MACDL Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

SPRING 1996 ***Vol. VI, No. 2***

BOTH A REMINDER AND A COMMENDATION FOR ETHICAL BEHAVIOR

J. R. Hobbs, MACDL President

When was the last time that you took your automobile in and received a free repair job? When was the last time that you underwent major surgery and received either free surgery or services charged at $40.00 per hour for the "out of operating room" or $60.00 per hour "in the operating room?" How many times have you been to a grocery store and the checker says, "Because we have always sold you groceries from our HyVee, we are obligated to do that until your family is full. As a result, here are some free groceries." While other occupations seldom, if ever, experience these situations, this is an all too common occurrence in the practice of the criminal defense lawyer.

It's ironic that attorneys, particularly criminal defense attorneys, seem to be the butt of everyone's jokes; yet these attorneys frequently give their time away on an appointed basis or pro bono arrangement or other nominal fee arrangement in order to help secure effective representation for all. Even retained cases may from time to time end in a bill that is substantially discounted if the case is tried to verdict and ultimately appealed. The criminal defense lawyer in particular is attuned to rules that require he or she to stay on a case until the end of time, if necessary.

The law is indeed a noble and honorable profession. Like any profession or other vocation, there are obviously bad apples from time to time. Yet, the majority of us strive hard to render effective representation for our clients. We need to speak to the public loudly and continuously that the aim of the criminal lawyer is to secure a fair system for all. The adversarial system is vital, and it can work effectively within the bounds of ethics. We are the only profession that systematically, regularly, and intentionally either gives free services or services at a reduced rate. We should be proud of our commitment to the administration of justice. The purpose of this letter is to both remind us of the need of effective, yet ethical advocacy and to commend us for achieving that goal.

Of course, any meaningful discussion of ethical considerations in criminal practice should begin with a focus on professionalism. As Abraham Lincoln stated:

(cont'd on page 3)

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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 Director, **MACDL**, 416 E. 59th Street, Kansas City, MO 64110.

> Let no young man choosing the law for a calling for a moment yield to the popular belief -- resolve to be honest in all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do in advance, consent to be a knave.

Since the passage of time the legal professional has implemented various rules that address considerations involving representation of clients. The American Bar Association's Model Code of Professional Responsibility ("Model Code") and the more recent Model Rules of Professional Conduct ("Model Rules") are the two most significant examples of state ethical codes. In Missouri, the Model Rules set forth by the American Bar Association have been adopted by the Missouri Supreme Court as Rule 4, applicable to all attorneys licensed in the State. Rule 4 takes the place of the previously enacted Model Code. Although some aspects of the Model Code remain the same, other areas have changed. The primary purpose of ethical rules and the corresponding discipline associated with infractions of ethical rules is not to punish the attorney or inhibit effective legal representation, "but to protect the public and maintain the integrity of the profession." In re Tessler, 783 S.W.2d 906 (Mo. banc 1990). If an attorney breaches an ethical rule, liability need only be established by a preponderance of the evidence in a disciplinary proceeding. See, In the Matter of Lawther, 611 S.W.2d 1 (Mo. banc 1981). Criminal law practitioners especially need an appreciation for ethics since most criminal cases involve highly emotionally charged clients. Many criminal cases also involve complex ethical issues.

With the ever increasing stress associated with the practice of law and the competitive marketplace, attorneys may be tempted to strain strict adherence to certain ethical rules in order to maintain or attract new clients. Attorneys are warned by Don Young and Louis Hill in their article "Professionalism," Case and Comment, (Nov. 1988):

> Perhaps we have to accept this focus on winning as being akin to competition in society and business, but such a perspective must never be entertained in the law. What must not be blurred is the recognition that, unlike business and society in general, the law is a profession with obligations that go not only to the client, but to the public as well. Lawyers cannot strive to see if their clients win, regardless of the justice of their claims. In the legal profession, the end does not ever justify the means.

In short, whenever legal ethics are discussed, it is important to emphasize the necessity of exercising and implementing one's moral judgment. This should be done regardless of the existence of artificial rules. However, it is equally important to understand that some ethical breaches are not necessarily obvious from a moral perspective. Instead, a clear understanding of the ethical rules is needed, coupled with

the exercising of a good moral conscience. It has been my experience that most criminal practitioners try to represent their clients zealously yet ethically. Certainly, ethical issues often arise during the course and scope of the representation of an individual accused of crime. We should be reminded that "winning at all costs" is not appropriate. We should also be commended because most criminal lawyers recognize the need for zealous advocacy, and their arguments are tempered with a good sense of ethics. The "scorched earth" or "Rambo" style of litigation is often not effective and tends to create an unnecessarily hostile atmosphere. In many cases, this style of representation leads to unethical conduct. Certainly, the criminal defense bar has a need to be strong, and the advocacy should be meaningful. But we should act with dignity and integrity. We should fight hard for our clients, but remind ourselves that we are constitutional guardians, not a rubber stamp for anyone's desires or inappropriate actions whether it be the client or the government. There is no better feeling than securing a letter of declination of charges, an acquittal, a reversal, or a reduced sentence after effective advocacy -- but ethical advocacy.

