VOLUME II NO. 1 SPRING/SUMMER, 1999

PRISONS AND CORRECTIONS FORUM

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

HIGHLIGHTS

Focus on Family

Section adopts detailed position on visiting and telephone restrictions. *See Page 3.*

To Cap or Not to Cap?

U.S. S.Ct. and E.D. Michigan examine the PLRA cap on attorney fees from different perspectives. *See Pages 5 and 10.*

Section to Amend Bylaws.

Notice of proposed amendments. *See Page 8.*

Glover remanded.

Michigan Supreme Court affirms statutory right to detailed written opinion describing reasons for parole denial. *See Page 6.*

MDOC Update.

Truth in Sentencing rears its ugly head with the commencement of disciplinary time. Video Conferencing with Virginia transferees is up and running. *See Page 7.*

X Files viable retaliation claim.

The truth is out there. *En Banc* Sixth Circuit refuses to bury prisoner retaliation claims. *See Page 11.*

FEATURE ARTICLE

Pending Legislation May Close State Court Doors to Prisoners

By: Barbara R. Levine

Various bills recently introduced in the Michigan Legislature would, collectively, greatly reduce the ability of prisoners to seek redress in state courts.

SB 419, which has passed the Senate, would create a state prison litigation reform act styled after, but more extreme than, the federal act. It would place a variety of procedural and substantive constraints on conditions of confinement suits. A less expansive pair of House bills, HB 4622 and 4623, was introduced on May 5, 1999, and referred to the Committee on Criminal Law and Corrections.

SB 298 and HB 4624 would both amend MCL 191.234 to eliminate prisoner appeals of parole board decisions to deny release, while maintaining the rights of prosecutors and victims to appeal grants of parole. The bills are similar to one defeated by the House last term, except for an additional twist. The current requirement that lifers have to be interviewed once they have served 10 years and every five years thereafter would be changed to require lifer interviews "at the conclusion of 10 years...and thereafter as determined by the parole board." SB 298 is pending before the Senate Judiciary Committee and HB 4624 has been referred to the House Committee on Criminal Law and Corrections.

HB 4475 would amend MCL 37.1101 *et seq*, the persons with disabilities civil rights act, to remove jails and state correctional facilities from the definitions of public accommodation and public service, and thereby eliminate prisoners, their families, volunteers, and professionals who must access these facilities, from the protection of the act.

HB 4476 would amend MCL 37. 2101 et *seq*. the Elliott-Larsen civil rights act, to remove jails and state correctional facilities from the definitions of public accommodation and public service, and thereby eliminate prisoners, their

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Legislation

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families, volunteers and professionals who must access these facilities, from the protection of the act. Both the civil rights bills have been referred to the House Committee on Constitutional Law and Ethics.

Although these bills are being justified as necessary to reduce a flood of frivolous prisoner lawsuits, they appear in fact to be a response to cases that are bringing the attention of the courts, and the public, to very serious claims.

> Two major class action lawsuits are currently addressing fundamental problems with the DOC's treatment of prisoners. *Neal vMDOC*, brought under the Elliott-Larsen Act, concerns a history of sexual assaults on and sexual harassment of women prisoners. *Cain v MDOC* raises state constitutional claims about the security classification system, the confiscation of previously permitted personal property, and (ironically) the ability of prisoners to access the courts.
>
> The bulk of prisoner litigation in the state courts consists of parole appeals and petitions for judicial review of misconduct findings. Parole appeals are resulting in a growing body of precedent interpreting the statutory constraints on the parole board's authority.

The Prisons and Corrections Section Council has unanimously voted to oppose the four bills introduced prior to May 1, 1999. While it recognizes the burden that frivolous litigation, whether filed by prisoners or others, places on defendants and the courts, extreme solutions that will prevent the filing of meritorious claims cannot be justified.

The vast majority of prisoners are already at an enormous disadvantage in attempting to litigate their concerns because half are functionally illiterate, most are indigent, and very few have access to competent legal advice. It is enormously difficult for them to find their way around bare-bones prison law libraries and draft acceptable pleadings. Much litigation that appears frivolous actually involves the inartful drafting of legitimate complaints.

Other than pointing to a few individual prisoners who are "frequent filers," proponents of these bills have not shown that most prison litigation is in fact frivolous, how many cases would actually be eliminated, or how many positions in the Attorney General's office would be saved.

State law should provide remedies for abuses of state power. Elected officials have long complained about the intrusion of federal judges into the management of state prisons and local jails, but these bills would reduce or eliminate the ability of prisoners to take their concerns to state courts and force them to seek recourse in the federal courts.

Eliminating access to state courts is not about being "tough on crime." It is about being tough on the increasing numbers of prisoners who are most vulnerable to the effects of discrimination, negligent treatment or the outright abuse of power - - women, juveniles, the mentally ill, and the physically disabled.

Most of these bills apply not only to inmates of state-operated prisons, but to those in local jails, youth facilities, and privately-operated prisons. Since these institutions have total control over the lives of inmates, and they exist, by

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Prisons and Corrections Section
State Bar of Michigan
Position Statement Regarding
Family Values Behind Bars

Notice having been given, this position statement was adopted by the Prisons and Corrections Section Council on May 1, 1999 by a vote of 9-0. The views expressed are those of the Section and do not necessarily represent the views of the State Bar of Michigan.

Background

Over the last four years, changes in Michigan Department of Corrections (MDOC) policy have placed substantial new constraints on visitation and telephone usage. While inmates used to be able to receive visits from anyone not barred for particular reasons, new visiting rules implemented in 1995 limit the nature and number of visitors allowed. The term "immediate family member" is narrowly defined, and the number of non-immediate family members on a prisoner's visiting list is limited to ten. Children under 18 who are not the inmate's child, step-child, or grandchild are not allowed at all. Thus the inmate's underaged siblings are barred, along with nieces, nephews, and cousins. The consequence has been a 50% drop in the number of visits.

At about the same time, the MDOC began monitoring all inmate phone calls (other than to attorneys). Calls are also interrupted by repeated voiceovers and are automatically terminated in 15 minutes. Inmate phone calls must be collect, and each one carries a surcharge of up to three dollars, much of which is used to supplement the MDOC budget.

