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PRISONS AND CORRECTIONS FORUM

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

HIGHLIGHTS

FEATURE ARTICLE

LEGISLATURE STOPS PRISONER PROGRESS IN COURTS

By Barbara R. Levine

The Spring/Summer 1999 issue of the Forum described a number of pending bills that, collectively, would greatly reduce the opportunity for prisoners to seek judicial review of actions by the Michigan Department of Corrections. Since then, four of these bills have been enacted, with various modifications. The exact content of each is described in the summary on pages 27 through 30. It is also important, however, to understand the process by which this legislation was passed, and to place it in a broader context.

As a group, these bills were promoted as a means of reducing "frivolous" prisoner litigation that was said to unduly burden the Attorney General's office and the MDOC. Each was designed to reduce prisoner access to the courts, and thereby to reduce the prospect that a judge might decide that: 1) an action taken by the MDOC was wrong, and 2) an affected prisoner (or class of prisoners) is entitled to relief. All are part of a larger trend to insulate corrections authorities from outside oversight and isolate prisoners from outside contact.

Notably, each bill was introduced in response to clearly non-frivolous suits that were either pending or had already been won. As has happened before, prisoners used the legal system properly to seek redress for their concerns in the courts, and the system reacted by changing the rules.

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DID YOU MISS US?????

Although we would like to be able to blame the lengthy hiatus in your receipt of this publication on the negligence of the U. S. Postal Service or a conspiracy to crush our First Amendment rights, we have to confess that this is the first issue to be published since the Spring/Summer 1999 Forum (Vol. II, No. 1). We apologize for the delay, which was caused by illnesses and other problems beyond the control of the editorial staff. We hope you will forgive us and that you will find this issue worth the wait.

Legislature Stops Prisoner Progress
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Senate Bill 419

SB 419 is the state version of the federal Prison Litigation Reform Act. Although promoted as a means of reducing frivolous litigation by prisoners "complaining about being served chunky peanut butter," the legislation sets up numerous procedural hurdles that affect meritorious and non-meritorious cases alike. For instance, one provision prohibits suits for mental or emotional injury unless accompanied by a physical injury. A prisoner could be driven to a mental breakdown by staff harassment or months in isolation, but have no right to sue. And because all previous civil suits of any age and type must be disclosed, even a prisoner with serious physical injuries could be bounced out of court for neglecting to mention a divorce or some other unrelated civil action she had initiated years before. SB 419 applies to state and local facilities housing adult and juvenile offenders, whether publicly or privately operated. The compound effect of the bill's various provisions will be to prevent prisoners from pursuing remedies in state court, no matter how conditions in these facilities might deteriorate.

Except for the filing fee provisions, SB 419 addresses only conditions of confinement suits. The MDOC 1997 Statistical Report states that in 1997, a total of 1971 lawsuits were filed against the Department. (Chart F4, Litigation Statistics, 1994-1997, p 174) However, when one discounts prisoner suits concerning parole, time computation, or misconduct findings, and suits by brought by MDOC employees and members of the public, at most only 423 cases could have been conditions of confinement suits brought by prisoners. Of these, the data does not indicate how many were brought in state as opposed to federal court, or how many were won by prisoners. Thus, legislative hearing testimony by an assistant attorney general that there were "approximately 2000" prisoner lawsuits a year did not accurately reflect how big a problem "frivolous" conditions suits actually are.

SB 419 was the first bill in the series to pass. The Senate Judiciary Committee heard substantial testimony in opposition from representatives of various interested groups, including the Prisons and Corrections Section. Those testifying in support of SB 419 included Lucille Taylor, the Governor's legal counsel, who addressed the bill's limitations on the remedies a court can impose to correct prison conditions that violate prisoners' rights. Ms. Taylor referred specifically to *Cain v MDOC*, and the attitude of "some judges" toward prisoner litigation, as an example of why the bill was needed. [See related article at page 6]. The bill also bars prisoners with three prior nonmeritorious suits from being represented by an attorney "who is directly or indirectly compensated …in whole or in part by state funds", a provision aimed at Prison Legal Services, the plaintiffs' counsel in *Cain*.

As originally drafted, SB 419 had several provisions that were far broader than those of the federal PLRA. The Senate Committee adopted two amendments offered by Sen. Chris Dingell that cured the most extreme problems. The bill then sailed through both chambers by a large enough majority to give it immediate effect.

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MEDIA ACCESS IN THE MDOC

By Marjorie M. Van Ochten

On April 6, 2000, a new administrative rule (R 791.6605) and policy directive (PD 01.06.130) took effect with regard to access of the news media to prisoners in the Michigan Department of Corrections (MDOC). While the rule allows a prisoner to visit with or talk on the telephone to a media representative, it specifically states that "a news media representative shall not be allowed to use or possess a camera or other audio or visual recording device while on a visit with a prisoner." (R 791.6605 (3)) In other words, there will be no more television interviews with prisoners and no more news photographs taken during interviews. It should be noted that this rule does not address media access to prison facilities, but rather only to individual prisoners. The MDOC has another administrative rule which addresses access to facilities, R 791.2220. Subsection (5) of that rule states that the MDOC "shall establish reasonable policies regarding news media visits to department facilities." All such facility visits must be approved by the MDOC Central Office, as described in the MDOC policy directive 04.01.110. That policy states that permission to use a camera inside a facility will be granted "only in limited, unique circumstances."

The rule which was in place prior to the recent change had permitted interviews of prisoners by the media if the request was "reasonable" as to number and duration, and if it was not "a threat to security, order, or rehabilitation". The old rule made no mention of a ban on cameras and other recording devices.

Although this MDOC rule change prompted much negative editorializing in State newspapers, the U.S. Supreme Court decided in cases dating from the 1970's that news media representatives have no right of access to prisons and prisoners beyond that which is afforded to the general public. (See *Houchins v. KQED*, Inc., 438 U.S. 1, 98 S.Ct. 2558, 57 LEd.2d 553 (1978)) Regardless of such rulings, the MDOC has afforded full media access to prisoners in the past. However, recent years have seen a substantial retreat from provision of such access, culminating in the change to R 791.6605.

One instance of the policy of limiting access is, in fact, currently being litigated, as it arose prior to the recent rule revision. In that case, ABC sued the MDOC Director in Genesee County Circuit Court over his refusal to allow Barbara Walters to interview Jack Kevorkian on camera. The Circuit Court did not accept the MDOC's proferred security reasons for refusing the interview, and ordered the Director to allow it to occur. However, the MDOC has appealed that ruling to the Michigan Court of Appeals and a stay of the lower court's order has been granted. This case also involved the MDOC's refusal of interviews with two other prisoners, both of whom are serving life sentences, which arose after the lawsuit regarding the Kevorkian interview had been initiated. The Circuit Court upheld the department's refusal of interviews in those two instances.

Although the revised rule allows media representatives to interview prisoners by telephone or on a visit, it should be noted that these types of access are subject to MDOC restrictions as well. The revised rule states that telephone access is subject to R 791.6638. That rule allows the MDOC to monitor all prisoner telephone calls except those to an attorney or a public official. Thus, under this rule, conversations between a prisoner and a reporter would be monitored. The MDOC's telephone monitoring system allows all calls subject to monitoring to be recorded and recorded calls may be listened to as determined necessary by MDOC administrators. The prisoner telephone system also is set up to allow prisoners to call only certain numbers on their approved telephone access list. That list is limited to 20 numbers, and numbers may be deleted or added only once every six months under MDOC policy. The MDOC has stated that it will arrange for a telephone call between a reporter and a prisoner by adding the reporter's number to the prisoner's list. However, such access is not provided for in the rule, and thus is subject only to the MDOC's discretion.

The rule also allows interviews during personal visits, but again the rule states that visits are subject to the rules on visiting, specifically R 791.6607, R 791.6609, R 791.6611, and R 791.6614. Those rules require someone to be on a prisoner's approved visitor list in order to visit (attorneys are excepted from this requirement). The rules also limit a person to being on the visitor list of only one prisoner to whom s/he is not closely related, and MDOC policy allows list changes only once every six months. Subsection (3) of R 791.6609 does allow a one time exception, at the discretion of a warden, without the person being on a prisoner's visitor list, if the visit is determined to be "in the best interest of the prisoner and is not a threat to the good order and security of the facility." For reporters, the MDOC's policy requires a warden to "consult with" the Public Information Officer in Lansing before allowing a special visit. Under the other rules

cited, visits may be limited to noncontact visits and may be restricted completely if the prisoner is on a temporary or permanent visit restriction.

Although media representatives will still have access to prisoners under the new rule and policy of the MDOC, it is clear that the access is much more restrictive than it has been in the past, and televised prisoner interviews are eliminated. When the pro-posed amended rule was first published, Senator Phillip Hoffman introduced a bill in the State Legislature requiring the MDOC to provide reasonable media access to state prisons. However, after reportedly being assured by MDOC Director Bill Martin that media access would be permitted, he withdrew his bill. Clearly the promised access does not include television coverage. Many media representatives, and others, including the Council of the Prisons & Corrections Section as evi-denced by the position statement reprinted below, do not see the access provided for in the rule and policy as appropriate public policy, even if the legislature and the courts decline to intervene.

PRISONS AND CORRECTIONS SECTION ADOPTS POSITION STATEMENT ON MEDIA ACCESS TO STATE PRISONS

November 15, 1999

Prior notice having been given, a quorum of the Council taking part and a majority having voted in support, the Prisons and Corrections Section of the State Bar of Michigan has adopted the following Position Statement. The views expressed are those of the Section and do not necessarily represent the views of the State Bar of Michigan.

Local and National media interest has in the past resulted in the exposure of prison conditions which demanded correction. Media coverage has also prompted the justice system to correct wrongful convictions. In these times of expanding prison populations and one and one-half billion dollar State prison budgets, media access is now more critical than ever.

The Prisons and Corrections Section of the State Bar of Michigan believes that as an arm of State Government the Department of Corrections functions on behalf of the people of this state. We believe strongly in the people's right to know what is being done in their name. We believe strongly that the people have the right to know who is being incarcerated at their expense, why the person is incarcerated, and under what conditions that incarceration is taking place. We further believe that the only effective way the public has access to this information, and often the only avenue left to prisoners seeking to express their concerns, is through the media. The media must therefore have access to all sources of information and the ability to present all points of view.

For these reasons:

It is the position of the Prisons and Corrections Section of the State Bar of Michigan that media access to prisons should not be denied absent specific and articulated security concerns related to the particular institution.

It is further our position that media access to individual inmates should not be denied absent specific and articulated security concerns related to the particular inmate.

LITIGATION UPDATE

A Summary of Current Prisoner Class Actions

BAZZETTA CLASS ACTION NEARS TRIAL

Visiting Rules Bar Young Family Members; Ban All Visits for 1250 Prisoners

Bazzetta v McGinnis, a class action lawsuit challenging prisoner visiting rules, is scheduled to start trial in the U.S. District Court in Detroit in early September. The class includes all Michigan prisoners, their families, and other members of the public who are prevented by the rules from visiting prisoners. Attorneys for the class say the rules are harsh and applied arbitrarily, that they are an overreaction to isolated incidents, and that they undermine constitutionally guaranteed rights to family relationships.

In 1995, the MDOC took several steps to control the volume of visits, which had increased with the growing prison population. The steps included standardizing visiting hours and the number of visits prisoners are allowed each month, and requiring each prisoner to have an approved visiting list that may consist of "immediate family members" and up to 10 other people. These changes, which caused the number of visits to drop over 50%, are not being challenged.

Rules intended to reduce contraband smuggling and protect children from assault were also enacted. These provide that no one under age 18 can visit any prisoner unless the minor is the prisoner's child, step-child or grandchild. R 791.6609 (2) (b). Siblings, nieces, nephews, and all other minors are excluded, no matter how close their ties to the prisoner are. Even the prisoner's own children cannot visit unless accompanied by an immediate family member or legal guardian. R 791.6609 (5). Thus they cannot be brought by someone who has custody under a power of attorney, or by a social worker if they are in foster care. Unless they are immediate family, former prisoners are barred, no matter how long they have been out of custody. R 791.6609 (8).

