MACDL
Action Report

Newsletter

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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HAMMERING OUT LONELINESS -- GET INVOLVED!

J. R. Hobbs, MACDL President

As one of our members, Elizabeth Carlyle, noted at the October CLE program in Branson entitled "Defending the Ozarks," criminal defense lawyers often experience loneliness. This is certainly an accurate observation for anyone who is more than casually involved in our line of work. It's often a lonely feeling to be putting in the long hours and hard work for a client who may (or may not) truly appreciate your anxieties, concerns, and efforts. Sometimes it's lonely when you are preparing for a case and your family and friends wish you were with them -- and vice versa. Sometimes it's lonely when you enter the courtroom for a hearing, plea, sentencing, or trial, and it appears that the prosecution, case agents, the court, court personnel, bailiffs, marshals, probation officers, jurors and the law itself are against you! In speaking to a community civic group, church awareness group, a class and, yes, even to fellow lawyers, a criminal defense lawyer often learns that the understanding of the "role of the criminal defense lawyer" is misunderstood or confused. In working with legislators, lobbyists, prison officials, victims of crime and even with friends and family a lonely feeling often arises. In some ways, the attitudes of others are understandable since crime is rampant (despite several years of "deterrent" efforts like minimum mandatory sentences). Still, defense lawyers do not defend crime; we defend the necessity of a fair system in dealing with criminal justice issues and those rightly or wrongly accused of crime. MACDL is at least one effective tool in hammering away at the loneliness that a good criminal defense lawyer endures. The work and enthusiasm of networking with fellow members in our various programs help to ease this loneliness.

Though by no means exhaustive and at great risk of not specifically mentioning someone by name, let's see how this loneliness has been whittled away during the current MACDL term. In 1995-96, MACDL continues to grow in quality, stature and numbers! Several members of our organization have received regional and even national recognition for their contributions to the administration of criminal justice. Longtime member and past president J.D. Williamson has been appointed by Governor Carnahan as the most recent Jackson County State Court Judge. Linda Murphy, Charlie Atwell, Robert Beaird and Byron Fox have been selected to various panels for different judicial vacancies through the State. Charlie Atwell has again been serving as co-chair of the National Association of Criminal Defense Lawyers' CLE Committee.

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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.

LEGISLATIVE WORK

Outstanding legal work and efforts on behalf of the organization continue to emerge from our new board members and others. For example, T.D. Pawley, Tom Carver, Dan Viets, Charlie Atwell and Jim Worthington have consistently represented MACDL's views on pending legislation before the Missouri General Assembly. They have all worked actively with Randy Scherr, MACDL's lobbyist, to present our various positions. Pat Eng has also been involved in this effort and consistently allows our board to meet at his office as a central statewide location to discuss pending legislation and other issues of concern. Similarly, MACDL is also planning for another presentation at the NACDL Congressional Fly-In in May. Bruce Houdek, Ellen Suni, Sean O'Brien and others continue to be involved in this effort as well.

AMICUS WORK & NEW COMMITTEE EFFORTS

Jackie Cook and Bruce Simon recently presented oral arguments in the Missouri Court of Appeals for the Western District of Missouri on behalf of one of our members concerning the issue of ethical duties and its conflict with effective trial preparation. Elizabeth Carlyle -- one of our hardest-working members -- continues to give of her time and energy by preparing amicus briefs; improving the MACDL newsletter; and brainstorming new ideas. She has taken the seed planted by Dave Everson, another member and new board member, in developing programs for reaching out to the community and civic groups in what we have commonly styled our "Education Committee." Dee Wampler has also contributed articles for the Education Committee to illuminate to the citizenry the role of the criminal defense lawyer.

CLE

We also continue to work cooperatively with our brothers and sisters in the public defender system. Their input at the board level and suggestions for improved CLE programs and a better newsletter have been significant and meaningful. In particular, Marty Robinson, Peter Sterling, Dan Gralike, Kathy Kelly, Kathy DiTraglia and Lew Kolias are prominent members of the Missouri criminal defense bar who have supported MACDL in an active manner during this 95-96 term.

CLE Chair Larry Schaffer, along with Co-Chairs Marco Roldan and Larry Fleming, not only create new ideas and topics of interest for the CLE programs, but try to fashion new ways of presenting the material. Our Defending Criminal Cases Annual Meeting as well as the Fall Criminal Defense Institute have been successful in '95, and we look forward to another great program to be held May 17 and 18 at the Downtown Marriott Hotel in Kansas City, Missouri. The CLE Committee works in coordination with Cecil Caulkins, the Director of CLE for the Missouri Bar. This joint effort has vaulted the content of the programs to the forefront of CLE criminal law programs in the country. Rick Sindel, Scott Rosenblum, Bernie Edelman and Tom Howe persistently pump new ideas and input into our programs. Our ability to attract national and regional speakers makes the programs and enjoyable. Certainly, Charlie Atwell's efforts as Co-Chair of the NACDL CLE Committee have also helped us interact with outstanding speakers through the nation.

COMPUTERS

Sean Askinosie has taken the lead on establishing a MACDL connection on the Internet. His close work with NACDL member (and past presenter at several MACDL programs) E.X. Martin, has helped MACDL enter the computer age.

EXECUTIVE DIRECTOR

Our guiding hand -- Francie Hall -- continues to serve as our Executive Director, as she has for several years. She is working to improve our MACDL directory, membership drive, newsletter

and a hundred other tasks, including working with yours truly on the minutiae of details for board meetings and CLE programs.

MACDL PRESENCE

The enthusiasm of our organization is persistent and growing. Recently during my term, we extended an award of appreciation to retiring Jackson County Circuit Judge Donald Mason whose contributions to criminal justice generally and to the criminal defense bar have been enormous. I was pleasantly surprised to learn that all of the distinguished judges, members of the bar, and the community who attended the program in which the award was bestowed were well aware of MACDL and interested in its work. MACDL, as well as other local and state-wide bar associations, was also recently invited to send a representative to the reenactment of the famous trial, State v. Hyde, held at the UMKC Law School Courtroom. This case involved a reenactment based on actual transcripts and history of the alleged poisoning death of Colonel Thomas Swope, noted philanthropist and community leader in the greater Kansas City area in the early 1900s. Many of you may know Colonel Swope as the individual whose name is affiliated with Swope Park and the Swope Park Zoo. Longtime members and active participants in MACDL, Charlie Rogers and J.D. Williamson, served as defense counsel in the trial. As your president and representative of MACDL, I had the privilege of serving as a juror for this trial. The re-enactment was well done, enjoyable and interesting. *[Ed note: Best actress award goes to Bobbie Lou Nailling, Executive Director of the Kansas City Metropolitan Bar Association.]* It was another opportunity to interact with people committed to the administration of criminal justice.

