VOLUME I NO. 1 SPRING, 1998

PRISONS AND CORRECTIONS FORUM

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

HIGHLIGHTS

Sixth Circuit Winds Down *Glover* Class Action Suit.

The Sixth Circuit sets an accelerated time line to end court supervision over the *Glover* class action suit. *See Page 8.*

Cain Case Continues on Course.

Court rulings result in limitations on rights of prisoners as trial proceedings remain pending. *See Page 6.*

Supreme Court to Decide Whether ADA Applies to Prisons.

The U.S. Supreme Court has granted certiorari to determine whether the Americans with Disabilities Act applies to prisons. *See Page 10.*

New MDOC Policies Affect Pre-Sentence Investigations, Inmates' Ability to Acquire Clothing

The Department of Corrections has initiated several new policy directives which impact prisoner's rights. These changes will affect not only the responsibilities of MDOC employees, but also sentencing arguments made by criminal law practitioners at the trial court level. *See Page 7.*

FEATURE ARTICLE

5,400 New Prison Beds: Why Do We Need Them?

By: Barbara R. Levine

Crime rates are down. Fewer people are being sent to prison for new crimes and fewer parolees are being returned with new sentences. So why do we need new prisons? The numerical explanation is not hard to find. The policies driving the numbers raise a great many questions.

In December 1997, the Michigan Sentencing Guidelines Commission released its long awaited report. As required by statute, the Commission addressed the impact of the proposed guidelines, and of the "truth-in-sentencing" provisions that will go into effect along with them, on the prison population. The guidelines require longer sentences for assaultive offenders but shorter sentences and fewer prison terms for nonassaultive offenders. "Truth-in-sentencing" eliminates disciplinary credits, adds "bad time" for prison misconduct, and prohibits prisoners from entering community placements until they have served their minimum sentences.

The Commission retained consultants from the National Council on Crime and Delinquency (NCCD) for the purpose of developing population projections for the next 10 years. Their report contains three important conclusions:

- Standing alone, the new guidelines would actually reduce the prison population. Although the actual impact varies from year to year, in 2007, 700 fewer beds would be needed if the guidelines are implemented.

- "Truth-in-sentencing" would require 5,667 additional beds if

Continued on Page 2

New Prisons Continued

Continued from page 1

applied only to prisoners convicted of assaultive offenses. (The Senate Fiscal Agency projects a need for 11,000 new beds if "truth-in-sentencing" is expanded to all offenses as proposed in pending legislation.)

- If neither the guidelines nor "truth-in-sentencing" are adopted, under current Department of Corrections policies the population will grow by over 20,000 prisoners to 65,040 in 2007.

The startling third conclusion is made even more compelling by the fact that the baseline projections, supplied to NCCD by the DOC, were revised in late 1997. Table 2 in the NCCD report compares the original projections, made in Fall 1996, to those made just one year later. The original estimate for 2007 was 51,944. Thus, the projection increased by 13,096 prisoners.

In the past few months, the projections were revised yet again. While the NCCD chart shows a need for 53,278 beds by 2001, the DOC is currently telling the Legislature that 50,578 is the target for that year. On that basis, the Governor is requesting funding for 5400 new beds in the 1998-99 budget. The construction costs alone would be $186 million.

What causes these projections to keep changing? Largely, it is policies implemented recently by the DOC. The need for prison beds depends on the number of people sent to prison each year and the average time they serve.

The DOC divides the people sent to prison into five categories: new court commitments, probationers with new sentences, parolees with new sentences, probationers with technical violations (that is, noncriminal violations of supervision conditions), and parolees with technical violations. The DOC has no control over the first three categories. It has substantial control over whether technical probation violations result in prison, since probation officers are DOC employees. More importantly, it has complete control over returns to prison by technical parole violators.

The amount of time a prisoner serves is determined by three factors: the length of the judicially imposed sentence, the amount of disciplinary credit awarded, and when the prisoner is released on parole. The DOC has no control over the sentence. Within statutory constraints, it has total control over the granting and forfeiture of disciplinary credit. Additionally, the parole board, whose members are selected by the DOC director, has complete control of whether and when any eligible prisoner is paroled.

There is no dispute that, since 1992, new commitments have decreased by 26% and parolees with new sentences have decreased by 29%. (The DOC data does not distinguish between probationers with new sentences and those with technical violations.) Yet the number of total admissions in 1992 and 1997 were almost identical, and the prison population increased by 25%. While longer minimum sentences contribute to the need for beds, three factors within the DOC's control explain most of the phenomenon.

Continued on Page 3.

New Prisons Continued

Continued from Page 2

1. **Since 1992, the number of technical parole violators being returned annually to prison has gone from 1657 to 2742 - - a 66% increase.** In just the two years from 1995-1997, the jump was 43%. Within the group of parolees returned to prison, the shift from those with new sentences to those with technical violations has been dramatic. In 1992, 47% of those sent back were technical violators. In 1997, it was 67%. This occurred even though the total number of parolees being supervised declined (although the number of parole officers increased).

