MACDL

Missouri Association of Criminal Defense Lawyers

Action Report
Vol. V, No. 4
Fall 1997

PRESIDENT'S LETTER

by Elizabeth Unger Carlyle

Recently, two instances of persistence in advocacy have come to my attention with dramatically differing results. On the good news front, MACDL members Cheryl Pilate and Charlie Rogers recently won a new trial for death row inmate Eric Clemmons in the Eighth Circuit on a motion for rehearing. In their opinion granting relief, the Eighth Circuit repudiated its previous analysis of two issues raised in Clemmons's previous appeal. Upon reconsideration, relief was granted.

A more disappointing result occurred in State v. Simmons, a recent capital case in the Missouri Supreme Court. There, the court upheld the imposition of sanctions on Simmons's post-conviction counsel for raising grounds for relief in his post-conviction petition which had previously been rejected by state and federal courts. The court held (emphasis added),

The postconviction court did not abuse its discretion in imposing these sanctions on Simmons' counsel. Three of the claims cited, those concerning the reasonable doubt instructions, the death penalty constitutionality, and the juror disqualification, have been firmly and uniformly rejected by previous decisions of this Court and the federal courts. In his postconviction motion, counsel did not present arguments designed to confront and refute these decisions. Rather, he simply rehashed the arguments that these decisions had already rejected. This practice does not constitute "a nonfrivolous argument for the extension, modification, or reversal of existing law" Rule 55.03(b)(2). Counsel's assertion that preservation of these claims for federal review warrants their inclusion in the Rule 29.15 motion is unconvincing. Preservation of these claims is unnecessary because, as stated, the federal courts have rejected these same claims in other cases. Had the federal courts not rejected the claims previously, counsel's argument would be much more tenable.

A motion for rehearing is pending.

I hope that this decision will not deter persistence in advocacy. In addition to Cheryl and Charlie's most recent example, the work of Abe Fortas in Gideon v. Wainwright, which reversed Betts v. Brady and required the appointment of counsel for all indigent defendants facing imprisonment, and of J. David Niehaus, Frank W. Heft, Jr., and Daniel T. Goyette. in Batson v. Virginia, which reversed years of reliance on the rule of Swain v. Alabama and permitted challenges to the discriminatory use of peremptory challenges, come to mind. In all of these cases, "federal courts had rejected these same claims in other cases." Yet, because of the persistence of the advocates in bringing up the same

(cont'd on page 3)

Table of Contents

~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~

The ***Action Report*** is published quarterly by the **Missouri Association of Criminal Defense Lawyers.** We welcome submissions from **MACDL** members. Please send articles to: Francie Hall, Executive Director, **MACDL**, 416 E. 59th Street, KCMO 64110.

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

claims over and over, the courts changed their minds. The refusal of the Missouri Supreme Court to recognize this reality is dismaying, to say the least.

The Simmons episode also prompts me to remind you that MACDL members have the MACDL Strike Force available to them at no charge if they are in the position of Simmons's counsel. These volunteer attorneys will provide representation to any MACDL member who is subject to sanctions for vigorous advocacy on behalf of a client. The Strike Force is a measure of how seriously we at MACDL take the responsibility to take the necessary steps to advocate for our clients, sometimes at the risk of judicial ire. I urge you to call upon the Strike Force if you need it, both for your own good and to help us all avoid the effect of decisions like Simmons.

The labor movement has a song which begins,
Step by step, the longest march can be won.
Many stones to form an arch, singly none.

We might add "trial by trial" and "brief by brief" to that litany. I'm excited by the enthusiasm I hear from MACDL members about making our organization more active. Several of you have gotten in contact with me to express interest in serving on the Strike Force, board, and in various other capacities. I hope more of you will do that. Feel free to join us at our next board meeting at my office December 5. (If possible, call if you're coming so I'll get enough refreshments!) In the meantime, remember, "Every member get a member."

Elizabeth Unger Carlyle
President, MACDL

Are you interested in serving on MACDL's Board of Directors? Please contact a member of the Nominating Committee: Jim Worthington (816/259-2277), Pat Eng (573/874-4190), or J.R. Hobbs (816/221-0080).

The next board meeting is scheduled for 4:00 p.m., December 5, at Elizabeth Unger Carlyle's office, 200 SE Douglas, Lee's Summit (816/525-2050). All board meetings are open to MACDL members.

Sprint Videoteleconferencing in Missouri Prisons

For those of us who spend a lot of time on the road to prison, relief may be in sight. Sprint and the State of Missouri have agreed to conduct a one-year pilot project, which began June 1, to provide visits between prison inmates and attorneys or family members via two-way videoconferences. The attorneys and family members go to designated Kinko's locations for the visits. The institutions where the visits are available at this time are Farmington Correctional Center, Jefferson City Correctional Center, and the Western Missouri Correctional Center (not Crossroads) in Cameron.

Rates are $33.75 for each 15 minutes, with a 15 minute minimum. The visits must be scheduled at least three days in advance, and the available times vary somewhat from institution to institution. Major credit cards are accepted for payment.