CONCLUSION

In short, loneliness is often an understandable state of mind in the stressful job that we indulge. It can be lessened by active work and participation in this organization and the various events in which we are invited.

Thank you for your past efforts as well as your continued work during my 95-96 term as your president. Let all of us persist in our efforts to make MACDL meaningful. Keep up the good work! Continue to reach out and expand the horizons of MACDL. sometimes our efforts succeed and sometimes they fail, but MACDL will continue its vigilance in obtaining a just criminal justice system. While we may be lonely from time to time, we are not alone. We'll never give up in our efforts. End your loneliness -- Join Us!

J.R. Hobbs
President

MISSOURI LEGISLATIVE REPORT

by J.R. Hobbs

On January 31st, a follow-up presentation was made by MACDL regarding two proposed criminal bills pending before the Senate Judiciary Committee. This was additional work following the presentation by T.D. Pawley, Dan Viets, Jim Worthington, Charlie Atwell, Tom Carver, Randy Scherr and others the preceding week. As your President, I spoke on behalf of the Expungement of Certain Criminal Records Bill (S.B. 552). I did propose an amendment to expand it to all non-violent offenses and, with the assistance of a memorandum from Dan Viets, pointed out that even small amounts of controlled substances which are sold would create a situation that the offender would not be eligible for expungement of his or her criminal record. I talked about the fairness of the system that would allow for expungement.

I spoke about cases in which defendants many years later are permanently disenfranchised from federal and state governmental jobs, surety bonding, working in restaurants where liquor is served, working as teachers, doctors, lawyers, or other professionals.

In addition, I spoke against the Witness Immunity Bill (S.B. 692). In this regard, we pointed out that often the worst offenders are able to sell testimony in exchange for immunity even when a particular witness is lying. The tool of cross-examination may not expose this lie. As a result, citizens are often wrongly convicted based upon lying co-defendant testimony. However, I pointed out that, if a bill was to pass, it should have a reciprocal defense use immunity requirement where a co-defendant could gather testimony showing his innocence or his marginal involvement in relation to other co-defendants. In that regard, I presented some amendments principally drafted by Tom Carver with the assistance of Randy Scherr. The first amendment discussed the judicial review and exhaustion requirement which the present Senate bill does not include. The second amendment discussed the proposed defense use immunity alternative.

We'll keep you further advised as to developments in our State Legislature.

The following is the language proposed by MACDL for the Judicial Review and Exhaustion Requirement and Defense Witness "Use" Immunity (S.B. 692):

JUDICIAL REVIEW AND EXHAUSTION REQUIREMENT PROPOSED BY MACDL

Amend Senate Bill 692, Page _____, Section _____, Line _____, by deleting the language "the attorney general or a duly designated assistant attorney general" and inserting the following language, "a circuit or associate circuit court judge in the county where the prosecuting attorney serves," **and by adding a subsection to section _____ that states:**

> The application shall be by sworn affidavit and shall state the name of the person proposed to receive immunity, the proposed testimony to be obtained, the reason for the proposed grant of immunity and that all other methods and sources of obtaining the witness's testimony have been exhausted. In the event of a denial of the application for a grant of immunity, the judge is authorized to seal the application to all except the person for whom the application was sought."

DEFENSE WITNESS "USE" IMMUNITY PROPOSED BY MACDL

Amend Senate Bill 692, Page _____, by adding a new section to read as follows:

> 4. In the case of any individual who has been or may be called to testify or provide information at any proceeding ancillary to or before a circuit or associate circuit court of the State of Missouri, the judge of the circuit in which the proceeding is or may be held shall issue, in accordance with subsection 5 of this section, upon the written request of a defendant, an order requiring such individual to give testimony or provide other information which the individual refuses to give or provide on the basis of the individual's privilege against self-incrimination. When such an order is issued, the witness may not refuse to comply with the order on the basis of the witness's privilege against self-incrimination, but after complying with the order and giving the testimony or producing the evidence compelled by the order, no testimony or other information compelled under the order (or any

information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving false statement or otherwise failing to comply with the order.

5. A defendant in a criminal proceeding may, with the approval of a circuit or associate circuit judge presiding over the criminal proceeding, only request an order compelling a witness to testify and produce evidence when in the judgment of the defendant:

(1) Testimony or other information from such individual may be exculpatory or necessary to the public interest; and

(2) Such individual has refused or is likely to refuse to testify or provide other information on the basis of the individual's privilege against self-incrimination as expressed in Article I, Section 19 of the Missouri Constitution and the Fifth Amendment to the United States Constitution.

The application shall be by sworn affidavit and shall state the name of the person proposed to receive immunity, the proposed testimony to be obtained, the reason for the proposed grant of immunity and that all other methods and sources of obtaining the witness's testimony have been exhausted. In the event of a denial of the application for a grant of immunity, the judge is authorized to seal the application to all except the person for whom the application was sought.

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.]

PLEASE NOTE: OPINIONS MAY HAVE BEEN UPDATED OR SUPERSEDED.

Recent Missouri Cases

State v. Allen, 905/874 (Mo. 1995)

The Supreme Court rejected a constitutional challenge to the state's hazing statute, § 578.365, finding it neither overbroad or vague. Further, the prohibition against physical beatings is not a word or phrase "shrouded in mystery or squirming with ambiguity."

State v. Kerr, 905/514 (Mo. 1995)

The Supreme Court upheld a constitutional challenge to § 565.082.1(3), making it a felony of second degree assault on a law enforcement officer to cause injury to a law enforcement officer while operating a vehicle in an intoxicated condition and acting with criminal negligence. The Court noted the officer here was clearly on duty, and defendant may not raise other hypothetical instances in which the statute may not be constitutionally applied.

