

PRISONS AND CORRECTIONS FORUM

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

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Mental Health Programs in Michigan Prisons

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Presentation to the Prisons and Corrections Section

State Bar of Michigan

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Before the Corrections Mental Health Program (CMHP)

I have observed mental health care from my vantage point in the Ombudsman's Office since 1982. At that time, the Michigan Department of Corrections (MDOC) provided for its own mental health services through directly employing psychiatrist and psychologists. However, the MDOC was really poorly equipped to manage the mentally ill. The primary emphasis seemed to be more control than care.

The closure of the majority of Michigan's mental health institutions in the 1980's through the 1990's included mainstreaming mentally ill patients into communities. Community services did not appear to be able to absorb this increase in patients. Mentally ill patients who were not able to get care, were not well regulated, who self-medicated and/or suffered from co-occurring substance abuse issues often ended up in our legal system. Our legal system was not well-equipped to respond to this group either and many offenders ended up in the prison system during this time. Our corrections system was also poorly situated to provide services to large numbers of mentally ill offenders, even though it was quickly becoming the de facto mental institutions for the State.

The majority of prisoners considered or identified as mentally ill were usually placed at the Riverside Correctional Facility in Ionia. This facility was originally a state mental institution that had been closed for that purpose and transferred to the MDOC to operate as a prison for offenders with mental health and protection issues. Thorazine was one of the primary medications of choice in those days. It was fairly common to find prisoners shuffling through the hallways or locked in their cells in an almost catatonic state, a common side effect of this medication.

Many corrections staff, with essentially no training in mental health issues, often viewed prisoner behavior as manipulation rather than mental illness. The trend was to view this behavior as a choice and it was typically addressed by punishing the behavior through the misconduct process. It was not uncommon for these prisoners to find themselves in segregated housing units for disciplinary reasons, often for extended periods of time lasting from several months to several years. Due to a 'get tough on crime' mentality prevalent at the time, Corrections employees who suggested these prisoners needed care rather than punishment were often ostracized creating a disincentive to look for other ways to address negative behavior. In addition to

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that issue, there has been a longstanding mistrust between custody and health care staff, whether medical or mental health professionals. Custody almost always trumped treatment then, and still does to this day.

Advent of the CMHP

In 1985, the MDOC entered into a consent decree as the result of a federal class action lawsuit called *USA v Michigan*. Mental health services and medical care were just two components of that case, which also covered a variety of conditions issues within the state prison system. Although the MDOC did not really appear to embrace the changes to mental health services that were a part of that negotiation, it ultimately agreed to contract with the Michigan Department of Mental Health (presently called the Department of Community Health) as part of its resolution for the mental health portions of that case. That was the beginning of the CMHP. This format was also incorporated into the mental health portion of another class action federal consent decree in 1985 called *Hadix v Johnson*, which involved numerous conditions issues at the Jackson prison complex. The CMHP created a bifurcated system that somewhat arbitrarily divided mental health services between MDOC's Psychological Services Unit (PSU) and DCH's Corrections Mental Health Program (CMHP).

The MDOC's PSU was responsible for providing initial psychological evaluations and program recommendations for newly committed male prisoners to the MDOC's Reception and Guidance Center, which is the initial intake for all newly incarcerated male prisoners and parole violators. PSU also provided emergency crisis intervention, identification and referral of prisoners with serious mental illness or major mood disorder to CMHP staff, group psychotherapy for sex offenders and assaultive offenders, segregation rounds, 30 and 90 day evaluations of segregation prisoners not on CMHP caseloads, parole board pre-release screening evaluations, reduced custody screening evaluations, as well as providing evaluations for prisoners charged with major misconducts suspected of having serious mental illness or major mood disorders.

The CMHP, on the other hand, was charged with the responsibility of evaluating and treating prisoners with serious mental illness or major mood disorder on a level of service continuum from the most intensive level of crisis care in the Crisis Stabilization Program, inpatient psychiatric hospital care, rehabilitative treatment, Residential Treatment Programs and Outpatient Treatment.

The former Huron Valley Men's Facility near Ypsilanti was the site chosen to house the new CMHP. This was previously a level IV correctional facility. The MDOC has since renovated a portion of the old Maxey Boys Training School in Whitmore Lake for an acute inpatient facility, which is now called Woodland Correctional Facility. Other mental health units have been placed at numerous prisons located throughout the state.

In practice, it appears that this bifurcated system actually allowed large numbers of prisoners with serious mental illness and major mood disorders to fall between the cracks in this continuum of services. There appeared to be little coordination of services between the PSU and CMHP clinicians. Many prisoners seemed to be placed in administrative segregation units, where clinicians made routine rounds twice a month and a psychological check list review was completed every 30 to 90 days, rather than real mental health services.

Current Available Programming

In late 2010, the Michigan Legislature called for the CMHP to be moved back under the auspices of the MDOC. The Legislature felt that the dual system in place was not functional or manageable, allowing for too many prisoners to fall through the cracks. The merger began in early 2011 and all CMHP staff are now under the MDOC. However, there appears to be much work left to be done to consolidate a single set of policies and protocols for managing mentally ill offenders.

Mental health programming currently available within the MDOC consists of:

- Acute Inpatient
- Rehabilitation Treatment Services (RTS)
- Crisis Stabilization Program (CSP)
- Residential Treatment Program (RTP)
- Secure Status Residential Treatment Program (SSRTP)
- Adaptive Skills Residential Program (ASRP) (formerly called the Social Skills Development Unit)
- Outpatient Mental Health Treatment (OPT)
- Secure Status Outpatient Treatment (SSOPT)

Acute Inpatient

The Acute Inpatient for male prisoners is located at Woodland Correctional Facility (WCC) in Whitmore Lake. The female Acute Inpatient facility is found within the only female prison in Michigan at Women's Huron Valley near Ypsilanti.

The target population for Acute Inpatient status are seriously mentally ill prisoners with prominent primary symptoms of psychiatric disorder, such as psychosis, suicidality, and extreme agitation resulting from onset of new psychiatric illness, relapse, or deterioration from a previous stable condition.

These facilities consist of dedicated housing units where prisoners are housed in single cells. Acute care prisoners must be escorted by custody staff anywhere outside of the unit and are not considered general population status. Most acute care prisoners are discharged and transferred to another level of care within two to four weeks.

The mission of Acute Inpatient status is intensive assessment and treatment, resulting in rapid disposition for acute mentally ill prisoners. Services in this setting are more comprehensive than those typically available else-

where in the CMHP. Patients are followed by a multidisciplinary team of mental health and correctional professionals to provide mental health care and program. Programming emphasizes intensive diagnostic assessment, stabilization with psychotropic medications as needed, and brief psychotherapy. It is intended to offer a protective environment to facilitate stabilization of acute psychiatric disorders.

Acute inpatient services include an initial psychiatric evaluation within 24 hours of admission, a comprehensive assessment including a psychological evaluation and testing, a written inpatient treatment plan, psychotropic medications, crisis intervention, psychotherapy, activities therapy, scheduled daily activities that contribute to a therapeutic environment, and discharge planning.

Rehabilitation Treatment Services (RTS)

The targeted population for RTS are male and female prisoners with severe and chronic mental illness. These are typically prisoners with treatment resistant primary symptoms of mental illness who exhibit significant impairment in social skills and a limited ability to conduct activities of daily living.

RTS has dedicated housing units, prisoners confined to single cells unless otherwise recommended by the treatment team, and continuous programming during the day accompanied by less intensive programming in the evening and on weekends. RTS units are presently found at the Macomb Correctional Facility (MRF) in New Haven and WCC.

