

PRISONS AND CORRECTIONS FORUM



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

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Michigan seeks to export inmates out of state through new legislation. *See Page 5.*

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FEATURE ARTICLE

Hot Issues in Parole Appeals

By: Stuart G. Friedman



Recent decisions from the courts on parole appeals have been generally negative. The one notable exception, however, has come from the courts being more willing to reject Parole Board attempts to deny paroles simply because the Board disagrees with the original sentence.

Right to Counsel at Parole Interviews

Overturning a trial court decision to the contrary, the Michigan Court of Appeals has ruled that there is no right to counsel at parole interviews. *Franciosi v Parole Board*, ___ Mich App ___, ___ NW2d ___, 1998 Mich App LEXIS 157 (CA #195684; 5/26/98).

The dispute in *Franciosi* centered around the statutory scheme which bars attorney representation of inmates at parole interviews, while permitting prosecutors and victims to appear through counsel before the Board. The statutory scheme also permitted any person other than an attorney (or another prison inmate) to appear before the Board.

In *Franciosi*, the prisoner challenged this bar on equal protection grounds and prevailed at the Circuit Court level. Following *Franciosi*, Mr. Nix, another prisoner, brought an action for a declaratory ruling seeking a firm decision that an attorney could appear at the interview. In order to avoid the constitutional question, the Parole Board agreed to permit attorneys to appear at the interviews providing that the attorney is not appearing in the capacity of attorney, but as a representative. This position was accepted by Mr. Nix and the suit was dismissed. Based on the Nix settlement, the Department modified its policy directive to track the Nix agreement.

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Parole Issues
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This small victory was recently crushed by the Court of Appeals. At oral arguments in *Franciosi*, both sides urged the Court to not address this issue and only to address – whether a unanimous two person vote violated the statutory mandate that the Board make its release decision on the majority vote of three Board members.¹ Despite the request from both counsels, the Court of Appeals proceeded to address the question of attorney representation during parole interviews.

The Court applied the rational basis standard of review, finding that attorneys are not a suspect class and a client's rights in a parole interview were not fundamental. The Court went on to find that there was a legitimate government interest in excluding attorneys. In so holding, the Court relied on its belief that the presence of attorneys impaired the informal nature of the hearings and would make it more difficult for the Board to assess a prisoner's demeanor. The Court did not address the fact that the statute permitted other professionals to appear on behalf of inmates, including parole consultants, several of which are operating in Michigan. The Court also did not explain why it was acceptable for a victim's demeanor to be filtered by counsel, where the prisoner's could not be.

Leave to appeal is currently being sought to the Michigan Supreme Court. In the mean time, it is unclear what position the Parole Board will take regarding the appearance of attorneys before them.

Right to Remain Silent at Parole Interviews.

Reversing the decision of the Sixth Circuit, the United States Supreme Court ruled that a prisoner does not have a right to remain silent at a sentence commutation hearing.² Woodard was an Ohio prisoner sentenced to death who was still actively pursuing his post-conviction rights, though his appeal of right had been concluded.³ Scheduled for execution, the Parole Board registered Woodard for a clemency interview and hearing. Woodard objected to the procedures utilized by the Board and requested an adjournment and for assurances that his attorney could attend and participate in the interview. Not receiving a satisfactory answer, Woodard commenced suit. After the District Court dismissed the suit, the Sixth Circuit reversed in part.⁴ The Court found minimal due process required that a prisoner's assertion of his right to remain silent while post-conviction proceedings are pending was required by the Fifth Amendment. The High Court disagreed.

Writing for a person plurality, the Chief Justice explained that commutation proceedings were a matter of grace and were not intimately tied to the trial process. Even though Ohio conceded that it would use an inmate's admissions against him in any retrial, the Court believed that the prisoner's testimony was not compelled within the meaning of the Fifth Amendment. The Court found that death penalty commutation proceedings were more analogous to civil proceedings where an adverse inference can be drawn.⁵

The Court further found that a prisoner's role at a parole hearing was akin to a defendant who takes the stand in his own defense. Once a criminal defendant takes the stand, he is not permitted to invoke the Fifth Amendment in the face

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Know Your Parole Board

The Michigan Department of Corrections recently released brief biographies of the current slate of Parole Board members. These individuals, appointed by the Director of the Michigan Department of Corrections, are charged with the task of determining whether or not prisoners are eligible for release into the community. They also review petitions for executive clemency, none of which have been granted since Engler took office. The current parole board policy emphasizes that release on parole "is not a gift to the offender nor a guarantee to the public that the prisoner has been rehabilitated." DOC DIR OFFICE May 18 '98 14:21.

