MACDL
Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

SUMMER 1994 ***Vol. VI, No. 3***

PRESIDENT'S LETTER

MACDL is actively representing the interests of criminal defendants and their counsel in both the state and federal legislatures. On page 16 of this issue you will find a report on the largely successful 1994 session of the Missouri General Assembly.

In May several members of the MACDL Board and our Executive Secretary, Francie Hall, spent several days in Washington, D.C. attending the National Association of Criminal Defense Lawyers' Third Annual Legislative Fly-In. Members of our delegation met with members of Congress or their legislative aides to discuss a wide variety of issues related to the pending crime legislation in Congress. A more detailed account of that effort also appears elsewhere in this issue of the *MACDL Action Report.*

As this issue goes to press, Congress is still debating the final form of the crime bill. The versions passed by the House and Senate differ significantly in many respects. It is extremely important that we contact our Congressmen and Senators now to let them know they have constituents who do not want to see a crime bill passed which includes longer sentences and more prisons, but does nothing to address the root causes of crime.

We should send the message that we do not want nonviolent victimless drug offenses included as "strikes" in the "three strikes" portion of the bill. The focus of all the public debate these days is on violent crime. Unfortunately, there are proposals under consideration which would include a state drug felony offense as a prior "strike" against a defendant in a pending criminal case.

Another important message we must communicate is to urge support of the House version of the mandatory minimum "safety valve" and to make it retroactive. The "safety valve" proposal would allow a federal judge to impose as little as 24 months on a first-time nonviolent offender. If Congress adopts this provision retroactively, many of our clients now serving horribly long sentences might become eligible for reduction of sentence or release. We should all share this important information with our clients and their families, and urge them to contact members of Congress immediately.

TABLE OF CONTENTS

President's Letter
Dan Viets 1

Trial Tip: Voir Dire and Court T.V. 3
Pat Eng

Recent Missouri Cases
Kris Daniel 4

Significant Federal Cases
Elizabeth Unger Carlyle 9

Missouri Legislative Report
Dan Viets 16

May It Please The Court - Review
Elizabeth Unger Carlyle 18

Sentencing Project Report
Dan Viets 20

F.Y.I.
Francie Hall 22

New Members/Membership Renewals 23

Membership Application Form 23

* * * * * *

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

PRESIDENT'S LETTER (cont'd from p. 1)

MACDL is about to produce its first membership directory. We hope to go to press with this directory very soon. Please be certain that we have your correct current address, phone and fax numbers. If you need to check or update any information, call Executive Secretary Francie Hall at 816/855-6650.

Because of the imminent publication of our first directory of Missouri criminal defense lawyers, this is an excellent time for us to recruit new members. If you know criminal defense practitioners who have not joined MACDL, or who have let their memberships lapse, urge them to join/rejoin soon so we can include them in this directory.I am pleased to announce the dates for MACDL's annual **Fall Criminal Defense Seminars: October 14 - St. Louis; October 21 -Springfield; October 28 - Kansas City; and November 4 - Columbia.** Mark your calendar now so you will be able to attend these very informative CLE programs.

Sincerely,

Dan Viets, President

TRIAL TIP: VOIR DIRE AND COURT T.V.

by Pat Eng

Now that Court T.V. appears to be here to stay, with Missouri being one of the final states to accept cameras in the courtroom, we as defense attorneys need to know how to deal with it and to perhaps use it to our advantage in our cases.

We have always been concerned about a venireperson's prior jury service. Now we need to find out which of them watch Court T.V., how often, and which cases. Of course, this is not jury service, but it is about as close as it gets for a person outside an actual courtroom and probably should be of even more concern to us since on Court T.V. the prosecution and the defense are cussed and discussed on a play-by-play basis. At a recent meeting of our *MACDL* Board of Directors I was surprised to learn Court T.V. isn't seen everywhere. Since it is offered on cable where I practice in Columbia and most of Central Missouri, I naively thought it was everywhere, mainly because it is my mother-in-law's favorite show; when we visit from time to time, she asks me about some of the cases she has watched. She lives in a retirement community in Florida, where Court T.V. has aired for many years. I am told there are people who watch it all day. It has become real live soap opera for many people.

If your upcoming challenge is a rape case, you need to know which potential jurors watched the William Kennedy Smith trial. If you have police brutality in your case, find out about the Rodney King trials. If there is a question of state of mind, see if anyone followed the Bobbitt trials; and so on.

As my good friend Rick Sindel so accurately stressed to us in his voir dire presentation at *MACDL's* April seminar, voir dire is the only time we can talk to the folks who are going to decide our cases, so we need to find out how they feel about some of the cases they have seen. As I believe Rick was trying to point out, sometimes we don't go far enough. Get specific! Exactly what cases have these

people seen? What did they like and dislike about those cases? What did they believe was fair or unfair? After discovering what they have been exposed to, we need to dig deeper and make sure they understand how Missouri law may differ from the cases they might have seen. For instance, years ago I was involved in a Kansas case that involved the "rape trauma syndrome", which was accepted in Kansas and was big obstacle to overcome in that particular case. If this won't be an issue in your case, then it needs to be discussed; you need to ask questions to make sure that is understood.

What we are all trying to avoid is talking to jurors after a loss and hearing something along the lines of, "Well, one of us had seen that murder case in Iowa on Court T.V., and such-and-such happened in that case, so we applied what we knew about that case to make our decision against your client."

It would be good to have your secretary, paralegal or law clerk find out Court T.V.'s format 30 days or so before you are set for trial. I know I do.

Finding one person on a panel who saw a case involving an issue gives us a tremendous opportunity to question that person and others on the same issue, thus getting the entire panel to think about the issues we will be concentrating on in our case.

I guarantee you, if my mother-in-law turns up on your panel, you'd better know which cases she has seen in the last 30 days (and the big ones in the last year or so), and how those cases may even remotely fit into what is going on in your case. If you don't, you might really find yourself involved in a soap opera.

RECENT MISSOURI CASES

by Kris Daniel, Missouri Capital Punishment Resource Center

ABUSE OF DISCRETION

State v. Massey, 867 S.W.2d 266 (Mo. App. E.D. 1993) -
The trial court abused its discretion by excluding the testimony of 2 of defendant's 3 alibi witnesses, as a sanction for giving erroneous addresses for those witnesses in alibi disclosure. The case is remanded for a new trial.

CONSTITUTIONALITY - PROPORTIONALITY DEFECTS

Davis v. Shinn, No. 48308, slip op. (Mo. App. W.D. February 8, 1994) -
Immediately before the murder trial of Chad Davis began, the trial judge sustained the precluded the State from seeking the death penalty due to disproportionality in sentencing. The judge based his decision on the defendant's youth and the fact that four co-participants escaped any charges for the crime. On appeal, the court asserted that, "different treatment between co-participants in a crime will not be a basis for a claim of unconstitutional disproportionality." In addition, the court determined that Davis could not rely on § 565.035, which mandates an independent review of a defendant's death sentence, because that statute applies only after the death penalty is imposed. Finding no constitutional basis for a finding of dispropor-

tionality, the court remanded the case with instructions that the trial court vacate the order precluding the State from seeking death.