The mission of RTS is to provide inpatient treatment programs for chronically mentally ill offenders in need of this structured environment. Programs are designed to improve psychiatric symptoms and daily functioning. The RTS is staffed with psychiatrists, nurses, social workers, psychologists, and activity therapist. On-site nursing and corrections staff are assigned on every shift every day, with access to psychiatrists at all times.

In addition to the elements of Acute Inpatient unit described above, depending on the length of stay RTS may also include specific rehabilitation programs such as medication and symptom management, cognitive and social skills training, and anger and stress management, Treatment of Dual Diagnosis (substance/alcohol abuse in the context of mental illness), Sex Offender Treatment and Assaultive Behavior Treatment, Symptoms and Medication Management, Creative Arts/Leisure Skills Development,

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Anger and Stress Management, Family Education/Interventions, Behavior Modification, and Self Help Support Groups such as Schizophrenics Anonymous, Alcoholics/Narcotics Anonymous

Crisis Stabilization Program (CSP)

CSP targets prisoners whose symptoms and behavior initially appear to be indicative of a mental health crisis with a need for immediate intervention and further evaluation. The crisis may be an urgent or potentially emergent mental illness and/or possible high risk of suicide. The patient either has a serious major mental disorder or is suspected of suffering from a serious major mental illness, and a Qualified Mental Health Professional (QMHP) evaluation reveals the patient has symptoms indicative of major decompensation or is at a high risk for suicide.

CSP has dedicated housing units located at WCC and Marquette Branch Prison (MBP) for Upper Peninsula prisons. The maximum length of stay is usually seven days.

It is the mission of CSP to provide prisoners with a short-term crisis stabilization service whose behavior is grossly inappropriate due to mental illness and demonstrates a high risk for immediate danger to self or others or destruction of property. The CSP uses solution-focused treatment to allow quick re-establishment of a more stabilized coping behavior so the prisoner can be reintegrated into the prison general population.

CSP uses crisis mental health intervention, brief solution-focused therapies and/or counseling, psychopharmacological interventions, management observation or suicide interventions, interpersonal interventions to modify attitudes and behavior, brief psychoeducational interactions such as problem solving and self-care, and strategies for thinking productively. Triage, treatment, discharge and placement planning for and appropriate level of care begins upon admission. Nursing care is available in these units including the administering of medications, monitoring behavior and other health care services.

Residential Treatment Program (RTP)

RTP focuses on mentally ill prisoners whose primary symptoms of mental illness have begun to remit, but who continue to demonstrate significant impairments in social skills and limited ability to participate independently in activities of daily living. These patients cannot function adequately in the general population without significant supports and modified behavioral expectations.

RTP's consist of dedicated single-cell housing units. There is a level one and level two RTP at The Handlon Correctional Facility (MTU). Level four RTP's are located at the Harrison Correctional Facility (ARF) in Adrian and MRF. The RTP unit at WHV houses female patients of every custody level.

A RTP units housing 70 to 85 patients typically consists of a unit chief, psychiatrist, QMHP's (which may be a psychologist, clinical social worker, registered nurse or clinical nurse specialist), secretary, health records technician, activity therapists (selected from occupational therapists, recreational therapists, or music therapists). Mental health nursing coverage in the RTP is required for morning and afternoon shifts, inclusive of primary program hours.

RTP units employ psychotherapy, psychopharmacological interventions, activity therapy, case management, crisis intervention (including the use of in-unit observation cells and access to CSP when necessary), psychosocial rehabilitation intervention such as medication management, symptom management, cognitive skills training, social skill training, anger management, and stress management, cognitive and behavioral therapy, treatment of dual diagnoses (Substance Abuse and/or Alcohol Abuse in mental illness), as well as preparation and planning for general population reintegration.

Secure Status Residential Treatment Program (SSRTP)

SSRTP is designed to provide an alternative treatment option for prisoners who otherwise meet admission criteria for an RTP, but whose pattern of assaultive and/or destructive behavior is clinically assessed as related to a personality disorder rather than being a product of major mental illness and the prisoner is unresponsive to the usual therapeutic and management interventions available in the RTP setting.

SSRTP is a dedicated housing unit at ARF with patients in single cells. There are four phases for SSRTP and the time frame for participation in each is dependent on individual progress. Phase I has the most restrictive custody requirements (i.e. full restraints when moved out of cell), with increasing freedom being granted as the prisoner progresses. When a prisoner enters Phase II, a minimum of six months is required for successful completion of the entire four-phase program. Those who successfully complete the program will be moved to regular RTP program status. Prisoners determined to be unresponsive to SSRTP interventions, may require that their mental health treatment services be provided in a segregation setting.

The primary goal and treatment focus of SS RTP is to increase the prisoner's ability to control his or her behavior, thus permitting a transition to regular RTP programming with a greater emphasis on psychosocial rehabilitation.

SS RTP operates under the assumption that frequent and intensive individual and small group interventions by both mental health and corrections staff will be required due to the disruptive nature of the target population. Treatment and management plans often require frequent review and modification. Restrictions on prisoner movement will result in the need for custody staff to provide escort and monitoring during program activities, resulting in the need for more custody staff than would normally be required in a regular RTP unit.

Adaptive Skills Residential Program (ASRP)

The target population for the ASRP are prisoners with mental retardation, dementia and other severe chronic brain disorders (acquired after age 18 as a result of brain injury due to medical conditions, trauma or toxins) with moderate to substantial functional limitations, pervasive development disorders (i.e. Autism, Asperger's), and other moderate to severe development disorders (i.e. manifested before age 18, characterized by substantial functional limitations).

Prisoners are housed in a dedicated unit and placed in single or double cell situations depending upon their ability to cope with a roommate. MTU has a level two ASRP unit, and a level four ASRP unit for higher security prisoners is located at the St. Louis Correctional Facility (SLF).

The mission of ASRP is to improve the functioning and self-management of prisoners with developmental disabilities so they can adapt to the prison setting, thereby decreasing the likelihood of being victimized, becoming disruptive, or engaging in behavior which could result in a reclassification to administrative segregation, and to prepare them for community re-entry.

Many individuals with developmental disabilities have difficulty comprehending and responding to instructions, a low frustration tolerance, impulsivity, and aggressive behavior that could occur as a result of limited communication skills, misinterpretation of social cues, a sense of being threatened, or undeveloped concrete logic. ASRP uses a range of behavioral techniques including behavior reinforcement schedules, visually enhanced communications, and social skills training. Treatment is conducted in clear, simple language, giving the prisoner additional time to learn and incorporate behavior changes and responses. Staff are trained to redirect and intervene in a calm manner. Extra care is taken to prevent these prisoners from being ridiculed or preyed upon by other prisoners.

ASRP services include assistance with activities of daily living, social skill activities, leisure, fitness, wellness and recreational activities, psychotherapy and psychopharmacological intervention when indicated, case management, crisis intervention including the use of in-unit observation cells, psychoeducational interventions such as medication and symptom management, cognitive and social skills training, anger and stress management, self care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. Cognitive therapy, psychotherapy and counseling are provided in group and individual settings. Behavioral reinforcements can be used to bring about desired changes in behavior. Such reinforcements may include praise for positive behavior, personal items such as stationary or use of CD or radio for a prescribed amount of time, additional yard or day room time, coffee, tea, small edible items such as hard candy or popcorn. Treatment of Dual Diagnosis (Substance Abuse and/or Alcohol Abuse and developmental disability) is also provided.

Outpatient Mental Health Treatment (OPT)

Prisoners placed on OPT status usually have moderate functional impairment due to serious mental illness or serious mental disorders, but can care for their basic needs and live in the general population setting. They normally receive treatment by visiting outpatient therapists in their offices for group, individual therapy or case management services.