Visits with family members will be monitored and recorded. Visits with attorneys will not be monitored and recorded. Sprint is investigating the possibility of recording attorney visits for the attorney only. For more information, contact Paul J. Eide at Sprint, 816-854-2114, or Gwen Fletcher at the State of Missouri Office of Administration, 573-751-5172.

MACDL will be interested to see how this works. Please let us know about your experiences with the program.

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 be aware that opinions may have been updated or superseded. If you know of a case we should include in these summaries, please send it to Elizabeth Unger Carlyle.

U.S. Supreme Court

Richards v. Wisconsin, No.96-5955, 61 C.L.Rptr. 2057 (4/28/97), the court eased up on the requirement that officers knock and announce before serving a warrant. The court still held that the Fourth Amendment incorporates the common-law requirement that police knock on a dwelling door and announce their identity and purpose before attempting forcible entry, but flexible reasonableness requirement does not mandate a rigid announcement rule that ignores countervailing law enforcement interests. If there is a danger under the circumstances of either defendant's escape or the destruction of evidence, the knock and announce rule may be waived. In this case, it was reasonable to forcibly enter before knocking and announcing that law enforcement officers were there to serve a warrant where an officer dressed as a maintenance man knocked on defendant's door, and when he opened it, the defendant saw a uniformed officer in the background and quickly closed the door. The officers then kicked in the door and caught him trying to escape, finding a large amount of cash and cocaine in the bathroom. The court was unanimous in deciding that under the circumstances of this case, the decision not to knock and announce was a reasonable one mandated by the defendant's unusual actions in slamming the door upon viewing the uniformed officer. The fact that a magistrate did not issue a no-knock warrant only meant that at the time the warrant was requested, there was insufficient evidence for a no-knock entry. The officer's decision to enter the room must be evaluated as of the time of the entry. Fortunately, the court did not accept the state's argument that the nature of drugs and the ease with which they may be destroyed merits waiving the no-knock requirement in all drug seizures.

Johnson v. United States, No- 96-203.61 C.L.Rptr. 2105 (5/12/97)

Under Fed. R. Evid. 52(1), a ruling that was in compliance with settled law at the time of trial but which was clearly erroneous in light of the law existing at the time of the appeal may be "plain error" for purposes of Rule 52(1). In this case, the trial court decided the issue of materiality in a perjury trial in compliance with precedent at the time of trial, which was later overturned by the United States Supreme Court. However, although the defendant was entitled to plain error review, the fact that the evidence concerning materiality was overwhelming rendered the error harmless.

Lambrix v. Singletary. 96-5658, C.L.Rptr 2106 (5/12/97)

The court found that Teague v. Lane barred, as a new rule, the application of the court's decision in Espinosa v. Florida, 505 U.S. 1079, holding that a death sentence is constitutionally invalid if the trial judge. in the course of weighing aggravating and mitigating circumstances, indirectly considers an invalid aggravating factor by giving deference to a recommendation of death by a jury that directly considered the invalid aggravating factor. Habeas relief will not lie for a petitioner whose conviction was final before the rule of Espinosa was announced.

Court of Appeals, Eastern District

State v. West, No. 7795 (7/22/97)

The defendant's conviction for driving while intoxicated was reversed because the court did not adequately advise the defendant of the perils and dangers of self-representation before compelling the defendant to appear pro se in a bench trial. In this implied waiver of counsel case (the defendant did not want to waive counsel), the record fell far short of showing the defendant knowingly and intelligently waived his right to counsel, as the trial court did not advise the defendant of all the facts essential to a broad understanding of the crime for which he was charged, did not admonish him of the dangers and

consequences of self-representation, and defendant was not notified before the date of trial that he would be forced to proceed without counsel.

State v. Jaynes, No. 69869 (7/22/97)
The court reversed the conviction for first degree murder, based on improper admission of a letter which was hearsay. The victim was the defendant's husband. The victim's brother-in-law was allowed to testify regarding a letter purportedly written to the defendant by a representative of the Ohio State Life Insurance Company. The subject of this letter was " [defendant's] letter of August 11, 1991." That date was shortly before the defendant shot the victim. While the defendant asserted a defense of not guilty by reason of mental disease or defect, this letter was still prejudicial, clearly hearsay, and not subject to admission as a business record since no one from the Ohio State Life Insurance Company was called to properly qualify the letter as an exception under the business records statute. The jury could have found that the defendant deliberated on the death of her husband by writing this letter inquiring about insurance on the life of her husband within two weeks of shooting him.

State v. Brown, No. 70740 (8/5/97)
The court reversed the conviction for unlawful use of a weapon due to improper joinder of offenses. The defendant was charged with three counts: second degree assault, shooting into a dwelling, and armed criminal action. All of these counts were based on an incident which occurred October 27, 1994, when the defendant allegedly fired at a house. These cases were joined with another incident occurring two months later, when an officer chased the defendant and saw the defendant discard a loaded handgun. As the later incident had nothing whatsoever to do with the earlier offenses, it was improper to join them. The fact that the jury could only convict of the later incident and hung up on the other three counts, does not change this result. The appellate court cannot speculate that the defendant was not prejudiced in the count involving the second incident after hearing the facts involving the first incident.

