legislators to fight this, but prosecutors have declared it one of their highest priorities to pass in some form this session. It would be most helpful for members to give their opinions on whether it might be a reasonable compromise, if the bill is going to pass in some form, to allow the granting only of "use" immunity rather than "transactional" immunity.

Public Defenders: There are bills in the house which would establish law school loan repayment programs for attorneys who have completed at least one year of employment with the Missouri Public Defender System.

Forfeiture: There are proposals before both houses to return to the bad old days when the police received the proceeds of forfeiture activity. Due to a State Supreme Court decision interpreting Missouri's Constitution, all forfeiture funds through state courts now go to schools. The proposal is that half the money be returned to police officers if a constitutional amendment is passed by the voters in November. It is strongly suggested that we urge our representatives not to return to the inherent conflict of interest and temptation toward corruption that is represented by permitting the police to benefit directly from forfeiture activity.

Prisons: The Senate has passed a bill authorizing the purchase of the Tarkio College Campus in extreme N.W. Missouri for use by the Department of Corrections. The money has not yet been appropriated, however. The Governor and the Dept. of Corrections oppose using the Tarkio Campus because of its remote location.

Medical Marijuana: Two bills filed by St. Louis Republican Sen. Irene Treppler relate to medical marijuana. One bill would end the prosecution of persons who possess less than 35 grams and whose doctor certifies that they have legitimate medical need for marijuana. The other bill is a resolution which urges the federal government to take action to make marijuana available by prescription. This resolution, SCR 14, has passed the Missouri Senate and is awaiting assignment in the house.

Sentencing: There are various bills known as "three strikes and you're out" which generally would enhance the time served for repeat offenders. Some of these are quite extreme. It is important that we remind legislators that the United States leads the world by a wide margin in imprisoning its own citizens. There are plenty of people serving plenty of prison time already, and it does not seem to be reducing the crime rate. These bills will impose a tremendous financial burden on Missouri taxpayers without appreciably reducing crime. We must urge legislators to encourage the courts to use alternatives to incarceration.

Jury Size: A resolution which would place before Missouri voters a constitutional amendment to reduce the size of juries in both criminal and civil trials does not seem to be moving forward at this time. There seems to be wide-spread opposition to the notion of reducing jury size.

Questions or comments? Call Dan Viets (314/443-6866) or Randy Scherr (314/636-2822).

DRUG COURT UPDATE

by The Honorable Donald L. Mason

On behalf of the Circuit Court of Jackson County, I would like to inform all members of the bar about the new drug diversion program underway in Division Eleven. This diversion program, also referred to as the "Drug Court", is an effort to get users off drugs and break the cycle of repeated crime. Through drug treatment, education and job skills training, this program can significantly impact the problems of drug addiction, jail space and overall crime activity. The drug diversion program is jointly sponsored by the Jackson County Prosecutor's Office, Missouri Probation and Parole and the Circuit Court of Jackson County.

The primary focus of the program is to identify defendants in drug cases who are known drug users, and whose drug habit in all likelihood contributed to the criminal offense. Defendants who meet certain eligibility criteria can voluntarily participate in the program, which could take up to two years, during which time the prosecution is stayed. If the defendant successfully completes all phases of the program, the criminal charges will be dismissed.

There are three main components of the drug diversion program. The first is the treatment phase, which lasts generally for fourteen weeks. The drug treatment includes acupuncture, counseling and regular drug screening. The second phase of the diversion program requires defendants who have not completed their high school education to obtain a G.E.D. The third component requires defendants who are unemployed to complete job skills training.

The eligibility criteria to enter the program require that the amount of drugs possessed or sold be very minimal. There must be no gun or violence involved in the criminal offense, and the defendant must have no more than one prior conviction in the last five years. If the defendant is currently on probation, the judge must approve his or her participation. Any violent offense automatically disqualifies a person from consideration to enter the program.

All defendants who participate must appear regularly in my court. If they refuse to comply with any phase of the program, they will stand trial.

In developing this drug diversion program, we studied several other successful programs in Las Vegas, Miami, Oakland, Portland and Washington, D.C. This program is funded through the Jackson County anti-drug sales tax.

To apply for the program, individuals should contact the prosecutor assigned to the case, or the Pretrial Release Office, Room 100, 1315 Locust, Kansas City, MO 64106 (881-4315). If you have any questions about the program, please call my division at 881-3611.