Level one OPT units are found at MBP, ARF, MRF, MTU, WHV, Pugsley Correctional Facility (MPF), Carson City Correctional Facility (DRF), Bellamy Creek Correctional Facility (IBC), Ionia Correctional Facility (ICF), Cotton Correctional Facility (JCF), Lakeland Correctional Facility (LCF), Michigan Reformatory (RMI), and Ryan Correctional Facility (RRF). Thumb Correctional Facility (TCF) in Lapeer has OPT for youthful offenders. Level two OPT prisoners are housed at ARF, DRF, IBC, ICF, JCF, LCF, MRF, MTU, RMI, RRF, TCF, WHV, Kinross Correctional Facility (KCF), Brooks Correctional Facility (LRF), and Chippewa Correctional Facility (URF). Level four and five OPT prisoners are located at LRF, MBP, SRF, URF, DRF, IBC, ICF, JCF, MRF, RMI, WHV, and Oaks Correctional Facility (ECF).

OPT patients are typically served by a psychiatrist, psychologist, clinical social worker, clinical nurse specialist or psychiatric nurse and a secretary. The average active treatment caseload is 130 to 160 prisoners. OPT staff usually provide services between the hours of 8:00 a.m. to 4:00 p.m., Monday through Friday, but 24-hour coverage for emergency services is provided.

OPT includes psychiatric evaluations and individual psychotherapy, group psychotherapy (which is the preferred

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mode of therapy), psychopharmacology intervention, case management, crisis intervention including the use of observation cells and access to inpatient services, psychosocial rehabilitation intervention (i.e., medication and symptom management, cognitive, social, and problem solving skills training, anger and stress management), reintegration and preparation of a relapse prevention plan for discharge from prison for individuals with serious mental illness.

Secure Status Outpatient Treatment (SSOPT)

SSOPT was designed for prisoners classified to administrative segregation for institutional reasons to provide prisoners with an OPT level of care who are clinically stable, have a serious mental illness, with relatively remitted symptoms. SSOPT is designed to provide a secure and safe alternative treatment option for prisoners with a major mental illness who otherwise functionally meet admission criteria for an OPT and who would be in Administrative Segregation because of behavior that is considered a threat to safety and security of staff or other prisoners. Prisoners are in the SSOPT unit because of assaultive, disruptive or unmanageable behaviors.

SSOPT prisoners are housed in a dedicated housing unit at ICF. Prisoners who enter Phase IV are moved to a general population cell in a transition housing unit. Consideration for reintegration into the general population begins after 60 successful days at Phase IV.

Privatization of mental health services

Both MDOC and DCH (while it operated the CMHP) have had difficulties filling psychiatric positions at state correctional facilities. It is my understanding that there were two primary factors for this problem—the salaries the State offers could not compete with the private sector and the location of the prisons, many of which are in outstate areas away from the major population centers or in the Upper Peninsula. As a result, the decision was made to contract with a private vendor to staff these areas.

The private vendor has also experienced difficulty filling many of these vacancies. Presently, a mixture of telemedicine and psychiatric staff making monthly visits to some of the outlying facilities has been incorporated to provide services.

The MDOC Director has gone on the record with concerns about the wide array of services the MDOC has taken

on that are outside its core mission of providing secure correctional facilities to house offenders. The Director indicated those services include mental health, medical care, and education. Additionally, the Legislature has instructed the MDOC to obtain Requests for Proposal (RFP) from private vendors for mental health services. The RFP is now with the Department of Technology Management and Budget. It is unclear when it will be submitted for bids.

Conclusion

The Michigan corrections system has struggled with the management of mentally ill offenders for many years. Although treatment models seem to be better now than they were for many years, there still appears to be room for improvement.

There still seems to be a question among CMHP clinicians about which prisoners need mental health treatment versus those who don't. It should be recognized that this is no easy task. Prisoners suffering from mental illness can be manipulative as well as mentally ill. Manipulation is sometimes a manifestation of mental illness. A dilemma with having a two-label mindset of mental illness versus manipulation is that prisoners determined to be manipulative rather than mentally ill often end up being disciplined as a result of their behavior even if they also need treatment. This can result in a cycle of punitive behavior management that frequently does not really have the desired correction of the behavior causing long periods of segregation or other punishments. There is also evidence suggesting that punitive behavior for the mentally ill, particularly isolation through the use of segregation, actually exacerbates mental illness and can even cause mental health issues.

The length of time we incarcerate offenders is directly related to this cycle of punishment versus treatment. If the punishment model persists over providing treatment for mentally ill offenders, the Parole Board will be less inclined to favorably consider those prisoners for release due to their behavioral histories in the prison setting. It becomes difficult for the Parole Board to justify releasing an offender who has a history of institutional misconduct and lengthy confinement in segregation. This affects a considerable number of offenders, if the study conducted by U-M is accurate stating that approximately 20% of the prisoner population suffers from mental illness. ■

The Practical Barriers to Legal Access in Michigan Prisons

By Raymond C. Walen, Jr.

“The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of an orderly government.” *Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907).

The Constitution guarantees everyone the right to access to the courts.¹ As to prisoners, the state has three obligations: to provide adequate law libraries; to assist those who need help to present their claims to the courts; and to not obstruct access. Unless you have lived or worked in a prison, it is virtually impossible to understand the obstacles to prisoners exercising their right to access the courts. Many are due to the fact of imprisonment, some are personal, and some are intentionally imposed by one or more of the three branches of government for a variety of reasons.

The fact of imprisonment means that one cannot visit and interview witnesses or go to the county law library to do research, Kinko's for copies, or to the courthouse to file papers. These restrictions are compounded by personal limitations, including low literacy rates; high rates of mental health disorders and substance abuse problems; and indigency.

Indigency

Most prisoners earn less than \$25 per month – about \$1.14 per day, a rate that has not increased since 1991. Although some prisoners receive money from family and friends, it is usually not a lot. In 2001, then-MDOC Director William Overton reported that fewer than one-third of Michigan's prisoners had more than \$60 in their prison accounts.

Mental Health Disorders and Substance Abuse

More than half of Michigan's prisoners reported a history of drug abuse before prison; forty percent reported a history of alcohol abuse; and nearly half have a history of mental health treatment before or in prison. Dr. Judith Kovach has reported that thirty-five percent of Michigan's prisoners have serious mental health problems.² Prisoners with serious mental illness are disproportionately represented at higher, more punitive security levels because of their tendency to “act out.” This results in the further restrictions that come with higher security housing – less out-of-cell time, less telephone access, access to fewer programs, and restrictions on visits to non-contact visits (behind glass).

Literacy

Michigan's Citizens Alliance on Prisons and Public Spending (CAPPS) reports that nationwide prisoners' average reading level is at the fifth grade.³ Low literacy levels in prison are not new, and they are a serious impediment to court access. One court found that the average prisoner at the State Prison of Southern Michigan in the 1980s read at a sixth grade level, and that to understand typical Michigan legal materials requires a reading level higher than 12th grade.⁴

Prisoners without a high school diploma or a GED, and those in segregation, are eligible for assistance from a “Legal Writer.” Legal writers are prisoners who have been selected and trained to draft an initial pleading to courts in post-conviction and civil rights cases, including prison conditions. They must have a high school diploma or GED and, once selected, they take a two- to three-week class on post-conviction and civil rights law and procedure; the class does not cover investigation. They work from documents the prisoner provides. When they follow the procedure, their work is e-mailed for review by a contract attorney. The attorney reviews only the pleading prepared by the legal writer, not any of the source documents, such as court transcripts, police reports, or medical records.

Incoming Michigan prisoners as well as those in MDOC education programs take the Test of Adult Basic Education (“TABE test”). It measures reading, math, language, and spelling abilities; the results are reported in a grade level equivalent. The lowest possible score is zero, the highest is 12.9. The language section of the TABE “measures skills needed to communicate effectively.” A 2002 review of TABE test scores of prisoners with a GED or high school diploma found that – despite their diploma or GED – the thousands of prisoners tested over the preceding ten years averaged below a ninth grade reading level and below a seventh grade language level.