State ex rel. Nixon v. Campbell, 906/369 (Mo. 1995)

The Supreme Court approved revocation of probation even though probationer was not at fault for failure to comply with conditions of probation. Probation was premised on completion of two-year sex

offender program at Fulton, but program was cancelled before probationer could finish it. "No question", said the Court, that probationer violated the terms of his probation. "In this type of a situation, society's needs to be protected from criminals like [probationer], as well as [probationer's] own need for rehabilitation, justify revocation, even if [probationer's] probation violation was not of his own fault.

State v. Samuels, 905/536 (S.D.1995)

The Court clarifies that the involuntary intoxication defense is only available to one who is forced to take the drugs, or one who ingests a substance which he does not know, and has no reason to know, has a tendency to cause such a drugged condition. Here, defendant consented to the medical procedure that required him to be medicated; there was no evidence that defendant did not know the medication used in the medical procedure would produce a drugged condition.

State v. Langley, No. 19779, 905/898 (S.D. 1995)

Convictions for involuntary manslaughter and second degree assault **reversed** since blood tests of defendant failed to conform with requirements of §§ 577.020-577-041 and 19 CSR 20-02.080. The Dept. of Health has set out approved methods in CSR for testing blood for presence of drugs; failure to strictly comply with those requirements will require exclusion of test results.

State v. Gateley, 907/212 (S.D. 1995)

Trial court erred in giving voluntary intoxication instruction since the level of defendant's intoxication did not rise to that necessary for giving the instruction, but defendant was not prejudiced. It was also proper to refuse a character instruction when defendant adduced evidence as to his reputation for honesty, as that does not meet the criteria for character in a sexual abuse case. The same is true with a witness who testified that defendant was a very upstanding person; that related to veracity, not character.

State v. Spurgeon, 907/798 (S.D. 1995)

Court found probable cause for stop when an officer recognized defendant as someone whose license had been revoked about eight months earlier and the officer knew the revocation had been for one year.

State v. Baker, 1995 WL 576808 (W.D. 10/3/95).

Immeasurable residue cannot be sufficient to support a drug conviction. The Court cited § 195.010(18), listing factors to be considered drug paraphernalia, and noted two of those separate factors: (1) proximity of object to controlled substance, and (2) any residue of a controlled substance on the object.

State v. Uelentrup, 910/718 (E.D. 1995)

Defense has no right to depose a child sex victim before videotape deposition taken in lieu of live testimony under § 491.680. The language of the statute contemplates providing defendant the right of cross-examination **only after** video deposition. Defendant here did not utilize other procedures under the statute, such as requesting another deposition upon showing of good cause.

State v. White, 907/366 (E.D. 1995)

Conviction for sale of imitation controlled substance reversed, since state made no showing that defendant knew the substance he sold was imitation controlled substance. The imitation sale was virtually identical to a prior sale of crack cocaine. The state, having chosen the higher mental state of "knowledge" over "reckless", is stuck with this result.

State v. Smith, 907/301 (W.D. 1995)

The prosecutor was late for a hearing on a motion to suppress. The judge was not pleased, and offered the prosecutor a choice of personally paying defense counsel $250 or the court would sustain the suppression motion based on the state's failure of proof. The prosecutor dismissed the case. The court said the case would not be dismissed without prejudice, and then sustained defendant's motion to suppress. The state appealed.

The appellate court held the trial court had no authority to refuse the motion to dismiss, as the prosecutor has unfettered discretion to enter a *nolle prosequi* at any time before verdict. Once the state's motion to dismiss was tendered, the trial court lacked jurisdiction to rule on the motion to suppress.

State v. Bledsoe, No. 66898, 1995 WL 606763 (E.D. 10/17/95).

The Court reversed defendant's conviction (after bench trial) on two counts of second degree assault and ACA for swinging a beer bottle and injuring two people. The injuries were not serious, and the Court rejected the state's contention that the minor scars were serious disfigurement sufficient to find serious physical injury. The Court found the evidence would support misdemeanor third degree assault and remanded for punishment.

State v. Sinamon, 908/191 (E.D. 10/24/95)

Conviction affirmed on direct appeal, but reversed for evidentiary hearing on issue of whether defense counsel forced the client to testify. Hearing was denied on basis of trial strategy, but the appellate court noted the decision to testify belongs to defendant, not counsel; if defendant's allegation is true, he may be entitled to a new trial. A hearing is necessary to determine the verity of the claim.

State v. Chandler, 908/181 (E.D. 10/24/95).

Trial court granted new trial because it, rather than jury, sentenced defendant for two misdemeanors. At time of offense, § 558.016 did not apply to misdemeanors. By the time of trial, it had been amended to include "any offense" (eg., misdemeanor). Trial court granted new trial, asserting the statute in effect at the time offense is committed controls. The appellate court disagreed. It found the change of law (providing for the judge, not the jury, to pass sentence) procedural, not substantive, and thus no ex post facto application of laws applied to defendant.

State v. Sloan, No. 66753, 1995 WL 619892 (E.D. 10/24/95).

Child sex case reversed and remanded because the trial court refused to allow defense to call an expert witness who could testify to improper and suggestive techniques utilized by investigating officers interview the child/victim, as investigating

officers ostensibly had specialized skills in child interviewing. The Court found the expert could and should have been allowed to testify, and that the state's experts acted improperly in using unreasonably suggestive techniques and methods with the child.

State v. Ellsworth, 908/375 (E.D. 1995).

No reversal, but the court found prosecutor's argument improper where he said defendant, charged with robbing a store, had been terrorizing the entire community. A prosecutor may not make statements implying a knowledge of facts not before the jury. This court also found the state failed to prove, under the prior Class X offender law, that appellant served the requisite 120 days in a penal institution; it showed he served 120 days in Illinois county jails, but failed to show such jails were equivalent to Missouri Department of Corrections.

State ex rel. Cavallaro v. Groose, 908/133 (Mo. 1995).

The court rejected a prisoner's argument that he was entitled under due process or ex post facto grounds to have his parole reviewed by the process in effect at the time he was first incarcerated, not under current parole standards.

State ex rel. Osowski v. Purkett, 908/690 (Mo. 1995).

A sentence in excess of the statutory maximum is not subject to waiver by failure to file PCR, and may be corrected by habeas corpus. Defendant was sentenced to 15 years for attempt to commit statutory sodomy. The completed crime is a class "B" felony, so an attempt is a class "C"; defendant could be sentenced to a maximum of 7 years, which he served. He was then entitled to discharge under habeas corpus.

Elliott v. Carnahan, No. 51062, 1995 WL 710576 (W.D. 12/5/95).