State v. Bohn, No. 70444 (8/5/97)
The court reversed a conviction for first degree murder. The defendant was taken to the highway patrol station and given a polygraph examination. During the course of the exam, she told the examiner, in response to his statements that she was being deceptive and that she should talk to the investigators now, "I feel like I ought to have a good counselor. I have in the past." The examiner responded that she was entitled to legal counsel. He then told the investigating officers that the defendant had requested counsel, and when the defendant attempted to leave the room, the investigating officers told her to return to the room, interrogated her, and she confessed. Under these circumstances, a clear violation of Miranda occurred, and the incriminating statements had to be suppressed. However, the court rejected claims that the Miranda violation also required the suppression of testimony of a witness who identified the location where the defendant threw the murder weapon off a bridge, since the witness was already known to the officers, and this evidence would have been discovered apart from the defendant's confession. Similarly, the gun itself did not need to be suppressed as this was located due to information provided by the witness, not the defendant.

State v. Allen, No. 69709 (8/12/97)
The court affirmed the conviction on direct appeal, but reversed and remanded the denial of a 29.15 motion without an evidentiary hearing, for a hearing on the issue of whether counsel was ineffective for requesting continuances despite defendant's request that he not seek continuances so as to claim the defendant's right to a trial within 180 days under the Uniform Mandatory Disposition of Detainers law. The court noted that if the evidence supports movant's claim that counsel sought continuances despite movant's express wishes that no continuances be obtained, and counsel thereby waived the speedy trial issue, the trial court would lack jurisdiction to try defendant and the defendant should be discharged from custody.

State v. Johnson, No. 69054 (5/20/97)
The court affirms the conviction although it did find that the trial judge should not have said, in the jury's presence, immediately before giving the Hammer instruction, "We spent too much time on this case not to have a verdict." Then, immediately

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

after giving the Hammer instruction, the judge told the jurors, "Jurors, would you return to the jury room and decide this case?" As to the first comment, the giving of the Hammer instruction cleared up any misconception the jury might have had that it was required to return a verdict. As to the latter comment, while somewhat improper, the jury could not have construed that the judge's comment required them to return a verdict and it was therefore not prejudicial.

State v. Russ, No.68180 (5/20/97)
The court found that there was insufficient evidence presented to support a persistent offender allegation that the defendant had committed two prior felonies at different times. The state did present certified records showing the defendant was convicted of second degree murder on June 27, 1979, and that he was convicted of first degree robbery on July 24, 1979. However, both offenses were in the City of St Louis, and were near in time. There was no evidence presented showing the date of the second degree murder. Additionally, none of the documents presented by the state showed that the defendant was represented by counsel on the second degree murder charge. Therefore, while the defendant could have properly been found to be a prior offender, he could not be found to be a persistent offender. Remanded for resentencing.

State v. Woodard, No.63840 (5/20/97)
The court reversed a conviction for attempted rape, and remanded for resentencing for child molestation in the second degree. The evidence showed that the defendant forced the victim to touch his penis. At the time of the crime. this was defined as sodomy, but the Legislature amended the provisions so that this crime of sodomy involving sexual contact became second degree child molestation punishable as a Class A misdemeanor. Defendant was sentenced after the amendments went into effect, and he can only be sentenced to one year. Therefore, his twenty-year sentence for sodomy is remanded with directions that the court sentence defendant to punishment within the applicable range of punishment for the Class A misdemeanor of child molestation in the second degree.

State v. Howard, No. 67837 (5/20/97)
The court reverses a first degree murder conviction for failure to give an instruction on second degree murder. The state's evidence showed that the defendant shot the victim in the back four times causing his death. However, the defendant's testimony was that he only did so after the victim uttered a racial slur towards him, and reached behind his back for what the defendant believed was a gun. Under these circumstances, if the jury believed the defendant's testimony, it might find that defendant did not have the element of deliberation. This is a factual question for the jury, not a question of law for the court. It was improper to prevent the jury from considering the possibility of convicting the defendant only of second degree murder. The court withholds ruling on the defendant's claim of error that a voluntary manslaughter instruction or self-defense instruction should also have been given, leaving that issue open for the trial court on retrial, with the admonition that if the defendant's evidence supports the giving of these instructions, they should be given as well. The jury may accept or reject all or part of the defendant's evidence, but the defendant's evidence will constitute evidence to support the giving of instructions in a case.

State v. Shaw, No.68664 (5/13/97)
The court reverses and remands the denial of a 29.15 motion for a hearing on the movant's claim that counsel was ineffective in failing to strike a juror either for cause or peremptorily who was biased against him. The juror stated that he would definitely hold it against the defendant if evidence showed the defendant ran from police. The evidence at trial did in fact show that the defendant ran from police. This juror did appear to be biased. The defendant is entitled to an evidentiary hearing on this claim, where counsel's reasoning for failure to challenge the venireperson at issue may be evaluated.

State v. Carnes, No.70069 (5/13/97)
The court reversed the conviction for carrying a concealed weapon where the court refused counsel's strike for cause to a juror who indicated that police officers start with something extra in terms of their credibility, and the juror was equivocal with other

responses with regard to the credibility of officers. She was not rehabilitated by the state or the trial court, and the state's case consisted primarily of officer testimony.

