

PRISONS AND CORRECTIONS FORUM

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

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Substance Abuse Services

Determining treatment needs of prisoners in the MDOC. See page 3.

Cost Effectiveness

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California's Prop 36

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FEATURE ARTICLE

MICHIGAN'S MANDATORY DRUG SENTENCES: THE PRESENT AND FUTURE OF OUR PRISONERS OF WAR

By Margaret Sind Raben

In 1978, the Michigan Legislature began enacting statutes which require lengthy mandatory minimum prison sentences for most drug offenses involving Schedule 1 or 2 narcotic controlled substances. The mandatory minimum prison sentences now apply to all drug possession crimes, drug delivery/distribution/manufacturing crimes, attempts, and inducement crimes which involve Schedule 1 or 2 narcotic drugs, except for a possession crime involving less than 25 grams. The Legislature has also enacted statutes which require consecutive or "stacked" sentences for multiple drug offenses, and for drug sentences imposed after any other felony sentence. Persons sentenced for drug crimes are not eligible for suspended sentences or for disciplinary credits on the mandatory portion. These sentences are intentionally harsh. These sentences are our Legislature's response to the multi-faceted problem of illegal drugs, despite almost uniform consensus that long term prison sentences are a bankrupt response. The people serving these sentences are our prisoners of war.

As originally enacted, the mandatory minimum prison sentences were non-parolable life in prison for any offense involving 650 grams or more, a minimum of 20 years for an offense involving a quantity of 225 - <650 grams and a minimum of 10 years for a quantity of 50 - <225 grams. These penalties have been amended to permit lesser prison penalties under certain limited circumstances and life probation in certain limited circumstances, and to add a mandatory minimum one year prison sentence for possession crimes involving 25-50 grams of a Schedule 1 or 2 controlled substance and a mandatory one year prison sentence for distribution crimes involving less than 50 grams. As of October 1, 2000, the mandatory minimum prison sentences for crimes involving 650 grams or more is at least 20 years and can be up to life; for crimes involving 225 - <650 grams, a mandatory minimum of 20 years; for crimes involving 50 - <225 grams, a mandatory minimum of 10 years; and for most crimes involving less than 50 grams, a mandatory minimum of 1 year in prison. These are "minimums" - a sentencing court starts its consideration of an appropriate sentence at these levels.

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The general rule of sentencing in Michigan has been that prison sentences imposed at the same time are served concurrently with each other and with any pre-existing sentence. Drug sentences are the exception. In a case where more than one drug sentence is imposed in the same proceeding, or if a drug sentence is imposed after any other felony sentence, the sentences are served consecutively to each other, or “stacked”. In addition to “stacked” sentences, the habitual drug offender statute increases the penalties for repeat drug offenders well beyond the usual habitual offender penalties. Depending on the defendant’s prior record, the general habitual offender statutes increase the statutory maximum term of years for a subsequent offense by 50 or 100% or up to life, and do not necessarily increase the minimum sentence at all. The habitual drug offender statute states a person sentenced for a drug offense involving any quantity between 50 grams - <650 grams, who has a prior drug conviction involving an amount within those quantities must receive a life sentence. For other circumstances, the habitual drug offender statute permits a prison sentence of up to twice the term otherwise authorized for the latest offense. Thus, a person who is convicted of possessing 75 grams of cocaine, and who has a prior conviction for possession of the same amount, receives a life sentence. A person who has a prior conviction for possession of <50 grams of cocaine and is convicted of an offense with a mandatory minimum prison sentence of 10 years, may be sentenced to up to 20 years.

The mandatory minimum prison sentences apply to Schedule 1 and 2 narcotic drugs and certain others. These substances include heroin, cocaine (including crack or base), codeine, morphine, opiates, LSD and CAT. For sentencing purposes, drug weight is measured in grams. A gram is equal to the quantity of powder in one packet of artificial sweetener. The mandatory penalties apply to a weight of “any mixture containing” a detectable amount of a narcotic controlled substance, no matter how dilute the mixture. This means that the mandatory minimum prison sentence is the same for the drug user who buys two highly diluted half-ounce baggies “on the street”, the dealer who sells an ounce of a nearly pure controlled substance to a middleman, and the middleman who can cut and resell the original ounce several times.

Since 1987, a sentencing court may depart below the mandatory minimum prison sentences for offenses involving <650 grams if the court finds “on the record” that there are “substantial and compelling reasons” to do so, or, under some circumstances, if the defendant is a juvenile. These departures are not permitted in cases involving 650 grams or more. The phrase “substantial and compelling reasons” is not defined in the statutes, but has been defined in a series of state Supreme Court and Court of Appeals cases.

In *People v Fields*, 448 Mich 58 (1995), the Michigan Supreme Court held that a sentencing judge may use “objective and verifiable factors” to find “substantial and compelling reasons” to depart from mandatory minimum prison sentences for certain drug offenses. The *Fields* court opined that the statutory mandatory minimum prison sentences reflected the Legislature’s and society’s determination that the specified mandatory minimum prison sentences were necessary to meet the traditional sentencing goals of discipline of the offender, protection of society, and deterrence of others. *Id.* Departures, even for substantial and compelling reasons, were to be the exception. *Id.* As examples of objective and verifiable factors, the Court

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SUBSTANCE ABUSE SERVICE NEEDS OF MICHIGAN PRISONERS

By Sheryl Pimlott

Over the last 12 years, drug control strategies have increased legal sanctions for drug use, possession, manufacturing and sale of controlled substances shifting dollars from treatment to interdiction and law enforcement. In 1998, individuals sentenced on drug offenses accounted for 58% of all federal inmates and 21% of all state inmates¹. In addition, studies have consistently demonstrated the high lifetime prevalence rates of illegal drug use among offenders in general. Indeed, it is estimated that substance abuse by adult offenders ranges between 65% and 85% (Criminal Justice and AOD Service Delivery Task Force, June 1, 1998).

However, the data reveal more than prevalence; crimes are also committed while offenders are under the influence of drugs and alcohol. Government data showed that 33% of state and 22% of federal inmates committed their crimes while under the influence². Nationwide, correctional systems are witnessing ever-increasing numbers of drug offenders, and other offenders who are drug dependent, coming under their supervision.

Until recently, attempts to control drug abuse (and attendant crimes) were often polarized between two systems – criminal justice and drug treatment. However, the increase in offenders with drug/alcohol abuse problems has expanded consideration of the drug treatment provided within prison settings. State legislatures are mandating adequate and appropriate drug treatment for their states' inmates and, in turn, are putting pressure on state correction systems to accurately determine their substance abuse treatment needs.

While there is relative consensus that most offenders are in need of substance abuse treatment, there are fewer data and thus less agreement on the types of treatment services required for this population. One of the biggest research problems in determining substance abuse treatment needs is finding a way to conduct a scientifically sound assessment. Ideally, all prisoners should be assessed using an instrument that is valid, reliable, inexpensive, simple to administer, elementary to score and easy to interpret³.

In the past, the substance abuse treatment needs for a Michigan prisoner were determined in one of two ways: either by a recommendation from the sentencing court or by a recommendation from a staff member at a Reception Center of the Michigan Department of Corrections (MDOC). A staff member interviewed the offender at the Reception Center and made a recommendation based on a review of several aspects of the offender's record: pre-sentence investigation (PSI), a prior criminal history and the answers to questions about previous use/misuse of drugs or alcohol. If slots were available, prisoners could receive treatment through self-initiation by contacting the subcontracted treatment provider at their institution. Treatment providers were responsible for conducting a clinical assessment at intake at the cost to the department of \$85 per offender/client. This decentralized referral system (which included court, staff or self referral) made it difficult to determine which type of treatment (education, group or intensive) was most appropriate as well as which offenders should have treatment priority.

In an attempt to remedy the problem, and to develop a more systematic method of determining offenders' treatment needs, the Substance Abuse Program Section (SAPS) of the Michigan Department of Corrections (MDOC) began exploring the use of a clinical assessment that could be administered to all offenders. The Substance Abuse Subtle Screening Inventory-3 (SASSI-3)⁴ was chosen because it has been effectively used with incarcerated populations, is easy to administer, and is thought to meet scientific standards of measuring what it is intended to measure (validity) and measuring it consistently (reliability).

¹Beck, Allen. (2000). Prison and jail inmates at midyear 1999. NCJ 181643. Washington, DC: US Department of Justice, Office of Justice Programs.

²Bureau of Justice Statistics. (January, 1999). Substance Abuse and Treatment, State and Federal Prisoners, 1997, NCJ 172871.

³Hepburn, J.R. (1994). Classifying drug offenders for treatment. In D.L. MacKenzie & C.D. Uchida (Eds.), *Drugs and crime: Evaluating public policy initiatives* (pp. 172-187). Thousand Oaks, CA: Sage.

⁴ Miller, G. (1994). Substance Abuse Subtle Screening Inventory (SASSI-3).

The Substance Abuse Subtle Screening Inventory (SASSI-3) is a 93-item questionnaire that can be administered in a group setting using pencil and paper and takes approximately 15 –20 minutes to complete. The SASSI has been translated into Spanish and there is a taped version available that can be played to respondents who have literacy issues. The SASSI-3 contains 8 sub-scales, the newest of which was recently developed and added to increase the accuracy of the SASSI decision rules. The assessment can be scored and interpreted with an electronic scanner, which means little staff time and no delay in obtaining results.

The SASSI-3 has very high predictive consistency (reliability coefficients between .94 and .99) and appropriately measures substance dependence (validity coefficients of between .70 and .98) when compared to the Structured Clinical Interview for the Diagnostic and Statistical Manual of Mental Disorder IV (DSM-IV) (SASSI Institute, February 13, 1998). This high reliability rate means that the SASSI-3 is able to accurately assess substance dependency, consistent with criteria found in the Diagnostic and Statistical Manual of Mental Disorders.⁵

Diagnostic categories for alcohol and drug related disorders include dependency and abuse. Substance dependence is characterized by greater tolerance to the drug, withdrawal symptoms, and a great deal of time/energy spent on obtaining the drug. A diagnosis of drug dependency is more severe than that of drug abuse (which may be marked by problems with personal, social or work obligations). Typically the SASSI is used to determine if someone is dependent or not, since the reliability in assessing abuse is lower (78% reliability). However, in the process of this assessment study, the University of Michigan and the MDOC, in conjunction with clinicians from the SASSI Institute were able to graduate the scores from the SASSI into four meaningful levels that would meet clinical standards and also available treatment offerings. Thus the SASSI narrative could produce these cutoffs, creating four groups (severe dependence, dependence, abuse and no problem) and these groups could be matched with treatment modalities (residential, out-patient, education and no treatment) available within the state’s institutional and community-based services facilitated through the Michigan Department of Corrections Substance Abuse Services Unit.

Table 1: SASSI-3

	<i>SEVERITY OF PROBLEM</i>	<i>RECOMMENDATION*</i>
<i>Severity 4:</i>	<i>High probability of severe dependence</i>	<i>Residential/Intensive Outpatient</i>
<i>Severity 3:</i>	<i>High probability of substance dependence</i>	<i>Outpatient individual/group, community support</i>
<i>Severity 2:</i>	<i>Possible substance abuse problem</i>	<i>Education Only</i>
<i>Severity 1:</i>	<i>Low probability of substance dependence</i>	<i>No treatment or education</i>

**SASSI severity scores were graduated to match current service availability within MDOC in order to facilitate treatment matching.*

Results of Statewide Screening

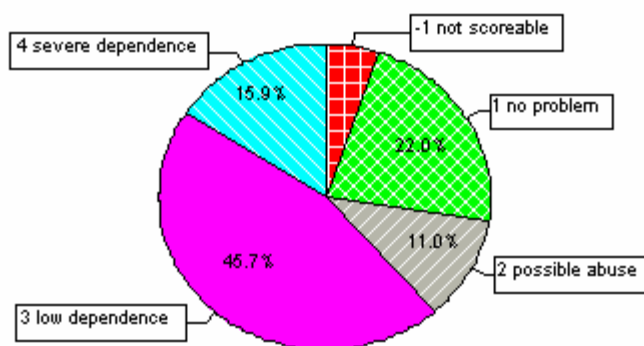
After piloting and testing the use of the SASSI-3 in a sample of men and women in Michigan prisons during October of 1998, attempts were made to survey all prisoners (N = 44,013) between April and June 1999 using the SASSI-3. The survey was voluntary and the purpose of the assessment and how the results would be used were explained to prisoners by institutional staff, who then disseminated the surveys. The two goals of this assessment were to determine the numbers of inmates meeting dependency criteria, and the numbers eligible for treatment or education services based on MDOC criteria.

