MACDL

Missouri Association of Criminal Defense Lawyers

Action Report

Winter 1997 Vol V, No. 1

President's Letter: POTPOURRI AND ENNUI

by James D. Worthington

The dawn of a new year, like the budding of spring flowers, ignites hope and excitement and uncertainty. Just as assuredly the ringing of the bell and crash of the gavel, be they in a court of law or the hallowed halls of our Missouri Legislature in Jefferson City, arouse a wellspring of similar emotions.

Mark Twain once mused, tongue planted firmly in cheek, that "it would be gratifying to observe the Congress convene and adjourn without doing any mischief." Let us all give thanks that Mel Carnahan, an intelligent, well-meaning and decent human being, was recently inaugurated as Governor of Missouri. But politics still dictates that the constituency of least support is the class arbitrarily and euphemistically referred to as CRIMINALS. And who will stand for **THEM** in the halls of the legislature?? Remember, we all owe a duty to treat people with human dignity and respect. Jefferson called them INALIENABLE human rights and the Constitutions of the United States and Missouri sanctified them as fundamental to the concept of due process. Absent the guarantees, the government forfeits its jurisdiction, authority and power to govern (see the Declaration of Independence).

Now the attack on our independent Missouri Judiciary takes the shape of a challenge to the salary increases recommended by an independent and nonpartisan commission while the legislature considers more bills containing mandatory minimums which transfer power away from the bench and into politicized prosecutorial offices.

The latest rumor is that "sentencing guidelines" will not be presented this session in order to offer voluntary testing/use of sample guidelines for one year. When and why did we come to distrust our judges so much?

The pre-filing of bills has begun. Proposals include:

1. HB 26 - which would provide for search warrants by telephone, radio or fax. The bill would allow a prosecutor to orally authorize a law enforcement officer to sign the prosecutor's name and to allow the judge to orally authorize the law enforcement officer to sign the judge's name to the actual search warrant.

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

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

2. HB 65 - which would expand the 20 hour rule for police holding and interrogation of suspects to 32 hours.

3. HB 121 - will create a new crime of vehicular manslaughter by an intoxicated person with a penalty of 10 - 15 years in the penitentiary. Second offense will carry a minimum of 60 days in jail.

4. HJR 1 - to divide forfeiture proceeds so that 50% goes to schools (now it is 100%) and the remaining 50% goes to police and prosecuting attorneys. Why do these people keep proposing legalized bribery and graft to perform their sworn duties?

5. SB 36 - proposes a new, increased minimum jail term of 60 days for driving without a license.

6. SB 57 - The chain gang proposal is, like Freddie Kruger, BAAACK!!!

7. SB 56 - The opt-in for the U. S. Congressional rush-to-punish Anti-Terrorism requirements has returned.

8. SB 74 - would create a new crime of **EVADING** a PEACE OFFICER.

9. SB 86 - would allow forfeiture of property used in illegal DUMPING activities.

10. SB 129 - would lower the blood alcohol content for presumption of intoxication from .10 to .08%.

I was gratified to hear Governor Carnahan announce to the Missouri Legislature at the start of this legislative session his primary emphasis on EDUCATION issues. Then, only one week later, Mr. Carnahan asked our Missouri Legislature to fund two new prisons with $146 million.

The next issue will include a report on our Missouri Legislative Drive-In of February 11.

Now is the time for all of us to come to the aid of our future! See you in Court.

James D. Worthington
President

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FEDERAL LEGISLATIVE ISSUES

The NACDL Board has decided to focus on the crucial grassroots level of national politics. To accomplish this, there will be no Fly-In in 1997. NACDL's legislative coordinators will emphasize consistent communications and meetings during the year through constituent contacts in legislators' home districts. If you have rapport with a legislator, or are interested in helping NACDL establish key grassroots relationships, call Legislative Director Leslie Hagin at 202/331-8269.

The 105th Congress convened in January, and the agenda is starting to take form. The trend to increase punishments rather than prevent crime is still growing.

How can we ever forgive ourselves if any member of Congress votes without knowing the truth about draconian legislation designed to preserve and expand the law enforcement industry? These proposed laws will NOT prevent or reduce crime by:

1. putting more people in prison for non-violent drug crimes;

2. punishing children as if they were adults;

Federal Issues *(cont'd from page 3)*

3. unfairly targeting minorities for longer sentences;

4. rushing to kill in capital cases;

5. ignoring truth, innocence and fundamental due process by severely restricting Habeas Corpus appeals;

6. eliminating the unanimity requirement in jury verdicts;

7. granting more power to federal law enforcement agents to expand wiretaps and to increasingly intrude on our privacy rights;

8. increasing the ability of crime victims to interject themselves into the criminal justice process prior to convictions. NACDL and its member affiliates fought any proposals of these types in the 104th Congress during 1995 and 1996 with TRUTH. By exposing the horrors of unfettered, unsupervised, absolute power by the FBI and DEA at Waco and Ruby Ridge, defense lawyers helped to stop these proposals from becoming law. But it was not easy. And the War still rages for right, truth, justice and mercy. Our only tools are wisdom, energy and courage.