Again, I hope to make all attorneys aware of this program so any interested individuals may participate. If we can treat the root problem of addiction, we can greatly decrease recidivism of criminal activity. We have high hopes for the success of the program, and I invite any of you to stop by my courtroom on Wednesday or Friday mornings to see this "Drug Court" in action.

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MISSOURI CASE LAW UPDATE

by Sean O'Brien

AGGRAVATING CIRCUMSTANCES

State v. Debler, 856 S.W.2d 641 (Mo. 1993)

Although the defendant's capital murder conviction was upheld, the admission of extensive evidence of drug dealing by the defendant, without instruction on drug dealing as an aggravating circumstance, was plain

error, demonstrating manifest injustice and warranting reversal of the death sentence.

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."

CAPITAL CASES AFFIRMED

State v. Ramsey, 864 S.W.2d 320 (Mo. 1993)

The defendant's first degree murder conviction and sentence of death were affirmed. Prior inconsistent statements were properly admitted; counsel was not ineffective; the sentence of death was not disproportionate; and execution of the arrest warrant did not violate the fourth amendment.

State v. Shurn, 866 S.W.2d 447 (Mo. 1993)

The Missouri Supreme Court affirmed the defendant's capital murder conviction and sentence of death. The racial composition of the grand jury did not violate equal protection; the defendant did not establish a prima facie showing of discrimination under Batson; counsel was not ineffective; the prosecutor's statements in closing argument did not constitute plain error; evidence supported the aggravating circumstance; and the sentence was not disproportionate.

CIRCUMSTANTIAL EVIDENCE

State v. Grim, 854 S.W.2d 403 (Mo. 1993)

The Missouri Supreme Court rejected the circumstantial evidence rule for both appellate review and for jury instructions. In reviewing a challenge to the sufficiency of evidence in a case based on circumstantial evidence, the standard announce in State v. Dulany, 781 S.W.2d 52 (Mo. 1989) now applies. In addition, the circumstantial evidence instruction shall no longer be given.

CONFRONTATION - WITNESS' FIFTH AMENDMENT PRIVILEGE

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.

DISCOVERY SANCTIONS - WITHHOLDING EVIDENCE

State v. Childers, 852 S.W.2d 390 (Mo. App. E.D. 1993)

The trial court committed error requiring a new trial when it refused to grant the defendant's request for a continuance. The state's failure until the day of trial to produce reports containing inculpatory statements allegedly made by the defendant entitled the defendant to a continuance to prepare his defense. The prosecution committed a discovery violation, no legitimate reason was advanced for the violation, and information not revealed was prejudicial.

HABEAS CORPUS - STATE

Simmons v. White, 866 S.W.2d 443 (Mo. 1993)

The Missouri Supreme Court held that the defendant's failure to raise claims as to validity of his conviction by either direct appeal or by Rules 24.035 provided a basis for denying the petition for habeas corpus. "Habeas corpus may be used to challenge a final judgment after an individual's failure to pursue appellate and post-conviction remedies only to raise

jurisdictional issues or in circumstances so rare and exceptional that a manifest injustice results."

INVOLUNTARY MANSLAUGHTER - UNBORN VICTIM

State v. Knapp, 843 S.W.2d 345 (Mo. banc 1992)

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 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.

JUDGMENT AND SENTENCE

State v. Johnson, 861 S.W.2d 807 (Mo. App. E.D. 1993)

The trial court committed plain error when it entered a written sentence which deviated from the oral pronouncement of sentence. The court lacked authority to enter either a written sentence and judgment deviating from oral pronouncement of sentence or a nunc pro tunc order amending the sentence where the defendant was not returned to court for resentencing or clarification of the trial court's original oral pronouncement.

JURY INSTRUCTIONS

State v. Brokus, 858 S.W.2d 298 (Mo. App. E.D. 1993)

The court remanded for a new trial on the charge of attempted felonious restraint after determining that the instruction submitted by the trial court, which required physical injury rather than serious physical injury and failed to define serious physical injury, was plain error.

State v. Erwin, 848 S.W.2d 476 (Mo. 1993), *cert. denied*, 114 S. Ct. 88 (1993)

The Missouri Supreme Court reversed the judgment of second degree murder after finding that MAI-CR3d 310.50 created 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.

