JUNE-JULY 2008

NEWS & VIEWS

THE CRIMINAL LAW SECTION / STATE BAR OF MICHIGAN NEWSLETTER

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Events

State Bar of Michigan Annual Meeting
September 17-19, 2008
Hyatt Regency, Dearborn

Save the date! The Criminal Law Section will hold a short business meeting beginning at 9 a.m. on Friday, September 19. During the meeting, elections will be held for positions on the Council. In addition, we will induct our new Chair. Our annual program will immediately follow the brief meeting.

The Criminal Law and Prison & Corrections Sections will present a joint program from 10 a.m. until 12 noon. Please mark your calendar for another provocative and lively program. More detailed information on elections and our annual program, in addition to other programs of interest to the criminal law community, will be provided in future newsletters.

For registration, schedules, and other general information about the Annual Meeting, please visit: www.michbar.org/annualmeeting.cfm.

Council Meeting
Sheraton Hotel, Lansing

The Council will not meet during the summer months, but will reconvene in the fall. The next meeting date will be announced in an email to council members, and will appear in a future newsletter. Monthly meetings are 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.

Michigan Ranks 44th in the Nation for Public Defense Spending;
So-called "McJustice" System Puts Communities at Risk*

Michigan ranks 44th in the nation for public defense spending, behind Alabama and Georgia, spending only $7.35 per capita, according to a report recently released by the National Legal Aid & Defender Association (NLADA). "A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis" found that residents are routinely tried in district courts without access to any legal counsel whatsoever, calling into question the reliability of Michigan's criminal justice system. NLADA is asking state lawmakers to take ownership of this problem and immediately address funding and administrative deficiencies.

"With each passing day, Michigan's public defense system is crumbling under the strain of tight budgets and under-resourced systems, and Michigan residents are bearing this burden," said David Carroll, research director for NLADA. "By forcing counties to pay for and administer the public defender system, the state has wasted taxpayer money and increased the likelihood of wrongful convictions and lawsuits. The time is now for Michigan lawmakers to right this wrong."

Despite the U.S. Supreme Court's decision in *Gideon v. Wainright* establishing that states are constitutionally required to provide for public defense, Michigan's current system requires counties to use their own budgets. With many counties at their breaking points, Michigan courts increasingly value speed over quality, leading many advocates in the Ottawa County criminal justice community to describe the system as providing "McJustice." The report found that counties across the state failed to meet the vast majority of the American Bar Association's Ten Principles, which are considered the national standard for indigent defense. In particular, many residents facing district court trials never have the opportunity to meet with a public defender, and when they do, these meetings are often last-minute and non-confidential.

In addition to fiscal mismanagement, the lack of quality public defenders puts public safety at risk. When the innocent are imprisoned, the real criminals remain on the street. In recent years, Michigan has had a series of wrongful convictions overturned, including the well-known case of Eddie Joe Lloyd who was exonerated of rape and murder by DNA evidence after seventeen years' imprisonment. The true perpetrator of the crime remains at large.

"A fully funded public defender system protects Michigan families and communities," added Carroll. "State policymakers must take immediate, decisive steps to begin funding and administering this vital program on behalf of all Michigan residents."

The findings are based on a year-long study of ten counties chosen by a Michigan-based advisory group consisting of representatives from a number of state and county legal offices and groups, including the State Court Administrator's Office, the Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan, as well as the state Supreme Court and trial-level judges. NLADA, in partnership with the Michigan State Bar Association, conducted the study at the request of state lawmakers.

For the Executive Summary, fact sheet or full report, please visit: http://www.nlada.org/Defender/Defender_Evaluation/Michigan_Evaluation

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Recent United States Supreme Court Cases

Gonzalez v United States, No. 06-11612 (May 12, 2008): Petitioner Homero Gonzalez was charged with several drug-related charges in federal court, and the matter ultimately proceeded to a jury trial. During jury selection, a magistrate judge who had presided over several pretrial matters announced that she would conduct voir dire. The magistrate judge sought and received express consent from attorneys for both parties. Petitioner Gonzalez, however, was not directly asked for his consent. In addition, he did not volunteer his consent or affirmatively object. He was convicted and, on appeal, argued that he was entitled to a new trial where he did not give his personal consent for a magistrate to conduct voir dire. The Fifth Circuit disagreed, finding that personal consent was not required. The United States Court agreed, and held that express consent by counsel sufficed to permit a magistrate judge to preside over jury selection in a felony trial.

