VOLUME 11, NO. 2 FALL 2011

PRISONS AND CORRECTIONS FORUM

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

Contents

Position Supporting Appointment of Counsel for Prosecutor Appeals of Parole.... 1

Position Opposing HB4472, Seeking to Deny Appointed Counsel to Defend Prosecutor Appeals of Grants of Parole 2

Position Supporting ABA Resolution 104B, "Prison Oversight and Monitoring" 2

CORRECTION 8

Due Process for Prisoner Discipline in the Michigan Department of Corrections?

By Raymond C. Walen, Jr........... 8

Law School Clinics Team Up with ACLU and Legal Services to Challenge Default Parole Conditions

By Paul D. Reingold 11

The Consequences of Overusing High Security Bed-Space

By Peter Martel 12

Join the Prisons and Corrections Section 12

News in the Michigan Department of Corrections ... 13

United States Sentencing Commission Urges Rescission of All Mandatory Minimum Sentences 14

Sentencing Juveniles to Life without Parole: Recent Developments 15

Position Supporting Appointment of Counsel for Prosecutor Appeals of Parole

On March 5, 2011, the Council of the Prisons and Corrections Section adopted the following position regarding Prosecutor Appeals of Parole and Appointment of Counsel. The position expressed is that of the Prisons and Corrections Section only and is not the position of the State Bar of Michigan. To date, the State Bar does not have a position on this matter. The total membership of the Prisons and Corrections Section is 153. The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 15. The number who voted in favor of the position was 9; the number who voted against the position was 0; no abstentions.

Issue: MCL 791.234(11) permits a county prosecutor or a victim to appeal from Michigan Department of Corrections' decisions to grant parole to a prisoner committed from that county. (Prisoners, however, do not have the same right to appeal when their parole is denied.) Prosecutors are filing such appeals with increasing frequency. As a result, prisoners who are granted parole, including those who have already been released, are forced to defend their parole status in formal court proceedings. Prisoners usually do not have the means to hire counsel, nor is there any rule or other mechanism for the appointment of counsel in such circumstances. These appeals may involve complicated issues of fact, as well as procedural and substantive issues of law. The Office of the Attorney General does not defend the parolee; it will defend only the authority of the Parole Board to grant parole. An unrepresented prisoner is no match for a county prosecutor in litigating such issues, and the unfairness is plain.

The grant of parole implicates a liberty interest. Michigan already recognizes the right to counsel in the context of parole revocation proceedings, and appoints counsel in such proceedings where the parolee is indigent. A similar interest and right is implicated in the context of these prosecutor and victim appeals.

Position: The Prisons and Corrections Council believes it essential, as a matter of due process, that prisoners who are unable to hire counsel to defend these appeals have counsel appointed to them for such defense. The right to counsel in the context of these appeals should be recognized, and steps taken to adopt the necessary court rules or other available measures to ensure that counsel is appointed to indigent prisoners. ■

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The opinions expressed in this newsletter do not necessarily represent the views of the Prisons and Corrections Section of the State Bar of Michigan or the State Bar of Michigan, but those of the individual contributors.

Position Opposing HB4472, Seeking to Deny Appointed Counsel to Defend Prosecutor Appeals of Grants of Parole

On May 7, 2011, the Council of the Prisons and Corrections Section adopted the following position regarding HB 4472. The position expressed is that of the Prisons and Corrections Section only and is not the position of the State Bar of Michigan. To date, the State Bar does not have a position on this matter. The total membership of the Prisons and Corrections Section is 153. The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 11. The number who voted in favor of the position was 10; the number who voted against the position was 0; one member abstained.

Position: The Prisons and Corrections Section voted to oppose HB 4472, which would prohibit the appointment of legal counsel for prisoners who have been granted parole and must defend against an appeal by the prosecutor or victim.

Background: The Criminal Law Section also voted to oppose HB 4472, as reported in the State Bar of Michigan's Public Policy Update, April 18-24, 2011, Volume 9 Issue 17. ■

Position Supporting ABA Resolution 104B, "Prison Oversight and Monitoring"

On March 5, 2011, the Council of the Prisons and Corrections Section adopted the following position relating to ABA Resolution 104B, "Prison Oversight and Monitoring". The position expressed is that of the Prisons & Corrections Section only and is not the position of the State Bar of Michigan. To date, the State Bar does not have a position on this matter. The total membership of the Prisons & Corrections Section is 153. The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 15. The number who voted in favor of the position was 8; the number who voted against the position was 0; one person abstained.

RESOLVED, that the Prisons and Corrections Section of the State Bar of Michigan commends the House of Delegates of the American Bar Association (ABA) for creating and adopting ABA Resolution 104B, "Prison Oversight and Monitoring," and the accompanying "Key Requirements for the Effective Monitoring of Detention and Correctional Facilities," and recommends adoption of the Resolution provisions to the State of Michigan, and federal and local governments within the State in order to take affirmative steps toward implementing the "Key Requirements."

FURTHER RESOLVED, that it is recommended the State Bar of Michigan (SBM) also consider adoption of ABA Resolution 104B and the "Key Requirements" as policy of the SBM to ensure adequate, independent oversight of detention and correctional facilities within the State.

Editor's note: *ABA Resolution 104B, the "Key Requirements" and Report that are recommended by the Section follow on pages 3-8.*

ABA Resolution 104B

AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION REPORT TO THE HOUSE OF DELEGATES RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, tribal, local, and territorial governments to develop comprehensive plans to ensure that the public is informed about the operations of all correctional and detention facilities (facilities for the confinement of individuals for alleged or adjudicated crimes or delinquent acts) within their jurisdiction and that those facilities are accountable to the public.

FURTHER RESOLVED, That the American Bar Association urges federal, state, tribal, and territorial governments to establish public entities that are independent of any correctional agency to regularly monitor and report publicly on the conditions in all prisons, jails, and other adult and juvenile correctional and detention facilities operating within their jurisdiction.

FURTHER RESOLVED, That the American Bar Association adopts the "Key Requirements for the Effective Monitoring of Correctional and Detention Facilities", dated August 2008, and urges that federal, state, tribal, local and territorial monitoring entities meet these Key Requirements as minimum standards.

FURTHER RESOLVED, That the American Bar Association recommends that the federal government:

(1) Provide technical assistance and training to facilitate the establishment of monitoring entities that meet the "Key Requirements for the Effective Monitoring of Correctional and Detention Facilities."

(2) Require that jurisdictions receiving federal funds for correctional or detention facilities ensure that the facilities are monitored by at least one entity meeting these requirements.

(3) Develop common definitions for the collection and reporting of key performance data by correctional and detention facilities.

