

# PRISONS AND CORRECTIONS FORUM



*A Publication of the State Bar of Michigan's Prisons & Corrections Section*

## HIGHLIGHTS

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Speakers to debate cost-effectiveness of prison system. See page 7.

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## THE MENTALLY ILL IN MICHIGAN PRISONS: AN OUT OF CONTROL CRISIS

By Robert R. Walsh, Ph.D

### **Scope of the Problem**

Over the last 3 1/2 decades, we have witnessed a steadily increasing number of mentally ill and severely mentally disordered people entering our prison systems across the nation, and a concomitant decrease in the number of people confined in state mental hospitals. In Michigan, as a result of "de-institutionalization" and "mainstreaming," the number of mentally ill confined to state hospitals went from over 19,000 in 1960, to approximately 1,600 in 1995, and most state mental hospitals were closed. Community mental health services were supposed to fill the gap and provide a safety net of much less costly out-patient treatment and support services, but in fact these were significantly underfunded and neglected. A recent study (2003) by the National Mental Health Association (NMHA) found mental health care across the nation to have major deficits, and Michigan was rated as having the most inadequate care for the mentally ill of any state.

In addition to the thousands of people released back to the community from the state mental health system to face inadequate support services, the same treatment availability limitations were faced by new cases of mentally ill, as well as by the large number of outpatients and people in remission who also ended up with little or no care from poorly funded community mental health agencies. During this period, there was a massive increase in the number of people being committed to state prisons nationally. In Michigan, between 1960 and 1995, the Michigan Department of Corrections' (MDOC) incarcerated population spiraled from 9,622 to 40,510. While much of this obviously was a consequence of harsher sentencing ("three strikes" type laws and mandatory sentencing), reduced use of parole, and cutbacks in "good time" allowances, some of this increase was accounted for by the mentally ill, especially those without adequate resources to survive independently in the community. The result has been the transformation of many prisons into de facto mental hospitals, by default, not choice, as corrections departments have been ill equipped and ill suited to deal with this massive problem.

How big is the problem? Many corrections departments, including Michigan's, appear to avoid facing up to its magnitude. On a national level, Kupers (1999) has estimated that between 10 - 20% of all prisoners in state

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*Reader submissions are welcome. Please send to the Section at P.O. Box 12037, Lansing, MI 48901.*

and federal corrections facilities have a severe enough mental disorder to require intensive treatment over the course of a year. The U.S. Department of Justice (USDOJ) estimates are similar, and indicate that between 15 - 20% of the U.S. prison population is mentally ill. No one really knows for sure. Accurate statistics are not uniformly kept, and definitions as well as interpretation and application of diagnostic criteria still vary and are overly subjective, despite the existence of widely accepted, standardized guidelines such as the *Diagnostic and Statistical Manual of Mental Disorders-IV* (DSM-IV). In Michigan, intake diagnostic screening in the Reception and Guidance Center (R&GC) for physical and mental disorders are required by state statute, but the MDOC still does not gather and maintain psycho-diagnostic data on its incoming prisoners. To do so would be tantamount to admitting that the mentally ill population in MDOC facilities is much larger than the department has been saying it is over the last 25 years, and it would then require that the MDOC provide these people with adequate treatment. The problem is that at least since the Consent Decrees in *USA v. State of Michigan* and *Hadix, et. al. v. Johnson, et al.*, signed in 1984 and 1985 respectively, MDOC has consistently disputed estimates of the mentally ill in its prisons that exceeded those it was willing to accept as manageable, especially from the standpoint of having to create and staff more treatment beds in its prisons. This included disagreement with its own mental health staff as well as outside experts who investigated conditions of confinement in the 3 prisons that erupted in riots in 1981 at Jackson, Ionia and Marquette.

In 1987, the U.S. District Court finally ordered an epidemiological study of the prevalence of mental disorders in Michigan prisons. An unprecedented, state of the art study was completed, jointly performed by the University of Michigan's Survey Research Center and Michigan State University's Department of Psychiatry, along with other affiliated departments from both universities, and with assistance from MDOC mental health and administrative staff. This study was unique in its rigorous methodology and was regarded as the most comprehensive study of the prevalence of mental disorders in an entire prison system that had ever been done at the time. It found, among many other things, a prevalence rate of psychosis (all categories) of 10.4% of the prison population, and for mood disorders, a rate of 29.6% (Neighbors, *et al.* 1987). The majority of the mood disorders were people with Major Depression (20.7%) and the majority of the psychotic disorders were Schizophrenia (5.8%). Obviously, not all of these people would require intense treatment at the same time, but instead would be in various stages of their condition, ranging from remission to active exacerbation. A more direct assessment of current intervention needs at the time of the survey were ascertainable from the "Primary Diagnosis" data used in the study, which would have reflected the focus of clinical attention, i.e., currently active cases. The percentage of the total Michigan prison population with a primary diagnosis of a psychosis was found to be 4.6%, and that for mood disorders, 22.7%.

Even following completion and release of the results of this massive study, MDOC administrators chose not to accept the results, and instead proposed alternatives for estimating needs that were not based on prevalence data. The fact is that this study's data, while showing somewhat higher than national averages, are consistent with trends that have been occurring in Michigan for

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many years, and are consistent with my approximately 20 years experience in managing the psychological screening of incoming prisoners in the RGC. Sadly, based on a recent communication I reviewed, the MDOC once again has down-played the relevance of the epidemiological study of mental illness in its prison population, this time on the grounds that it is now over 15 years old and thus outdated. To the contrary, I believe it is still very relevant and in all probability, the rates of mental illness/severe mental disorder in the Michigan prison system are actually higher now, as such prisoners tend to be denied parole and are kept longer than comparable, but non-mentally ill prisoners.

It's important to clarify to what I am referring when I talk about mentally ill and severely mentally disordered prisoners so there will be no misunderstanding. I am using these terms clinically, and not necessarily limited to definitions in the Michigan Mental Health code, although most of the conditions I discuss would meet this criteria if properly applied. Thus, in addition to the traditional interpretation, usually restricted to active psychoses and severe major mood disorders, I include any mental disorder classified in the DSM-IV on Axes I or II (including personality disorders), that is so severe as to result in major impairment in the person's thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with basic demands of life. This, incidentally, is consistent with the MDOC's definition, as contained in the most recent "Criteria and Guidelines" used by the Michigan Department of Community Health's (MDCH) Bureau of Forensic Mental Health Services (BFMHS) for their Corrections Mental Health Program (CMHP). However, the very restrictive application of these guidelines excludes many prisoners from treatment who actually do meet their criteria. There is a large gap between policy and practice when it comes to diagnosing and treating the incarcerated mentally ill.

### **MDOC's Mental Health Treatment Program**

In the aftermath of the 1984 Consent Decree, the MDOC continued to be in non-compliance with the mental health portions for many years, and following orders from the Governor's office, contracted out care of the mentally ill to the then Michigan Department of Mental Health (MDMH). While this department hired a new bureau chief for its forensic services division, it filled the majority of its institution level positions (both clinical and supervisory) with the same mental health staff that had worked for MDOC and whose views and clinical practice with regard to the incarcerated mentally ill were often the very ones that had kept the MDOC in non-compliance with its Consent Decree agreement for mental health services. The fact is that from 1984 until relatively recently, whenever the various mental health experts from the litigants toured the Consent Decree prisons, they found fairly large numbers of severely mentally ill prisoners left untreated and often locked in the extremely punitive and dehumanizing confinement of prison segregation units. This was related to the fact that too many of the MDOC (and now MDMH) staff incorrectly viewed these prisoners as simply non-mentally ill, personality disordered manipulators and malingerers. The 1992 transfer of responsibility for treating the mentally ill and seriously mentally disordered prisoners to the MDMH, formally bifurcated mental health services into two separate, unequal, and often conflicting service delivery systems, under different state departments. MDOC kept psychological services under its control but restricted its role largely to identifying and referring mentally ill and suicidal prisoners to BFMHS staff, to RGC screening of new prisoners, and to providing group psychotherapy services to an ever-decreasing prisoner base, basically limited to some sex offenders and assaultive offenders.

Historically, there had been a division and conflict between psychological and psychiatric services in the MDOC. Typically, this has been manifest in disagreement over whether disruptive prisoners were psychotic (or insane) or simply personality disordered (or psychopathic). The psychiatric services, formerly called the Clinical Services Unit (CSU), ran the inpatient units in the prison system for treatment of the mentally ill, and rarely interfaced with the general prison population. The Psychological Services Unit (PSU) served as a filter or screening service for the CSU when it was not doing RGC intake or pre-release parole evaluations, and helped reduce "inappropriate" referrals from the custody staff. The CSU staff were the ultimate gate

## SUMMARY REPORT, PRISONER B-02

This is a 32 year old white male first incarcerated at age 18. Currently locking at Level 4, he reports having been placed in segregation units at least once every year since he has been incarcerated. He has an extensive history of psychological problems prior to incarceration, including Schizophrenia. He relates that he was extensively abused, both sexually and physically violently, by his step-father growing up. A sister of his committed suicide and his mother suffered from long-term depressive illness. Records show he had serious adjustment problems early in his incarceration, resulting in repeated acts of self-mutilation. Corrections staff have acknowledged that he is mentally ill, variously diagnosing him as having a Major Depressive Disorder, severe, recurrent, with psychotic features; Bipolar I Disorder, and several different personality disorders. He has been on a variety of anti-psychotic and anti-depression medications off and on throughout his incarceration.

He reports that he periodically feels pressure building up in him, and he starts to slip down hill, getting very angry and starting to lose control. He says this happened to him prior to his assaulting two corrections officers two years ago. He was placed in segregation and deteriorated further, acting out with many instances of self-mutilative behavior. In one of these episodes he cut open his stomach and inserted pieces of metal into his wounds, but prison staff choose to see this as manipulative behavior, rather than as a part of the mental illness he has suffered with most of his life. He was re-diagnosed as "Malingering", suddenly no longer mentally ill!

When interviewed, he was obviously depressed with slow, hesitant speech and behavior. He reports being depressed most of the time, but also has frequent mood swings. He states he will no longer tell staff if he is feeling suicidal, because they would "punish" him by stripping off his clothes (except for an uncomfortable and humiliating "bam-bam suit"), placing him in a barren "observation cell" and four-point restraint, shackling him to a concrete slab. He states his many acts of serious self-injury are preceded by his hearing conflicting voices in his head, telling him what to do. His description of living in segregation status is one of severe physical and emotional isolation and deprivation, which intensifies his symptoms and causes his mental condition to deteriorate further, resulting in assaultive behavior and more misconduct citations.

keepers, determining who was "genuinely" mentally ill and thus would be admitted for treatment, and who was psychopathic or simply manipulating. A significant number of mentally disordered prisoners were already screened out by PSU staff and never made it to the CSU. In addition, many of those who PSU staff believed to be mentally ill were rejected by the CSU, often ending up being treated as disciplinary problems and confined to the harsh and punitive environment of segregation units, where their conditions often deteriorated further.

It is against this back-drop that the problems with the current system are best understood, as, in many practical aspects, it is basically a re-packaging of the same process and narrow philosophy that has failed to provide appropriate, much needed mental health treatment to many mentally ill prisoners who still end up in the isolation of segregation units. Much money has been spent addressing the problem, and yet many mentally ill prisoners remain lost between the two large mental health bureaucracies that have evolved in the MDOC's attempts to get out from under the mental health portions of the Consent Decree. To its credit, MDOC developed some well-written and comprehensive policy directives for screening and identifying mentally ill prisoners in segregation, but actual practice has continued to reflect the old views. Many severely mentally ill prisoners continued to be neglected and denied treatment, unable to gain acceptance to BFMHS staff caseloads (Walsh, 1998).

### Conflict Over "Mad" Versus "Bad" Prisoners

The debate over "mad" versus "bad" prisoners has gone on almost since the beginning of the legal system's recognition that some actions by severely mentally ill people may be due to their mental condition and not under voluntary control. While appearing to be a very simplified dichotomy, this characterization really underscores the clinical decision-making process and determines who will be treated and who will be punished for their behavior, both in the community and in prison. Our concern here is how it influences clinical judgment in the prison setting. Prisoners in the MDOC who most mental health staff agree are mentally ill usually receive mental health intervention and treatment, although the adequacy of that treatment varies. Typically, these are people who have well-documented histories of a relatively recent psychosis, clearly meet all or most of the DSM-IV diagnostic criteria, and generally are uncomplicated by other conditions, such as personality disorders and/or substance abuse disorders. There is usually little disagreement here, unless the prisoner also becomes assaultive and difficult to manage and control. Then there is a good chance that he will be "undiag-

nosed” as mentally ill, and be re-diagnosed as a personality disorder or malingerer. Variations in a person’s condition that would strongly suggest the presence of an “atypical psychosis,” not unexpected in a harsh prison environment that itself is very atypical of the “free world,” are often overlooked or dismissed as malingering.

At the other end of the spectrum, there are a large number of prisoners mental health and custody staff generally agree are “bad,” i.e., their behavior is primarily if not exclusively volitional, and not the product of mental illness. These people are often diagnosed by mental health staff as having personality disorders, usually of the antisocial (historically, psychopathic or sociopathic) or borderline type. They are typically regarded as “management” problems, and are left to custody staff to deal with, usually in a punitive mode that strips them of most prison privileges, restricts their movement and isolates them from other prisoners. Levels of severity of these personality disorders are acknowledged, but significant mental health treatments are usually not offered or believed effective. It is ironic that despite advances in our understanding of human behavior, we persist in viewing what is now labeled antisocial personality disorder as a unified entity, when in fact it is extremely varied, with many identifiable subtypes differing in their responsiveness to treatment initiatives.

Many people do not fit neatly into pre-conceived diagnostic criteria, and those who become management problems in prison often exhibit varying degrees of both “madness” and “badness,” i.e., clinically, they have multiple disorders, generally a psychosis or major mood disorder and a personality disorder. Toch and Adams (2002) have characterized these people as exhibiting “disturbed-disruptive syndrome,” recognizing that people who are problems, also can and do have problems. Yet these people often are characterized as just “bad” or disruptive, and are considered to be management problems best handled by a custodial rather than treatment approach. Sometimes however, even custody staff recognize that some of these people are severely mentally disturbed and that they cannot manage them in segregation cells. It is not unusual to find severely decompensated prisoners locked in the isolation of Michigan segregation units, who repeatedly smear themselves and their cell with their own feces, experience hallucinations, assault staff, and/or severely inflict major physical injury on themselves. All too frequently, when custody staff try to obtain mental health intervention for some of these people, they run up against a closed door to treatment. PSU staff

*Continued on Page 25*

#### SUMMARY REPORT, PRISONER F-02

This 36 year old African American man has been locked up in a Level VI (Super Maximum) Security Michigan Prison since 1998, and prior to that, he was confined in Level V (Maximum) Security prisons since 1994. Almost all of that time has been spent in the extreme isolation of segregation cells, which has progressively taken its toll on his mental status. His psychiatric history reveals that early in his incarceration, he was diagnosed as having an unspecified Psychotic Disorder, which was later identified as Schizophrenia, Undifferentiated. As his behavior deteriorated further, and he became harder to manage, he was re-diagnosed as having Schizophrenia Paranoid Type, and then he was suddenly “undiagnosed,” and declared to be “Malingering”, no longer mentally ill. It also appears that around this time his anti-psychotic medication was discontinued, and his condition worsened, resulting in more acting out and assaultive behavior. Instead of treatment for his mental illness, he was continued in segregation and given a diagnosis of Adult Antisocial Behavior.

When interviewed, this man came across as extremely delusional and appeared at times to be hallucinating. He was very suspicious, hyper-responsive and exhibited marked impairment in concentration and memory. His speech was largely incoherent and illogical, characterized by flights of disconnected ideas and rapid topic shifting. It was very difficult to get much history out of him, and his mental state and ability to focus became worse as the interview progressed. He was confused, disorientated, grandiose and paranoid, and stated that he is being plotted against by the people around him who put things in his food. He variously claimed the following: he was the owner of the Detroit Lions, he is Judge Crockett’s son, his daughter is locked in his closet, a Senator’s son inserted a “sperm sample” in his penis, and he has spent the last 2 years “recruiting for the (Detroit) Tigers.”