No denial of equal protection when a defendant with 15-year sentence serves more time than one with 16-year sentence. § 558.011.4 (establishing prison terms and conditional release terms) causes a 15-year sentence (where only 3 years will be conditional release) to be longer than a 16-year sentence (where 5 years will be conditional release).

Guana v. State, 911/326 (W.D. 1995).

Reaffirms that, if the trial court decides the merits of an untimely filed motion for post-conviction relief, the proper disposition is remand for dismissal of the motion (*not* affirmation of the judgment denying relief).

Carr v. State, No. 51260, 1995 WL 733487 (W.D. 12/12/95).

Remanded for limited purpose of making record to determine if movant's attorney sent his Luleff statement to movant before filing it with the court.

State v. Logan, No. 50714, 1995 WL 730309 (W.D. 12/12/95).

Drug search and seizure from car driven by defendant affirmed, even though defendant declined to consent to search and was detained 32 minutes prior to arrival of drug dog, and dog jumped inside the car before alerting. Traffic stop for weaving was permissible; defendant's answers to brief questions, including those about

description of titled owner of vehicle, were contradicted by his wife. Also, defendant was very nervous and car was from a drug source state (Arizona). All this amounted to reasonable suspicion, allowing for detention of driver beyond that necessary to deal with traffic infraction. Dog's jump through car window before alerting was not a violation of the Fourth Amendment.

State v. Dees, No. 48052, 1995 WL 730316 (W.D. 12/12/95).

Prosecutor's statement in closing argument that "she [defendant] is in court ... she didn't give truthful testimony" was a clear and direct comment on defendant's failure to testify, but did not rise to the level of plain error.

State v. Magee, 911/307 (W.D. 1995).

Defendant was remanded for resentencing as prior, rather than persistent, offender, since only one of his guilty pleas was entered before commission of the charged offense. (See §558.016.6.)

State v. Conaway, No. 18205 (11/21/95).

Counsel chastised for severe violations of appellate rules. Both direct and consolidated PCR appeals were dismissed. The court indicated a willingness to consider issues for plain error on the civil appeal under Rule 84.13, but was simply unable to do so as the brief was so deficient.

State v. Looney, 911 S.W.2d 642 (S.D. 1995).

When defendant's canoe overturned, several plastic bags floated down river and were retrieved by officers. One bag contained a film canister; the officers, suspecting it contained drugs, opened it and got high. Defendant did not consent to the search, nor did he abandon his property by overturning his canoe (an unintentional act); enclosing the canister in a plastic bag indicated an intention of privacy, especially as the canister was not transparent. The officers had no reasonable suspicion, and no basis for a warrantless search.

State v. Howard, No. 63087, 1995 WL 751066 (E.D. 12/19/95).

The court condemned as "personalization" the prosecutor's argument that defendant was "advancing on your kids" by selling drugs. However, the issue was not preserved for review since counsel's objection was not specific as to "personalization", but rather was general: "inflammatory and meant to prejudice the jury." No plain error occurred.

State v. Weston, No. 19121, 1995 WL 731581 (S.D. 12/6/95).

Reaffirms that an affirmative statement, "I have no objection to the admission of the evidence", bars review, even for plain error.

State v. Driver, No. 78122, 1995 WL 748734 (Mo. 12/19/95).

The Supreme Court found general statements of defendant in 29.07 post-sentencing interview by trial court to the effect that defendant is generally satisfied with counsel, has no complaints, etc., are not specific enough to refute pos-conviction allegations -- here, that defendant had informed counsel of medical condition and an expert could have been

called to offer a reason for defendant's apparent intoxicated condition.

State v. Dixon, No. 50292, 1995 WL 759024 (W.D. 12/26/95).

Conviction for sexual abuse reversed because, after right to counsel had attached and while defendant was in jail, he was questioned by a DFS worker and made an incriminating statement. The DFS worker gave the information to the prosecutor, who introduced it at trial. Even though case was court-tried, the error was so prejudicial as to require a new trial since defendant's statement negated his testimony of accidental touching of the victim. The DFS worker, a state employee, is required by § 210.145.7 to give relevant information to the prosecutor.

Moore v. State, No. 50886, 1995 WL 756666 (W.D. 12/26/95).

Attorney for movant filed an affidavit stating he had thoroughly reviewed records and consulted with movant, and no additional cognizable grounds for relief could be raised. The court remanded pursuant to newly enacted amendments to Rule 24.035(e), directed that counsel's affidavit be presented to movant, and that he have ten days to respond.

State v. Rogers, No. 20040, WL 761348 (S.D. 12/22/95).

Court rejected duress claim which was based on fear of two avowed enemies of defendant at Fulton who could have harmed him had he appeared for sentencing. (Defendant was charged with failure to appear.) The threat of harm must be real and imminent for duress defense.

State v. Mays, No. 19952, 1995 WL 744829 (S.D. 12/18/95).

Drug trafficking conviction reversed since state did not present sufficient evidence of the requisite weight amount. The court also rejected the state's argument that the appellate court could impose sentence on the lesser offense of possession, noting that someone could violate the trafficking statute without possessing drugs. Remanded to trial court to determine whether, under the evidence, it is appropriate to find appellant guilty of possession.

State v. Mulder, No. 67325, 1996 WL 2035 (E.D. 1/2/96).

Conviction for attempted first degree robbery reversed for insufficient evidence. Defendant, wearing shorts and no shirt, approached a gas station attendant who was secure behind a bullet-proof window. Defendant slammed a stick on the counter, demanded money and threatened to produce a gun. The attendant was sure Mulder had no gun, as he had no way to conceal a weapon on his person, and refused the demand. Defendant then fled. Four elements support an attempt conviction: (1) intent to commit a crime; (2) an overt act toward commission; (3) failure to consummate; and (4) apparent possibility of commission. The first three were clearly evidenced by defendant's conduct, but the last was clearly lacking; defendant could not have committed the crime, as he possessed no weapon. The attendant knew he had no weapon, and was not in fear.

State v. Gabbard, No. 63822, 1996 WL 5704 (E.D. 1/9/96).

Reversal of trial court's findings dismissing PCR without evidentiary hearing, to-wit: "Comes now the court and sustains respondent's motion to dismiss. Based upon the record made in [trial case #], petition of movant filed [PCR case #], and motion to dismiss filed by respondent, the court finds there is no conclusive showing that movant is entitled to the relief requested."

