MACDL

Missouri Association of Criminal Defense Lawyers

Action Report
Summer 1997 Vol. V, No. 3

PRESIDENT'S LETTER

by Elizabeth Unger Carlyle

Summer is always a disorganized time around our house. Our two school-age children lose their regular five day a week routine, and begin various comings and goings at irregular intervals. We try to take some vacation. The normal pattern of life is disrupted. This disruption has given me the incentive to set aside my normal pursuits and think about my goals for MACDL this year. It is an honor to be your president. I hope to make a positive difference for our organization this year, but I need your help.

I have been practicing criminal law for almost twenty years, and the largest office I have been in had four lawyers. I've been on my own for ten of those twenty years. I look to MACDL to keep me in touch with other criminal defense lawyers and to give me a way to make my voice for justice heard. For me, the chief value of MACDL is the opportunity it provides for individual criminal defense lawyers to have a place to share their concerns, triumphs and tragedies and to have a way to voice our collective concerns.

How can MACDL improve its ability to do that? First, **there need to be more of us!** The Texas Criminal Defense Lawyers Association has six times as many members as MACDL. Now, Texas is a bigger state than Missouri, but I don't think there are six times as many criminal defense lawyers there. We need to make sure our friends in the criminal defense bar understand the benefits of belonging to MACDL and encourage them to join. I'd like to recognize members who are doing this, and so, beginning this month, the membership application includes an optional "sponsor" line. When you give an application to a friend, put your name on the "sponsor" line so we'll know who invited them. We're exploring other ways to increase membership, including contacting the rather substantial number of people who belong to NACDL but not MACDL, but the basic way we will grow is by heeding the maxim, borrowed from Texas, "EVERY MEMBER GET A MEMBER."

Second, we need to have more **active** members participating in our activities. These include CLE, writing for the newsletter, working with law students, working on committees, and thinking of other ways our association can spread the word about the need for equity in the criminal justice system. I have begun writing to new members about the opportunities for working in the association, but I know there's plenty of old blood which hasn't been stirred lately. The active MACDL members I know are a great bunch of people. I urge you to join them and get to know them.

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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)*

Third, we need **more visibility**. Last winter, we had an excellent presentation on media relations by Kathryn Kase from NACDL. This year, I've appointed Dan Dodson, a board member with a journalism background, to chair a public relations committee for MACDL. I want to make sure that when the news media want an opinion about a Missouri criminal justice issue, they call us. If you have information about media people in your area who we should get to know, I urge you to let Dan know about it. One way in which we recently made our way into the news was through presenting a resolution at the Missouri Bar's Criminal Justice Committee Spring Meeting urging the governor to implement the ABA recommendation for a moratorium on executions. I can't tell you that this action resulted in a moratorium on executions, but it did focus attention on a criminal defense issue which is of pressing importance.

Finally, we need to **get together more**. I'd like to see social gatherings happening on a regular basis in all of the metropolitan areas where we have members. If you are interested in facilitating this in your area, please let me know. I know many of you, like me, are practicing solo or in small offices. We need each other! By the time you read this, you should have your new MACDL directory and so you'll know where to find each other. I urge you to do so.

When I hear calls for vengeance and retribution against persons accused or convicted of crimes, I often feel as if I am standing against the tide of public opinion. I do see glimmers of hope in the occasional voices that speak out for mercy and rationality in sentencing and the preservation of civil liberties. I'd like for MACDL to be available to stand behind each of you to fan those sparks of hope, and to support you when you are the object of anger. Please let me hear from you.

HONORS & AWARDS

At its Annual Awards Luncheon last April in St. Louis, the MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS presented its *Atticus Finch Award* to **David C. Hemingway**, voted by his peers in the St. Louis Public Defender Appellate Unit as the most diligent and caring of advocates for those with little hope, pursuing their last appeals. Once he returned to his office after being mugged. David was not outraged, but excited by his insight that victims of such swift crimes could not possibly be reliable identification witnesses!

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MACDL also honored **Donald L. Wolff** of Clayton for his many years of outstanding achievement and devoted service to his clients, his community, this organization, **NACDL** and the defense bar as a whole. Don has worked long and hard for the cause of justice and the rights of the individual, as well as to improve the quality of life in his community.

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At the Annual Federal Defender's Conference in San Diego last spring, **R. Steven Brown** of the Springfield Federal Defender's Office was presented with the outstanding Assistant Federal Defender's Award in the presence of nearly 400 of his peers. Steve has devoted over 23 years to Federal Defender service, and has earned a stellar reputation in the criminal law community.

Congratulations to these outstanding representatives of Missouri's defense bar!