The new rules also use visiting restrictions as a form of punishment for misconduct. They give the MDOC director the authority to permanently prohibit visits (except by attorneys and clergy) to any prisoner found guilty of two misconducts involving substance abuse or one misconduct connected directly to visiting. R 791.6609 (11). Substance abuse misconducts include not only possessing, using or smuggling illegal drugs, but refusing to take a urine test or to wear a drug patch, possessing prison-brewed alcohol, and possessing unauthorized prescription medication.

Attorney Deborah LaBelle, who initiated the lawsuit along with Attorney Michael Barnhart, says the new rules have caused enormous hardships for prisoners and their families. Children already upset by the incarceration of a parent are often unable even to see the parent because the adult available to bring the child does not fit MDOC criteria. Parents who want to bring their own children to see an incarcerated brother or sister are not permitted to make that decision. Some women prisoners who voluntarily terminated their parental rights in favor of an "open adoption" by a close friend or relative can no longer see their children because they are not the legal parent. The rules also conflict with state and federal laws designed to reunify families by requiring that children in foster care see their parents regularly. "It is stunning," LaBelle says, "that in a society that supposedly values families and children, we will commit kids as young as 14 to a state prison, but we will not help families stay intact by letting them visit loved ones in prison."

Over 1250 prisoners are currently subject to a permanent ban on all visits. The permanent visiting restrictions for two substance abuse misconducts are part of the MDOC's "zero tolerance" approach to drug and alcohol use, which also includes drug tests, searches of prisoners and their living areas, discipline for misconduct tickets, and the prosecution of prisoners who attempt to have drugs smuggled in. MDOC policy says that prisoners restricted for two alcohol tickets may ask to have their visits reinstated after six months, for non-alcohol tickets after two years, and for smuggling after three years. However, these restrictions are imposed and lifted wholly in the Director's discretion. There are no written criteria to be applied and there is no appeal process. Some prisoners have already gone more than four years without seeing their spouses, children, or elderly parents.

The *Bazzetta* plaintiffs allege that permanent restrictions are uniquely harsh sanctions and that the restriction process is arbitrary and unfair. Prisoners have lost all visitation for such behavior as being unable to produce enough urine for a drug test, spitting out a medication prescribed for mental illness, refusing to wear a sweat patch that caused an allergic reaction, and failing to turn in a roommate for fermenting fruit juice. Visitation bans have been based on conduct that occurred over three years earlier. Prisoners who have gone for two years without another substance abuse ticket, and have completed substance abuse treatment, have been denied restoration of their visits because they received some unrelated ticket, such as disobeying an order or being out of place.

Defendants maintain that there is no constitutionally protected right to any form of prisoner visitation, and that the new rules are within the broad discretion given prison officials to make decisions about institutional security. Plaintiffs assert that the MDOC has ample alternative methods of insuring security, imposing discipline, and addressing substance abuse. "The Department has gone well beyond its role in maintaining institutional security and entered the realm of punishing innocent families and eroding the rehabilitation of prisoners for no appreciable benefit," LaBelle says.

The new rules dramatically changed long-standing MDOC policies. Previously, any person who was not affirmatively restricted for specified reasons (such as attempted smuggling or inappropriate behavior in the visiting room) could visit any prisoner. Also under prior policy, loss of visits could only be imposed as punishment by a hearing officer, for a limited time period, for conduct connected to a visit, and applied only to the visitors involved. Even today, a prisoner confined in detention for major misconduct, or reclassified to Level V or VI for an assault, escape attempt, or a string of non-substance abuse misconducts, is not denied visits altogether, though they are limited to non-contact.

"Visits are enormously important to prisoners, their families, the correctional facilities, and, ultimately, the community," LaBelle observes. "They help the prisoner build a positive self-image, motivate the prisoner to keep a good institutional record, help family members stay bonded, and enhance the prisoner's chance for success on parole. That is why sound corrections policy has always encouraged visitation."

Bazzetta has already been to the U.S. Court of Appeals for the Sixth Circuit. When District Judge Nancy Edmunds granted summary judgment to the defendants, the Sixth Circuit found the rules restricting certain categories of visitors constitutional as applied to contact visits. The panel held that there is no constitutional right to contact visits, and that the rules were adequately justified by legitimate penological objectives. *Bazzetta v McGinnis*, 124 F.3d 774 (CA 6, 1997). The claims regarding the permanent visiting restrictions were not decided then because they were not ripe. The issues to be tried in September concern the constitutionality of banning visits altogether, instead of permitting non-contact visits conducted through the glass in a visiting booth.

FEMALE PRISONERS' PORTION OF *CAIN* CASE SETTLED

The first issue of the Section's newsletter contained an informative article on the status and history of *Cain, et al v. Michigan Department of Corrections*, a statewide prisoner class action lawsuit in the Court of Claims concerning issues of prisoners' personal property, security classification, access to the courts, and telephone use. (See "Charting Progress in *Cain* Case" by Sandra Bailiff Girard, Vol. 1, No. 1, Spring 1998.) As noted in that article, there are two Plaintiff classes in this case: the Plaintiff class, comprised of all male prisoners, and Plaintiff-Intervenor class, comprised of all female prisoners. Each group is represented by separate attorneys.

On July 18, 2000, Plaintiff-Intervenors' portion of the *Cain* case was dismissed by Judge James R. Giddings on stipulation of the parties. The parties stipulated to dismissal based on a Settlement Agreement signed by the MDOC and Plaintiff-Intervenors which addressed the claims of the female prisoners. Highlights of that agreement are as follows:

- The MDOC agreed to make several changes in its security classification system as it is applied to women prisoners. The net effect of these changes is anticipated to be a lowering of the security level of a substantial number of female prisoners. All female prisoners are to be screened or re-screened based on the changes within 180 days of entry of the Agreement.

- The MDOC agreed to hire a nationally-known expert in prisoner security classification, Dr. James Austin, to study the effects of certain changes and to conduct a study to determine if

there are significant differences in the type, quantity or quality of misconducts issued to male and female prisoners, and whether misconduct penalties for similar infractions differ for the two groups.

- The MDOC agreed that female prisoners will have the same opportunities for legal assistance as are mandated by the courts in *Hadix/Knop*, an ongoing case in federal court which covers certain of the MDOC's male facilities, and in the male Plaintiffs' portion of the *Cain* case. The *Hadix/Knop* case essentially calls for the MDOC to train prisoner "legal writers" to assist other prisoners with specified types of litigation.

- The MDOC agreed to provide additional legal materials for prisoners' use in the law library, specifically the ICLE Family Law volumes, the Michigan Basic Practice Handbook, and the ICLE Probate Law volumes. The MDOC also must ensure that all general population prisoners, including those in Levels IV and V, have physical access to the law library.

- The MDOC agreed to provide an unmonitored telephone which will allow prisoners to participate in court ordered hearings, including Friend of the Court proceedings, at no expense to the prisoner, and agreed to notify all Michigan courts of the availability of this telephone access for female prisoners.

- The MDOC agreed to payment of $33,000 to be used to settle outstanding prisoner claims connected to the lawsuit. The claim submission process is to be developed and administered by Plaintiff-Intervenor class representatives.

- The MDOC agreed to pay a total of $117,100 in fees and costs related to the case to Plaintiff-Intervenors and their attorneys.

During the period required to implement the provisions of the agreement, four prisoners are named in the agreement to assist in carrying it out. The four, who have been active throughout the litigation, are Serena Gordon and Monica Jahner for the Scott Facility and Gladys Wilson and Victoria Hollis for the Crane Facility and Camp Branch. Plaintiff-Intervenors' attorneys are Deborah LaBelle, Charlene Snow, and Donna K. Tope. However, under the terms of the Court's July 18th Order, Ms. Snow was released from further obligation to represent the prisoners in this case.

Settlement of the female prisoners' issues in *Cain* was reached after many months of intense negotiation by the parties. However, the male prisoners continue to litigate their portion of the case. The issue which precipitated the lawsuit, reduction of prisoners' personal property, was largely decided in the MDOC's favor in October 1997 in response to a motion for partial summary disposition. (See Girard article referenced above.) Trial of the remaining issues, beginning with access to courts, commenced on April 10,1997, but the proceedings were stayed by the Court of Appeals from July 1998 until October 1999 due to hearings on the issue of representation of the female prisoners.

The trial also has been interrupted by hearings on motions for preliminary injunctive relief on several issues and by hearings on Plaintiffs' claims of retaliation by the MDOC against Plaintiff class members and their counsel. In addition, recent hearings involved a dispute over whether prisoners in the Michigan Youth Facility (MYF) are members of the class. That facility is privately owned and operated by Wackenhut Corporation but houses only youthful male prisoners committed to the MDOC. On June 2, 2000, the Court ruled that MYF prisoners are indeed members of the class and, therefore, preliminary injunctive relief ordered in the case applies to prisoners at MYF.

The court also issued a ruling on June 30, 2000 denying the MDOC's motion for reconsideration of a ruling in 1997 that the department had retaliated against Plaintiffs' counsel, Prison Legal Services, for their representation of the male prisoners. The MDOC has been ordered to pay Plaintiffs' attorney fees and costs for that retaliation claim.

Many other such issues have required the Court's attention in this lengthy and complex case and have delayed progress in the trial. It is not expected that the remaining portion of the *Cain* case will end any time soon.

CONDITIONS AT WOMEN'S PRISONS: LITIGATION, LEGISLATION, MORE LITIGATION

While two major lawsuits regarding the treatment of women prisoners have now been settled, two suits are still pending, as are questions about the constitutionality of legislation introduced in response to one of the pending cases.

Prisoners at the three state women's prisons – Scott, Crane, and Camp Branch – have been subjected to various forms of sexual abuse, including rape, unwanted sexual touching, and invasions of bodily privacy. The situation was compounded by threats of staff retaliation if women reported abuse. Although the majority of prison staff performed professionally, the opportunity for abuse was inherent in the structure of the work environment. Over half of the officers at the women's prisons are male. Men worked in the living units where they could see women dress, shower, and use the toilet. Men transported women to outside medical appointments and remained in examining rooms. Men conducted patdown searches of women prisoners that included touching their breasts and genital areas.

These conditions became the focus of three separate lawsuits. *Nunn et al v MDOC* is a federal civil rights suit brought in March 1996 on behalf of 31 individual women prisoners by Attorney Deborah LaBelle, and co-counsel Molly Reno and Richard Soble. *Neal et al v MDOC et al,* a class action with allegations similar to those in *Nunn*, was filed at the same time in state court under the Elliott-Larsen Civil Rights Act. *United States of America v State of Michigan* was filed in May 1997 by the Department of Justice (DOJ) under CRIPA, the Civil Rights of Institutionalized Persons Act.

The *USA* case was settled in May 1999 when the MDOC agreed to provide more training on sexual misconduct to both staff and prisoners, to do more extensive background checks on current and potential employees, to maintain a database of sexual misconduct allegations, and to require male officers to announce their presence when entering women's living areas. The MDOC also agreed to suspend routine patdown searches of women prisoners by male officers during an evaluation period.

The *Nunn* plaintiffs maintained that the DOJ settlement did not go far enough. Pointing to numerous criminal convictions and pending charges against officers for criminal sexual conduct, they insisted that the heart of the problem was the presence of male officers in the living units. Much media attention was focused on that very problem by a September 1999 television documentary by Geraldo Rivera, "Women in Prison: Nowhere to Hide", which featured Michigan prominently. Thereafter, MDOC Director Bill Martin agreed to remove male officers from the women's living units.

The damages portion of *Nunn* was settled earlier this year for $3.8 million dollars. Injunctive relief was obtained through a settlement agreement signed in August 2000, which covers women's camps and corrections centers, as well as prisons. The *Nunn* agreement sets timing goals for limiting the assignment of facility housing unit staff to female officers. It continues the ban on cross-gender patdown searches during a further evaluation period, and limits the circumstances under which male officers can participate in transporting women prisoners or remain with them in medical examining rooms. Several outside consultants are being retained to evaluate existing training for both staff and prisoners and to recommend necessary changes. The *Nunn* agreement also provides for improving procedures for reporting and investigating sexual misconduct, and for controlling acts of retaliation against prisoners who report such misconduct.