Visitation

Fifty years of undisputed social science study has proven that there is a direct and positive relationship between the number of visits received by an inmate and both current institutional behavior and reducing recidivism after release. Furthermore, the fostering of relationships is greatly beneficial to the family as a whole. The cardinal policy of state and local correctional facilities should be to encourage relationships between inmates and families, and to impose no restriction not essential for security. Visits should be allowed and encouraged.

Fundamental principles involving visitation should include:

1) Families should visit in the least restrictive atmosphere conducive to security.

2) Visits should not be restricted or denied except for reasons specifically related to visiting behavior of the persons involved.

3) Visits should be contact visits unless precluded for specific reasons directly relevant to the visiting behavior of the persons involved, or the visits are with a child who was a victim of the inmate's criminal conduct.

4) Children should be allowed to visit with their incarcerated parents even if there is an intervening adoption, so long as the adoptive parents consent and it is not contrary to an order of a court.

5) >Outdoor visiting areas and child playgrounds should be made available wherever possible.

6) Visitors who have complied with behavior rules should not have visits shortened because of lack of space or because visitors must temporarily leave the room for reasonable necessities (such as using a restroom or changing a baby).

7) Visitors should be permitted to appear on more than one inmate's visiting list as long as they are not a threat to institutional order or security.

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8) An MDOC inmate should be incarcerated at a place reasonably near the inmate's home county whenever facilities of the appropriate security level are available.

9) All possible effort should be made to avoid the out of state placement of an inmate.

A) Inmates housed in non-Michigan facilities should be entitled to the same number of visits, under the same conditions, to which they would be entitled if housed in Michigan at their true security levels.

B) Video visits with inmates housed outside of Michigan should be provided, at no cost to the inmate or family, no less frequently that in-person visits would be permitted if the inmate were in Michigan.

10) The definition of immediate family should be expanded to include aunts and uncles, and the spouses and children of immediate family members.

11) Children under the age of 18 who otherwise fit the definition of permitted visitors should not be excluded so long as they are accompanied by an appropriate adult.

12) Prompt notification shall be provided to the families of hospitalized inmates absent the inmate's objection and medical information shall be provided to the extent permitted by state law. Accommodation should be made to permit inmate visitation in times of illness, and especially in times of critical care.

Telephone Communication

Distance and the costs of visitation often cause the telephone to be the most frequent and sometimes the only means of contact inmates have with family members. It is therefore crucial that telephones be available, affordable, and allow for a reasonable degree of privacy.

Fundamental principles involving telephone availability and usage should include:

1) Monitoring of inmate phone calls should not take place absent security concerns specific to the persons involved.

2) Alternatives to existing phone systems should be continuously explored and adopted so as to provide the least expensive, most available, and most efficient system consistent with security concerns.

3) Telephone charges should not be used to supplement institutional budgets, nor for any purpose other than the continued provision of available, affordable telephone service to all inmates.

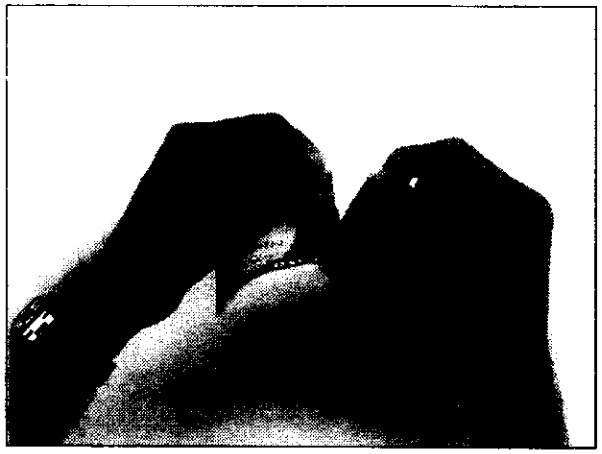
4) Institutional telephone systems should be expanded so that there are sufficient telephones to enable all inmates who wish to place calls to do so without unreasonable waits or limits on the duration of calls.

5) There should be no restriction on telephone or written communication availability based solely upon the use of a foreign language ❖

Eastern District Invalidates PLRA Attorney Fee-Cap Provision

By: Stuart G. Friedman

In order to encourage attorneys to assist individuals in challenging the violation of their civil rights, Congress has had a long history of rewarding prevailing plaintiff's attorneys with their actual attorney fees. Even where these fees exceeded the actual damages to the plaintiff, this award has been given on the theory that these attorneys are redressing the public harm which occurs through the violation of fundamental constitutional rights.



In 1995, Congress passed the Prison Litigation Reform Act with the stated purpose of reducing frivolous prisoner litigation. Part of this legislation purported to limit the maximum attorney fees that could be awarded in a prisoner civil rights violation case to one hundred and fifty percent of the prisoner's judgment.[1] Since prisoner judgments were historically very low, these provisions would make it financially disadvantageous for an attorney to take any prisoner civil rights work. On August 3, 1999, Magistrate Judge Paul J. Komives ruled the statute unconstitutional. *Walker v Bain*, Eastern District of Michigan, Docket No. 95-CV-76273-DT.

In *Walker*, Magistrate Judge Komives found that these provisions violated a prisoner's right to equal protection of the law by singling prisoners out for this harsh treatment. While the Court found that prisoners gave up many rights by virtue of their incarceration and that any law discriminating against prisoners had to be judged under the rational basis equal protection standard, the Court reiterated the basic principle of law that this deferential standard of review does not empower Congress to pass a law with a "bare congressional desire to harm a politically unpopular group."[2]

After undertaking a detailed discussion of the proffered governmental justifications for such a law, the Court found such justifications lacking. Reducing attorney fee awards to successful litigants would not deter the initial filing of frivolous civil rights acts. These suits are usually filed *pro se* and have to survive an initial screening for frivolousness. The Court compared the statute to the one struck down in *Lindsey v Normet*, 405 U.S. 56 (1972).

The statute in *Lindsey* required a defendant in an action brought under a state forcible wrongful reentry and wrongful detainer statute to post a double bond as a prerequisite to appealing. The *Lindsey* Court found that this statute imposed additional requirements which did not bear a reasonable relationship to the problem which the Legislature was purporting to address. The Court found that the statute "arbitrarily discriminates against tenants appealing from adverse decisions in" lockout cases. The Court held:

> The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but allows meritless appeals by others who can afford the bond.