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

United States v. Gonzales, 117 S.Ct. 1032 (1997)
A sentence for using or possessing a firearm in connection with a drug offense (18 U.S.C. §924(c)) cannot run concurrently with a state sentence. It must be consecutive to both state and federal sentences imposed upon the defendant.

Young v. Harper, 117 S.Ct. 1148 (1997)
A pre-parole program instituted in Oklahoma to reduce prison overcrowding was sufficiently like parole to prevent the summary re-imprisonment of the pre-parolee without providing the procedural protections of *Morrissey v. Brewer*.

Chandler v. Miller, 117 S.Ct. 1295 (1997)
This case invalidates a Georgia law requiring candidates for public office to undergo drug testing. The court held that the hazards cited as the basis for the law were merely hypothetical, that the drug testing was not a reasonable means of avoiding those hazards since candidates could simply remain drug free during the testing period, and the officers in question did not perform high-risk or safety-sensitive tasks.

Missouri Supreme Court

State v. Barnes, No. 79348 (3/25/97)
The court affirmed a constitutional challenge to Mo. Rev. Stat. §287.128, dealing with workmen's compensation fraud. The defendant was a claims adjuster who misled a defendant in several ways, inducing her to accept a settlement that was too low. This violated the statute, which prohibits making false or fraudulent statements or material misrepresentation for the purpose of obtaining or denying any benefit. The statute was not vague or overbroad.

State v. Carson, No. 79120 (3/25/97)
The court reversed a conviction for drug trafficking, finding that the "bringing into the state" element has a requisite mental state of "knowledge" as does possession of a controlled substance. (See Mo.Rev.Stat. §195.223.2.) This is true although the statute contains no mental element. The MAI-CR instruction used at the trial had not been updated after a statutory change, and provided for a conviction if the defendant was "reckless". A new trial was therefore required. The court held that lower appellate courts should not follow MAI instructions where they are in conflict with substantive law.

State v. Roll, No. 76570 (3/25/97)
The court affirmed a death sentence after a guilty plea. Even if testimony from the victim's family urging the death penalty was error, it did not affect the trial court's decision and was therefore harmless.

State v. Basile, No. 77123 (3/25/97)
The court affirmed a death sentence, overruling all challenges to the prosecutor's argument. These included an argument that all of Perry Mason's clients were innocent, but defense counsel had not argued her client's innocence (apparently a response to a defense argument that defense counsel was no Perry Mason); a reference to the defendant as "Mr. Evil' (permissible because the defendant had referred to himself as "the desk of evil"); the statement that the murder was one of the most vicious and cold-blooded in the history of the county (argument was improper but not so egregious as to constitute plain error, and there was no objection).

State v. Hendricks, No. 79513 (4/29/97)
The court sidestepped the question of whether an offer to sell is sufficient to support a conviction for sale of drugs where there is no evidence that the defendant ever possessed the drugs. The court found that the appellant's brief did not adequately address the issue, refused to speculate on his argument, and affirmed the conviction.

State v. Taylor, No. 78086 (4/29/97)
The defendant's conviction was affirmed but the case was remanded for a new penalty hearing. Among other issues, the court rejected the defendant's contention that voir dire should be videotaped to permit the appellate court to observe prospective jurors on appeal. The penalty reversal was required because the prosecutor argued, over objection, that the jury could be mad and angry at the defendant and base their decision on their emotions. Although the jury failed to agree on punishment, the error was not harmless because they could have sentenced the defendant to life imprisonment. It was also error to admit the opinion of the victim's family that the death penalty would be appropriate.

State v. Skillicorn, No. 78864 (4/29/97)
The court affirmed the conviction and death sentence. The primary trial issue was the admissibility of a co-defendant's statement as a statement against interest. The court found that the statement, a confession made to multiple law enforcement officers, lacked sufficient indicia of reliability. The court also affirmed the admission of evidence of subsequent bad acts as relevant to the defendant's intent in the charged offense. At the penalty phase, the court affirmed the exclusion of a defense expert as a discovery sanction when trial counsel refused to permit the prosecutor to inspect the expert's notes which he had brought to court with him.

State v. Simmons, No. 77269 (4/29/97)
Venue was proper in Jefferson County, where the victim was abducted, because the defendant formed the intent to kill there. The prosecutor was entitled to ask voir dire questions about whether the venirepersons could impose death on a person who was seventeen years old at the time of the crime. The defendant's confession was admissible. Due process was not denied by the presence of cameras in the courtroom and extensive media coverage of the trial. There was no ineffective assistance of counsel. Conviction and death sentence affirmed.