Members of the Parole Board serve four year terms and may be re-appointed by the Director of the Department of Corrections. The current Chairman and Members are:

Stephen H. Marschke (Chairman) of St. Joseph, former Berrien County Sheriff, has worked in law enforcement since 1977. Before becoming Berrien County Sheriff, Marschke was a Detective Sergeant, Patrol Sergeant, and Commander of the Metro Narcotics Unit in Berrien County. He has a bachelor's degree from Indiana University and a master's degree from Michigan State University.

Maurice Armstrong of Lansing, is a former municipal court administrator and a judicial accounts clerk in the 30th Circuit Court in Lansing. Armstrong, who has a master's degree in public administration, also was a human services eligibility worker in Texas and administrator of the Wichita Falls, Texas, municipal court. For 20 years he was a legal services technician for the U.S. Air Force, Department of the Judge Advocate General Corp. in Washington, D.C.

Charles E. Braddock of Saginaw, is the former President/CEO of First Ward Community Service, a non-profit organization. He was previously a police officer and homicide detective with the Saginaw Police Department from 1983 to 1991. He has a bachelor's degree in Criminal Justice from Saginaw Valley State University

Ronald E. Gach of Grand Rapids, has been a Parole Board member since 1985 and is a career corrections professional who has been a deputy warden at two Michigan prisons and superintendent of one facility. He holds a master's degree in sociology from the University of Detroit.

John A. Hallacy is a former chief assistant prosecuting attorney for Calhoun County. Hallacy, of Marshall, earned his law degree in 1988 from Valparaiso University School of Law in Indiana. After graduation from law school, he joined the Calhoun County Prosecuting Attorney's Office. His bachelor's degree came from Western Michigan in the field of criminal justice.

Barbara A. Queen-Johnson of Southfield, has been Director of Training for Orchards Children's Services in Southfield and previously was director of Foster Care Management there, as well as being Foster Care Administrative Director. Johnson also has been a part-time therapist. She holds a master's degree in social work from Indiana University in Indianapolis.

Margie R. McNutt of Lansing, has been a pretrial services investigator in Ingham County since 1979. In this position, she interviewed accused felons for bond recommendations to the judges and has supervised caseloads to ensure compliance with pretrial release conditions. She has a bachelor's degree in multi-disciplinary social science from Michigan State University.

Andrea J. Morse of Grand Rapids, was the U.S. Attorney's advisor on victim-witness matters and administered the provisions of the Victim and Witness Protection Act for the U.S. Attorney's Office in the Western District of Michigan. From 1980 to 1995 she directed the victim witness services program for the Kent County Prosecutor's Office. She has a master's degree in public administration from Western Michigan University.

William B. Reed of West Bloomfield, has been probation supervisor in Oakland County since 1990 and previously was supervisor of the Pontiac Corrections Center. He began his career with Corrections in 1988 as a probation officer in Oakland County. Reed has a bachelor's degree in Criminal Justice from Michigan State University and has done postgraduate work at the University of Detroit.

William A. Slaughter of Dimondale, was the Equal Employment Opportunity Officer for the Michigan State Police and previously worked with the Internal Affairs and Inspection Section of the Michigan State Police. He began his law enforcement career in 1971 as a Deputy Sheriff with the Cass County Sheriff's Department. He has a bachelor's degree in Criminal Justice from Michigan State University.

While the Department takes pride in the perceived diversity of the current Board, practitioners and inmates seeking parole should note that the backgrounds of Board members lie almost exclusively in some branch of law enforcement or military service ■

Parole Issues

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of a prosecutor's cross-examination. The Court concluded by holding that even though the prisoner may face a Hobson's choice in being forced to select between a successful commutation hearing and a successful retrial, this choice does not violate the Fifth Amendment.

Justice O'Connor authored a partial concurring opinion (joined by Justices Souter, Ginsburg, and Breyer). She found that the due process clause applied to commutation hearings, but that Ohio's procedures did not violate the due process clause. Justice Stevens dissented from the court's holding that due process clause did not apply to commutation hearings, but joined in the Court's Fifth Amendment analysis. On remand, the Sixth Circuit ordered the Court affirm the dismissal of Woodard's suit.⁶

It is too early to determine whether Woodard will effect Michigan law. Already, one court has held that Woodard is applicable to parole interviews.⁷ One key point worth noting is that the Woodard ruling is based on the premise that there is no due process right to a parole because Ohio's commutation proceeding permits a commutation to be denied for any constitutionally permissible reason. In reaching this ruling, the Court relied on its past ruling in *Greenholtz v Inmates of Nebraska Penal and Correctional Complex*.⁸ In *Glover v Parole Board*, however, the Michigan Court of Appeals rejected *Greenholtz* as a matter of state constitutional law. With *Greenholtz* being rejected, a good argument remains that Woodard should also be rejected by the Michigan courts. Further, at least one court has found that under *Greenholtz*, Michigan law creates a liberty interest in its parole process. It appears that further litigation of this issue is necessary before Michigan's stance is made certain.

