

MACDL

Missouri Association of Criminal Defense Lawyers



Spring, 2016



Carl M. Ward
MACDL 2015-16 President

President's Letter

Dear Brothers and Sisters:

Next month, my term as President of MACDL will come to an end. I want to thank everyone who supported my efforts this past year. I would especially like to thank Randy, Brian and Sarah for all of their hard work this

past year. Without them, this organization would not be able to function.

It has been a good year for the Association. We have taken major steps towards expanding MACDL's membership and our ability to affect positive change upon the criminal justice system. Thanks to the hard work of the Board and membership, we now have a clear path for the future.

Grass Roots Organization

MACDL is now organized at the grass roots level. The State has been divided into seventeen (17) regions, each with at least one Regional representative. Every County also has a MACDL representative who serves as a contact for the members of their local legal community. County and Regional representatives have been hard at work distributing MACDL's new membership brochure and recruiting new members. As a result, MACDL has added 77 new members since April, 2015, and now has well over 500 members. That is a 15% increase in MACDL's membership in less than a year.

In addition, County and Regional representatives are available to lobby their local Legislators on bills of importance to MACDL and will be distributing flyers for upcoming MACDL sponsored seminars. This should boost our influence in the Legislature and increase attendance at all upcoming MACDL events.

New Committees

MACDL has established many new Committees and

Advisory Groups. The new Appellate Watch Committee is charged with the duty of monitoring pending appellate cases so that MACDL may offer AMICUS assistance BEFORE we all learn of the case for the first time when the opinion is handed down. The Finance Committee has been established to find new ways to increase MACDL's sources of revenue. The Finance Committee will be working with the Website Committee to launch our new MACDL Sponsorship Program to raise money for MACDL's PAC fund. We will be looking for Platinum, Gold, Silver, and Bronze Sponsors, as well as "Friends of MACDL." More details to follow in the future.

The new Forensic Science Committee (FSC) is charged with educating and advising the membership on all matters related to science and the law. Some of the top experts in their fields have agreed to serve or support the FSC. The Research Committee will support the work of the Amicus and Legislative Committees. We have also created the Sex Crimes Defense Committee and White Collar Crime Committee. If you are interested in serving on one of these new Committees or any of our other committees, please call the MACDL office.

New Advisory Groups

MACDL has also established several Advisory Groups. Advisory group members include all experts, law professors, attorneys who practice in areas other than criminal defense, and MACDL members who are otherwise unable to devote the time necessary to serve on a regular committee.

Currently, the Alternative Sentencing Advisory Group was created to look for and promote creative alternatives to incarceration. The Amicus Advisory Group consists of three constitutional and appellate law professors who will provide technical support and strategic advice to the Amicus Committee. The Information Technology Group will provide the Website and Social Media Committee with technical support. If you have computer whiz kids in high school and college



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that you can recruit to help, please call the Office. The Legislative Advisory Group consists of two groups: (1) MACDL members who are available to testify before Senate and House Committees during the legislative session in support of, or in opposition to, bills affecting the rights of the criminally accused; and (2) a network of past legislative interns, aides, and legislators who are willing to use their contacts on behalf of MACDL.

We have also established the Immigration Law Advisory Group and the Military Justice Advisory Group. These groups will help educate the membership on current developments in these very specialized areas of practice.

Call the Office if you would be willing to serve on any of these Advisory Groups.

Law Student Involvement

MACDL is working to establish MACDL Chapters on each of Missouri's Law School Campuses. MACDL has waived membership dues for law students. We have also established a Summer Internship Program, a Summer Job Fair, and appointed a Law School Coordinator.

New Awards

MACDL has established several new Awards. These include: "Lawyer of the Year," "Case of the Year," and the MACDL "Hall of Fame" Awards.

Tuition Assistance Scholarship

MACDL may provide tuition assistance for a MACDL member who wishes to attend one of Gerry Spence's trial practice workshops. Anyone interested in tuition assistance should contact the Office for more information.

MACDL e-News

In addition to publishing the *MACDL Newsletter* twice a year, we are also distributing the MACDL e-News 26 times a year. There, you will find links to helpful articles written by some of the top

experts and lawyers, case alerts, and much more useful information.