State v. Isa, 850 S.W.2d 876 (Mo. banc 1993) (capital case)

After determining that the jury instruction submitted during the sentencing stage of the trial impermissibly attributed to the defendant the conduct of her co-defendant, the court reversed the death sentence and remanded for resentencing. In addition to confusing the jury because of technical errors, the instruction permitted the jury to decide sentencing issues based on vicarious liability.

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. E.D. 1992)
State v. Christian, 847 S.W.2d 179 (Mo. App. E.D. 1993) -
State v. Ivy, 851 S.W.2d 71 (Mo. App. E.D.

1993)
State v. Sanders, 842 S.W.2d 916 (Mo. App. E.D. 1992)
State v. Tate, 845 S.W.2d 154 (Mo. App. E.D. 1993)

The trial courts erred in not requiring the state to provide specific, race-neutral explanations for its preemptory strikes. The cases were remanded for a hearing on whether the state exercised its preemptory challenges in a discriminatory manner.

RULE 24.035 - TIMELY FILING

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.

McCoo v. State, 844 S.W.2d 565 (Mo. App. S.D. 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 29.15 -
EVIDENTIARY HEARING

State v. Weber, 844 S.W.2d 579 (Mo. App. E.D. 1992)

Where defendant's Rule 29.15 motion alleged that trial counsel was ineffective for failing to obtain 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 EVIDENCE -
DELIBERATION

State v. O'Brien, 857 S.W.2d 212 (Mo. banc 1993)

Defendant's life sentence for first-degree murder was reversed and remanded for a new trial on felony-murder charge. Proof that defendant merely aided another with the purpose of facilitating an intentional killing cannot be sufficient to prove first-degree murder. White v. State is overruled to the extent that it can be read to require less than proof of defendant's own premeditation.

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NACDL NOTE

IRS Fines Attorneys Who Refuse on Ethical Grounds to Provide Client-Identifying Information

by Cheryl Anthony Epps

Reprinted by Permission from **NACDL's** WASHINGTON DIGEST, February 1994, No. 7

In a press release dated 12/7/93, the Internal Revenue Service Announced its intent to impose harsh fines on attorneys who file an IRS information tax Form 8300 reporting the receipt of cash in excess of $10,000, as required under § 60501 of the IRS Code, but omit the client-identifying information on the basis of lawyer-client privilege, state bar ethical

restrictions, and other constitutional provisions. According to the IRS, the filing of an "incomplete" Form 8300 will now be treated as a "willful violation," thereby triggering an "intentional disregard penalty" in the amount of $25,000 or more per incomplete form. Shortly after the press release, criminal defense attorneys, including several **NACDL** members, began receiving notices assessing these penalties. To date, it appears that only lawyers in the 2nd and 11th Circuits have been fined.

The professional ethics codes controlling attorney conduct in every state include general provisions requiring the attorney to protect the confidences and secrets of a client, and at least nine states have specific ethics opinions advising attorneys not to provide the client-identifying information requested on IRS Form 8300 absent a court order.

This leaves many attorneys in the untenable position of choosing between following their state ethical obligations, and being fined $25,000 or more by the IRS; or providing the information sought by the IRS and being subject to disciplinary action by their state bar and a lawsuit by the client.

The assessment of these harsh penalties represents a marked departure from DOJ's previous policy of litigating the applicability of these IRS Code provisions to attorneys through civil summons enforcement actions. The American Bar Association and **NACDL** have been engaged in a dialogue with the Department of Justice for several years regarding these matters, and based on meetings in 1990, were led to believe that the DOJ would continue to litigate these issues by way of civil enforcement summonses, without the threat of fines or criminal prosecution, until the law has been clarified.

When the IRS began this enforcement escalation, **NACDL** immediately sought a meeting with officials at DOJ and IRS to discuss the crisis. On January 6th, **NACDL** President John Henry Hingson III and 8300 Task Force Chair Gerald Lefcourt, along with representatives of the ABA/Criminal Justice Section, met with Assistant Attorney General Loretta Collins Argrett and others from DOJ and Chief Counsel David Jordan and others from IRS. The purpose of the meeting was twofold: (1) to seek a moratorium on the issuance of further fines by the IRS (and to have the current fines withdrawn); and (2) to explore ways of dealing with the underlying conflict. The meeting, while cordial, did not bode well for a negotiated settlement.

Although we are currently awaiting the official response from DOJ/IRS to our proposals to resolve this matter fairly, we are not optimistic that a negotiated resolution is likely. Both agencies are taking the position that, state ethical restrictions notwithstanding, lawyers who fail to report client-identifying information on a Form 8300 are guilty of a willful failure to file, and thus subject to a minimum $25,000 fine. We will continue these discussions.

