

News & Views



2008-2009 OFFICERS

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Events

Annual Meeting & Program September 18, 2009 Hyatt Regency - Dearborn

The Criminal Law Section will hold a short business meeting at 9 a.m. on Friday, September 18. The meeting will begin with elections to fill five positions on the Council. Incoming Chair Opolla Brown will be installed in her new position. Our annual program will begin shortly after the business meeting.

Our annual program, a panel presentation on specialty courts, will be held from from 10 a.m. to 12 p.m. The panel will consist of several distinguished guests, including Michigan Supreme Court Chief Justice Marilyn Kelly. Please join us for this exciting program.

More detailed information on our annual meeting and program, including the full agenda and program panelists, is provided on the next page of this newsletter.

Symposium: "Balancing Our Priorities" October 8, 2009 The Inn at St. John's - Plymouth, Michigan

The Criminal Law and Prisons & Corrections Sections, together with three other organizations, presented a joint program to address whether we could safely spend less on corrections. The Prisons & Corrections Section will present an extended program on the same topic this fall. The three-quarter day program will include breakfast and lunch, and will focus on prison population reduction strategies, including: progress made thus far, risk assessment and rehabilitation, and the prosecutor's perspective. In addition, the program will address investing in prevention, such as: the reentry initiative, mental health and substance abuse issues, creative jail programs, and barriers to reentry.

For additional details and registration forms, please visit <http://balancingourpriorities.org/>.

Annual Meeting Details

Friday, September 18, 2009:

9 a.m. – 9:30 a.m.: Criminal Law Section Business Meeting

The Criminal Law Section will elect five members to the Council. The five candidates receiving the most votes will serve a three-year term on the Council. To be elected, a candidate must be a member of the Criminal Law Section. Those who wish to be nominated, or those who wish to nominate a member to stand for election to the Council, should submit the following to the Nominating Committee:

Name, P number, and address of the nominee

A brief written candidate statement (by or on behalf of the nominee)

Nominations will be allowed from the floor. Please confine the written candidate statements to no more than one page, and submit them via e-mail to: Btimmons@house.mi.gov or via US mail to:

Bruce A. Timmons, Legal Counsel
House Republican Policy Office
P.O. Box 30014
Lansing MI 48909-7514

The Section's annual meeting begins at **9:00 A.M.** at the **Hyatt Regency Dearborn**. You must be present to vote. Candidates do not have to be present, but their presence is encouraged. A brief oral statement by candidates is permitted before elections. Please be prompt – or you may miss the election. The winners of the election will be announced in next month's newsletter.

If you have any questions about the elections, please call Bruce Timmons, Nominating Committee Chair, during regular business hours at 517-373-0770.

10 a.m. – 12 p.m.: Criminal Law Section Annual Program: Specialty Courts

This program is offered on the heels of our policy conference at the Grand Hotel on Mackinac Island, during which we discussed the issue of specialty courts, specifically those addressing the needs of the mentally ill. Together with the assistance of the following distinguished panelists to guide us, we will continue our discussion of the implementation of specialty courts in Michigan:

Patrick Bowler, Retired Chief Judge, 61st District Court, Grand Rapids

Julie Creal, Chief Judge, 15th District Court, Ann Arbor

Marilyn Kelly, Chief Justice, Michigan Supreme Court, Detroit

David Leyton, Genesee County Prosecuting Attorney, Flint

For more information on the specialty courts panel discussion, please contact Erika Julien at esjulien@julienlaw.com or 734-272-3200. For registration, schedules, and other general information about the State Bar of Michigan's Annual Meeting, please visit: www.michbar.org/annualmeeting.cfm.

Editor's Note: The Criminal Law Section has long advocated for reform of our system for appointing counsel to indigent defendants. Laura Sager, Director for the Michigan Campaign for Justice, provided us with the following update:

Michigan Public Defense Update

On Friday, August 14, the chief defender in Montana, a private attorney in Montana, and a regional defender in Minnesota, will participate in a public forum entitled "Improving Public Defense: The Future for Michigan's Defense Attorneys." This is an opportunity to learn how public defense systems have worked in other states post-reform, and the role of both public defender offices and the private bar. The event is co-sponsored by the Michigan Campaign for Justice, the Thomas M. Cooley Law School, the Criminal Defense Attorneys of Michigan, and the State Bar of Michigan.

The event is taking place simultaneously in three locations. The details are as follows:

Date: Friday, August 14, 2009

Time: 12:30 p.m. Refreshments; 1-3 p.m. Forum

Place: Cooley Law School via videoconferencing technology

•Auburn Hills: 2630 Featherstone Rd., Auburn Hills, MI 48326 (main site)

•Grand Rapids: 111 Commerce Ave., SW, Grand Rapids, MI 49503

•Lansing: 300 S. Capitol Ave., Lansing, MI 48901

Sharing their expertise about public defense will be several national speakers, including: Randi M. Hood, Chief Public Defender for Montana; Fred T. Friedman, Chief Public Defender of Minnesota's Sixth District and former part-time public defender in the private bar; and, Meghan L. Sutton, a private attorney performing contract work for the Montana Office of Public Defense. Maureen Dimino, Indigent Defense Counsel from the National Association of Criminal Defense Lawyers, will moderate the panel. Michigan Campaign for Justice Director Laura Sager will provide a legislative update and answer questions about the Campaign.

