

News & Views



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Events

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

IT'S NOT TOO LATE TO REGISTER!! Please join us for our annual winter conference. The conference opens with the traditional review of the year's high-impact court decisions by **Timothy Baughman**, Chief of Research Training & Appeals, Wayne County Prosecutor's Office. The welcome reception for all conference participants rounds out the first evening's activities. The conference continues the next morning with a presentation by Third Circuit Court Judge **Daniel P. Ryan**, who will discuss the Rules of Evidence. Seventeenth Circuit Court Judge **Christopher P. Yates** will speak in the afternoon.

The program also offers several long breaks for skiing and other winter activities. The pre-registration form, which should be faxed directly to the hotel to reserve your room, is inserted in this newsletter. For more information, please contact Steve Taratuta at: smtaratuta@gmail.com or 313-224-5770.

Biennial Criminal Law Section Policy Conference "Mental Health Cases in the Criminal Justice System" June 12-14, 2009 Grand Hotel – Mackinac Island

Research shows that mentally ill criminal offenders may be 4 to 5 times more likely to be jailed, and typically remain in jail 6 times longer, than other inmates. The public cost of housing mentally ill inmates is 60% more than housing other inmates. Mentally ill criminals also have a substantially higher recidivism rate. But, does it make sense to treat the mentally ill as typical criminal offenders?

Conference participants, with the assistance of a distinguished panel of professionals, will examine these issues and adopt a position statement to guide future action by the Criminal Law Section. Conferees will seek to define a less costly and more effective criminal justice system that also provides better outcomes for mentally ill offenders. To register for the conference, return the pre-registration form that is inserted in this newsletter to the Grand Hotel.

Events, cont.

Council Meeting March 17, 2009 Sheraton Hotel, Lansing

The Council will not convene for its regularly-scheduled meeting this month due to the Annual Mid-Winter Conference at Shanty Creek. The monthly meetings will resume on March 17, 2009. The 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.

United States Supreme Court - Cert Granted

Bobby v Bies, No. 08-598 (January 16, 2009): Review was granted to determine whether a state post-conviction hearing to determine the mental capacity of a defendant whose death sentence was affirmed before **Atkins v Virginia**, 536 US 304 (2002), which bars the execution of mentally retarded defendants, violates double jeopardy.

Maryland v Shatzer, No. 08-680 (January 26, 2009): Review was granted to determine whether **Edwards v Arizona**, 451 US 477 (1981), which prohibits police from initiating questioning with suspects who have invoked their right to counsel, applies to a re-interrogation that occurs more than two and a half years after a suspect's request for counsel under the Fifth Amendment.

McDaniel v Brown, No. (January 26, 2009): Review was granted to determine the standard a federal habeas court is to use in weighing the sufficiency of the evidence in the defendant's state conviction for sexual assault.

Nijhawan v Mukasey, No. 08-495 (January 16, 2009): Review was granted to determine whether the petitioner's conviction for conspiracy to commit mail, bank and wire fraud is an aggravated felony under the immigration laws, the penalty for which is lifetime banishment from the country, where the petitioner stipulated for sentencing purposes that the victim loss from his offense met the statutory requisite for such a felony.

Safford United School District #1 v Redding, No. 08-479 (January 16, 2009): Review was granted to determine whether public school officials are prohibited from strip searching a student suspected of possessing and distributing a prescription drug on campus, in violation of school policy.

United States Supreme Court - Opinions

Arizona v Johnson, No. 07-1122 (January 26, 2009): Respondent Lemon Montrea Johnson was convicted by a jury of gun possession. Arizona gang task force officers stopped a car for a vehicle infraction warranting only a citation - the registration had been suspended for an insurance-related violation - but did not suspect the occupants of any criminal activity when the car was pulled over. One officer became suspicious of the respondent, the back seat passenger, and learned that he had been in prison and was from an area with high gang activity. Johnson was removed from the car for questioning and patted down based upon the officer's belief that he was armed. During the pat down, a gun was

found in his pocket, and marijuana was recovered in the subsequent search. The trial court denied his motion to suppress, finding that the police legally stopped the vehicle, and that the officers had cause to believe that the respondent was armed. The Arizona Court of Appeals overturned his conviction, holding that the officers did not have any suspicion of criminal activity when they performed the pat down search, and that the search was unrelated to the reason for the traffic stop. The Arizona Supreme Court denied review. The United States Supreme Court, in a unanimous opinion, reversed and remanded. The Court held that, in a traffic-stop setting, a lawful investigatory stop is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity. The temporary seizure of a driver and passengers thus ordinarily continues, and remains reasonable, for the duration of the stop.