Magistrate Judge Komives also found that the law could not be justified on the basis of protecting public funds because this doctrine cannot be utilized "as a basis to arbitrarily single-out a particular class to bear the entire burden of achieving that end."[3] Based on these findings, the Court invalidated the law.

Since the Defendants opted for trial by magistrate, this ruling is considered final at the District Court level. As it is likely that the Defendants will appeal, however, it is unlikely that this will be the final word on this subject◆

Endnotes

1. 42 U.S.C. §1997 e(d).
2. Slip Op. At 12 (quoting Weinberger v. Salfi, 422 US 749, 722 (1975)).
3. Id. at 18 (quoting Westberry v Fisher, 297 F. Supp. 1109 (D Me 1969).

Michigan Supreme Court Partially Overrules *Glover*

By: Tracie Dominique Palmer

On July 13, 1999, the Michigan Supreme Court issued its ruling in *Glover v Parole Board*[1], affirming the remand ordered by the Court of Appeals for the sole purpose of ordering the parole board to issue a more detailed written explanation for their denial of Mary Glover's parole. This ruling reversed several important holdings by the Court of Appeals.

As discussed in the Winter 1998 issue of *The Forum*, the issues before the Court were (1) whether an individual serving a parolable life sentence has a federal and state due process right to a written opinion detailing the reasons why parole was denied, and (2) whether the parole board is subject to the Open Meetings Act (OMA). The Court of Appeals had held that the due process clause did provide protection to prisoners at lifer parole hearings and that such parole board hearings were covered by the OMA. The Supreme Court, however, disagreed.

In an opinion drafted by Justice Brickley, the Court stated that the Court of Appeals rightfully remanded the case for a more "meaningful explanation" of the parole denial, but for all the wrong reasons. First, the Court asserted that there could have been no violation of Glover's due process rights.

The Court of Appeals was admonished for resting its holding on a dissenting opinion in *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*[2], as:

> [n]either the Court of Appeals nor any other court, save for the United States Supreme Court itself on rehearing or in a later case, is free to hold that the federal constitution provides a right that a majority opinion of the United States Supreme Court says it does not contain.[3]

The Court further found no compelling reason to justify interpreting the Michigan Constitution to confer greater due process rights on parolable lifers.

The Court agreed that Glover did have a statutory right to a written explanation of the parole board's decision to deny her parole. The Court held that "individuals serving parolable life terms and denied parole are statutorily entitled to a sufficiently detailed written explanation for the board's decision and, where appropriate, specific recommendations for corrective action the prisoner may take to facilitate release."[4]

The Court cautioned, however, that this holding is to be interpreted narrowly as merely an interpretation of an existing right created by statute, and that it does not stem from a constitutional right. This ruling appears to accept the proposition that lifer parole appeals are in fact subject to judicial review, a stance which has been frequently rejected.

Finally, the Court concluded that parole board hearings are not subject to the Open Meetings Act. The Court criticized the reasoning of the lower Court, asserting that even though the Legislature did not amend OMA fspecifically following its amendment to MCL 15.263(2) exempting the parole board from the public meeting requirements of OMA, the Legislative intent was to excuse the parole board entirely.

A concurring opinion signed by Justices Taylor and Corrigan took exception to the majority's holding that a lifer has a statutory right to a written explanation of the reasons for denial of her parole.

Taylor reasoned that the remand should have been based solely on the basis of MCL sec. 791.234(8) and MCR 7.104(D)(7), which merely provides the discretionary ability of a reviewing Court to request further explanation from the parole board should it deem such explanation necessary on a case-by-case basis.

Endnotes

[1] Dkt. No. 111221. Available on the internet at: http://www.icle.org/michlaw/oview.cfm?caseid=11122111.

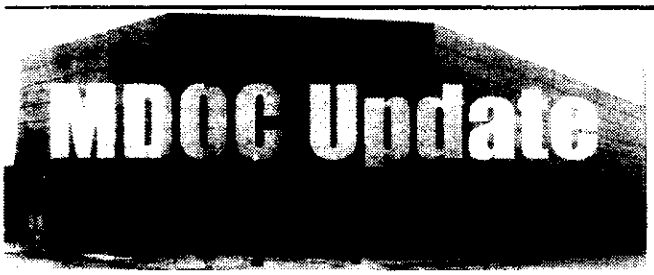
[2] 442 US 1; 99 SCt 2100; 60 LEd 2d 668 (1979).

[3] Slip Op. at 5.

[4] Slip Op. at 6.

Geraldo nationalizes conditions at Michigan women's prisons

On Friday, September 10, 1999, the Geraldo Rivera show is scheduled to run a feature story on prison conditions in Michigan. The show will be focusing on the pending litigation concerning women's prison conditions in the state and the effects of conditions of confinement on prisoners' children. It also will address the numerous allegations of sexual assault and harassment of women prisoners, as well as focusing on the work of Annual Meeting speaker Joyce Dixon, and her organization, Sons and Daughters of the Incarcerated. The program will air on NBC at 10:00 pm EDT.



By Marge VanOchten

Implementation of Disciplinary Time

The "Truth-in-Sentencing" law, which was first enacted by the Legislature in 1994, and modified in 1998, became effective on December 15, 1998. This statute introduces the concept of disciplinary time into the sentencing scheme for Michigan's prisoners.

A prisoner serving a sentence which is subject to disciplinary time cannot earn any type of credit, i.e. time off the sentence for good behavior such as good time or disciplinary credit. For example, if a minimum term of five years is given by the judge, the prisoner must serve the entire five years before being eligible for parole consideration by the Parole Board. In addition, disciplinary time is automatically accumulated for each guilty finding for major misconduct. (The amount of time accumulated for different misconducts is set out in R 791.5515.)

Although disciplinary time is not added to the minimum term, as was required by the original legislation prior to the 1998 amendments, the Parole Board must take into account the total accumulated disciplinary time when it considers whether to parole a prisoner. Thus, the Department must keep track of accumulated disciplinary time for those prisoners affected by it.