Parole Board Resentencing

In what seems to be the only good news from the courts during this time period, several courts have now provided detailed reasons why the Parole Board may not continue to deny a parole simply because they disagree with the sentencing judge.

In *Bonner v Parole Board*,⁹ the Court found that even though the Parole Board is given significant discretion in determining whether to grant an inmate parole, this discretion is not a license for the Board to continually deny a parole because they believe that he or she originally should have been given a longer sentence. Bonner was flopped seven times for factual reasons that already had been examined by the sentencing Court when first

imposing his sentence, and which would never change. In reaching this holding, Judge Battani asserted:

I believe this 7th continuance rises to the level of abuse of discretion. It appears that there is nothing that the appellant can do, short of becoming a choir boy, to satisfy the parole board that he is eligible for release. The risk of repeat offenders is always too high. However, containing prisoners to the expiration of maximum sentence because of the nature of the crime is an abuse of power and obliterates the concept of indeterminate sentencing. The "fix" of our archaic indeterminate sentencing system is purely a legislative function and cannot be usurped by this Court or the Parole Board. Appellant has met his burden in proving that the decision is a clear abuse of discretion.

Similarly, in *Feek v Parole Board*,¹⁰ Judge James P. Noecker held that the parole board may not deny a parole "solely because of the circumstances of his conviction without more." Slip Op. at 5.

Whether these rulings represent a trend or an aberration remains to be seen, but they do give inmates appealing Parole Board decisions new hope of a chance for success ■

Endnotes

¹Interview, Neal Bush to Stuart Friedman, June 30, 1998.

²Ohio Parole Authority v Woodard, ___ U.S. ___, 118 S Ct 1244, 140 LEd 387 (1998). The decision is available on the Internet at <http://supct.law.cornell.edu/supct/html/96-1769.ZS.html>.

³State v. Woodard, 698 Ohio St 3d 70, 623 NE2d 75 (1993), cert denied 512 US 1246 (1994).

⁴Woodard v Ohio Parole Authority, 117 F3d 1178 (CA 6, 1997).

⁵1998 US App LEXIS 2130, *25 (quoting Baxter v Palmigiano, 425 US 308, 316-18, 47 LEd 2d 810 (1976)).

⁶Woodard v Ohio Parole Authority, 1998 US App LEXIS 10619 (CA 6, 1998) (unpublished).

⁷Speth v Pennsylvania Board of Probation and Parole, 1998 US Dist LEXIS 7753 (ED Pa, 1998).

⁸442 U.S. 1, 99 S. Ct. 2100, 60 LEd2d 668 (1979).

⁹Wayne Circuit No. 97-734219-AP (Hon. Marianne Battani). The decision is available on the internet at <http://www.crimapp.com>.

¹⁰St Joseph County Circuit Court No. 97-598. (Hon. James Noecker). The decision is available on the internet at <http://www.crimapp.com>.

Legislature Approves Out-of-State Prisoner Transfers — With Conditions

Until recently, Michigan law (MCL 791.211a) prohibited the transfer of any prisoner to an out-of-state facility without the prisoner's consent, unless the transfer was necessary for the prisoner's safety. Anticipating that a shortfall in prison beds would occur before new ones could be constructed, the DOC sought to have the statute amended. Its solution was simply to eliminate the consent requirement without adding any conditions or selection criteria. Thus, the DOC would be free to send any prisoner, anywhere, at any time.

The only constraints on who these prisoners could be and what rights and privileges they retain would be the contract terms negotiated with the receiving state and the modest requirements of the Interstate Corrections Compact. The DOC also proposed to eliminate the Hearings Division's responsibility for transferred prisoners so that misconduct hearings, for example, would be conducted by and in accordance with the rules of the receiving state.

A bill with these amendments, SB 838, easily passed the Senate in February. However, when it reached the House, Rep. John Freeman, Chair of the Corrections Committee, recognized the enormous impact the proposed legislation could have on prisoners and their families. The DOC was pressing for immediate passage because, it claimed, Michigan was virtually out of space and it needed to execute a contract with Virginia to lease about 1200 beds. Regardless, Rep. Freeman insisted on holding hearings at which all sides of the question could be aired.

