

JANUARY 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 another ski conference, where you can work and play in the same weekend. The following programs will be offered:

Sunday, February 18: The evening program will feature 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 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. Criminal Law Section Chair Graham Teall will moderate the session, while Richard Helfrick will represent the defense, and Helen Brinkman will represent the prosecution.

Tuesday, February 20: The morning begins with a presentation on the civil ramifications of a criminal conviction. Kathleen L. Alcorn from the Department of Homeland Security, Immigration and Customs Enforcement, will be the featured speaker for this topic.

The pre-registration form has been included on the last page of this newsletter. Interested parties should return the 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 January 23, 2007 Sheraton Hotel, Lansing

Our next monthly council meeting will be held 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. Everyone is welcome to attend.

Proposed Amendments to Court Rules Impacting Criminal Cases

Public administrative hearings will take place on January 17, 2007 for the following proposed amendments:

Rules 2.512, 2.513, 2.514, 2.515, 2.516, and 6.414: The proposed amendment completely rewrites some of the rules, and collects the rules governing jury trials in civil and criminal cases in a single rule. Other provisions impact a juror's use of material, jury participation, a judge's comment on the evidence, the attorney's role during trial, and the submission of evidence

Rule 3.932: The proposed amendment would allow a court to enter a plea for juveniles who violate the state vehicle code, and would require a court to report to the Secretary of State violations of the code, committed by juveniles, that are handled on the court's consent calendar.

Rules 6.610, 6.625, and 7.103: The proposed amendment would allow the adoption of rule amendments, as suggested by the Representative Assembly of the State Bar of Michigan and as revised by the Court, that would ensure that individuals who are convicted in district court are aware of their right to counsel under *Halbert v Michigan*, 545 US __ (2005).

The following proposed amendments have not yet been set for public hearing:

Rule 6.106: The proposed amendment incorporates new statutory requirements for setting bond in certain criminal non-support cases.

Rules 7.204 and 7.205: The proposed amendment makes some technical changes and also clarifies how motions for post-judgment relief, including a motion for a new trial and a motion for rehearing or reconsideration, tolls the time for filing an application for leave to appeal in the appellate court.

Rule 6.445: The proposed amendment would create uniformity between the rule outlining the requirements for guilty and no contest pleas with the rule outlining the requirements for guilty pleas in probation revocations.

Recent State & Federal Criminal Cases

People v Lewis, No. 270318 (December 12, 2006): In an unpublished per curiam decision, the Court of Appeals found that the trial court erred in granting the defendant's motion to suppress his police statement and in dismissing the cases. The defendant failed to claim his privilege against self-incrimination before he gave an incriminating statement during a pre-polygraph interview. An agreement between defense counsel and police - that the attorney must approve the questions before the polygraph test - was not an invocation of the privilege.

People v Tompkins, No. 266032 (December 14, 2006): The defendant claimed that he was entitled to re-sentencing, arguing that his offense variable score could not be premised on his possessing a firearm following his acquittal for felony firearm. Relying on **Drohan**, in which the Michigan Supreme Court held that **Blakely** did not require a jury finding beyond a reasonable doubt of facts relied on for sentencing where the facts were relevant to the determination of the minimum sentence, the Court of Appeals affirmed in an unpublished memorandum decision. It concluded that, because a different burden of proof applies to the determination of a minimum sentence, the scoring of the guidelines did not have to be consistent with the jury verdict.

People v Margraves, No. 263125 (December 14, 2006): The defendant was convicted of fourth-degree criminal sexual conduct and first-degree home invasion. The home invasion was alleged to have occurred when the defendant entered a dwelling without permission and committed fourth-degree criminal sexual conduct, a "felony." The defendant argued that the prosecution failed to prove that he committed a "felony," where the predicate offense was a statutorily defined misdemeanor. In an unpublished per curiam decision, the Court of Appeals found that fourth-degree criminal sexual conduct could not be used as the predicate offense, but that it could nonetheless be used to support the "felony, larceny, or assault" element of MCL 750.110a(2).

