

STATE APPELLATE DEFENDER OFFICE

1990 ANNUAL REPORT

APPELLATE DEFENDER COMMISSION

John C. Emery, Jr., Attorney
Chairman
Nominated by the State Bar
Term Expires May 24, 1991

John E. S. Scott, Attorney
Secretary
Nominated by the State Bar
Term Expires May 24, 1991

Norbert Jaworski, Clerk, Michigan Court of Appeals
Nominated by the Court of Appeals
Term Expires May 24, 1994

Fred J. Borchard, Retired Judge
Nominated by the Circuit Judges Association
Term Expires May 24, 1993

Janet E. Findlater, Associate Law Professor
Nominated by the Supreme Court
Term Expires May 24, 1991

Frank Eaman, Attorney
Nominated by the Supreme Court
Term Expires May 24, 1991

Rolando H. Shorey, Executive Director
Nominated by the Governor
Term Expires May 24, 1992

The State Appellate Defender Office (SADO) was established in 1970 by Michigan Supreme Court Administrative Order 1970-1 to provide competent, high-quality legal representation of indigent criminal defendants in post-conviction matters. The staffed, state-funded office now operates under 1978 PA 620, MCL 780.711. et seq. The legislation established a seven-member Appellate Defender Commission to supervise the office and to develop a system for supervising the assignment of counsel for all assigned appeals in Michigan. After the legislation was enacted, the Commission developed performance Standards for criminal appellate counsel and established the Michigan Appellate Assigned Counsel System - MAACS, to supervise the private bar, assigned to conduct indigent appeals. The administration of MAACS is state funded but the counties pay the fees for assigned private counsel.

By statute, SADO is to receive no less than 25% of all criminal appeals, with the remaining 75% going to locally appointed private counsel. To prevent overassignment of the state funded, staff attorney component because it is "free", the statute mandates that SADO accept only that number of cases that will allow the office to provide quality defense services consistent with the funds appropriated by the Legislature.

Beginning in the early 1980's, prison populations and the resultant appeals rapidly expanded. Funding however did not keep pace, in fact it decreased dramatically in 1989 and 1990. From 1986 - 1989, SADO controlled the rapidly growing caseload by closing the office to new assignments a month at a time. While this moderated the intake for brief periods, it so abruptly turned on and off the flow of work that it proved unmanageable. When it became clear that the surge of cases would continue indefinitely, on March 29, 1990, the Appellate Defender Commission took the unprecedented step of reducing the percentage of cases the office would accept. They voted to reduce SADO's percentage of cases from "no less than 25 %" of the assigned appeals to no more than 17%. The new assignment levels became effective in June of 1990. By the close of 1990, SADO had received slightly over 17% of the state's indigent appeals.

As noted above, while the workload of the office surged, funding and staffing levels peaked and then sharply dropped. The workload, coupled with the lack of adequate funding, affected the capacity of the entire system including the Appellate Defender Office.

Table 1

STATE APPELLATE DEFENDER OFFICE STAFFING LEVELS, 1989-1990

1/1/89	21 attorneys*
6/1/89	24 attorneys
6/1/90	21 attorneys
6/1/91	20 attorneys

* numbers reflect all salaried staff attorneys employed in the Detroit and Lansing SADO offices excluding managers.

Table 2

APPELLATE CASELOAD 1986 -1990

	APPELLATE ASSIGN'S	25% SADO ASSIGN'S	STAFF ASSIGN'S	CAPACITY
1986	3660	915	742 (20.2%)	720
1987	3831	958	851 (22.2%)	720
1988	4230	1058	897 (21.2%)	755
1989	5153	1288	1121 (21.7%)	860
1990	5550	1387	994 (17.9%)	755*

* During 1990, staff capacity fell with the threatened and then actual budget reductions of FY 89-90 and at the start of FY 90-91.

Defender, James R. Neuhard, directs the operations of SADO. The SADO Commission adopted regulations for operation of the mixed public defender/private appointed counsel system. This integrated appellate representation system began on December 2, 1985.