⁵American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition. Washington, D.C, APA, 1994.

Response rate varied based on the security status; 62% of prisoners in Level I Security (minimum) responded compared to 31% in Security Level VI. Overall a 50% response rate was obtained. Based on initial analysis, 62% of the population had an alcohol or drug dependency (Severity 3 or 4) that required treatment services and 11% had abuse problems that would require educational services. (See graph.)

Substance Abuse Assessment Levels

Tested Inmate Population N=22,080



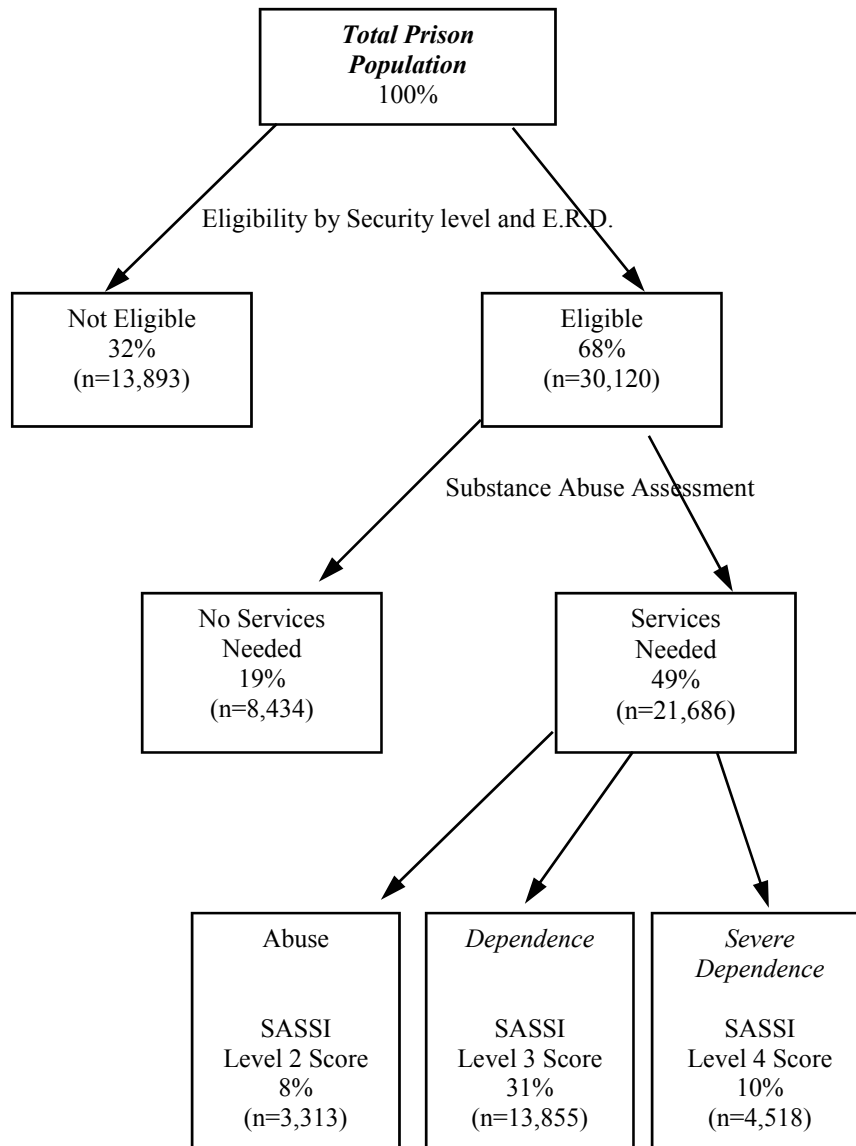
MDOC criteria for inclusion in substance abuse treatment services includes minimum or medium security status and being within 24 months of earliest release date with a goal of effectively utilizing resources by treating those who are on their way back into the community. Analyzing data from MDOC Corrections Management Information Systems (CMIS) and applying the criteria for treatment eligibility outlined above, we found that 68% (n = 30,120) of the population met those two criteria. (Note: security level was based on the actual placement of the prisoner, not management or confinement level).

Combining results of the statewide substance abuse assessment (SASSI) and CMIS data, we offer the following data driven estimates for those needing and eligible for substance abuse treatment and/or education services: approximately 28% of the eligible population have been classified as having a low probability of abuse or dependency (SASSI Severity 1); 11% of the eligible population have been classified as having a possible abuse diagnosis (SASSI Severity 2); 46% of the eligible population have been classified as having a dependency diagnosis (SASSI Severity 3) and 15% of the eligible population have been classified as having a severe dependency diagnosis (SASSI Severity 4). Thus, using MDOC eligibility criteria (Security levels I-III and Earliest Release Dates) as well as high SASSI-3 scores, **we found that 49% (n = 21,686) of the entire institutionalized population in Michigan are in need of and eligible for substance abuse treatment or education at any point in time.**

In the ten years that the MDOC Substance Abuse Unit has been in operation, treatment availability in the prison and community has increased dramatically. In the same fiscal year as the assessment was completed, over 17,000 persons under MDOC supervision received substance abuse related services, more than any other year. However, in addition to the 44,000+ inmates housed in correctional facilities, there are those under the department's supervision on parole and probation who also require services in the community. Of the nearly 17,000 who received services during FY 1998-99, nearly 5,000 received them while in prison.⁶

⁶ MDOC Substance Abuse Programs Section Annual Report, Fiscal Year 1998/99. January, 2000

Figure 4: Eligibility Flow Chart



The purpose of implementing a substance abuse assessment – the SASSI-3 – in Michigan was to understand the treatment needs of the prison population in order to match the offender’s need for treatment with the appropriate treatment. At this time, in the State of Michigan, not only does the SASSI-3 narrative become a part of the offender file but also the paper work follows the offender from institution to institution and into the community. Since the documentation of substance abuse/dependence diagnosis follows the offender, other housing staff should know what treatment is needed. Field Operations staff who work in parole offices around the state will also have access to this information.

In addition, the MDOC-SAPS staffs, working with technicians from data processing, have the computerized results of the SASSI-3 that are immediately downloaded from the Reception Centers to the Corrections’ Management Information System (CMIS). In this way, the information will become a permanent part of the offenders record and

can be retrieved by any department staff should paper work be delayed or lost. The particular screen (substance abuse assessment screen) includes information on the SASSI-3 score and the recommended service or treatment level. The screen also includes information on whether the prisoner received or is scheduled to receive drug treatment and the result of that service (successful/unsuccessful discharge).

Substance abuse treatment options have steadily increased in the number of types of treatment available to prisoners, parolees and probationers in Michigan. However, this assessment provides evidence of the continuing need. Unless state and federal policies shift their response to drug control strategies, the need for an ever-expanding treatment response in prisons will continue.

(Note – a version of this paper by Pimlott, Boyd, Slayden and Young was submitted to *Behavioral Justice* in December of 2000.)

Sheryl Pimlott is a doctoral candidate in psychology and women's studies at the University of Michigan. Associated with U-M research institutes on both women and gender, and substance abuse, her particular research interests are women in the criminal justice system and the delivery of substance abuse treatment. Ms. Pimlott frequently serves as a consultant to public and non-profit agencies, and has completed several contracts with the MDOC that involved screening prisoners for substance abuse dependency and evaluating treatment services.

TREATMENT VS INCARCERATION: A QUESTION OF COST-EFFECTIVENESS

By **Barbara R. Levine**



According to MDOC annual reports, in 1998, nearly 6000 Michigan prisoners were serving sentences for drug offenses. That year, 19 per cent of the new commitments to prison were for drug offenses. From 1986-1996, the overall rate of incarceration for drug offenses per 100,000 Michigan citizens went from 8.92 to 27.17 – a 205 per cent increase.¹ Perhaps even more significantly, the MDOC reports that in 1999, approximately 63 percent of males and 71 percent of female prisoners reported a history of substance abuse at intake.

The connection between substance abuse and crime of all kinds is well-known, and it is not just illegal drug users stealing to support expensive habits. *Behind Bars: Substance Abuse and America's Prison Population*, a 1998 research report by the National Center on Addiction and Substance Abuse at Columbia University (CASA), reports that 49 percent of all state prison inmates incarcerated for violent crimes were under the influence of alcohol, drugs, or both when they committed their offenses. Alcohol is the most closely associ-

ated with violent crime, including murder, rape, assault, and spouse and child abuse. Of these violent offenders, 21 percent were under the influence of alcohol alone, while another 16 percent had used both alcohol and drugs.²

Substance abuse, CASA reports, is also “tightly associated” with recidivism. “The more prior convictions an individual has, the more likely that individual is a drug user.”³

A recent issue of *Newsweek* reports that, after spending literally billions of state and federal dollars annually on interdiction and imprisonment: “Even hard-liners in the war on drugs like to say that we can no longer incarcerate our way out of the problem.” The consensus emerging between liberals and conservatives “combines flexible enforcement with mandatory treatment”. Noting that current spending priorities look “pound foolish”, *Newsweek* says:

“The research shows that those forced into treatment do at least as well as addicts who enroll voluntarily – often better, because they must stay in therapy longer or risk reincarcera-

tion. In all recovery programs, the best predictor of success is the length of treatment. While relapse is common, those who remain at least a year are more than twice as likely to stay clean.”⁴

There is little doubt that whether treatment occurs in prison or in the community as an alternative to prison, it is the best investment long-term. For instance, a 1997 study by the RAND Corporation compared the effect of traditional law enforcement methods (including asset seizures), mandatory minimum sentences, and treatment on heavy cocaine use.⁵ For federal drug offenses, RAND found that spending an additional one million dollars to make mandatory minimums longer would reduce cocaine consumption by almost 13 kilograms. Spending the same money to incarcerate more dealers for conventional prison terms would reduce consumption by 27 kilograms. But applying the million dollars to treat heavy users would reduce consumption by over 100 kilograms.

RAND also estimated the impact on drug-related crime, both property and violent. It found no difference in the impact of conventional enforcement and mandatory minimums. But treatment reduces serious crime by fifteen times as much as either basis of incarceration.

While both costs and success rates vary with the type of treatment, the impact goes far beyond criminal justice system and corrections expenses or even the economic and social benefit of crime prevention. Substance abuse produces huge health care costs, and substance abusers are typically not productive employees, taxpayers, and income-earners for their families.

The CASA study looked at in-prison treatment, which it concluded could be effective if well-designed and “combined with pre-release training and planning and community-based aftercare services, including assistance with housing, education, employment and health care.” It estimated that such treatment would cost about \$6,500 per year above the usual incarceration costs. However, CASA then estimated the savings in reduced crime, reduced arrest and prosecution costs, reduced incarceration costs, reduced health care and substance abuse treatment costs, and the economic benefits of employment that would accrue in the first year after release “[i]f an addicted offender successfully completes the treatment program and returns to the community as a sober parolee with a job”. The researchers concluded:

“Under these conservative assumptions, the total benefits that would accrue during the

first year after release would total \$68,800 for each successful inmate. These estimated benefits do not include reductions in welfare, other state or federal entitlement costs, or foster care for the children of these inmates.

