

JANUARY 2008

# NEWS & VIEWS

THE CRIMINAL LAW SECTION / STATE BAR OF MICHIGAN NEWSLETTER

2007-08 Officers:

Chair:  
Daniel M. Levy  
Detroit

Chair-Elect:  
Matthew P. Smith  
Grand Rapids

Secretary:  
Opolla Brown  
Detroit

Treasurer:  
Kenneth M. Malkin  
Bay City

Editor:  
Elaine M. Spiliopoulos  
Ann Arbor

## Events

### **31st Mid-Winter Ski Conference “Handling Confidential Informants” President’s Day Weekend: February 17-19, 2008 Shanty Creek Resort – Bellaire, MI**

This year’s ski conference will begin at 6:00 PM on Sunday, February 17, and end at noon on Tuesday, February 19, 2008. The traditional format continues, with ample time for recreation and family activities.

Sunday, February 17: 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. Immediately following, the evening’s program concludes with a welcoming reception for all conference participants.

Monday, February 18: Confidential informants pose unique issues for the prosecutor, the defense attorney, and the court. Conference participants will hear from two experienced attorneys offering insights from all three perspectives. The **Honorable Timothy Kenny** is currently a 3rd Circuit Judge who has significant prosecutorial experience in both federal and state court. **Steven Fishman** is one of Detroit’s leading defense attorneys.

Tuesday, February 19: **John Powell**, of the State Appellate Defender Office, will instruct us about winning PowerPoint presentations in the courtroom.

The pre-registration form has been included in this newsletter. Interested parties should return the form directly to the resort (address and fax number provided on registration form).

### **Council Meeting January 15, 2008 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.

## Chair Chatter

If you keep track of such things, you might expect these notes from the Chair to come from last year's Chair-Elect, Sherrie Guess. Well, Sherrie was made 'an offer she could not refuse,' and has started a new job in Indiana. While she has expressed her intentions to stay involved in the doings of the Criminal Law Section, Sherrie did not believe she would be able to carry out the responsibilities of being Chair given both the additional time required for the new position and the additional travel that would be required due to her relocation. I know you will all join me in wishing her well in her new position, and in thanking her for her many years of service to this section. Her leadership will be sorely missed.

Traditionally, the first letter from a new chair would tell you of some new project or goal for the coming year. This one won't. The Criminal Law Section Council has been involved in a number of important and ongoing projects that I believe warrant our continuing attention. These include ongoing efforts related to preliminary exam reform and the reform of Michigan's system (or some would argue the lack thereof) for providing indigent defense. We will continue to be involved in efforts to examine, provide guidelines for, and perhaps mandate, videotaping of custodial interrogations. We also hope to continue to improve upon our reincarnated newsletter by providing you with more information and commentary related to the practice of criminal law. And, of course, we will be ready to respond where appropriate to legislative issues as they arise.

The Council is always interested in any concerns or suggestions you might have and I urge you to contact any council representative you may know. I also encourage you to consider presenting your point of view on criminal issues by submitting a short article or opinion piece to this newsletter. Mostly though, I look forward to all the coming year may have in store for us and I hope to have an opportunity to talk with you at either our winter or spring conferences.

Daniel M. Levy  
Criminal Law Section Chair

## Meet the Council

During the annual meeting, new officers were installed, and five new members were elected to the Criminal Law Section Council. Congratulations to the following officers and council members who will be serving you this term:

**Daniel M. Levy, Chair:** Daniel Levy was the Criminal Law Section's Secretary before his installation as Chair-Elect. Once an Assistant Attorney General in the Alcohol & Gambling Enforcement Division, Mr. Levy is now Chief Legal Counsel for the Michigan Department of Civil Rights.

**Matthew P. Smith, Chair-Elect:** Matthew Smith has been in practice for over twenty years as both a prosecutor and defense attorney. He joined the Criminal Law Section thirteen years ago, and is a former Chair. Mr. Smith has taught at a number of colleges and universities, and has taught some or all of the Grand Valley Police Academy.

**Opolla Brown, Secretary:** Opolla Brown is a Wayne County Assistant Prosecuting Attorney assigned to the General Trials Division, and is responsible for a courtroom docket that includes many major felony cases. Ms. Brown is also a member of the Board of Directors for the Wayne County Criminal Advocacy Program, which provides continuing legal education for criminal lawyers in the county.

**Kenneth M. Malkin, Treasurer:** Kenneth Malkin has been an attorney with the Bay County Office of Criminal Defense for twenty-two years. Last term, Mr. Malkin served the section as the representative from the Criminal Defense Attorneys of Michigan (CDAM).

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The following individuals were elected to a three-year term on the Council:

**Honorable John T. Hammond:** Judge Hammond was a judge in Berrien County for four decades, and also worked as a criminal defense attorney, and as an elected prosecuting attorney. He was a charter member of the Council of the Criminal Law Section, and previously served as its Chair, as well as other officer positions. Judge Hammond is also a member of the Standard Criminal Jury Instructions Committee, and served as a member of the Criminal Jurisprudence Committee for twenty years.

