MACDL

Missouri Association of Criminal Defense Lawyers

Action Report
Spring 1997 Vol. V No. 2

PRESIDENT'S LETTER

by James D. Worthington

Meet me in St. Louie, Louie! It's springtime. When a young man's fancy turns to love in bloom ... or golf. The officers and directors of your ***Missouri Association of Criminal Defense Lawyers*** plan another successful annual meeting and seminar (in St. Louis, the GATEWAY to the Midwest), including fun and good food.

I note with sadness the recent passing of past MACDL president Bob Duncan of Kansas City. Bob was a founding member of the club who shared the vision and commitment that became MACDL. Bob had poor eyesight, a commanding voice, astounding intelligence, and the courage to stand toe-to-toe against the might, money and manpower of The State. He was a skilled and worthy advocate who, by the force of his intellect and will, helped balance the scales of justice for his clients. We are all beneficiaries of his example, and we are poorer for his passing. We will miss him! May we ever honor his memory and guidance by standing <u>with</u> the defendant, <u>for</u> justice, before the bar.

Another sad note is sounded by the continued onslaught on the Constitution in the hallowed halls of Jefferson City. "Open season" continues on reason, logic, compassion, real solutions to root problems, and, of course, the Constitution. The Missouri Highway Patrol continues to seek legislative legitimacy for banditry under the forfeiture laws. The state prosecutors' association advocates a state system of immunity so they can "purchase perjury", in the face of myriad horror stories of abuses on the federal level. Talk to your senators and representatives. Tell them "what's wrong with this picture"!

At a time when the entire, stodgy American Bar Association has seen the inequities and evils of the current arbitrary, capricious imposition of the death penalty, and has called, by resolution, for a moratorium on executions, Missouri is at the forefront of state-sanctioned murder. AND the Missouri Legislature is considering a proposal to amend § 552.060 RSMo in order to execute mentally retarded persons who cannot comprehend the punishment, its etiology or its logic.

And don't lose sight of the draconian proposals, made without a hint of embarrassment in the legislative halls of the City of Jefferson, to approve:

1. Telephonic applications for search warrants;
2. Extension of the 20-hour rule to 32 hours;
3. Legitimizing chain gangs;
4. Opting-in to the federal anti-terrorism act in order to execute fellow citizens more quickly -- in spite of Barry Scheck's use of DNA evidence to prove

Table of Contents

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

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

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

the innocence of convicted "criminals". The horror of finding the system might have erred?!? (Brother Scheck will be at UMKC Law School at 7:30 p.m. on Wed., April 16, for the Joseph Cohen Lecture.)

Note MACDL's support of Representative Brian May's proposal (House Bill 582) that would require recordation of all grand jury proceedings.

This is the close of my term as president of your organization. I have been honored to work for each and all of you (and your clients). More importantly, I have appreciated working with the following people on shared goals:

☼ Francie Hall, our executive secretary, for the many hours of organizing, composing, informing, record-keeping, newsletter editing ... and for knowing and appreciating us, our goals and our principles.

☼ Elizabeth Unger Carlyle, incoming president, for her dedication to **MACDL** and the ***ACTION REPORT***, her ready acceptance of sometimes tedious appellate work, and her willing acceptance of the jobs no one else volunteers for.

☼ The dedicated leadership of J.R. Hobbs, Charley Rogers and Larry Schaffer in our CLE efforts. The wisdom and energy of the two Cathys (DiTraglia and Kelly) have been much appreciated by the CLE Committee and the entire board.

☼ Our Legislative Committee Co-Chairs, Dan Viets and Tom Carver, with strong assistance from Tim Cisar, Dan Dodson and John Simon. Your vitality is inspirational, gentlemen!

☼ Our entire Board of Directors for the extra effort you've given this year.

I was particularly gratified by the participation in ***MACDL***'s first Retreat Weekend in January. The Board, interested members and several past presidents gathered for an evening of merriment followed by a good day's work for the Association at Lake Ozark. Francie arranged for NACDL to send us the wit and wisdom of Kathryn Kase on media and public relations (from an insider's point of view). The information and interaction were excellent.

Part of the point is that new people continually become involved and make a mark on this organization. We need a steady infusion of youth, energy, wisdom, courage and perspective. Get involved! Work with us! Invite your friends and colleagues.

Thank you all! I look forward to an ongoing active role as a past president. See you in court.

Respectfully submitted,

James D. Worthington

REPORT OF 1997 *MACDL* NOMINATING COMMITTEE

To be presented for vote of the membership at MACDL's Annual Meeting, 4:15 p.m., Friday, April 25

OFFICERS:

President: Elizabeth Unger Carlyle
President Elect: Rick Sindel
Vice President: Larry Schaffer
First Vice President: Bruce Houdek
Second Vice President: Tom Carver

DIRECTORS (3-year terms):

Shawn Askinosie, *Springfield*
Jackie Cook, *Kansas City*
Dan Dodson, *Columbia*
Pat Eng, *Columbia*
T. D. Pawley, *Columbia*

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

Ohio v. Robinette, No 95-891 (11/18/96)
The court overturned an Ohio Supreme Court decision stating a bright line rule that an officer inform motorists detained for traffic violations that they are free to leave after the purpose of the traffic detention expired before continuing with a consensual interrogation or requesting consent to search. The subjective motivation of the officer in detaining the motorist is not important since under Whren v. U.S., subjective intentions of the officer do not make a continued detention illegal when there is objective cause for the stop. Also, ordering a motorist out of the vehicle is permissible, subjective reasons notwithstanding, where there is probable cause for the traffic stop. It is simply unrealistic to required police to inform detainees they are free to go before a consent to search may be deemed voluntary.

Old Chief v. United States, No. 95-6556 (1-7-97)
It was error to refuse the defendant's stipulation the he had been convicted of a crime punishable by more than one year of imprisonment. This was an element of the federal firearms violation with which he was charged. Although the prosecution is not generally required to accept a stipulation as to an element of a case, the states need for evidentiary depth to tell a continuous story has no application when the point at issue is a defendant's legal status resulting from a prior, independent adjudication. This element is entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the offense. Weighing the probative value of the prior offense against the prejudicial nature of the crime, assault with serious bodily injury, it was harmful error to permit the prosecution to adduce evidence of the nature of the prior crime.

Maryland v. Wilson, No. 95-1268 (2/19/97)
A police officer making a traffic stop may order passengers out of the vehicle without any suspicion of danger or crime. The state's interest in protecting officer safety outweighs the passenger's interest in remaining in the vehicle.