Prisoners who have a GED or high school diploma but are unable to prepare their own papers are forbidden to

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receive assistance with their legal work from another prisoner. For more than twenty years, the MDOC had allowed “Legal Assistance Agreements” between prisoners. But in 2006 it forbade prisoners not eligible for the legal writer program to help one another.

Governments, like people, follow most of the rules most of the time. It is the times they do not that causes problems. For those who need help but are not eligible for legal writer assistance, the elimination of legal assistance agreements appears to be unconstitutional. In *Johnson v. Avery*, 393 U.S. 483 (1969), the Supreme Court held a similar ban in Tennessee was an unconstitutional denial of access to courts. The Sixth Circuit, in *Knop v. Johnson*, 977 F.2d 996, 1006 (6th Cir. 1992), held, “to the extent that inmate writ writers, or jailhouse lawyers, are not adequately filling the needs of prisoners who claim they are being held unconstitutionally, the state must furnish, at a minimum, the functional equivalent of jailhouse lawyers who are up to the job.” Four years later the Supreme Court, in an opinion by Justice Scalia, held that when any prisoner shows that an actionable claim relating to fact or conditions of confinement “which he desires to bring has been lost or rejected, or that presentation of such a claim is currently being prevented, because the capability of filing suit has not been provided, he demonstrates that the State has failed to furnish *adequate* law libraries or *adequate* assistance from persons trained in the law.” *Lewis v. Casey*, 516 U.S. 804 (1996) (emphasis in original; citations and internal quotations omitted).

For prisoners with an education but without legal skills, it is impossible to learn how to investigate and prepare post-conviction pleadings within a reasonable time. Higher education, including the college paralegal programs in place through the 1980’s and 1990s, has been eliminated in the MDOC.

Institutional Barriers

Access is equally challenging for those with legal skills. In the 1985 settlements in *Hadix v. Johnson*, U.S. District Court, E.D. Mich. No. 80-cv-73581; *Knop v. Johnson*, U.S. District Court, W.D. Mich. No. 84-CV-651; and *U.S.A. v. Michigan*, U.S. District Court, W.D. Mich. No. G84-63CA; the state agreed that the prison law library collections would continue to include the books listed in the Michigan Department of Corrections’ Minimum Collection for Michigan Prison Law Libraries.

The 2003 settlement in *Cain v. MDOC*, Ingham County

Circuit Court No. 88-61119-AZ, included the same case reporters in the minimum collection. It updated the list and added publications by the Michigan Institute of Continuing Legal Education (ICLE); the Michigan Court of Appeals; books on federal habeas corpus and prisoners’ rights; and federal standard jury instructions for prisoner civil rights cases.

In 2005 and 2007, the MDOC slashed the list of books required in Michigan prison law libraries. Books cut from the list included many that the MDOC previously agreed to keep in some or all of the settlements. They included Michigan Supreme Court Reports and Michigan Appeals Reports before 1986; Federal Reporter Second Series, Federal Supplement and Supreme Court Reporter before 1970; and Shepard’s Citations for those volumes. They also cut Michigan Court Rules Practice; the ICLE books; the Criminal Law Reporter; the Michigan Department of Corrections Time Computation Manual; and the federal standard jury instructions for prisoner civil rights cases.

Once these volumes were no longer included in the policy as part of the minimum law library collection, many prison “librarians,” channeling the “firemen” in Ray Bradbury’s *Fahrenheit 451*, raced to the incinerators with tens of thousands of dollars worth of books that were “no-longer-required”. As a result, prison law libraries no longer have annotated court rules or rules of evidence, or many cases one might need, including:

- *Barber v. Page*, 390 U.S. 719 (1968) (confrontation);
- *Brady v. Maryland*, 373 U.S. 83 (1963) (suppression of exculpatory evidence);
- *Bruton v. United States*, 391 U.S. 123 (1968) (confrontation);
- *Douglas v. California*, 372 U.S. 353 (1963) (counsel on appeal of right);
- *Harris v. Nelson*, 394 U.S. 286 (1969) (habeas corpus discovery);
- *Johnson v. Avery*, 393 U.S. 483 (1969) (access to legal assistance);
- *Napue v. Illinois*, 360 U.S. 264 (1959) (false evidence);
- *People v. Cherry*, 393 Mich. 261 (1974) (failure to exercise discretion);
- *People v. Ginther*, 390 Mich. 436 (1973) (ineffective assistance of counsel);
- *People v. Tanner*, 387 Mich. 683 (1972) (two-thirds sentencing rule); and

- *Lamb v. Bureau of Pardons & Paroles*, 106 Mich. App. 175 (1981) (habitual offenders).

The State of Michigan Library will provide copies of cases, rules and statutes that are not part of the prison library collection, but the cost is prohibitive – a \$5 minimum charge per item with a maximum of 25 pages per item – is about a week's pay for most prisoners. Additional pages are billed at \$0.20 each.

The prisoner benefit fund at each prison may buy books for the law library that are not on the required list, but that requires the librarian's approval. At least one librarian has refused to approve the benefit fund's purchase of Michigan Court Rules Practice, Evidence, a three-volume set of annotated rules of evidence, for the prison law library collection.

In the early 1980s, the law libraries at Marquette and Jackson prisons had duplicate sets of materials, made from advance sheets and donations, for lending on requests from segregation but that is no longer the case. At most prisons, a single law library collection will serve all general population levels as well as segregation prisoners. Books sent to the segregation cell blocks may never come back to the law library. Sometimes the loss is due to a prisoner refusing

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Attorney-Prisoner Communications

Legal Mail

Prisoners' outgoing mail to attorneys, courts, parties to lawsuits, court reporters, and legal service organizations is still unlimited. The prisoner must fill out an Expedited Legal Mail disbursement form and give it and the mail to a staff member before 10:00 a.m. on a business day. The staff member will verify that it is going to one of the approved entities, sign his or her approval on the form, and drop it off at the prison mail room to be metered and placed in the outgoing mail. The prisoner will receive a receipt showing the date and time the mail was given to the staff member mailing. If a prisoner does not have the money for postage, it will be loaned and must be repaid at a rate of all income over \$10 per month, until it is paid off. In at least one instance, prison staff refused to recognize Cooley Law School's Innocence Project as a legal service organization under the policy. Prisoners still report disputes about whether a law school clinic qualifies as an attorney or legal service organization under the policy.

For incoming attorney mail, prisoners can request "special handling", in which case it will be logged, opened in the prisoner's presence, and the prisoner will sign a receipt showing the date it was delivered. The request for special handling can be made at intake at each facility, or at any time after a transfer by writing to the prison mail room. To be given special handling, the mail must be clearly identified as coming from "an attorney or law firm, a legitimate legal organization, a non-prisoner paralegal working on behalf of an attorney law firm or legal service organization, the Department of Attorney General, a prosecuting attorney's office, a court, a clerk of the court, or a Friend of the Court office." For example, mail from an attorney or law firm should contain the attorney's or firm's name in the return address and be clearly marked to indicate that it is confidential attorney-client correspondence.

With the recent cuts to non-custody staff, the mail rooms at some prisons are not open every weekday to process mail. For this reason, prisoners should send outgoing mail via the Expedited Legal Mail system and sign-up for special handling of incoming mail so there will be a record of when they actually sent and received the mail.