Disciplinary time does not apply to all felonies. Rather, it applies only to those felonies listed in the statute, MCLA section 800.34, which are committed on or after December 15, 1998. However, the legislation also states that it will apply to all crimes beginning December 15, 2000. Disciplinary time affects only indeterminate sentences, i.e. those with a minimum and maximum term. It does not affect life sentences or flat sentences, e.g. felony firearm offenses (MCL 750.227b).

The Department has issued Director's Office Memorandum (DOM) 1999-34 to implement the requirements of disciplinary time. In addition to what is outlined above, the DOM also discusses how prisoners may reduce accumulated disciplinary time through good behavior. It also states that a prisoner who is serving a sentence subject to disciplinary time is not eligible for community residential programs (CRP) until the entire minimum sentence has been served. This means that such prisoners will be eligible for CRP, and subject to Parole Board jurisdiction, on the same date. This requirement stems from a provision added to MCL 791.265a when disciplinary time was enacted. The crimes currently subject to disciplinary time are listed in an attachment to the DOM.

Prisoners subject to disciplinary time are still eligible for the Boot Camp program if their crime is not one which precludes placement in that program. Information on prisoner Boot Camp eligibility is contained in MCL 791.234a and Department policy directive 06.04.106 "Special Alternative Incarceration Program Prisoner."

Prisoner Disciplinary Policy

A revised version of the Department's prisoner disciplinary policy, PD 03.03.105, became effective January 1, 1999. Most changes in the policy are simply updates in language and references to programs which have changed since the last revision in 1994. There are significant changes in Attachment B of the policy, however, which contains the definitions of all major misconduct violations.

Three new major misconduct charges have been added to the list. The new charges are "Assault Resulting in Serious Physical Injury"; "Possession of a Weapon"; and "Smuggling." The first two charges were formerly part of the still-existing charges of "Assault and Battery" and "Possession of Dangerous Contraband" respectively. "Smuggling" is a completely new charge, which had been requested by Department staff to address several problems such as prisoners bringing cigarettes into an area where they are not allowed, e.g. segregation. All three charges have been added to the administrative rules setting forth amounts of disciplinary credit which may be forfeited, R 791.5513, and amounts of disciplinary time which are accumulated, R 791.5515.

Video Visiting

As has been discussed in this column in previous issues, the Department is housing several hundred prisoners with the Virginia Department of Corrections (VDOC). In late February, 1999, a video conferencing system was set up by the MDOC which allows attorneys and prisoners' family members and friends to communicate with those prisoners using video monitors which have been installed in the Virginia prison and at Southern Michigan Correctional Facility in Jackson, Michigan.

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Proposed Amendments to the Bylaws of the Prisons and Corrections Section of the State Bar of Michigan

At its meeting of March 13, 1999, the Prisons and Corrections Section Council voted to recommend the following proposed amendments to the Section bylaws. The first proposed amendment expresses the intent of the bylaws authors. The second proposed amendment clarifies that the Section Newsletter is to be the primary method of publication for proposed bylaws amendments.

Amendment One (Proposed):

2.1(B): Members of the Law Student Section and the Affiliate Member Section of the State Bar may ~~be~~ **BECOME ASSOCIATE** non-voting members of the Section upon payment of annual dues.

Amendment Two (Proposed):

8.2: Any proposed amendment shall be submitted in writing to the council in the form of a petition signed by at least ten (10) regular members of the Section, or by written motion of five (5) voting members of the council, at least sixty (60) days before the annual meeting of the Section at which it is to be voted upon. The council shall consider the prposed amendment and shall prepare recommendations thereupon, which recommendations, together with a complete and accurate text to said proposed amendments, shall be published in **THE SECTION NEWSLETTER**, the Michigan State Bar Journal or by such written communication as the council shall direct at least fifteen (15) days prior to the annual metting to the Section at which it is to be voted upon.

These proposed bylaws amendments shall be voted on by all Section members present at the Section's annual meeting on Thursday, September 16, 1999, 2:00 pm, at the Amway Grand Plaza Hotel & Grand Center, Grand Rapids.

MDOC Update
Continued From Page 7

The video conferencing system, and the process for gaining access to it, are described in Director's Office Memorandum (DOM) 1999-36. Attorneys wishing to set up a video visit with a Michigan prisoner housed in Virginia must submit a written request to the office of the Correctional Facilities Administration Deputy Director in the Grandview Plaza Building in Lansing. Attorney visits may be arranged during the normal visiting hours of the Jackson facility or, if confidentiality is necessary, at a time when the visiting area is not being used for regular visits. For more information on these visits, DOM 1999-36 should be reviewed.

Prisoner Mail Policy

The MDOC's policy directive on prisoner mail, PD 05.03.118, was revised effective November 30, 1998. This policy directive had not been revised since 1985 due, in part, to orders issued in *Cain v. MDOC*, a prisoner class action lawsuit filed in 1988 which is still being litigated in Ingham County Circuit Court. However, resolution of the property issues in that case removed some of the impediments to issuance of a revised mail policy.

The basic processes and requirements for handling incoming and outgoing prisoner mail are not altered by the revisions to the policy. However, there are some notable changes, including:

(1) The list of types of mail which are prohibited because the content presents a threat to security or interferes with rehabilitation has been expanded and clarified, based on several state and federal court decisions which have been issued since 1985, which previously had been disseminated to wardens and mail room staff via memoranda from Central Office.

(2) The process for placement of rejected newspapers, magazines and books on the Department's Restricted Publications List is fully explained. The final decision to place a publication on that list because it falls within one of the prohibited areas discussed above is made by the Deputy Director of the Correctional Facilities Administration.

(3) A provision has been added requiring notification to the sender whenever incoming mail is rejected, if the sender's return address is noted on the rejected mail. The sender is allowed to submit objections to the rejection to the facility head. This requirement was included in R 791.6603 when it was amended in 1993, but had not yet been added to the policy directive❖

650-Lifer Law Victory Is Only First Step

By Laura Sager, Director
Families Against Mandatory Minimums, Michigan Project

Michigan's notorious "650 Lifer Law" --responsible for sending nearly 200 drug offenders to prison for life without parole-- was finally modified last year, after a state-wide coalition organizing effort spearheaded by Families Against Mandatory Minimums' Michigan Project (Michigan FAMM).