Recent State Cases

People v Osantowski, No. 134244 (May 7, 2008): Defendant, in a series of instant messages to a girl in Washington, indicated that he was planning to commit a mass murder at his high school. The girl's father, a police officer, forwarded copies of the messages to authorities in Michigan. During a search of the boy's home, police found the weapons that were discussed in the messages. The defendant was convicted of and sentenced for making a false report or threat of terrorism, using a computer to commit a crime, and felony firearm. He appealed, and the prosecution cross-appealed the sentence, arguing that the trial court erred by failing to assess points under the guidelines for Offense Variable 20. Under OV20, one hundred points must be assessed if the "offender committed an act of terrorism by using or threatening to use...[an] incendiary device, or explosive device." The Court of Appeals affirmed the convictions, but remanded for re-sentencing, finding that an "act of terrorism" included not only overt acts but also threats to engage in the prohibited acts. The Michigan Supreme Court reversed, holding that the threats of harm did not constitute acts of terrorism where the statue explicitly requires the individual to have "committed an act of terrorism by using or threatening to use a harmful substance of device."

People v Dendel, No. 132042 (May 28, 2008): Defendant Dendel, a diabetic, was charged with the first-degree murder of her live-in partner by injecting him with insulin. During a bench trial, the defense theorized that the decedent either took his own life or accidentally died from the side effects of his various medications. The court found her guilty of second-degree murder. The defendant unsuccessfully moved for a new trial on the basis of ineffective assistance of counsel. The Court of Appeals reversed, holding that counsel was ineffective for failing to present expert testimony on the cause of death. The Michigan Supreme Court reversed. Even though the defense's expert witness testified during an evidentiary hearing that the evidence did not support the prosecution expert's testimony that the decedent died from a insulin overdose, there was no reason to disturb the trial court's implicit finding that the defense expert was not more credible than the prosecution's. The defendant's own post-arrest statements - that the decedent had injected himself with insulin – further supported the prosecution's experts theory regarding the cause of death. Her statements were inconsistent with the defense expert's theory of death, but were consistent with the testimony of the prosecution's experts that the defendant had died of an insulin overdose.

Legislative Update

2008 PA 158 (HB 4184). Revised the eligibility for special alternative incarceration (boot camp). Introduced to expand the entry list for boot camp, the public act now requires that:

> (6) Beginning September 30, 2008, and notwithstanding preceding subsections, a prisoner shall not be placed in a special alternative incarceration unit unless all of the following conditions are met for the prisoner at the special alternative incarceration unit:
> (a) Upon entry into the special alternative incarceration unit, a validated risk and need assessment from which a prisoner-specific transition accountability plan and prisoner-specific programming during program enrollment are utilized.
> (b) Interaction with community-based service providers through established prison in-reach services from the community to which the prisoner will return is utilized.
> (c) Prisoner discharge planning is utilized.
> (d) Community follow-up services are utilized.

Important time restrictions were also added in two new subsections:

> (12) Each prisoner or probationer placed in the special alternative incarceration program shall fully participate in the prisoner reentry initiative not later than the following date, as applicable:
> (a) Each prisoner serving his or her second prison sentence shall participate not later than June 1, 2008.
> (b) Each prisoner serving his or her first prison sentence shall participate not later than August 1, 2008.
> (c) Each probationer shall participate not later than September 1, 2008.
> (13) This section is repealed effective September 30, 2009.*

Effective June 5, 2008. MCL 791.234a.

Judge John T. Hammond notes that, until total abolition of boot camps, admission will be subject to statutory restrictions <u>and</u> Department of Corrections Policy Directive 05-01-142 (eff. 6/13/08). The new policy directive replaces 06-04-106, which is no longer available. Judge Hammond warns that plea bargains based on the expectation of admission to boot camp, with no medical or statutory bar and with express prosecutor and court approval, may be illusory and yet without remedy.

*This "sunset" provision is <u>not</u> expected to be extended beyond September 30, 2009.