State v. Smith, No. 77337 (4/29/97)
The defendant's statement was not inadmissible due to his delusional condition or to his use of cocaine and marijuana. A defendant does not have a constitutional right only to confess when rational and properly motivated. When the jury cannot reach a decision on punishment, the judge may consider all of the aggravating circumstances. He need not determine the aggravating circumstances agreed or rejected by the jury. The denial of the post-conviction motion without an evidentiary hearing was affirmed. Conviction and death sentence affirmed.

Court of Appeals, Eastern District

State v. Lee, No. 67816 (3/4/97)
The trial court sentenced defendant to thirty and three years to be served consecutively, but the written judgment inaccurately stated that the sentences were concurrent. Even though a nunc pro tunc order was entered after notice of appeal was filed, it was proper because it merely corrected a clerical error.

Strickner v. State, No. 70750 (4/8/97)
The trial court erred in imposing an extended sentence based upon the defendant's admission of prior offenses when the defendant was not charged as a prior and persistent offender. The sentence was imposed as part of an agreement under which the defendant was to receive probation, which was later revoked. Although the plea was voluntary, remand was required for amendment of the information and resentencing.

State v. Gillespie, No. 68066 (4/22/97)
The defendant is entitled to resentencing under MO. REV. STAT. §1.160 where the statute was amended prior to trial but after the commission of the offense to make the defendant's conduct a lower grade of offense.

Riley v. State, No. 70248 (4/29/97)
The court remanded for a Luleff determination, since the record displayed no activity of counsel from the time of appointment and entry of appearance until well after the time to file an amended motion. A Luleff statement was filed five months after the attorney entered an appearance. Since counsel on appeal asserted some claims which could have been raised in an amended motion, a hearing is required to determine whether motion counsel abandoned the defendant.

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

State v. Kilburn, No. 69877 (3/11/97)
The court reversed a conviction for DWI where the trial court failed fully to advise the defendant of the perils and dangers of self-representation in advance of the trial date, and while defendant had time to heed the warnings and take other action. The defendant went through a couple of attorneys, and finally the court, after giving several continuances to the attorneys, set a trial date. Defendant's last attorney moved to withdraw two weeks before trial. When the defendant appeared for trial without counsel, the trial court required him to proceed unrepresented.

State v. Townes, No. 67513 (3/18/97)
The trial court remanded for a hearing on the post-conviction motion allegation that counsel was ineffective for failing to file a motion to sever the count of possession of a concealable firearm since this count required proof of the defendant's prior felony, which would have otherwise been inadmissible. The motion court must make a determination as to the validity of any trial strategy reasons offered by counsel at the hearing.

Court of appeals, Southern District

State v. Malicoat, No. 20644 (4/14/97)
The defendant's offer of proof consisted of defendant's testimony as to why the employer might fabricate evidence against her in this forgery case. The materiality and relevancy of the offer was unexplained, and the offer contained inadmissible hearsay. When an offer of proof consists of evidence which is admissible in part and inadmissible in part, the court is justified in rejecting the entire offer.

State v. Bishop, No. 21088 (4/21/97)
The court reversed a drug possession conviction because of the failure to strike a venireperson who indicated difficulty with the presumption of innocence if the defendant did not testify. Neither the state nor the judge followed up on this response. In absence of further inquiry showing an ability to be fair and impartial, the venireperson, who served on the jury, should have been stricken for cause.

State v. Roberson, No. 21001 (3/21/97)
The objection to the question "What did [defendant] tell you about his condition" that the question was "vague" did not preserve the issues of relevancy and evidence of prior bad acts. (The response was that the defendant said he was an addict.) Trial objections must be specific and cannot be enlarged on appeal.

State v. Swinson, No. 20882 (3/19/97)
The DWI conviction was reversed for insufficient evidence when the defendant was found sleeping in his car well off the road. The car was not running and the keys were not locked in the ignition. There was no showing that the car had recently been running. (The court notes that the new definition of "operating" a motor vehicle under Mo.Rev.Stat. §577.001.1 requires physically driving or operating a motor vehicle, but this did not apply because the offense was before the statute's effective date.)

Court of appeals, Western District

State v. Larson, 941 S.W.2d 847 (Mo. App. W.D. 1997)
The court reversed convictions for 50 counts of animal abuse as each count merely charged the defendant with mistreating a "pig." When the defendant requested a bill of particulars, the state should have identified each pig specifically (by gender, breed, markings, etc.) so as to prevent multiple prosecutions. (Somehow, it seems fitting that this case was decided on April Fools' Day. The mind boggles at a charging instrument describing fifty pigs individually.)