CASE LAW UPDATE

Summarized by Lew Kollias, edited by Elizabeth Unger Carlyle

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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.

Missouri Supreme Court

State v. Barton, No. 77147 (Nov. 19, 1996)
The trial court abused its discretion in sustaining the prosecutor's objection to defense argument. When an objection to defense counsel's reasonable inference from the facts and evidence is sustained, the court will examine whether the error was "prejudicial." Previous standards of "clearly injurious" or "decisive effect" were rejected. Here, the error was prejudicial because the evidence was not overwhelming and the trial court's sustaining of the objection and prosecutor's comment gave the court's approval of the prosecutor's incorrect statement.

Moore v. State, No. 78691 (Nov. 19, 1996)
Carr v. State, No. 78694 (Nov. 19, 1996)
A Luleff/Sanders abandonment inquiry is not necessary where motion counsel files a statement in lieu of an amended post-conviction motion indicating that a thorough review of the record has been made and additional grounds have not been found. In Moore, no hearing was required because the above-described statement was filed. In Carr, a hearing was required because the statement of counsel indicated that not all of the record had been reviewed. [The current version of the post-conviction rules requires that movant be given advance notice of the filing of such a statement in lieu of amended motion, and that movant has ten days to respond to the statement.]

State v. Rushing, No. 78838 (Nov. 19, 1996)
A juvenile officer saw what he believed to be a drug transaction between the defendant and a man in a car, who exchanged objects. The juvenile officer summoned a police officer, returned to the scene, and pointed out the defendant. The officer conducted a Terry search because there was gang graffiti present at the place where the defendant was found. The officer felt a hard cylinder in the defendant's pocket which he believed to be a life-save container which is commonly used to hold

drugs. The court affirmed the conviction, holding that the Missouri Constitution gives the defendant no greater protection than the United States Constitution as interpreted in Minnesota v. Dickerson, 508 U.S. 366. Probable cause to seize the object existed because of 1) the officer's feel; 2) the suspicious transaction observed by the juvenile officer; 3) the reputation of the neighborhood for drug trafficking; and 4) the officer's knowledge of commonly used drug containers.

State v. Smulls, No. 75511 (Nov. 19, 1996)
The court modified its previous opinion of June 25. A change of judge is necessary not only upon a showing of actual prejudice, but if there is an objective basis on which a reasonable person could base a doubt about the impartiality of the trial court. At issue here was the judge's racism. The court held that the standard for disqualification of the judge was met by comments made by the judge in response to a Batson challenge at trial, inter alia, that he cannot tell if someone is black since years ago they said a person was black if he had one drop of black blood. Comments like this suggested an inability or hostility to taking notice of a venireman's race. In addition, counsel indicated that the judge would be needed as a witness to events which occurred off the record. The motion for change of judge should have been sustained. Remanded for a new post-conviction hearing.

Western District, Missouri Court of Appeals

State v. Ide, No. WD 52252 (Sept. 17, 1996)
The evidence was insufficient to support a charge of second degree robbery where the defendant impersonated a police officer, told a gas station attendant that there was a bomb threat and she needed to move her car to make room for his units to park, and stole the money while the attendant was gone. There was no use or threat of physical force; the attendant did not leave to avoid the bomb but to make room for the defendant's fictitious police car. This was stealing by deceit, not robbery.

Shevalier v. State, No. WD 51848 (August 20, 1996)
In this administrative suspension appeal, the trial court erred in excluding testimony as to the reading on the breathalyzer machine. The printout was illegible. The "best evidence" rule only applies when proof of the operative terms of substantive written instruments are in issue, and the witness must purport to testify to those terms. Here, the officer was asked to state the result of the test, not the content of the printout. If a fact exists independent of a writing, the best evidence rule does not bar admission of testimony about that fact.

State v. Harris, No. WD49455 (Sept. 10, 1996)
The judgment was reformed to omit a reference to MO. REV. STAT. §558.019 where the offenses at issue were not class A or B property crimes or dangerous felonies. Also, the prosecutor's representation of the sheriff and other county officials in a civil rights action filed by the defendant did not create a conflict of interest that precluded the prosecutor from representing the state in the defendant's criminal case.