Under the Commission's regulatory scheme, SADO accepts varying numbers of assignments from the circuits. The number accepted, 1 out of 4, 5, 6, or 7, depends on the ratio of attorneys to the number of criminal, felony appeals taken in that particular jurisdiction. Local appointing authorities sequentially appoint either SADO or private defense counsel from those rosters. The goal is to distribute evenly the state funded service to all the counties. The system also allows counties to assign SADO out-of-sequence if the local judge believes the case will be costly or difficult to handle. This gives the counties an insurance policy to avoid extremely large fee cases that could deplete their entire assigned counsel funds with one case.

In 1989, SADO accepted 1,122 new assignments, 21.7% of the total indigent appellate assignments for that year (5,153). This was a 25% increase over the number (897) accepted in 1988. In 1990, SADO took in only 994 new cases due to the vote of the Commission to reduce the intake percentage as a result of chronic underfunding and staff reductions. SADO's 994 assignments for 1990 were only 17.9% of the 5,550 total indigent assignments for the year.

Between 1979 and 1986, SADO accepted an average of about 700 cases a year. However, from 1987 to 1990 the number of assignments to SADO dramatically increased and far exceeded its capacity to handle them. If SADO had received 25% of the State's appellate appointments in 1990, the number of new assignments would have been 1,387. This is 632 or 83% more than its diminished capacity of 755. Even with the percentage decrease and intake shutdowns in March and May, SADO still received more assignments than it had resources to handle. These 240 cases over capacity represent the work of 7 attorneys.

SADO projections of future caseload for the office, the Court of Appeals and Supreme Court, continues to be bleak. Because of the lack of staff increases and the continuing caseload increase, restriction of intake will continue to be necessary. During the past decade, the caseload rose more than 100% and the staff levels are back to the levels they were a decade ago.

SADO received no staffing increases for 1991. The 9.2% cutback early in the 1991 fiscal year (late 1990), coming on the heels of the cutbacks in the 1990 fiscal year, required elimination of cost-efficient student research, not filling vacant attorney positions, voluntary unpaid leaves and payless days. Without additional funding for the 1992 fiscal year, additional staff layoffs will occur. The caseload projections continue to show that 13% of those convicted and 41% of those imprisoned will appeal. Department of Corrections computer models project increases in imprisonment rates for 1991 and 1992 for those in the group most likely to appeal — minimum sentences of 2 – 10 years.

OFFICE SERVICES

SADO attorneys review transcripts and lower court records, and then visit and interview clients at Michigan's prisons and jails scattered across the state. They investigate facts, research legal issues, file all necessary pleadings, conduct post-conviction hearings in state and federal trial courts and present oral arguments at all levels of the Michigan and Federal judiciaries.

During 1990, the Defender, two Deputy Defenders, Assistant Defenders, Legal Resources Project Director, and Special Unit Director were housed in the Detroit (main) and Lansing offices. SADO also employed legal secretaries, a Chief Investigator and her paralegal assistant. Administrative assistants, clerks, and a receptionist supported the legal staff. One SADO attorney was housed at and received clerical support and research assistance from the University of Michigan Law School while teaching the Appellate Practice Clinic/Course there. To further cut costs and increase efficiency, SADO established another Appellate Practice Course at Wayne State University Law School in Detroit.

ACTIVITIES AND WORKLOAD ANALYSIS

In 1990, SADO's assistant defenders and deputy defenders handled a combined total of 994 new cases. Although below 1989 totals due to loss of staff, this number is 172 cases over the totals for 1988 and continues to reflect a work effort well beyond capacity. The Special Unit, which included the Unit Manager and three (3) other Assistant Defenders handled 347 of these assignments. The Unit provides expedited relief and handles a high volume of simple cases with similar issues. Unit attorneys handle about twice as many cases as other assistant defenders.

Among their many accomplishments, SADO attorneys were successful in again changing the standard for appellate review of sentences from the "Shocks the

Conscience" of People v Coles to proportionality of People v Milbourne. This should not only produce fairer sentencing, but reduce the costs of incarceration as well.

The 994 cases assigned to attorneys included; 55 special assignments (these range from United States Supreme Court briefs to responses to prosecutor appeals), 569 plea, and 370 trial appeals.