Implementation of the *Nunn* agreement will be monitored by a compliance expert for 12 months. Monitoring of the housing unit staffing arrangements may be extended for up to an additional twelve months. In related developments, Director Martin has announced that, in October, the women prisoners will be transferred from the Crane Facility, in Coldwater, to the Western Wayne Facility, in Plymouth, where more female officers will be available for assignment to the living units. On July 12, 2000, several officers filed a federal class action suit claiming that gender-based assignments of staff to women's housing units is intentional sex discrimination in employment that violates their civil rights. *Everson et al v MDOC et al*, No. 00-73133 (E. D. Mich.).

Because *Nunn* was not certified as a class action and *USA v MDOC* was a CRIPA action, the only avenue for seeking damages left open to women prisoners who have suffered rape or other sexual abuse, but who were not plaintiffs in *Nunn,* is the class action in *Neal*. Although the Defendants sought summary judgment on the ground that prisoners were not covered by the state civil rights act, the Washtenaw Circuit Court and the Court of Appeals held that prisoners were not excluded from

Elliott-Larsen protection. *Neal v MDOC*, 232 Mich App 730 (1998).

The MDOC appealed to the Supreme Court. While the application for leave was pending, the Legislature passed HB 4476, which not only amends the Elliott-Larsen Act to exclude prisoners, but purports to "correct" the "misinterpretation" of legislative intent by the Court of Appeals in *Neal,* thereby eliminating the women prisoners' class action by a retroactive change in the law. [See related articles at pages 1and 27] The statutory amendments have themselves raised constitutional issues of equal protection and due process which now have to be decided before *Neal* can be tried.

While the *Neal* application remains pending in the Supreme Court, another case which will test the constitutionality of the statutory amendments has been initiated. The ACLU, with Michael L. Pitt as lead counsel, has filed a class action lawsuit against the Livingston County Jail on behalf of all present and former women jail inmates. The case, *Cox v Livingston County,* is pending before the Hon. Bernard A. Friedman in the U.S. District Court for the Eastern District.

The plaintiffs seek injunctive relief for violations of constitutional and statutory rights and international law, as well as money damages. They allege that women have been discriminated against by failures to provide work release programs and trusty assignments, by subjecting women to viewing by male officers while using toilets and showers, and by sexual assaults and harassment.

The plaintiffs in Cox also request a declaration that the Legislature's 1999 amendment of the Elliott-Larsen Civil Rights Act, which excludes jails and prisons from the definition of "public service", is unconstitutional. [insert reference to lead article] The Attorney General has entered an appearance, at the invitation of the Court, to address this issue.

GLOVER V JOHNSON: COURT JURISDICTION ENDS, BENEFITS CONTINUE

By Deborah LaBelle

Glover v Johnson, the class action suit brought by women prisoners in 1977, has finally come to an end. The key issues in Glover were the disparity in educational and vocational programs available at the men's and women's facilities, and the denial to women prisoners of adequate access to the courts. An article in the Spring 1998 issue of the Forum (Is Glover v Johnson Nearing an End? page 8) described a Sixth Circuit opinion that remanded the case to the District Court for a determination of whether the goals of that Court's 1979 judgment had been. What follows is a report by Glover lead counsel Deborah LaBelle on the end of the judicial proceedings and the beginning of some hopeful new developments.

Introduction:

In December 1999, Judge John Feikens found that the Michigan Department of Corrections had complied with the Court's requirement in *Glover v Johnson* to provide women prisoners with programming on par with men prisoners. The Sixth Circuit Court of Appeals affirmed this finding and terminated that aspect of the *Glover* litigation. The remaining issue, with regard to access to the courts, was resolved by the Defendant's agreement to provide all women prisoners the same training, law library access, and legal writers program that Judge Feikens and Judge Richard Enslen ultimately order for male prisoners at the *Hadix* and *Knop* facilities.

The Court's opinion contemplates that Defendants will maintain vocational and educational programs for women prisoners as long as they maintain similar programming for male prisoners to satisfy the on-going Constitutional requirement for gender parity. Similarly, with regard to access to the courts, there is an on-going requirement for Defendants to provide parity of treatment with regard to access to the courts for women and male prisoners.[1] Two issues in the *Glover* case remained outstanding after the Sixth Circuit affirmed Judge Feikens' termination of the programming and access issues.

[1]In addition to the access to court issues resolved in the *Glover* case, the *Cain* settlement, which is scheduled to be implemented on July 18, 2000 provides additional access to the court benefits for women only. See related story, page 6.

CURRENT STATUS

1) Sanction Order

A) Rehabilitation Programs

Judge Feikens granted Plaintiffs' motions for an order sanctioning Defendants for their failure to provide two court ordered vocational programs at the Scott Facility. Judge Feikens ordered the Defendants to pay a daily sum of money, which totaled $385,000, as a sanction for their disobedience of this court order. In December, 1999, the Sixth Circuit rejected Defendants' appeal and affirmed Judge Feikens' order on this issue.

It remained to be decided what was to be done with the sanction monies. Defendants argued it should be returned to them for use in providing programming as they were now obeying the Court's order. Plaintiffs argued that under no circumstances should the Department have access to or control of the monies.

In order to maintain Plaintiffs' control of the monies for the benefit of the Plaintiffs, the $385,000 will be utilized to establish and provide skill training and/or education for women prisoners upon their release from prison. Judge Feikens has issued an order transferring the monies to a not-for-profit corporation, Women Arise, for purposes of linking women prisoners with education, training, housing, and support services to enable successful participation in the training and educational programming of their choice. Women Arise is in the process of seeking additional funds to work toward the goal of a permanent program.

B) College

During the appellate process, the $385,000 was placed in an interest-bearing account resulting in approximately $25,000 in interest on the principle. This $25,000 will be utilized as seed money for a task force established to bring college programming back into the prisons. The Department of Corrections has matched this amount with $75,000 of Department money in order to facilitate this work. Judge Feikens himself is sitting on the task force, which has as its sole goal bringing post-secondary college programming back into the Michigan prison facilities. The task force is to begin its meetings immediately.

2) PLRA

The remaining issue pending in the Sixth Circuit Court of Appeals is related to both the *Glover* and *Hadix* cases and involves Plaintiffs' challenge to a portion of the Prison Litigation Reform Act enacted in April 1996. One section of the PLRA excludes prisoners' cases from the provisions of 42 U.S.C. § 1988, which allows for a reasonable attorney fee to be awarded successful Plaintiffs in civil rights cases. The PLRA prohibits the award of "reasonable" attorney fees and costs in prison cases and instead subjects fees to an arbitrary cap. This provision has had a significant negative effect on the ability of prisoners to obtain attorneys to take any cases. Pending in the Sixth Circuit is a challenge to the constitutionality of this Act based on the argument that it violates the equal protection rights of prisoners. Once the Sixth Circuit has resolved this issue, all outstanding litigation with regard to the *Glover* case will be over.

THE FUTURE

Given the planned move of women prisoners from the Crane facility to the Western Wayne facility, Glover counsel will monitor the plans for transferring on-going programming. They are also monitoring the access to courts agreement. However, with the entry of the most recent orders, the jurisdiction of the Court is over. Absent a reinstatement of the case, in the event that there is sufficient proof that Defendants are again violating the Constitution and/or failing to abide by the agreement with regard to access to the courts, the *Glover* case is now terminated.

AN UPDATE ON *HADIX V. JOHNSON*

By Patricia A. Streeter

After twenty years, this class action case, originally brought by *pro se* prisoners alleging civil rights violations in the conditions that contributed to the 1981 prison disturbances, is near resolution. The case has been heavily litigated. It initially covered only the State Prison of Southern Michigan at Jackson, but now covers several other prisons. Counsel for the class include Michael Barnhart and Patricia Streeter of Detroit, Deborah LaBelle of Ann Arbor, and Elizabeth Alexander of the National Prison Project in Washington, D.C.

After court-supervised negotiations, the parties have entered into a Memorandum of Understanding relating to the out-of-cell activities provisions of the *Hadix* decree before Judge John Feikens of the U.S. District Court for

the Eastern District of Michigan (Case No. 80-cv-73581-DT). The agreement addresses many unresolved issues related to college, academic and vocational programs, as well as recreation, special activities, and volunteer programs. A feature of the agreement is the establishment of a task force that will oversee development of programs at all state prisons for 2 and 4 year college degrees through distance learning, such as interactive TV. The task force will explore various funding and technological means by which this goal can be achieved without using taxpayer funds for tuition. The parties agree that if the defendants implement the provisions of the memorandum for a six month period beginning September 1, 2000, the parties will jointly recommend termination of this section of the Consent Decree.

Other issues remaining before Judge Feikens are near resolution as well. These relate to environmental health and safety, and the final stages of the decentralization plan (the break-up of the State Prison of Southern Michigan into several smaller institutions).

Other issues in this case are before Judge Richard Alan Enslen in the U.S. District Court for the Western District of Michigan (Case No. 4:92-CV-110). These include medical and mental health care, and access to the courts (the law library and legal writer system). The health issues are currently in settlement negotiations. A basic approach to a final plan has been agreed upon and the experts for the prisoner-plaintiffs are meeting to evaluate the MDOC's implementation of these plans. While the parties have not reached an agreement on a final plan to resolve the access to courts issues, they are in contact with the court's monitor to discuss such a plan.

HEIT et al: MDOC PRISONER DISCIPLINE PROCESS CHALLENGED

By Marjorie M. Van Ochten

A lawsuit challenging the fairness of the Michigan Department of Corrections (MDOC) prisoner disciplinary process may soon be settled in the U.S. District Court for the Western District of Michigan. That case, *Heit, et al v. Van Ochten, et al,* No. 1:96-CV-800, is a class action filed in 1996, that includes all prisoners in the MDOC. Its principal claim is that the hearing officers who conduct prisoner major misconduct hearings are coerced to find prisoners guilty by officials of the MDOC. The author, one of the defendants in this case, was the head of the MDOC Office of Policy and Hearings until her retirement in January of this year.

Several cases making claims similar to those made in the *Heit* case had been filed in federal district courts over the past few years but were dismissed. However, Judge Richard A. Enslen denied the MDOC's motion for dismissal in *Heit* and appointed the ACLU National Prison Project to represent the plaintiff. The ACLU proceeded to obtain certification of the case as a class action, and filed an amended complaint. The lawsuit seeks only injunctive relief and not money damages.

The *Heit* case, and the similar cases which were dismissed, were precipated by pleadings filed in litigation and administrative proceedings, which have been ongoing since 1993, regarding the dismissal of one of the MDOC's hearing officers. The department asserts that the dismissal was based on the hearing officer's poor performance, but the litigation claims it was based on racial bias and the hearing officer's refusal to find sufficient prisoners guilty of misconduct, contrary to the expectations of MDOC administrators. The department was granted summary judgment in this matter in Federal District Court, but that ruling was reversed by the U.S. Court of Appeals earlier this year and remanded to the lower court for further proceedings. Rulings have not yet been issued in related state court proceedings. Briefs and other pleadings filed in these cases have been widely distributed among prisoners.

The terms of the proposed settlement in *Heit*, on which prisoners were allowed to submit comments until August 11, 2000, are:

1. If the Settlement Agreement is approved, it will not entitle any individual prisoner to reversal or expungement of any existing finding of guilt on a misconduct ticket. Similarly, the Settlement Agreement will not hinder any prisoner who seeks to challenge in court a finding of guilt, or the particular punishment imposed, as a result of a misconduct report.

2. The MDOC will no longer keep statistics on the not guilty or dismissal rates of individual hearing officers.

3. No hearing officer will be threatened or disciplined because of the number or percentage of misconduct hearings that result in a not guilty finding or dismissal. Defendants do not admit that any hearing

officers were threatened or disciplined on this basis.

4. Staff at the prisons will communicate with hearing office staff about the decision in a misconduct hearing only through the rehearing process. A written record will be kept of communications and attempted communications in violation of this requirement.