State v. Smith, No. WD52411 (Nov. 12, 1996)
No abuse of discretion occurred when the court denied the defense motion for mistrial after a state's witness, on cross-examination referred to a prior arrest of the defendant. The state did not induce the response and carefully avoided any further reference to the prior arrest.

Southern District, Missouri Court of Appeals

State v. Smith, No. 19536 (Nov. 14, 1996)
The conviction was reversed for a faulty verdict directing instruction in this first degree murder case. The instruction failed to require deliberation by the defendant prior to the murder. The theory was accomplice liability.

State v. Williamson, No. 20820 (Nov. 8, 1996)
Where the defendant was prevented from presenting evidence from a pharmacist as to the effects of Lorcet, which appellant contended he took within three hours of his DWI arrest, no error was found because of the lack of an adequate offer of proof.

State v. Breshears, No. 20671 (Oct. 15, 1996)
Where the defendant paid his fine on the day of sentencing, and the fine was the only punishment imposed, his appeal was dismissed. In order to appeal in such circumstances, the payment of the fine must not be voluntarily made.

Eastern District, Missouri Court of Appeals

State v. Seals, No. 66974 (Sept. 24, 1996)
Tampering is not a class A or B or dangerous felony, and therefore MO. REV. STAT. §558.019 does not apply. Remanded for resentencing.

State v. Wolf, No. 67445 (October 8, 1996)
The court reversed the determination that the defendant was properly sentenced under pre-1994 MO. REV. STAT. §558.019 as a class X offender. The defendant was charges with a class C felony offense as a persistent offender, which increased the maximum punishment to 20 years. The state argued that this allowed the offense to be considered a class B felony offense by operation of law, citing MO. REV. STAT. §557.021.3. The court held that the "operation of law" term applies to offenses that allow for enhancement within the statute defining the offense, not the additional range of punishment as a persistent offender.

State v. George, No. 67883 (Nov. 12, 1996)
The consent defense, MO. REV. STAT. §565.080 did not apply when the defendant was accused of biting a guard at a mental hospital. Security personnel are not deemed to have consented to assault by virtue of their employment. No hearing was required on defendant's allegation that he was denied the right to testify where the amended motion gave no indication as to the content of his testimony or how it would have been helpful. Appellant could not raise a claim concerning ineffective assistance of post-conviction counsel because of factual errors in the amended motion.

State v. Davis, No. 67345 (Nov. 19, 1996)
Where the defendant did not want to represent himself, but was not eligible for public defender services, the trial court was required to advise him of the dangers of self-representation in order for a valid implied waiver to occur. Even though the court advised the defendant well in advance of trial of the trial date, the advice concerning the dangers of self-representation was required.

State v. Barnes, No. 68282 (Sept. 24, 1996)
The defendant's constitutional challenge to the validity of MO. REV. STAT. §287.125, dealing with worker's compensation fraud, was properly preserved for appeal by 1) filing a pretrial motion to dismiss; 2) filing a motion for judgment of acquittal at the close of the state's case and the close of all evidence; and 3) raising the issue in the motion for new trial. Case transferred to the Missouri Supreme Court.

State v. Branyon, No. 67432 (Nov. 19, 1996)
A lesser included offense instruction on misdemeanor stealing was not required in this robbery case where the defendant testified that he "snatched" the item from the victim; this supported, at best, a felony stealing from the person charge.

Eighth Circuit

Hadley v. Groose, No. 95-2392 (8th Cir.)
Ineffective assistance of counsel merited relief where defense counsel failed to investigate and utilize available alibi witnesses for a second attempted break-in which the state linked to defendant to convict him of the break-in and rape of the victim four days earlier. Also ineffective was trial counsel's failure adequately to cross-examine an officer who testified that footprints which led from the victim's trailer to the defendant's trailer were found shortly after the second break-in attempt.

Other Jurisdictions

United States v. Hall, 59 Cr.L.Rptr 1493 (7th Cir.)
It was error to refuse expert testimony that a person with a mental disorder like defendant's would be pathologically eager to say what he thought his interrogator wanted to hear. The trial court excluded the evidence on the ground that it would usurp the function of the jury. However, just because a portion of the expert's proffered testimony may overlap with some common sense does not mean that the testimony will not be "helpful" to the jury.

Rupe v. Wood, 59 Cr.L.Rptr 1504 (9th Cir.)
A new sentencing hearing was granted in this death penalty case due to the trial court's failure to allow the defendant to introduce, at the penalty phase, polygraph evidence that suggested a co-actor and state witness may have been testifying falsely concerning the witness's culpability in the crime, and actually may have been more culpable than the

witness testified at the defendant's trial. The witness testified that the defendant shot the victims. Relative culpability is a valid factor of mitigation, and the refusal to allow this evidence at trial was error.

