

PRISONS AND CORRECTIONS FORUM



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

HIGHLIGHTS

Meaningful Change to Reduce Corrections' Budget is Unlikely: Politics are Likely to Control

State of Michigan budget deficit is affected by the money spent on Corrections. See page 7.

Balancing Our Priorities: Can We Safely Spend Less on Corrections?

Announcement regarding the conference to be held October 8, 2009. See page 12.

Hadix v Caruso

Hadix v. Caruso is a prisoner class action filed in 1980 challenging the conditions of confinement at the State Prison of Southern Michigan. On March 31, 2009 Judge Jonker of the Western District Court dismissed the mental health provisions from the case. See page 16.

Correctional Medical Services Nurses are Denied Qualified Immunity in Case of Inmate Who Died from Asthma Attack

Pretrial detainee Jones died after suffering a severe asthma attack. See page 17.

Federal Prison Staff are Law Enforcement for Purposes of FTCA Claims

Federal prisoners are no longer able to sue pursuant to the Federal Tort Claims Act (FTCA). See page 18.

Fifteen Million Plus Dollar Judgment Affirmed for Failure to Protect Female Prisoners from Sexual Harassment and Assaults by Staff

This case was originally filed in 1996. On appeal, Defendants did not challenge that plaintiffs were members of a protected class. See page 20.

Legislative Corrections Ombudsman

Ombudsman has the authority to investigate administrative actions of the MDOC. See page 21.

STATEMENT OF THE PRISONS & CORRECTIONS SECTION

RESTORATION OF EARNED SENTENCE CREDITS FOR PRISONERS

Disclosure pursuant to Administrative Order 2004-1: The Prisons and Corrections Section is a voluntary section of the State Bar, not the State Bar itself. The position expressed here is that of the Section. The State Bar has no position on the restoration of earned sentence credits for prisoners. The Prisons and Corrections Section has a membership of approximately 140. The Section's governing body, a Council elected by the membership, is composed of 15 voting members. This policy position was adopted, after due notice, at a meeting of the Section's Council on —March 21, 2009. The vote was 12 yes, 0 no, 0 abstention.

Position

In 1998, Michigan enacted legislation, known as "truth in sentencing", which requires that all prisoners serve every day of their minimum sentences, thereby prohibiting any form of earned credit for good conduct, work or participation in treatment, academic or vocational programs. It is the position of the State Bar Prisons and Corrections Section that a system of earned sentence credits should be restored. This system should be given immediate effect and applied, prospectively, to all prisoners currently serving indeterminate sentences who are not already eligible for earned credits because of their conviction dates, as well as to everyone sentenced

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to an indeterminate term in the future. It is further the position of the Section that judges should be required to place on the record at sentencing the extent to which earned credits may affect the service of the minimum sentence.

Summary of Findings

The Section's position is based on the following findings:

1. There is no evidence that permitting earned credits presents a risk to public safety.
2. There are alternate means of promoting transparency in sentencing.
3. Permitting earned credits is a common correctional practice nationally and on the county level in Michigan.
4. The opportunity to earn sentence credits provides a significant incentive to prisoners who currently are penalized for misconduct but rarely rewarded for positive efforts.
5. Permitting earned credits does not require the release of any particular prisoner, make institutional management more difficult or interfere with the discretion of the parole board. On the contrary, it provides the Department of Corrections with a useful tool for managing institutional behavior and promoting participation in rehabilitative programs.
6. The restoration of earned credits would significantly help reduce the prison population and save taxpayers tens of millions of dollars.

Analysis

History

For decades, Michigan, like most states, granted prisoners generous amounts of credit for good behavior, commonly referred to as "good time." Regular good time was awarded on a progressive basis. The number of days per month increased with the number of calendar years served. By the 20th year, regular good time could equal 15 days a month. In addition, special good time could be awarded in amounts up to half the regular credit. Thus, a 40- year minimum could be served in fewer than 16 years.

In 1978, the voters amended the Michigan Constitution to prohibit the award of good time to reduce the minimum sentence. The actual time a defendant would have to serve on a given minimum increased from 30-300%, depending on the amount of good time that might have been earned.

By 1982, it became apparent that the elimination of good time was contributing to increasingly overcrowded prisons. Therefore, the legislature restored a limited amount of good conduct credit in the form of five regular and two special disciplinary credit days per month, or up to 84 days a year. Because some people

were not eligible to earn disciplinary credits and others forfeited credits for misconduct, on average, Michigan prisoners served 88 percent of their judicially imposed minimum sentences.

In the 1990s, the federal government began encouraging “truth in sentencing” by conditioning the award of federal prison construction funds to the states on the requirement that *violent* offenders serve 85 percent of their sentences. The federal system itself permits sentence reductions of up to 15 percent. Because Michigan already met the standard, it was awarded \$33 million in federal VOI/TIS (Violent Offender Initiative/Truth in Sentencing) funds in 1997.

Nonetheless, in 1998, Michigan prospectively eliminated disciplinary credits and required all prisoners to serve 100 percent of their minimum sentences. The consequence was to lengthen the time served by everyone, regardless of the nature of their offenses, whose good conduct in prison would otherwise have allowed them to earn modest amounts of credit. For instance, a five-year minimum sentence that could have been served in four years and one month with disciplinary credits now requires every day of five years.

When truth-in-sentencing was first proposed in 1994, the MDOC estimated that the elimination of disciplinary credits would require 2,268 beds within 10 years. Data about the accuracy of that projection is not available. However, the Citizens Alliance on Prisons and Public Spending (CAPPS) estimates that if the average sentence of 7.5 years was reduced to 6.1 years and 3,000 people who earned the maximum amount of disciplinary credits (84 days per year) were released when they first became eligible, the savings would exceed \$100 million.

Proponents of the change did not assert that it would increase public safety. The purpose was to ensure that victims and the general public have a clear understanding of what a sentence actually means.

Public Safety

No evidence has been presented that either awarding earned credits poses any risk to public safety. By definition, such incentives are available only to those people who earn them by positive conduct. The average minimum sentence in Michigan in 2005 was 7.5 years. There is no basis for believing that if people actually served, on average, 6.4 years, crime rates would be impacted.

In fact, a substantial body of research indicates that keeping people incarcerated longer does not reduce recidivism and may actually increase it. For instance, in 1999, Gendreau, Goggin and Cullen conducted a meta-analysis that included 23 studies of the impact of more versus less time in prison.¹ In 2002, Smith, Goggin and Gendreau published a follow-up meta-analysis that included 26 additional studies.² Neither analysis found any deterrent effect. On the contrary, longer length of stay was associated with a small increase in recidivism.

¹ Gendreau, Paul, Goggin, Claire and Cullen, Francis T., *The Effects of Prison Sentences on Recidivism*, Ottawa: Solicitor General of Canada (1999).

² Smith, Paula, Goggin, Claire and Gendreau, Paul, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences*, Ottawa: Solicitor General of Canada (2002). The authors note that even slight increases in recidivism can be very costly when they occur on a large scale and suggest that excessive incarceration may be fiscally irresponsible for that reason.

