

**CRIMINAL LAW SECTION EXECUTIVE COUNCIL MINUTES OF THE
JANUARY 22, 2016 MEETING**

I. CALL TO ORDER

II. ROLL CALL

Present were the following members: Judge Angélica Zayas, Joel Silvershein, Martin McDonnell, O. David Barksdale, David Rothman, Jason Blank, Judge Lisa Campbell, Robert Dillinger, Scott Fingerhut, Jeffrey Harris, Mac Heavener III, Judge Richard Hersch, Susan Hugentugler, Judge Cynthia Imperato, Judge James Klindt, Brian Kramer, Abraham Laeser, Judge Jeffrey Levenson, Warren Lindsey, Richard Polin, Michael Sinacore, Ken Swartz, Brian Tannebaum, George Tragos, Larry Turner, Whitney Untiedt Jennifer Zedalis

Absent were: Michelle Suskauer, Jose Arrojo, and the Hon. William Davis

Also present were Florida Bar President-elect William Schifino, Michael Higer, Section members Calianne Lantz and Sheryl Lowenthal and Arlie Coleman (Bar Staff).

III. APPROVAL OF MINUTES

Approval of the minutes of the 9/25/15 meeting was moved by Ken Swartz and seconded by Larry Turner. The minutes were approved by voice vote.

IV. REPORT OF THE CHAIR

Judge Zayas noted that it has been a very active year for the Criminal Law Section. As a result of the Executive Council's efforts, many new members volunteered for committees and Judge Zayas encouraged all members of the council to take advantage of the new members as it is always helpful to have new input. Judge Zayas also briefly discussed the Miranda showcase and a more detailed report on the showcase will be presented later in the meeting.

V. BOARD OF GOVERNORS LIAISON REPORT

Michelle Suskauer was not present at the meeting and no report was given.

VI. TREASURER'S REPORT

Treasurer David Barksdale reported that the current balance of the criminal law fund is down slightly but that is no cause for concern. The lower balance is due primarily from investment losses. Additionally, revenue streams fluctuate throughout the year based primarily on CLE revenues.

David Rothman discussed the Criminal Law Section's generous donation to the Florida Bar Foundation at the last Foundation meeting. Present at that meeting, among others, were the Foundation's executive director Bruce Blackwell and former Florida Bar president Greg Coleman. David Rothman stated that the meeting went very well and the Foundation was very appreciative. He felt that such a generous contribution gives the Criminal Law Section a larger presence among the Foundation and hopefully many of the Section's concerns can be addressed by the Foundation. A picture of the presentation is scheduled to be in the upcoming Bar News. There is currently an exonerates fund which helps inmates reintegrate to society. When contributions are made through the Bar Foundation to that fund, the Foundation matches the donations. Finally, Mr. Rothman said that the interest rates continue to rise and if they do so, the balance in the Section's trust account likewise should increase.

VII. COMMITTEE REPORTS

A. Capital Cases

Abe Laeser spoke about the potential serious implications of the recent case of *Hurst v. Florida*. Abe received notice of a January 27, 2016, meeting of the Senate Criminal Justice Committee to discuss various *Hurst* issues including aggravating factors, unanimous recommendations, overrides for life, and possible abolition of the death penalty. The Section was invited to attend. Mr. Laeser next introduced Mark Schlakman, the senior program director for Florida State University's Center for the Advancement of Human Rights, who is very knowledgeable about issues to be addressed by the Senate Committee. Judge O. H. Eaton is going to speak, and other speakers are also expected. Abe then asked whether we should take a position on issues the Senate Committee will address. Marty McDonnell reminded that the Criminal Law Section has a longstanding official position that there should be a comprehensive review of all death penalty issues by all branches of government. Chair Zayas opened a discussion as to whether the Criminal Law Section should send a representative to appear live at the Senate Committee meeting or simply repeat the Section's official position in writing to avoid difficult-to-anticipate questions from the Committee. After a lengthy discussion, immediate past chair David Rothman moved to send Marty McDonnell to the meeting as a representative of the Criminal Law Section to explain the makeup of the Executive Council and emphasize our longstanding official position. Susan Hugentugler seconded the motion and it passed.