The new law, effective October 1, 1998, establishes a penalty of 20 years to life for delivery or conspiracy to deliver over 650 grams of heroin or cocaine. In addition, it provides retroactive relief for those incarcerated prior to that date. Individuals are eligible for parole consideration after 20 years or 17 ½ years, if they have no prior convictions for serious crimes (as defined in the statute). If a judge certifies on the record that an individual has co-operated with law enforcement, the individual is eligible for parole 2½ years earlier. The statute also requires the Parole Board to consider whether the individual played a key role in the drug trade, sold to children 17 years or younger, or committed the offense in a drug-free school zone. Copies of the statutes are available from FAMM.

JeDonna Young, who served 21 years in prison, was the first "650 Lifer" paroled. A recent CBS *60 Minutes* segment chronicled JeDonna's homecoming, the impact of the "650 Lifer Law," and the reasons behind the reform effort. Since her release in January, Young has been admitted to the School of Social Work graduate program at the University of Michigan.

You made it possible

FAMM is extremely grateful for the extraordinary amount of time and effort contributed by members of the Prisons and Corrections Section of the Bar and the Criminal Defense Attorneys of Michigan. Your invaluable assistance as technical advisors and activists during the campaign to change the law made this first stage of reform possible. We also are deeply indebted to those who provided assistance to prisoners seeking parole hearings and to the Prisons and Correction Section as a whole for its endorsement of the efforts to reform Michigan's draconian drug laws. Thank you! FAMM will continue to need your advice, support and leadership in the months ahead.

Reform effort continues

While all of those who took part in the rollback effort should be proud of this historic victory, we must continue the effort to reform Michigan's drug statutes-which remain among the harshest in the nation. The "650 Lifer Law" victory is only a first step on road to reform

During this legislative session, we will focus on the fiscal and human cost of mandatory minimum sentences for under-650 offenses (10-20 years for possession/delivery of 50-224 grams, 20-30 years for 225-649 grams) and consecutive sentencing for drug offenders. Our goals: eliminate mandatory and consecutive sentences so judges can use their discretion, within sentencing guidelines, to "fit the punishment to the crime." We will also ask legislators to make any changes retroactive.

In addition, FAMM is also working with substance abuse treatment organizations to help educate the legislature and the public about alternatives for addicted drug offenders that both enhance public safety and are far more cost-effective than long prison terms. We also continue to monitor the parole process for "650 Lifers."

FAMM is developing case profiles of prisoners serving long mandatory and consecutive sentences for under-650 offenses, meeting with legislators, working with the media and continuing to build our state-wide coalition. We still need your help in identifying prisoner cases and generating endorsements from organizations. In addition, from time to time we have specific situations where currently incarcerated prisoners need legal advice or *pro bono* assistance.

If you can help, please contact Families Against Mandatory Minimums at: Michigan FAMM, 115 W. Allegan, Suite 950, Lansing, MI 48933, FAX (517) 482-5839, e-mail lsager@aol.com, or call (517) 482-4982◆

Chart of laws:

650 grams +	20 years - life (delivery)1
	life (possession)2
225 - 649 grams	20 - 30 years3
50 - 224 grams	10 - 20 years
25 - 49 grams	1 - 20 years4

Endnotes

1Prior to 10/1/98, life without parole. Now "650 lifers" are eligible for parole at 15, 17½ or 20 years, based on prior record and cooperation.

2"Eligible for parole after 10 or 15 years, based on sentencing date.

3For under-650 gram offenses (delivery and possession), the court may sentence below the mandatory minimum only for "substantial and compelling" reasons.

4 Delivery offenses

Hadix gives PLRA prospective effect

On June 21, 1999 in *Martin v Hadix*, Dkt. No. 98-262, the United States Supreme Court set forth a framework for the application of the attorney fee cap contained within the Federal Prison Litigation Reform Act of 1995 (PLRA) to cases pending at the time of its enactment.

Originating in Michigan, the *Hadix* case involves fee claims by attorneys who had represented plaintiff prisoners who had won two separate suits against the MDOC challenging conditions of confinement pursuant to 42 USC sec. 1983. The underlying conditions lawsuits had been filed in 1977 and 1980, but both required post-judgment monitoring long after the PLRA's effective date of April 26, 1996.

At the time the PLRA went into effect, the local market rate for attorney fees in both cases was $150 per hour. The PLRA, however, capped attorney fee rates for the Eastern District of Michigan at a rate of $112.50 per hour. Originally, the District Court held that the PLRA did not limit attorney fee rates for services performed before its effective date, but did cap fees for services performed after that date.

The Sixth Circuit, however, held that the PLRA's fee cap could not apply to cases pending on the date of its enactment, as that would necessarily have an impermissible retroactive effect of reducing attorney fees. The Sixth Circuit asserted that when the attorney's work was performed with regard to the effective date of the PLRA did not matter, the proper focus was on whether or not the case was already in progress at that time.

In affirming in part and reversing in part, the Supreme Court returned to the holding of the District Court. It flatly rejected the arguments that the PLRA should not be applied to cases pending on its date of enactment and that it only be applied to cases filed after that date. Acknowledging that the legislation must be applied prospectively, the Court held that the attorneys would be compensated at the pre-PLRA rate set by the Eastern District for work performed prior to April 26, 1996. Postjudgment monitoring work performed after that date, however, is subject to the fee cap of the PLRA.

The Court rejected the reasoning of the Sixth Circuit that such an application effectively would result in a retroactive application of the PLRA to reduce the overall award of attorney fees. The Court asserted that such a holding was based on the erroneous assumption that the decision to file the underlying conditions cases by the attorneys was irrevocable. To support its reasoning, the Court argued that at no time were the attorneys prohibited from withdrawing their representation during the postjudgment monitoring phase of the cases.

Note, the issue of whether Hadix applies to cases where an attorney sought to withdraw and was denied permission to do so is currently pending Eastern District of Michigan◆

Court reluctantly holds HCRA applies to inmates

By: Tracie Dominique Palmer

With statements implying that it was being dragged kicking and screaming into reaching such an opinion, the Michigan Court of Appeals held that the Handicappers Civil Rights Act (HCRA, now the People with Disabilities Civil Rights Act, PWDCRA) applies to prisoners. In *Jane Doe, et al v Dep't of Corrections*, Dkt. No. 200810, the Court (Griffin, McDonald and White) was faced with reviewing the summary disposition of a class action suit on behalf of all prisoners who had been denied placement in community residential programs, camps and farms because they were HIV-positive, pursuant to official MDOC policy.

