

OCTOBER-NOVEMBER 2008

NEWS & VIEWS

THE CRIMINAL LAW SECTION / STATE BAR OF MICHIGAN NEWSLETTER

2008-09 Officers:

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Matthew P. Smith
Grand Rapids

Chair-Elect:
Opolla Brown
Detroit

Secretary:
Kenneth M. Malkin
Bay City

Treasurer:
Stephen M. Taratuta
Detroit

Editor:
Elaine M. Spiliopoulos
Ann Arbor

Events

**Council Meeting
November 18, 2008
Sheraton Hotel, Lansing**

It's back to business for the new term! The Council's monthly meetings have resumed. The next meeting will be held in the Hemingway Room of Christie's Bistro, (the hotel restaurant). The hotel is located at 925 South Creyts Road, immediately off I-496. Social hour begins at 6:00 p.m., with dinner and the meeting starting at 6:30 p.m.

The tentative meeting schedule for the term is:

December 16
January 20, 2009
February 17
March 17
April 21
May 19

Please check for date confirmations in future newsletters and email notices to the Council.

**32nd Mid-Winter Ski Conference
President's Day Weekend: February 15-17, 2009
Shanty Creek Resort – Bellaire, MI**

Save the date! The annual conference will again be held at the newly renovated Shanty Creek Resort. Please join us for fun in the snow - and a little legal business - over the President's Day Weekend. The conference is still in the planning stages but more information, including topics and presenters, will be posted in future newsletters.

Meet the Council

During the annual meeting, this term's officers were chosen and inducted, and five individuals were elected (or re-elected) to the Criminal Law Section Council. Congratulations to the following officers and council members who will be serving you:

Matthew P. Smith, Chair: Matthew Smith has been in practice for over twenty years as both a prosecutor and defense attorney. He joined the Criminal Law Section fourteen years ago, and previously served as 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, Chair-Elect: Opolla Brown is a Wayne County Assistant Prosecuting Attorney assigned to the General Trials Division, and is responsible for a courtroom docket that handles cases from OWI 3rd to homicide. 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, Secretary: Kenneth Malkin has been an attorney for more than two decades with the Bay County Office of Criminal Defense. Mr. Malkin has served the section as both the treasurer and as the representative from the Criminal Defense Attorneys of Michigan (CDAM).

Stephen M. Taratuta, Treasurer: Stephen Taratuta will begin his second year on the Council. He represents Wayne County in the Representative Assembly, is Chair of the District H Character and Fitness Committee and sits on the Criminal Jury Instructions Committee. He remains active with the Michigan Arson Prevention Committee.

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

Michael J. Brady: Michael Brady first came to us as a representative from the Defender Systems and Services Committee. He was ultimately elected an officer and served in several capacities including: Treasurer, Secretary, Chair-elect, and Chair. He most recently served a three-year term on the Council.

David. E. Gilbert: David Gilbert 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 several years' experience handling court-appointed contracts. Mr. Gilbert is an adjunct professor in Criminal Justice at Kellogg Community College.

Steve Lockhart: Steve Lockhart is a newly-elected member to the Council, though he has served in the recent past. He is a District Court Magistrate, and brings a unique perspective to a group mostly comprised of practicing defense attorneys and prosecutors. He looks forward to working on the legislative projects.

Gerald Surowiec: Gerald Surowiec has been practicing criminal law for over four decades. He has extensive trial and appellate experience, having tried hundreds of cases, and having

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authored over seven hundred appellate briefs. Mr. Surowiec is a member of the Wayne County Criminal Defense Bar Association and, for over fifteen years, the Criminal Jury Instruction Committee.

Graham Teall: Graham Teall has practiced law for over twenty years, and for the last seventeen he has been an Assistant United States Attorney in Detroit, where he practices white-collar criminal law. He has been active in the section for years, and is a past Chair. Mr. Teall looks forward to helping the section meet the challenges of representing and serving its constituency.

United States Supreme Court – Cert Granted

The Supreme Court recently granted certiorari in the following cases involving criminal law issues:

Boyle v United States, No. 07-1309 (October 1, 2008): Review was granted to determine whether, to establish the existence of an “enterprise” under RICO, the government must prove the existence of an entity with an ascertainable structure apart from the pattern of racketeering activity in which it engages.

Corley v United States, No. 07-10441 (October 1, 2008): Review was granted to determine whether federal law permits the suppression of a voluntary confession made more than six hours after arrest, but before the defendant appeared in front of a magistrate on federal charges, if there was unreasonable or unnecessary delay in bringing the defendant before the magistrate.

Kansas v Ventris, No. 07-1356 (October 1, 2008): Review was granted to determine whether prosecutors may use a defendant’s statement, which was made in the absence of a knowing and voluntary waiver of the right to counsel, to impeach the defendant instead of using the damaging statement during its case-in-chief.

Montejo v California, No. 07-1529 (October 1, 2008): Review was granted to determine whether an indigent defendant must affirmatively accept the appointment of counsel to preclude future police interrogation in the absence of the court-appointed attorney.

Puckett v United States, No. 07-9712 (October 1, 2008): Review was granted to determine whether forfeited claims -- that the government breached a plea agreement --are subject to “plain error” review when they were not raised in the trial court.

Rivera v Illinois, No. 07-9995 (October 1, 2008): Review was granted to determine whether the erroneous denial of a criminal defendant’s preemptory challenge, which resulted in the challenged juror being seated, requires automatic reversal of the defendant’s conviction.