Keep up the good work. All of us at MACDL look forward to seeing you at the upcoming program on May 17th and 18th in Kansas City!

J.R. Hobbs
President

From The Missouri Supreme Court - Rules 27.08 & 69.03, MAI 302.01

(Effective January 1, 1997)

Submitted by James R. Wyrsch

In re:

(1) Adoption of a new subdivision 27.08, entitled "juror Note-taking," of Supreme Court Rule 27, entitled "Misdemeanors or Felonies - Trial."

(2) Adoption of a new subdivision 69.03, entitled "juror Note-taking," of Supreme Court Rule 69, entitled "Trial by Jury."

ORDER

1. It is ordered that effective January 1, 1997, subdivision 27.08 of Supreme Court Rule 27 be and the same is hereby adopted, to read as follows:

27.08 JUROR NOTE-TAKING

If the court allows juror note-taking, the court shall supply each juror with notebooks and pencils. Jurors shall not have their notes during recesses but may use their notes during deliberations. The court shall collect all juror notes immediately before discharge of the jury. After the jury is discharged, the court shall destroy the notes promptly without permitting their review by the court or any other person. Juror notes shall not be used to impeach a verdict.

2. It is ordered that effective January 1, 1997, subdivision 69.03 of Supreme Court Rule 69 be and the same is hereby adopted, to read as follows:

69.03 JUROR NOTE-TAKING

If the court allows juror note-taking, the court shall supply each juror with notebooks and pencils. Jurors shall not have their notes during recesses but may use their notes during deliberations. The court shall collect all juror notes immediately before discharge of the jury. After the jury is discharged, the court shall destroy the notes promptly without permitting their review by the court or any other person. Juror notes shall not be used to impeach a verdict.

MAI CR 3rd
302.01 DUTIES OF JUDGE AND JURY

Those who participate in a jury trial must do so in accordance with established rules. This is true of the parties, the witnesses, the lawyers, and the judge. It is equally true of jurors. It is the Court's duty to enforce these rules and to instruct you upon the law applicable to the case. It is your duty to follow the law as the Court gives it to you.

However, no statement, ruling, or remark that I may make during the trial is intended to indicate my opinion of what the facts are. It is your duty to determine the facts and to determine them only from the evidence and the reasonable inferences to be drawn from the evidence. In this determination, you alone must decide upon the believability of the witnesses and the weight and value of the evidence.

In determining the believability of a witness and the weight to be given to testimony of the witness, you may take into consideration the witness' manner while testifying; the ability and opportunity of the witness to observe and remember any matter about which testimony is given; any interest, bias, or prejudice the witness may have; the reasonableness of the witness' testimony considered in the light of all of the evidence in the case; and any other matter that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness.

Faithful performance by you of your duties as jurors is vital to the administration of justice. You should perform your duties without prejudice or fear, and solely from a fair and impartial consideration of the whole case.

(Each of you may take notes in this case but you are not required to do so. I will give you notebooks. Any notes you take must be in those notebooks only. You may not take any notes out of the courtroom before the case is submitted to you for your deliberations. No one will read your notes while you are out of the courtroom. If you choose to take notes, remember that note-taking may interfere with your ability to observe the evidence and witnesses as they are presented.

Do not discuss or share your notes with anyone until you begin your deliberations. During deliberations, if you choose to do so, you may use your notes and discuss them with other jurors. Notes taken during trial are not evidence. You should not assume that your notes, or those of other jurors, are more accurate than your own recollection or the recollection of other jurors.

After you reach your verdict, your notes will be collected and destroyed. No one will be allowed to read them.)

CASE LAW UPDATE

Summarized by Lew Kollias
Edited by Elizabeth Unger Carlyle

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[Missouri cases are based on advance sheets. Federal cases are drawn from BNA Criminal Law Reporter and West Digest.]

All case citations are "State v." the named defendant, unless otherwise noted. We hope to include S.W.2d citations in future issues.

PLEASE NOTE: OPINIONS MAY HAVE BEEN UPDATED OR SUPERSEDED.

Missouri Supreme Court:

Zindel, No. 78084 (Mo.) (1/23/96)
The state supreme court gives much needed water to plain error review, which had been withering on the vine. Here, Nels Moss, the prosecutor, drove home during opening argument, examination of officers and cross-examination of defense experts, that defendant's invocation of Miranda was an indicator of sanity. While there was no objection at trial, the pervasive use of a constitutional violation to defeat the central issue in the case from the defense perspective, defendant's sanity at the time of the murder, rose to the seldom reached height of plain error. The court also rejects the claim that it could have been trial strategy not to object, noting that "it is impossible to perceive any strategic reason why defense counsel would allow a prosecutor to admit and repeatedly refer to this damaging evidence, knowing that the evidence was prohibited."

