MACDL

Missouri Association of Criminal Defense Lawyers

Action Report

Summer 1996 Vol. VI, No. 3

President's Letter

by Jim Worthington

Thank you for allowing me to serve this Association and its individual member attorneys as well as the public of the State of Missouri. I am keenly aware of the responsibilities we all bear to quality, tenacious advocacy and the provision of valid and beneficial legal services to every human being who crosses our path, as well as ethical and moral conduct. As Isaac Newton stood on the shoulders of Galileo and Copernicus, so I stand on the shoulders of trial attorneys who have paved the trail before me. That trail has been blazed by members of this presidential club and by the attorneys on the front lines preparing the motions and arguing the cases before judges and juries on a daily basis. There is much work yet to be done.

In our last business session (May 17, 1996, in Kansas City), we shared our goals for the coming year. These include:

1. Increased membership.
2. Greater participation by the membership in preparation and presentation of written materials and as speakers at seminars.
3. An expanded legislative committee and lobbying effort to provide information and a broader perspective to members of the Missouri Legislature in order to aid them in making good decisions that will affect our entire society.
4. An increased emphasis on our brothers and sisters in St. Louis as well as less populous parts of the state.
5. A continuing presence in the National Association of Criminal Defense Lawyers, including participation of influential defense attorneys at our annual seminar for the education of our members.

Everyone in this association should extend the hand of fellowship and gratitude to J. R. Hobbs and Dan Viets for the excellent work they have done in guiding this organization during the past year. President Hobbs was indefatigable in cultivating contacts with NACDL and participating in its educational efforts, including the Legislative Fly-In in Washington, D.C. He also managed to be an integral part of our state lobbying and legislative efforts. He has worked long and hard on MACDL's CLE Committee for several years, and will continue to serve with Larry Schaffer, Charlie Rogers, Marco Roldan and Cathy Kelly on that Committee. Thanks, J.R., for your hundreds of hours of service to MACDL.

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The ***Action Report*** is published quarterly by the **Missouri Association of Criminal Defense Lawyers.** We welcome articles written by **MACDL** members. Please submit articles, letters to the editor, sample motions, etc., on a 3.5" or a 5.25" high density or double density disk, along with a hard copy, preferably in WordPerfect 5.1. Mail to: Francie Hall, Executive Director, **MACDL**, 416 E. 59th Street, Kansas City, MO 64110.

President's Letter *(cont'd from page 1)*

Dan Viets lives in Columbia but must feel he has a home away from home in Missouri's Capitol Building. It's rough on Dan (and his law practice) to trek to Jeff City to oppose bills as ridiculous as the one to enact chain gangs. One senator asked if we thought this was an idea "who's time has just not come". With effort, we kept from laughing in response. Dan has chaired MACDL's Legislative Committee for a number of years, and has agreed to continue monitoring that committee for the coming year. To assist him and lighten his load somewhat, I intend to expand that committee to ten members who can consistently voice the position of the criminal defense bar on bills (both silly and serious) proposed by Missouri's legislators.

I know you'll all join me in a round of applause and sincere thanks for the work done by Francie Hall, our Executive Secretary, and President-Elect Elizabeth Unger Carlyle on MACDL's *Action Report*. Much effort goes into gathering material, editing, formatting, publishing and mailing our quarterly publication, an important link among MACDL members.

With invaluable assistance from MoBar's CLE Director Cecil Caulkins, MACDL presented another successful annual seminar in May. Sincere thanks to the many people involved. If you weren't there, you missed, among other things, Cynthia Short on child abuse cases; Cathy Kelly on effective opening statements; David Everson on the **real** story of Johnny Lee Wilson; Drew Findling on cross-examining the homicide detective; Dave Rudolph and Gordon Widenhouse on impeachment evidence; and, of course, Milton Hirsch's informative and entertaining Supreme Court update.

Friends, many of my days and nights are consumed by worry about our government, the mood of our country and the freedoms that were supposed to be guaranteed to all citizens when this country was founded. We are in an ever-increasing cycle of vengeance, punishment, anger and retribution. "America the Punitive", read a headline in the Kansas City Star on Sunday, February 4th. The article indicated that the country has become more vengeful, but that vengeance and punishment do not benefit society. Columnist George Will wrote in the February 1st K.C. Star that to spare the rod is to spoil the criminal. His article extolled the virtues of chain gangs as a form of public embarrassment and shame as a means of altering human conduct. He failed to mention the polarization this issue has caused, both within and without the prison system. A "chain gang" bill was introduced in Missouri; among those testifying against it were a man of the cloth, a psychologist, and a representative of the Department of Corrections. The bill was defeated in committee, but only by a 5-4 vote. Such issues reverberate with the tangled relationships of wealth, politics, opportunity, race and gender.