Website Expansion

We have taken steps to improve and expand MACDL's website (www.MACDL.net). Members of the general public can now Search for a Lawyer by practice area and other relevant search criteria. Be sure to go to the Membership section and update your information as soon as possible.

We have a link to the state Legislator Lookup section so that members can easily identify and contact their local legislators. Committee and Advisory Group members will now be listed on MACDL's website, along with the Mission Statements of each.

Resource Library

MACDL is taking steps to expand the resource information available to the membership. The old Motion Bank is being scrapped and the creation of a new Resource Library is under way. We are now looking for any petitions, motions, memorandums, proposed findings, briefs, or other documents you are willing to share with your colleagues. Please contact the Office and ask how you can help.

Information for the Public

The MACDL Website Committee is considering a Public Information section where members of the general public can find information on various topics, such as, *Your Rights if You're Arrested*, etc. Please contact the Office if you have something you can contribute.

Additional Seminars

MACDL held two additional seminars this year in conjunction with the Missouri Bar. The revenue for these two programs will boost MACDL's revenue by about 10% for the year. In addition, attendees were recruited to join our ranks at both programs.

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President's Letter

(from page 2)

So Long

It has been a great honor to serve as your President. Remember ... if everyone is willing to help a little, and a few are willing to contribute a lot, there is no end to what MACDL can accomplish. It is my hope that MACDL will someday become a powerful offensive weapon in Jefferson City that can affect significant improvements in the law for the good of the criminal justice system and for the rights of us all. Please get involved.

Sincerely,

Carl M. Ward

MACDL President



Dates to Remember ...

MACDL Spring CLE and Annual Meeting

March 31 - April 1, 2016

*Westin Crown Center
Kansas City, MO*

Bernard Edelman DWI CLE

July 22-23, 2016

*Tan-Tar-A
Osage Beach MO*

Some Member Benefits

MACDL List Serve

The MACDL ListServe helps facilitate, via e-mail, all sorts of criminal defense law discussions, including recommendations for expert witnesses, advice on trial practices, etc. Subscription is free and limited to active MACDL members. To subscribe, please visit our website, enter the member's only page, and follow the ListServe link. (www.MACDL.net)

Lawyer Assistance Strike Force

As a benefit of membership, members have the opportunity to consult with MACDL's Strike Force if they are threatened in any way for providing legal representation to a client in a criminal proceeding and are subpoenaed to provide information, cited for contempt, being disqualified from the representation, or who become the subject of a bar complaint resulting from such representation. Please visit the website for guidelines. (www.MACDL.net)

Case Law Update

For up-to-date Case Law Updates please visit the MACDL website/ Newsletter page and check out the link to Greg Mermelstein's Reports located at the bottom of the page.



We would like to thank the following members who have chosen to support MACDL with their Lifetime Membership:

Kim Benjamin	Carol Hutcheson	Tamara Putnam
J. Denise Carter	Matthew Lowe	Eric Vernon
Daniel Dodson	Travis Noble	Carl Ward
William Goldstein	Joseph S. Passanise	

A Warm Welcome to our new members!



MACDL sincerely appreciates your support. We can't function without you! Your dues pay for postage, printing, MACDL's interactive website, this newsletter, travel expenses of CLE speakers, and lobbying efforts in the Missouri General Assembly, among other things.

William Kenney ♦ *Kansas City, MO*
Joshua Meyer ♦ *Kirksville, MO*
Kevin Jamison ♦ *Gladstone, MO*
Chastidy Dillon Amelung ♦ *Clayton, MO*
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Ian Murphy ♦ *St. Louis, MO*
Gabe Crocker ♦ *St. Louis, MO*
Brooke Kraushaar ♦ *Clayton, MO*
Jeremy Brauer ♦ *Park Hills, MO*
Michael Jones ♦ *St. Louis, MO*
Susan Ayers ♦ *Overland Park, KS*
Cheryl Hom ♦ *Springfield, MO*
Rodney McKinney ♦ *Union, MO*
Jared Welch ♦ *Platte City, MO*
James Anderson ♦ *Lees Summit, MO*
Bradley S. Dede ♦ *Clayton, MO*
Geri Gilmore ♦ *Sikeston, MO*
John Moffitt ♦ *St. Louis, MO*
Amanda Oesch ♦ *Charleston, MO*



Legislative Committee Report

by Brian Bernskoetter

The Legislative Committee of the Missouri Association of Criminal Defense Lawyers met to review proposed legislation in the General Assembly. The Committee recommended the following positions that were adopted by the Board on January 30th. The 2nd Session of the 98th General Assembly runs through May 13th.