Lynce v. Mathis, No. 95-7452 (2/19/97)
An *ex post facto* violation occurred when the state of Florida canceled good time credits in effect at the time of the defendant's offense. The Florida legislature had enacted a law that authorized early release credits when prison overcrowding reached certain levels. The defendant was released from prison on the basis of his accumulated credits. The Florida legislature then canceled the credits for certain classes of prisoners, including the defendant who had been convicted of attempted murder, and the defendant was reincarcerated. Can't do, says the court, since the cancellation of the credits has the effect of imposing greater punishment than the law in effect at the time of the crime allowed. It is the effect of the statute, not the subjective intent of the legislature, and controls *ex post facto* determinations.

Recent Missouri Cases

Supreme Court

State v. Gentry, 936 S.W.2d 790 (Mo. 1996)
The court reversed a conviction for violation of a full order of protection where the defendant received neither actual nor legal notice of the existence of the order. An ex parte order had been served on the defendant notifying her of a hearing on the request for a full order. She did not appear at the hearing but went to the victim's house the next day. The officers read her the full order only after her arrest. This was insufficient.

Haynes v. State, 937 S.W.2d 199 (Mo. 1996)
The court affirmed the motion court's denial of a request for change of judge. At sentencing, the trial judge had stated his desire that the defendant be dismembered, called him a monster, and expressed the hope that he would die in prison. This did not support a claim of bias and partiality; a judge may

express society's outrage at the depravity of the crime.

State v. Redmond, 937 S.W.2d 205 (Mo. 1996)
The conviction for second degree murder was reversed for failure to give the defendant's requested instruction on voluntary manslaughter. The victim confronted the defendant, accused him of treating his girlfriend badly, and displayed what appeared to be the handle of a weapon when the defendant told him to stay out of his and the girlfriend's business. Defendant then grabbed a baseball bat and struck and killed the victim. Sudden passion was shown by the confrontation, and therefore an instruction on voluntary manslaughter should have been given in addition to the instruction given on self-defense.

State v. Damask, No. 78826 (12/17/96)
The court affirms the use of drug checkpoints. The police posted signs warning of drug checkpoints on a highway. The actual checkpoint was placed at a highway exit before the designated spot to catch persons who pulled off the highway to avoid the supposed checkpoint. The court reasoned that 1) interdicting drug traffic is a grave state interest; 2) the checkpoints effectively promoted that interest, and 3) the objective and subjective intrusion on the motorist was minimal in that there was little interference with legitimate traffic and the officers had minimal discretion in operating the checkpoint.

State v. Kinder, No. 75082 (12/17/96)
The court rejected a contention that the judge should have disqualified himself on defendant's motion. Shortly before the defendant's trial, the judge issued a press release in which he discussed his reasons for switching from the democrat to the republican party, and made remarks which could be construed as disparaging to minorities. The defendant was African-American. The court found this to be a political rather than a judicial statement, and found no evidence of any discriminatory, unfair or improper treatment toward the defendant at trial. The court also found no prejudice in denying a continuance when the defendant's psychiatrist was unable to complete his evaluation, in that the defendant failed to offer evidence tending to show that the psychiatrist would have found him incompetent. Evidence that the defendant refused to swear on the Bible and to talk to officers with his legs uncrossed was properly admitted to show consciousness of guilt. In connection with the aggravating circumstance of history of convictions for serious assaultive crimes, it was proper for the judge to determine as a matter of law if the prior was for a serious assaultive crime, then for the jury to determine whether the defendant was convicted. The fact that the crime involved physical injury rather than serious physical injury did not exclude it as a predicate for this aggravator. (This case involves a number of other issues.)

State v. Lane, 937 S.W.2d 721 (Mo. 1997)
The grant of a suppression motion as to the search of a passenger's bag was reversed. The discovery of marijuana in the car after the driver consented to a search gave probable cause to search all containers in the car. The fact that the defendant agreed to drive the car to police headquarters after the driver was arrested did not negate the officer's license to continue the search once he arrived.

State v. Becker, No. 79012 (1/21/97)
The court reversed convictions for misdemeanor gaming violations which were commenced outside the one-year statute of limitations. The state sought to apply the statute of limitations for fraud offenses arguing the language of the statute under which the defendants were prosecuted, "knowingly making a false statement," is equivalent to fraud. The court disagreed, noting that the legislature could have made fraud a material element of the offense but did not do so.

State v. Lee Mechanical, No. 78893 (1/21/97)
The court found that MO. REV. STAT. §290.250, establishing the crime of willful violation of the prevailing wage law, is constitutional. The key provisions of the offense are adequately conveyed, and the statute is sufficiently specific that a person of common intelligence would not have to guess at its meaning.

State v. Whitfield, No. 77067 (1/21/97)
Manslaughter is a "serious assaultive offense" which satisfies the statutory aggravating circumstance. (All other issues were rejected, and the death sentence was affirmed.)

(cont'd on page 6)

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

Johnson v. State, No. 78953 (1/21/97)
The trial court is not required to state, at the time of formal pronouncement of sentence, that the defendant was sentenced as an offender under former MO. REV. STAT. §558.019, which limited parole, if the court has already found that section to be applicable to the defendant. (Under the new parole-limiting law, no court finding is required.)

State v. Brown, 1997 WL 22611 (1/21/97)
The court affirmed a conviction for drug trafficking even though a member of the jury did not disclose a prior conviction. The dispositive issue was the fact that neither attorney ever clearly asked the jury if any members of the panel had a prior conviction or criminal history, so there was no intentional juror misconduct.

State v. Fowler, 1997 WL 22762 (1/23/97)
The identity of the victim is not an element of the offense is stealing, and therefore the conviction was affirmed even though the verdict-directing instruction and information included different victim's names.

White v. State, No. 78459 (2/25/97)
The court affirmed the denial of Sup.Ct.R. 29.15 motion in a death penalty case without an evidentiary hearing, finding the numerous assertions of ineffective assistance of counsel did not sufficiently plead facts, not conclusions, of matters not refuted by the record which resulted in prejudice to movant.

State v. Phillips, No. 74785 (2/25/97)
The court remanded for a new sentencing hearing due to the state's failure to disclose exculpatory evidence in violation of Brady v. Maryland. The defendant's son apparently told a witness that he had helped his mother kill the victim but that he, not his mother, dismembered the body, and that he scattered the body parts about while his mother drove the car. Harm was shown since the sole aggravating factor found by the jury was depravity of mind, and the state argued the dismemberment extensively in closing, urging the jury to give the defendant death based on this act which was attributed solely to the defendant.

State v. Sutherland, No. 78884 (2/25/97)
The admission into evidence of a jail visitor card was within the business record exception to the hearsay rule. The defendant was driving a car in which Adell, the assailant, was lying in the back seat. The defendant claimed he did not know Adell, who was a hitchhiker. The state offered Adell's jail visitor card to show that defendant was an approved visitor. The jail custodian testified that the record was made in the regular course of business at or near the time of the event, and that the social worker gives the custodian names of visitors provided by the inmate. This met the requirements for admission under Mo.Rev. Stat. 490.680. The court held that Adell's listing the defendant's name was not inadmissible hearsay because it was offered only for the fact that Adell made the statement that he wanted the defendant to visit him, not for the statement's truth.