Given these substantial economic benefits, the success rate needed to break even on the \$6,500 per inmate investment in prison treatment is modest. If only 10 percent of the inmates who are given one year of residential treatment stay sober and work during the first year after release, there will be a positive economic return on the treatment investment.”⁶

Similar findings for community-based treatment were reported in *Evaluating Recovery Services: The California Drug and Alcohol Treatment Assessment (CALDATA)* (1994). This large-scale study of the effectiveness, benefits, and costs of alcohol and drug treatment, conducted for the California State Department of Alcohol and Drug Programs, focused on participants in two types of residential programs and two types of outpatient treatment. Follow-up interviews occurred an average of 15 months after treatment. Key findings included:

- The 1992 cost of treating approximately 150,000 participants represented by the study sample was \$209 million, while the benefits during treatment and the first year after equaled approximately \$1.5 billion, mostly due to reductions in crime.
- Each day of treatment paid for itself on the day it was received.
- The benefits of alcohol and other drug treatment outweighed the costs of treatment by ratios from 4:1 to greater than 12:1, depending on treatment type.
- Criminal activity declined by two-thirds. The greater the length of time spent in treatment, the greater the reduction in criminal activity.
- The use of alcohol and other drugs declined by approximately two-fifths from before to after treatment.
- About a one-third reduction in hospitalizations after treatment was reported, along with significant improvements in other health indicators.
- Longer lengths of stay in treatment have a positive effect on employment.⁷

In 1999, the Arizona Supreme Court reported on the initial results of a program for diverting offenders from prison to drug treatment. Of 2,622 probationers who

participated in treatment during the program's first year, completion data was available for 932. The success rate was 61.1 percent. Even after subtracting treatment and probation costs, researchers estimated that the program achieved a net saving of \$2,563,032 in incarceration costs. They estimated that these savings would increase in future years when the initiative was fully implemented.⁸ These results helped inspire California's Proposition 36. (See article on p. 10)

These promising research results helped promote the expansion of drug courts – specialized courts for drug offenders that have become a “therapeutic alternative” to traditional court processing. Drug courts combine the opportunity for community-based treatment with close judicial monitoring and progressive sanctions for non-participation. Three key features of drug courts are: 1) immediate intervention upon arrest, 2) collaboration between the court, prosecutors, defense attorneys, probation officers, and treatment professionals, and 3) the availability of incarceration as a motivational tool. The first Michigan court to follow this therapeutic model was established in Kalamazoo, under the leadership of Judge William Schma. There are now such drug courts in twelve Michigan circuits, with eight more in the planning stages.

Evaluations of the effectiveness of drug courts are limited and mixed. Johnson, Hubbard, and Latessa reviewed the literature in “Drug Courts and Treatment: Lessons to be Learned from the ‘What Works’ Literature.”⁹ The authors concluded:

“It is unlikely that the drug court model will be effective merely by holding status review hearings to gauge progress. Reducing criminality and addictions begins with the recognition that drug addiction is a chronic relapsing condition that will not be effectively reduced by applying short-term, education-based treatment services. If the drug court model hopes to achieve behavioral change through community-based treatment, the program must use empirically validated and theoretically driven treatment models.”¹⁰

The authors go on to identify seven principles of effective intervention, drawn from the literature on both community and institutional-based treatment. Services should be:

- Based on behavioral approaches and use cognitive strategies
- Located in the offenders' natural environment
- Multimodal
- Intensive enough to be effective

- Encompass rewards for pro-social behavior
- Target high-risk and high-criminogenic need individuals
- Matched with the learning styles and abilities of the offender.

The authors then identify four critical points for using these principles to develop an effective drug court:

- Incorporate a strategy for classifying clients according to their risk level.
- Refer clients to treatment services that are based on a behavioral model and use cognitive techniques, and that are sufficiently intensive to effect behavioral change.
- Ensure a continuum of care for clients that includes aftercare services.
- Emphasize the quality of treatment by holding service providers accountable.

As states like California and Arizona have discovered, in the long run, it makes far more sense to treat those who commit crimes related to alcohol and drug use than to keep locking them up, over and over. It is less expensive, more humane, and has the best prospects for increasing public safety and public health. Unfortunately, what *Newsweek* said of the country as a whole is also true for Michigan. “For all its promise, treatment remains a spit in the ocean of national substance abuse.”¹¹ The challenge for policy makers is to shift resources from entrenched strategies that have failed to treatment programs, in prison and in the community, that can prove their cost-effectiveness if given support, time, and adequate funds.

¹*Poor Prescription: The Costs of Imprisoning Drug Offenders in the United States*, Justice Policy Institute, Washington, D.C., July 2000, Appendix, Table 3.

²CASA Report at 9.

³*Id.* at 7.

⁴“The War on Addiction”, *Newsweek*, Feb. 14, 2001, p. 36, at 38-39.

⁵Caulkins, Rydell, Schwabe, and Chiesa, *Mandatory Minimum Drug Sentences: Throwing Away the Key on the Taxpayers' Money?* RAND Corporation, Santa Monica, CA, 1997.

⁶*Behind Bars, supra*, at 19.

⁷CALDATA at iv-vi.

⁸“*Poor Prescription*”, note 1 *supra*, at 14.

⁹*Corrections Management Quarterly*, Vol 4, No. 4, Fall 2000, pp. 70-77.

¹⁰*Id.* at 72.

¹¹“The War on Addiction”, note 4 *supra*, at 39.

DRUG TREATMENT INITIATIVE PASSES IN CALIFORNIA

Many, both within and outside the criminal justice arena, have been crying as voices in the wilderness for years about the policies promoted by the national “war on drugs”. We are finally beginning to see some indications that a sense of priorities and rationality is being restored to the criminalization of the possession and sale of drugs. Treatment of drug addiction is being recognized as an essential component of drug policies, a point forcefully and dramatically made in the recent movie, “Traffic”, and more substantively and beneficially in the passage of Proposition 36 by California voters in the last election.



Proposition 36 mandates probation and treatment, and forbids incarceration, for certain nonviolent drug offenders convicted of possession, use, and transporting for personal use of controlled substances. It also forbids parole revocation for similar offenses, and provides \$660 million in funding for treatment programs over six years. According to an article in the Los Angeles Times, legislative analysts predict that this legislation will divert 36,000 offenders from California’s prisons and jails, and save up to \$250 million a year. The state also could save another \$500 million by avoiding the need for new prison construction, according to the analysts. Evaluation procedures are built into the initiative.

The full text of Proposition 36 is reprinted below. Although this was a ballot initiative, similar provisions could be enacted by legislation. Section 2 makes findings about the benefits of drug treatment as opposed to incarceration and relies specifically on the successful results of a comparable 1996 Arizona ballot proposal. Section 3 is a statement of purpose that expresses, in part, the intent of the people of the State of California: “To halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration – and re-incarceration – of non-violent drug users who would be better served by community-based treatment.” Section 5 specifies who is and is not eligible for probation with mandatory drug treatment. It provides for expungement of the conviction when treatment has been completed. It also spells out the circumstances under which probation can be revoked. Notably, in recognition that relapse is a common part of the treatment process, revocation for a drug-related violation is not mandatory until the third such instance. Under Section 6, parole revocation for drug use is not mandatory until the second violation.

Much of the funding for promotion of passage of this initiative was provided by the Campaign for a New Drug Policy, a group backed by philanthropists: George Soros, a New York financier, John Sperling, founder of the University of Phoenix, and Peter Lewis, chairman of Progressive Insurance. According to the Times, supporters spent about \$3.7 million. Opponents of the measure reportedly raised far less, but did receive at least \$100,000 for the anti-proposition effort from the California corrections officers union.

SECTION 1. Title

This Act shall be known and may be cited as the “Substance Abuse and Crime Prevention Act of 2000.”

SECTION 2. Findings and Declarations

The People of the State of California hereby find and declare all of the following:

- (a) Substance abuse treatment is a proven public safety and health measure. Non-violent, drug dependent criminal offenders who receive drug treatment are much less likely to abuse drugs and commit future crimes, and are likelier to live healthier, more stable and more productive lives.
- (b) Community safety and health are promoted, and taxpayer dollars are saved, when nonviolent persons convicted of drug possession or drug use are provided appropriate community-based treatment instead of incarceration.

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PAROLE PRACTICES AND PRISON POPULATION

By Marjorie Van Ochten

A recent article in the New York Times entitled, "Often Parole is One Stop on the Way Back to Prison", outlined the impact that parole return policies have had on the explosive growth of the nation's prison population. Although the November 29, 2000 article cites national statistics and mentions several states, reporter Fox Butterfield's emphasis is on the state of California.

According to the article, figures from the federal Bureau of Justice Statistics show that nationwide the number of people sent to state prisons rose 22.7 percent between 1990 and 1998. However, the number of new offenders rose only 7.5 percent, while the number of parole violators returned to prison increased 54.4 percent. In California, 68 percent of the people admitted to prison in 1999 were on parole at the time of their return, and 80 percent of those returnees had not been convicted of a new crime but rather were technical parole violators, e.g. they had failed a drug test or missed an appointment with a parole officer. (In California, prisoners receive a determinate sentence but are subject to a mandatory period of parole supervision upon release and may be returned to prison for specified periods if they fail to complete parole.) In 1980, only 21 percent of prison admissions were parole violators. Similar problems were noted in other states.* Clearly, as pointed out in the article, one of the major factors contributing to the explosive and expensive growth of prison populations in this country is the high rate of parole returns.

The article outlines possible reasons for this high rate of reincarceration, and recounts the stories of several individual parolees. One reason cited for the high return rates is the fact that incarceration reduces the likelihood that an individual will be able to become a law-abiding citizen. Joan Petersila, a professor of criminology at the University of California at Irvine states that "the more times a person has been to prison before, the more likely they are to be rearrested, because things like finding housing and jobs and reestablishing family ties become harder and harder for them."

*In Michigan, from 1992-2000, the number of "new court commitments" declined by 39%, while the number of parolees returned as technical violators rose by 87%.

One of the principal reasons for these difficulties, as noted in the article, is the lack of rehabilitation programs in prisons, which were largely eliminated in the 1990's so the money could be used to build and staff more prisons. According to Dr. James Austin, director of the Institute on Crime, Justice and Corrections at George Washington University, only 9 percent of prisoners are in full-time job training or education programs, and 24 percent are completely idle. If a paroled prisoner overcomes the lack of training, as well as prejudices and legal prohibitions against hiring ex-felons, and procures a job, the article notes that they usually earn only half as much as people of the same social and economic background who have not been incarcerated.

As emphasized in the article, however, one of the major reasons for parole returns is drug and alcohol abuse. According to the Bureau of Justice Statistics, 82 percent of parole returnees are drug or alcohol abusers. However, availability of prison drug treatment programs has declined in recent years. The Bureau reports that in 1991, 25 percent of prison inmates were in drug treatment programs; in 1997, only 10 percent were in such programs. There has been no decline, however, in the percentage of prisoners who are drug or alcohol abusers.

The article concludes on its only positive note in this bleak picture which is the establishment of new drug treatment programs by the California Department of Corrections. These include a six-month residential post-incarceration component and offer group therapy, vocational training, and free medical care. A study of one such program showed that only 27 percent of individuals who completed the program were returned to prison after three years, as contrasted with a 75 percent return rate for those who did not complete such a program. With the passage of Proposition 36 (see related story, page 10), California will need many more drug treatment programs such as this one.

SOME FACTS ABOUT MICHIGAN PRISONS

- Since 1975, the number of Michigan prisoners has gone from 11,000 to nearly 48,000.
 - The prison population has grown at 38 times the rate of the general population.
 - By 2005, the prison count is projected to reach 53,000. That does not include the impact of “truth in sentencing” provisions that phase in the total elimination of disciplinary credits.
 - From 1986 to 1996, the rate of incarceration per 100,000 for drug offenses increased by 22.7% for whites and 335.7% for African-Americans.
- The proposed MDOC budget for FY 2002 is nearly \$1.8 billion.
 - The average cost per prisoner is \$30,400.
 - Salaries alone for the over 18,000 MDOC employees exceed \$3.7 million per day.
 - The \$55 million increase for Corrections is greater than that proposed for any other department.
 - From 1990-2002, inflation will have increased 41%, increases in higher education spending will be 62%, and increases in corrections spending will be 145%.
- Crime rates have declined so steadily that the commitment of prisoners for new crimes dropped 39% from 1992-2000.
 - Over half of all people admitted to prison in 2000 were probation or parole violators.
 - Technical parole violators alone occupy 2590 prison beds.
- Parole grant rates have dropped from 68.2% in 1990 to 47.3% in 2000.
 - The proportion of prisoners serving beyond their parole eligibility dates is now 44%, compared to 18% in 1989 and 29% in 1997.
 - Nearly 21,000 prisoners who are eligible for parole are still incarcerated, due largely to parole board policies that make people convicted of assaultive offenses serve their maximum sentences and keep parolable lifers locked up for the rest of their lives.
 - These across-the-board policies do not reflect the merit of individual prisoners, the intentions of the judges who sentenced them, or the expectations that underlie plea negotiations and sentencing guidelines.