I worry that, in spite of evidence that the death penalty is not a deterrent, Americans are in a rush to execute more people more quickly. I worry about the political concept of getting "tough on crime" when in fact it builds a cottage industry of prisons, guards and institutions with no empirical evidence of affecting crime rates. I worry because the number of people in federal and state prisons rose from 241,000 in 1975 to almost 800,000 in 1990. Further, from 1977 (when states resumed executions after an 8-year hiatus imposed by the Supreme Court) to 1990, Texas, Florida and Georgia led our nation in putting people to death; Texas, Florida and Georgia have been rewarded with higher murder rates.

The inescapable conclusion is that imprisoning more criminals and executing more convicted killers have no positive impact on the volume of violence. Yet the U.S. Congress has passed a

President's Letter *(cont'd from page 3)*

rush-to-execution bill to ensure that death is quick and final -- though with no guarantee of accuracy. In fact, the sum and substance of the bill is that more innocent people will be executed in this country.

Meanwhile, federal legislators reduce funding for legal aid (civil as well as criminal) for the poor. AMERICAN HERITAGE (July-August '95) features O.J. Simpson, and claims the jury system itself is on trial. Indeed, the backlash from O.J.'s trial may wreak such vengeance upon our society as to take away fundamental principles of fairness and justice. This is true economically, philosophically, morally and LEGALLY.

With these opening remarks, I ask you to welcome me to a term as MACDL's president, and I welcome you to a time of turmoil which provides opportunity for growth, not just for us as lawyers, but for all of society. I urge you to bring your friends, comrades and cohorts to the association and join with the members of MACDL and NACDL so that none of us will ever "stand alone" as "liberty's last champion".

As inspiration in the continuing battle to preserve liberty and the Constitutions of the United States and the State of Missouri, I offer three favorite quotes:

> Mr. Justice Louis Brandeis, in the famous *Olmstead* dissent: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. ... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."
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> British philosopher, politician and statesman Edmund Burke: "All that is necessary for the triumph of evil in the world is for good people to do nothing."
>
> John Greenleaf Whittier: "For of all sad words of tongue or pen, the saddest are these: 'It might have been!'"

Sincerely,
Jim Worthington

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CASE LAW UPDATE

Summarized by Lew Kollias, Edited by Elizabeth Unger Carlyle

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. Please be aware that opinions may have been updated or superseded.

Western District, Missouri Court of Appeals

Futo, 1996 WL 133242, No. ED63992 (3/26/96)
A multi-count conviction for first degree murder was reversed when the trial court prevented the defendant from discussing his testimony with counsel during two overnight recesses taken during the testimony. The state was also admonished not to attempt to impeach the defendant with his post-arrest silence.

Boulware, 1996 WL 131865, No. WD49032 (3/26/96)
The grant of a motion in limine for the state does not preserve error for review, and the point was denied here because defense counsel failed to attempt to offer the excluded evidence at trial.

Kemp, 919 S.W.2d 278 (Mo. App. W.D. 1996)
A misdemeanor assault conviction based only on the "excited utterance" of the defendant's wife and alleged victim in response to a police officer's question. Because there was no evidence apart from the wife's statement that the offense occurred, the evidence was inadmissible under the "excited utterance" exception to the hearsay rule. (Mrs. Kemp did not testify at trial.)

Bruns v. Thomas, 919 S.W.2d 302 (Mo. App. W.D. 1996)
Habeas corpus relief from a contempt judgment was granted where, prior to the defendant's incarceration, there was no sufficient written legal judgment of contempt specifying the facts underlying the contempt citation.

State ex rel. Nixon v. Clark, 1996 WL 162340, No. WD51817 (4/9/96)
The trial court's grant of habeas corpus relief discharging the petitioner from the custody of the parole board by overturning his conviction was reversed by the appellate court. Because the defendant had failed to use Rule 24.035 to attack his conviction, it was improper for the trial court to grant habeas relief. Further, counsel was under no duty to warn the defendant of collateral consequences of conviction such as deportation.

State ex rel. MacLaughlin v. Treon, 1996 WL 162246, No. WD50982 (4/9/96)
Plain error required reversal of a forfeiture judgment where the state did not meets its burden to show that the funds were directly derived from criminal activity. The state failed to show a clear improper source for the money, and Treon offered evidence of a legitimate source.

Wilson, 920 S.W.2d 177 (Mo.App. W.D. 1996)
The evidence was insufficient to prove endangering the welfare of a child. The child was abused by the defendant's boyfriend, who was prosecuted for failing to take the child to the doctor. However, as the child's injuries were not dangerous, the evidence was insufficient under the endangerment statute.