Table 3

ASSIGNMENTS OF STATE APPELLATE DEFENDER OFFICE, 1990

Pleas	569
Trials	370
Specials	<u>55</u>
Total	994

Table 4

CASELOAD STATISTICS FOR STATE APPELLATE DEFENDER OFFICE, 1990

Cases Open as of 12/31/90	1,915
Cases Closed 1/1/90 to 12/31/90	<u>753</u>
Total	2,668

COLLATERAL ACTIVITY AND SPECIAL PROJECTS

The Legal Resources Project completed during 1990 thirteen years of service to the criminal justice community. Highlights for the Project during the year included a grant award of \$70,231 from the Michigan Criminal Justice Training Commission for the writing and production of a new edition of the Defender Trial Book. Covering updates through December of 1990, the book was divided into looseleaf binders containing the law on trial and sentencing issues. A new feature was "Practice Notes," being helpful tips from an experienced trial attorney. More than 1,000 pages of material made up the revised editions, planned for distribution in Spring of 1991.

Another highlight of the year was the move to a monthly publication schedule for the Criminal Defense Newsletter, from its previous schedule of nine issues annually. The move was motivated by the need to inform readers of the many changes occurring in criminal law and procedure. New features in the newsletter included regular coverage of opinions and significant orders of the United States Supreme Court, and summaries of

significant unpublished Court of Appeals opinions. The annual survey of newsletter subscribers revealed high satisfaction with form and substance, with many indicating that they would be lost without it.

Automation of core functions continued, with conversion of the Project's subscription database from the outdated Barrister system. Brief bank maintenance was significantly improved through development of a new method of brief entry; Project staff now review by computer all new pleadings shortly after they are filed, eliminating unnecessary photocopying. The Project Director screens all briefs to enter only those containing a significant update or comprehensive treatment of an issue, and the Clerk prepares the computer files and printouts. Planning of automated retrieval of brief bank material continues, while possible in 1990 in elementary form. Over 5,835 briefs were in the brief bank at year's end.

Collection and development of forms also was a highlight, largely in response to increased caseloads and a reduced SADO budget. Service to non-client inmates was reduced to provision of forms and simple advice on counsel and right to appeal questions.

Requests for information, from both SADO and non-SADO attorneys, continued to grow, reaching the level of 5,108 answered during the year. These consisted of requests from attorneys (2,908), inmates (859), and judges or other workers (1,341). Calls and letters came in from 81 of Michigan's 83 counties, as well as nine states other than Michigan. Most (892) requests came from Wayne County, followed by Oakland County (366), Washtenaw (156), Macomb (104), and Ingham (101). Over 22,000 pages of brief bank and other material were provided to these persons, in addition to advice by phone. The value of materials provided was \$1,330,500, using a conservative formula. Growth in response to requests for information was dramatic this year, from 4,200 last year to the all-time high of 5,108. The ability to handle more requests without more staff was a product of their hard work, development of more forms packets, and automation of more functions.

The Criminal Defense Newsletter remained the flagship of Project publications, published monthly and averaging 24 pages in length. Over 1,400 subscriptions went out to criminal defense attorneys and others in the criminal justice system. Other publications included opinion summaries (sent out twice monthly), prior editions of the Trial Book, and an attorney sentencing manual.

The Project continued to support SADO attorneys and researchers through access to Westlaw and Lexis databases. To eliminate costly and fruitless searches done by the attorneys themselves, Project staff formulated research inquiries and performed the automated searches. Nearly ninety hours of on-line searches were performed, in response to 216 requests.

Under the auspices of the State Appellate Defender Commission, Michigan Justice Training funds obtained by SADO, MAACS and the Criminal Defense Attorneys of Michigan again enabled those organizations to continue producing training materials and conduct essential and otherwise unavailable training for attorneys representing indigent criminal defendants.

SADO continued efforts to expand its presence in Michigan's law schools. The Wayne State University Law School implemented its appellate practice clinic/course and the original clinic/course completed its 19th year at the University of Michigan law school. Under arrangements with both state funded law schools, the cost for the course is shared by both SADO and the Law Schools. This allows SADO to operate two full caseloads at half the cost while providing intensive training for the students. Several other SADO attorneys conducted courses at the Cooley Law School and supervised Cooley and Wayne State University law students assigned to SADO's Detroit and Lansing offices.