Redman, No. 78380 (Mo.) (2/20/96)
The court affirmed a conviction for sodomy, allowing into evidence the victim's out of court statements to the mother, DFS worker and deputy sheriff, finding them reliable under MO. REV. STAT. §491.075.1. The Supreme Court noted that some appellate courts of this state have focused on the terminology used by the child itself rather than the knowledge of the subject matter generally in assessing content-reliability under the statute. No more. This case makes it clear that appellate courts, when assessing content-reliability of the out-of-court statements, must examine whether the child's knowledge of the subject matter, rather than the child's particular vocabulary or words, is unexpected from a child of similar age.

Mayo, No. 78298 (Mo.) (2/20/96)
The court rejected the contention that revocation of driving privileges is punitive so that a prosecution after revocation is violative of the Double Jeopardy Clause. The revocation of driving privileges has remedial, not punitive purposes, as the "overarching purpose" of the revocation statute is the safety of Missouri highways.

Hatton, No. 78277 (Mo.) (3/26/96)
The court rejects a constitutional vagueness challenge MO. REV. STAT. §195.218 which makes it a class A felony to distribute drugs within 1000 feet of "real property comprising public housing." The court finds the term "public housing" is sufficiently clear to apprise persons of what conduct is proscribed. The court also notes that even if the phrase may be ambiguous in other settings, "it is of no consequence in this case" since the sale

took place near a housing project which received funds from the city of Mexico, Mo. The court does not rule on the other phrase in MO. REV. STAT. §195.218, "other governmental assisted housing," since that is not involved in this case.

Court of Appeals, Eastern District:

Clover, No. ED67300 (11/21/95)
A "new" prosecutor, trying only her second case, asked defendant, on cross-examination, "and isn't it true that during the two weeks previous to [date of the charged offense] you were selling cocaine for a hundred dollars a gram to a number of people? Oops! The court granted the defense request for a mistrial, and then ruled that it was "with prejudice" since the state goaded defense into asking for it by its clearly improper questioning, the excuse of inexperience notwithstanding. The appellate court dismissed the state's appeal, noting MO. REV. STAT. §547.200 does not authorize an appeal from such a decision. The appellate court also noted that the trial court properly found that the state intentionally asked an improper question, and the preclusive mistrial grant was warranted.

Jones, No. ED65806 (2/6/96)
The court reversed convictions against a pastor who allegedly sexually abused two boys. The state improperly introduced evidence of other crimes against other young men, which, while similar, were not so unusual or distinctive as to be "signature" evidence. The error here was prejudicial and harmful, especially in light of the sharp contradictions between the pastor's testimony and that of the victims. The unrelated crimes here involved boys over fourteen years old, so MO. REV. STAT. §566.025 does not save the evidence or conviction for the state.

Damask, No. ED68793 (2/6/96)
The court affirmed the suppression of drug evidence seized pursuant to a drug surprise checkpoint established by the Franklin County Sheriff's Department. A false sign indicating a drug checkpoint one mile ahead was set up just before Exit Ramp 242. Surprise! The real checkpoint was set up at the top of Exit Ramp 242, to evaluate cars that exited there rather than proceed to what they thought would be a checkpoint further ahead. If the officers believed the occupants of the car looked suspicious or like suspected traffickers, then consent to search would be asked, and if refused, the drug dog would be used. The surprise nature of the checkpoint, relatively limitless discretion on who and when to search, and little or no guidelines validated the trial court's decision to suppress the evidence seized from the defendant pursuant to this checkpoint.

Sutherland, No. ED66213 (2/27/96)
The court reversed a conviction for robbery based on the introduction of a jail visitor card for the co-defendant, as a business record, which contained defendant's name as an approved visitor. The state did this to rebut defendant's defense that he picked up the co-defendant hitchhiking, and didn't know him before that time, and that the co-defendant actually committed the robbery alone before the defendant picked him up. The jail custodian could not qualify the visitor card as a business record since he knew nothing of its terms. It was improper hearsay, offered for the truth of the matter asserted, and a new trial is necessary.

Brown, No. ED65994 (2/27/96)
The court reversed a trafficking conviction based on juror misconduct, when a juror who served did not disclose prior convictions during voir dire. Defendant learned of this and filed an amended new trial motion. The court, finding the preservation issue irrelevant, notes plain error occurred because of the intentional non-disclosure by this juror.

