



# THE MACDL NEWS

MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS  
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MISSOURI ASSOCIATION  
OF  
CRIMINAL  
DEFENSE  
LAWYERS

Spring, 2017

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## MACDL STAYS IN TOUCH

MACDL disseminates information on many platforms. For example:



*The MACDL News* is a biannual publication of the Missouri Association of Criminal Defense Lawyers.

Your submissions and suggestions are welcome!

## PRESIDENT'S MESSAGE

Criminal defense community, change is upon us. We do not know what the changes will be, but we will only be ready to protect our clients' rights if we stand together. Being a criminal defense attorney is bigger than any political party. Criminal defense attorneys will be center stage for the Constitutional challenges to come.

We will be prepared for whatever comes. We are already in the thick of the fight. Look at the headway our DUI lawyers have made in pushing back the seemingly silent erosion of Fourth Amendment and Fifth Amendment rights of those specifically accused of DUI. Look at the success in laws persecuting those accused of sex offenses. Our fight continues to protect the mentally ill and juveniles from outrageous inhumane sentences. Organizations like Arch City Defenders have exposed to all what the criminal defense community already knew, the poor are preyed upon by municipal and misdemeanor courts.

Whatever your specialty practice may be, over criminalization is a constant battle. MACDL, through its legislative presence and members who volunteer to testify, remains vigilant in the fight against over criminalization. Our members who devote so much time to the de-criminalization of marijuana to free Missourians from future incarceration will never give up. Appellate and post-conviction attorneys stand guard against the attack on our clients' rights to a fair trial and effective representation. The trial attorney who faces a myriad of challenges every day; racism, elitism, sexism, prejudice against the disenfranchised, they remain strong.

One change we are already aware of is the loss of a liberal lion on our Missouri Supreme Court, Judge Richard B. Teitelman. The loss of Judge Teitelman will be felt by our entire legal community. Certainly, a criminal defense attorney can respect a Supreme Court



Michelle Monahan  
2016-17 MACDL President

## PRESIDENT'S MESSAGE *(from page 1)*

Judge who dissented over 200 times in his career when he saw injustice. Known as the "voice for the voiceless," we must work all the more to make sure those who need our best work, get exactly that.

MACDL has never backed away from the constant assault on our clients' rights. Winning the fight also means changing the minds of those in power. In the words of a fellow warrior, Don Quixote, "Never let yourself be guided by arbitrary law, which is so favored by the ignorant who think they're so clever. Let the tears of the poor find more compassion." Maybe this does not seem like a time for optimism. I'm not being blindly optimistic. I simply know MACDL members. The reality is, we are strongest when challenged and stand together.

We have so many dedicated, active members but there is a need for more. If you do not know enough about MACDL, then ask. If you think MACDL should be addressing an issue more aggressively, then speak up. Your voice will be heard. The issue will be discussed by your board or come and speak to us yourself if you prefer. Remember this is your organization, you should be proud to state it and those who have not joined should feel they have lost out. If you just need help from MACDL and do not know how to get it, call on me or any MACDL member you know and I assure you, help will be on the way. The attorneys, comrades in this organization have never let me down when I was in need and they will not let our clients down for whatever the future holds.



## MACDL LISTSERV

The MACDL ListServ 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 ([www.MACDL.net](http://www.MACDL.net)) enter the "Member's Only" page and follow the ListServ link.

# save the dates!

**MACDL Annual Meeting**  
**April 27-28 2017**  
**Hilton Ballpark**  
**St. Louis, mo**



**Benard M. Edelman**  
**DWI Seminar**  
**July 21-22, 2017**  
**Lodge of Four Seasons**  
**Lake Ozark, MO**



## 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 ([www.macdl.net](http://www.macdl.net)) for guidelines.

## AMICUS COMMITTEE UPDATE

A big thank you to Denise Childress (with the Ward & Associates), who authored an amicus brief on behalf of MACDL to the Missouri Supreme Court.

MACDL's interest in the proceedings were to encourage the Court to apply the Abandonment Doctrine regarding Rule 29.15 PCR motions to appointed and retained counsel alike, arguing that failing to do so would leave an inmate choosing to retain counsel after filing a pro se motion without the Abandonment Doctrine's intended protections, effectively creating a disincentive to hire private counsel, discouraging alleviation to an already overburdened public defender system.