5. Hearing officers will not automatically believe staff rather than prisoners when their statements are in conflict. The hearing officer will explain in the record of the misconduct report the evidence that the hearing officer accepted in making a decision to dismiss a misconduct, or to a find a prisoner guilty or not guilty.

6. These policies will be reflected in new Policy Directives issued by the MDOC.

7. The Settlement Agreement will not be an injunction enforceable by the judge. But if the plaintiff, within one year of the time that the MDOC issues its new Policy Directives, persuade the judge that the defendants have violated this agreement, this case will be set for trial before the judge. If the MDOC carries out the Settlement Agreement for a year after the new Policy Directives are issued, the case will be over.

The MDOC maintains that the 27 hearing officers who conduct major misconduct hearings, all of whom are required by state law to be licensed attorneys, are not biased against prisoners and have never been threatened with discipline or disciplined for finding prisoners not guilty. In fact, the requirements set forth in item 5 of the proposed settlement are already embodied in Administrative Rule 791.3315 and the department's Hearings Handbook, which sets out procedures to be followed in prisoner hearings. The Handbook states on page 22:

> The hearing officer's role is somewhat like that of a judge - - an impartial decision maker who determines, based on the evidence presented at the hearing, whether the misconduct charged was committed ….
>
> To be impartial, the hearing officer's decision must be based only on the evidence presented at the hearing ….

The proposed settlement does contain two provisions which would definitely change the MDOC's current practices. The department has maintained statistics of hearing officers' guilty/not guilty rates since the misconduct records were automated in the late 1980's and, under item 2 of the proposal, that would no longer be permitted. Also, institutional staff will only be allowed to communicate with the staff of the hearing office about individual misconduct decisions through the formal request for rehearing process, as outlined in item 4. This provision is not directed at pre-hearing communication or communication with the hearing officers who actually conduct the hearings, as such communication has been prohibited by the department for many years. Rather, it is directed at the practice of allowing prison staff to call Central Office hearing staff when they question a decision that has already been made by a hearing officer.

Unfortunately, this requirement of the proposed settlement may work to the detriment of prisoners. Such communications have been very helpful over the years in educating prison staff about the hearing process and defusing some of their frustration at a not guilty finding. Also, some of these contacts have been on behalf of the prisoners when staff believe that a prisoner was wrongly found guilty, and the decision has been upheld on the rehearing request filed by the prisoner. Allowing post-hearing communication between prison staff and Central Office hearing staff has been a powerful tool over the years in explaining the process to staff and ensuring their sometimes grudging acceptance of the role of a fairly conducted hearing process in a well run prison. Such feedback is not an issue in most prison systems because, in most jurisdictions, hearing officers work for the prison. In Michigan, since the passage of Public Act 140 of 1979, hearing officers must work for a hearings administrator, who reports to the Director.

The pressures on hearing officers to find prisoners guilty, and thus uphold the actions of prison staff when they decide to charge prisoners with misconduct, are undeniably present and understandable, even though they must be strenuously resisted. Similar pressures affect the trier-of-fact in judicial proceedings when law enforcement officers testify in criminal cases. The problem of challenging the credibility of prison staff - - or of police officers - - has been and will remain a thorny issue in criminal justice. If the *Heit* case serves to reinforce the need to face that issue, and guard against automatic assumptions of guilt, it will be of some benefit.

PRISONS AND CORRECTIONS SECTION STARTS LIFER PAROLE PROJECT

By Barbara R. Levine

Until the "Lifer Law" [MCL 791.234] first took effect in January 1942, all life terms in Michigan were non-parolable. As the Department of Corrections noted in its Third Biennial Report, 1941-1942, *Corrections in Wartime*, Michigan "was one of the few states in the country with a sizeable number of lifer cases which had no provision in the law for release of these persons other than by invoking the pardoning or commuting power of the Governor." *Id.* at 92. As the report observed, the high profile commutation process was too politicized to result in the release of all the prisoners who had earned consideration. *Id.* at 93-94.

The purpose of the Lifer Law was to make every prisoner, except those serving for first-degree murder, eligible for parole after serving 10 calendar years, whether they had a life sentence or a long indeterminate term. A parole eligibility examiner was assigned to prepare lifer cases for submission to the parole board. In the first year of the law's operation, about 75 of the roughly 200 eligible prisoners were screened. Of these, four were paroled and another 15 were being favorably considered. The Third Biennial Report concluded: "With the passing of the Lifer Law, the entire outlook for over three hundred life terms changed significantly." *Id.* at 93.

Lifer paroles remained common for decades. Although the annual number was not great, that was because life sentences for offenses other than first-degree murder were not all that common. Throughout the 1970's, judges imposed life sentences in the belief that lifers who conducted themselves well in prison could earn their release if not in 10, then in 12 or 14 years. This belief was based on experience with individual cases and supported by MDOC data.

Starting in 1964, MDOC annual statistical reports show how many prisoners with parolable life sentences were committed to the MDOC each year. In the ten years from 1964-1973, these reports show 254 prisoners committed to serve parolable life terms (1964 – 8, 1965 – 3, 1966 – 7, 1967 – 3, 1968 – 37, 1969 – 45, 1970 – 43, 1971 – 43, 1972 – 37, 1973 – 28).

In 1973, a new chart was added to the annual report showing the distribution of sentences among all prisoners incarcerated at year end, regardless of when they were sentenced. The 1973 report shows 272 prisoners serving life. Without knowing which prisoners may have died or obtained release by some means other than parole, it appears that, at most, 18 lifers were eligible for parole by the end of 1973. (272 prisoners serving life in1973 *minus* 254 lifers sentenced within past 10 years *equals* 18 lifers who had served 10 or more years by 12/73). According to another chart of MDOC data provided by the Attorney General in response to a number of parole appeals, the number of lifers paroled the following year was 18. Thus, it appears from Defendants' own figures that in 1974, every lifer eligible for release was paroled.

By the late 1980's, as prison expansion began in earnest, lifer paroles were relatively less frequent. Today, there are about 1700 Michigan prisoners serving parolable life terms. Of these, about 750 have served over 15 years, many have served two, three or even four decades. The current parole board has seriously considered releasing only the smallest handful. The board's views were stated by Chairperson Stephen Marschke, when he testified in September 1999, before the House Criminal Law and Corrections Committee in support of HB 4624, the bill that amended the Lifer Law.

"It has been a long standing philosophy of the Michigan Parole Board that a life sentence means just that – life in prison … It is the parole board's belief that something exceptional must occur which would cause the parole board to request the sentencing judge or Governor to set aside a life sentence. Good behavior is expected and is not in and of itself grounds for parole."

The terms of HB 4624 enshrine this attitude in statute without actually changing the board's jurisdiction. Lifers will now be seen in person only at the point they have served 10 calendar years. For people sentenced after October, 1992, and for 650 drug lifers, this interview will occur at least five years before they are even within the board's jurisdiction, and for that reason will not be very meaningful. Prisoners who have already had their 10 year interviews may never see the parole board again. Although their files will be reviewed every five years, the planned process appears to be a faceless paper shuffle. A recent Director's Office Memorandum (DOM 2000-44) makes it clear that no documents, such as parole guideline scores or parole eligibility reports, will be prepared for placement in those files. The burden will be wholly on the prisoner to prepare a written submission, upon 30 days notice that a file review will occur, that creates an impression favourable enough to interest the board in conducting an in-person interview. It can only be anticipated that, in the future, the number of lifers in Michigan prisons will continue to grow, while the number released each year will be even smaller.

By unilaterally rewriting the intent of the lifer law, which has been widely understood for over 50 years, the parole board is erasing the distinction between nonparolable and parolable life terms. The presumption that life should mean life in virtually every case is problematic for many reasons.

- It nullifies the legislative intent that parole be an actual possibility after 10 or 15 calendar years, depending on individualized consideration of each prisoner's conduct and achievements.
- It negates the intent of sentencing judges who, especially 20 and more years ago, believed that parolable lifers who behaved well in prison would be released in 12 or 14 years.
- It negates the value of plea bargains in which the parties thought that a parolable life term meant that a realistic possibility of parole would exist.
- It effectively treats people sentenced for a variety of crimes as if they had all committed first-degree murder.
- It reinforces racial disparities and arbitrary local sentencing policies reflected in some life sentences that were imposed before statewide sentencing guidelines took effect.
- It renders hollow the 1998 legislative decision to make 650 drug lifers eligible for parole.
- It treats unfairly those lifers who have been told for decades by the parole board itself that their release would depend on their own maturation and good conduct, leading many to be model prisoners.
- It wastes enormous amounts of taxpayer dollars to keep people incarcerated long past the time they pose any danger to the community.

In its position statement on parole, adopted November 7, 1998, the Prisons and Corrections Section Council said: "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." In accord with this position, and in light of the many concerns raised by the parole board's current treatment of parolable lifers, the Section Council has decided to collect and disseminate information about lifers who are clearly viable candidates for parole consideration. It is hoped that examples of individuals who have served many years in prison, and could safely be released, will persuade legislators and the public to address the parole board's policy.

To obtain this information, the Council is asking judges, lawyers, and prisoners to provide information about parolable lifers who meet the following minimum criteria:

- serving a parolable life sentence
- has served at least 15 calendar years
- has minimal or no prior record (or is an habitual offender with only non-violent priors)
- has very good prison conduct record for a lengthy period of time
- facts of offense not more extreme than most cases of same type
- no currently outstanding objection to parole by sentencing judge or successor
- current security classification of level 1 or 2
- would not score "low probability" on parole guidelines

and who also have some other more unique positive factors, such as:

- academic, vocational or other achievements in prison
- completion of treatment programs
- strong family and/or community support
- an indication on the record at sentencing or in other documents that the trial judge expected/ desired the pri-soner to actually serve less time than has been served already
- service of far more time than is typical for the offense or would be permissible under current sentencing guidelines
- significant mitigating factors about the offense
- prior expressions of interest by the parole board or documented indications that release could reasonably have been expected years ago (including commutation and long term release guidelines score or recommendations for special parole).

Information about cases that meet these criteria should be sent to: **Prisons and Corrections Section, Lifer Parole Project, P.O. Box 12037, Lansing, MI 48901-2037**. Include the prisoner's name, number, current location, date of birth, race, gender, type of conviction, sentencing date, sentencing court and judge, and a concise statement

of how each of the criteria is met. Attach, if possible, critical documents, such as presentence reports, sentencing transcripts, parole board records showing prior favorable assessments, and letters of support from judges or victims. Also, if possible, supply the name, address and telephone number of an attorney familiar with the case and a supportive family member who can be reached for comment.

Judges and lawyers are also strongly encouraged to write about what their understanding of parolable life sentences has been, and how that understanding has affected plea and sentencing practices in their jurisdiction.

NEW PAROLE APPEAL FORMS AVAILABLE

Prison Legal Services of Michigan, Inc., has revised its parole appeal forms in light of the 1999 PA 191 amendments to MCL 791 .234(8); MSA 28.2304(8). Effective March 10, 2000, prisoners are not allowed to appeal Parole Board decisions under MCL 791.234(8); MSA 28.2304(8), and MCR 7.104(D).

The statute and rules that now govern prisoner appeals from parole board decisions are MCL 600.631; MSA 27A.631, and MCR 7.101 and 7.103. The standard of review is whether the decision or order is authorized by law or whether it is an abuse of discretion. "This discretion, however, is not unfettered but, rather, is circumscribed by the many requirements of the statute." *Wayne County Prosecutor v Parole Bd*, 210 Mich App 148, 153; 532 NW2d 899 (1995).

The procedure under MCL 600.631; MSA 27A.631, is to file a claim of appeal in either the circuit court for the county of which the appellant is a resident, or the Ingham County Circuit Court, within 21 days of the date of the decision. MCR 7.101(B)(1). One may file an application for leave to appeal if a claim cannot be timely filed. MCR 7.103(A)(2).