Coates v. State, No. 78924 (2/25/97)
The court affirmed the denial of the Rule 24.035 motion without a hearing, determining that no prejudice was pleaded when the movant asserted that he would not have accepted probation had he known the full range of punishment which could have been given if he violated probation. Further, the issue of the trial court's failure to advise the defendant of the maximum punishment was waived because the motion alleged only that counsel failed to inform the defendant of the maximum punishment.

State ex rel. Juergens v. Cundiff, No. 79249 (2/25/97)
A probationer must be mentally competent to proceed before the court may hold a probation revocation hearing. Mo.Rev.Stat. §552.020.1 provides that no person who as a result of mental disease or defect lacks capacity to understand proceedings against him or assist in his own defense may be tried, convicted or sentenced as long as the incapacity endures. This includes sentencing after probation revocation. Indeed, the incapacity prevents the accused from assisting counsel at the probation revocation hearing as it does at trial.

Western District
State v. Brisco, No. WD 51803 (11/26/96)
The court reiterates the need to object specifically at the instruction conference to any instruction or refusal to give a requested instruction. The

defendant made no specific objection to the failure to give a refused instruction until the motion for new trial, which was too late.

State v. Irvin, No. WD 52336 (11/26/96)
The court reformed the judgment to delete a reference to the defendant as a prior and persistent offender where no mention of that status was made at the time of sentencing.

State v. Ricker, No. WD 50598 (12/3/96)
The court reversed a conviction for first degree assault where the instruction allowed a conviction for recklessly causing serious physical injury to the victim, but the statute requires a mental state of knowing or an attempt. Analogizing to State v. O'Brien, the court holds that double jeopardy would not be violated if the defendant were retried for second degree assault.

State v. West, No. WD 52164 (12/10/96)
The court reversed the trial court's grant of a judgment of acquittal after a jury verdict of conviction. These state appeals are usually successful since the standard is whether there is any evidence which would permit a rational trier of fact to find guilt.

Turner v. State, 935 S.W.2d 393 (Mo. App. 1996)
The court remanded for dismissal where the Rule 24.035 motion was filed one day late, despite the fact that it was mailed nearly two weeks before the due date.

State v. McWhirter, 935 S.W.2d 778 (Mo. App. 1996)
There was no error in overruling an objection from the party not questioning the witness that the witness's answer was unresponsive. That objection rests with the questioner alone.

Reynolds v. State, No. WD 52201 (12/24/96)
The court rejected a contention that Sup. Ct. R. 29.07(d) could be used to withdraw a guilty plea where the defendant contended that he was misled to believe he would get a 120-day callback, and could not file a motion within 90 days as he would not know at that point that he wouldn't get his callback. The court suggested habeas corpus may be appropriate under these circumstances, where a claim doesn't come to light within the Sup. Ct. R. 24.035 time limits.

State v. Aldrich, No. WD 51442 (12/24/96)
Another possible point goes down in flames due to failure to make an offer of proof. When the victim testified that she delayed reporting a sexual assault because this was new to her and she never experienced it before, the defendant attempted to impeach her with a prior sexual assault report she had made. When the state's objection was sustained, the defendant failed to show what the excluded testimony would have been.

State v. Poindexter, No. WD 50237 (1/14/97)
The court reversed the summary dismissal of a Sup. Ct. R. 29.15 motion for failure to pay filing fee after the circuit court determined movant was not indigent. The court held that the dismissal was a proper sanction, but only after notice to the movant, which did not occur. [Ed's note: For some reason, the court did not discuss the fact that Sup. Ct. R. 29.15 explicitly states that no cost deposit is required with no mention of indigency.]

State v. Rosendahl, No. WD 49918 (1/14/97)
The court found that the prosecutor improperly defined reasonable doubt when he said, "What you reasonably believe, you cannot reasonably doubt." However, the error did not rise to the level of plain error, and relief was denied in the absence of an objection.

State v. Stillman, 938 S.W.2d 287 (1/21/97)
Where the defendant carefully objected to evidence by pretrial suppression motion, has a suppression hearing, renews the objection before trial, and objects when testimony concerning the challenged evidence is first adduced, he was held not to have waived his objection when he later said, "No objection" to further references to the challenged evidence. This is another case which may save an appeal but should not be relied on by trial counsel: Object anyway!

State v. Burch, No. WD 51762 (2/18/97)
The court held elbows can be a dangerous instrument supporting second degree assault.

(cont'd on page 8)

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

State v. Wallace, No. WD 51127 (2/25/97)
The court reversed a conviction for first degree assault where the state was allowed to adduce evidence ranging back nearly eight years of five separate incidents of assault on the same victim. Only the most recent was marginally relevant, since it involved more serious injury and the state contended it was admissible to show the defendant's intent to cause serious physical injury. However, it was error to admit this evidence in the state's case in chief. The state presented evidence that the defendant straddled and choked the victim, including witness testimony and admissions by the defendant. The proof of the act ordinarily gives rise to an inference of the required *mens rea*. Thus, the extraneous offense evidence would be relevant, if at all, only if the defendant presented evidence of lack of intent.

State v. Scott, No. WD 50480 (2/25/97)
The court reversed a conviction for causing catastrophe for breaching a levee during the Great Flood of 1993, despite what the court termed substantial evidence of guilt, due to the state's late disclosure of oral statements made by the defendant after the levee breach indicating it was intentional. The court attempted to fashion a remedy for the discovery violation, permitting the introduction of this evidence only as rebuttal after the defendant testified. However, since the trial strategy of the defendant involved his testimony, and trial counsel had therefore told the jury about his prior convictions in opening statement, this remedy was insufficient to cure the harm caused by the discovery violation. Therefore, a mistrial should have been granted.

Eastern District

Tolen v. State, 934 S.W.2d 639 (Mo. App. 1996)
The court remanded finding the trial court lacked jurisdiction to accept a plea to a dismissed count of the charging instrument. The state's argument that the error caused no manifest injustice since both offenses involved possession of controlled substance was rejected. The defendant still faced the disposition of the undismissed count. The existence of a valid information is a jurisdictional issue.

State v. Otto, 934 S.W.2d 639 (Mo. App. 1996)
The court sentenced defendant to six months in jail for DWI, but suspended execution of five months of the sentence and ordered "no work release or early release." This was remanded for the assessment of a definite period of probation.

State v. Newcomb, 934 S.W.2d 608 (Mo. App. 1996)
The court approved the showing of photographs of the defendant's tattoos, and the identification of the defendant from the tattoos even though the witness could not identify the defendant's face. A "tattoo lineup" was unnecessary and impractical. Also, there was no error in failing to admit the testimony of the defendant's purported expert concerning the blood evidence, where the expert stated that she did not "claim to be a serologist, necessarily."