Chair Zayas then took a break from the scheduled itinerary to invite William Schifino, President-Elect of the Florida Bar, to address the Executive Council. Mr. Schifino emphasized the importance of criminal issues at the Florida Board of Governors and the critical importance of the Section's input. Mr. Schifino, who said he believes that currently there is inadequate representation by the Criminal Law Section at the Board of Governors, stated that our issues are important and should be addressed. Mr. Schifino then introduced Michael Higer, the Florida Bar's president-elect designate. Mr. Higer also emphasized the importance of the Criminal Law Section to other sections of the Bar and invited our participation in Board of Governors' matters.

B. CLE

Susan Hugentugler discussed the two recent CLE programs sponsored by the Criminal Law Section. Three prosecutors and five assistant public defenders, all practicing less than ten years, were invited to attend the December Criminal Law Update program without charge. They were very appreciative of the opportunity to attend.

In January the Section sponsored the Advanced Federal Practice seminar led by Honorable Richard Hersch and Ken Swartz. Ms. Hugentugler advised that this seminar also went well. The CLE Committee is now comprised of 15 members, eight of whom are not members of the Executive Council. The new members bring a fresh perspective and the Committee is hoping to come up with additional ideas for seminars. They are working in conjunction with the membership committee. A DUI Masters seminar is tentatively scheduled for April, and will be moved from Miami Dade County to Tampa as Miami Dade County now has a diversion program for first-time DUI offenders.

David Barksdale advised that last year we co-sponsored with the Jacksonville Federal Bar Association, the Nimmons Federal Practice seminar and invited the U.S. Attorney Lee Bentley for the middle district of Florida to attend. Co-sponsorship is a practical approach for the Section, and Mr. Barksdale believes that the U.S. Attorney would be willing to travel to Jacksonville for expense reimbursement only. The Executive Council voted to co-sponsor again this year. Larry Turner advised that the CLE Committee and Membership Committee are working together to run webinars four times a year during lunch hours. The Committee recommends that the webinars be free only to members of the Criminal Law Section. A motion was made to put on the quarterly lunchtime CLE webinars, with the first one free for all Bar members and the rest free to Section members only. We will work with the Florida Bar to ensure that we comply with Bar rules. Ken Swartz expressed concern that the webinars could end up competing with other profitable CLE programs run by our Section, but the motion was seconded by Susan Hugentugler and passed.

C. Communications

Richard Polin advised that there are criminal law updates posted weekly on our website and all members are invited to review. The communications committee is respectfully asking other members of the Executive Council to draft pertinent and timely articles for the criminal law section's quarterly newsletter. The Chair personally thanked Richard Polin for his hard work updating the website weekly as the criminal law update is a quality product.

D. Federal Practice

Ken Swartz advised that 55 people attended the Federal Practice CLE, which was a good turnout. However, there were advertising glitches as FACDL no longer advertises for

CLE seminars that they do not sponsor. Ken spoke with the Executive Director of the FACDL and voiced his displeasure however it appears nothing is going to change, so we should look at other ways to advertise our seminars and also reach out to the federal public defenders and the assistant U.S. attorneys to ensure that they receive notice. Larry Turner agreed. Susan Hugentugler stated that of the 55 attendees at the federal practice seminar, only 10 were not members of this section. Ken Swartz discussed our loss in membership and stated that we should be reaching out to former members that do not renew their membership in the section. Larry Turner, chair of the Membership Committee, stated that we are currently reaching out to former members that do not renew and that we have had success. We should have a method to automatically send reminders to those that haven't renewed to try to keep them as Section members.