Blackmon, No. ED65528 (2/5/96)
The trial court allowed the prosecutor to adduce evidence of the defendant's prior conviction for possessing PCP, to support guilty knowledge of the character of the contents of the package involved in the instant charge of trafficking in PCP. Citing State v. Dudley, 912 S.W.2d 525 (Mo. App. W.D.), the appellate court reversed, noting that there was no showing that the PCP from the prior offense was packaged like the PCP in the current charge, so the prior offense did not show knowledge, and therefore its prejudicial impact outweighed any probative value.

Coates v. State, No. ED68233 (3/19/96)
The court remanded for hearing on the 24.035 motion where the movant alleged that he was not advised he could receive consecutive sentences on two Class D felonies and one Class C, for a total of 17 years. After movant violated his probation, the court sentenced him to 12 years. The appellate court notes that if the evidentiary hearing shows the movant was aware of the possibility of consecutive time, then no relief is forthcoming. However, if no one advised him of the possibility of consecutive sentences, then the motion court should resentence to concurrent time.

Trice v. State, No. ED68182 (3/5/96)
The court reversed the summary denial of a 24.035 motion on the basis that the movant's allegation that he understood his new sentence would start at the same time as a previous sentence, was not clearly refuted by the guilty plea record. As it was possible the movant could have entered a guilty plea under this mistaken belief, a hearing on this issue was required.

Geiler v. State, No. ED68862 (3/12/96)
The court reversed the denial of a 29.15 motion without a hearing on the basis of the movant's claim that the jury was so misinstructed by the court as to deny due process under the Fifth and Fourteenth Amendments. The motion court ruled that allegations of instructional error are beyond the scope of Rule 29.15 and are for direct appeal only. Not so, says the appellate court, which notes that the issue is not trial court instructional error, but "fundamental instructional sufficiency which would deny the constitutional right to be tried and found guilty of all elements of the crime by the jury." Here, movant complained jurors were not given proper instructional guidance as to the term "written consent" as defined under MO. REV. STAT. §452.377, which was allegedly lacking in this child abduction case.

Court of Appeals, Western District:

Clark, No. WD49380 (1/16/96)
The prosecutor's office did not have to be disqualified merely because a current prosecutor had represented the defendant on a conviction that was used to support the prior offender allegation. The court also held that if prosecutorial argument did not rise to the level of plain error, it could

not support the prejudice prong to find ineffective assistance of counsel.

Fritz, No. WD47933 (1/23/96)
The court reversed a denial of a 29.15 motion without evidentiary hearing on the movant's claim that counsel was ineffective for failing to object when two jurors were sleeping during the cross-examination of the victim. The motion court found this claim lacked a sufficient factual basis, but the appellate court disagreed, noting movant asserted it occurred and he could produce evidence to support it not only with his own testimony with that of his two attorneys and the bailiff. The prejudice from such a claim, if true, is clear since movant would have been subjected to a verdict by a jury that had not heard all of the evidence.

Haynes, No. WD51322 (1/23/96)
The court reversed the denial of a 24.035 motion without a hearing for a determination by a different judge on movant's claim that the motion court, who was also the plea/sentencing judge, was biassed. To prevail on such a claim, a party challenging the judge must raise a reasonable showing that "a reasonable and disinterested bystander would reasonably question the impartiality of the judge." This was shown here, where the judge, at sentencing, call defendant "a monster," and indicated that if the judge had the power, they would "only take parts of you from this room," and that he "hoped" defendant dies in prison. To set aside his judgment or sentence, the defendant must show that the judge's personal hostility came from an extra-judicial source, resulting in an opinion on the merits based on something other than what the judge learned from his participation in the case.

Albanese, No. WD50892 (2/13/96)
The court reversed a manslaughter and armed criminal action conviction for failure to give a self-defense instruction. Even though the instruction that was tendered by the defendant was improper, self-defense is within the pattern instructions and the court should have given a proper instruction, as the defendant's version of the facts, including being attacked by the victim and two of his friends, supported defendant's theory that he needed to use deadly force to protect himself. Also, the defendant should be allowed to cross-examine a state witness with a DUI conviction if the defendant can show it is not a municipal violation but a state offense. The appellant violated some rules with regard to raising the self-defense issue, including failing to include the requested instruction in full in the argument portion of his brief, but the appellate court notes that it should not "punish innocent parties for the shortcomings of counsel on appeal."

Givens, No. WD50000 (3/12/96)
The trafficking decision was reversed for failure to give a lesser offense instruction on possession. The crack was contained in 17 separate baggies. The expert weighed the bags and crack together, then weighed one empty bag and multiplied by 17, then subtracted this amount from the total. The net weight was 2.02 grams, enough to support a second degree trafficking conviction which requires more than 2 grams of crack. However, he could not guarantee the accuracy of the net weight; it was possible that some of the baggies might weigh more than the one he weighed. Under these circumstances, the court held that when the weight of the substance is within .02 grams of the

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Defending Criminal Cases, 1996

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 573/659-8931. All registrations must be received in writing by mail or fax.

