



# MACDL

## *Action Report*

*Newsletter*

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## **Newsletter**

## **SPRING 1988**

### REPORT FROM THE PRESIDENT

Greetings!

I hope you'll be able to clear your docket for what promises to be an interesting and informative CLE experience: MACDL's Annual Meeting and Seminar, April 22-23, 1988 at the Embassy Suites in Kansas City. We have a great line-up of speakers, including Robert W. Ritchie of Knoxville, Tennessee at Friday's luncheon. The Awards Dinner on Friday promises to be a fun evening of barbecue and bonhomie at Woodside Racquet Club. If you haven't yet sent in your registration, there is still time. (Remember, too, the Kansas City Royals are playing Baltimore that Friday, Saturday and Sunday!)

Welcome to Pat Eng, who was appointed to fill a vacancy on the MACDL Board of Directors. He is one of several new faces to join the Board in the past year. The others include J.R. Hobbs of Kansas City, Dan Viets of Columbia, and Dorothy Hirzy of St. Louis. If you haven't met these folks, take a minute at the seminar to introduce yourself.

MACDL EXECUTIVE SECRETARY  
FRANCES M. HALL  
Executive Secretary, MACDL  
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The MACDL Annual Membership Meeting is scheduled for 11:15 on Saturday morning, April 23rd. The Nominating Committee will present the following slate for your consideration:

<b>President:</b>	<b>Hugh Kranitz</b>
<b>President-Elect:</b>	<b>Charles Atwell</b>
<b>First Vice President:</b>	<b>Bernard Edelman</b>
<b>Second Vice President:</b>	<b>Bruce Simon</b>
<b>Treasurer:</b>	<b>Jay De Hardt</b>
<b>Directors:</b>	<b>Mark Kempton</b>
	<b>Joe Downey</b>
	<b>Brian Gepford</b>
	<b>Anne Hall</b>

The "mini-seminars" in February were quite successful, especially considering that this was our first attempt at that type of program, and we look forward to a similar series next fall. Your input concerning topics, locations, etc. would be most welcome. Our sincere thanks to Charlie Atwell, Sean O'Brien, Bernie Edelman, Dee Wampler and all those who helped put those seminars together.

I look forward to seeing you in Kansas City.

Sincerely,

Thomas Howe

**RECENT MISSOURI DECISIONS  
SUPREME COURT**

.....  
**STATE EX REL. CARL TURNER V.  
HONORABLE BYRON L. KINDER, JUDGE,  
ET AL.  
COLE COUNTY  
NOS. 69544, 69545, 69546  
11-25-87**

Various inmates of the state penitentiary seek to prohibit the use of video equipment to conduct court proceedings in which they are defendants. The equipment is used in such a manner that the inmates are retained in the penitentiary rather than being transported to the courtroom of the county courthouse. In Turner the use of the equipment to take guilty pleas is challenged; in Jackson the use of the equipment to conduct preliminary hearings is challenged; and in Arnold the use of the equipment to conduct arraignments and not guilty pleas is challenged.

**ORDERS MADE ABSOLUTE.**

**Court en banc holds:** (1) Sections 546.030, 544.250 and 544.270, RSMo, require that a person to be personally present to enter a plea of guilty, that no information shall be filed charging a felony without first according the accused the right of a preliminary examination before a specified associate circuit judge as provided in Chapter 544, and that the preliminary examination shall be done on oath in the presence of the prisoner, respectively.

(2) Substantially similar antecedents to Sections 546.030, 544.250 and 544.270, RSMo, were enacted long before audio-visual technology existed or could have been contemplated. However, in 1981, 544.275 was enacted. The statute is a legislative statement that preliminary hearings and pretrial proceedings may be conducted in a conference room in the penitentiary as well as in the courtroom. The Court will not presume to legislate public policy beyond this legislative statement.