Telephone Calls with Attorneys

Prisoners' telephone calls are monitored and recorded, except for those made to attorneys and "legitimate legal service organizations," public officials who have made a written request that calls to them not be monitored or recorded, the Sexual Abuse Hotline, and Crimestoppers. To make attorney calls that are not monitored or recorded, the prisoner must fill out a CAJ-370, Telephone Agreement and Number List-Monitor and Record Form, with the attorney's name and telephone number, and his or her P-number. Prison staff then verify the attorney's business number through the Michigan Bar Journal Directory or the State Bar of Michigan website, and forward the completed form to the telephone vendor for entry as a "private" number that is not monitored or recorded. An attorney's home number will be entered as confidential if the attorney sends the prisoner a letter requesting that the number be added to their list, then forwards the letter with the request to add it on a CAJ-370 form. If the procedure is followed, the list is sent to the telephone vendor within one business day of verification, the vendor adds it and notifies the prison within two business days, and staff notify the prisoner within one business day. However, at some prisons it is rare to receive notification that a number has been entered as non-monitored.

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to surrender the books, sometimes it is because the guards refuse to go get the books when they are due, and sometimes someone destroys them. In any case, the result is the same – the books are not available to anyone else until they are replaced. The law library policy provides that books “that are lost defaced, stolen, or destroyed must be replaced promptly.” The speed with which they are replaced depends on the prison’s librarian and business office. Staff at some prisons replace books immediately; others take months or even years.

Sometimes personality issues interfere with access. Prisoners must send a written request to use the law library, and the librarian is supposed to make sure they are called out to do so. Prisoners report that some librarians won’t put prisoners they don’t like on call for the law library. Some librarians refuse to pick up overdue books in segregation or even to call the segregation cell blocks to have guards pick up overdue books. Sometimes the law library is closed because it is the librarians’s day off and either nobody was assigned to open it or the person who was assigned refused. At one prison, *Gillespie’s Michigan Criminal Law & Procedure* was not updated from 2007 to 2011 because of an issue between the librarian and the vendor.

Prisoners are not permitted the use of computers or have access to word processing software for their personal or legal work. Beginning in 2009, the MDOC banned prisoner purchases of their own memory typewriters, which had been allowed since 1985. Prisoners who already had memory typewriters could keep them, but those without are required to buy typewriters without memory. The cost of the approved non-memory typewriter is over \$200, although brand name memory typewriters are available for less. The non-memory typewriters cannot store a document for editing or print multiple copies. When more than a single copy is needed, photocopies must be purchased, or each copy must be separately typed, letter-by-letter. Photocopies can be expensive because, in 2008, the MDOC doubled the price of photocopies from \$0.05 to \$0.10 per page, even though the actual cost of the copies to the MDOC is under \$0.04 per page. The balance is retained by MDOC. The MDOC’s access to courts policy allows financial loans to photocopy items that must be filed with a court or served on a party to a case. Any copy loan is repaid by a debit to the prisoner’s account each month from all income over \$10 until it is paid in full. However, these loans will not be made if the document “can otherwise be reproduced by the prisoner,” such as the five-plus copies of a Court of Ap-

peals application that must be filed with the Court as well as additional service copies for the parties. As a result, it is not uncommon for a prisoner without the money to pay for photocopies from his own account must type or hand write each page of each copy. Obtaining photocopies can be a problem even when a prisoner has the money to pay for copies. There can be delays if the librarian is not at work and the person filling in does not have access to the account information needed to process copy requests.

While legal research and document preparation are difficult in prison, fact investigation is virtually impossible for prisoners who lack the money to hire a private investigator. The ability to gather information from prison was substantially reduced in the 1990s when prisoners were exempted from the benefits of Michigan’s Freedom of Information Act. As a result, if a prisoner’s lawyer did not obtain and send all the documents on his or her case not generated by courts, such as police reports, forensic reports, and witness statements, the prisoner cannot get them unless he or she has someone outside the prison willing and able to fight through all of the red tape involved in getting the information from the law enforcement agencies through the Freedom of Information Act.

Finding and interviewing witnesses cannot be done from prison. Internet access and telephone books are prohibited, and prisoners are limited to calling 20 telephone numbers. Except for adding, deleting, or changing the number of an attorney or public official, or changing the number of an immediate family member, changes to one’s telephone list can only be made quarterly. Communication by mail is limited. In 2001 the MDOC banned postage stamps in the prisons. In 2003 it rescinded the rule that guaranteed prisoners the right to send unlimited outgoing mail. Prisoners are now limited to buying 20 metered envelopes every two weeks. Visitors are limited to “immediate family” plus ten others, provided that they submit a written application and are approved by the MDOC. The prisoner must also add them to his or her visitor list, and those people who are not immediate family may only be added or changed every six months. Communication between prisoners is limited by the 2004 elimination of prison newspapers and the 2009 ban on mail correspondence between prisoners, except for those who are immediate family or co-parties to pending court cases. A prisoner may write to a prisoner witness in a civil case, but permission may be denied before the case is filed and in cases that are decided on a lower court or agency record. This could result in a

denial of access when a prisoner appellant needs to contact the witness to obtain information needed to support a motion to remand to supplement the record for appeal.⁵ Every prisoner who wants to write to another prisoner must fill out a form that explains why he or she wants to write, and each recipient must be approved by staff at the prison and the MDOC Central Office.

Prisoner Telephone Use

All prisoner's telephone calls must be collect, pre-paid collect, or debit calls. If a law office's telephone company does not have a billing arrangement with the prisons' telephone vendor, currently Public Communications Services, Inc. (PCS), it will be unable to receive collect calls from prisoners and will require that the office establish an account directly with the vendor. This can be done the first time a prisoner tries to call collect. The automated operator will prompt the recipient to "press 5" or dial (855) 466-2832 to set up a prepaid-collect call account. It can also be done at the PCS website, PCSDailyDial.com, which provides three ways of setting up a prepaid PCS "Daily Dial" account: online, automated telephone, or live operator. Money can be added to the account - "recharging" the account, in PCS parlance

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Attorneys should not assume that their numbers have been entered as non-monitored number until the approved form is returned and the prisoner is notified that the number has been added as a non-monitored number.¹ There are also two ways to tell whether a telephone number has been entered as a non-monitored attorney number. The first is the announcement at the start of the call. When a monitored or recorded call is accepted, the voice-over announcement at the start of the calls says, "This call is subject to monitoring or recording." In this case, parties to the call may be waiving rights of privilege or confidentiality. If the call is not monitored, the announcement will say only, "Thank you for using PCS." The second way to know if the telephone number is being properly un-monitored is in the duration of the call. Calls to attorneys are cut off after twenty minutes; all others after fifteen minutes.

The times during which prisoners can use the telephone vary depending on the prisoners' security level and whether they are in general population or some form of segregation; prisoners in lower security levels have more access, those in higher security levels have less. Prisoners in administrative, punitive, or temporary segregation are not allowed to use the telephone unless there is a request by an attorney that the prisoner call him or her. This can be arranged through the office of the Warden. Some institutions require the request in writing.

Attorney-Client Visits

Attorney and their representatives – including paralegals, law students, and investigators – are allowed to visit prisoners during each prison's regular visiting hours. They do not have to be on the prisoner's visiting list. Visits outside normal visiting hours are allowed with the permission of the warden or warden's designee. Visits with prisoners in segregation are non-contact unless the attorney or representative requests a contact visit. It is best to call the prison at least a full day in advance to arrange for the visit to be sure that the visit will be allowed at the requested time, to arrange a contact visit if the prisoner is in segregation, and to be sure that the prisoner will be there at the appointed time rather than transferred or out of the facility on a medical detail.

Before being allowed in to visit, attorneys must present identification including "a valid pictured driver's license, state identification card, military identification card, passport, or other government issued identification card" as well as a state bar card. A non-attorney representative must have photo identification and "a letter on official letterhead from the attorney or law firm" stating that he or she is the attorney's representative acting on the attorney's behalf.