KEY REQUIREMENTS FOR THE EFFECTIVE MONITORING OF CORRECTIONAL AND DETENTION FACILITIES

1. The monitoring entity is independent of the agency operating or utilizing the correctional or detention facility.
2. The monitoring entity is adequately funded and staffed.
3. The head of the monitoring entity is appointed for a fixed term by an elected official, is subject to confirmation by a legislative body, and can be removed only for just cause.
4. Inspection teams have the expertise, training, and requisite number of people to meet the monitoring entity's purposes.
5. The monitoring entity has the duty to conduct regular inspections of the facility, as well as the authority to examine, and issue reports on, a particular problem at one or more facilities.
6. The monitoring entity is authorized to inspect or examine all aspects of a facility's operations and conditions including, but not limited to: staff recruitment, training, supervision, and discipline; inmate deaths; medical and mental-health care; use of force; inmate violence; conditions of confinement; inmate disciplinary processes; inmate grievance processes; substance-abuse treatment; educational, vocational, and other programming; and reentry planning.
7. The monitoring entity uses an array of means to gather and substantiate facts, including observations, interviews, surveys, document and record reviews, video and tape recordings, reports, statistics, and performance-based outcome measures.
8. Facility and other governmental officials are authorized and required to cooperate fully and promptly with the monitoring entity.
9. To the greatest extent possible consistent with the monitoring entity's purposes, the monitoring entity works collaboratively and constructively with administrators, legislators, and others to improve the facility's operations and conditions.
10. The monitoring entity has the authority to conduct both scheduled and unannounced inspections of any part or all of the facility at any time. The entity must adopt procedures to ensure that unannounced inspections are conducted in a reasonable manner.
11. The monitoring entity has the authority to obtain and inspect any and all records, including inmate and personnel records, bearing on the facility's operations or conditions.
12. The monitoring entity has the authority to conduct confidential interviews with any person, including line staff and inmates, concerning the facility's operations and conditions; to hold public hearings; to subpoena witnesses and documents; and to require that witnesses testify under oath.

Continued on next page

Prison Oversight ...
continued from page 3

13. Procedures are in place to enable facility administrators, line staff, inmates, and others to transmit information confidentially to the monitoring entity about the facility's operations and conditions.
14. Adequate safeguards are in place to protect individuals who transmit information to the monitoring entity from retaliation and threats of retaliation.
15. Facility administrators are provided the opportunity to review monitoring reports and provide feedback about them to the monitoring entity before their dissemination to the public, but the release of the reports is not subject to approval from outside the monitoring entity.
16. Monitoring reports apply legal requirements, best correctional practices, and other criteria to objectively and accurately review and assess a facility's policies, procedures, programs, and practices; identify systemic problems and the reasons for them; and proffer possible solutions to those problems.
17. Subject to reasonable privacy and security requirements as determined by the monitoring entity, the monitoring entity's reports are public, accessible through the Internet, and distributed to the media, the jurisdiction's legislative body, and its top elected official.
18. Facility administrators are required to respond publicly to monitoring reports; to develop and implement in a timely fashion action plans to rectify problems identified in those reports; and to inform the public semi-annually of their progress in implementing these action plans. The jurisdiction vests an administrative entity with the authority to redress noncompliance with these requirements.
19. The monitoring entity continues to assess and report on previously identified problems and the progress made in resolving them until the problems are resolved.
20. The jurisdiction adopts safeguards to ensure that the monitoring entity is meeting its designated purposes, including a requirement that it publish an annual report of its findings and activities that is public, accessible through the Internet, and distributed to the media, the jurisdiction's legislative body, and its top elected official.

REPORT

In 1987, Supreme Court Justice Brennan made the following observations about prisoners and the world in which they live: "Prisoners are persons whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness. They are members of a 'total institution' that controls their daily existence in a way that few of us can imagine . . . ." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting). Justice Brennan's observations apply equally today. Prisoners still live in a netherworld with which few of us are familiar. While at times a horrific problem or scandal in a correctional facility or facilities, such as the sexual abuse of inmates, attracts headlines, the public is mostly oblivious about conditions in prisons, jails, and other correctional and detention facilities, even those within their own communities.

While the inner workings and conditions of correctional and detention facilities largely are insulated from the public eye, they need not be. As is true with public schools and other governmental entities, the operations of correctional and detention facilities can be transparent and accountable to the public they serve. And, for a number of reasons, they should be.

First, the public identification of significant problems in correctional conditions and operations can and should lead to the rectification of those problems, resulting in correctional and detention facilities that are safer, operated in conformance with the Constitution, other laws, and best correctional practices, and equipped to better prepare inmates for a successful reentry into society. Second, through the objective observations of an entity that is wholly independent of the facility being inspected, potential problems that have been overlooked at the facility can be detected, preventing them from becoming major problems for correctional officials. Third, external oversight of correctional operations and the problem solving that it catalyzes can be a cost-effective and proactive means to potentially avert lawsuits challenging the legality of conditions of confinement or the treatment of prisoners. Fourth, the factual findings of the monitoring entity can substantiate the need for funds requested by correctional administrators. And finally, the revelation by a monitoring entity of what is and is not happening behind prison walls can lead to better-informed decisions about a jurisdiction's sentencing and correctional policies.

At a conference on prison oversight in 2006, 115 of the world's top experts on correctional oversight convened at the University of Texas to discuss a variety of domestic and international oversight models. See OPENING UP A CLOSED WORLD: WHAT CONSTITUTES EFFECTIVE PRISON OVERSIGHT?: CONFERENCE PROCEEDINGS (Michele Deitch, ed, The University of Texas at Austin, forthcom-

ing 2008).[1] The conference revealed that correctional oversight by an independent entity whose findings are disseminated to the public is a relative rarity in the United States, though some monitoring bodies do exist in this country. *See infra* note 2. By contrast, prisons in all of the countries (over forty-five) that are members of the European Union are subject to independent monitoring by the European Committee for the Prevention of Torture (CPT). Michele Deitch, Why You Should Love Watchdogs: The Case for Effective Prison Oversight and the British Experience, THE STATE OF CORRECTIONS: PROCEEDINGS OF THE 2005 AMERICAN CORRECTIONAL ASSOCIATION ANNUAL CONFERENCES 147-48 (2006). The diverse group of stakeholders represented at the conference – correctional administrators, judges, human rights advocates, policymakers, representatives of prison monitoring bodies, and scholars – reached a consensus about the value of, and need for, expanded external oversight of prisons and jails in the United States. *See* Michele Deitch, *Conference Report: Opening Up a Closed World: What Constitutes Effective Prison Oversight?*, XVIII CORRECTIONAL L. REP. 22 (Aug./Sept. 2006).