**OPINION BY JUDGE DONNELLY**

**Opinion Concurring in Part and Dissenting in Part by Judge Blackmar:** The writer is inclined

to accept the State's argument that the use of the electronic equipment in the manner shown by the record satisfies requirements of "presence" and "open court" as used in the governing statutes and rules. However, he believes that in the exercise of the Court's superintending control the writ should be made absolute as to the guilty plea proceedings (Turner, No. 69544). He also concurs in the issuance of an absolute writ with regard to preliminary hearings (Jackson, No. 69546). He finds no reason why the effective administration of justice requires the presence of the judge, the defendant and the defendant's counsel in the same room for arraignment and entry of pleas of not guilty. Therefore, he dissents as to Arnold, No. 69545.

**Opinion Concurring in Part and Dissenting in Part by Judge Robertson:** The writer believes the language of 546.030 requiring a person to be personally present for a plea of guilty is unambiguous and would make the writ absolute for such cases. With respect to preliminary hearings, he finds 544.270 to be ambiguous and believes the attributes of being present are present through the use of the audio-video equipment. He concurs in that part of Judge Welliver's opinion discussing preliminary hearings. He shares Judge Blackmar's views regarding arraignment and pleas of not guilty. He finds no constitutional violation in the procedures used in Cole County.

**Dissenting Opinion by Judge Welliver:** The writer would quash all of the preliminary writs issued in these cases. He believes that if videotaped depositions may be introduced at trial pursuant to 492.303.3, RSMo, when a witness is unavailable to testify, then all videotaped pretrial proceedings should also be permitted. He notes that the Missouri constitution is a living constitution. The intent of the constitution and the implementing statutes relating to pretrial procedures can be carried out by the judge in his discretion utilizing both the courthouse courtroom and the approved courtroom in the department of corrections connected by closed circuit television utilizing split screen projection in each courtroom and a videotaped permanent record of the proceedings.

**WESTERN DISTRICT**

**WILLIAM MCLAUGHLIN v. STATE**  
Jackson County  
No. 39233  
11-24-87

McLaughlin appeals the denial of his Rule 27.26 motion.

**REVERSED AND REMANDED  
WITH DIRECTIONS.**

Division One holds: The trial court erred in denying relief to McLaughlin on his Rule 27.26 motion because it lacked jurisdiction over him because McLaughlin was not incarcerated in the Missouri penal system but was a prisoner in federal custody.

**PER CURIAM**

**STATE v. ANGEL BROWN**  
Chariton County  
No. 38926  
11-24-87

Brown appeals her carrying a concealed weapon, possessing a short-barrel shotgun, and possessing a controlled substance convictions.

**REVERSED AND REMANDED.**

Division holds: The trial court erred in finding that under the totality of the circumstances, as set forth in affidavits, there was a sufficient basis for the issuance of the search warrant because, even with giving due deference to the judge who issued the warrant and no reason to punish the police for having obtained a warrant, and only requiring a "fair probability" of the finding of contraband, the affidavits fall just short of showing a fair probability that evidence of a crime involving robbery of a camera would turn up in a car being driven by Brown.

**OPINION BY JUDGE LOWENSTEIN**

**STATE v. RAYMOND CARTER**  
Jackson County  
No. 38486  
11-24-87

Carter appeals his convictions of first degree robbery, attempted first degree robbery, and armed criminal action.

**REMANDED WITH DIRECTIONS.**

Division holds: The present case is remanded because the trial court needs to conduct evidentiary hearing for the purpose of determining the validity of Carter's equal protection claim under Batson of the prosecutor impermissibly using peremptory challenges to strike two of three black jurors.

**OPINION BY JUDGE NUGENT**

**STATE v. RODNEY CAYSON**  
Jackson County  
No. 39071  
11-24-87

Cayson appeals his first degree robbery convictions.

**REVERSED AND REMANDED IN PART.**

Division holds: (1) The trial court erred in denying Cayson's motion to dismiss the more serious charge prior to trial because it resulted from prosecutorial vindictiveness.