E. Legislative

Marty McDonnell referred the Executive Council to a written summary of bills pending before the 2016 Legislature that may impact criminal law. Highlighted bills included a Senate bill supporting firearms on college campuses, which was killed in committee. There was also legislation revising some anti-corruption bills to remove the element of corrupt intent, which also was killed in the Senate. The death penalty issue is still on the table as a result of the *Hurst* decision and discussions are ongoing. Updates will be posted through the Committee as bills pass. The Public Interest Law Section (PILS) requested that the Criminal Law Section review a request by PILS for legislation streamlining prisoner reentry into society, but stated they had no formal position to take other than to support the concept. The Executive Council did not take a formal position due to lack of detail. The PILS also asked the Criminal Law Section to take a position to conceptually supporting streamlining the process for restoring civil rights, specifically the right to vote. Mark Schlakman discussed the many hurdles faced by Floridians who seek restoration of civil rights after a felony conviction. Marty McDonnell advised that the House and Senate have constitutional amendments awaiting in the forms of joint resolutions to be placed on the November ballot, which would remove the exclusivity of the executive branch to restore civil rights. Since PILS had not taken any formal position, the Executive Council chose to discuss the matter at the next meeting. Finally, the council discussed the joint resolution to amend the constitution to adopt term limits for Florida's appellate judges. David Rothman stated that the Florida Bar has already taken a formal position opposing that constitutional amendment. There was a motion made to support the Florida Bar's position opposing the constitutional amendment to term limit appellate judges. The motion was seconded and passed unanimously.

F. Long Range Planning

Joel Silvershein reiterated that Committee liaisons should reach out to form alliances where appropriate with the Appellate Rules, Criminal Rules, and Juvenile Rules Committees as well as the Government Attorneys and Sole Practitioner Sections. Joel also raised the issue of our annual support for the St. Thomas Law Review. Although our Executive Council has attempted to discuss our concerns with St. Thomas, they have been unresponsive. Abe Laeser stated that Tony Musto, who lead the St. Thomas Law

Review for many years recently retired. The Long Range Planning Committee also discussed a recent rule of the Rules of Judicial Administration Committee (RJA) placing restrictions on the activities of counsel in cases who are not the attorney of record. The concept put forth by the RJA does not translate well to criminal practice, as many criminal law hearings are brief, unopposed motions that are handled quickly. To preclude a "cover" attorney from assisting practitioners with a conflict is impracticable within the criminal practice. George Tragos addressed the relationship between the RJA and other Sections rules. There was extensive discussion by the council regarding the impracticalities of the current RJA rule as well as the formal position of the Florida Board of Governors regarding the rule. George Tragos moved that we formally oppose the rule as it doesn't take into consideration the special circumstances of criminal practice. The motion was seconded by Larry Turner and passed unanimously. George Tragos also moved that we take the position that the appropriate rules committee on criminal law issues and juvenile law issues should be the Criminal Law Rules Committee and the Juvenile Rules Committee. Joel Silvershein seconded the motion. The motion passed unanimously after extensive discussion. Finally, Warren Lindsey made a motion that we formally ask the Board of Governors to reconsider its approval of that rule within the realm of juvenile cases and criminal law cases. The motion was seconded and passed unanimously.

G. Membership

Larry Turner stated we have an increase this year of 115 members and that law students are joining. Our recruiting at law schools has been a success. We should continue to generate ideas to increase membership. Mr. Turner suggested that we should sponsor lunchtime seminars and initiate an online mentoring program for young attorneys. We would need experienced attorneys to volunteer their time, as many younger members of the section utilize the Internet a lot more than some of us do. The Committee would commence the mentoring program once the details are finalized and it would be open for anyone that would like to participate. Our Section offers CLE discounts for Section members, which should be advertised to encourage people to join, since the annual membership fee is equal to the savings for attending one seminar. We should also reach out and collaborate with other sections. The Committee has had success reaching out to the Young Lawyers Section; Jason Blank has been instrumental in communicating with them. We also should consider a seminar to assist young attorneys leaving government work and entering the private sector; the transition can be difficult and we can assist in answering questions. We should initiate networking events on a local basis with other sections and sponsor happy hours or get-togethers where we can discuss various issues that the sections may have in common, and perhaps increase collaborative efforts. Attendees were encouraged to read again the full handout prepared by the Membership Committee and follow the recommendation that each member of the Executive Council reach out to at least five attorneys who aren't members and recruit them to become members of this section. Joel Silvershein then engaged the council in a discussion about recruiting graduating law students who are interested in criminal law. New members of the Bar are allowed free section memberships and we should discuss our section with those law students early in the process. Nothing was put to a formal vote.