Evidence - Hearsay

State v. Cole, 867 S.W.2d 685 (Mo. App. E.D. 1993) -
On appeal from his conviction of murder in the first degree and from the denial of his 29.15 motion, the court found that the trial court erred in admitting into evidence a tape recorded statement of the only eyewitness to the shooting. The cumulative error of improper bolstering and admission of hearsay specifically objected to from the playing of the entire tape recorded statement was prejudicial and constitutes reversal.

Double Jeopardy

State ex rel. Reynolds v. Kendrick, 868 S.W.2d 134 (Mo. App. E.D. 1993) -
After the victim testified to facts tending to show that he was the aggressor in the altercation leading to the defendant's trial for assault and admitted to perjuring himself at the defendant's preliminary hearing, the trial court expressed an opinion that the defendant would be entitled to a directed verdict of acquittal. The prosecutor then demanded the judge recuse himself, an action which would necessitate a mistrial. Without stating its reasons, the court granted the mistrial. Because the defendant did not consent to the mistrial and expressed a desire to continue with the case, and because nothing in the record necessitated a mistrial, the court held that retrial was barred by double jeopardy.

State v. Nichols, 865 S.W.2d 435 (Mo.
The defendant's convictions for four separate violations of statute prohibiting carrying of concealed weapons, based on defendant's possession of four knives at time of arrest, did not subject defendant to double jeopardy. Section 571.030 defined offense in terms of carrying "a" weapon, thus, each knife carried by defendant was allowable unit of prosecution.

Juror Interviews

Butler v. Howard, 1994 WL 4300, No. 48096, slip op. (Mo. App. W.D. Jan. 11, 1994) -
A trial court has authority to forbid interviews between the jurors who convicted a defendant, or other members of the venire from which they were chosen, and the attorney who is working on the defendant's petition for post-conviction relief. Post-conviction questioning of jurors or veniremembers may be necessary in some cases, the court said, but even then the trial court has authority to conduct the interviews itself, in court and on the record, to ensure the reliability of juror responses.

Jury Instructions - Elements of the Offense

State v. Jones, 865 S.W.2d 658 (Mo. 1993) -
The trial court committed prejudicial error when it submitted unlawful possession of a concealable firearm case to the jury under verdict director, patterned on approved jury instruction, that did not require any finding of culpable mental state and thus failed to instruct the jury on all of the elements of the offense charged. To the extent State v. Bean, 720 S.W.2d 21 (Mo. App. 1986), and its progeny are inconsistent with the opinion, they are overruled.

JURY SELECTION - DISCRIMINATION

State v. Jackson, 865 S.W.2d 678 (Mo. App. E.D. 1993) -
The trial court erred in not requiring the state to provide specific, race-neutral explanations for its peremptory strikes. The case was remanded for a hearing on whether the prosecutor's strikes were racially motivated.

State v. Mayweather, 865 S.W.2d 672 (Mo. App. E.D. 1993) -
The defendant did not have to prove that venirepersons peremptorily stricken by prosecutor were, in fact, black in order to mount prima facie challenge to prosecutor's use of peremptory strikes, particularly where both defense counsel and prosecutor referred to stricken venirepersons as black and there did not appear to be any question regarding venireperson's races.

State v. West, 866 S.W.2d 150 (Mo. App. E.D. 1993) -
The trial court did not err in sustaining the State's motion to compel defendant to give race neutral explanations for his exercise of peremptory strikes removing white venirepersons and in denying defendant his exercise of a peremptory strike against a white venireperson. Batson applies to white venirepersons on a predominantly white venire panel.

RETROACTIVITY - JUROR QUALIFICATIONS

State v. Wings, 867 S.W.2d 607 (Mo. App. E.D. 1993) -
The defendant argued that the court violated his right to a fair jury in that he had to expend one of his peremptory strikes to eliminate an unqualified venireperson from the venire panel. The court held that § 494.480, which states that juror's qualifications are not grounds for a new trial or reversal unless the juror participated in the verdict, is procedural and can be applied retroactively without violating the ex post facto clause. Thus, the statute was applicable to defendant's appeal, which was pending on the date the statute became effective.

RULE 29.15 - ABANDONMENT

State v. Green, 867 S.W.2d 273 (Mo. App. S.D. 1993) -
The court reversed the post-conviction motion court's dismissal of the defendant's 29.15 motion as untimely filed and remanded for further proceedings as directed by Sanders v. State, 807 S.W. 2d 439 (Mo. banc 1991) for determination of whether the untimeliness was the result of counsel's abandonment.

State v. White, No. 71600, slip op. (Mo. banc March 22, 1994) -
Following Leamon White's conviction and sentence of death, he filed a pro se motion for post-conviction relief which was not notarized, due to the fact that a notary was not available. The court appointed a public defender who requested and was granted a 30-day extension to file the amended motion. Fourteen days before the motion was due, the attorney filed a motion to withdraw and a second attorney entered his appearance. The defendant's second attorney filed his first amended motion four days late and requested a second extension. The motion court granted the second extension and counsel filed a second amended motion just prior to its deadline. Both the first and second amended motions contained a verification which was signed by the defendant before the first amended motion was drafted.
On remand for a Sanders hearing, the motion court found that the defendant had not been abandoned because his pro se

motion was not properly verified, and therefore, the court dismissed all the defendant's motions. The court concluded that "you can't abandon something that doesn't exist." On appeal, the Missouri Supreme Court cited the "drawn out nature of death penalty cases" and the "need to expedite" post-conviction proceedings, when it held that henceforth, for purposes of filing a *pro se* 29.15 motion, the defendant's signature will be sufficient verification. The court will continue to require all amended motions to be properly verified. The court remanded the defendant's pro se motion back to the motion court for further findings of fact and conclusions of law.

The court then addressed the issue of the first and second amended motions. Because the verification the defendant signed predated the existence of the motions, the court "will not allow him to later argue that the document that he falsely verified is incomplete or does not raise all grounds known for relief . . . nor will we allow a defendant who actively participates in falsifying the verification to argue lack of jurisdiction because of that improper verification."

The court also considered White's first amended motion untimely. According to the court, the motion court exceeded its jurisdiction by granting the request for the second extension of time. Thus, the motion court had no jurisdiction to rule on the first and second amended motions and should have dismissed the amended motions as untimely and proceeded on to the issue of abandonment pursuant to Sanders, if there was a request to do so after the dismissal.