Attorneys and their representatives may bring into the visiting room legal papers, writing pads, pens and pencils, soft bound law books and up to \$25 in change per person to use in the vending machines, up to a maximum of \$60. No other items are allowed without the Warden's approval. Laptop computers and other electronic devices are prohibited, and all items are subject to search. After the visit, attorney and their representative may leave legal documents for the prisoner at the front desk; they will be subject to search and delivered as mail.

Prisoners may bring their legal paperwork to an attorney visit, with prior approval of the warden or the warden's designee.

Endnotes

1 Director's Office Memorandum 2012-12, 2-3, available with MDOC Policies at <<http://www.michigan.gov/corrections>>.

Practical Barriers ...

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- in one of these three ways or by MoneyGram, Western Union, or mailing a money order or cashier's check to PCS, Post Office Box 2868, Mobile, Alabama 36652. According to PCS's website, there is no service fee for "recharging" a "Daily Dial" account by mail and the minimum deposit is \$25. The contract between Michigan and PCS allows a \$3.95 transaction fee each time payment is made by credit card and provides that there is no minimum deposit or service fee.⁶ Prisoners can make debit calls by setting up an account through the prison and can deposit \$10 or more, in \$5 increments.

Prisoner telephone vendors from 1991 through 2007 paid the State a "premise fee" for prisoner telephones that totaled between \$3 million and \$13.5 million annually. Thanks to the work of Michigan Citizens United for Rehabilitation of Errants (MI-CURE) and Michigan's American Friends Service Committee Criminal Justice Program (AFSC), language in the 2007-2008 and subsequent appropriations bills eliminated the premise fees. Legislation now requires that fee schedules for prisoner telephone calls "including rates and any surcharges other than those necessary to meet special equipment costs, be the same as fee schedules for calls placed from outside of correctional facilities."

From 2007 until June 2011, the State was paid nothing from prisoner telephone calls. Collect call rates were \$0.12 per minute for in state calls and \$0.15 for out of state calls; debit calls were \$0.10 per minute in-state and \$0.12 per minute out of state, including all tax. In 2011 the rates nearly doubled, to pay for a "special equipment fund" created under the new telephone contract. Now, in state debit calls cost \$0.18 per minute plus tax, or \$2.88 for a 15 minute call. PCS charges \$0.0343 per minute for in-state calls, with the balance of the roughly fourteen cents for "key word searching" (\$0.0075) and a "special equipment fund" (\$0.1382). Collect and prepaid-collect calls cost twenty cents per minute plus tax. The telephone company charges \$0.0393 per minute for these calls, plus \$0.0075 for "key word searching" and \$0.1532 for the "special equipment fund."

One might assume from the context that "special equipment costs" in the appropriations bills refers to special equipment needed to operate the prisoner telephone system. That may have been the original intent, but in practice it is different. It has become a kind of governmental Christmas club account. The Senate version of the corrections appropriations bills for FY 2012-2013 allows the special

equipment fund to pay for capital outlay and maintenance projects, appropriating over \$17 million to pay for items such as the demolition of the now-closed Camp Brighton, purchasing TASERS, replacing staff personal protection devices, and security cameras for two cellblocks at the Michigan Reformatory. Except for the cameras at Michigan Reformatory, the House version of the bill is the same.

PCS collects a fee for maintaining the special equipment fund that is based upon the number of minutes each month. The State and PCS share the fund in a range from 70/30 to 80/20, with the State receiving the larger share. PCS earns more money for maintaining this fund than it does for its telephone services.

Other Barriers

The executive branch is not solely responsible for prisoners' systemic access to courts problems. In *Hardin v. Straub*, 109 S. Ct. 1998 (1989), the Supreme Court held that M.C.L. 600.5851(1), which tolled the statute of limitations in civil cases for prisoners until one year after their release, applied to civil rights actions under 42 U.S.C. §1983. Michigan's Legislature responded by amending M.C.L. 600.5851(1) to remove prisoners from its tolling provisions; now the imprisoned are governed by the same limitations periods in civil actions as someone who can walk into a lawyer's office and ask for help.

Outside of prison, the law provides for fee waivers for low income people who cannot afford to pay filing fees and court costs. *Boddie v. Connecticut*, 401 U.S. 371 (1971). M.C.R. 2.002(D) and M.C.L. 600.2529(5) provide for waiver or suspension of fees for indigent litigants. In 1997, Michigan's Legislature eliminated fee waivers for prisoners in civil cases. M.C.L. 600.2963 provides that a prisoner who is unable to pay the filing fee and costs when he or she commences a civil action or an appeal must submit a certified copy of his or her prison account, showing the current balance and all deposits and withdrawals in the last 12 months. If the balance in the prisoner's account equals or exceeds the filing fee, he or she must pay the whole fee. If the balance is less than the filing fee, the court must order the prisoner to pay an initial fee in the amount of 50% of the average monthly deposit for the past 12 months, or 50% of the average monthly balance for the past 12 months, whichever is greater. In addition, the court must order the prisoner to make monthly payments on the balance of the filing fee in the amount or 50% of all monthly deposits to his or her account until the fee is paid in full.

Federal law requires payment of an initial partial filing fee of 20% of the greater of average monthly deposits or the average balance for the preceding 6 months, and monthly payments of 20% of all income until the entire filing fee is paid. 28 U.S.C. §1915(b). State and federal courts will issue an order providing the amount of the initial fee and the percentage to be paid in monthly installments.

Michigan's Prison Litigation Reform Act (PLRA), M.C.L. 600.5501, *et seq.*, may be more a barrier than a reform as that term is commonly understood. For example, M.C.L. 600.5507(2) requires a prisoner who files a civil action or appeal to disclose at the time of filing the number of civil actions and appeals he or she has previously filed. If the prisoner "fails to comply" with this disclosure requirement, "The court shall dismiss a civil action or appeal." M.C.L. 600.5507(3). The Court of Appeals holds that the number must be disclosed, "even when the number is zero," and that failure to do so requires dismissal without an opportunity to correct the defect. *Tomzek v. Department of Corrections*, 258 Mich. App. 223, 225 (2003), *lv. denied*, 469 Mich. 1013 (2004). The court dismissed his appeal. The prisoner plaintiff in *Komejan v. Department of Corrections*, 270 Mich. App. 398 (2006), won his suit to correct inaccurate prison records regarding his prior record. The inaccuracy of the prison records does not appear to have been in dispute. Rather than correcting the records, the MDOC appealed on the ground that the plaintiff had not disclosed the number of prior lawsuits, although the number was zero. The Court of Appeals agreed with the MDOC, reversed the circuit court order to correct the inaccurate records, and dismissed his case. At least in this regard the PLRA appears to have superseded the liberal amendment rule of M.C.R. 2.118.

Non-prisoners who apply for leave to appeal in the Michigan Court of Appeals can circumvent the 5-copy rule of M.C.R. 7.205(B)(1)-(2) by electronically filing their applications. Because prisoners are prohibited from having Internet access, they cannot electronically file. They must file 5 copies – no exceptions.