Rick v. State, 934 S.W.2d 601 (Mo. App. 1996)
The court granted relief on a Rule 25.035 motion since ineffective assistance of counsel occurred when counsel failed to object to the state's recommendation of consecutive sentences. The record indicated that the defendant understood the plea was conditioned on the state's not making a recommendation. It was irrelevant that the court might have given consecutive sentences anyway; the movant was entitled to the benefit of his bargain.

State v. Steward, 936 S.W.2d 592 (Mo. App. 1996)
The denial of the Sup. Ct. R. 29.15 motion without evidentiary hearing was reversed, where the defendant alleged that his trial counsel was ineffective for failing to call an alibi witness. The witness's testimony was not cumulative since the other alibi witnesses were strongly impeached and the state argued an adverse inference from the defendant's failure to call this witness.

Sharp v. State, 936 S.W.2d 596 (Mo. App. 1996)
The court dismissed the Rule 24.035 where the movant failed to plead the date he was received at the Department of Corrections and the filing date appeared to be beyond the 90-day time limit.

State ex rel. State v. Campbell, 936 S.W.2d 585 (Mo. App. 1996)
The court made permanent a writ prohibiting the trial court from ordering a blood test on children to

determine paternity. The defendant was charged with criminal nonsupport. In so holding, the court notes that the definition of "child" in 568.040.2(1) now includes any child whose relationship to the defendant has been determined, by a court of law in a proceeding for legal separation or dissolution, to be that of child to parent. Since the state relied on the dissolution decree to establish the parent-child relationship, blood test results were irrelevant and therefore beyond the court's discovery powers under Sup. Ct. R. 24.04(A).

State v. Sumling, 1996 WL 705818 (12/10/96)
The court reversed the summary denial of a Rule 29.15 motion on the grounds that the motion was not in substantial compliance with Form 40. The motion is sufficient to apprise the trial court, appellate court, and state that the defendant seeks relief under Rule 29.15.

State v. Hendricks, 1996 WL 705881 (12/10/96)
The court transferred the case to the Missouri Supreme Court on the issue of whether a mere offer to sell under §195.101(37) requires a specific intent to consummate the sale. The court of appeals notes that since the defendant manifested an intent to sell, it would affirm.

State v. White, 1996 WL 706011 (12/10/96)
The conviction was reversed on plain error review because of the prosecutor's use of the defendant's post-arrest silence in an effort to impeach the defendant's alibi testimony at trial. The state elicited testimony from officers concerning the defendant's refusal to talk to them after she was warned, and also elicited an admission of silence from the defendant on cross-examination. No trial objection was made.

State v. Williams, 937 S.W.2d 330 (Mo. App. 1996)
The trial court did not abuse its discretion in refusing the defendant's attempt to enter an Alford plea, rather than an ordinary guilty plea, where the defendant acknowledged guilt.

State v. Duong, 935 S.W.2d 87 (Mo. App. 1996)
The court reversed sanctions against counsel for refusing to delete a claim that Missouri post-conviction rules were unconstitutional because of their restrictive time limits. The appellate court noted that the claims were easily disposed of and raised in good faith to preserve them for federal constitutional review, and the appellate court could not conclude that no circumstances existed where the laws of this state could be changed.

Griffin v. State, No. 69855 (1/21/97)
The court reversed the summary denial of a Rule 24.035 motion, since the movant had actually challenged a matter relating to his sentencing after revocation of probation, and did not challenge the revocation proceeding.

State v. Conley, 1997 WL 29207 (1/28/97)
The convictions were reversed for improper admission of uncharged misconduct evidence. Because the victims were 14 years old, they did not fall within MO. REV. STAT. §566.025 which applies only when victims are under the age of 14 years. No other exception to the uncharged misconduct rule operated to save the evidence.

State v. Phillips, No. 63423 (2/4/97)
The court reversed a conviction for murder because of the erroneous admission of the defendant's statement, "I was going to turn myself in for escaping custody because I had thought about it the night before." Whether or not this was a spontaneous declaration, it still constituted evidence of other crimes which was more prejudicial than probative. The only other evidence against the defendant was the testimony of two eyewitnesses, and the state strongly argued the escape as bearing on the defendant's credibility. That defendant had four prior felonies did not alter this analysis. The court also found error in the trial court's denial of a Batson motion without giving the defendant the opportunity to rebut the state's race-neutral explanations for its strikes.

State v. Newton, No. 63938 (2/11/97)
The appellate court declined to conduct an independent review of records reviewed in camera by the circuit court. The records concerned the competency of the state's key witness. The appellate court held that since competency issues are left to the discretion of the trial judge, no independent review was needed.

(cont'd on page 10)

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

State v. Fay, No. 70398 (2/11/97)
The defendant pleaded not guilty, waived a jury trial, and presented the case to the court on stipulated facts contained in investigation reports. The appellate court held that this was not a guilty plea and therefore Sup. Ct. R. 24.02 did not apply. The court also found that the trial court had properly insured that the waiver of a jury trial was voluntary.

State v. Price, No. 70139 (2/11/97)
The court reversed and remanded numerous convictions for sodomy. At the time of the offense, sodomy included hand to genital contact, but under amendments effective prior to sentencing, the offense was redefined as either sexual abuse, if forcible compulsion was involved, or sexual contact if no force was involved. Under Mo.Rev.St. 1.160, the defendant is entitled to the benefit of the amendments reducing the punishment for his conduct, and a new sentencing is therefore required. The court also remanded for an evidentiary hearing on the defendant's claim that counsel was ineffective for not striking jurors who indicated a problem with the defendant not testifying, especially since several jurors were struck for this reason. Counsel should be provided an opportunity at the evidentiary hearing to offer strategic reasons for not striking the jurors at issue.

State v. Hunter, No. 67127 (2/25/97)
The court reversed one conviction of endangering the welfare of a child but affirmed another. The count alleging that the defendant made the child drink a small glass of malt liquor before bed did not support endangerment, although the court found it reprehensible. However, making another child drink 40 ounces of malt liquor, with resulting vomiting and disorientation, was held to create a substantial risk to her health.

Southern District
State v. Sullivan, 935 S.W.2d 747 (Mo. App. 1996)
The court rejected without plain error review a challenge to the constitutionality of the charging statute which was first raised in the motion for new trial. To preserve a constitutional question of this kind, the issue 1) must be raised at the first opportunity; 2) must list the sections of the constitution claimed to be violated; 3) must raise the issue again in motion for new trial, and 4) must adequately brief the issue on appeal. Because trial counsel omitted step 1, no review was given. The court also rejected defendant's contention that the evidence was insufficient to show more than 5 grams of marijuana when the parts of the plant excluded by the statute were excluded from the weight. Once the state establishes that the substance is marijuana, the burden shifts to the defendant to prove that the substance contained portions of the marijuana plant excluded by statute.