On the issue of abandonment, the court found that the untimeliness of White's first amended petition was because his second appointed counsel had only fourteen days (as opposed to sixty days as suggested by the motion court) to file the motion, not because of any negligence or misconduct by White. The court, therefore, concluded that White was abandoned by the decision of the public defender's office to change defendant's counsel fourteen days before the end of the period for filing the motion. Moreover, the court requested that the Chief Disciplinary Counsel investigate and determine whether any ethical considerations or disciplinary rules were broken by the office of the public defender because of this action. Finally, having determined that the defendant was abandoned only as to the timeliness and not as to the content of his first amended motion, the court concluded that the first, but not the second, amended motion be reinstated. The case is remanded to the motion court with directions to make findings of fact and conclusions of law on any points in both the defendant's *pro se* motion and his first amended motion which have not yet been ruled on.

RULE 29.15 - PRESENCE OF DEFENDANT

State ex rel. McCulloch v. Lasky, 867 S.W.2d 697 (Mo. App. E.D. 1993) -
The court quashed the preliminary writ of prohibition it had issued after the State sought to prevent the Honorable Herbert Lasky from permitting William Weaver, a death row inmate, from attending his 29.15 hearing and from ordering that some of the State's trial files be sealed for future appellate review of Weaver's case. The court held that Missouri Supreme Court Rule 29.15(h), which gives the court discretion to determine whether the movant may be present at post-conviction hearing supersedes RSMo 491.230(2) to the contrary. In addition, the court found that because three witnesses referred to the State's files in their testimony and to the

use of these files as a means of refreshing their recollection, Judge Lasky was well within his authority in ordering the State's files preserved for meaningful appellate review.

Voir Dire - Reasonable Doubt

State v. Jacobs, 866 S.W.2d 919 (Mo. App. W.D. 1993) -
The state's voir dire question, asking potential jurors whether they understood that burden beyond reasonable doubt applied only to the elements charged in the case, was confusing and argumentative and should not have been allowed. However, the error did not prejudice the defendant, as the question was incomprehensible and proof of the defendant's guilt was overwhelming, and therefore was not reversible.

Detainers

Clark v. Long, 870 S.W.2d 932 (Mo. App. S.D. 1994) -
Missouri's version of the Uniform Mandatory Disposition of Detainer Law, R.S.Mo. § 217.450-.485, is triggered by a prisoner's request for disposition of untried charged pending in the state even if no detainer concerning those charges has been lodged with the prisoner's custodian. In this case, the trial court lost jurisdiction of pending charges of first-degree murder and armed criminal action when the defendant was not brought to trial within 120 days after he made a request to be brought to trial under UMDDL.

Evidentiary Hearing

Miller v. State, 869 S.W.2d 278 (Mo. App. E.D. 1994) -
Post-conviction movant who claimed that he pled guilty while believing he was being sentenced to only one term of life imprisonment plus 15 years, rather than three concurrent terms of life imprisonment plus 15 years, was entitled to an evidentiary hearing, where it could not be determined from the transcript of his guilty plea whether it was clearly stated to the defendant that he was pleading guilty to three concurrent life sentences.

State v. Hamilton, 871 S.W.2d 31 (Mo. App. W.D. 1993) -
Remand was required after the post-conviction movant made a sufficient factual allegation to require an evidentiary hearing to determine the merits of his claim of ineffective assistance of counsel for failing to call an alibi witness.

Juror Note Taking

State v. Trujillo, 869 S.W.2d 844 (Mo. App. W.D. 1994) -
Addressing the movant's claim that note-taking by a juror is *per se* reversible error, the court of appeals concluded, from analysis of cases germane to the issue, that juror note-taking is not prohibited in Missouri. According to the court, the trial court should have the authority to allow note-taking when, in its judgment, notes would be helpful and aid the jury members to perform their duties in determining the facts. In this case, the court did not err in failing to declare a mistrial after the court confiscated notes taken by one juror and told him that he was not permitted to take his notes into deliberations.

Jury Instructions - Confusion of Jurors

State v. James, 869 S.W.2d 276 (Mo. App. E.D. 1994) -
The defendant's conviction for first degree assault and armed criminal action was reversed and remanded after the trial court erred in submitting an instruction patterned

after MAI-CR3d 310.50 (repealed 1993), which provided: "You are instructed that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct." The court first noted that State v. Erwin, 848 S.W.2d 476 (Mo. 1993), which held an instruction patterned on the MAI instruction should not be given because it "implicitly relieves the State of the burden of proving beyond a reasonable doubt that [defendant] possessed the requisite mental state for the crime charged," is not applicable to this case. Here, the court found the instruction improper because there was no evidence of defendant's impairment. Since the defendant did not raise the issue of intoxication or impairment, submitting the instruction was likely to have confused the jury or misled them to believe the defendant admitted to some wrongdoing and was attempting to escape liability based on intoxication.

JURY SELECTION - DISCRIMINATION

State v. Boyd, 871 S.W.2d 23 (Mo. App. E.D. 1993) -
Revised Missouri Statute § 494.480, which provides that qualifications of a juror are not grounds for reversal of conviction or sentence unless the juror served on the jury and participated in the verdict, applies retroactively.

RULE 27.26 - ABANDONMENT

Chunn v. State, 869 S.W.2d 326 (Mo. App. S.D. 1994) -
On appeal from an order dismissing, without notice or a hearing, a postconviction motion filed under former Rule 27.26, the court reversed and remanded for an inquiry into whether counsel failed to comply with the rule. Although several different attorneys were appointed to represent the movant, no amended motion was filed, the record did not reflect why an amended motion was not filed, and neither defendant nor his attorney was given notice prior to the entry of the dismissal order.

SIGNIFICANT FEDERAL CASES - EIGHTH CIRCUIT AND SUPREME COURT

by Elizabeth Unger Carlyle

NOTE: This column did not appear in the Spring *Action Report*. The previous column included Eighth Circuit opinions through 7/93. Because the slip opinions for August, September, and October were not available when I began work on this article, there is a three-month break in the sequence of columns. I regret any inconvenience this may cause. This column includes cases decided from 11/93 through 3/94.

APPELLATE PROCEDURE

Powell v. Nevada, 114 S.Ct. 1280 (1994)
The rule of McLaughlin that a judicial probable cause determination is required within 48 hours of a warrantless arrest applies retroactively to all defendants whose convictions were not final when it was announced.

Hulsey v. Sargent, 15 F.3d 115 (8th Cir. 1994)
Where the state filed a motion for reconsideration in the district court, after filing notice of appeal from the district court's grant of habeas corpus relief, and then failed to file a new notice of appeal after the motion was denied, the court of appeals had no jurisdiction to consider the state's appeal.

Woods v. Kemna, 13 F.3d 1244 (8th Cir. 1994)
In a lengthy dictum to its decision to dismiss without prejudice so that the habeas corpus petitioner could file a motion to recall mandate, the court suggests that Ortega-Rodriguez v. United States, 113 S.Ct. 1199 (1993) might bar the application of the escape rule to deny this petitioner appellate relief. The record showed that in between his conviction and sentencing, the petitioner travelled to Oklahoma and was arrested there. Although Missouri authorities were aware of this, they did not have him returned to Missouri for sentencing until his Oklahoma sentence had been served.