The majority reasoned, albeit reluctantly, that under the holding of *Neal v Dep't of Corrections (on Reh'g)*, 232 Mich App 730 (1998), (*Neal II*), the HCRA must be interpreted to apply to prison facilities. *Neal II*, which held that the Michigan Elliot-Larsen Civil Rights Act applied to prisons, was issued following the United States Supreme Court decision of *Pennsylvania Dep't of Corrections v Yesky*, 524 US 206 (1998). The opinion of the Court in *Jane Doe*, however, is littered on nearly every page with disclaimers stating how the majority of the panel agreed with the reasoning and decision of the *Neal I* opinion, and the dissent to *Neal II*.

Judge Helene White criticized the panel's dicta in her concurring opinion. White argued that prisons are necessarily established to "provide a public service," and that the plain language of both the state Civil Rights Act and the PWDCRA require an interpretation which includes application to prisons. White focused on the need to interpret remedial statutes liberally and the unavoidable parallels between the Americans with Disabilities Act, which *Yesky* held did apply to prisons, and the PWDCRA◆

En Banc Sixth Circuit Finds That Retaliation Claims Do Not Need to Meet *Sandin* Standard

By: Stuart G. Friedman

Convicted prisoners give up many of their rights by virtue of their incarceration. In *Sandin v Conner*,[1] the United States Supreme Court held that due process did not ordinarily protect an inmate's claims regarding placement in a prison. Nor does due process protect that prisoner against deprivation of prison privileges, even where the state regulation was cast in mandatory terms.

The net effect of *Sandin* was to remove legal protection from numerous prison rules and regulations which had been previously protected. Does this mean that a prison has the right to deny a prisoner such a right for any reason? What if the prison denies a prisoner this right or privilege in retaliation for the inmate's exercise of a constitutional right? This was the question recently addressed by the *en banc* United States Court of Appeals for the Sixth Circuit in *Thaddeus-X v Blatter*.[2]

In *Thaddeus-X*, ("X") several inmates brought suit against various Michigan Department of Corrections employees, claiming that those employees took steps to penalize the inmates for their litigation activities. According to the lawsuit, inmates Bell and X executed a "legal Assistance Agreement" under which X would help Bell sue the Warden of the State Prison of Southern Michigan.

During the course of the lawsuit, a guard refused to continue to transfer legal materials between the two inmates and transferred X to the lowest level of segregation at the prison. This was the part of the segregation unit which was typically reserved for mentally ill patients.

For the next several months, the guard in charge of X refused to transfer materials between the two inmates, consistently brought the inmate cold food, and housed him next to an inmate who refused to bathe. The complaint alleged a variety of unhealthy conditions in the housing unit. The defendants denied these allegations.

Thaddeus X filed a pro se complaint in the United States District Court for the Eastern District of Michigan alleging among other things denial of access to the courts, retaliation, and Eighth Amendment violations.. The defendants sought to dismiss the suit. The magistrate recommended dismissing the equal protection and due process claims, but recommended denying the defendants' motion as to the retaliation charge, the access to the courts charge, and the Eighth Amendment claims.

Judge Zatkoff dismissed the charges as to all Defendants. On appeal, a panel of the Sixth Circuit found that the Eight Amendment claim and the retaliation claim should go to the jury. Defendants moved for rehearing *en banc*.

On *en banc* rehearing, the Court found that a retaliation claim can exist even where the defendant's conduct would otherwise be legal. In doing so, the Court overruled its prior ruling in *Cale v Johnson*,[3] which required prisoners claiming retaliation to make a heightened showing that the government employee engaged in an "egregious abuse of governmental power."

The Court held that access to the courts was protected by the First Amendment and was a right retained by prisoners. Therefore, retaliation for constitutionally-protected access to the Courts was actionable. Once a retaliatory motive is established, a plaintiff is not required to demonstrate that the defendant engaged in illegal conduct. All that is required is a demonstration of "adverse action."

Borrowing from employment law, the Court found that adverse action took place where "the adverse action is one that would deter a person of ordinary firmness from exercise of the right at stake." Such action would include transfers to administrative segregation. Based upon this reasoning, the Court remanded the matter for further proceedings.

Several Judges dissented from the majority's holding. Judge Suhrheinrich and Judge Kennedy believed that the conduct to which X was subjected was not such as to "deter the average convicted criminal from filing a lawsuit," and "was an ordinary incident in prison life."

Judge Merritt concurred in part and dissented in part, believing that X should be required to re-exhaust his administrative remedies in lieu of the change in law announced by the Court's decision❖

Endnotes

1 515 U.S. 472, 482-83, 115 S Ct 2293, 132 LEd2d 418 (1995).

2 175 F.3d 378 (6th Cir. 1999).

3 861 F.2d 943 (6th Cir. 1988).

definition, to be punitive, enforceable laws are necessary to prevent abuse.

HB 4475 and 4476 - Sponsored by Reps- Bishop, Birkholz, Pappageorge, Howell, Caul, Gosselin, Vander Roest, Voorhees, Kuipers, Vear, Koetje, Patterson, Richner, Bovin, and Scranton.

The People with Disabilities Civil Rights Act protects people from being denied access to public accommodations and services based on characteristics resulting from illness, injury, or congenital birth defects. In a prison setting, this means insuring the disabled have access to such facilities as toilets, showers, medical clinics, visiting rooms and chow halls, and to programming, such as religious, educational, treatment, work and recreational activities. It also means having adequate evacuation plans for people in wheelchairs, TDD telephones for the hearing impaired, written notices in type readable by the visually impaired, and misconduct policies that do not penalize the disabled for their inability to comply with rules.

The Elliott-Larsen Civil Rights Act protects people from being denied access to public accommodations and services based on their race, gender, religion, ethnic origin, age or marital status. In the prison setting this means that people cannot be harassed or mistreated because they are non-white or foreign-born, that individuals cannot be forced to violate sincerely held religious beliefs, that some prisoners cannot be denied access to services and programs because they are too old or too young, and that women cannot be sexually harassed and assaulted because they are women.

