

MAY 2008

# NEWS & VIEWS

THE CRIMINAL LAW SECTION / STATE BAR OF MICHIGAN NEWSLETTER

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## Events

**4th Spring Conference  
“Investigating Cold Cases”  
June 13-14, 2008**

**Ann Arbor Marriott Ypsilanti at Eagle Crest – Ypsilanti, MI**

The Criminal Law Section Spring Conference will focus on investigational and procedural issues, and scientific evidence, in “cold cases.” The nominal conference fee for section members will include lunch on Friday.

The conference will begin at 10:00 a.m. on Friday, June 13, and will end at noon on Saturday, June 14, 2008. The conference format allows plenty of time for golfing in the afternoon and evening on Friday, and in the afternoon on Saturday, at the challenging home course for Eastern Michigan University.

State Bar of Michigan Criminal Law Section members will receive special hotel rates for Friday, June 13, at the newly renovated Ann Arbor Marriott Ypsilanti at Eagle Crest. Tee times can be reserved directly with the Eagle Crest Golf Club by calling (734)487-2441.

For further information about the conference, or for questions, please contact Ralph Simpson by phone: (313)859-4173 or email: ralphcts@aol.com.

**Council Meeting  
May 20, 2008  
Sheraton Hotel – Lansing, MI**

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.

## Legislature Toughens Animal Cruelty Statutes

by

John Reiser\*

Michigan's animal cruelty statute was recently amended to be tougher on those who abuse animals, and a look at pending legislation reveals that stricter laws are on the horizon. Effective April 1, 2008, Section 50 of the Michigan Penal Code calls for stiffer penalties based on the number of animals harmed. See MCL 750.50. Harming one animal remains a 93-day misdemeanor, harming two or three animals elevates the crime to a one-year misdemeanor, and harming four to nine animals is now a two-year felony. Harming ten or more animals is a four-year felony. Intentionally killing or torturing an animal remains a four-year felony, but a new one-year misdemeanor was created: the negligent killing of an animal.

Michigan's basic animal cruelty statute formerly prohibited willfully or negligently allowing an animal to suffer unnecessary neglect, torture, or pain. MCL 750.50 was amended to remove the word "willfully," leaving only "negligently" and reducing the *mens rea* requirement in most animal cruelty cases. The new legislation also gives courts the discretion to mete out consecutive sentences in animal cruelty cases and to order costs for the care of the animals whether or not forfeiture was ordered. The previous law only allowed costs if forfeiture of the animals was not ordered, which meant that Humane Societies and veterinarians risked incurring costs for the medical treatment, care, and housing of abused animals.

Under consideration by the Michigan Legislature are additional modifications to MCL 750.50 that would allow for consecutive sentencing in felony charges where an animal is killed, and to reclassify the killing or torturing of an animal from a four-year, class F felony, to an eight-year, class D felony. Also under consideration is a new prohibition against hoarding animals. As proposed, to "hoard" animals is to possess ten or more animals whose living conditions negatively impact their health and well-being, and the possessor of the animals must display an inability to recognize or understand the nature of, or have a reckless disregard for the harmful nature of, the animals' living conditions and the deleterious impact of those living conditions on the health and well-being of the animals or human beings.

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\* John Reiser is an Assistant Prosecuting Attorney for Washtenaw County. In 2007, the Humane Society of Huron Valley presented him with their Animal Humanitarian award for efforts in preventing animal cruelty. He has prepared search warrants, authorized criminal charges, and litigated civil forfeiture proceedings in a number of pit bull fighting and animal cruelty cases.

## Recent United States Supreme Court Cases

**Baze v Rees**, No. 07-5439 (April 16, 2008): Two convicted murderers, Ralph Baze and Thomas Bowling, were sentenced to death in Kentucky. On appeal, the men argued that executing them by lethal injection would violate the prohibition against cruel and unusual punishment, in contradiction to the Eighth Amendment. Specifically, the men argued that the three-drug cocktail that would be used to kill them carried an unnecessary risk of inflicting pain during the execution process. Following extensive hearings, the state trial court upheld the constitutionality of the process, finding that there was minimal risk of improper administration of the cocktail. The Kentucky Supreme Court affirmed, holding that the protocol did not violate the ban against cruel and unusual punishment because it did not create a substantial risk of wanton and unnecessary infliction of pain, torture, or lingering death. The United States Court agreed with the lower courts, and rejected the death row inmates' arguments. In deciding the case, the high court established a new, more rigorous constitutional test of execution methods under the Eighth Amendment. However, it declined to embrace a significantly stricter constitutional standard urged by one of the men. In rejecting that standard, the majority held that a government-sanctioned execution was not constitutionally required to be pain-free. Rather, the Eighth Amendment only required that an execution procedure not involve "a 'substantial' or 'objectively intolerable' risk of serious harm." Justices Ruth Bader Ginsburg and David Souter dissented, noting that the case should be remanded to the lower courts with instructions to consider whether the failure to include available safeguards in execution procedures creates an "untoward, readily avoidable risk of inflicting severe and unnecessary pain."