H. Prosecutor/Public Defender

Jennifer Zedalis advised that the prosecutor/public defender program is scheduled for July 31 – August 5 this year in Gainesville, Florida. If there are members of the Executive Council that would like to be invited to be a faculty member contact her by email.

I. Selig Golden

Harvey Sepler reported that letters have gone out requesting nominations for the Selig Golden award. Letters were sent to the FPAA, FPDA and emails were sent to all members of the Section. The Committee has decided to consider nominations from the last two years in addition to this year's, as many are qualified. Law professors should be considered for the award as many exemplify the qualities that merit the Selig Golden award. A notice will be published in the Bar News requesting nominations. There was a motion to revise the guidelines for nomination. Abe Laeser opined that the proposed new guidelines are too limiting. As the Executive Council did not have sufficient time to consider the matter a decision was made that the Council will revisit at a future meeting.

J. Website/Social Media

Jason Blank addressed the council regarding our working relationship with the Young Lawyers Division. Jason put on a webinar for the Young Lawyers Division and it went very well. We have been working with the Florida Bar to continue to improve our website.

VIII. Old Business

Bylaw Amendment for Past Chairs. David Rothman advised that we voted and approved the language to amend the bylaws at our last meeting and the amended bylaws should be sent to the Board of Governors for approval within the next week.

Kozyak Minority Mentoring Picnic. Jason Blank stated that he attended the picnic as did Brian Tannebaum, Judge Zayas and Joel Silvershein. The picnic was well attended by first and second year students and was an overall success. Joel Silvershein said we should develop communications with first and second year students so we can recruit them into membership when they reach their third year. Jason Blank stated that we compiled a list of interested parties at the picnic and established a database so we can maintain communications with them. We should attend next year and continue with similar programs. Larry Turner said that the Membership Committee needs to come up with guidelines and a policy for dealing with these invitations on a short notice. It will be difficult to guarantee attendance if we continue to handle invitations on an ad hoc basis.

Law Student Section Memberships. Jason Blank stated that we are continuing to seek law student members and our liaison in the Young Lawyers Division is assisting us by ensuring that all the law schools in Florida realize that we are offering free membership and they are welcome to join.

IX. New Business

Committee Summaries. The Chair discussed the written committee summaries in the materials. Many new members have agreed to join committees as a result of Executive Council recruitment. The committee summaries should be placed on the webpage as they seem to generate interest in the Section.

Adult Civil Citation Legislation. Bob Dillinger addressed Senate Bill 618 which is also referred to as "adult civil citations" but is actually a pre-arrest diversion program for adults. The bill allows municipalities and counties to offer the pre-arrest diversion for adults as some state attorneys do not actively participate in diversion programs. SB 618 permits more police officer discretion to divert adults from prosecution.

