

**MARCH-APRIL 2008**

# **NEWS & VIEWS**

**THE CRIMINAL LAW SECTION / STATE BAR OF MICHIGAN NEWSLETTER**

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## **Events**

**Council Meeting  
April 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 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.

**Balancing Our Priorities:  
Can We Safely Spend Less on Corrections?  
May 2, 2008  
Lansing Community College, Lansing**

How can corrections spending be safely reduced? Do we have too many people in prison or does public safety require such a large system? Should sentencing rules be adjusted to lock fewer people up? Should more people who are eligible for parole be released? What can be done about the thousands of mentally ill people who end up in prison? How cost-effective are treatment programs and crime prevention strategies? How does the return on investing in prisons compare to investing in universities, local communities and at-risk kids?

The Criminal Law and Prison & Corrections Sections, together with the Michigan Corrections Association, the Michigan Council on Crime & Delinquency, and the Citizens Alliance on Prisons & Corrections, will present a combined program to address these issues and more. Following opening remarks and a presentation providing a thirty-year perspective on the growth of corrections, moderated panels will discuss strategies for promoting cost-effective corrections, and investing in prevention.

For general information about this half-day conference, and to register, please visit: <http://www.balancingourpriorities.org/> or call 517-482-7753.

**People v. Meconi: Clarifying Crime Victims' Constitutional Rights  
To Be Present During Criminal Proceedings**  
by  
**Nicholas V. Dondzila\***

*People v. Meconi*, WL 204141 (Mich. App. 2008), recently presented the Michigan Court of Appeals with the issue of whether trial courts have the authority to sequester crime victims when the accused has a right to attend a criminal proceeding. In 1988, the Michigan Constitution was amended to provide crime victims with certain rights, including “[t]he right to attend trial and all other court proceedings the accused has a right to attend.” Mich. Const. art. I, § 24. Michigan statutory law also provides crime victims with the right to be present at trial; however, this right is limited by a trial court’s authority to sequester crime victims for a portion of the trial:

[t]he victim has the right to be present throughout the entire trial of the defendant, unless the victim is going to be called as a witness. If the victim is going to be called as a witness, the court may, for good cause shown, order the victim to be sequestered until the victim first testifies. The victim shall not be sequestered after he or she first testifies. M.C.L.A. 780.761.

While the majority of *Meconi* found it unnecessary to address the tension between these two provisions, Judge Sawyer, in his concurrence, confronted the issue because of its practical importance to trial courts. He properly concluded that, under the Michigan Constitution, crime victims may not be involuntarily sequestered if the accused has a right to be present in the courtroom.

In *Meconi*, the trial court issued a sequestration order to all potential witnesses to leave the courtroom at the beginning of the trial. The prosecutor and defense attorney made brief opening statements, and the prosecutor then called the victim as its first witness. At this point, the trial court realized the victim had not honored the sequestration order and had remained in the courtroom. Accordingly, the trial court ordered a mistrial on the ground any testimony from the victim was tainted by her exposure to the opening statements. The trial court subsequently entered an order precluding the victim from testifying at a new trial on the ground that any testimony she would give was tainted by her violation of the sequestration order. *Meconi*, 2008 WL 204141 at \*1.

The prosecution appealed the trial court’s orders, and the Court of Appeals reversed. The majority found it unnecessary to engage in a constitutional analysis under the facts presented. Instead, the court, relying on *United States v. Smith*, 441 F.3d 254, 263 (4th Cir. 2006); found that although the remedy of precluding a witness is available to trial courts, this remedy should be used only in extreme and rare circumstances. *Meconi*, 2008 WL 204141 at \*2. The court determined such a rare circumstance was not present in this case as the violation of the trial court’s order was an innocent mistake, the opening arguments were brief, and the case involved a bench trial. Under these circumstances, the majority held the trial court abused its discretion by precluding the victim from testifying, regardless of whether the victim had a constitutional right to be present. *Meconi*, 2008 WL 204141 at \*2.