Song and Lieb reviewed four studies of whether, after controlling for other factors, length of sentence affects recidivism.³ Overall, either there was no substantial relationship between time served and recidivism rates or rates increased with longer sentences. Three studies of early release programs undertaken to relieve prison overcrowding in California, Washington State and Illinois concluded that releasing people anywhere from 3.5 to 6 months before their scheduled parole dates did not increase recidivism.⁴

Most recently, Washington State researchers analyzed the impact of increasing the amount of earned release credits available to certain prisoners.⁵ In Washington, those convicted of violent and sex offenses could earn up to 15 percent off their sentences and non-violent offenders could earn 33 percent. In 2003, the law was changed to increase potential earned time to 50 percent for selected offenders, while decreasing it to 10 percent for violent and sex offenses. The researchers concluded:

We find that the law has no statistically significant effect on violent criminal recidivism, while we estimate a statistically significant decrease for non-violent crimes. Overall, 39 percent of offenders released under the new law are convicted for a new felony within three years compared with 42 percent of offenders prior to the law's enactment.

Since the implementation of the new law, offenders spend an average of 63 fewer days in prison, resulting in an average cost savings of \$6,155 per person. Due to the estimated reduction in felony crime, we also calculate benefits of \$4,588 per person for future crimes avoided and taxpayer costs saved – a total savings of \$10,743 per offender.

Transparency

As its colloquial name suggests, the purpose of “truth in sentencing” is transparency in the criminal justice process. However, this can be achieved without the high fiscal and social costs of lengthening time served. One method is to have the judge state on the record at sentencing how much credit the defendant might be able to earn. The State of New Jersey has a court rule entitled “Statement of Estimated Real Time to be Served” that requires the sentencing judge to do just that.

³ Song, Lin and Lieb, Roxanne, *Recidivism: The Effect of Incarceration and Length of Time Served*, Washington State Institute for Public Policy (1993); <http://www.wsipp.wa.gov>.

⁴ See also Kassebaum, Gene, Davidson-Coronado, Janet, Perrone, Paul and Allen, Joe *Parole Decision Making in Hawaii*, Social Science Research Institute, University of Hawaii at Manoa and Research and Statistics Branch, Crime Prevention and Justice Assistance Division, Dept. of the Attorney General (August 2001), www.cpja.ag.state.hi.us, at 3; Kellam, Leslie and Hayes, Michael, *2003 Releases: Three Year Post Release Follow-up*, New York State Department of Correctional Services, Division of Program Planning, Research & Evaluation; Langan, Patrick and Levin, David, *Recidivism of Prisoners Released in 1994*, U.S. Department of Justice, Bureau of Justice Statistics (Washington, D.C., 2002).

⁵ Drake, E.K. and Barnoski, R., *Increasing Earned Release from Prison: Impacts of 2003 Law on Recidivism and Criminal Justice Costs*, Washington State Institute for Public Policy, (Olympia, 2008), www.wsipp.wa.gov.

Common Correctional Practices

Other Jurisdictions. While no systematic survey of every state is available, most have some form of earned credit. Some have multiple types of credit and some still award very generous amounts, especially for nonviolent offenders. For example: (For more detail, see www.balancingourpriorities.org.)

Increasing the availability of earned credit has become a common way for states to control spiraling prison populations. Just since 2003, Colorado, Iowa, Kentucky, Mississippi, Rhode Island and Washington have all adjusted their earned credit systems to reduce the length of stay of at least some categories of offenders. Rhode Island, with approximately 4,000 total prisoners, expects to save \$8 billion over five years.

Michigan Counties. Under MCL 51.282, Michigan's sheriffs are authorized to award jail inmates one day of good time for each six days of the sentence. Sheriffs routinely use that authority to help control county jail populations and promote compliance with jail regulations. As a result, a person convicted of felonious assault who receives a year in the county jail can earn 54 days of credit. If the same person receives a prison term with a one year minimum, he or she can earn no credit. There is no apparent rationale for viewing earned credits as "untruthful" when applied to prison sentences but not to jail sentences.

Prisoner Incentives

In Michigan, while misconduct is quickly punished, there are virtually no rewards for positive achievements. Opponents of earned credits suggest that prisoners are supposed to behave appropriately and participate in programs and that they should not be rewarded for merely doing what is expected of them. However, that position runs counter to common knowledge about learning and behavior modification. Adults, children and animals all respond better to positive reinforcement than to punishment. We expect children to earn good grades and employees to do their jobs, but we still reward children who bring home good report cards and give merit raises to employees who do their jobs well.

Prisoners are incarcerated because they failed to meet societal expectations, often despite receiving plenty of punishment throughout their lives. If one goal of incarceration is rehabilitation, opportunities for positive reinforcement are needed. Because of security concerns, these opportunities are very limited in the prison environment. Release is, of course, the ultimate incentive. Earned credits can play a meaningful part in encouraging prisoners to behave responsibly, work hard at prison jobs, engage in treatment and complete academic and vocational programs that will ultimately benefit not only them but the communities to which they return.

Rationale for Section Position

Since earned credits merely give the parole board jurisdiction sooner, they do not require that any particular prisoner be released. In the absence of evidence that reductions in the length of time served increase recidivism to any extent, earned credits can only have a positive impact.

They serve to reinforce desirable behavior by prisoners and provide corrections personnel with an additional management tool. They can play a significant role in reducing the prisoner population and, thus, the corrections budget.

Earned credits are routinely awarded by many states, the federal prison system, and sheriffs in all 83 Michigan counties. It is not reasonable to assume that all these entities are somehow “untruthful” and that eliminating all earned credits is the only way to keep the sentencing process transparent. Requiring sentencing judges to place on the record a statement of the maximum amount of credit the defendant may be able to earn is a viable, cost-free alternative.

Eligibility for earned credits should begin with current prisoners, as opposed to just those sentenced in the future. While it may be unduly complicated to calculate earned credits for time already served, there is no reason they cannot be earned by current prisoners going forward.⁶ Since earned credits affect parole eligibility but do not change the actual sentence, there would be no violation of separation of powers. If this approach is justifiable and beneficial, it should be given effect as soon as possible. To the extent that it only results in cost-savings once someone has reached their earliest release date, it is important to start the accumulation of credits as soon as possible in order not to delay potential fiscal benefits more than necessary.

⁶ Excepting, of course, those whose sentences were imposed so long ago that they are entitled to earn disciplinary credits or even good time under prior laws.

Editor’s note: In July 2009, The National Conference of State Legislatures published a report entitled *Cutting Corrections Costs: Earned Time Policies for State Prisoners*. The report notes that at least 31 states award “earned time”, defined as sentence reduction credits for participation in productive activities, such as education, vocational training, treatment and work programs. In addition to summarizing information about the nature and quantity of time available to eligible prisoners, the report discusses the public safety and cost savings implications of these provisions. Research has shown that reducing sentences through earned time positively impacts both corrections spending and recidivism. The report concludes with observations about the expansion of earned time policies as a means of managing prison populations and corrections budgets. It can be found at www.ncsl.org.

MEANINGFUL CHANGE TO REDUCE CORRECTIONS' BUDGET IS UNLIKELY: POLITICS ARE LIKELY TO CONTROL¹

By Daniel Manville, J.D.