Chambers v United States, No. 06-11206 (January 13, 2009): Following Petitioner Deondery Chambers' guilty plea to felon in possession of a firearm, the government argued that he was subject to a fifteen-year mandatory minimum sentence under the Armed Career Criminal Act (ACCA). The Act requires an enhanced sentence following convictions for three violent felonies or serious drug offense. The government contended that the petitioner's state conviction for escape was a predicate felony for sentence enhancement. Under Illinois law, escape could be both breaking free from custody, and knowingly failing to report to prison. Petitioner argued, and the government did not dispute, that the escape was based upon his knowing failure to report to prison. The district court, however, found that the escape constituted a violent felony under the Act. It declined to differentiate between failure-to-report escape and custodial escape, and sentenced the petitioner under the enhanced penalties provision of the ACCA. The United States Court of Appeals for the Seventh Circuit, believing it was bound by its earlier decision in **United States v Golden**, 466 F.3d 612 (7th Cir. 2006), held that any escape constituted a crime of violence under the Act. The United States Supreme Court, in a unanimous decision, disagreed and held that failure to report escape is not a violent felony under the Act. The elements of the offense did not involve physical force. It a crime of inaction rather than one of purposeful, violent, and aggressive conduct. Justice Alito's concurring opinion was joined by Thomas.

Herring v United States, No. 07-513 (January 14, 2009): Petitioner Bennie Herring went to the county sheriff to retrieve items from his impounded truck. The petitioner was recognized by an investigator, who asked the police department's warrant clerk to check for any arrest warrants for Henning. The petitioner did not have any warrants in that county, and the investigator asked the warrant clerk to check in a neighboring county. The clerk in the neighboring county erroneously reported that there was, in fact, an active warrant for the petitioner for failure to appear on a felony charge. Unbeknownst to the investigator, who had pulled over and arrested the petitioner when he left the impound lot, the warrant had been recalled five months earlier. During a search incident to arrest, a pistol and methamphetamines were found on Petitioner Herring. He was arrested and indicted on weapons and drug charges. He unsuccessfully moved to suppress the evidence, arguing that his initial arrest was illegal because the warrant had been rescinded. On appeal, the petitioner argued that the district court erred in granting his motion to suppress. The United States Court of Appeals for the Eleventh Circuit affirmed, finding that the arresting officers were innocent of any wrongdoing, and that the county's failure to update the records was merely negligent. The evidence was thus admissible under the good-faith rule enunciated in **United States v Leon**, 468 US 897 (1984). The United States Supreme Court agreed and held that when police mistakes are the result of negligence, rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply. Justice Ginsburg filed a dissent, which was joined by Stevens, Souter, and Breyer.

Jimenez v Quarterman, No. 07-6894 (January 13, 2009): Petitioner Carlos Jimenez was convicted of burglary. He requested that his court-appointed attorney file an appeal on his behalf, but appellate counsel instead asked to withdraw pursuant to **Anders v California**, 386 US 738 (1967). The brief was mailed to the petitioner, who had been moved from the jail to a state penitentiary and never received it. The state court of appeals dismissed the appeal, but the petitioner did not know the appeal was dismissed because the appellate court also sent the decision to the jail instead of the prison. Once the petitioner became aware that his appeal had been dismissed, he filed a state habeas corpus petition alleging ineffective assistance of appellate counsel. Jimenez's petition was successful, and he was granted the right to file an out-of-time appeal, though his conviction was ultimately upheld by the state courts. Jimenez then sought federal habeas corpus relief. The Antiterrorism and Effective Death Penalty Act (AEDPA) establishes that a state prisoner must file a federal habeas corpus petition within one year from the latest of four dates, including "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Petitioner contended that the date on which the judgment became final could be postponed by a state court's decision during collateral review to grant a defendant the right to file an out-of-time direct appeal. The District Court disagreed, finding that the date could not be moved to reflect the out-of-time appeal. The United States Court of Appeals for the Fifth Circuit affirmed. The United States Supreme Court, in a unanimous opinion, reversed and remanded. It held that where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet final under the AEDPA. Thus, "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" must reflect the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that appeal.