People v McBride, No. 271579 (December 19, 2006): Following remand from the Supreme Court, in a published per curiam opinion, the Court of Appeals affirmed the trial court's order suppressing inculpatory statements made by the deaf-mute defendant. In admonishing the defendant of her rights during questioning, the detective omitted the right about the presence of an attorney and failed to tell the defendant that an attorney could be appointed for her prior to questioning. He also failed to tell her that she could at any time decide not to "answer any questions or make any statement." The admonishments were constitutionally inadequate and, thus, the trial court did not clearly err in concluding that the defendant's waiver was not knowingly and intelligently made.

Eddleman v McKee, 05-1493 (December 14, 2006): The United States Court of Appeals for the Sixth Circuit held that, when a state court has found an error to be harmless, the court on collateral review should ask whether the state court's harmless-error decision was an unreasonable application of the federal rule that a trial error is harmless only if it is harmless beyond a reasonable doubt. Applying this standard, the court affirmed the district court's conditional grant of a writ of habeas corpus to the petitioner, finding that the Michigan Court of Appeal's harmless-error determination was an unreasonable application of United States Supreme Court precedent (**Chapman v California**; **Arizona v Fulminante**).

Legislative Update

The legislature adjourned its session without voting on the preliminary examination package, which would have eliminated the right to a preliminary examination for certain offenses.

Someone You Should Know

Lorne Brown has been a defense attorney for fifteen years - nearly his entire legal career. Following a short stint in the military, Mr. Brown attended the University of Michigan Law School and then began a general practice. One year later, Mr. Brown joined the Washtenaw County Office of Public Defender, and is now a First Assistant. He did not plan to become a criminal attorney, but rather drifted over to criminal law, finding it interesting and exciting. "I didn't choose criminal law – criminal law chose me. [The cases] tell such interesting stories," Mr. Brown stated.

Lorne spent much of his career handling trials, but now works mainly in the preliminary examination court. His audience is different now, but he still enjoys challenging the prosecutor's case. Mr. Brown discovered that success at the preliminary exam is not measured by whether the case is bound over, but rather by whether he has learned new perspectives on the case and developed a theory for trial. Ultimately, true success to Mr. Brown is having a client who is satisfied with his work, even if the result is not what the client hoped. Indeed, when asked to recall a career highlight, Lorne smiled and offered a quote from a convicted client: "No one has ever fought for me like you did."

*"I didn't choose criminal law
– criminal law chose me."*

Lorne Brown

Mr. Brown finds that a big challenge for today's public defense attorneys is connecting with juries who are heavily influenced by popular media, which he believes portrays public defenders in a negative light. According to Lorne, this disrespect is different from what he experienced during his law school career, when television shows portrayed public defenders as respectable and their work as honorable. Lorne was inspired by these shows and by his stepfather, who worked for legal aid.

Mr. Brown is also inspired by the creativity found in comic books. He has been collecting them for many years and is proud of his complete collection of Marvel Silver Age Super Heroes, which spans fifteen years. Mr. Brown can also be found on the basketball court where, not surprisingly, he plays defense. Lorne is married and has two daughters.

If you would like to know more about someone in the criminal justice system please, submit the person's name and contact information to elaine@zaret.com.

Editor's Note

For the next few issues of this newsletter, I will be your editor. In taking on this responsibility, I have been asked to fill the shoes of Jim Shonkwiler, who faithfully edited this newsletter for almost three decades before retiring last year. Nobody can fill Jim's shoes. The Criminal Law Section, and indeed the entire criminal law community, is indebted to Jim for his overwhelming contribution.

In addition to the content in this newsletter, in upcoming issues I hope to include "hot" practice topics & tips, articles, letters to the editor, and a point-counterpoint section on a controversial topic currently in the news. If you have general comments or suggestions, or if you would like to contribute content to the newsletter, please e-mail elaine@zaret.com.

Mid-Winter Conference at Summit Village of Shanty Creek

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, 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
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