The State of Michigan finds itself in a budget deficit from which it will take years to recover. A significant portion of this deficit is a result of the enormous sum of money spent on Corrections. Correctional spending ballooned in the 1980s and 90s as a result of the "lock'em up" mentality of the State Government, resulting in the construction of numerous prisons. In its attempt to find solutions to this budget crisis, the Council of State Governments (CSG) Justice Center joined with Michigan's leaders to develop options that would lower the costs of Corrections while keeping the people of the State of Michigan safe.²

One of the major concerns I have is that elected officials will likely not step up to the plate and take advantage of this opportunity to bring meaningful and constructive changes to Michigan's criminal justice system. See Detroit News, 5/8/09, Editorial: "Taxpayers deserve more serious efforts to control Corrections costs." State officials have the opportunity now to bring Michigan's Corrections system into the twenty-first century. Yet they hesitate to make hard decisions, likely, at least in part, out of concerns of getting reelected. Michigan is at a point where its political leaders must place the people of the State of Michigan ahead of their own individual political concerns.

In preparing this position paper, I reviewed the proposed options by CSG, analysis of these options by the Citizens Alliance on Prisons and Public Spending³ and comments from other sources and individuals. While I agree overall with many of the proposals from the CSG, I believe that some of the proposals do not go far enough.

CSG's Option 3A

Retroactivity of 100-120% of Minimum Sentence

CSG proposal 3A recommends that "all offenders serve at least 100-120% of their minimum sentence." However, instead of applying this provision to those presently incarcerated, the CSG proposes that this provision is to be applied to those sentenced after April 1, 2009. In recommending an effective date of April 1, 2009, it appears that the CSG did not understand that under present Michigan law prisoners sentenced after 2000 are required to serve their entire minimum sentences before being considered for parole, which meets the 100% criteria of proposal 3A. The CSG's failure to explain this option lacked an understanding of the sentence structure in Michigan. Or, that the CSG might have believed that if this option was applied retroactively to the start of the truth-in sentencing, thousands of prisoners would be mandated to be released with no concern for the safety of the public. The opposite is true. Instead of being automatically released, prisoners sentenced since

¹ By Daniel E. Manville. Mr. Manville is a former offender and has been a practicing attorney in the area of rights of prisoners. He was also a Clinical Staff Attorney at Wayne State Law School Civil Rights Litigation Clinic and a Visiting Professor at University of Denver College of Law.

² The CGS released its recommendations on January 22, 2009.

³ To read CAPPS's response, go to <http://www.capps-mi.org/pdfdocs/Response%20to%20NGC.pdf>.

2000 would still be subject to an interview by the parole board, and would not be released if the prisoners failed to demonstrate that they are good prospects for return to society without endangering its safety.

If this provision was applied to the prisoners sentenced under the truth-in sentencing provision and the parole board released only 60% of all those meeting that criteria, the State of Michigan could save another millions of dollars.

Lack of Completion of Required Programs and Institutional Misconducts

The CSG recommends that each prisoner serves no less than 100% of the court imposed minimum sentence and no more than 120% of that sentence. The CSG proffers two justifications for not paroling a prisoner who has completed 100% of their minimum sentence. The first is if “there is a failure to complete required programs that are determined to reduce an offender’s risk to public safety or institutional misconduct.” Everyone would agree that if a prisoner has engaged in serious institutional misconduct, this would likely be justification not to release him at the 100% of the minimum sentence. However, to keep a prisoner incarcerated because the Department of Corrections has not provided the means for prisoners to complete a required program is a classic Catch 22. It costs the State over \$25,000 a year, depending on the security level of confinement, to house a prisoner. CSG is telling the taxpayers of Michigan they should spend \$25,000 a year to keep confined each prisoner who was not timely offered a required program. CSG, instead, should be recommending that sufficient funds be provided so that required programs can be completed before the 100% of the minimum sentence is completed.⁴ If the State budgets the necessary funding to timely provide the required programs, the State could likely save between five and ten million dollars per year.

The CSG’s second justification for not paroling a prisoner who has completed 100% of his minimum sentence is if there is a history of institutional misconducts which is determined to create a risk to public safety. The use of institutional misconducts in consideration of parole should have restrictions imposed. If a prisoner, while serving a ten-year minimum sentence, receives a major misconduct in the second year of incarceration, and then has not received another major misconduct in seven and one-half years, the major misconduct should not be considered by the parole board. Any non-bondable major misconduct that is over three years old, unless it is an assault misconduct, should not be used by the parole board. The parole board should not consider any bondable major misconduct that is over two years old.

Statutory Up to Life Sentences Should be Included

Proposal 3A does not to apply to those whose crime carried a maximum sentence of up to life in prison even though the judge had the authority to impose a sentence of life or any term of years less than life, and did. This means that if a judge sentenced a person to one to ten years instead of life, the person would not qualify to be released under this provision even if they demonstrated exceptional conduct while in prison. This is another example of the CSG’s failure to closely examine the sentencing structure in Michigan. If a judge believed that a prisoner who could have been sentenced to life did not deserve such a sentence based upon the facts known by the judge, there is no rational basis for CSG to exclude that prisoner from review for release on parole at service of 100% of his minimum sentence. This provision simply makes the person eligible, and the parole board still retains the discretion to deny parole if it is determined that the prisoner is a threat to the safety of society.

⁴ *The Justice Center’s Policy Options for Michigan: An Analysis by the Citizens Alliance on Prisons and Public Spending* states that “The vast majority of such ‘failures’ are currently attributable to the Department of Corrections’ inability to provide timely access to treatment programs. Some prisoners are unable to participate because of language barriers, mental illness or development disability. ... However, there are still nearly 500 people on waiting lists [for required programs] who are within six months of their earliest release dates.”

The exclusion of those crimes in which a life sentence “might” be imposed is based upon the folk lore that those who commit violent crimes are more likely to be recidivist. National and Michigan data does not support this. This data shows that those sentenced under the statutory requirement of up to life for crimes against persons represent some of the lowest recidivism rates. On the other hand, those who commit economically motivated crimes are more likely to be recidivist, but they are the first ones that the CSG is recommending to be released. The practice of locking prisoners with violent crimes up for a long time to reduce recidivism has been rejected. In fact, keeping people imprisoned past their minimum sentences may actually decrease chances for an eventual successful return to their communities and families.

CSG’s Option 3B

CSG recommends that the penalty for first-time parole violation be for no more than nine-months. On the face of it, this looks like a very good recommendation. However, many parole violations are for technical reasons, such as moving without telling the parole agent, failure to report, a dirty urine test, etc. At present, there are approximately 3,000 technical violators confined in prison. “[T]his option does not confront the fundamental question of whether people should be returned to prison at all for non-criminal violations of supervision rules or for conduct that does not present a danger to the public.”⁵ Parole violation for technical reasons should not result in a mandatory return to prison but should be based upon a progressive response to such violation. A moving without telling the parole agent, failure to report, or a dirty urine test. Commons sense needs to be applied to technical parole violations.

CSG’s Option 3C

CSG recommends that no prisoners who are not released on their minimum sentences be kept confined to their maximum sentences. This is contrary to what the Michigan Parole Board has been doing, i.e., in 2007 more than 1000 people were released as “maxed out.” This is a very positive suggestion. Within the first six months of release is where people have the most difficulties in adjusting. The help of the parole agents and others in the reintegration of a person back into society can be the difference between that person becoming a tax paying, productive citizen or another failure of the Corrections system.

CSG’s Option 3D

The Michigan Parole Board has contributed much to the overcrowding problems that exist in Michigan prisons. Until the Board becomes less of a sentencing review court and more of a reviewer of prisoners’ behavior while confined, there will continue to be many who are denied parole for no other reason than the Board’s belief that the sentencing judge did not impose an appropriate sentence. The recommendations by the CSG are positive in the processing of parole but a more detailed review should be undertaken to ensure that parole decisions are appropriately made.

