

CRIMINAL LAW SECTION COUNCIL MEETING
STATE BAR OF MICHIGAN
March 20, 2012

Members Present: David Gilbert, Sherrie Guess, Jonathan Sacks, Stephen Taratuta, Kenneth Malkin, Hon. William Caprathe, Hon. David Hoort, Michael Marutiak, Jon Potbury for David Leyton, Opolla Brown, Jon Posner, Stephen Gobbo, Matthew Smith, Hon. Paula Manderfield, Barbara Levine, Martin Krohner, Heather Garretson.

Also Present: Bruce Timmons, Thomas Rombach, Elaine Spiliopoulos, Graham Teall

- I. Call to Order by Stephen Taratuta, Chair, 6:31 p.m.
 - a. Absence with notice: Charlie Marr, Lynn D'Orio, Ward McDonough
 - b. Absent without notice: None.

- II. December 20, 2011 Minutes; David Hoort, Secretary.

Sherrie Guess requested a correction to the report on the trip to Cuba.

Jon Posner moves, Martin Krohner second, to approve December 20, 2011 minutes, as corrected. Motion carried by acclimation.

- III. Treasurer's Report; Charles Marr, Treasurer

Treasurer absent. Chair requests Council approve reimbursement to the treasurer for payment of the meal expense at Troppos from the December meeting.

Motion by Jon Posner, Martin Krohner second, to authorize reimbursement to Charles Marr for his payment of the meal expense to Troppos. Motion carried by acclimation.

Jon Posner moves, Martin Krohner second, to accept Treasurer's Report. Motion carried by acclimation.

- IV. Committee Assignments / Report
 - a. Shanty Creek; Opolla Brown, Chair

Opolla Brown reports, possibly because of the weather, a smaller than hoped for attendance at Shanty Creek. The speakers, materials and interaction were great, but we're not reaching the numbers we should for the value offered and the costs. Discussion whether to continue the present venues at Shanty Creek, Frankenmuth and Mackinac Island, and possible other locations. Consensus was that we need to pay the deposit required by Shanty Creek to save the 2013 dates but that the membership should continue to look for other possible venues. Elaine Spiliopoulos asks that members advise her sufficiently in advance of the next meeting of any possible sites so she can check out the numbers.

Motion by Martin Krohner, Jon Posner second, to authorize payment of the \$200.00 deposit to Shanty Creek to save the 2013 dates. Motion passed by acclimation.

- b. Frankenmuth Conference; Ken Malkin, Chair (June 8-9, 2012)

Ken Malkin reports on the proposed Agenda for the Frankenmuth Conference. The program on Friday is from 9 a.m. to 4:45 p.m. with a CLS provided lunch. Anticipated speakers include John Collins, Director of the MSP Forensic Science Lab and Speckin Labs. Program topics include firearms, fingerprints, controlled substances, trace evidence, toxicology, DNA and serology. Saturday's program is from 9 a.m. to 11 a.m. and will be a 'nuts and bolts' presentation by Tom Loeb for new lawyers and attorneys looking for a refresher presentation on criminal law topics of interest. Ken Malkin requests authorization of \$6,000.00 as set forth in the previously approved Council budget, noting that many speakers will not be needing lodging.

Motion by Martin Krohner, Jon Posner second, to authorize a budget of \$6,000.00 for Frankenmuth. Motion passed by acclamation.

The vice chair, David Gilbert, will be absent due to his attendance at the Leadership Forum on Mackinac Island on the same weekend. The Chair appointed Graham Teal to replace him on the Frankenmuth committee.

c. Annual Meeting (September 20-21, 2012, Amway Grand, Grand Rapids, MI)

Michael Marutiak reports the Prison and Corrections section would like to partner with the CLS at the annual meeting. Ideas for the annual meeting are welcome. Committee persons include Michael Marutiak, David Gilbert, and Charles Marr.

d. Young Lawyer

Opolla Brown reports that she will be contacting the Young Lawyers section of the SBM to see if the section wishes to partner with CLS for a presentation at the annual meeting. Ideas are welcome. With Kiana Franulic's resignation from the Council, the Chair appoints Graham Teal and Judge Caprathe, with Opolla Brown, to the Young Lawyer committee.

V. Legislation / Court Rules

a. Legislative Report—Bruce Timmons

Bruce Timmons reports the legislature is working legislation involving medical marijuana, magistrates, lying to the police and video conferencing. The lying to the police is on a fast track with copies of the to-date legislation unobtainable and approval imminent. He believes the Senate has added proposed amendments. The video conferencing has gone through both the house and senate and needs only house concurrence before being presented to the Governor for signature.

b. House Bill 5191 - Magistrates

HB 5191 would require beginning 1/1/2013 that to be appointed a magistrate one must be admitted to the practice of law in this state.