Eastern District, Missouri Court of Appeals

State ex rel. King v. Conard, 918 S.W.2d 388 (Mo. App. E.D. 1996)
A contempt judgment was overturned because the judgment and sentence did not cite the essential facts constituting contempt as well as fixing the punishment.

Hicks v. State, 918 S.W.2d 385 (Mo. App. E.D. 1996)
The court remanded for an evidentiary hearing on the allegation of the 24.035 motion that defense counsel coerced the defendant's plea of guilty by informing him that as an African-American, he could not get a fair trial in St. Francois County. (A change of venue as a matter of right could have been granted if requested.)

Rushing, 1996 WL 133233, No. ED68145 (3/26/96)
The court transferred this case to the Missouri Supreme Court noting that it would reverse because there is no "plain feel doctrine;" the trial court upheld a search based on the officer's hunch that a closed container he felt in the defendant's pocket contained crack.

Becker, 1996 WL 174806, No. ED68779 (4/16/96)
The attorney general could institute a prosecution for making a false statement on a gaming license application without a request by the gaming commission. The statute of limitations is one year from the discovery of the false statement.

Shipley, 920 S.W.2d 120 (Mo. App. E.D. 1996)
The conviction for stealing by deceit as a lesser included offense of robbery first degree was reversed as plain error. Stealing by deceit includes different elements than robbery first degree, and convicting for an offense not charged is manifest injustice.

O'Connell, 921 S.W.2d 121 (Mo. App. E.D. 1996)
Because an original Rule 29.15 motion now need not be verified but only signed by the movant, the defect in verification provided no basis for dismissing the motion. Further, the court may conduct a hearing even if no hearing is requested by the movant if a hearing is required to resolve issues raised by the motion.

Case Law Update *(cont'd from page 5)*

Fowler, 1996 WL 207459, No. ED65992 (4/30/96)
Since the defendant was charged with stealing from Rhoda Blade, but the evidence and verdict director showed the victim as Lyle Blade, and the relationship between Rhoda and Lyle was not shown at trial, plain error required reversal of the conviction.

Phillips, 1996 WL 207421, No. ED63423 (4/30/96)
The murder conviction was reversed because of the improper admission of evidence of uncharged misconduct, here the defendant's spontaneous statement, "I was going to turn myself in for escaping custody because I had thought about it the night before." These statements were evidence of uncharged misconduct or crimes, and highly prejudicial to the defendant. Reversal is required in this case since the state argued extensively the that evidence of escape impaired the defendant's credibility, and the trial testimony of the state's key witnesses was very inconsistent with their pretrial testimony. The fact that the defendant had other, unrelated priors does not make the error harmless. The court further held that the imposition of a Class X status in the written judgment was improper where it was not included in the oral pronouncement of sentence. Finally, the court held that it was error to deny the defendant's Batson challenge before giving the defense an opportunity to rebut the state's offered race-neutral explanation.

Foust, 920 S.W.2d 949 (Mo. App. E.D. 1996)
Convictions for several counts of sexual abuse of children involving multiple victims are reversed. During the cross-examination of one of the victim's, the defense sought to elicit what the victim's stepmother told her with regard to what the stepmother had heard about the defendant allegedly abusing children. The trial court ruled it hearsay and not relevant. The appellate court reversed, noting it was not hearsay since it was not offered to prove the truth of the matters heard by the stepmother but rather that the victim heard it, and it was relevant since this may have suggested the victim's accusations. The court further criticized the prosecutor's statement "improper impeachment" as a ground for objection.

Southern District, Missouri Court of Appeals

Knight, 920 S.W.2d 612 (Mo. App. S.D. 1996)
The state should have the opportunity to show, on remand, that the release from custody on the prior offense occurred within 25 years of the instant offense as required for enhancement of punishment under MO. REV. STAT. §558.019. If the state cannot make this showing, the case is reversed and remanded for a new trial. [This is an interesting result, since the judge could still have imposed sentence under MO. REV. STAT. §558.016.]

Johnson v. State, 1996 WL 162016, No. SD20298 (4/5/96)
Because the oral pronouncement of sentence did not mention the defendant's status as a prior and persistent offender and a drug offender, the defendant is remanded for resentencing without the parole limitations imposed by that status. Where there is a conflict between the written judgment and oral pronouncement of sentence, the oral pronouncement controls.

George, 921 S.W.2d 638, (Mo. App. S.D. 1996)
Denial of post-conviction relief reversed, remanded for evidentiary hearing on the claim of ineffective assistance of counsel by failure to call the victim's mother as a witness, in that the mother wrote a letter to trial counsel indicating a willingness to testify that she told her children on previous occasions to make allegations of sexual abuse against three men other than the defendant. (The state agreed a hearing was warranted on this issue.)