Other strategies are also being pursued. We are asking U.S. Senators and Representatives to write to the IRS Commissioner, Margaret Richardson, outlining the problems stemming from § 60501's application to attorneys and asking that the penalty assessment be terminated until the law has been clarified. Such pressure, coupled with other measures, may succeed in getting the IRS to stop imposing the intentional disregard penalties and withdraw the penalties already assessed, until this issue has been fully litigated.

The ultimate answer may lie with Congress -- we need an amendment passed to exempt lawyers from the client-identifying provision of 60501. And we are working to advance such an amendment. **NACDL** recently wrote all 50 state bar associations to request their support and involvement with their congressional delegation, as well as the 70 state and local criminal defense bar associations affiliated with **NACDL**. This will be a major focus of **NACDL**'s Third Annual Legislative Fly-In, May 4-5, 1994 in Washington, D.C.

PROGRAM AND FACULTY

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

FRIDAY, APRIL 22, 1994

8:15 - 8:45 *Pick up materials; late registration if space available*

8:45 - 9:00 *Welcome*
Speaker: **Jay D. DeHardt**, Kansas City, Missouri
President, Missouri Association of Criminal Defense Lawyers

9:00 - 9:50 *Writing Effective Criminal Appellate Briefs*
Speaker: **David S. Durbin**, Kansas City, Missouri

9:50 - 10:40 *Innovative Techniques for Direct Examination*
Speaker: **Charles W.B. Fels**, Knoxville, TN
National Association of Criminal Defense Lawyers

10:40 - 10:55 *Refreshment Break*

10:55 - 12:00 *Ethical Considerations in the Presentation of Evidence*
Speaker: **James W. Fletcher**, Kansas City, Missouri

12:00 - 2:00 *Luncheon — Cash Bar — Annual Awards Ceremony — Luncheon Address*
Speaker: **John Henry Hingson, III**, Oregon City, OR
President, National Association of Criminal Defense Lawyers

2:00 - 2:50 *Creative Voir Dire Tips in Criminal Cases*
Speaker: **Richard H. Sindel**, St. Louis, Missouri

2:50 - 3:50 *Creative Closing Arguments*
Speaker: **Drew Findling**, Atlanta, GA
National Association of Criminal Defense Lawyers

3:50 - 4:00 *Refreshment Break*

4:00 - 5:15 *The Art of Opening Statements*
Speaker: **Cynthia L. Short**, Kansas City

5:30 - *Cash Bar* — All attendees invited to attend

SATURDAY, APRIL 23, 1994

8:30 - 9:00 *Missouri Association of Criminal Defense Lawyers Board Meeting* (all attendees invited)

9:00 - 10:00 *Review of Recent Developments in United States Supreme Court Decisions*
Speaker: **Milton Hirsch**, Miami, Florida
National Association of Criminal Defense Lawyers

10:00 - 10:50 *Changes in Forfeiture Law and Procedure*
Speaker: **Bruce W. Simon**, Kansas City, Missouri

10:50 - 11:00 *Refreshment Break*

11:00 - 12:00 *Round Table Discussions* (Attendees may submit tactical problems and issues from municipal, state, or federal cases they are handling for suggestion and advice)
Round Table Moderator: **Larry A. Schaffer**, Independence, Missouri
Panelists: **Milton Hirsch**, Miami, Florida
Bruce W. Simon, Kansas City, Missouri
Donald L. Wolff, Clayton, Missouri
James R. Wyrsch, Kansas City, Missouri

Defending Criminal Cases

Send this form with your check, payable to The Missouri Bar, for the amount due, or pay by VISA/MasterCard (see form below) to: CLE Department, The Missouri Bar, P.O. Box 119, Jefferson City, Missouri 65102, FAX 314/635-2811. All registrations must be received in writing by mail or fax.