(2) The trial court erred in denying the motion to dismiss the additional charge without applying the test for prosecutorial vindictiveness because the prosecutor filed an additional charge arising out of the same incident that led to the original charge after Cayson had exercised some statutory or constitutional right.

**OPINION BY JUDGE TURNAGE**

**WESTERN DISTRICT (CONTINUED)**



**STATE v. GREGORY DAHMER**  
Vernon County  
No. 38830  
11-17-87

Dahmer appeals a defrauding a secured creditor conviction.

**REVERSED AND REMANDED.**

Division Three holds: The trial court erred in submitting the verdict directing instruction in the disjunctive form "removed, concealed, or transferred property subject to a security interest" because each alternative was not supported by the evidence.

**OPINION BY JUDGE GAITAN**

**STATE v. BRUCE KUZMA**  
Clay County  
No. 38338  
11-17-87

Kuzma appeals his first degree sexual abuse conviction.

**REVERSED.**

Division Four holds: (1) The trial court erred in submitting the case to the jury because the child's identity testimony left doubts and, therefore, required corroboration.

(2) The trial court erred in submitting the case to the jury because the nature of the corroborating evidence offered fell far below the standard suggested in other cases in that (a) to enable the jury to find Kuzma guilty beyond a reasonable doubt, the purported corroboration should have been substantial evidence, and (b) the evidence offered was ambiguous and insufficient to corroborate either of the child's contradictory stories.

**OPINION BY JUDGE NUGENT**

**STATE v. DARRELL CROSS**  
Boone County  
No. 38974  
12-15-87

The State appeals an order suppressing evidence of the presence of a gun under the driver's seat of an automobile.

**REVERSED AND REMANDED.**

Division holds: The trial court erred in finding that evidence of the presence of the gun under the seat must be suppressed in that the police officer had a reasonable suspicion that justified an investigative stop of the Cross vehicle and the search of the passenger compartment after the stop was justified since the police officers were reasonably warranted in believing that Cross was dangerous and might gain immediate control of weapons.

**OPINION BY JUDGE TURNAGE**

**Dissenting Opinion by Judge Berrey:** The writer believes that the suppression of the weapon was proper as the stop and subsequent search of the car in which the weapon was found was not grounded on the specific and articulable facts necessary to give a police officer reasonable suspicion for the stop and search but instead based upon the race of the suspects. Further, unless its ruling is "clearly erroneous" a reviewing court may not reverse the trial court. The trial judge did not believe the officer had reasonable suspicion to proceed with the stop and the evidence is sufficient to sustain such a finding. The writer certifies this cause to the Supreme Court pursuant to Rule 83.01.

**MARK LONG v. STATE**  
Jackson County  
No. 39281  
12-29-87

Long appeals the denial of his Rule 27.26 motion without an evidentiary hearing.

**REVERSED AND REMANDED.**

Division holds: The trial court erred in denying Long's Rule 27.26 motion without an evidentiary hearing in that there is nothing in the record to negate the assertions that Long's plea counsel mis-

represented to him that any sentence he might receive, in the event his probation was revoked, should be limited to five years or the assertions that Long's sentence counsel was ineffective in allowing the court to sentence him to ten years, contrary to his perceived agreement that the sentence would be five years.

**PER CURIAM**

**STATE v. FINCH**  
**No. 39466**  
**February, 1988**

Finch was charged with attempted forcible rape and sexual abuse in the first degree. A jury heard the evidence, acquitted Finch of rape, but convicted him of sexual abuse.

**REVERSED, NEW TRIAL GRANTED**

**STATE v. HERRON**  
**No. 53076**  
**February, 1988**

Defendant appeals his conviction of possession of a Schedule II substance on the grounds that the prosecutor discriminatorily struck black venirepersons from the jury panel and because of an erroneous instruction.

**REMANDED**

**EASTERN DISTRICT**

**STATE v. DAVID EDWARDS**  
**St. Francois County**  
**No. 52319**  
**11-17-87**

Edwards appeals his forgery and receiving stolen property convictions.