I. Comprehensive Oversight Plans That Include Monitoring by Independent, Public Entities

The American Bar Association is calling on federal, state, local, and territorial governments to develop comprehensive plans to make the operations of their correctional and detention facilities more transparent and accountable to the public. The facilities on which this resolution focuses are those, both public and private, in which individuals are confined for alleged or adjudicated crimes or delinquent acts, whether or not immigrants are also confined in them. Prisons, jails, police lockups, juvenile detention facilities, and juvenile training schools are examples of such facilities. But while this resolution solely concerns facilities within criminal- and juvenile-justice systems, the public's interest in transparency and accountability obviously transcends those systems, extending to other types of facilities, such as mental-health institutions and immigration facilities, in which individuals are confined involuntarily.

As a first step towards injecting more transparency and accountability into the operations of correctional and detention facilities, the ABA is urging federal, state, and territorial governments to establish public entities, independent of any correctional agency, to regularly monitor and publicly report on conditions in prisons, jails, and other correctional and detention facilities for adults and juveniles in their jurisdictions. Other countries, such as Great Britain, already utilize such independent monitoring entities, and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recognizes their value. But the comprehensive oversight for which the ABA is advocating entails more than external monitoring by an independent entity. Examples of other components or potential components of a comprehensive oversight plan include: monitoring by citizens' groups, accreditation, legislative oversight, media access, and special mechanisms for the prosecution of crimes committed by correctional staff. The attentive monitoring by correctional officials of the implementation of their contracts with private correctional facilities is another example of a way to supplement the external monitoring for which this resolution calls. All of these oversight processes and tools can complement, though not supplant, the external monitoring that is the focal point of this resolution.

It bears emphasizing that the external monitoring that is the focus of this resolution is not intended to replace, and should not replace, the internal mechanisms that correctional administrators can and should set up to evaluate correctional operations and programs. Internal evaluation is vital to the efficient and effective functioning of correctional facilities. But external monitoring can bring accountability and transparency to correctional facilities and, in turn, improve their functioning in ways that internal evaluation mechanisms simply cannot.

In order for the work of the monitoring entities to be marked by the professionalism, expertise, and insulation from cronyism that are essential to the fulfillment of their objectives, they should be established at the state and federal levels. At the same time, it is essential that local officials be informed in a timely fashion of the monitoring entity's findings about jails, juvenile detention centers, or other facilities in their community, that they respond promptly to correct noted deficiencies in those facilities, and that they are vigilant in ensuring that the monitoring of conditions in their local facilities is thorough, accurate, and effective. Periodic assessments of confinement conditions conducted by local bodies themselves may be one means of achieving the latter objective and of bringing added transparency and accountability to local correctional and detention facilities.

II. Key Requirements for Effective Monitoring

The resolution specifies certain key requirements that must be met in order for the goals of correctional monitoring to be realized. The reason many of these requirements need to be met is readily apparent, but several warrant elaboration:

Requirement #1: In order for monitoring assessments and evaluations to be objective and undistorted by inappropriate pressures, the monitoring entity must be wholly independent of the correctional agency that is operating or utilizing the facility being inspected. The monitoring entity, for example, should not be under the correctional

Continued on next page

Prison Oversight ...
continued from page 5

agency's authority or supervision and should not be dependent on the agency for funding, space, staff support, or the meeting of other operational needs.

Requirement #2: Each monitoring entity must be adequately funded and staffed, allotted the resources necessary to ensure that inspections occur regularly, that monitoring teams are well-trained and large enough to perform their work well, and that there is sufficient time to prepare thorough and timely reports that achieve the objectives of external oversight. Since budgetary constraints and cutbacks can be used to hamper the work of the monitoring entity and even retaliate against it for the candor of its findings, mechanisms must be in place to protect the entity's funding and independence. An example of one possible such mechanism is the set allocation of a fixed percent of the correctional budget to fund the monitoring entity rather than having it subject to the vagaries and political pressures that can attend *ad hoc* appropriations.

Requirement #3: The requirements that the head of the monitoring entity be appointed for a fixed term by an elected official, be confirmed by a legislative body, and be subject to removal only for just cause also are designed to preserve the independence of the monitoring entity. Depending on the jurisdiction's preferences and needs, the monitoring entity may be headed by either an individual or a board.

Requirements #8 and 9: External oversight works best – is more effective, efficient, and less costly – when the monitoring process is collaborative, cooperative, and collegial, rather than adversarial. Consequently, correctional and other governmental officials should not only be authorized, but also required, to cooperate fully and promptly with the monitoring entity. In turn, the monitoring entity should strive to work collaboratively and constructively with correctional administrators, the legislature, and others who have the authority or capacity to ameliorate problems in monitored facilities. But the monitoring entity must be careful to ensure that it is not co-opted by correctional officials– that its independence and the need for accuracy and rigor in its fact-finding are preserved and not compromised as it works closely with correctional and other governmental officials.

Requirements # 10, 11, 12, 13, and 14: One of the keys to full and accurate reporting of conditions in a correctional facility is granting the monitoring entity broad and unhindered access to the facility, correctional personnel, and inmates, as well as records bearing on the facility's operations and conditions. There are monitoring prototypes already in place that exemplify this kind of unimpeded access to the information needed to ascertain and verify the true state of conditions in a correctional facility.[2] Of course, even the broad access to information accorded the monitoring entity may be subject to certain limited confidentiality requirements, such as those that apply to private medical information.

Because the monitoring entity's efforts to collect accurate information about a correctional facility may be stymied by the fear of line staff, inmates, and others that they may be retaliated against for their forthright disclosures, procedures must be in place to enable facility administrators, line staff, inmates, and others to communicate confidentially with the monitoring entity about the facility. In addition, it is essential that adequate safeguards be established to protect those who communicate with the monitoring entity from retaliation or threats of retaliation for those comments.

Finally, because obstructionism, a "code of silence," and layers of secrecy may surround correctional operations and conditions, the monitoring entity must be vested with the authority to subpoena witnesses and documents. But if correctional officials and the monitoring entity build a collaborative relationship, this power to subpoena witnesses and documents can be exercised sparingly and may not need to be utilized at all.

Requirement #16: The reports disseminated by a monitoring entity should review and assess a facility's policies, processes, programs, and practices objectively and accurately. Since a monitoring report is supposed to provide an objective account of correctional conditions and operations, it typically will include positive as well as negative findings. But if the impetus for the preparation and issuance of a special report is some discrete problem, such as reported excessive use of force by staff, the report may not include any positive findings.