Name _____

Address _____

City _____

Phone Number _____

Bar Number (if admitted in Missouri) _____

[ ] Check Enclosed [ ] Credit Card (Info. Below)

[ ] MasterCard [ ] VISA

Credit Card No. _____

Expiration Date _____

Signature _____
(Required for Credit Card Purchases)

REGISTRATION — PROGRAM, COURSE MATERIALS:

[ ] $195 — Program, course materials and lunch — lawyer or nonlawyer

[ ] $165 — MACDL member

[ ] $110 — Out-of-State Public Defenders

[ ] — Missouri Public Defender - tuition waived

PROGRAM DATE AND LOCATION:

KANSAS CITY
April 22-23, 1994

A block of rooms at the Ritz-Carlton Hotel in Kansas City has been set aside for MACDL. To make room reservations at the Ritz-Carlton, call their reservation desk at (816) 756-1500 **by March 21, 1994**, and indicate that you will be attending the MACDL program. Confirm your reservation with a major credit card or prepaid deposit. Room rates are $125 — single, $135 — double, $140 — deluxe/guaranteed Plaza View, single or double.

Course Materials: Course materials prepared by the speakers for this program.

MCLE Accreditation: This program qualifies for 10.6 hours of MCLE credit. Application has been made for appropriate Federal Western District credit. For Missouri MCLE information contact the MCLE Department, The Missouri Bar, P.O. Box 119, Jefferson City, Missouri, 65102, 314/635-4128.

MasterCard/VISA: Advance registration can be done by using your MasterCard or VISA credit card. See the registration form or FAX in your registration at 314/635-2811.

If You Can't Attend: A colleague may attend in your place if he or she could have registered for the same price.

Smoking: Not permitted in seminar room.

Special Needs: If you have special needs addressed by the Americans with Disabilities Act, please notify us at the address or telephone number below *at least one week* before the program.

Registration at the Program: Permitted only as space and materials are available. If you plan to register at the door, we strongly recommend that you FAX us your registration at 314/635-2811 by the *Friday before the program. We cannot accept cash payments at the door — checks or credit cards only!*

Children/Guests: Not generally permitted. Attendance is limited to seminar registrants. See address and phone number below to inquire about exceptions.

Comments, Suggestions, and Inquiries: For information about registration contact the CLE Department, The Missouri Bar, P.O. Box 119, Jefferson City, Missouri 65102, 314/635-4128.

Program Date and Location

April 22-23, 1994
Kansas City
Ritz-Carlton Hotel
401 Ward Parkway

(Continued from page 9)

You can help by writing your U.S. Representative and two U.S. Senators, urging (1) support for an amendment to 26 U.S.C. § 60501 to exempt attorneys from the client-identifying requirements of Form 8300; and (2) that they write to IRS Commissioner Margaret Richardson, urging her to cease these harsh enforcement penalties and to withdraw the current fines while these matters are fully litigated.

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REPORT ON L.R. NO. 2460-3, TO REPEAL § 559.021, RSMO 1986 AND §§ 556.061, 558.011 AND 558.019, RSMO SUPP 1993, RELATING TO CRIMES AND PUNISHMENT, AND TO ENACT IN LIEU THEREOF SEVEN NEW SECTIONS RELATING TO THE SAME SUBJECT, WITH PENALTY PROVISIONS

by Rick Sindel

From the tenor of the proposed legislation it is obvious that the perceived legislative solution to the crime problem is to remove criminal offenders from circulation for longer and longer periods of time. The prevalence of crime, the escalating homicide rates and the dangers that pervade the inner cities must be addressed. Unfortunately, in my opinion the solutions embraced by this bill, while appealing to the public's desire for harsher consequences and legislative rigor, do not have a reasonable prognosis for success.

The proposed changes of significance and my comments follow:

1. 556.061(8) expands the definition of "dangerous felony" to include all drug trafficking crimes that involve distribution of at least: (i.) 30 grams of a substance containing a detectable amount of heroin (195.222.1. RSMO Cum. Supp. 1992); (ii.) 150 grams of a substance containing a detectable amount of cocaine (195.222.2.); (iii.) two grams of a substance containing cocaine base (195.222.3.); 500 milligrams of a substance containing a detectable amount of LSD (195.222.4.) ; thirty grams of a substance containing a detectable amount of PCP (195.222.5.); four grams of PCP (195.222.6); more than thirty kilograms of a mixture or substance containing marijuana (195.222.7.) 150 grams of any material containing any quantity of amphetamine, methamphetamine, phenmetrazine or methylphenidate (195.222.8.); or defendants who have pleaded guilty to or been found guilty of any felony and who have two prior felony convictions that "relate[] " to controlled substances.

