VOLUME I NO. 3 WINTER, 1998

PRISONS AND CORRECTIONS FORUM

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

HIGHLIGHTS

Virginia is *not* for Lovers.

Tales from transferees and their loved ones paint unfavorable picture of MDOC's new involuntary transfer program. *See Pages 4 and 9.*

Participants in Computer Education Program Excel.

MDOC pilot program using Computer-Assisted Instruction in the classroom to be made more widely available to inmates. *See Page 10.*

Does Due Process Protect Parolable Lifers in Michigan?

Michigan Supreme Court may determine the Constitutional implications of the parole hearing process for inmates serving life with the possibility of parole. *See Page 11.*

How Poor is Poor?

Recent Michigan Court of Appeals Decision redefines who is considered indigent for the purpose of waiving Court fees and costs. *See Page 12.*

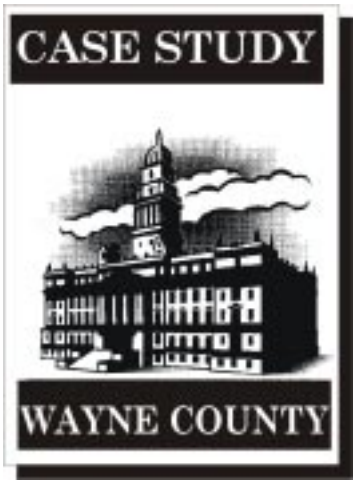
High Court to Attack Attorney Fee Awards.

United States Supreme Court to consider retroactivity of PLRA on the award of attorney fees in prisoner civil rights actions. *See Page 13.*

FEATURE ARTICLE

Potential Impact of New Sentencing Guidelines

By: Dennis Schrantz



The Wayne County Department of Community Justice performed a study to gauge the potential impact of Legislative Sentencing Guidelines (Public Act 317) on the Wayne County jail system, admissions to prison from Wayne County, and the effect upon Wayne County's participation in the Jail Reimbursement Program (see Figure 1: *Legislative Sentencing Guidelines: A New Sentencing Policy for Michigan; Page 17*). The study included a computation of the new sentencing guidelines for each individual in a sample of 471 felony court cases. The Study consisted of identifying a sample of current felony sentences, collecting information on the prior record and offense variables, determining likely or projected sentences under the new legislative sentencing guidelines, and comparing those projected "new" sentences with the actual sentences. This comparison provides an objective and realistic basis for policy decisions and planning.

In order to calculate the impact realistically, assuming the most minor change in judicial sentencing patterns, the analyses assumed changes in actual sentences *only* if the sentence was in conflict with the new guidelines. In projecting the sentence under the new guidelines, the actual sentence was assumed unless the new guidelines *require* a change: all non-incarcerative sentences were assumed to remain non-incarcerative unless the proposed guidelines require a prison sentence (lower limit of the recommended minimum range greater than 12 months). In other words, all non-incarcerative sentences remained non-incarcerative, all jail sentences remained jail sentences and all prison sentences remained prison sentences if they are allowed in the new guidelines. It was assumed that sentencing judges will follow the guidelines and that departures below and above sentence ranges would offset each other and have no effect[1]. *This allowed for analyses which assumed compliance with the new guidelines while allowing for the least amount of change*

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Case Study

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in sentencing patterns.

The Study controlled for prison and jail length of stay reduction policies (credit for time served, good time, early release) but did not include the impact of the proposed Truth in Sentencing laws on the prison system. The Study did not initially include "technical" probation violators, as those offenders are not covered by the new guidelines.

Local impact is an important consideration because an increase in admissions to, and length of stay in, jail may affect the prison commitment rate due to the local policy through Public Act 511 (the Community Corrections Act) to contain prison admissions through the use of local programs and the use of available jail space. An important consideration within that local policy is the availability of state-funded reimbursement for certain felons through the Jail Reimbursement Program.

The availability of this reimbursement was the driving force behind local policies (including the Second Stipulation Court Order to the Jail Population Control Plan) which allow diverted felons to be housed in the downtown jail in the Diverted Sentenced Felon Unit. This agreement is closely tied to alleviating early releases from the jail system as well as achieving sufficient bed space to house 360 misdemeanants and ordinance violators in the Dickerson Facility (which took several years to successfully implement). The end result is ideal to the goals of PA 511: reduced admissions to prison and improved jail utilization. The primary target population for the Diverted Sentenced Felon Unit is felons eligible for jail reimbursement who have guideline lower range minimums (min/mins) of 12 months or more. This policy and program approach has been successful in reducing prison admissions of targeted felons from a 43% prison admission rate in 1993 to a 34% rate in 1996.

The data shows Wayne County is responsible for about 60% of the total annual reductions in prison admissions for these felons in part due to the targeting of these felons within the local comprehensive corrections plan. Wayne County targets these otherwise prison bound felons for a "split sentence" (jail followed by probation) which begins in the Diverted Sentenced Felon Unit in the downtown jail established specifically for these diverted felons.

Key Findings: Potential Wayne County Impact

1. ***Impact on the Wayne County Prison Population*:** The study shows that the new guidelines would add 12.3 months to the average prison sentence taking into account current length of stay reduction policies. They would add an additional 1,688 "man years" in prison, a 27% increase in sentence guideline cases in prison. In other words, according to this analysis, the guidelines may eventually require an additional 1,688 prison beds for Wayne County felons[2]. *This impact does not reflect offenses not covered under the guidelines, probation violations, or the effects of Truth in Sentencing*[3]. The impact in Wayne County would likely be offset statewide to a certain degree by the impact in other counties which may experience comparatively large reductions in prison admissions due to offenders being barred from prison under the new guidelines[4]. Therefore, the study does not address the *overall statewide impact* of the new guidelines on the prison population.

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Prisons and Corrections Section
State Bar of Michigan
Position Statement Regarding Parole

Notice having been given, this position statement was adopted by the Prisons and Corrections Section Council on November 7, 1998 by a vote of 9-0. The views expressed are those of the Section and do not necessarily represent the views of the State Bar of Michigan.

The Prisons and Corrections Section Council of the State Bar of Michigan hereby finds that:

1. Obtaining conditional release from incarceration is one of the most important interests that a prisoner serving a parolable term has.

2. All eligible prisoners, including those serving parolable life sentences, have a right to fair and meaningful parole consideration by an impartial and fully-informed decisionmaker.

3. The parole guidelines that govern board decisionmaking should weigh only those factors, both positive and negative, that reflect in-prison conduct or have a proven correlation with the likelihood that the prisoner's release would threaten public safety.

4. The parole guidelines and the statutes governing the parole interview and decisional process should apply to statutorily eligible prisoners serving parolable life terms as they do to other prisoners.

5. All prisoners who are denied parole should be given, at minimum, a meaningful written explanation of the reasons for denial and, to the extent possible, of corrective steps the prisoner can take.

6. An indeterminate sentencing scheme assumes that in setting the minimum term, the judiciary defines the punishment appropriate for the offense and the parole board's role is to assess the prisoner's current suitability for release once the minimum has been served. The parole board should not deny parole on the basis that it believes that certain offenses warrant service of more than the minimum term or on other historical facts considered by the trial court that the prisoner can never change.

7. Since parole decisionmaking is at least as important as numerous other administrative agency decisions subject to judicial review, all prisoners should have a right to seek judicial review of adverse parole board decisions.

8. Supportive services likely to enhance successful reentry to the community, such as substance abuse and mental health treatment and job counseling, should be available to parolees as needed.

9. To avoid using costly prison bedspace to house parole violators, a range of progressive sanctions should be utilized, whenever possible and consistent with public safety, as alternatives to revocation of parole for non-criminal conduct.