Oliver v. State, 936 S.W.2d 242 (Mo. App. 1996)
The court remanded for specific findings as to the post-conviction motion where the motion court merely noted that the parties appeared through counsel, that the court grants the motion in limited part by vacating a count for resentencing, but "all other parts of movant's motion are denied."

State v. Friend, 936 S.W.2d 824 (Mo. App. 1996)
The court reversed a conviction for attempt to steal a utility trailer. The state's proposed instruction, which was given by the court, stated that the substantial step committed by the defendant was backing a pickup truck up to the trailer and hooking it up. However, the state failed to show that the defendant backed the truck up to the trailer. (The state could have submitted an aider and abettor theory, but failed to do so.)

State v. Flynn, 937 S.W.2d 739 (Mo. App. 1996)
This case sets out when an offer of proof doesn't need to be made to preserve an issue: "Generally, appellate courts will not review excluded evidence without a specific and definite offer of proof. We carved out an exception to this rule in State ex rel. Highway Commission v. Northeast, 421 S.W.2d 297... In Northeast an offer of proof was not needed because everybody at trial knew what the testimony would be.... [W]e created an exception to the rule requiring offers of proof. This exception is very narrow. First, it requires a complete understanding, based on the record, of the excluded testimony. Second, the objection must be to a category of evidence rather than to specific testimony. Third, the record must reveal the evidence would have helped its proponent." This exception may save appellate counsel on occasion,

but trial counsel are better advised never to rely on it, but rather to make a specific and detailed offer of proof on each occasion.

State v. Deprow, 937 S.W.2d 748 (Mo. App. 1997)
The court remanded for more specific findings as to the post-conviction motion, since the motion court order stated only that the court "finds that movant was not denied his right to effective assistance of counsel as granted by the constitution, and the motion to vacate judgment and sentence is overruled and denied."

State v. Swope, 1997 WL 21034 (1/22/97)
The state attempted to appeal the trial court's order finding the out-of-court statement by a child victim to be unreliable and therefore inadmissible. The appellate court found that this was an evidentiary ruling rather than a ruling suppressing evidence, and therefore the state could not appeal under MO. REV. STAT. §547.200(2).

State v. Fouts, No. 20019 (2/11/97)
The court reversed a second degree murder conviction because of the trial court's refusal to give a voluntary manslaughter instruction. The defendant's testimony supported the instruction, as he claimed his wife yelled and screamed at him in a heated altercation and threatened him with a knife. He also testified that she had stabbed him in the past with an ice pick. This presented a jury issue requiring the submission of voluntary manslaughter in addition to the self-defense instruction which was given.

State v. Tripp, No. 20008 (2/13/97)
The court affirmed on direct appeal finding, *inter alia*, no error in refusing joinder of separate burglaries. However, the court reversed and remanded for specific findings of fact and conclusions of law on 29.15 issues regarding failure of counsel to strike a juror for cause who indicated concern about a defendant's not testifying, and for agreeing to allow the jury to be taken out through a hallway where jailers were removing the defendant.

Eighth Circuit

United States v. Rouse, 60 Cr.L.Rptr. 1211 (8th Cir. 1996)
Refusal to allow defense counsel to question a court-appointed psychologist regarding his opinion that the five child victims had, in his opinion, been subjected to questioning that "was suggestive" of what their trial testimony should be was error. This compounded other error which occurred when the defense was not allowed to have the children examined by its own expert to determine if they had been influenced in their testimony.

United States v. Montgomery, 1996 WL 673374 (8th Cir. 1996)
A defendant was held to have a right to compel witnesses to try on a shirt whose ownership was relevant to the charged offense. The witnesses' invocation of the Fifth Amendment did not shield them, since the requested action was not testimonial in nature.

Reeves v. Hopkins, 60 Cr.L.Rptr. 1330 (8th Cir. 1997)
A defendant facing the death penalty is entitled to lesser offense instructions even in the face of a state statute or case law saying otherwise. Beck v. Alabama does not allow a "death or nothing" choice to the jury.

Other Jurisdictions

Weeks v. Jones, 60 Cr.L.Rptr. 1234 (11th Cir. 1996)
The district court erred when, after the execution of the petitioner it withdrew its order appointing counsel to a death row inmate who filed a habeas corpus action challenging his competence to be executed. A death row inmate is entitled to appointment of counsel regardless of the merits of his contentions, and therefore appointed counsel was entitled to attorneys' fees.

United States v. Blount, 60 Cr.L.Rptr. 1165 (5th Cir. 1996)
Police lacked valid exigent circumstances to pursue a suspect into a neighbor's home, especially where they waited 30 minutes to search for the suspect negating a "hot pursuit" theory. Nor did another neighbor's statement that the suspect probably fled into the neighbor's home and that there were probably drugs there provide probable cause for the warrantless search. *(cont'd on page 12)*

Case Law Update *(cont'd from page 11)*

Huynh v. King, 95 F.3d 1052 (11th Cir. 1996)
Failure to move to suppress evidence which would have been suppressed is a motion was made can be ineffective assistance of counsel.

United States v. Foster, 60 Cr.L.Rptr. 1181 (10th Cir. 1996)
Blanket suppression, in both state and federal court, was required when state officers executed a search warrant as though it were general, not limited to the specific items mentioned. This includes the marijuana they found, which formed the basis for the federal prosecution after DEA agents were called in by state officers conducting the search. The police misconduct in the execution of the warrant merited the blanket suppression, regardless of the officers' state of mind when they obtained the warrant.

United States v. Weaver, 60 Cr.L.Rptr. 1182 (6th Cir. 1996)
Using a preprinted search warrant application consisting mostly of boilerplate language with a few handwritten facts invalidated the warrant, particularly where the affiant took no steps to try to corroborate the informer's tip.

State v. Parish, 937 S.W.2d 745 (Mo. App. 1997)
The appellate court reversed the trial court's grant of a suppression motion based on a deceptive roadblock. As in Damask, the defendant exited to avoid an announced roadblock that didn't exist, only to be search at the top of the exit in the middle of the night, after being descended upon by a batch of sheriff's deputies and drug-sniffing fidos.

~ ~

NEW MEMBERS & MEMBERSHIP RENEWALS

Rusty Antel, Columbia
Glenn Bradford, Kansas City
Marsha Brady, Hillsboro
William J. Fleischaker, Joplin
George W. Gilmore, Jr., Sikeston
Milt Harper, Columbia
Bruce Houdek, Kansas City, *Sustaining Member*
W. Geary Jaco, Kansas City
James K. Journey, Clinton
Marianne Marxkors, Florissant
Patrick E. Richardson, Green City
Rick Steinman, Lindenwood College, St. Charles
Susan G. Watkins, Independence
Ronald D. White, Rolla, *Sustaining Member*
Cecil D. Williams, Kansas City
James D. Worthington, Lexington, *Sustaining Member*
Claudia J. York, Kansas City

Welcome to our new members, and sincere thanks to renewing members who support *MACDL*'s efforts year after year. Your dues pay for daily overhead like postage and printing, phone bills and travel expenses, as well an occasional scholarship to the National Criminal Defense College. Sustaining members voluntarily double their annual contributions, and are doubly appreciated. Special thanks to the Missouri Public Defenders and Assistants who maintain membership in *MACDL*.