Use of the term "relate" is vague and could be applicable to a myriad of possible innocuous offenses. Does a conviction "relate" to controlled substances if the defendant had abused drugs at the time of the offense? At the time of his conviction or at the time of his sentencing? Does a conviction "relate" to controlled substances if a co-defendant had been using them? Does a felony stealing become a substance-related offense if at the time of his arrest for a non-substance offense the defendant has a small amount of marijuana on his person? This broad terminology invites abuse.

Possession or delivery of small amounts of marijuana or drug paraphernalia committed at different times but incorporated within one criminal proceeding (separate counts of a single indictment) would expose the defendant to extremely harsh punishment (e.g. service of a minimum of 80% of the sentence imposed (556.061.2(1) and (2)) or an automatic sentence of life imprisonment with no possibility of release without executive intervention. (556.061.2(3)). Application of these provisions is automatic because the prosecutor cannot "engage in any bargaining ... if the offense charged or contemplated to be charged" is a dangerous felony (559.021, § 2).

A 17-year-old defendant who gives two friends marijuana cigarettes could be charged with two counts of delivery, plead guilty, receive a suspended imposition of sentence and successfully complete his probation. If, at some later date, he were to negotiate an insufficient funds check, he would, under this law, be considered a dangerous offender and must serve at least 80% of any sentence imposed. Even if he were a perfect inmate, strongly motivated and attentive to his rehabilitation, there would be no sentencing alternatives.

The prosecuting authority would have no authority to "deal" a bad or unfair case if he or she, at any time, "contemplated" charging the defendant as a dangerous offender. If the prosecutor knew of the prior convictions and was thus aware of the possibility of issuing the case pursuant to these provisions, no subsequent determination that leniency is somehow appropriate and justified is permissible. Any competent prosecutor "contemplates" all possible charges, but may decide to issue the actual charge under a more lenient provision because of perceived weaknesses in his case or other extenuating circumstances. This valid exercise of discretion is no longer possible.

Additionally, the use of two or more prior felonies that may have been prosecuted and disposed of as a package subjects the defendant to punitive sentencing laws without reasonable rationale. If one assumes that the purpose of recidivist sentencing laws is to more severely punish those who continue to violate the law after society has attempted to rehabilitate them, that purpose is not furthered by the proposed amendment. A defendant who disposes of several related but distinct cases in a package will be forever a dangerous offender, even though his circumstance is considerably distinct from the defendant who is sentenced to prison, completes his term, returns to the street, commits a second crime, completes that sentence, and once again returns to the street and commits another crime. This latter defendant has had full exposure to society's attempts to instruct by retribution and rehabilitation. The former, while twice convicted, has not been twice provided and not been exposed to the same level of "learning."

2. I do not understand the provisions of 556.061.4. The sentencing court "imposes" a sentence of imprisonment. If that sentence, i.e. the sentence imposed, I am at a loss to explain what sentence could be left.

3. 561.061.5 provides the Board of Probation & Parole the authority to extend a defendant's opportunity to secure conditional release (parole) for rule and regulation violations. Extension of an inmate's release date is an obvious and significant punishment. The statute should authorize counsel to assist the inmate in examining witnesses and securing helpful testimony. Presently inmates are allowed but not required to have counsel in hearings before the parole board at revocation proceedings and at hearings on possible parole releases. The statute should permit but not require counsel, at the inmate's discretion and expense.

4. Other provisions increase the minimum length of incarceration: (558.019.2(3)) - mandatory life with no release possibilities; and (558.019.3.) requiring that a defendant sentenced to life imprisonment must serve at least twenty-five years of his sentence. The enforcement of these provisions will overwhelm a system that is already stretched to the breaking point. Missouri's penitentiaries are presently at 97% capacity. Of 16,410 available beds, there are only 452 vacancies. Further, the number of available beds institution-wide does not address the concerns about "specialty" space. In other words there may be 452 beds at various minimum security institutions, but maximum security and housing for long-term offenders may be filled to capacity. It is those slots this legislation will dramatically reduce.

Overcrowding at penal institutions exposes the

inmates and state employees to additional dangers, increases tension and hostility among inmates and staff, and encourages 1983 conditions litigation. Many non-violent inmates secure parole release after serving a small percentage of their actual sentence to free up bed space for the constant flow of new arrivals. Increasing the length and number of inmates who must remain in prison for an extended term despite efforts at rehabilitation and a spotless prison record unduly burdens a penal system that is already backed up against a wall.

