

FEBRUARY 2007

NEWS & VIEWS

THE CRIMINAL LAW SECTION / STATE BAR OF MICHIGAN NEWSLETTER

2006-07 Officers:

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Events

30th Mid-Winter Ski Conference "Trials in the CSI Age" President's Day Weekend; February 18-20, 2007 Shanty Creek Resort, Bellaire

Please join us for this exciting conference featuring the following programs:

Sunday, February 18: The conference begins in the evening with criminal law updates, including a legislative update by Thomas Robertson, and a review of the year's high-impact decisions by Timothy Baughman. The evening's program concludes with a welcoming reception for all conference participants.

Monday, February 19: The morning begins with a presentation by Judge Donald E. Shelton on practicing law in the CSI age and the effect of CSI programs on juries. The afternoon program includes a practicum on how to handle juries in the CSI age, with tips and demonstrations on techniques to use during voir dire and cross-examination. Graham Teall will moderate the session, with Ron Bretz representing the defense, and Helen Brinkman representing the prosecution.

Tuesday, February 20: The program concludes with a morning presentation on the civil ramifications of a criminal conviction by Ronald Walker.

The complete agenda and pre-registration form are included as an insert in this newsletter. Interested parties should return the pre-registration form directly to the resort (address and fax number provided on registration form). For program questions contact Matt Smith at (616) 456-8024.

Council Meeting March 20, 2007 Sheraton Hotel, Lansing

February's council meeting will not be held due to the ski conference. The monthly meetings will resume on March 20, 2007 in the Hemingway Room of Christie's Bistro, located within the hotel. The hotel is located at 925 South Creyts Road, immediately off I-496 at the Creyts Road exit. Social hour begins at 6:00 p.m., with dinner and the meeting beginning at 6:30 p.m.

Criminal Law Section Conference June 15-17, 2007 Grand Hotel, Mackinac Island

Save the date! This conference is currently in the planning stages. If you have any suggestions for conference topics, please contact Charlie Marr (marrlaw@msn.com; 248-596-1599) or Bruce Timmons (Btimmons@house.mi.gov; 517-373-0770).

Legislative Update*

The following public acts impacting criminal cases recently have gone, or soon will go, into effect:

2006 PA 487 (HB6275). Requires certain levels of supervision for parolees who were convicted of a violent crime or have an alcohol or substance abuse problem. Effective January 1, 2007. MCL 791.240.

2006 PA 507 (SB1110). Allows a person convicted of misdemeanor child abuse under MCL 750.136b to be placed on probation for five (5) years. Effective December 29, 2006. MCL 771.2a(3).

2006 PA 517 (SB1404). Makes it a crime to kill, injure or harass a search and rescue dog. Effective December 29, 2006. MCL 750.50c.

2006 PA 532 (SB1495). Requires appointed counsel at a parole revocation hearing if the parolee is indigent and requests counsel. Effective December 29, 2006. MCL 791.240a.

2006 PA 533 (SB1508). Authorizes correction officers of a private vendor who receives prisoners to use force to defend themselves and enforce rules and disciplines. Effective December 29, 2006. MCL 800.41.

2006 PA 535 (HB6631). Increases the penalty for jail escape to five (5) years. Effective December 29, 2006. MCL 750.197c.

2006 PA 540-41 (HB5999, HB6000). Makes it a felony to furnish a cell phone to a prisoner in a correctional facility. Effective December 29, 2006. MCL 800.283a.

2006 PA 543 & 668 (HB6181, HB6182). Whenever a person is arrested or a warrant is issued, the agency involved must check LEIN to determine if the person is a parolee. If they are a parolee, they must promptly notify DOC by telephonic or electronic means. Effective December 29, 2006 and January 10, 2007. MCL 764.1g & 764.15g.

2006 PA 544 (HB6271). Increases the penalty for criminal contempt to ninety-three (93) days and/or a fine of up to \$7,500. The person can also be placed on probation. Effective March 30, 2007. MCL 600.1715.

2006 PA 548 (HB6553). Allows points to be scored under OV 9 based upon the number of property crime victims. Effective March 30, 2007. MCL 777.39.

2006 PA 552-53 (HB5657, HB5658). Includes libraries within the 1,000 foot drug free zone. Effective March 30, 2007. MCL 333.7410.

2006 PA 557 (HB6348). Makes crime stoppers information confidential. The prosecuting attorney can petition a court for disclosure. Effective December 29, 2006. MCL 600.2157b.

2006 PA 558 (HB6416). Allows drug forfeiture funds to be given to nonprofit organizations whose primary activity is to assist law enforcement with drug-related criminal investigations and obtaining information for solving crimes. Effective December 29, 2006. MCL 333.7524(b)(ii).