**REVERSED AND REMANDED.**

Division Three holds: The trial court did not err in sentencing Edwards as a persistent offender because 558.016(3) applies to one who commits criminal conduct at separate places on separate dates and to those who commit offenses arising out of one single criminal episode in that Edwards stole two credit cards approximately ten minutes apart in time from two cars parked at the same location.

(2) The trial court erred in submitting MAI-CR 2d

3.60 rather than MAI-CR 2d 3.58, because the jury should not have been able to consider Edward's previous crimes to establish Edward's intent to commit the current crime.

(3) The trial court erred because Edwards' Sixth Amendment right to a speedy trial was not violated because there was no actual prejudice apparent on the record or by reasonable inference.

(4) By separate order this cause is transferred to the Supreme Court pursuant to Rule 83.02 and V Mo. Const. 10 because of the general interest and importance of the persistent offender question.

**Concurring Opinion by Judge Smith:** The writer agrees with the need to reverse and remand for instructional error, but does not agree that Edwards was a persistent offender. The legislative intent is to punish more severely those who have evidenced their criminal propensity by engaging in criminal episodes on more than one occasion. Therefore, the persistent offender statute requires that the felonies occur as separate criminal episodes.

**STATE v. RICHARD BECK**  
**City of St. Louis**  
**No. 51142**  
**12-22-87**

Beck appeals his possession of marijuana conviction.

**REVERSED AND REMANDED FOR NEW TRIAL.**

Division Five holds: (1) The trial court erred in permitting evidence of Beck's passenger's possession of valium because it was prejudicial and the failure to object at the first mention of a questionably relevant subject does not prevent later objection when clearly improper evidence on the subject is presented.

(2) The trial court erred in permitting testimony by a police officer which indicated Beck was also guilty of a crime not charged because it denied Beck a fair trial in that the State deliberately injected irrelevant and prejudicial evidence.

(3) Beck's contention of prosecutorial misconduct in final argument and the court's error in sentencing Beck as a persistent offender are not reviewed by the appellate court because they will undoubtedly be corrected before a second trial.

**OPINION BY JUDGE C. GAERTNER**

**STATE v. KING**

**No. 52671**

**March, 1988**

Defendant appeals from his convictions by a jury of kidnapping, armed criminal action and unlawful use of a weapon. Defendant cannot be punished for both the armed criminal action and the unlawful use of a weapon because the proof of the unlawful use of a weapon supplied an essential element of the armed criminal action. The multiple conviction violated the double jeopardy clause.

**AFFIRMED IN PART, REVERSED IN PART**

**SOUTHERN DISTRICT**

**STATE v. JEROME JOHNSON**

**Mississippi County**

**No. 15136**

**11-30-87**

Johnson appeals his misdemeanor resisting arrest conviction.

**REVERSED.**

Division One holds: The trial court erred in overruling Johnson's acquittal motion because the evidence was insufficient to sustain his conviction in that the State failed to show at trial what crime

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**BULK RATE  
U.S. POSTAGE  
PAID  
PERMIT NO. 1917  
K.C., MO**

**STATE v. MASSION**

**No. 53170**

**March, 1988**

Massion appeals from convictions of two counts of involuntary manslaughter and one count of driving without a valid operator's license. The trial court erred in refusing to allow defendant to present testimony concerning the bias of a witness for the state. Further, the state made a submissible case based on circumstantial evidence.

**REVERSED AND REMANDED**

or ordinance violation Johnson was in the middle of committing when the arrest occurred.

**OPINION BY JUDGE GREENE**

**STATE v. KING**

**No. 15178**

**February, 1988**

After jury trial, King was convicted of second degree robbery, and sentenced to 10 years' imprisonment. On appeal, King alleges the trial court abused its discretion in failing to sustain King's challenges for cause of veniremen Collier and Bye.

**REVERSED AND REMANDED**