2. **The number of probation violators returned to prison increased by 60% in just the three years from 1994-1997.** Although the number of probationers supervised was virtually the same in 1992 and 1996, the proportion sent to prison rose from 4.1% to 6.3%. While the DOC stopped separating out technical probation violators after 1993, it seems likely that this increase is largely due to technical violations, in light of the general decrease in the crime rate and the comparable data on parolees.

3. **The rate of parole has dropped from 63.3% in 1993 to 54.5% in 1997.** The DOC has announced a policy of denying parole to prisoners convicted of assaultive offenses, particularly sex offenses. As these prisoners keep getting "flopped" at each successive review, the pool of people eligible for parole contains an ever-growing number of assaultive offenders who are predestined to have parole denied. Movements to parole declined from 9,463 in 1996 to 8,401 in 1997, a difference of 1,062 beds. In 1989, 18% of prisoners (5,746) were beyond their minimum term. By 2004, the DOC projects that 41% of prisoners will be beyond their minimums; they will require 24,373 beds.

This new parole policy is not based on the individual's behavior in prison, on an objective assessment of whether the prisoner is currently dangerous, or even on the board's own parole guidelines. Nor is it based on the DOC's own data about recidivism, which shows that offenders convicted of homicide and criminal sexual conduct have the highest success rates on parole.

Instead, the policy is based on the perception that the board has a mandate to keep these prisoners well beyond the judicially imposed minimum, regardless of the expectations of the parties at the time of sentencing (or plea bargaining). It is also based upon the board's belief that its mandate is to keep virtually all parolable lifers in for life, despite their statutory eligibility for parole after 10 or 15 years (depending on the conviction date).

Returning to the parole, parole revocation and probation revocation rates of just a few years ago would save nearly 4000 beds. Even more beds in secure facilities could be saved if prisoners were in community placements, such as corrections centers and tether programs, to the extent they were prior to the 1993 policy changes. For the past five years, the "zero tolerance" policy for minor rule infractions has drastically decreased those eligible to remain in these programs.

Before the Legislature commits hundreds of millions of dollars to building and operating prisons now and for decades to come, it should examine the policies underlying the recent increased bedspace projections very carefully. Among the questions it should ask are:

- Do we want to keep building expensive secure beds to house prisoners, probationers and parolees who have violated the rules of their supervision but who have not committed new crimes?
- Are there not more cost-effective ways to deal with rule violations?
- What accounts for the sudden increase in commitments for technical violations by probationers and parolees?
- Should the parole board be permitted to negate, unilaterally, the importance of the judge's role in selecting the minimum sentence, the sentencing guidelines, and plea agreements reached by the parties?
- Should whole categories of offenders be denied parole despite their individual suitability for release?
- Are there other ways to decrease bedspace needs, such as changing the drug laws or reviewing all prisoners who have served over 20 years?

Crime rates began declining long before the DOC changed its policies. If bedspace needs can be reduced simply by returning to DOC practices that were in place just a few years ago that justifies the state's to taking money from education, mental health, substance abuse prevention and the environment to increase the number of prison beds?

State Bar Prisons & Corrections Section Position Paper Opposing SB 873

On March 7, 1998, the State Bar Prisons & Corrections Section Council decided to oppose SB 873 which would prohibit appeals of parole board decisions by prisoners. The views expressed in the following position paper are those of this Section and do not necessarily represent the views of the State Bar of Michigan.

In his 1998 State of the State Address, Governor Engler urged the Legislature to abolish prisoner parole appeals. The only justification cited by the Governor in support of this was the unsupported claim that no prisoner has ever won a parole appeal. As a result of Governor Engler's position, SB 873 was introduced in the Senate which would abolish prisoner parole appeals while preserving prosecution and victim parole appeals. This bill has passed the Senate and is currently before the House of Representatives. As will be demonstrated in this document, the bill was conceived under a misunderstanding of the facts, creates poor public policy by immunizing the parole board from a duty to comply with the statutes governing parole appeals, and is probably unconstitutional.

Prisoner Parole Appeals Are Not "Frivolous"

The Governor's statement that inmates never win parole appeals is demonstrably false. Inmates have won numerous parole appeals based on the parole board's refusal to follow statutory procedures governing parole proceedings. As a result of prisoner appeals prisoners have secured the right to insure that:

- all members on a parole panel actually vote on a parole request;[1]
- none of the parole board members cast their votes before all the evidence is presented; [2]
- the board considers private psychological reports;[3]
- a non-English speaking prisoner is entitled to have an English interpreter present at a parole interview;[4]
- the parole board follows the parole guideline statutes;[5]
- the board must give the inmate notice of all issues which will be discussed at the interview;[6]
- the board not hand down flops beyond the statutorily allowed period;[7]
- an attorney can argue for a prisoner's parole where the prosecution and victims are permitted to be represented by counsel.[8]

Removal of an enforcement mechanism of these regulations will only create further disregard for the law.

As this list demonstrates, the issues which have prevailed are not trifling or insignificant. Many of the issues have gone to the basic fairness of these proceedings. Parole appeals are the only mechanism available to insure compliance with the parole board statutes.