**Erika S. Julien:** Erika Julien dedicates her practice solely to criminal defense, and currently serves on the Board of Directors of Criminal Defense Lawyers of Washtenaw County and the Washtenaw County Bar Association (WCBA). Ms. Julien is a past recipient of the State Bar's Regeana Myrick Outstanding Young Lawyer Award and was named a "Lawyer of the Year" by Michigan Lawyer's Weekly. She is also the recipient of the first ever WCBA Outstanding Young Lawyer Award, which is now given to one lawyer each year that demonstrates strong leadership and dedication to the community.

**Barbara R. Levine:** Barbara Levine is the Executive Director of the Citizens Alliance on Prisons and Public Spending (CAPPS). Ms. Levine began her legal career more than thirty years ago as an attorney for the State Appellate Defender Office. She has also taught criminal procedure at Wayne State Law School and University of Toledo College of Law, served as a Commissioner at the Michigan Supreme Court, and was an administrator of the Michigan Appellate Assigned Counsel System. A previous member of the Criminal Law Section Council for almost a decade, Ms. Levine is also a past chair and current member of the Prisons and Corrections Section Council.

**Ralph C. Simpson:** Ralph Simpson is an attorney in private practice specializing in criminal appeals. Mr. Simpson previously represented indigent criminal defendants throughout the state during his fifteen years as an attorney for the State Appellate Defender Office. For the past eight years, he has been an active member of the Criminal Law Section Council, and is a past chair. Mr. Simpson currently serves as Vice President of the Michigan Council on Crime and Delinquency and is a member of the National Board of the American Civil Liberties Union.

**Stephen M. Taratuta:** Stephen Taratuta is a Wayne County Assistant Prosecuting Attorney assigned to the Homicide Division. Mr. Taratuta previously served on the Representative Assembly for seven years, and won another three-year term in the most recent election. He has served on the State Bar of Michigan Character and Fitness Hearing Committee for District H, and is a past president of the Recorder's Court Bar Association and the Wayne County Criminal Defense Bar Association. For the past two years, Mr. Taratuta has been on the Board of Directors for the Michigan Arson Prevention Committee.

The following individual was elected to fill a one-year vacancy on the Council:

**David E. Gilbert:** David Gilbert has been an attorney for almost twenty years and is currently a sole practitioner, dedicating approximately half of his practice to criminal law. Mr. Gilbert is a former Assistant Prosecuting Attorney, and Chief Assistant Prosecuting Attorney. He also has five years' experience in court-appointed criminal defense contracts. Mr. Gilbert has been an adjunct professor in both Trial Advocacy and Real Estate Law at Kellogg Community College. He is currently the Treasurer of the Barry County Bar Association.

## Recent State & Federal Criminal Cases

**People v Cline**, No. 268604 (September 18, 2007): In a published decision, the Court of Appeals held that the defendant's wife met the statutory definition of a vulnerable adult as she was "suspected of being...abused, neglected, or exploited," and she lacked the skills to live independently due to her physical disability. The defendant was convicted of kidnapping and seventeen counts of first-degree vulnerable adult abuse after his blind and diabetic wife found photos of herself hogtied, nude and lying face down. The defendant manipulated his wife's insulin so that she lost consciousness, allowing him to tie her up in various stages of undress and videotape her. The defendant's convictions were affirmed. The Court of Appeals further held that the trial court's upward departure was proper even though, despite using improper rationales to justify the departure including the defendant's age and future dangerousness, the court explained that the guidelines "did not adequately account for the circumstances" of the case.

**People v Shahideh**, No. 267961 (October 25, 2007): In a split decision, the Court of Appeals held that the trial court abused its discretion in not allowing a privately retained psychologist to evaluate the defendant in jail, thereby violating the defendant's right to present a defense and right to the effective assistance of counsel. The defendant's attorney sought an evaluation to determine the validity of an insanity defense for his client, who was accused of bludgeoning his girlfriend to death. Using the precise language of 768.20a, the prosecution insisted that a notice of insanity had to be filed and the forensic center analysis performed before an independent review could occur. The trial court agreed, and refused to permit access by the retained psychiatric expert. The Court of Appeals reversed, finding that defense counsel had a duty to investigate whether a notice of insanity was proper. If supported, then the defendant had a right to present the defense. Accordingly, the cause was remanded for an independent psychiatric examination. Judge Schuette dissented, concluding that the trial did not err in denying the defendant's request.

**People v Shafier**, No. 267192 (October 30, 2007): In another split decision, the Court of Appeals held that the prosecutor erred by using evidence of the defendant's silence for impeachment and substantive evidence. During the defendant's trial on two counts of second-degree criminal sexual conduct, the prosecutor introduced the defendant's post-warning silence during examination of a police officer, and during cross-examination of the defendant. During closing arguments, the prosecutor argued to the jury that the defendant's silence was evidence of his guilt because he did not declare his innocence or question the charges against him. Though the majority found the repeated references to the defendant's silence was error, it was harmless. Judge Davis dissented, strongly criticizing the majority for its "anomalous conclusion."