Civil Rights Litigation

Williams v. Carter, 10 F.3d 563 (8th Cir. 1994)
Denial of subpoenas for witnesses requested by in forma pauperis plaintiff in 1983 case was abuse of discretion where request for counsel was denied, and defendant should not have been required to follow formal requirements to request witnesses. Some of the listed witnesses who were not subpoenaed could have given relevant evidence.

Johnson v. Bi-State Justice Center, 12 F.3d 133 (8th Cir. 1994)
Where the plaintiff's claim that excessive force was used to subdue him was neither irrational nor wholly incredible, dismissal under §1915(d) was improper. The evidence before the magistrate raised a factual issue under Hudson v. McMillian as to whether excessive force warranted recovery.

Hickey v. Reeder, 12 F.3d 754 (8th Cir. 1994)
Where officers used a stun gun on an inmate who refused to sweep his cell, the response was disproportionate to the inmate's misconduct and amounted to summary punishment in violation of the constitutional prohibition against cruel and unusual punishment. Remanded for a determination as to damages.

Phelps v. U.S. Federal Government, 15 F.3d 735 (8th Cir. 1994)
The district court erred in granting summary judgment on the plaintiff's Bivens claim because it did not notify the plaintiff that it intended to treat the government's motion to dismiss as a motion for summary judgment, did not give the plaintiff an opportunity to respond to the motion after the conversion, and the record does not support summary judgment. Plaintiff's claims that he was placed in seclusion because he refused to answer questions which implicated his Fifth Amendment right to remain silent, that the prison improperly restricted his use of the mails, and that he was punished for exercising his religious beliefs state a cause of action, and he must be permitted to attempt to amend them.

Robinson v. Freeze, 15 F.3d 107 (8th Cir. 1994)
The trial court erred in concluding that the county sheriff, who acted as a bailiff at the plaintiff's trial, had absolute quasi-judicial immunity from this §1983 suit. The immunity extends only to actions that were "specifically ordered by the trial judge and related to the judicial function." Some of the acts here apparently did not meet that standard. The court refers the trial court to Antoine v. Byers & Anderson, Inc., 113 S.Ct. 2167, 2171 (1993), on remand.

Williams v. Mueller, 13 F.3d 1214 (8th Cir. 1994)
The trial court's grant of motion for judgment on partial findings was reversed, and the case was remanded for findings concerning whether the actions of the

defendant prison guard in failing to intervene in a fight between the plaintiff and another inmate violated the Eighth Amendment.

Thongvanh v. Thalacker, 17 F.3d 256 (8th Cir. 1994)
The evidence was sufficient to sustain the jury's verdict in favor of the civil rights plaintiff and against the defendant where the state of Iowa did not show sufficient justification for enforcing its "English only" correspondence rule against the inmate plaintiff. Other non-English speaking prisoners were permitted to correspond in German and Spanish, and free Lao-English translation services were available to the prison system. Because there was no basis in the record for the trial court's reduction of the damage award from $4,000 to $2,000, the original award was reinstated.

Patterson v. Pearson, 19 F.3d 439 (8th Cir. 1994)
Summary judgment in favor of the prison dentist on plaintiffs 42 U.S.C. §1983 claim was improper where the plaintiff's claim that the dentist refused to provide follow-up dental care despite knowledge that the inmate was in severe claim could support a finding of an Eighth Amendment deprivation.

Due Process

Van Dyke, 14 F.3d 415 (8th Cir. 1994)
The trial judge's conduct prevented a fair trial where the trial judge interrupted the defendant's testimony and the testimony of a defense expert repeatedly to impeach it or to bolster the prosecution's case, and, in so doing, either "assumed the mantle of an advocate or at least very probably gave the jury the impression that he had done so." The trial court also improperly refused to allow the expert to give opinion testimony, and abused its discretion in refusing to make written instructions available to the jury. These errors as a whole deprived the defendant of a fair trial.

Belk v. Purkett, 15 F.3d 803 (8th Cir. 1994)
The parole revocation procedure followed here was deficient, and the petitioner was entitled to habeas corpus relief where: The evidence was undisputed that petitioner received notice of the violations alleged against him only moments before the preliminary hearing, he was denied the right to confront adverse witnesses at the final hearing without good cause, improper hearsay evidence was used against him, there was no evidence that the petitioner ever received written notice of the charges, the evidence used against petitioner was not disclosed to him, there is a dispute about whether the petitioner had the opportunity to call witnesses, and the findings of the parole board were not sufficiently specific. Finally the court was critical of the trial judge's failure to make a de novo review of the magistrate's report based on the petitioner's objections to the report.

Effective Assistance of Counsel

Foster v. Lockhart, 9 F.3d 722 (8th Cir. 1994)
Trial attorney was ineffective for failing to investigate and pursue impotency defense to rape charge. Attorney did not get enough facts to justify his conclusion that

it was fruitless to investigate further; impotency defense bolstered alibi defense; to show incompetent counsel, a defendant need not show that he could not have been convicted, only undermine that counsel's ineffectiveness undermines confidence in the outcome. Where the only real evidence

was the victim's testimony, and medical evidence showed impotence, this test was met.

Foster v. Delo, 11 F.3d 1451 (8th Cir. 1994)
The defendant was denied effective assistance of counsel when counsel waived his right to testify at the penalty phase of his trial without obtaining his informed consent. The case is especially noteworthy because the court finds prejudice despite the defendant's failure at any stage to show what his testimony would have been. Death sentence vacated.

Hanson v. Passer, 13 F.3d 275 (8th Cir. 1994)
The defendant was denied his right to counsel when the trial court refused to appoint counsel unless the defendant paid $1000 into the court before the hearing, and conducted a pretrial omnibus hearing at which witnesses were examined and pretrial motions were presented.

Burden v. Zant, 114 S.Ct. 654 (1994)
Remand was required where the district court record contained evidence that a co-defendant represented by the same counsel had been granted immunity, thus giving rise to a conflict of interest. Contrary to the conclusion of the Eleventh Circuit, the district court made no finding on this issue.

EVIDENCE

United States v. Barrett, 8 F.3d 1296 (8th Cir. 1994)
Reversible error occurred where the court found that a child witness was not competent to testify, but admitted some hearsay statements of the child, and wouldn't let the defendant introduce the child's statements at the competency hearing that she did not know about truth and lies.

United States v. Has No Horse, 11 F.3d 104 (8th Cir. 1994)
The trial court erred in admitting evidence of other crimes under FED. R. EVID. 404(b), and reversal is required. The defendant was convicted of aggravated sexual abuse and sexual abuse of a minor. (Federal jurisdiction is grounded on the facts that the defendant is an enrolled Oglala Sioux and the offenses occurred on the Pine Ridge Reservation.) The 11-year-old victim testified that she and the defendant engaged in consensual sexual intercourse. The defendant denied any sexual conduct with the victim. The government offered the testimony of two teen-aged girls that the defendant had made sexual advances toward them. There was insufficient similarity to the charged offense for these extraneous acts to have any relevance to the defendant's intent, and the evidence was highly prejudicial.