PLSM worked first on developing the form application for leave to appeal because it is not likely that most prisoners will be able to get the copies and send the check for filing fees in time to file a timely claim of appeal. The form application for leave to appeal (with instructions) is available from Prison Legal Services of Michigan, Inc., P. 0. Box 828, Jackson, Ml 49204. The price is $3 for prisoners and $6 for all others. The claim of appeal forms will be available in the future.

For further information on procedures in administrative appeals under MCL 600.631; MSA 27A.631, read Sections 17.27 to 17.36, in Gromek, Lydick, & Bosch, *Michigan Appellate Handbook* (ICLE).

GARNER v JONES, LIFER INTERVIEWS, AND FOILED JUDICIAL EXPECTATIONS

Is the *Ex Post Facto* Clause Being Violated?

By Barbara R. Levine

Among the changes made by recent amendments to the Lifer Law (MCL 791.234) was the elimination of periodic interviews of lifers. More broadly, changed parole board attitudes about the meaning of a life sentence have rewritten the expectations upon which many sentencing judges relied. [See related articles at pages 1, 13 and 27] The U. S. Supreme Court's recent decision in *Garner v Jones,* ___US___; 120 S Ct 1362; 146 LEd 2d 236 (2000). suggests that both these changes may violate the *ex post facto* clause of the U. S. Constitution.

As was summarized in *Shabazz v Gabry*, 123 F 3d 909 (CA 6, 1997), the requirements for lifer interviews have been changed repeatedly. Before 1977, there was no applicable statute or administrative rule. Under board operating procedures, parolable lifers were interviewed after serving seven years, then every three years, for a 7 + 3 + 3…schedule. The 1974 MDOC Annual Report explained the purpose of starting early: "While release cannot be prior to ten years, the Parole Board, as a practice, grants an initial interview in all lifer law cases after the service of seven years. This is done primarily to get acquainted with the individual prior to the service of ten years and to offer any advice or help relative to achieving future parole." *Id*. at 101. In 1977, the MDOC adopted Administrative Rule 791.7710 which required the board to interview prisoners subject to the lifer law after seven years, then three years, then every year thereafter, for a schedule of 7+3+1+1.

In 1982, the lifer law was amended was to make interviews even more frequent. The first interview was set at four years, with subsequent interviews every two years thereafter. Under this schedule of 4 + 2 + 2..., a lifer who came within the board's jurisdiction after serving 10 years would be on his or her fourth interview at that point, and would be well known to board members. However, the drastic change in attitude toward lifer paroles was made strikingly apparent by the next statutory amendment. In 1992, when the structure of the parole board was changed, and board jurisdiction over lifers was prospectively changed to require service of 15 years, the interview schedules for all lifers, regardless of when they were sentenced, was changed to a 10 + 5 + 5 schedule. Thus a lifer who was eligible for release at 10 years would only be seen for the first time after coming within the board's jurisdiction. A second interview would come at 15 years, instead of 6, and a third interview would come at 20 instead of 8.

The 1992 amendment to the interview schedule was challenged in *Shabazz, supra*. The District Court had applied the test of *California Department of Correction v Morales*, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995) to find an *ex post facto* violation as to prisoners sentenced before 1977. In *Morales*, the time between parole interviews had been extended from one to three years for a very narrow class of prisoners – those who were serving for their second murder. Even then, the California board had to find that parole would not have been reasonably likely in the interim between interviews, and to articulate the basis for its finding. The Supreme Court had upheld the amendments because they had not created "a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 509, 115 S.Ct. at 1603. In other words, there was no realistic chance that these lifers were getting out anyway, so the changed interview schedule did not have any practical impact on the length of time they would serve. Besides, the Court stressed, the parole board could always decide to interview someone sooner.

The District Court in *Shabazz* distinguished the Michigan amendments from the California ones on various grounds. It found that postponing both initial and subsequent interviews for entire classes of prisoners, without any individualized assessment, would cause a sufficient risk of increased punishment, for a sufficient number of people, to violate the *ex post facto* clause. However, the Sixth Circuit was not persuaded. It observed that the amendments had not changed the standard for granting parole, just the review process. Noting that there had not been time to develop reliable statistical evidence, it found that Michigan lifers had ample opportunity to petition the board for interviews, and that the board could "grant interviews of its own volition". *Shabazz*, *supra*, at 914. Therefore the Court of Appeals held there was no *ex post facto* violation and reversed the District Court.

Morales was recently applied by the U.S. Supreme Court itself in *Garner v Jones*, supra. Georgia had been reviewing parolable lifers at seven years, and every three years thereafter. It amended its rule to lengthen the reconsideration period for up to eight years. The majority found that the retroactive application of this change did not, on its face, violate the *ex post facto* clause. Two factors were considered critical. The board could set shorter reconsideration dates in cases where there was some real possibility of earlier release. And, review could be expe-

dited if warranted by changed circumstances or the receipt of new information.

Garner emphasized that the assessment of whether the risk of lengthened punishment is sufficient to violate the *ex post facto* clause must be a practical one. The parole board's internal policy statements and actual practices must be assessed to determine whether discretion is being exercised in a manner that creates an unconstitutional risk. Notably, the majority stressed that its analysis rested on the premise that the Georgia board was exercising its discretion by making individualized assessment's of each prisoner's likelihood of release before setting a reconsideration date.

Garner's application to Michigan's recent statutory amendment could go either way. On the one hand, the length of time between reviews has not been changed. On the other hand, the nature of the review has changed drastically. Periodic reinterviews have been eliminated altogether. It seems doubtful that file reviews of nothing but prisoner-provided material will be an adequate substitute for face-to-face assessments, but there is, of course, no data available yet.

The real problem in applying *Garner* is that, depending on what measure is used for comparison, the amendments become self-justifying. With few lifers having been released in recent years anyway, it is easy to assert that changing the method of lifer reviews will not increase the risk of lengthened punishment. If the board is already refusing to parole lifers on the assumption that "life means life", changing the review process to conform to that reality will not, as a practical matter, makes things much worse. Yet accepting this argument brings one full circle to the recognition that even personal interviews are largely meaningless if paroles are being denied based on across-the-board policies, not individualized review.

However *Garner* is applied to the change in the lifer interview requirement, it may have great significance if more broadly applied to the change in the practical meaning of a parolable life sentence over the last 20 years. If the standard of comparison is the understanding in effect when the sentence was imposed, and if changes in the board's internal policies and actual practices have, in fact, forced prisoners to serve many more years than the sentencing judge intended or reasonably expected, is that not a retroactive change that has created a sufficient risk of increased punishment to violate the *ex post facto* clause?

The prisoners in *Garner* and *Morales* were each serving life sentences for their second murders. It is not surprising that the Supreme Court did not see changes in the parole interview schedule as being a major factor affecting their release. However, refusing to release parolable lifers because they are lifers, instead of applying the criteria considered relevant at the time of sentencing, presents a very different issue. This change in the Michigan standard for granting parole is a matter about which ample data exists. The *Garner* majority's assumption that parole boards engage in individualized decisionmaking, and its willingness to decide the constitutional question based on evidence of actual parole board policies and practices, could lead to a very different result where it is the substantive basis on which release decisions are made that has been changed after the fact.

FINDING ANOTHER WAY OUT

Two Lifers Use 6.500 Motion to Circumvent Parole Board Denials

In two recent cases with strong similarities, parolable lifers have managed to obtain their freedom despite the parole board's refusal to act. In both cases, successor sentencing judges, aware of their predecessors' actual intentions when imposing life sentences pursuant to plea bargains, granted motions for relief from judgment that resulted in resentencing.

In 1973, James Jones was a 17 year old who pled guilty to a reduced charge of second-degree murder. He had been an accomplice in a robbery during which the janitor at a Catholic school was killed. While incarcerated, he had an excellent institutional record, obtained his bachelor's degree, and developed his exceptional talent as an artist. Two key supporters wrote to the parole board on his behalf -- Monsignor Anthony Tocco, who had been a priest at the school, and the sentencing judge, Hon. Robert Chrzanowski, who made it clear that he had expected Jones to serve between 15 and 20 years. Nonetheless, after 26 years, the board still had "no interest" in granting parole.

Attorney Frank Eaman filed a 6.500 motion for Jones that argued, among other things, that the intent of the sentencing judge was being violated by parole board policies, that the sentence was based on mistaken assumptions about how long Jones would actually serve, and that the plea bargain was illusory. With the agreement of Macomb County Prosecutor Carl Marlinga, Jones was resentenced on February 28, 2000, to a maximum term of 22 years and 3 months, which resulted in his immediate release.

Dennis Davey pled guilty to rape in 1975, when he was 22 years old. Pursuant to a bargain with the Oakland County Prosecutor, he expected to be sentenced to 25-40 years. However, right before sentencing, he was persuaded by the court and his attorney to accept a life sentence instead, in the belief that this would enhance his chance of receiving psychological counseling and make him eligible for parole sooner. In fact, he had to fight to obtain counseling, and the board showed no interest in paroling him.

In 1990, Judge John N. O'Brien wrote to the board on Mr. Davey's behalf: "I would like to state as clearly as possible that it was my understanding then, as it is now, (an understanding that I think is shared by most trial court judges) that when such a sentence is imposed, the Parole Board opens a parole file on the person after 10 years and thereafter the average release will occur after 14 years." Although Judge O'Brien said that upon reviewing Davey's prison records he was satisfied that the public interest would be served by Davey's release, the board was unpersuaded.

Finally, after attorney Paul Reingold filed a 6.500 motion in Oakland Circuit Court, Davey was resentenced to the 25-40 year term for which he had originally bargained. With the accumulated good time applicable to sentences imposed in the '70's, Davey had served more than enough time to "max out". He was discharged from custody in August, 2000, after serving 25 calendar years – over a decade more than any of the trial court participants intended.

APPEALING PAROLE DENIALS: DID LIFERS EVER HAVE THE RIGHT?

In *Glover v Parole Board*, 460 Mich 511 (1999), the Supreme Court decided that lifers, like all other prisoners, had a statutory right to a written statement of reasons when they were denied parole. The rationale depended in large part on the need to facilitate judicial review if the parole board's decision was appealed. The appellant, Mary Glover, had been the subject of a lengthy public hearing, after which the board "withdrew interest" in proceeding without specifying its reasons.

While *Glover* was pending, the Court of Appeals decided *In re Parole of Johnson*, 235 Mich App 21 (1998). The *Johnson* panel concluded that only a decision to grant or deny parole is appealable. It said that a decision of "no interest" in proceeding to public hearing on a lifer who is within the board's jurisdiction is not a decision denying parole, and therefore is not appealable, even though the result is that the prisoner continues to serve his or her sentence after review of the facts and a vote by the board. Although the word "eligible" is not actually used in MCL 791.234, the panel reasoned that a lifer is not eligible for parole until he or she meets all the statutory conditions for release. Parole may not be granted if the sentencing or successor judge objects and, absent such objection, until after a public hearing has been held. Since a prisoner who fails to overcome these hurdles cannot, by statute, be released, any appeal would be futile.

Johnson does not discuss the fact that whether to proceed to public hearing is itself a decision that is wholly within the parole board's discretion. Even though the public hearing is a precondition to parole, deciding not to hold

one is said not to be an "ultimate" decision not to parole. It is just a decision not to hold a public hearing.

Although the Appellee in *Glover* submitted *Johnson* to the Supreme Court as supplemental authority, *Johnson* was never mentioned in the *Glover* majority or concurring opinions. The Court proceeded to grant a lifer relief, even though the Board's action had been to "withdraw interest". On March 10, 2000, 1999 PA 191 took effect. It amended the Lifer Law to overrule the result in *Glover* by eliminating the written explanation requirement for lifers and to implement the result in *Johnson* by defining a decision in a lifer case to be one made after public hearing. But for lifers who filed parole appeals before March 10th, circuit courts are faced with interpreting the viability of *Johnson* in light of *Glover*. Did *Glover* implicitly overrule *Johnson* by resolving a lifer's appeal and requiring a written explanation of a decision to withdraw interest, or did *Johnson* render *Glover* largely irrelevant by limiting the written explanation requirement to cases where public hearings had been held?