This man is clearly suffering from Chronic Schizophrenia, technically Undifferentiated type with strong paranoid features. His records reveal he has accumulated over 450 disciplinary citations including numerous assaults on staff, incidents of “threatening behavior” and “refusing a direct order.” He probably also has an underlying personality disorder with antisocial features, but that does not override or eliminate the fact that he is severely psychotic and in need of proper psychiatric care, not more punishment and isolation in a segregation cell that actually contributes to, and reinforces his delusions and hallucinations. Confinement in the isolation of segregation serves to substantially exacerbate his mental illness and increases his dangerousness and the risk of serious injury to himself and to prison staff.

## Proposed Bylaw Amendments Number 1-2004:

Purpose: To make a technical correction to the Section's bylaws by clarifying that the immediate past chairperson of the Section is an ex officio member of the Council and not a voting member unless s/he is also serving a duly elected term of office as an elected member.

**PLEASE TAKE NOTICE** that in accordance with Article 8 of the Bylaws of the Prisons and Corrections Section of the State Bar of Michigan, the following proposed amendments are being timely submitted by written motion of five (5) voting members of the Council for consideration and recommendation of the Council and for timely communication to the Section prior to the annual meeting at which it is to be voted upon.

(For the reader's quick and easy reference, the motion is presented in "strike/cap format": proposed deletions in strike format; proposed additions in capital letters.)

### Proposed Bylaw Changes:

**SECTION 3.1. COUNCIL.** The Section shall be governed by its council. The voting membership of the council is to be composed of 12 elected members AND 3 associate members. ~~and the immediate past chairperson of the Section.~~ THE IMMEDIATE PAST CHAIRPERSON OF THE SECTION SHALL SERVE AS AN EX OFFICIO NON-VOTING MEMBER OF THE COUNCIL, UNLESS S/HE IS SERVING A DULY ELECTED TERM AS A REGULAR OR ASSOCIATE MEMBER.

**SECTION 3.2. EX OFFICIO COUNCIL MEMBERS.** The Director of the Department of Corrections, the President of the Michigan Sheriffs' Association and, as determined by the Council, the head of a third department, association or agency, or their designees, AND THE IMMEDIATE PAST CHAIRPERSON OF THE SECTION, IN ACCORDANCE WITH SECTION 3.1, are ex officio nonvoting members of the council..

## CAPPS TAKES OVER LIFER PAROLE PROJECT – REPORT DUE SOON

When the Prisons and Corrections Section initiated its Lifer Parole Project, it had two goals. One was to survey current and former circuit and Recorder's Court judges to determine what their understanding of parolable life terms was when they imposed them in the 1960s, '70s and '80s. Judges were also asked how they felt about the current parole board's refusal to parole lifers on the rationale that "life means life." The report on that survey, "*What Should 'Parolable Life' Mean? Judges Respond to the Controversy,*" was published in March 2002. It can be found on the CAPPS website ([www.capps-mi.org](http://www.capps-mi.org)) under "Related Resources."

The second goal was to prepare a publication that would describe the history and current application of the lifer law but would primarily focus on illustrative case histories – stories about real people that would break stereotypes and make the problem tangible for policymakers and the general public.

Researching, drafting, printing and distributing such a publication is time-consuming and expensive. The Section lacked the resources to complete the project. The Citizens Alliance on Prisons and Public Spending (CAPPS), which uses prisoner profiles in its advocacy work, assumed responsibility and raised funds specifically for this project. Its report is now complete and will be published in late September. See the CAPPS website for further information.

## NOTICE TO OUR READERS

This is the first issue of the newsletter that has been published in nearly a year. The Section sincerely regrets this long dry spell. The newsletter is prepared on a volunteer basis and competing obligations have made it difficult to prepare a high quality publication on a regular schedule. We look forward to getting back on track in the coming year. In the meantime, we hope that the current super-sized issue helps make up for the delay and we apologize for the inconvenience.

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## STATE BAR OF MICHIGAN ANNUAL MEETING

September 30 – October 1, 2004

Lansing Center and Radisson Hotel, Lansing

### PRISONS AND CORRECTIONS SECTION ANNUAL MEETING

Friday, October 1, 2004

Lansing Center;

9:30 AM: Business Meeting & Elections, Room 103

10:00 AM: Program, Room 202

Crime & Punishment:

Choosing a Cost-effective Corrections Plan for Michigan

*As pressure increases on the MDOC to open mothballed prisons, the CRIMINAL LAW and PRISONS AND CORRECTIONS SECTIONS will combine their annual meetings to examine the issues.*

The specter of prison overcrowding again haunts Michigan. Governor Granholm's recent mandate to return parolees to prison if they become involved with weapons, adds to the pressure. The cost to reopen two prisons that are currently unused could be as much as fifty-six million dollars. Among other questions, these stand out:

- Given the deepening budget crisis, can Michigan afford to provide sufficient secure prison bed space to ensure public safety?
- What options open to us can keep the prison population from growing while providing adequately for public safety?
- How should we be managing the process of confinement? ...the release process? ... alternatives to incarceration?

Our challenge: to implement an effective corrections plan at an affordable cost. On Friday, October 1, these panelists will face these questions with us:

**Senator Alan Cropsey**, Chair of Senate Judiciary Committee and Senate Appropriations  
Subcommittee on Corrections

**Dennis Schrantz**, Deputy Director for Policy and Strategic Planning,  
Michigan Department of Corrections

**Kevin Simowski**, Chief, Criminal Justice Bureau, Michigan Department of Attorney General

**Barbara Levine**, Executive Director, Citizens Alliance on Prisons & Public Spending

Join us for the discussion with the combined *Prisons and Corrections* and *Criminal Law* Sections, **Lansing Center Room 202, October 1, 2004, 10:00 AM**. The Prisons and Corrections Section Annual Business Meeting and elections will convene in Room 103 at 9:30 AM. The Criminal Law Section will also conduct its Annual Business Meeting at 9:30 AM in Room 202.

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## Sandra Girard To Receive State Bar Champion of Justice Award

Sandra Bailiff Girard, executive director of Prison Legal Services, founding member of the Prisons and Corrections Section and longtime fighter for the rights of prisoners, minorities and low-income citizens will receive a State Bar Champion of Justice Award for 2004. Sandy will be honored at the Distinguished Awards Dinner during the State Bar's Annual Meeting.

**DATE: Thursday, September 30**

**TIME: 6:00-7:30 p.m.**

**PLACE: The Lansing Center**

While many of the people who have worked with Sandy the longest or benefited the most from her efforts will be unable to attend, it is hoped that her many friends in the free world will be present to celebrate this long overdue recognition of a lifetime of unselfish service. Tickets for the dinner are \$45 if purchased before 9/13 and \$55 if purchased afterwards.

For those who may not be aware of just why Sandy so richly deserves this award, reprinted below is the text of the nominating letter signed by more than 50 judges, lawyers and criminal justice system colleagues.



*Each year the State Bar bestows the Champion of Justice Award upon exceptional individuals for "extraordinary professional accomplishments" or devotion to a cause. One definition of a champion is a person who advocates for the underdog; Sandra L. Bailiff Girard, Executive Director of Prison Legal Services of Michigan (PLSM), undoubtedly fits this description. Her entire career has been spent representing people without means to defend themselves or a platform from which to be heard. We hereby support Sandy's nomination to receive the 2004 State Bar of Michigan Champion of Justice Award.*

*PLSM is a non-profit corporation providing legal aid to Michigan prisoners. Because there were no civil legal services available to prisoners, the State Bar's Young Lawyers section started PLSM in 1975 in response to an American Bar Association initiative. Over the years, PLSM staff has included attorneys, law students, paralegals, and various volunteers, but since 1984, Sandy has been the constant force driving PLSM's mission to protect the rights of tens of thousands of prisoners. This year marks the 20th anniversary of her tenure as PLSM's Executive Director.*

*As a young, single mother, Sandy entered the University of Michigan Law School with the goal of using her professional career to help the underserved. Even before entering law school, Sandy worked for the underprivileged as a legal secretary/paralegal with the Washtenaw County Legal Aid Society. From there, she became Director of the Garden Homes community development project, rebuilding one of Ann Arbor's poorest communities. Shortly after her graduation from law school in 1981, Sandy began work at the State Appellate Defender Office. In 1983, Sandy accepted a position as Staff Attorney at PLSM.*

*One year after joining PLSM, Sandy became its Executive Director. With this promotion, she moved from the Huron Valley Women's Facility to the State Prison of Southern Michigan. There, her office was deep within the world's largest walled prison. In the years Sandy has been at the helm of PLSM, she has made extraordinary contributions to the developing law of prisoner rights, access to courts, due process and equal protection. Sandy has handled cases involving*

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issues of criminal law, domestic relations law, probate matters, and sophisticated questions on immigration, separation of powers, and federal supremacy. PLSM also publishes comprehensive legal "self-help" materials for prisoners.

Sandy has generously shared her expertise with the Bar, law schools, and the public. Her book *Michigan Prison Sentences: A Guide for Defense Attorneys*, published by the Michigan Appellate Assigned Counsel System, is widely considered the "Bible" on the topic and is currently in its second edition. As one of the very few people outside the Michigan Department of Corrections (MDOC) who is knowledgeable about a wide range of department practices and policies, she has unfailingly served as an invaluable resource, taking phone calls and giving advice to all who asked.

Sandy has undertaken many volunteer positions on behalf of the State Bar. She is a founding member of the Bar's Prisons and Corrections Section, and has served as a member and later chair of both the former Defender Systems and Services Committee and the Criminal Law Section. For many years, Sandy has been an active member of the Michigan Council on Crime and Delinquency, spending one term as president. In her home community of Jackson, she has also volunteered for eight years as a member of the Board of Directors of the local Fair Housing Center, serving terms as President and Vice-President. In all these roles, Sandy upheld the principle of civil discourse among adherents of widely divergent views and helped advance understanding of difficult issues.

In 1996, PLSM was appointed to represent Michigan prisoners in the historic and highly publicized lawsuit, *Cain v. MDOC*. This case has addressed such critical prison issues as security classification placement, state-issued clothing deficiencies, prisoners' property rights, and access to courts issues such as law library services, access to typewriters, the prison mail system, and the administrative grievance process. A final settlement agreement was entered in *Cain* on November 4, 2003 with the entry of a series of settlement agreements Sandy negotiated with the Attorney General's office.

As Sandy wrote in the most recent edition of PLSM's letter to all *Cain* class members, "Prisoner litigation is not a hobby prisoners use to escape boredom and harass corrections staff. Involvement in any lawsuit is stressful, but suing the people who are responsible for your food, clothing, safety, medical care, the length of your incarceration and virtually every aspect of your life takes great courage."

To many citizens, any money spent on prisoners and any discussion of "prisoners' rights" are both equally repugnant. Yet, Sandy has spent her entire career championing prisoners' entitlement to fundamental due process and human rights. She has given countless Michigan prisoners a voice by testifying at legislative hearings and filing briefs on issues concerning prisoners in various courts from the Jackson Circuit Court to the United States Supreme Court. Often a solitary endeavor, Sandy has shown great courage in devoting so much of her life to this cause. When the Bar created PLSM in 1975, surely it envisioned an office that would protect the legal rights of people who are among the least able to access the legal process. Under Sandy's direction, and because of her dedication, that vision became a reality.

In sum, Sandra Bailiff Girard's professional career, now well into its third decade, undoubtedly meets the standard for the Champion of Justice Award. Her "integrity and adherence to the highest principles and traditions of the legal profession" and her achievements in the most difficult of cases, often under the harsh glare of controversy, exemplify "superior professional competence." Sandy has never sought the limelight, but her accomplishments have had such a profound impact on the lives of others that her quiet actions warrant recognition.

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# **BARRIERS TO REENTRY: LEGAL STRATEGIES TO REDUCE RECIDIVISM AND PROMOTE THE SUCCESS OF EX-OFFENDERS**

**By Miriam J. Aukerman**

When Clara was fifteen, she and her best friend discovered that they were being “two-timed” by the same boy. Outraged, the girls went over to the boy’s house, entered through an open door, and placed the boy’s collection of Playboy magazines on the kitchen table so that he would get in trouble when his mother got home. But it was the girls who got in trouble. Clara ended up with a felony-level juvenile adjudication for breaking and entering. Now, almost thirteen years later, Clara – whose only other run-in with the law was a failure to get a dog license – is married, has three kids, and wants to work as a nurse’s aid to support her family. But Clara cannot even get her nursing degree, because her school requires clinical work in a nursing home, and under a new Michigan law, individuals with felony records cannot work in nursing homes.<sup>1</sup>

## **THE PICTURE IN MICHIGAN**

Clara, like millions of other ex-offenders, has discovered that if you make a mistake, society will continue to punish you long after your sentence is done. Ex-offenders face not only the social stigma of a criminal conviction, but also tremendous legal obstacles. This combination of social and legal barriers prevents many ex-offenders from finding employment, reuniting with their families, or securing stable housing. Unsurprisingly, 40% of released inmates in Michigan are unable to overcome these hurdles, and return to prison within four years. Each such cycle costs the state \$224 million dollars per year.<sup>2</sup>

How many people suffer the consequences of a criminal record? While exact figures are difficult to come by, the U.S. Department of Labor has estimated that about one-quarter of the adult population lives a substantial portion of their lives having a criminal record.<sup>3</sup> One in 37 Americans has had prison experience, with 17 percent of African-American men, 7.7 percent of Hispanic men, and 2.6 percent of white men having served prison time.<sup>4</sup> In Michigan, the prison population has grown since 1975 at 38 times the rate of the general population, with approximately 48,000 people now behind bars.<sup>5</sup> Almost 1,000 Michigan prisoners return to the community each month.<sup>6</sup> In addition, some 16,000 Michiganders are on parole,<sup>7</sup> almost 174,000 Michiganders are on probation,<sup>8</sup> and an untold number still struggle with the consequences of convictions that are years or even decades old.

Because there are so many potential civil consequences to a criminal conviction, this article can only provide an overview of a few of the most serious issues ex-offenders face in the areas of employment, family law, and housing.<sup>9</sup> The article also discusses some of the existing legal strategies that counsel can adopt to minimize the civil consequences of criminal convictions, and then considers what the bar, courts, and policy makers can do to reduce recidivism and encourage reintegration of ex-offenders.

## **PROMOTING THE EMPLOYMENT OF EX-OFFENDERS**

Employment at a decent wage is strongly correlated with lower rates of reoffending. According to one estimate, a 10 percent decrease in an individual’s wages is associated with a 10-20 percent increase in criminal activity and likelihood of incarceration.<sup>10</sup> Unfortunately, studies show that two-thirds of all employers will not knowingly hire an ex-offender.<sup>11</sup> Moreover, bylaw many former offenders are barred from a variety of professions. In order to maximize the employment prospects and reduce the recidivism risk of ex-offenders, counsel assisting such individuals should be aware of (1) the limited employment rights that ex-offenders do have, (2) the statutory restrictions on ex-offender employment, and (3) the federal financial incentives to encourage the hiring of ex-offenders.

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## 1. Employment Rights of Ex-Offenders

Although it is widely assumed that employers have an absolute right to reject job applicants based on their criminal records, in fact there are several legal protections available to ex-offenders. First, with the exception of law enforcement, an employer or employment agency “shall not in connection with an application for employment . . . , or in connection with the terms, conditions, or privileges of employment . . . request, make, or maintain a record of information regarding a misdemeanor arrest, detention or disposition where a conviction did not result.”<sup>12</sup> This statutory prohibition does not extend to “information relative to a felony charge before conviction or dismissal.”<sup>13</sup>

Second, for African-American and Hispanic ex-offenders, adverse employment decisions based on criminal records may constitute race discrimination in violation of Title VII of the Civil Rights Act of 1964.<sup>14</sup> Because African-Americans and Hispanics are disproportionately represented within the criminal justice system, courts have held that blanket policies prohibiting the employment of ex-offenders have a disparate impact on minority job seekers.<sup>15</sup> Accordingly, the Equal Employment Opportunity Commission has issued several policy statements under which the exclusion of persons from employment based on their conviction records violates Title VII unless the employer demonstrates a business necessity for the exclusion. Three factors are relevant to business necessity:

- (A) The nature and gravity of the offense;
- (B) The time that has passed since the conviction and/or completion of the sentence; and
- (C) The nature of the job held or sought.<sup>16</sup>

In other words, under most circumstances an employer cannot adopt an outright prohibition on the employment of ex-offenders, but must consider the individualized circumstances of potential employees.