NAACP Organizes to Aid Transferees

By: Tracie Dominique Palmer

On December 1, 1998, the Detroit Branch of the National Association for the Advancement of Colored People (NAACP) organized and hosted a community meeting on the Michigan Department of Corrections' policy on transferring inmates to Virginia. Approximately One Hundred Fifty people, many of whom had friends, family members or loved ones that had already been shipped out of state, attended the meeting. Local media provided coverage.

The meeting was organized into three stages. Attorneys and legal workers gave a panel presentation providing information regarding MDOC policies, how they are being implemented, and the effect they are having on our transferees. Copies of the legislation authorizing the transfers were distributed and explained. Many audience members then gave testimony about the difficulties in visiting transferees, the mistreatment of those transferred and problems facing friends and family members of those transferred when dealing with the bureaucracy of both the Michigan and Virginia Departments of Correction. The group then discussed a plan of action to try and alleviate some of these problems and to challenge the policies causing them.

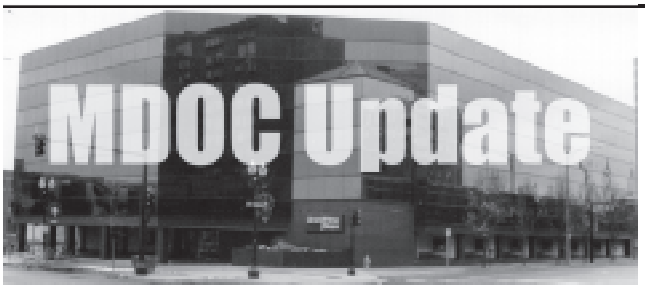
Panel and family members alike painted a disturbing picture of the reality of the Virginia transfers. The treatment of those transferred is unconscionable. Each transferee was necessarily a model prisoner in a low-level facility while in Michigan. Many transferees are new to the prison system entirely and were not allowed time to adjust to incarceration prior to transfer out of state. Letters from those transferred consistently report the same forms of mistreatment. Transferees are transported in leg and belly chains. They have been beaten, gassed and pepper sprayed.

Once in Virginia, transferees are placed in housing units that mirror Michigan's Level V facilities: conditions not warranted by the history of good behavior attributed to these inmates while residing in low-level Michigan prisons. The Virginia DOC has different disciplinary rules. Transferees are not allowed general access to a law library, and must know the exact citations of Michigan cases in order to obtain copies of any Michigan materials. Transferees are restricted from receiving mail sent by other prisoners or sending mail to other prison facilities, resulting in their inability to maintain ties with their friends in Michigan facilities. Further, transferees are restricted from receiving any of the good jobs while in Virginia. One of the biggest problems, however, is the psychological persecution: Virginia has the death penalty and has executed at least four inmates from the facility housing our transferees since the transfers began.

Under the current law, inmates can be transferred involuntarily. While transferees are supposed to have the same rights in Virginia as they would have in Michigan, this simply is not the case. Several panel members reported that Virginia still is not providing the programming, substance abuse treatment and mental health care that they are required to put in place for transferees. Property that transferees were supposedly allowed to keep is being taken away upon transfer. Most importantly, transferees are not allowed to keep their typewriters, putting a severe restriction on their ability to prepare Court pleadings, letters and other documents.

The inmates are not only those affected. The ripple effects of these involuntary transfers have a profound impact on the transferee's friends, family members and loved ones. The high cost of telephone calls taxes the inmate's support system. Visits are hampered by the twelve-hour drive from the Detroit area to the Virginia facility. Visitation is only allowed on Saturdays and Sundays. Due to the insufficient visiting facilities in Virginia, visitors are restricted in number and only allowed to stay for short periods of time.

Attorneys affiliated with the Detroit Branch of the NAACP are working to try and stop the mistreatment of the transferees and their families. Further, community members are organizing to provide education and a support group for those on the outside. If you would like more information about, or are interested in participating in, this effort, please contact the *NAACP at: (313) 871-2087; 2990 East Grand Boulevard, Detroit, Michigan, 48202*❖



By: Marjorie VanOchten

Administrative Rules 791.5515 and 791.5513

On November 12, 1998, the Legislature's Joint Committee on Administrative Rules (JCAR) approved two MDOC rules, R 791.5515 (a new rule on disciplinary time) and R 791.5513 (amended due to changes in certain MDOC major misconduct violations).

As explained in Volume 1, No. 2 of the *Forum*, R 791.5515 establishes the amount of disciplinary time which will be accrued whenever a prisoner who is subject to disciplinary time is found guilty of major misconduct. Due to legislative revisions to the disciplinary time statute which were enacted this summer (PA 316 of 1998), however, this accumulated time does not affect a prisoner's parole eligibility date. The Parole Board is required to take into consideration the amount of disciplinary time accumulated when deciding whether to grant parole.

The other approved rule, R 791.5513, is an amended rule and sets forth the amounts of disciplinary *credits* and good time which may be forfeited if a prisoner is found guilty of a major misconduct. This rule was changed by adding three new major misconduct violations: (1) Assault Resulting in Serious Physical Injury; (2) Possession of a Weapon; and (3) Smuggling. The first two charges resulted from splitting each of the former major misconducts of Assault and Battery and Possession of a Dangerous Contraband into two charges, with the more serious violations of the old charges becoming the new major misconducts. All of a prisoner's accumulated credits may be forfeited for Assault Resulting in Serious Physical Injury and Possession of a Weapon. Up to two years of credits may be forfeited for Smuggling. Definitions of the new misconducts will be published in the MDOC's revised prisoner discipline policy, PD 03.03.105, which will be issued in December, 1998.

After JCAR approval, the rules were adopted and filed with the Secretary of State, and went into effect December 2, 1998. Copies of the rules may be ordered from the MDOC's Office of Policy and Hearings in Lansing.

Director's Office Memoranda Regarding Virginia Transfers

Also as discussed in issue 2, the Legislature authorized the involuntary transfer of Michigan prisoners to another state under the Interstate Corrections Compact, and the MDOC has entered into a contract with the State of Virginia to house our prisoners there. The MDOC has issued two Director's Office Memoranda (DOM's) governing these transfers: DOM 1998-39 and 1998-46.

DOM 1998-39 addresses the types and amount of personal property which Michigan prisoners are allowed to have in Virginia. If a prisoner who is transferred has property which is not allowed by Virginia Department of Corrections (VDOC), it can be sent home at the MDOC's expense, held for pick-up by someone designated by the prisoner, or stored by the MDOC until the prisoner returns to Michigan. Michigan prisoners cannot be required to stay in Virginia for more than one year.

DOM 1998-46 addresses all other issues related to the Virginia transfers, including: eligibility criteria for selected prisoners, the responsibilities of the MDOC's Contract Administrator and on-site Monitor, how prisoners are provided access to courts, handling of mail and telephone calls, how escapes are handled, and the return of prisoners to Michigan. Of special note is the fact that transferred prisoners are subject to the misconduct charges and hearing procedures of the VDOC. The VDOC major misconducts are listed in an attachment to the DOM.

This is a lengthy DOM (nine pages, plus a four-page attachment) which will be of interest to anyone with a prisoner client who has been transferred to the VDOC. The address of the Virginia prison is: Greenville Correctional Center, 902 Corrections Way, Jarratt, VA 23870-9614. Correspondence to transferred prisoners must contain the prisoner's VDOC prison number once the prisoner has been there for sixty days. If that number is not known, it may be obtained from the Office of the Deputy Director of the MDOC's Correctional Facilities Administration in Lansing.