CORRECTIONS IN THE LEGISLATURE

Listed below are the names of legislators serving on the committees directly concerned with corrections issues. Republicans are listed in regular print; Democrats are listed in italics. The information necessary to contact them in person, by phone, by fax, or by e-mail is provided. All phone numbers are 517 area code.

If you wish to write a legislator, the correct format is:

State Senator

The Honorable (full name)
State Senator
State Capitol
P.O. Box 30036
Lansing, MI 48909-7536
~

Dear Senator (last name):

State Representative

The Honorable (full name)
State Representative
State Capitol
P.O. Box 30014
Lansing, MI 48909-7514
~

Dear Representative (last name):

You may check committee schedules and agendas at the following website:
www.michiganlegislature.org

COMMITTEE MEMBERS

	Phone	Fax	E-Mail
House – Criminal Justice			
Jennifer Faunce (Chair)	373-1772	373-5906	jfaunce@house.state.mi.us
Mike Kowall (Vice-Chair)	373-2616	373-5843	mkowall@house.state.mi.us
Paul N. DeWeese	373-0587	373-9430	pdeweese@house.state.mi.us
Thomas M. George	373-1774	373-8872	tomgeorge@house.state.mi.us
Larry Julian	373-0841	373-7937	ljulian@house.state.mi.us
Andrew Raczkowski	373-1793	373-8501	araczko@house.state.mi.us
Alan Sanborn	373-0843	373-5892	asanbor@house.state.mi.us
<i>William McConico (Vice-Chair)</i>	373-0144	373-8929	repbillmconico@house.state.mi.us
<i>William Callahan</i>	373-0113	373-5912	wcallah@house.state.mi.us
<i>William J. O'Neil</i>	373-0140	373-5924	woneil@house.state.mi.us
<i>Vera Rison</i>	373-7557	373-5953	vrison@house.state.mi.us

House – Corrections Appropriations

Charles LaSata (C)	373-1403	373-3652	clasata@house.state.mi.us
Gary A. Newell (VC)	373-0842	373-6979	repgarynewell@house.state.mi.us
Mike Kowall	373-2616	373-5843	mkowall@house.state.mi.us
Mickey Mortimer	373-1775	373-5242	mmortimer@house.state.mi.us
Scott Shackleton	373-2629	373-8429	sshackleton@house.state.mi.us
John C. Stewart	373-3816	373-5952	johnstewart@house.state.mi.us
<i>Triette Reeves (Vice-Chair)</i>	373-6990	373-5985	treeves@house.state.mi.us
<i>Richard J. Brown</i>	373-0850	373-9303	richbrown@house.state.mi.us
<i>Hansen Clarke</i>	373-0589	373-6404	hclarke@house.state.mi.us
<i>William McConico</i>	373-0144	373-8929	repbillmconico@house.state.mi.us

Senate – Judiciary

William Van Regenmorter (Chair)	373-6920	373-2751	senwvanregenmorter@senate.state.mi.us
Thaddeus G. McCotter	373-1707	373-3935	sentmccotter@senate.state.mi.us
Bill Bullard, Jr.	373-1758	373-0938	senbbullard@senate.state.mi.us
Bill Schuette	373-7946	373-2678	senbshuette@senate.state.mi.us
<i>Gary Peters</i>	373-7888	373-2983	sengpeters@senate.state.mi.us
<i>Christopher D. Dingell</i>	373-7800	373-9310	sencdingell@senate.state.mi.us
<i>Robert L. Emerson</i>	373-0142	373-3938	senremerson@senate.state.mi.us

Senate – Corrections Appropriations

Walter H. North (Chair)	373-2413	373-5144	senwnorth@senate.state.mi.us
Philip E. Hoffman	373-2426	373-2964	senphoffman@senate.state.mi.us
<i>Alma Wheeler Smith</i>	373-2406	373-5679	senasmith@senate.state.mi.us

PANEL AT ANNUAL MEETING DISCUSSES MEANING OF PAROLABLE LIFE TERMS

At its annual meeting held in Detroit on September 21, 2000, the Section hosted a panel discussion on the topic “Parolable Life: Is it Parolable or is it Life?” Panelists included Wayne Circuit Judge Vera Massey Jones, Parole Board Chairperson Stephen Marschke, Detroit Defense Attorney Steven Fishman, Washtenaw County Prosecutor Brian Mackie, and former lifer Anthony James.

Mr. James began the discussion by describing the guilty plea he entered at the age of 16. Based on the statements of the trial judge and his own lawyer, Mr. James believed that he would serve about 15 years on a life term. When the parole board continued to pass him over, despite his efforts to earn release, he filed a motion for relief from judgment under MCR 6.500, asserting that the original sentence had been imposed under a misconception about the likelihood of parole. The motion was granted and he was resentenced to time served after being incarcerated for 22 ½ years.

Mr. James offered his own accomplishments since being released as evidence that paroled lifers can lead productive lives. He observed that the current parole board’s policy of “life means life” abolishes the distinction between mandatory and parolable life terms, brands an entire group of prisoners as “irredeemable” based on their sentences, not their offenses or institutional histories, and conflicts with the expectations of “a whole generation of judges, lawyers, prosecutors, victims, and wrongdoers.”

Mr. Marschke began by providing a general description of the parole board’s procedures and workload. He noted that the current parole grant rate is 47.1%; the continuance rate is 52.9%. Turning to life sentences, in particular, he said the difference between a non-parolable life term and a parolable one is who makes the final release decision, i.e., the governor or the board. He described the board’s decision making process in lifer cases, including notification of the sentencing court, and stated that “[w]ithout the court’s approval for parole, the parole board doesn’t have jurisdiction to proceed.”

Mr. Marschke said that the board takes life sentences very seriously and that there is a higher threshold for lifers because of their sentences. He said the board will not read into the lifer law anything the statute does

not provide, and there is no statutory basis for judges to believe that lifers will be released after any particular number of years. If a judge wants a defendant to serve 12, 15, 20 or 25 years, the judge should impose an appropriate indeterminate term. The parole board relies for information primarily on the presentence report, and most of these do not mention plea bargains or the “mutual understanding” between the judge, prosecutor and defense counsel. Ultimately responsibility for the release decision is the board’s, and judges cannot control if or when the board takes interest in a lifer.

Although he acknowledged that he, too, had heard stories “back in the 70’s” about lifers being released in 15 or 20 years, and that there were more lifers paroled during Governor Milliken’s term than there were thereafter, Mr. Marschke maintained that historically few lifers have been released no matter what the composition of the parole board. When paroles and commutations are combined, during the 1970’s there were 138 lifers released, during the 80’s there were 67, and during the 90’s there were 43.¹ Of 108 lifer cases in which the board took an interest since 1990, 14 were the subject of judicial objections and the board itself withdrew interest in 62, either before or after public hearing. Thirty lifers were actually paroled and two cases are pending. There are currently 2628 prisoners serving non-parolable life and 1655 serving parolable life terms.

Judge Jones, who has imposed felony sentences since becoming a Recorder’s Court judge in 1979, said that the understanding among judges and lawyers was that a life sentence was less harsh than a long term of years because lifers become eligible for parole after serving ten years.¹ Lifers could demonstrate rehabilitation, not just by good behavior but by advancing their education, and could earn their release. “[W]e all believed,” Judge Massey-Jones noted, “that you spend a maximum of 15 years, unless you continuously find yourself involved in violent behavior within the prison. And therefore that “life” gave them the ability to keep you when you had demonstrated that, obviously, there was no way you could be rehabilitated and released.” Thus, she explained, when she wanted someone to serve 20 years, she would impose a long indeterminate term rather than life because she did not want to take

¹ Editors note: There was no indication given as to how many lifers had served the statutorily required 10 years and therefore were eligible for parole by the end of each decade.

the risk the person would be released sooner. Judge Jones concluded that the intentions judges had when they imposed life sentences in the 1980's had been undermined by changed political practices. She suggested that if life meant life, there should never have been a history of the parole board interviewing lifers in 10 years and releasing them in 15. She found it unfortunate that lifers who have shown themselves to be rehabilitated are not being given serious consideration for release, and was glad that motions for relief from judgment are being used as a means of implementing the sentencing judge's intent.

Mr. Fishman, who has been a defense attorney for 27 years, said "life means life" is a catchy slogan, but it represents a political shift that occurred while people like Mr. James, who had accepted plea bargains when they were teenagers, were serving life sentences they thought "meant anything in the world other than life." Mr. Fishman described how, in the 70's and 80's, defense attorneys would debate whether a 15 or 20 year minimum sentence was more to a client's advantage than a life term. Judges would impose life terms when their intent was to give a defendant a chance at release. Everyone knew that lifers became eligible for release at 10 years, received regular reviews, and actually got paroled in 15, 16 or 17 years.

Mr. Fishman characterized the parole board's current policy as analogous to an *ex post facto* law that changes the terms on which people relied at the time of sentencing. He observed that most defense attorneys in Detroit feel the current board engages in resentencing by holding many prisoners to their maximum sentences. Instead of negotiating pleas on the basis of the minimum term, lawyers now feel they must negotiate for a reduced maximum. He suggested that to avoid future shifts in the way the parole board exercises its discretion, parole should be abolished and Michigan judges should impose determinate sentences, as judges do in the federal system. He also suggested that motions for relief should be granted when there is evidence that the parole board's refusal to release lifers has subverted the intent of the sentencing judge.

Mr. Mackie, who became an assistant prosecutor in 1978, noted that prosecutors used to complain that the parole board released people too readily. He expressed satisfaction that the board listens when he wants to discuss the release of particular prisoners and he suggested that the board's policy of holding most sex offenders to their maximums may be appropriate. However, he agreed that, based on his experience, "in the old days" he did not think that life means life. He observed that

the situation lifers like Mr. James now find themselves in may be due in part to the movement for victims' rights and the emphasis on truth in sentencing that arose since they were sentenced. He also agreed that 6,500 motions may be a good mechanism for effectuating the intent of the sentencing judge.

A complete transcript of the panel discussion, including the question and answer session with the audience, is available for \$5, including shipping and handling. Make checks or money orders payable to "State Bar of Michigan" and send to: Prisons and Corrections Section, State Bar of Michigan, P.O. Box 12037, Lansing, MI 48901-2037.

MDOC UPDATE

**By Richard B. Stapleton
Administrator
Office of Policy and Hearings**

The Department of Corrections recently revised several policy directives which may be of particular interest to members of the Prisons and Corrections Section. Many of the changes were necessitated by statutory amendments, including sentencing provisions and statutes aimed at reforming prisoner litigation. The brief review of the key points that follows is intended only to highlight the changes. I would encourage section members who desire additional information concerning these policies, or other Michigan Department of Corrections' policy directives, to contact me at the Office of Policy and Hearings, Grandview Plaza Building, P0 Box 30003, Lansing, MI 48909.

PD 03.01.105 "Disciplinary Time" (effective 11/13/00) Prisoners serving sentences which are subject to disciplinary time pursuant to the Truth in Sentencing Act (MCL 800.34) may not earn sentence reductions, i.e., disciplinary credits, on their sentences. This policy sets forth the manner in which a prisoner's minimum and maximum release dates will be calculated. Rather than earning reductions on their sentences, all prisoners sentenced for offenses committed on or after December 15, 2000 will accumulate disciplinary time for misconduct at the rate specified in an administrative rule, R 791.5515. The amount of accumulated disciplinary time is not added to the minimum sentence imposed by the court, but must be considered by the Parole Board at the time of parole consideration. Furthermore, prisoners may not be placed in a community residential program, e.g., corrections center or tether supervision, until they have served their minimum terms on all sentences subject to disciplinary

time.