State v. Clover, No. 67300, 1995 WL 686528 (E.D. 11/21/95).

Prosecutor, trying her second case, asked defendant, charged with possession of controlled substance, on cross-exam, "Isn't it true that during the two weeks previous to February 8 [date defendant's apartment was under surveillance], you were selling cocaine for a hundred dollars a gram to a number of people?" Defense motion for mistrial was granted with prejudice since the state goaded defendant into requesting it by clearly improper questioning, the excuse of inexperience notwithstanding. The state appealed, but was dismissed by the appellate court in accordance with § 547.200. The appellate court noted the finding of the trial court that the state intentionally asked an improper question to bolster a weak case and inject improper prejudicial matters, warranting the grant of preclusive mistrial.

State v. Hayes, 785 S.W.2d 661, 663 (Mo. App. 1990)

There was no proper trial strategy not to interview and call an alibi witness where the defense was alibi; the alibi witness was not "cumulative" of defendant's testimony, which is "always received with doubt because of his interest in the case."

Frederick v. State, 754 S.W.2d 934 (Mo. App. 1988)

The allegation that the failure to obtain evidence that a doctor examined the victim and found no evidence of sexual abuse required an evidentiary hearing.

Perkins-Bey v. State, 735 S.W.2d 170 (Mo. App. 1987)

Failure to interview and subpoena an alibi witness was ineffective assistance of counsel. Counsel has a duty both to investigate evidence and present it in court "The presence of the alibi witness may not have changed the result, but the probability cannot be ignored and meets the minimum standard of undermining confidence in the outcome."

Bonner v. State, 734 S.W.2d 606 (Mo. App. 1987)

The failure to investigate, through discovery, the witness's prior record could be ineffective assistance of counsel.

Poole v. State, 671 S.W.2d 787 (Mo. App. 1983)

The defense attorney's failure to investigate the case and presentation of harmful testimony, cumulatively amounted to prejudicial ineffective assistance of counsel.

State v. Moon, 602 S.W.2d 828, 837 (Mo. App. 1980)
Ineffective assistance of counsel was rendered where defense counsel failed to request a mental evaluation of the defendant even though prior counsel had filed a not guilty by insanity plea. "The power to review *sua sponte* for plain error

defendant even though prior counsel had filed a not guilty by insanity plea. "The power to review *sua sponte* for plain error is rarely exercised-- and properly so. [Citation omitted] It should be exercised in this case because both areas of error affect fundamental rights under our Federal Constitution, and it is clear that a manifest injustice has been done. If such review is not undertaken in a case like the present one, it never will be."

Milentz v. State, 545 S.W.2d 688 (Mo. App. 1977)

Where there was no showing in the record of trial strategy in the defense attorney's failure to call witnesses who would testify that the defendant didn't do it, the defendant was entitled to an evidentiary hearing on his post-conviction motion.

Thomas v. State, 516 S.W.2d 761, 767 (Mo. App. 1974)

The failure to investigate alibi witnesses was ineffective assistance of counsel. "The gamble of counsel, that his pretrial motions would be sustained and the case dismissed, was a dangerous one and resulted in a deprivation of movant's constitutional right to effective assistance of counsel at his trial."

Eighth Circuit Cases

Elem v. Purkett, 1995 WL 516624 (8th Cir.)

Batson, already adrift, has gone under for a second time. The Elem court says no Batson violation occurred when the state struck a black venireman because of his haircut (which, the court noted, had no relation to defendant's case or the juror's ability to serve). As long as the strike is not inherently discriminatory, the reason may be "implausible or fantastic", or even "silly or superstitious."

Ford v. Norris, 58 CLR 1084.

Racial discrimination in the jury selection process is a "structural error" and therefore not under the "harmless error" analysis, says the 8th Circuit. Citing Powers v. Ohio, 499 US 400, discrimination in the voir dire process "casts a doubt over the obligations of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause, and the influence of the voir dire process may persist through the whole course of the proceedings.

Bailey v. U.S., No. 94-7448, 58 CLR 2029 (12/6/96).

The U.S. Supreme Court reversed a conviction for the separate offense of "use" of a firearm during and in relation to a drug trafficking crime. Defendant was arrested while driving his car; drugs were found near the passenger seat; a loaded 9mm weapon was found in the trunk. On this basis, defendant was convicted of "use ..." The appellate court affirmed, finding the presence of the weapon emboldened defendant or facilitated him in conducting the drug transaction. The Supreme Court disagreed, finding that "use" means something more than mere possession or presence of a weapon.

Thompson v. Keohane, No. 94-6615, 58 CLR 2021 (11/29/95).

The court decided that the state court's determination of a Miranda violation, and whether the accused is "in custody" for purposes of Miranda, is a mixed question of law and fact, entitled to independent federal review in habeas. The "in custody" question for Miranda purposes necessitates two discrete inquiries: (1) What were the circumstances surrounding the interrogation? and (2) Given those circumstances, would a reasonable person have felt he was free to terminate the interview and leave? The first is a true factual question entitled to a presumption of correctness, but the second is a question of constitutional law independently reviewable in habeas.

Driscoll v. Delo, 58 CLR 1250 (8th Cir.)

Defendant in a death penalty case received ineffective assistance of counsel where his lawyer failed to investigate whether other blood tests were run by the state's expert and, if counsel had investigated, he would have learned the victim's blood was positively not on the knife. During trial, the jury was informed that, while victim's blood type was not on the knife, it could have been masked or hidden by a separate blood test the expert ran. The jury might not have imposed the death penalty had they known defendant's knife apparently was not involved in the stabbing. Defense counsel was further ineffective in failing to object to prosecutor's Caldwell arguments (that the judge was the 13th juror who could overturn a recommendation of death).

Cases of Note from Other Circuits

A seatbelt violation standing alone will never provide a basis for a stop, says Commonwealth v. Henderson, 1995 WL 470762. Under Pennsylvania law, a seat-belt violation must be based on another violation of motor vehicle laws. ***Note: Missouri law is the same; see § 307.178.2.***

Failure to allow defense to call expert who could criticize the government's handwriting expert was error. U.S. v. Velasquez, 1995 WL 519297 (3d Cir.)

Your body's "thermal heat" is a protected privacy interest according to U.S. v. Cusumano, 58 CLR 1046 (10th Cir.) A thermal imager may not be used without a search warrant.

