

M . A . C . D . L

.....
Massachusetts Association of Criminal Defense Lawyers

Dear friends:

Happy New Year to all of our members, and a special welcome to those who have newly joined. I hope to see you all at our January 23 Winter Meeting, at Pier 4, at which we will honor Judge Nancy Gertner and Roger Witkin. (More about this later and click [here](#)).

2012 turned out to be an eventful year for MACDL and the criminal bar.

Drug lab scandal

Surely, the biggest news of the year was the disclosure that Annie Dookhan, a chemist at the Hinton drug lab, had been falsifying drug test results for years. Even the most skeptical among us have been surprised at the scale of the problem – the extent of which seems to grow every day. By year’s end, we still did not have all the facts as to how the lab operated and how much of its total work product was tainted. And we definitely do not yet know whether justice will be done for all of the affected defendants, or how difficult it will be to get it. MACDL has been working closely with CPCS, in advocating for our clients with the office of the Governor, the Attorney General, EOPS, special counsel David Meier, and the courts. Together with CPCS, the MBA, and ACLUM, we objected, in person and [in writing](#), to the continued investigatory role of the Attorney General’s office, which we believed was conflicted on a number of grounds. This advocacy led to the inquiry being shifted to the Office of the Inspector General, whose investigation is still in the preliminary stage.

Legislation

Despite a prodigious effort by MACDL and a host of other organizations, new habitual offender legislation was enacted. **Liza Lunt** and I logged many hours at the State House in this battle which lasted right up to the final days of the legislative session. The opposition was successful, however, in coupling the legislation with mandatory minimum reform – which has had far reaching effects for our clients -- and reducing the number of “three strikes” eligible offenses. Most importantly for the

future, we helped to create and we participated in an extensive and vibrant statewide advocacy network, ready and willing to engage the State House in real sentencing reform. Prisoner Legal Services, under the adroit leadership of **Leslie Walker**, was instrumental in quickly analyzing and publicizing the real effects of each new iteration of the bill as the session wore on. MACDL members were consistently responsive and energetic in responding to our frequent legislative alerts, and to our requests that specific legislators be contacted.

Since then, MACDL has been meeting with various organizations to prepare for the next legislative session. At this point – besides continuing to resist new repressive measures - it appears that our priorities will be the following anticipated bills:

- Juvenile Life Without Parole – Bills concerning the appropriate sentence for a juvenile convicted of first degree murder. See below.
- Mandatory minimum reform – Additional bills to eliminate or reform mandatory minimums.
- Parole reform – Bills to increase the number of persons on the Parole Board and to require that Board members have expertise in certain areas (other than law enforcement).
- Compassionate Release of Prisoners – A bill concerning the release of elderly, severely debilitated and dying prisoners.
- Juvenile Court Jurisdiction – A bill to up the age of juvenile court jurisdiction to include 17 year olds.
- Limitation on Solitary Confinement Time – A bill to limit the length of time a prisoner can be held in solitary confinement.

Once again, we will be looking to our membership for help on these legislative matters. To get more involved, please contact **Liza Lunt** or **Marty Rosenthal**, our legislative co-chairs.

Judge Dougan

MACDL was intensely involved in supporting the defense of BMC Judge Raymond Dougan against a full-scale attack by District Attorney Dan Conley, based on the fiction that the judge was “biased” in favor of defendants. (If anyone is aware of the existence of such a judge, we will all be pleased to learn who it is.) Conley’s campaign, which threatened to intimidate the entire judiciary and was misguidedly supported by The Boston Globe, sadly was taken seriously by the Commission on Judicial Conduct, which authorized its counsel to conduct something of an audit of his many years on the bench. However, after the SJC ruled – assisted by a [MACDL amicus brief](#)– that the judge could not be grilled on his mental processes – on why, for example, he acquitted particular defendants, or chose to disbelieve certain police officers - the Commission apparently recognized that Conley’s claims lacked merit and closed its investigation without making any formal allegations. *See In re: A Subpoena*, 463 Mass. 162 (2012)(establishing judicial deliberations privilege).

Amicus committee

Since my last letter, MACDL's **Inna Landsman** filed an amicus brief in **Commonwealth v. Greineder**, SJC No. 08866, in support of the defendant's contention that the Confrontation Clause prohibits testimony by a substitute DNA expert who did not perform the original analysis, testifying solely on the basis of hearsay information. [The brief](#), with its many links to the scientific literature, is a valuable resource on its own. The MACDL argument emphasized the subjectivity and potential unreliability of much forensic testimony, as graphically illustrated by the Dookhan case. The appeal was argued in November and is under advisement.

Following up on [our brief supporting the appeal](#) of bar counsel in *In re: Jeffrey Auerhahn*, (First Circuit No. 11-2206), involving a prosecutor's suppression of exculpatory evidence, we moved for and were granted leave to participate in the oral argument. It is very rare, indeed, for any appellate court to grant such leave. The case was argued in September, and our attorney, **Peter Krupp**, gave a brilliant performance. The appeal remains under advisement.

As noted above, our arguments in the Dougan matter carried the day in the SJC. In the course of its opinion, the Court noted the concern (particularly emphasized in our brief) that the risk to judicial independence caused by such an inquiry is greater where a complaint is brought by a district attorney, no ordinary party. Credit for this goes to **Barry Pollack, Joshua Solomon, Phillip Rakhunov** and **Gretchen Silver**.

In *Commonwealth v. Pugh*, 462 Mass. 482 (2012), the SJC accepted the argument, made in [the brief](#) drafted by **McKenzie Webster**, that a pregnant woman could not be found criminally liable for manslaughter for alleged wanton and reckless conduct during childbirth. But, in *Commonwealth v. Bright*, 463 Mass. 421 (2012), the Court, rejecting our advice, held that a hearsay statement of a co-venturer can be admitted solely upon a preliminary finding by the court on a preponderance standard.