CSG’s Failure to Address other Issues

Most states allow prisoners to earn some form of credit against their sentences, whether these earned credits are for good behavior, work performance, and/or participation in programs. Most of these states have imple-

⁵ *The Justice Center’s Policy Options for Michigan: An Analysis by the Citizens Alliance on Prisons and Public Spending*, at 7.

mented these credit programs, in part, as a method of controlling their prison populations. “If 10,000 Michigan prisoners earned at least five days of credit per month and were then released on their minimums, the [potential] time saves for each year served would equal 1,644 beds.”⁶

The earning of credits does not mandate that the person is released at the minimum sentence, less credit earned. It only means that the prisoner is considered for release at an earlier date than the minimum sentence. The parole board would still retain the discretion to deny parole based upon institutional behavior or failure to complete required programs.

Collateral Consequences of Criminal Convictions

The proposed options by CSG will be meaningless unless people released from prison are able to find employment. In Michigan, it is almost impossible for those without a criminal conviction to find a job, let alone those with a criminal conviction. The major reason given for those who do return to prison is that they were not able to find employment. State officials need to change the draconian collateral consequences imposed on those with criminal convictions.⁷ A total review of the collateral consequences now imposed by the State of Michigan should be undertaken. Without a change in the back end of the prison release process, most people released will not have an opportunity to becoming taxpaying, productive citizens.

Editor’s Note: The opinions contained in this article belong to the author and are not the policy or opinions of the Prisons and Corrections Section of the Michigan State Bar.

⁶ *The Justice Center’s Policy Options for Michigan: An Analysis by the Citizens Alliance on Prisons and Public Spending*, at 8.

⁷ See Daniel Manville, “Collateral Consequences of Criminal Convictions in Michigan,” for a more detailed discussion of problems faced by those with criminal convictions in trying to obtain employment. (Release date July 1, 2009; contact daniel.manville@gmail.com.)

DEPORTATION OF PRISONERS, HB 4130 AND SECTION SUPPORT

In February, Representative Alma Wheeler Smith introduced HB 4130 to authorize the DOC to release prisoners to the U.S. Immigration and Customs Enforcement (ICE) if an order of deportation is received and the prisoner has served at least one-half of his or her minimum sentence imposed by a Michigan Court.

Exceptions to the authority for “deportation release” are for prisoners serving a sentence for first or second degree murder, or first, second or third degree criminal sexual misconduct, and prisoners who were sentenced as an habitual offender.

The bill was introduced as a cost savings measure to the DOC. According to an analysis prepared by the staff of the nonpartisan House Fiscal Agency, as of February 2009, there were 660 prisoners flagged in the offender database for possible release to federal authorities, although the number for whom deportation orders have been issued is uncertain. Of the 660 total possible, about 150 meet the other criteria specified in the bill and an additional 55 prisoners who are not “flagged” for detainer appear to have foreign or unknown citizenship.

The savings realized to the DOC would be highly dependent on the number of prisoners actually released to ICE, their relative security levels at the time of release, and of course the length of time they would have otherwise served in the DOC. According to the DOC, the average appropriated cost per prisoner when factoring various fixed administrative and operational costs is about \$32,000 annually.

In April, the Prisons & Correction Council voted (8-0-0) to support HB 4130 in principle. The Council also established a task force for the purpose of drafting constructive suggestions for improvement of the bill and identifying potential issues in implementation.

The bill was referred to the Committee on Appropriations.

Reader submissions are welcome.
Please send to:

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Balancing Our Priorities: Can We Safely Spend Less on Corrections?

October 8, 2009

**The Inn at St. John's
44045 Five Mile Road
Plymouth, MI**

Faced with an ever-deepening fiscal crisis, Michigan is searching for ways to reduce the \$1.9 billion budget of the Department of Corrections. The decision of the Granholm administration to parole more people who have served their minimum terms has been criticized by some as a threat to public safety. Corrections employees and communities where prisons are located oppose facility closings. Legislators are sharply divided between those who want to reduce the prison population and those who want to privatize prison services. Community-based programs proven to reduce crime are starved for funds.

Last year, the Prisons & Corrections Section and four other organizations sponsored a well-received, half-day symposium in Lansing that addressed these questions. The Section is now presenting an updated and expanded version at a location convenient for those in Southeast Michigan, the beautiful Inn at St. John's. The symposium, which will run from 8:30 a.m. - 2:30 p.m., is open to any member of the criminal justice community and should be of interest to defense attorneys, prosecutors, judges, probation and parole staff, treatment personnel, community service providers and members of law enforcement.

The morning portion of the program will focus on population reduction strategies, including those currently being employed, additional alternatives, risk assessment and rehabilitation, and the prosecutor's perspective. The afternoon portion will address investing in prevention, such as: the Michigan Prisoner Reentry Initiative, mental health and substance abuse treatment, community corrections and creative jail programs, and barriers to reentry. A wide variety of viewpoints will be represented, including those of the MDOC, policy advocates, treatment providers and prosecutors. Ample time will be reserved for questions.

The cost is \$45 for Section members. It is \$65 for nonmembers, but that will include a year of Section membership. Both breakfast and lunch will be served.

So mark your calendars, tell your colleagues and watch your e-mail for further notices.

Additional details and registration forms will also be available on the Section's web site, www.michbar.org/prisons, and on the symposium site, www.balancingourpriorities.org.

GO AHEAD . . . TRY TO KEEP UP WITH TARINO BROWNER, IF YOU CAN

By Dustin Seibert*

A chilly Monday March morning has him driving all through Metro Detroit, working to secure a future location for the Re-Enter Into Society Enterprise (R.I.S.E.) prisoner rehabilitation program. Hitting the road before the sun comes up, Travino Browner's travels take him to a closed-down school, an old lounge and a vacant former Chili's restaurant, among other locations.

For Browner, it's just another day in the life of a hungry entrepreneur. An energy level that would wipe out most 9-to-5 working stiffs before long will remain with him throughout the day.

Browner is director of staff and a key investor with R.I.S.E. The agency, the only of its kind in the state of Michigan, is dedicated to helping ex-convicts and those with mental deficiencies re-enter society through housing, trade training and outreach programs.

R.I.S.E. has grown much faster than expected since opening its doors in the middle of last December. Originally designed to house 150 ex-convicts, the program is already at about 100 participants and counting.

Later that week, Browner and company secured a 14,000 square-foot former learning center in Southfield. The building will house, among other things, R.I.S.E.'s corporate offices and classrooms for training programs like a culinary arts school and heavy machinery.

Locking it down that week was essential to R.I.S.E., considering that CareLink of Michigan and the Michigan Department of Corrections need to see a substantive property before the end of the month, which would subsequently allow the agency necessary, grant money from the U.S. Department of Housing and Urban Development.

"They don't wanna see that we're just housing inmates," Browner said. "They want to see a building

that's ready to go. Once the grant is secure, R.I.S.E.'s future is secure."

The hustler's theme

Browner grew up on Detroit's west side influenced by the lifestyle of Young Boys, Inc., one of the most infamous drug cartels in the city's history. He made his first sale at 14, at which time he said he "never looked back."

"I saw the math. I saw how to take \$80 and turn it to \$160. I saw the double-up thing, so it was like 'this is easy,' he said. "Other than stick-ups, I did some of everything under the sun."