Parole of Prisoners Serving for Certain Drug Law Violations

Public Act 314 of 1998, which became effective October 1, 1998, allows the Parole Board to grant parole to prisoners who are serving what had been a life sentence without parole for the manufacture or delivery of 650 grams or more of a controlled substance. MCL 333.7401 (2)(a)(i). The Board is granted jurisdiction under what is known as the "Lifer Law" after the prisoner has served twenty calendar years. MCL 791.234. If the prisoner is not serving for another "serious crime" as defined by subsection (11) of the statute, s/he is eligible for parole after seventeen and one-half years. In addition, if the sentencing judge or his/her successor determines that the prisoner "has cooperated with law enforcement," s/he is eligible for parole consideration after serving fifteen years.

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MDOC Update

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This new legislation, as well as the procedures which the MDOC will follow for implementation, are explained in DOM 1998-43. The Board already has begun interviewing eligible prisoners. The new legislation requires the Board to consider five specific factors related to the circumstances of the offense when deciding whether to grant parole in these cases.

The Parole Board will be using these factors and following these procedures for all future cases of parole consideration for prisoners convicted of this offense. In another piece of legislation enacted this past summer, the legislature changed the mandatory sentence for this crime from life without parole to a mandatory minimum of twenty years, thus making all drug law convictions potentially parolable. Only prisoners convicted of First Degree Murder (MCL 750.316) or Placing Explosives with Intent to Destroy - Causing Injury (MCL 750.207) now are not eligible for parole.

Finally, it should be noted that the statutory changes also mandate parole revocation under certain circumstances for all parolees serving for certain drug law violations. MCL 333.7401 (2)(a)(i) or (ii) and 333.7403 (2)(a)(i) or (ii). Revocation is required if the parolee is convicted of any controlled substance violation punishable by imprisonment for four years or more, or if s/he is convicted of a "violent felony," as defined by the law and as listed in the DOM.

Prisoner Personal Property

As reported in Volume 1, No. 1 of this publication, the MDOC issued a new policy directive on prisoner personal property in January, 1998: PD 04.07.112. This directive followed the favorable ruling the Department received on this issue in the class-action lawsuit *Cain* v *MDOC*. Due to additional requirements placed on full implementation of the policy by Judge Giddings in that ruling, however, it was not implemented as to currently possessed property when it initially took effect. After completing the additional required steps, a massive property reduction involving every prison facility except corrections centers was undertaken by the MDOC in three phases (from 8-27-98 to 11-8-98). Any items of property not allowed by the new policy were required to be sent home, donated to charity, or discarded.

Prisoners in the higher security levels (Levels IV through VI) also were required to reduce the volume of their property by about one-half. Prisoners at Level IV and above must now wear State-issued uniforms. For this reason, prisoners in Levels V and VI were required to dispose of all personal clothing and are no longer allowed to possess non-State-issued clothing. Prisoners in Level IV may have only one set of personal clothing which may be worn only on visits and for specified court appearances. The prohibition on personal clothing has two exceptions under the *Cain* Order: winter coats and gloves. The Court has required the MDOC to improve its State-issued winter coat and gloves before it is allowed to require all prisoners to dispose of these personal items.

Now that the policy is fully implemented, an increase in custody to Level IV or above will have a significant impact on the property which the transferred prisoner is allowed to possess❖

New Guidelines Focus of Annual Meeting

On September 16, 1998, the Prisons and Corrections Section hosted its first Annual Meeting program: *What does the Judge's Sentence Really Mean? Determining How Much Prison Time a Defendant will Serve*. Honorable Paul Maloney, Jeanice Dagher-Margosian and Sheila Robertson Deming spoke on the drafting and adoption of the new sentencing guidelines and their projected impact on Michigan's criminal justice system.

Judge Maloney, chair of the Michigan Sentencing Commission, spoke about the process of drafting the new guidelines and factors taken into consideration by the Commission. The Sentencing Guidelines Commission is comprised of eight legislators, four judges, and ten members from various constituent groups. The legislature mandated the Commission to focus on reducing disparity, covering habitual offenders and considering the existing MDOC resources when formulating the new guidelines.

Under the new guidelines, according to Maloney, fewer low-level felony offenders will go to prison. Violent offender sentences are increased, and if the statutory maximum is fifteen years or more on a crime, the defendant will serve prison time. The width of the guidelines ranges are narrower and allow for less judicial discretion in sentencing. Maloney asserted that the new guidelines are bedspace neutral, but did acknowledge that the Truth in Sentencing (TIS) legislation, which was tie-barred to the new guidelines, will affect bedspace. He reported that the first phase of TIS implementation will result in the use of anywhere from 1,000 to 5,000 more beds by the year 2000. This number will further increase when TIS is applied to all crimes on December 15, 2000.

Maloney asserted that the new guidelines will only be "marginally" more complex to apply than the existing guidelines. Terminology has been changed. Crimes are now divided into "classes," and each prior conviction of a defendant must be classified under the new system when determining the proper prior record variable score. Ranges set forth in the grids are broken into "intermediate sanction cells" (the defendant will not serve any prison time and is eligible for either probation or county jail), "straddle cells" (the defendant could receive either an intermediate sanction or prison time, at the Judge's discretion), and "prison cells" (the defendant must be sentenced to prison time).

Maloney emphasized the need for attorneys to make a clear record on contested variables, as the statute once again makes scoring an appealable issue. He further instructed attorneys to remind sentencing judges about the applicability of TIS when sentencing on TIS crimes to ensure that the judge realizes the defendant will have to serve the entire minimum sentence imposed.

In closing, Maloney summarized: "I think the Sentencing Guidelines represent a much better allocation of our prison resources than the existing system does . . . We wanted to save prison space for those people we fear, rather than those we are mad at"

Sheila Robertson Deming of the State Appellate Defender Office spoke as another member of the Sentencing Guidelines Commission. She first emphasized that TIS does not mean that all offenders will have to serve the entire minimum sentence imposed by the Court. Rather, those convicted of committing one of the enumerated crimes after December 15, 1998 will have to serve their minimum, and after December 2000, most defendants will have to do so. Robertson Deming warned attorneys that the new guidelines published by West Publishing are not accurate and attorneys should follow the statute instead.

Inmates will no longer earn time off for good behavior while incarcerated. Inmates affected by TIS must serve their actual "calendar" minimum in a secure facility. This means that there will be no Center eligibility to reside in the community programs before an inmate's full minimum is served. The new legislation did add to the parole statute, however, giving the Parole Board discretion to order 30 to 180 days of Center time at the beginning of an inmate's parole as a condition of their parole. One exception to TIS is the Special Alternative Incarceration Unit (SAI Boot Camp). Offenders eligible for and who successfully complete this program are parole eligible without serving their actual calendar minimum.

Robertson Deming demonstrated how different specific offenses will be scored under the new guidelines. She offered that it is difficult to predict how sentences for each individual crime will be affected by the new guidelines, but that on average, sentences for high-level offenses will go up. She cautioned that the new guidelines weigh prior criminal history very heavily, and advised attorneys to be aware of the TIS/non-TIS offense designation when plea bargaining over the next two years.

The final presentation by Jeanice Dagher-Margosian focused on parole issues. She emphasized that the focus of the current parole board appears to be "keep people in prison." This policy is especially egregious in the cases of sex offenders. While extremely few sex offenders are paroled on their first out-date, MDOC statistics consis-

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Prosecutor Cannot Intervene in Parole Revocation Hearing

In *Wayne County Prosecutor v Department of Corrections*,[1] the Supreme Court rejected the Wayne County Prosecutor's attempt to make re-offending parolees serve their remaining maximum sentence before commencing their new sentence. The Court, however, stressed that the parole board retained the jurisdiction to require an inmate to serve additional time on their old sentence before beginning their new term. On remand, the Court of Appeals found that the prosecutor had standing to challenge how the Department of Corrections computes an inmate's sentence.