State v. Toolen, No. 71855 (5/20/97)
The court reversed the grant of a motion to suppress, and stated that evidence found in a search of the car would be admissible where the defendant was shown to be driving a car which was rented to a different person. Drugs which were found in a tan bag in the car were admissible because the defendant disclaimed ownership of the bag. Since the defendant did not show that owner of the rental car (Hertz Corporation) had authorized the defendant to be the second driver on the rental, he did not meet his burden of showing that he possessed the car with the consent of the owner or someone with the authority to grant possession. As such, he is not aggrieved by the search and cannot claim protection under the Fourth Amendment. Similarly, his disclaimer of ownership of the bag prevents him from asserting an expectation of privacy therein.

Court of Appeals, Southern District

State v. Stevens, No. 21235 (7/11/97)
The court refuses plain error review because defense counsel stated he had no objection to the court's proposed response to a jury inquiry during deliberations. This is an affirmative waiver of **any** appellate review.

State v. Eastburn, No. 26004 (7/16/97)
The court affirmed the motion court's ruling of no ineffective assistance of counsel where the attorney who handled the trial could not recall having a specific reason for failing to challenge a venire person who indicated, during voir dire, that she would prefer to hear evidence from the defendant. The appellate court notes that they cannot reverse the motion court where the movant's lawyer cannot recall, long after trial, whether or not he had a strategic reason for failing to challenge a venire member for cause, as an automatic basis to nullify the conviction under an ineffective assistance of counsel claim, especially where the record arguably demonstrates a plausible reason to fail to challenge the juror. This reason was the juror's indication that she had been through a nasty divorce and bore enmity towards her ex-husband, and the defendant was charged with killing her ex-husband.

State v. McGowan, No. 20607 (7/23/97)
The court reversed and remanded a determination that the defendant was a persistent offender based on records of a conviction from Florida, which noted defendant was guilty of robbery and sentenced to three to ten years in the state penitentiary, but did not show the date the offense occurred. The robbery statute is denoted a felony under Florida law, but the statute has been in effect since 1974. Prior to 1974, there were a series of statutes addressing the crime of robbery. Before the Missouri court could find and judicially notice the applicable statute, the date that the other state offense was committed would have to be known. Therefore, whether the defendant's Florida conviction was for a felony offense is unproven, and the case is reversed and remanded for the state to attempt to prove that this out-of-state conviction was a felony.

State v. Haskins, No. 21520 (7/21/97)
The court reversed the trial court's dismissal of a class A misdemeanor DWI (based on one prior conviction), where the prior conviction was a blood alcohol content municipal violation. The defendant argued that under 577.023.14, only driving while intoxicated offenses in municipal court could be used to show that a defendant is a prior offender. While the statute cited by the defendant does state that, it has to be read in conjunction with all other statutes and statutory provisions dealing with prior offenses and driving while intoxicated offense cases, and the clear intent of the general assembly was to include blood alcohol content convictions in municipal court as prior convictions to enhance driving while intoxicated offenses.

State v. Meggs, No. 21519 (7/18/97)
The court reversed the dismissal by the trial court of a prior DWI offense case, where the trial court's dismissal was premised on Mo. Rev. Stat. §577.023.14, which does not define a municipal violation following a guilty plea and a suspended imposition of sentence as a prior conviction. The prior here involved a municipal violation and SIS after a plea of guilty. While the terms of Mo. Rev. Stat. §577.023.14 appeared to exclude this from use

Case Law Update *(cont'd from page 7)*

as a prior conviction, when read with other provisions of driving while intoxicated laws, the general assembly's intent is clear, and that is to include, not exclude, municipal violations where the accused pleads guilty and receives a suspended imposition of sentence. These are permissible as prior offenses, and the court erred in dismissing the action.

State v. Williams, No. 20990 (7/31/97)
The court reaffirms the importance of being specific in the new trial motion. The defendant filed a motion to suppress statements on the basis of police coercion, properly renewed the objection during trial, but failed to list this (police coercion) as the reason for the error in overruling the motion to suppress in the motion for new trial. This failed to preserve the point for review, allowing review only under the plain error standard, and the court rejected the claim.

State v. Kelley, No. 19988 (7/17/97)
One count of murder in the first degree was reversed for improper admission of hearsay statements. A witness testified that the victim (the defendant's wife) had told the witness that the victim and defendant had an argument, and that the victim told the defendant she did not love him anymore and did not want to be married. In response, the defendant said "If I can't have you, no one will". Another witness testified that in a conversation with the victim about three weeks before her death, that the victim recounted that the defendant had told the victim he was upset with her because she was seeing another man, and that the defendant would just as soon "see her dead as with anyone else". The court rejected the state's claim that this testimony was admissible under the state of mind exception to the hearsay rule. The state of mind exception in homicide cases may be available where the defendant claimed self-defense, suicide, or accidental death. Here, while defendant claimed his wife's death was accidental in that she drowned in the bathtub, he did not admit that he was the actor that caused the death accidentally, self-defense was not in issue, nor was an assertion made that the victim committed suicide. Under these circumstances, the defendant's state of mind as to her belief in the future of the marriage and future relations with the defendant had no relevance, was prejudicial, and requires a reversal of this count of murder in the first degree involving this victim.