The Number of Parole Appeals Should Decline

Governor Engler's State of the State address implies that parole appeals will be increasing, when in fact the opposite is true. At the present moment, a common law of parole appeals is developing. Many appeals are based on procedural arguments where there is currently a disagreement of opinion between circuit judges. A great number of these issues are currently on appeal to the Court of Appeals and should be resolved within the next two years. With the definitive resolution of these questions by an appellate court, the pool of possible issues that can be raised on appeal will decrease and with it the number of parole appeals.

Need for Agency Accountability

In 1995, the Governor adopted a position that legislative oversight over agency rulemaking was an unconstitutional invasion of his sovereign rights to run executive level agencies. This issue is currently on appeal to the Michigan Supreme Court. If the Supreme Court agrees with the Court of Appeals, the Legislature will not be able to oversee the parole board's rulemaking. If this is the

Continued on Page 11

Certiorari Denied in *Shabazz*

By: Suzanne Carol Schuelke

On February 23, 1998, the United States Supreme Court refused to review the Sixth Circuit's ruling in the *Shabazz v Gabry* suit. The Sixth Circuit held that new legislation lengthening the interview cycle for lifer paroles did not violate the *Ex Post Facto* clause of the United States Constitution.[1]

In 1992, the Michigan Legislature passed legislation establishing a uniform mandatory parole interview schedule for inmates who committed their crimes before the effective date of the law, and received a natural life, parolable life, or long indeterminate sentence. Under the new law, inmates would be interviewed initially after ten years, and then interviewed every five years from that point forward.[2] The effect of this law was to drastically increase the period between interviews for numerous inmates. Following the passage of the law, a number of inmates brought suit to enjoin the enforcement of the law claiming that the law violated the prohibition against *Ex Post Facto* laws contained in the United States Constitution.

After granting class action certification, the District Court ruled in favor of the prisoners who had a right to annual interviews conferred on them by agency regulation and/or state statute. The Court found that the state alteration of the interview schedule had a significant negative impact on an inmate's parole eligibility and consequently constituted an *Ex Post Facto* increase in punishment.[3] The Parole Board appealed to the Sixth Circuit which reversed.

The Sixth Circuit found that the operative test to be employed by courts to determine in the parole interview process violate the *Ex Post Facto* clause is "whether the amendments produce a sufficient risk of increasing the measure of punishment attached to the covered crime."[4] In *California Department of Corrections v Morales*, the United States Supreme Court upheld a California law which increased the period between parole interviews for individuals who were serving multiple murder convictions and who the Board certified were not likely to receive a parole in the near future. The District Court in *Shabazz* distinguished *Morales* because the class of people involved in Michigan was broader than in California and did not have as remote a chance for parole as in *Morales*. The District Court further noted that California required an individualized determination that the person was not likely to receive a parole, where Michigan's system operated across the board.

The Sixth Circuit dismissed the trial judge's finding of facts as speculative. The Court noted a Michigan prisoner always remains eligible for parole consideration without an interview and that a prisoner could petition the Board to exercise its discretion to hold an early interview. The Court found that the District Court erroneously relied on anecdotal evidence and inferences to conclude that inmates suffered a demonstrable risk. The Supreme Court's denial of certiorari makes the *Shabazz* ruling binding in Michigan.

Shabazz raises serious questions of whether there is an outer limit to how far a state can extend the interview process, before there is an *Ex Post Facto clause* violation. The Michigan Legislature currently has before it SB 873, which would give the Parole Board the authority to deny a lifer all parole interviews after the first one. This provision has currently passed the Senate and is in the House. Whether such a procedure would violate *Shabazz* and *Morales* remains to be seen. ■

Endnotes

[1] 123 F3d 909 (CA 6, 1997) cert denied ___ US ___, ___ S Ct ___, ___ Led 2d ___ , 66 USLW 335 (1998)

[2] Inmates convicted of a crime committed after October 1, 1992, received their initial interview after fifteen years and subsequent interviews on a five year basis.

[3] Shabazz v Gabry, 900 F Supp 118 (ED Mich, 1995).

[4] 123 F3d at 913 (quoting California Department of Corrections v Morales, 514 US 499, 115 S Ct 1597, 131 Led 2d 588 (1995).

Charting Progress in *Cain* Case

By: Sandra Bailiff Girard

Cain, et al v *Michigan Department of Corrections* [MDOC] is a state-wide prisoner class action lawsuit currently pending in the Court of Claims. The case is unusual in several respects. It is based solely on Michigan's Constitution and law, unlike most prisoner rights cases which are based on federal constitutional claims. The *Cain* case was filed *in pro per* in 1988 by six prisoners; on behalf of all male prisoners until August 8, 1996. Represented by Charlene Snow, female prisoners were allowed to intervene in September, 1988.

Cain is the largest prisoner class action in Michigan history, and the case includes all Michigan prisons, all current and all future prisoners in the custody of the MDOC. The over 40,000 prisoners currently in the system are divided into two Plaintiff classes: the Plaintiff class includes male prisoners, and the Plaintiff-Intervenor class consists of female prisoners.