Following this ruling, Chief Assistant Wayne County Prosecutor Attorney George Ward (the attorney for the plaintiff in *Young*) began openly advocating that prosecutors should become involved in the parole violation process. In a State Bar Journal article, Mr. Ward claimed that attempting to utilize the remaining term of an inmate's sentence represented a cheaper and more economical alternative to re-prosecuting many prisoners for their new offenses.

Attempting to put his theories to the test, Mr. Ward sought to intervene in several parole violation hearings being held by the Michigan Parole Board. The Parole Board permitted Mr. Ward to attend as an observer, but refused to permit him to function as a party at these hearings.

Mr. Ward challenged these rulings in a superintending control proceeding in the Wayne County Circuit Court. The trial court ruled that the Parole Board had no clear legal duty to permit prosecutor participation in a parole revocation proceeding. On appeal, the Court of Appeals affirmed.[2] The Court found that under our present statutory scheme, a prosecuting attorney lacks sufficient standing to intervene in the parole violation process. The Court distinguished prior cases holding that a prosecutor has standing to bring civil actions challenging how the Department of Corrections functioned. While the Court showed some sympathy to Mr. Ward's plans, they found that reshaping the parole process (e.g. making a criminal prosecutor a party) needed statutory authorization and that Mr. Ward's should direct his theories to the Legislature rather than the Courts❖

[1] Wayne County Prosecutor v Department of Corrections, 451 Mich 569, 548 NW2d 900 (1996), on remand sub nom, People v Young (On Remand), 220 Mich App 420, 559 NW2d 670 (1996).

[2] In re O'Hair, __ Mich App __, __ NW2d __, 1998 Mich App LEXIS 302 (CA #205448; 11/10/98).

Governor Attributes Crime Decrease to Increased Incarceration

Recent reports from the U.S. Department of Justice (USDOJ) indicate that the nation's violent crime rate fell almost seven percent in 1997, and more than 21 percent since 1993. The USDOJ's Bureau of Statistics reported that the nation's murder rate fell overall by eight percent during 1997. It estimates that in 1997, there were 39 violent victimizations per 1,000 U.S. households, as compared to 266 during 1996, 319 during 1993, and 554 during 1973. In 1997, property crimes were at their lowest reported rate nationally since 1973. This national decrease in crime affected all socio-economic levels.

In Michigan, index crimes (murder, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft and arson) reported to the Michigan State Police in 1997 were down five percent, and dropped 15 percent overall between 1993 and 1997. The number of index crimes per 100,000 persons in Michigan decreased by 17.5 percent and the number of murders dropped 20 percent over the same time period. Additionally, reported incidents of rape dropped 41 percent, aggravated assault dropped 25 percent and robbery were down 39 percent.

In late 1997, Michigan received a federal grant based upon the State's ability to keep its violent offenders incarcerated. In announcing the receipt of this grant, Governor Engler attributed Michigan's crime rate decrease over the past five years to Michigan's revised criminal justice policies resulting in increased incarceration rates. These are most readily demonstrated by the changes in the Parole Board's composition, policies and practices.

Statistics cited by Engler show that from 1988 through 1991, the number of prisoners in Michigan serving their maximum sentence increased by 19 percent. From 1994 through 1997, however, the increase was 34 percent. Parole approvals for violent offenders, particularly sex offenders, have dropped dramatically during this time period.

Engler's theory that the increased denial of parole is the key factor responsible for Michigan's decrease in index crime assumes that the majority of index crimes are committed by recidivists while on parole. This leap in logic, however, fails to account for the overall national decrease in index crime reported by USDOJ over the same time span, and does not examine other factors which impact the crime rate, most notably, the state of the economy❖

1,246 Prisoners Now In Virginia
More To Be Shipped Soon

By: Barbara Levine

By November 1, 1998, 1,246 Michigan prisoners had been transferred to the Greensville Correctional Center in Jarratt, Virginia. By Christmas, eighty more will have been moved. Further transfers are scheduled for January 1999. A recent issue of *FYI* (the MDOC employee newsletter) states that a total of 300 beds have been added to the Virginia contract and that the MDOC anticipates having to lease as many as 3,000 out-of-state beds before the construction of space for 5,400 more prisoners in Michigan is completed in the year 2000.

Prisoners in the process of being transferred to the Virginia Department of Corrections. (Courtesy of FYI)

The transfer is causing a wide variety of concerns. Some are inherent in the situation and were anticipated. Others are less apparent to those in Michigan, or are less well documented.

Since Jarrett (an hour south of Richmond) is 688 miles from Detroit, the most obvious problem is visitation.[1] Information gathered by the Detroit Branch of the NAACP show that many wives, parents and siblings who had been visiting regularly at a Michigan prison simply do not have the money or time off work to travel to Virginia. Others report that health problems and lack of transportation prevent them from making the long trip. In some cases, children too young to communicate by mail or phone will lose contact with their fathers for an entire year. Some family members who have already made the trip experienced frustration at the restrictions placed on the length of their visits by the Virginia DOC staff.

Distance is also a problem for attorneys representing transferred clients, particularly those who are appointed to pursue appeals. While assigned appellate counsel must interview their clients before proceeding, paltry county fee schedules are rarely adequate to compensate the time and expense of visits to Michigan prisons, much less a twelve-hour drive each way for a Virginia visit.[2] Attorney/client contact is also burdened by more complex procedures than Michigan requires for arranging unmonitored telephone calls.

The MDOC states that it will establish a video-conferencing link between Greensville and the Southern Michigan Correctional Facility in Jackson. The equipment has been purchased, installed and tested, and MDOC anticipates having it online by the end of January 1999. The tentative plan is to allow family members to use the equipment during regular Virginia visiting hours, which are limited to weekends and holidays. Attorneys will be able to use it on weekdays when the Michigan visiting room is not otherwise in use. Since videoconferencing will be confidential (i.e., only subject to visual surveillance), this may satisfy the needs of attorneys if it becomes available in time to meet appellate Court deadlines. For families, videoconference visits of limited duration are obviously a meager substitute for seven contact visits a month.

A variety of organizations, including the NAACP (Detroit Branch), the American Friends Service Committee in Ann Arbor, MI-CURE, and Prison Legal Services of Michigan are attempting to share and assess the information they are receiving from transferred prisoners and their families. Interested readers may wish to contact one of these organizations for further information. Further information detailing transfer criteria and policy is available in the MDOC's Director's Office Memorandum (DOM) 1998-46❖

[1] Although the MDOC stresses that Michigan prisons in Marquette and Baraga are also far from Detroit, the fact is that neither of these facilities is *as* far from Detroit as Greensville is. Marquette and Baraga are actually closer to other Michigan locations, and together they house fewer prisoners than are already in Virginia. More importantly, these UP prisons are for higher security prisoners who have "earned" their way in by their own misconduct. The prisoners being sent to Virginia are low and medium security prisoners with good behavior records who are being transferred primarily from Lower Peninsula facilities or straight from the Reception Center.

[2] Attorneys with clients at a number of Michigan prisons can at least conduct multiple interviews during a day or two set aside for travel to several locations: a scheduling option that obviously does not work on the route from Michigan to Virginia.

Martin to Succeed McGinnis

On December 18, 1998, Ken McGinnis announced his resignation as director of the MDOC, effective January 15, 1999. Bill Martin was appointed his successor.