Rickman, 920 S.W.2d 615 (Mo. App. S.D. 1996)
The court found error in the failure to give an alibi instruction. Error was preserved since defense counsel specifically objected and presented the alibi evidence at the instruction conference and followed up with a general assertion in the new trial motion. Further, the evidence from a defense witness that others committed the crime and defendant was asleep at home when the witness left at 4 a.m. and was also asleep when the witness returned two hours later supported the alibi instruction, even though it didn't precisely account for the defendant's whereabouts at the exact time of the crime. No prejudice occurred, however, since the jury was required to find defendant was present to convict, and the

defendant's evidence and arguments of counsel were sufficient to focus the jury's attention on the issue even without an alibi instruction.

Rost v. State, 921 S.W.2d 629 (Mo. App. S.D. 1996)
The defendant challenged his conviction of DWI on the basis that it was a lesser included offense of felony assault. The court agreed, but denied relief because the DWI conviction was entered first, and the felony assault conviction could not be challenged because the post-conviction proceedings in that case had already been completed.

Missouri Supreme Court Transfers:

The Missouri Supreme Court has granted transfer in the deceptive roadblock cases discussed in the last newsletter: State v. Bishop, Alvarez, and Garcia, No. 78843; State v. Damask, No. 78826.

U.S. Supreme Court

Lonchar v. Thomas, 116 S.Ct. 1293 (1996)
A defendant who waited until the last minute to file his first petition for writ of habeas corpus was granted by a narrow majority of the Supreme Court, which held that a federal judge should have time to consider the merits of a first petition.

Cooper v. Oklahoma, 116 S.Ct. 1373 (1996)
An Oklahoma statute which requires the defendant to prove incompetency to stand trial by clear and convincing evidence violates due process and is therefore invalid.

Carlisle v. United States, 116 S.Ct. 1460 (1996)
The district court lacked jurisdiction to consider a motion for judgment of acquittal filed one day late. Fed. R. Crim. Pro. 29(a) is jurisdictional, and the court has no inherent power to vacate a judgment which lacks evidentiary support.

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BOOK REVIEW: DRUG WARRIORS AND THEIR PREY: FROM POLICE POWER TO POLICE STATE

by Richard Lawrence Miller

The war on drugs is a war on ordinary people. Using that premise, historian Richard Lawrence Miller analyzes America's drug war with passion seldom encountered in scholarly writing. Miller presents numerous examples of drug law enforcement gone amok, as police and courts threaten the happiness, property, and even lives of victims -- some of whom are never charged with, let alone convicted of, a drug crime. Miller not only argues that criminal justice zealots are harming the democracy they are sworn to protect, but that authoritarians unfriendly to democracy stoke public fear to convince citizens to relinquish traditional legal rights. Those are the very rights that thwart implementation of an agenda of social control through government power. Miller contends that an imaginary "drug crisis" has been manufactured by authoritarians to mask their war on democracy. He not only examines numerous civil rights sacrificed in the name of drugs, but demonstrates how their loss harms ordinary Americans in their everyday lives. Showing how the war on drug users fits into a destruction process that can lead to mass murder, Miller calls for an end to the war. This book is for anyone who wonders about the value of civil liberties, or wonders why people seek to destroy their neighbors. Using voluminous examples of drug law enforcement victimizing blameless people, this book demonstrates how the loss of civil liberties "in the name of drugs" threatens law-abiding Americans at work and at home.

Contents: Preface: The Destruction Process; Identification; Ostracism; Confiscation; Concentration; Annihilation; Coda; The Creation of Utopia; Notes; Sources; Index.

Richard Lawrence Miller is the author of *HERITAGE OF FEAR: ILLUSION AND REALITY IN THE COLD WAR* (1988); *TRUMAN: THE RISE TO POWER* (1985); *THE CASE FOR LEGALIZING DRUGS* (Praeger, 1991); and *NAZI JUSTIZ: LAW OF THE HOLOCAUST* (Praeger, 1995).

DRUG WARRIORS AND THEIR PREY: FROM POLICE POWER TO POLICE STATE (Praeger) is available at book stores, or call 800/225-5800 to order.

NACDL 1996 Legislative Fly-In

J.R. Hobbs, Jim Worthington and Tom Carver represented MACDL at the National Association of Criminal Defense Lawyers' Fifth Annual Legislative Fly-In on May 21-22 in Washington, D.C. (MACDL has sponsored a delegation to the Fly-In every year since its inception.) On May 21st, delegates from around the country were briefed extensively on civil forfeiture reform; anti-terrorism legislation; crack cocaine vs. powder sentencing disparities; death penalty litigation and funding of capital defense; Fourth Amendment exclusionary rule; Fifth Amendment preservation; habeas corpus "reform"; indigent defense funding; IRS overreaching; juvenile justice policy; mandatory minimums; and victim restitution, among other issues.