The significance of some facts that a monitoring report discloses about a correctional or detention facility may not be readily apparent without some benchmark against which to measure those facts. Legal requirements are one example of a benchmark that should be utilized by the monitoring entity when reviewing and assessing a facility's conditions and the treatment of its inmates. Constitutional and statutory requirements, as well as obligations under human-rights or other treaties signed by the United States and ratified by Congress, are examples of the legal requirements to be considered during the assessment process.

What are considered "best correctional practices" also provide helpful and illuminating criteria for evaluating a facility's operations, conditions, programs, and services. This resolution reserves the question of how to define the "best correctional practices" and certain other objective criteria to be utilized when assessing a facility's performance. Professional standards, such as those developed by the American Bar Association, American Correctional Association, and National Commission on Correctional Health Care, may provide a helpful starting point for jurisdictions determining what assessment criteria to apply when monitoring correc-

tional facilities. But at this point in time, according jurisdictions flexibility to explore and pilot different ways of defining "best correctional practices" and other assessment criteria seems advisable as this country begins to utilize, on a widespread basis, systematic, external monitoring of correctional and detention facilities by independent, public entities to promote transparency and accountability as national norms.

This resolution confirms that the purpose of monitoring reports is not simply to inform the public and policymakers about conditions of confinement. The reports also should be designed and disseminated to prompt change -- the timely implementation of corrective measures to eliminate the problems monitoring reports have revealed. Consequently, when possible, monitoring reports should pinpoint the reasons for a noted deficiency, particularly when actions need to be taken by individuals or entities other than correctional officials to cure the deficiency. For example, if a county jail is unable to attract or retain enough correctional officers because it pays them so little, a monitoring report needs to denote the reason for the staffing shortage so that the county board can take the necessary follow-up actions.

Requirement #17: To meet its informational and problem-solving purposes, the monitoring entity's report about a facility must be readily available to the public, including accessibility through the Internet. Occasionally, however, the monitoring entity may decide that, due to privacy or security requirements, it should not disclose a portion of its report to the general public. For example, the monitoring entity appropriately may refrain from disclosing information to the public, such as the presence of a hole in a prison's perimeter fence, which will jeopardize institutional security.

In addition to being disseminated to the public, the monitoring report should be distributed to the media, the legislature, and the jurisdiction's top elected official. But while copies of the report must be provided to legislative and executive officials to ensure that appropriate actions are taken to rectify problems identified in the report, its dissemination and distribution must not be conditioned on the assent of any governmental official or entity outside the monitoring body, such as the governor, state legislature, or county board.

Requirements #18 and 19: There are several steps that jurisdictions can take to guard against the risk that monitoring reports become meaningless pieces of paper, largely ignored by correctional and other officials. First, facility administrators should be required to respond publicly to the reports and to develop and implement in a timely way action plans to correct identified problems. Since the solving of problems sometimes or often will require the involvement of other executive officials, the legislature, the county board, or others, these other individuals and entities may need to play an integral role in the development and implementation of a viable action plan.

Second, facility administrators should report to the public twice a year, recounting the progress that has been made in implementing the action plan. To conserve time and resources, once administrators have reported that a problem has been remedied, progress reports need not address it further unless the monitoring entity determines that the problem has not abated or has reoccurred.

Third, the jurisdiction needs to vest some administrative entity with the authority to enforce the above requirements so that problems identified in a monitoring report are addressed and resolved with dispatch. The monitoring entity need not be the body performing this enforcement function.

Finally until a problem highlighted in a monitoring report is resolved, the monitoring entity should continue to assess and report on the problem and the progress made in solving it. As part of this ongoing assessment, the monitoring entity should pinpoint and report on the reason or reasons why a problem persists. In order to meet these responsibilities, the monitoring entity may need to conduct special follow-up inspections.

Requirement #20: The premise of the ABA's resolution is that the operations of correctional and detention facilities should be more transparent and accountable to the public. These same principles of transparency and accountability apply to monitoring entities as well. Consequently, states and the federal government should adopt safeguards to ensure that their monitoring entities are meeting their designated purposes and performing their functions well. One of the adopted safeguards should require the monitoring entity to publish an annual report of its activities and findings. This report should be accessible through the Internet and distributed to the media, the legislature, and the jurisdiction's top elected official.

III. The Federal Role

The federal government can and should play a central role in furthering the goals of making this nation's prisons, jails, and other correctional and detention facilities more transparent and accountable to the public. First, the federal government should provide technical assistance and training to the states to facilitate their establishment of effective monitoring processes and the development of a professional corps of correctional monitors.

Second, the federal government should condition its funding of correctional and detention facilities in states on their compliance with the "Key Requirements for the Effective Monitoring of Correctional and Detention Facilities" set forth in this resolution. The federal government understandably can and should be reluctant to funnel federal funds to correctional and detention facilities that rebuff efforts to

Continued on next page

Prison Oversight ...
continued from page 7

make them transparent and accountable, no longer hidden from the public's and the federal government's view.

Finally, the federal government should develop common definitions for the collection and reporting of key performance data by correctional and detention facilities. These common definitions, such as the definition of what constitutes an assault on an inmate or "overcrowding," will facilitate the reporting and understanding of the true conditions in the facilities being monitored and will enable the conditions in a facility to be compared more meaningfully with those in other facilities. In short, the promulgation of these definitions, in conjunction with the other prescribed steps to be undertaken by the federal government, will promote the transparency and accountability goals of correctional oversight. The realization of these goals in turn will help to ensure that correctional officials operate, and have the resources to operate, correctional and detention facilities in conformance with legal requirements and best correctional practices.

Respectfully submitted,
Stephen J. Saltzburg
Chair, Criminal Justice Section
August 2008

Endnotes

1 Videos of the conference sessions are available at http://www.utexas.edu/lbj/prisonconference/video.php.

2 For examples of external-monitoring entities with this level of access to facilities, see *Prison Oversight and Systems of Accountability: National Prison Rape and Elimination Commission Hearing* (Dec. 6, 2007) (statement of Michele Deitch), *available at* http://www.nprec.us/docs3/Deitch%20Testimony.pdf (citing, among other oversight bodies, the Inspector General of the United States Department of Justice, the California Inspector General, the Ohio Correctional Institutions Inspection Committee, the Texas Youth Commission's Office of the Independent Ombudsman, the Correctional Association of New York, the New York City Board of Correction, the British Prison Inspectorate, the European Committee for the Prevention of Torture (CPT), and the British Independent Monitoring Boards).