Vermont v Brillon, No. 08-88 (October 1, 2008): Review was granted to determine whether delays caused by a public defender can deprive a criminal defendant of his right to a speedy trial.

Jury Reform Pilot Project Begins

The Michigan Supreme Court, under Administrative Order 2008-2, adopted a pilot project to evaluate proposed jury trial reforms in both civil and criminal cases.* The purpose of the project is to “determine whether, and in what way, the proposed jury-reform amendments support the goal of meaningful juror participation, and lead to greater confidence in the validity of the specific verdict and the overall jury system.” Twelve judges from six circuit and five district courts throughout the state have been selected to participate:

6th Circuit Court – Judge Potts
14th Circuit Court – Judge Hicks
16th Circuit Court – Judge Viviano
18th Circuit Court – Judges Schmidt & Caprathe
41st Circuit Court – Judge Celello
45th Circuit Court – Judge Stutesman

2B District Court – Judge Sanderson
55th District Court – Judge Boyd
79th District Court – Judge Wadel
90th District Court – Judge May
92nd District Court – Judge Gibson

The Court is also interested in the effects of several proposed rules on court efficiency. Michigan Court Rules 2.512-2.516 were rewritten under the project and include, inter alia, some of the following reforms:

- Providing each juror with a copy of preliminary and final jury instructions
- Allowing jurors to be instructed before closing arguments
- Permitting jurors to discuss the case during the trial and before deliberations
- Authorizing jurors to take notes during the case
- Permitting jurors to submit written questions for witnesses
- Allowing a transcript of the testimony to be available to the jury
- Providing jurors with notebooks containing witness names, relevant statutory provisions, and copies of documentary evidence and exhibits
- Scheduling expert testimony in a way to assist jurors, including holding panel discussions with expert witnesses during trial with the jury present
- Allowing attorneys to provide interim commentary to the jury during the evidentiary portion of the trial
- Authorizing the court to “fairly and impartially” summarize the evidence for the jury
- Permitting the court to discuss the issues with the jury if the jury is at an impasse

Participating judges have some discretion to choose among the various options available, but are encouraged to incorporate as many as possible. Attorneys may object to the use of the reforms in a particular case. The pilot project runs until December 31, 2010.

For more information on the project, including a copy of the full administrative order, visit: <http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#administrative>

* Justice Kelly opposed the implementation of the pilot project.

Preliminary Examination Reform

The preliminary examination requires the state to produce probable cause to believe that a crime was committed, and probable cause to believe that the defendant committed it. In the past three years, a movement has been afoot to eliminate this critical screening in the criminal justice process. According to proponents of the movement, police and civilian witnesses are brought to court unnecessarily for preliminary examinations that are ultimately waived by criminal defendants. By reforming the process, preliminary examinations would be reserved only for the most serious offenses. To this end, two bills affecting preliminary exams were recently introduced in the Michigan House of Representatives: HB 6592 and 6593.*

HB 6592 does not propose substantive changes to the current legislation. HB 6593, however, proposes a dramatic change. Unlike prior legislation, the current legislation does not require the abandonment of all preliminary exams, but it does eliminate preliminary exams for some felonies. The bill was introduced by Representative Paul Condino, House Judiciary Committee Chair, and provides for expanded use of hearsay to establish probable cause in cases involving felonies for which prison is not mandated. In capital and mandatory prison cases, the existing rules of evidence would remain unchanged. In assault cases that do not mandate prison, hearsay is admissible if the victim testifies during the preliminary exam. In all other cases, hearsay could be used entirely. Thus, hearsay testimony from a law enforcement officer involved in the investigation could be used to establish probable cause that a charged felony had been committed and that the defendant committed that felony.

The bills would also authorize, but not mandate, pre-exam conferences in the district courts. During such conferences, the rules of evidence would not apply, and witnesses would not be presented. In addition, the bills would revise the district court's jurisdiction by allowing those courts to take pleas on felony and serious misdemeanor charges. However, sentencing for those charges would remain in the circuit court. Finally, the bills would require the preliminary examination to be consolidated for all defendants charged with a felony arising out of the same transaction, except in some circumstances.

The House Judiciary Committee approved the bills in early November. The Committee, however, promised to make amendments to the legislation before bringing it to a vote in front of the full House.

For a complete copy of the proposed legislation, visit <http://www.legislature.mi.gov>

*Senator Alan Cropsey introduced SB 1586 and 1587, two identical bills, in the Michigan Senate.

Proposed Amendments to Court Rules Impacting Criminal Cases

Comments on the following proposed amendments are due by January 1, 2009:

Rule 7.205: The Supreme Court is considering two alternative amendments to the rule on applications for delayed leaves to appeal. Alternative A would adopt the principle that the period in which to file an application for delayed appeal pursuant to the rule is tolled while a claim of appeal is pending. Alternative B would clarify that the period in which to file an application for delayed appeal pursuant to the rule is not tolled while a claim of appeal is pending, except as allowed by the rule.

Rules 7.302, 7.314, and 7.316: The proposed amendments would give the Supreme Court the authority to order a supplemental brief to correct a deficient brief, or to strike a nonconforming brief, similar to the authority given to the Court of Appeals under MCR 7.212(I). The Court can conclude that a brief does not substantially comply with the requirements of this rule on its own initiative or on a party's motion. The proposed amendments would also allow dismissal of a case in which a party failed to pursue the case in conformity with the rules.