United States v. Whitted, 11 F.3d 782 (8th Cir. 1994)
The trial court committed plain error in admitting an expert opinion that the victim, the defendant's daughter, had suffered repeated sexual abuse. While the doctor could state that his findings were consistent with repeated sexual abuse, he did not have information other than his opinion of the victim's credibility to support his opinion. This type of testimony had previously been condemned by the court, and was very prejudicial here.

United States v. Vue, 13 F.3d 1206 (8th Cir. 1994)
The trial court committed reversible error when it admitted evidence, over defense objection, that tied opium smuggling in the Twin Cities area to members of the Homong ethnic group.

Forfeitures

United States v. James Daniel Good Real Property, 114 S.Ct. 492 (1993)
Seizure of real property for forfeiture purposes without notice and hearing is a violation of due process. The exigency which permits pre- notice and hearing seizure of tangible personal property is not present with real property, which cannot be readily concealed or removed.

Glasgow v. United States Drug Enforcement Administration, 12 F.3d 795 (8th Cir. 1994)
Where the plaintiff and his attorney's had "unambiguously conveyed his intent to contest" the forfeiture of $76,000 by the DEA beginning one week after the seizure, and the DEA failed to alert the plaintiff to the deadline for filing a claim, notice was inadequate and the agency's actions reflect bad faith. The administrative forfeiture is void. Further, the district court erred in dismissing Bivens claims against the agents without determining whether the forfeiture remedies in the Tariff Act preclude such claims.

United States v. Woodall, 12 F.3d 791 (8th Cir. 1994)
The trial court had jurisdiction to consider the defendant's claim that his property was forfeited in violation of his right to due process because he did not receive adequate notice of the forfeiture, despite the fact that administrative forfeiture had already occurred.

General Sentencing Issues

United States v. Talley, 16 F.3d 972 (8th Cir. 1994)
Remand for resentencing is required because the trial court may only enhance a defendant's sentence under 18 U.S.C. §924(e) for convictions that occurred before the defendant violated 18 U.S.C. §922(g) (felon in possession of firearm). The trial court erroneously counted a conviction that occurred after the instant offense.

Guilty Pleas

United States v. Osment, 13 F.3d 1240 (8th Cir. 1994)
The defendant's guilty plea was involuntary where the trial court failed to advise him that he could be subject to a term of supervised release which could add to his imprisonment if the supervised release were revoked.

Habeas Corpus

Foster v. Lockhart, 9 F.3d 722 (8th Cir. 1994)
A magistrate judge may release petitioner on bail after granting the writ.

Duvall v. Purkett, 15 F.3d 745 (8th Cir. 1994)
Relying on the Missouri Supreme Court decision in Simmons v. White, 1993 WL479730, the court concludes that federal courts should be reluctant to accept state waivers of exhaustion. Here, under the Simmons rule, state habeas corpus relief is unavailable and Duvall's claims are procedurally defaulted. Petition dismissed.

Woods v. Kemna, 13 F.3d 1244 (8th Cir. 1994)
The appellant's habeas corpus petition is dismissed without prejudice because the appellant still has the state remedy of motion to recall mandate available, and therefore his claims are unexhausted. Using the standard of State v. Thompson, which allows for relief on motion to recall mandate where there has been a prejudicial mistake of fact, a deprivation of constitutional rights, or an intervening U.S.

Supreme Court decision contrary to the appellate decision, the court concludes that Woods may be entitled to relief from the Missouri court.

Jury Instructions

United States v. Schrader, 10 F.3d 1345 (8th Cir. 1994)
Where the trial court erroneously instructed the jury that the adverb "forcibly" in the statute punishing one who "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" federal officers applied only to the verb "assaults," reversal for a new trial was required.

Search and Seizure

United States v. Ramos, 20 F.3d 348 (8th Cir. 1994)
Reversal was required where the defendants's motion to suppress evidence seized in the search of their vehicle should have been granted defendants were stopped because the front seat passenger was not wearing a seat belt. The officer asked the driver to wait with him in the patrol car, and engaged him in a conversation about his destination. Eventually, he obtained a consent to search, and marijuana was found in the gas tank. The court held that while there was probable cause to stop the truck, the continuing detention of the defendants was not "reasonably related in scope to the circumstances which justified the interference in the first place," citing Terry v. Ohio. Where the questioning of the driver in the patrol car was unrelated to the cause for the stop, and the driver and passenger were separated and did not feel free to leave, the continuing detention and search were unreasonable.

United States v. Lucht, 18 F.3d 541 (8th Cir. 1994)
The "knock and announce" doctrine was violated, and the defendant's motion to suppress evidence seized in the search of his home should have been granted, where the officers knocked at the door, yelled "police officers," waited 3-5 seconds, and used a battering ram to open the door. The officers never announced their purpose and had no reason to think the occupants knew they were there to execute a search warrant, and the entering officers were aware of no exigent circumstances justifying the unannounced entry.

Sentencing Guidelines

Balano, 8 F.3d 629 (8th Cir. 1994)
The trial court's determination that the conspiracy was not relevant conduct for sentencing purposes was proper. The defendant was acquitted on the conspiracy count. The trial court's factual findings on sentencing are reviewed only for clear error. The government therefore loses its appeal.

United States v. Wessels, 12 F.3d 746 (8th Cir. 1994)
Remand for a new sentencing hearing was required where the government, in the face of defendant's objection, was not required to produce evidence that the substance at issue was D-methamphetamine rather than L-methamphetamine, a determination which is relevant to sentencing guidelines calculations.

United States v. Coohey, 11 F.3d 97 (8th Cir. 1994)
United States v. Holmes, 13 F.3d 1217 (8th Cir. 1994)
These cases were remanded so that the sentencing courts could, if they chose, exercise its discretion to resentence the defendants under the Sentencing Guidelines amendment pertaining to the

weight of LSD carriers.

United States v. White Buffalo, 10 F.3d 575 (8th Cir. 1994)
The trial court properly departed downward from the sentencing range of 18-24 months to sentence the defendant to three years probation. The defendant was convicted of possession of an unloaded sawed off rifle in his van. There was no ammunition present, and there was evidence that the rifle had been altered to make it easier to handle while hunting animals in the crawl spaces under the defendant's chicken shacks. Departure was justified under Sentencing Guidelines §5K2.11, because the defendant's conduct did not cause or threaten the harm sought to be prevented by the law. The extent of the departure was also reasonable.

United States v. Behler, 14 F.3d 1264 (8th Cir. 1994)
Kok v. United States, 17 F.3d 247 (8th Cir. 1994)
Where the Sentencing Guidelines have changed between the time of the offense and the time of sentencing, an ex post facto violation occurs if the defendant is sentenced under harsher guidelines than those in effect at the time of the offense.