Nelson v US, No. 08-5657 (January 26, 2009): Petitioner Lawrence Nelson was convicted of conspiracy to distribute and to possess with intent to distribute more than fifty grams of cocaine base, and was sentenced to the bottom of the guidelines range by a district court judge who noted that the guidelines were considered presumptively reasonable. The United States Court of Appeals for the Fourth Circuit affirmed the conviction and sentence, finding that sentences within the guidelines were presumptively reasonable. Nelson successfully petitioned for a writ of certiorari, which resulted in a remand of the case for further consideration in light of **Rita v United States**, 551 US 338 (2007), which held that district courts cannot legally presume the reasonableness of a sentence under the United States Sentencing Guidelines. The Fourth Circuit, without further briefing, affirmed the sentence on remand. Nelson again filed a petition for a writ of certiorari, and the government conceded error. The United States Supreme Court, in a per curiam opinion, reversed and remanded. The Guidelines are not only not mandatory on sentencing courts, they are also not to be presumed reasonable, according to the Court. Justice Breyer concurred in the judgment, joined by Alito.

Oregon v Ice, No. 07-901 (January 14, 2009): Petitioner Thomas Ice was convicted of two counts of first-degree burglary with intent to commit sexual abuse, and two counts of first-degree sexual assault following his breaking into the residence of an eleven year old girl and touching her vagina and breasts. Oregon law generally called for concurrent sentences, but allowed consecutive sentences when a defendant was simultaneously sentenced for offenses that did not arise from the same course of conduct and when offenses did arise from the same course of conduct, if the judge found that the offense was an indication of the defendant's willingness to commit more than one criminal offense, or the offense caused or created a risk of causing greater or qualitatively different harm to the victim. The trial court imposed consecutive sentences based on its own factual findings that the two burglaries constituted separate incidents, and it also imposed a consecutive sentence for touching the victim's

vagina under either of the state statute's provisions. On appeal, the petitioner argued that the sentencing statute was unconstitutional under **Apprendi v New Jersey**, 530 US 466 (2000) and **Blakely v Washington**, 542 US 296 (2004). The state court of appeals held that the consecutive sentences were not in violation of the state's constitution because none of the factual issues reviewed by the judge were an "element" of the crime. However, the state supreme court reversed, finding that the sentences violated the Sixth Amendment. The United States Supreme Court held that, in light of historical practice and the states' authority over administration of their criminal justice systems, states can constitutionally assign to judges the finding of facts necessary to impose consecutive sentences for multiple offenses without violating the Sixth Amendment. Justice Scalia dissented, joined by Roberts and Souter.

Spears v United States, No. 08-5721 (January 21, 2009): Steven Spears was convicted of conspiracy to distribute cocaine base and powder cocaine. The district court determined that an excessive sentence would result if it used the ratio of crack to powder cocaine dictated under the United States Sentencing Guidelines Manual (100:1). It instead calculated the sentence based on a much lower scale - 20:1 - and imposed the statutory minimum sentence. The United States Court of Appeals for the Eighth Circuit reversed and remanded. The United States Supreme Court vacated the reviewing court's decision, and remanded for reconsideration in light of its recent decision in **Kimbrough v US**, 552 US ____ (2007). The Eighth Circuit again reversed, holding that the district court could not unequivocally reject the guidelines. The Supreme Court of the United States summarily reversed the Eighth Circuit. The Court reiterated its prior holding, which allows a district court to vary from the federal cocaine sentencing guidelines based upon policy disagreement with the guidelines. Chief Justice Roberts authored a dissenting opinion, which was joined by Alito. Justice Thomas dissented without opinion. Justice Kennedy would have granted certiorari.