The proposed bills would not merely place reasonable conditions on the filing of state civil rights claims. They would prevent such claims from being filed at all, not only by prisoners but by others who may be the object of discrimination because of their relationship to prisoners, including family members, volunteers, attorneys, and clergy. There is no justification for this change in the law.

> There is no evidence that prisoners are filing a large number of claims under these acts, much less a large number of frivolous claims.
>
> To whatever extent frivolous claims are a problem, independent means to discourage them exist that do not also prevent legitimate claims from being heard.
>
> Michigan prisoner civil rights claims are subject to the balancing test devised by the U.S. Supreme Court in *Turner v Safley* to insure that the governmental interest in prison security remains paramount.
>
> Accommodating the disabled is not as costly as many assume.
>
> State facilities need not be made accessible for all disabilities — just those in which people with particular disabilities are actually placed.
>
> Experience has shown that many individual accomodations can be made at little or no cost.

Unlike employees or members of the public, prisoners (and those who wish to speak or visit with them) - no matter what their race, religion, nationality, age, gender, or disability - have no option but to function where and under the circumstances in which corrections officials place them.

Taking the regressive step of removing prisons from the coverage of the civil rights acts would not only deny remedies to prisoners with meritorious claims, it would communicate the Legislature's lack of concern about whether corrections officials do in fact violate the civil rights of prisoners and of members of the public who must access correctional facilities.

SB 419 - Sponsored by Senator Van Regenmorter

As initially proposed, this multi-faceted bill amending the Revised Judicature Act would have barred prisoners who had previously had two cases dismissed for being nonmeritorious from ever fling a conditions of confinement suit unless he or she was in imminent danger of serious physical injury or sexual assault. "Nonmeritorious" was broadly defined to include actions "not reasonably related to legitimate penological interests" or which failed to state a claim upon which relief could be granted.

After hearings before the Senate Judiciary Committee at which many people testified, including several Section members, two amendments offered by Sen. Chris Dingell were adopted. One changed the filing bar to be more like that in the federal PLRA. Prisoners with three prior nomneritorious suits are barred from filing *in forma pauperis*. That is, they must pay full filing fees in advance.

An additional provision, expressly aimed at Prison Legal Services of Michigan, also bars those with "three strikes" from being "allowed legal representation by any attorney who is being directly or indirectly compensated for his or her services in whole or in part by state funds." The

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second Dingell amendment changed the definition of"nonmeritorious" to mean "frivolous" as defined in MCL 600.2591(3), i.e., filed to harass, embarrass or injure the prevailing party, or without reasonable basis for believing the factual allegations were true, or devoid of arguable legal merit.

While some of the most troubling aspects of SB 419 were corrected, many concerns remain. Not only does the current proposal still go well beyond the federal act, the constitutionality of the federal act itself remains highly controversial. If enacted in its present form. SB 419 may well generate more litigation than it avoids! The remaining concerns include the following:

The successive claims provision applies:

to any dismissed prior action, notjust conditions of confinement suits

to prior suits that may have been meritorious but inartfully drawn

retroactively to all prior suits, no matter how old and despite the lack of notice

The prisoner must disclose all prior civil actions, regardless of their nature or merit. Even a non-willful failure to do so requires dismissal of the current suit, regardless of its merit or the amount of filing fees already paid.

Prisoners are barred from bringing "an action for mental or emotional injury suffered while in custody without a showing of physical injury arising out of the incident giving rise to the mental or emotional injury."

This would bar suits arising from the abuse of such behavior control techniques as prolonged isolation, extreme sensory deprivation, and four point restraints. It could bar suits for failure to provide appropriate treatment to the mentally ill. It additionally appears to bar suits for discrimination, sexual harrassment and perhaps even sexual assault, depending on how "physical injury" is defined.

SB 419 contains a presumption that conditions of confinement suits are frivolous. Defendants can simply fail to reply without consequence, and no relief can be granted unless a reply is filed. A court can only order a reply if it first finds the prisoner is likely to prevail on the merits. Further, judges who require responses must explain their "failure" to dismiss prisoner complaints.

SB 419 also incorporates the requirements of MCL 600.2963. Prisoners must pay filing fees within abbreviated deadlines they may be unable to meet because of prison business office practices. Indigent prisoners must pay off fees and costs at punitive rates.

Trial courts may appoint special masters to conduct hearings and prepare proposed findings of fact, but must compensate them at an hourly rate no greater than that paid to court-appointed counsel, to be paid from funds appropriated for payment of appointed counsel. These requirements will, as a practical matter, eliminate both the willingness of competent individuals to serve as special masters and the ability of trial judges to pay them.

Damages awarded to prisoners who have successfully sued prison officials over conditions of confinement must be used to satisfy restitution orders issued under the State Correctional Facility Reimbursement Act. This permits defendants to take back money for room and board from damages they have just been required to pay out for their wrongful conduct.

NOTE: Both SB 419 and HB 4623 contain provisions similar to those of the federal PLRA regarding the availability of prospective relief in prison conditions suits. HB 4622 contains provisions regarding the in forma pauperis filing of civil actions by state prisoners that are narrower in scope and less punitive than those of the Senate bill. For instance, there is no limitation on the appointment of special masters, no limitation on claims for mental or emotional injuries, and no presumption that conditions of confinement suits are frivolous.

The sponsors of HB 4622 are Reps. Gilbert, Shackle/on, Kowall, Julian, Howell, Hager, Patterson, Tabor, Voorhees, Vear, Garcia, DeRossett, Mortiner, Caul, Rocca, Gosselin, Pappageorge, Bovin, Ehardt, Green and Toy. SB 298 - Sponsored by Senators Stille, Bennett, Goschka, Bullard, Hammerstrom and Jaye. HB 4624 - Sponsored by Reps. Shackleton, Gilbert, Howell, Bisbee, Patterson, Tabor, Julia, Caul, Green, Koetje, and Ehardt

Prisoner Parole Appeals

The Section's opposition to the elimination of parole appeals was originally reported in the Spring, 1998 issue of the ***Forum***. The Governor made abolishing prisoner parole appeals a priority in his 1999 State of the State message. The justification offered is that the hundreds of such appeals filed annually are all frivolous and drain the resources of the Attorney General.