United States v. Baker, 16 F.3d 854 (8th Cir. 1994)
Sentencing the defendant as a career offender was improper because his conviction under 21 U.S.C. §856 of managing or controlling drug premises was not a predicate "controlled substance offense" within the meaning of Sentencing Guidelines §4B1.1. The conviction here could have been for managing premises where drugs were distributed, which would have been a predicate offense, or for managing premises where drugs were used, which would not be a predicate offense because simple possession offenses are excluded from the §4B1.1 definition. Given this ambiguous verdict, the defendant is entitled to the lower sentencing range.

United States v. Parham, 16 F.3d 844 (8th Cir. 1994)
Where the trial court mistakenly believed a government motion was required for any downward departure, the case was remanded for the trial court to consider the defendant's departure request. The opinion contains a useful summary of the law of downward departure.

United States v. Washington, 17 F.3d 230 (8th Cir. 1994)
Where the trial court fully considered the conduct involved in the defendant's Missouri sentence, which was imposed after the commission of the instant offense but before sentencing, the defendant was entitled to have the federal sentence run concurrent with the state sentence. Remanded for a determination as to whether the federal sentence should run concurrently or consecutively to an undischarged California sentence on which the defendant's parole was revoked.

United States v. Magee, 19 F.3d 417 (8th Cir. 1994)
Remand was required for the trial court to clarify the basis it used to determine the amount of drugs attributable to the defendant.

United States v. Bauer, 19 F.3d 409 (8th Cir. 1994)
Remand was necessary where the district court imposed a $2,500,000 fine without articulating its reasons, and the defendant faces a lengthy prison term and has dependents to support.

United States v. Yell, 18 F.3d 581 (8th Cir. 1994)
Where, although he initially minimized the amount of cocaine he sold when talking to the probation officer, the defendant truthfully informed the court of the correct quantity on several occasions before sentencing, imposition of the obstruction of justice penalty was unwarranted and remand for resentencing was required.

United States v. Reetz, 18 F.3d 595 (8th Cir. 1994)
The district court improperly grouped the defendant's five counts of conviction into two sentencing groups. Where the five counts all related to the defendant's conduct in jumping bond, a single group was required under Sentencing Guidelines §3D1.2. Remand for resentencing is therefore required.

Sufficiency of Evidence

United States v. Frayer, 9 F.3d 1367 (8th Cir. 1994)
Where the only evidence against one defendant was that he was present at a meeting of conspirators, but not that he was aware of a drug deal, the evidence was insufficient and reversal was required.

Ratzlaf v. United States, 114 S.Ct. 655 (1994)
In order to be found guilty of structuring financial transactions, a defendant must be shown to have known that such structuring was illegal.

Missouri Legislative Report

by Dan Viets

Friday, the 13th of May, 1994, was the final day of this year's session of the Missouri General Assembly. All things considered, it was a remarkably good year for MACDL's legislative agenda.

It is impossible in the space available here to describe all the important changes to the criminal law passed in 1994. Most bills passed were actually combinations of several individual bills amended in committee or replaced by committee substitutes, which were then further amended on the floor of each house as bills worked their way through the legislative process. Thus, the final form of many bills bears little or no resemblance to the original bill filed.

Our major disappointment of the session was the legislature's failure to pass a law prohibiting the execution of retarded people. MACDL's Board had voted to make this one of our top priorities. Despite our best efforts, we were unable to bring this proposal out of either house. The Senate bill sponsored by Wayne Goode of St. Louis did receive a favorable recommendation from the Senate Judiciary Committee. But before the bill could come before the full Senate for a vote, intense lobbying by the Prosecutors' Association, which included some very misleading statements in a letter distributed to all Senators, resulted in the bill being pulled from the calendar by its sponsor.

Public opinion is clearly on our side in this issue. All the polls conducted consistently show a solid majority of Americans, including many who support the death penalty generally, do not support the

execution of retarded defendants. The issue is virtually certain to come before the legislature again in 1995, and MACDL and its allies will continue to push for this important reform.

Prosecutors suffered a major defeat when their highest priority, passage of a witness-immunity law, went down to defeat on the final day of the session. They seemed desperate to pass this bill in some form. Despite their vigorous lobbying, witness immunity again was defeated due to a combination of Missouri Senators who recognize the threat to civil liberties which witness immunity presents, and the acrimonious debate over concealed weapons legislation, which was included in the same bill.

Throughout the session, the notion of a "three strikes" law was much discussed in the Capitol and in the news media. A variety of substantially different proposals went under this title. For instance, some "three strikes" proposals called for a life sentence, while others called for 100% of whatever sentence the court might impose. Some included nonviolent, victimless drug offenses among the convictions which might trigger the "three strikes" consequences, and others did not.

The sentencing enhancement bill which finally passed has nothing to do with "three strikes". Senate Bill 763 is a 59-page omnibus bill containing dozens of changes in the law, which primarily relate to the Department of Corrections.

Under the new law, a defendant committed to the DOC after conviction for a single dangerous felony shall serve a minimum of 85% of the sentence imposed. Dangerous offenses are defined in the new law to include: murder I; robbery I; assault I; arson I; forcible rape; forcible sodomy; and kidnapping. Offenses no longer considered dangerous for purposes of sentence enhancement include: burglary; causing catastrophe; felonious restraint; and voluntary manslaughter.

Also, a defendant with three or more previous remands to the DOC for felonies unrelated to the present offense must serve 80% of the sentence imposed by the time the defendant attains age 70. This law does not apply to violations of Chapter 195, which covers drug offenses.

If a defendant has two previous remands to the DOC for felonies unrelated to the present offense, the minimum prison term will be 50% of the sentence. If he has one prior remand to the DOC for a felony, he must serve 40% of his sentence.

These enhancement provisions apply to all classes of felony offenses except violations of Chapter 195. Unlike the previous scheme, the enhancement provisions only apply to prior felony convictions for which the defendant actually served prison time. Prior felony convictions which did not result in DOC time will not be factored into the enhancement.

SB 763 also grants authority to the Board of Probation and Parole to convert consecutive sentences to concurrent sentences in cases where the sentences were imposed at the same time or the offenses were part of a course of conduct constituting a common scheme or plan.

SB 763 also modifies the Missouri Sentencing Commission and renames it the Missouri Sentencing Advisory Commission. Its membership is expanded from 9 to 11, and charged with examining whether and to what extent sentencing disparity exists in imposition of the death sentence.

By July 1995 the Commission is required to establish a system of recommended sentences within the range presently authorized by statutes. These recommended sentences will be distributed to all courts, and are to take into account the nature and severity of each offense, the record of prior offenses, the sentences imposed for the offense in other courts and the availability of resources in the DOC and elsewhere to carry out the sentences.