The court appointed Prison Legal Services of Michigan, Inc. to represent the Plaintiff class in August 1996, with the continued assistance of the Class Representatives. Deborah LaBelle and Donna Tope have joined Charlene Snow in representing the Plaintiff-Intervenors. The MDOC is represented by A. Peter Govorchin and Allan Soros from the Attorney General's office.

The original complaint challenged the imminent, drastic changes in the MDOC's policies regarding prisoners' personal property. A second complaint was filed that raised challenges to prisoner classification, access to courts, and the prisoner telephone system. Both complaints were later consolidated.

The consolidated complaint alleges that the design of the prisoner classification system is fundamentally unfair and is implemented in an arbitrary and capricious manner. It also alleges that prisoners' access to courts is obstructed by the MDOC's policies and practices regarding law libraries, legal assistance, photocopying, stamps, telephones, and access to attorneys.

The trial began on April 10, 1997 with Judge James R. Giddings presiding. Since that date, there have been 126 court appearances. Trial testimony has been interrupted several times for hearings on motions for injunctive relief and show cause hearings on MDOC retaliation against prisoner witnesses, class representatives, and counsel for the Plaintiffs. In addition, the judge continues to handle his regular docket and periodically must recess this trial in order to conduct hearings in other cases.

Plaintiffs submitted a witness list of nearly 700 prisoner witnesses. It is not yet known how many of these will actually be called. One of the difficulties is that the Defendant argued, and the Judge agreed, that Plaintiffs and Plaintiff-Interveners must show that all the allegations are true at each of the forty- plus institutions and that they are not just random incidents. This requires a minimum of several witnesses to testify about each separate institution and each of the counts in the complaint. Discussions are currently underway to try and minimize the number of witnesses it will be necessary to call.

There have been several interim rulings on issues involving access to courts. MDOC policy provides for different types of searches for prosecutors and judges than it does for all other attorneys prior to entering a facility. After hearing testimony concerning some particularly intrusive searches of defense attorneys, the court enjoined the MDOC from employing a double standard for attorney/judge searches.

Under MDOC policies, before one prisoner may help another with a legal matter, they must request, and the assistant deputy warden must approve, a ninety-day "Legal Assistance Agreement." This allows the prisoner providing assistance to possess the other's legal papers and, if they are placed in different housing units, policy provides that staff will carry papers and correspondence between them. The court ordered Defendant MDOC to permit Legal Assistance Agreements to last for one year, instead of the original ninety days, and to renew them upon request even if one or both parties have been transferred to different institutions or different security levels.

A motion for partial summary disposition was argued shortly before trial began. On October 2, 1997, the court held that the takings clause of the Michigan Constitution (Art X, Sec 2) does not require the MDOC to compensate prisoners for property which it forces them to send out of the prison. In most cases, the property was purchased through the institution ordering procedures, for the prisoner's personal use during their sentence. The Court entered this Order on December 5, 1997, and denied Plaintiffs' motion for a stay on January 9, 1998. Plaintiffs and Plaintiff-Intervenors filed for leave to appeal on January 30, 1998.

Continued on Page 7

By: Marjorie M. Van Ochten

Property Policy

On January 12, 1998, the Michigan Department of Corrections began implementing a new policy directive on prisoner's personal property, after a delay of almost ten years due to an injunction issued by Ingham County Circuit Court Judge James Giddings in the class action lawsuit *Cain v MDOC.* The injunction was dissolved by an Order entered on December 5, 1997, which granted the MDOC's Motion for Summary Disposition.

The Court's Order, however, still impedes MDOC implementation of two of the most important elements of the new policy: (1) a reduction in the total amount of property possessed by high security prisoners, and (2) the requirement that those same prisoners wear only state-issued clothing. These provisions cannot take effect until each institution has completed and filed an affidavit with the Court attesting to the existence of both an ample supply of state-supplied clothing, and an operating procedure to implement the policy at the facility.

The most substantial immediate effect of the new policy is a requirement that all personal property acquired by prisoners, except books and magazines, must be ordered through the institution from approved vendors. Previously, family and friends of inmates were allowed to send certain items into the facility, especially clothing, for inmate use. The Department disallowed this practice due to security concerns that items sent in may contain drugs or other contraband.

Pre-Sentence Investigation (PSI) Reports

The MDOC has a new policy directive (PD 06.01.140) and operating procedures (OP 06.01.140 and OP 06.01.141) on preparation of PSI reports. The major change in this policy and the procedures is the use of PSI recommendation guidelines and a probation risk classification scoresheet in determining sentencing recommendations. The guidelines and scoresheet were developed by the MDOC's Field Operations Administration, with the assistance from the Department's Research Section. The recommendation guidelines must be used in all cases except those where a prison sentence is mandated by statute.