McGowan v. State, No. 21328 (8/4/97)
The court affirmed the denial of a 24.035 motion. The accused was not sentenced to the Missouri Department of Corrections for his current offense, but rather received a one year sentence to the county jail for a felony assault, to run concurrently with the sentence movant was already serving on an unrelated case in the Department of Corrections. While movant was in the Department of Corrections and filed his motion within 90 days of sentencing, he was not in the Department of Corrections for the offense which was the subject of the challenge of the 24.035 action, and therefore he could not pursue a 24.035 motion.

State v. Marsh, No.20159 (5/6/97)
The court remanded, finding that the trial court's ruling that the defendant was sentenced as a prior and persistent drug offender was erroneous. In fact, the defendant was charged with and found only to be a prior and persistent offender. The former finding has the consequence of preventing parole. so the defendant was prejudiced by this improper designation and the judgment entry must be corrected. The court also remanded for further consideration of the issue of whether an evidentiary hearing was required on appellant's postconviction motion. The motion court found that the motion was not timely filed based on the date the trial transcript was filed in circuit court. However. this was not the controlling date, as the controlling date is when the transcripts were filed in the appellate court. The motion was timely filed based on the date the transcript was filed in the appellate court.

Court of Appeals, Western District

Royston v. State, No. 53703 (7/15/97)
The court reversed and remanded for an evidentiary hearing of the denial of a 24.035 motion where the movant claimed his plea was not voluntary but rather was caused by counsel's failure to investigate his claim that he did not possess the controlled substance in issue and that officers reported falsely he threw down a baggy of cocaine. Movant further asserted

that counsel told him he would receive only probation, but shortly before trial, told him that could not be worked out and he would go to trial unless he accepted a twelve year sentence on each count. During the plea proceeding, movant was somewhat equivocal regarding elements of the crime to which he pleaded guilty, and even about very general questions regarding satisfaction with counsel, and understanding the proceedings and voluntariness of his plea. The court did not specifically inquire of movant if he was satisfied with counsel's investigation in the case, and contacted all witnesses that movant wanted him to contact, a claim directly at issue on the postconviction case. Under these circumstances, the guilty plea record did not refute movant's allegation of failure to adequately investigate witnesses to support his defense, and a hearing was required.

State v. Wilkerson, No. 53109 (7/15/97)
It was error for the trial judge to allow defendant to proceed pro se without obtaining a written waiver of counsel in accordance with Mo. Rev. Stat. §600.051. Originally, appellant entered a plea to three counts of illegal possession of wildlife, with the state waiving any confinement as a possible punishment. However, the trial court refused the pleas because of the state's waiver of confinement. The Public Defender then withdrew with appellant's permission, and the court had a waiver of counsel form read into the record and the appellant signed it. However, the waiver form did not indicate that if he pled guilty or was found guilty, the judge was most likely to impose a sentence of confinement, as required under Mo. Rev. Stat. §600.051.1(5). On remand, the court has the option to set aside the sentence of confinement, or to set aside convictions and grant a new trial.

State v. Allen, No.51289 (4/29/97)
The appellate court rejected the state's argument that the Escape Rule should apply because the record indicated that appellant failed to appear at sentencing hearing on May 22. The record also showed the hearing had originally been set for May 15, but the record did not reveal what happened on May 15, or whether appellant knew he was to appear on May 22. The motion court, based on this record, determined the Escape Rule should not apply, and the appellate court agreed.

Brown V. Gammon, No.52841 (4/29/97), the court grants habeas corpus relief to the movant by providing him with the opportunity to withdraw a guilty plea. where the record showed that he could have expected to receive a 120-day callback pursuant to Mo. Rev. Stat. § 559.115 if he successfully completed a substance abuse treatment program during the first 120 days of his incarceration. He did so, and then the court's refusal to provide the callback probation based on a report prepared by the Board of Probation and Parole recommending against probation caused his plea to be entered under a promise that was not forthcoming. Petitioner could not be expected to have proceeded under Sup. Ct. R. 24.035 since petitioner could not know that the promise of 120-day callback probation would not be fulfilled until after the expiration of the 90 day period to file a Rule 24.035 action.

State v. Slavin, No.50624 (4/29/97)
The court reversed a conviction for possession of controlled substance with intent to deliver based on an invalid search and seizure of drugs from defendant's car. Defendant was stopped for speeding and driving in the passing lane while not passing. The trooper engaged defendant in conversation, and defendant indicated he was traveling from Colorado to New York to take his infirm parents to Florida. Defendant stated he owned the car he was traveling in. and had not worked full time in two years, implying he worked part-time during that period of time. After the trooper completed his computer check which revealed no irregularities, he indicated he would give defendant only a warning. At that point the traffic stop ended, yet the trooper asked defendant for his consent to search the vehicle. Defendant declined to give the consent, and the trooper called for a K-9 unit. The trooper also read defendant his Miranda warnings. The K-9 unit arrived approximately an hour later, and a large amount of marijuana was discovered in the trunk of the car. The appellate court reversed the denial of appellant's motion to suppress. A lawful seizure for a traffic stop encompasses the period of time the officer needs to conduct a reasonable investigation of the traffic violation, but once this is completed, the detainee should be allowed to proceed unless specific, articulable facts create an objective reasonable suspicion that the individual may be involved in criminal activity.