CORRECTION

In the Winter 2011 edition of our newsletter, we published Richard B. Stapleton's article on the Michigan Department of Corrections' disciplinary policy, "Due Process for Prisoner Discipline in the Michigan Department of Corrections." See *Prisons and Corrections Forum*, Vol. II, No. 1 (Winter 2011). There were two omissions from the article at page 7, in the following paragraph presented here with corrections:

> Class II rule violations are defined by policy as minor misconducts. They are comprised of the charges that were formerly classified as bondable major misconduct violations. These include charges for disobeying a direct **order**, insolence and out place. Approximately one half of the former major misconduct violations are now defined as Class II. These are generally the charges that address routine non-compliance with facility rules. They are **not** necessarily predictive of law abiding behavior or success on parole. Class II violations are therefore addressed at the facility level by facility staff.

Due Process for Prisoner Discipline in the Michigan Department of Corrections?

By Raymond C. Walen, Jr

The November 2010 amendments to Michigan Department of Corrections (MDOC) Prisoner Discipline Policy Directive, PD 03.03.105, may be the most significant change in MDOC disciplinary procedure since the Corrections Hearings Act of 1979, M.C.L. 791.251-791.255. But they may not be the best.

For more than thirty years, prison misconduct charges have been divided into major and minor misconduct. Both types have due process components of notice and hearing. Notice involves an employee reviewing the misconduct charge with the prisoner, taking his or her statement, if any, and giving the prisoner a copy of the misconduct report. A prisoner charged with minor misconduct has the option of waiving a hearing, pleading guilty at review, and having a sanction imposed by the reviewing officer. A prisoner charged with major misconduct must await the formal hearing to enter a plea.

A prisoner charged with major misconduct receives a formal hearing under M.C.L. 791.252-791.255 and Administrative Rules R.791.3315 and R.791.3320(2). It includes the rights to an impartial attorney hearing officer from the State Office of Administrative Hearings and Rules (SOAHR) and a hearing investiga-

tor to gather evidence and interview witnesses; to be present and offer evidence, oral and written arguments; to compel disclosure of relevant documents; to request disqualification of a hearing officer for personal bias; to receive a written decision including reasons for denying the prisoner's requests for evidence or disqualification and findings of fact based on the evidence; and to have an official record of the hearing. If found guilty, the prisoner may petition the MDOC's hearings administrator for rehearing, and he or she has an appeal of right from the hearing administrator's decision to the circuit court under the procedures in M.C.R. 7.105.

A prisoner who is found guilty of major misconduct may be sentenced to punitive segregation for up to 30 days, classified to administrative segregation indefinitely, and lose good time or disciplinary credits or accumulate disciplinary time. In some cases, the prisoner may have his or her visits restricted or receive a high or very high assaultive risk classification. Major misconduct convictions are reported to the Parole Board in the prisoner's Parole Eligibility Report (PER) and they are used in calculating his or her Parole Guidelines scores, which may affect his or her release. Major misconduct convictions are used to determine the security level at which the prisoner is placed; changes in security level are reported to the Parole Board in the PER and used in calculating the Parole Guidelines.

A prisoner who is charged with minor misconduct receives a fact-finding hearing under R.791.3310 (a "Rule 310 Hearing") and R.791.3320(1). This is the same type of very informal hearing held when *some* due process is required, such as when a prisoner's incoming mail is rejected. The prisoner has the rights to be present and speak on his or her own behalf; to receive copies of relevant department documents; to receive a summary report of the hearing and decision; and to appeal an adverse decision to the deputy warden.

The Rule 310 Hearing is held by a prison staff member, typically someone who works in the prisoner's housing unit and has day-to-day contact with him or her. Minor misconduct charges are not reported in the PER or used in calculating the Parole Guidelines, nor do they provide the basis for security level decisions.

Under the changes that took effect November 1, 2010, prison rule violations are defined as Class I, Class II, or Class III, rather than major or minor misconduct. The Class I misconduct charges include the former major misconduct charges which the MDOC considers the most serious, and proceedings on them follow the previously established major misconduct procedures. Class III misconduct charges include the former minor misconduct charges, and proceedings follow the previously established minor misconduct procedures.

The big change is the Class II charges. These were formerly defined as major misconduct. Guilty findings were reported to the Parole Board in the PER and directly used in calculating the Parole Guidelines. A guilty finding had the same potential consequences described above for major misconduct, including loss of one to two years of good time or disciplinary credits or accumulation of seven to thirty-five days of disciplinary time. Class II charges include bribery of an employee, theft, forgery, creating a disturbance, gambling, possession of money, disobeying a direct order, insolence, interference with the administration of rules, unauthorized occupation of a room, and out of place.

Like Class I hearings, the decision on a Class II hearing must be based on a preponderance of the evidence and the evidence relied upon must be set forth in the hearing report. The hearing investigator retains a record of charges that result in not guilty verdicts or dismissals; those are not kept in the prisoners' paper files. The verdicts of all Class I and Class II charges against a prisoner – guilty, not guilty, and dismissed – are recorded in CMIS, the MDOC's computer database.

The proceedings on Class II charges differ from Class I proceedings in several ways: The prisoner may plead guilty at review and receive a sanction immediately rather than going through the hearing process; there is no hearing investigator unless the hearing officer wants one; the hearing officer is a Resident Unit Manager, Captain, or Lieutenant without prior direct involvement in the matter; hearing procedures are governed by R.791.3310, which does not provide for witnesses, rather than R.791.3315, which does; and copies of the hearing report are kept in the prisoner's Counselor file and Record Office file, but not in the Central Office file.

The system has been in place for a little more than a year, and reviews report good news and bad news.

Good news for saving money: The charges that are now Class II misconducts typically amounted to about 70% of the major misconduct reports written, and taking then out of the major misconduct category enabled the state to reduce the number of SOAHR hearing officers doing prisoner hearings from twenty-two to twelve.[1]

Giving prisoners the option of pleading guilty to the charge and receiving a sanction at review avoids the hearing process entirely and saves that time and expense.

Prisoners convicted of Class II misconducts will not have their sentences extended by forfeiture of good time or disciplinary credits or accumulation of disciplinary time: M.C.L. 791.251 requires a hearing by a SOAHR hearing officer before that may be done.[2]

Continued on next page

Due Process ...
continued from page 9

Taking these charges out of the major misconduct category means they are not reported in the PER or directly used in calculating the Parole Guidelines, leading to more favorable Guidelines scores for the prisoners and potentially more paroles.

Bad news for due process: Cases where a hearing investigator is assigned, where the result is not guilty or dismissal, or where the prisoner wins on appeal, are virtually impossible to find.