State v. Zimmerman, No. 52632 (4/1/97)
The defendant was charged with felony assault and armed criminal action. A lesser included offense instruction on misdemeanor assault was also given. The jury returned not guilty verdicts as to Counts I and II, and also returned a guilty verdict of misdemeanor assault. However, the trial court failed to notice the guilty verdict, found the defendant not guilty, and discharged the jury and the defendant. The state appealed. The trial court found that because the verdicts on the assault were inconsistent, a new trial is required on the assault count. This case presents a comedy of errors which turned out not to be very funny.

State v. Whitmore, No. 48754 (4/15/97)
The court reversed one count of robbery and armed criminal action where the counts in question involved property owned by the store which was not in possession of the alleged victim at the time it was stolen. Although there was a reference to the right to remain silent in final argument, it does not require reversal in light of the overwhelming evidence against the defendant.

State v. Booker, No. 50027 (3/4/97)
Argument, in response to a defense argument that a foam cup was not tested for fingerprints, that "You know everything was tested. If they truly thought it wasn't tested, they can request it," was improper in that it shifted the burden of proof. The error was harmless here in light of its brevity and the substantial evidence against the defendant.

State v. Wells, No. 52914 (3/4/97)
The court affirmed the conviction, but set out the requirements for admissibility of hearsay statements as declarations against penal interest. The exception applies only if the statement has substantial indicia of reliability, implicates the declarant, and, if true, exonerates the defendant. Relief was denied here because this exception was not met.

State v. Vaughn, No. 52865 (3/11/97)
The convictions for first degree assault and armed criminal action were reversed because the evidence did not show that the victim sustained a serious physical injury, and the weapon was a kitchen-type knife. The evidence did not even support a conviction for second-degree assault because there was no evidence of physical injury. Remanded for trial for the offense of third degree assault.

State v. Ray, No. 52109 (3/11/97)
The conviction for murder was reversed where the trial court excluded relevant evidence, including threats made to the defendant and his family before the shooting. Defendant contended that he armed himself before going to the victim's house because of these threats, and that the gun went off accidentally during a struggle. The exclusion of the evidence of the threats prevented the jury from hearing the full picture. An excellent offer of proof at trial, including the use of live witnesses, was material in this decision.

State v. Folson, No. 52636 (3/18/97)
The court granted the defendant's motion for new trial, and the state appealed. The trial court then rescheduled the trial and, when the state refused to appear, dismissed the case with prejudice. This was error, since the trial court lost jurisdiction when the appeal was filed. However, the appellate court affirmed the grant of a new trial.

State v. Friend, No. 51797 (3/18/97)
The DWI conviction was reversed for lack of evidence. The defendant drove in an extremely bizarre way, and tested positive for methamphetamine, but there was no evidence offered that his driving behavior was the result of the methamphetamine. This is different than alcohol, where the law provides that a BAC of .1 or above is prima facie evidence of impairment.

State v. Morrow, No. 50160 (3/25/97)
The court affirmed convictions against a contention that some misconduct occurred when a co-defendant's attorney advised him not to testify for the defendant. Counsel for defendant and co-defendant were public defenders from different offices. There was no conflict of interest, and the co-defendant's attorney gave the same advice any attorney, private or public, would have given in the situation.

State v. North, No. 52167 (3/25/97)
The defendant received a new trial on his 29.15 motion while his first direct appeal was pending. He then dismissed the appeal. After his conviction, he claimed that he was entitled to dismissal because of a speedy trial motion filed in his first trial. The court found this issue was waived by the dismissal of the first appeal.

State v. McClanahan, No. 51634 (3/25/97)
The conviction for interference with custody was affirmed. The prosecutor committed error by asking irrelevant and prejudicial questions about the defendant's drug use, addiction, arrests, and having been contacted about termination of her parental rights. However, the error was harmless in light of the overwhelming evidence of guilt. The error was harmless as to sentence because no request was made to the trial court to reduce the punishment assessed by the jury. (A dissent found the error harmful as to sentence.)

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

State v. Fenton, No. 50783 (4/1/97)
The court reversed the determination that the defendant was a Class X offender. Since he was a persistent offender and had committed a Class C felony, the trial court deemed the defendant to have committed a Class B felony using Mo.Rev.Stat. §557.021.3. However, his offense was stealing, a code offense, so this section did not apply and the Class X designation was incorrect.