Waddington v Sarausad, No. 07-772 (January 21, 2009): Respondent Cesar Sarausad was charged with murder and several other felonies, under a theory of accountability, for his role in a fatal gang-related shooting at a high school in Seattle. Sarausad was not the shooter, but was the driver of the car carrying two gang members, including the shooter. The respondent contended that he went to the school expecting only a fist fight, and denied knowing that his passenger was going to shoot anyone, or even had a gun. During deliberations, the jury sought clarification of the accomplice liability issue three times, but the judge told it only to refer back to the instructions. Respondent was convicted of second-degree murder, attempted murder, and assault. On appeal, he argued that he lacked the requisite intent to be charged under accomplice liability law. Washington law at the time of trial was unclear whether an accomplice needed only to know that the principal planned on committing a crime, or whether an accomplice needed to know that the principal planned on committing a particular crime. The state appellate and supreme courts affirmed the convictions on direct review. The Washington Supreme Court, in two unrelated subsequent cases, held that accomplice liability is triggered under the stricter particular crime charged requirement. Respondent unsuccessfully sought collateral relief in the state courts. The United States Court of Appeals for the Ninth Circuit Court granted federal habeas relief, holding that the jury instructions were ambiguous. The United States Supreme Court reversed and held that, because the state court's interpretations of federal law were not objectively unreasonable, federal habeas relief should not have been granted. Habeas relief is only justified when ambiguous jury instructions caused the reasonable likelihood that the state had not proven every element of its case beyond a reasonable doubt. Justice Souter dissented, joined by Stevens and Ginsburg.

Legislative Update*

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

2008 PA 194 (SB 0370). Weapons; licensing; eliminate requirement for post-purchase pistol safety inspection. Effective January 7, 2009. MCL 28.429d, 28.432, 28.432b; repealed 28.429.

2008 PA 205-06 (HB 4065, SB 0346). Crimes; animals; fleeing the scene of dog or wolf-dog cross bite incident or failing to provide assistance to bitten individual; prohibit and provide penalties. Effective January 1, 2009. MCL 750.66a.

2008 PA 339 (HB 4552). Crimes; animals; penalties for animal cruelty; revise to allow consecutive sentencing. Effective January 1, 2009. MCL 750.50b.

2008 PA 341 (HB 5160). Crimes; other; allow use of certain out-of-state violations to enhance drunk driving penalties. OWI. Effective January 1, 2009. MCL 257.625.

2008 PA 380 (HB 4092). Criminal procedure; evidence; DNA testing upon arrest for certain crimes; required. Effective July 1, 2009. MCL 750.520m.

2008 PA 391 (HB 6602). Crime victims; other; crime victims services commission payment of sexual assault medical forensic examination costs to health care providers; provide for under certain circumstances. Effective December 29, 2008. MCL 18.352, 18.354, 18.355, 18.360, 18.361.

2008 PA 396 (HB5355). Crime victims; other; distribution and use of crime victim's rights funds; broaden types of authorized expenditures. Effective December 29, 2008. MCL 780.901, 780.904, 780.908.

2008 PA 407 (SB 0505). Weapons; concealed; exemption for certain state court judges and state court retired judges from concealed weapons no-carry zones; provide for. Effective January 6, 2009. MCL 28.421, 28.425o.

2008 PA 410 (HB 5089). Criminal procedure; DNA; deadline for filing petition for DNA testing in felony conviction cases; extend, and revise certain procedures for obtaining test of DNA evidence. Effective January 6, 2009. MCL 770.16.

2008 PA 411 (HB 6092). Crimes; other; prohibit making material false statement in petition or supporting affidavit seeking review of DNA evidence and provide penalty. Effective January 6, 2009. MCL 750.422a.

2008 PA 412 (HB 6093). Criminal procedure; sentencing guidelines; prescribe guidelines for crime of making material false statement in petition or supporting affidavit seeking review of DNA evidence. Effective January 6, 2009. MCL 777.16v.

2008 PA 421 (SB 1622). Human services; medical services; liability for false or fraudulent claims to the Medicaid program; amend Medicaid false claims act to comply with federal dictates as to civil penalties required for eligibility for federal funding. Effective January 6, 2009. MCL 400.602, 400.607, 400.610a, 400.610c, 400.611, 400.612, 400.614, 400.615.

2008 PA 475-76 (HB 6022, SB 1193). Crimes; larceny; include theft of a catalytic converter as basis for larceny from a vehicle. Effective April 1, 2009. MCL 750.356a.

2008 PA 493 (SB 1413). Law enforcement; investigations; national crime prevention and privacy compact; allow participation by this state. Effective January 13, 2009. MCL _____ (not yet assigned).