Circuit judges have gone both ways. The Court of Appeals has now granted leave on the question in *Vargas v Michigan Parole Board*, CoA No. 221566 (lv grntd 10/13/99). Notably, Mr. Vargas had appealed a previous parole board decision to the Supreme Court and obtained relief. The board had decided to proceed to public hearing in 1993, but an objection was lodged by a trial judge who was actually disqualified. In lieu of granting leave, the Supreme Court remanded for consideration by an appropriate successor judge. When that judge found no basis for objecting, the Supreme Court remanded the matter to the parole board. Without providing any explanation, the board then changed its mind about proceeding. Vargas attempted to appeal that decision by the board. However, the circuit judge who had had no objection to parole when considering the case on remand, found that under *Johnson*, Vargas had not actually been denied parole and therefore had no right to appeal.

In a related development, the Supreme Court itself issued an order in a lifer parole appeal that it had held in abeyance pending its decision in *Glover*. On December 21, 1999, in *Abrahams v Michigan Parole Board*, SCt No. 110420, in lieu of granting leave the Court directed the parties to brief the following issues: "(1) whether *In re Parole of Johnson*, 235 Mich App 21 (1998) is applicable here; (2) if so, whether that case was properly decided; (3) whether 1999 PA 191 is applicable here: and (4) what, if any, impact that provision has on this matter."

GOD OF THE RODEO:
The Quest for Redemption in Louisiana's Angola Prison
by Daniel Bergner, Ballantine Books, 1999 (paperback ed.)

Reviewed by Marjorie M. Van Ochten

God of the Rodeo is a book which should be required reading for anyone concerned about prisons in this country. The author, Daniel Bergner, is a journalist from New York, but you should not be put off (if you have such tendencies) by his profession or location. This book is a reasonably objective and enlightening account of prison life. Importantly, it also is well written; as one reviewer said, it reads almost like a novel.

Mr. Bergner was granted unfettered access to Louisiana's Angola Prison by its warden, Burl Cain, to obtain material for a book on the annual rodeo which has been held at the prison for many years. The warden and the journalist eventually have a dispute about the terms of continued access (putting it in the most neutral terms possible), and the legal action required to resolve that dispute is described in the book.

The author spent a lot of time talking to prisoners and staff and provides a perceptive outsider's view of prisoners and their relationships with each other, their families, and the staff who guard them. He also describes the effect the "god of the rodeo," i.e. the warden, has on both staff and prisoners. Mr. Bergner largely avoids the trap often fallen into by journalists, that of overly romanticizing prisoners. He describes in grizzly detail the crimes which brought them to Angola. However, he also reveals their humanity, their hopes and fears, and the ability of some of them to change. Prison staff also are objectively and insightfully described. However, except for that of the warden, those descriptions are brief, and relate primarily to staff's impact on the prisoners.

God of the Rodeo should be especially interesting to Michigan readers in light of the recent controversy over the new limitations on media access to our State prisons. The author also comments on the impact of the federal court on the prison, and the effect of the Prison Litigation Reform Act. But it is his description of prison life, and what it does to the keepers and the kept, which

SECTION PROPOSES COURT RULE FOR CORRECTING PRESENTENCE REPORTS

On April 13, 2000, Prisons and Corrections Section Chairperson Daniel Levy submitted the following recommendation to the State Bar Representative Assembly for consideration at its September meeting.

RECOMMENDATION

The Prisons and Corrections Section Council asks the Representative Assembly to endorse the attached proposed amendment to MCR 6.435 and submit it to the Michigan Supreme Court with a recommendation that it be adopted. The proposed amendment adds section (E), which would allow prisoners to challenge inaccuracies in their presentence investigation reports when they affect Michigan Department of Corrections decisions about them, but do not affect their sentence or sentencing guidelines calculation.

The Problem. A Presentence Investigation Report (PSI) is required by statute and MCR 6.425(A). The probation department, a division of the MDOC's Field Operations Administration, prepares a PSI for every person sentenced in circuit court. Although it is prepared for sentencing, the PSI must be sent to the MDOC. MCL 771.14(7); MSA 28.1144(7).

Within the MDOC, the PSI is used continuously from the first day at the reception center until the prisoner is discharged. The PSI is the primary basis for most of the processes that determine the length and circumstances of the prisoner's incarceration. It is used for time calculation, program and security classification, risk screening, screening for Residential Electronic Placement, parole guidelines scoring and consideration, and commutation applications.

Information in the PSI does not have to come from sworn testimony or affidavits and rarely does. Much of it consists of hearsay from victims, neighbors, former friends, police officers, prosecutors, former teachers, family members, and even co-defendants.

Although defendants and their attorneys can challenge inaccuracies at sentencing, they are usually focused on factors that affect the sentencing guidelines calculation and sentencing. They are frequently unaware of how extensively the PSI is used by the MDOC and how other errors may affect the prison term.

If the PSI contains conflicting or ambiguous information, the MDOC staff person using it is supposed to contact the probation department of the sentencing court and get clarification. If the probation department cannot give it, the staff person uses his / her "best judgment." MDOC policy directive, PD 05.01.130(C). Inaccuracies or clerical errors in the PSI can determine whether Michigan prisoners receive or are denied various privileges or treatments ranging from psychological services, family visits, educational opportunities, parole consideration, community placement, commutation decisions etc.

Examples. One first-time prisoner who was sentenced to 1 to 2 years had attempted to kick out the window of the police car during an arrest. The MDOC staff person classifying this man interpreted this as an attempted escape from a secure adult facility and placed him in a prison with a security classification of Level IV instead of a Level II prison where his crime and other history would have placed him. While in Level IV with more serious offenders, he was repeatedly raped and assaulted.

Prisoners often have problems getting visits with family members not identified in the PSI. The current MDOC visiting rules enumerate those relationships that constitute immediate family and can be included on the visiting list. They include someone who raised the prisoner but was not a close blood relative. If this information was left out of the PSI, the prisoner will have to prove it. This can be very difficult.

The Current Lack of Remedy. There is no administrative procedure the prisoner can use to have inaccurate or irrelevant information removed from the PSI or to add missing information, e.g., about family members, after sentencing. The PSI can only be corrected through an order from the sentencing court. There are two potential

options, but neither is well suited for these situations:

> MCR 6.500, Motion for Relief From Judgment, is the only method by which a prisoner can seek post-conviction relief and essentially sets a lifetime limit of one 6.500 motion per conviction. This one 6.500 motion has to be used to challenge an invalid or unconstitutional conviction or an error in the length of the sentence. Prisoners are naturally reluctant to use this 6.500 motion to challenge an error in the PSI report and lose their only chance for substantive post-conviction relief;
>
> and
>
> MCR 6.429(0) permits a motion to correct the presentence report if the error is presented as soon as it could be "reasonably" discovered. However, very often defense counsel and defendant know at sentencing that something is inaccurate. Still, where it does not affect the calculation of the sentencing guidelines or length of sentence, defense counsel and defendant may not raise it because they are unaware of how the error will impact the defendant's stay in prison.

Prisoners' attempts to correct these errors by either of these means or by letters to the sentencing courts or kites to the MDOC, create unnecessary paperwork and frustration. Providing a method to resolve this type of problem will save the courts and the MDOC administrative hassles as well as time and money. It will also give prisoners a heightened sense of fairness about the process if the length and circumstances of their incarceration is based on accurate information.

The Proposed Solution. The Prisons and Corrections Section Council believes it is important to adopt a straightforward method to allow the correction of errors in PSIs that affect the MDOC's treatment of prisoners, but do not affect the sentences imposed by the court. This should be done in a manner that minimizes any burden placed upon the trial court. This will not only correct unfair and unequal treatment for affected prisoners, but it will save the MDOC money where the accurate information makes a prisoner eligible for a lower security classification or an improved guideline score for parole eligibility.

After considerable discussion of these problems and potential solutions, the Prisons and Correction Section developed the attached proposed amendment to the Michigan Court Rules. The Council voted to approve the proposed rule and seek the endorsement of the Representative Assembly on March 4, 2000, following advance notice to Council members.

The enclosed draft of the proposed court rule, allows a prisoner to file motion for correction of specified errors in the PSI; provides for service on the prosecuting attorney; permits the court to decide the motion on the pleadings or after a hearing; and limits a prisoner to filing one such motion unless the significance of an error could not have been known previously. It provides for the appointment of counsel under the same circumstances as those provided for in MCR 6.500.

PROPOSED COURT RULE RE:
CORRECTING PRESENTENCE REPORTS

6.435 (E) **Correction of Presentence Report**. If a dispute arises regarding the accuracy of the presentence report in a criminal case as to a matter that would not affect the sentence imposed by the court but that could affect decisions by state or local corrections officials about such matters as evaluation, classification, treatment, placement, programming, and parole, the court shall, on motion by a defendant, resolve the dispute.

(1) The motion shall explain the specific nature of the inaccuracy and the way in which it has, or foreseeably may, affect corrections decisions about the defendant. A copy of the presentence report and any affidavit, document, evidence, or other supporting document shall be attached. The defendant shall serve one copy of the motion on the prosecuting attorney.

(2) Within 90 days of filing, the court, in its discretion, shall either decide the motion on the pleadings or conduct a hearing. When an inaccuracy is found, the court shall order the presentence report to be corrected and inaccurate copies to be destroyed by the appropriate corrections agency. The court shall provide a copy of the corrected report to the defendant and the corrections agency with notice that it supplants prior versions.

(3) (a) If the defendant has requested appointment of counsel, and the court has determined that the defendant is indigent, the court may appoint counsel for the defendant at any time during the proceedings under this subchapter. Counsel must be appointed if the court directs that oral argument or an evidentiary hearing be held.

(b) If the court appoints counsel to represent the defendant, it shall afford counsel 56 days to amend or supplement the motion. The court may extend the time on a showing that a necessary transcript or record is not available to counsel.

(4) Unless the significance of inaccurate information could not have been known previously, the defendant may file only one motion under this section. Such a motion shall not be considered a motion for relief from judgment under Rule 6.502 or a motion for resentencing under Rule 6.429 (C).

Equitable Telephone Charges (eTc) Campaign Makes Progress

By Kay Perry

Families and friends of prisoners throughout the nation have been actively participating this year in a campaign to reduce the high cost of prisoner-initiated telephone calls. Prison telephone systems are similar in most states. Calls are limited to collect calls and are subject to a large surcharge in addition to the high cost of the collect call. There are limits on the length of the call, with 15 to 20 minutes rather typical. The prison system receives a commission on those calls which ranges from 40% to 60% of the revenues. In Michigan, those revenues amount to approximately $12.5 million per year. Some prison systems use the commissions for programming. In other cases the revenue is placed in the state's general fund. In Michigan, the revenue supports the County Jail Reimbursement Program.

The Equitable Telephone Charges (eTc) Campaign is advocating for elimination of all surcharges on prisoner calls and the availability of direct calls using a prepaid debit account (a system cur-rently available in Tennessee, Colorado and some federal prisons.) The campaign is also working to address the Texas prison system practice of allowing only minimum security prisoners to call home, and then only four times a year.

More than 37,000 individuals received packets of campaign materials. The materials, based on holiday and special events themes, were then sent (or, in some cases, delivered) by campaign participants to state legislators, gover-nors, leaders of prison systems, and boards of directors of telephone companies. The campaign has participants in every state and the District of Columbia.

During the month of August, campaign participants will refuse non-emergency phone calls from pri-soners. In systems where it is possible, they will also explain to the operator that they are refusing the call in protest to the high cost of those calls. Campaign organizers report that they are encouraged with progress to date. They have had contact with le-gislators in approximately 20 states. The Missouri prison system contract reportedly reduced telephone charges significantly beginning in July.

The Colorado system is reportedly exploring options for reducing telephone charges. The Request for Proposal for the Michigan prison telephone system will likely include some form of debit calling.