The issue arose too quickly for the Prisons and Corrections Section to take a formal position. However, two Section council members, Penny Ryder and Barbara Levine, spoke on behalf of their respective organizations at the hearings. They urged the Committee to adopt statutory guidelines that would minimize disruption of prisoners' family relationships, treatment programming, parole prospects, and access to courts and counsel.

Ryder and Levine also emphasized the connection between family ties and successful return to the community, the need to insure adequate medical and mental health care, and the possibility that prisoners could be

denied parole for failing to complete programs not available to them at out-of-state facilities. They stressed that eliminating Hearings Division responsibility would actually violate the Interstate Compact by denying an existing statutory right. And, along with the Michigan Corrections Officers, they argued against permitting transfers to private facilities.

Sensitive to these concerns, Rep. Freeman arranged to have the bill passed out of committee but left off the House floor agenda until some conditions had been agreed to by the DOC. The legislation that was adopted on June 11, 1998 prohibits transfers to private prisons. In addition, it contains the following conditions:



(3) In considering transfers of prisoners out-of-state pursuant to the interstate corrections compact due to bed space needs, the department shall do all of the following:

(A) Consider first prisoners who volunteer to transfer as long as they meet the eligibility criteria for such transfer.

(B) Provide law library materials including Michigan compiled laws, Michigan state and federal cases, and U.S. Sixth Circuit Court cases.

(C) Not transfer a prisoner who has a significant medical or mental health need.

(D) Use objective criteria in determining which prisoners to transfer.

(4) Unless a prisoner consents in writing, a prisoner transferred under the interstate corrections compact due to bed space needs shall not be confined in another state for more than 1 year.

(5) A prisoner who is transferred to an institution of another state under this section shall receive all of the following while in the receiving state:

(A) Mail services and access to the court.

(B) Visiting and telephone privileges.

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Prison Reimbursement Law Update

By: Daniel M. Levy

This issue was previously discussed in an article appearing in the February 1998 Prisons and Corrections issue of the Michigan Bar Journal. The prior article outlined the case law on prison reimbursement as it existed at that time and raised some questions relating to pending litigation. Since publication of that issue, two very significant federal decisions were issued, and while they were included in an addendum to the original article, they merit closer analysis. In general, prison reimbursement actions are filed pursuant to the State Correctional Facilities Reimbursement Act (SCFRA), MCL section 800.401, et. seq.; MSA 28.1701, et. seq.

The first case, *Douglas Roberts State Treasurer v James Baugh and Chrysler Corporation*, came out of the Federal District Court, Eastern District of Michigan.¹ *Baugh*

involved the apparent conflict between the intents of SCFRA and the Employee Retirement Income Security Act (ERISA).² ERISA provides that certain federally protected pensions are non-alienable and non-assignable.

In *Baugh*, the State argued that it should be permitted to secure a court order which would name a pension source as a party and require that the source send all pension payments due to an inmate to that inmate's prison address. The State reasoned that this would be consistent with ERISA's intent that the pension funds reach the intended recipient. The State further asserted that once a pension check is in the intended recipient's account, the funds are no longer protected by ERISA and as such may be recovered by the State in a prison reimbursement action. The Court held that a court may not order a pension source to redirect a recipient's funds, as ERISA prevents any entity other than the recipient from instructing the pension source where to send payments.

The *Baugh* Court did not address the question of whether the recipient can be ordered to cause the funds to be redirected, nor does it indicate what a court might be

permitted to do to enforce such an order should the recipient refuse to comply. The Court did, however, specifically find that once pension benefits reached the inmate's personal account, ERISA no longer protected those funds. For this reason, continued litigation over ERISA protected pensions can be expected.

Another case which bears mention in this context is *Douglas B. Roberts State Treasurer v Garry Lee Ebright and Metropolitan Life*.³ In an unpublished opinion, the *Ebright* Court held that removal of a prison reimbursement case to the Federal Court based on the argument that ERISA presented a federal question was improper. The Court remanded *Ebright* back to the State Circuit Court for litigation of the ERISA issue.

While federally protected pensions may still be open to much litigation, the question of state protected pensions appears to be a settled issue. In *State Treasurer v Schuster*, the Court found that SCFRA has priority over a state

pension act and that the non-assignment provision in the state pension statute does not insulate a public school employee's pension from a reimbursement action.⁴ While the *Schuster* case specifically applies only to the pensions of former public school employees, there is no reason why it could not be extended to all other pensions protected by similar state statutes.