State v. Pollard, No. 52625 (4/1/97)
The factors to find outrageous governmental conduct which invalidates a conviction are: 1) the manufacture by police of a crime that would not otherwise have occurred; 2) engagement by police in the criminal conduct; 3) use of appeals to humanitarian instincts, temptation of exorbitant gains or persistent solicitation to overcome the defendant's unwillingness to engage in the illegal conduct; and 4) a desire on the part of police to obtain the conviction of the defendant without a movie to prevent further crimes or protect the public. If these are established, the defendant's lack of predisposition need not be shown. Here, however, the conviction was affirmed because the evidence did not meet this test.

TOP 10 INDICATORS THAT YOUR CLIENT'S IN TROUBLE WHEN YOU GO TO TRIAL

by Lew Kollias

10: The judge knows your client's inmate registration number by heart since he has appeared in front of him so many times.

9: Members of the jury roll their eyes and shake their heads when your client enters the courtroom.

8: The alternative sentencing specialist summarily rejects your request for assistance upon hearing your client's name.

7: Half the jury panel is wearing white sheets, and there's no toga party in town.

6: The prosecutor's nickname is "Dr. Death", a name given him before he became a prosecutor.

5: The client spends more time talking to "the little man on his shoulder" than to you.

4: The client insists you present his "alien-abduction" theory of defense.

3: The prosecutor "goose-steps" into the courtroom.

2: The client refuses your jacket and tie in favor of his flashy orange jumpsuit.

1: The jury laughs hysterically when you mention the names of your alibi witnesses during voir dire.

NEW MEMBERS & MEMBERSHIP RENEWALS

Thomas R. Carnes, St. Louis
Jacqueline A. Cook, Kansas City, *Sustaining Member*
Jay DeHardt, Kansas City, *Sustaining Member*
Jeffrey E. Denton, Joplin
Steven M. Dioneda, St. Louis
Caterina DiTraglia, St. Louis, *Public Defender*
Joel Elmer, Kansas City, *Public Defender*
Pat Eng, Columbia
W. Brian Gaddy, Kansas City
James R. Hall, Oak Grove
Ronald L. Hall, Overland Park, KS
J. R. Hobbs, Kansas City, *Sustaining Member*
Susan L. Hogan, Kansas City, *Public Defender*
Harold (Doc) Holliday, Jr., Kansas City
John Jenab, Kansas City
Michael P. Joyce, Kansas City
Marilyn B. Keller, Kansas City
Ronald D. Lee, Kansas City
William S. Margulis, St. Louis
Murry Marks, St. Louis
Kurt Marquart, Kansas City
Rosemary D. McGuire, St. Louis, *Public Defender*
Steven D. Miller, St. Louis, *Public Defender*
Daniel Nack, St. Charles
Patrick O'Brien, Lee's Summit
Matthew J. O'Connor, Kansas City
Kelly Parker, Salem
T. D. Pawley, *Public Defender*
Cheryl Pilate, Kansas City
S. Dean Price, Springfield
Cheryl Rafert, St. Louis
C. R. Rhoades, Neosho
Douglas Richards, St. Louis
Charles M. Rogers, Kansas City, *Sustaining Member*
Stephen E. Rothenberg, St. Louis
Larry Schaffer, Independence, *Sustaining Member*
Kenneth R. Schwartz, Clayton
Rebecca S. Stith, St. Louis
Clinton Wright, St. Louis
Stephen Cotton Walker, Jefferson City
Fred Weems, Columbia, *Student Member*
Gregory Nat Wittner, Clayton
Mark Wooldridge, Boonville
William O. Worsham, Springfield

Welcome to our new members, 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.**

MACDL Presence at Criminal Law Committee

The Criminal Law Committee of the Missouri Bar held its annual Spring Meeting on May 9. **MACDL** sponsored two resolutions on its agenda:

1. ***Resolved*, that the Governor should impose a moratorium on executions in the State of Missouri in accordance with the Resolution of the House of Delegates of the American Bar Association adopted February 3, 1997**; and

2. ***Resolved*, that Missouri's funding for capital post-conviction relief representation in the state courts is inadequate to support application of the "opt-in" provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996.**

Some fifty people were in attendance at the meeting, a record for recent times. **MACDL** was well represented by both public defender and private counsel members. One recorded vote was taken on a motion to table the first resolution. It failed 34-17. A spirited discussion of the resolutions followed which directed attention to the problems in the administration of the death penalty in Missouri. The press in Columbia, Jefferson City, St. Louis and Kansas City picked up the issue. Proponents of the resolution were accused of packing the meeting. Marty Robinson, Director of the Public Defender System and a **MACDL** Board member, pointed out that all public defenders, like the private attorneys, were there on their own time and without subsidy or direction from the system.

Both resolutions were adopted by voice vote.