He won't argue that he's earned each of the six years' prison time he's done to date. From his first stint in juvenile at 15 to his first felony charge at 18 to his first federal case stemming from a concealed weapon charge at 22, there's nothing pretty about the record Browner built.

The drug game, the legal system's rotating doors and perpetual paranoia for the safety of him and his family led Browner to start a legal venture in 2006: United Property Management, the landscaping company he runs with Arthur Watkins.

He traded in an opulent lifestyle of Escalades, jewelry and motorcycles for longer hours and a decidedly less glamorous black Silverado truck with a big yellow plow on the front and the company's phone number on the doors. He insists the transition wasn't difficult to make.

"I like life better the way it is now. Trading in this hustle for the other...it's a lot of stress off me," Browner said. "I don't have to tote a pistol; I don't have to look over my shoulder when driving; I don't have to worry about the safety of my family."

"Not just about him"

Between R.I.S.E., United Property Management and the two adult foster care homes he owns with his

fiancé Raina Searcy, Browner often cranks out 14-plus-hour work days, seven days a week. He visits, on average, 16 houses throughout the city and suburbs at least twice a week.

His nature, amiable yet meticulous with a pinch of no-nonsense, compels him to keep his fingers in everything from household maintenance to counseling to keeping his staff on their toes. His passion for keeping his businesses moving like a well-oiled machine is demonstrated by the fact that he'll quickly take a trip when he could just make a phone call, or get on his knees to fix something when it's someone else's job to do so.

"He and I don't have off days," said Verrita Fountain, the founder and director of R.I.S.E. "Because of the emotional investment he has in this company, he's invested in not letting anything happen to it. Period."

Fountain met Browner through mutual friends in summer 2008, at which time he was purchasing homes in Detroit to turn into Section 8 housing. When Fountain's original business partner failed her at a pivotal moment, Browner came on as an 11th hour investor and helped keep R.I.S.E from collapsing before it ever got a chance to get off the ground.

Where Browner's temperament regarding his situation remains steely, Fountain emotes enough passion for them both when asked about the future of her friend and partner.

"People need jobs and I could put an ad in the paper, but I can't think of who would come out at seven in the morning, work until 11:30, get up in the middle of the night if they have to, and do that seven days a week without question," she said. "His shoes are so huge to fill, it's overwhelming for me to think about who would do all of that"

In R.I.S.E.'s Livonia headquarters, where Browner is affectionately known as "Tav," Fountain's sentiments are shared by several other co-workers: his potential incarceration wouldn't just affect him; it would serve as a detriment to many others looking to reset their lives.

Volunteer Patricia Adams said R.I.S.E. fields roughly 10 new calls a day from parolees, case managers and others searching for housing that Browner has been instrumental in providing. She believes his departure from R.I.S.E. could significantly cripple the burgeoning company.

"Because he can provide the necessary housing so quickly, if he's eliminated from that process, I can't see us being able to keep it up," she said. "There's no way that folks can come out [of prison] and be prepared to start over if we have nowhere to put them. He plays a major part."

Adams added that Browner's experience in the legal system gives him a unique edge and perspective that helps in his dealings with R.I.S.E. residents who are fresh out of incarceration.

"A lot of the men we have in the program look to him for advice. They need structure, and they get that structure from him," she said. "It's a different perspective for inmates coming out to speak to someone who's been on the inside over someone who never experienced [prison] life."

"He gives them that push like 'you too can make it.' They may have lost all hope inside, but outside someone is willing to give them the chance and opportunity to take it to the next level."

"Coach Tav"

Browner and Raina Searcy, his fiancé, own two R.I.S.E.-independent adult foster care homes on Littlefield Street in Detroit. They currently handle 12 residents between both homes.

Between R.I.S.E., United Property Management and the adult foster care homes, Browner helped get jobs for some of the friends and family members he believes he "led astray;" many of whom led lives like his former one.

The above-and-beyond that Browner puts into his work and the people around him is evident in his willingness to interact with residents from both his homes and R.I.S.E. outside of their program

requirements; be it giving them work for wages through United Property Management, taking them out for ice cream and bowling field trips or just throwing a few extra dollars from his pocket to theirs.

Browner interact with the residents with his foster care residents reveals more of a father-son relationship than a master-subordinate one. It's the reason he's earned the nickname "coach" from a few of his adult foster care residents.

"Tav runs a disciplined house. He don't take no stuff, and that's good because I need help with that," said foster care resident Matt Kind. "He's not afraid to point you out, but he does it in the right matter; he respects you when he does it. And he gives me opportunities to put money in my pocket."

A thousand percent

While Browner's incarceration would clearly affect R.I.S.E., it would undoubtedly have the most direct and intimate impact on his fiancé, Raina Searcy.

A friend of Browner's for 11 years and with him romantically for five, she wasn't far removed from the lifestyle —the spoils or the danger — that accompanied his involvement with drug dealing. As such, she bears more testament than most to the 180-degree turn he's made from Tav the hustler to Tav the legit businessman and loving father of their daughter Hannah.

"You would have to know the person he was a few years ago to know exactly how much he changed," she said. "He's a whole new person; he's changed from being "street Tarvino" to being a businessman and a great dad."

Searcy's well-kept composure when speaking about her fiancé's very tangible future imprisonment seems strange, until you remember that she's been down this road before.

"It was hard at first, but I had to get it in my mind that he's doing everything for [me and Hannah]," she said.

"And we're in a better living situation now than where we were, because all of this is ours. It belongs to us, and it's legal."

In a morbid stroke of history repeating itself, Browner could potentially become incarcerated while his daughter Hannah is still a 2-year-old. Tayvion, 13, his daughter with a former wife, was also two when he went to prison for four years back in 1999.

"Tarvino went through it. It was hard when she came to visit because she was so young," Browner said. "[The first prison bid] basically taught me how to be a man. It brought me down off that high horse."

That maturity he cultivated was what made him stand up, chin tall, during a February 10 court date to acknowledge his crimes and tell the judge flatly that he was ready for his punishment.

Whatever will happen with Tarvino Browner—if he's to pay his debt to society behind bars or through his continued work on the outside—he believes that R.I.S.E. and his other companies will stay afloat. And he's certain that, if he has to be away for a few years, he will come back to R.I.S.E. being a bigger, more profitable and more helpful entity to those looking to start over.

It's that attitude that makes it hard for others to keep up with him.

"I get out and bust my behind because I really do wanna give back," he said. "I'll tell anyone: 'I did sell those drugs; I did all that.' But the hundred percent I put into doing wrong back then, I put a thousand percent into doing right today."

Editor's Notes:

*Dustin Seibert is a freelance reporter. He can be reached at djohnseib@hotmail.com.

** Tarvino Browner was sentenced in February, 2009 to 48 months by U.S. District Judge Denise Page Hood. He will be incarcerated at the federal facility in Pointsville, New Jersey. He remains free until 9/9/09. You may contact Mr. Browner through R.I.S.E at verritafountain@sbcglobal.net.

***HADIX V CARUSO* MENTAL HEALTH PROVISIONS DISMISSED**

The *Hadix* prisoner class action was filed in 1980 pursuant to 42 U.S.C. § 1983 challenging conditions of confinement at Michigan's oldest and largest prison, the State Prison of Southern Michigan ("Jackson Prison"). In 1985 a consent decree was approved addressing most of the issues in the complaint. Among other issues, the Decree addressed fire safety, medical care and mental health care.