On May 22, J.R., Jim and Tom met with Rep. Ike Skelton, Jr. (Lexington) and his Legislative Director, Lara Battles; Rep. Karen McCarthy (K.C.) and her Legislative Director, Peter Muller, Jr.; Rep. Pat Danner (Chillicothe); and Steve Elmendorf, Deputy Chief of Staff for House Minority Leader Richard Gephardt (St. Louis). While some (particularly Karen McCarthy) were more sympathetic to our positions than others, all the legislators and staffers appreciated our input. These people pay attention to intelligent, logical presentations, and they respond to numbers. When they don't hear from us, they assume no one cares. A brief letter from a constituent can outweigh dozens of form letters from a huge, subsidized interest group. Make sure your voice is heard.

A voluntary contribution of as little as $10 annually to MACDL's Political Action Committee is another way to support the legislative concerns of the criminal defense bar. Several bills now pending in Congress warrant the attention of MACDL members. In this issue, we will address one that threatens what's left of the Fourth Amendment:

HR 666 would extend the good-faith exception carved out by the U.S. Supreme Court in Leon to cases where no search warrant is issued. Leon, of course, says that, where an officer has probable cause, lawfully obtains a search warrant, and reasonably believes, in good faith, that search and seizure of persons or property are proper, an otherwise defective warrant is not cause for exclusion of evidence seized thereunder. Objections to this ruling continue to be debated. Meanwhile, HR 666 would extend the good-faith exception to cases where police did not bother to apply for a warrant, perhaps believing in good faith (as they would undoubtedly testify) that a warrant was not required in a particular situation. This bill exceeds the generosity of the most prosecution-oriented court's reading of Leon. Obviously, the FBI, DEA, ATF and DOJ are priming big guns in support of HR 666. Think about it; consider the ramifications. Decide to act. Call or write your congress(wo)man. Contact a MACDL officer or director about getting involved in our lobbying efforts. Send a check to MACDL's PAC with your next dues payment.

Future issues of the *Action Report* will include discussions of criminal law issues under debate in the U.S. Congress. State legislatures, including our own, tend to follow Congress' lead (e.g., forfeiture, mandatory minimums). We need to be informed, aware and active in our support of the U.S. and Missouri Constitutions, lest precious rights and liberties be further eroded.

Compiled from reports submitted by Tom Carver and Jim Worthington

4:00 PM Thurs., Sept. 29: All MACDL members welcome at K.C. Westin Crown Center for Board Meeting.

NEW TELEPHONE POLICY IN MISSOURI PRISONS

by Elizabeth Unger Carlyle

The Missouri Department of Corrections' new Procedure on Inmate Access to Telephones became effective June 17, 1996. Of particular interest are the following changes regarding attorney calls.

Inmate Calls to Attorneys: Inmates may have unmonitored telephone conversations with counsel in accordance with the following:

1. Standard operating procedures will designate staff who will coordinate telephone calls.

2. Inmates must advise designated staff of their need for an unmonitored attorney conversation.

3. The inmate must demonstrate that communication with counsel by correspondence, visit or normal telephone use is not adequate (e.g., imminent court deadline).

4. All calls to attorneys will be made on a collect basis.

5. All calls will be dialed and verified by designated staff.

6. Staff will maintain visual supervision during the telephone conversation.

Other provisions of the procedure include the fact that inmate calls may be monitored and recorded. Notices to this effect should be posted by inmate phones. Further, "third-party and three-way calls are not authorized. Participating in such calls may result in disciplinary action."

To preserve an attorney's right to unmonitored consultation with a client, it is important to inform the client of this procedure. If the client needs an unmonitored call, he/she should call the attorney to advise of the need. The attorney can then fax a call request to the institution.

As always, I am interested in issues concerning attorney relations with clients in prison. Please let me know of your experiences, good or bad, by writing to MACDL or to me.

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AN OPEN LETTER TO CHRIS DARDEN

by Michael P. Heiskell

(Reprinted by permission from VOICE FOR THE DEFENSE, Vol. 25, No. 3, April 1996, a publication of the Texas Criminal Defense Lawyers Association)

Dear Chris,

Congratulations on your book, In Contempt, which offers your opinions and perspective on your role in the prosecution of O.J. Simpson. I have been watching your televised promotion of the book to try to attain a better understanding of what really makes you tick, and why the trial so embittered you. Your polemic account is, of course, one of many that this nation is currently enduring, but it is your account and your comments made in the book's promotion that really trouble me. You see, as an African American, as well as a former prosecutor for nine years, we have a lot in common, including being recruited to co-prosecute a high-profile case in our respective communities. I was asked to sit second chair in Galveston County in the mid 70s to prosecute black Galveston Police Detectives accused of taking bribes from a drug dealer. We lost the case. However, I chalked it up as experience and decided to learn from it and move on. You, on the other hand, seem to have chosen a different route -

Dear Chris *(cont'd from page 9)*

motivated perhaps by greed (promotion of book sales) rather than rational thought.