Not guilty verdicts and dismissals are reviewed by the wardens; guilty verdicts are not. Unlike Class I misconducts, where the wardens' only option is to file an appeal to the Hearings Administrator from a finding by a SOAHR hearing officer with which he or she disagrees, the hearing officers on Class II misconducts are subordinate to the warden in the chain of command. A warden may order a rehearing on his or her own initiative and, because of the chain of command, wardens can influence the hearing officers. Despite this potential conflict of interest, bias by a hearing officer in a Class II misconduct hearing is not a ground for reversal of a guilty finding on appeal under the prisoner discipline policy. These facts seem to raise due process concerns at least as serious as those in *Perry v. McGinnis*, 209 F.3d 597 (6th Cir. 2000), and *Heit v. Van Ochten*, 126 F.Supp.2d 487 (W.D. Mich. 2001).

The most common question prisoners ask when called to the control center for review of a Class II misconduct report is, "How many days?" meaning how many days toplock or loss of privileges will they receive for a guilty plea at review. Prisoners report that reviewing staff often encourage guilty pleas by bargaining for sanctions, and they report being told at the review to plead because if they are found guilty at a hearing, they will get a greater sanction than the reviewing officer is offering, and "these tickets don't count anyway."

Prisoners have reported being offered a plea at the hearing, with a promise of greater sanctions if they do not plead guilty. Unlike SOAHR hearing officers, whose only job is to conduct hearings, everyone involved in the Class II misconduct process already has a full time job, and their focus seems to be moving things along so they can get back to their regular jobs. These pressures increase the likelihood that prisoners will do the expedient thing and plead guilty, and that raises other concerns.

Class II misconducts very obviously "count" because they can be used to increase one's security leve1. That means more restricted living conditions and, when that happens, the Parole Board will know about it because security level changes are reported in the PER and scored in the Parole Guidelines.

Guilty findings on Class II misconducts may be the basis for reclassification to administrative segregation. The process involves a hearing by a SOAHR hearing officer, but the only issue at the hearing is whether there was a guilty verdict on the underlying Class II charges, not whether the prisoner is guilty of them.

The number of Class II misconduct convictions a prisoner incurs each year is reported in his or her annual Security Classification Screen-Review.

A prisoner who pleads to a baseless charge in the hope of the least severe sanction and in the belief that the Parole Board will never know, may be right. On the other hand, if he or she draws an interview with a Parole Board member who happens to look at his or her Security Classification Screen, the Counselor file which is available at the parole interview, or who happens to check the prisoner's file on CMIS, then the Board will certainly know.

Creation of the Class II misconduct charges appears to have resulted in a system where there is virtually no chance of acquittal, the only mitigation is a guilty plea as early in the process as possible, and findings based on this questionable due process may contribute to security classification and parole decisions. Are the changes an improvement? It depends on what one values. ■

About the Author

Raymond C. Walen, Jr*. worked as a staff paralegal at Prison Legal Services of Michigan from 1987 to 2008.*

Endnotes

1 See Richard B. Stapleton, "Due Process for Prisoner Discipline in the Michigan Department of Corrections" *Prisons and Corrections Forum*, Vol. II No. 1 (Winter 2011) at 8.
2 While good time or disciplinary credits are not to be forfeited or disciplinary time accumulated for guilty findings on Class II misconduct charges, at least one prisoner has reported forfeiture of disciplinary credits after a guilty verdict on a Class II misconduct charge.

Law School Clinics Team Up with ACLU and Legal Services to Challenge Default Parole Conditions

By Paul D. Reingold

In 2007, Miriam Aukerman of Legal Aid of Western Michigan noticed that nearly all prisoners released on parole for criminal sexual conduct were assigned parole conditions which barred the parolees from (1) having any contact with their own minor children; (2) living with their spouses or dating people who had custody of minor children; and (3) attending events (like church) where children might be present.

These parole conditions were assigned even in cases where the underlying offense had nothing to do with children, and where the prisoners had been permitted to have in-person visits and phone and mail and e-mail contact with their children while in prison. The conditions were also assigned in so-called "Romeo and Juliet" cases, where an 18-year-old may have had sex with a sexually mature but underage boyfriend or girlfriend. The conditions were also assigned in some cases that the MDOC classified as involving a "child victim" – including a case where the "child victim" was an infant in a car seat during an armed robbery of the driver of the car.

When Miriam was unable to get these default conditions changed through informal advocacy, she sought help from the ACLU of Michigan and the clinics at the University of Michigan Law School. The combined legal team then filed suit in federal district court. The complaint in *Houle v. Sampson* alleged that the automatic assignment of parole conditions that interfered with parolees' right to parent their children, or to have romantic relationships with whom they chose, or to attend places of worship, violated the First and Fourteenth Amendments to the U.S. Constitution. The complaint also alleged that the assignment of the conditions without notice and an opportunity to be heard violated the Fourteenth Amendment. The U-M Child Advocacy Law Clinic represented the parolees' children, who were deprived of their own right to have access to a parent absent a compelling state reason for that access to be blocked.

The case became moot when the parole board modified the conditions of the plaintiffs, and the court would not allow additional plaintiffs to be added. Instead, the parties brokered an informal settlement. The board agreed to study the issue and to propose changes that would not violate the parenting, associational, or religious rights of parolees. The board also agreed to set up a process by which these cases could be heard until systemic changes might be made.

To protect the rights of new parolees in the interim, the Michigan Clinical Law Program established the parole Re-entry Conditions (RC) Project. Under the RC Project, parolees who are assigned these default conditions contact the clinic for assistance. Student attorneys review the applicants' crimes, their sex offender or assaultive offender therapy reports, and their parole conditions. Students then interview family members and outside therapists if necessary. Once the students are persuaded that a parolee poses no risk (either to his/her own children or to children generally), the students send a letter to the parole board's designee, requesting that the conditions be altered or waived. The RC Project is slow and unwieldy, and many parolees remain unaware of it. At the same time, more than 50 parolees have participated in the RC Project, and many were able to get their conditions altered or waived in 2010-11, enabling them to see their kids or their loved ones or worship where they wished, due to the efforts of the student attorneys.

The RC Project was intended to be a stopgap measure that would remain in place only as long as it took the board to address the underlying issue (of automatically assigning default conditions of parole by computer with little or no individualized review). But in the waning days of the Granholm Administration, this issue did not draw the board's best attention, as it struggled to reduce the prison population and to get as many meritorious commutation cases to the Governor before her term ended. In 2011 Governor Snyder appointed a new parole board, which had to be brought up to speed and broken in before it could address deeper policy issues of the sort presented by *Houle v. Sampson*.