A third legal protection for ex-offenders in Michigan is that there are limits on the use of criminal records in licensing decisions. Under MCL 338.42, a criminal conviction shall not be used, in and of itself, by a licensing board or agency as proof of a person’s lack of good moral character. It may be used as evidence in the determination, and when so used the person shall be notified and shall be permitted to rebut the evidence by showing that at the current time he or she has the ability to, and is likely to, serve the public in a fair, honest, and open manner, that he or she is rehabilitated, or that the substance of the offense is not reasonably related to the occupation or profession for which her or she seeks to be licensed.

In addition, licensing boards or agencies cannot use certain criminal records at all in determining good moral character.<sup>17</sup> Moreover, rules must be promulgated for each licensing board or agency prescribing the offenses that the department considers indicate that the person is not likely to serve the public in a fair, honest, and open manner.<sup>18</sup>

To summarize, while the employment rights of ex-offenders are limited, neither employers nor governmental agencies can adopt blanket policies discriminating against ex-offenders.

## 2. Statutory Barriers to Employment: The Example of Michigan’s New Nursing Home Law

The employment prospects of ex-offenders are hampered not only by the reluctance of employers to hire individuals with criminal records, but also by outright prohibitions on employment of ex-offenders in certain fields. These restrictions stem both from federal<sup>19</sup> and Michigan law. Since a survey of these restrictions is beyond the scope of this article, an example of one such statute will be analyzed to demonstrate the impact of occupational restrictions on ex-offenders, the necessity of reviewing such legislation carefully to determine its reach, and the potential for challenging such laws and policies.

*Continued on Page 33*

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## CAIN v MDOC UPDATE

**By Sandra Bailiff Girard**

In April, 2003, PLSM was ordered to move its office out of the Egeler Facility. The Michigan Supreme Court also ordered the judge to end the trial phase of the *Cain* case by November 1, 2003. As a practical matter, the parties had to negotiate a settlement because there was not enough time to finish trying the case. (There had been 18 months of trial in 1997-1998.) The parties settled most of the claims. Copies of the entire series of settlement agreements are available in prison law libraries and will soon be on PLSM's website ([www.plsminc.org](http://www.plsminc.org)). PLSM is now monitoring compliance with the settlements.

In addition to specific changes in security classification, the settlement agreement mandated four Work Groups consisting of Plaintiffs' counsel and experts, and Defendants' counsel and MDOC staff appointed by the Director. These Groups have been evaluating security classification, long term segregation, Reception and Guidance Center procedures, and psychiatric/psychological services. The Groups will make final reports and recommendations to the director of corrections after six quarterly meetings. The Security Classification Work Group already recommended elimination of Level VI and that was implemented effective May 17, 2004. (Ionia Maximum Correctional Facility now has Level V and Level II prisoners.)

The settlement reduced the time prisoners had to automatically spend in Level IV. Now if a prisoner has served three years or is within seven years of his Earliest Release Date he can go to Level II, if his prison conduct permits. Level II prisoners who could never go to Level I because of a Very High Assault Risk label are now eligible if they have not had an assaultive misconduct within 7 years. The MDOC will revise its classification manual and make it available in prison law libraries by November 1, 2004.

Although most of Plaintiffs' mental health claims were dismissed without prejudice, under the settlement, a prisoner who is in a psychiatric unit for 96 hours or longer does not have to be returned to the same prison and security status he was in immediately before his admission. The settlement also required evaluations of 25 ICF Level VI segregation prisoners in November 2003. Prisoners with serious mental illnesses were not supposed to be housed in Level VI. Plaintiffs selected the prisoners who were evaluated by three teams of psychologists and psychiatrists from MDOC and Community Mental Health. These teams found three of the 25 were mentally ill and one was hospitalized for further evaluation. These findings trigger another settlement provision that requires the development of a system to evaluate all prisoners in ICF segregation, as well as 10 Level V segregation prisoners to be selected by Plaintiffs.

The settlement of the access to courts count required that: law library collections and inventories be updated and expanded; segregation prisoners have better access to law books; clerks and civilian workers receive training on legal research; law libraries will be open required hours even if the librarian is not available; call-outs to the law library will be processed within 48 hours and emergency call-outs will be available; prisoners on toplock be permitted to use the law library the same as other prisoners; and extended the Legal Writer Program to all prisons and greatly increased the number of prisoners eligible to receive assistance. The Legal Writer program prepares pleadings in fact or conditions of confinement cases. Legal assistance agreements between prisoners must be approved or denied within 10 business days and may not be denied due to a pending transfer of one party.

Flash Kites were developed to resolve emergency access to courts problems. The Deputy Warden or designee must act on the Flash Kite within 24 hours. Photocopies of pleadings and exhibits must be provided within three business days; copies of research materials must be provided within one week. One of the most controversial settlement provisions was standardizing the cost of photocopies at \$.10 per page at all prisons. That was a decrease at some prisons but an increase at others. In November 2004 the cost will be reduced to actual cost plus \$.02.

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Excess legal property hearings must continue to comply with OP 04.07.112 and the standard set forth in *Hadix v. Johnson*, 712 F. Supp 550, E.D. Mich 1989. General population prisoners are allowed to store legal property in their cells. Segregation prisoners whose legal property is stored outside their cells must be given access to it in less than 48 hours. The MDOC will loan containers to indigent prisoners to store excess legal property.

Outgoing legal mail must be delivered to the post office within two business days of its receipt by MDOC staff and prisoners get a receipt when they turn it in. Postage will be loaned, if necessary, for mail to an attorney, a court, a party to a lawsuit, PLSM, SADO, MAACS, or other legal aid organization. A prisoner may request special handling of incoming legal mail that allows the prisoner to pick up the mail and sign for it. The MDOC maintains a log of these deliveries. Grievances and rehearing requests may be sent through regular procedures, but postage will be loaned if the prisoner cannot use Inter-Departmental mail. These documents are considered “received” on the date they are mailed

Attorney phone calls have been extended to 20 minutes from 15. A prisoner may also add the attorney’s home number(s) if the attorney makes this request in writing.

The MDOC had announced plans to disallow all typewriters. Under the settlement, the MDOC was allowed to make word-processing diskettes contraband, but typewriters that can operate without the disks may be kept. Prisoners may buy one of two allowable typewriters and general population prisoners at all levels may keep them in their cells. One of the approved typewriters has 128K of internal memory. Outside parties may order a typewriter for a prisoner directly from the manufacturer. Prisoners may also buy an approved single outlet surge protector. Typewriters are considered legal property only for property limits and are excluded from the personal property limits.

If a prisoner is waived to a higher level, any property not allowed at that level must be itemized and stored until he returns to a level at which the property is allowed. Prisoners may keep the winter coats and gloves or mittens they now possess and may order approved gloves or mittens and winter coats subject to the price and style limitations of PD 04.07.112. Funds may be deposited in a prisoner’s account and earmarked for the purchase of a winter coat. It must state on the money order or cashier’s check that it is for a winter coat and the person sending the funds should keep a copy as well as including a note to the Business Office stating that the funds may be used only to buy a winter coat.

Some of Plaintiffs’ claims were dismissed without prejudice. On October 18, 2001, the Court found the MDOC’s prisoner legal mail disbursement system unconstitutional and preserved claims for damages by those who lost a right to present a claim or appeal because the MDOC sent their mail out late. Damage claims were not resolved in the settlement but the claims continued to be preserved. Claims dealing with a prisoner’s right to receive legal assistance from attorneys were dismissed without prejudice, as were claims relating to the classification and placement of people who are illiterate, mentally ill, physically handicapped, hearing impaired, learning disabled, or non-English speaking.

The author is the executive director of Prison Legal Services, Inc., which represented the plaintiff class in Cain. See related story at page 8.

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## **Legislative Oversight of Michigan's Prison Conditions, Policies and Practices: A Solution Interrupted**

**By Charlene Lowrie**

Michigan Public Act 46 of 1975 established a unique concept of direct legislative oversight of the state corrections system by creating the Office of the Legislative Corrections Ombudsman (Ombudsman). As a governmental official appointed to receive and investigate complaints about alleged abuses or capricious acts by public officials, the Ombudsman's function was to report findings and attempt to achieve equitable resolutions where the facts supported it.

Under the guidance of the Michigan Legislative Council, the impetus behind the Ombudsman's creation was state and federal studies of unresolved prison unrest which had led to violent uprisings, the results of which were costly in fiscal and, more importantly, human terms. These studies identified the fact that prison systems throughout the nation lacked internal methods through which prisoner conflicts could be resolved in a way that was perceived as fair and accountable. The studies also revealed that prison systems had little if any external oversight, despite legislative funding responsibilities. Among the recommendations offered in Michigan to solve these problems were the prisoner grievance mechanism (internal problem solving system) and the ombudsman concept (external oversight).

Legislators recognized that the internal prisoner grievance mechanism was not by itself sufficient to assure responsible protections within the prison bureaucracy and they understood that prisoners had little faith in the credibility of the system that controlled their every action. It was clear that the lack of credibility caused the most dissatisfaction between the keeper and the kept. Adding to the mix, studies indicated that prison staff had little time, resources, or the inclination to investigate or resolve a prisoner's individual concerns, leaving prisoners with little faith in the ability of one employee to resolve a grievance that might criticize or overrule the actions of another employee. Most importantly, Legislators recognized that, minimally, mistakes could and did occur in a large institutional climate and that external oversight would provide the necessary accountability.

While its investigatory authority was great, the Ombudsman's effectiveness was based in its ability to make substantive, objective recommendations that had the force of in-depth, factual investigation and research. Throughout its history, the types of allegations leading to Ombudsman intervention ran the gamut from individual prisoner concerns to changes in department-wide policies and practices within the Michigan Department of Corrections.

In addition to investigation of individual prisoner complaints, by providing the Ombudsman with statutory access to all information, records and documents in the possession of Corrections, the ombudsman concept provided the Legislature with a means to receive unsanitized information about the corrections system. The Ombudsman also provided new legislators with an institutional memory that would normally be depleted through legislative turnover.

Until October 2003, when funding was withheld for the first time since the Ombudsman's creation, the Office responded yearly to thousands of complaints submitted by prisoners, legislators, the public, and other interested parties. In addition to recommendations to resolve individual prisoner problems, countless recommended changes to statute, administrative rule, and Corrections' policy and procedure were presented to and, in many instances, adopted by Corrections and the Michigan Legislature. Working together, the savings that resulted from the Ombudsman's quiet interventions in terms of dollars and human spirit were incalculable.

Although currently inactive, the Ombudsman's enabling legislation remains available for Michigan to again provide its citizens with effective and efficient oversight of an expensive and massive prison complex.

*The author served as Chief Investigator in the Office of the Legislative Corrections Ombudsman from 1992 until she retired in 2003.*

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## CAPPS ANALYSIS OF PAROLE-ELIGIBLE PRISONERS

### REPORT SAYS THOUSANDS COULD BE SAFELY RELEASED, SAVING TAXPAYERS MILLIONS

Thousands of prisoners in the state's correctional system who have already served the minimum sentence required by law could safely be released now and save the state tens of millions of dollars in prison operating costs.

That is the major conclusion drawn from an analysis of prisoner data released today by the Citizens Alliance on Prisons and Public Spending (CAPPS). The parole board has adopted numerous policies and practices that lengthen the time prisoners serve. As a result, nearly 35 percent of all Michigan prisoners have served the time required by law for their offenses.

CAPPS purchased the prisoner database from the Michigan Department of Corrections (MDOC). The 17,129 state prisoners eligible for parole on May 6, 2003, were studied to identify patterns that might explain why they had not been released. The basic background factors examined were current age, age at offense, race, gender, sentencing county, type of offense, prior criminal record, security classification, institutional misconduct history, parole guidelines score and length of time served.

Four groups were identified: Those who had been granted parole but had not yet left prison; those who had been returned to prison for technical parole violations; those who had been denied parole and were past their earliest release dates; and parolable lifers. Results of the analysis were published in November 2003 in a report entitled: *"The high cost of denying parole: an analysis of prisoners eligible for release."*

A total of 1,428 prisoners have been granted parole but have not yet left prison. Of these, 965 had "fixed-date" paroles that required them to spend an average of four additional months in prison at a cost of over \$7 million. The prisoners given fixed-date paroles cannot be readily distinguished from those who are released when parole is granted. It is unclear how the public gains any increased safety from delaying the release of prisoners already determined to be suitable for parole.

Over 20 percent of the parole-eligible prisoners are technical parole violators. Over half of this group were initially convicted of non-assaultive or drug offenses. Although they have not been convicted of any new offenses while on parole, they are returned to prison for an average of 24 months for failing to comply with conditions of supervision. The annual cost of incarcerating these 3,645 technical violators is over \$81 million. With a combination of progressive sanctions and increased support services, many of these prisoners could be supervised adequately in the community for a tenth of the cost.

Over 11,000 prisoners have passed their earliest release date (ERD) and been denied parole. Nearly 4,300 are more than three years past their ERD. In about half these cases it appears that the justification for denial may be a history of poor institutional conduct.

The remaining prisoners are older, have fewer prior felony convictions than those who are granted parole, and have good institutional conduct. The majority are housed in minimum security facilities. More than 1,750 had parole guidelines scores in the range called "high probability for release." These prisoners are primarily being denied parole because of their offenses. Most are serving for a variety of sexual or assaultive offenses.

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For the parole board to lengthen the time a prisoner must serve based solely on the type of offense is an expensive and questionable practice. The nature of the crime is fully considered the minimum sentence is set in the first place. The MDOC's own data tends to show that offenders in these categories actually have lower recidivism rates than other offenders. No data indicates that holding aging prisoners long past the completion of their minimum terms increases public safety. If the parole board simply substitutes its judgment for that of trial court and the legislators who adopted sentencing guidelines, it is effectively engaged not in risk assessment but resentencing.

Paroling just 30 percent of the prisoners who have served their minimum terms and been denied release would save nearly \$69 million.

The 864 parole-eligible lifers are, as a group, much older prisoners with good institutional records. While their median age now is 49, two-thirds were 28 or younger when they committed their offenses. Nearly 30 percent were 20 or younger; 72 were ages 15 to 17. They have served, on the average, 22 years. About half were convicted of second-degree murder; most of the rest were convicted of criminal sexual conduct, armed robbery or other assaultive offenses. Many were sentenced before sentencing guidelines took effect and would not receive life terms today.

Although the judges who imposed these sentences assumed meaningful parole review would occur after 10 years, these lifers are not being denied release because they continue to pose a risk to public safety. The parole board does not even calculate parole guidelines scores for lifers to assess their risk. Based on revised procedures adopted in 1999, the board reviews a lifer's file once every five years and decides whether it wants to even interview the person. If the board decides it has no interest in proceeding toward release, it is not required to give reasons for that decision. The prisoner has no right to appeal. Lifers are uniquely expensive to keep because, as an aging population they have much greater medical care costs than other prisoners.

CAPPS concludes that Michigan has gone further than is necessary for public safety in refusing to release parole-eligible prisoners. Using conservative budget figures, it estimates that if 7,200 of these prisoners – fewer than 45 percent – were placed on parole, the savings to taxpayers would be more than \$145 million.

The report includes numerous recommendations for how the parole decision-making process can be improved so that thousands of prisoners who are not likely to re-offend are not warehoused for years unnecessarily. Some of these recommendations involve statutory changes that would place clear boundaries on the parole board's exercise of its currently unlimited discretion.

- Establish a statutory presumption of parole at the judicially-imposed minimum unless the prisoner's institutional conduct or current risk to the public warrants denial.
- Develop parole guidelines that complement the sentencing guidelines. This would decrease the weight given by the parole board to factors such as the crime and prior record that were already used by the sentencing judge to set the minimum sentence.
- Permit judicial review of parole decisions that depart from the parole guidelines or are based on factual errors.
- Limit the amount of additional time technical parole violators can be required to serve.

The full report is available on the CAPPS website: [www.capps-mi.org](http://www.capps-mi.org).

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## NATIONAL RESEARCH REPORTS ADDRESS MENTALLY ILL PRISONERS, SEX OFFENDER RECIDIVISM

**Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (New York, 2003), 215 pgs; available at [www.hrw.org](http://www.hrw.org)**

This exceptionally thorough and well-written report addresses, on a national scale, many of the same concerns as the lead article in this issue of *The Forum*. Human Rights Watch staff visited prisons in 13 states (not including Michigan) and interviewed by telephone correctional and mental health professionals in additional states (including Michigan). The authors further drew on communications with more than 300 prisoners, mental health experts, prison officials and lawyers. The result is a detailed and depressing portrait of the conditions under which 200-300,000 men and women with mental disorders are kept in U.S. prisons.