In bittersweet news, we will be losing our one-of-a-kind amicus chair, **Peter Krupp**, to the Superior Court bench. Our loss will be the Commonwealth's gain. We wish Peter the best of luck at what we know to be the beginning of an illustrious judicial career. **Jamie Sultan** and **Alex Philipson** will take over as co-chairs. Jamie's appellate prowess is known to everyone in the defense bar. Alex did a fabulous job for us in drafting our brief in *Commonwealth v. Bright*. We very much look forward to the energy and intellectual power that they will bring to this major component of MACDL's program.

MACDL'S Continuing Legal Education Program

In an October, 2012 CLE session, **Samuel Sommers**, Associate professor of psychology at Tufts University led a thoughtful discussion of his research in the identification of implicit bias in witnesses and jurors. We thank member **Victoria Nadel** who thought of the topic and arranged the speaker. In November, 2012, our CLE committee sponsored its annual one day seminar on Advanced Post Conviction Litigation. **Steven Maidman**, as he has done in all six years of the seminar, put

together a superb presentation for that seminar. We very much appreciate the support of the **WilmerHale** firm, which provided the venue.

The CLE committee is currently planning another event in late February or early March. We will let you know the date, place and topic. If you have any ideas for CLE programs or would like to volunteer for this committee, please contact **Lenore Glaser** at lglaser@glaser-law.com.

Juvenile Life without Parole

In *Miller v. Alabama* and *Jackson v. Arkansas*, 132 S.Ct. 2455 ([June 25, 2012](#)), the Supreme Court held that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of Parole” for those under age eighteen at the time of the crime. (Both cases were argued by **Bryan Stevenson**. See below).

There are 62 prisoners in Massachusetts whose life sentences are now illegal and there are a host of issues to be decided as to what the new sentences should be and how they should be determined. In two Superior Court cases, in two counties, trial judges have decided that the only remaining lawful sentence for a juvenile currently convicted of first degree murder is life with 15 year parole eligibility. The Commonwealth is seeking appellate review in the Suffolk case, contending that the defendants should be resentenced by a judge with discretion to reimpose life without parole, but not less than life with 15 year eligibility. **Barbara Kaban**, the head of appeals for the Youth Advocacy Department of CPCS is coordinating efforts by appointed counsel in the 62 Massachusetts cases. She can be reached at 617-988-8351.

There will also be a major legislative battle to come on how to treat future juvenile murder cases. The Massachusetts Coalition for the Fair Sentencing of Youth is spearheading policy and public education efforts on this issue. You can follow the coalition on Facebook ([fb.com/FairSentence](https://www.facebook.com/FairSentence)) or Twitter ([@FairSentence](https://twitter.com/FairSentence)) or email the Coalition to get involved (fairsentene@gmail.com).

Eyewitness Identification Study Committee

As promised in *Commonwealth v. Walker*, 460 Mass. 590, 604 n. 16 (2011), the SJC has convened a committee “to consider how we can best deter unnecessarily suggestive procedures and whether existing model jury instructions provide adequate guidance to juries in evaluating eyewitness testimony.” The Court invited us to submit nominations and we selected **Jim Doyle** – one of the most knowledgeable persons in the Commonwealth on the issue – and he was duly appointed. The committee has been at work and is expected to report soon.

Working Group to Study Cinquegrana recommendations

In November, on the heels of the Cinquegrana report on OUI jury-waived acquittal rates, the SJC announced the formation of a working group to consider the report’s recommendations, among them, most significantly, a proposal to restrict the ability to waive jury trial – a proposal which would affect all cases across the board. The

Court invited us to submit nominations and, as a result, Randy Chapman, our former President, has been appointed to the committee. The group has a March deadline. Randy will be looking for input from MACDL members. We will be posting more information about this shortly. In the meantime, he can be contacted at R.Chapmanlaw@verizon.net.

2012 Spring meeting

We had an extraordinarily successful general meeting in June, at Pier 4. We presented our highest honor – the Joseph J. Balliro award – to **Janice Bassil** for her lifetime of dedication and commitment to the rights of the accused. We also made the Clarence Gideon Award to **Leslie Walker**, for her unparalleled leadership in the fight for sentencing reform and against new repressive legislation. Then we were all treated to an inspiring – indeed, electric – talk by **Bryan Stevenson**, the head of the Equal Justice Initiative in Montgomery, Alabama. Bryan appeared literally two days after his outstanding Supreme Court victory against juvenile life without parole in *Miller v. Alabama*. At that point, he had suddenly found himself as the *de facto* leader of a nationwide project to resentence some 2500 prisoners, and we are very indebted to him for taking the time to be with us. His talk interwove his personal story, his professional experiences, and his insights into the criminal justice system. We ended that evening uplifted about the value of what we do every day in defending our clients. For those who missed it, you can view similar version of what he had to say at http://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice.html.

Upcoming January 23 Winter meeting

We are very much looking forward to our January 23 Winter meeting at Pier 4. At that time, we will be presenting the Judicial Excellence award to **Judge Nancy Gertner**. As we all know, Nancy was not only a fabulous judge, but she preceded her judicial tenure with a brilliant career as a Massachusetts criminal defense lawyer. She has agreed not only to accept the award, but to give the keynote speech, sharing her insights from her years on the bench. We will also present the Gideon award to **Roger Witkin**, for his lifetime work as criminal defense lawyer *par excellence*. Roger has served as a model and guidepost for many of us, and we welcome this opportunity to thank him for his service to the cause.

Please check the [website](#) for information about purchasing tickets and ads for the program book.

Best regards to all for the new year.

Max Stern