The probation risk scoresheet classifies prisoners as minimum, medium or maximum risk based on such factors as substance abuse history and prior criminal history. The PSI recommendation guidelines then use the risk classification determination, as well as other factors, such as the sentencing guideline recommendation for the offense, to determine whether to recommend that the prisoner be sentenced to prison or a community alternative■

Charting Cain (Continued from 6)

A new MDOC prisoner property policy took effect on January 12, 1998. The most immediate effect is that all property must be ordered through the institution from approved vendors. Prisoners' families and friends can no longer send gifts of clothing. Prisoners at the three highest security levels will be required to wear state-issued clothing and to send out all of their personal clothing, except that Level IV prisoners will be allowed to keep one set of personal clothing to wear on visits. The policy also requires that prisoners at Level VI give up all personal items except health items, a wedding ring, religious items, legal property and footlockers to store it, a calendar, stamps, writing paper and envelopes. Level V prisoners may keep the above items, as well as a television, typewriter, radio, cassette tape player, 24 tapes and case, 10 books, and store merchandise. Level IV prisoners will be allowed to keep all the above, in addition to one calculator, one electric shaver, a wristwatch, sunglasses, one pair of post earrings, one photo album and four leisure games such as cards or chess.

Levels III, II, and I will be allowed all of the above, plus the following additional items: one lamp, one hair dryer, curling iron or beard trimmer, personal towels, recreation equipment and musical instruments approved by the warden, and approved hobby or craft items. These prisoners can also keep personal clothing which is on the institution's approved list, in the approved amounts, and which must fit in one duffel bag and footlocker with all other personal property.

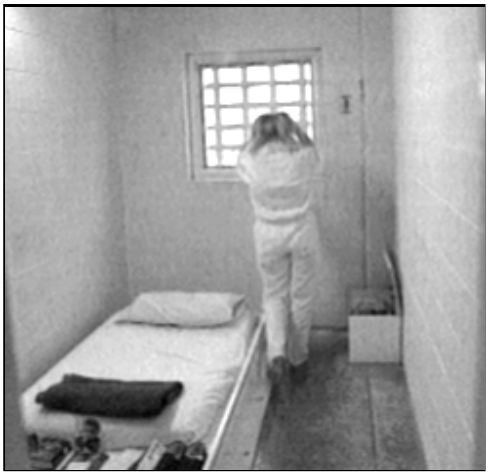
The harshest aspect of this change in policy is that a prisoner must send out or get rid of all items that are not allowed at his or her current security level. The property will not be stored by the MDOC. When the security level is reduced and more items are allowed, the prisoner must purchase new items. The items previously sent out cannot be sent back in. This will be financially burdensome, as most prisoners are from low-income families, with little or

Continued on page 11

Is *Glover v Johnson* Nearing an End?

By: Stuart Friedman

On March 2, 1998, the Sixth Circuit Court of Appeals handed down a sixty page ruling which may clear the path to end court monitoring over women's prisons in the State of Michigan.[1] In doing so, the Court could end judicial oversight of one of longest running disputes in Michigan prison history. Such closure, however, leaves lingering doubts about whether the problems which have brought about the *Glover* suit in the first place in fact have been cured.



Background

In 1977, women prisoners at the former Huron Valley Women's facility filed a class action suit against then MDOC-Director Perry Johnson with the hopes of bringing education and vocational training on a level par with those provided in the men's prisons. In 1979, U.S. District Court Judge John Feikens conducted a two week trial and found that there was "significant discrimination against the female prison population occur[ing] in several areas of programming in violation of the Fourteenth Amendment."[2] The Court entered a judgment aimed at ending this disparity. The Court also found that the Defendants were not providing women adequate access to the courts. Two years later, the parties to the *Glover* dispute supplemented the order with a "final Order" which set forth a plan to remedy the problems.[3] Neither order was appealed and the District Court retained the authority to implement the orders.

In the more than twenty years since *Glover* was filed, many problems have persisted. While there have been improvements, the Department was found in violation of numerous court rulings over the years. In 1989, the Court found that the MDOC and its employees had demonstrated an "unwillingness or inability to make progress towards implementing the programs ordered," and had treated the Court's threats of contempt "with studied indifference." As a result of the judicial determination of the Department's bad faith, the Court ordered the Defendants to appoint a Special Administrator and a Compliance Monitor. The MDOC unsuccessfully appealed this order. Finding that the MDOC had engaged in a "consistent and persistent pattern of obfuscation, hyper technical objections, delay, and litigation by exhaustion on the part of the defendants to avoid compliance," the Court upheld this order.

In 1991, the MDOC filed a proposed plan to bring it in compliance with the original *Glover* ruling. Plaintiffs objected to the plan, claiming both that it was vague and that it failed to address many of the problems which the District Court had previously determined existed at the women's prisons. The Defendants never sought judicial approval of the plan and the court never approved it.

In December of 1993, the MDOC brought a motion to modify the compliance/monitor plans and to provide for termination of portions of the decree. Following an extensive hearing in the District Court, the court denied the motion. As part of the hearing, the trial court made a determination that numerous deficiencies still exist in the women's prisons. The Department of Corrections appealed the Court's refusal to end most of the Court supervision.

