



MACDL

Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

SPRING 1995

Vol. V, No. 1

PRESIDENT'S LETTER

My year as president of the MACDL is quickly drawing to a close. At the Annual Seminar and Meeting in St. Louis on Friday and Saturday, April 28 and 29 at the Marriott Pavilion Hotel, J.R. Hobbs will take over as president of the organization.

If you are not already planning to do so, I urge you to be with us in St. Louis on April 28-29. This seminar promises to be the best yet, and the meeting provides an excellent opportunity to see old friends and share information about the practice of criminal defense law.

During the past year, we have continued our very successful CLE programs and have continued to influence the course of legislation in the Missouri General Assembly and in the U.S. Congress.

We have also produced the first membership directory for MACDL. I look forward to a second edition of the directory being published soon in a new and improved format.

Pending Missouri Legislation

The 1995 session of the Missouri General Assembly is quickly drawing to a close. On Friday, May 12, the legislature will adjourn until January of next year.

This time of year is the most critical to determining what laws we are all going to have to live and practice under in the future. If you have not already done so, now is the very best time you could choose to contact your state senator and state representative to express your opinions about several issues which will be decided very shortly.

One of the most disturbing developments in this session of the Legislature is the fact that the police and prosecutors are again attempting to obtain a cut of the proceeds of criminal forfeitures. House Joint Resolution 3 would permit police and prosecutors to receive one-half of all proceeds of criminal forfeitures in the state. That situation was remedied just a few years ago when MACDL Director Jim Worthington persuaded the Missouri Supreme Court that the Missouri Constitution requires criminal forfeiture proceeds to be used to support education.

After many news accounts of terrible abuses of forfeiture by police and prosecutors, and with MACDL's support, the Missouri legislature passed further reforms of the forfeiture laws. Now law enforcement interest groups seek to turn back the clock.

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

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

HJR 3 would place on the ballot a proposed Missouri Constitutional Amendment which would again permit the obvious conflict of interest which occurs when police and prosecutors have a direct financial stake in forfeiture activity. The Missouri Constitution was written the way it presently reads in order to prevent this conflict of interest.

HJR 3 has already passed the Missouri House and there is a very real possibility that the Senate will also pass it and voters will soon be invited to amend our Constitution. It is very important that legislators understand that the conflict of interest involved in forfeiture proceedings going to police and prosecutors should not be allowed to rear its ugly head again.

The topic of juvenile justice reform has been at the top of the agenda for many legislative leaders this year. Two different versions of sweeping revisions of the law in this area are presently pending.

House Bill 174 would permit children of any age to be tried as adults if the offense of which they are accused would be a felony if it were committed by an adult. This is a very drastic change from the present statutes.

In contrast, Senate Bill 40 would only permit young children to be charged as adults for certain specific and very violent offenses. Obviously, Senate Bill 40 takes a more moderate approach than HB 174.

Another very disturbing development in the Legislature is **House Bill 252** which, in its present incarnation, would permit judges to require the installation of a very expensive auto "ignition lock devices by defendants charged with their first DWI offense. The bill mandates that second offenders be required to install these devices before they could be permitted to drive legally.

So-called "ignition interlock devices" are essentially portable breathalyzer machines

which are installed in a vehicle in such a way as to prevent the vehicle from starting until someone has breathed into the device and the device indicates that the person breathing into it has not been drinking.

It is shocking that the legislature has come this close to adopting such a bill. If these devices were used to permit people who otherwise would not be permitted to drive to do so conditioned on the use of the device, we would probably have no objection. However, as presently proposed, this bill would actually permit or require courts to order defendants to purchase and install these devices when they would not otherwise be prohibited from driving. It is incredible that the Legislature could be taken in by this scam. The makers of these devices are, of course, lobbying very hard for the passage of the bill.

HB 252 has passed the House and could very easily pass in the Senate unless we act now to stop it. Call and write your Senator, Representative and newspapers to object to this bill now.

Not only are these devices very expensive, but there is no way to guarantee that an offender who is ordered to use them would not have another person breathe into the device and thus permit him to start his car and drive. Although the proposed law would also make a separate new crime of doing so, it is highly unlikely that such a law would be enforceable.

In its present form, this bill will not permit anyone to drive legally who could not already do so under the present statutes. It will place a heavy financial burden on people who are already struggling to pay the cost of dealing with DWI charges.

The companies who make these machines are anxious to have Missouri become a guinea pig for a foolish and very expensive social experiment which will probably not reduce the number of drunk drivers on the road, but will

PRESIDENT'S LETTER *(cont'd from p. 3)*

certainly result in a great financial bonus for the manufacturers of these machines.

House Bill 252 also contains a proposal to inflict DWI penalties on people under 21 who have consumed any measurable and detectable amount of alcoholic beverage. In other words, people under 21 who are not intoxicated but have had a single drink will be treated as if they were driving while intoxicated simply because they are under 21.

This legislation makes no sense since there are already laws prohibiting drinking by people under 21. There is no evidence that people under 21 are more dangerous after a single drink than people over 21 after a single drink.

If legislators want to do more to discourage underage drinking, they should simply enhance the penalties for that offense, but not inflict all the penalties which are presently inflicted on adult DWI offenders.