The *Schuster* opinion also resolves any question as to whether the relationship between the inmate and the State is that of debtor and creditor. The Court found specifically that it is not. Rather, the Court described this relationship as one between a statutory obligor and statutory obligee. As such, statutes designed to govern the debtor/creditor relationship would not, by their terms, be applicable to prison reimbursement actions ■



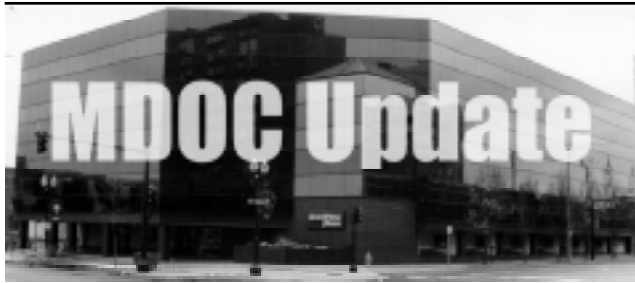
Endnotes

¹ Douglas Roberts, *State Treasurer v James Baugh and Chrysler Corporation*, 986 F Supp 1074 (ED Mich 1997).

² 29 USC 1001, et seq.

³ Case No. 97-CV-10069-BC (ED Mich N. Div).

⁴ *State Treasurer v Schuster*, 456 Mich 408 (1998).



By: Marjorie Van Ochten

Administrative Rules on Disciplinary Time

The Michigan Department of Corrections has submitted a proposed administrative rule, R 791.5515, to the Legislative Joint Committee on Administrative Rules. This rule sets forth the amount of time which would be added to a prisoner's minimum term of sentence if the prisoner is found guilty of a major misconduct violation. Promulgation of the rule by the MDOC is required by MCL section 800.35, which is a section of the Act which created disciplinary time. That Act, PA 83 of 1996, is more generally known as the "truth in sentencing" legislation. Although it was enacted by the Legislature in 1996, it is tie-barred to the enactment of the new sentencing guidelines, which have not yet been passed by the House as of the date of this article.

Disciplinary time as enacted in PA 83 of 1996 does not apply to all prisoners but only to those convicted of one of the dozens of offenses enumerated in MCL section 800.34(5). There is currently a proposal in the Legislature, however, to expand disciplinary time to all offenses, thus completely eliminating the current concept of disciplinary credit for all those convicted after the effective date of any such legislation. Disciplinary time is added to a prisoner's minimum term of sentence, and the prisoner is not eligible for parole until the minimum term, plus any accumulated disciplinary time, has been served.

The amount of disciplinary time which is added, as set forth in R 791.5515, ranges from all available disciplinary time for the major misconduct of homicide, to a low of seven days for major misconducts such as Out of Place and Interference with the Administration of Rules. The total added disciplinary time cannot be greater than the maximum term of sentence imposed by the sentencing Court. Thus, when all available disciplinary time is added, the minimum term becomes the same as the maximum.

It is expected that the Legislature will complete work on sentencing guidelines in the near future, which means that shortly thereafter prisoners sentenced for crimes designated under PA 83 of 1996 will be subject to its provisions. The MDOC's rule on disciplinary time then will become operational. A copy of the proposed rule may be obtained by submitting a Freedom of Information Act request to the MDOC's Office of Policy and Hearings in Lansing.

Policy Directive on Religion

The MDOC has revised its policy directive which governs prisoners' exercise of their religious beliefs in MDOC facilities (PD 05.03.150). The policy directive covers all facets of religious practices, including receipt of religious literature and other items which are necessary to the practice of a prisoner's religion, recognition of religious groups for purpose of holding services within a facility, special menus for religious purposes, and access to prisoners for clergy and religious volunteers.

The new policy directive, which went into effect May 18, 1998, is similar to the previous policy in many respects. However, it contains new information on procedures for allowing prisoners to observe religious dietary restrictions, and a specific list of approved religious materials for those religious groups which have recognized by the MDOC for purposes of group meetings and services. The subject of special religious menus is further addressed in a recently-issued operating procedure, OP 05.03.140-A "Kosher Meal Program," which includes a list of MDOC facilities where kosher meals are available.

The basic premise of the policy directive is that prisoners are permitted to exercise their religious beliefs within the constraints necessary for safe operation of a prison. It is the delineation of those constraints which is the major subject of the policy directive, and, indeed, has been a major concern of the Courts for many years. ■

Supreme Court Holds that the ADA is Applicable to Prisons

Ruling Calls Into Question Prison Exemption to Elliot Larsen Act

By: Stuart G. Friedman

In the last issue of the Prison & Corrections Forum, we discussed how the United States Supreme Court had agreed to determine whether the American With Disabilities Act ADA (42 USC §1201 *et seq*) was applicable to state prisons.¹ On June 15, 1998, a unanimous Supreme Court ruled that the act did apply to prisons. Justice Scalia, writing for a unanimous Supreme Court refused to write such an exclusion into the act when Congress had not.² Relying on the plain meaning doctrine, Justice Scalia found that the act was applied to state prisons. The Court refused to address Pennsylvania's constitutional challenge to the statute.