Judge Hoort reported that Criminal Jurisprudence & Practice voted to support the legislation; the idea being that inevitably magistrates are going to be required to be lawyers. Matthew Smith suggested that there should be a grandfather clause for non-attorney magistrates. David Gilbert expressed a concern that police officer magistrates approving search warrants could lead to 'good faith' rulings upholding otherwise defective warrants.

Opolla Brown moves, Ken Malkin second, to support the proposed legislation. Motion passed by show of hands. Voting members-21, Ayes-17, Nays-0, Abstain-1, Did not vote-0.

Explanation of the Position, including any recommended amendments: The council believed that the proposed is appropriate in response to the increasing judicial duties required of magistrates in criminal and civil matters. The Council took into consideration existing and upcoming court reform and the reduction in judges.

The countering position is that the existing use of non-attorney magistrate works, whether the proposed legislation would impinge on the right of the chief judge to appoint magistrates of his/her own choosing, and whether it may be difficult for certain jurisdictions to financially afford attorneys as magistrates.

b. House Bill 5050 – Lying to Police

HB 5050 would create a penalty for lying to police during an investigation. HB 5050 requires that the police inform the person that the officer is conducting a criminal investigation, and makes the penalty for lying to the police related to the crime being investigated.

Graham Teall reports that the legislation is similar to what exists in the federal system. Heather Garretson questioned whether such conduct was already punishable by obstruction of justice charges. David Gilbert expressed a concern whether the proposed legislation is constitutional. Graham Teall suggested allowing the police officer to determine the degree of penalty may be unduly vague and thereby unconstitutional.

David Gilbert moves, Opolla Brown second, to oppose the proposed legislation. Motion passed by show of hands. Voting members-21, Ayes-17, Nays-0, Abstain-1, Did not vote-0.

Explanation of the Position, including any recommended amendments: The council believed that the proposed legislation allowed undue discretion to police officers in making the charge and determining the degree of penalty.

The concerns expressed by the Section was whether the legislation would pass constitutional muster. The proposed legislation has the potential to affect the criminal justice system through significantly increased charges, forcing plea agreements, and taxing the financial well being of the related jurisdictional entities.

c. Medical Marijuana Package

The medical marijuana legislation includes procedural and substantive changes relating to the required medical examination, photo ids for care givers, tightening access to the registry, allowing for private contractors to assist the Secretary of State, definition of caregiver, transportation of medical marijuana, removing glaucoma from the list of debilitating medical conditions, prohibiting use at certain locations.

The consensus was that the legislation was not consistent with the public policy position offered by the Criminal Law Section, and that the legislation appears to be contrary to what was approved by the public initiative. The package of bills appears to be still in the planning stage in the legislature thereby making any Council action premature. There is also a citizen initiative going forward on the issue of dispensaries.

VI. Old Business

a. None

VIII. New Business

a. Resignation of Dan Levy/ Appointment of Graham Teal.

Chair announces the resignation of Dan Levy. Matthew Smith moves, Sherrie Guess second, to appoint Graham Teall to the Criminal Law Section Council. Motion passed by acclamation.

b. Resignation of Kiana Franulic

Chair announces the resignation of Kiana Franulic. The membership is encouraged to submit possible nominees to replace Kiana.

c. Request from Prisons and Corrections Section/Policy Statement

The P/C Council has adopted a policy position calling for legislation or court rule enactment that would require appointment of counsel to indigents in prosecutor appeals of parole decisions. HB 4472 proposes to prohibit the expenditure of public funds for representation of prisoners in these cases. Both the Criminal Law Section and the Prisons & Corrections Section have published positions in opposition to that bill, and the State Bar's BOC also adopted a position in opposition.

Barb Levine/Michael Marutiak explains the concern in not allowing counsel to an indigent prisoner in appeals by the prosecutor or victim of a parole board decision. Jonathan Sacks discussed a pending

case in the Court of Appeals following the prosecutor's appeal of the decision by the trial court to appoint counsel.

Barb Levine moves, Jonathan Sacks second, to support the policy position of the Prison and Corrections Section calling for legislation or court rule enactment that would require appointment of counsel to indigents in prosecutor appeals of parole decisions. Motion passed by show of hands. Voting members-22, Ayes-18, Nays-0, Abstain-1, Did not vote-0.

Explanation of the Position, including any recommended amendments: The council believes that it is unfair to allow the prosecutor and victim to appeal parole board decisions while denying the same right to the prisoner. In the absence of legislative reform, due process requires that an indigent prisoner be provided counsel if the prosecutor or victim appeals a parole board decision. Without this representation, the unequal position of the parties effectively denies one's access to the courts.

