

DECEMBER 2008

NEWS & VIEWS

THE CRIMINAL LAW SECTION / STATE BAR OF MICHIGAN NEWSLETTER

2008-09 Officers:

Chair:
Matthew P. Smith
Grand Rapids

Chair-Elect:
Opolla Brown
Detroit

Secretary:
Kenneth M. Malkin
Bay City

Treasurer:
Stephen M. Taratuta
Detroit

Editor:
Elaine M. Spiliopoulos
Ann Arbor

Events

Council Meeting December 16, 2008 Sheraton Hotel, Lansing

The next meeting will be held in the Hemingway Room of Christie's Bistro, the hotel restaurant. The Sheraton Hotel is located at 925 South Creyts Road, immediately off I-496. Social hour begins at 6:00 p.m., with dinner and the meeting starting at 6:30 p.m.

32nd Mid-Winter Ski Conference President's Day Weekend: February 15-17, 2009 Shanty Creek Resort – Bellaire, MI

The annual conference will again be held at the newly renovated Shanty Creek Resort. The conference will open with our traditional review of the year's high-impact court decisions by **Timothy Baughman**, Chief of Research Training & Appeals, Wayne County Prosecutor's Office. The evening's program concludes with a welcome reception for all conference participants.

On Monday morning the conference continues with a presentation by Third Circuit Court Judge **Daniel P. Ryan**, who will give us an update on the Rules of Evidence. Seventeenth Circuit Court Judge **Christopher P. Yates** will speak during the afternoon session.

The pre-registration form, which can be faxed directly to the hotel to reserve your room, will be included in next month's newsletter.

Biennial Criminal Law Section Policy Conference June 12-14, 2009 Grand Hotel, Mackinac Island

Save the date! Our classic every-other-year policy conference will again be held at the Mackinac Grand Hotel. The conference is still in the planning stages but more information will be posted in future newsletters.

Campaign for Justice Update

by

Laura Sager*

As many of you know, a National Legal Aid and Defender Association (NLADA) study, released last June by the State Bar of Michigan, found that Michigan's public defense services are failing its citizens.

NLADA researchers spent over a year evaluating Michigan's system of providing public defense by performing in-depth research in ten representative counties selected by a Michigan advisory group. The study, initiated in 2006 by a concurrent legislative resolution, was sponsored by legislators concerned about years of reports of widespread violations of the right to counsel.

David Carroll, NLADA's director of research and evaluation, concluded that Michigan "fails to provide [effective] representation to those who cannot afford counsel in its criminal courts." The state fails its residents by placing the burden of funding public defense on the counties and neglecting to provide any oversight, training, or monitoring. The entire report can be found at www.michigancampaignforjustice.org.

Some of the many ways Michigan fails its constitutional mandate:

- There is little to no funding for experts or investigators.
- Individuals often meet their attorneys for just a few minutes before trials.
- Many attorneys have such unmanageable caseloads that they cannot provide an effective defense.
- There is no statewide system to train attorneys and ensure they are qualified to handle their cases.

In short, our failing system largely renders even the most competent and dedicated public defense attorneys ineffective. A recent New York Times article, "Citing Workload, Public Lawyers Reject New Cases," November 9, 2008, drew from the NLADA report and noted that "Michigan requires counties to protect the indigent without providing state funds, resulting in large disparities. In some counties, those charged with misdemeanors are not even offered a lawyer; in others, the judge hires one for a flat fee, creating a conflict of interest and incentives to skimp on defense..."

We should expect more state and national news on the dire consequences of Michigan's inadequately funded and overwhelmed public defense system. However, the good news is that a vigorous statewide effort is underway to fix the failing system.

**Ms. Sager is the Director for the Campaign for Justice. She can be reached via email at: lsager@michigancampaignforjustice.org*

National polls show that 88 percent of the public believes that the right to counsel is a fundamental part of due process. Well over 90 percent believe that due process includes access to DNA, investigators, experts and reasonable caseloads.

-- David Carroll, National Legal Aid and Defender Association

Time for Reform

The Campaign for Justice is a new broad-based, bi-partisan coalition of organizations and individuals fighting for a fair and effective public defense system. The Campaign goals are 1) adequate statewide funding, and 2) a system that meets national standards established by the American Bar Association and State Bar of Michigan. The Campaign has both the staff and consultants with the expertise to carry out a statewide legislative reform initiative in the coming session.

Campaign staff and volunteers are working with our partner in the reform effort, the State Bar of Michigan, to keep the media spotlight on the issue and bring new and diverse organizations into the coalition for reform. In addition, the Campaign staff is meeting with key stakeholders to define the key elements of legislative reform in Michigan.

Many of you have already taken an active role in the Campaign by assisting in these efforts by providing expertise, attending round table briefing and training sessions, speaking to community groups, or by forwarding information, case profiles, or suggestions for outreach.

However, if you have not yet signed up for E-Alerts about the progress of the Campaign on our website, now is the time! The Campaign media launch in January will kick off our efforts in the coming legislative session and we will need your help. Once you've signed up, you can keep up to date on Campaign activities in a host of ways, including our monthly "Campaign Corner" conference call updates, to learn about the public education, coalition building, and legislative aspects of the Campaign, as well as how you can be part of the solution.

In addition, you will continue to find ongoing excellent coverage of events, media coverage, and up to date research on the public defense issue at www.michigancampaignforjustice.org. So please, join online, bookmark the page and plan to visit it often. Or, if you prefer, please don't hesitate to contact us at (517) 372-3050 or info@michigancampaignforjustice.org to join, ask questions, or voice concerns. If you are a fan of social media, the Campaign is now on Twitter and Facebook.