Please check the expiration date on your mailing label. You'll find a renewal form inside the back cover of this *ACTION REPORT*. Feel free to copy it for friends and colleagues, as well.

THE WINNING BEGINNING *by William P. Allison*

(Reprinted with permission from VOICE FOR THE DEFENSE, Texas Criminal Defense Lawyers Association, April 1996)

This paper will be mercifully short. It is not its purpose to spend energy on the law of opening statements. Rather, we need to understand some of the techniques of a winning beginning.

If there is nothing else that comes from this short learning session on opening statements, it must be that the opening is the **story of your case.** The technique for delivering the story of your case is, not surprisingly, **storytelling.** It is amazing to sit in courtrooms and listen to lawyers open to juries. How stilted the language is, filled with tortured phrases like, "the evidence will show. . ." or ". . . and then the defense will then call to the stand. . ." or "it is our contention that. . ." More often than not, the lawyer uses about three or four of these favorites and then continues to repeat them throughout the opening statement. The result from a juror's point of view is that the advocate standing in front of them is trying to sound like what he or she thinks a lawyer ought to sound like. They immediately recognize that the way the lawyer talks to them is not the way they talk or the way anyone they know talks. It usually comes out as boring, condescending, repetitive, and just not listenable. If they aren't listening, you're not winning.

But what if there was another choice? What if you did not have to stand up before a group of people you do not know and make a fool of yourself by imitating a bad lawyer doing a bad job? What if you could stand before the jury and tell them a fascinating story, one that had a beginning and an end, one that had heroes and villains, good guys and bad guys? What if when it was over they were ready to vote for you? Well, it can happen -- and it can happen the very next time you set foot in front of a jury. Just relax a little, forget you are a lawyer, try to remember when you were once a legitimate member of the human race. Let's reconstruct the art of storytelling, and the art of winning.

Preparation

We've talked a little about what opening statement is and how to do it. How do you get there? The traditional way of preparing for trial is still the best way -- prepare backwards. First, the jury charge; next, the final argument; then the evidence; then opening statement; and finally, jury *voir dire.* This still makes sense. It is hard to get to the end of the trial where the charge and argument are, if you don't know where you are going. By defining the ending first, you always have your goals in mind. The more experience you have, the more all these stages of preparation tend to run together. However, if you are new to the game of trial law, do it by the book -- do it backwards! Make your trial notebook with at least these five parts in it. After being retained, talking with your client, getting a copy of the charging instrument and, maybe, having a conversation with the prosecutor, you are ready to build the notebook. The first thing that goes in is the charge to the jury with all the defenses and justifications that may be relevant to your case.

When you start the process of getting ready for trial, create a file for opening statement. This can be a paper file or a computer file if you are computer-agile. You need to be able to get to this file quickly and easily so you can put things in it. What things? The thoughts you have at various times of the day or night that you catch as they come tumbling out of your head. That means that you must devise a system of catching these thoughts. Some of us are disciplined to always carry our calendars around with us. Others have some other method of taking notes. Simply sticking a notepad and pen in your pocket is sufficient if you train yourself to take it out and write down your thoughts. You need to be able to get to it while you are cooking, changing the baby's diaper or taking a bath. Your note taker must be at hand while you are waiting for a plane, in a taxi, at the hotel or even at dinner. You must have a system of catching your thoughts or you will lose them. As you catch these thoughts, you write them down and they go into your opening statement file. Don't give a thought to order at this point.

Write It Out

Now you are at the point in your preparation where you are beginning to actually set aside time to work on your opening statement. How do you actually do it? It's done by committing a trial heresy -- you write it out.[1] You can use a computer or do it in

Winning Beginning *(cont'd from page 13)*

longhand, but if you are going to win in opening, you need to write it out. This is quite different from saying you get to read it to the jury; you don't. The exercise of writing out the story of the case lets you see it develop. It lets you put your hands on it and mold it into the best story. It tells you immediately when your sentences are too long, when you have used big words when little ones work better. It lets you recognize "legalize," so you can get rid of it. Writing out the story lets you do all this while learning the ebb and flow of the story of your case, while you add and subtract facts to make the more compelling parts last longer, and shorten that which is boring or not in your favor. Maybe the most important thing that writing out your opening statement does is make you take the time needed to do it right.

The first and last sentences of your opening are critical. This follows the rules of primacy and recency -- i.e., the first and last things you say are the most important. Good trial lawyers know you want to start your opening statement with a good line, one that hooks the jury. Those lawyers will spend a lot of time thinking of what to open with. (One essential part of this first sentence is a deep breath, a pause, and a centering of yourself before the jury.) Equally important is how you end your opening statement. Again, spend whatever time it takes to find the good ending. One way of looking at an opening is circular rather than linear. A common technique is to open and close your story of the case with the same statement. That statement might be your overall theory of innocence or defense or justification in your case. Although it is easier for the jury to remember a story told in a chronological sequence, you do not have to start at the beginning. You might start with the single most significant event in the case, tell it in a sentence or two, then go back and pick up the story line from the beginning. This allows you to come back and end with the beginning. Remember, this statement is still part of the story, told from the storyteller's point of view, so it is not out of context, like your actual argument of the theory of the case.

Finally, reduce your written story to a workable outline or set of topical words which you can take with you to the podium. Don t be afraid to refer to your notes to make sure you have covered the field. Your opening will be learned by this time, not memorized. Memorization is not the goal of all this preparation. It is an understanding of the story that goes far beyond memorization; it comes from your knowledge and sincere belief in the facts of your case. **Your mastery of the facts** should be such that the story is part of your skeleton and muscles, not just your mind.

Passion

What really goes into your opening statement is what makes you passionate about your case. Caring is contagious. This topic should logically go under the storytelling part of the paper, but it is so central to the formation of the story itself as to deserve its own headline. If nothing makes you passionate, if you just don't seem to care, give the case to someone else to try because you cannot do the job you need to do to represent this client. This passion is what you are searching for when you are putting your thoughts down on those slips of paper and throwing them into the opening file.

You can always do a momentary and relatively accurate analysis of any opening statement immediately after it is over by simply asking yourself, "Do I care?" If you don't, the opening was not a winning beginning.