Please R.S.V.P. by August 10 by emailing info@mijjustice.org or calling (517) 372-3050. Please indicate which location you will be attending.

Proposed Amendments to Court Rules

Comments on the following proposed amendment are due by October 1, 2009:

Rules 6.302 (Pleas of Guilty and Nolo Contendere) and **6.310** (Withdrawal or Vacation of Plea): The proposed amendment of MCR 6.302 would require all discussions regarding a defendant's plea agreement to occur in open and on the record to reduce the possibility that a defendant would be coerced into agreeing to a particular sentence. Furthermore, the proposal would eliminate language in MCR 6.302 and MCR 6.310, which allows a defendant to withdraw a guilty plea if a prosecutor agrees to recommend a sentence but the judge refuses to sentence as recommended by the prosecutor. (ADM File No. 2009-11; June 30, 2009).

Comments on the following proposed amendment are due by November 1, 2009:

Rule 6.201 (Discovery): The proposed amendment of MCR 6.201 would require prosecutors to maintain electronic recording evidence made by governmental agencies until the time for all appeals has expired. Failure to preserve evidence would entitle the defendant to a jury instruction that jurors may presume any evidence not produced was adverse to the prosecution. (ADM File No. 2008-38; July 31, 2009).

To send your comment electronically, please submit it to: MSC_Clerk@courts.mi.gov. To send your comment via mail, please write to:

Michigan Supreme Court, Clerk's Office, P.O. Box 30052, Lansing, MI 48909

When submitting a comment, please reference the relevant ADM File No.

United States Supreme Court - Cert Granted

Briscoe v Virginia, No. 07-11191 (June 29, 2009): Review was granted to determine whether a state that allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, avoids violating an accused's constitutional rights if the accused has a right to call the analyst as his own witness.

Florida v Powell, No. 08-1175 (June 22, 2009): Review was granted to determine whether a suspect must be expressly advised to his right to counsel during questioning and, if so, does the failure to provide this express advice vitiate **Miranda v Arizona**, 384 US 436 (1966).

United States v Comstock, No. 08-1224 (June 22, 2009): Review was granted to determine whether Congress had the constitutional authority to enact 18 USC 4248, which authorizes court-ordered civil commitment by the federal government of: (1) "sexually dangerous" persons who are already in custody but who are coming to the end of their federal prison sentences; and, (2) "sexually dangerous" persons who have been found mentally incompetent to stand trial and are thus in the custody of the Attorney General.

United States Supreme Court - Opinions

District Attorney's Office for the Third Judicial District v Osborne, No. 08-6 (June 18, 2009): Respondent William Osborne was convicted in state court of several violent crimes, including kidnapping and sexual assault, for an incident in which two men drove a prostitute to an abandoned location and left her for dead in the snow after raping and shooting her. During the assault, the passenger vaginally penetrated the victim while wearing a blue condom, which was later recovered at the scene. The driver was ultimately found, and told police that the passenger was the respondent, Osborne. The victim later identified both men as the likely perpetrators, even though the description of the passenger she had previously given police did not exactly match the respondent. The sperm was tested and found to have the same genotype as Osborne - and 16% of all African Americans. Trial counsel did not request another, more discriminating, scientific test of the DNA. Respondent was convicted by jury and sentenced to twenty-six years imprisonment. He unsuccessfully appealed in state court. More than a dozen years after his conviction, the respondent sought to have scientific evidence found inside the condom re-tested using advanced testing techniques that were not available at the time of his trial. Osborne believed that the re-testing, which he would pursue at his own expense,

would establish his innocence. However, the state denied him access to the evidence because of other factors establishing his guilt. The respondent filed a civil rights suit in federal court, claiming that the state's refusal to allow access to the evidence violated his due process rights under the Fourteenth Amendment. The district court dismissed the complaint, holding that a federal civil rights suit was the inappropriate avenue to access the evidence. Relying on **Heck v Humphrey**, 512 US 477 (1994) - which held that in order to recover damages for allegedly unconstitutional conviction or imprisonment a civil rights plaintiff must prove that the conviction or sentence has been reversed on direct appeal or called into question by a federal court's issuance of a writ of habeas corpus - the district court held that the respondent could only seek the evidence through a federal habeas corpus proceeding because access to the evidence could invalidate his state-court conviction. Osborne would thus have to exhaust all of his state court remedies before suing in federal court. The Ninth Circuit disagreed with the lower court, finding that the proper vehicle for the claim was a claim under 42 USC 1983. On remand, the district court granted summary judgment in favor of the respondent, finding that he had a limited constitutional right to the new testing under the unique and specific facts presented. The Ninth Circuit affirmed, relying on the prosecutorial duty to disclose exculpatory evidence under **Brady v Maryland**, 373 US 83 (1963). The United States Supreme Court reversed, holding that a defendant does not have a constitutional right to post-conviction access to the state's evidence for scientific testing. The Court first concluded that the right of pre-trial disclosure did not extend to the post-conviction context under **Brady**. Osborne had already been found guilty and, therefore, had only a limited liberty interest in post-conviction relief. The Court also rejected the respondent's argument to recognize a free-standing, substantive due process right to scientific evidence untethered from the liberty interests he hoped to vindicate with it. Justice Alito filed a concurring opinion, which was joined by Justice Kennedy, and joined in part by Justice Thomas. Justice Stevens filed a dissenting opinion, which was joined by Justices Ginsburg and Breyer, and joined in part by Justice Souter. Justice Souter also filed a dissenting opinion.