2006 PA 559 (HB6394). Allows local corrections officers to carry concealed during the performance of their duties if authorized by the sheriff or chief. Effective December 29, 2006. MCL 28.432a.

2006 PA 563 (SB0647). Makes an officer's *Garrity* statement confidential. Effective December 29, 2006.

2006 PA 564-65 (HB6009, SB1241). Eliminates the ten-year time limitation on operating while intoxicated, third offense. Effective January 3, 2007. MCL 257.625.

2006 PA 573-74 (SB0454, SB0455). Creates a fifteen-year penalty for embezzling between \$50,000 and \$100,000, and a 20 year penalty for embezzling \$100,000 or more. Effective March 30, 2007. MCL 750.174(6) & (7).

2006 PA 594 & 675 (HB6630, HB6599). Increases the penalties for second hand junk dealers who purchase stolen scrap metal. Effective March 30, 2007. MCL 445.401, et seq.

2006 PA 620 (SB1428). Allows drug courts to accept participants from other jurisdictions. Effective January 3, 2007. MCL 600.1052(4).

2006 PA 631 (SB1032). Allows probation for ordinance violations. Effective January 3, 2007. MCL 771.1.

2006 PA 655 (HB5135). The maximum sentence for a second, third, or fourth habitual offender cannot be less than the maximum term for the predicate offense. Effective January 9, 2007. MCL 769.10(2); 769.11(2); 769.12(2).

2006 PA 663 (HB5968). Precludes a domestic violence deferral under MCL 769.4a if the defendant has a prior conviction for an assaultive crime. Effective January 10, 2007.

*Special thanks to Thomas Robertson for sharing his legislative update, from which this legislative update was derived. Mr. Robertson will present his legislative update during the opening program of our ski conference later this month. A copy of it is also available online at www.michiganprosecutor.org under the downloads/publications section.

Recent State & Federal Criminal Cases

People v Lewis, No. 265564 (December 21, 2006): In an unpublished, per curiam decision, the Court of Appeals found that the district court did not abuse its discretion in binding the defendant over for trial on a criminal sexual conduct-third degree charge. However, the trial court did err in granting the defendant's motion to quash the information. Even accepting the defendant's claim that he did not do anything to encourage or induce the sexual activity, he did knowingly allow a fifteen-year-old to perform oral sex on him, and thus involved himself in, participated in, or took part in sexual penetration. Accordingly, probable cause that the defendant committed the sex offense existed.

People v Boatman, No. 270564 (December 28, 2006): On remand from the Supreme Court, the Court of Appeals held that the trial court's failure to indicate which guidelines were being applied to the defendant's sentence comprised a procedural flaw resulting in the failure to properly inform the defendant of the consequences of his plea. The trial court's reference to the "guidelines" did not specify whether the standard guidelines for the offense or the enhanced guidelines for the defendant's habitual offender status would be used for sentencing, thus rendering the plea unintelligent. For a plea to be "understanding," a defendant must be informed of the nature and consequences of his bargain, including a designation of the guidelines to which he is agreeing.

People v Lapworth, No. 271142 (December 28, 2006): The Court of Appeals held that an invocation of the right to counsel did not constitute an express objection to consent given by a co-tenant to enter a residence, thereby negating that consent. The court found that the roommate's permission to enter the premises was adequate if the defendant did not object, and rejected the defendant's argument that his invocation of his rights constituted a tacit objection because an express objection was required under established case law.

People v Spangler, No. 261375 (December 28, 2006): In an unpublished, per curiam decision, the Court of Appeals remanded the case to the trial court for a *Ginther* hearing. The defendant, the victim's great-uncle, was convicted of criminal sexual conduct-first degree. Prior to trial, the victim's brother accused his and the victim's mother of sexually abusing them both, and the mother later pleaded guilty. The defendant argued that his attorney was ineffective for failing to investigate the accusations against the mother. The court concluded that the allegations were relevant and material because they explained the boys' sexual activity and preoccupation, and their humiliation over having sexual relations with their mother provided them with an ulterior motive to fabricate their testimony against the defendant. The only defense theory was that the boys were fabricating the allegations, but defense counsel provided no motive, and thus the failure to investigate the allegations and present the evidence to the jury potentially undermined confidence in the trial's outcome.

People v Jambor, No. 259014 (January 4, 2007): On remand from the Supreme Court, the Court of Appeals held that fingerprint cards were admissible as business records and that their admission would not violate *Crawford*. The fingerprint cards were prepared during the normal course of investigating a crime scene, the technician prepared some of the cards using regularly established practices, and no person was identified as a suspect when the cards were prepared.