After the enactment of the Prison Litigation Reform Act ("PLRA") in 1996, several hearings were held on motions by defendants seeking to terminate injunctive relief pursuant to the provisions of the Act. The PLRA requires termination of injunctive relief in prison conditions of confinement cases in the absence of a current and ongoing violation of federal law. The first hearings addressed the medical care sections of the Consent Decree, and resulted in a determination that certain medical provisions and enforcement orders related to the treatment of the medically disabled remained necessary in light of Eighth Amendment violations. In 2005 and 2006 the district court issued additional injunctive relief regarding medical care.

In 2001, the district court granted defendants' motion to terminate enforcement of the mental health provisions of the Consent Decree. In 2006 the mental health issues were reopened as necessary to allow the court to address fully the constitutional violations involving medical care.

In 2007 defendants filed a motion to terminate all injunctive relief related to mental health, and plaintiffs filed a motion for further relief regarding mental health care. The district court heard five days of trial testimony in April and June 2008. On March 31, 2009 the court denied relief to plaintiffs and granted defendants' motion to terminate injunctive relief regarding mental health care.

Plaintiffs have appealed the decision, challenging the application of the deliberate indifference standard to the Eighth Amendment violations rather than the objective component, an excessive risk to prisoner health

and safety, the standard set forth in *Farmer v. Brennan*, 511 U.S. 825 (1994) for Eighth Amendment in injunctive cases. Plaintiffs also challenge the finding that plaintiffs' request for relief was not within the scope of the original mental health provisions of the Consent Decree, and were required to prove not only an Eighth Amendment violation, but also a violation of the requirements of the original Consent Decree. Finally, plaintiffs challenge the decision for not providing findings of fact explaining its reasoning.

CORRECTIONAL MEDICAL SERVICES NURSES ARE DENIED QUALIFIED IMMUNITY IN CASE OF INMATE WHO DIED FROM ASTHMA ATTACK

Pretrial detainee Jones died after suffering a severe asthma attack. The personal representative of Jones (Harrison) brought a 42 U.S.C. § 1983 lawsuit against two nurses and a number of jail officers. The district court granted defendants-officers' motion for dismissal based upon qualified immunity and denied the nurses' motion for summary judgment. The plaintiff appealed and defendant nurses cross-appealed. The appellate court reversed as to the jail officers, granting them qualified immunity and dismissed the nurses' appeal for lack of jurisdiction. *Harrison v. Ash*, 539 F.3d 510 (6th Cir. 2008).

After he arrived at the jail, Jones complained about tightness in his chest and shortness of breath about 9:00pm. The officer on duty took Jones to the medical unit for treatment. It was determined that Jones was absorbing approximately 95% of the air in the room, which was within normal ranges. Jones was given some Albuterol and then retested, which increased his oxygen level intake to 98%. He was then returned to his cell.

At approximately 10:30 pm, Jones was again taken to the medical unit for the same complaints. He was again treated and given more Albuterol. He was returned to his cell.

At 11:00 pm, Jones was again taken to the medical unit for the same complaint. He was admitted to the medical unit and placed in an infirmary cell though no treatment was provided since his oxygen level was at 95%.

At 11:50 pm., Jones again reported difficulty breathing and was given further treatment. Around 2:30 am, Jones again complained about breathing difficulties. His blood oxygen level had dropped to 60%. Jones was then placed on oxygen and arrangements were made to take him to the outside hospital. On the way to the hospital, Jones died. The autopsy determined that he had died as a result of a severe asthma attack.

In analyzing the district court grant of qualified immunity to the Defendants-officers, the Court first con-

sidered whether Plaintiff's constitutional right had been violated. 539 F.3d at 517. The Supreme Court, in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976), had held that a prisoner stated a constitutional violation for denial of medical care when he had a serious medical need and staff was deliberately indifferent to that need. The Court found that the "parties do not dispute the fact that asthma satisfies" the serious medical need criteria for stating an Eighth Amendment claim.¹ The parties disagreed whether plaintiff had established that the jail Defendants-officers were deliberately indifferent.

The Court found that the jail officers were not deliberately indifferent since they had "reasonably responded to the substantial risk to Jones' health,..." *Harrison*, 539 F.3d at 519-20. The Court found that these officers took Jones to the medical unit each time he complained of breathing and, even though they were present after he had been confined to the infirmary, the medical emergency medical care was already en route to the jail. Plaintiff had failed to show that the officers had acted with deliberate indifference.

The Defendants-nurses had also sought review by the appellate court of denial of their motion for summary judgment. The Court found it had to first determine whether the defendants-nurses could appeal denial of summary judgment, which was not a final decision, as part of an appeal based upon the denial of qualified immunity to other defendants. The Court found that it did not have appellate jurisdiction of the appeal of the nurses, citing to *Johnson v. Jones*, 515 U.S. 304, 313, 115 S.Ct. 2151 (1995). The Court based its decision on the fact that the nurses were employees of Correctional Medical Services, which was a private entity, which was not entitled to "assert a defense of qualified immunity and thus we lack jurisdiction to hear their appeal." *Id.* at 521-22.

¹ *Harrison v. Ash*, 539 F.3d 518-19 ("In the instant case, the parties do not dispute the fact that asthma satisfies the "objective" requirement of Harrison's deliberate indifference claim. Indeed, the symptoms associated with an asthma attack - wheezing, difficulty breathing, tightness in the chest - are quite obvious and recognizable even to a lay person. See *Estate of Carter*, 408 F.3d at 311-12 (finding that the plaintiffs medical need was "sufficiently serious" because he was "exhibiting the classic signs of an impending heart attack")").

FEDERAL PRISON STAFF ARE LAW ENFORCEMENT FOR PURPOSES OF FTCA CLAIMS

Federal prisoners are no longer able to sue pursuant to the Federal Tort Claims Act (FTCA) for property that was negligently lost or destroyed by federal prison staff. In *Ali v. Federal Bureau of Prisons*, the United States Supreme Court held that federal prison staff are considered “law enforcement officials” and are entitled to sovereign immunity for such claims.¹

Prisoner Ali was transferred from U.S. Penitentiary — Atlanta to U.S.P. Big Sandy. As part of the transfer process, Prisoner Ali turned two duffle bags of personal property over to the transferring staff so that the property could be inventoried, packed and shipped. Ali’s bags arrived a few days after he did. Upon inspecting his property, he noticed that several items were missing; mostly his religious items, which he valued at \$177. He exhausted FTCA’s administrative process before filing a lawsuit claiming a violation of the FTCA, 28 U.S.C. §§ 1346, 2671 *et seq.* Both the district court and appellate court found that Ali’s claim was barred by the exception in § 2680(c) for property claims against law enforcement staff. The Supreme Court accepted certiorari since the federal circuits were in disagreement as to the application of 2680(c) to loss of property by prison staff.

The U.S. Government has immunity against claims unless that immunity has been waived by Congress. 28 U.S.C. § 2674. The FTCA constitutes a limited waiver of the sovereign immunity enjoyed by the United States.² The FTCA allows a prisoner to file an action against the United States for negligent or intentional acts committed by federal prison staff during the course of their employment, so long as the administrative procedures outlined in its provisions have been exhausted.

The question before the Supreme Court was whether the prison staff who had lost the property qualify as other law enforcement officer; within the meaning of [28 U.S.C.] § 2680(c).³ If the staff was a law enforcement officer, then Ali’s lawsuit had to be dismissed based upon sovereign immunity.⁴ If the staff was not included in the definition of law enforcement officer, then Ali’s lawsuit could proceed.