PD 03.01.101 “Disciplinary Credits / Drug Law Credits” and PD 03.01.100 “Good Time Credits” (effective 11/13/00)

Prisoners sentenced for certain offenses which occurred prior to December 15, 2000 will continue to be eligible to earn disciplinary credits or good time credits and have their sentences reduced by demonstrating positive behavior. The recent revisions of the policies addressing these prisoners include the circumstances under which a court may order forfeiture of any or all of a prisoner’s accumulated good time or disciplinary credits as set forth in MCL 600.5513. Effective November 1, 1999, a court may order a forfeiture of good time or disciplinary credits, or both, if it is found on its own motion or motion of a party that a prisoner has filed a civil claim for a malicious purpose, filed a claim solely to harass the party against whom it was filed, or when a prisoner has testified falsely or otherwise presents false information to the court. PD 03.01.101 was revised to identify certain drug offenses and the sentences under which a prisoner may be eligible to earn drug law credits. These credits affect only a small number of prisoners who remain incarcerated and affect only the manner in which credits were earned prior to 1987.

PD 05.01.143 “Security Level VI” (effective 11/1/00)

The Department’s long anticipated “supermax” security level program began operations in November 2000 with the release of this policy. First proposed in 1988, the program had been on hold as a result of a court order in the matter of *Cain, et al v. MDOC*, a statewide prisoner class action lawsuit in the Court of Claims concerning prisoners’ property rights and access to courts. The issues in *Cain* which delayed initiating a security Level VI program have been resolved, and the program now operates at the Department’s Ionia Maximum Correctional Facility as the highest security level for general population male prisoners. Prisoners in security Level VI have demonstrated an inability to be managed at lower security levels, but no longer require classification to administrative segregation. All Department policy directives apply to Level VI prisoners, except those that are specifically exempted under this policy. As an incentive for prisoners to progress through the three phases of the Level VI program, privileges are awarded for positive behavior. The privileges include out of cell activities, telephone calls, and work assignments.

PD 05.02.112 “Education Programs for Prisoners” (effective 8/28/00)

By Public Act No. 320 of 1998, the Michigan

or its equivalent in the form of a general education development certificate (GED) before he or she may be released on parole. MCL 791.233(l)(f) also provides that the Director of the Department of Corrections may waive this requirement for certain prisoners as set forth in the statute. The Department’s policy on prisoner education programs was revised to include the circumstances under which a warden may waive this requirement under state law. These include when a prisoner is 65 years of age or older, was gainfully employed before committing the crime, does not have the necessary proficiency in English to attain a GED, has certain learning impairments, documented medical problems which preclude education programming, or for some reason that is not the fault of the prisoner who is unable to complete the requirements for a GED. A prisoner who is paroled with a waiver of the GED requirement may be required to continue his or her education in the community as a special condition while under parole supervision.

PD 05.03.118 “Prisoner Mail” (effective 1/1/01)

This policy sets forth the Department’s limitations on prisoners incoming and outgoing mail. A significant revision in the policy is a newly defined restriction of sexually explicit photographs to now include pictures depicting actual or simulated sexual acts by one or more persons. Photographs in a publication are included in this prohibition. The Department’s prior policy restricted photographs depicting sexual acts between persons of the same sex who are also the same sex as the prisoners at the facility at which the mail was received. Publications from legitimate publishers who have removed the offending pages prior to mailing will still be allowed into a facility. Prisoners will continue to have the right to a hearing to appeal the rejection of photographs or publications which are alleged to meet the new definition.

Newjack: Guarding Sing Sing by Ted Conover Random House, 2000

Reviewed by Marjorie M. Van Ochten

Newjack, which is apparently slang for a novice corrections officer in New York's prisons, is an account of the approximately ten months spent by its author, Ted Conover, first as a trainee and then a corrections officer for the New York Department of Correctional Services (NYDCS).



Cell in Sing Sing

(The book's jacket states that the author "spent a year as a prison guard at Sing Sing", but in the book he says he entered the Training Academy in March 1997, started at Sing Sing in late April, and had turned in his resignation by New Year's Day of 1998.) The book contains an accurate, though incomplete, picture of what life is really like inside the walls (it is decidedly NOT a country club atmosphere), and has some flashes of insight as to why corrections officers respond as they do to prisoners. However, its sometimes supercilious tone towards corrections officers, as well as its disparagement of prisons without any hint of what the author would propose as an improvement or an alternative, makes it difficult to unreservedly recommend it.

The book contains many interesting and colorful descriptions of prison life and prisoners, from gang members to jailhouse philosophers, but its primary focus is on the job of the corrections officer. The author had originally asked the NYDCS to allow him into their Training Academy as an observer, but was told it was off limits to journalists. He then approached a representative of the corrections officers union, and although he was willing to help him in interviewing officers, Mr. Conover quickly realized that the officers would not be honest and open in interviews with an outsider. So he decided to go "undercover" and applied to become a corrections officer in order to gather material for his book. He passed the state's civil service examination and was subsequently hired by the NYDCS.

Conover succeeds to a great extent in describing the unique, difficult and sometimes bizarre job of being a corrections officer, from working in a housing unit, to

supervising the visiting room, to staffing the gun tower, and other assignments which are part of the job. However, he makes it clear at several points that he views the occupation of corrections officer as a less than honorable one. He states that it is "odd to devote yourself professionally to confining others in a small space", and is surprised that his classmates at the Academy proudly invite their families to the graduation ceremony. One wonders how he would propose to operate prisons without corrections officers, but, more importantly, he does not seem to appreciate that such a relatively well paying and secure job may be all that can be hoped for if one is not equipped to be a college educated writer for *The New Yorker*. His insights also are marred by his relatively brief time on the job and the fact that during the entire ten months of his training and work inside he knew he could quit at any time. At the most, he planned to be there for only a year. Psychologically, he did not have to become a corrections officer. Interestingly, one of the prisoners picked up on his detachment and asked him why he "was not like the other corrections officers".

Also troublesome are some of the broad generalizations he makes from his brief time as a corrections officer which was limited to one facility, Sing Sing, that had a lot of trainees and staff turnover due to requested transfers to other facilities further away from New York City. One of the most disturbing is his assertion that drugs are widely available in prison and that while some are smuggled in through visiting rooms, "most it seemed, were helped into prison by officers who were paid off". Some or all of this may be true, and is probably based on what he heard from prisoners or some of his colleagues, but there is no substantiation for this damning accusation. He does not even mention one of the most common sources of drugs in many prisons, which is packages mailed to prisoners by friends and family which have drugs hidden in such places as the lining of clothing and even in fake legal documents. This is possibly due to his lack of knowledge of prison mailrooms, which are not mentioned in the book and usually are not staffed by corrections officers.

In short, this book provides an interesting picture of prison life and some insight into the problems faced by corrections officers, as well as the often destructive dynamics for both sides of the interactions between the keepers and the kept. Although it suffers from the shortcomings noted above, it still is well worth reading for those interested in how prisons operate.

ATTORNEY RELATED TO PRISONER ALLOWED ATTORNEY VISITS

In 1995, the MDOC promulgated an administrative rule, R 791.6607, which, among other provisions, excludes an attorney related to a prisoner by blood or marriage from having privileges allowed for attorney visits with that prisoner. An attorney related by blood or marriage may still visit the prisoner to whom s/he is related, but must conform to the requirements for visits by the general public, e.g., be on the prisoner's approved visitor list, visit only during regular visiting hours, and visit in the visiting area rather than in a private attorney visiting room. A recent decision by Judge Avern Cohn, *Vincent, et al v. Martin, et al*, USDC-ES, No. 99-71416, ruled that this regulation violates an attorney's First and Fourteenth amendment rights, and violates a prisoner's right of access to the courts.

The *Vincent* case was brought by a prisoner and his father, who was attempting to represent his son on a habeas petition and had been denied attorney visiting privileges by the MDOC. The department argued that the rule was necessary for security reasons in that family members are more likely to succumb to requests by prisoners to violate rules against smuggling or to assist in an escape. The MDOC also argued that the rule was necessary to avoid abuse of visiting privileges by attorney family members, since attorneys are not subject to limits on times and numbers of visits. The Court, however, rejected these arguments and granted the Plaintiffs' motion for summary judgment.

Using the standards articulated by the U.S. Supreme Court in *Turner v. Safley*, 482 U.S. 78(1987), Judge Cohn found that the MDOC failed to meet the first factor of a *Turner* analysis, i.e., the requirement of a valid, rational connection between the prison regulation and the governmental interest put forth to justify it. The Court stated that the Defendants "offer(ed) no evidence that attorneys who are family members are more likely to present security problems to justify Rule 607." Thus, he found that the rule violated attorney Vincent's First and Fourteenth amendment rights.

The Court went on to find a violation of prisoner Vincent's right of access to the courts, ruling that he had clearly established he had been prejudiced by his inability to have attorney visits with his father. Although the case involved attorney visits, claims were apparently also raised regarding refusal by the MDOC to honor prisoner Vincent's request to have mail from his father

treated as legal mail. Although the Judge stated that this issue was "not squarely before the Court", he went on to prohibit the MDOC from using Rule 607 to bar attorney mail handling for mail to a prisoner from an attorney related by blood or marriage.

It is unclear from the opinion how the Court was able to resolve these disputed factual issues on a motion for summary judgment, but the decision has not been appealed. However, the Department also said that it has not amended Rule 607, reportedly on the belief that the ruling applies only to attorney Vincent and prisoner Vincent, who was released to tether during the pendency of the case. While it is true that the Court did not certify this case as a class action, it is stated in footnote 2 that the case was not moot because "it seems clear that Rule 607 will be invoked against other attorney-relatives and prisoners with attorney-relatives in the future." Thus, it appears the Court believes the ruling has application beyond the named Plaintiffs.

The Forum Wants YOU!

The Prisons and Corrections Forum is intended to be a vehicle for attorneys and criminal justice practitioners to exchange information, ideas, and opinions. Thus, we welcome the submission of comments on articles appearing in the Forum, as well as new articles which would be of interest to our readers. Submissions for potential publication should include the name and address of the author, including e-mail address if available, so we can contact you if necessary. Please send submissions to:

Prisons and Corrections Section
State Bar of Michigan
P.O. Box 12037
Lansing, MI 48901-2037

The deadline for items to be included in the next issue is April 23, 2001.

Michigan's Mandatory Drug Sentences
Continued from Page 2

identified: (1) mitigating circumstances in the offense, which the *Fields* court stated should be given particular emphasis, (2) the defendant's lack of a prior record, (3) the defendant's age, (4) the defendant's work history, and (5) factors arising after a defendant's arrest, especially cooperation with law enforcement authorities. *Id.* In *People v Daniel*, 462 Mich 1 (2000), the Supreme Court made it clear that only objective and verifiable factors will support a departure from the mandatory minimum, and rejected the idea that trial judges could use their discretion to depart from mandatory minimum prison sentences with regularity.

The Court of Appeals reads *Fields* strictly and narrowly. For example, in *People v Johnson*, 223 Mich App 170 (1997), a panel of the Court of Appeals stated the purpose of the mandatory minimum prison sentences was to impose heavy punishment on persons who commit drug crimes, and any departures from mandatory minimums must be evaluated in that context. In *People v Perry*, 216 Mich App 277 (1996), the Court of Appeals held that a departure justified by substantial and compelling reasons will be evaluated for proportionality since the mandatory minimum prison sentence is presumptively proportionate. Various panels of the Court of Appeals have rejected the following reasons as not "objective and verifiable" or not "substantial and compelling": the defendant's remorse, the defendant's "turning himself around", injury to the defendant during the crime, the defendant's deportation resulting from the drug conviction, and a probation officer's statement that he would recommend probation if it was available. Courts have affirmed departures based on prompt cooperation with authorities after arrest, a complete change in lifestyle and successful participation in rehabilitation, and plans to continue education amidst strong support from a stable family.

Mandatory minimum prison sentences are based only on the weights of "mixtures containing detectable amounts" of controlled substances. These sentences ignore every other important sentencing variable. For almost every other crime, a minimum sentence is based on the sentencing court's evaluation of the defendant and the circumstances of the offense. The factors traditionally used in this evaluation have been found since 1984 in Michigan's various versions of sentencing guidelines. In 1999, the Legislature enacted Michigan's first statutory sentencing guidelines. These statutory sentencing guidelines now include guidelines for most drug felonies. However, the drug statutes still presumptively require mandatory minimum prison sentences. The interplay between these two sentencing schemes poses some interesting questions.