**Begay v United States**, No. 06-11543 (April 16, 2008): Petitioner Larry Begay had been convicted twelve times of driving while intoxicated. Under New Mexico, each conviction after the third was a felony. He later pleaded guilty to unlawfully possessing a gun. The Armed Career Criminal Act imposes a special mandatory fifteen-year prison term upon a felon who unlawfully possesses a firearm and who has three or more prior convictions for committing certain drug crimes or "a violent felony." The Act defines "violent felony" as a crime punishable by more than one year's imprisonment that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Using the prior drinking offenses, the sentencing judge concluded that the career criminal statute applied, and imposed the enhanced sentence. Begay appealed, claiming that his prior offenses were not "violent felonies" under the statute. The Tenth Circuit affirmed. The United States Supreme Court, in a divided vote, held that the driving while intoxicated convictions did not qualify under the statute because they were too different from the felonies specifically enumerated by Congress. Those felonies explicitly listed in the statute involved purposeful, violent, and aggressive conduct unlike drunk driving. Furthermore, Congress would not have needed to include the examples if it meant the statute to be all encompassing. Justice Alito, joined by Justices Thomas and Souter, dissented.

**Burgess v United States**, No. 06-11429 (April 16, 2008): Petitioner Keith Burgess was convicted of a drug offense in state court. South Carolina classified the offense as a misdemeanor, even though it was punishable by more than one-year incarceration. Burgess was later convicted of another drug offense in federal court – conspiracy to possess with intent to distribute fifty grams or more of cocaine base – that ordinarily carried a mandatory-minimum sentence of ten years. The sentencing judge found that the "prior conviction" statute was applicable, thus subjecting the petitioner to a mandatory-minimum sentence of twenty years'

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imprisonment. The Controlled Substance Act doubled the mandatory-minimum sentence for certain federal drug crimes if the defendant was previously convicted of a “felony drug offense.” Burgess appealed, arguing that the statute did not apply to him since his previous offense was considered a misdemeanor by South Carolina. The Fourth Circuit affirmed. The United States Supreme Court also rejected the argument, holding that the term “felony” under the statute meant any offense punishable by more than a year incarceration, even if another jurisdiction classified the offense as a misdemeanor. Justice Ginsburg, in delivering the unanimous opinion, specifically relied on the language and structure of the Controlled Substances Act. The Act exclusively defined the compound term “felony drug offense” to mean an offense involving specified drugs that “is punishable by imprisonment for more than one year under any law” of this country, or of any state, or foreign country.

**Virginia v Moore**, No. 06-1082 (April 23, 2008): Respondent David Lee Moore was pulled over for driving on a suspended license, a minor traffic violation that usually calls for police to issue a ticket and court summons. However, instead of being released, he was arrested. During the ensuing search, crack cocaine was seized and the drugs were later used against him in a prosecution for possession with intent to distribute cocaine. Moore unsuccessfully moved to suppress the evidence, and was ultimately convicted on the drug charge and sentenced to prison. On appeal, he argued that he could be searched only following a lawful state arrest. The Virginia Supreme Court unanimously ruled that police should have released him and could not have lawfully conducted a search incident to citation. According to the court, state law restricted officers to issuing a ticket in exchange for a promise to later appear in court. The United States Supreme Court held that police did not violate the Fourth Amendment. In so holding, the high court concluded that police have the power to conduct searches and seize evidence, even when done during an arrest that turns out to have violated state law. Justice Scalia wrote the majority opinion, which held that officers who have probable cause to believe a person has committed a crime in their presence can also make an arrest and search the suspect in order to safeguard evidence and ensure their own safety without violating the Fourth Amendment. Justice Ruth Bader Ginsburg concurred that the arrest and search was constitutional, even though it violated state law.

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