As of this writing, the plaintiffs' legal team remains optimistic that the board will address the issue in 2011 and will come up with a solution that (1) tailors parole conditions to the actual risks posed by the parolee; (2) ensures public safety, and (3) does not violate the constitutional rights of parolees. If the board does not act, then the evidence that the RC Project has produced will be used to support a second civil rights lawsuit. ■

About the Author

Paul D. Reingold *is a clinical professor of law at the University of Michigan and director of the Michigan Clinical Law Program's Civil Litigation Clinic.*

The Consequences of Overusing High Security Bed-Space

By Peter Martel

The amount of programming, recreation, and relative freedom available to a person incarcerated by the Michigan Department of Corrections depends largely upon his or her security classification. In Level I (minimum security) facilities, the person may be able to participate in a building trade class or an assaultive offender program. They may spend the majority of the day out on the recreation yard playing basketball, jogging, or lifting weights. They may have a key to their own cell or live in a cube that has no door at all. In the highest custody level, in Level V (maximum security) prisons, on the other hand, there is no building trade class or assaultive offender program. Individuals incarcerated in Level V stay in their cells all day with few exceptions. They can go to the chow hall for meals, or out for their work details (if they have a job), and are given one hour of recreation yard per day. They can attend the law library three times a week, and they may be given fifteen minutes a week to find a book in the general library. Some are able to participate in a General Educational Development (or GED) program if they do not have a high school diploma. There is not much to do at a Level V facility other than to pass one's days.

The administrative rule which governs security classification requires that an individual be placed at the least restrictive custody level in which he or she can be safely managed. Because of the lack of rehabilitative opportunities and the very high cost of holding someone in a Level IV or V facility, this rule makes good sense both morally and fiscally.[1] In order to accomplish this goal even-handedly, the MDOC developed a screening tool that relies on objective criteria to determine the level at which a person should be housed. This screen includes two columns — "management" and "confinement" — which gather and score such information as whether the person has attempted to escape, whether the person is a "very high" assault risk, how long the person has behaved well, and, if the person has been found guilty of misconduct, how serious that misconduct actually was. The resulting totals indicate the appropriate custody and management levels for the prisoner. As Warden Klee of the Gus Harrison facility recently testified before an Appropriations Subcommittee, this screening process often helps prisoners determine the level at which they are housed. If a person remains misconduct-free for one year and earns

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positive work or school reports, he or she can drop a significant number of points from their record and "earn" a lower security level. Such rewards create an incentive for individuals to stay out of trouble and do well in school.

What is troubling with custody and management classification, however, is the common practice changing the level as scored on the screening tool at the time of actual placement, called a "departure" or "waiver." In these cases, an individual who screens as a Level I prisoner in both the confinement and management columns of the screening form is "departed" or "waived" from that security level by security classification committee, usually a three-person committee at each facility made up of mid-level administrative staff. Departures of one step, from a Level I to a Level II, or from Level IV to a Level V, for example, are generally not that drastic in relative terms, but departures of two levels or more present considerable differences in living conditions, rehabilitative opportunities, parole prospects, and overall cost.

Such departures were the subject of a recent report released by the Legislative Corrections Ombudsman's (LCO) office. In this report, we learned that the MDOC is currently holding over 1,500 Level I and II prisoners in Level IV and V facilities on "departures." The general reasons used to justify these decisions include "further monitoring required," "institutional history," and "nature of recent misconducts." Such explanations, however, do not provide much explanation. In fact, they beg the questions: Aren't misconducts, and their nature, already considered in the management column? Isn't institutional history the sole purpose of the whole confinement column? If a person has behaved well enough, for a long enough period of time, to earn a lower security level under both the management and confinement columns, hasn't that person been monitored long enough?

Of course (and somewhat unfortunately), what currently seems to convince us that a prison issue is sufficiently important to act upon is how it will affect our state budget. The LCO's report found that when we tally all of those who are departed and waived from Level I or II up to Level IV or V, it costs us a lot of money that we should not have to spend. If all of these individuals were placed according to their management and confinement levels (the higher of the two, actually), we would save over $18 million every year. I'm sure there are extraordinary cases where the MDOC's screen should not apply to an individual, but I know there are not 1,500 extraordinary cases. This high number of departures needs more scrutiny and more explanation.

It does not seem to happen often enough that we can save money by doing the right thing. As we have learned with MPRI, however, it does happen sometimes. With security classification, the MDOC's new director has before him an issue that gives him the chance to offer more programming opportunities while saving money. All that is required is moving Level I and II individuals to Level I and II facilities. If they've earned their way down to a Level I or II screening through good behavior and hard work, it doesn't seem unreasonable or soft to place them accordingly. ■

About the Author

Peter Martel *is a Program Associate with the American Friends Service Committee Criminal Justice Program in Ann Arbor, Michigan.*

Endnotes

1 According to the MDOC 2009 Annual report, the annual cost of housing prisoners at Secure Level I is $23,742, Level II (medium security) $29,688, Level IV (close custody) $40,872, and Level V (maximum security) $40,948.

News in the Michigan Department of Corrections

MDOC Eliminates all ADW Positions

The MDOC in undergoing changes that will make it smaller and consume fewer state resources, with fewer prisoners and fewer employees. On October 4 the MDOC announced it would eliminate all Assistant Deputy Warden positions and reassign ADW responsibilities to other positions within each facility. The Deputy Wardens and Wardens will have more involvement with daily operations. In addition, the number of total Resident Unit Managers will be reduced, with some facilities receiving additional Deputy Wardens.

DNA Collection

In July 2011 an amendment to M.C.L. 791.233(d) was enacted, entitled, "Samples for DNA Identification Profiling" that allows prison officials to take DNA samples from prisoners currently housed in state correctional facilities without delay. Until this amendment, the MDOC could only take samples of prisoners near their release date who had not yet provided one. Within three months after passage of the amendment, the MDOC completed sampling of nearly 5,000 prisoners still in the system who had not yet been DNA profiled, except for HYTA prisoners (sentenced under the Holmes Youthful Trainee Act). ■

Source: MDOC Newsletter, *FYI* November 10, 2011; FYI October 28, 2011; FYI October 4, 2011, available at the MDOC website: <http://www.michigan.gov/corrections>.

United States Sentencing Commission Urges Rescission of All Mandatory Minimum Sentences

On October 31, 2011 the United States Sentencing Commission submitted to Congress its 645-page report assessing the impact of statutory mandatory minimum penalties on sentencing. The report resulted from a Congressional directive to examine mandatory minimum penalties in the federal system, particularly in light of the Supreme Court's 2005 decision in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the federal sentencing guidelines advisory. The comprehensive report contains the most up-to-date data and findings on federal sentencing and the application of mandatory minimum penalties compiled since the Commission released its 1991 report. About the report, Judge Patti B. Saris, chair of the Commission commented that:

> While there is a spectrum of views on the Commission regarding mandatory minimum penalties, the Commission unanimously believes that certain mandatory minimum penalties apply too broadly, are excessively severe, and are applied inconsistently across the country. The Commission continues to believe that a strong and effective guideline system best serves the purposes of sentencing established by the Sentencing Reform Act of 1984.