In addition, SB 763 creates an Offenders Under Treatment Program, a 180-day course for first-time drug offenders, or other defendants where substance abuse was a factor, and for nonviolent first-time offenders convicted of a crime not involving use of a weapon. Those who complete the program successfully may be granted parole by the Board of Probation and Parole. The bill also creates a two-year treatment program for chronic nonviolent offenders with cocaine addictions. Upon completion of the program, the sentencing judge may place the offender on probation.

The same bill creates the Missouri Post-Conviction Drug Treatment Program for first-time offenders on probation. This program permits defendants on probation to be required to participate in a noninstitutional drug-treatment program. Those who fail that program may be placed in an institutional program without having their probation revoked.

Another provision of the bill permits courts to determine whether a defendant found not guilty by reason of mental illness or defect of a nondangerous crime should be immediately conditionally released. It also increases the classification of the crime of escape from confinement in the DOC from a Class D felony to a Class B felony.

Finally, SB 763 prohibits granting an appeal bond to defendants sentenced to death or life imprisonment for second degree murder, first degree assault or forcible rape. This section goes into effect upon signature of the Governor. Gov. Carnahan signed SB 763 on June 29, 1994. Other provisions of the bill will not take effect until the end of August 1994.

The next most extensive crime legislation is contained in SB 693, which makes several modifications in the law related to sex crimes. The bill is a wholesale overhaul of the statutes on rape, sodomy, child molestation, sexual assault, sexual misconduct and deviant sexual assault. Several existing such crimes are repealed and new ones created, including: statutory rape I and II; statutory sodomy I and II; sexual misconduct I, II and III; and child molestation I and II. The elements of the crime of sexual assault are changed, as are the definitions of deviant sexual intercourse and sexual contact. This bill reinstates marriage to the victim as an affirmative defense to the crimes of statutory rape, statutory sodomy, sexual assault, deviant sexual assault, child molestation and sexual misconduct I.

One provisions which seems to be clearly unconstitutional and is certain to be challenged in short order provides that if the victim of an alleged sex crime is 13 or younger, evidence of other alleged sex crimes the defendant may have committed, regardless of whether he was convicted **or even charged** with those prior acts, will be admissible to show the propensity of the defendant to have committed the crime charged! The additional alleged bad acts may have occurred **either before or after** the alleged offense for which the defendant is being tried!

The elements of forcible rape are changed to no longer include the phrase "without

that person's consent", substituting a new definition: intercourse "by the use of forcible compulsion". The maximum penalty for this offense is increased to life in prison.

The House Committee substitute for Senate Bill 969 makes a number of changes in the law related to the Corrections Department. Among these are a requirement that health care providers provide copies of medical records to the DOC when requested. Also, the bill requires an individual to receive credit for time served while waiting to be placed in the DOC. And it requires the DOC to perform autopsies on inmates who die under violent or suspicious circumstances, or of apparent suicide.

SB 696 also requires the DOC to develop work programs in which offenders may be employed by any agency or political subdivision of the state. It also requires the DOC to implement a plan for educational purposes. And this bill requires all individuals placed on probation, parole or conditional release to pay $15 per month to the inmate fund, which is used to cover costs of half-way houses.

SB 470 requires the Board of Probation and Parole to provide supervision for persons convicted of the class A misdemeanors of endangering the welfare of a child or violating an order of protection.

SB 657 permits juvenile officers to appeal any final judgment, order or decree concerning a juvenile under their jurisdiction except for determinations involving violations of state laws or municipal ordinances. A juvenile officer may appeal an order suppressing evidence, confessions or admissions. The bill also grants grandparents the right to intervene in juvenile court proceedings when custody of a child is at issue.

The Missouri legislature gave strong support to the concept of the medical use of marijuana by passing Senate Concurrent Resolution 14, which states that marijuana has been shown to be of medical value in the treatment of various ailments, and calls on the federal government to make marijuana available for medical use "... by ending federal prohibitions against the legitimate and appropriate use of marijuana in medical treatments ..." Copies of this resolution have been sent to President Clinton, leaders of the U.S. Senate and House of Representatives, and all members of the Missouri Congressional Delegation. The resolution was passed unanimously in the Missouri Senate, and passed on a voice vote in the House on the final day of the legislative session.

Another bill, which would have created a statutory defense for patients whose doctors certify their medical need for marijuana, did not get out of committee; it will almost certainly be introduced again next session.

Copies of these and other bills passed in the 1994 session may be obtained by contacting your state senator or representative. While contacting them about these bills, let them know you think the recent enactment of SB 763 surely makes Missouri's criminal code tough enough.

MAY IT PLEASE THE COURT

Edited by Peter Irons and Stephanie Guitton, The New Press, 1993
Reviewed by Elizabeth Carlyle

May It Please the Court is a set of tapes and transcripts of 23 edited U.S. Supreme Court arguments dating from 1958 through 1989, all involving the Bill of Rights. They include such noteworthy criminal cases as Gideon v. Wainwright and Miranda v. Arizona as well as civil rights, free speech and equal protection cases. According to the editors, arguments in the Supreme Court have been tape recorded since 1955. They claim that this is the first public collection of such tapes.

I see the value of this collection as twofold. First, it is inspirational. Listening to the judges argue with Duane Nedrud in Miranda about whether lawyers are a threat to law enforcement, for example, reminded me of what I am here for. Listening to Abe Fortas arguing for Clarence Gideon reminded me of what real advocacy is about.

Second, it is educational. I recently used the tape of Tinker v. Des Moines Independent School District to talk to sixth-graders about the court and its process. It would also be useful in other groups.

The editing is good, and the narrative explanations on the tape provide a background that is basic enough for the lay reader/listener without being simplistic. The quality of the recordings varies somewhat, but it is generally good. The tape set comes with a book which contains the transcript of the tape, an edited version of each Supreme Court opinion, and some additional background material.

The set costs $75.00. That may seem a little steep, but it's worth it. Reward yourself, and then listen to the tapes in your car. You'll be a better person, and a more dedicated lawyer, for having done so.

SENTENCING PROJECT FIGHTS FOR TRUTH AND JUSTICE

"Eternal vigilance is the price of liberty." -- Thomas Jefferson.

Mr. Jefferson's statement has never been truer than it is in 1994. We face serious challenges to the preservation of the essence of constitutional liberties from the very public servants who are sworn to uphold them. In both the federal and state legislatures, politicians pander to the perceived public demand for ever-harsher sentencing, even though those politicians and most of their constituents have no idea how harsh sentencing already is.

The Sentencing Project is a non-profit independent public interest organization based in Washington, D.C., which studies and reports on sentencing policies and practices. In three reports to the public over the past four years, the enormous proportions of America's dependence on imprisonment have been analyzed.

In 1990 the Sentencing Project issued a report authored by Marc Mauer which pointed out that nearly one-quarter of the U.S. population of black men aged 20-29 are under the control of the criminal justice system, either incarcerated, on probation or on parole. In 1991, in an attempt to

establish a context for understanding the statistics of its earlier report, the Project studied incarceration practices around the world. That study resulted in the issuance of another report which concluded that the U.S. leads all other nations on the face of the globe in its rate of imprisoning its own citizens.