Storytelling

This is the heart of what you need to learn to do a winning beginning. It's not that difficult. As luck would have it, we are all natural storytellers, and natural listeners. Everyone likes a good story, and this includes jurors. (It should come as no surprise to you that judges are susceptible to this magic, too.) You go where the power is, and the power is in the story of your case. There are a couple of things common to all good stories.

First, stay in the same tense -- almost always the past tense. If you are going to tell a good story of your case, you cannot continually keep breaking into present and future tenses by using old, worn-out standards like, "We will then call to the stand _____, who will tell you. . ." When you do this, you immediately jerk the jurors out of the rhythm of the past and into the glaring and uncomfortable light

of their present, unfamiliar position. Then you jump back into the story and expect them to relax comfortably back into being good listeners. It just doesn't happen that way. You can avoid this by staying in the past tense. Again, this includes the opening and closing hooks to your story. Those may be out of chronological order, but they are still told in the past tense and from the storyteller's point of view.

Second is the concept of good versus evil. It may be expressed as the good guys versus the bad guys, or heroes and villains, but it is always present in good stories. Think in polar opposites. Explore these concepts with every witness who will appear in your case. Some, of course, appear in the roles of supporting witnesses and cannot and should not be unnecessarily painted with a good or bad brush. In many criminal cases, you want to paint the opposition as mistaken and therefore simply human, while representing your client as a victim of this understandable human catastrophe. Give thought to the words you use to describe the major witnesses in the case based on how you will depict them in the story. By the end of your opening statement, the jurors must know who is good and bad, or right and wrong, or victim and perpetrator.

Talk about your client. It is a rare criminal case indeed where the lawyer does not come to like his or her client. That is very different from not liking what the client may have done or what the client is accused of doing. We always discover good things about the person we represent. They may be funny things, they may be sad or compelling facts; sometimes they are facts that truly make us humble. These are the things that you look for in your client. Explore how these facts can be gotten into evidence without opening bad doors, and then how and where to incorporate them into the opening statement.

Details -- A Thorough Opening

You need to get the details of your case out in your opening.[2] This little piece of magic seems to run contrary to the idea of being concise, but it is necessary if you are going to win at the beginning. Its magic exists in the telling of an interesting story. An interesting story will have descriptive adjectives, action verbs and colorful phrases. For instance a "look" might be a "glance," a "glare," or an "icy stare." People don't just say things, they "spew" or "spit" or "whisper" or "scream" important statements. All this can be gotten into evidence if you ask the proper witness the right question. "Describe how you said that." If you are really telling a story, the time will pass quickly and the jurors will stay involved in the facts. Because what you are saying is interesting to them, they will stay tuned to you. As a result, other good things will happen. The jury will know the position you will take with each witness called. They will be psychologically set up to accept your version of the facts of the case when they hear them, and to reject the facts from the other side because they do not fit into their now-preconceived idea of the case.

Another way of expressing what you are doing in this area is that you are **painting a word picture** for the jurors. Many things we treasure visually are valued because of the detail, the fineness of their existence. That is what you strive for in the telling of your story. You need to consider yourself an **"Imagineer,"** -- one who transports juror's imaginations out of the jury box and into a world you create by the use of the word pictures you paint. You want each listener to vicariously live the story through your client and to feel what he or she felt at the time.

The single most important thing you can do to become a master of the facts in order to paint a good word picture is to go to the scene. We learn so much faster through visualization than through hearing things. If you've seen the place where the incident occurred, you can make up a thousand descriptions culled solely from the database in your mind left by the impression of the scene.

How long should the opening be? Probably longer than you think, but the time will go fast. Good storytelling is compelling, and if you are good, people will listen and be unaware of real time passing. It is the boring opening statement, short though it may be, with all its broken time sequences and lawyer talk that seems interminable. The jurors know immediately they are being talked to, not involved in the story. If the prosecutor has done the usual cursory opening statement, you will have a real advantage here by doing a complete and thorough opening statement.

Winning Beginning *(cont'd from page 15)*

Visuals

Use visuals. **A picture is worth a thousand words.** It can certainly be worth a thousand words to you in crafting your opening, and it can quickly transport the jury back to the time and place where the incident occurred. Visuals are both comforting and clarifying to juries. If you can, work a visual or two into your opening statement. Use visuals especially in places where distance and direction are critical. These are two things jurors simply cannot hold in their memories. Just think about the testimony given by law enforcement officers who are forced to give distance and direction testimony without the use of a diagram. None of us can follow this type of testimony -- and we, the pros, are used to it. The jury needs to see it. They may need a combination of diagrams and photographs big enough for all the jurors to see and for you to realistically use in front of them.

Objections and Other Problems

One problem often encountered in opening statement is the judge or prosecutor who is not comfortable unless they hear the phrase, "The evidence will show," several times. There are a couple of things you can do to defuse this situation. First, talk to the judge before the trial and explain that, although you will not be using the phrase, what you will be saying will be supported by the evidence. Second, use a poster board with the phrase, "The evidence will show . . ." in large bold print, placed on a stand behind you. Invite the judge to tell the jury, before you start, that what you are saying is what the evidence will show and that is why the board is there. As a last resort, you may have to throw this drama-killing phrase into your opening statement once in a while, but use it sparingly as it does break the suspended reality of the story of past events.

What about making objections to the prosecutor's opening? Try to stay away from them. The prosecutor's opening is not going to be as good or as thorough as yours, and you can win the opening by just being better. The danger of objections is that you create sympathy from the jury for the prosecutor

The one area where you might object is if the prosecutor attempts to tell the jury what the law is and does so by paraphrasing. This almost never works, and is almost always wrong or misleading. If the prosecutor is going to tell the jury the law during his or her opening (you need to keep away from this since it is inconsistent with storytelling) you might object if he is doing it wrong. The consideration that weighs against making even this objection is that this law talk is so boring, jurors are not listening anyway, and if the prosecutor misstates the law during opening, you might be able to come back in closing and make the jury believe he was trying to mislead them at the outset of the case.

DO NOT OVERSTATE YOUR CASE. If you are faced with this type of choice, be conservative and understate your case. Understating your case and telling a compelling story are not at all inconsistent. It is certainly much more fulfilling from the jury' s point of view that the facts in evidence are even worse than you painted them to be.

If you have a controversial piece of evidence, try to get pretrial rulings on admissibility. Secondarily, know your trial judge and do the research; be ready with trial briefs to overwhelm opposition if they object to the introduction of the evidence. In the final analysis, if you do not know whether a piece of evidence is admissible, leave it out of the opening.