House Bill 1408 –

Establishes a “Law Enforcement Technology Fund” - OPPOSE

House Bill 1521 –

Requires a peace officer to obtain written consent prior to conducting a consensual search of a vehicle - OPPOSE

House Bill 1585 –

Modifies provisions relating to videoconferencing at parole hearings. - OPPOSE

House Bill 1641 –

Modifies provisions relating to the detention of persons under the age of seventeen in adult facilities - OPPOSE

House Bill 1995 –

Repeals mandatory life sentence for juveniles, specifies prison terms for juveniles convicted of first degree murder, and grants parole hearings for those previously convicted - SUPPORT

House Bill 2256 –

Provides that Missouri residents shall not be assessed any points on their driving record for traffic tickets occurring in another state if the other state does not have a point system identical to Missouri - SUPPORT

House Bill 2355 –

Establishes the Missouri State Juvenile Justice Advisory Board - SUPPORT

Senate Bill 588 –

Modifies and expands the options for seeking expungement of criminal records - SUPPORT

Senate Bill 618 –

Requires any juvenile certified as an adult be detained in a juvenile facility until the juvenile has been sentenced or turned seventeen years of age - SUPPORT

Senate Bill 658 –

This act provides that any offense of Chapter 570, which includes robbery, stealing, and other similar offenses, may also be prosecuted in the county in which the victim resides or conducts business or the property obtained, or attempted to be obtained, was located - OPPOSE

Senate Bill 929 –

Modifies provisions regarding when a court must instruct the jury on an included offense - OPPOSE

Senate Bill 1013 –

Modifies provisions relating to procedures in criminal proceedings - OPPOSE

Senate Bill 1014 –

This act abrogates the holdings of *Stiers v. DOR* - OPPOSE

ATTENTION!

MACDL is looking to broaden our base of witnesses who may testify before the General Assembly on MACDL's behalf. If you are interested please email Brian Bernskoetter at brianb@swllc.us.com.

Thank You!

MACDL would like to thank The Bar Plan for exhibiting at our 2015 Fall CLE.



MACDL and Public Defender Team Up on Pending Issues List

by Greg Mermelstein, Deputy Director, Specialty Practices and Resources

MACDL's Appellate Committee and the Public Defender have recently teamed up to produce a new resource – a "pending issues" list of important cases awaiting decision in Missouri's appellate courts.

The list, which will be published in MACDL's eNews, will eventually cover all pending Missouri Supreme Court cases of interest to criminal practitioners, and selected pending cases in the Court of Appeals.

The committee and Public Defender began by listing new cases accepted by the Missouri Supreme Court since late October 2015. The list will be updated monthly. As time goes on, all new Supreme Court cases will eventually appear on the list. As cases get decided, they will be removed from the list.

The committee will begin covering selected Court of Appeals cases in coming months, but seeks your help in doing so. The committee members are not able to personally review every case pending in the Court of Appeals, due to the large number of cases. If you know of a case raising an "important" issue that you believe other MACDL members should know about, please email the case name and the legal issue presented (in the format below) to Greg.Mermelstein@mspd.mo.gov. I will add the case to the next published list.

The Supreme Court has accepted the following criminal cases since late October:

1. *State v. Meeks* (SC95221):

- (1) Does race, when offered as even a partial motivation for a peremptory strike, render the strike impermissible under Batson, or does a dual motivation analysis apply?
- (2) Was the State's strike of an African-American venireperson, who reacted negatively to a racist remark by a different venireperson, race-neutral under Batson?

2. *Ross-Paige v. St. Louis Metropolitan Police Dept.* (SC95214):

Where a juror during deliberations conducts an internet search on Wikipedia to answer a legal question as opposed to a factual one, must prejudice be presumed?

3. *Green v. State* (SC95363):

In light of Rule 78.07(c), is a judgment that omits findings of fact and conclusions of law on a particular claim in a Rule 24.035/29.15 motion a "final judgment" subject to appeal?