Melendez-Diaz v Massachusetts, No. 07-591 (June 25, 2009): Petitioner Luis Melendez-Diaz was charged with distributing and trafficking in cocaine following his arrest, which was predicated on an informant's tip about a third party. Following the arrest of the petitioner and two other men, four clear white plastic bags containing a substance resembling cocaine, and a plastic bag containing nineteen smaller plastic bags were recovered by police. The seized evidence was submitted to a state laboratory for chemical analysis. During the petitioner's jury trial, the prosecution placed the seized bags into evidence, and submitted three certificates of analysis showing the results of the forensic analysis performed. The certificates, sworn to before a notary public by state lab analysts, reported the weight of the seized bags and stated that the bags had a substance found to contain cocaine. Melendez-Diaz objected, arguing that the chemists were required to testify in person, pursuant to **Crawford v Washington**, 541 US 36 (2004). Over defense objection, the trial court admitted the certificates as "prima facie evidence of the composition, quality, and the net weight of the narcotic...analyzed." The jury ultimately returned a guilty verdict. On appeal, the petitioner renewed his argument that allowing the prosecution to submit the certificates violated the Confrontation Clause. The Appeals Court of Massachusetts rejected the claim, and review was denied by the Massachusetts Supreme Court. The United States Supreme Court agreed with the petitioner, and held that the admission of the certificates violated his right to confront the witnesses against him, guaranteed under the Sixth Amendment. It reasoned that a witness's testimony against an accused is inadmissible unless the witness appears at trial or, if the witness is unavailable, the accused had a prior opportunity to cross-examine the witness. The Court concluded that the certificates were affidavits, which fell within the "core class of testimonial statements" covered by the Confrontation Clause. Justice Thomas filed a concurring opinion. Justice

Kennedy filed a dissenting opinion, which was joined by Chief Justice Roberts and Justices Breyer and Alito.

Safford United School District #1 v Redding, No. 08-479 (June 25, 2009): Respondent Savana Redding, a thirteen year old middle school student, was subjected to a search of her body on the belief that she had violated a school policy. The policy strictly prohibited students from bringing drugs to school, including any prescription or over-the-counter drug, except those for which permission to use in school had previously been granted. Following a tip from a student, the respondent became the focus of an investigation for giving prescription-strength ibuprofen to another classmate. Redding was removed from her math class and taken to the assistant principal's office. With consent, the assistant principal first searched the respondent's backpack, but found nothing. Redding was then required to take off all her clothes, except for her bra and underwear, and was strip searched by two female aides. She was also required to pull her bra and underwear away from her body, thus exposing her breasts and pelvic area to some degree, so that the aides could see if any pills were next to her body. However, no pills were found during the search of her body. Redding's mother unsuccessfully sued school officials claiming the search was a violation of the Fourth Amendment. The district court disagreed. The Ninth Circuit Court panel affirmed the lower court's decision. But, in review en banc, the court reversed. It found that the intrusive search was unjustified under **New Jersey v TLO**, 469 US 325 (1985). The United States Supreme Court agreed, and held that the search of the respondent's underwear violated the Fourth Amendment. The Court reiterated that, for school searches, the public interest is best served by a standard of reasonableness that stops short of probable cause. Thus, measures adopted for the search must be reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. Even though the assistant principal had sufficient suspicion to justify searching the respondent's backpack and outer clothing in the relative privacy of his office, he did not have sufficient suspicion to warrant extending the search to the point of making the respondent pull out her underwear. The suspected facts did not indicate that the drugs presented a danger to students or were concealed in the respondent's underwear and, therefore, the content of the suspicion failed to match the degree of intrusion. However, the Court further held that the official who ordered the unconstitutional search was entitled to qualified immunity from liability. Justices Ginsburg and Stevens joined the opinion in part. Justice Stevens filed an opinion concurring in part and dissenting in part, which was joined by Ginsburg. Ginsburg also filed an opinion concurring in part and dissenting in part. Justice Thomas filed an opinion concurring in the judgment in part and dissenting in part.