Finally, Senate Bill 52, which has passed the Senate and is presently pending before the House, establishes "drug-free zones". This bill actually proposes to enhance the punishment for possession or sale of illegal substances if the offense occurs near a place where young people congregate. Obviously, the vague and overly broad language of this bill will leave it vulnerable to constitutional challenges. The legislature should recognize that infirmity and clean up the language of this bill, or reject it altogether.

Annual NACDL Congressional Fly-In

On Wednesday and Thursday, June 14 and 15, the National Association of Criminal

Defense Lawyers will hold its Fourth Annual Congressional Legislative Fly-In. The event will be based at the Hyatt Regency in Washington, D.C.

Last year, MACDL helped several of its members attend this event, which includes an intensive briefing on pending criminal law issues in Congress. NACDL's new Legislative Director, Leslie Hagin, has presented an excellent overview of those issues in the April issue of *The Champion*, the monthly magazine of NACDL.

In May 1994, MACDL's representatives had the opportunity to visit with several members of congress or their legislative aides. Members of congress seemed to take very seriously our suggestions for changes in pending bills.

If you are interested in attending this year's National Legislative Fly-In, please contact my office at 314/443-6866 for additional information.

MoBar Criminal Law Subcommittee on Disclosure

For the past several months, I have represented MACDL on a special subcommittee of the Missouri Bar Criminal Committee. This group has met a number of times, and is ready to submit its final report to the Missouri Bar Board of Governors. These are some of the issues which the subcommittee has reviewed, and on which we will be asking the Missouri Bar to consider making changes:

1. ***Early disclosure of investigative reports when defendant is charged by complaint.*** The suggestion is that defendant should be entitled to existing investigative reports as

PRESIDENT'S LETTER *(cont'd from p. 3)*

soon as there is an arrest and formal charge. Alternatives included disclosure of defendant's statements and disclosure of investigative reports at a specified time prior to arraignment.

2. **Disclosure by state of defendant's criminal record.** The suggestion is that the state should be required to disclose defendant's prior criminal record because of its access to law enforcement data bases.

3. **Procedure and costs for depositions in criminal cases.** It is suggested there is need for clarification of the procedure which will protect either party from unduly burdensome and costly depositions where witnesses or counsel are foreign to the jurisdiction in which the case is pending.

4. **Definition of discoverable work product.** It is suggested there is need for clarification of the distinction between discoverable investigation of disclosed witnesses and protected work product. What is the status of investigation directed by counsel as part of case preparation?

5. **Notice to state of defendant's intent to use defense of diminished capacity.** The existing rule requires disclosure of the defense of non-responsibility because of mental disease or defect, but is silent with respect to diminished capacity.

6. **Continuing duty to disclose to require parties to contact witnesses to assure witness has provided all written or recorded statements or memoranda summarizing oral documents.** (Submitted by letter after our November 11th meeting.) It is suggested that Rule 25.08 should specifically require each party to assure that its witnesses have provided discoverable material in their possession at least ten days prior to hearing or trial.

It has been a tremendous honor and pleasure to serve as president of MACDL during the last twelve months. My term has passed quickly. I am proud of MACDL's achievements, yet well aware of how much more we can accomplish. I look forward to remaining active in the organization, and encourage each of you to contribute to our endeavors.

Sincerely,

Dan Viets

MACDL's Annual Spring Seminar, *Defending Criminal Cases*, will be held April 28-29, 1995 at the Marriott Pavilion Hotel in Downtown St. Louis.

See pp. 10-11 for details.

RECENT MISSOURI CASES

by Kris Daniel, Missouri Capital Punishment Resource Center

APPELLATE REVIEW

State v. Troupe, 891 S.W.2d 808 (Mo. 1995)

The Missouri Supreme Court held that dismissal of an appeal under the escape rule was proper even though the escape occurred prior to sentencing and had no impact on the appellate process. In so holding, the court rejected the United States Supreme Court's limitation of the dismissal doctrine in *Ortega-Rodriguez*, 113 S. Ct. 1199 (1993). The court reasoned that a delay in proceedings "necessarily" has an adverse impact on the criminal justice system and the state's case, particularly if the appellant is successful and the case must be remanded for a new trial.

CLOSING ARGUMENT

State v. Crooks, 884 S.W.2d 90 (Mo. Ct. App. W.D. 1994)

The trial court violated the defendant's sixth amendment right by refusing to allow defense counsel to present a closing argument during bench trial. Reversed and remanded for a new trial.

State v. Sublett, 887 S.W.2d 618 (Mo. Ct. App. W.D. 1994)

The case is remanded for an evidentiary hearing on movant's allegation of counsel ineffectiveness for failing to object to the prosecutor's allegedly improper and inflammatory closing argument, in which the prosecutor urged jurors, at considerable

length, to deter others by sentencing the defendant to a lengthy term of imprisonment.

COUNSEL -- EFFECTIVENESS -- GUILT PHASE

State v. Sublett, 887 S.W.2d 618 (Mo. Ct. App. W.D. 1994)

An evidentiary hearing is required on movant's claim that counsel was ineffective in failing to investigate and call alibi witnesses who would have testified that the defendant was at work at the time of the robbery for which he was convicted.

State v. Young, 882 S.W.2d 291 (Mo. Ct. App. W.D. 1994)

The court remanded for an evidentiary hearing on the allegation that defense counsel was ineffective in failing to allow Young to testify in his own behalf at trial, where the record does not conclusively show that the movant voluntarily and knowingly elected not to testify.