The Ruling

On March 2, 1998, the United States Court of Appeals partially reversed the trial court. In reversing the District Court, the Sixth Circuit was not kind to the MDOC. It found that it had acted in bad faith through much of the proceedings. The Court also expressed sympathy with the District Court's attempt to bring the MDOC in compliance with its order. The Sixth Circuit, however, believed that continued judicial attempts to make the Department comply with interim orders constituted an unwarranted intrusion into the management of prisons:[4]

> [The Court's] misdirection is understandable. It was necessary for the district court, once it found constitutional violations, to develop a specific methodology by which constitutional compliance could be attained and maintained. The intermediate steps it has devised to achieve the compliance, however, have become the focus of everyone's attention; the ultimate goal toward which those compliance measures have been directed appears to have been largely ignored. "Getting there" has obscured where "there" is.

(Continued on Page 9)

Glover *Ending ? (Continued from 9)*

The Sixth Circuit found that the goals of the *Glover* judgment were to: (1) insure that "sufficient parity" is achieved between male and female institutions to comply with the Equal Protection Clause of the Fourteenth Amendment; and, (2) to insure that female inmates have the level of access to the courts that is constitutionally required under the First Amendment.[5]

The Court went on to note that it wished to "cut the Gordian knot presented by this aging litigation," but found that in order to do so, it first required sufficiently detailed findings of fact and conclusions of law addressing whether the defendants have achieved the parity of educational and vocational opportunity and the requisite access to the court that the district court found lacking in 1979.[6]

The Court therefore remanded the case to the District Court and ordered it to hold hearings within 120 days of the Sixth Circuit's opinion regarding whether these goals were achieved. In doing so, the Sixth Circuit instructed the District Court to pay attention to whether there is currently relative parity between the male and female facilities. The District Court's evaluation must compare the differences between the facilities in terms of custody levels, population sizes, and other objective factors. With respect to the court access issue, the Sixth Circuit indicated that the question which the District Court should answer is: whether female prisoners are being provided adequate access to the courts within the meaning of *Lewis v Casey*.[7]

The Court also ruled that the Prison Liability Reform Act of 1995[8] did not apply retroactively to reduce the grants of plaintiff attorney fees for services rendered before the passage of the act.[9] Judge Welford concurred in part and dissented in part. In his separate opinion, Judge Welford also opined that it was time to close the *Hadix* class action suit.[10]

At the time this article went to press, the plaintiff's time to seek rehearing or rehearing *en banc* had not run. Given the breadth of the Sixth Circuit's ruling, it seems likely that the plaintiffs will seek to have the ruling overturned. Unless such challenges are successful, it appears that the end to *Glover* is in sight. One can only hope that the problems which initially caused the *Glover* suit to be initiated will also end■

Endnotes

1 *Glover v Johnson*, ___ F3d ___, 1998 FED App 0072P, 1998 US App LEXIS 3239 (CA 6, 1998). The decision is available on the internet at http://www.law.emory.edu/6circuit/mar98/98a0072p.06.html.

2 *Glover v Johnson*, 478 F Supp 1075, 1077 (ED Mich, 1979).

3 *Glover v Johnson*, 510 F Supp 1019 (ED Mich, 1981).

4 1998 US App LEXIS at 35-36.

5 1998 US App LEXIS at 37.

6 1998 US App LEXIS at 38-39.

7 518 US 343, 116 S Ct 2174, 135 Led 2d 606.

8 Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 11-Stat 1321 (1996).

9 1998 US App LEXIS at 48. The Court also addressed several case specific issues which are beyond the scope of this article.

10 *Hadix* is a comprehensive class action suit challenging the conditions at the at the State Prison of Southern Michigan. *Hadix v Johnson*, Civ. No. 80-73501 (E.D. Mich.).

U.S. Supreme Court Will Decide Whether the ADA Applies to Prisons

By: Stuart Friedman

On January 23, 1998, the United States Supreme Court granted certiorari to the Third Circuit's decision in *Pennsylvania Department of Corrections* v *Yeskey* to determine whether the Americans with Disabilities Act ("ADA") (42 USC § 1201 *et seq*) is applicable to prisons and, if so, whether it should be applied in a relaxed fashion.[1] This issue has been hotly litigated nationwide and has resulted in a number of conflicting rulings.

Yeskey was a Pennsylvania inmate who was denied admission to Pennsylvania Boot Camp program based on his history of hypertension. Yeskey filed suit claiming that this exclusion violated the ADA. Relying on a minority position, the District Court dismissed the suit, holding that the ADA was inapplicable to prisons.[2] The Third Circuit rejected this view. Finding that there was nothing in the history of the ADA which suggested that Congress intended such an exclusion, the Court found that the judicial creation of such an exclusion would be unwarranted judicial legislation. In so ruling, the Court noted that the majority of courts which had reviewed the issue found that ADA was applicable to prisons.[3] The Court also justified this position based on the U.S. Department of Justice regulations making this statute applicable to prisons.[4]

In reaching this ruling, the *Yeskey* Court did not address the equally controversial question of whether judicial deference to state administration of prisons should factor in to determining what is a reasonable accomodation. In *Turner v Safley*,[5] the high court held that constitutional rights may be curtailed behind prison walls in order to accommodate valid penological goals. In so ruling, the court applied a highly deferential standard of review of state determinations of these needs. Courts have disagreed whether this standard applies to the ADA in the prison setting.[6]

The Court's ruling in *Yeskey* is expected by July.