Some Final Thoughts on Preparation for Opening -- The Fear List

Involve yourself in the case. Make a fear list. This is the list that you make as you go about your trial preparation. Your fear list tells you before you start what things scare you the most about the case. If you are inexperienced, you may be afraid you will not appear as smooth as more experienced lawyers you admire. Don t worry. Being a little rocky is quite charming if it is the real you. You don't even need to apologize for it. Jurors want to save someone, and maybe that will be you. You will only have this advantage while you are truly inexperienced, so make the most of it. What scares you might be a fact, a prior record, the judge or prosecutor. Some of this, facts and legal questions, can be addressed by thorough preparation and legal research. This is usually an area where you should have the advantage over the prosecutor.[3] If it is inexperience in dealing with the judge or prosecutor, go find a more seasoned lawyer who can sit down

and talk you through your fear. Whatever scares you, make the list and then deal with the items on it. **You cannot be effective if you are frightened by that which you refuse to confront.**

Conclusion

There is much that each of us can do right now to make the next opening a winner. Use some of these suggestions immediately and see if you don't get immediate results. It takes time to learn your case this way, but it is time well spent if it allows you to win early.

1 This technique comes from one of the most gifted of trial advocacy teachers, Jo Ann Harris, now head of the Criminal Division for the Department of Justice. As a young teacher in the 70s, I began teaching trial advocacy with her. She was adamant about her assistants writing out their openings, closings and examinations. I thought she was crazy, just part of the "old school" I had been sent to overthrow. I was wrong. Gerry Spence, in his videotapes on openings, says the same thing.

2 This is one I learned from Gerry Spence. It was something I had not been doing, but have been doing every since buying his tapes on this subject. He's dead right.

3 You might want to read *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials*, Robert Klonoff and Paul Colby, Mitchie Company, 1990. It makes a sound argument, one which we have used successfully for ordering types of facts and evidence in jury trials.

UFOs, Comets, Cults and The Dunc

by Jerry Handley

On March 9, 1997, with the comet Hale-Bopp approaching as a marker, Bob Duncan was called to a higher court. Surely, the Dunc saw the signs long before Do & Ti, or Bo & Peep. Or perhaps he was in the advance party called to represent Bo & Peep at the ultimate sentencing hearing. The Dunc leaves behind a legacy of memories, and a host of people he helped out of trouble. While I know he'd rather be here in court, I also know he had reason to be proud of what he did while standing with his brothers defending the accused.

Many members of this Association may not realize Bob was in the vanguard of organizing MACDL. He drank whiskey and reflected on past and current trials at our very first meeting.

A highlight of his career was his successful representation of Bobby Ashe before the Supreme Court of the United States (Ashe v. Swenson). He made good law in numerous appellate cases. Respected as a great criminal defense lawyer at the trial level, he was amazing as an appellate attorney.

In his final closing argument (written out as his last wishes), Bob asked for things he would need on his journey, to-wit: whiskey, cigarettes, reading glasses, a flashlight, a book. I'm not sure Bob's going to like Bo Appellwhite, who will probably be bitter that the Dunc preceded him on his intergalactic voyage to a higher place. I do know Bob would be pleased for us to picture him representing Bo & Peep. Think of the stories he'd tell!

Defending Criminal Cases

April 25-26 • St. Louis

Regal Riverfront Hotel

For late registration, fax your name, address, phone & bar numbers to The Missouri Bar, 573/659-8931, IMMEDIATELY. Tuition for program, course materials and lunch: $195 - Lawyers or nonlawyers; $165 - MACDL members; $100 - Out-of-state public defenders; Fee waived for Missouri Public Defenders.

(cont'd on page 18)

For room reservations, call the Regal Riverfront at 314/241-9500. The Downtown Marriott and Adam's Mark are within two blocks of the seminar.

The program, presented by **MoBarCLE, The Missouri Association of Criminal Defense Lawyers, and The National Association of Criminal Defense Lawyers,** has qualified for 9.1 MCLE Hours, and 2.1 Ethics Hours.

~ ~ ~ ~ ~ ~ ~ ~ ~ ~

Moderators: J.R. Hobbs & Charles M. Rogers, K.C.; Cathy R. Kelly, St. Charles

Friday, April 25

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

8:45 - 9:00 Welcome: *James D. Worthington,* Lexington, President, Missouri Association of Criminal Defense Lawyers

9:00 - 10:00 **Practical Aspects of Evidence**
Honorable Charles E. Atwell, Judge, Sixteenth Judicial Circuit of Missouri
Larry A. Schaffer, Kansas City

10:00 - 10:15 **Refreshment Break**

10:15 - 12:00 **Ethics in Criminal Defense**
John Wesley Hall, Little Rock, Arkansas, *NACDL*
James H. Voyles, Indianapolis, Indiana, *NACDL*

12:00 - 2:00 **Luncheon - Awards Ceremony - Luncheon Address**
Kevin McNally, Frankfort, Kentucky, *NACDL*

2:00 - 3:00 **What Every Criminal Lawyer Should Know About Developments in Missouri Juvenile Law**
Caterina DiTraglia, St. Louis
Michael Goldman, St. Louis

3:00 - 3:15 **Refreshment Break**

3:15 - 4:15 **Building a Successful Criminal Law Practice in the 90s**
Dennis M. Kleper, Skokie, Illinois, *NACDL*

4:15 - 5:00 **Missouri Association of Criminal Defense Lawyers Annual Membership Meeting** ***(All attendees invited)***

5:00 **Reception - Cash Bar** ***(All attendees invited)***

Saturday, April 26

9:00 - 10:00 **Review of Recent Developments in United States Supreme Court Decisions**
Milton Hirsch, Miami, Florida, *NACDL*

10:00 - 10:50 **Losing Control in Voir Dire Intentionally**
M. Shawn Askinosie, Springfield
Stacy Schreiber, Galveston, Texas

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

11:00 - 12:00 **Panel Discussion (Attendees may submit questions on municipal, state or federal matters of interest)**
Panel: *Milton Hirsch, M. Shawn Askinosie, Linda Murphy, Scott Rosenblum*

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
Law Students, Paralegals & Legal Assistants $25.00

NAME _____

FIRM _____

ADDRESS _____ E-MAIL _____

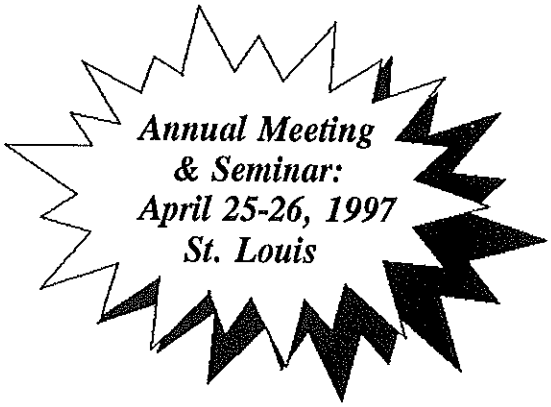
CITY _____ STATE _____ ZIP _____

PHONE _____ FAX _____

DATE _____ AMOUNT ENCLOSED _____

_____ **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; 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 _____