Bill Martin the newest Director of the Michigan Department of Corrections. (Courtesy of FYI).

Martin, of Battle Creek, served as the commissioner of the Bureau of State Lottery since January 1995. Prior to holding that position, he represented the Battle Creek area in the Michigan House of Representatives from 1986 to 1995, serving as assistant minority floor leader in the 1991-92 session, and chairman of the House Committee on Insurance for the 1999-94 term. Martin also worked for the Michigan State Police for nine years, and formerly served a tour of duty in the Army.

Governor Engler cited Martin's management experience, leadership ability, background as a State Trooper and his service on the House's standing Committee on Corrections to justify his appointment as the new director❖

Where are the Web Links?

In prior editions of the *Forum*, we have provided the URLs for various web sites from which readers could download recent opinions, statutes and further information to supplement our article content. Several readers brought to our attention difficulties that they were having accessing these web sites. As a service to our readers, we have tried a new approach. Rather than listing individual web sites, we will be providing links to, or scanned copies of, most of the material cited in the articles on our temporary home web page. Visit us at http://www.crimapp.com/prisons. We hope that you find this service helpful. Reader feedback is always welcome.

CAI Pilot Program Produces Positive Results

As reported in *FYI: a news bulletin for employees for the Michigan Department of Corrections*, Jan. 7, 1999 issue, the computer-assisted education pilot program started earlier this year in eight MDOC facilities in the Upper Peninsula has produced positive results. The Computer-Assisted Instruction (CAI) pilot program was established to improve the efficiency of the prisoner education system and to aid in preparing inmates for re-entry into the workplace once they are released. The program ran in two Chippewa prisons (KTF and URF), Hiawatha, Kinross, Newberry, and the camps in Cusino, Manistique and Ojibway.

An evaluation conducted by MDOC of the first 397 prisoners who completed the CAI program shows a vast improvement in overall test scores. The average program participant showed an improvement of 4.2 grade levels in the fields of mathematics and reading comprehension. Participants also showed greater progress than non-participants toward ABE and successful GED completions.

Interviews with participants showed that prisoners in the pilot program were more motivated, worked more independently and displayed a higher level of concentration on their work. Principals and teachers reported a notable decrease in the number of disruptive students in the classroom. The program also succeeded in better meeting the educational needs of prisoners with learning disabilities, as instructors were able to give greater individual attention to participants who required it.

The Michigan version of the CAI education program was modeled after the current Ohio system. The computer software tested in the Michigan pilot program is also in use in thirty other states and offers units on literacy, numeracy, basic education and GED preparation.

The Newberry facility served as a GED magnet school for the program, and received inmates who had been prepared at other facilities acting as "middle schools." The camps ran independent GED preparation programs. The participating facilities worked together as a "virtual school district," focusing on a standardized curriculum and a standardized educational transfer policy.

Due to the success of the pilot program, CAI is now being incorporated into all of Michigan's correctional facilities. Currently, MDOC reports that there are at least ten computer stations available for inmate use at each facility❖

Michigan Supreme Court Hears Arguments in *Glover* Case

On January 23, 1999, the Michigan Supreme Court heard oral arguments in *Glover v Parole Board*.[1] The issue in *Glover* is whether the state and federal due process clauses provide some protection in the parole process for prisoners serving life sentences *with* the possibility of parole.

The Michigan Court of Appeals had held that in such instances, the due process clause provided prisoners with minimal due process at lifer parole public hearings. The Court further held that the hearings were governed by the Open Meetings Act,[2] and that the Parole Board could not circumvent the public hearing requirements by avoiding an agency determination of the facts by "withdrawing interest" following the public hearing.[3] In so ruling, the Court of Appeals adopted the position urged by the amicus curiae American Civil Liberties Union ("ACLU") and Criminal Defense ("CDAM") regarding the scope of due process protection at the hearings. While the issue was not raised by Mary Glover in her appeal, the Michigan Attorney General's office had argued strenuously that the due process clause did not protect such hearings.

Attorney John Royal (foreground) gives oral arguments to the Michigan Supreme Court on behalf of Mary Glover while Assistant Attorney Chester Sugierski (near back) and Solicitor General Thomas Casey (far back) listen on. *(Courtesy of Michigan Government Television)*

On appeal to the Michigan Supreme Court, the Attorney General's Office now has challenged the correctness of the Court of Appeals reaching the due process clause issue.[4] They have further challenged the validity of the underlying ruling. Ms. Glover's counsel (John Royal and Neal Bush) have responded by arguing that the Court of Appeals had the discretion to reach a question only raised by an amicus, that the issue was properly raised by the Attorney General's office and that these factors legitimately put the claim before the Court for review. They have also argued that the Michigan Constitution provides due process protection at lifer parole hearings and have traced the history of this protection back to several Nineteenth Century Michigan Supreme Court decisions providing state constitutional protection in the parole arena.

The ACLU and CDAM *Amici* Brief in the Michigan Supreme Court (authored by Attorneys Jeanice Dagher-Margosian and Stuart Friedman) traces the federal due process cases which suggest that federal due process protection exists in this area. The Prison & Corrections Section also filed an amicus brief written by Section Chair Barbara Levine. In that brief, the Section argues that recent United States Supreme Court decisions have suggested that there may be a due process interest in parole and that recent changes to the Michigan Lifer Law clarify that lifers are entitled to most of the statutory procedural protections given to other parole-eligible inmates.[5]

While the position of most of the Supreme Court justices on this issue is not known, one Supreme Court justice is already on record as disagreeing with Ms. Glover's position: in *Scholtz v Parole Board*,[6] Justice (then Judge Corrigan) joined an opinion criticizing *Glover*.

The *Forum* will continue to report on this decision as further developments occur❖

Endnotes

[1]Glover v Parole Board, 458 Mich 866, 582 NW2d 837 (1998).

[2]Michigan Opening Meetings Act, MCL 15.261 *et seq*; MSA 4.1800 *seq*.

[3]Glover v Parole Board, 226 Mich App 655, 575 NW2d 772 (1997).

[4]Copies of all party briefs are available on the internet at http://www.crimapp.com.

[5]1998 PA 315, effective Dec. 15, 1998 amending MCL 791.234(6). This amendment provides that lifer parole interviews are to be conducted in the same fashion as all other parole interviews. The act does not make parole eligibility reports mandatory for lifer interviews. The Committee believes that the act also requires the Board to provide a statement of reasons for the denial of a lifer parole interview, though this interpretation is currently contested by the Corrections Division of the Michigan Attorney General's Office.

[6]Scholtz v Parole Board, 231 Mich App 104, 585 NW2d 352 (1998).

Inmate with $124 Income not Indigent

By: Stuart G. Friedman

MCR 2.002 provides for the waiver or suspension of fees for individuals who "are unable to pay fees and costs" because of their indigency. In *Lewis v Department of Corrections*,[1] the Ingham County Circuit Court revoked its original Order suspending costs and fees following litigation of a prisoner's claim, after holding that the Plaintiff inmate was not indigent. The Plaintiff inmate had $360 worth of deposits in his prison account over a six-month period, but had only $28.25 in his account at the time of the Court's order (and this money was restricted by a hold).

The Court of Appeals, in a published Opinion, held that the trial court did not abuse its discretion in looking back over the six-month period to determine the prisoner's income. The Court further found that the prisoner had used most of his income to pay the litigation costs associated with the trial over the course of the same six-month period. Additionally, however, the Court found that the prisoner had also spent $124 at the prison store during this time period. Therefore, the Court did not find an abuse of discretion in the revocation of the original Order.