Your denigration of the jury, the judge and defense counsel is appalling, more so than disheartening, because you, as one of the most recognized prosecutors in the country, stand as a symbol of high achievement for African Americans in the field of law. You have forever compromised that now by crossing a terrain over which our contemporary democratic mythologies about justice stood.

Your attempt to characterize the predominantly black jury, a jury that you helped select by the way, as simple-minded, is demeaning and ludicrous. There was no racial solidarity or jury nullification. You and the prosecution team were simply out-lawyered from pretrial to the verdict by a talented team of aggressive attorneys. It was readily apparent to me as well as my colleagues, who often ridiculed your team's weak attempt at developing and conveying a coherent theory. Yes, the jury did deliberate, and they followed the law on the definition "beyond a reasonable doubt" with their own sensibilities, as your team delved into a risky deal with the devil (Mark Fuhrman), a half-crocked explanation of sloppy evidence collection and an unbelievable, unrehearsed courtroom demonstration that you directed (the gloves did not fit).

You felt betrayed by Judge Lance Ito, whom you accused of turning the courtroom over to the defense team. Where have you been practicing, Chris? What have you been taught about "courtroom dynamics?" Any lawyer worth his or her salt knows that in a non-contemptuous manner you seek as much control of the courtroom as you possibly can in order to exhibit to the jury your confidence and intimate knowledge of the judge as well as other courtroom personnel. Did your team suddenly lose sight of this? Did you and Marcia Clark decide to assume the role of a shrinking violet, or seek to unsuccessfully wrestle control of the courtroom as well? You see, this takes considerable aplomb, as well as talent, in this arena of advocacy. However, from my perspective, Judge Ito let both sides have a lot of rope, but seemed to favor you, Marcia and the rest of the prosecution that still could not keep a jury out for over half a day. For you to now blame Judge Ito is yet another half-hearted jab at our system of justice.

Johnnie Cochran, your former hero. Give him his due, Chris! (Or his "props", as you might say.) He is obviously a talented man whose eloquence and delineated passion thrust him into the forefront of the great litigators of our time. Cochran's perfect orchestration of the proceeding and his command of the English language left you in his wake as you paced around the podium reflecting a moody, dispassionate and, indeed, disrespectful arrogance for the proceedings. Cochran convincingly revealed the holes in some of the evidence and unearthed the potentially sleazy motives behind the actions of the LAPD detectives while at Simpson's home. In your heart I believe that you know this, yet you stoop, as have many (including Robert Shapiro) to a distraught discourse over the so-called use of the race card. For you and others to bellow and whine about this alleged tactic is to deny that another African American attorney is one of the best in the business. You are simply following the pompous lead of those jealous and envious persons who are allowed to impose a limited vision on a talented African American male. Your immaturity has allowed you to fall into that trap - one that especially ensnares you. The trap is to believe that no matter how talented, skilled or experienced, according to the so-called experts, your successes have more to do with skin color (yours and your targeted audience) than with your own skills or ability. You see, race is such a large decoy for some that it allows minor matters to be taken out of context and blown up in a spectacular fashion, corrupting many in the process. Isn't it strange that as we seek to get bast the imbecilic racial divide of the past to interracial prosecution and defense teams and yes, diversity in the judiciary and interracial juries, that our criminal justice system is increasingly described as a system in crisis? Our current national Congress seeks approval of a "jail not bail" bill that allows states to build even more local jails for federal inmates. Your California legislature seeks jury reform to allow less-than-unanimous jury verdicts in criminal cases. Indeed, some are advocating dispensing with the jury system. The Fourth Amendment is under attack by Congress relating to the abolishment of the "exclusionary rule".

As our humanity is being compromised by constant references to a broken system in need of many fixes, your voice now leads the morose march against many individual liberties. Is this what you intended, Chris? Can post-trial sour grapes push you this far to the edge that you contemptuously write off the verdict as the fault of everyone but your own irresponsible prosecution team?

I am glad you have taken a leave of absence from the district attorney's office, but it saddens me that you have headed for the classroom. But since you are there, tell students the truth about how our studies of police misconduct, inept prosecution teams and sloppy crime laboratories can move us closer to perfecting the liberty of the people through the law enforcement agencies created to protect them. Tell them that to move our country closer to justice we all have to continue to mature and, as our Federal Sentencing Guidelines Manual constantly reminds us, accept responsibility for our own failures in judgment.

Michael P. Heiskell of Johnson Vaughn & Heiskell practices in Fort Worth, TX. A former state prosecutor and a former federal prosecutor, he is a frequent lecturer on criminal law.