SADO attorneys again participated in legislative hearings on criminal justice issues and worked with legislators and legislative committees on criminal law and corrections matters. They also served on many boards, commissions, committees, and task forces working on criminal justice programs at both the state and national levels and were faculty and participants in the full spectrum of criminal justice activities.

SADO continued to accept lengthy and difficult "out-of-sequence" cases to save the counties from financial distress by paying private counsel to handle extremely costly cases. Also, SADO handled one "impact" litigation case that saved the state several millions of dollars in improper incarceration costs. This case responded to the 1990 Department of Corrections elimination of disciplinary credits from the entire minimum sentences, including non-mandatory portions thereof, of all controlled substance offenders. SADO filed a civil action which required the Department of Corrections to restore credits improperly forfeited. This litigation success saved the State over 16 million dollars in incarceration costs over a period of several years. SADO also filed a similar challenge to a "window" period requiring mandatory consecutive sentencing for certain offenders. Success with this challenge will provide millions of dollars in additional cost savings.

GOALS

SADO will continue to seek funding for the resources it needs to provide effective, high-quality, cost efficient representation in its 25% of the ever-expanding number of indigent appeals taken annually and to support the private component of Michigan's unified indigent appellate defense delivery system and the criminal defense bar in general. It will also continue to publish training materials, practice and procedure books and manuals, distribute the Criminal Defense Newsletter and opinion summaries, develop computer interactive sentencing guidelines scoring and annotated reference programs and conduct and participate in various training programs.

**STATE APPELLATE DEFENDER OFFICE ANNUAL REPORT
FOR THE YEAR ENDED DECEMBER 31, 1990**

Total New Assignments 1/1/90 to 12/31/90	994
Cases Open as of 12/31/90	1,915
Cases Closed 1/1/90 to 12/31/90	<u>753</u>
TOTAL CASES PROCESSED 1/1/90 TO 12/31/90	<u>2,668</u>

Last Action on Cases Open as of 12/31/90

I. TRIAL COURT

Motion Resentence	16
Motion New Trial/Withdraw Plea	23
Leave case - transcript received	57
Leave case, no transcript	9
Motion Bond/Other	0
No action calendar year	2
Remanded, hearing/decision pending	56
Substitution of Counsel pending	6
Regular disposition, further action pending	<u>8</u>
Total:	177

II. COURT OF APPEALS

Claim filed - incomplete transcript	188
Claim filed - transcript received	582
SADO brief filed	229
SADO and Prosecutor briefs filed	254
Oral argument had	77
Motion Remand pending/granted	26
Trial Court motion denied/granted-brief due	9
Motion Resentencing/Peremptory Reversal/Other	4
Supplemental brief	54
SADO/Prosecutor Motion Rehearing	27
Motion/Stipulation Dismiss pending	12
Application Leave/Delayed Appeal	10
Motion Bond	4
Held in abeyance	8
Regular disposition, further action pending	68
No action calendar year	<u>0</u>
Total:	1,552

III. SUPREME COURT

Application for Leave to Appeal with brief	140
Application for Leave to Appeal - held in abeyance	8
Leave granted, brief filed	1
Leave granted - oral argument had	2
Motion Rehearing	3
Leave granted	0
Motion Dismiss	1
Remanded for hearing	7
Regular disposition, further action pending	16
Reply brief in response to order to show cause	2
Case assigned, transcript not received	1
Case assigned, transcript in	<u>0</u>
Total:	181

IV. UNITED STATES COURTS - DISTRICT/APPEALS/SUPREME

SADO/Prosecutor briefs	0
Petition for Writ of Habeas Corpus	2
Order for further pleadings	1
Petition for Writ of Certiorari	<u>2</u>
Total:	5