In resolving the above question, the Court looked at the word “any” in the phrase “any other law enforcement officers.” It found that “any” had been given an

expansive reading in prior cases decided by the Court.⁵ The Court went on to state that if Congress had intended this provision not to apply to prison staff it could have written the law to state “any other law enforcement officer *acting in a customs or excise capacity*.”⁶ The Supreme Court held that this language barred a federal prisoner’s FTCA claim arising out of the loss of certain personal property.

However, federal prisoners are not without recourse when their property is lost or damaged through the negligence of prison staff and the value is less than \$1,000. *See* 31 U.S.C. § 3723(a)(1), commonly referred to as the “Small Claim Act.”⁷ The value of most property lost or destroyed by prison staff will be under this \$1,000 claim so you should use this statute to seek compensation.⁸ If you want to recover some money for your lost property, your only recourse will be to file a claim within one year of the date that the property was lost.⁹ The procedures for filing such a claim is found at 28 C.F.R. § 543.31, *et seq.* It is the same procedure that you must follow for filing a FTCA claim. If you don’t accept the amount that is offered by the BOP to settle your claim, you cannot then file in federal court.¹⁰

Federal prisoners may have a *Bivens*¹¹ claim against individual prison staff who intentionally lost or destroyed their property when the value of the property is over \$1,000.¹² In *Hudson v. Palmer*,¹³ the Court stated that if the prisoner is provided post-deprivation remedies for either negligent or intentional lost or destroyed property, the prisoner has received all the due process that is required. Prior to the *Ali* decision, courts had held that the federal government provided a meaningful post-deprivation remedy for loss of property pursuant to the Federal Tort Claims Act and this meant that most courts would dismiss a *Bivens* claim for lost property. Based upon *Ali*, the federal government provides no post-deprivation remedy for lost property over the value of \$1,000. This should mean that you can bring a damage claim for intentional loss or destroyed property, with a value of over \$1,000, pursuant to the Due Process Clause of the Fifth Amendment.⁵

¹ -- U.S. --, 128 S.Ct. 831 (2008).

² *United States v. Testan*, 424 U.S. 392, 399, 96

³ 28 U.S.C. § 2680(c) states: “Any claim arising in respect of ... the detention of any ... property by ... any other law enforcement officer ... based on injury or loss ... [of] property, while in the possession of ... any other law enforcement officer, ...”

property lost by individual federal prison staff stated a claim).

⁴ *Ali*, 128 S.Ct. at 835. 28 U.S.C. 1346(b)(1) provides:
... the district courts ... shall have exclusive jurisdiction of
civil actions on claims against the United States, for money.

⁵ *Ali*, at 835-36.

⁶*Id.* at 840 (emphasis in original).

⁷*Id.* at 841 n.7.

⁸*Id.* at 849 (“Under 28 CFR § 543.31(a) (2007), the “owner of the damaged or lost property” first must file an FTCA claim with the Bureau of Prisons (BOP) regional office; the BOP, in turn, is authorized by statute to settle administrative claims for not more than \$1,000, see 31 U.S.C. § 3723(a), which likely encompasses most claims brought by federal prisoners.”).

⁹ 31 U.S.C. § 3723(b).

¹⁰ *Andrews v. US.*, 441 F.3d 220, 225 n. 4 (4th Cir. 2006), citing to *Bazuaye v. US*, 83 F.3d 482, 486 n. 3 (D.C. Cir. 1996) (Section 3723 “provision did not allow suits against the government,...”). See also *Parrott v. Taylor*, 451 U.S. 527, 542-43, 101 S.Ct. 1908 (1981), where the Court held that where staff had lost the property of a prisoner he had received all the due process he was entitled since the state had an established procedure for recovery of a value for the lost property. damages ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

¹¹ *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct 1999 (1971).

¹² *Hasten v. White*, 275 F.3d 1208, 1210 (10th Cir, 2002) (An “inmate’s ownership of property is a protected property interest that may not be infringed without due process,...” Since inmate was allowed to send property home that he could not possess, he was not denied due process.); *Sellers v. US*. 902 F.2d 598, 603-04 (7th Cir. 1990) (holding that

¹³ 468 U.S. 517, 533, 104 S.Ct. 3194 (1984) (no due process claim for random and unauthorized deprivation of property, even if taking is intentional, so long as state provides inmate suitable post-deprivation remedy); *Raditch v. United States*, 929 F.2d 478, 481 (9th Cir.1991) (“Although *Hudson* involved § 1983 and the Fourteenth Amendment, the same due process principles apply to the federal government through the Fifth Amendment.”).

In *Hudson*, the Court stated that if a prisoner is alleging the unauthorized, intentional deprivation of property, where the government offers compensation through statute, such as the FTCA, there is no due process violation. Remember, the decision in *All* states that the FTCA cannot be used to recover compensation for that lost or destroyed property.

**FIFTEEN MILLION PLUS
DOLLAR JUDGMENT
AFFIRMED FOR FAILURE TO
PROTECT FEMALE
PRISONERS FROM SEXUAL
HARASSMENT AND
ASSAULTS BY STAFF**

This case was originally filed in 1996. Its first reported decision was *Neal v. Dep't of Corrections* (On Rehearing), 232 Mich. App. 730, 592 N.W.2d 370 (1998), which contains a summary of the pertinent facts. It is a class action covering approximately 500 female prisoners. The lawsuit alleged that supervisory prison staff, including the directors, wardens and others prison staff, knew of the existence of a pervasive risk of sexual harassment and assaults occurring in female prisons and these supervisors turned a blind eye to these violations. The women prisoners sued under Michigan Civil Rights Act (CRA), M.C.L.A. § 37.2101 et. seq.

In the first trial of ten of the 500 women prisoners against former MDOC Director Kenneth McGinnis, Scott Prison Warden Joan Yukins and the MDOC, the jury found these three defendants liable and imposed individual award of damages to each of the plaintiff, with damages totaling \$15,545,000.¹ Defendants appealed.

On appeal, Defendants did not challenge that plaintiffs were members of a protected class, subjected to sexual harassment or that the conduct of the guards had created “an intimidating, hostile, or offense environment.” *Neal v. DOC, Court of Appeals* No. 285232, 2009 WL 187813. *2 (unpublished). What Defendants presented to the appellate court were a number of arguments which the Court readily rejected based upon the evidence admitted at trial, failure of defendants to object prior to trial to certain rulings, and the failure to object at trial to evidence admitted.

Defendants first argued that they could not be liable since they did not have “actual or constructive notice of the harassment.” *Id.* The Court found that the standard of review was “whether the totality of the circumstances [was] such that a reasonable employer would have been aware of a substantial probability that at trial, stating that “the level of sexual assault, sexual

abuse, sexual harassment, and invasions of privacy ... is far beyond the level that would be expected in a prison system that has made a serious, concerted effort to minimize instances of staff-inmate relationships, sexual assaults ... indicates that the [d]efendants are deliberately indifferent to protecting inmates from sexual misconduct of all types.” *Id.* at *3. Other supportive evidence admitted at trial included MDOC’s records which reflected the extent of the number of sexual misconduct allegations and that the MDOC had not taken adequate steps to protect against the potential for custodial sexual misconduct in prisons. The jury also heard the plaintiffs testified that the sexually abusive behavior they endured was observed by or reported to supervisors. Further, the warden admitted at trial, and in her deposition, that many women reported being assaulted by a particular CO before the actual assaults in issue at trial and she should have fired him before he sexually assaulted any of the plaintiffs. However, she never took any action to protect the women.