Effective September 1, 2011, the Michigan Supreme Court amended M.C.R. 7.205 to shorten the deadline for seeking leave to appeal in the Court of Appeals from one year to six months. Justice Marilyn Kelley dissented. She wrote, "Michigan's one year timetable is not only appropriate, it is essential." Among other things, she cited the difficulty the shorter deadline would cause for Michigan's

State Appellate Defender Office (SADO) – the undisputed experts on criminal appeals in Michigan. 489 Mich. xxxiv, xxxvii-xxxix (2011). If the shorter deadline is a problem for SADO, with all of its resources and expertise, imagine the challenge incarcerated litigants face to meet the new shorter deadline. ■

List of Related Policies

(available at the MDOC website <<http://www.michigan.gov/corrections>>)

- 04.02.105 Prisoner Funds (eff. 01/01/10)
- 05.03.115 Law Libraries (eff. 11/01/10)
- 05.03.116 Prisoners' Access to the Courts (eff. 07/21/08)
- 05.03.118 Prisoner Mail (eff. 09/14/09)
- 05.03.130 Prisoner Telephone Use (eff. 01/01/09)
- 05.03.140 Prisoner Visiting (eff. 10/01/07)

About the Author

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

Endnotes

- 1 U.S. CONST. amends. I, XIV; U.S. CONST. art IV, § 2 cl. 1.
- 2 *Off The Record*, WKAR-TV, 03/11/12; *see also* Judith Kovach, PhD, Executive Director of the Michigan Psychological Association, "The Impact of Inadequate Mental Health Care in Michigan" (June 24, 2008) Conference Paper for the Michigan Policy Summit on Emerging Trends in Mental Health, Council of State Governments, Lansing, Michigan. Available online at <<http://www.csg.org/knowledgecenter/docs/Mental%20Health%20Summits/MI%20Kovach.pdf>> accessed 2 April 2012.
- 3 *Consensus* (the CAPPs Newsletter) Fall 2011, 2.
- 4 *Hadix v. Johnson*, 694 F.Supp 259, 269 n.7 (E.D.Mich. 1988) *rev'd on other grounds*, *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992); *cert. denied* 13 S.Ct. 1415 (1993).
- 5 MCR 7.105(I) and MCR 7.211(C)(1).
- 6 Contract number 071B1300208 Between the State of Michigan and Public Communications Services, Inc. See <http://www.michigan.gov/documents/buymichiganfirst/1300208_348329_7.pdf>.

Update on Pre-Release Programs

By Jessica Zimbelman

The Ombudsman’s office has seen many complaints regarding access to Sex Offender Programming (SOP) and Assaultive Offender Programming (AOP). In the last year, the Michigan Department of Corrections has made a concentrated effort to reduce the waiting lists for both AOP and SOP. The number of prisoners per group has increased from 13 to 17. For prisoners past their Earliest Release Date (ERD) and within 12 months of their ERD, the MDOC administered the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) evaluation, a core risk assessment tool. If the result was “high” risk for violence, the prisoner remained on the AOP list. If the score was “moderate,” the prisoner would be placed in Thinking 4 Change, a new cognitive restructuring program that teaches offenders problem solving skills with a focus on changing the way they think.

For SOP, the MDOC administered the Vermont Assessment of Sex Offender Risk (VASOR) scale, a risk assessment tool for adult male sex offenders age 18 and older, and COMPAS. If the VASOR score was “low”, and COMPAS violence risk was “low,” the prisoner would receive a STATIC-99¹ assessment, and a psychological evaluation. If the STATIC-99 was moderate or high, the prisoner will be required to take SOP. The grid below details other programming requirements, based on assessment scores.

The need for the psychological evaluation rests in Michigan Statute, M.C.L. 7.10(D)(7), which requires such an evaluation for a sex offender to parole (a SOP termination report is sufficient to meet the statutory requirement if a prisoner takes the full six-month SOP).

An important point to note is that even if the assessments (or the psychological evaluation) for both SOP and

AOP are returned as low risk, the Parole Board can override the results, and request placement in certain programming. Neither the Ombudsman, nor the Legislature, has the ability to challenge the decisions and/or recommendations of the Parole Board.

In April 2012, the MDOC submitted a quarterly report to the Legislature detailing the numbers of individuals waiting for programming. There were 1,107 prisoners within one year of their ERD needing AOP, and 503 past their ERD. For SOP, there were 1,418 prisoners within one year of their ERD needing the program, and 3751 past their ERD.

A new assaultive offender program, the Violence Prevention Program (VPP), is slated to being sometime in the summer of 2012. This should also aid in reducing the waiting lists, as the program becomes available.

It is important for prisoners to understand that the Ombudsman’s office can verify which program they are required to take, if there has been a Parole Board override, etc. However, we cannot determine where a prisoner is on a specific waiting list, and we do not have the authority to move a prisoner ahead on that list. ■

About the Author

Jessica Zimbelman is the Senior Analyst in the office of the Michigan Legislative Corrections Ombudsman.

Endnotes

- 1 The STATIC-99 is a research-derived actuarial risk assessment tool designed to predict sexual recidivism, developed by combining two actuarial risk instruments.

VASOR score	COMPAS Violence Risk Score	Type of Program
Low	Low	STATIC-99/psychological evaluation
Low	Moderate	Thinking 4 Change/psychological evaluation
Low	High	AOP
Moderate	Low/Moderate/High	SOP
High	Low/Moderate/High	SOP

A Fair Chance for Ex-Offenders Through “Ban the Box” Legislation

By Monica Jahner

The negative automatic stereotype that comes with being an ex-offender is the single greatest challenge to successful re-entry after release from prison. Those who want to become productive members of society find this public perception acts as a constant barrier to finding employment by pre-screening them out of the job interview process.

Ex-offenders are effectively denied consideration for employment in the application process when employers placing the question on their job application form that asks “have you ever been convicted of a crime?” Employers will admit that once a potential employee checks the box “yes”, his or her application goes directly into the trash.

This creates a population that is discriminated against before they are even allowed to provide their experience, education or skills. Removing this box and the question from job applications for those jobs that do not bar a prior conviction will at least allow ex-offenders the opportunity to be interviewed, giving the potential employer the opportunity to see what the applicant has to offer. When the interview is complete and a job offer is made, the offender will disclose his or her history, share what led them into the criminal justice system, and allow them to illustrate their motivation to be a good employee.

To provide ex-offenders a fair chance at an interview, the Fair Chance Coalition is promoting state-wide legislation that would remove this question from job applications for work that is not statutorily barred for those with prior criminal records and does not create a threat to the public.

On January 17, 2012, House Representative Fred

Durhal and Senator Burt Johnson announced that they will introduce and sponsor legislation to “Ban the Box” in Michigan. The draft bill is nearly complete and will be introduced as soon as all the language is agreed upon. The draft is consistent with existing “Ban the Box” legislation nationally. Most legislation covers only public employers and their vendors, but some also include private employment. In Michigan there are already four cities that have adopted the policy, Detroit, Saginaw, Kalamazoo, and Battle Creek. The draft of statewide legislation includes both public and private employment and would not apply to employment barred by statute to those with criminal records.

This legislation will be a “win-win” situation for everyone. It allows the ex-offender a better opportunity to become a productive member of society rather than needing food stamps and welfare to survive, and keep them from re-offending. This legislation puts into practice Governor Snyder’s recent message on public safety in which he addressed “smart justice”, acknowledging that skills and employment are key to ensuring safe communities and economic growth. ■

About the Author

Monica Jahner is Director of the Fair Chance Coalition, a 501(c)3 not for profit organization located in Lansing advocating for improvement in state and local laws to increase employment opportunities for individuals with prior convictions. Telephone: (517) 999-2894, email: Banthe-BoxIn2012@gmail.com.

Recent Legislation & Case Updates

Legislation

Private Prisons

On March 7, 2012, the state Senate approved bills (SB 877, 878) that would allow the State to contract with the contractor of the privately owned prison near Baldwin, or any other private corrections contractor, to house inmates if the private contractor will save the State at least 10% on what it would cost to house the prisoners at a MDOC facility. The bills now go to the House, which is considering similar legislation.