The action of the committee was reported to the Board of the Missouri Bar, but the committee did not request that the bar take any action on the votes. John Simon, Chairman of the Criminal Law Committee, announced his intention to appoint a subcommittee to study the specific application of the ABA recommendations to Missouri. The committee came in for some criticism for considering the issue at all and for allowing its actions to be publicized.

Special thanks are due to all of those who travelled from out of town. We can take pride in assembling such a large group of supporters. Particular thanks go to John Simon for his advice on presentation of the resolutions, and to Dan Dodson, chairman of **MACDL**'s Public Relations Committee, for his assistance with publicity.

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The 1997 Missouri Legislative Session

by Tom Carver

After more than twenty years of legislative attempts, Missouri has joined the majority of states by enacting witness immunity legislation. In a rare alignment, the leadership in the House and Senate joined with Governor Carnahan to make passage of the bill a priority this session.

Although we were unable to defeat the bill, it nevertheless bears **MACDL**'s imprint. In its original version prosecutors from around the state could apply to the attorney general for a grant of immunity. Through **MACDL**'s efforts those provisions were removed from the bill and approval by an impartial member of the judiciary was substituted. Additionally, *immunized testimony that is given during grand jury proceedings must be recorded*, a change from current practice where recording is not required for any testimony.

MACDL members should pay special attention to the implementation of the immunity statute. Prosecutors have claimed they will not immunize co-defendants, but will only use immunity to force testimony from victims or innocent bystanders. Incidents of co-defendant immunity and incarceration of victims for failing to cooperate might provide potential arguments for modification or repeal of this law.

A more promising legislative development resulted from **MACDL**'s opposition to an ill-conceived and probably unconstitutional telephone search warrant bill. **MACDL** Board members provided powerful testimony and written opposition to the measure when it was considered in the House and Senate. Although we were successful in keeping the bill from coming out of committee, late in the session it was attached to other legislation that was passed by the House. Through the excellent efforts of **MACDL** lobbyist Randy Scherr and other **MACDL** members, we were able to have the telephone search warrant provisions stripped from the bill in the Senate during the waning days of the session.

Other **MACDL** victories included the defeat of House Bill 69, which would have extended the time individuals could be detained from 20 to 32 hours, and House Bill 738, which made changes to Missouri's "zero tolerance law".

MACDL's support of efforts to require grand jury testimony to be recorded were rewarded when that legislation made it out of the House and into the Senate before dying near the end of the session. Chances look good next year for the enactment of this legislation. **MACDL** Board member Shawn Askinosie was especially interested in this legislation and developed much of the support for it through his work with State Representative Mike Shilling.

Mike Shilling, by the way, not only sponsored the grand jury bill but also authored of legislation that would have repealed the death penalty in Missouri. Mike is a highly principled lawmaker, and every **MACDL** member owes him a debt of gratitude for his sometimes lonely pursuit of justice.

MACDL members interested in working on legislative issues, having suggestions about legislation or wishing to contribute to **MACDL**'s **PAC** should get in touch with Tom Carver at 417/869-2010.

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STATEMENT OF *THE MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS*
RE: MORATORIUM ON EXECUTIONS
Released at Amnesty International Press Conference, August 4, 1997

At its Annual Meeting in April of this year, the MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS adopted the resolution of the American Bar Association calling for a moratorium on executions until policies are implemented which insure that the death penalty is administered fairly and impartially, and that innocent persons are not executed. Now, on the eve of a wave of Missouri executions, we again call attention to the grave doubts which exist about the Missouri process which has imposed the death penalty on Ralph Feltrop, Andrew Six, Donald Reese and William Boliek, as well as the other persons now awaiting execution in Missouri.

The four areas discussed in the ABA resolution are:

1. **Standards which insure competent counsel at all states of death penalty litigation.** Until July of this year, no standard existed in Missouri requiring two counsel to represent a defendant in Missouri post-conviction litigation, the most significant part of the death penalty review process. Although the newly adopted Supreme Court Rule 29.16 requires this as of July 1 of this year, none of the persons now on death row in Missouri were subject to this rule at the time of their post-conviction litigation, and the missouri Public Defender System has not been appropriated additional funds to enable it to comply with the new rule.

2. **Permitting courts to exercise independent judgment on the merits of constitutional claims in state and federal post conviction proceedings.** The restrictive time periods and pleading requirements for seeking post-conviction relief in Missouri throw into question the validity of its post-conviction proceedings. Because of these restrictions as well as the restrictions on relief in federal court contained in the Anti-Terrorism and Effective Death Penalty Act now in effect, many

Press Release *(cont'd from page 11)*

legitimate constitutional claims cannot even be considered by either state or federal courts.