Another issue raised by the Defendants was whether evidence pertaining to guard Lynn Williams who had stopped working with MDOC in 1997, and was not added as a defendant until 2003, should be allowed based upon the statute of limitation and an earlier ruling by that Court. *Id.* at *4. The Court found that this argument by the Defendants was fundamentally flawed since the claims that were tried involved sexual harassment from multiple guards and not just Lynn Williams. Further, the court found that Lynn Williams was not a defendant at this trial but the trial was against MDOC, McGinnis and Yukins.

Defendants claimed that the plaintiffs should have been required to file individual complaints and not litigate this lawsuit as a class action. The Court found that allowing a class action was not an abuse of discretion by the trial court. *Id.* at *5.

Another claim raised by the Defendants was that the trial court ordering that trial be done in lots of ten (bundling) was erred. In rejecting this argument, the Court held that if Defendants needed additional information pertaining to each of the first ten bundled plaintiffs that they should have requested more discovery, which they did not. Further, the Court held that the litigation had proceeded from 1997 through 2003 as a class action with no objections from the Defendants. The Court also found no abuse of discretion when the trial court denial severance since Defendants waited until the day before trial to ask to sever the claims.

Defendants also raised the standard claim that “the jury verdict was excessive and against the great weight of the evidence and that remittitur is appropriate.” *Id.* (footnote omitted). The Court found “Defendants’ argument in support of this claim, however, is muddled.” Defendants argued that they were not allowed to inform the jury that the claims against the individual perpetrators had been dismissed at the request of the Plaintiff. The Court found, contrary to Defendants’ claim, plaintiff had not agreed to dismiss the individual perpetrators but had agreed not to requesting damages against them. *Id.* at *6-7. Thus, the argument of Defendants was contrary to the record.

There were a few other issues raised by the Defendants that the Court rejected with little analysis. *Id.* at 7-8.

On July 15, 2009, Washtenaw Circuit Judge Timothy P. Connors preliminarily approved a \$100 million settlement between parties in this and related cases filed in state and federal court. The settlement is pending a period for making claims and objections from the class and a fairness hearing in August.

¹A recent trial held for another ten women resulted in a second verdict of liability against the defendants for damages against totaling approximately \$15,000,000. Each trial that is held will generally have ten plaintiffs. This could mean another 48 trials.

LEGISLATIVE CORRECTIONS OMBUDSMAN

The Michigan Legislature established the Office of Legislative Corrections Ombudsman within the Legislative Council in 1975 following several prison riots throughout the country. The Legislature wanted its own nonpartisan agency to investigate issues affecting the Michigan Department of Corrections (MDOC), prisoners and Corrections staff. The authority for the Legislative Corrections Ombudsman can be found in Public Act 46 of 1975 and Michigan Compiled Laws sections 4.351 through 4.364.

Statute grants the Ombudsman authority to investigate administrative actions of the Michigan Department of Corrections that are alleged to be contrary to law or Department policy. Anyone can submit a complaint to the Ombudsman for investigation, but most are initiated by a Legislator, a prisoner, or a prisoner’s family member or friends. Except for significant health and safety issues, statute directs complainants to complete

all administrative remedies before the Ombudsman opens an investigation. The grievance procedure and the rehearing process for major misconducts are the two administrative remedies available to prisoners and parolees. The Ombudsman may begin an investigation on his own initiative prior to completion of the administrative remedies for significant health and safety issues, or for other matters for which there is no effective administrative remedy. Statute does not require the Ombudsman to conduct an investigation for every complaint that is submitted. A person is not entitled as a right to be heard by the Ombudsman. Statute specifically states that prisoners are not to be penalized in any way by an official or the MDOC as a result of filing a complaint, complaining to a Legislator, or cooperating with the Ombudsman in an investigation.

The Ombudsman is required to maintain confidentiality with respect to all matters and the identities of the complainants or persons from whom information is acquired, except so far as disclosures may be necessary to enable the Ombudsman to perform the duties of the office and to support any recommendations resulting from an investigation. Correspondence between the Ombudsman and a prisoner is confidential and must be processed as privileged correspondence in the same manner as letters between prisoners and courts, attorneys, or public officials.

The Ombudsman has unlimited access to all facilities, information, records, and documents in the possession of the MDOC. Ombudsman staff visit the correctional facilities throughout the state to interview prisoners and Corrections staff, inspect conditions, and obtain documentation necessary to complete investigations.

The Ombudsman also prepares and submits reports of the findings of investigations and makes recommendations to the Legislative Council after completing an investigation if the Ombudsman finds any of the following:

1. A matter that should be considered by the department.
2. An administrative act that should be modified or canceled.

-
3. A statute or rule that should be altered.
 4. An administrative act for which justification is necessary.
 5. Significant prisoner health and safety issues as determined by the Legislative council.
 6. Any other significant concerns as determined by the Legislative Council.

The Legislative Council may forward the report to the MDOC, the prisoner or prisoners affected, or the complainant who requested the report.

The Ombudsman may request to be notified within a specified time by the MDOC of any action taken on any recommendation that is presented. The Ombudsman shall also notify the complainant of the actions taken by the office and by the MDOC.

The Ombudsman makes recommendations to the Legislature, as requested, concerning changes to existing laws or suggestions for new laws. The Ombudsman is also responsible for submitting an annual report regarding the conduct of the office to the Legislative Council and the Michigan Legislature.

The ability to obtain, interpret and explain information about the MDOC in an unbiased manner uniquely positions the Ombudsman to serve the Legislature and citizens of Michigan.

Additional Information

Legislative Corrections Ombudsman

Keith Barber, Ombudsman
Scott Base, Field Investigator
Jessica Zimbelman, Field Investigator
Kim Nixon, Executive Assistant



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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, September 18, 2009. Elections will be at the Section's annual meeting at 8:30 a.m. in the Hyatt Regency Hotel, Dearborn, MI. Candidates are encouraged to attend the meeting.

The Section will have five (5) open seats for regular members and one (1) open seat for an associate member. Regular membership is limited to attorneys who are members of the State Bar in good standing. Four (4) of the regular member seats are three year terms and one is for an unexpired term ending in 2010. Associate members must be criminal justice practitioners but may be non-attorneys. Selection of regular members is by the qualified voting Section membership present. Selection of associate members is by Council vote. Council members must be members of the Section and will be required to attend meetings most months of the year, usually on Saturday mornings, in Lansing, or as the Chairperson may otherwise direct.

To be placed on the ballot a nominee must provide all of the following information to the Election Qualifications Committee **no later than September 10^h, 2009**.

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:

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

Prisons & Corrections Section
C/O State Bar of Michigan
 306 Townsend Street
 Lansing, MI 48933-2012

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Name (include State Bar Number, if applicable)	
Firm/Professional Affiliation/Inmate Number & Facility	
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City State Zip Code	
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<p>PLEASE NOTE: Newsletter subscriptions will no longer be available to prisoners. Law libraries will continue to have the <i>Forum</i> available. Copies will be available for purchase at \$4 each by sending a request to: Prisons & Corrections Section, C/O State Bar of Michigan, 306 Townsend Street, Lansing, MI 48933-2012.</p>	