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BULLETIN BOARD

Congratulations to Past President Charlie Atwell,
recently appointed by Governor Carnahan to serve as Circuit Judge of Division 10
in Jackson County on the retirement of the Hon. Gene R. Martin.
We're very proud of you, Charlie.

MACDL Director Marco Roldan has been appointed as Commissioner of Jackson County's Drug Court. The newly-created position of Commissioner was formerly held by a Circuit Judge. Congratulations, Marco!

MACDL's efforts in opposition to a state witness immunity bill
were successful once again this year,
in spite of an all-out push by Missouri prosecuting attorney groups.
Our thanks to Randy Scherr, Dan Viets, Tom Carver, Jim Worthington
and T.D. Pawley, among others, for this outstanding victory.

WAYS TO IMPLEMENT SUPPLEMENTAL JURY QUESTIONNAIRES

by Inese A. Neiders, Ph.D., J.D.

Until recently, jury questionnaires were used only in high-stakes commercial cases and death penalty cases. In fact, many trial lawyers and jury consultants think it is almost malpractice not to employ a supplemental juror questionnaire in these kinds of cases. Articles about the rationale for using questionnaires have been published in criminal defense publications in New York, Texas, Ohio, Oregon, Tennessee, Georgia, Illinois, Indiana, Missouri and Kentucky[1]. This article gives ways to ensure that the court will accept the questionnaire and allow for ample time to assimilate the information[2].

Ask court personnel what has worked before. They are often a resource of information for successful use. Also, because of the increased use of questionnaires, they are interested in ideas for successfully implementing the process.

Contact a consultant in advance to help with the processing of the questionnaire, including construction, grading, summarizing and analyzing the results. Clients are pleased because consultants work at an hourly rate equal to or lower than that of lawyers; courts are pleased because specialists can help avoid the pitfalls which may occur when they first implement this approach. A consultant's presence often influences the judge to permit the use of the questionnaire.

Point out advantages for the judge, such as protection of his or her reputation in sensitive or high-publicity trials and more productive use of the court's time[3]. You may wish to start with a long questionnaire like O.J. Simpson's defense team, and shorten it if the judge objects to its length[4] Ask the court to have the jurors complete the questionnaire in advance. While short questionnaires mailed to jurors have a higher response rate than long ones, the return rate is still lower than if the jurors fill out the questionnaires at the courthouse.

Better decisions can be made about whether or not to proceed with the trial. Civil attorneys frequently settle after evaluating the completed questionnaires. If the defendant can opt for a plea, the decision is best made after more thorough questioning. Prosecutors in several cases decided to dismiss charges when they saw that the defense attorneys were prepared with a questionnaire as well as other pretrial motions.

Inese Neiders is a jury consultant from Columbus, Ohio, who has successfully used questionnaires in death penalty, drug conspiracy, police brutality, child sexual abuse, white collar product liability and tort cases. She wishes to thank Don Larrick, Ph.D., for editing this article and critiquing the methodology. You may contact her at 614/263-6558.

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1 How to Save Your Client While Saving the Court Time, Inese A. Neiders.

2 More information is collected by using questionnaires, so it is critical to have time to assimilate it. Multiple choice and forced choice questions are quick to grade and have some advantages over open-ended questions, so they should be included with open-ended questions.

3 Michael Stout suggested that materials such as the witness list and other less interesting questions be placed in the questionnaire. More interesting material can be brought up in open *voir dire.*

4 It is desirable to have a comprehensive instrument like those used in the Simpson and Rodney King trials, but judges may prefer shorter questionnaires. A brief supplemental questionnaire is better than none at all.

NEW MEMBERS AND MEMBERSHIP RENEWALS

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Christine Carpenter, Columbia
K. Louis Caskey, Kansas City
Jay DeHardt, Kansas City, ***Sustaining Member***
Steven M. Dioneda, St. Louis
Daniel Dodson, Columbia
Catherine Earnshaw-Hobbs, Lee's Summit
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Susan Kister, St. Louis
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Dee Wampler, Springfield
Andrew Wood, Neosho
Paul Yarns, St. Louis, ***Public Defender***

MACDL sincerely appreciates your financial support. We can't function without it. Your dues pay for postage and printing, expenses of continuing legal education programs, 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 supplies for the computer on which this newsletter is composed, among other things. Special thanks to the Missouri Public Defenders and Assistants who support our efforts, and to our Sustaining Members for voluntarily doubling the amount of their annual dues.

Please check the mailing label on the back page of this newsletter to see if it's time to renew your membership. You'll find a renewal form inside the back cover.