MACDL also had an interest in holding all defense counsel, appointed and retained alike, to the same standards of practice to ensure equal justice and protections to all criminally accused, arguing that applying the Abandonment Doctrine's enforcement of the Rule's minimum standards of action to appointed counsel and not retained counsel arbitrarily assumes that appointed counsel's representation requires court supervision more so than privately retained counsel in order to ensure effectiveness, which is arbitrary and unconstitutional.

If you see Denise please extend your thanks.

# Welcome

*MACDL wants to welcome the following new members and sincerely appreciates their support. We can't function without you! Your dues pay for postage, printing, MACDL's interactive website, travel expenses for CLE speakers, and lobbying efforts in the Missouri General Assembly, among other things.*

Kenneth Leiser ♦ West Plains  
Justin Crozier ♦ Kansas City  
Ronald Michel ♦ Rolla  
Tory Bernsen ♦ Clayton  
Anthony Muhlenkamp ♦ St. Louis  
Stephanie Lummus ♦ St. Louis  
Victoria Marszalik ♦ Springfield  
AAA Way Bail Bonds ♦ Carthage  
Hope Nordyke ♦ Butler  
Leslie Anderson ♦ Kirksville  
Dominic Cicerelli ♦ Clayton  
Callie Moench ♦ St. Louis  
Deidra Ritchhart ♦ Jasper  
Brandon Swartz ♦ Rolla  
Russell Dempsey ♦ Springfield  
Jessica Shaw ♦ Independence

## LIFETIME MEMBERS

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

## MACDL NEEDS YOU!

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](mailto:brianb@swllc.us.com).



## LEGISLATIVE UPDATE

*(As of February 6, 2017)*

The list below represents a small portion of bills that MACDL is tracking on behalf of the membership. The positions listed were determined after a thorough review by the Legislative Committee and Board of Directors. If you have any interest in testifying on any particular bill please email [info@macdl.net](mailto:info@macdl.net) You may also follow MACDL's twitter feed to get details of legislative committee hearings and bills as they are posted. Our handle is @MoACDL.

BILL	MACDL POSITION	SUMMARY
House Bill 38	SUPPORT	Provides that mandatory minimum sentences are now discretionary and creates provisions when a person is eligible for a parole hearing.
House Bill 57	MONITOR/ OPPOSE	Enhances the penalty for certain crimes when the victim is a special victim.
House Bill 75	NEUTRAL	Modifies provisions relating to county prosecuting attorneys.
House Bill 107	OPPOSE	Establishes "Toby's Law", which requires any person who has pled guilty to or been found guilty of driving while intoxicated to complete a victim impact program approved by the court.
House Bill 135	SUPPORT	Repeals the provisions that allow the use of the death penalty in Missouri.
House Bill 151	NEUTRAL	Requires the department of revenue to issue REAL ID compliant driver's licenses unless the applicant requests a license that is not compliant with the REAL ID.
House Bill 152	OPPOSE	Establishes the Armed Offender Docket Pilot Project within the Jackson County Circuit Court to handle all matters regarding a person accused or convicted of first degree robbery or a firearm offense.
House Bill 171	SUPPORT	Requires a convicted sex offender to be told of his or her obligation to register as a sex offender both prior to release or discharge and at the time of adjudication.
House Bill 219	SUPPORT	Modifies provisions relating to private probation services for misdemeanor offenders.

## LEGISLATIVE UPDATE *(Cont. from page 3)*

BILL	MACDL POSITION	SUMMARY
House Bill 274	SUPPORT	Requires children under the age of 18 to be prosecuted for most criminal offenses in juvenile courts unless the child is certified as an adult.
House Bill 301	OPPOSE	Modifies provisions relating to videoconferencing at parole hearings.
House Bill 431	SUPPORT	Changes the laws regarding the state sexual offender registry and its requirements.
House Bill 499	AMEND/ OPPOSE	Modifies provisions relating to records of regularly conducted activity as evidence law.
House Bill 595	OPPOSE	Makes offenders who owe court costs or restitution, or have not fulfilled certain other conditions, ineligible for early release for earned compliance credits.
House Bill 623	AMEND/ SUPPORT	Prohibits the fine collection center from taking an individual's drivers' license for failure to appear for a traffic violation.
House Bill 726	SUPPORT	Authorizes the early parole of certain offenders over the age of 65.
Senate Bill 24	MONITOR/ SUPPORT	Modifies provisions relating to racial profiling in policing.
Senate Bill 34	OPPOSE	Creates the crime of illegal reentry.
Senate Bill 40	SUPPORT	Requires children under the age of 18 to be prosecuted for most criminal offenses in juvenile courts unless the child is certified as an adult.
Senate Bill 84	SUPPORT	Restricts the use of cell site simulator devices.
Senate Bill 101	OPPOSE	Increases penalties for knowingly allowing a minor to drink or possess alcohol or failing to stop a minor from drinking or possessing alcohol.
Senate Bill 154	SUPPORT	Establishes and defines restorative justice conferences.
Senate Bill 345	SUPPORT	Creates certain policies relating to police-worn cameras, funding, and stored data.
Senate Joint Resolution 6	SUPPORT	Delineates procedures a court must follow when assessing a claim that the government has enforced a law that limits a person's constitutional rights.