The harsh mandatory minimum prison sentences are required by statute. The guidelines, also by statute, require sentencing courts to impose a minimum sentence within the appropriate guideline range in most circumstances. MCL 769.341(2)(a), the guidelines statute, states: "If a statute mandates a minimum sentence..., the court shall impose a sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section..." Most judges assume the statutory drug minimums override the guidelines. However, now that the guidelines are statutory for many drug crimes, have the statutory guidelines trumped the mandatory minimums for drug crimes? Since the drug statutes permit a departure in many cases for substantial and compelling reasons, is the minimum sentence really "mandatory"? Are the guidelines themselves "substantial and compelling reasons" to depart from the mandatory minimums because a guideline sentence is based on "objective and verifiable factors"? Do guideline ranges for drug crimes set a floor for downward departures? Do guideline ranges for drug crimes reflect the Legislature's more informed thinking on appropriate drug sentencing? Since legislatively mandated sentences are presumed to be proportionate, have the drug crime guidelines implicitly returned to the sentencing courts a legislatively sanctioned alternative to mandatory minimums? If not, should the guidelines statute be amended to confer this discretion on sentencing courts explicitly?

The difference between a mandatory minimum sentence and a sentence calculated under the statutory guidelines for drug crimes can be startling. For example, assume D is convicted of delivering, at the request of a codefendant, an eighth of a kilogram (125 grams) of cocaine to an undercover police officer posing as a buyer. Although D has no prior convictions and no firearms or violence was involved, D receives a mandatory minimum prison sentence of 10 years because his sentencing judge declines to depart from the mandatory minimum. Under the most recent edition of the statutory guidelines, a drug crime involving 125 grams is a Class B offense. The statutory guidelines specifically address D's lack of prior criminal history and the objective circumstances of his offense. D's minimum sentence under the guidelines would be within the range of 12-20 months. If D had a previous conviction for another 125 gram offense, he is sentenced to mandatory life pursuant to the habitual drug offender statute. Under the statutory guidelines, D's minimum sentence, even enhanced for his prior drug conviction, is in the range of 51-85 months.

D's codefendant, L, is convicted of the same 125 gram offense as D. L has prior felony convictions for fleeing and eluding, and stalking a minor. Under the statutory minimums, L should receive a minimum sentence of at

least 10 years; as a habitual offender his maximum sentence increases to 40 years. Under the drug sentence guidelines, L's two prior felony convictions are low severity felonies. L's guideline range for a minimum sentence which reflects his prior criminal history and his involvement in the offense of sentencing is 30-50 months. His guideline range for a minimum sentence as a habitual felony offender (as he would likely be charged) is 30-75 months.

In some cases, the guidelines specifically negate the mandatory minimum 1 year prison term applicable to some offenses involving <50 grams of a Schedule 1 or 2 controlled substance. MCL 769.34(4) does not permit prison sentences when the upper limit of the minimum sentence guideline range is 18 months or less. In such a case, the sentencing court can craft a sentence from a list of alternatives which focus on rehabilitation and supervision and which can include up to 1 year in jail or lifetime probation. Because the guidelines are statutory, they reflect the Legislature's intent and are presumptively proportionate. They also account for more factual variances. The guidelines allow a sentencing court to tailor a sentence to the offense and the offender. Unlike the statutory mandates, they are not "one size will fit all".

Many persons who are eligible for sentences which depart from the mandatory minimums have received them. Statistics provided by the Michigan Department of Corrections (DOC) indicate that within the categories of sentences which permit departures, 40-64% of inmates are serving sentences which are less than the statutory mandatory minimum. For example, as of August, 1999, the DOC counted within its population 796 sentences for delivery/manufacture of 50-224 grams. This offense carries a 10 year mandatory minimum sentence. According to the DOC, 46.4% of these sentences are 10 year sentences, 46.4% of these sentences are less than 10 years, and 7.5% are more than 10 years. The average minimum sentence is 8 years. The DOC counted 53 sentences for possession of 225-649 grams, which carries a mandatory minimum of 20 years. According to the DOC, 32.1% of these sentences are 20 years, 62.3% are less than 20 years, and 5.6% are greater than 20 years. The average minimum sentence is 14.4 years. These statistics must be treated with great caution. The DOC statistics count sentences, not people. Many people are serving more than one sentence consecutively. In addition, the likelihood of receiving a departure from a mandatory minimum sentence appears to vary significantly because of factors which have nothing to do with the person receiving the sentence.

Based on anecdotal information, this author believes some judges refuse to find substantial and compelling

reasons to depart in all cases. Some judges try to depart from the minimums in most cases. Some judges will depart from the mandatory minimum sentence only if the prosecutor concurs. Some judges will depart only to balance what is perceived to be overcharging or double charging by the prosecutor. Some prosecutors implicitly encourage departures because they never or rarely appeal a departure. Some prosecutors implicitly discourage departures by appealing all or most departures. The DOC does not generate departure statistics by county of conviction. If those statistics were available, it is likely that certain counties would present extremes in the number of departure sentences. These extremes would seem to be a new variant of the vagaries which mandatory minimum sentences purported to eliminate.

The substantial number of departure sentences obscures several important facts:

- ◆ mandatory minimum sentences are the usual and expected sentence
- ◆ hundreds of people are serving the harsh mandatory minimum sentences in full
- ◆ where downward departures are made, they are very modest reductions from the mandatory minimums
- ◆ even departure sentences are lengthy
- ◆ significant numbers of people have been sentenced above the mandatory minimum, especially for crimes where the mandatory minimum sentence is 1 year or 10 years
- ◆ many people are serving sentences which are stacked on other sentences and, even with departures, are excessive
- ◆ mandatory minimums use the quantity of controlled substances as the primary criteria for sentencing and ignore most other traditional sentencing factors, including prior records.

A particularly perfidious byproduct of mandatory minimum sentences is that the police and the prosecutors can functionally control sentences. In the usual undercover drug investigation, the police will conduct several drug transactions before they make arrests. In order to determine how "big" their target is, they will try to obtain larger quantities in succeeding transactions, or try to arrange for the target to identify a supplier. The transactions will continue as long as the police believe their target will eventually lead them to someone higher in the distribution chain. The police decide when to stop a particular investigation. This creates the temptation to do one more buy, so as to reach a quantity which triggers a mandatory minimum sentence or a higher mandatory minimum sentence. This gives the police leverage in eliciting cooperation from their arrestees. The difference between an offense involving

224 grams and an offense involving 225 grams is approximately ½ teaspoon of powder cocaine. The difference between the mandatory minimum sentence for offenses based on those quantities is ten years.

The police turn their investigation over to the local prosecuting attorney. The prosecutor has the discretion to charge a course of conduct as one crime or as several separate drug crimes. The requirement of consecutive sentences for multiple drug convictions allow prosecutors to artificially increase a defendant's sentence by charging several small drug transactions as separate crimes instead of a course of conduct or by charging each participant in a drug transaction with conspiracy to commit a drug offense and the underlying substantive drug offense. For example, three persons who help each other sell 250 grams of cocaine to an undercover officer are charged with conspiring with each other to sell the drugs, which triggers a 20 year mandatory minimum, and with the actual sale of the same drugs, also a 20 year mandatory minimum. These two 20 year sentences will be served consecutively, or stacked to total 40 years. In some counties, such double charging is routine and is further exacerbated by a prosecution policy not to dismiss counts in exchange for guilty pleas. This may be unfair, but it is not illegal. A prosecuting attorney is an elected official who must act in the political arena. The more crimes charged, the more "law and order" publicity, as well as better statistics to argue for more money from the county Board of Commissioners or the federal government.

In addition, a prosecutor's input can more directly affect sentencing. A sentencing court may grant a departure for the substantial and compelling reasons of a defendant's conduct after arrest, i.e. his cooperation with the police. A defendant who has no information of interest to the police will not usually receive this departure. A more culpable person can often seek such a departure because his activities make him a bigger "player". The prosecutor will tell the court if a defendant has cooperated and how valuable the cooperation was. Under the mandatory sentencing scheme, the prosecutor can effectively control sentences by refusing to credit a person with cooperation. One of the strengths of the statutory guidelines is that they can ameliorate the impact of the prosecutor's policies and decisions.

The Legislature appears to have recognized some of the limitations of mandatory sentencing and amended the statutes. However, the amendments have created some anomalies. For example, the statutory penalty for possession with intent to deliver >650 grams of cocaine is a sentence of at least 20 years, and up to life. But a simple possession offense involving >650 grams of

Schedule 1 and 2 narcotic drugs requires a life sentence with no alternative of a term of years, even for juveniles. As with all >650 crimes, no departure for substantial and compelling reasons is allowed for an adult offender. Moreover, the offense of possession with intent to deliver has statutory guidelines, but the offense of simple possession of >650 grams has none. There does not seem to be any principled explanation for treating these two >650 gram crimes in such dissimilar ways. The Legislature would do well to enact guidelines for the possession of >650 gram offense and/or a mandatory minimum.

In addition to the sentence amendments, the Legislature has reconsidered nonparolable sentences for offenses involving 650 grams. In 1998, the Legislature amended the parole eligibility statutes to make persons serving mandatory nonparolable life sentences for >650 drug crimes eligible for parole after serving 15, 17½, or 20 years, depending on their date of conviction, nature of the offense, and prior record. The Legislature realized that most of the drug lifers were not drug kingpins or even major actors. Public reaction to this parole eligibility was uniformly positive. Legislators basked in the warm publicity glow of what was said to be the start of a more humane and more realistic approach to incarceration of drug crime offenders. The sentences to be served before becoming eligible for parole were still harsh. But people originally sentenced to die in prison were now hopeful that they might be able to reclaim their lives.

However, parole eligibility has not meant parole. The Parole Board does not view the eligibility amendments as a directive to the Board to actually parole any drug lifers. To date, this author is aware of two persons paroled under the parole eligibility amendments. Je-Donna Young was paroled in 1999 after serving 17 years of her life sentence for possession with intent to distribute cocaine. Ronald Harmelin was paroled in 2000 after serving 13 years of a drug possession life sentence. This author believes there are approximately 24 persons eligible for parole today, and more become eligible each year. Stephen Marschke, chairperson of the Parole Board, has stated that parole for lifers is "exceptional" and will not be routinely granted. There may be persons serving drug sentences who should not ever be paroled. But there are many who should be.

This author assumes the Legislature intended parole eligibility to result in parole, at least for most of the drug lifers who were the focus of the amendments. The Legislature's intent to modify intentionally harsh mandatory sentences by permitting parole appears to be stonewalled by the Parole Board's inaction. One possible solution to this situation is for the Legislature to enact a statutory presumption of parole once the

Board acquires jurisdiction over a prisoner and require the Parole Board to rebut the presumption in order to deny parole. The Board could rely on objective post-sentence factors to deny parole, but would be expected to grant parole absent a showing of reasons supporting denial.

Our drug prisoners are likely to become casualties of each legislator's election year wish to appear to be "tougher on crime" than the challenger running for his or her contested seat. "Tough on crime" is usually not "smart on crime". Each new legislator has to be educated about the folly of incarcerating hundreds of persons until death or for 10 or 20 or 30 years without relief. The societal costs of these sentencing policies is staggering. The statutory guidelines and parole eligibility – if it likely results in parole – are reasoned responses to the necessary balancing of the multiple interests which exist. To maintain this balance, the Legislature should explicitly permit sentencing courts to use the guidelines instead of the mandatory minimums, enact sentencing guidelines for all drug crimes, and direct the Parole Board to make denial of parole the exception rather than the rule.

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eTc CAMPAIGN PROGRESS

By Kay Perry



The eTc Campaign was launched in January of last year in an effort to reduce the cost of prisoner-initiated telephone calls throughout the country. Over 37,000 individuals participated in the public education portion of the campaign, sending educational materials to telephone company directors, legislators, governors and prison system leaders. That portion of the campaign ended with a boycott of prison telephone calls in the month of August.