\*Nicholas is a second year law student at the University of Detroit Mercy School of Law.

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Although Judge Sawyer agreed with the majority's decision, he wrote separately to address the question of whether crime victims have a constitutional right to be present during criminal proceedings. Judge Sawyer correctly determined the crime victim had a constitutional right to attend the opening statements in *Meconi*, and that, as a general rule, crime victims have a right to refuse to comply with a sequestration order when the accused is present in the courtroom. *Meconi*, 2008 WL 204141, at \*5. This conclusion is supported by an analysis of the constitutional and statutory provisions.

During the 1980's, criminal defendants were perceived as having substantially greater rights than victims during criminal prosecutions, and many, including President Reagan, advocated providing criminal victims with more protections in the criminal justice system. See Melissa Hook, Anne Seymore, *A Retrospective of the 1982 President's Task Force on Victims of Crime*, <http://www.ojp.usdoj.gov/ovc/ncvrvw/2005/pg4d.html> (last updated Feb. 8, 2007). Accordingly, in 1982, the President created the Task Force on Victims of Crime to address the issue of victim's rights and support reforms. *Id.* One right the Task Force addressed was a victim's right to attend trial, as victims were often forced to leave the trials of the person accused of perpetrating the crime against them. The Task Force proposed adding the following sentence to the Sixth Amendment: "[l]ikewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings." *Id.* The amendment failed; however, the movement created awareness of ways in which victims could receive more protection during criminal prosecutions.

Michigan voters fully embraced this movement in 1988 by amending their Constitution to provide victims with a number of rights within criminal proceedings. One of the rights included in the 1988 amendment is the provision at issue in *Meconi* – the right to attend proceedings that the accused has a right to attend. Mich. Const. art. I, § 24. Since Michigan's amendment, other states have followed by amending their constitutions to provide victims more rights. See Douglas E. Beloof, Paul G. Cassell, *The Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LCLR 481, 503-509 (2005) (discussing amendments to state constitutions).

Prior to the 1988 constitutional amendment, the right of victims to be present in the courtroom was limited by the statutory power given to trial courts to sequester victims until they testified. M.C.L.A. 780.761. As Judge Sawyer correctly concluded, when Article I, § 24 was adopted in 1988, this constitutional provision preempted the existing statutory provision on sequestration of crime victims to the extent there is a conflict between the two provisions. *Meconi*, 2008 WL 204141, at \*4. In *Meconi*, the defendant attempted to argue that, notwithstanding Article I, § 24, trial courts retain the authority to enforce sequestration orders against crime victims as such orders are expressly permitted under M.C.L.A. 780.761. *Meconi*, 2008 WL 204141, at \*4. In fact, the legislature amended the statute in 2000 to provide, "The victim shall not be sequestered after he or she first testifies."<sup>1</sup> M.C.L.A. 780.761.

A statutory provision, however, cannot be relied upon to justify a court order when its application results in an order contrary to a constitutional guarantee. *Reynoldsville Casket*

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*Co. v. Hyde*, 513 U.S. 749 (1995) (citing *Marbury v. Madison*, 5 U.S. 137, 171 (1803)). In *Meconi*, the crime victim remained in the courtroom for opening statements, despite the trial court's sequestration order at the beginning of trial to all potential witnesses. The defendant clearly had the right to remain in the courtroom, and therefore, under Article I, § 24, the crime victim had the right to remain as well. The trial court's attempt to enforce its sequestration order against the crime victim, while authorized by statute, was unconstitutional.

Although Article I, § 24 provides victims the right to be present at criminal proceedings, it is important to note this right is not absolute. First, this right does not apply when the defendant has no right to attend the trial proceeding. Under *Illinois v. Allen*, 397 U.S. 337 (1970), trial courts have the authority to remove a defendant who engages in disruptive behavior without violating the Sixth Amendment. Michigan's Constitution conditions the victim's right to attend upon the defendant's right to be present during the criminal proceeding. Though the statutory scheme was unconstitutional as applied in *Meconi*, if the defendant is removed from the courtroom pursuant to *Allen*, a trial court could constitutionally apply M.C.L.A. 780.761 and sequester the victim upon a "finding a good cause."