Corrections Budget Developments for FY 2012-13

The Michigan Senate has passed its version of the FY 2012-13 Corrections and it has been referred to the House where it was referred to the House Appropriations Committee on April 25, 2012. The Senate authorized a \$60.59 million increase in the Corrections budget, but is \$67.32 million less than the Governor’s FY 2012-13 executive recommendation for the Corrections budget. The House and Senate versions of the FY 2012-13 Corrections budget have

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Recent Legislation and Case Updates

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several differences that will require they be reconciled in a conference committee. Some of the differences:

- **Closure of Michigan Reformatory.** The House proposed closing this 1,200-bed facility in Ionia and provided funding to house those prisoners elsewhere in the Cost-Effective Housing Initiative line item. The net savings from this shift is assumed to be \$7.1 million or about 16%. Consistent with the closure of the facility, the House also removed \$2.5 million in capital outlay the Governor had proposed for new security cameras at the Reformatory. The Senate did not include this closure or associated savings and concurred with the Governor in removing the Cost Effective Housing Initiative.
- **Community Corrections.** The House removed \$1.2 million in funding from the Community Corrections line item; Senate did not include this reduction.
- **Clinical Complexes Alignment.** The House removed \$5.0 million in total funding from clinical complexes in the Northern and Southern regions. The Senate did not include this reduction.
- **MPRI Re-Entry Program Funding.** The Senate included a 2.7% reduction to all the re-entry (formerly called MPRI or Michigan Prisoner Re-Entry Initiative) programming line items (except the Federal funded line). The House did not include these reductions.
- **Evaluation of Mentally Ill Prisoners.** Senate amendment adds the words “at least” to the following clause: “a [mentally ill] prisoner in therapeutic seclusion shall be evaluated at least every 12 hours by a mental health professional in order to remain in seclusion”. House concurred with Governor’s recommendation which states “at a frequency defined in the mental health code.”
- **Information for Families of Prisoners.** Senate language requires the Department to produce and make available on their website a packet of information for families of prisoners on topics such as how to make phone calls and how to put money in prisoner accounts; House did not include.

Sources: Senate Fiscal Agency, FY 2012-13 Corrections Budget S.B. 951 (S-1) Summary of Differences. The House Bill is H.B. 5365.

Cases

Juvenile Lifers

1. *People v. Anthony Jones, Kalamazoo County (9th Circuit Court No. 1979-1104-FC)*

Anthony Jones was convicted in 1979 of felony murder under the “pre-Aaron” felony murder rule, which did not require the jury to find that the defendant had any *mens rea* with respect to the death that occurred. Mr. Jones’ co-defendant shot and killed a store owner during a robbery in Kalamazoo. Mr. Jones was 17 years old at the time of the offense.

The ACLU of Michigan, Deborah Labelle, and the University of Michigan Juvenile Justice Clinic (through Kim Thomas) represented Mr. Jones in Kalamazoo County Circuit Court. The defendant filed a motion under MCR 6.500 challenging the constitutionality of his mandatory life sentence under *Graham v. Florida*, given that Mr. Jones did not kill, intend to kill, or foresee that a life would be taken.

In an opinion and order issued December 21, 2011, Judge Gary C. Giguere, Jr., found that Jones’ sentence was unconstitutional under the Michigan and U.S. Constitutions. The court resentenced Mr. Jones to a parolable life term. An appeal by the state is not expected at this time.

2. *Hill v. Snyder, E.D. Mich. File No. 10-14568*

In this action the national and state ACLU and attorney Deborah Labelle challenged (under the Eighth and Fourteenth Amendments) Michigan’s life without parole laws as applied to minors. The state filed a motion to dismiss, largely on jurisdictional and procedural grounds. The court (Judge John Corbett O’Meara) denied the motion, allowing the case to proceed on the claims that juvenile life without parole is cruel and unusual punishment. The court dismissed some plaintiffs on statute-of-limitations grounds, ruling that they were required to file within three years of having completed or exhausted post-conviction avenues of relief. New plaintiffs whose claims would not be time-barred have since been added. The case is now in the discovery phase. After discovery the plaintiffs expect that motions on the merits of the Eighth Amendment claim will be filed.

Sex Offender Parole Conditions and Registration

1. *Houle v. Sampson, E.D. Mich. File No. 2:09-cv-10504*

In *Houle v. Sampson*, the plaintiffs challenged the Parole

Board’s policy of imposing parole conditions that barred parolees with sex offenses from having contact with their own children, from dating anyone who had custody of children, and from worshipping in places where children might be present. The parole conditions were assigned automatically (as computer defaults), whether or not the underlying offense involved children, and without any assessment or finding that the parolees in fact posed a danger to children (let alone to their own children). The case was dismissed as moot in 2010 when the Board amended the parole conditions of the named plaintiffs, with a promise that it would re-evaluate its policies with an eye to changing the default parole conditions in many such cases. The plaintiffs were represented by the ACLU of Michigan, Legal Aid of Western Michigan, the Child Advocacy Law Clinic, and the Michigan Clinical Law Program.

In the meantime, the Re-entry Conditions (RC) Project at the Michigan Clinical Law Program has continued to monitor the conditions assigned to paroled sex offenders, and has advocated on behalf of more than 50 such parolees to have their conditions altered or amended. The Parole Board has proposed new policies regarding the default parole conditions for sex offenders, but the plaintiffs’ counsel have not yet agreed that the proposed changes pass constitutional muster. At this point further litigation remains a possibility.

**2. *John Does v. Snyder*, E.D. Mich.
File No. 2:12-cv-11194**

The plaintiffs in this action are challenging the constitutionality of the 2011 amendments to Michigan’s Sex Offender Registration Act, as applied retroactively. The amendments were passed to conform to the requirements of the federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16901 *et seq.*, which is Title I of the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248).

The plaintiffs assert that the requirements of the amended act are so onerous and so all-encompassing that they constitute punishment, as well as violating the First and Fourteenth Amendments. The complaint includes a Headlee claim that the act is an unfunded mandate requiring more than *de minimus* expenditure of local funds. Expert reports incorporated into the complaint show that modern sex offender registration laws have the opposite of their intended effect: they correlate with *increased* rates of sex offenses and/or sex offender recidivism. Such laws also make it virtually impossible for registered offenders to live and work in many communities, or to travel across state lines. The plaintiffs are represented by the ACLU Fund of Michigan, the Michigan Clinical Law Program, and Detroit attorney William Swor. ■

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The Prisons and Corrections Section of the State Bar of Michigan

presents

Presentence Investigation Reports & Risk Assessment Tools in the Michigan System

Saturday, June 2, 2012

9:00 a.m. – 1:00 p.m.

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Purpose of the Program

This is a seminar for attorneys and corrections professionals interested in Michigan's Presentence Investigation Report process (preparation, correcting errors, how it is used during incarceration and for parole), and new risk assessment tools (VASOR, STATIC-99 R) used by the Michigan Department of Corrections (MDOC)

Presentations

- The judicial perspective on the importance of the presentence report.
Speaker: Honorable Timothy M. Kenny, Presiding Judge of the Third Circuit Court
- Referring the Case: A review of the referral process for Bond and Custody Reports, covering the MDOC Operating Procedure and the Interstate Compact when the offender lives out of state.
Speaker: MDOC Legislative Liaison Jessica M. Peterson
- Ensuring Accuracy of the Information: A review of special attention items, such as the description of the offense and checking the accuracy of each section, with examples; use of the COMPAS in the Report as a predictor; making corrections to the Report and ensuring the earlier version is destroyed, review of the Court Rule.
Speaker: Lansing Attorney Richard B. Stapleton
- How the MDOC Uses the PSI and How to Correct the Report After Commitment, including considerations for the Risk Classification Assessment and use of juvenile information; obtaining a copy of the PSI; review of the Court Rule and Director's Office Memorandum 2012-11; and correcting the PSI after commitment.
Speaker: Jackson Attorney Sandra L. Bailiff Girard
- How the COMPAS and VASOR Tools Are Used: Predictive assessments using the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) and Vermont Assessment of Sex Offender Risk (VASOR).
Speaker: MDOC Legislative Liaison Jessica M. Peterson

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