# POST-CONVICTION REVIEW

by Elizabeth Unger Carlyle

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. Citations are current to February 7, 2017.

## 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. If not, only the claims in the original motion can be considered. Last year’s article provided a long list of cases on this issue, but the courts are not through yet! Here’s the latest.

### Remand for abandonment determination required:

(Note that in these cases, remand was required even though an evidentiary hearing had been held and relief had been denied on the merits.)

- Wilson v. State*, 495 S.W.3d 827 (Mo. App. E.D. 2016);
- Mahone v. State*, 504 S.W.3d 71 (Mo. App. E.D. 2016);
- Richard v. State*, 487 S.W.3d 504 (Mo. App. E.D. 2016);
- White v. State*, 2016 WL 7321750 (Mo. App. E.D. Dec. 13, 2016);
- Johnson v. State*, 491 S.W.3d 310 (Mo. App. E.D. 2016);
- Usry v. State*, 2016 WL 5030350 (Mo. App. E.D. Sept. 20, 2016) (transfer application pending);
- Williams v. State*, 2016 WL 4385081 (Mo. App. S.D. 2016);
- Yelton v. State*, 2016 WL 7147941 (Mo. App. S.D. December 7, 2016);
- Williams v. State*, 501 S.W.3d 562 (Mo. App. S.D. 2016);
- Price v. State*, 489 S.W.3d 358 (Mo. App S.D. 2016)

(These cases were denied without evidentiary hearing.)

- Hill v. State*, 499 S.W.3d 311 (Mo. App. S.D. 2016);
- Pulliam v. State*, 484 S.W.3d 877 (Mo. App. E.D. 2016);
- Adams v. State*, 483 S.W.3d 480 (Mo. App. E.D. 2016);
- Wallace v. State*, 487 S.W.3d 62 (Mo. App. E.D. 2016);
- Price v. State*, 500 S.W.3d 324 (Mo. App. W.D. 2016);
- Sayre v. State*, 493 S.W.3d 33 (Mo. App. W.D. 2016);
- Huffman v. State*, 493 S.W.3d 892 (Mo. App. E.D. 2016)

**Turner v. State**, 501 S.W.3d 904 (Mo. App. E.D. 2016)

The post-conviction motion was timely. The appellant was delivered to DOC on August 17, 2015. He filed his Rule 24.035 motion on February 16, 2016. The 180-day period began on August 18, and ended on Tuesday, February 16 because the 180th day was a Sunday and the following day was a holiday. (Note that the state confessed error.)

**Propst v. State**, 2016 WL 5030353 (Mo. App. E.D. 2016) (Transfer application pending)

The movant filed an untimely pro se motion for post-conviction relief, but he was entitled to relief because the district defender, although he was not appointed to represent the movant, assisted him with the preparation of the original motion and told the movant that he would file it on the movant’s behalf. Thus, the “active interference” doctrine of *McFadden v. State*, 256 S.W.3d 103 (Mo banc 2008) applies.

See **Taylor v. State**, 497 S.W.3d 342 (Mo. App. W.D. 2016), below, for a timeliness win!

## POST-CONVICTION REVIEW MESSAGE *(from page 6)*

### **A few more timeliness traps for the unwary:**

When probation is revoked and the person is sentenced to DOC for a 120-day program, the 180 period for filing a motion under Rule 24.035 begins to run. Thus, in *Edwards v. State*, 484 S.W.3d 847 (Mo. App. E.D. 2016), the motion was untimely even though it was filed within 180 days after Mr. Edwards was returned to DOC for the second time.