Defendant's ignorance of the name of the friend she was going to visit did not warrant reasonable suspicion for detaining her and her luggage to submit to a dog sniff. The court notes defendant's refusal to consent to search of her luggage after she consented to a search of her person and purse may be the real reason authorities called in the dog, but refusing consent to search does not provide reasonable suspicion for detention. U.S. v. Torres, 58 CLR 1053 (4th Cir.)

Where the judge declares a mistrial at state's request or on its own motion for "manifest necessity", don't forget the double jeopardy issue. Review Weston v. Kernan, 50 F.3d 633 (9th Cir. 1995).

Failure to advise defendant of possible order of restitution made his guilty plea "unknowing". Defendant was entitled to withdraw the plea since he was not aware of all possible ramifications. U.S. v. Showerman, 58 CLR 1134 (2d Cir.)

Pope v. Zenon, 58 CLR 1170 (9th Cir.), condemned the tactic of questioning a suspect about evidence marshalled against him in advance of Miranda warnings.

Refusing a one-day continuance to produce relevant witnesses at a suppression hearing was error, according to U.S. v. Mejia, 58 CLR 1141 (9th Cir.) Defendant's due process rights were violated, and prejudice resulted.

A prosecutor's intentional intrusion, unsupported by any legitimate state interest, into the defense team violates the Sixth Amendment regardless of the showing of specific harm. Shillinger v. Haworth, 58 CLR 1186 (10th Cir.) Here, defendant was guarded by a deputy during pretrial sessions with his attorney; the prosecutor obtained information from the deputy and used specific instances of coaching by defense counsel to impeach defendant's credibility at trial.

A motion to disqualify the judge was granted in the Oklahoma City bombing case. The judge's office was damaged in the explosion and court personnel were injured. The appellate court, in overturning the district court's denial of the motion for recusal, noted that "a reasonable person could not help but harbor doubts about the impartiality" of the judge. Nichols v. Alley, 58 CLR 1241 (10th Cir.)

U.S. v. Erwin, 58 CLR 1280 (6th Cir.), invalidated a consensual search when the driver was detained after the suspicion underlying the initial stop dissipated. Here, defendant was stopped on a tip that he was DWI, which proved to be unfounded. The officer asked for documentation anyway, which, when checked, revealed drug and weapons offenses. The consent to search ceased to be valid since officers lacked justification for continuing the stop and investigating defendant's past criminal history.

TECHNOLOGY MATTERS

by Shawn Askinosie

Windows 95

This past September I placed an ad in our local paper to sell all of my home and office computers in one "package deal". Why such drastic action? Even though Windows 95 installed smoothly on my home computer, the office network system did not go so well. I installed and uninstalled Windows 95 on my office system eight or ten times, each time trying something different. I have not tried to call Microsoft since then, but in September the company's phone lines were perpetually busy. I tried to contact local computer companies, most of whom admitted they did not yet understand Windows 95. I was determined to successfully install it on the office network. I thought I needed certain Win 95 features in the office. I was going to Dallas for the weekend, so I packed up the office system (excluding monitors) and

took the computers to a network specialist (kind of like going to the Mayo Clinic) in hopes that he could find a solution to the problem. The problem was that all network functions were inoperable.

Many dollars later and back in Springfield, I still had the same problem. That's when I gave up and bought a Power Mac system. I ran the ad for my old system for a week. Only one person called -- not a potential buyer. After passing through the grief stages, I realized I was stuck. At this point (well into October), I decided to try one more time. I purchased new network cards, new Windows 95 software, and finally completed the mission at 4:00 one morning. It worked!

I now love Windows 95 and regularly use the features I wanted in the first place. Specifically, I enjoy instant e-mail notification via sound or pop-up screen. The program is definitely faster, and the interface is more Mac-like and more fun. What I like most is the ability to create file names longer than eight characters. After upgrading to Microsoft Word 7.0 for Windows 95, my Word file names are longer than eight characters. Finally, the "form files" make sense. Even though the program is supposed to be easy, there is a substantial learning curve if you are accustomed to Windows 3.11. Another feature (with the Plus package) is the dial-up network function. Remote users can connect to the office, and the Internet is only a click away.

MACDL and the Internet

Speaking of the Internet, MACDL is slated to open a homepage on the net, hopefully by the time you read this. You can find us at: http://www.cyberbar.net/. Check out this website now and you will find the National Association of Criminal Defense Lawyers homepage and those of several state affiliates. The site is a great jumping-off point to multiple legal research sources. Once the MACDL homepage is up and running, we hope to have the membership directory online along with a roster of officers and directors, upcoming CLE information and legal research materials available for downloading.

How to be a Lawyer to be Reckoned With

by Jeff Weiner

(Original presentation to the Annual Meeting of the National Association of Criminal Defense Lawyers, August 1995, Snowmass, Colorado. Reprinted by permission. First of two parts.

Happy are they who maintain justice and do righteousness at all times.

Part I

Over the last 23 years, starting with my early days as an intern in the Cook County, IL, Public Defender's Office and continuing through 20+ years in practice as a private criminal defense attorney, I have observed some of the finest criminal defense lawyers throughout the United States. I have been privileged to represent defendants in cases in over 25 states, and to argue appeals throughout the country, including before the United States Supreme Court.

I have seen superb lawyering by attorneys well-known to many of us, and often by lawyers not known beyond their local

communities. I have tried to observe what makes lawyers effective, not only in courtrooms, but in chambers during informal discussions, at meetings with prosecutors, agents and police, at social gatherings, at bar conferences and during virtually every situation I have been part of or observed over the years.

I have seen lawyers who go out of their way to try to curry favor with judges or prosecutors; at the other extreme, I have observed lawyers who seem to enjoy antagonizing them when it is clearly unnecessary to do so.

I have seen mature criminal defense lawyers, and those whose immaturity is embarrassing to the profession and harmful to their clients. I have seen the results obtained from **lawyers who enjoy good reputations as "lawyers to be reckoned with"** and results from lawyers who do not enjoy such a reputation, who are equally competent in the mechanical skills of lawyers, yet are unable to get the same results. I have also observed that the amount of the fee charged or the lawyer's reputation does not always correlate to the result obtained.

So what is it that makes a lawyer one "to be reckoned with"?