U.S. v. Duguay, 59 Cr.L.Rptr. 1505 (7th Cir.)
It was improper for the police to impound a vehicle after arresting the occupant where there was no probable cause to search the vehicle and no showing that the arrested person could not have the vehicle removed from the roadway. The defendant was arrested for assaulting officers. His girlfriend, who was driving the car, was arrested after refusing to surrender the keys. Cocaine was discovered in the trunk of the car after impoundment. There was no written policy as to inventory searches and no legitimate need to impound the vehicle.

U.S. v. Davis, 1996 WL 496289 (10th Cir.)
The defendant's making and then breaking eye contact with officers and then sticking his hands in his pockets did not justify an investigative detention, despite the officers claim that the defendant was a known offender and they reasonably believed he had a gun in his pocket.

U.S. v. Annigoni, 60 Cr.L.Rptr. 1004 (9th Cir.)
Reversal was required without harmless error analysis where the trial court refused to allow the defense to exercise a peremptory challenge against an Asian juror after a prosecution objection. The defense offered race-neutral reasons for the challenge.

Huynh v. King, 60 Cr.L.Rptr. 1010 (11th Cir.)
The defendant was denied effective assistance of counsel when his trial attorney failed to file a suppression motion which would have been successful. The defense attorney's strategy rationale was that he thought the argument would more likely be successful on federal habeas corpus review. The court rejected this, noting that Stone v. Powell bars such review.

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Standard of Competence for Execution: Action Alert

by Sean O'Brien

I was notified recently that Missouri's Attorney General is pushing a bill to amend § 552.060, which sets the standard of mental competence for execution. Under the current standard, two retarded men, Chuck Mathenia and Marvin Jones, have been found mentally unfit for execution. A reasonable and moral person would have no qualms with the result in those cases. There are a number of other prisoners with mental defects whose executions were not prevented by the existing statute.

I urge you to contact your senator and representative and let him/her know that you vigorously oppose this statute. For centuries, English and American law has considered execution of the insane to be a barbaric and inhumane practice. Currently, § 552.060 protects an individual whose impairment is so severe that he or she cannot understand matters in extenuation of punishment, or reasons why the sentence should not be carried out. This is merely an extension of the common law doctrine which found it morally repugnant to execute a prisoner incapable of pleading for mercy. To permit the execution of prisoners found incompetent under the existing standard (which is the objective of this legislation) is an affront to human dignity.

On a per capita basis, Missouri, with five executions in 1996, led not only the United States, but indeed the world in the number of people it has executed during the past year.

Dr. Michael Radelet, Professor of Sociology at University of Florida-Gainesville, quoted at last October's Annual Meeting of the Western Missouri Coalition Against the Death Penalty.

Preserving the Record for Appeal: Four Traps to Avoid

by Lew Kollias

Some recent cases serve as good reminders of the need to preserve the record, and proper ways of doing so. One of the most common areas of improper record preservation deals with the offer of proof. Another is the failure to renew pretrial objections by timely and specific objection at trial. A third involves an affirmative indication of "no objection" to evidence. Finally, failure to be specific in objecting to improper closing arguments by the state has fatal ramifications for review on appeal.

Offers of Proof

Two recent cases highlight the problem. In State v. Savory, 893 S.W.2d 408 (Mo.App., WD 1995), the appellate court was confronted with a claim that the trial court improperly sustained the state's objection to questions of witnesses as to what the victims of a kidnapping and rape said to them. The defense claimed the hearsay objection was inappropriate since the questions sought answers that were not hearsay, but related to the victims' state of mind, not for the truth of the matters asserted. The court rejected the claim for failure to make an adequate offer of proof as to what the victims allegedly told the witnesses:

> However, when an objection to proffered evidence is sustained, the proponents of that evidence must make an offer of proof in order to preserve the issue for appellate review. [Citation omitted.] An offer of proof must show the relevancy of the evidence sought to be admitted, must be specific, and must be definite. After the objections were sustained, the defendant made no offer of proof as to what the witnesses' testimony would have been had they been allowed to answer the questions. He further failed to explain why the testimony was relevant and under which exception to the hearsay rule the statements fell. As such, the issue of the admissibility of the hearsay statements was not properly preserved for appellate review. Without knowing what the hearsay statements would have been, we have no way of judging their admissibility.
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> Savory, 893 S.W.2d at 411-412.