The countering position is that the Attorney General in behalf of the parole board is thereby also representing the interest of the prisoner before the reviewing court.

d. ICLE Partnership

Elaine Spiliopoulos reports the ICLE is interested in a working relationship with the Criminal Law Section. A representative had hoped to appear before the Council but was unable to make the March meeting. Elaine will obtain information. The Chair tables this agenda item to the next meeting.

e. Request from Wayne County Criminal Defense Bar Assoc for seat on Council

The WCCDBA is the largest regional bar association in the State of Michigan, with 451 practicing criminal defense attorneys in Wayne County Michigan, and is requesting a seat on the CLS Council.

Jon Posner reports that two members WCCDBA are already CLS Council members. Ken Malkin expresses a concern that allowing regional associations a seat on the Council would lead to similar requests by other organizations.

Opolla Brown moves, Matthew Smith second, to deny the request for WCCDBA to have a seat on the CLS Council. Motion failed by show of hands. Voting members-22, Ayes-6, Nays-6, Abstain-4, Did not vote-0.

Judge Hoort suggests that an invitation go out to inviting applications for the open seat created by Kiana Franulic's resignation, and invite WCCDBA members to submit an application.

Michael Marutiak moves, Judge Manderfield second, to table the agenda item to the next meeting. Motion passed by acclimation.

f. Collateral Consequences of Pleas/Practice Guide, Court form

g. Michigan Court Forms Committee-Criminal Work Group Report

Chair reports that himself, David Gilbert, Judge Hoort, Jonathan Sacks have been appointed to the Michigan Court Forms Committee-Criminal Work Group. The Work Group has met and suggested revisions to Judgment of Sentences, Motion and Order to Show Cause, Motion for Reinstatement of Bond, Writs of Habeas Corpus, and Advice of Rights forms. It is anticipated that misdemeanor advice of rights forms will no longer include certain, possible consequences. There was some interest in CLS being involved in alternative means of dissemination of possible consequences. Heather Garretson reports that the Criminal Issues Initiative Section is compiling collateral consequences in a written format for dissemination to the bar and the same is working its way through the State Bar for approval. She will attempt to provide the materials to the Council.

h. SBM – Leadership Forum (June 8, 9, 2012)

Matthew Smith moves, Jon Posner second, to send the Vice Chair, David Gilbert, to the SBM Leadership Forum on Mackinac Island on June 8, 9, 2012. Motion passed by acclamation.

d. Proposed Bankruptcy Presentation

Chair reports interest by an attorney in providing a presentation on bankruptcy to the Council. No action was requested or moved by the Council.

j. Judicial Review of Parole Objections-Barb Levine

Michigan prisons house about 850 parolable lifers currently eligible for release. About 700 were sentenced for crimes committed before October 1, 1992, and were eligible for release after serving 10 calendar years. The remaining 150, whose crimes occurred after October 1, 1992, became eligible for parole after serving 15 years. Although the parole board has been willing to release more lifers in recent years, if the judge objects in writing within 30 days the parole board loses jurisdiction to grant parole and the scheduled public hearing is canceled. The judge does not have to state any reason for objecting and the decision is not subject to appellate review.

Of the 156 public hearings scheduled for non-drug lifers from January 2007 through December 2011, 39 were cancelled because of judicial objections. All but one objection was by a successor judge.

Judge Caprathe indicated a possible willingness by the Michigan Judges Association to consider removing vetoes by successor judges and that judges should be required to articulate his/her reasons. There was a concern by one of the judges that the judge's objection be supported by substantial and compelling evidence with the judge proposing an abuse of discretion standard. Graham Teall expressed a concern with judges exercising authority without judicial review. Judge Hoort indicated he personally had no objection to eliminating in its entirety the veto provisions in existing statutory authority. There is already a safeguard with prosecutors and/or victims being able to appeal the granting of parole. One possible alternative was to allow for a veto power for a certain number of years to minimize any premature release of a person convicted of a life offense.

Matthew Smith moves, Jon Posner second, to support in principal to apply due process standards to judge decision making regarding parole for life offenders. Motion passed by show of hands. Voting members-22, Ayes-18, Nays-0, Abstain-1, Did not vote-0.

IIX. Good and Welfare

- a. Next Meeting: April 19, 2012, Copper, 2874 Lake Lansing Road.
- b. Opolla Brown reports Mike Brady is willing to host a BBQ at his house.

Chair moves, Jon Posner second, to authorize a budget of \$500.00 for a BBQ at Mike Brady's house. Motion passed by acclamation.

IX. Adjourn

Matthew Smith moves, Opolla Brown second, to adjourn. Motion carried by acclamation. Meeting adjourned at 8:52 p.m.

Approved: 4/17/2012

Respectfully submitted
David Hoort, Secretary
Criminal Law Section