People v Baiz, No. 262912 (January 9, 2007): In an unpublished per curiam decision, the Court of Appeals remanded the case because the trial court did not make an independent determination that the defendant's trial testimony "amounted to willful, material, and flagrant perjury" before scoring OV 19. It concluded that the trial court's assessment of ten points for perjury, based on the fact that the defendant testified to his innocence but was ultimately found guilty, raised constitutional concerns. Moreover, the trial court did not make any specific finding concerning what portions of the defendant's testimony it considered perjured. Rather, in assessing the ten points for perjury, the trial court simply stated that it was the jury who found that the defendant had perjured himself.

US v Mooneyham, Nos. 04-5189, 04-5190 (January 9, 2007): The Sixth Circuit Court of Appeals held that some of the co-defendant's statements were admissible as co-conspirator statements made in furtherance of the conspiracy, and further held that there was no *Crawford* error in their introduction. The court found that the co-defendant's statements, by definition, were not testimonial in nature. However, a remand for re-sentencing under *Booker* was necessary because the record was insufficient to overcome the presumption that the defendant's substantial rights were affected by the fact that the trial court sentenced him under a mandatory guidelines scheme.

People v Golba, No. 262261 (January 16, 2007): On an issue of first impression, the Court of Appeals held that compliance with the sex offender registration act was not a punishment for a criminal violation. Thus, ordering the defendant to comply with the act did not violate the *Apprendi-Blakely* rule.

Van v Jones, No. 04-2277 (January 16, 2007): On an issue of first impression, the Sixth Circuit Court of Appeals held that a state consolidation hearing was not a critical stage of the criminal proceedings against a defendant, and thus the total absence of counsel at the petitioner's hearing did not require a writ of habeas corpus to issue. The court found "the inflexible rule of reversal that would be created by declaring this hearing to be a 'critical stage' would create an intolerable structural trap for the unwary state trial court and prosecutor."

In Memoriam

The Criminal Law Section, and indeed the entire criminal law community, lost a dear friend with the passing of Norris J. Thomas, Jr. last month. Mr. Thomas, the Chief Deputy Defender of the State Appellate Defender Office, succumbed after a brief illness. Norris Thomas was a charter member of the Criminal Law Section and a former section chair. He served on the council both as a designated representative and an elected member for more than a decade. Mr. Thomas was a member of the council when he passed away. Norris Thomas worked throughout his career to build improvements in the justice process. He led a state delegation to *Indigent Defense 2000*, a national conference convened by then Attorney General Janet Reno. That delegation was instrumental in creating Michigan's Gideon Project and Michigan's Citizen Task Force on Improving Public Defense, which worked for the creation of a statewide public defender system for indigent defendants, and which has been the principle guide to continuing efforts to improve criminal defense services in the state. During a legal career that spanned almost forty years, Norris was the attorney on many landmark criminal cases in our state supreme court, and held leadership roles in numerous public interest organizations. He will be greatly missed by his family, many friends and professional colleagues. The family has suggested the following charities for memorial contributions:

Tougaloo College
Norris J. Thomas, Jr. Memorial Fund
500 W. County Line Road
Tougaloo, MS 39174

Prison Legal Services
209 W. Washington Avenue
Suite 201
Jackson, MI 49201

Citizens Alliance on Prisons and Public Spending
115 W. Allegan
Suite 850
Lansing, MI 48933

Michigan Council on Crime and Delinquency
1115 S. Pennsylvania Avenue
Suite 201
Lansing, MI 48912

Statement from the Chair

As many of you know, Jim Shonkwiler, our longtime newsletter editor, stepped down last year. We thank Jim for his many years of service and look forward to working with him as an elected member of the council. We hope to continue to offer a useful newsletter to you and invite your input. Feel free to contact Elaine Spiliopoulos, our new newsletter editor, or me, with any comments or suggestions you might have. In the near future we will begin offering electronic delivery of the newsletter, expanded coverage of specific topics of interest to practitioners, and other changes we hope you will find useful. We also invite you to join us at our Shanty Creek Conference in February and our Mackinac Conference in June. In the meantime, our listserv has generated some spirited discussions and has also helped its users answer some practice questions. Keep in touch! -Graham Teall

30th Mid-Winter Ski Conference
“Trials in the CSI Age”
President’s Day Weekend; February 18-20, 2007
Shanty Creek Resort, Bellaire

Sunday, February 18, 2007

2:00 P.M. – 7:00 P.M. **CLS Registration**

Unload luggage at Summit Center Parking Circle

“Welcome” Reception area; Hotel and Conference RegistrationSummit A

5:00 P.M. – 9:00 P.M. Ski at Summit Slope

6:00 P.M. – 7:30 P.M. **Conference Session** Top Deck

2005 – 06 Legislation Update (Do we still have Preliminary Exams?):