The Commission found that federal mandatory minimum sentences are often "excessively severe," not "narrowly tailored to apply only to those offenders who warrant such punishment," and not "applied consistently."

For people convicted of drug-trafficking offenses, representing 75 percent of those serving federal mandatory minimum sentences, the Commission recommends that Congress reevaluate certain statutory recidivist provisions, and consider extending the "safety valve" relief mechanism to other low-level, non-violent offenders convicted of other offenses carrying mandatory minimum penalties. It also recommends that Congress reevaluate mandatory consecutive sentences ("stacking") of mandatory minimum penalties for certain federal firearms offenses, due to the excessively severe and unjust sentences that may result, particularly where there is no physical harm or threat of physical harm.

The federal prison system is over-capacity by 37 percent, a condition also addressed in the report. Commission Chair Saris noted:

> The number of federal prisoners has tripled in the last 20 years. Although the Commission recognizes that mandatory minimum penalties are only one of the factors that have contributed to the increased capacity and cost of inmates in federal custody (an increase in immigration cases is another), the Commission recommends that Congress request prison impact analyses from the Commission as early as possible in the legislative process when Congress considers enacting or amending federal criminal penalties.

The Commission reviewed 73,239 cases from fiscal year 2010 as well as its data from previous years to conduct the data analyses in the report and support the findings and conclusions set forth. In reaching its findings and recommendations, the Commission reviewed legislation, analyzed sentencing data, studied scholarly literature, sought the views of stakeholders from all three branches of government, as well as social scientists, scholars, and others who apply or study mandatory sentencing provisions. Key findings include:

1. More than 27 percent of offenders included in the pool were convicted of an offense carrying a mandatory minimum penalty.
2. More than 75 percent of those offenders convicted of an offense carrying a mandatory minimum penalty were convicted of a drug trafficking offense.
3. Hispanic offenders accounted for the largest group (38.3%) of offenders convicted of an offense carrying a mandatory minimum penalty, followed by Black offenders (31.5%), White offenders (27.4%), and Other Race offenders (2.7%).
4. Almost half (46.7%) of all offenders convicted of an offense carrying a mandatory minimum penalty were relieved from the application of such penalty at sentencing for assisting the government, qualifying for "safety valve" relief, or both.
5. Black offenders received relief from a mandatory minimum penalty least often (in 34.9% of their cases), compared to White (46.5%), Hispanic (55.7%) and Other Race (58.9%) offenders. In particular, Black offenders qualified for relief under the safety valve at the lowest rate of any other racial group (11.1%), compared to White (26.7%), Hispanic (42.8%) and Other Race

(36.6%), either because of their criminal history or the involvement of a dangerous weapon in connection with the offense.

6. Receiving relief from a mandatory minimum penalty made a significant difference in the sentence ultimately imposed. Offenders subject to a mandatory minimum penalty at sentencing received an average sentence of 139 months, compared to an average sentence of 63 months for those offenders who received relief from a mandatory minimum penalty.
7. 14.5 percent of all federal offenders remained subject to (meaning they received no relief from) a mandatory minimum at sentencing. ■

Source: October 31, 2011 Press Release, United States Sentencing Commission, "Sentencing Commission Issues Comprehensive Report on Statutory Mandatory Minimum Penalties, Sends Recommendations for Statutory Changes to Congress." The press release, full report, including an executive summary, are available on the Commission's website, <http://www.ussc.gov>.

Sentencing Juveniles to Life without Parole: Recent Developments

Despite international understanding that children cannot be held to the same standards of responsibility as adults and are entitled to special protection and treatment, there are about 2,570 children serving sentences to juvenile life without parole in the United States. With 358 such prisoners, Michigan is second only to Pennsylvania in number. Although Michigan residents comprise 3 percent of the national population, it houses about 14 percent of the nation's prisoners with no-parole sentences for crimes committed as juveniles.

Michigan law requires that children as young as 14 who are charged with certain felonies be tried as adults and, if convicted, be sentenced without judicial discretion to life without parole. Judges and juries are not allowed to take into account the fact that children bear less responsibility for their actions and have a greater capacity for change, growth and rehabilitation, than adults.

Since 2006, the Prisons and Corrections Section of the State Bar of Michigan has publicly urged statutory changes to prospectively eliminate life without parole sentences for juveniles and provide parole eligibility for who are sentenced to life without parole as juveniles. The Section's full position and report are online at <http://www.michbar.org/prisons/pdfs/JuvLifeSentences.pdf>.

A legal challenge to Michigan's statutory scheme was recently filed by the ACLU of Michigan in *Hill, et al. v. Snyder, et al.*, in the United States District Court for the Eastern District of Michigan, Civil No. 10-14568. The complaint is brought pursuant to 42 U.S.C. § 1983 on Eighth Amendment grounds challenging Michigan's sentencing for juveniles law as cruel and unusual punishment. At present, the case is in discovery and the state is seeking leave to appeal the district court's denial of summary disposition.

On November 7, 2011, the United States Supreme Court granted certiorari in two cases that are expected to impact the *Hill* litigation and Michigan's statutory scheme. In *Miller v. Alabama*, 10-9646, petitioner was sentenced to a mandatory sentence of life imprisonment without parole for a homicide offense committed when he was 14 years old. At issue is whether the Eighth Amendment precludes a life-without-parole sentence on a fourteen-year-old child when (1) the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children; and (2) the statutory scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances.

In *Jackson v. Hobbs*, 10-9647, 2011 Ark. 49 (Ark. S.Ct), petitioner was sentenced to a mandatory sentencing of life imprisonment without the possibility of parole for offense committed when he was 14 years old. In this case the Court is expected to consider whether the Eighth Amendment prohibits a life-without-parole sentence for a juvenile convicted of homicide, a question left undecided by *Graham v. Florida* and *Sullivan v. Florida*. Jackson's offense involved homicide, but he was not the shooter. He was convicted as an accomplice to a robbery during which a shop attendant was shot by another, without any showing of

Continued on next page

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Sentencing Juveniles ...
continued from page 15

intent or awareness that the attendant would be shot. At sentencing, under the statutory scheme, his age and other mitigating circumstances could not be considered. At issue is whether the Eighth Amendment precludes a life-without-parole sentence on a fourteen-year-old child when (1) the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children; (2) the offender did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed; and (3) statutory scheme categorically precludes consideration of the offender's young age or any other mitigating circumstances. ■