Campaign coordinators are still compiling data to assess the impact of the boycott. At the same time, they report very encouraging results from the public education element of the campaign. Legislation to address the high cost of the calls has been introduced in at least 11 states. There has been legislative interest in six other states. At least eight states have either introduced debit calling, eliminated or reduced state commissions, lowered the cost of calls, or announced their intention to do one of the above.

In Michigan, Representative LaMar Lemmons has introduced HB 4184 that would require MDOC to ensure competitive telephone services within the prisons. That competition could come from multiple providers, debit calling, toll-free numbers, or any other method that would accomplish the purpose. The bill is co-sponsored by Representatives Stallworth, Garza, DeWeese, Reeves, Williams, and Waters. Campaign coordinators are working to gather more support for the measure.

Michigan Innocence Project Begins

The Thomas M. Cooley Law School Innocence Project hosted a lecture and fundraiser to kick off the newly created Innocence Project. Barry Scheck, nationally recognized DNA expert, author, law professor and Innocence Project founder at Cardozo Law School discussed concepts and techniques for freeing persons who have been victims of wrongful conviction. The program was held on Friday, March 2, 2001, in the 6th floor auditorium of the Thomas M. Cooley Law School. A reception fundraiser followed in the Cooley Center Lobby.

The Cooley Innocence Project is slated to begin operations in the Spring. The project will initially focus on cases where biological evidence (DNA) may be available, but will eventually review all cases submitted where there is a claim of actual innocence. Over 160 attorneys and 10 investigators have volunteered to assist with cases after they been screened by staff and students and found appropriate for the project.

- (c) In 1996, Arizona voters by a 2-1 margin passed the Drug Medicalization, Prevention, and Control Act which diverted non-violent drug offenders into drug treatment and education services rather than incarceration. According to a Report Card prepared by the Arizona Supreme Court, the Arizona law: is “resulting in safer communities and more substance abusing probationers in recovery,” has already saved state taxpayers millions of dollars, and is helping more than 15% of program participants to remain drug free.

SECTION 3. Purpose and Intent

The People of the State of California hereby declare their purpose and intent in enacting this Act to be as follows:

- (a) To divert from incarceration into community-based substance abuse treatment programs non-violent defendants, probationers and parolees charged with simple drug possession or drug use offenses;
- (b) To halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration - and re-incarceration – of non-violent drug users who would be better served by community-based treatment; and
- (c) To enhance public safety by reducing drug-related crime and preserving jails and prison cells for serious and violent offenders, and to improve public health by reducing drug abuse and drug dependence through proven and effective drug treatment strategies.

SECTION 4. Section 1210 is added to the Penal Code to read:

1210. Definitions.

As used in Penal Code sections 1210.1 and 3063.1, and Division 10.8 of the Health and Safety Code:

- (a) The term “non-violent drug possession offense” means the unlawful possession, use, or transportation for personal use of any controlled substance identified in Health and Safety Code sections 11054, 11055, 11056, 11057 or 11058, or the offense of being under the influence of a controlled substance in violation of Health and Safety Code section 11550. The term “non-violent drug possession offense” shall not include possession for sale, production, or manufacturing of any controlled substance.
- (b) The terms “drug treatment program” or “drug treatment” mean a licensed and/or certified community drug treatment program which may include one or more of the following: outpatient treatment, half-way house treatment, narcotic replacement therapy, drug education or prevention courses and/or limited inpatient or residential drug treatment as needed to address special detoxification or relapse situations or severe dependence. The terms “drug treatment program” or “drug treatment” shall not include drug treatment programs offered in a prison or jail facility.
- (c) The term “successful completion of treatment” means that a defendant who has had drug treatment imposed as a condition of probation has completed the prescribed course of drug treatment and, as a result, there is reasonable cause to believe that the defendant will not abuse controlled substances in the future.
- (d) The term “misdemeanor not related to the use of drugs” means a misdemeanor that does not involve (1) the simple possession or use of drugs or drug paraphernalia, being present where drugs are used, or failure to register as a drug offender or (2) any activity similar to those listed in (d)(1) above.

SECTION 5. Section 1210.1 is added to the Penal Code to read:

1210.1 Possession of Controlled Substances; Probation; Exceptions.

- (a) Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a non-violent drug possession offense shall receive probation.

As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program. The court may also impose as a condition of probation participation in vocational training, family counseling, literacy training and/or community service. A court may not impose incarceration as an additional condition of probation. Aside from the limitations imposed in this subdivision, the trial court is not otherwise limited in the type of probation conditions it may impose.

In addition to any fine assessed under other provisions of law, the trial judge may require any person convicted of a non-violent drug possession offense who is reasonably able to do so to contribute to the cost of their own placement in a drug treatment program.

- (b) Subdivision (a) shall not apply to:

- (1) Any defendant who has previously been convicted of one or more serious or violent felonies in violation of Penal Code sections 667.5(c) or 1192.7, unless the non-violent drug possession offense occurred after a period of 5 years in which the defendant remained free of both prison custody and the commission of an offense which results in (a) a felony conviction other than a non-violent drug possession offense or (b) a misdemeanor conviction involving physical injury or the threat of physical injury to another person.
 - (2) Any defendant who, in addition to one or more non-violent drug possession offenses, has been convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony.
 - (3) Any defendant who:
 - (A) While using a firearm, unlawfully possesses any amount of (1) a substance containing either cocaine base, cocaine, heroin, methamphetamine, or (2) a liquid, non-liquid, plant substance, or hand-rolled cigarette, containing phencyclidine.
 - (B) While using a firearm, is unlawfully under the influence of cocaine base, cocaine, heroin, methamphetamine or phencyclidine.
 - (4) Any defendant who refuses drug treatment as a condition of probation.
 - (5) Any defendant who (a) has two separate convictions for non-violent drug possession offenses (b) has participated in two separate courses of drug treatment pursuant to subdivision (a) and (c) is found by the court, by clear and convincing evidence, to be unamenable to any and all forms of available drug treatment. Notwithstanding any other provision of law, the trial court shall sentence such defendants to 30 days in jail.
- (c) Within 7 days of an order imposing probation under subdivision (a), the probation department shall notify the drug treatment provider designated to provide drug treatment under subdivision (a). Within 30 days of receiving that notice, the treatment provider shall prepare a treatment plan and forward it to the probation department. On a quarterly basis after the defendant begins the drug treatment program, the treatment provider shall prepare and forward a progress report to the probation department.
- (1) If at any point during the course of drug treatment the treatment provider notifies the probation depart

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- (2) ment that the defendant is unamenable to the drug treatment being provided, but may be amenable to other drug treatments or related programs, the probation department may move the court to modify the terms of probation to ensure that defendant receives the alternative drug treatment or program.
 - (2) If at any point during the course of drug treatment the treatment provider notifies the probation department that the defendant is unamenable to the drug treatment provided and all other forms of drug treatment, the probation department may move to revoke probation. At the revocation hearing, unless the defendant proves by a preponderance of the evidence that there is a drug treatment program to which he is amenable, the court may revoke probation.
 - (3) Drug treatment services provided by subdivision (a) as a required condition of probation may not exceed 12 months, provided, however, that additional aftercare services as a condition of probation may be required for up to six months.

(d) Dismissal of charges upon successful completion of drug treatment.

- (1) At any time after completion of drug treatment, a defendant may petition the sentencing court for dismissal of the charges. If the court finds that defendant successfully completed drug treatment, and substantially complied with the conditions of probation, the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment or information against the defendant. In addition, the arrest on which the conviction was based shall be deemed to have never occurred. Except as provided in subdivision (d)(2) and (d)(3) below, the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted.
- (2) Dismissal of an indictment or information pursuant to subdivision (d)(1) does not permit a person to own, possess, or have in his or her custody or control any firearm capable of being concealed upon the person or prevent his or her conviction under Penal Code section 12021.
- (3) Except as provided below, after an indictment or information is dismissed pursuant to subdivision (d)(1), the defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or convicted for the offense. Except as provided below, a record pertaining to an arrest or conviction resulting in successful completion of a drug treatment program under this section shall not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.

Regardless of his or her successful completion of drug treatment, the arrest and conviction on which the probation was based may be recorded by the Department of Justice and disclosed in response to any peace officer application request or any law enforcement inquiry. Dismissal of an information or indictment under this section does not relieve a defendant of the obligation to disclose the arrest and conviction in response to any direct question contained in any questionnaire or application for public office, for a position as a peace officer as defined in section 830, for licensure by any state or local agency for contracting with the California State Lottery, or for purposes of serving on a jury.

(e) Violation of Probation.

- (1) if probation is revoked pursuant to the provisions of this subdivision, the defendant may be incarcerated pursuant to otherwise applicable law without regard to the provisions of this section.
- (2) Non-drug related probation violations.

Where a defendant receives probation under subdivision (a), and violates that probation either by being arrested for an offense that is not a non-violent drug possession offense, or by violating a non-drug-related condition of probation, and the state moves to revoke probation, the court shall conduct a

hearing to determine whether probation shall be revoked. The court may modify or revoke probation if the alleged violation is proved.

(3) Drug related probation violations.

- (A) Where a defendant receives probation under subdivision (a), and violates that probation either by being arrested for a non-violent drug possession offense or by violating a drug-related condition of probation, and the state moves to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked. The trial court shall revoke probation if the alleged probation violation is proved and the state proves by a preponderance of the evidence that the defendant poses a danger to the safety of others. If the court does not revoke probation, it may intensify or alter the drug treatment plan.
- (B) Where a defendant receives probation under subdivision (a), and for the second time violates that probation either by being arrested for a non-violent drug possession offense, or by violating a drug-related condition of probation, and the state moves for a second time to revoke probation. The court shall conduct a hearing to determine whether probation shall be revoked. The trial court shall revoke probation if the alleged probation violation is proved and the state proves by a preponderance of the evidence either that the defendant poses a danger to the safety of others or is unamenable to drug treatment. In determining whether a defendant is unamenable to drug treatment, the court may consider, to the extent relevant, whether the defendant (1) has committed a serious violation of rules at the drug treatment program, (2) has repeatedly committed violations of program rules that inhibit the defendant's ability to function in the program, or (3) has continually refused to participate in the program or asked to be removed from the program. If the court does not revoke probation, it may intensify or alter the drug treatment plan.
- (C) Where a defendant receives probation under subdivision (a), and for the third time violates that probation either by being arrested for a non-violent drug possession offense, or by violating a drug-related condition of probation, and the state moves for a third time to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked. If the alleged probation violation is proved, defendant is not eligible for continued probation under subdivision (a).
- (D) Where a defendant on probation at the effective date of this act for a non-violent drug possession offense violates that probation either by being arrested for a non-violent drug possession offense, or by violating a drug-related condition of probation, and the state moves to revoke probation, the court shall conduct a hearing to determine if probation shall be revoked. The trial court shall revoke probation if the alleged probation violation is proved and the state proves by a preponderance of the evidence that the defendant poses a danger to the safety of others. If the court does not revoke probation, it may modify probation and impose as an additional condition participation in a drug treatment program.
- (E) Where a defendant on probation at the effective date of this act for a non-violent drug possession offense violates that probation a second time either by being arrested for a non-violent drug possession offense, or by violating a drug-related condition of probation, and the state moves for a second time to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked. The trial court shall revoke probation if the alleged probation violation is proved and the state proves by a preponderance of the evidence either that the defendant poses a danger to the safety of others or is unamenable to drug treatment. If the court does not revoke probation, it may modify probation and impose as an additional condition participation in a drug treatment program.
- (F) Where a defendant on probation at the effective date of this act for a non-violent drug offense violates that probation a third time either by being arrested for a non-violent drug possession offense, or by violating a drug-related condition of probation, and the state moves for a third time

to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked. If the alleged probation violation is proved, defendant is not eligible for continued probation under subdivision (a).

SECTION 6. Section 3063.1 is added to the Penal Code to read:

3063.1. Possession of Controlled Substances; Parole; Exceptions.

- (a) Notwithstanding any other provision of law, and except as provided in subdivision (b), parole may not be suspended or revoked for commission of a non-violent drug possession offense or for violating any drug-related condition of parole.