The authors review the nationwide increase in the incarceration of the mentally ill, the difficulties mentally ill prisoners have in coping with the prison environment, the inadequacy of mental health treatment and the prevalence of punitive responses to behavior caused by mental illness. Special attention is given to mentally ill prisoners in segregation and to the frequency of suicide and self-mutilation. The report also discusses national and international legal standards and offers a series of recommendations to policymakers and prison officials. While the systematically brutal conditions in Alabama and Mississippi are perhaps the most shocking, one example after another from states all over the country illustrate the pervasive problems that arise when people who are seriously mentally ill are incarcerated in prisons that are “ill-equipped” to address their circumstances.

**Bureau of Justice Statistics, *Recidivism of Sex Offenders Released fro Prison in 1994*, U.S. Dept. of Justice (Washington, D.C., 2003), 40 pgs; available at [www.ojp.usdoj.gov/bjs/](http://www.ojp.usdoj.gov/bjs/)**

Research by the U.S. Department of Justice shows that, contrary to popular belief, sex offenders have lower rates of recidivism than those who commit other kinds of offenses. Re-arrest, conviction and re-incarceration rates were examined for 9,691 sex offenders released fro prison in 15 states (including Michigan) in 1994. Only 5.3 percent of all sexual offenders were re-arrested for a new sex offense within three years of their release. The study divided the offenders into four overlapping categories: rapists, sexual assaulters, child molesters and statutory rapists. Even those described as child molesters with victims under 16 had low re-arrest rates. A total of 3.3 percent of the child molesters and 2.5 percent of the statutory rapists were re-arrested for molesting another child. Only 2.5 percent of rapists were charged with repeating the crime for which they were imprisoned. There was no clear association found between recidivism rates and how long the offenders were kept in prison.

[Ed. note: The national statistics are corroborated by Michigan data. The MDOC’s 1995 Statistical Report shows the new conviction rates for prisoners first paroled in 1991, before changed parole policies greatly reduced sex offender releases. Of the 525 prisoners paroled for sex offenses, only 12 (2.3 percent) were convicted of another sex offense while on parole.]

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## JONES v DEPARTMENT OF CORRECTIONS: TEXTUALISM IN ACTION

By Stuart G. Friedman

In *Jones v Michigan Department of Corrections*,<sup>1</sup> the Michigan Supreme Court overturned long established Michigan precedent that stated that the failure to hold a parole violation hearing within 45 days of the date that a parolee was detained and/or became available to the Department of Corrections precludes the Parole Board from proceeding. These cases applied a statute that requires holding such a hearing within the specified time period. The earlier courts noted that the purpose of the statute was to implement the guarantee of a timely parole hearing and held that the violation of the statute required the dismissal of the charges.<sup>2</sup>

In *Jones*, the Court of Appeals ruled in an unpublished opinion that dismissal was the appropriate remedy. The Michigan Supreme Court reversed the Court of Appeals and in the process overruled the cases, *Stewart v Department of Corrections* and *In re Lane*, that mandated such a remedy.<sup>3</sup> The Court found that since the Legislature did not specify a remedy, it was improper for a court to fashion one. As a practical result of this, the Parole Board is free to disregard the 45-day time period.<sup>4</sup>

The current Michigan Supreme Court adheres to a theory of law known as textualism.<sup>5</sup> Under textualism, courts will not search for the intent of the drafting legislature. They will simply use a dictionary to look up the meaning of the words and apply those words without applying any value judgments. Textualists claim that the worst way to interpret a law is to look at the history of the law. They claim that such an approach introduces subjectivity into the interpretation process.<sup>6</sup> Included in this approach is what textualists refer to as “dice loading” – the utilization of various doctrines of public policy such as the rule of lenity, strict construction of penal laws, liberal construction of remedial laws, and the strict construction of statutes in derogation of the common law. Textualists claim that engrafting these non-enumerated values into a statute is an illegitimate form of skewing the meaning of the statutes.<sup>7</sup>

In a series of cases, the Michigan Supreme Court has utilized this principle to deny remedies for statutory breaches. If the Legislature does not specify a remedy, the Court will not generally fashion one. The Court had applied this principle in previous cases to overrule a number of judicially created rulings. Even where it is clear that the Legislature was aware of prior judicial interpretation and reenacted the law in the face of such interpretation, the current Court majority has declared that it would constrain itself to the four corners of the statute and not engraft any remedies not stated in the statute.<sup>8</sup> As Chief Justice Corrigan is fond of saying: the “Legislature expresses its intent through its words, not its silence.”<sup>9</sup>

The assumption that the Legislature does not intend a remedy when it fails to specify one is a major change in Michigan law. Traditionally it has been assumed that where the Legislature didn’t fashion a remedy, a court was empowered to create such a remedy.<sup>10</sup> Moreover, it was generally believed that the Legislature did not pass laws without intending them to be obeyed.<sup>11</sup>

Justice Cavanaugh’s dissent in *Jones* stated that the Court should look to the history of the law to determine that the Legislature was aware of the dismissal remedy and chose not to displace it. The dissent also focused on the mandatory language of the statute. Unlike the majority, Justice Cavanaugh did not impose value judgments in his opinion. Justice Cavanaugh was presumably aware of the language in *Morrissey v Brewer* regarding the interest a parolee has in continuing a parole,<sup>12</sup> but chose not to invoke it. His opinion analytically dissected the statute by looking at the history of the law and the extrinsic tools that demonstrated the legislative intent behind the law. Even though Justice Cavanaugh’s opinion was not textualist in its approach, it can be credibly argued that the analysis he employed suffered less from the “dice loading” effect than that of the textualist majority.

What *Jones* demonstrates is that neither the contextualists or the textualists have a fool proof system. Any method of statutory interpretation that human beings devise has the danger of individuals bringing personal values into the ruling. The canons of statutory construction and respect for past precedent, however, have a tendency to slow down the

process and create a more thought-out and reasoned debate.

It is probably safe to assume that the former approach was so long-standing that the Legislature was aware that courts would fashion remedies when it drafted laws without them. The Legislature rarely enacts laws intending them to be treated as non-binding guideposts or standards. Presumably a textualist would note that when the Legislature intends to create non-binding standards it says so with words like “may” or “shall try to the extent possible” or other words stating that they are codifying goals rather than directives. All of these discussions, however, are irrelevant. Justice Corrigan is correct in stating that a majority of the Court will follow the principles of textualism in the future. Rather than adhering to old approaches, appellate lawyers need to be keenly aware of the approaches of the current court.

*Jones* is a good example of how textualism is considered more important to the current court than precedent. In the short term, lawyers hoping to prevail in the Michigan Supreme Court are advised to learn and apply this new doctrine. In the long term, the Legislature will need to learn to include everything in its statutes. Including statements of intent in legislative hearings, or merely acquiescing in judicial interpretations, is no longer sufficient.

## Endnotes

<sup>1</sup> 468 Mich 646, 664 NW2d 717 (2003).

<sup>2</sup> *Jones v. Department of Corrections*, 2001 WL 1545705, Mich.App., Nov 30, 2001

<sup>3</sup> See, e.g. *Stewart v Dep’t of Corrections*, 382 Mich 474, 170 NW2d 16 (1969); *In re Lane*, 377 Mich 695, 387 NW2d 912 (1966).

<sup>4</sup> While the Court held that mandamus remains a theoretical remedy to compel compliance with the statute, given current judicial backlogs, it would take more than 45 days to obtain a ruling on the mandamus petition.

<sup>5</sup> Maura D. Corrigan, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 Tex. Rev. L. & Pol. 261 (2004) (“*Textualism in Action*”).

<sup>6</sup> *Textualism in Action*, *supra*, at 263.

<sup>7</sup> Maura D. Corrigan and J. Thomas, *Dice Loading of Statutory Construction*, 59 N.Y.U. Ann. Surv. Am. L. 231, 232-233 (2003).

<sup>8</sup> Justice Weaver appears to be the notable exception to this doctrine within the textualist majority. In *Jones*, Justice Weaver stated that she accepted the reenactment rule. See also *people v. Hawkins*, 468 Mich. 488, 688 N.W.2d 602, (2003)

<sup>9</sup> *Id.* at 265 (quoting *Donejeski v Alpena Power*, 596 N.W.2d 574, 581-82 (Mich. 1999)).

<sup>10</sup> See, e.g. M. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 906-50 (1986) (stating that courts have broad power to create remedies based upon statutes, jurisdictional grants, and the federal Constitution).

<sup>11</sup> Courts must “avoid any construction which would render any part of the statute surplusage or nugatory.” *People v. Borchard-Ruhland*, 460 Mich. 278, 285; 597 NW2d 1 (1999).

<sup>12</sup> *Morrissey v Brewer*, 408 US 471, 92 S Ct 2593, 33 LEd2d 484 (1972).

Stuart G. Friedman is a past president of the Prisons and Corrections Section, an appellate attorney, and an avid *contextualist*.

## MICHIGAN TIME LIMITS ON FILING OF GRIEVANCES ARE NOT TO BE STRICTLY APPLIED

By Dan Manville

In *Thomas v. Woolum*, 337 F.3d 720 (6<sup>th</sup> Cir. 2003), the prisoner alleged that he was beaten by Officer Woolum while handcuffed and that he suffered serious injuries. Thomas filed a grievance against Woolum and mentioned in it that he saw other officers observe the beating. He did not provide their names since he did not know who they were. The appeal to the second level of the grievance process was denied as being untimely.

Thomas then filed suit in state court against Woolum and two John Does who observed the beating

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alleging that they were liable for not protecting him. At this time, Thomas obtained a prison record that listed three officers who likely observed the incident. The state court suit was dismissed without prejudice and Thomas filed a complaint in federal court suing Woolum and naming the other three officers as defendants. The district court dismissed the case against the additional three named officers since Thomas had not exhausted his remedies against them.

When Thomas appealed, defendants argued that he had not filed his first step grievance until after the 30-day time period to file a grievance had expired. The three added defendants argued that Thomas's grievance was against Woolum and not them so that, even if the original grievance was timely filed, they were not named in that grievance.

The Sixth Circuit rejected the argument that dismissal was required since Thomas had not filed within the 30 days allowed by a prison rule. Relying on United States Supreme Court cases discussing exhaustion of administrative remedies in Title VII and ADEA cases, the court found that a state could not use its procedural requirements to bar the processing of an untimely grievance and then claim in court that the prisoner had not exhausted the grievance process. The Court went on to state that Thomas had done all that is required by the Prison Litigation Reform Act. He had filed his grievance and at each level when it was denied as being untimely he had taken it to the next level. Thomas had given prison officials an opportunity to resolve the grievance. The Court stated at 733:

*Thomas gave the state officers an opportunity, which is all that is required. We may not penalize Thomas simply because the prison does not wish to hear grievances more than thirty days after the incident. See Oscar Mayer, 441 U.S. at 761, 99 S.Ct. 2066. We therefore hold that a prisoner who has presented his or her grievance through one complete round of the prison process has exhausted the available administrative remedies under 42 U.S.C. § 1997e(a), regardless of whether the*

*prisoner complied with the grievance system's procedural requirements.*

The Court then found that Thomas had not exhausted the grievance process against the three defendants he had not mentioned in his grievance. It rejected Thomas's argument that his cooperation with the internal investigation satisfied the grievance process. The Court stated that the PLRA, 1997e(a), is directed at the prisoner exhausting available administrative remedies. Sixth Circuit case law requires that a prisoner state the name of the individual being grieved.

## **EXHAUSTION REQUIRES ONLY FAIR NOTICE OF PRISONER'S CLAIMS**

To pursue a lawsuit under 42 U.S.C. §1983, a prisoner must first exhaust available administrative remedies. Thus a Michigan prisoner must seek relief through all three steps of the MDOC grievance process. The prisoner must both describe the alleged mistreatment or misconduct and connect it to the named defendant at Step I. However, the Sixth Circuit Court of Appeals held in *Burton v Jones*, 321 F.3d 569, 575 (CA 6, 2003), that the prisoner does not have "to allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory. It is sufficient "that a prisoner's Step I problem statement gave prison officials fair notice of the alleged mistreatment or misconduct..." The prisoner may include additional factual details at Step II or III to support an appeal, so long as the grievable issue was alleged at Step I. Thus, where the prisoner asserted at Step I that the defendants had been deliberately indifferent to his medical needs because he had previously filed a lawsuit against them, his First Amendment claim of retaliation was adequately exhausted.

The "fair notice" standard, the Court observed, serves the purposes of the exhaustion requirement. It gives prison officials the first opportunity to take corrective action and it facilitates development of an administrative record for judicial review if litigation does occur.

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## COURT MAIL IS LEGAL MAIL

### Damages and Fees Upheld in Legal Mail Opening

By Dan Manville\*

The Sixth Circuit has held that mail from a court is legal mail entitled to First Amendment protection, so that prison officials had to open it in the presence of the prisoner to check for contraband. The Court reached the opposite result as to mail from a legal organization, such as the American Bar Association (ABA), and from county clerk offices. See: *Sallier v. Brooks*, 343 F.3d 868 (6<sup>th</sup> Cir. 2003).

In 1994, prisoner Sallier made a written request that mail from attorneys and courts be opened in his presence. Over the next year, the defendants opened 20 different pieces of mail identified as being from attorneys, courts, county clerk offices and from the American Bar Association. Sallier did not allege that his legal mail had been read by the defendants but only that it had been opened outside of his presence. A jury returned a favorable verdict on 13 of his 20 claims. It awarded \$750 compensatory and \$250 punitive damages as to each claim, for a total of \$13,000 in damages.

On appeal, the Court held that “[n]ot all mail that a prisoner receives from a legal source will implicate constitutionally protected legal mail rights. Indeed, even mail from a legal source may have little or nothing to do with protecting a prisoner’s access to the courts and other governmental entities to redress grievances or with protecting an inmate’s relationship with an attorney.” *Id.* at 874. The Court found that a letter from the ABA was not legal mail since the organization, a support group for attorneys, does not represent clients and the letter was not stamped to indicate that it was to be treated as legal mail and opened only in the presence of the prisoner. The favorable jury finding on this one claim was set aside by the court.

The Court next dealt with mail from the County Clerk and/or Register of Deeds offices. Since the envelopes from these offices did not indicate that they contained privileged mail and since the records these offices maintain, such as birth certificates,

marriage licenses and automobile titles, are not confidential, the Court held that prison officials could treat this mail as regular mail and open it outside the prisoner’s presence. *Id.* at 876. The Court then set aside favorable jury findings as to five of the original thirteen awards.

The Court then addressed whether six letters from different courts, not containing a special designation on the envelopes, were legal mail and had to be opened in the prisoner’s presence. The Court acknowledged that most mail from a court would consist of documents that are part of the public record and, therefore, would not contain confidential information. However, it “could imagine a situation in which a court corresponded with a prisoner before filing the prisoner’s complaint because some administrative requirement, such as submitting an *in forma pauperis* affidavit, paying the filing fee, or signing the complaint, has not been met. In that situation, the complaint is not yet a public record, and prison officials have no legitimate penological interest in reading the correspondence before it.” Thus the Court held that mail from a court was legal mail and had to be opened in the presence of the prisoner. *Id.* at 877.

The Court then considered defendants’ argument that they were entitled to qualified immunity as to these six claims since it was not clearly established in 1994 that mail from courts was to be treated as legal mail. The Court stated that prior to 1994 it had struggled with what was included in the definition of legal mail. In fact, one unreported decision had held that mail from a court was not legal mail. Further, the Court stated: “at the time Sallier’s mail was opened, the Seventh Circuit had stated in widely-quoted dicta that mail from courts was not ‘legal mail.’ [citation omitted] Nothing from the Supreme Court, or in our circuit precedent, or from our sister circuits at the time clearly established that mail from a court was protected as legal mail.” *Id.* at 879. Therefore it granted qualified immunity as to these claims.

This then left only three favorable findings by the jury – those dealing with mail from attorneys. The court affirmed the jury findings as to Sallier’s First Amendment rights being violated when the defendants opened three different letters from attorneys.

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Since only three favorable verdicts had survived appellate review, the Court reduced Sallier's damage award to \$3,000 (\$750 compensatory and \$250 punitive for each claim). Since the Prison Litigation Reform Act provides that attorney fees cannot be more than 150 per cent of the damages awarded a prisoner [42 U.S.C. section 1997e(d)(2)], it also reduced the original award of fees to \$4,500.