2008 PA 508 (HB 4260). Criminal procedure; records; criminal conviction overturned based on DNA evidence; provide for deletion of record. Effective January 13, 2009. MCL 769.16a.

2008 PA 519 (HB 4872). Crimes; other; leaving children unattended in a vehicle; prohibit under certain circumstances and provide penalties. Effective April 1, 2009. MCL 750.135a.

2008 PA 520 (HB 4873). Criminal procedure; sentencing guidelines; prescribe guidelines for crime of leaving child unattended in a vehicle. Effective April 1, 2009. MCL 777.16g.

2008 PA 521 (SB 0760). Criminal procedure; sentencing guidelines; revise guidelines for child abuse in the third degree to reflect citation change and for leaving child in car seat. Effective April 1, 2009. MCL 777.16g.

2008 PA 533 (HB 6645). Criminal procedure; evidence; DNA identification profiling samples; require individual to provide an adequate sample. Effective January 13, 2009. MCL 28.173a.

2008 PA 534 (HB 6646). Criminal procedure; evidence; use of DNA profiles; authorize. Effective January 13, 2009. MCL 28.175.

2008 PA 535 (SB 1549). Criminal procedure; evidence; prohibit the misuse or removal of DNA identification profiling records and provide penalties; provide for good faith provision in obtaining and retaining DNA samples in violation of act. Effective January 13, 2009. MCL 28.172, 28.175, 28.176.

2008 PA 537 (HB 4611). Law enforcement; other; standards for training and qualification for certain former law enforcement officers to carry firearms; clarify for the purposes of federal law allowing the carrying of concealed weapons. Effective January 13, 2009. MCL _____ (not yet assigned).

2008 PA 538 (HB 4612). Criminal procedure; sentencing guidelines; provide false information on application for certificate to carry firearms by a retired law enforcement officer; include in guidelines. Effective January 13, 2009. MCL 777.11b.

2008 PA 542 (HB 5987). Corrections; jails; emergency overcrowding release procedure; modify as to unsentenced prisoners. Effective January 13, 2009. MCL 801.56.

2008 PA 543 (SB 1616). Criminal procedure; other; increase minimum state costs assessed in certain criminal cases involving juveniles and provide for distribution of proceeds to assist victims of CSC. Effective April 1, 2009. MCL 712A.18m.

2008 PA 544 (SB 1617). Crime victims; other; create child advocacy center fund. Effective April 1, 2009. MCL _____ (not yet assigned).

2008 PA 545 (SB 1618). Law enforcement; other; provide for redistribution of certain justice system funds to pay for certain costs associated with CSC. Effective April 1, 2009. MCL 600.181.

2008 PA 546 (HB 5054). Crime victims; other; sexual assault victims' forensic medical intervention and treatment act; create and provide funding for. Effective April 1, 2009. MCL _____ (not yet assigned).

2008 PA 547 (HB 5055). Criminal procedure; other; minimum state costs assessed in certain criminal cases; increase, and provide for distribution of proceeds to assist victims of criminal sexual conduct. Effective April 1, 2009. MCL 769.1j.

2008 PA 562 (SB 0661). Criminal procedure; sentencing guidelines; prescribe guidelines for crimes involving gangs and assign 50 points under offense variable 13 (OV 13) under certain circumstances. Effective January 1, 2009 (§16b) and April 1, 2009 (§§16t & 43). MCL 777.16b, 777.16t, 777.43.

2008 PA 563 (SB 0660). Criminal procedure; sentencing guidelines; gang activity; prohibit and provide penalties. Effective April 1, 2009. MCL 750.411u.

2008 PA 564 (SB 0291). Crimes; definitions; gang felony crimes; create. Effective April 1, 2009. MCL 750.411u.

2008 PA 565 (SB 0292). Criminal procedure; sentencing guidelines; prescribe guidelines for gang felonies. Effective April 1, 2009. MCL 777.16t.

2008 PA 577 (SB 0158). Crimes; abuse; committing act likely to cause physical harm to a child; include in definition of child abuse. Effective April 1, 2009. MCL 750.136b.

**Special thanks to Bruce A. Timmons for sharing his legislative update, from which this list was derived. Mr. Timmons is the Criminal Law Section's Legislative Counsel.*