Editorial support has also been encouraging. The Al-buquerque Journal commented, "It is a sorry com-mentary on the moral compass of the Department of Corrections that it sees nothing wrong with extorting free citi-zens for the simple human contact of talking to loved ones, even if they are in prison." Newsday columnist Sheryl McCarthy wrote, "This is another crime of the prison industrial complex, where everybody from phone companies to bankrupt towns to governors profit off criminals and their families. New York's complicity in this scam is a rip-off, pure and simple." The Grand Rapids Press commented, "Of course, families don't have to accept collect calls, notes De-partment of Corrections spokesman Matt Davis. That's true. But those who say 'yes' to the call shouldn't be penalized for doing so."

The Campaign is being sponsored by a number of criminal justice reform and prisoner advocacy organizations including Citizens United for the Rehabilitation of Errants (CURE); the American Friends Service Committee; Correctional Association of New York; Justice Policy Institute; Criminal Justice Ministry; Society of St. Vincent DePaul, St. Louis Council; Women's Project; Coalition for Prisoners' Rights; Project Return; National Coalition to Abolish the Death Penalty; Massachusetts Correctional Legal Services; Family Voices of Oklahoma; Families of Incarcerated Individuals; and Dominicans of St. Catharine Kentucky.

Legislature Stops Prisoner Progress
Continued from Page 2

House Bill 4624

HB 4624 eliminates prisoner appeals of parole board decisions and the requirement that lifers be interviewed at regular intervals. Its history is complex but instructive. In the 1998-99 legislative session, the House defeated a bill promoted by the administration that would have eliminated prisoner parole appeals. In 1999-2000, with control of the House having changed from Democratic to Republican hands, the parole appeal bill was introduced again. However, this time there were several additional provisions regarding lifer interviews.

The bill was the subject of lengthy committee hearings in both the House and Senate. Among the witnesses were spokespeople for several organizations, including the Prisons and Corrections Section, attorneys who spoke on behalf of individual clients, former prisoners, and representatives of the parole board. Although the parole appeal provision was said to be a response to an increasing number of frivolous appeals by prisoners, legislators were told of various cases in which circuit and appellate courts had ordered relief for serious procedural and factual errors. Opponents argued that the effort to close the courthouse doors was motivated more by successful appeals than by frivolous ones. Although a measure of review is still possible under the Revised Judicature Act, [see related article at page 15], HB 4624 was an apparent attempt to insulate the parole board from judicial review and allow it to avoid having to comply with a growing body of judicial precedent.

The appearance that HB 4624 was a reaction to successful prisoner litigation is confirmed by the history of the lifer interview provisions. The statute governing the parole interview process says that prisoners are entitled to written explanations of why they were denied parole. Although the statute on its face did not exempt lifers, the parole board had long taken the position that this requirement did not apply to lifers. In *Glover v Michigan Parole Board*, 460 Mich 511 (1999), the Michigan Supreme Court held that nothing in the statute "remotely" supported the board's interpretation. Moreover, while the *Glover* decision was pending, the statute was amended to make the application of the written explanation provision to lifers explicit. By eliminating the requirement that lifers even be interviewed, and by reducing the procedural protections for those that are, HB 4624 undid both the Supreme Court's decision and the 1998 statutory amendment.

Opponents of the bill spoke urgently of parole board practices that override the intent of sentencing judges and drive up the need for prison beds, of deserving parolable lifers who will be left to die in prison if the board never even has to see them, of 650 drug lifers who were given the hope of release just a year earlier when their sentences were made parolable, and of the unfairness of letting only prosecutors appeal. Board representatives testified that virtually all prisoner parole appeals are frivolous, that few result in release even after court-ordered reconsideration, that interviewing parolable lifers is a waste of time because hardly any are ever released, and that prosecution parole appeals are justified because society's interest in safety is at stake.

Ultimately, amendments offered by Rep. Laura Baird gained bipartisan support. They require the parole board to conduct file reviews of lifers every five years after the initial ten year interview. And they require the board to give the prisoner notice of an upcoming file review and an opportunity to place information supporting release in the file. They do not require the MDOC to place any updated information in the prisoner's file, or to score the sentencing guidelines. The amended bill passed the House without a large enough majority to support immediate effect and was unchanged in the Senate. [See related articles at pages 13 and 16].

House Bills 4475 and 4476

HB 4475 and 4476, which exclude prisoners from the protections of the Persons with Disabilities Civil Rights Act and the Elliott-Larsen Civil Rights Act, respectively, were aimed directly at pending litigation. Neither act has been widely used by prisoners, and no one claimed a problem with frivolous suits. However, *Doe v MDOC,* 236 Mich App 801 (1999) is a class action filed under the disabilities act on behalf of HIV positive prisoners who were excluded from community placements. *Neal v MDOC,* 232 Mich App 730 (1998) is a class action on behalf of women prisoners who have suffered sexual assault, sexual harassment, privacy invasions of the most basic sort, and retaliation for reporting staff misconduct. The Department of Corrections had claimed in each case that the applicable civil rights act did not cover prisoners. In each case, that claim was rejected by the Michigan Court of Appeals. An application for leave to appeal to the Supreme Court is currently pending in *Neal*. [See related article at page 8].

The House bills expressly amend the civil rights acts to exclude from the definition of "public service" jails and prisons "with respect to actions or decisions regarding an individual serving a sentence of imprisonment". They then effectively apply these amendments retroactively by

enacting language that states the amendments are "curative", "intended to correct any misinterpretation of legislative intent" in the Court of Appeals decisions, and designed to express the original intent of the legislature that prisoners not be covered by these acts. Since the pending cases are cited by name in the enacting section, the desire to fashion legislation to avoid having to address these prisoners' claims in court is wholly undisguised.

HB 4475 and 4476 reduce prisoner access to the courts by eliminating causes of action for official violations of basic civil rights. Even a prisoner who is blatantly mistreated because of his or her race, religion, ethnic origin, age, marital status or gender will have no recourse in state court against the MDOC because no state law will have been violated. The same is true if a prisoner with a disability is denied access to even the most necessary services. Although proponents of the bills assert that state constitutional violations can still be raised, it is not clear where or how this can be done, particularly when these bills are read in conjunction with SB 419. Almost as important, the state civil rights acts expressly provide for awarding attorney fees. If lawyers must take these cases without any hope of payment, prisoners will face the virtually impossible task of enforcing on their own whatever rights to nondiscriminatory treatment they may have left.

HB 4475 and 4476, the most controversial of the four prisoner bills, were rushed through the legislative process with the least opportunity for public input or legislative deliberation. They had been referred in April to the House Committee on Constitutional Law and Ethics, which is chaired by the bills' sponsor, Rep. Michael Bishop. However, they were not scheduled for hearing until December 1st, nine days before the Legislature was to adjourn for the year.

The House Committee hearing was scheduled with less than 24 hours notice, at a time the committee did not usually meet. Substitute bills, with language making the amendments retroactive, were first introduced that day. With virtually no time to organize or prepare, only three opponents of the bills were able to testify. Over intense opposition from Democratic members, the committee reported the bills out immediately. However, when they reached the House floor the next day, amendments introduced by Rep. Liz Brater that stripped out the retroactivity language were adopted by an overwhelming majority of House members.

At that point, it seemed unlikely the bills could be enacted in 1999 because the deadline for referrals to Senate committees had passed. Nonetheless, a hearing was scheduled before the Senate Judiciary Committee, chaired by Sen. William Van Regenmorter, for December 7. Once again, less than 24 hours notice was given, the meeting was not at the committee's usual time, and language making the amendments effectively retroactive was put into substitutes. Although several witnesses protested both the substance of the bills and the speed of the process, once again, the bills were promptly reported out on a party-line vote.

The Senate debated the bills on December 8th. Sens. Virgil Smith, Chris Dingell, and Alma Wheeler Smith voiced strong opposition. Sen. Van Regenmorter dismissively noted that all the testimony in opposition to the bills had come from prisoner advocates and the Prisons and Corrections Section of the Bar, then read a letter from the Deputy Attorney General expressing that office's support. On a straight party line vote, the Senate adopted the bills with the retroactivity language in place. Later that night, under pressure to adjourn for the year, 59 House members concurred with the Senate version. Despite critical editorials from papers as diverse as the Grand Rapids Press, the New York Times, the Detroit Free Press, and the Kalamazoo Gazette, Gov. Engler signed the bills on December 20th.

Insulating the Department/Isolating Prisoners

Legislation that greatly reduces prisoners' access to the courts must be understood in two related contexts. First, by inhibiting judicial review, it further insulates MDOC policies and practices from direct accountability to anyone but the governor. The Corrections Commission, which had been responsible for making policy and hiring the MDOC director, was abolished by Governor Engler. Legislative oversight of the Department's administrative rulemaking through the veto power of the Joint Committee on Administrative Rules (JCAR) has also been effectively eliminated. Thus the availability of outside checks on MDOC actions, either before or after the fact, is extremely limited.

Second, reducing prisoners' access to the courts is part of a process that has limited their access to the outside world generally. Numerous changes in MDOC policies regarding telephones and visitation have greatly diminished the ability of prisoners to maintain relationships with family, friends, and the media. At the same time, these changes diminish the extent to which outsiders have contact with and learn about the prisons.

Prisoners can only make collect calls, which are billed at exorbitantly high rates. [See related article at page 23]. Starting in 1994, all prisoner telephone calls that are not to attorneys or public officials have been tape-recorded and may be monitored. All calls are repeatedly interrupted by computerized voiceovers and are automatically

terminated after 15 minutes. Prisoners can only call telephone numbers on their pre-approved list of 20, and the list can only be changed twice a year. Expense, lack of privacy, interruptions, and delays make conducting meaningful conversations difficult, if not impossible.

Visits, which are particularly treasured by prisoners and their families, have always been difficult because of the distance between many prisons and the urban centers from which most prisoners come. New rules implemented in 1995, drastically restricted the number and identity of people who can visit each prisoner, and permitted the permanent elimination of a prisoner's visits as punishment for misconduct. [See related article at page 5].

Other burdensome changes have also been made. Visiting hours and the number of visits each prisoner may have were significantly reduced. Hundreds of beds have been added at some facilities without increasing the visiting space, causing further time limitations at those institutions. Visitor searches were made more intrusive and even restrictions on the use of vending machines and restrooms were increased, making visits increasingly unpleasant. As a result of these changes, the overall volume of visits has fallen by more than half.

In November, 1999, in the midst of widespread publicity about the mistreatment of women prisoners, the MDOC proposed a new rule on media access to prisoners. Reporters will have the same access to individual prisoners as the rest of the public. They can accept 15 minute monitored collect calls if they are on the prisoner's telephone list, and, unless granted a one-time exception by the warden, they can visit only if they are on the prisoner's approved list of ten non-immediate family members. No on-camera television interviews will be allowed.

The new rule, which is now in effect, [see related article at page 3] applies whether the reporter is investigating prison conditions, the parole process, or a particular prisoner's claim of innocence. Although the rule is being justified in the name of security, there has been no showing that security problems have arisen in the past, or could not be controlled in the future with far less stringent limitations.

Conclusion

The newly enacted legislation raises a host of questions. Some concern the constitutionality of the bills themselves. For instance, does it violate the *ex post facto* clause to eliminate lifer interviews? Does it violate equal protection to retain prosecution parole appeals? Does it violate the state equal protection clause to remove prisoners from civil rights statutes that are expressly mandated by the equal protection clause itself? Does it violate due process to apply the civil rights amendments to pending cases? Does it violate due process to apply filing requirements so onerous they may effectively bar meritorious suits to only one class of litigants, raising only one type of claim?

Some questions concern the precedent these bills are setting. How far will the Legislature go in shielding other state agencies from accountability? Will some other disfavored group be next to lose civil rights protections? What constraints is the Legislature willing to impose on MDOC policies and practices? Or is there, as Sen. Virgil Smith asked his colleagues, no "degradation of prisoners that we will not tolerate?"

Collectively, the legislative and administrative rule changes raise sobering questions about our fundamental social and political values. Why, when the maintenance of family ties is strongly correlated to good prisoner conduct and success on parole, are these ties are being systematically undermined? Why, when we purport to cherish the value of a free press in exposing abuses of government power, are the media about to be excluded from the very forum in which, history shows, power is most easily and grossly abused? Why, when the judiciary is, by design, the branch of government charged with protecting the least popular among us from oppression by the majority, are prisoners who may have been mistreated by state employees increasingly being denied the opportunity for judicial review? And why, when we have quadrupled our prison population and raised the MDOC budget to $1.7 billion to support "law and order" policies, are we so reluctant to look objectively at how these policies are being implemented?