Just ten days before *Yeskey* was decided, the Michigan Court of Appeals reached a contrary decision interpreting the Michigan Elliot-Larsen's Act.³ Even though the statute did not contain an express bar on its application to prisons, the Court relied on the deference traditionally afforded prison administration as a ground to find that the Legislature could not have intended the act to apply to prisons. In reaching this conclusion, the Court relied on federal decisions which utilized this reasoning to exclude prisons from federal civil rights law. This rationale was the exact rationale rejected by the United States Supreme Court in *Yeskey*. Rehearing has been sought in the Michigan case in light of the *Yeskey* decision.

While the Supreme Court's ruling in *Yeskey* is a promising development, it is clear that this dispute is not over. ■

Endnotes

¹ *U.S. Supreme Court Will Decide Whether the ADA Applies to Prisons*, Prisons and Corrections Forum, Spring, 1998, p. 10.

² *Pennsylvania Department of Corrections v Yeskey*, ___ US ___, ___ S Ct ___, ___ Fed 2d ___, 1998 US LEXIS 3888 (1998). The decision is available on the Internet at <http://supt.law.cornell.edu/supt/html/97-634.ZS.html>.

³ *Neal v. Department of Corrections*, ___ Mich App ___, ___ NW2d ___, 1998 Mich App LEXIS 168 (CA #198616; 6/5/98); MCL 37.2101 *et seq*; MSA 3.548(101) *et seq*. This decision is available on the internet at <http://www.icb.org/mictapp/1998/06/final/198616.htm>.

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(C) Occupational and vocational programs such as GED-ABE and appropriate vocational programs for his or her level of custody.

(D) Programs such as substance abuse programs, sex offender programs, and life skills development.

(E) Routine and emergency health care, dental care, and mental health services.

Unfortunately, among the proposed conditions **not** adopted were those that would prohibit transferring a prisoner:

- who has received eight (8) or more visits within the 12 months preceding the intended transfer date, excluding attorney, clergy and other professional visits;
- whose last sentence was imposed fewer than 12 months preceding the intended transfer date and who is therefore within the period for filing an application for leave to appeal to the Michigan Court of Appeals;
- who is within 24 months of his or her next parole eligibility date.

Nor would the DOC agree that the privileges accorded prisoners under Section(5) had to be substantially similar in scope to those they would have had in Michigan.

Hearings Division responsibility for transferred prisoners became a particularly complicated issue. Initially, it was restored at the June 11 hearings, but subsequently was eliminated again when the State of Virginia refused to sign a contract that gave Michigan Courts the ultimate authority over discipline imposed in Virginia prisons. Other areas in which transferred prisoners' existing statutory and constitutional rights might be implicated include the possession of personal clothing and other personal property, and access to courts by prisoners unable to use the law library effectively.

If and when prisoners actually are transferred to Virginia, or any other state, the burden on prisoners, their families and their lawyers will be substantial. Depending on the receiving state, numerous issues may have to be resolved, whether by negotiation or litigation, to insure that Michigan prisoners whose rights and privileges have already been greatly reduced are not further disadvantaged by being shipped hundreds or thousands of miles to prisons where conditions are substantially worse. ■

Michigan Religious Freedom Bill To Exclude Prisoners

By: Penelope Ryder

The right to the free exercise of religion for all is central to the American ideal of liberty. But there has been a significant change in this right since 1990. Until 1990, the Supreme Court had interpreted the words of the Constitution to forbid the government from burdening religion except in the most exceptional circumstances: when the state could prove that it had a "compelling interest" in prohibiting or regulating certain religious activity.

The Supreme Court abandoned the compelling interest standard in 1990 through their decision in *Employment Division v. Smith*.¹ The Court held that a law burdening religion would pass Constitutional muster only if the government could show that the law was neutral with regard to religion. For example, a law intended to curb consumption of alcohol by minors could have the unintended effect of prohibiting children from taking communion. A law regulating animal slaughter could inhibit dietary practices of Jews and Muslims.