\*The author represented the plaintiff in this case.

## CONSTITUTIONAL VIOLATIONS IN PAROLE PROCESS MAY SUPPORT CIVIL RIGHTS ACTION

In *Dotson v Wilkinson*, 329 F3d 453 (6th Cir. 2003), the Sixth Circuit en banc held that prisoners may challenge the process that led to denial of parole under 42 USC 1993, rather than habeas corpus, provided they are seeking a new parole hearing rather than immediate release. The court rejected the state's claim that the 1983 suit was barred by *Heck v Humphrey*, 512 US 477 (1994) (A prisoner's claim for damages under 42 USC 1983 for harm caused by actions whose unlawfulness would necessarily imply invalidity of the fact or length of confinement is barred unless the prisoner can prove that he has already prevailed on a claim that the conviction or sentence is invalid.)

The court in *Dotson* said, "where a prisoner does not claim immediate entitlement to parole or seek a shorter sentence but instead lodges a challenge to the procedures used during the parole process as generally improper or improper as applied in his case, and that challenge will at best result in a new discretionary hearing the outcome of which cannot be predicted, we hold such a challenge cognizable under section 1983." 329 F3d, 472.

On March 22, 2004, the United States Supreme Court granted certiorari in *Dotson*. The questions presented are: "(1) When prisoner invokes section 1983 to challenge parole proceedings, does *Heck v Humphrey's* favorable termination requirement apply in case in which success by prisoner on claim would result only in new parole hearing and not necessarily guarantee earlier release from prison? (2) Does federal court judgment ordering new parole hearing "necessarily imply the invalidity of" decision at

previous parole hearing for purposes of *Heck v Humphrey*?" *Wilkinson v Dotson*, No. 03-287, 74 CrL 2197.

## SUPREME COURT DOES NOT REQUIRE DISCIPLINARY GUILTY FINDINGS TO BE SET ASIDE PRIOR TO BRINGING LAWSUIT

By Dan Manville

In *Muhammad v. Close*, 124 S.Ct. 1303 (2004), the prisoner filed a lawsuit alleging that prison staff had written a threatening behavior misconduct to retaliate against him for prior lawsuits and grievances against that staff. The hearing officer found Muhammad not guilty of the threatening behavior but guilty of the lesser included offense of insolence. In his suit, Muhammad alleged that if he had been charged with the offense he had actually committed, and not a fabricated one, he would not have been placed in segregation pending the disciplinary hearing.

The district court dismissed the case for failure to provide sufficient evidence of retaliation. Muhammad appealed. Instead of affirming upon the grounds found by the district court, the Sixth Circuit Court of Appeals applied its earlier ruling in *Huey v. Stine*, which held that if a favorable court's decision on a claim of the prisoner would imply that the disciplinary guilty finding was wrongly decided, the prisoner had to have the misconduct guilty finding set aside before the civil rights lawsuit could proceed.<sup>1</sup>

The *Muhammad* Court reversed for two reasons. First, it found that the Sixth Circuit had committed a factual error by assuming that Muhammad had sought expungement of the insolence guilty finding and the punishment. The Supreme Court stated that nowhere in his complaint did Muhammad challenge his conviction for insolence or the punishment imposed. *Id.* at 1305.

The second reason for reversing was that the Sixth Circuit erred in requiring the setting aside of the disciplinary guilty finding prior to bringing a "suit challenging prison disciplinary proceedings." *Id.* at 1306.<sup>2</sup> The Supreme Court found that Muhammad's lawsuit did not "seek a judgment at odds with his [criminal] conviction or with the State's calculation of

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time to be served in accordance with the underlying sentence.”<sup>3</sup> *Id.* at 1306. The *Muhammad* Court stated that since no claims were raised in the complaint that would require the filing of a habeas action, such as seeking return of lost good time or shortening of a criminal sentence, the Sixth Circuit was wrong in requiring the setting aside of the disciplinary conviction.

The decision in *Muhammad v. Close* is applicable as follows when a prisoner wishes to challenge a misconduct guilty proceeding or the sentence imposed.

1. If the prisoner **did not** lose good time as part of the disciplinary guilty proceeding, the prisoner **does not** have to get the disciplinary conviction overturned in a state forum or by federal habeas corpus prior to bringing a federal lawsuit. The prisoner can bring a Section 1983 lawsuit as soon as administrative remedies are exhausted.

2. If the prisoner **did** lose good time as a result of the disciplinary guilty finding, the prisoner cannot bring a Section 1983 suit to challenge the guilty finding until after the disciplinary conviction is overturned, either in a state administrative proceeding, in state court, or by federal habeas corpus after state remedies are exhausted.

3. If the only disciplinary punishment imposed is placement in segregation, the prisoner **does not** need to have the guilty finding set aside. The prisoner can bring a Section 1983 lawsuit once the administrative remedies are exhausted. However, a prisoner will be required to show that the disciplinary conviction deprived him of a liberty interest or imposed an “atypical and significant hardship.”

4. *Muhammad* does not change the requirements that in **all** Section 1983 lawsuits, the prisoner has to exhaust available administrative remedies before bringing a Section 1983 lawsuit, **and** is required to show that the disciplinary conviction deprived the prisoner of a liberty interest, or either imposed an “atypical and significant hardship” on the prisoner, or caused the prisoner to serve more time in prison.

## Endnotes

<sup>1</sup> 230 F.3d 226 (6th Cir. 2000) (prisoner filed a Section 1983 action seeking to challenge a sentence of administrative

detention). In *Huey*, the Sixth Circuit held that requiring the setting aside of the guilty finding “applies even to lawsuits challenging only the conditions of prison confinement where the relief sought by the inmate would require the court to ‘unwind the judgment of the state agency.’” *Id.* at 230. (“*Heck* generally does not bar Eighth Amendment claims, but if the claim is founded solely on an allegation that a corrections officer falsified a disciplinary report, then [the misconduct must be set aside before a claim can be stated].”).

<sup>2</sup> The *Muhammad* Court stated that its previous rulings limited the situations where a favorable result from the civil rights action “could affect credits toward release based on good-time served.” *Id.* at 1304.

<sup>3</sup> Contrary to the Sixth Circuit’s statement that *Muhammad* had sought expungement of the misconduct charge, the Supreme Court stated that “the Magistrate expressly found or assumed that no good-time credits were eliminated by the prehearing action.” *Id.*

## UPDATE ON MAJOR CASES: VISITING RULES, LIFER RESENTENCING, PAROLE APPEALS

During the last year, higher courts have decided several cases of major interest to prisoners that were discussed in earlier issues of **The Forum**. In every case, the prisoners lost.

In *Bazzetta v McGinnis*, 286 F.3d 311 (2002), the Court of Appeals for the Sixth Circuit upheld the District Court’s findings that sweeping changes to MDOC visiting rules made in 1995 violated the First, Eighth and Fourteenth Amendments. Among others, the plaintiff class of prisoners and prospective visitors challenged rules that prohibited visits by minor siblings, minor nieces and nephews, former prisoners who are not immediate family members and biological children when parental rights were terminated voluntarily. Plaintiffs also challenged a rule that allowed the MDOC director to permanently restrict all visits to prisoners found guilty of two or more misconducts involving substance abuse.

The MDOC appealed. In *Overton v Bazzetta*, 123 S Ct 2162 (2003), the U. S. Supreme Court reversed the Court of Appeals. In a unanimous opinion, it held that under the four-factor test of *Turner v Safley*, 482 U.S. 78 (1987), the infringements on Plaintiffs’

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First Amendment right to intimate association caused by the restrictions on classes of visitors are permissible. It also found that permanent visiting restrictions for substance abuse, which are reviewable after two years, are not cruel and unusual punishment.

Several points about the decision are important to note. First, the Court expressly declined to hold that any right to intimate association is terminated by incarceration and assumed that a First Amendment right existed for purposes of its decision. Second, the MDOC had already complied with the lower court order to allow visits by minor siblings and that restriction was no longer at issue. Third, the Court noted that a permanent visiting ban might violate the Eighth Amendment if imposed arbitrarily on a particular inmate or for much longer than two years. Finally, the Supreme Court had not granted certiorari on the question whether the manner in which the MDOC imposed permanent visiting restrictions violated the Fourteenth Amendment. The procedural due process issues are the subject of ongoing litigation as plaintiffs seek to enforce the District Court's original conditions for imposing permanent bans. No such bans are being imposed in the interim.

In *People v Louis Moore*, the Court of Appeals had held in an unpublished opinion that a trial court may resentence a parolable lifer when the parole board's denial of release on the theory that "life means life"

undermines the original expectations of the sentencing judge. The Supreme Court reversed in *People v Moore*, 468 Mich 573 (2003), holding that where a sentencing judge understood that the defendant would become eligible for parole but that actual release was up to the board, the judge's failure to accurately predict the actions of the parole board does not constitute a misapprehension of the law that renders a sentence invalid. Other lifers' cases at various stages of appellate review claim that the board's policy violates the constitutional prohibition against ex post facto laws and renders guilty pleas involuntary. These claims have yet to be decided by any court.

In *Morales v Michigan Parole Board*, 206 Mich App 29, lv den, 470 Mich 885 (2004), the Court of Appeals rejected arguments that, although the right of prisoners to appeal parole denials under the Corrections Code had been abolished, a version of the right still existed under the Revised Judicature Act. The Court also held that the parole board may use the presentence report to reach different conclusions about the facts of the prisoner's offense than had been reached in scoring the sentencing guidelines. As a result of the Court's decision, except in the extreme and unlikely circumstances where habeas corpus or mandamus might lie, prisoners have no means available to seek judicial review of parole denials and the statutory constraints on parole board decision-making are unenforceable.

## MANVILLE AUTHORS MANUAL FOR LITIGATING PRISON DISCIPLINARY ISSUES

Dan Manville, incoming chairperson of the Prisons and Corrections Section, has published a new manual that will be of immense help to prisoners. The **Disciplinary Self-Help Litigation Manual (DSHLM)** covers all aspects of the disciplinary process, including a detailed discussion of the draconian changes made in these procedures by the United State Supreme Court in *Heck v Humphrey*, *Edwards v Balisok* and *Sandin v Connor*.

Manville, who co-authored the well known **Prisoner's Self-Help Litigation Manual** (now in its third edition), discusses how prisoners should prepare for and conduct a disciplinary hearing. The DSHLM provides guidance in determining whether the disciplinary punishment created an "atypical and significant hardship" requiring federal Due Process protections at the disciplinary hearing and, if so, what procedural protections were required. The Manual sets forth the steps prisoners must take to preserve a disciplinary guilty finding for administrative appeal and court litigation. Each chapter cites hundreds of cases that can assist the prisoner in preparing pleadings for filing a challenge to a disciplinary guilty finding.

The 350 page paperback is available from: Daniel E. Manville, P.C., P.O. Box 20321, Ferndale, MI 48220. Ph – (248) 341-1201; Fax – (248) 341-1204; E-mail – [DSHLM@comcast.net](mailto:DSHLM@comcast.net). The price, including shipping, is \$34.95 for prisoners and \$64.95 for non-prisoners.

are often reluctant to refer many of these people to BFMHS staff because they either view the prisoner as manipulative, or they are fearful they will be criticized as being naive or inexperienced by the BFMHS staff. If they do refer these prisoners to BFMHS staff, they run a high probability of having the prisoner returned, diagnosed as a manipulator, malingerer, or antisocial personality disorder, thus beginning a cycle that often repeats itself during incarceration many times. If a prisoner is so deteriorated and psychotic that his antisocial features are suppressed or overwhelmed by the psychosis, there is a chance he may be admitted to inpatient care for a short period, generally with a tentative or “provisional” diagnosis of the mental disorder. If, however, he starts to act out or not cooperate fully with mental health staff, he runs a high risk of being undiagnosed as mentally ill and re-diagnosed as a malingerer personality disorder.

### **Mislabeling Mentally Ill Prisoners as Manipulative and Undiagnosing**

Why do mislabeling and undiagnosing happen? A combination of factors seem to contribute to the enduring phenomenon of ignoring mental illness in personality disordered people. In prison settings, there are many prisoners with significant aspects of antisocial personality disorder. Long term patterns of conflict with social norms and laws, impulsiveness, as well as disregard for the rights of others, are part of the diagnostic criteria used to establish the condition. Graduate schools for psychology and psychiatry rarely prepare students for a career in corrections, and prisons are still regarded as an undesirable place to work by many mental health professionals. Thus, many mental health staff who go to work in prisons are unprepared for dealing with an aggressive and disturbed clientele who are often manipulative, deceitful, will malingering, are disruptive, are sometimes assaultive, threatening, and sometimes also are mentally ill! As Kupers (1999) has repeatedly stressed, mentally ill people who are not receiving needed treatment will sometimes exaggerate their symptoms and manipulate to get access to treatment, an adaptive means of drawing attention to their plight. This frequently happens in segregation units where access to mental health staff is very limited. This does not mean these prisoners are not mentally ill, but unfortunately, this type of manipulation obscures their need and they are often denied treatment. It is actually not uncommon at all for a person to be mentally ill or suicidal and to manipulate! The manipulation is there and is recognized by staff, but is inappropriately allowed to mask the underlying psychosis or other severe mental disorder and is often incorrectly used by prison mental health staff as a diagnosis.

Another problem that occurs is related to the formal MDOC new employee training, which, as is typical with most corrections departments, overly stresses the manipulative, antisocial characteristics of inmates in general. While it is important to stress this to untrained new staff, and to emphasize the “us” versus “them” line that cannot be crossed, the MDOC’s over-emphasis dehumanizes the prisoner population and essentially equates any legitimate act of compassion or feeling of empathy, with weakness, naiveté, risk to self, and/or endangering the safety and security of other staff and the institution. The effects of this training are profound and can directly affect the clinical practice of mental health staff. Many experienced mental health staff, including supervisors and administrators, continue to impose this philosophy on new employees, who then risk censure and ostracism from colleagues who often will view them as naive, inexperienced and a threat to the status quo if they violate this norm.

This has been described elsewhere (Robinson and Walsh, 1990) as “Jail House Syndrome” (JHS), and in state prison systems it can become very controlling. In fact, it sometimes can reach the level of not too subtle threat by custody or administrative staff that if the mental health employee is too much of a “bleeding heart” in dealing with disruptive prisoners, that employee is endangering staff safety and thus might not be able to count on staff support if he/she is in danger of being assaulted or taken hostage. I believe this implied threat, implicitly understood early by most staff, enters into the phenomenon where many mentally ill prisoners

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who assault staff are found responsible for their behavior by prison mental health staff, and thus become eligible for full disciplinary sanctions, rather than “getting away with” that behavior because of mental illness. For many mental health staff, compliance becomes a matter of survival in the prison, subtly translated into either conform, leave, or face ongoing conflict with other staff. What we are characterizing as JHS is a perceptual set and predisposition on the part of mental health staff to view most prisoners as manipulative and deceptive when asking for mental health services, and that is developed and reinforced over time by the prison environment.

One last factor is briefly worth examining in considering why it is so difficult to properly deal with mentally ill people in prison, especially when they violate rules and act out, i.e., the inherent nature of the prison environment itself. In this regard, it is easy to overlook the powerful and shocking effects on people of the need to conform to authority, which was uncovered in some of the great social psychology research of the last half of the twentieth century, in an effort to try to understand the atrocities and crimes against humanity committed with the knowledge, if not complicity, of whole nations. Thus, e.g., the unsettling findings of Milgram (1974) from a series of experiments on the extent to which ordinary people will go in terms of their obedience to authority, even if it means subjecting others to injury, also help to explain the development of the JHS response set among prison staff. This is escalated in the rigid, highly structured, para-military environment of prisons, where perceived deviations from the norms are punished swiftly, whether they be by inmate or staff. The incredibly dehumanizing nature of these environments was dramatically demonstrated by the Stanford Prison Experiment (Haney, Banks & Zimbardo, 1973), which revealed that even in a simulated prison environment, many otherwise normal and reasonable people, when placed in roles as guards and custodians of people identified as prisoners, could very easily become negative, hostile, dehumanizing and aggressive. Also, many of those placed in prisoner roles became very depressed, anxious, intensely angry, and developed other symptoms of emotional disturbance. The point is that the social, psychological and physical characteristics of the prison environment itself takes a profound toll on people, prisoners and staff alike, and those at increased risk because of mental illness or pre-existing psychological vulnerabilities are going to be greatly influenced by it in a very destructive way.