COUNSEL -- EFFECTIVENESS -- PLEA NEGOTIATIONS

State v. Stillings, 882 S.W.2d 696 (Mo. Ct. App. S.D. 1994)

The southern district held that where a defendant seeks post-conviction relief on grounds that his lawyer rendered ineffective assistance in failing to relay a

prosecutor's plea offer, he must demonstrate a reasonable probability that he would have accepted the offer instead of standing trial.

DEATH SENTENCES AFFIRMED

State v. Chambers, 891 S.W.2d 93 (Mo. 1994)

The Missouri Supreme Court once again affirmed James Wilson Chambers' conviction and sentence of death. Two earlier convictions for the same crime had been reversed by the federal courts. Although Chambers had raised a number of diverse issues, the court relied heavily on precedent to dispense with the claims in a cursory manner.

State v. Gray, 887 S.W.2d 369 (Mo. 1994)

The Missouri Supreme Court found there was sufficient evidence of accomplice deliberation to affirm Marlin Gray's conviction and sentence of death for the 1994 killing of two sisters. Both women drowned in the Mississippi River after being pushed from the Chain of Rocks Bridge by Gray's co-defendants. According to the court, three factors permitted an inference of deliberation -- threats made by the defendant prior to the murder indicating a purpose to kill, evidence that the defendant had access to a deadly weapon although no deadly weapon was used, and evidence that the defendant continued in the criminal enterprise after the deadly threats were made. The court also rejected petitioner's claims of improper judicial comment on the concepts of reasonable doubt and accessory liability during voir dire, improper exclusion of jurors, ineffective assistance for failure to interview a co-participant who testified on behalf of the state until the eighth day of trial, discriminatory exercise

of peremptory challenges by the state, improper closing by the state, and instructional error.

Parker v. State, 886 S.W.2d 908 (Mo. 1994)

A unanimous court rejected all thirty-two of appellant's points of error, including, among others, several jury issues, discovery and suppression issues, admission of statements made by the victim shortly before the murder and victim impact evidence during the penalty phase, failure to strike certain aggravating circumstances, and several ineffective assistance of counsel claims. In conducting its proportionality review the court examined data consisting of three expert statistical analyses of Missouri death penalty cases compiled by Professors Jon Sorensen, Donald Wallace, John Galliher and David Keys. However, the court determined that the data does not aid in conducting a proportionality review, reiterating that the issue is "not whether any similar cases can be found in which the jury imposed a life sentence, but rather whether the death sentence is excessive or disproportionate in light of "similar" cases as a whole." Parker was convicted and sentenced to death for shooting a woman who he had allegedly assaulted and who was to testify against him at a probation revocation hearing the day after the murder.

DISCOVERY

State v. Bradley, 882 S.W.2d 302 (Mo. App. S.D. 1994)

The trial court abused its discretion by admitting into evidence a videotaped recording which had not been disclosed to the defense. The defendant was entitled to

rely on the state's representation that only those tapes produced for the trial court's review three days prior to trial would be used as evidence at trial. A new trial was ordered.

State v. Perry, 879 S.W. 2d 609 (Mo. App. E.D. 1994)

The State committed Brady error when it failed to disclose a statement from the defendant's former girlfriend which directly contradicted her testimony at trial and which supported the defendant's claim that his confession to the robbery was solely in response to a police beating.

JURY INSTRUCTIONS -- GUILT PHASE

State v. Ferguson, 887 S.W.2d 585 (Mo. 1994)

Ferguson's conviction for capital murder is reversed and remanded for a new trial where the trial court submitted a verdict director which charged the element of deliberation in the alternative -- to either defendant or his codefendant -- thereby allowing the jury to find him guilty without finding that he deliberated as required under Rev. Mo. Stat. § 565.020.

State v. Howard, 1995 WL 81935, No. 18265 slip op. (Mo. App. S.D. February 28, 1995)

Submission of jury instruction dealing with the defendant's claim of justification for killing in defense of a third party, which erroneously charged the jury to consider the unlawful acts of the wrong victim, resulted in manifest injustice and a miscarriage of justice.

State v. Kehner, 886 S.W.2d 130 (Mo. App. E.D. 1994)

Submission of pattern jury instruction that intoxicated condition from alcohol will not relieve person of responsibility for his conduct, in the absence of evidence of intoxication, was error which required reversal of the defendant's second degree murder conviction.

State v. Rollins, 882 S.W.2d 314 (Mo. App. E.D. 1994)

The defendant was entitled to a new trial where the court charged the jury that a voluntary drugged condition would not relieve the defendant of responsibility for his conduct. Submission of the instruction, which was found unconstitutional in State v. Ervin, 848 S.W.2d 476 (Mo. 1993), because it excused the state from proving the defendant's mental state beyond a reasonable doubt, cannot be deemed harmless where a mental element is required for conviction.

JURY SELECTION -- CHALLENGES FOR CAUSE

State v. Richardson, 886 S.W.2d 175 (Mo. App. E.D. 1994)

The defendant is entitled to a new trial on his claim that he was denied a fair and impartial jury because a juror never unequivocally stated that she would not draw an adverse inference if the defendant failed to testify.

JURY SELECTION - DISCRIMINATION

State v. Boyce, 887 S.W.2d 447 (Mo. Ct. App. 1994)

The defendant failed to prove that the prosecutor's explanations for the exercise of a peremptory challenge were pretextual. A party cannot carry his burden of proof on

this issue merely by taking the position that the explanations were not supported by evidence in the record.