Absent from the Court's discussion was any citation to the leading United States Supreme Court decision regarding what constitutes "indigency" for purposes of filing an action in forma pauperis. In *Adkins v E.I.. Dupont & Numars*, the United States Supreme Court held that a litigant is not required to give up his/her "last dollar ... and thus make themselves and dependents wholly destitute" to proceed in forma pauperis. Further, the *Adkins* ruling has been held to be applicable to prisoners.

In *Souder v McGuire*,[2] the Third Circuit recognizes that under *Adkins*, prisoners are not required to "totally deprive themselves of [the] small amenities of life which they are permitted to acquire in prison or mental hospitals beyond the food, clothing, and lodging already" furnished them by the state in order to file *in forma pauperis*. Further, federal courts interpreting similar provisions have looked to the purpose for which inmates spend their money rather than blindly applying the mathematical formulas applied by this Court of Appeals panel.[3] Even the federal courts which have upheld fee waiver schedules for indigent prisoner filings have focused on the necessity of waiver provisions for exceptional circumstances.[4]

In its quest to quell what the Court of Appeals believes is frivolous litigation, the Court has adopted an overly rigid and mechanistic approach to determine indigency. It is the opinion of this author that the *Lewis* decision is wrongly decided and we can only hope that it will be overturned by the Supreme Court or limited by future panels of the Michigan Court of Appeals ❖

Clemency Manual Published by ACLU

The Battered Women's Clemency Project of the Michigan ACLU has recently published *Clemency for Battered Women in Michigan: A Manual for Attorneys, Law Students and Social Workers*. This manual provides practitioners with a detailed overview of the process, along with the forms, research and formatting required to prepare clemency petitions in Michigan. The book also provides attorneys with a "crash course" in the dynamics of domestic violence relationships, along with demonstrating how to raise battered womens' syndrome through expert testimony in support of a claim of self-defense.

The Clemency Project can be contacted directly at: *1980 Alhambra, Ann Arbor, MI 48103*. The Clemency Manual text (without appendices) can be down-loaded free of charge from the State Appellate Defender Organization's web site at www.sado.org. A complete copy of the manual can be ordered by mail from the Legal Resources Project, 645 Griswold, 3300 Penobscot Building, Detroit, MI 48226 for $5.00. Also available through the Legal Resources Project are the *Domestic Violence Benchbook* and the *Juvenile Justice Benchbook*, both published by the Michigan Judicial Institute.

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[1] Lewis v Department of Corrections, ___ Mich App ___, ___ NW2d ___ (CA #194240; 11/20/98).

[2] Souder v McGuire, 516 F2d 820, 824 (CA 3, 1975).

[3] *See* Ayers v Eggers, 145 FRD 99, 101 (D Neb, 1992) (finding that a prisoner with substantial funds can still be indigent if the funds are required for urgent purposes such as medical care or the support of family members); Wiideman v Harper, 754 F Supp 808, 810-813 (D Nev, 1990).

[4] *See, e.g.* In re Epps, 888 F2d 964 (CA 2, 1989).

U.S. Supreme Court to Determine Retroactivity of PLRA Attorney Fee Provisions

On November 16, 1998, the United States Supreme Court granted certiorari to determine the retroactivity of the statutory limitations in the Prison Liability Reform Act ("PLRA")[1] on attorney fee awards in prisoner civil rights actions brought under 42 U.S.C. §1983.[2] As part of an attempt to limit liability of state prison employees for constitutional violations they commit against state prisoners, Congress provided for a cap on the hourly rates attorneys may be awarded under 42 U.S.C. §1988 for work done on such lawsuits. The Act limits attorney fee awards to a fee not greater than 150% of the judgment obtained *and* 150% of the hourly rate for court appointed criminal attorneys for that district. In lawsuits brought in the United States District Court for the Eastern District of Michigan, this would limit attorney fees to $112.50 per hour with the caveat that this award could still not exceed 150% of the prisoner's total award.

The retroactivity of the Act has been a source of serious contention in the courts. In *Wright v Morris*,[3] the Court held that the PLRA's requirements that prisoners exhaust all administrative remedies before bringing a lawsuit did not operate retroactivity. In *Glover v Johnson*,[4] the Court held that the PLRA's restrictions on attorney fees did not apply retroactively to cases where the attorney's work was actually completed before the effective date of the PLRA. In *Hadix*, the question before the Court was whether the PLRA's limitation on attorney fees applied to work done by the attorney after the effective date of the act, but where the case and the attorney's appearance in the case predated the effective date of the PLRA. The Sixth Circuit concluded that it did not.

The Sixth Circuit based its decision on the principle that retroactive laws are disfavored. In the *Hadix* case, the Court found that the legislative history regarding the reach of these provisions was ambiguous and that doubts should be resolved in favor of the attorney's reliance interest on the old law at the time that he or she accepted responsibility for the case. The Court further found that the evidence that did exist regarding legislative intent favored a prospective application. The Court noted that there were other provisions of the act which were clear regarding their retroactive reach.

It is unclear which way the United States Supreme Court will rule on this issue. *Hadix*'s reasoning has been rejected by many courts which have reviewed the issue.[5] A decision is expected before the end of summer❖

Endnotes

[1] Prison Litigation Reform Act, 42 U.S.C. § 1997(e)(d).

[2] Johnson v Hadix, ___ US ___, ___ S Ct ___, 142 Led 2d 422, 67 USLW 336 (1998).

[3] 111 F3d 414 (CA 6), cert denied, ___ US ___118 S Ct 263, 139 Led 2d 190 (1997).

[4] 143 F3d 246 (CA 6, 1998). *See also:* Cooper v Casey, 97 F3d 1191, 1202-03 (CA 7, 1996) (suggesting that the fee limitations provisions are not retroactive); Jensen v Clarke, 94 F3d 1191, 1202-03 (CA 8, 1996). Contra Alexander v Boyd, 113 F3d 1373 (CA 4, 1997) cert denied 118 S Ct 880, 139 LEd 2d 869 (1998).

[5] See Madrid v Gomez, 150 F3d 1030 (CA 9, 1998); Williams v Brimeyer, 122 F3d 1093 (CA 8, 1998); Rodriguez v Zavaras, 22 F Supp 2d 1196 (D Colo, 1998); Collins v Algarin, 1998 US Dist LEXIS 83, 1998 10234 (ED Pa, 1998).

We Want Your Input!

We welcome input from our membership and subscribers. Please send us your suggestions for newsletter articles, ideas for future Section-sponsored activities, and relevant information you wish to share with your collegues. We are also soliciting copies of unpublished opinions regarding prisons, corrections or parole issues. All correspondence should be sent to:

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

The Section unfortunately does not have the resources to respond to all correspondence or to assist individual prisoners with their cases. All correspondence received will be read and considered by the editorial staff.

Section business correspondence, including changes of address for associate members and prisoners subscribing to the *Forum,* should also be sent to the above address. Address changes for attorneys on the Section mailing list should be reported directly to the State Bar of Michigan and will automatically be added to our membership roster.

Michigan Court of Appeals Reverses Itself and Holds Elliot-Larsen Act Does Apply to Prisons

By: Stuart Friedman

In the last issue of the *Forum*, we reported on the Michigan Court of Appeals' ruling in *Neal v Department of Corrections*[1] and suggested that the ruling may have been implicitly overruled by the United States Supreme Court's subsequent ruling in *Pennsylvania Department of Corrections v Yeskey*.[2] On November 24, 1998, the Michigan Court of Appeals reached the same conclusion on rehearing.