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In fact, the number of parole appeals has increased both because the prison population is expanding so rapidly and because the board, as a matter of policy, is increasingly denying parole to prisoners who are well beyond their earliest release dates. An increasing number of these appeals are beginning to win, as the courts are coming to understand both board procedures and the manner in which the board exercises its discretion. The Section's opposition to these identical bills is based on several points.

Eliminating appeals by the prisoners whose own lives are at stake, while continuing to permit them for prosecutors, would be grossly unfair and a probable violation of the equal protection guarantee. Further, permitting judicial review of parole denials is critical for several reasons:

The parole board has decided, as a matter of policy, not to parole whole categories of offenders regardless of the individual prisoner's institutional record and suitability for release.

This is unfair to individuals who have worked hard to earn release,

If the parole board effectively resentences prisoners simply because it disagrees with the minimum sentence, it makes the judicially imposed minimum effectively irrelevant. This undermines judicial sentencing discretion, the recently enacted legislative sentencing guidelines, and the process of plea negotiations.

The incarceration costs resulting from inappropriate parole denials far outweighs the cost of appealing them.

The parole board is an administrative agency like many others in the Executive branch and its decisions should be equally subject to judicial review.

The entire body of parole statutes was revised in 1992. Procedural protections designed to make the process fair and accurate are part of a comprehensive scheme. These protections are meaningless if they cannot be enforced through judicial review.

The declining rate of paroles in the last several years contributes substantially to the need to construct new prison beds without having a significant provable impact on public safety. Additionally, prisoner parole appeals are not inherently frivolous. Prisoners have won numerous cases involving procedural protections that make parole decisions more fair and accurate. These include:

requiring consideration of relevant information provided by the prisoner, such as private psychological reports

requiring compliance with the parole guidelines statute

assessing the discriminatory impact on women prisoners of guidelines factors developed for men

In some cases, decisions to deny parole have been found to be an abuse of discretion because the factual record supported the prisoner's release.

It is not the appeals that lose which are most important, it is those that win. Most appeals to the Court of Appeals, both civil and criminal, do not succeed. But those that do create a body of precedent to guide decisionmaking in all future cases.

Lifer Interviews

Until the composition of the parole board was changed in 1992, and lifer eligibility for parole consideration was changed from 10 to 15 calendar years, lifers were first interviewed when they had served seven years and then every two years thereafter. The change to a five year interview cycle reflected the reality that the board rarely paroles parolable lifers.

Permitting the board to interview lifers (regardless of when they were sentenced) only if and when it chooses to would undoubtedly leave virtually all lifers to languish indefinitely without any consideration. Since the retroactive application of the change to five years was upheld in *Shabazz* v *Gabry,* the new proposal would also affect lifers sentenced 20+ years ago by judges who expected them to get genuine consideration for release after 12 or 14 years.

The proposal contains no standards and no basis for claiming that a refusal even to interview a lifer was an abuse of discretion. The result would be an end-around last term's amendment of MCL 791.234(6), which requires the board to state reasons when it denies parole to a lifer as it must when it continues any other prisoner. Obviously, if the prisoner need never be interviewed, the need to explain the denial of release never arises.

Even more importantly, the current practice of making virtually no functional distinction between parolable and nonparolable life would be enshrined in the statute. This would rob thousands of current parolable lifers of hope for release, including those "650-lifers" who were just given parole eligibility through the hard-won 1998 legislation. It also would alert future defendants considering guilty pleas down from first-degree to second-degree murder that they would have nothing to gain from an ostensibly parolable life term.

Section representatives are prepared to testify if and when these bills are scheduled for hearing. Individual Section members are also encouraged to contact legislators by letter, phone or e-mail◆

Prisons & Corrections Section
Council Elections

The section will be holding elections at the State Bar of Michigan Annual Meeting to fill four council seats for three-year terms beginning in the fall of 1999. We are a working council and applicants must be prepared for the responsibilities of the office. All interested attorneys are encouraged to run for these offices. Council members must be members of the section and must be available to attend meetings on the first Saturday of every month in Lansing. To be placed on the ballot, you must provide all of the following information to the Election Qualifications Committee on or before **September 10, 1999** (please print or type legibly):

Name and P-number: _____

Mailing Address: _____

City/State/Zip Code: _____

Daytime telephone number: _____

Current fields of practice/employer: _____

Professional affiliations: _____

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

_____

_____

_____

_____

_____

_____

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

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

The elections will take place at the Section's annual meeting on Thursday, September 16, 1999 at 2:00 PM, at the Amway Grand Plaza Hotel & Grand Center, Grand Rapids. All candidates should plan on attending the meeting.

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

Join the Prisons & Corrections Section

I am interested in joining the Prisons and Corrections Section of the State Bar of Michigan!

Name (include State Bar Number, if applicable)

Firm/ Professional Affiliation / Inmate Number & Facility

Mailing Address Suite/Apt. Number

City State Zip Code

Telephone Number

Membership Status Sought:

_____ Attorney membership ($20)

_____ Associate membership ($15)

_____ Newsletter Subscription for Prisoners and Non-Criminal Justice Professionals ($10)

Send completed application with payment to:

Prisons & Corrections Section
P.O. Box 12037
Lansing, Michigan 48901-2037

Make Checks Payable to: "State Bar of Michigan"
Changes of address should be sent directly to the State Bar of Michigan

1999 State Bar of Michigan Annual Meeting

The Prisons & Corrections Section will hold their annual meeting on Thursday, September 16, 1999, at 2:00 pm in the Emerald Room (A), Concourse Level of the Amway Grand Plaza Hotel. We encourage all members to attend our program:

Family Values Behind Bars: Promoting Prisoner Family Relationships

A Panel Discussion

Prof. Rosemary Saari, Professor of Social Work, University of Michigan and Institute for Social Policy, University of Michigan

Response Panel:

Denise Quarles, Regional Administrator for Region 3, Michigan Department of Corrections

Joyce Dixon, MSW, Director: Sons and Daughters of the Incarcerated

Deborah LaBelle, Attorney, Lead Counsel in several prominent class-action suits focusing on women prisoners' rights; recipient of the State Bar of Michigan's 1999 Champion of Justice Award.