Second, there is a strong argument that *Allen* provides trial courts with the same authority to remove a victim who engages in disruptive behavior as courts have to remove a disorderly defendant. As the *Allen* Court explicitly held, "a defendant can lose his right to be present at trial if...he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Id.* at 343. This same logic should apply in a situation where a victim's behavior is compromising the integrity of trial proceedings. Thus, if a trial court finds a victim's behavior disruptive, the court should have the authority to order the victim removed from the court.

In *Meconi*, the trial court's reliance on M.C.L.A. 780.761 to sequester the victim was unconstitutional. Judge Sawyer correctly concluded the Michigan Constitution provides crime victims with the right to be present at court proceedings when the accused has such a right. Although M.C.L.A. 780.761 provides trial courts with the authority to sequester crime victims, courts can only rely on this authority to the extent it is consistent with the constitutional provision. Therefore, the Michigan legislature should amend M.C.L.A. 780.761 to clarify a crime victim may not be sequestered unless (1) the defendant has no right to attend or (2) the trial court concludes the victim is disruptive. Such legislative action would provide trial courts and the criminal bar with clear guidance on the applicability of sequestration orders to crime victims, and thereby avoid situations such as the one that arose in *Meconi*.

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<sup>1</sup> The legislature's failure to consider the 1988 constitutional amendment when amending M.C.L.A. 780.761 in 2000 provides support to Judge Sawyer's conclusion that the defendant's arguments fail due to preemption. The oversight of the 1988 amendment may be attributed to the fact that when it was adopted, the right to attend trial was one of many rights given to crime victims. Regardless of the reason, the 2000 amendment did not enact any substantive change to the existing statutory provision. The statute already stated a sequestration order is proper "until the victim first testifies." Mich. Comp. Laws Ann. § 1983 (emphasis added). This wording implies a victim may return to the courtroom, notwithstanding any sequestration order, once he or she has testified. By enacting the last sentence to the statute in 2000, the legislature missed an opportunity to make the statute consistent with the 1988 constitutional amendment.

## In Memoriam

### **Kimberly M. Cahill:**

The Criminal Law Section of the State Bar of Michigan notes with great sadness the passing of former State Bar President Kimberly M. Cahill, who recently lost her brief battle with cancer. Ms. Cahill was the immediate past president of the organization, and only the fourth woman to hold that prestigious title.

Ms. Cahill practiced law for more than twenty years with her long-time law partners – her mother and sister – in a practice that focused on real estate, probate, estate planning, and family law matters. She was also the president of Schoenherr Developments, Inc., a company that acquires, develops, constructs, and leases commercial, industrial, and office properties.

In addition to her legal practice, Ms. Cahill actively served the legal community in various positions of leadership. For a decade she served as a State Bar commissioner, and chaired the Representative Assembly. Ms. Cahill served as commissioner liaison to numerous sections and committees, and served as the statewide chair of the Access to Justice Campaign. She also sat on the board of the Michigan State Bar Foundation, which helps administer and coordinate grants to legal service providers.

### **The Honorable Terrance K. Boyle:**

The Criminal Law Section of the State Bar of Michigan also notes with great sadness the passing of a founding member, the Hon. Terrance K. Boyle.

Judge Boyle, Terry to his many friends in the Section, helped to establish the Bar's Criminal Law Section in 1972 as a group of criminal practitioners from both the prosecution and defense perspective, dedicated to finding common ground in the interest of improving the criminal justice system. He served on the Sections Council for many years and in many capacities, including as its Chair for the 1983-84 bar year.