4. *State v. Bazell* (SC94318):

Do two convictions for felony stealing under Sec. 570.030.3 for theft of two different firearms from the same owner at the same time and place violate double jeopardy?

5. *State ex rel. Tankins v. Frawley* (SC95370):

- (1) Can a trial court, at a probation revocation hearing, rely on hearsay (probation violation reports) to revoke probation?
- (2) Can a trial court revoke probation without stating specific reasons why probation is being revoked?
- (3) Can a trial court, at a probation violation hearing, compel Defendant to be a witness (called by the State) and then draw a negative inference from Defendant's invocation of her Fifth Amendment right against self-incrimination to revoke probation?

We hope the new pending issues resource will prove useful to you!



"The MACDL Amicus Committee is pleased to officially welcome W. Scott Rose, Nathan Swanson, Denise L. Childress, and John William Simon as members. If you are interested in joining the committee, or if you would be willing to help with research and briefing projects, please reach out to any of the committee members or email Talmage Newton at tnewton@nwblegal.com. As always, if you have an issue you believe MACDL would have an interest in, please do not hesitate to reach out to the Amicus Committee."

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Post-Conviction Update

by Elizabeth Unger Carlyle © 2016



Below are the “good news” cases since the last newsletter, as well as some practice pointers. Of course you should do your own history check before citing anything here. As will be evident, the big story this time is, well, time.

Abandonment/Timeliness Issues

Following the Missouri Supreme Court’s decision in *Moore v. State*, 458 S.W.3d 822, 825 (Mo. banc 2015), when an untimely amended motion is filed, the motion court is required to determine whether the untimely filing was the result of abandonment by appointed counsel. Prior to this ruling, it was apparently pretty common for the motion court simply to assume that the untimeliness was due to abandonment and treat the amended motion as timely no matter when it was filed. After *Moore*, this is improper. The court must conduct an “independent inquiry” concerning abandonment, and may only consider the amended motion as timely if abandonment is found. If there was no abandonment, the court is to proceed on the original motion. In several cases, courts have remanded the post-conviction case to the trial court, sometimes even after a hearing on the untimely amended motion.

These cases include *Hawkins v. State*, 476 S.W.3d 313 (Mo. App. E.D. 2015); *Gales v. State*, 470 S.W. 2d 405 (Mo. App. E.D. 2015); *Harris v. State*, 474 S.W.3d 600 (Mo. App. E.D. 2015); *Patton v. State*, 2016 WL 513655 (Mo. App. E.D. Feb. 9, 2016); *Creighton v. State*, 2015 WL 9240967 (Mo. App. E.D. Dec. 15, 2015) (Westlaw mistakenly lists this case as “*State v. Creighton*”); *Lewis v. State*, 476 S.W. 3d 364 (Mo. App. S.D. 2015); *Mann v. State*, 475 S.W.3d 208 (Mo. App. E.D. 2015); *Roberts v. State*, 473 S.W.3d 672 (Mo. App. E.D. 2015); *Frazee v. State*, 2016 WL 313219 (Mo. App. W.D. Jan. 26, 2016); *Hicks v. State*, 473 S.W. 3d 204 (Mo. App. 2015); *McCullough v. State*, 2016 WL 312652 (Mo. App. W.D. Jan. 26, 2016); *Blackburn v. State*, 468 S.W.3d 910 (Mo. App. E.D. 2015); *James v. State*, 477 S.W.3d 190 (Mo. App. S.D. 2015); *Hendricks v. State*, 2016 WL 513497 (Mo. App. E.D. Feb. 9, 2016); and *Shields v. State*, 2016 WL 616108 (Mo. App. E.D. Feb. 16, 2016).

Note that there may be an exception where the motion court denies the grounds alleged in both the original and amended motions, and the court of appeals follows suit.

In that situation, remand would be “pointless.” *Childers v. State*, 462 S.W.3d 825, 827 (Mo. App. 2015); *Bustamante v. State*, 2015 WL 5704466 (Mo. App. W.D. Sept. 29, 2015).