Again, for those of you who are already involved, please continue to help by being our eyes, ears and – if you can contribute more – our voices.

United States Supreme Court Update

The United States Supreme Court recently dismissed a criminal case it had already heard. In **Bell v Kelly** (07-1223), review was granted to determine whether the deferential standard in the federal habeas statute should be applied to claims of ineffective assistance of counsel that the state court did not consider. In its November 17, 2008 Order, the Supreme Court said certiorari had been “improvidently granted” but did not give any further explanation for dismissing the case.

On December 2, 2008, the Supreme Court issued its per curiam opinion in **Hedgpeth v Pulido** (07-544). Review in that case was granted to determine whether, during habeas review, incorrect instructions on which the jury may have relied constitute “structural error” requiring reversal.

For his role in the robbery of a gas station in which the cashier was shot and killed, Petitioner Michael Pulido was convicted of first-degree murder, robbery, receiving stolen property and auto theft. Pulido alleged that his uncle was the actual shooter, and that he was involved in the robbery only after the shooting had occurred. The jury was unable to determine that he personally committed the shooting, but it did find that the robbery was committed during the course of a felony murder. Accordingly, Pulido was sentenced to life in prison without possibility of parole for murder “with special circumstances.” Both the California Court of Appeals and the Supreme Court of California affirmed the convictions on direct appeal.

Pulido then filed a pro se habeas petition alleging error in the jury instructions. The case was originally submitted to the jury on three alternative theories: Pulido personally shot the cashier at a gas station and convenience store; he aided and abetted in the robbery during the shooting; or, he aided in the robbery only after the shooting. The instructions were erroneous because it allowed the jury to find him guilty of felony-murder even if he was involved in the crime only after the shooting had taken place. Under California law, a felony-murder conviction is proper only if the defendant is involved in the robbery prior to the killing. The California Supreme Court again affirmed the conviction despite the error. The Court of Appeals for the Ninth Circuit, however, concluded there was a structural error in the erroneous jury instruction. It overturned the jury verdict on the basis that the instructions given had left open the possibility of conviction on an impermissible ground.

The United States Supreme Court unanimously ruled that a conviction based on jury instructions containing more than one theory of guilt, including an ultimately invalid theory, was to be judged on whether there was harmless error. It concluded that such an error is not to be treated as “structural error,” which undermines the verdict. The ruling below was vacated, and the cause remanded for a harmless error analysis by the Ninth Circuit Court of Appeals. Justice Stevens, together with Justices Souter and Ginsburg, dissented only on the remand for harmless error analysis.

Practice Note

Is a minor, who has been placed on probation for a first-offense minor in possession, subject to jail time for violating his or her probation? That is the debate raging amongst practitioners in the district courts. Oakland County Circuit Court Judge Mark Goldsmith, a former district court magistrate, recently ruled that jail is not a permissible sentence. *Township of Bloomfield v Williams* (08-DA8771-AR; August 6, 2008). Though the defendant in that case was convicted of a first offense under a municipal code, the ordinance is similar to MCL 436.1703, which explicitly provides the following fines and sanctions for first offense minors in possession:

- (a) For the first violation a fine of not more than \$100.00, and may be ordered to participate in substance abuse prevention services or substance abuse treatment and rehabilitation services...and may be ordered to perform community service and to undergo substance abuse screening and assessment at his or her own expense[.]

- (3) When an individual who has not previously been convicted of or received a juvenile adjudication for a violation of subsection (1) pleads guilty to a violation of subsection (1) or offers a plea of admission in a juvenile delinquency proceeding for a violation of subsection (1), the court, without entering a judgment of guilt in a criminal proceeding or a determination in a juvenile delinquency proceeding that the juvenile has committed the offense and with the consent of the accused, may defer further proceedings and place the individual on probation upon terms and conditions that include, but are not limited to, the sanctions set forth in subsection (1)(a)... Upon violation of a term or condition of probation or upon a finding that the individual is utilizing this subsection in another court, the court may enter an adjudication of guilt, or a determination in a juvenile delinquency proceeding that the individual has committed the offense, and proceed as otherwise provided by law.

Therefore, if a minor is placed on probation for that offense and subsequently violates the terms of probation, the court may enter an adjudication of guilt and sentence that minor only to any penalties authorized for a first offense. See also MCL 771.4 ("if a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made."). The penalties authorized by the statute do not include jail.

Nonetheless, many district court judges are using contempt powers to sentence defendants to jail time for violations of probation. Judge Goldsmith found that the trial court could not use its contempt powers to impose jail time for a probation violation. He concluded that,

continued on next page...

by sentencing the defendant to jail for contempt, “the trial court would be violating the principle that a probation violation in and of itself does not amount to a new crime.” See **People v Kaczmarek**, 464 Mich 478, 482-83 (2001) (noting that, upon violating probation, “the probationer is neither burdened with a new conviction nor exposed to punishment other than that to which he has already been exposed”).

Editor’s Note

The Council has discussed the option of electronic delivery of News & Views. In order to provide you with more timely delivery of the newsletter, and to lower printing and mailing costs associated with its production, members may be given the option of receiving this publication through email as a PDF. The Council is trying to gauge interest in, and address member concerns of, receiving electronic delivery of the newsletter. To comment, or to submit your request for electronic delivery of the newsletter, email the editor at newsletter@zaret.com. Please include the following subject line in your email: electronic delivery of newsletter. If you have previously indicated a preference for electronic delivery of the newsletter, you do not need to resubmit your request.