FYI

by Francie Hall

Defending Criminal Cases 1996 brought together over 260 members of the public and private defense bar. What a great group of people! Once again, I heard out-of-state speakers say that **MACDL** is the best state organization they've visited, and they're not just being polite. Milt Hirsch of Miami (now an official honorary **MACDL** member) wouldn't miss his annual trip to Missouri -- it's too much fun. Drew Findling of Atlanta spoke here in 1994, and was thrilled to be invited back. When Bob Fogelnest, NACDL President, had a last-minute conflict, Mike Monico of Chicago agreed to fill in as our luncheon speaker with less than 48 hours' notice -- and later offered to return any time!

Much credit for the seminar's success goes to immediate past president, J.R. Hobbs. In addition to the time and effort required of him as president of this organization in 1995-96, J.R. continued to assist Larry Schaffer and Marco Roldan with our CLE program. His years of work in this area (and his sense of humor and adaptability in the face of last-minute crises) have been invaluable.

I'd like to applaud some of the people who have truly made a commitment to **MACDL** and have served as a creative and dedicated part of the association's leadership. Shawn Askinosie and Tom Carver of Springfield have the longest distance to travel, yet never miss a meeting. Elizabeth Carlyle is always willing to take on another task, and always does an outstanding job. Charlie Rogers, Bruce Houdek, Larry Schaffer, Pat Eng and Marco Roldan have worked behind the scenes for years to maintain the high standards set by their predecessors. J.D. Williamson, David Russell, David Godfrey, Hugh Kranitz, Tom Howe, Charlie Atwell, Bernie Edelman, Sean O'Brien and Dan Viets remained active in **MACDL**'s affairs long after their terms as president expired. Bruce Simon is a mainstay of our Amicus Committee. Missouri has the best state organization because we have the best people.

And, of course, there's our newly elected president (the 19th criminal defense attorney to hold that office), Jim Worthington. For over a decade, Jim has consistently and generously given time, effort, money, humor and wisdom to **MACDL**'s endeavors. His administration is sure to be challenging and rewarding for the Board and the membership.

Speaking of our membership -- I'd like your help in increasing it! If each of you would pass on your copy of this ***ACTION REPORT*** to a friend or colleague, spend a few minutes telling him/her what a terrific organization **MACDL** is, and point out the Membership Application Form inside the back cover of each issue, we could gain dozens of new members across the state. There is strength in numbers. If you'll reach out to others who defend the rights of the criminally accused and encourage them to join us, we'll all benefit. If you don't want to give up your newsletter (and I'm sure some of you will be requesting hand-tooled binders for them soon), give me a call; I'll be happy to send you extra copies.

Since CLE reporting time is upon us, let me remind you that our fall 1995 seminar, DEFENDING THE OZARKS, qualified for 6.4 MCLE hours, including 1.2 in ethics and 2 in federal practice. The May 1996 program, DEFENDING CRIMINAL CASES, earned you 9 credit hours, including 5 federal.

MACDL's Board of Directors will meet August 23, 4:00 p.m., at Pat Eng's office in Columbia.

On September 18 and 19, MACDL will host a hospitality suite, courtesy of President Jim Worthington, at Kansas City's Westin Crown Center Hotel in conjunction with the MoBar meeting. Drop by to visit, have a drink, park your briefcase during sessions. Interested members are invited to join us for a Board Meeting at 4:00 p.m. on Thursday, September 19. The suite will be in Jim Worthington's name.

As promised, you can now visit **MACDL**'s web site at **http:\\www.cyberbar.net\macdl.htm**. Also -- HOW ABOUT THE NEW LOGO? Pretty cool, huh? Sean Askinosie deserves most of the credit for both achievements, though he won't admit it's his thumbprint.

MACDL

MEMBERSHIP APPLICATION / RENEWAL FORM

If you are not currently a member of the Missouri Association of Criminal Defense Lawyers, take a moment to complete 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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Licensed 5 years or more $100.00
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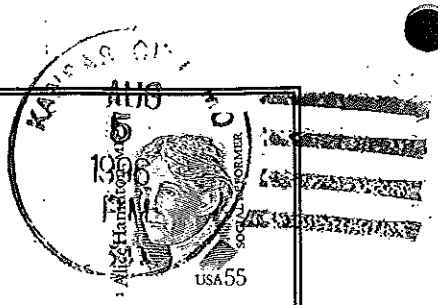

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FRANCIE HALL
MACDL
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YOUR ADDRESS LABEL NOW INCLUDES THE EXPIRATION DATE OF YOUR MACDL MEMBERSHIP. IF THAT DATE IS NEAR (OR PAST), PLEASE USE THE APPLICATION FORM INSIDE THE BACK COVER TO RENEW YOUR MEMBERSHIP AND EXTEND YOUR SUBSCRIPTION TO THE *ACTION REPORT*. THANK YOU.

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