A lawyer to be reckoned with is:
One who gets things done legally, ethically and professionally on behalf of his or her client, one who, with strength, a sense of purpose and civility, makes a positive difference for his or her client.

A lawyer to be reckoned with is **effective** on a continual basis.
A lawyer to be reckoned with enjoys a certain status because of **earned respect.**

A lawyer to be reckoned with is perceived as being **sincere.**

A lawyer to be reckoned with has a presence which allows him or her to **quietly command attention** in a courtroom and in other legal settings.

A lawyer to be reckoned with is always **prepared** on the facts and the law.

A lawyer to be reckoned with is an **advocate** for his or her client.

A lawyer to be reckoned with is **candid** with the court, while not compromising the attorney-client privilege.

A lawyer to be reckoned with is **not intimidated** by judges, prosecutors or law enforcement agents.

A lawyer to be reckoned with **holds judges accountable** for their rulings.

A lawyer to be reckoned with **holds prosecutors accountable** for their actions and conduct.

A lawyer to be reckoned with **shows respect for fellow professionals** by being courteous, punctual and returning calls.

A lawyer to be reckoned with **shows respect** for the court.

A lawyer to be reckoned with **writes persuasively and clearly,** always telling the court the precise relief sought.

A lawyer to be reckoned with **tries cases and argues appeals.**

A lawyer to be reckoned with inspires others to **'do the right thing'.**

Life in the Balance VIII:

Defending Death Penalty Cases
March 2-6, 1996
Regal Riverfront Hotel
St. Louis, Missouri

presented by
National Legal Aid & Defender Association
co-sponsors
Missouri Association of Criminal Defense Lawyers
Missouri Public Defender Office
Illinois Attorneys for Criminal Justice
Illinois Public Defender Association
Bar Association of Metropolitan St. Louis

Demands on capital defense team members continue to grow. Elimination of the Death Penalty Resource Centers and shrinking budgets compound the challenges. NLADA is committed to help you meet the challenges you face every day. Whether you are a new defense team member or have years of experience, this training event will provide an opportunity to improve your skills and techniques and increase your knowledge in the various aspects of capital litigation. The written materials provided are an invaluable resource. The information presented is essential for providing the best possible defense for your clients.

Life in the Balance VIII combines two formerly separate conferences, and will include an expanded 2-day capital case investigation track and its customary 2-3/4 day litigation track.

FACULTY INCLUDES:

Cessie Alphonso, New Jersey
Vince Aprile, Kentucky
Steve Bright, Georgia
Kevin Curran, Missouri
Lee Norton, Florida
Isaiah "Skip" Gant, Tennessee
Rick Kammen, Indiana
George Kendall, New York
Jill Miller, Wisconsin
Sean O'Brien, Missouri
Randy Stone, Illinois
Bryan Stevenson, Alabama
Kathy Wayland, California
Ron Wurtz, Kansas

Register now with NLADA, 1625 K Street NW, #800, Washington, DC 20006
1/202/452-0620

BULLETIN BOARD

MACDL's Annual Spring Seminar,
Defending Criminal Cases,
will be held May 17-18, 1996,
at the Marriott Allis Plaza in Downtown Kansas City.

Book your room by April 19.

We didn't get the pay raise; why work? *Robert Dole in 1989*

Defending the Ozarks - October 1995

This seminar has been approved for 6.4 MCLE hours, including 1.2 ethics hours and 2.0 federal hours.

Reader, suppose you were an idiot; and suppose you were a member of Congress; but I repeat myself. *Mark Twain*

If you don't want to work for a living, this is as good a job as any.
Neophyte congressman John F. Kennedy in 1946.

Damn it, when you get married, you kind of expect you're going to get a little sex.
Alabama Sen. Jeremiah Denton, commenting on the prosecution of a man charged with raping his wife.

NEW MEMBERS AND MEMBERSHIP RENEWALS

David K. Back, Springfield *Public Defender*
Glenn E. Bradford, Kansas City
Jennifer Brewer, Kansas City *Public Defender*
R. Steven Brown, Springfield *Fed. Public Defender*
John P. Burnett, Independence
Kevin Curran, St. Louis *Fed. Public Defender*
Caterina DiTraglia, St. Louis *Public Defender*
Jasper Edmundson, Poplar Bluff
John B. Gourley, St. Louis
Calvin Holden, Springfield
Cathy Kelly, St. Charles *Public Defender*
William S. Margulis, St. Louis
Christopher McGraugh, St. Louis
Mary Merrick, CLAS, St. Louis
Robert Peterson, Union *Public Defender*
John Michael Quinn, Kansas City
Cheryl Raftert, St. Louis
Robert Richart, Joplin
J. Reuben Rigel, St. Louis *Public Defender*
J. Marty Robinson *Public Defender*, **Sustaining Member**
Gary L. Smith, Lebanon
Christopher Slusher, Columbia *Public Defender*
Peter Sterling, Columbia Public Defender
Patricia Sullivan, Maryville *Public Defender*
Christine Sullivan, St. Louis *Public Defender*
F. A. (Al) White, Jr., Kansas City

MACDL sincerely appreciates your financial support. We can't function without it. Your dues pay for postage and printing, expenses of continuing legal education, lobbying efforts in the Missouri General Assembly, scholarships to the National College of Criminal Defense, partial expenses of our representatives to the NACDL Legislative Fly-In, and the computer on which this newsletter is composed, among other things. Special thanks to the assistant public defenders who support our efforts, and to sustaining members for voluntarily doubling the amount of their annual dues.

Please check the back page of your newsletter. If there's a red "X" on your mailing label, it's time to renew your membership. You'll find a renewal form inside the back cover.

FYI

by Francie Hall

Ten years ago this month, I had lunch with David Godfrey of St. Louis, Charlie Atwell and (The Hon.) J.D. Williamson of Kansas City, and Hugh Kranitz of St. Joseph. David was president of MACDL that year, and hired me as MACDL's executive secretary. He also initiated MACDL's ongoing contract with the Missouri Public Defender -- in exchange for a set fee, MACDL would provide all state public defenders an opportunity to earn their required CLE hours at MACDL seminars. (Terry Brummer was the Director of the Missouri Public Defender System at that time.)

Some of you have never met David or Terry. Ten years is a long time. Bear in mind, though, that you're part of the ongoing MACDL tradition. This organization was founded in 1978 by defense lawyers who felt it important to spread the word, to share their knowledge, to "decompress" with brethren (and, a little later, sisters) who understood the war stories.