Thomas Robertson, Executive Secretary, Prosecuting Attorneys Coordinating Council

2006 Impact Decisions:

Timothy Baughman, Chief, Research, Training & Appeals, Wayne County Prosecutor’s Office

7:45 P.M. – 8:45 P.M. **Shanty Creek Welcoming Reception** Bellaire Room

Monday, February 19, 2007

7:00 A.M. – 9:00 A.M. Breakfast Buffet..... Lakeview Dining Room

9:00 A.M. – 10:30 A.M. **Conference Session**Summit C

Practicing Law in the CSI age. The effect of CSI-type programs on juries

Hon. Donald E. Shelton, Judge, 22nd Circuit Court

11:30 A.M. – 2:00 P.M. Luncheon..... Lakeview or Ivan’s

4:30 P.M. – 6:00 P.M. **Conference Session**Summit C

Practicum on how to handle juries in the CSI age. Tips and demonstrations on techniques to use on voir dire and cross-examination to benefit from the CSI effect on jurors.

Moderator: **Graham L. Teall**, Chair, Criminal Law Section

Prosecutor: **Helen V. Brinkman**, Asst. Prosecuting Attorney, Kent County Prosecutor’s Office

Defense: **Ronald J. Bretz**, Professor, Thomas M. Cooley Law School

6:00 P.M. – 9:00 P.M. Dinner Lakeview, Ivan’s or La Vigna’s

All day & evening; Ski at Summit and Schuss Mountain Slopes

Tuesday, February 20, 2007

7:00 A.M. – 8:30 A.M. Breakfast Buffet..... Lakeview Dining Room

8:30 A.M. – 10:00 A.M. **Conference Session**Summit C

Civil Ramifications of a Criminal Conviction. The immigration and civil ramifications of a conviction.

Ronald Walker, Walker & Associates of Michigan

12:00 Noon – Checkout

All day & evening; Ski at Summit and Schuss Mountain Slopes

**30th Mid-Winter Ski Conference
 "Trials in the CSI Age"
 President's Day Weekend; February 18-20, 2007
 Shanty Creek Resort, Bellaire**

Rooms are blocked for the mid-winter conference with arrival on Sunday, February 18, and departure on Tuesday, February 20, 2007. Choose **Ski** or **Non-Ski** packages:

Modified American Plan, Non-Ski*

\$308 per person, per stay, single
 \$213 per person, per stay, double
 \$187 per person, per stay, triple
 \$174 per person, per stay, quad

Above Includes:

Welcoming Party with Hors d'oeuvres
 Lodging - Sunday and Monday
 Breakfast - Monday and Tuesday
 Lunch - Monday
 Dinner - Monday
 Taxes and gratuities
 Children Sleep Free with food a la carte

Modified American Plan, Ski Package*

\$353 per person, per stay, single
 \$258 per person, per stay, double
 \$232 per person, per stay, triple
 \$219 per person

Above Includes:

Welcoming Party with Hors d'oeuvres
 Lodging - Sunday and Monday
 Breakfast - Monday and Tuesday
 Lunch - Monday
 Dinner - Monday
 Taxes and gratuities
 Lift Ticket - Sunday at Summit, 5p.m. - 9p.m.; Monday
 & Tuesday at Summit and Schuss, 9a.m - 9p.m.
 Children Sleep & Ski Free with food a la carte

Extra adjoining room for kids - \$80.00, plus taxes, per day. Children ages 3 to 12 years attending Welcoming Party - \$17.00. Day care (nursery program), and adult & kids ski instruction available. Indoor pool with whirlpool available at no charge. Sorry, no pets. *Call Shanty Creek for rates on 1 or 2 - bedroom condos or studios.

SHANTY CREEK RESORT
 ONE SHANTY CREEK ROAD
 BELLAIRE, MI 49615

Group Code: 1181
 CHECK-IN TIME: 6:00 P.M.; some rooms available earlier.
 CHECK-OUT TIME: 12:00 noon

DATE _____ NON-SMOKING ROOM REQUESTED _____

NAME _____ PHONE (____) _____

STREET _____ CITY _____ STATE ____ ZIP _____

ARRIVAL: DAY _____ DATE _____ DEPART: DAY _____ DATE _____

NO. OF ADULTS _____ NO. OF CHILDREN _____ NO. OF ROOMS _____

[] SKI PACKAGE [] NON - SKI PACKAGE

DEPOSIT: \$90.00 per room required. Deposit will be refunded ONLY if cancellation or changes are received five days prior to scheduled arrival; \$10 per reservation fee. Early departures will forfeit deposit. Total payment of all charges is required on check-out unless advance arrangements made.

RESERVATION BY FAX: 1/231/533-7004; FOR INFORMATION: 1/800/678-4111