The increased cost to the taxpayer will be enormous. Housing an inmate for one day in a minimum security institution costs approximately $25.03. Per diem costs for an inmate in a maximum security institution is $39.42. Minimum supervision of an offender on probation or parole costs $.05 a day, regular supervision $.73 per day, enhanced supervision $1.83 per day, and intense supervision $6.28 per day. Further, these expenses do not contemplate the enormous expense of building new institutions or rehabbing old ones. The state's maximum security facility, Potosi Correctional Center, is presently double-bunking and is at 926 capacity. Those inmates who will be serving mandatory life sentences will need to be housed at Potosi.

Finally, inmates with no possibility of release have no incentive to improve, no need to work towards rehabilitation, and no future prospects. Whatever their prison behavior they will probably never be released. An inmate with no hope and no legitimate goals is a ticking time bomb. He can only lose his life, as he has lost everything else. Penological experts believe these inmates, the ones with nothing to gain and nothing to lose, are the most unmanageable and dangerous of the residents. This legislative initiative unnecessarily expands the contours and inhabitants of this lost class.

5. 559.021. Section 2.2 prohibits the prosecutor from reducing the class of crime charged or <u>to be charged</u> against a prior offender. Again, this provision is so broad as to preclude the prosecutor from selecting a lesser class of offense even if during the investigation of the crime or during the pendency of the case additional evidence is discovered which makes the lesser offense the only appropriate charge. The defendant cannot bargain for a lesser class of offense even if his priors were relatively insignificant misdemeanors since it is prior criminal "offenses" not "felonies" that trigger this provision. An offense is defined as a "felony, misdemeanor, or infraction" (556.061(19)). A 24-year-old violation of two municipal ordinances would qualify the defendant under this provision. To avoid the harsh consequences of this provision requires the defense lawyer to attempt complete plea negotiations before any charge is filed or discovery initiated. Indigent defendants will never be able to take advantage of precharge bargaining because they will not be appointed counsel until the charges are filed in court. The defense lawyer will need to make potentially critical decisions with no opportunity to complete an independent investigation, to obtain payment for his services, or to complete a thorough review of the State's case. A conscientious lawyer may be constitutionally defective by forfeiting his client's options to negotiate a plea to a lesser offense.

6. 559.021.2(3) requires a defendant to pay all costs of any drug or alcohol rehabilitation program if the offense (felony, misdemeanor or infraction) "involve[d]" alcohol or a controlled substance. Alcohol or drugs may exist on the periphery of any offense. Suppose a young boy is arrested for speeding and one of the passengers has a controlled substance or is under 21 years old and holding a beer. Is alcohol involved in this offense? Should the driver be forced to complete an alcohol rehabilitation program at his expense if he has no alcohol dependency problem?

Compelled completion of these programs is better left to a determination by the probation officer or the court on a case-by-case basis. Any attempt to mandate treatment to an overly broad number of criminal offenders will simply

mushroom the number of enrollees and unduly delay treatment of those most in need. Any treatment for alcohol or drug problems, if successful, will help stem the rising tide of crime. Treatment should be available not only to those who violate the law and are caught but those who recognize the need for treatment before they are in the system. Mandating attendance may shut out those who wish and need to "volunteer" for help.

Offenders who are indigent, in school, or totally lacking in resources will not be able to pay for the treatment required. What will happen to them? Will the failure to pay for the program be a violation of their probation or conditional release? Will they be able to enroll in the program before paying? Presently the 14-day in-patient program at St. John's costs $510.00 per day, the follow-up two-week "day program" costs $460.00 per day, intensive out-patient follow-up is $260.00 per day, and regular out-patient is $64.00 per hour. Few offenders have access to such funds.

GENERAL COMMENTS

In the Federal system the government increasingly sought to lengthen required prison terms. Mandatory minimum sentences abound. The use of the sentencing guidelines requires a specific sentence be imposed despite valid and compelling reasons to do otherwise. Sentencing discretion is a relic of the past. As a result, the federal prison system is bursting at the seams. Parole has been eliminated and the required sentence must be completed. Scarce financial reserves are spent not to help the inmates rediscover useful lives but simply in accomplishing the herculean task of housing them. The district court judges I have talked to dislike the guidelines and recognize the folly in their universal application. Unfortunately they are powerless to do anything about them. Mandatory sentencing provisions and loss of prosecutorial discretion have further jammed crowded dockets. A defendant has little to lose and much to gain by risking the vagaries of a trial. If the sentence will be the same, there is little reason not to roll the dice. Mo. Sup. Ct. Rule 17 requires the dockets in the state system to be accelerated at a speed unlike any in the past. An already overcrowded system will be strained that much more.