Endnotes

[1] *Pennsylvania Department of Corrections* v *Yeskey*, ___ US ___, 118 S Ct 876, ___ Led 2d ___ (1998). The Third Circuit's decision is reported at 118 F3d 168.

[2] *See Torcasio* v *Murray*, 57 F3d 1340 (CA 4, 1995); *White* v *State of Colorado*, 82 F3d 364 (CA 10, 1996). After the Third Circuit decided *Yeskey*, the Fourth Circuit reaffirmed its position that the ADA does not apply to prisons. *Amos* v *Maryland Dep't of Pub Safety & Correctional Servs*, 126 F3d 589 (CA 4, 1997).

[3] *See Crawford* v *Indiana Department of Corrections*, 115 F3d 481 (CA 7, 1997); *Duffy* v *Riveland*, 98 F3d 447 (CA 9, 1996); *Harris* v *Thigpen*, 941 F2d 1495 (CA 11, 1991); *Clarkson* v *Coughlin*, 98 F Supp 1019 (SD NY, 1995); *Outlaw* v *City of Dothan*, No. CV 92-92-A-1219-S; 1993 WL 735802 (MD Ala Apr 27, 1993). Two Michigan courts have agreed with this view. *See Kaufman* v *Carter*, 952 F Supp 520 (WD Mich, 1996); *Niece* v *Fitzner*, 941 F Supp 1497 (SD Mich, 1996). *See also* Ira Robbins, *George Bush's America Meets Dante's Inferno: The American With Disabilities Act in Prison*, 15 Yale L & Pol'y Rev 49 (1996).

[4] 28 CFR § 42/540(h).

[5] 482 US 78, 107 S Ct 2254, 96 Led 2d 64 (1987).

[6] *See Pargo* v *Elliot*, 49 F3d 1355 (CA 8, 1995) (*Turner* inapplicable to ADA cases). Contra *Gates* v *Rowland*, 39 F2d 1439 (CA 9 1994) (*Turner* applies to ADA cases). *See also Crawford* v *Indiana Department of Corrections*, 115 F3d 481 (CA 7, 1997) (holding that what constitutes a "reasonable" accommodation of handicap under the ADA requires judicial respect for institutional concerns for prison safety and security).

Postition Paper (Continued from Page 4)

case, there will be absolutely no oversight over parole board actions.

Development of an Artificially Negative Body of Parole Appellate Law

The Governor's proposal will have the effect of forcing an already conservative parole board to become drastically even more conservative. Currently there is a balance between prisoner parole appeals and prosecution/victim parole appeals. With only prosecution appeals existing, a negative body of case law will develop which will have the effect of drawing agency discretion even more against parole. This will result in driving up the need for prison bed space.

Constitutional Problems

This proposal also presents serious constitutional problems associated with these procedures.

First, the proposal ignores the fact that there is a constitutional right to judicial review of these decisions under Const 1963, art 1, §28.

Second, there are serious equal protection problems associated with a law which gives the prosecution and victim the right to appeal, but not the prisoner. In *Wardius v Oregon*, 412 US 470, 37 LEd2d 82, 93 SCt 2208 (1973), the United States Supreme Court held that equal protection generally prohibits conferring of a right on the prosecution without granting a corresponding right to the defense. While Michigan has not addressed this issue, this principle has been applied to parole board proceedings by at least one other state. In *Tasker v Mohn*,[9] the West Virginia Supreme Court held that equal protection barred the state from permitting prosecutors and attorneys for victims to appear at parole board hearings, but not permitting defense counsel.

Conclusion

Prisoner parole appeals are not frivolous or useless. These decisions have brought about greater parole board accountability and have insured that the Board abides by the law. The rulings which have been handed down have significantly improved the quality of parole board decisionmaking. Concerns about the amount of parole appeals will sharply drop over the next two years as the Court of Appeals decides the most controversial issues. Permitting only prosecution and victim parole appeals may not only be unconstitutional, but will also result in the development of a lopsided body of case law which will force an already extremely conservative board to become even more so. Lastly, this bill flies in the face of the Michigan Constitution's guarantee of the right to judicial review of agency decisions.

Charting Cain (Continued from Page 7)

no income in prison.

The trial was also interrupted for hearings on the property order and on February 17, 1998, the court began a hearing on the Plaintiffs' motion for a preliminary injunction to stop enactment of the new property policy. Plaintiffs and Plaintiff-Intervenors are presenting testimony to show that state-issued clothing is inadequate for inmate health and safety, that the new policy will actually cause more violence by prisoners, increase mental illness, and contribute to increased prisoner misconduct at the higher levels, as many feel they have nothing left to lose. These hearings are expected to conclude March 13, 1998, and the trial will resume the week of March 23rd.