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REGISTRATION — PROGRAM, COURSE MATERIALS:

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

[ ] $165 — MACDL Member

[ ] $100 — Out-of-State Public Defender

[ ] — Missouri Public Defender tuition waived

PROGRAM DATES AND LOCATION:

May 17-18, 1996
Marriott Downtown Hotel
Kansas City

A block of rooms at the Marriott Downtown Hotel in Kansas City has been set aside for those attending this program. To make room reservations, call the Marriott Downtown's reservation desk at 816/421-6800 **by April 19, 1996**, and indicate that you will be attending The Missouri Bar program. You can guarantee your reservation with a major credit card. Room rates are $102, single or $112 double. Triples, quads, and suites are available.

Course Materials: Prepared by the speakers for this program.

MCLE Accreditation: This program qualifies for 9.0 MCLE credit hours; including 5.0 hours of federal credit. For Missouri MCLE information contact the MCLE Department, The Missouri Bar, P.O. Box 119, Jefferson City, Missouri 65102-0119, 573/635-4128. (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 573/659-8931.

If You Can't Attend: A colleague may attend in your place if he 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 573/659-8931 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, 573/635-4128.

Program Dates and Location

May 17-18, 1996
Kansas City
Marriott Downtown Hotel
200 W. 12th St.

PROGRAM AND FACULTY

Moderators: **Larry A. Schaffer,** Independence; **Charles M. Rogers,** Kansas City

FRIDAY, MAY 17, 1996

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

8:45 - 9:00 **Welcome**
J.R. Hobbs, Kansas City, Missouri President, Missouri Association of Criminal Defense Lawyers

9:00 - 9:50 **Effective Opening Statements**
Speaker: *Cathy R. Kelly,* St. Charles, Missouri Director of Training, Missouri Public Defender System

9:50 - 10:00 **Refreshment Break**

10:00 - 12:00 **Impeachment/Evidence — An Interactive Approach**
Speakers: *David S. Rudolph,* Chapel Hill, N.C., and *Gordon Widenhouse, Jr.,* Raleigh, N.C.

12:00 - 2:00 **Luncheon — Annual Awards Ceremony — Luncheon Address**
Speaker: *Robert C. Fogelnest,* New York, N.Y. President, National Association of Criminal Defense Lawyers

2:00 - 2:50 **Demonstrative Evidence — New Dimensions**
Speaker: *Patrick J. Berrigan,* Kansas City, Missouri, Missouri Public Defender System

2:50 - 3:00 **Refreshment Break**

3:00 - 4:00 **Extrajudicial Remedies for the Wrongly Convicted — "Johnny Lee Wilson Revisited"**
Speaker: *David E. Everson,* Kansas City, Missouri

5:00 **Reception — Cash Bar**
All attendees invited to attend

SATURDAY, MAY 18, 1996

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 **Cross-Examination of the Homicide Detective**
Speaker: *Drew Findling,* Atlanta, Georgia, National Association of Criminal Defense Lawyers

10:50 - 11:00 **Refreshment Break**

11:00 - 12:00 **Investigation in Child Sex Cases**
Speaker: *Cynthia L. Short,* Kansas City, Missouri, Missouri Public Defender System

Continued from page 9

statutory line and the weight cannot be guaranteed accurate, a lesser included offense instruction should be given.

President v. State, No. WD50961 (3/12/96)
The court reversed the denial of post-conviction relief and remanded with instructions to impose the originally agreed upon five year concurrent sentences, or allow the defendant to withdraw his plea. Here, after accepting the guilty pleas, the court deferred sentencing for two weeks, and told defendant that if he appeared at sentencing, he'd get three 5 year concurrent sentences, but if he didn't, all bets were off and he could get up to 45 years. The defendant absconded, was recaptured, and sentenced to three concurrent 10 year sentences. His request to withdraw his plea was rejected, and his post-conviction motion was dismissed based on the escape rule. However, the escape rule does not apply to post-recapture issues, and the denial of the motion to withdraw the plea at sentencing when the plea bargain was not enforced is not subject to dismissal by the escape rule. The court may condition an increase in punishment on the defendant's failure to appear for sentencing, but it must do so before the defendant's guilty plea has been accepted.

Court of Appeals, Southern District:

Lane, No. SD20524 (1/23/96)
The court affirmed the grant of a motion to suppress evidence based upon a warrantless search and seizure of items taken from a duffle bag, bearing defendant's name and address, taken from a car in which he was a passenger. The state argued he lacked standing to object to the search of the duffle bag since he was but a mere passenger in the car, but the court rejected this noting he retains privacy rights in his personal items he places in another's car. The court also rejects the state's argument that his bag could have been searched since other marijuana belonging to the driver was located in the car, and defendant could have been arrested for possession and the search of his bag could be incident to arrest, noting succinctly that the defendant was not arrested and the court would not decide the case on what might have occurred when it clearly didn't occur. the state's effort to extend the good faith exception under United States v. Leon was quickly dispatched by the court, noting that it applies to facially valid by defective warrants, not to warrantless searches.