***Washington v. State***, 2017 WL 160885  
(Mo. App. W.D. Jan. 17, 2017)

Mr. Washington's original motion was untimely. The mailbox rule does not apply in Rule 29.15 cases; the motion must be filed in circuit court by the due date. If there is a question about timeliness (such as an allegation that the motion was actually received by the court but not filed timely), the issue should be raised in the amended motion, but failure to do is not "abandonment" by appointed post-conviction counsel.

### **Appeal dismissed for lack of jurisdiction**

***Green v. State***, 494 S.W.3d 525  
(Mo. banc 2016)

Where the motion court failed to address any of the pro se claims incorporated in the amended motion, the judgment was not a final, appealable order. Mr. Green did not waive this claim by failing to raise it in a motion to amend judgment.

***Goetz v. State***, 502 S.W.3d 771  
(Mo. App. E.D. 2016)

Where the motion court's order addressed only one of the movant's two grounds for relief, it was not an appealable order.

***Rose v. State***, 2016 WL 7176916  
(Mo. App. S.D. 2016)

The movant was entitled to an evidentiary hearing on his claim that he was denied effective assistance of counsel when trial counsel failed to object to the verdict director. The issue was the failure of the instruction to require the jury to be

unanimous on the specific criminal act committed by the defendant, and there was evidence of numerous acts.

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

#### **Hearing Required**

***Miller v. State***, 2016 WL 2339049  
(Mo. App. E.D. May 3, 2016)  
(Transfer application pending)

The movant is entitled to an evidentiary hearing on an allegation that his plea counsel failed to object to a "group plea" procedure without further allegation of prejudice. "In what appears to be at least the tenth time in the past decade, this court is again confronted with a post-conviction appeal, premised upon the same trial court judge's ritual of conducting 'group pleas.'"

***Watson v. State***, 2016 WL 6236630  
(Mo. App. E.D. October 15, 2016)  
(Transfer application pending)

The movant is entitled to an evidentiary hearing on his claim that he would have accepted a ten-year plea offer if he had been properly advised about what the state would have to prove to convict him.

***Williams v. State***, 494 S.W.3d 638  
(Mo. App. W.D. 2016)

The motion court erred in granting the motion of appointed counsel to withdraw at a hearing at which the movant did not appear. The motion was based on the movant's failure to respond to counsel's letters requesting that he complete forms needed for indigent representation. Appointed counsel did not file an amended motion or a statement indicating that an amended motion was not necessary as provided by rule. The case was remanded for a determination of whether the movant was abandoned; if so, he is to be given time to file an amended motion.

## POST-CONVICTION REVIEW MESSAGE *(from page 7)*

***Williams v. State***, 503 S.W.3d 301  
(Mo. App. W.D. 2016)

Remand was required for a determination on abandonment and for adjudication of all available claims.

***Taylor v. State***, 497 S.W.3d 342  
(Mo. App. W.D. 2016)

First, the court finds the original motion timely. While the filing stamp indicated that it was one day late, the facsimile transmission marking indicated that it had been received during business hours on the date the motion was due, and thus it was timely under the local rule. Next, the court holds the movant is entitled to an evidentiary hearing on his claim that plea counsel failed to advise him that the charges were filed without probable cause, and that absent such failure, he would not have entered a plea of guilty.

***Routt v. State***, 493 S.W.3d 904  
(Mo. App. E.D. 2016)

The movant was entitled to a hearing on his claim that defense counsel's representation was constitutionally deficient when she failed to investigate and call the defendant's stepsister as a witness in his sentencing hearing. It was clear from the allegations in the post-conviction motion that sentencing counsel did not perform her obligation to conduct a reasonable investigation. Prejudice was not refuted by the record when the defendant was sentenced to 35 years in prison and denied a drug program.

### POST-CONVICTION RELIEF GRANTED

***Hoeber v. State***, 488 S.W.3d 648  
(Mo. App. 2016)

The verdict directors in this statutory sodomy case failed to require the jury to agree on the act committed by the defendant where there was evidence of multiple acts in different times and places. Prejudice was shown where there was a real risk that the jurors did not agree unanimously. No trial strategy justified

the failure to object, and therefore the movant was denied effective assistance of counsel.

***Cusumano v. State***, 494 S.W.3d 652  
(Mo. App. E.D. 2016)

The defendant was entitled to a new trial where trial counsel's decision to submit lesser-included offense instructions which waived the defendant's limitation defense was not reasonably effective.