However, even if you make a pretrial offer of proof, unless you renew it at the appropriate point of trial, you will fall prey to State v. Boulware, 923 S.W.2d 403 (Mo.App., WD 1996). In this case, the defense sought to introduce testimony that the victim had accused other relatives [Mr. Cronk and his son] with whom she resided temporarily after the alleged sexual assault by defendant [victim's stepfather], of similar sexual abuse, in an effort to show the victim falsely accused relatives of sexual assault. The state sought a pretrial motion *in limine* which, after defendant's offer of proof, the court sustained. The appellate court refused to review the issue on appeal, since defense counsel had not renewed his offer of proof at the appropriate point of trial when the witness testified.

> Here, appellant, as proponent of the evidence, had a duty to make an attempt at trial to present the excluded evidence [emphasis original]. Since the trial court's ruling was interlocutory and could have been reversed when Mr. and Mrs. Cronk took the stand and attempted to testify to the sexual abuse charges lodged against Mr. Cronk and his son by the victim, appellant's pretrial offer of proof did not preserve the issue for appeal. Appellant never gave the trial court the opportunity to reverse its ruling at trial once the proffered evidence was put in the context of the entire trial. We find appellant's failure to proffer the excluded evidence during the course of trial results in the issue not being preserved for appeal.
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> State v. Boulware, 923 S.W.2d at 405.

The teachings of these two cases are: You must make a specific and definite offer of proof; and, if made pretrial, it must be renewed at the appropriate time at trial. You should also use live witness testimony in making your offer unless the court prohibits you from doing so, and then the narrative

offer in lieu of live testimony must be specific and definite to show the relevancy of the proposed testimony/evidence.

Reviewing Pretrial Objections

State v. Radley, 904 S.W.2d 520, 524 (Mo.App., WD 1995), serves as a good reminder of the need to renew pretrial objections at the appropriate point during trial:

> Next, appellant contends that statements he made to police should not have been admitted because he was intoxicated and therefore, they were not knowing and voluntary. Whether or not this point has merit is irrelevant because it was not preserved. A pretrial motion *in limine* was made to exclude evidence of appellant's statements. The motion was denied. Appellant did not object at trial when the statements were entered into evidence, nor was the issue raised in the new trial motion. Appellant failed to preserve this error for review. [Citation omitted.] A pretrial motion in limine does not relieve a defendant of the duty to make a timely objection at trial.

The "No Objection" Trap

State v. Funke, 903 S.W.2d 240 (Mo.App., ED 1995), highlights the preclusive effect of "no objection." Funke challenged on appeal the admission of autopsy photographs, which he claimed were highly prejudicial. The issue could not be reviewed on appeal because at trial, defense counsel had affirmatively told the court he had "no objection" to the admission of the photographs: "The established rule in Missouri holds that stating 'no objection' when evidence is introduced constitutes an affirmative waiver of appellate review of the issue," precluding even plain error review. Id., at 244.

Objections to Argument

Finally, when objecting to improper closing argument of the prosecutor, be specific in the objection or fall prey to waiving the issue for review or at best, plain error review, which in closing argument issues is virtually tantamount to no review at all. This is exemplified in State v. Howard, 913 S.W.2d 68 (Mo.App., WD 1995), where the prosecutor clearly improperly personalized his argument by informing the jury that the defendant sought to advance himself on their kids, and others like their kids, when selling drugs. Defense counsel objected to the argument as "inflammatory and meant to prejudice the jury," but the appellate court refused to review the issue on appeal, noting that "the objection was too broad, and did not include with specificity improper personalization, and preserved nothing for review." Id., at 71.

Remember, making a good record by timely and specific objections and offers of proof, renewed in the new trial motion, increases your client's chances on appeal.

TECHNOLOGY MATTERS

by Shawn Askinosie

With the able assistance of Dee Wampler and David Mercer, I completed a capital murder trial in October – *State of Missouri v. Jon E. Feeney* – and our client was acquitted. I owe it all to (well, maybe the acquittal had something to do with the facts, but not for the purposes of this column) ECCO® Pro personal information manager. I demonstrated the ECCO Pro program at various CLEs around the state in October, 1994. The software has matured considerably since that time, and it is even more useful now. This is not just a database of calendar dates and contact information. The newest version ECCO Pro 4.0 is a powerful 32-bit program compatible with Microsoft Windows 95 or Windows NT. The recent release of ECCO Pro 4.0 is significant in that NetManage was able to beat Microsoft

Technology Matters *(cont'd from page 9)*

"Outlook" to market. Microsoft has been working on the development of a personal information manager with more depth and versatility than Schedule+.