The problem of crime can be attacked but it cannot be solved, at least not in the short run, and probably not by any steps that are politically realistic, or that a free people would tolerate. The point is not that the police and courts do not matter - clearly they do - but that they cannot bear the entire burden of social control. Order depends less on coercion than on voluntary and automatic compliance that keeps most people law-abiding most of the time, even when detection and punishment are unlikely.

"Three strikes and you're out" is this year's political nostrum. See St. Louis Post Dispatch, Sunday, January 30, 1994. The effects would be minuscule - except on prison construction, which would become a growth industry and enrich contractors. What is at issue is not whether punishment deters crime - of course it does - but whether more severe and certain punishment would deter crime more effectively than the punishment now being meted out.

Contrary to the popular view, we are already imprisoning the great majority of those found guilty of violent crimes. Reasonable people may disagree over the adequacy of the punishment, but punishment, like everything else, is subject to the law of diminishing returns.

Lengthening the terms of those already serving time would produce only a modest reduction in crime - all the more so because violent crime is a young man's occupation. Like professional athletes, criminals lose physical stamina and coordination, not to mention nerve, relatively early. Criminal activity drops off sharply when offenders reach their mid-twenties, more sharply in their mid-thirties. Thus, mandatory life sentences for third offenders would fill our prisons with over-the-hill criminals.

The problem of crime has always been surrounded by political posturing, a fact noted by America's first talking head, Alexis de Tocqueville. "Such is the insufficiency of human institutions that we see melancholy effects resulting from establishments which in theory promise none but happy results." Put more simply, the chief cause of problems is solutions. In my opinion these amendments offer at least as many problems as solutions, and the proposed solutions will not substantially impact upon crime within the community.

* * *

F.Y.I

by Francie Hall

Dee Wampler of Springfield has served long and honorably on **MACDL**'s Board of Directors and, for the past year, as Second Vice President. Dee has advised us he no longer feels able to commit the time and energy to continue as an officer of **MACDL**, and will resign at the end of his term next month. We'll miss our "token Republican", and we thank Dee for all he's done for the organization.

As part of its John B. Gage Lecture Series, UMKC Law School will present Gerry Spence, *GUNNING FOR JUSTICE: A LIFELONG COMMITMENT,* on March 24, 1994 in the E.E. Thompson Courtroom at the Law School. Admission is free, but reservations are requested for the lecture and the reception immediately following. Call 235-1645 for reservations.

We hope to see you at the Ritz-Carlton in Kansas City April 22-23 for *DEFENDING CRIMINAL CASES*, our annual seminar co-sponsored by The Missouri Bar and the National Association of Criminal Defense Lawyers. Program notes and registration form are reprinted on pages 9-10 of this issue.

WELCOME, NEW MEMBERS

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* * * * *

NOMINATING COMMITTEE REPORT

MACDL's Nominating Committee (Sean O'Brien, J. D. Williamson, Rick Sindel and Dee Wampler) met on March 9 to approve a slate of officers and board members for submission to the general membership at **MACDL**'s Annual Meeting on April 23, 1994:

President:	Dan Viets
President-Elect:	J. R. Hobbs
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Second Vice President:	Elizabeth Carlyle

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The Office of the Califomia State Public Defender is conducting exams for Supervising Deputy State Public Defender positions. Application forms are available from: Testing Unit, 801 K Street, Ste. 1100, Sacramento, CA 95814; filing deadline: 4/8/94.

The Administrative Office of the U. S. Courts and *NACDL* will present eight 2 1/2 day seminars for CJA Panel Attomeys in Oklahoma City (4/28), Salt Lake City (5/19), Atlanta (6/2), Minneapolis (7/7), Dayton (8/25), Washington (9/22), Phoenix (10/20), and either Philadelphia or Boston in November. Enrollment is limited to CJA panel attomeys (those who accept court appointments in federal criminal cases) who did not attend this program in 1993. Tuition is free. Direct inquiries to Musu Clemens, Training Coordinator, Defender Services Division, Administrative Office of the U.S. Courts, Room 4248, One Columbia Circle, NE, Washington, DC 20544 (202/273-1676).

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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.

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