The trial is being held in the Ingham County Jail gymnasium in order to provide greater security and to make it easier to handle the large number of prisoner witnesses. While the trial is open to the public, there has been very little attendance by either the public or the media.■

Ms. Girard is the lead counsel from Prison Legal Services of Michigan, Inc., representing the original Plaintiff class in this lawsuit.

Endnotes

[1]*See, e.g., Walker v Parole Board*, Calhoun Circuit No. 95-3571-AP; *Franciosi v Parole Board*, Wayne Circuit No. 95-356121-AP; *Bryant v Parole Board*, 95-527817-AP; *Antanosian v Michigan Parole Board*, Wayne Circuit No. 96-626565-AV; *Musa v Parole Board*, Wayne Circuit No. 96-622-581 AP; *King v Parole Board*, Wayne Circuit No. 96-635386.

[2]*See Stewart v Parole Board*, Wayne Circuit No. 97-711357-AP; *Provenza v Parole Board*, Wayne Circuit No. 96-646630-AP.

[3]*See Wiseman v Parole Board*, Oakland Circuit No. 96-523018-AP. *See also Wilson v Parole Board*, Kent Circuit No. 96-13435-AP (Board must consider its own psych reports when voting on parole); *Yelle v Parole Board*, Saginaw Circuit No. 95-008779 AP 4.

[4]*See Provenza v Parole Board*, Wayne Circuit No. 96-646630-AP.

[5]*Franciosi v Parole Board*, Wayne Circuit No. 95-356121-AP; *Pierson v Parole Board*, Kalamazoo Circuit No. E-96-3264-AP; *Melson v Parole Board*, Kalamazoo Circuit No. E-96-3253-AP;

[6]*Craft v Parole Board*, Ingham Circuit No. 95-81718-AP; *Fisher v Parole Board*, Ingham Circuit No. 95-79468-AP.

[7]*Libbey v Parole Board*, Wexford Circuit No. 96-12565-AP; *Punt v Parole Board*, Ottawa Circuit No. 96-25734-AP.

[8]*Franciosi v Parole Board*, Wayne Circuit No. 95-356121-AP.

[9]165 W Va 55, 267 SE2d 183 (1980).

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

A Successful Start for Corrections Section

By: Tracie Dominique Palmer, Editor

Welcome to the inaugural edition of the Prisons and Corrections Section Newsletter! As a new section, we are proud to announce our successful beginning to what should prove to be a tradition of providing education, policy statements and practical training on a cross-professional basis throughout the State of Michigan. Since assuming our official status in September 1997 at the State Bar Annual Meeting, we have grown to over 140 members. The predecessor committee produced the first Michigan Bar Journal Prisons and Corrections theme issue (February 1998), which was distributed not only to all State Bar members, but also to each State legislator. In the first six months of our existence, we have elected a governing council, elected our officers, and held monthly council meetings. We have taken policy positions on various legislative bills which affect inmates and issued policy papers opposing both the proposed "Truth-in-Sentencing" legislation (copies available upon request) and the elimination of prisoner parole appeals (see page 4). Section representative Barbara R. Levine has spoken at a Senate judiciary committee meeting regarding our positions on the proposed Truth-in-Sentencing legislation. We have issued a press release urging caution in Governor John Engler's call for funding to build new prisons. We are also presenting a half-day state forum on prison expansion designed to bring together representatives from different human services organizations and civic leaders to debate the policies driving the perceived need for more prison beds and the impact that increasing MDOC costs will have on other State departmental budgets.

With all of these exciting projects, we hope not only to educate our legal, judicial and legislative communities, but also to generate increased section membership to aid us in achieving our goals. To that end, we ask that you share this issue with one of your professional colleagues, discuss the articles contained within, and urge them to join our section to aid in its growth and success. Under the bylaws of the State Bar and our section, membership must be restricted to criminal justice practitioners, defined as: A person, not currently incarcerated, who is engaged in an occupation or profession which affects the enforcement of criminal statutes, or the sentencing and treatment of persons convicted of a violation of such statutes, or who is a leader of a state-wide or national organization involved in criminal justice advocacy. Membership is divided into three categories: Full Membership is available to all legal professionals who are currently members of the State Bar of Michigan for Twenty ($20.00) Dollars. Law enforcement, legal service, education and corrections professionals can join as Associate Members for the reduced cost of Fifteen ($15.00) Dollars. Current inmates can still subscribe to the Section newsletter at the subscription cost of Ten ($10.00) Dollars. All dues payments should be made payable to: The State Bar of Michigan, and forwarded to the above address, along with a completed copy of the application contained within this issue.

Thank you for your participation in our new section. We hope that with your assistance and activism, we can continue to provide meaningful service to professionals on a state-wide basis. Your input regarding issues you wish the section to address, activities you would like the section to undertake, and subjects you would like to see discussed in this newsletter, is always welcome.