There are some new features of ECCO Pro 4.0, which make a great program even better. For example, the integration of this software over the network is now easier through a workgroup sharing "wizard." I have used ECCO Pro since 1994, and connected it with Microsoft Mail, which has integrated nicely. Another feature of ECCO Pro is its integration with the U.S. Robotics Pilot and the Timex DataLink watch. I do not have the watch, but I do have the Pilot 5000 and have not tried to integrate the two yet. I will talk about the Pilot and other small hand-helds in another column. Although I do not presently use a laptop, another new feature of ECCO Pro is the use of a file synchronization wizard to make the complicated process somewhat easier. I have always said that ECCO Pro is a fairly complicated program to learn, but now through wizards, the basics of contact and calendar management are pretty easy to learn. The more complicated features of ECCO Pro are still intricate, but easier than they were.

One unique feature of ECCO Pro is a customizable relational database in the form of "notepads." Now, these "notepads" work like tab dividers in a notebook. In the *Jon Feeney* murder case, for example, I created a notepad entitled "Jon Feeney Trial" and listed all of the 160-plus endorsed state's witnesses. Less than two weeks before trial, the state endorsed 91 additional witnesses, and I believe that ECCO Pro helped us manage those people so that we did not have to request a continuance. After we listed all of the witnesses, we created columns of information that we wanted to be able to access quickly. One column was entitled "issues." From that column, we could pick from a list of twenty issues that we had identified in the case and associate one or more of those issues with a particular witness identified in the case. Then, once all of the witnesses had issues associated with them, we could then (on the same notepad) go to the list of issues and find not only every issue under a particular witnesses' name, but also a list of every witness under a particular issue. We also used this same notepad to divide the responsibilities of cross-examination, so that we could easily scroll through the list of names and see what attorney was responsible for that witness. The notepad was also used to keep track of things such as completion of cross-examination outlines and status of subpoena service for defense witnesses. In fact, we created the same type of list of witnesses and issues on the defense side of the case and used it to manage our case completely through the end of trial. I know various relational databases on the market would do the same thing, but I do not think it would be as easy as this.

One of the biggest complaints lawyers have about personal information managers (at least until ECCO Pro 3.0) was once a trial date has been set, and then ultimately changed, all other dates associated with the trial have to be manually changed. Not anymore -- ECCO Pro automatically takes "related dates" with a date change of a single event like a trial. For example, if a trial is set on March 15, 1997, and various related dates are put on the calendar such as discovery deadlines or other self-imposed deadlines that have some day number relationship with the main event then changing the main event will automatically change all other related dates. There are so many other things that ECCO Pro can do, I do not have time for them in this space. To use ECCO Pro 4.0, you need a 486 or higher processor, Microsoft Windows 95 or NT, 8 megabytes of RAM (more recommended), 12 megabytes of free hard disk space for the minimum installation, and a mouse. If you would like

more information about this program, feel free to contact NetManage on the web at: http://www.netmanage.com or me by e-mail at mshawn@smartnet.net.

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NATIONAL COLLEGE OF CRIMINAL DEFENSE: AN EYEWITNESS ACCOUNT

by Joe Zuzul

(Ed. Note: Joe Zuzul is a Public Defender in Nevada, Missouri. He attended the NCDC Program in the summer of 1996, with a little help from a MACDL scholarship.)

The case hinges on fingerprint identification. The defense lawyer has elicited from the state's expert that, of hundreds of points on a fingerprint, only six have actually been matched. Now it is time for defense counsel to drive this point home to the jury in closing argument. He asks the jury to shut their eyes. "Six points," he says, "are all they have." He drops six ball bearings into a metal bowl. "This is what they don't have." He drops a hundred or so ball bearings into the same bowl, which sound like hail on a tin roof. The jury gets it.

This was part of a lecture on demonstrative evidence at the Trial Practice Institute produced by the National Criminal Defense College (NCDC). We all know visual aids are effective communication tools, but how often have we considered aural aids? One of NCDC's primary goals is to push trial lawyers to expand their creative horizons, to leave no stone unturned (or ball bearing undropped) in the search for meaningful and dynamic communication with juries.

NCDC hosts two two-week sessions each summer at Mercer Law School in Macon, GA (about an hour south of Atlanta). The faculty includes some of the best criminal defense lawyers in the country. The program is run by Dean Dantzler, a member of Mercer's law faculty. She has to wear two hats: the stiff, no-nonsense, get-where-you're-supposed-to-be-right-now helmet; and the gracious, caring host's chapeau. Her passion and skill complement both.

Each session educates ninety or so participants. Faculty members arrive and depart as their schedules permit. Last June, I was privileged to attend.

I'm the District Public Defender for a rural circuit about halfway between Kansas City and Joplin. I've been a public defender for almost ten years, and have attended numerous training activities. The Missouri Public Defender System places great emphasis on training -- obviously, because many P.D.s do not stay with the system long enough to learn effective trial practice by experience alone. People in the know say NCDC is the best defense training in the country. Having attended, I must agree. I thank MACDL most emphatically for the scholarship which enabled me to attend -- and we're not talking pocket-change here!