TOTAL OPEN CASES: **1,915**

**STATE APPELLATE DEFENDER OFFICE ANNUAL REPORT
FOR THE YEAR ENDED DECEMBER 31, 1990**

Disposition of Cases Closed 1/1/90 to 12/31/90

I.	TRIAL COURT	
	Motion Resentence/Credit granted/denied	39
	Substitute counsel appointed/retained	32
	Dismissed by motion/stipulation	3
	Motion Vacate Plea/Sentence/Conviction granted/denied	3
	Motion New Trial/Withdraw Plea granted/denied	15
	Appeal dismissed-client died	1
	Other disposition	<u>1</u>
	Total:	94
II.	COURT OF APPEALS	
	Regular disposition	233
	Appeal dismissed by stipulation/motion	193
	Consolidated with another case	0
	Application Leave/Delayed Appeal denied	3
	Appeal dismissed-client died	0
	Attorney retained	2
	Other	<u>0</u>
	Total:	431
III.	SUPREME COURT	
	Leave denied - SADO	189
	Leave denied - Prosecutor	9
	Reversed and remanded	10
	Reversed - Prosecutor	5
	Affirmed	3
	Leave granted - SADO (new case started)	3
	Leave granted - Prosecutor (new case started)	2
	Appeal dismissed by motion/stipulation	<u>1</u>
	Total:	222
IV.	UNITED STATES COURTS - DISTRICT/APPEALS/SUPREME	
	Petition for Writ of Certiorari denied	6
	Motion granted/denied	0
	Reversed	0
	Affirmed	0
	Other	<u>0</u>
	Total:	6
	TOTAL CLOSED CASES:	<u>753</u>

Filings by SADO 1/1/90 to 12/31/90

TRIAL COURT	399
COURT OF APPEALS	1,259
SUPREME COURT	383
UNITED STATES COURTS	<u>20</u>
Total Filings:	<u>2,061</u>

Assignments of SADO 1/1/90 to 12/31/90

PLEAS	569
TRIALS	370
PROSECUTORS	13
RESENTENCING	40
SPECIALS	<u>2</u>
Total Assignments:	<u>994</u>

**STATE APPELLATE DEFENDER OFFICE ANNUAL REPORT
FOR THE YEAR ENDED DECEMBER 31, 1990**

**Disposition of All Cases Closed
Since the 1970 Formation of the State Appellate Defender Office**

I.	TRIAL COURT	
	Final disposition reached	798
	Substitute counsel appointed	294
	Case/Appeal dismissed	146
	SADO withdrew as counsel by request/appointment returned	70
	Withdrew as counsel	43
	Assigned in error, improper assignment, etc.	37
	Appeal withdrawn	32
	Client retained own counsel	26
	Client missing, no possible action	3
	Assigned to advise client only	1
	Client released on habeas corpus	<u>1</u>
	Total:	1,451
II.	COURT OF APPEALS	
	Final disposition reached	5,054
	Appeal dismissed by motion/stipulation	1,699
	SADO motion to withdraw as counsel granted	230
	Application for Delayed Appeal denied	86
	Client missing, deceased	20
	Client retained own counsel	14
	Appeal dismissed as moot	7
	Prosecutor's motion to dismiss appeal granted	2
	Confession of error by prosecutor	2
	Appeal dismissed for lack of progress	<u>1</u>
	Total:	7,115
III.	SUPREME COURT	
	SADO/Prosecutor leave granted/denied	2,711
	Final disposition reached	594
	Prosecutor's leave granted	46
	Appointment vacated	32
	Appeal dismissed	20
	Disposition by Supreme Ct on plea cases for Ct of Appeals	10
	Case dismissed - client missing/deceased	6
	SADO leave granted - client retained own counsel	5
	Withdrew as counsel	5
	Client withdrew appeal	3
	SADO removed as counsel, client found not indigent	<u>3</u>
	Total:	3,435
IV.	UNITED STATES COURTS - DISTRICT/APPEALS/SUPREME	
	Final disposition reached	34
	Writ of Certiorari SADO/Prosecutor granted/denied	21
	Writ of Habeas Corpus denied	14
	Appeal dismissed	2
	Substitute counsel appointed	<u>1</u>
	Total:	72
	TOTAL FINAL DISPOSITIONS	<u>12,073</u>