State v. Dunn, 889 S.W.2d 65 (Mo. App. E.D. 1994)

Remand is required for a Batson hearing in which the state must give its reasons for peremptorily striking an African-American venireperson.

State v. Hayden, 878 S.W.2d 883 (Mo. App. E.D. 1994)

Case remanded for an evidentiary hearing on whether the prosecutor's exercise of peremptory challenges was motivated by a gender bias.

State v. Lannert, 889 S.W.2d 131 (Mo. App. E.D. 1994)

The trial court erred in overruling Lannert's Batson objection without requiring the state to provide reasons for its use of peremptory strikes against prospective female jurors.

State v. Sellers, 878 S.W. 2d 89 (Mo. App. E.D. 1994)

Batson hearing ordered for determination of whether the State exercised its peremptory challenges in a racially discriminatory manner.

State v. Thurman, 879 S.W. 535 (Mo. App. W.D. 1994)

The procedural guidelines, established in *Parker v. State*, 836 S.W. 2d 930 (Mo. banc 1992), for courts to follow when confronted with a Batson challenge, should be applied to cases which were not yet final or pending on appeal at the time

Parker was established. The case is remand for a Batson hearing.

POST-CONVICTION MOTIONS -- ABANDONMENT

State v. Petalino, 890 S.W.2d 679 (Mo. Ct. App. W.D. 1994)

State v. Collins, 891 S.W.2d 583 (Mo. Ct. App. E.D. 1995)

Defendants' Rule 29.15 motions are remanded, pursuant to *Sanders v. State*, 807 S.W.2d 493, for a determination of why appointed counsel failed to file a timely verified amended motion.

Smith v. State, 887 S.W.2d 601 (Mo. 1994)

The Missouri Supreme Court dismissed Sam Smith's 29.15 motion as successive and refused to reach the merits of Smith's abandonment of counsel claim pursuant to Luleff and Sanders. In this case, the public defender's office, who had been appointed to represent Smith in the preparation of his 29.15 motion, failed to file a timely motion because it received no notice of the circuit judge's order of appointment. In the meantime, Smith's trial counsel had filed the transcript on appeal seven weeks early without notice to either Smith or the public defender.

POST-CONVICTION MOTIONS -- TIMELY FILING

Reuscher v. State, 887 S.W.2d 588 (Mo. 1994)

Dismissal of Reuscher's 29.15 motion as untimely filed was affirmed. The court rejected Reuscher's argument that he was denied due process in that he was misinformed by retained (*cont'd on p. 12*)

PROGRAM AND FACULTY

Moderators:

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

FRIDAY, APRIL 28, 1995

- 8:15 - 8:45 **Pick up materials; late registration if space available**
- 8:45 - 9:00 **Welcome**
Daniel L. Viets, Columbia, Missouri
President, Missouri Association of Criminal Defense Lawyers
- 9:00 - 9:50 **New Look at Missouri and Federal Prison Program • Boot Camp • Parole • Institutional Issues**
Speaker: *Joseph Brandenburg*, Kansas City, U.S. Parole Commission & Probation Office
- 9:50 - 10:40 **Effective Preservation of the Record**
Speaker: *Burton H. Shostak*, St. Louis, National Association of Criminal Defense Lawyers
- 10:40 - 10:55 **Refreshment Break**
- 10:55 - 11:30 **Lloyd Schlup — Victory in U.S. Supreme Court; Developments in Federal Habeas Corpus**
Speaker: *Sean D. O'Brien*, Kansas City, Missouri Capital Punishment Resource Center
- 11:30 - 1:30 **Luncheon — Cash Bar — Annual Awards Ceremony — Luncheon Address**
Speaker: *Gerald H. Goldstein*, San Antonio, Texas, President, National Association of Criminal Defense Lawyers
- 1:30 - 2:20 **Dramatic Techniques in the Courtroom**
Speaker: *Mick Denniston* (Director, Little Theater) and *S. Dean Price*, Springfield, Missouri
- 2:20 - 3:20 **Breakout Sessions**
Effective Voir Dire; Speaker: *Karen E. Kraft*, St. Louis
Developments in White Collar Practice; Speakers: *James Eisenbrandt*, Overland Park, Kansas, and *R. Stan Mortenson*, Washington, D.C.
- 3:20 - 3:35 **Refreshment Break**
- 3:35 - 4:45 **Panel Discussions**
Attendees may submit tactical problems and issues from municipal, state, or federal cases they are handling for suggestion and advice.
State Court Practice — Emphasis in Psychiatric Issues; Panelists: *Karen E. Kraft*, *Richard H. Sindel*, *Dr. Stephen Dinwiddie*, and *Cathy DiTraglia*
White Collar Defense; Panelists: *James Eisenbrandt*, *Burton H. Shostak*, *Arthur S. Margulis*, and *R. Stan Mortenson*
- 5:30 **Reception • Cash Bar**
All attendees invited

SATURDAY, APRIL 29, 1995

- 8:30 - 9:00 **Missouri Association of Criminal Defense Lawyers Board Meeting** (All attendees invited to attend)
- 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 **Impeachment With Feeling**
Speaker: *Charlie Daniels*, Albuquerque, New Mexico, National Association of Criminal Defense Lawyers
- 10:50 - 11:00 **Refreshment Break**
- 11:00 - 12:00 **Consent Defenses in Sex Cases**
Speaker: *Randi McGinn*, Albuquerque, New Mexico, National Association of Criminal Defense Lawyers