### **The Plight of the Mentally Ill in Prison**

People with mental illness and severe mental disorders face special problems in prison because many of the symptoms they exhibit are exacerbated by the general prison environment and its demands for strict rule conformity. Generally, actively mentally ill people do not follow, understand or adhere to rules very well, and those wishing to gain their compliance need to be patient and supportive in dealing with them. Confrontation, threats and punitive approaches seldom work well, and lead to more conflict with prison rules, corrections officers and prison administration. Disciplinary sanctions eventually ensue, and without meaningful mental health intervention, can lead to increasingly long stays in disciplinary, and eventually administrative, segregation. This is why early intervention and placement in secure treatment settings in prison helps manage behavior that could otherwise easily escalate into major confrontation.

Another source of pressure and stress on the mentally ill comes from other inmates in the general population who quite openly express their dislike and sometimes fear of living with people they stigmatize as “bugs” and “crazies.” In addition to not having any social support or affiliation with non-mentally ill prisoners, many of these people, depending on the behavior they are exhibiting, are at increased risk of assault by other prisoners as a desperate means of getting them moved out of the housing unit. For many non-mentally ill prisoners trying to “do their time,” there is little tolerance or empathy for people whose mental illness is manifest in openly paranoid behavior, hallucinations, delusional beliefs and other bizarre characteristics.

If not accepted as mentally ill by the prison’s mental health care system, many of these prisoners end up placed in segregation units, where the punitive and sensory deprivation characteristics of the environment

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serve to accelerate their psychological deterioration and mental breakdown. Many experts agree that the confinement of large numbers of mentally ill prisoners in segregation units is a national crisis, which has evolved as part of the very punitive and non-rehabilitative approach to managing these institutions (e.g., Kupers, 1999; Haney, 1998; Grassian, 1983; Toch, 1992, Toch & Adams, 2002). Further, many prisoners who may not have been mentally ill when they were placed in long term administrative segregation, eventually decompensate and break down under the very dehumanizing and socially isolated conditions they are subjected to in these environments. Toch and Adams (2002) have noted that many of the mental disorders and pathological behaviors that occur in these units are iatrogenic, i.e., specifically induced by the conditions of confinement that the people housed in these units are subjected to as a means of control. Instead, the conditions of isolation, stimulus deprivation, 23 hour or more per day cell confinement, sleep disruption/deprivation, very infrequent, limited, non-contact visitation, loss of most prisoner privileges, constant exposure to poorly ventilated, stagnant air, full restraints for all out of cell movement, small caged solitary exercise areas with very limited access, and virtually no other contact with the outside world except by mail, all designed to help eliminate disruptive behavior, actually end up causing more disruptive behavior by contributing to emotional breakdown in these prisoners. Prolonged exposure to such conditions tend to cause prisoners to engage in further acting out and rule violations, guaranteeing that their chances of leaving segregation before their sentence ends will be minimal or non-existent.

SUMMARY REPORT, PRISONER E-02

This 29 year old white male was originally incarcerated for a non-violent property offense approximately 10 years ago, and was originally placed in a minimum (Level I) custody facility. He has an extensive history of mental illness, and states he had been institutionalized much of the time since age 8. He says he saw "the devil" around that time and was hearing voices which he tried to get rid of by inhaling gasoline fumes. At the time of interview he was housed in the administrative segregation unit of a Close Security (Level IV) Michigan prison. Early in his incarceration his behavior began to deteriorate and he started to receive misconduct citations, usually for property destruction or being "out of place". As his security level increased (on several occasions to Maximum Security) his mental state worsened and he began cutting himself and engaging in self-mutilative behavior, including head banging, according to him, to make the "voices" in his head go away. He also became increasingly assaultive. Prison staff are aware of his mental illness, and have variously diagnosed him as Schizophrenia, Residual type, Schizoaffective Disorder, Mood Disorder and Bipolar I Disorder with Psychotic Features. Over the course of his incarceration he has been prescribed both antipsychotic and antidepressant medications. They have also "undiagnosed" him several times. Most recently a psychiatrist at HVC told him he was not mentally ill but a manipulating self-mutilator.

When interviewed, this man was agitated with rapid, sometimes disconnected speech and presented symptoms of serious depression high anxiety and distractibility. He stated he was afraid of completely losing his mind, as he hears voices that are a mixture of his fathers' and another voice which he characterized as "satanic," threatening to kill him. He shifts subjects rapidly, and says he is very scared because corrections officers, and sometimes other inmates, are trying to hurt him. He accuses the officers of frequently "setting me up" for misconduct so they can keep him in segregation and continue tormenting him. He admits that he has cut himself to get attention and help, as it is often "the only way to see a psych," but that instead he gets punished for it by being placed in restraints and isolated even further in so-called "observation" cells. This also happens when he is feeling genuinely suicidal, and he is learning not to tell staff if he feels like killing himself. Other times he says he hurts himself in response to voices telling him to do so.

This man states that he is receiving some mental health treatment from an "outpatient treatment team," but that his contacts with them are episodic and brief. His level of functioning at the time of interview was impaired, and he demonstrated evidence of a psychotic process. He is quite paranoid, and believes that the guards are plotting to hurt him. He also states they have threatened to "spit in my food," and repeatedly call him names. He frankly stated "I'm scared. I need help."

Yet, the records I was able to review show that he has continued to be placed in segregation isolation, sometimes bouncing back and forth between disciplinary and treatment units. Since his incarceration he has accumulated over 155 disciplinary citations, which have progressively increased from property type violations to assaults on staff. His confinement in segregation isolation, whether for punishment or alleged "treatment" purposes, has not worked to help his mental illness nor reduce his assaultiveness, but instead, has actually made it worse.

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It has long been recognized that prolonged exposure to the stimulus deprivation conditions of solitary confinement produces mental illness in many prisoners. As early as 1823, officials at the New York State Prison at Auburn experimented with the solitary confinement model of Pennsylvania's Eastern Prison with 80 "hardened convicts" and found that following 2 years of this deprivation, many of those men became "insane" and suffered other illness (Allen & Simonsen, 1995), although that did not stop Auburn from using it as a punishment for rule violators. In Michigan, the fact that lengthy placement in solitary confinement results in severe mental illness for many prisoners so placed was known as early as 1861, when, following placement of 20 prisoners in the then new solitary confinement building at the Jackson State Prison in 1857, 45% of them were found to have become "insane" (MDOC's FYI Newsletter, 2003).

Similar effects have been observed and identified in other primates kept in isolation in laboratory cages. Reinhardt (2002) reported the results of his experience as a research veterinarian with over 700 rhesus macaques kept locked in small, solitary cages. He found that most of these monkeys developed a variety of stereotypical, abnormal behaviors, ranging from compulsive body swaying and limb biting, to smearing feces on their cage walls. He reported other research accumulated from observation of approximately 15,000 solitary caged macaques found over 10 % of these animals became so distressed by their conditions of isolated confinement that they engaged in self-mutilation! Sound familiar? It is the same behavior observed and reported in hundreds of prison segregation units across America. Significantly, Reinhardt also reported that efforts aimed at ending the brutal way these monkeys have been confined in isolation has been undertaken by the U.S. Department of Agriculture, the National Research Council and many animal welfare organizations. But what are we doing to help human beings kept in long-term isolation in our prison segregation units? Appropriate prisoner control, safety and security can be readily achieved and maintained without resorting to the extreme brutality of long term confinement in administrative segregation units as currently practiced. Yet, many states, including Michigan, continue to use it as a method of both punishment and control of disruptive prisoners, often regardless of the effects on their mental state.

Solitary confinement today is admittedly different in some respects from that of the 19th century, in that prisoners are not literally locked up in total darkness and fed just bread and water. But the differences begin to end there. Disruptive prisoners may have their solid cell door slots closed, windows, if they have them, blocked, their water cut off, and if they are considered a possible suicide risk, they may end up tied down in 4 or 5 point restraints to either a metal bed or a concrete slab in a so-called "observation cell," which in most cases is experienced by the men and women as even more punishing than regular segregation cell placement. Additional restrictions may include the provision of food in the form of a loaf usually created from combining the contents of a regular meal into one single mass, termed either "nutra-loaf" or "food loaf," and generally described by prisoners as horrible in taste. In place of confinement in total darkness, there often is confine

## **The SHU Syndrome**

Many prisoners who experience long term placement in segregation-type confinement have been found to develop a distinct, psychotic-like symptom complex that has been referred to as the Security Housing Unit (SHU) syndrome (Grassian, 1983; Kupers, 1999). While usually described in relation to confinement under conditions of extreme control associated with so called "Super Maximum Security" Prisons (e.g., Pelican Bay, Wabash Valley, Marion, etc.), these conditions appear in prisoners kept in long term, isolated segregation status in non-super maximum security prisons as well. Generally, the symptom complex these prisoners develop may not precisely fit currently established, specific DSM-IV categories, but they present mixed components of severe mental disorders manifest in anxiety, mood, psychotic and organic-like conditions. Specifically, Grassian (1983) who identified the syndrome, found the presence of massive free-floating anxiety, hyper-responsiveness, hallucinations, derealization, impaired concentration, impaired memory functions, acute confusional states, dissociative features, aggressive fantasies, persecutory ideation, delusional

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beliefs, motor excitement, violent destructive and/or self-mutilative outbursts, in prisoners subjected to long term solitary confinement. Not every prisoner placed in solitary confinement will develop all of these symptoms, but in varying degrees, many who do not become fully psychotic exhibit an alarming number of them.

Common to prisoners experiencing the SHU Syndrome is what Grassian described as a “rapid reduction” of many of these symptoms when these prisoners are removed from isolation. This sudden recovery may partially help explain why some BFMHS mental health practitioners will confuse what is happening with malingering, after they have examined a person referred by PSU staff for exhibiting some psychotic-like behavior, but who suddenly appears to be functioning much better than the referral source description. In these cases, mental health treatment is still critical, as many of these people will exhibit lasting effects of the trauma they experienced in the isolated confinement of segregation, and will need meaningful follow-up after-care to prevent relapse. Instead, under the current MDOC disruptive prisoner management system, they can expect to be returned to the segregation unit from which they were referred to BFMS staff, and the process of cycling between segregation, deterioration, acting out, mental health referral, and return to segregation starts all over again.

## **What Can be Done**

There are many excellent recommendations discussed in detail by Kupers (1999) that anyone interested in improving mental health care in our prisons should study and bring to the attention of the appropriate policy makers. While there are many promising approaches to diverting from prison the mentally ill who run afoul of the legal system, such as mental health courts, I will concentrate on reform of the manner in which the mentally ill in Michigan prisons are treated. Obviously, the problem is deeply rooted in our social values and priorities, and ultimately must begin with the way we treat the mentally ill in our community as a whole, which has usually been quite negligent.

Based on my experience of 25 years with the MDOC, I believe that many changes can be made that are not unusually costly, nor will they undermine or weaken the safety and security of staff or the institutions. Some of these include the following:

1. Intake screening must deal directly with the early identification and tracking of not just currently mentally ill prisoners, but also those with prior histories of mental illness and/or serious mental disorder, as they are at increased risk that their condition will exacerbate as a consequence of the “normal” stress, conflict and structure of the prison environment.
2. When “at risk” prisoners begin to exhibit significant adjustment problems, often first manifest by lesser, non-assaultive rule violations, mental health assessment, intervention and treatment should start early in the process, as a preventive measure for reducing the probability of the prisoner’s condition deteriorating and the acting out becoming more severe.
3. If major disciplinary action is contemplated against an “at risk” prisoner, a thorough mental health evaluation, including current psychological testing, should be undertaken to determine if treatment intervention is warranted. Whenever possible, if staff or other prisoner safety is not an issue, placement in a secure treatment setting, not punitive detention, should be initiated.
4. More focused mental health staff training should be implemented, and should include understanding the psychological effects of long term segregation confinement, recognizing the presence of mental illness/severe mental disorder when co-existing with serious personality disorder, proper diagnostic protocol for assessing

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malingering (including appropriate psychological testing), the inappropriateness of dismissing symptoms based on the presence of manipulation, and assessment of atypical or non-traditional manifestations of mental illness.

5. The practice of indefinitely confining prisoners to administrative segregation should be ended. Instead, this level of confinement should be used only long enough to bring specific dangerous behaviors under control. Stricter guidelines and protocols for this placement must be developed and enforced, subject to outside or independent review whenever exceeding the guidelines is believed necessary. Most segregation, when necessary as a specific sanction, should be limited to a fixed period of disciplinary segregation placement, and the prisoner must be carefully monitored for the development of signs of significant psychological decompensation during that period.

6. Improve the quality of mental health assessment of segregation prisoners by requiring a thorough evaluation in a private office. End the practice of allowing brief “cell door interviews” by mental health staff to substitute for such assessments, and the convenient but inadequate use of checklists in place of full narrative evaluations.

7. Stop the rampant practice of undiagnosing previously diagnosed mentally ill prisoners, and require strict, comprehensive protocol for changing a diagnosis, that includes appropriate psychological testing and full explanation and justification of the change. Part of the protocol should include supervisory review, and review and input from the practitioner who made the suspected “incorrect” diagnosis, with provision of appropriate, remedial training for either party found to have made the actual incorrect diagnosis.

8. End the practice of automatically returning a mentally disordered prisoner back to segregation following referral and treatment of that person in a mental health treatment unit. Only under the most extreme circumstances where a prisoner is a clear risk to other people should this option be available, and then only under very strict time limitation and supervision by security and mental health staff.

9. Create a significant number of high security level residential treatment beds in most security level prisons, especially close and maximum levels.

10. Stop placing mentally ill prisoners in administrative segregation completely. If higher level security is needed, then place them in a treatment unit in an appropriate security level prison.

11. Take action to reduce the more psychologically destructive aspects of solitary confinement in segregation by allowing more activity, social interaction and privileges. Also, provide psychotherapy in a secure but out-of-cell area in the unit. This can be accomplished without compromising safety and security in these units.

12. Remove the Self-Mutilator Prevention Unit (SMPU) from administrative segregation and re-define it as a treatment, rather than or in addition to, a behavior control program.

13. Provide anger management training to prisoners placed in any segregation status longer than 30 days, as well as supportive psychotherapy services.

14. End the practice of keeping some prisoners in segregation status until their actual discharge from their sentence and release back to the community. A security level “step-down” process should be provided for all prisoners prior to their release, as a critically needed psychological decompression process.

15. Relax the current, Draconian restrictions on prisoner visitation, allowing more frequent visits and an expanded visitor list. The basic, humanizing contact and emotional support derived from frequent family contact goes a long way in helping prisoners cope, adapt to incarceration, and socially and emotionally prepare for eventual release back into society. These contacts are critical for improving the treatment of the incarcerated.

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ated mentally ill.

16. Merge the two separate prisoner mental health treatment services (BFMHS and PSU) into one, cohesive mental health service with a single chain of command, bureaucracy and administrative structure, in one state department (either MDCH or MDOC) that would be held accountable for treating all mental health problems that arise, including the mentally ill, the non-mentally ill seriously mentally disordered, severe personality disorders, behavior/management problem prisoners, suicidal prisoners, and self-mutilative prisoners. I believe that up to 50% of the current duplicate supervisory, managerial and administrative positions could be eliminated at great cost savings to the state. Personnel currently in the proposed positions to be eliminated could effectively be reassigned to provide direct patient care in currently vacant staff positions where more primary care services are urgently needed.

Ultimately, there is the question of our own moral leadership as a great democracy, especially as it relates to our overuse and abuse of solitary confinement as an additional, non-sentenced punishment. Because the conditions under which prisoners are confined strongly influences their mental health, it is difficult to totally separate out the effects of prison policies on incarceration in general, from that specifically affecting the mentally ill. Prevention is every bit as important as treatment. Long term segregation with its imposed inactivity, stimulus deprivation, and its very restrictive social contact, go beyond the need to protect society and staff, serving instead to damage people subjected to conditions which are beyond the punishment imposed by the courts.