That has not always been the case. Although the U.S. prison population increased by more than 50% between 1973 and 1980, we still ranked #3, behind the Soviet Union and South Africa, as recently as 1982. By 1992, however, the U.S. was the undisputed leader.

At that time the incarceration rate per 100,000 people was 268 in the Soviet Union; 333 in South Africa; and 426 in the U.S. Moreover, the rate for black American males stood at 3109 per 100,000 people, nearly four times the rate for black males in South Africa.

According to an article in the winter 1992 issue of the ABA's Criminal Justice, the Sentencing Project believes the enforcement of drug prohibition is "... probably the largest single factor behind the rise in prison populations during the past decade."

On June 2, 1994, Associated Press reported that the Sentencing Project had issued another report, this one highlighting the fact that the U.S. prison population has nearly tripled since 1980. And Missouri is doing its share to inflate these figures. In 1980, the Missouri Department of Corrections reported 5,885 prisoners. In 1993, the DOC housed an average monthly population of 16,478.

Professor Alfred Blumstein of Carnegie-Mellon University, commenting on the recent report, pointed out that the U.S. incarceration rates remained around 110 per 100,000 from the 1920s through the 1980s. But, Prof. Blumstein notes, during the past 20 years "... murder rates have remained absolutely flat, robbery has grown about 1% per year and burglary has declined somewhat."

Despite these facts, many among the press and our elected officials encourage the feeding frenzy for more prisons, ignoring alternatives which are both more effective in reducing crime and far less costly.

Both MACDL and the National Association of Criminal Defense Lawyers are vigorously working with our allies to turn the tide against ignorance and repression, and we are making progress. Only a few short years ago, the crime debate in Congress and the General Assembly focused specifically on nonviolent, victimless offenses: violations of drug prohibition. Today this is no longer true. The debate is now focused primarily on violent offenses, and the so-called "three strikes" proposals apply primarily to those who intentionally inflict physical harm on other human beings. In Missouri, attempts to include drug offenses failed. In fact, no "three strikes" proposal was passed in the Missouri legislature, although a bill increasing the time served for truly violent offenses was adopted. *(See MISSOURI LEGISLATIVE REPORT, p. 17.)*

In Congress, the debate continues over whether to define nonviolent, victimless offenses as violent crimes. Such changing definitions bring to mind Orwell's **1984** or the Queen of Hearts in **Alice in Wonderland**.

If the federal crime bill passes in a form that includes drug offenses as prior "strikes", the federal prison population will increase dramatically because state

offenses will be counted as prior "strikes" in subsequent federal prosecutions.

To obtain copies of the full reports issued by the Sentencing Project, or to contribute to the work of this fine organization, write to the Sentencing Project, 918 F Street, NW, Suite 501, Washington, DC 20004, or call 202/628-0871.

F.Y.I.

by Francie Hall

On April 22-23, some 260 people attended DEFENDING CRIMINAL CASES, **MACDL**'s spring seminar. At Friday's luncheon, Charlie Rogers presented **MACDL**'s annual award for excellence to Sean O'Brien, Director of the Missouri Capital Punishment Resource Center. John Henry Hingson III, current president of the National Association of Criminal Defense Lawyers, spoke to us of challenges met and battles to be fought.

At the annual membership meeting Saturday morning, the Nominating Committee's recommendations were approved and the following officers and directors were elected by acclamation:

President:	**Dan Viets**
President-Elect:	**J. R. Hobbs**
Vice President:	**James Worthington**
First Vice President:	**Larry Schaffer**
Second Vice President:	**Elizabeth Carlyle**
Directors:	**M. Shawn Askinosie**
	Thomas Carver
	Patrick Eng
	Brad Kessler
	Richard Sindel

Jay DeHardt's accomplishments as President of **MACDL** during 1993-94 were lauded by Sean O'Brien, who presented Jay with a commemorative plaque. Sean mentioned Jay's and J.D. Williamson's work on behalf of a Missouri Capital Punishment Resource Center attorney in the Faye Copeland trial.

Dave Everson proposed that **MACDL**, from time to time, recognize attorneys who represent particularly unpopular defendants with a newly created ATTICUS FINCH AWARD. Dave suggested Charlie Atwell, J.R. Hobbs, K. Louis Caskey and Jim McMullen for the first award for their work on the defense of Taylor/Nunley. The motion was seconded and carried.

On May 3-4, I was privileged to be part of Missouri's delegation to the Third Annual Legislative Fly-In in Washington, along with Dan Viets, Larry Fleming, Burt Shostak, Bruce Houdek, Charlie Atwell and Dan Dodson. Attitudes of staffers of Sens. Danforth and Bond, Reps. Wheat and Skelton, ranged from politely noncommittal to warmly interested in our discussions of topics from the death penalty to forfeiture. I believe we scored some points here and there, and was proud to be one of dozens of people crisscrossing the hill on behalf of **NACDL**'s legislative agenda.

Speaking of **NACDL**, Charlie Atwell of K.C. has been nominated for a position on the national board, and his wife, Janel, for a position on the board of Friends of NACDL. I recommend both of them highly to those of you eligible to vote in **NACDL**'s election this month.

WELCOME, NEW MEMBERS & MEMBERSHIP RENEWALS

Jeannie M. Arterburn, K.C. *(Public Defender)*
Robert C. Babione, St. Louis
James D. Beck, St. Joseph
R. Steven Brown, Springfield *(Federal P.D.)*
Catherine Earnshaw-Hobbs, Lee's Summit
Thomas Howe, St. Louis *(Sustaining Member)*
Sean J. O'Hagan, St. Louis
Robert W. Richart, Joplin

MACDL Membership Application

If you are not currently a member of MACDL, **or if a red "X" appears on your mailing label indicating it's time to pay your annual dues,** 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
Public Defender (Head of Office):	50.00
Assistant Public Defender:	25.00
Provisional (Nonvoting) Member - Judges, Law Professors & Students, Paralegals & Legal Assistants:	20.00

Name _____

Address _____

City _____ **State** _____ **Zip** _____

Phone _____ **Fax** _____ **Adm/Bar** _____

____ **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 <u>not</u> a requirement of membership in the Missouri Association of Criminal Defense Lawyers.)***

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

BULK RATE
U. S. POSTAGE
PAID
PERMIT NO. 1917
K.C., MO

A red "X" on your address label indicates that you owe annual dues. Please use form on p. 23.

Please verify the information on the above mailing label.
Use the address change form below to make any corrections.

ADDRESS CHANGE / CORRECTION

(Please send a photocopy of this entire page in order to keep your newsletter intact.)

Name _____ *County* _____

Street _____

City _____ *State* _____ *Zip* _____

Phone _____ *Fax* _____