Defending Criminal Cases, 1995

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 314/659-8931. 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:

\$180 — Program, course materials, and lunch — lawyer or nonlawyer

\$155 — MACDL Member

\$100 — Out-of-State Public Defender

— Missouri Public Defender tuition waived

PROGRAM DATES AND LOCATION:

April 28-29, 1995
Marriott Pavilion Hotel
St. Louis

A block of rooms at the Marriott Pavilion Hotel in St. Louis has been set aside for those attending this program. To make room reservations, call the Marriott Pavilion's reservation desk at 314/421-1776 by April 6, 1995, and indicate that you will be attending The Missouri Bar program. You can guarantee your reservation with a major credit card. Room rates are \$85.00, single or double.

COURSE MATERIALS: Prepared by the speakers for this program.

MCLE ACCREDITATION: This program qualifies for 10.6 MCLE credit hours including 5.0 hours of federal credit for the 1994-1995 reporting year. For Missouri MCLE information contact the MCLE Department, The Missouri Bar, P.O. Box 119, Jefferson City, Missouri 65102-0119, 314/635-4128. (Kansas credit has been applied for.)

MASTERCARD/VISA: Register in advance by using your MasterCard or VISA credit card. See the registration form or FAX in your registration at 314/659-8931.

IF YOU CAN'T ATTEND: A colleague may attend in your place if she or she could have registered at 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 314/659-8931 by the *Friday before the program*. We cannot accept cash payments at the door — checks or credit cards only!

CHILDREN/GUESTS: Not generally permitted in meetings — registrants only. 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 65102-0119, 314/635-4128.

Program Dates and Location

April 28-29, 1995
St. Louis
Marriott Pavilion Hotel
1 Broadway

RECENT MO. CASES (cont'd from p. 9)

counsel when the transcript on appeal was due to be filed and thus was unaware of when the Rule 29.15 deadline commenced. Unusual dicta in the opinion indicates that the court may be willing to incorporate federal cause and prejudice analysis and the miscarriage of justice standard into their state habeas rulings. The court also stated that the standard of review for claims of ineffective assistance of appellate counsel brought in a motion to recall the mandate "inevitably tracks the plain error rule; i.e., the error that was not raised on appeal was so substantial as to amount to manifest injustice or a miscarriage of justice." Dissenting, Judges Thomas and Price proposed a change in Rule 29.15 procedure so that "motions would be filed automatically and promptly in death penalty cases unless the defendant expressly and intentionally waives the filing of the motion."

PROCEDURAL DEFAULT

State v. Rollins, 882 S.W.2d 314 (Mo. App. E.D. 1994)

The defendant sufficiently preserved his claim that the voluntary intoxication instruction impermissibly excused the state

from proving his mental state beyond a reasonable doubt, where he supplemented his original objection at trial, that the evidence did not support the instruction, with a due process objection in his motion for new trial.

PROSECUTORIAL MISCONDUCT

North v. State, 878 S.W. 2d 66 (Mo. App. W.D. 1994)

The prosecutor breached his plea agreement with defendant by making a sentencing recommendation after agreeing to make no recommendation if the presentence investigation report was unfavorable.

TRIAL -- JURISDICTIONAL AND PROCEDURAL ISSUES

State ex rel Davis v. Lewis, 1995 WL 86522, No. 77018 slip op. (Mo. February 21, 1995)

The Missouri Supreme Court held that Rule 32.08(a) prohibits separate applications for change of venue and change of judge. A criminal defendant who desires both must bring them in a single application. In this case, Davis' application for change of venue foreclosed his subsequent application for change of judge.

LAWYERS FOR LITERACY

The Public Service Committee of the Lawyer's Association of Kansas City/Young Lawyer's Section is seeking volunteers to participate in its Lawyers for Literacy Program. The project is associated with the Adult Basic Education Program of the Kansas City School District, and provides tutors for illiterate and semi-literate individuals. Volunteers are trained in the Laubach method through a ten- to twelve-hour training program. Then each volunteer is paired with an adult student with reading skills at the 6th grade level or below who has expressed an interest in learning to read or improving his/her reading skills. Volunteers conduct tutoring sessions with their students each week. At least a six-month commitment is required of the volunteer. To date, the program has trained more than 70 attorneys and paralegals, as well as three judges, as tutors. To participate, contact Richard Chatfield-Taylor, Program Chair, at Morrison & Hecker (816/691-2600).

MISSOURI CRIMINAL TRIAL PRACTICE - REVIEWED

James R. Wyrsh, Senior Partner of Wyrsh Atwell Mirakian Lee & Hobbs and stalwart supporter of MACDL, has authored an important book in conjunction with Susan M. Hunt, private practitioner and former forensic chemist with the Kansas City Regional Crime Lab, and Judge Anthony P. Nugent, active senior judge of the Missouri Court of Appeals, Western District, since his retirement in 1991. Wyrsh, a frequent lecturer and author on criminal law, holds a J.D. from Georgetown University and an LL.M. from UMKC. He has taught criminal trial techniques as an adjunct professor at UMKC since 1981. *Missouri Criminal Trial Practice* begins with issues surrounding arrest and continues through the appellate process. The constitutional requirements which limit the power of the government to arrest and search are presented in depth. This book reaches beyond the constitution to help with the practical tasks of defending a criminal case, such as client interviews, bond procedures, opening statements and closing arguments.