Austin v. State, 2016 WL 514233 (Mo. App. E.D. Feb. 9, 2016). The court of appeals remanded because the record did not reflect sufficient information to show when the amended motion was due. This was a Rule 24.035 case, and the record did not show when the transcript of the plea proceedings was filed or when counsel was appointed. Since the amended motion was filed over five months after appointed counsel’s entry of appearance, there was certainly the appearance of untimeliness. It will be interesting to see what happens when the court reviews a case where, as was true in a recent case of mine, there is no record that the plea/sentencing transcript was actually filed in the circuit court.

As a result of the rulings discussed above, counsel should 1) make sure the record reflects the events which establish when the amended motion is due; 2) make sure the court rules on the motion for extension of time, preferably before the original time expires, and 3) if the amended motion is untimely, ask the motion court to make a determination as to abandonment before proceeding to a hearing.

On the timeliness of the **original motion** front, things are not looking good for movants who file late.

Green v. State, 2015 WL 9435254 (Mo. App. S.D. Dec. 23, 2015) In this case, the movant alleged that he had delivered his initial motion to the prison mail system six days before it was due. However, it was not file-marked until 17 days after it was due. The motion court conducted a hearing on timeliness, and found the motion timely because the late filing was not the movant’s fault. The court of appeals reversed, finding that since neither the original nor amended motion contained factual allegations

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excusing the late filing, the right to file a post-conviction motion was waived. This would seem to present an abandonment issue under *Vogl v. State*, 437 S.W.3d 218, 227 (Mo. banc 2014), and I hope the Missouri Supreme Court considers the issue; a transfer motion is pending. Meanwhile, counsel filing amended motions where there is a question of the timeliness of the original motion should make sure that the amended motion addresses that issue. Note that it would be difficult for the pro se litigant to address the issue of the late filing in his original motion before the late filing occurs, but the court of appeals didn't seem to notice that.

Gunn v. State, 2015 WL 8776885 (Mo. App. W.D. 2015) In this distressing case, appellate counsel admitted that she did not inform the movant that the appellate mandate had been issued in his case. Mr. Gunn testified that she had agreed to let him know of that event, and appellate counsel stated that was her practice but she had not done so for Mr. Gunn. The original motion was filed approximately six months late. Following *Price v. State*, 422 S.W.3d 292, 302 (Mo. banc 2014), the court said that appellate counsel's assumption of the responsibility to notify the defendant of the issuance of the mandate was not sufficient to keep him from filing in a timely manner. The motion was ordered dismissed.

Now, on to cases where the court actually made a decision.

Hearing Required

Randle v. State, 473 S.W.3d 221 (Mo. App. E.D. 2015). Where the defendant stated, at the time of his plea of guilty, that he wanted to withdraw the plea because he thought his counsel had misled him about the effect his plea would have on another case, he was entitled to a hearing on his post-conviction motion. The motion asserted that but for the fact that his counsel misled and coerced him to plead guilty, he would not have done so. Remanded for evidentiary hearing.

Teaver v. State, 2015 WL 7280675 (Mo. App. S.D. 2015) Where the defendant alleged that trial counsel misinformed the defendant concerning his parole eligibility for the sentence he agreed to in his plea agreement, he was entitled to a hearing on his post-conviction motion.

Post-Conviction Relief Granted

DePriest (Natalie) v. State, 2015 WL 7455009 (Mo. App. E.D. Nov. 24, 2015) and **DePriest (David) v. State**, 2015 WL 6473150 (Mo. App. E.D. Oct. 27, 2015) In these two cases, the court of appeals reversed the convictions

without a hearing due to two problems. The first was the fact that the defendants, who were brother and sister, were permitted to plead guilty together as part of a "group plea" in which no individual questions were asked of them. The second problem was that they were represented by the same attorney, which created a presumption of prejudice. The problem was exacerbated by the fact that the state's plea offer to Natalie was contingent on her brother's simultaneous plea of guilty. The court is particularly critical of the trial court's overwhelming emphasis on "saving time" by having the consolidated plea proceeding. Anyone who is appearing in a court where group pleas are conducted should read these cases. And anyone who is considering representing co-defendants should read them twice. The state has applied for transfer in both cases, which are pending at the time of this article.