As a Recorder's Court Judge in Detroit from 1985-99, Judge Boyle was known for being well prepared and unfalteringly fair. Judge Boyle served with the Wayne County Prosecutors Office both before and after his time on the bench. He first joined the office in 1968 and quickly worked his way up so that before becoming a judge he had been the Deputy-Chief of the Criminal Division and served as Chief of Trials and Appeals. He is credited with being the driving force behind many of the successful efforts to professionalize the office through recruitment, never-ending continuing legal education, the elimination of patronage in hiring through institution of an examination and review process, the creation of internships and clerkships, and collaboration with other offices through the Prosecuting Attorneys Association of Michigan.

Judge Boyle played key rolls in the drafting of Michigan's Criminal Sexual Conduct laws, (especially in provisions for the protection of rape victims), the Citizens Grand Jury Law and the drafting of Michigan Rules of Criminal Procedure. He also willingly shared his expertise as a frequent lecturer in countless forums, including as an adjunct professor at the University of Detroit Law School and a visiting professor at the University of Michigan and Wayne State University law schools.

## Practice Note

The United States Sentencing Guidelines recently eliminated the sentencing disparity between convictions involving crack and powder cocaine. The amendment resulted in a two-point sentencing reduction. The United States Sentencing Commission voted to apply the reduction retroactively; the amendment went into effect on March 3, 2008. Thus, criminal defendants who were sentenced under the old guidelines for a crime involving crack cocaine may now be entitled to a two-point reduction. However, application of the retroactive guideline is not automatic. The federal courts will administer the guideline and, if the court believes the individual could pose a public safety risk, it can refuse to grant a sentence reduction.

Moreover, not everyone sentenced for offenses involving crack cocaine is eligible for the reduction. For instance, individuals serving a sentence pursuant to the mandatory minimum law of either five or ten years cannot benefit from the guideline reduction (the guideline sentencing range cannot be lower than the mandatory minimum except in cases in which the safety valve, or a downward departure based on substantial assistance, was applied). In addition, individuals sentenced under either the career offender or the armed career offender guideline are not eligible. Individuals with a base offense level less than twelve or more than forty-three, or individuals whose offenses involved more than 4.5 kg of crack cocaine, are also not able to receive a sentence reduction.

## Recent State & Federal Criminal Cases

**People v Mungo**, No. 269250 (January 17, 2008): Following a lawful traffic stop, sheriff deputies requested the license of the defendant driver and his passenger. The deputy ran the licenses and found that the passenger had outstanding warrants. The passenger was arrested and placed in the patrol car. The deputy then ordered the defendant out of the car, patted him down, and searched the interior of the defendant's car. During the search, the deputy found a gun and ammunition. The circuit court suppressed the evidence, but the appellate court reversed that ruling, holding that the search was permissible under *New York v Belton*, 453 US 454 (1981). The Michigan Court of Appeals concluded that the importance of preventing an arrestee from accessing weapons or contraband justified a bright line rule even when there is no reason to believe that the car contains evidence or that the driver of the car is engaged in illegal activity.

**People v Grazhidani**, No. 273212 (January 22, 2008): The defendant pled guilty to third-degree criminal sexual conduct and was sentenced to five years probation, with one year to be served in the county jail. He served 268 days in jail before being released early under the Jail Overcrowding Act. Following his release, the defendant violated his probation and was sentenced to two to fifteen years in prison. The trial court granted the defendant credit for the full year, and the prosecutor appealed. The Michigan Court of Appeals reversed, limiting credit to the days actually served. It concluded that, since a defendant does nothing to earn overcrowding credit, he is not entitled to time not actually served.

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**People v Meconi**, No. 273040 (January 24, 2008). The defendant was charged with an assault on a woman. During a bench trial, the judge ordered sequestration of the witnesses. Following the alleged victim's testimony, the judge noticed that she remained in the courtroom. Upon questioning, the alleged victim told the court that the crime victim advocate told her to remain in the courtroom. Due to the violation of the sequestration order, both the district court and the circuit court excluded the witness' testimony. The prosecutor argued that, under the crime victim amendment to the state constitution, victims had an absolute right to be present and could not be sequestered. In a split decision, the Michigan Court of Appeals ruled in the prosecutor's favor, but on the grounds that the trial court abused its discretion to disqualify the witness when the witness only heard opening statements and not actual testimony. Judge Sawyer, in a concurring opinion, held that the state constitution entitled the victim to be present for the entire trial including portions of trial that occur before the victim testifies.