While the sheer amount of information in this work is impressive, the careful organization of *Missouri Criminal Trial Practice* puts specific subjects of inquiry at the reader's fingertips. The book progresses logically from initial police investigation through trial tactics and post-conviction remedies. Chapters are neatly divided into distinct topics, and each section is full of statutory and case law, with complete cites and reference suggestions in the footnotes.

The authors' cumulative judicial, academic, private defender and scientific expertise brings diverse perspectives to each issue. Tables of code sections and rules of criminal procedure, along with an exceptionally thorough index, are invaluable. Missouri Approved Instructions-Criminal are included, and the recent radical changes to Missouri's forfeiture law are explained.

Norman S. London of St. Louis says:

I have had the privilege of reviewing the Wyrsh, Hunt, Nugent publication, *Missouri Criminal Trial Practice*. My only regret is that this book was not published thirty years ago. I have reviewed the publication with an eye to seeing whether the authors covered items I thought they might miss, and it appears they have missed nothing. To the older practitioner, this book will be a constant companion; to the newer practitioner, this book will be a paramour. This is one of the best publications in its field that I have had the privilege of reading.

Missouri Criminal Trial Practice provides quick, accurate answers to questions that arise at every phase of a criminal case. You can spend more money purchasing several lesser volumes, or you can get all the information you need in one user-friendly book at an introductory price of \$79.95 from The Harrison Company, Publishers, P. O. Box 7500, Norcross, GA 30091-7500. Place your order by mail, phone (800/241-3561) or fax (404/729-0265).

YOUR TAX DOLLARS AT WORK: *The United States Custom Service has produced an 81-card set of their drug-sniffing dogs. The collection includes such canine luminaries as "Nacho", "Peaches" and "Solo" in action poses, with their breed, age, weight, tattoo number and largest drug bust described on the back of the card. Statistics on false alerts are not included.*

NEW MEMBERS AND MEMBERSHIP RENEWALS

Dave Angle, St. Louis (Public Defender)	Mary Merrick, St. Louis (C.L.A.)
Rusty Antel, Columbia	John Michael Quinn, Kansas City
S. Richard Beitling, Lee's Summit	Dennis Schafer, Montgomery City <i>(Sustaining Member)</i>
Delores Berman, St. Louis (Public Defender)	Charles Shaw, Clayton
Will Bunch, Kansas City	Gary Smith, Lebanon
Kevin Curran, St. Louis (Public Defender)	Christopher Slusher, Columbia (Public Defender)
Caterina Ditraglia, St. Louis (Public Defender)	Prof. Ellen Suni, Kansas City
Bernard Edelman, St. Louis <i>(Sustaining Member)</i>	Jeff Tisoto, St. Louis (Public Defender)
Wm. Brian Gaddy, Kansas City	Debra E.N. Vigil, Clayton (Public Defender)
Ty Gaither, Joplin	Dee Wampler, Springfield
David Godfrey, St. Louis <i>(Sustaining Member)</i>	Robert Welch, Independence <i>(Sustaining Member)</i>
John Gourley, Clayton	J.D. Williamson, Jr., Independence <i>(Sustaining Member)</i>
Ron Hall, Kansas City (Federal Public Defender)	Don Wolff, Clayton <i>(Sustaining Member)</i>
Gerald Handley, K. C. <i>(Sustaining Member)</i>	Mark Wooldridge, Boonville
Victor Head, Monett (Public Defender)	Paul Yarns, St. Charles (Public Defender)
Calvin Holden, Springfield	Claudia York, Kansas City
Charles Hoskins, Rolla (Public Defender)	
Eric Hutson, Lebanon	
Kurt Marquart, Kansas City	

MACDL sincerely appreciates your financial support. We can't function without it. Your dues pay for postage and printing, expenses of continuing legal education, lobbying efforts in the Missouri General Assembly, scholarships to the National College of Criminal Defense, partial expenses of our representatives to the NACDL Legislative Fly-In, and the computer on which this newsletter is composed, among other things. Special thanks to the assistant public defenders, whose salaries are woefully inadequate, for supporting our efforts, and to sustaining members for voluntarily doubling the amount of their annual dues. Please check the back page of your newsletter. If there's a red "X" on your mailing label, it's time to renew your membership. You'll find a renewal form inside the back cover.

SEX OFFENSES -- § 566.025

M. Shawn Askinosie

Senate Bill 693 was recently signed by the Governor enacting sweeping changes to the sex crimes laws. The legislation is not all bad but media coverage is limited to the perspective of victim and prosecutor. The Governor should have vetoed the bill because of one unconstitutional provision.¹ The bill is potentially devastating to an accused. This short paragraph wipes away decades of law. The general rule throughout this country is that evidence of other crimes (not necessarily a conviction) is not admissible to prove guilt of

the crime charged. In other words the courts have prevented prosecutors from making the argument that "this is a bad person so he must be guilty of the crime charged."

That is not to say that prosecutors don't legitimately get this evidence in through the back door. For example, evidence of a similar crime might be admissible where the defense is that they have the wrong guy and the prior criminal act goes to the defendant's identity. Prosecutors can also introduce evidence of the

defendant's bad character if the defendant testifies that he is of good character. The defendant's previous convictions are also admissible if he testifies. The prosecutor has many ways of getting this type of evidence in front of a jury because there are so many exceptions to the general rule.