Pherigo, 475 S.W.3d 233 (Mo. App. S.D. 2015) The motion court's grant of post-conviction relief was affirmed in this case. After the end of the trial, the prosecutor provided to defense counsel, for the first time, recorded statements from the co-defendants that exculpated Mr. Pherigo. In his motion for new trial, counsel urged reversal for the late disclosure of these interviews, but failed to provide them to the court. The motion court granted relief on Mr. Pherigo's claim that counsel was ineffective for failing to request a continuance due to the late disclosure, failing to move for a mistrial when other undisclosed evidence was referenced at trial, and failing to present sufficient evidence at the motion for new trial hearing. The motion court also found a discovery violation and a *Brady* violation which was prejudicial to the movant. On appeal, the state did not contest the discovery violation, and the court of appeals found that trial counsel's decision not to request a continuance before listening to the co-defendant's statements was not reasonable trial strategy. The fact that the defendant did not desire further delay did not obviate counsel's duty to review this important evidence.

Habeas Relief Granted

In Re Kory v. Gray, 2016 WL 66504 (Mo. App. W.D. Jan. 5, 2016) On July 2, 2014, the defendant was arrested for an incident with a minor victim which was alleged to have occurred on October 31, 2013. On August 11, 2015, the state dismissed the 2014 information, but filed a new complaint charging three new offenses arising from the same October 31, 2013 incident. On December 16, 2015, the state dismissed the August, 2015 complaint and filed an information alleging that the defendant committed the

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offense of Class A misdemeanor sexual abuse. That day, Mr. Kory pled guilty and was sentenced to a year in jail. By that time, he had been confined for 532 days. The circuit court denied Mr. Kory credit for this time, and directed the jail to hold him for an additional year. On habeas corpus, the court of appeals first held that the application was properly filed there since filing in the court where he was being held, and of whose ruling he was complaining, would have been futile. The court then held that under Mo. Rev. Stat. §558.031.1, Mr. Kory was entitled to credit. The 532 days was “related” to the charge of conviction because but for that incident, Mr. Kory would not have been incarcerated. Writ granted.


State ex rel. Royal v. Norman, 2016 WL 215236 (Mo. App. W.D. Jan. 19, 2016) The defendant’s seven year sentence for felony victim tampering was unlawful where the underlying offense was a misdemeanor. In order to be guilty of felony victim tampering, a defendant must “tamper” with the victim of a *felony* offense. Writ granted, remanded to circuit court for resentencing for misdemeanor tampering.

State ex rel. Clemons v. Larkins, 475 S.W.3d 60 (Mo. banc 2015) In a 4-3 decision, the Missouri Supreme Court set aside Mr. Clemons’s convictions and death sentences because of a *Brady v. Maryland* violation. The Court had appointed a special master to conduct a hearing on Mr.

Clemons’s claims. The master found that the state had violated the *Brady* rule by not producing evidence that a witness observed an injury to Mr. Clemons’s face after a police interrogation, and that the witness’s report of that injury was altered by the state. Because this evidence could have led to the suppression of Mr. Clemons’s confession as coerced, Mr. Clemons showed prejudice from the *Brady* violation. The Missouri Supreme Court agreed, and gave the state 60 days to retry Mr. Clemons. The opinion is worth reading by anyone who has ever raised a coerced confession or *Brady* claim. (Mr. Clemons also raised a proportionality argument attacking his death sentence, which the Missouri Supreme Court declined to address in light of the reversal of the conviction.) On January 25, 2016, the St. Louis City Circuit Attorney announced his intention to retry Mr. Clemons.

Hall of Fame

Congratulations to Timothy Forneris (Randle), Ellen Flottman (Teaver), Jessica Hathaway (N. DePriest), Lisa Stroup (D. DePriest), Emmett Queener (Pherigo), Daniel Miller and Matthew Terry (Kory), Stephen Harris (Royal), and a whole team of lawyers from Simpson Thacher & Bartlett, New York, plus Mark Arnold from St. Louis (Clemons).



Calling All Writers

If you have an article of interest relating to the practice of criminal defense, why not submit it for publication in the MACDL newsletter?

Submit them electronically to info@macdl.net with “MACDL Newsletter” in subject or mail to MACDL.

MACDL Website Traffic

Reporting Period: August 31, 2015 - March 18, 2016

Item	Counts
Total Hits	535,224
Average Hits per Day	2,802
Total Visitors	74,473
Average Page Views per Day	988
Average Page Views per Visitor	2.53
Average Visitors per Day	389