3. Racial discrimination in the imposition of the death penalty. Statistical and anecdotal evidence in Missouri indicates that racial disparities exist in all phases of the death penalty process, beginning with the decision whether to seek the death penalty in a particular case, and proceeding through plea bargaining and sentencing.

4. Preventing execution of mentally retarded persons and those who were under 18 at the time of their offenses. Missouri executes persons who were 17 years of age at the time of their offenses, as well as mentally retarded persons.

Because of these serious concerns about the fairness of the process by which the death penalty is imposed, executions must be suspended in Missouri.

For additional information, contact Elizabeth Unger Carlyle, President (816/525-2050; elizcar@aol.com), or Dan Dodson, Public Relations Committee Chair (573/449-6969).

Bulletin Board

Fall CLE Program -- The one-day program will be presented in Springfield on October 9, in Kansas City and St. Louis on October 17. DWI, Internet Research on Criminal Law, Missouri Case Law Update and Tips on Missouri Appellate Practice will be covered. If you have not received a brochure, call Cecil Caulkins' office at MoBar (573/635-4128).

Thank You -- In St. Louis last April, **MACDL** again kicked off its Annual Meeting and Seminar with a Thursday night reception for officers, board members and seminar speakers. Bernie Edelman did an excellent job of arranging an elegant event at Piccolo's. The following members made financial contributions to underwrite the cost of the function: **Wyrsch Hobbs Mirakian & Lee, P.C.; Caterina DiTraglia; Ellen Suni; Michael Gorla; Gerald Handley; Bruce Houdek; Linda Murphy; Jim Worthington; and Scott Rosenblum.** Thanks to all of you for helping **MACDL** host such an enjoyable evening.

Vacancies on MACDL Board of Directors -- Much to our regret, Cathy Kelly of St. Louis and Dean Ellen Suni of Kansas City have resigned their seats on **MACDL**'s Board of Directors. Anyone interested in serving on the Board should contact a member of the Nominating Committee: Jim Worthington (816/259-2277), Pat Eng (573/874-4190) or J.R. Hobbs (816/221-0080).

Wanted: Potosi "Horror Stories" -- Elizabeth Carlyle and Sean O'Brien are collecting evidence of abuse of prisoners' rights at Potosi Correctional Center. If you have a client who's been seriously mistreated, deprived of medical treatment, denied access to counsel, etc., please share the information with Elizabeth or Sean.

MACDL Hospitality Suite & Board Meeting -- **MACDL** host a hospitality suite at the MoBar Annual Meeting in St. Louis on Friday afternoon, September 19, at the Adam's Mark. The Board will meet at 2:p.m. Board meetings are always open to members, and attending them is a great way to get more involved. Please stop by to see us.

Directory Correction -- Barbara Hoppe's correct address is 3402 Buttonwood, Columbia, MO 65201. Please send any corrections to Francie Hall.

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

MACDL Law Student Outreach

At the April Board Meeting, the importance of reaching out to Missouri law students was discussed. With a view to attracting student members, we voted to create a new category of membership with annual dues of just $10. A motion was passed to host pizza parties on various campuses to spread the word among law students. Dan Viets kicked off the project with a gathering in Columbia, which was relatively well attended for a summer session. Scott Turner and Scott Rosenblum are planning similar presentations in Kansas City and St. Louis, respectively. We hope these gatherings will spark interest in criminal defense work and **MACDL** among Missouri law students. Anyone interested in participating, or sharing ideas for useful law student activities, should contact Dan Viets (573/443-6866), Scott Turner (816/561-4449) or Scott Rosenblum (314/862-3535).

NACDL News Release: White House Needs to do More To Eliminate Racially Unjust Drug Laws

The Clinton Administration's proposal that Congress reduce the penalty for possession and distribution of crack cocaine while increasing the penalty for powder cocaine signals that the White House is finally beginning to recognize the terrible racial injustice of our nation's drug laws. Unfortunately, the proposal will do little to reduce the unjust impact of these draconian laws on minorities, and African-Americans in particular.

Who is kidding whom? Where is the sense of fairness that black and white Americans are being treated equally before the law? What kind of justice permits more African-American youths to be jailed -- or jailed for much longer -- than white youths in such an arbitrary and discriminatory manner?

Why should the lives of black kids, and the opportunities afforded them, count less than those of white kids? As a society that stands for justice in the international community, how do we justify such rank injustice at home? How long do we permit such transparent unfairness to persist?