I am grateful to have shared in MACDL's history, and look forward to being part of its future.

The tradition continues with a great seminar, DEFENDING CRIMINAL CASES, planned for May 17-18 at the Downtown Marriott in Knasas City. I understand April 19 is the deadline for registering at the less expensive "seminar" room rate, so be sure to call the hotel before that date.

Recently, I sent you all a hot-pink "Notice" about the spring seminar. All the speakers have confirmed for the May 17-18 dates. Seminar brochures should reach you about the same time as this newsletter.

Please note that MACDL is co-sponsoring the NLADA Death Penalty Seminar, *Life In the Balance VIII*, March 2-6. See page __ for details.

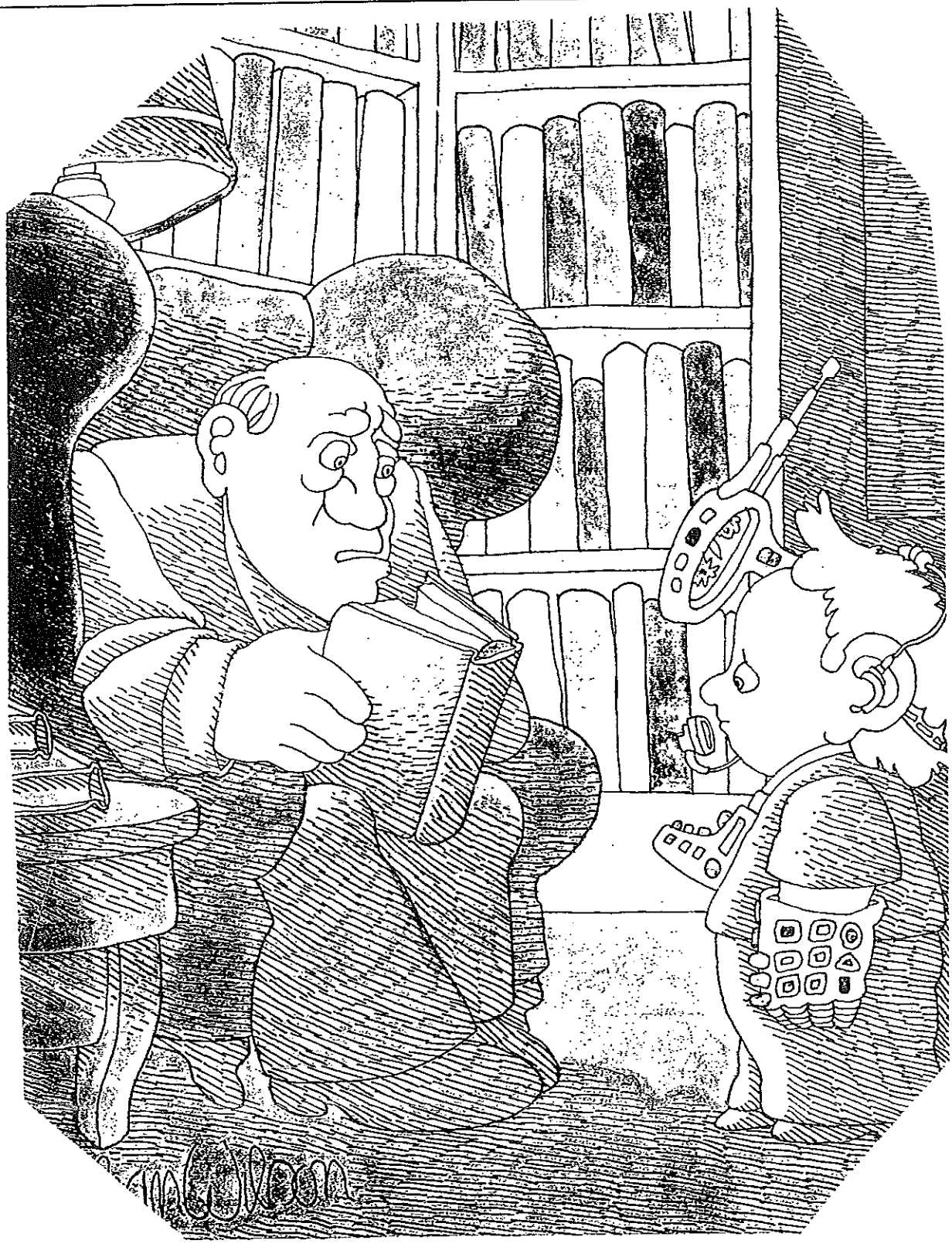
As noted in the ***Bulletin Board***, MACDL's fall seminar, "DEFENDNG THE OZARKS", qualified for 6.4 MCLE hours, including 1.2 ethics hours and 2.0 federal hours.

MACDL has been quite active in Jefferson City during the last five or six weeks, as President J.R. Hobbs has indicated in his President's Letter (page 1) and Legislative Update (page 4). I believe influence on state legislation is among the most important of our duties. If you agree and want to help, let us know. Call J.R. at 816/221-0080; Jim Worthington at 816/259-2277; Tom Carver at 417/869-2010; or me at 816/361-6900.

I'm still looking for some support out there in terms of spontaneous contributions to the newsletter. 1996 deadlines for submissions are: April 15; July 15; and October 15. Please send me your article on disk, as well as on paper, if possible.

The next meeting of MACDL's Board of Directors is scheduled for Friday, March 22, 4:00 p.m., at Pat Eng's office, 903 East Ash, Columbia, Mo. *Board members, please let me know if you'll be attending.*

I hope to see all of you in Kansas City for the Annual Meeting on May 17-18, 1996. Call if I can be of assistance.



"It's a book."

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 photo-copy of this form and mail it today, with your check, to:

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

ANNUAL DUES: (CIRCLE APPLICABLE AMOUNT)

Sustaining Member - Officers, Board Members & Past Presidents:	$200.00
Regular Member - Licensed 5 years or more:	100.00
Licensed less than 5 years:	50.00
Public Defender (Head of Office):	50.00
Assistant Public Defender:	25.00
Provisional (Nonvoting) Member - Judges, Law Professors & Students, Paralegals & Legal Assistants:	20.00

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

MACDL
416 E. 59TH ST.
K.C., MO 64110

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

ADDRESS CHANGE/CORRECTION

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

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