We as a people and nation were signatories to the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, treaties that prohibit inflicting severe pain or suffering, physical or mental, from being inflicted on a person to obtain information or confession, to punish, coerce or intimidate for any reason. We, as a nation, were also instrumental in developing the United Nations Standard Minimum Rules for the Treatment of Prisoners, as well as other minimum guidelines for protection of imprisoned people. Yet we seem to be slipping backward in the manner in which we are now treating our own prisoners. It is simply outrageous that we continue, in the twenty-first century, to treat the people we imprison in an inhumane way, and it is totally unacceptable that we do this to the incarcerated mentally ill. It is time we regain our focus and our moral leadership, and stop burying our heads in the sand about what goes on in our prisons. The need for public access, oversight and intervention is critical. What goes on behind closed prison doors needs to be open to public scrutiny and review, before it becomes a national tragedy that will effect generations to come. There is absolutely no justifiable reason to exclude the media and concerned citizen groups from reasonable access to our prisons and segregation housing units.

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The author received his Doctorate from the University of Wisconsin-Madison in 1975 and was employed by the MDOC as a psychologist for nearly 25 years. For 22 years he was the Director, and later, Administrator of Psychological Services for the Jackson Area Prisons. He retired in 1999 and currently serves as a consultant and expert witness on correctional mental health services and practices. This paper was originally presented at the Prisons and Corrections Section's Annual Meeting on Sept. 11, 2003.

In May 2002, a new Michigan statute went into effect preventing persons with any felony conviction within the last 15 years or one of several specified misdemeanor convictions within the last 10 years from working in nursing homes, county medical care facilities or homes for the aged.<sup>20</sup> Based on the experience of Western Michigan Legal Services, which has been flooded with requests for assistance from low-income clients like Clara, the law has forced many qualified and experienced caregivers out of the nursing home field, while simultaneously preventing many promising candidates from starting careers in this area. In many cases those clients, who are typically low-income mothers, are unable to find other work, and end up on welfare.

Despite the draconian impact of the new law, counsel who advise either nursing home facilities or their employees should recognize that some ex-offenders can continue to work in the health care field. First, the law “grandfathers in” employees who were employed by a health facility before the effective date of the act, that is before May 10, 2002.<sup>21</sup> Second, the law applies only to individuals “who regularly provide” direct services to patients or residents.<sup>22</sup> Thus nursing homes should not disqualify ex-offenders from positions where they have limited patient contact. Third, the law applies only to “convictions,” and therefore should not be applied to juvenile adjudications, which by definition are not convictions. Finally, although many hospitals and home health care agencies appear to be relying on this law to justify prohibitions on ex-offender employment, in fact that law applies only to nursing homes, county medical care facilities, and homes for the aged, not to hospitals.<sup>23</sup>

It is questionable whether this law – or similar laws, which place broad restrictions on an individual’s ability to pursue a chosen profession and do not provide for individualized assessments – pass constitutional muster. In Pennsylvania, a law that prohibited ex-offenders from working in nursing homes was struck down by the state Supreme Court because it “does not bear a real and substantial relationship to the Commonwealth’s interest in protecting the elderly, disabled, and infirm from victimization, and therefore unconstitutionally infringes on the Employees’ right to pursue an occupation.”<sup>24</sup> Similarly, a Massachusetts court struck down a state policy providing that persons convicted of certain crimes were subject to a mandatory disqualification for jobs within the Office of Health and Human Services.<sup>25</sup> The court found a procedural due process violation in the failure to provide an opportunity for ex-offenders to rebut the inference that they are unfit to work in the human services field.

### **3. Encouraging Employers to Hire Ex-Offenders**

Attorneys working with either employers or ex-offenders should be aware of several programs that provide financial incentives for the hiring of ex-offenders. First, the Work Opportunity Tax Credit provides a federal tax incentive for employers to hire former offenders. Employers who hire low-income ex-felons who were convicted or released within one year of hire are eligible for the credit, which is worth up to \$2,400 per worker. Ex-felons who were convicted or released more than a year ago may fall under one of the other target groups for the credit, which include physically or mentally disabled individuals and recipients of welfare, food stamps or SSI.<sup>26</sup>

A second program is designed to address the fact that private bonding agencies often reject job applicants with criminal histories, thereby preventing ex-offenders from obtaining positions with companies that require bonding. The Federal Bonding Program makes no-cost fidelity bonds available to protect employers who hire ex-offenders. The bond is typically for \$5,000 (although coverage up to \$25,000 may be allowed) and insures the employer against theft, forgery, larceny or embezzlement. Of the 40,000 job applicants who have been bonded through the program, 99% have turned out to be honest employees.<sup>27</sup>

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## THE FAMILY LAW CONSEQUENCES OF CRIMINAL CONVICTIONS

Over 10 million children in the United States have parents who were imprisoned at some point in their children's lives, and about 1.5 million children have parents who are currently in prison.<sup>28</sup> In Michigan, 53% of males and 59% of female prisoners have minor children.<sup>29</sup> Imprisonment results in a range of family law consequences which may represent a greater loss to the parent than the loss of freedom itself. Two of the most common issues are termination of parental rights and the accumulation of unwarranted, incarceration-related child support arrears.

### 1. Keeping Families Together through Appropriate Pre-Incarceration Planning

Parents who are incarcerated risk losing their children forever. As one commentator has noted, "particularly with respect to incarcerated mothers, imprisonment of a parent disrupts intact, viable families. The overwhelming majority of incarcerated mothers were active parents to their children prior to their incarceration and intend to continue in that role after release."<sup>30</sup> Whether or not these parents will have the opportunity to reunite with their children depends not just on the length and nature of the sentence, but also on the child's placement during the parent's incarceration. Legal advice at this stage can be critical in ensuring that families can be reestablished upon the parent's release.

MCL 712A.19(3)(h) provides that a parent's rights may be terminated if "[t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody within a reasonable time considering the child's age."<sup>31</sup> Thus, while there are also many other grounds for termination,<sup>32</sup> parents who will be imprisoned in excess of two years are in particular danger of termination.

The risk that incarceration will permanently tear apart a family can be greatly reduced through appropriate pre-incarceration child placements, which keep the child out of foster care. In order for a termination to occur, the probate court must have jurisdiction over the child. The probate court has jurisdiction, *inter alia*, over a child "who is without proper custody or guardianship."<sup>33</sup> Significantly, Michigan's appellate courts have repeatedly found that if a parent makes satisfactory arrangements for the child's welfare during the parent's incarceration, the child is not "without proper custody."<sup>34</sup> Since the court lacks jurisdiction over the child, the parents' rights cannot be terminated.

The best placement for the child will depend on each parent's specific circumstances. In a marital family, children may be left with the other parent, though there is always a risk that the incarcerated parent's rights will be terminated either because the non-incarcerated parent runs into problems with the law or child protective system, or because the non-incarcerated parent seeks a divorce and, subsequently, a step-parent adoption.

A non-custodial parent generally will have little say about the child's placement. A custodial parent facing incarceration in excess of two years will generally be well-advised to place his or her children with alternate caregivers. This may involve agreeing to a change of custody, if the other parent is an appropriate caregiver. If placement with the other parent is inappropriate or impossible, a custodial parent should consider granting a limited guardianship to grandparents, relatives, or other potential caretakers. While each client's situation will be different, placing a child under a limited guardianship rather than a regular guardianship will often make it easier for the parent and child to be reunified once the parent is released from incarceration. Limited guardianships are based on the consent of the parents, and require the parties to develop a limited guardianship placement plan.<sup>35</sup> By contrast, regular guardians may be appointed over the parents' objections under a variety of statutorily-prescribed circumstances, including parental incarceration.<sup>36</sup> While limited guardianships can be terminated upon a showing that the parents have substantially complied with the limited

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guardianship placement plan,<sup>37</sup> termination of a regular guardianship is more complicated, and generally requires a showing that this is in the child's best interests.<sup>38</sup>

Since guardianships can be difficult to set aside once issued, and since they involve the suspension of parental rights, parents facing shorter periods of incarceration are often better off not placing their children under a guardianship. In order to reduce the risk that a guardianship will be issued over the parent's objections, parents should provide a power of attorney to the child's temporary caregiver. If the parent fails to provide a power of attorney, the parent is "permit[ing] the minor to reside with another person and ... not provid[ing] the other person with legal authority for the minor's care and maintenance," which is one of the bases for authorizing a guardianship.<sup>39</sup>

Regardless of where a child is placed during the parent's incarceration, parents should be advised that if they want to avoid termination of their parental rights and if they want to retrieve their children from a guardianship upon release, the parents must maintain contact with the child during the parent's incarceration. Parents should keep records not only of any financial support they provide, but also of their efforts to remain involved in their children's lives, whether through calls, letters, or prison visits.

## **2. Easing the Burden of Huge Child Support Arrears**

Many of the parents who enter prison, particularly fathers, are non-custodial parents with existing support orders. These parents are almost always financially unable to pay support while incarcerated, and therefore typically leave prison with huge arrearages. Ex-offenders who do find work often discover that much of their meager paycheck is going to pay back support. This is not only a huge disincentive to lawful employment, but may make it difficult or impossible for the ex-offender to survive on what little of the paycheck is left. Moreover, show causes and bench warrants are common, which may cause ex-offenders to get in trouble with their probation or parole officers, and may even result in reincarceration.

In principle, since support obligations are based on an ability to pay, incarcerated parents who lack the ability to pay should not be required to pay support. Thus, the Court of Appeals has held that "where a noncustodial parent is imprisoned for a crime other than nonsupport that parent is not liable for child support while incarcerated unless it is affirmatively shown that he or she has income or assets to make such payments."<sup>40</sup> The difficulty arises under MCL 552.603(2), which provides that a support payment "is not, on and after the date it is due, subject to retroactive modification." Thus, although a prisoner has no obligation to pay support, once the support has accrued, a prisoner usually cannot get the arrearage modified.<sup>41</sup>

In order to avoid ending up with a huge child support arrearage, an offender simply needs to file a motion to modify support when the offender is first incarcerated. Defense counsel should routinely advise clients who are non-custodial parents to file such motions.<sup>42</sup> Unfortunately, offenders who already have accumulated large support arrearages while incarcerated have few options for eliminating this back support obligation, no matter how unwarranted it is. The first step is to determine whether the arrearage is owed to the state or to the other parent (or another private individual, such as a guardian). If the support is owed to a private individual, the parties may be able to reach an agreement to waive part or all of the back support. If the back support is owed to the State of Michigan, the pay or should contact his or her Friend of the Court office to determine whether the Friend of the Court can assist in reducing back support or modifying ongoing payments.

So long as Michigan does not automatically suspend child support upon a non-custodial parent's incarceration, many parents are likely to leave prison owing thousands of dollars in back support, even though that support obligation should never have accrued in the first place. The ex-offender's inability to get out from under this crushing financial burden represents yet another barrier to reentry.

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## LOSING ACCESS TO AFFORDABLE HOUSING

As of 1999, there was no jurisdiction in the United States where a full-time minimum-wage worker could afford the fair market rent for a one-bedroom in his or her community.<sup>43</sup> Access to affordable housing can be a particular problem for ex-offenders, many of whom are homeless upon release from prison, are unable to find stable employment, and are rejected by private landlords. While subsidized housing provides a limited safety net for other low-income people – though demand far outstrips supply – many ex-offenders, and their families, are ineligible for federally subsidized housing.

Criminal convictions affect both admissions and evictions decisions. Managers of federally funded housing must deny admission to individuals who were evicted from federally-assisted housing for drug-related criminal activity within the last three years.<sup>44</sup> Denials are also mandatory where a household member is currently using illegal drugs or abusing alcohol in a manner that interferes with other residents.<sup>45</sup> However, the household can be admitted if the offending individual has successfully completed a drug rehabilitation program or if the circumstances leading to the eviction no longer exist (i.e. the offending household member is no longer part of the household).<sup>46</sup>

Federal regulations permit, but do not require, public housing agencies to deny housing if a household member has engaged in (1) drug-related criminal activity; (2) violent criminal activity; or (3) other criminal activity that would adversely affect health, safety or the peaceful enjoyment of the premises.<sup>47</sup> In order to serve as a basis for a denial, past criminal conduct must have occurred “during a reasonable time” prior to the admission decision.<sup>48</sup> While the regulations are silent on how recent a conviction must be in order to have occurred within a reasonable time, commentary by the Department of Housing and Urban Development suggests that a reasonable time period is five years.<sup>49</sup>

Public housing authorities must include a provision in the lease agreement that both the tenant and the tenant’s family can be evicted for “any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off the premises” by a tenant, household member, guest, or other person “under the tenant’s control.”<sup>50</sup> In *Department of Housing and Urban Development v. Rucker*, the United States Supreme Court recently decided that this language allows public housing authorities to evict innocent tenants for the criminal behavior of household members or guests, whether or not the tenant knew, or should have known, about the illegal activity.<sup>51</sup> For example, one of the tenants in *Rucker* was a grandmother whose mentally disabled daughter was found with drugs three blocks from the apartment. The Court held the eviction to be authorized, even though the tenant had regularly searched her daughter’s room for drugs and had never found anything.<sup>52</sup> Thus, evictions based on criminal conduct can result in homelessness not just for the offender, but also for that offender’s entire family.

In most screening and eviction actions, public housing authorities may consider a variety of circumstances, such as the seriousness of the offending action, the effect that denial of admission or termination of tenancy would have on non-offending household members, and the rehabilitation of the offender.<sup>53</sup> Therefore, attorneys working with ex-offenders to secure housing should seek to ensure that housing authorities exercise their discretion in those cases where exclusion is not mandatory.

## EXPUNGEMENT: HOPE FOR THE LUCKY FEW

Expungements provide one of the only forms of relief from the severe civil consequences attached to criminal convictions.<sup>54,55</sup> Because the statutory criteria for expungements are narrowly drawn, and because the ultimate decision is a discretionary one, most ex-offenders will be unable to clear their records. Still, where applicable, expungement is a powerful tool to free eligible ex-offenders from the burdens of a criminal record.<sup>56</sup>

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A motion to set aside a conviction may only be brought by a person “who is convicted of not more than 1 offense.”<sup>57</sup> The term “offense” has been interpreted broadly to apply to both felonies and misdemeanors.<sup>58</sup> Thus, a person who merely has two misdemeanors is ineligible for an expungement. Multiple convictions arising out of the same incident are considered separate offenses, and once again make the petitioner ineligible for an expungement.<sup>59</sup>

A person is not eligible for an expungement until five years after sentencing, or five years following the completion of any term of imprisonment, whichever occurs later.<sup>60</sup> Moreover, certain offenses are never expungable. Those offenses are: (a) a felony or attempt to commit a felony for which the maximum punishment is life imprisonment; (b) a conviction for a violation or attempted violation of MCL 750.520c, 750.520d, or 750.520g (criminal sexual conduct in the first, second, or third degree, or assault with intent to commit criminal sexual conduct); or (c) a conviction for a traffic offense.

If a person meets the statutory criteria, then it is within the court’s discretion to grant an expungement. The nature of the offense alone does not preclude setting aside an offender’s record.<sup>61</sup> Rather, in exercising its discretion, the court must balance the “circumstances and behavior” of the petitioner against the “public welfare.”<sup>62</sup> Thus, the Court of Appeals has regularly reversed lower courts that have focused on the nature of a defendant’s conviction, rather than the defendant’s conduct subsequent to conviction.<sup>63</sup>

## **THE TASK AHEAD**

Because the social and legal barriers faced by persons with criminal records severely diminish the chances that these individuals will successfully reestablish themselves, prosecutors, defense attorneys, and the courts should attempt to ensure that decisions made at the front end of the criminal justice system do not place unnecessary burdens on the ability of defendants to become productive citizens upon release. Similarly, civil legal aid offices and private civil counsel should be prepared to address the unique legal problems faced by ex-offenders. Finally, policy makers should seek to encourage reintegration rather than recidivism by reducing the social and legal barriers to reentry.

## **What Defense Counsel Can Do**

- Research the occupational consequences of particular convictions in order to maximize an offender’s employment opportunities post-conviction. Structure plea deals, where possible, so that a client’s conviction will not prevent him or her from working in his or her chosen field.
- Advise custodial parents regarding placement of their children during incarceration, or refer such clients to the private bar or civil legal aid offices for pre-incarceration child placement planning.
- Press for sentences and custodial placements that will maximize a client’s opportunities for family contact during incarceration.
- Advise non-custodial parents that upon incarceration they should file motions to eliminate or modify child support.
- Determine whether a particular conviction will cause the client to lose access to public housing, or cause the client’s family to be evicted.
- Ensure, if possible, that first-time offenders will be eligible for expungements by insisting that there is only one conviction on one count.