Since 1986, the federal penalty for mere possession of 5 grams of crack (street value: about $250) has been a mandatory 5-years imprisonment without parole. The law, which was supposed to be aimed at high-level dealers, has filled federal prisons with thousands of casual users and small-time street peddlers. The amount of powder cocaine a defendant must possess in order to receive 5 years mandatory minimum is 500 grams under current law, well over a pound (**street value: $25,000**). A 1995 U.S. Sentencing Commission study found that 92.6% of all defendants sentenced for crack cocaine offenses in the federal system, and <u>all</u> defendants sentenced for simple possession of crack, were African-American, despite the fact that more than 50% of crack users are white.

The Clinton Administration must do more to reduce the racially-discriminatory effect of our drug laws. The current proposal to treat crack offenses 10 times more harshly than other cocaine offenses will hardly reduce the inherent disparity. Concerns that crack trade and use breed violence were addressed in the U.S. Sentencing Commission's well-considered suggestion two years ago that drug offenders involved with violence or weapons be given tougher sentences based on their conduct, not which form of the drug they happened to possess.

Fairness in drug offense incarcerations can only be achieved by recognizing that crack and cocaine are chemically and pharmacologically indistinguishable forms of the same drug; that nonviolent drug crimes should not be treated as harshly as violent crimes; and that long-term success in America's "drug war" can only be achieved by eliminating arbitrary and capricious sentencing while at the same time recognizing the dire need for stepped-up funding for critical drug treatment and prevention efforts that could actually make a difference.

FELONIOUS ASSAULT BY THE HIV-INFECTED

by Dee Wampler

Acquired Immune Deficiency Syndrome (AIDS) is caused by a deadly virus that can live for only a few seconds outside the body. It is primarily transmitted by unprotected sexual intercourse, sharing of infected needles or exchanges of blood or other bodily fluids. Recently, a number of courts have considered whether an accused can be convicted of felonious assault with intent to kill by spitting, biting, scratching or throwing blood when the person knew of his own AIDS infection. Defendants who know they are infected generally accompany their assaults on others with words and threats.

Intent to kill may be inferred from the use of a deadly weapon directed at a vital part of the body. *State v. Jenkins, 515 A.2d 465 (MD App. 1986).* If a person knows he is AIDS-infected, that the infection is fatal, and **intends to infect others with the disease,** he should be charged. *State v. Haines, 545 N.E.2d 834 (IN App. 1989).* But the intent to kill must be more than a mere "tenuous, theoretical or speculative chance of transmitting the disease." There must be proof beyond a reasonable doubt that the accused knowingly took a substantial step toward the commission of murder.

In one case, a prisoner spit saliva onto a guard's face. *Weeks v. State, 834 S.W.2d 559 (TX App. 1992).* In another, a prisoner bit and punctured the skin of a prison guard. The court allowed the prosecution for assault with intent to kill, finding "ample evidence that defendant did all that he believed was necessary to infect the corrections officer." *State v. Smith, 621 A.2d 493 (NJ App. 1993).*

Another defendant bit and spit at emergency technicians and police who came to his aid after a failed suicide attempt. An officer was hit in the face with a blood-soaked wig. The defendant's lover verified that doctors had informed defendant that he had AIDS and it was fatal. Nonetheless, the conviction was reversed on appeal because there was a doubt as to whether the defendant took a "substantial step toward the commission of murder."

An HIV-infected defendant was convicted for throwing his fecal matter in a corrections officer's face because the officer had been tampering with his mail. *Commonwealth v. Brown, 605 A.2d 429 (PA 1992).*

In still another case, an accused told a convenience store clerk, "I'll give you AIDS," before sticking her with a needle attached to a syringe containing clear, innocent liquid. The court found a strong possibility the needle was infected with HIV since defendant pulled from his pocket and he was an intravenous drug user. *State v. Caine, 652 S.2d 611 (LA App. 1995).*

In "assault with intent to murder," there must be not only (1) proof of an assault, but also (2) proof of intent to murder. *Webb v. State, 93 A.2d 80 (1952).* It should be inferred from the natural consequences of the acts. *Davis v. State, 102 A.2d 816 (MD 1954); Chisley v. State, 95 A.2d 577 (MD 1953).*

A defendant may not be overcharged with assault with intent to kill unless intent can be proven. There must be clear evidence that the accused not only knew he was AIDS-infected, but also that he had or voiced a specific intent to kill.

I'll sit down with the little spikehead. We'll straighten this thing out.

William Bennett, then antidrug czar, after criticizing Bart Simpson in 1990. To which the producers of THE SIMPSONS replied, "If our drug czar thinks he can sit down and talk with a cartoon character, he must be on something."

MACDL

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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

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