Bishop, No. SD20296 (2/27/96).
The court affirmed the suppression of evidence, following the lead of the Eastern District in Damask, above, on the issue of surprise drug checkpoints.

Van v. State, No. SD20209 (2/29/96)
The court remanded for an evidentiary hearing on the defendant's Rule 24.035 motion where the defendant's motion alleged his attorney misled him into believing he could get twenty years on a DWI if he went to trial and was prosecuted as a persistent offender. (He could only have gotten ten years.) The record does not refute this allegation; there was nothing in the record to show that the defendant knew the maximum he could receive was 10 rather than 20 years.

Bledsoe, No. SD20180 (2/6/96)
Reversing a panel decision, the court en banc ruled that evidence that an attack with a beer bottle caused visible scars was sufficient for the fact-finder to find serious physical injury. Assault and armed criminal action convictions affirmed.

Jenson, No. SD20180 (2/6/96)
The court dismissed appellant's brief for violation of Sup. Ct. R. 30.06(d), as the two points relied on were insufficient to preserve any issue for review. Point One read as follows: The trial court erred in entering its judgment of conviction for DWI because the evidence was not sufficient to establish intoxication."

Tidbits From Other Jurisdictions:

United States v. Morgan, 1995 WL 783621 (D. Kans. 1995)
An initially voluntary encounter turned into custodial interrogation that violated *Miranda*, causing suppression of statements. A postal inspector questioned defendant for ten hours in increasingly accusatorial tones. The inspector repeatedly told defendant he believed defendant was lying and badgered him to confess to mail fraud. Also the inspector made statements which defendant may have reasonably believed meant that until he gave a written statement, he would not be allowed to leave. This, coupled with the defendant having nothing but a can of soda pop toe eat the whole time and the inspector's misleading statement that defendant as a federal indictee would not be allowed to remain silent, violated defendant's rights and his statements were suppressed.

Recent Missouri Supreme Court Transfers:

Moore v. State, No. 78691
Respondent's motion to transfer granted on the issue of whether an affidavit filed in lieu of amended motion by post-conviction trial counsel was sufficient.

Carr v. State, No. 78694
Appellant's motion to transfer granted on the issue of whether an affidavit filed in lieu of amended motion by post-conviction trial counsel was sufficient.

Haynes v. State, No. 78776
Respondent's motion to transfer granted on the issue of whether a case should be remanded for a hearing before a judge other than the guilty plea judge concerning the guilty plea judge's disqualification.

State v. Lane, No. 78742
Appellant's motion to transfer granted on the issue of the grant of a suppression motion. (The state is the appellant. MACDL Board member Shawn Askinosie is handling this case.)

No, no, no. You've got it all wrong. Jimmy Stewart for governor, Ronald Reagan for best friend.

Attributed to movie mogul Jack Warner on hearing in 1966 that Reagan was running for governor of California.

It's our fault. We should have given him better parts.

Jack Warner on learning Reagan had won the gubernatorial race.

TWO STEPS FORWARD

by Paul S. Petterson

Two recent cases order systemic reforms of indigent defense programs — one, an example of fast relief; the other slow, but sure.

Conscription and Case Loads in Arizona

In a Valentine to the criminal defense bar, the Arizona Supreme Court, granting relief in a Special Action (Arizona's mandamus) put an abrupt end to conscription and excessive caseloads in Yuma County. *Zarabia v. Bradshaw*, 1996 Ariz. LEXIS 17 (Feb. 13, 1996). According to the Court:

> In the fall of 1995, faced with Yuma County's failure to establish a public defender's office and a decline in the number of private attorneys willing and available to represent indigent defendants in the superior court, the presiding judge of the superior court in Yuma County put into effect a new system for providing representation to indigent criminal defendants. Under the new regime, which is still in place, indigent criminal defendants are represented by a mix of attorneys who contract with the Yuma County Superior Court to represent such defendants (contract attorneys) and practitioners appointed from the private bar as a whole. *Id.* at *1-2.

The contract attorneys, paid a set fee per month, were required to accept any and all cases assigned by the court; attempts to defer due to excessive caseloads were met with even more appointments. All other private attorneys, including those with absolutely no criminal experience or litigation background, were obliged to take the remaining cases in rotation.

Unwilling to tolerate the situation, one defendant, two conscripted civil attorneys and one overwhelmed contract defender sought out private counsel who in December filed a Petition for Special Action detailing the various ethical, due process, equal protection, effective assistance of counsel, and taking without just compensation violations rampant in Yuma County.