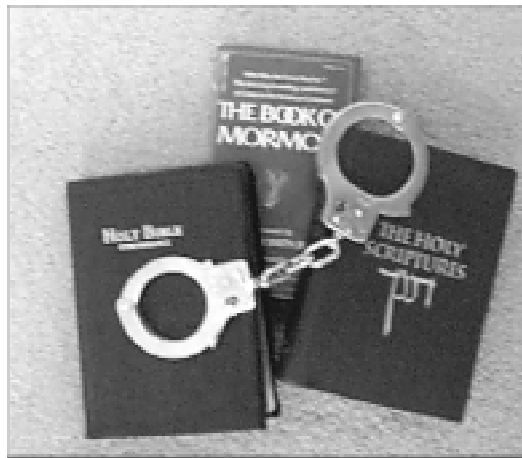
In 1993, Congress passed the Religious Freedom Restoration Act (RFRA)² in response to the widespread dissatisfaction with the Smith standard. RFRA simply required 1) that government demonstrate a compelling interest in order to justify its interference with an individual's right to the free exercise of religion; and 2) that government use the least restrictive means necessary to achieve its goal.

In July 1997, the Supreme Court declared RFRA unconstitutional.³ The Court said that, by passing RFRA, Congress had intruded into an area reserved by the Constitution for the States. Our Michigan State legislature now has a bill drafted to establish boundaries for the right to freely exercise one's religion.

The Bill that passed the State House and is being considered by the Senate (HB 4376) is seriously flawed because it exempts prisoners from the protection of RFRA. If the legislation in its current form is allowed to stand, an ominous precedent will be set: the Michigan Legislature will be allowed to decide which groups qualify for religious freedom and which do not. The prisoner exemption serves no legitimate purpose, since the Courts have already ruled that (as common sense dictates) prison

safety and security concerns are a compelling state interest.

Under the Constitution, we should not have to defend our religious practice, the government should have to defend any attempt to restrict it. The issue should be decided on the basis of a compelling interest of government (i.e. as to all of us) not on the popularity of a particular group or their ritual practice.



The RFRA Coalition has been formed (chaired by Steven L. Johns-Boehme of the Michigan Ecumenical Forum) and is attempting to get this bill changed: first to be a clean bill without any exemptions, and second to add language sensitive to incarcerated citizens. For example, the Coalition proposes adding language to the bill which states: "Nothing in this act shall be construed as authorizing or requiring any correctional or penal institution of any governmental entity to permit an incarcerated person's

exercise of religion in a manner in which there is a reasonable likelihood that it will endanger the security of the institution, including the health and safety of staff and prisoners"

Representative Kirk Profitt's HB 4376 that exempts prisoners was recently tie-barred to SB 923 (State Real Estate Transfer Tax Act) by the House. Nothing will formally happen in the Senate with any of the bills until the Fall session. At that time, they will be taken up in the Senate Judiciary Committee. Concerned parties should contact their state legislators regarding this bill ■

Endnotes

¹ *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)

² Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat 1488, 42 U.S.C. § 2000bb *et seq.*

³ *City of Boerne v Flores*, ___ U.S. ___, 117 S. Ct. 2157, 138 LEd 624 (1997).

Section Inspires New Citizens' Alliance

Many civic leaders and human service providers are frustrated by the extent to which the ever-growing DOC budget drains dollars from other important services, such as higher education, mental health and substance abuse treatment. However, since corrections is not their area of expertise, they are not always familiar with the specific public policies that drive prison growth. When legislators or DOC officials assert that there is no alternative to building more prisons, those who must compete for the dollars may be ill-prepared to discuss particular sentencing and parole practices that directly affect the rate of prison growth.

To make this sort of knowledge more broadly available, the Section hosted a half-day forum on prison expansion on April 3, 1998. About sixty people from widely diverse backgrounds attended. They heard speakers, received a substantial set of handout materials, broke into small discussion groups, and reassembled to share their conclusions.

Keynote speaker William Kime, former DOC Deputy Director in charge of research and planning, described how the prison population has exploded nationally since the mid-1970's and explained that this was not attributable to any comparable increase in crime. Instead, it was largely a reaction to the perception that crime has increased dramatically – a perception fueled by press coverage of especially notorious offenses and by lawmakers "playing to the gallery." Moreover, Kime asserted, increased imprisonment rates do not reduce crime rates, a fact proven by Michigan's own experience.

Gary Gabry, chair of the parole board from its revamping in late 1992 through 1996, explained that the abolition of the Corrections Commission politicized the parole process, causing current board policy to be driven by headlines. Gabry noted that another problem is that board members assess the minimum by their own standards and essentially resentence the prisoner by denying parole if they think the original sentence was too short.