Case Law Update *(cont'd from page 9)*

Here, the period of lawful seizure was limited to the eight minutes it took for the trooper to process the warning given to defendant. Only the information made available to the trooper during this lawful period of seizure could determine whether specific, articulable facts support the reasonable suspicion of criminal activity. During this period of time, nothing the defendant did or said rose to that level. The trooper indicated the defendant was cooperative, and the only time the trooper was suspicious was when defendant declined to give his consent to search. However, a refusal to consent to a search may not be used as support for the requisite reasonable suspicion to allow the search.

Otherwise, officers could manufacture reasonable suspicion in every case merely by asking permission to search. The other reasons offered by the trooper did not rise to the level of probable cause to believe criminal activity was afoot. These constituted nervousness of the defendant, the fact that fishing poles were in the back seat, causing the trooper to think maybe drugs were in the trunk. There is nothing to show that defendant paid cash for his car as the trooper asserted simply because he had the title to the car with him. And Interstate 70 is not known as a notorious drug route. In short, nothing supported the detention for the drug dog.

THE WORST THINGS YOU CAN SAY TO A COP

1. Sorry, Officer, I didn't realize my radar detector was unplugged.
2. Wow, you must've been doing over a hundred to keep up with me!
3. Excuse me, is "stick up" hyphenated?
4. I thought you had to be in relatively good physical condition to be a police officer.
5. I was going to be a cop, but I decided to finish high school instead.
6. You're not going to check the trunk, are you?
7. I can't reach my license; would you hold my beer?
8. Wow, you look just like the guy in the picture on my girlfriend's nightstand.
9. Gee, Officer, that's terrific! The last officer only gave me a warning, too.
10. Aren't you the guy from the Village People?
11. Well, when I reached down to pick up my bag of crack, my gun fell off my lap and lodged between the brake and the gas pedal, forcing me to speed.

NEW MEMBERS & MEMBERSHIP RENEWALS

S. Richard Beitling, Lee's Summit
Pat Berrigan, Kansas City
Dan L. Birdsong, Rolla *
Thomas A. Burke III, St. Charles *
Robert Childress, Marshfield *, sponsored by Tim Cisar
Alan S. Cohen, St. Louis *, sponsored by Gregory Nat Wittner
Dru Colhour, Kansas City, *Legal Assistant* *, sponsored by J.R. Hobbs
Catherine Connelly, Kansas City *
Catherine Earnshaw-Hobbs, Lee's Summit
Bernard Edelman, Clayton, *Sustaining Member*
Steven D. Gilley, Kansas City, *Student Member* *
Irene C. Karns, Columbia, *Public Defender*
Cathy Kelly, St. Louis, *Public Defender*
David L. Mills, Rolla *
Jason W. MacPherson, Mountain Grove *
Joseph S. Passanise, Springfield, *Student Member*
Fred Slough, Kansas City
Christopher A. Slusher, Columbia, *Public Defender*
Dan Viets, Columbia, *Sustaining Member*
Stephen E. Walsh, Poplar Bluff
Andrew P. Wood, Neosho
Clinton R. Wright, Clayton
Paul Yarns, St. Louis, *Public Defender*

Welcome to our new members, noted with an asterisk, and sincere thanks to renewing members who support *MACDL*'s efforts year after year. **Please check the expiration date on your mailing label. You'll find a renewal form is inside the back cover of this *ACTION REPORT*. Feel free to copy it for friends and colleagues, as well.**

~ ~

ALL YOU NEED TO KNOW ABOUT THE FIFTH AMENDMENT

by Dee Wampler

NO PERSON ... SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF.

Fifth Amendment, U.S. Constitution

THAT NO PERSON SHALL BE COMPELLED TO TESTIFY AGAINST HIMSELF IN A CRIMINAL CAUSE.

Art. I, §19, Missouri Constitution

One of the law's most perplexing questions is when a witness is allowed to claim the Fifth Amendment and what affect this will have on the trial. No particular art or special words are required to assert the protection of the Fifth. Simply saying, "I take the Fifth", "I refuse to testify", or "Fifth Amendment" after stating your name should be sufficient.

The Fifth Amendment privilege is "as broad as the mischief against which it seeks to guard."[1] "Many links frequently compose the chain of testimony necessary to convict an individual of a crime and no person is compelled to finish any one of them against himself," said Chief Justice Marshall in 1807.[2] The Fifth Amendment does not depend

Fifth Amendment *(cont'd from page 11)*

upon the questionable accuracy of a judge's prediction about the likelihood of a future prosecution.[3] The right of the witness should prevail.[4] A judge should not seek to evaluate the practical likelihood that a witness will actually be prosecuted.[5] A court must first determine whether the witness' testimony would be incriminatory, and then whether there is a substantial risk that the witness will actually be prosecuted.