This new law guts the general rule and its exceptions. The new law allows mere *accusations* of previous sexual misconduct *up to 10 years old* to prove that the defendant is guilty of the crime charged. That destroys the presumption of innocence. A defendant must be tried for what he did, not for who he is. As one Greene County jurist stated "there's one thing worse than child sexual abuse and that's being wrongfully accused of it."

The law-abiding public sees nothing wrong with this new law - they embrace it. That is, until the legislature thinks this is a good idea for all crimes. Joe Bob Juryperson understandably wants to know about the defendant's previous

wrongdoing. The accusation of past misconduct is probably relevant to the defendant's guilt. But courts over the last century have not permitted such testimony because the overwhelming prejudice of the evidence outweighs the relevance.

The Missouri Supreme Court in State v. Bernard has now been reversed by the legislature. That's fine unless the law is unconstitutional. Hopefully, this law will not withstand challenge. The Court has spoken clearly for years on the admissibility of this type of evidence.

¹ The new law, § 566.025, states: In prosecutions under Chapter 566 or 568 involving a victim under 14 years of age, whether or not age is an element of the crime for which the defendant is on trial, evidence that the defendant has committed other charged or uncharged crimes involving victims under 14 years of age shall be admissible for the purpose of showing the propensity of the defendant to commit the crime or crimes with which he is charged provided that such evidence involves acts that occurred within 10 years before or after the act or acts for which the defendant is being tried.

SEXUAL OFFENSE CHART

OFFENSE	DEGREE	VICTIM	PERPETRATOR	ACT
Statutory Rape	1st	13 or under		Sexual intercourse
	2nd	14 -16	21 or older	Sexual Intercourse
Statutory Sodomy	1st	13 or under		Deviate Sexual Intercourse
	2nd	14-16	21 or older	Deviate Sexual Intercourse
Forcible Rape				"by use of forcible compulsion"
Child Molestation	1st	11 or under		Sexual contact
	2nd	12-13		Sexual contact
Deviate Sexual Assault				Deviate sexual intercourse w/o person's consent
Sexual Misconduct	1st			Sexual contact through clothing w/o consent - same sex deviate intercourse
	2nd			Expose genitals or sexual contact in presence of 3rd person knowing act is likely to cause harm
	3rd			Solicit another to engage in sexual conduct knowing request is likely to cause alarm

MACDL Action Report

Sexual Abuse				Sexual contact by use of forcible compulsion
Endangering a child	1st	16 & under	Parent, guardian charged w/care and custody	Engages in sexual conduct

SEXUAL OFFENSE PENALTIES

Statutory Rape & Sodomy	1st degree	5 to life
	2nd degree	Class C felony
Forcible Rape		5 to life
Child Molestation	1st degree	Class C felony
	Prior conviction of sex offense Inflicted serious physical harm Displayed a deadly weapon in threatening manner Part of ritual or ceremony	Class B felony
Deviate Sexual Intercourse		Class C felony
Sexual Misconduct	1st degree	Class A misdemeanor
	Prior sex offense, weapon, ritual	Class D felony
	2nd degree	Class B misdemeanor
	Prior sex offense	Class A misdemeanor
	3rd degree	Class C misdemeanor
Sexual Abuse		Class C felony
	If under 14, serious physical injury, weapon, or more than one person	Class B felony
Endangering welfare of child		Class D felony
	Part of ritual or ceremony	Class C felony
	Prior sex offense, weapon, ritual	Class D felony

PROGRESS ON FORFEITURE - DOUBLE JEOPARDY

Pamela A. Wilk and Peter Goldberger, Law Offices of Alan Ellis ©1994

Two U.S. Supreme Court decisions since June 1993 have opened an avenue through which criminal defendants may obtain either vacatur of sentence or relief from

civil forfeiture when both are based upon the same offense: a claim under the "multiple punishments" prohibition of the Fifth Amendment's double jeopardy clause.

Austin v. U.S., 509 U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) holds that civil forfeiture under 21 USC §881(a)(4) (conveyances) and (a)(7) (real property) does not serve "solely a remedial purpose," and therefore constitutes punishment, which "is subject to the limitations of the Eight Amendment's Excessive Fines Clause." Dept. of Revenue of Montana v. Kurth Ranch, 511 U.S. ___, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994) holds that assessment of an "illegal drug tax" after criminal sentencing for the same conduct constitutes a "second punishment" in violation of the double jeopardy clause.

The combined lesson of Austin and Kurth is that civil forfeiture (and potentially other penalties triggered by criminal conduct, even though labeled as civil consequences) constitutes "punishment" for purposes of double jeopardy. Thus, civil forfeiture cannot be imposed on a defendant in a separate civil action if he has already been sentenced criminally for the same conduct. Nor can he be sentenced criminally if he has already been subject to a civil forfeiture based upon the same conduct. Punishing a defendant by both civil forfeiture and criminal sentence for the same conduct violates the double jeopardy clause's prohibition against "multiple punishments for the same offense." See U.S. v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). As a result of these decisions, every criminal defendant who has suffered both a sentence in a criminal case and forfeiture imposed in a separate civil proceeding (not a criminal forfeiture based upon a count in the indictment) should consider challenging the later punishment on double jeopardy grounds. And, to provide effective assistance of counsel, every lawyer must determine whether such a defense exists. Only after that is done is it possible to make an

informed decision as to which punishment might be in violation of double jeopardy and how best to raise the claim to maximize the chance of obtaining relief.