Laura Sager of Families Against Mandatory Minimums (FAMM) explained how harsh Michigan's state drug laws are compared to federal drug laws. She noted extensive research indicating that treatment is far more cost-effective than incarceration.

Kay Perry of MI-CURE described the availability of sex offender and assaultive offender treatment programs. Perry stressed that better use of proven treatment modalities would be more cost-effective than lengthy prison terms.

The forum participants reached consensus that the policies which have led to continued prison construction must be re-examined. There was general agreement that resources were being wasted on locking up drug and property offenders and paying for "get tough" initiatives like "truth-in-sentencing" that serve only to lengthen sentences. Strong concern was expressed that resources were being drained from the very areas that might ultimately reduce crime and improve the quality of everyone's lives, like education, mental health, and substance abuse treatment. It was also felt that more emphasis should be placed on providing these services to prisoners and parolees.

As a result of the forum, many attendees have formed a new organization – Citizens Alliance on Prisons and Public Safety (CAPPS). Designed to be a broad-based coalition of organizations and individuals, CAPPS has as its goals: capping prison construction, capping prison spending, and shifting resources. It will pursue these goals through public education, lobbying, and grass roots organizing.

Two organizational meetings have been held already. The group is developing bylaws and drafting position papers. Members include substance abuse and mental health treatment providers, academicians, criminal justice professionals, and representatives of various civic organizations. Organizational membership dues are \$100.00; Individual memberships are \$25.00. CAPPS may be contacted at 115 W. Allegan, Suite 940, Lansing, MI 48933; (517) 482-7753; E-mail: capprisons@aol.com.

Find It on the Web

Much of the source material contained in this issue of the Newsletter can be found on the World Wide Web. Senate bills can be found at <http://198.109.122.10/txt/senate.bills.intro>. This website contains full text for all bills currently pending in the Michigan Legislature. The Legislature maintains a bill finder search engine at <http://www.michiganlegislature.org/isapi/nls.exe.dll/BillStatMain>. Administrative rules can be found at <http://www.state.mi.us/excoff/admincode/about.htm>. Sixth Circuit decisions are available at <http://www.law.emory.edu/6circuit>. The unpublished cases in the lead article can be found at <http://www.crimapp.com>.

Prisons & Corrections Section

Council Elections

The section will be holding elections at the State Bar of Michigan Annual Meeting to fill four council seats for three-year terms beginning in the fall of 1998. We are a working council and applicants must be prepared for the responsibilities of the office. All interested attorneys are encouraged to run for these offices. Council members must be members of the section and must be available to attend meetings on the first Saturday of every month in Lansing. To be placed on the ballot, you must provide all of the following information to the Election Qualifications Committee on or before August 28, 1998 (please print or type legibly):

Name and P-number: _____

Mailing Address: _____

City/State/Zip Code: _____

Daytime telephone number: _____

Current fields of practice/employer: _____

Professional affiliations: _____

In approximately fifty (50) words, please summarize your qualifications, background and reasons for seeking a position on the council:

Applicants who do not provide a complete petition will not be included on the September ballot.

Please either mail completed petitions to: Election Qualifications Committee, 2100 Penscote Building, Detroit, Michigan 48226; or transmit via facsimile to: (313) 962-0766. Photocopies of this form or submissions on plain paper are also acceptable, provided they contain all requested information.

The elections will take place at the Section's annual meeting on Wednesday, September 16, 1998 at 2:00 PM, at the Radisson Plaza Hotel, Lansing. All candidates should plan on attending the meeting.

State Bar of Michigan
Prisons & Corrections Section
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2083

Prisons & Corrections Section Annual Meeting

Our section will hold its annual meeting on Wednesday, September 16, 1998, beginning at 2:00 pm during the State Bar of Michigan annual conference at the Radisson Plaza Hotel in Lansing, Michigan. The schedule for the meeting will be:

2:00 PM Business Meeting

2:30 PM Program:

WHAT DOES THE JUDGE'S SENTENCE REALLY MEAN?
Determining How Much Prison Time a Defendant Will Serve

Keynote Address: The New Legislative Sentencing Guidelines

Honorable Paul Maloney, Chairperson
Michigan Sentencing Commission

The Impact of Parole on Guidelines Sentencing and the Meaning of the Minimum

Jeanice Daegher-Margosian
Trial and Appellate attorney

**Other Factors Affecting the Minimum: Jail credit, "Truth-in-Sentencing,"
"corrected" judgments of sentence**

Sheila Robertson Deming, Director
Special Unit on Pleas and Early Releases
State Appellate Defender Office

Questions and Answers to the panel will follow the individual presentations.

New members or conference attendees interested in becoming section members are encouraged to attend this program.