**People v Davis & Perez**, No. 272547 (January 29, 2008): During a robbery in which the defendants used a note threatening to kill and a "finger-gun pointed pocket," Defendant Perez was hit with a flashlight by the female storeowner and a shovel by the storeowner's fiancé. The defendants argued that there was insufficient evidence of an assault. The Michigan Court of Appeals disagreed, finding sufficient evidence of an assault by virtue of the note and pocket gun, and the storeowner's testimony that she thought the defendant was armed. The defendants also argued that the trial court's instructions on assault, which included the explanation that a victim's subjective experience of fear was not as important as the defendant's intent to scare the victim, were erroneous. However, the appellate court found that the trial court did not err because a victim's fear is not an element of assault. In addition, the trial court did not err in refusing an instruction on the lesser offense of attempted assault with intent to rob because there was no evidence that the defendant's efforts were thwarted. The Court of Appeals also concluded that the defendant did not have an absolute right to trial counsel at sentencing, where substitute counsel ably represented the defendant, and the defendant did not object to the substitution. Finally, the trial court did not clearly err by scoring fifteen points for predatory conduct (OV10). The defendants cased the store and determined that the lone woman storeowner would be a good victim for the armed robbery.

**People v Stevenson**, No. 275845 (February 14, 2008): Following a bench trial, the juvenile defendant was convicted of carrying a concealed weapon, and sentenced to twelve months in jail. In conducting a bench trial, the trial court relied on the waiver in an arraignment before a referee in which the juvenile was never expressly told he had a right to a jury trial. The defendant moved for a new trial, which was denied. On appeal, the defendant argued that he did not knowingly and voluntarily waive his right to a jury trial. The Michigan Court of Appeals agreed, concluding that trial court erred in relying on the advice given by the hearing referee. The referee did not make it clear that the rights of an adult included the right to a jury trial, and his advice that the defendant had a right to a trial that "can include" a jury was not the same as advising him of his constitutional right to a jury trial. Accordingly, the defendant's waiver could not have been voluntary.

## Proposed Amendments to Court Rules Impacting Criminal Cases

Comments on the following proposed amendment are due by May 1, 2008:

**Rule 6.201:** The proposed amendment of the rule would eliminate the requirement that the prosecuting attorney provide the defendant with any exculpatory information or evidence known to the prosecuting attorney only upon request. This proposal also clarifies that the prosecuting attorney is required to provide such information or evidence regardless of whether it is requested by the defendant. The Court would appreciate specific comments on whether a court rule requiring the prosecuting attorney to provide the defendant with exculpatory information or evidence is necessary, in light of the prosecuting attorney's constitutional obligation to do so under *Brady v Maryland*, 373 US 83 (1963), and, if so, whether the proposed amendment of the rule is consistent with the requirements of *Brady*.

Comments on the following proposed amendment are due by July 1, 2008:

**Rules 6.302 and 6.310:** The proposed amendments of the rules would make the rules consistent with the federal rules, which preclude judicial involvement in negotiating plea agreements and limit the ability of defendants to withdraw guilty pleas.

## Legislative Update

The following public act recently went into effect:

**2007 PA 167 (SB 1540).** The bill amends the trespassing statute to eliminate the requirement that the offender "willfully" enter the property. It also eliminated the requirement that the owner request a trespasser to leave the premises. The act also prohibits entering posted farm property without consent of the owner, and increases fines from \$50 to \$250. Effective March 20, 2008. MCL 750.552.

## Editor's Note

Past News & Views editions will soon be uploaded to the documents and publications section of our website: <http://michbar.org/criminal/publications.cfm>. Only editions that are ninety days and older will be available online. Current editions will be available only in print copy to members of the Criminal Law Section

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