After accelerating a briefing schedule and hearing argument in January, the Supreme Court ordered an end to routine conscription of all private attorneys, finding the availability of experienced "mentors" no cure of the right to competent counsel violation: "Indeed, one wonders whether even a very able probate and estate planning lawyer will know when or on what issue to seek help and advice." *Id.* at *7. While clinging to some "inherent power" to compel pro bono work, a limit is recognized: "[L]awyers have a right to refuse to be drafted on a systematic basis and put to work at any price to satisfy a county's obligation to provide counsel to indigent defendants." *Id.* at *11.

As for excessive case loads, the Court adhered to *State v. Joe U. Smith*, 681 P.2d 1374 (1984) (excessive case loads result in ethical violations) and ordered evidentiary hearings when counsel asserts an inability to provide effective representation

"because of currently existing professional commitments." *Id.* at *12.

Finally, on the issue of compensation, the Court ordered "a fair and equitable fee schedule," considering "all appropriate factors, including the bar's obligation to serve the public." *Id.* Although that language is rather vague, some guidance was offered, in noting that

> A compensation scheme that allows lawyers significantly less than their overhead expense is obviously unreasonable. . . . It is impermissible for the presiding judge, in wholesale fashion, to transfer the public's constitutional obligation to pay the financial cost of indigent defense to the county's private lawyers. *Id.* at *8.

Appellate Delay in Illinois

Ten days after *Zarabia*, U.S. District Judge (and noted ethics expert) Milton Shadur issued an Opinion in a class action *habeas corpus* case — filed in 1993 — protesting long delays in processing appeals of Illinois criminal convictions. *Green v. Washington*, 1996 U.S. Dist. LEXIS 2668 (Feb. 23, 1996).

Accepting the testimony of preeminent experts in the field — notably Bob Spangenberg and David Newhouse of The Spangenberg Group and Norman Lefstein, Dean of the Indiana University School of Law — and adopting much of the petitioners' detailed proposed findings and conclusions, Judge Shadur found that delays of well over two years were common, were caused by chronic underfunding of the Office of the State Appellate Defender (OSAD), and violated the due process rights of the petitioner class — some of whom have been paroled by the time their convictions are reversed. Judge Shadur chastised the state legislature for underfunding the State Appellate Defender — and the state appellate court for failing to act on its own "inherent power" as the situation deteriorated over recent years.

Rejecting defenses raised by the state, Judge Shadur found that OSAD — with a national reputation for providing quality representation — did not spend too much time on its cases. The state's suggestion that more appeals be dismissed or summarily dropped was rejected as ethically and constitutionally untenable:

> It would be entirely improper . . . to seek to expedite its cases by filing more motions to withdraw from appeals under *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967). *Anders* is not a docket management tool. Motions to withdraw under *Anders* should be made sparingly and only after great care has been taken to assure that an appeal contains no non-frivolous issues. Moreover, a properly prepared *Anders* motion is often more time-consuming than a merits brief. *Id.* at *128-129.

Moreover, the overwhelmed public defender is caught in an ethical vise:

> When an agency such as OSAD is appointed to more cases than it can timely handle, as has been and continues to be the case here, conflicts of interest are necessarily created as a surfeit of clients compete for the scarce resources of

> available attorney time and attention. . . . Indeed, if anything that problem is less amenable to solution with indigent clients who have nowhere else to go than it might be with clients who have hired their lawyers and then, if dissatisfied with the attention that their cases are getting, may choose to go elsewhere for representation. Those conflicts of interest pose an inherently intractable dilemma that admits of only one possible solution — the agency must seek to withdraw from cases to which it has been appointed until there are sufficient available resources of attorney time and attention to eliminate the conflict. *Id.* at *124-125 (*citing In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1135, 1138 (Fla. 1990).

After noting that "typical relief" includes ordering release pending appeal, and the Tenth Circuit trilogy of *Harris v. Champion*, 15 F.3d at 1559 (1991), 15 F.3d at 1538 (1994), 48 F.3d 1127 (1995) Judge Shadur gave the state until April 2, 1996 — later extended to April 19th — to provide a complete report of the numbers of petitioners whose appeals are unresolved two years or more after filing of the notice of appeal, and the feasibility of resolving those appeals within "a specified short time period . . . to permit this Court to shape an appropriate order in that respect." *Id.* at *151-152. Short of a sudden and substantial supplemental appropriation to OSAD (and to the state appellate courts, which must process the appeals once they are briefed) this coming Bastille Day — July 14th — could be a bigger event than usual in Illinois.

Try This At Home?

The excellent petitions in these cases are available from the NACDL Brief Bank (*Green*, # 96033; *Zarabia*, # 96034) — in hard copy or computer disk — and from your local criminal defense association. Would such litigation bring relief to your jurisdiction? There may be only one way to find out.