The Fifth Amendment is a *privilege*. It cannot be claimed by a third person, but must be claimed by the witness. The privilege should not be employed merely to avoid giving testimony he simply would prefer not to give.[6] The privilege against self-incrimination extends to refusing to answer the question asked, but may not apply to *why the answer might tend to incriminate.*[7] Some courts may conduct a threshold inquiry as to whether the privilege is being properly asserted.

Once a witness claims the privilege, a rebuttable presumption arises that his answer might tend to incriminate him. To rebut this presumption, the opposing party must demonstrate that the answer cannot possibly have a tendency to incriminate.[8] Only after the court finds as a matter of law that the response cannot possibly tend to incriminate is the protection of the Fifth disallowed.[9] Only if the answer "cannot possibly" tend to incriminate should the witness be made to answer.[10]

In a judgment debtors' exam the privilege is available if the witness has a rational basis upon which the answer could conceivably incriminate him. Once the rational basis is seen by the court or is pointed out, the court should allow the witness to take the Fifth unless, as a matter of law, it would be impossible for the witness to incriminate himself.[11]

Although a defendant has the constitutional right to confront witnesses against him (which includes the right of cross-examination), it is not violated when a witness takes the Fifth.[12]

The Fifth Amendment is a two-edged sword, and once the privilege has been invoked to preclude discovery, trial courts have the power to not allow the defendant to change his position and testify at trial to his benefit.[13]

A person may testify and incriminate herself on several crimes and lose her Fifth Amendment right on some questions but not others.[14] A court cannot make the invocation of the Fifth Amendment costly.[15] The Fifth is not waived, and a person can take the Fifth after testifying as to matters that don't incriminate her.[16]

It is improper to force a witness to take the Fifth in front of a jury.[17]

Under the Prosecutorial Misconduct Doctrine, when a prosecutor grants immunity to a government witness but denies it to similarly situated defense witnesses for no legitimate reason, or when a prosecutor intimidates a defense witness into refusing to testify, a court may, in some circumstances, require the prosecutor to choose between dismissing the indictment or granting immunity.[18] To trigger this "carrot and stick" approach, the witness' testimony must be material, exculpatory, not cumulative, and unobtainable from another source. The judiciary does not have inherent authority to immunize a witness to effectuate a Sixth Amendment defendant's right, but we must assume the government has a legitimate interest for not granting a defense witness immunity when the defendant shows that a witness' privileged testimony is material, exculpatory, not cumulative, not unobtainable from another source.

Producing Records

In normal cases, the act of producing records under subpoena creates no implication of guilt.[19] It may make a difference on whether the records are required by law. If not required by law, there seems to be a greater right to assert the Fifth.[20]

Aa taxpayer has the right to refuse production of personal records at an IRS investigation.[21] The Fifth does give some protection to purely personal papers.[22]

The act of producing records is quite apart from the content of the records produced. The act of production may be communicative.[23] If testifying about the existence and location of records and control over those records, the act of production demanded of the witness and the possibility of self-incrimination are inherent in that act. An officer of a corporation has a Fifth Amendment right to prevent his oral testimony even if he has to produce records.[24]

Conclusion

The Fifth Amendment provides a broad and ancient privilege that protects a witness from providing the smallest link in a chain that might tend to incriminate her. No judge can conduct anything more than a limited threshold inquiry as to the reasons for claiming the protection. Only if, as a matter of law, the answer cannot possibly tend to incriminate is the witness denied this protection.

Notes

1 Counselman v. Hitchcock.

2 One Burr's Trial, 244 (1807).

3 Resnover v. Pearson, 965 A.2d 1453 (7th Cir. 1992)

4 Kastigar v. U.S., 406 U.S. 441 (1972)

5 Carter v. U.S., 60 Crim. Law 1119 (D.C. App. 1995)

6 Roberts v. U.S., 100 S.Ct. 1358 (1980)

7 State v. Powells, 684 S.W.2d 514 (Mo. App. 1984)

8 State *ex rel.* Anderson v. Hess, 709 S.W.2d 526 (Mo. App.1986); State v. Carey, 808 S.W.2d 861 (Mo. App. 1991);State *ex rel.* Mumm v. McKelvey, 733 S.W.2d 768 (Mo. banc 1987)

9 State *ex rel.* Flenn v. Schroeder, 660 S.W.2d 435 (Mo. App. 1983)

10 State v. Mahany, 748 S.W.2d 762 (Mo. App. 1988); State *ex rel.* Shaperill Realty v. Cloyd, 615 S.W.2d 401 (Mo. banc 1981)