It's been debated over the years whether trial practice is more an art or a science. NCDC supports the "science" position, i.e., excellence in trial practice can be taught, with established and proven techniques which lead to predictable results. Without this underlying foundation, trial training would be an exercise in futility, little more than an exchange of war stories.

NCDC is much more than anecdotes. It is a rigorous program. Participants learn by listening to lectures, but also by doing. At the program's conclusion, each of us had essentially tried an entire case. During the two weeks, we selected a jury, presented opening statements, elicited direct testimony, cross-examined witnesses and gave closing arguments. Our performances were critiqued, with no punches pulled. Performing for *(cont'd on page 13)*

NEW MEMBERS & MEMBERSHIP RENEWALS

Tracy Ambs, St. Louis, *Public Defender*
Dave Angle, Clayton
Shawn Askinosie, Springfield, *Sustaining Member*
James Beck, Troy, *Public Defender*
James Briscoe, St. Charles
R. Steven Brown, Springfield, *Public Defender*
Elizabeth Unger Carlyle, Lee's Summit, *Sustaining Member*
Tom Carver, Springfield, *Sustaining Member*
Tim Cisar, Lake Ozark
Stan Clay, Columbia
Donald Cooley, Springfield
Kris Daniel, Kansas City
Thomas Patrick Deaton, Springfield
Robert Duncan, Kansas City, *Sustaining Member*
Frank Fabbri III, St. Louis, *Sustaining Member*
Barbara Ann Fears, Columbia, *Public Defender*
Kent Gipson, Kansas City
Michael Gorla, St. Louis, *Sustaining Member*
John Gourley, St. Louis
Joseph Green, St. Charles
Scott Hamilton, Lexington
Victor Head, Monett, *Public Defender*
Kenneth Hensley, Raymore
Charles Hoskins, Rolla, *Public Defender*
Tim Joyce, Warrenton
Daniel Juengel, St. Louis
Paul Katz, Kansas City
David Kenyon, St. Louis, *Public Defender*
Lew Kollias, Columbia, *Public Defender*
Michelle Nahon Leonard, Springfield, *Public Defender*
Valoree Maycock, Lexington
Mary Merrick, St. Louis
Sean O'Brien, Kansas City
Larry Pace, Kansas City, *Public Defender*
Melinda Pendergraph, Columbia, *Public Defender*
Robert Popper, Kansas City
Derek Potts, Liberty
William Purdue, Toledo, Ohio
James Rutter, Columbia, *Sustaining Member*
Kimberly Shaw, Columbia, *Public Defender*
John Simon, Jefferson City
Gary L. Smith, Lebanon
Jim Speck, Kansas City, *Sustaining Member*
Christine Sullivan, St. Louis, *Public Defender*
Prof. Ellen Suni, Kansas City
William Swift, Columbia, *Public Defender*
Gerald Tanner, Jr., St. Louis

NEW MEMBERS & MEMBERSHIP RENEWALS *(cont'd)*

Janet Thompson, Columbia, *Public Defender*
George Winger, Kansas City
Don Wolff, Clayton, *Sustaining Member*
Jim Wyrsch, Kansas City

MACDL sincerely appreciates your financial support. Your dues pay for postage, printing, travel expenses of CLE speakers, lobbying efforts in Jefferson City and scholarships to the National College of Criminal Defense, among other things. Special thanks to Missouri Public Defenders and Assistants who support our efforts, and to our Sustaining Members for voluntarily doubling the amount of their annual dues. **Please check the expiration date on your mailing label (back cover) to see if it's time to renew your membership in MACDL.** A renewal form is inside the back cover. Make copies for friends and colleagues while you're at it!

~ ~

NCDC Report *(cont'd from page 11)*

a jury of one's peers (experienced attorneys) can be more intimidating than a real-life jury.

The two-week session follows the natural progression of a jury trial. A day of voir dire is followed by opening statements. Cross-exam, direct, and closing proceed in order. There are some important exceptions in the schedule. The first day is spent on "Theory of the Case." A faculty member explained how defense practice works before lawyers began talking about and using a defense "Theory of the Case." He said it was like standing in front of a wall, and through the cracks between floor and wall an army of cockroaches advanced. Each roach was a piece of state's evidence. Defense counsel's job was to stomp on as many cucarachas as possible, hoping that if one killed a sufficient number, the state could not prove its case beyond a reasonable doubt and the jury would acquit. He went on to explain that such a "tactic" rarely worked, and that consistent success would occur only when defense counsel abandoned such a defensive, reactive approach and began to utilize a positive strategy of presenting an alternative version of the case ("spin") -- a theory of defense.