<u>Ed. Note</u>: Mr. Petterson is Indigent Defense Coordinator for The National Association of Criminal Defense Lawyers, 1627 K Street, Ste. 1200, Washington, DC 20006; Phone: 202/872-8688; Fax: 202/331-8269; E-mail: NACDLPSP@aol.com. He has compiled a significant collection of indigent defense pleadings -- class action complaints, petitions, briefs, memoranda, summary judgment motions, etc. -- which may be useful in addressing caseload and compensation issues. I have an index of those pleadings as well as a list of recent law review articles on indigent defense issues, which I'd be happy to fax or mail to you. Call me at 816/363-6205, or contact NACDL directly.

This is Pearl Harbor Day. Forty-seven years ago to this very day, we were hit and hit hard at Pearl Harbor.

George Bush, addressing the American Legion in Louisville, Kentucky, on September 7, 1988.

NEW MEMBERS & MEMBERSHIP RENEWALS

Rusty Antel, Columbia
Charles Atwell, Kansas City **
Robert Beaird, Kansas City
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MACDL sincerely appreciates your financial support. We can't function without it. Several people named above joined MACDL or renewed their memberships last fall, but were inadvertently omitted from the list published in the Winter 1996 *ACTION REPORT*.

* *Public Defender*
** *Sustaining Member*

F Y I

by Francie Hall

The big news is: our Annual Meeting & Seminar, May 17-18, promises to be as good as or better than ever. (See pp. 10-11 of this newsletter for details.) If you haven't registered yet, get it together and do so immediately!

MACDL's Nominating Committee will submit the following slate of officers and directors to the membership at our annual meeting next month in Kansas City:

<u>Officers:</u>

Jim Worthington	President
Elizabeth Unger Carlyle	President-Elect
Rick Sindel	Vice President
Larry Schaffer	First Vice President
Bruce Houdek	Second Vice President

<u>Board Members:</u>

(3-yr terms) David Everson, Kansas City
Charles Rogers, Kansas City
Marco Roldan, Kansas City
Cathy DiTraglia, St. Louis
Cathy Kelley, St. Louis

(2-yr term) Scott Turner, Kansas City

I am pleased to announce that MACDL's board has approved funding (for the second consecutive year) of a full scholarship to the National Criminal Defense College. As we go to press, it's my understanding that the scholarship will be split equally among three Missouri Public Defenders.

The board has also voted to subsidize the expenses of two people to attend the **Fifth Annual NACDL Legislative Fly-In** (Washington DC, May 21-22). Schedules permitting, President J.R. Hobbs and President-Elect Jim Worthington will represent us in the capitol this year. **MACDL** has sponsored delegates to every NACDL Fly-In. We've learned a lot about lobbying from four years of education and participation at the national level, and we're applying those lessons at the state level. If you're interested in attending the 1996 NACDL Fly-In, or would like to assist **MACDL's** lobbying efforts in Jefferson City, call me or any MACDL officer. (See inside front cover of this newsletter for names & phone numbers.)

Shawn Askinosie, board member from Springfield, is our 90s techno-wiz. He introduced us to some concepts in the last newsletter in a column called **Technology Matters**. We'll hear more from him in print in the future. Meanwhile, he's setting up **MACDL's** home page on the net. We'll soon have one of those addresses with .s and com.s and @s, not to mention www.s. Better than Lenexa.

Additional kudos to Shawn for finding a graphic artist to Clean&Shine our image. Said GA has created a terrific new logo for **MACDL**. You can't see it until May (technical difficulties), but I'm pretty sure you're gonna love it.

State and national legislators continue to increase mandatory minimums, "enhance" penalties and justify forfeitures. Criminal defense lawyers wage strategic fights in the trenches on behalf of individual clients. Meanwhile, tactical battles must be fought in the legislatures. Your **MACDL** dues, whether $25 from an underpaid assistant public defender or $200 from a dedicated board member, support our efforts on all fronts. **MACDL's** PAC is tiny; our contribution to a candidate never exceeds $100. We ask you for an additional $10 donation to our PAC (<$1/month) when you pay annual dues, because it does make a difference, folks. Pay your dues. Contribute a few bucks to our PAC. Call us if you need assistance.

See you in K.C. May 17-18.

P.S. <u>Royals v. Toronto</u>, Fri. & Sat., 7:05 p.m.; Sunday, 1:05 p.m.

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 today, with your check, to:

Francie Hall, Executive Director
MACDL
416 East 59th Street, Kansas City, MO 64110

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Judges, Law Professors & Students,
Paralegals & Legal Assistants $20.00

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_____ Check here and add $10.00 to the amount of your dues check to contribute to MACDL's PAC Fund. *(Note: A PAC contribution is not a requirement of membership in the Missouri Association of Criminal Defense Lawyers.)*

MACDL
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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.

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