As an additional condition of parole for all such offenses or violations, the Parole Authority shall require participation in and completion of an appropriate drug treatment program. Vocational training, family counseling and literacy training may be imposed as additional parole conditions.

The Parole Authority may require any person on parole who commits a non-violent drug possession offense or violates any drug-related condition of parole, and who is reasonably able to do so, to contribute to the cost of their own placement in a drug treatment program.

- (b) Subdivision (a) shall not apply to:
- (1) Any parolee who has been convicted of one or more serious or violent felonies in violation of Penal Code sections 667.5(c) or 1192.7.
 - (2) Any parolee who, while on parole commits one or more non-violent drug possession offenses and is found to have concurrently committed a misdemeanor not related to the use of drugs or any felony.
 - (3) Any parolee who refuses drug treatment as a condition of parole.
- (c) Within 7 days of a finding that the parolee has either committed a non-violent drug possession offense or violated any drug-related condition of parole, the Parole Authority shall notify the treatment provider designated to provide drug treatment under subdivision (a). Within 30 days thereafter the treatment provider shall prepare a drug treatment plan and forward it to the Parole Authority and to the California Department of Corrections Parole Division Agent responsible for supervising the parolee. On a quarterly basis after the parolee begins drug treatment, the treatment provider shall prepare and forward a progress report to these entities and individuals.
- (1) If at any point during the course of drug treatment the treatment provider notifies the Parole Authority that the parolee is unamenable to the drug treatment provided, but amenable to other drug treatments or related programs, the Parole Authority may act to modify the terms of parole to ensure that the parolee receives the alternative drug treatment or program.
 - (2) If at any point during the course of drug treatment the treatment provider notifies the Parole Authority that the parolee is unamenable to the drug treatment provided and all other forms of drug treatment, the Parole Authority may act to revoke parole. At the revocation hearing, parole may be revoked unless the parolee proves by a preponderance of the evidence that there is a drug treatment program to which he is amenable.
 - (3) Drug treatment services provided by subdivision (a) as a required condition of parole may not exceed 12 months, provided, however, that additional aftercare services as a condition of probation may be required for up to six months.
- (d) Violation of Parole.

(1) If parole is revoked pursuant to the provisions of this subdivision, the defendant may be incarcerated pursuant to otherwise applicable law without regard to the provisions of this section.

(2) Non-drug related parole violations.

Where a parolee receives drug treatment under subdivision (a), and during the course of drug treatment violates parole either by being arrested for an offense other than a non-violent drug possession offense, or by violating a non drug-related condition of parole, and the Parole Authority acts to revoke parole, a hearing shall be conducted to determine whether parole shall be revoked. Parole may be modified or revoked if the parole violation is proved.

(3) Drug related parole violations.

(A) Where a parolee receives drug treatment under subdivision (a), and during the course of drug treatment violates parole either by being arrested for a non-violent drug possession offense, or by violating a drug-related condition of parole, and the Parole Authority acts to revoke parole, a hearing shall be conducted to determine whether parole shall be revoked. Parole shall be revoked where the parole violation is proved and a preponderance of the evidence establishes that the parolee poses a danger to the safety of others. If parole is not revoked, the conditions of parole may be intensified to achieve the goals of drug treatment.

(B) Where a parolee receives drug treatment under subdivision (a), and during the course of drug treatment for the second time violates that parole either by being arrested for a non-violent drug possession offense, or by violating a drug-related condition of parole, and the Parole Authority acts for a second time to revoke parole, a hearing shall be conducted to determine whether parole shall be revoked. If the alleged parole violation is proved the parolee is not eligible for continued parole under any provision of this section and may be re-incarcerated.

(C) Where a parolee already on parole at the effective date of this act violates that parole either by being arrested for a non-violent drug possession offense, or by violating a drug-related condition of parole, and the Parole Authority acts to revoke parole, a hearing shall be conducted to determine whether parole shall be revoked. Parole shall be revoked where the parole violation is proved and a preponderance of the evidence establishes that the parolee poses a danger to the safety of others. If parole is not revoked, the conditions of parole may be modified to include participation in a drug treatment program as provided in subdivision (a). This paragraph will not apply to any parolee who at the effective date of this act has been convicted of one or more serious or violent felonies in violation of Penal Code sections 667.5(c) or 1192.7.

(D) Where a parolee already on parole at the effective date of this act violates that parole for the second time either by being arrested for a non-violent drug-possession offense, or by violating a drug-related condition of parole, and the Parole Authority acts for a second time to revoke parole, a hearing shall be conducted to determine whether parole shall be revoked. If the alleged parole violation is proved, the parolee is not eligible for continued parole under any provision of this section and may be re-incarcerated.

SECTION 7. Division 10.8 is added to the Health & Safety Code to read:

Division 10.8. Substance Abuse Treatment Funding.

11999.4 Establishment of the Substance Abuse Treatment Trust Fund.

A special fund to be known as the “Substance Abuse Treatment Trust Fund” is created within the State Treasury which is continuously appropriated for carrying out the purposes of this division.

11999.5 Funding Appropriation.

Upon passage of this Act, \$60,000,000 shall be continuously appropriated from the General Fund to the Substance Abuse Treatment Trust Fund for the 2000-2001 fiscal year. There is hereby continuously appropriated from the General Fund to the Substance Abuse Treatment Trust Fund an additional \$120,000,000 annually for the 2001-2002 fiscal year, and an additional sum of \$120,000,000 in each such subsequent fiscal year concluding with the 2005-2006 fiscal year. These funds shall be transferred to the Substance Abuse Treatment Trust Fund on July 1 of each of these specified fiscal years. Funds transferred to the Substance Abuse Treatment Trust Fund are not subject to annual appropriation by the Legislature and may be used without a time limit. Nothing in this section shall preclude additional appropriations by the Legislature to the Substance Abuse Treatment Trust Fund.

11999.6 Distribution of Monies From Substance Abuse Treatment Trust Fund.

Monies deposited in the Substance Abuse Treatment Trust Fund shall be distributed annually by the secretary of the Health and Welfare Agency through the State Department of Alcohol and Drug Programs to counties to cover the costs of placing persons in and providing (1) drug treatment programs under this Act and (2) vocational training, family counseling and literacy training under this Act. Additional costs that may be reimbursed from the Substance Abuse Treatment Trust Fund include probation department costs, court monitoring costs and any miscellaneous costs made necessary by the provisions of this Act other than drug testing services of any kind. Such monies shall be allocated to counties through a fair and equitable distribution formula that includes, but is not limited to, per capita arrests for controlled substance possession violations and substance abuse treatment caseload, as determined by the department as necessary to carry out the purposes of this Act. The department may reserve a portion of the fund to pay for direct contracts with drug treatment service providers in counties or areas in which the department director has determined that demand for drug treatment services is not adequately met by existing programs. However, nothing in this section shall be interpreted or construed to allow any entity to use funds from the Substance Abuse Treatment Trust Fund to supplant funds from any existing fund source or mechanism currently used to provide substance abuse treatment.

11999.7 Local Government Authority to Control Location of Drug Treatment Programs.

Notwithstanding any other provision of law, no community drug treatment program may receive any funds from the Substance Abuse Treatment Trust Fund unless the program agrees to make its facilities subject to valid local government zoning ordinances and development agreements.

11999.8 Surplus Funds.

Any funds remaining in the Substance Abuse Treatment Trust Fund at the end of a fiscal year may be utilized to pay for drug treatment programs to be carried out in the subsequent fiscal year.

11999.9 Annual Evaluation Process.

The department shall annually conduct a study to evaluate the effectiveness and financial impact of the programs which are funded pursuant to the requirements of this Act. The study shall include, but not be limited to, a study of the implementation process, a review of lower incarceration costs, reductions in crime, reduced prison and jail construction, reduced welfare costs, the adequacy of funds appropriated, and any other impacts or issues the department can identify.

11999.10 Outside Evaluation Process.

The department shall allocate up to 0.5% of the fund's total monies each year for a long term study to be conducted by a public university in California aimed at evaluating the effectiveness and financial impact of the programs which are funded pursuant to the requirements of this Act.

11999.11 County Reports.

Counties shall submit a report annually to the department detailing the numbers and characteristics of clients-participants served as a result of funding provided by this Act. The department shall promulgate a form which shall be used by the counties for the reporting of this information, as well as any other information that may be required by the department. The department shall establish a deadline by which the counties shall submit their reports.

11999.12 Audit Of Expenditures.

The department shall annually audit the expenditures made by any county which is funded, in whole or in part, with funds provided by this Act. Counties shall repay to the department any funds that are not spent in accordance with the requirements of this Act.

11999.13 Excess Funds.

At the end of each fiscal year, a county may retain unspent funds received from the Substance Abuse Treatment Trust Fund and may spend those funds, if approved by the department, on drug programs that further the purposes of this Act.

SECTION 8. Effective Date

Except as otherwise provided, the provisions of this Act shall become effective July 1, 2001, and its provisions shall be applied prospectively.

SECTION 9. Amendment

This Act may be amended only by a roll call vote of two-thirds of the membership of both houses of the Legislature. All amendments to this Act shall be to further the Act and shall be consistent with its purposes.

SECTION 10. Severability

If any provision of this Act or the application thereof to any person or circumstances is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this initiative which can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this initiative are severable.

CAPPS HOLDS CONFERENCE; ELECTS BOARD AND OFFICERS

The Citizens Alliance on Prisons and Public Safety (CAPPS) held its first annual conference on October 30, 2000, in conjunction with the Michigan Council on Crime and Delinquency (MCCD). The theme was "Michigan Prison Expansion: The Reasons, The Costs, The Alternatives." Marc Mauer, Assistant Director of The Sentencing Project and author of *Race to Incarcerate*, was the keynote speaker. A panel on the factors driving expansion in Michigan included Judge William Schma, former MDOC Director Robert Brown, and attorneys Frank Eaman and Garth Jackson. Afternoon workshops focused on substance abuse treatment, incarcerating the mentally ill, promoting success on community supervision, and treating sex offenders.

At a meeting held during the conference, the CAPPS membership adopted by-laws, elected a board of directors, and approved a set of broad proposals for limiting prison expansion and shifting resources to human services that have a positive impact on crime prevention and the rehabilitation of prisoners. These proposals are:

1. Insure that current, comprehensive data are developed and disseminated so that policy decisions can be made on the basis of accurate information.
2. Restore judicial discretion in sentencing for drug offenses.
3. Require the use of progressive sanctions before committing technical probation and parole violators to prison.
4. Apply legislative sentencing guidelines to prison sentences imposed when probation is revoked.
5. Revise the parole guidelines and coordinate them with the sentencing guidelines so that virtually unreviewable parole board discretion does not undermine the sentencing policies of judges and legislators.
6. Shift resources to preventive programming and services that reduce recidivism.

CAPPS is a coalition that grew out of a forum on prison expansion sponsored by the Prisons and Corrections Section. The CAPPS Board reflects the diversity of its membership. The officers are: **President** - Robert Grosvenor, Michigan Chapter of the American Association of University Professors (AAUP); **President-Elect** - Prof. Ronald Bretz, Cooley Law School; **Secretary** - Heather Carr, Eastern Michigan Chapter of the AAUP; **Treasurer** - Rev. Robert Henning, United Methodist Church.

Additional board members are: Elizabeth Arnovits, MCCD; Gary Ashby, Lansing Diocese Criminal Justice Ministry; Gene Beerens, Exodus Correctional Ministries; Robert Brown, former MDOC Director; Joyce Dixon, Sons and Daughters of the Incarcerated; Atty. Kim Easter; Susan Herman, League of Women Voters; Atty. Deborah LaBelle; Edward Ozer, Licensed Psychologist; Michael Reagan, Project Rehab; Rev. James Richie, Faith Connections Ministry; Sharon Rivera, UAW Local 6000; Penny Ryder, American Friends Service Committee; Atty. Maia Storm, Prison Legal Services; Prof. William Tregoe, Adrian College/STEPP; Heaster Wheeler, NAACP. Barbara Levine, former MAACS Administrator and past-chairperson of the Prisons and Corrections Section of the State Bar, is the interim director.

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

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