***Christian v. State***, 502 S.W.3d 702  
(Mo. App. S.D. 2016)

The defendant was denied effective assistance of counsel when trial counsel failed to object to the prosecutor's presenting evidence that during a civil proceeding related to the forgery charge, the movant's deposition was taken and he invoked his Fifth Amendment privilege. Prejudice was shown where these statements were presented as direct evidence of the charged offense, and no curative instruction was given since there was no objection.

***Hannon v. State***, 491 S.W.3d 234  
(Mo. App. E.D. 2016)

The movant was denied effective assistance of counsel when trial counsel failed to obtain the victim's school records, which revealed that the victim was in school on the day of the offense. This potentially contradicted the state's evidence. The fact that the movant raised an issue on direct appeal that the discovery of the records required remand did not prevent his raising an ineffectiveness claim based on the same records after remand; the appellate finding did not resolve that claim.

***Note that the cases of Natalie and David DePriest, discussed in the last article, have been transferred to the Missouri Supreme Court.***

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## POST-CONVICTION REVIEW MESSAGE *(from page 8)*

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### HABEAS CASE OF INTEREST

*In Re Lincoln v. Cassady*, 2016 WL 5888944  
(Mo. App. W.D. October 11, 2016)  
(Transfer application pending)

In this case, the Western District Court of Appeals held that actual innocence is not a basis for habeas relief in cases in which there was no death sentence. An original application for transfer was filed in December 2016. The next date on which it could be acted on is February 28, 2017. Keep an eye out for this one!

### MANDAMUS RELIEF GRANTED

*State ex rel. Costello v. Goldman*,  
485 S.W.3d 397 (Mo. App. E.D. 2016)

The movant filed a timely pro se motion attacking his murder conviction, but the court mistakenly placed it in the file of a robbery case in which a post-conviction motion was already pending. While the pro se filing was somewhat confusing, it "clearly shows that Costello was seeking post-conviction relief from the murder conviction and was not a filing relating to the robbery conviction." On the filing of a timely motion, the movant was entitled to appointment of counsel. The circuit court is directed to open a new case and proceed from there. So, four years after filing his original motion, it appears that Mr. Costello will finally be permitted to proceed.

### HABEAS RELIEF GRANTED

*In Re Culp v. Lawrence*, 2017 WL 83534  
(Mo. App. W.D. 2017)  
(Rehearing motion pending)

The defendant was entitled to relief under *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016) from his conviction for stealing property worth more than \$500. His conviction of felony stealing is vacated, and the judgment is ordered amended to reflect Class A misdemeanor stealing. Because the petitioner has served more than a year in custody, his release is ordered upon issuance of the court's mandate. The court declined to apply the

escape rule to prevent review where, while the petitioner's parole was violated for failing to report, the escape rule generally operates only to deny the right to appeal, and if it applies to habeas, it is a matter of discretion. There is no evidence in the record concerning the length and circumstances of the failure to report.

*State ex rel. Koster v. Oxenhandler*,  
491 S.W.3d 576 (Mo. App. W.D. 2016)

The court of appeals affirmed the circuit court's grant of habeas relief in this unusual case. The real party at interest, petitioner Shanon Swickheimer, was found not guilty by reason of insanity in a proceeding which was off the record and of which no one but himself had a clear memory. Mr. Swickheimer testified that he did not want to enter a NGRI plea and had a defense to the underlying assault charge other than NGRI. The habeas court found that without a colloquy on the record and in the absence of evidence that statutory procedures were followed, the entry of the NGRI plea violated due process. Despite the fact that an NGRI plea does not result in a conviction, the consequences for liberty implicate the right to due process. The court declined to apply the escape rule to bar review. The court of appeals did quash the habeas court's order regarding jail time credit, finding it premature and not authorized by statute.

### HALL OF FAME

Congratulations to Kyle Matthew Turner, who won his case pro se, Samuel Buffaloe (Green), Amanda Faerber (Miller, R. Williams), Emmett Queener (Watson), Timothy Forneris (Propst), Ellen Flottman (V. Williams, Christian), Lisa Stroup (Costello), Natalie Hull (Taylor), Mark Grothoff (Rose); Amy Lowe (Cusumano), Gwenda Robinson (Hannon), Scott Rose (Culp), Susan Kister and Robert B. Ramsey (Swickheimer)