In a two-to-one opinion, the Court found that the *Yeskey* decision abrogated the cases holding that prisons were not places of public service within the meaning of civil rights statutes. The Court also recognized that several earlier Michigan Supreme Court decisions had also treated prisoners as members of the general public for purposes of the application of other acts. Based on this revised reasoning, the Court affirmed the trial court's ruling denying the Michigan Department of Corrections summary disposition.

Judge O'Connell (the author of the original *Neal* opinion) dissented. He asserted that he believed the *Yeskey* ruling was distinguishable from the situation at bar. Judge O'Connell further postulated that the Court's ruling would require the Department of Corrections to end its practice of using separate prisons for men and women because of the Act's prohibition against gender-based discrimination. Judge O'Connell did not explain, however, how this practice differed from gender-segregated restrooms and locker rooms, which have been universally upheld❖

Endnotes

[1]Neal v Department of Corrections, 230 Mich App 202, 583 NW2d 249 (1998).

[2]Supreme Court Holds that ADA is Applicable to Prisons: Ruling Calls into Question Prison Exception to Elliot Larsen Act, *Prison and Corrections Forum*, Summer, 1998, p. 8; Pennsylvania Department of Corrections v Yeskey, 524 US ___, 118 S Ct 1952, 141 LEd 2d 215 (1998).

Section Announces "Family Values" as its 1999 Theme

The Prison and Corrections Section will focus its work on the theme of family relationships and family values for its 1999 programing. Over fifty years of undisputed social-science research has consistently demonstrated that there is a direct and positive relationship between the amount of visits received by an inmate and both current prison behavior and the chance of recidivism after release.

The Section will be developing a position paper on the issue for publication, as well as sponsoring educational programs on related topics throughout the year. Watch future issues of the *Forum* for articles and events spotlighting our 1999 theme❖

Annual Meeting

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tently show that the recidivism rate for sex offenders is lower than for most other offenses.

Dagher-Margosian explained that the parole board guidelines function for the Parole Board much like the sentencing guidelines do for the sentencing Judge. She emphasized that with TIS, the parole board may begin using an inmate's accumulation of bad time to hit them harder. An alternate theory, however, is that since prisoners will be serving more time overall due to TIS, there may be a lower rate of parole denials due to the need for bedspace. She advised attorneys to take into account and advise the sentencing Judge of the recent history of the Parole Board almost routinely denying parole at the time a defendant is sentenced.

The legislation creating the new sentencing guidelines did not allocate funding for the publication of guidelines manuals nor the education of legal professionals on how to apply them. Incomplete guidelines manuals were recently published by the State and are in limited distribution. For more information on how to obtain information on the new sentencing guidelines, contact the State Bar of Michigan❖

Case Study
Continued from Page 2

2. ***Impact on the Wayne County Jail Population***: The study shows that the new guidelines would add 0.7 months to the average jail sentence taking into account current length of stay reduction policies. They would increase the number of man years in jail by 84 annually or, in other words, increase the average daily population in the jail by 84, a 23.5 % increase in sentence guidelines cases in jail. This does not include any impact from offenses not covered under the guidelines, for probation violators, or misdemeanants.

3. ***Impact on the Jail Reimbursement Program***: Under the changes to the types of prison bound offenders eligible for diversion and reimbursement stipulated in the FY 98/99 Corrections Budget (Public Act 321), the number of felons eligible for reimbursement and sentenced to jail would eventually[5] be reduced by as much 77% - a reduction of over 600 felons annually- assuming no downward departures from the presumptive prison guidelines. *Even when assuming the current departure rate (an unlikely outcome), reimbursable felons would be reduced by as much as 71% - a reduction of about 550 felons per year*[6]. This projected impact is primarily due to the elimination from reimbursement of prison bound offenders who have recommended lower range limits (min/mins) of 12 months.

   Other prison bound felons will be identified for eligibility under the Program by the Legislature[7] so that this reduction in Wayne County's participation in the Program will not result in the closing of the 168 bed Diverted Sentenced Felon Unit in the downtown jail. This unit annually houses over 500 diverted felons.(See Question #4 below).

For purposes of examining more closely issues related to the Jail Reimbursement Program, an additional 55 jail cases and probation violators[8] were re-scored under the new guidelines bringing the total sample to 526 cases. 94 of the 526 cases (18%) were identified who will scored in the so-called "straddle cells" with guideline ranges of 12 months or less to greater than 18 months. These analyses can be used to address four critical questions pertaining to the local impact of the new legislative guidelines.

Critical Questions Regarding Wayne County Impact

1. *How will guideline ranges be affected, i.e. how will the numbers in each of the three types of cells (low, moderate and high risk) change?*

Under the new guidelines, there will be an increase in the number of low risk offenders who have guideline min/maxs of 18 months or less. Some of the moderate risk felons who currently are scored within guideline ranges of less than or equal to 12 months to greater than 18 months will be scored into both lower and higher cells. Some high risk felons who currently are scored with min/mins of greater than 12 months will be scored lower, while others will be scored higher. Offenders who are not scored under the Supreme Court Guidelines will be scored under the Legislative Sentencing Guidelines. The net result, based on the local study of 526 cases, will likely include the following impact in Wayne County:

- *Felons with guideline ranges of 0 to 18 months will represent 70% of all cases, up from 50%; a* 38% increase.

- *Felons in the "straddle cell" ranges will represent 20% of all cases, up from 18%; a* 13% increase.

- No change is projected in the overall number of felons in "presumptive prison" guideline ranges, although the types of offenders who will be within those ranges will change.

The *primary* reason for these changes is that all of the cases for which the Supreme Court Guidelines do not apply (22% of all cases in the sample) will be scored under the Legislative Sentencing Guidelines. The vast majority of these (74%) will be scored in the 0 to 18 months range as "lock outs"; almost 18% of the cases currently not applicable will be scored within the straddle cell ranges; the remaining 9% will score in the "presumptive prison" range.

The *secondary* reason for these changes is that offenders will tend to have lower scores under the Legislative Guidelines.

2. *What are the new guideline ranges of felons who, under the Supreme Court Guidelines, had min/mins of 12 months or more (eligible for jail reimbursement)? How do the guidelines change for felons who will be within the straddle cells?*

A review of the sentencing ranges for felons who have Supreme Court guideline min/mins of 12 months show that the majority (56%) will in (straddle cell) felons will in the future have scores in the 0 to 18 month range (e.g. "lock-outs") and relatively few (9%) will have higher scores with min/mins of 13 months or more (presumptive prison). It is proejcted that 35% will have scores which are still in the "straddle cell" range (min/min=<20 months to min/max > 18 months). Based on a local study of 94 straddle cell cases, it appears that about 92% of the felons in the straddle cell ranges who would be scored with min/mins of 12 months under the Supreme Court Guidelines will now have min/mins of 5 months and higher. *(See Table 4, p 18).*

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Case Study

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3. What have been the annual prison admission rates for felons who in the futurewill be scored within the staddle cell range (i.e. min/min = <12 to min/max > 18 months)?
The rates of prison admission for specific categories of felons who in the future will be scored within the straddle cell range vary from 15% to 40%; overall, their prison rate has been about 23%.