Cross-exam was another exception to the schedule; we spent three days there. Basic techniques were covered in a day, another was devoted to impeachment, and a third allowed us to apply what we'd learned. I christened one day "buffet day". We could choose to attend one of several smaller sessions, like: informants & snitches; cross-exam in child sex-abuse; investigation in a death penalty case; etc.

NCDC demands commitment and hard work, but the two weeks are not all work and no play. Part of the experience is the opportunity to meet people from all over the country, learn about their practices, and encounter personalities ranging from outrageous to mundane. (I also learned that in North Carolina -- as if being chained to a podium isn't bad enough -- lawyers must remain seated at counsel table when examining witnesses. One good reason for practicing in Missouri.)

While our hotel was surrounded by several restaurants, bars and theaters, the main recreation point was The Cave of the Winds. "The Cave" is simply a hotel suite which faculty and students keep stocked with soda, beer, wine and whiskey. It's a pleasant place to visit, have a beverage, engage in conversation, meet a colleague ... The hotel pool is also popular. (The Cave closes at midnight; the pool doesn't.)

I was sad to see the session end, knowing I might never again see the people in my small group; after just two weeks, I felt I'd known them for years. Our teacher on that last day provided a grace note by suggesting that each of us say goodbye to our colleagues at the end of the videotape of our "performance". I didn't watch the tape until I returned home. I'll watch it often, and learn more from it each time.

FYI

by Francie Hall

Once again I'm beginning with an apology. You should have received this issue of the *ACTION REPORT* in early February, but my obligations to ***MACDL***, and the rest of the world, were superseded when my best friend of 33 years, Cynthia Delich, suffered a severe heart attack, resulting in massive brain damage. I spent interminable dark days in the Coronary Care Unit, as hope fought a losing battle with despair. Her death, *sans* tubes and ventilators in accord with her oft-stated wishes, taught me the meaning of that trendy new word, "closure". Smoking was a major cause of Cyn's asymptomatic heart disease; still, a simple stress test would have led to diagnosis and treatment. Preaching is not my style, but please take good care of yourselves.

~ ~ ~

In late January, ***MACDL***'s Board met for its first Retreat Weekend at Lake Ozark. Tim Cisar handled logistics with the ease of a seasoned campaign pro. On Friday night, ***MACDL*** was well represented at Maggie Moo's; our reputation as fun people remains intact. After a business meeting Saturday morning, Randy Scherr educated us on proposed legislation (handicapping bills as probable, possible or going-nowhere-fast), and lent his expertise to the formulation of ***MACDL***'s legislative goals and priorities for 1997.

For several years now, Randy has kept a weather eye on Missouri's General Assembly, calmly and competently communicating with unsung heros like J.D. Williamson, Bruce Houdek, and especially Dan Viets, when defense-oriented testimony on a criminal justice issue might tip the scales. It's not easy to fit a last-minute dash to Jeff City into a busy lawyer's schedule, but many ***MACDL*** members have responded to the call. We supported a few bills that passed, opposed some that didn't. We were often on the losing side of an issue, but got our position on record. Those years of effort have earned ***MACDL*** recognition and respect. Occasionally, our position on criminal justice issues is actually solicited! Want to help? Contact Dan Viets (573/443-6866) or Tom Carver (417/869-2010), who co-chair the Legislative Committee. No time to testify? Check the box at the bottom of your membership renewal form, and give $10/year (or more) to ***MACDL***'s PAC.

I believe it's time for this organization to build on past successes and encourage future growth by publicizing our message and our goals. Inspired by a NACDL public relations program in San Antonio last fall, I invited NACDL Public Affairs Committee Co-Chair Kathryn Kase of Albany, NY, to our Board Retreat Weekend. She accepted, and compiled a "Missouri Media Bible" of names, addresses, phone and fax numbers of all print and electronic media in the state. She taught us a lot about telling our side of the story, and taking credit for our successes.

Kathryn's presentation to ***MACDL***'s board was an unprecedented response of NACDL's Public Affairs Committee to an affiliate's request, and a closely observed experiment. I'm happy to report that, once again, we've started a trend.

I look forward to seeing you in St. Louis for ***MACDL***'s Annual Meeting & Seminar. The Board will gather Thursday evening, April 24. On Friday-Saturday, April 25-26, you'll be educated and inspired by some of the best criminal defense practitioners in the country. And, of course, there will be time and opportunities to tell your own war stories to people who understand that criminal defense lawyers fight to protect everyone's liberty.

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

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