11 State v. Webber. 600 S.W.2d 691 (Mo. App. 1980)

12 U.S. v. Cardillo, 316 F.2d 606 (2d Cir. 1963)

13 State *ex rel.* Pulliam v. Swink, 514 S.W.2d 559 (Mo. 1974); Tessmer v. Tessmer, 611 S.W.2d 299 (Mo. 1981)

14 State v. Sanders, 842 S.W.2d 170 (Mo. App. 1992)

15 Malloy v. Hogan, 378 U.S.1, 84 S.Ct. 1489 (1964)

16 Williams v. State, 768 S.W.2d 605 (Mo. App. 1989); State v. Ruff, 729 S.W.2d 667 (Mo. App. 1987)

17 Hudson v. State, 747 S.W.2d 770 (Mo. App. 1988

18 U.S. v. Bahadar, 954 F.2d 821 (2d Cir. 1992)

19 Braswell v. U.S., 487 U.S. 99 (1988); Marshetti v. U.S., 390 U.S. 59 (1988)

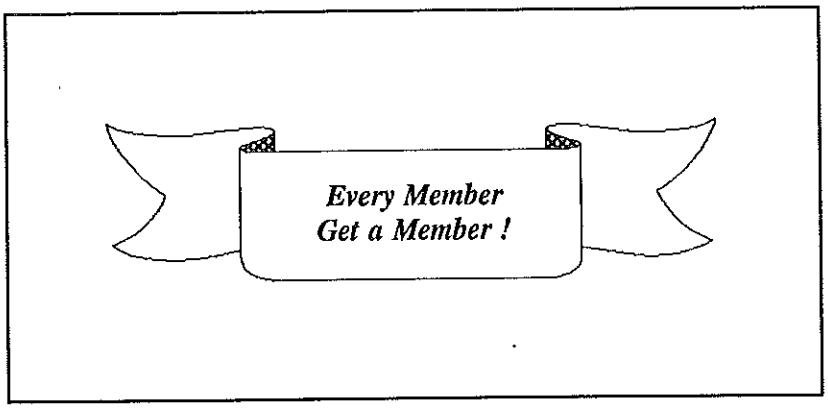
20 In Re: Grand Jury Subpoena, 55 Crim. Law 1045 (8th Cir. 1984)

21 U.S. v. Helina, 549 F.2d 713 (9th Cir. 1977)

22 Boyd v. U.S., 118 U.S. 616 (1886)

23 U.S. v. Doe, 465 U.S. 506 (1984)

24 State *ex rel.* Realty Consultants v. Doud, 796 S.W.2d 881 (Mo. banc 1990)



Bulletin Board

Board of Directors Meeting

The next regular meeting of ***MACDL***'s Board of Directors is scheduled for Friday afternoon, December 5, 1997, at 4:00. President Elizabeth Carlyle is hosting this meeting at her office, 200 S.E. Douglas, Suite 200, in Lee's Summit. For directions, call Elizabeth's office at 816/525-2050.

Second Annual Winter Retreat & Legislative Planning Session

Last winter, ***MACDL***'s Board met at the Holiday Inn in Lake Ozark, primarily to plan legislative strategy. Everyone attending agreed the time spent was extremely worthwhile, leading to more productive and consistent lobbying efforts, and fun, too! A similar retreat is being planned to begin with dinner Friday evening, February 13, followed by a working session Saturday, the 14th.

Members, Please Note: All members of MACDL are invited to attend board meetings. If you are interested in becoming more involved in MACDL activities, please join us.

NLADA 75th Annual Conference

Marty Robinson, Director of Missouri's Public Defender System, is a member of the Host Committee for the National Legal Aid and Defender Association's 75th Annual Conference at the Regal Riverfront Hotel in St. Louis from December 10-13, 1997. The conference will include accredited programs on civil and criminal substantive law, a Defender Management Track, and a program on Creative Community-Based Sentencing. For additional information, please contact Marty's office at 573/526-5210.

MACDL's Student Outreach Program

Dan Viets (Columbia), Scott Turner (K.C.), and Scott Rosenblum (St. Louis) have hosted pizza parties to introduce MACDL to Missouri law students. A year's student membership is only $10. Why not present your favorite law student with a MACDL membership for Christmas?

Francie Hall's daytime phone and fax have changed.
Phone: 816/292-8285; Fax: 474-3216.

MACDL

MEMBERSHIP APPLICATION / RENEWAL FORM

To join the Missouri Association of Criminal Defense Lawyers, or to renew your membership, 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

ANNUAL DUES SCHEDULE (effective 1/1/97)

Sustaining Member:
Officers, Board Members & Past Presidents $300.00

Regular Member:
Licensed 5 years or more $150.00
Licensed less than 5 years $75.00

Public Defender:
Head of Office $60.00
Assistant Public Defender $30.00

Provisional (Nonvoting) Member:
Judges, Law Professors $60.00
Paralegals & Legal Assistants $25.00
Law Students $10.00

NAME _____

FIRM _____

ADDRESS _____ E-MAIL _____

CITY _____ STATE _____ ZIP _____

PHONE _____ FAX _____

DATE _____ AMOUNT ENCLOSED _____

SPONSORED BY _____ *(OPTIONAL)*

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

MACDL
416 E. 59TH ST
KC MO 64110

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

ADDRESS CHANGE/CORRECTION

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

NAME _____ COUNTY _____

FIRM _____

STREET _____

CITY _____ STATE _____ ZIP _____

PHONE _____ FAX _____

DATE _____