4. What are the specific subcategories of felons which the Deparmtent of Corrections and local communtiies want to target for prison admission reduction through a revised Jail Reimbursement Program?
Given the paramaeters of thenew leiglstive sentencing policy and that the low and high level risk categories of offenders are already addressed with FY 98/99 Jail Reimbursement policy (i.e. min/mins of > 12 are to be reimbursed, all felony drunk drivers), the critical question of reasonable criteria for moderate risk (straddle cell) felons remains to be addressed by the Legislature. New Jail Reimbursement Program reimbursement criteria need to be established that take into account the felons within the straddle cells who were historically sentenced to prison in the past and have had their admissions reduced through the Program. The new criteria must also take into account those felons within the straddle cells who should be targeted for the Program in order to reduce prison admissions. *Given that increased numbers of felons in prison are expected as a result of both the presumptive prison policy within the guidelines and the new Truth in Sentencing law, the straddle cells represent a unique group of offenders which the Department of Corrections should target for decreased prison admissions.* If this question is not addressed, the numbers of moderate risk offenders bound for prison will increase - perhaps dramatically. This question can be addressed by examining a variety of scenarios for reimbursement which compare:

- •Annual prison admission rates of specific categories of offenders based on minimum/minimum sentencing guidelines scores or other criteria such as offense;
- •Potential sentencing outcomes under the new legislative guidelines sentencing policy;
- •Potential sentencing outcomes if the offenders are targeted for prison diversion under the Jail Reimbursement Program as a central policy component of Public Act 511;
- •The availability of funding for local sanctions/services and through the Jail Reimbursement Program.

A series of proposals have been developed and are under consideration by the Legislature❖

Endnotes

[1] Legal analysts suggest that the legal threshold for departures under legislative guidelines is higher than the threshold for departures under the Supreme Court guidelines.

[2] Note: Since this prison impact is a result of longer sentences rather than additional admissions, the 1,851 bed impact will take place slowly over time. In other words, since these offenders would have been sentenced to prison under current guidelines, the impact will only be apparent *after* the felons have served the time in prison they would have served anyway; once this time frame is passed, the number of months in prison become additional months due to the new guidelines.

[3] The new Truth in Sentencing law will exacerbate this situation by adding approximately 12.5 months to the average sentence for crimes included in the Truth in Sentencing law.

[4] For example, a county which historically sentences high numbers of felons to prison with low guideline ranges will no longer be allowed to do so under the new guidelines, which disallow prison admissions for felons with 0-18 month (inclusive) guideline ranges. The number of felons with these ranges under the new guidelines will increase in Wayne County and are expected to increase in other counties as well. This factor would offset increases in prison admissions and length of stay for Wayne County felons, as the County has a low imprisonment rate for felons with low guideline ranges.

[5] During FY 98/99, felons will be sentenced under both the Supreme Court Guidelines (for crimes committed before January 1, 1999) and under the Legislative Sentencing Guidelines (for crimes committed on or after January 1, 1999). Therefore, the *full year* impact will not be realized until after FY 99.

[6] Since annual reimbursements approximate $2.7 million per year, this equates to an eventual reduction of $2 million to $2.3 million per year in funding to house otherwise prison-bound felons.

[7] As of 12/3/98, this issue is still being considered by the Legislature but is hoped to be resolved during the current legislative session.

[8] According to the Sentencing Guidelines Commission, probation violations for *new charges* are covered under the new guidelines, but *technical* probation violations are not covered. Some analysts suggest that while judges may use the guidelines for guidance in responding to technical violations, they are not required to and are not bound by the guidelines. In other words, broad judicial discretion continues to exist for the sentencing of technical violators. For purposes of projecting an impact on the Wayne County jail, the additional 94 cases added to the Study included technical violators who were scored under the new guidelines. This assumes that the guidelines would be used to some extent by the judiciary in response to the violations even though their use is not required.

Editor's Note: On the last day of the Legislative Session, the Legislature approved a bill which amends the FY 98/99 Jail Reimbursement Program funding criteria by including reimbursement for a limited number of straddle cell cases: felons with min/mins of 10 months or more and min/maxs of greater than 18 months and technical probation violators with that guideline range for the underlying offense.

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Legislative Sentencing Guidelines: A New Sentencing Policy for Michigan

Figure 1

LOW RISK	MODERATE RISK	HIGH RISK
Guideline Ranges: SGL max < or = to 18 mos. +Locked Out of Prison +Jail Sentences allowed but not to exceed upper limit of minimum range (min/max) or 12 mos. whichever is less +Intermediate Sanctions +More Felons in Category	Guideline Ranges: SGL min < or = 12 mos. to SGL max > 18 mos. +Community, Jail, Prison +a.k.a. "Straddle Cells" +Minimum Jail Time Requirements	Guideline Ranges: SGL min 13 mos. or more +Presumption of Prison +Longer Sentence +Departures Appealable +Truth in Sentencing
Public Act 511 Prison Admission Reduction Targeting Issues		
+ Majority of Felony Cases + Most are Probation Cases + Most ineligible for PA 511 Prison Admission Reduction + Jail Reimbursement for Drunk Drivers only + Jail Inmates eligible for PA 511 Jail Utilization Improvement Strategies **LOW PRISON ADMISSION TARGETING PRIORITY**	+ Eligible for Prison or Jail + Jail sentences, if given, have minimum requirement: at least for length lower limit of minimum range (min/min), not to exceed 12 months + Eligible for PA 511 + Old Guidelines were Higher + Potential for limited Jail Reimbursement (policy decisions pending) **HIGH PRISON ADMISSION TARGETING PRIORITY***	+ Departures Eligible for PA 511 + Departures Eligible for Jail Reimbursement + MDOC Policy Re: PSI Recommendations Pending **LOW PRISON ADMISSION TARGETING PRIORITY**

Straddle Cell offender targeting policy pending outcome of policy decisions regarding eligibility for Jail Reimbursement Program.

Felons with Sentencing Guideline Min/Min of 12 Months
Comparison: Wayne County and Statewide 1993-1997
(Source: MDOC BIR database)

Table 1

Year	Statewide				Wayne County			
	Disp	Prison	Rate	Diff	Disp	Prison	Rate	Diff
1993	4062	2099	52%		1374	593	43%	
1994	3613	1814	50%	(285)	1091	480	44%	(113)
1995	3817	1712	45%	(102)	1290	437	34%	(43)
1996	3534	1586	45%	(126)	1105	371	34%	(66)
1997	3431	1676	49%	(90)	911	338	37%	(33)
TOTAL				(423)				(255)

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Case Study
Continued from Page 17

Comparison of Guideline Ranges: Supreme Court & Legislative Sentencing Guidelines
Sample: 526 Recorded Cases
(Source: Wayne County Circuit Court, April/May, 1998)

Table 2

Legislative Guidelines	Supreme Court Guidelines				
	0 to 18 mos. or less	min/min <12 to min/max >18	min/min >12	Not Applicable	TOTAL - %
0 to 18 months or less "Lock Outs"	237	50	8	84	367 - 70%
<12 to min/max >18 "Straddle Cells"	27	37	11	20	107 - 20%
min/min >12 "Presumptive Prison"	1	8	33	10	52 - 10%
Not Applicable/ No Guidelines	0	0	0	0	0%
TOTAL and %	265-50%	95-18%	52-10%	114-22%	526

Comparison of Supreme Court 12 month Min/Min Cases to Legislative Guidelines
Sample: 68 Min/Min of 12 Cases from a Sample of 526 Re-scored Cases
(Source: Wayne County Circuit Court; April/May, 1998)

Table 3

Supreme Court Guidelines	Legislative Sentencing Guidelines			
	0-18 mos. or less "Lock Outs"	min/min=<12 to min/max>18 "Straddle Cells"	min/min >12 "Presumptive Prison"	TOTAL
min/min 12	38 - 56%	23 - 35%	6 - 9%	68 - 70%

HONOR ROLL

The Prisons and Corrections Section would like to congratulate and thank the following individuals who joined our Section during the first year of its existence:

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