**People v Gullett**, No. 273013 (November 15, 2007): In a published decision, the Court of Appeals vacated the defendant's sentence, finding that the trial court erred in scoring the sentencing guidelines. The defendant was sentenced to fifty to seventy-five year for criminal sexual conduct after the trial court scored ten points of offense variable nine (OV9). This variable considers the number of victims. The trial court counted two victims because it counted a victim in a charge that was dropped. The sentencing guidelines limit the calculation of victims only to the conviction for which the defendant is being sentenced and, therefore, the defendant's score for the relevant offense variable should have been zero. Accordingly, the cause was remanded for re-sentencing.

**United States v Garner**, No. 06-3288 (November 7, 2007): The Sixth Circuit Court of Appeals reversed the judgment of the lower court, which denied the defendant's motion for new trial. Following a jury trial, the defendant was convicted of one count of carjacking and one count of using a firearm during a crime of violence. On appeal, the defendant argued that the district court erred in denying his motion for a new trial based on a violation of Brady v Maryland following the government's failure to timely turn over cell phone records prior to trial. The defendant argued in the alternative that the district court erred in denying his motion for a continuance to allow him time to investigate information contained in cell phone records. The Sixth Circuit agreed with the defendant, concluding that the cell phone records were material to the case because the person who attacked the victim took his cell phone to make and receive calls. Furthermore, the evidence of guilt was not overwhelming. In addition, the Sixth Circuit concluded that the trial court abused its discretion in denying defense counsel's request for a continuance. The defendant's attorney could not both investigate the cell phone records and focus on the trial, and the defendant was prejudiced by his attorney's lack of opportunity to proffer a full defense. Accordingly, the cause was remanded for a new trial. Judge Griffin dissented, concluding that a new trial was a waste of judicial resources.

**Baze v Rees**, No. 07-5439 (September 25, 2007): The United States Supreme Court granted certiorari in a case implicating the Eighth and Fourteenth Amendments. Review was granted to determine whether lethal injection violates the prohibition against cruel and unusual punishment, and whether due process requires the state to maintain life in case a stay of execution is granted after lethal injection chemicals have been administered to the prisoner.

**Begay v United States**, No. 06-11543 (September 25, 2007): The United States Supreme Court granted certiorari to determine whether felony driving while intoxicated qualifies as a "violent felony" under the Armed Career Criminal Act.

**Virginia v Moore**, No. 06-1082 (September 25, 2007). The United States Supreme Court granted certiorari in a case implicating the Fourth Amendment. Review was granted to determine whether suppression of evidence is required when it is obtained incident to an arrest based on probable cause, even though the arrest violates a provision of state law.

**Arave v Hoffman**, No. 07-110 (November 5, 2007): The United States Supreme Court granted certiorari in a case implicating the Sixth Amendment. Review was granted to determine whether the court erred in concluding that a habeas petitioner established prejudice when trial counsel advised the petitioner to reject a plea that would have eliminated the possibility of a death sentence, even though counsel's advice was predicated on an inadequate understanding of the relevant law and the petitioner was still exposed to a possible death sentence and stood little to gain from going to trial. Review was also granted to determine the remedy for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial.

**District of Columbia v Heller**, No. 07-290 (November 20, 2007): The United States Supreme Court granted certiorari in a case implicating the Second Amendment. Review was granted to determine whether a ban on the private possession of handguns violates the rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes.

**Rothgery v Gillespie County, Texas**, No. 07-440 (December 3, 2007): The United States Supreme Court granted certiorari in a case implicating the Sixth Amendment. Review was granted to determine whether an adversarial proceeding had commenced when a magistrate ruled on the sufficiency of a police officer's complaint to establish probable cause for a warrantless arrest, even though no prosecutor was involved in the arrest or the defendant's appearance before the magistrate.

## **Legislative Update**

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

**2007 PA 89 (HB 4228).** Makes the results of drug field tests admissible at preliminary exam, if the exam began on or after the effective date of the act. Effective December 29, 2007. MCL 766.11b.

**2007 PA 139 (HB 4234).** Allows a county or judicial circuit to adopt a county jail population management plan. Under the plan, a judge is authorized to reduce or suspend any jail sentence, or to modify bonds. The sheriff, prosecutor, chief circuit judge, and a representative of the district judges for each county must approve the plan. Effective November 13, 2007. MCL 801.51–801.64.

**2007 PA 140 (HB 4725).** Allows for release of some prisoners in a county, other than one for which a jail population management plan has been approved, when the jail capacity reaches 95% for five consecutive days. On the fifth consecutive day, the county sheriff has the authority to modify certain bonds to a personal recognizance bond if the bonds are under a maximum value established by the chief circuit and district judges, and the sheriff. The sheriff is also authorized to release non-violent prisoners and prisoners serving contempt sentences for failure to pay child support, if those prisoners have served 85% of their sentence. Effective February 11, 2008. MCL 801.51 et seq.

**2007 PA 143 (SB 0079).** Eliminates the requirement to sign your vehicle registration certification. Effective November 19, 2007. MCL 257.223.