Whether double jeopardy is raised in a §2255 motion or on direct appeal as a ground to vacate sentence, or in a civil proceeding to challenge a civil forfeiture, there are potential waiver and retroactivity problems. The government may argue that a defendant is barred from raising the defense if he did not raise it before the second punishment was imposed. In some circumstances, a defendant whose conviction results from a guilty plea may have waived the double jeopardy defense for that reason alone. If the defendant's plea agreement or civil forfeiture action included stipulations to the forfeiture, he may face a government waiver argument on the basis of consent. Defendants who raise a double jeopardy challenge on collateral attack may also face a government argument that the new Supreme Court cases do not apply because they are not retroactive. Where a conviction has resulted from a negotiated plea agreement, the government may argue that defendant has breached the agreement by succeeding in having his sentence or civil forfeiture overturned. This could expose your client to prosecution on related charges (but which are not the "same offense" for double jeopardy purposes) which were dismissed in exchange for the plea.

The law of double jeopardy is complicated, as are the procedural problems involved in collateral attacks on judgments. This new development may help many defendants. Every case should be reviewed to ascertain whether this potential issue applies.

Alan Ellis, past president of NACDL, maintains offices in Mill Valley, CA and Philadelphia, PA. To receive his newsletter, call 415/383-3862 or fax 415/383-7667.

FYI

Francie Hall

MACDL's new mailing address is **416 East 59th Street, Kansas City, MO 64110**. The P. O. box we rented for many years is in the federal building in downtown K.C., MO. I no longer work downtown, or even in midtown, so visiting that post office became quite a chore. Since MACDL's office is in my home, and my mailbox is right outside my front door, a change of address for the organization seemed logical. Last fall, I left Blackwell Sanders to manage Shaffer & Lombardo, a small but scrappy firm at 8900 Ward Parkway, Kansas City, MO 64114. You may contact me there by phone at 816/361-6900 or fax at 816/444-6576. Feel free to call me at home outside of business hours at 816/363-6205.

MACDL recently upgraded our computer with a fax/modem, which is wonderful. I can fax correspondence from the screen at the touch of a key. A recent communication from NACDL alerted me to §§ 502-503 of U.S. Senate Bill 3. The first, believe it or not, would exempt U.S. Attorneys from ethics rules, leaving it to the Department of Justice to monitor and discipline its own employees' excessive zeal. The second would create a new federal obstruction of justice offense, "false pleading", allowing U.S. Attorneys to seek indictments against defense counsel for allegedly making a false statement of law or fact in a pleading. I was motivated to express my opposition in a letter which I faxed to all members of the Senate Judiciary Committee. Technology: what a concept! Usually, of course, our new fax/modem capability allows me to communicate readily with the officers, board and membership of MACDL at night and on weekends, when I'm functioning as your executive secretary.

I look forward to seeing all of you in St. Louis next week. **DEFENDING CRIMINAL CASES - 1995** promises to be another great program put together by our CLE chairs, J.R. Hobbs and

Larry Schaffer, co-sponsored by the Missouri Bar and the National Association of Criminal Defense Lawyers. It's not too late to register. For details, see pages 10-11.

As his term nears conclusion, I'd like to thank Dan Viets for his commitment and dedication as MACDL's president over the past year. I've enjoyed working with Dan, and appreciated his pushing me to finally publish our first membership directory. The time and effort he has given to MACDL are especially impressive for a sole practitioner.

Speaking of the MACDL directory, please let me know of any address changes or corrections.

This newsletter is late to press partly because procrastination is my middle name, but also because I was awaiting final confirmation of the Nominating Committee's recommendations for the slate of MACDL officers and directors which will be presented for approval at our annual meeting on Saturday morning, April 29, in St. Louis. Those recommendations are:

J. R. Hobbs	President
Jim Worthington	President-Elect
Larry Schaffer	Vice President
Elizabeth Carlyle	First Vice President
Rick Sindel	Second Vice President

Board Members:	Michael Gorla, St. Louis
	Linda Murphy, Clayton
	T.D. Pawley, Columbia
	N. Scott Rosenblum, St. Louis
	Prof. Ellen Suni, Kansas City

Mike Gorla, Linda Murphy and Ellen Suni have each completed a three-year term on the board, and are willing to continue serving as directors. We look forward to working with T.D. Pawley and Scott Rosenblum, and welcome the new perspective they will bring to MACDL's endeavors.

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 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,
416 East 59th Street, Kansas City, MO 64110

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

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FIRM _____

ADDRESS _____

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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 not a requirement of membership in the Missouri Association of Criminal Defense Lawyers.)

MACDL

416 E. 59TH ST.
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A RED "X" ON YOUR ADDRESS LABEL INDICATES THAT YOU OWE ANNUAL DUES. PLEASE USE FORM ON INSIDE BACK COVER TO RENEW YOUR MEMBERSHIP IN *MACDL*. THANK YOU.

ADDRESS CHANGE/CORRECTION

PLEASE VERIFY THE INFORMATION ON YOUR MAILING LABEL ABOVE; TO KEEP YOUR NEWS-LETTER INTACT, RETURN A PHOTOCOPY OF THIS ENTIRE PAGE WITH ANY CORRECTIONS.

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