2016 Annual Convention Presidential Showcase. George Tragos discussed the Criminal Law Section's proposal for the Convention Presidential Showcase. The ultimate decision as to what proposal is selected is up to the Florida Bar. We proposed to sponsor a speaker and conduct a roundtable discussion regarding the Miranda decision. George Tragos reached out to an associate of Miranda's counsel team who actually drafted the Writ on behalf of Miranda; they were surprised that the United States Supreme Court granted certiorari. At George's invitation, the associate agreed to be our keynote speaker and to join the panel discussion. David Rothman and Scott Fingerhut also are speaking. Topics to be discussed at the roundtable include law enforcement attitude when the decision was issued and law enforcement's current attitude, as well as a discussion on Miranda's personal life. We expect to hear from the Florida Bar soon whether our proposal is selected to be the Presidential Showcase. Arlie Coleman, our liaison, suggested we put on our Miranda program even if the Bar does not select us for the Presidential Showcase. It may cost us some money and we would need to get clearance from the Florida Bar, but we could do it during the annual meeting. Calianne Lantz described the Bar's selection process and advised that the Bar will make its decision soon.

Criminal Law Certification Standards Amendments. Richard Polin circulated four proposed amendments to the criminal law certification standards, which were briefly discussed. At the Chair's suggestion, no formal vote was taken because the Executive Council members had not had sufficient time to review the materials. Parliamentarian David Rothman advised that this was within the Chair's authority; Abe Laeser felt that we should also have verbal interaction before putting the issues to vote. The Chair decided to reset this matter for a conference call in the near future.

Criminal Law Board Certification Exam. At the last meeting, Jeff Harris spoke of his concerns with the passing rate of the Florida Law Board Certification Exam over the past

several years. Jeff had done some research and realized that the passing has significantly dropped since approximately 2005, and the reason isn't readily apparent. The subcommittee proposed that we make a recommendation to the Board Certification Committee that the exam revert back to the old format, where test takers were required to answer five of six essay questions as opposed to five out of five questions on the current exam. Certification rules require one essay question on the exam to deal with the federal criminal law sentencing scheme. State public defenders have expressed concern about that mandatory question; the federal sentencing guidelines are complicated and public defenders within the state system would never have to deal with it in their practice. The proposed amendment was put to discussion. Larry Turner and Ken Swartz both felt Board certification should include knowledge of federal sentencing guidelines because certification isn't federal certification or state certification, but is for criminal trial lawyers. Ken Swartz stated anecdotally that he had to learn state death penalty law for the exam even though he practices exclusively federal and he was totally unfamiliar with the Florida death penalty process. George Tragos agreed with Ken Swartz that to earn Board certification you should be proficient in federal sentencing guidelines. David Barksdale spoke to the fairness of the questions and how that fairness can be ensured. The Chair questioned whether the subcommittee considered having questions drafted by professional test writers as opposed to the committee of certified criminal law attorneys. Jeff Harris stated that the Florida Bar has an agreement with Alpine Testing Solutions, Inc. as consultants but the questions themselves are written by Committee members and the subcommittee did not consider hiring professional test writers. The question was then formally called: should the Executive Council recommend to the Board Certification Committee that applicants for certification in criminal law be required to answer five of six essays? Larry Turner moved and Jennifer Zedalis seconded. The motion passed seventeen to three. The second recommendation discussed by Jeff Harris was a recommendation to the Certification Committee that our subcommittee continue to closely monitor the exam and more specifically, the results of the exam, as the pass rate was relatively high in 2015 and we would like to ascertain whether it was an aberration or should be expected to continue in the future. The motion passed unanimously. The third recommendation was to recommend to the Certification Committee that the test application include a question asking whether the test taker participates in federal criminal court. After discussion, Jeff Harris formally called the question. Joel Silvershein seconded the motion, and the motion failed eight to ten.

PILS' Request to Join Formal Position. The final item on the agenda was a request from PILS that our Section adopt PILS' formal position that Florida impose a moratorium on the death penalty pending the outcome of the comprehensive review of Florida's death penalty, as recommended by the Board of Governors and our Section. Mark Schlakman spoke in favor of the moratorium; his reasons included uncertainty of the future of Florida's death penalty as a result of the *Hurst* decision. There was no motion made regarding PILS' request.

The meeting adjourned at 12:20 p.m.