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## **What Prosecutors Can Do**

- Structure charging decisions and plea agreements in order to maximize an offender's opportunities for employment upon release. Particularly where offenders do not have a prior felony record, consider whether the benefits of obtaining a felony conviction are worthwhile, given the likely impact of a felony record on the offender's ability to reintegrate successfully upon release.
- Press for sentences and custodial placements that will maximize an offender's opportunities for family contact during incarceration.
- Assist civil legal aid offices and private counsel seeking to prevent the eviction of entire families based on the offender's conduct by clarifying where culpability lies.
- Structure charging decisions and plea agreements for first time offenders in ways that leave open the opportunity for a later expungement if the offender is rehabilitated. Seek a single conviction, rather than multiple counts, for offenses arising out of one transaction.
- Support expungements for eligible, rehabilitated offenders.

## **What Judges Can Do**

- Advise criminal defendants of the civil consequences of their convictions before accepting a plea or when imposing judgment. In the alternative, advise defendants to discuss the civil consequences of the conviction with counsel before agreeing to a plea.
- Devise sentences that are structured to maximize the chance that an offender, after receiving an appropriate punishment, will be able to find work, obtain stable housing, and reconnect with family.
- Structure sentences in order to maximize a client's opportunities for family contact during incarceration.
- Order reunification services and parenting time for incarcerated parents before deciding whether to terminate those parents' rights.
- Insist that managers of federally-funded housing exercise their discretion to consider each household's circumstances in making admission and eviction decisions based on criminal conduct.
- Encourage plea agreements that preserve the possibility of expungement for first time offenders.
- Exercise discretion in favor of ex-offenders by granting expungements where there is evidence of rehabilitation.

## **What Civil Legal Aid Offices and Private Civil Counsel Can Do**

- Educate employers, job placement agencies, and clients about the employment rights of ex-offenders.
- Advise employers to develop hiring policies that conform with the Title VII requirements; i.e. to consider the nature, age, and relevance of an applicant's convictions.
- Challenge occupational barriers, licensing restrictions, and company policies that represent blanket prohibitions on the employment of ex-offenders.

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- Provide pre-incarceration child placement planning assistance.
  - Help ex-offenders to clear up incarceration-related child support arrears.
  - Assist ex-offenders who are denied access to public housing, by encouraging public housing authorities to use their discretion, where applicable, to consider such factors as the age of the conviction and the offender's rehabilitation.
  - Assist ex-offenders in obtaining expungements where eligible.

### **What Policy Makers Can Do**

- Encourage the employment of ex-offenders by ensuring that state laws and policies do not unnecessarily restrict ex-offenders' employment opportunities; require consideration of the age of the conviction, the relationship of the offense to the job, and the offender's rehabilitation.
- Improve tax credits, bonding, and other programs to encourage employers to hire ex-offenders.
- Provide resources for employment programs targeted at the special needs of ex-offenders.
- Fund programs to preserve family ties between offenders and their children; require child welfare workers to remain in touch with incarcerated parents.
- Require that the DOC and local Friend of the Court offices communicate so that child support payments are automatically suspended upon imprisonment in a DOC facility.
- Provide financial support for transitional housing for ex-offenders.
- Work with public housing authorities to develop reasonable policies to allow rehabilitated ex-offenders access to subsidized housing; require public housing authorities to consider household circumstances before evicting entire families based on one individual's criminal conduct.
- Expand access to expungements so that individuals who have more than one conviction but can demonstrate rehabilitation have the opportunity to clear their records.
- Develop a process for the restoration of an ex-offender's civil rights – such as the certificates of rehabilitation used in some states – to free rehabilitated ex-offenders from the civil liabilities associated with past convictions.

### **Endnotes**

<sup>1</sup>The author is currently representing Clara (not her real name) on the question of whether the statute applies to juvenile felony adjudications.

<sup>2</sup>This figure assumes a two year stay upon reincarceration. See Michigan Office of the Governor & the Department of Corrections, Summary of Technical Assistance Initiatives for Prisoner Reentry (July 1, 2003), at 2.

<sup>3</sup>Debbie Mukamal, From Hard Time to Full Time: Strategies to Help Move Ex-Offenders from Welfare to Work 3 (U.S. Department of Labor, Employment and Training Administration, Division of Welfare-To-Work, June 2001), <http://www.doleta.gov/documents/hard.html>.

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<sup>4</sup>Bureau of Justice Statistics, Prevalence of Imprisonment in the U.S. Population, 1974-2001, Aug. 2003, NCJ 197976, [www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf).

<sup>5</sup>Some Facts About Michigan Prisons, PRISONS AND CORRECTIONS FORUM (State Bar of Michigan Prisons and Corrections Section, Lansing, MI) Winter 2001, at 12

<sup>6</sup>Bill Johnson, Judge puts educating inmates to test?, DETROIT NEWS, Aug. 23, 2002, <[www.detnews.com/2002/editorial/0208/239/a11-569044.htm](http://www.detnews.com/2002/editorial/0208/239/a11-569044.htm)>.

<sup>7</sup>Figures are for 2000. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, TRENDS IN STATE PAROLE, 1990-2000 (NCJ 184735) 3 (2001).

<sup>8</sup>Figures are for 2000. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2000 (NCJ 188208) 4 (2001).

<sup>9</sup>There are a wide variety of other civil liabilities resulting from criminal convictions, including severe immigration consequences, restrictions on public benefits, loss of drivers' licenses, loss of access to public benefits, limitations on gun ownership, limitations on the right to vote or serve on a jury, etc.

<sup>10</sup>See Urban Institute, From Prison to Home: The Dimensions and Consequences of Prisoner Reentry (2001) at 31.

<sup>11</sup>Jeremy Travis et al., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 35 (2001).

<sup>12</sup>MCL 37.2205(a)(1).

<sup>13</sup>Id.

<sup>14</sup>42 U.S.C. §2000e-2(k).

<sup>15</sup>See, e.g., *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401(C.D. Cal. 1970), modified on other grounds, 472 F.2d 631 (9th Cir. 1972); *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1971).

<sup>16</sup>Policy Statement on the Issue of Criminal Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. (1982) (Feb. 4, 1987); in II EEOC Compliance Manual § 604; Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (July 29, 1987), in II EEOC Compliance Manual App. § 604-B.

<sup>17</sup>See MCL 338.43(1). Records which may not be considered include records of arrests not followed by convictions; records of convictions that have been vacated or reversed; records of arrests or convictions unrelated to the person's likelihood to serve the public in a fair, honest and open manner; and records of an arrest or conviction for a misdemeanor for which a person may not be incarcerated.

<sup>18</sup>See MCL 338.43(3). In the absence of such rules, all felonies are considered relevant to likelihood of a person to serve the public in a fair, honest, and open manner.

<sup>19</sup>See, e.g., 1 §§44935(e)(2)(B) and 44936 (airport security screeners); 15 U.S.C. §5902 (armored car crew members); 29 U.S.C. §1111 (positions in employee benefit plans).

<sup>20</sup>MCL 333.20173. The relevant misdemeanor convictions involving abuse, neglect, assault, battery, or criminal sexual conduct or involving fraud or theft against a vulnerable adult." MCL 333.21073(1)(b).

<sup>21</sup>MCL 333.20173(2). Although the statute is not explicit, a plain reading of its language suggests that an individual is "grandfathered in" not just for a position held before May 10, 2002, but also for subsequent job changes. This interpretation also makes sense from a policy perspective, as employees with criminal records would otherwise be chained to a particular job, with no ability to change positions in light of their personal or professional circumstances.

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<sup>22</sup>MCL 333.20173(1).

<sup>23</sup>MCL 333.20173(1).

<sup>24</sup>*Nixon v. Commonwealth of Pennsylvania*, 2003 Pa. LEXIS 2604, at \*30-31 (Dec. 30, 2003).

<sup>25</sup>*Cronin v. O'Leary*, NO 00-1713-F, slip op. at 6-9 (Mass Super. Ct. Aug 9, 2001), [www.sociallaw.com/superior/00-1713-F.html](http://www.sociallaw.com/superior/00-1713-F.html).

<sup>26</sup>See Department of Consumer and Industry Services, Employers: 9 New Ways Employers Can Earn Federal Income Tax Credits, [www.michigan.gov/documents/ua\\_wotc-brc\\_3108\\_7.pdf](http://www.michigan.gov/documents/ua_wotc-brc_3108_7.pdf); Department of Consumer and Industry Services, Employers: 9 New Ways Employers Can Earn Federal Income Tax Credits, [http://www.michigan.gov/documents/ua\\_wotc-brc\\_3108\\_7.pdf](http://www.michigan.gov/documents/ua_wotc-brc_3108_7.pdf). The credit is currently authorized only through December 31, 2003, although it is anticipated that the credit will be renewed.

<sup>27</sup>See U.S. Department of Labor, Federal Bonding Program, [www.doleta.gov/documents/fedbonding.asp](http://www.doleta.gov/documents/fedbonding.asp); National HIRE Network, Federal Bonding Program, [www.hirenetwork.org/fe\\_bonding.html](http://www.hirenetwork.org/fe_bonding.html).

<sup>28</sup>Amy Hirsch, et al., EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS, Center for Law and Social Policy (2002), at 1, 7.

<sup>29</sup>Michigan Office of the Governor & the Department of Corrections, Summary of Technical Assistance Initiatives for Prisoner Reentry (July 1, 2003), at 2.

<sup>30</sup>Philip M. Genty, Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis, 30 J. FAM. LAW 757, 759 (1991-92).

<sup>31</sup>MCL 712A.19b(3)(h).

<sup>32</sup>See MCL 712A.19b(3).

<sup>33</sup>MCL 712A.2(b)(1).

<sup>34</sup>See, e.g., *In re Taurus F.*, 415 Mich 512, 535 (1982); *In re Curry*, 113 Mich App 821 (1982); see also MCL 712A.2(b)(1)(B).

<sup>35</sup>See MCL 700.5205.

<sup>36</sup>See MCL 700.5204.

<sup>37</sup>MCL 700.5209(1).

<sup>38</sup>See MCL 700.5209.

<sup>39</sup>MCL 700.5204(2)(b).

<sup>40</sup>*Pierce v. Pierce*, 162 Mich. App. 367, 370 (1987).

<sup>41</sup>See *McLaughlin v. McLaughlin*, 255 Mich. App. 475, 476 (2003).

<sup>42</sup>In pro per packets which address the relationship between child support and incarceration, and which provide information on how to file a motion to modify support are available from Western Michigan Legal Services.

<sup>43</sup>Hirsch, *supra* at 43.

<sup>44</sup>24 C.F.R. §5.854; 24 C.F.R. §882.518; 24 C.F.R. §960.204(a)(1).

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<sup>45</sup>24 C.F.R. §5.857; 24 C.F.R. §882.518(a)(1)(iii) and (b)(4); 24 C.F.R. §960.204(a)(2) and (b). Housing authorities must also deny admission to persons who are subject to a lifetime registration requirement under a state sex offender registration program, see 24 C.F.R. §5.856; 24 C.F.R. §882.518(a)(2); or who have ever been convicted of methamphetamine production on public housing premises, see 24 C.F.R. §882.518(a)(1)(ii); 24 C.F.R. §960.204(a)(3).

<sup>46</sup>24 C.F.R. §5.854(a); 24 C.F.R. §882.518(a)(1)(i); 24 C.F.R. §960.204(a).

<sup>47</sup>24 C.F.R. §5.855; 24 C.F.R. §882.518(b); 24 C.F.R. §982.553(a)(2)(ii).

<sup>48</sup>24 C.F.R. §5.855(a); 24 C.F.R. §882.518(b); 24 C.F.R. §982.553(a)(2)(ii).

<sup>49</sup>Final Rule, Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 FR 28776 (May 24, 2001) (“The reasonable time period is still left up to the owner (or PHA) to determine in its admissions policies.... While HUD considers that five years may be a reasonable period for serious offenses, depending on the offense, some PHAs or owners may not agree.”).

<sup>50</sup>42 U.S.C. §1437d(1)(6).

<sup>51</sup>*Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 130 (2002).

<sup>52</sup>*Rucker v. Davis*, 203 F.3d 1113, 1117 (9<sup>th</sup> Cir. 2001).

<sup>53</sup>24 C.F.R. §5.852; 24 C.F.R. §960.203.

<sup>54</sup>In pro per packets for expungements can be obtained by contacting Western Michigan Legal Services.

<sup>55</sup>Like adult convictions, juvenile adjudications can be set aside. The applicant must not only meet the same criteria as for an adult expungement, but must also be at least 24 years old. See MCL 712A.18e.

<sup>56</sup>When a conviction is set aside the petitioner is considered not to have been previously convicted for most, but not all, purposes. For example, the conviction can still be considered for sentencing purposes if there are subsequent offenses. Nor does an expungement prevent an action by a victim for civil damages or allow for the remission of any fines or costs. See MCL 780.622; 780.623.

<sup>57</sup>MCL 780.621(1).

<sup>58</sup>*People v. Grier*, 239 Mich. App. 521, 523 (2000); *People v. McCullough*, 221 Mich. App. 253 (1997).

<sup>59</sup>*People v. Blachura*, 176 Mich. App. 717, 719 (1989).

<sup>60</sup>MCL 780.621(3).

<sup>61</sup>*People v. Boulding*, 160 Mich. App. 156, 158 (1986).

<sup>62</sup>MCL 780.621(9).

<sup>63</sup>*People v. Rosen*, 201 Mich. App. 621, 623 (1993); *People v. Van Heck*, 252 Mich. App. 207 (2002).

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# Prisons & Corrections Section Council Elections

## Ballot Application

In accordance with Section 3.4 (Election of Council Members) of the Bylaws, the Section will hold elections at the State Bar of Michigan's Annual Meeting on Friday, October 1, 2004. Elections will be at the Section's annual meeting at 9:30 a.m. in Room 103, The Lansing Center, Lansing, MI. Candidates are encouraged to attend the meeting.

The Section will have six (6) open seats for regular members and two (2) open seats for associate members. Regular membership is limited to attorneys who are members of the State Bar in good standing. Selection is by the qualified voting Section membership present. Associate members may be non-attorney criminal justice practitioners and are selected by vote of the regular council members. Council members must be members of the Section and will be expected to attend meetings on the first Saturday of every month in Lansing, or as the Chairperson may otherwise direct.

Candidates for either type of council seat must provide the following information to the Election Qualifications Committee **no later than September 24<sup>th</sup>, 2004.**

Interest (check one): \_\_\_\_\_ Regular Member      \_\_\_\_\_ Associate Member

Name and P-Number: \_\_\_\_\_

Mailing Address: \_\_\_\_\_

City/State/Zip Code: \_\_\_\_\_

Daytime telephone: \_\_\_\_\_

Current Field of practice/employer: \_\_\_\_\_

Email address(s): \_\_\_\_\_

In fifty-two (52) words or less, please summarize your qualifications, background and reasons for seeking a position on the Council:

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Applicants who do not provide a complete application will not be included on the ballot. Completed applications may be mailed to: Elections Qualification Committee, c/o Michael Marutiak, 1131 Vail Court, Lansing, Michigan, 48917, or transmitted via facsimile to: (517) 886-0367. Photocopies of this form or submissions on plain paper are also acceptable, provided they contain all required information.

**State Bar of Michigan**  
**Prisons & Corrections Section**  
P.O. Box 12037  
Lansing, MI 48933-2037

First-Class Mail  
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## JOIN THE PRISONS & CORRECTIONS SECTION

I am interested in joining the Prisons and Corrections Section of the State Bar of Michigan!	<b>Membership Status Sought:</b> <input type="checkbox"/> Attorney membership (\$20) <input type="checkbox"/> Associate membership (non-attorney criminal justice professionals) (\$15) <input type="checkbox"/> Newsletter subscription only (prisoners and non-criminal justice professionals) (\$10)
Name (include State Bar Number, if applicable)	<i>Send completed application with payment to:</i>  <div style="text-align: center;">           Prisons &amp; Corrections Section            P.O. Box 12037            Lansing, Michigan 48901-2037         </div> <i>Make checks payable to: "State Bar of Michigan"          Attorney changes of address should be sent directly to the State Bar of Michigan. All others should be sent to the Section P.O. Box.</i>
Firm/Professional Affiliation/Inmate Number & Facility	
Mailing Address <span style="float: right;">Suite/Apt. Number</span>	
City <span style="margin-left: 100px;">State</span> <span style="margin-left: 100px;">Zip Code</span>	
Telephone Number	