Most of these questions will be answered by elected officials who purport to represent the views of their constituents. Many legislators discount prisoners' concerns because prisoners cannot vote. But 46,000 prisoners and 13,000 parolees have a lot of loved ones and supporters. These people **can** communicate their concerns to legislators and the media, and they **can** vote for candidates who share their views. The biggest question then becomes, will they?

SUMMARY OF RECENTLY ENACTED LEGISLATION

The following are the key provisions of the recent legislation discussed in "Legislature Stops Prisoner Progress in Courts, page l.

Senate Bill 419: 1999 PA 147, Effective November 1, 1999

Amends MCL 600.2963, the prisoner filing fee provisions of the Revised Judicature Act, and adds to that act chapter 55, Prisoner Litigation Reform, regarding prison conditions suits.

Filing Fees

Subsection (8) forbids a prisoner who has failed to pay outstanding filing fees and costs as required by the statute from filing a new civil action or appeal.

Subsection (9) directs the custodial agency removing monthly payments for filing fees or costs from a prisoner's account to remit payment to the court only when the entire outstanding balance has been collected.

MCL 600.5501 et seq. – Prison Litigation Reform

5501 - civil actions regarding prison conditions are to be brought in circuit court or court of claims, as appropriate

5503 - (1) prisoner must exhaust administrative remedies

(2) court must dismiss if action is frivolous or seeks money damages from a defendant who is immune

(3) no appointment of counsel

5505 - (1) applies filing fee provisions to conditions of confinement suits

(2) court must dismiss, regardless of fees paid, if: a) allegation of indigency is untrue, (b) action or appeal is frivolous, c) action or appeal seeks money damages from defendant who is immune, d) prisoner has not exhausted administrative remedies.

5507 - (1) prisoner who has, while incarcerated, brought 3 or more actions or appeals in MI courts that were dismissed for being frivolous cannot bring an action or appeal regarding conditions under indigent fee provisions or be represented by an attorney who is directly or indirectly paid by state funds unless prisoner has suffered or is in imminent danger of suffering serious physical injury or sexual assault

(2) prisoner filing action or appeal concerning prison conditions must disclose number of civil actions and appeals s/he has previously filed (NOTE: no limit on nature of prior filings, when filed, or whether prisoner was incarcerated at the time)

(3) court must dismiss, regardless of fees paid, if prisoner's claim of injury or imminent danger is false, or prisoner fails to comply with disclosure requirements.

5509 - (1) courts to review prisoner complaints against governmental entity or its employee in conditions cases "as soon as practicable"

(2) court must dismiss complaint, in whole or part, if frivolous or it seeks money damages from defendant who is immune

(3) defendant may waive right to reply without admitting allegations in complaint - court cannot grant relief to plaintiff unless a reply has been filed

(4) court can order defendant to reply to complaint if it finds plaintiff is likely to prevail on merits

(5) if court does not dismiss complaint under subsec. (2), it must indicate reasons for its decision in the record.

5511 - (1) action for mental or emotional injury suffered while in custody cannot be brought without a showing of physical injury arising from same incident

(2) damages awarded to prisoner to be first paid directly to satisfy restitution orders, including those issued under State Correctional Facility Reimbursement Act, Prisoner Reimbursement to the County Act, and Crime Victim's Rights Act, and outstanding costs and fees, and other debts owed to jurisdiction housing prisoner

(3) court must make reasonable attempt to notify victim before payment of damages to prisoner.

5513 - court may order revocation of good time or disciplinary credit if action was prohibited under 5503 or 5505 and claim was filed for malicious purpose or solely to harass the other party or the prisoner presented false information to the court.

5515 - (1) provides for prisoner participation in pretrial proceedings by telephone, video conference

(2) provides for hearing at prison, with counsel participating by telephone or video conference

5517 - (1) prohibits prospective relief unless court finds relief is "narrowly drawn, extends no further than necessary to correct the violation of the right, and is the least intrusive means necessary"; requires court to "give substantial weight to any adverse effect on public safety or the operation of the criminal justice system caused by the relief."

(2) prohibits prospective relief that lets government official exceed own authority unless specified conditions exist

(3) prohibits courts from ordering construction of prisons or raising of taxes.

5519 - places limits on preliminary injunctions like those described in 5517 (1); injunctions to expire automatically in 90 days unless court makes findings required in 5517 (1) within 90 days.

5521 - defines times when prospective relief becomes terminable

5523 - defines conditions under which prospective relief may be terminated or continued

5525 - prohibits court approval of consent decree that doesn't meet limits in 5517 and 5519

5527 - requires prompt rulings on motions to modify or terminate prospective relief and provides for automatic stays under specified conditions

5529 - (1) requires the State Court Administrative Office to maintain a list of prisoner conditions cases that were dismissed as frivolous, including unpaid fees and costs.

(2) requires court to check SCAO list

5531 - Definitions

(A) "civil action concerning prison conditions" does not include proceedings challenging fact or duration of confinement, parole appeals, or major misconduct appeals

(B) "consent decree" does not include private settlements

(C) "frivolous" is defined by MCL 600.2591

(D) "prison" includes any adult or juvenile facility holding people charged, convicted or adjudicated under state or local law, e.g., prisons, jails, juvenile detention centers, training schools, whether publicly or privately operated

(E) "prisoner" means anyone subject to commitment to a "prison" for violating state or local law or the terms of parole, probation, pretrial release or a diversionary program

(F) "private settlement agreement" is an agreement not subject to judicial enforcement other than through reinstatement of the lawsuit

(G) "prospective relief" is all relief other than money damages

(H) "relief" includes consent decrees but not private settlement agreements

House Bill 4624: 1999 PA 191, Effective March 10, 2000

Amends MCL 791.234 and 791.244 to eliminate prisoner's right to appeal parole denials and to change parole board interview requirements for prisoners serving life.

Parole Appeals

234 (9) - eliminates "or denying" and "the prisoner" from definition of which parole board decisions are appealable and by whom. Now says board action in granting a parole is appealable by the prosecutor or the victim.

Lifer Interviews

234 (6) - excludes prisoners serving long indeterminate terms from coming within parole board's jurisdiction after serving statutorily specified number of years as parolable lifers do

(A) mandates that lifers be interviewed upon completing 10 calendar years of sentence but eliminates requirement that they thereafter be re-interviewed every 5 years. Subsequent interviews are "as determined by the parole board" and are to be in accordance with procedures described in new section (7). Change applies retroactively.

(B) requires parole board to review file of parolable lifer after 15 calendar years and every 5 years thereafter. Prisoner must get 30 days notice before file review occurs and may submit written statements or documentary evidence for board's consideration.

(C) restates requirement that lifer parole not be granted until after a public hearing has been held to say that "decision to grant or deny parole…shall not be made" until after public hearing. [addresses argument that decision not to proceed to public hearing is effectively a decision to deny parole and should be reviewable to same extent as decisions denying parole generally]

234 (7) - requires lifer interviews to meet two conditions:

(A) prisoner to get 30 days written notice

(B) prisoner may be represented at interview by someone other than another prisoner and may present relevant evidence in favor of holding a public hearing - no entitlement to appointed counsel [no requirement that lifers, like other prisoners, receive notice of issues and concerns to be discussed at interview or that they receive a written explanation of reasons for parole denial]

244 (1) - eliminates requirement that nonparolable lifers be interviewed every five years after mandatory interview conducted at 10 years.

House Bill 4475: 1999 PA 201, Effective March 10, 2000

Amends Persons with Disabilities Civil Rights Act, MCL 37.1301, to exclude prisoners (other than pretrial detainees) in state prisons and county jails from coverage.

1301 - redefines term "public service" in act to state: "except that public service does not include a state or county correctional facility with respect to actions or decisions regarding an individual serving a sentence of imprisonment. [presumably applies to privately operated facilities under government contract]

Enacting section 1 states: This amendatory act is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision in *Doe v Department of Corrections*, 236 Mich App 801 (1999). This legislation further expresses the original intent of the legislature that an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act.

House Bill 4476: 1999 PA 202, Effective March 10, 2000

Amends Elliott-Larsen Civil Rights Act, MCL 37.2301, to exclude prisoners (other than pretrial detainees) in state prisons and county jails from coverage.

2301 - redefines term "public service" in act to state: "except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment. [presumably applies to privately operated facilities under government contract]

Enacting section 1 states: This amendatory act is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision *Neal v Department of Corrections*, 232 Mich App 730 (1998). This legislation further expresses the original intent of the legislature that an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act.

CAPPS TO HOLD FIRST CONFERENCE

The Citizens Alliance on Prisons and Public Safety (CAPPS) will hold its first annual conference in Lansing on October 30, 2000 in conjunction with the Michigan Council on Crime and Delinquency (MCCD). Marc Mauer, of the Washington D.C.-based Sentencing Project, will be the keynote speaker. The focus of the day-long event will be the factors driving Michigan's prison expansion and alternative ways to address them.

CAPPS, a coalition of organizations and individuals concerned with the social and economic cost of prison expansion, grew out of a forum sponsored by the Prisons and Corrections Section in 1998. A membership meeting will be held during the conference at which a board of directors will be elected and an action agenda will be adopted. Dues are $100 for organizations and $25 for individuals. For more information, contact CAPPS at 115 W. Allegan, Suite 325, Lansing, MI 48933; Phone/Fax: (517) 482-7753; E-mail: CAPPS@voyager.net

Prisons & Corrections Section
Council Election

The section will be holding an election at the State Bar of Michigan Annual Meeting to fill four council seats for three-year terms beginning in the Fall of 2000. We are a working council and applicants must be prepared for the responsibilities of the office. All interested attorneys are encouraged to run for these offices. Council members must be members of the section and must be available to attend meetings on the first Saturday of every month in Lansing. To be placed on the ballot, you must provide all of the following information to the Election Qualifications Committee on or before September 14, 2000 (please print or type legibly):

Name and P-Number: _____

Mailing Address: _____

City/State/Zip Code _____

Daytime Telephone: _____

Current fields of practice/employer: _____

Professional affiliations: _____

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

_____

_____

_____

_____

_____

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

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

The election will take place at the Section's annual meeting on Thursday, September 21, 2000 at 2:00 PM, at the Cobo Center, Room W2-79 (Level 2), Detroit. All candidates should plan on attending the meeting.

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

PRISONS & CORRECTIONS SECTION ANNUAL MEETING

Our section will hold its annual meeting on Thursday, September 21, 2000 during the State Bar of Michigan annual meeting in Detroit. The location is Cobo Center, Room W2-79 (Level 2). The business meeting, including the election of new council members, will begin at 2:00 pm. The program will begin at 2:15 pm.

PAROLABLE LIFE:
IS IT PAROLABLE OR IS IT LIFE?

Hundreds of Michigan prisoners were sentenced to parolable life terms, decades ago, by judges who expected them to serve 12 or 14 years. These judges, and the prosecutors and defense attorneys who negotiated plea bargains, understood that the defendant would become eligible for parole after 10 years, and that release would depend on the individual prisoner's actual progress. Today, however, the rules have changed. The current parole board declines to release these lifers, regardless of their achievements, on the premise that "life means life."

Is this situation just an acceptable byproduct of the fact that an agency with broad discretion may change its policies over time? Or is the board undermining the functions of other criminal justice professionals, and unfairly and unnecessarily incarcerating prisoners who could safely be released? And what, if anything, should be done?

Panelists who will address these questions include:

Anthony James	Former lifer, recently released after being resentenced to effectuate the intent of the sentencing judge
Hon. Vera Massey Jones	Wayne County Circuit Judge
Stephen Marschke	Chairperson, Michigan Parole Board
Steven Fishman	Detroit Defense Attorney
Brian Mackie	Washtenaw County Prosecutor