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## Asked and Answered . . .

### Katherine Marcuz on the Appellate Investigation Project

By **Steve Thorpe**

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The Michigan Appellate Assigned Counsel System (MAACS) and State Appellate Defender Office (SADO) are making appellate investigation more accessible in criminal cases with funding from a federal Byrne Justice Assistance Grant. The Appellate Investigation Project (AIP) provides investigative assistance to the 140 attorneys taking appellate assigned cases from MAACS, which maintains a statewide roster of private assigned appellate counsel. An AIP attorney and investigator train roster attorneys, develop materials, and assist with issue spotting and development. Katherine Marcuz serves as the principal attorney of the AIP.

#### **Thorpe: What was the genesis of the project?**

**Marcuz:** While the need for independent investigation is more widely recognized at the trial level, it is no less necessary on appeal. Michigan's appellate process is unique. Appellate counsel is not confined to raising only issues that arise on the record, but is also responsible for developing issues through record expansion, which makes it critical for attorneys to make reasonable investigations and consult with experts when necessary. Yet, access to investigative services is a challenge faced by many indigent appellate defendants and their attorneys. Nearly 75 percent of all indigent appellate defendants in Michigan are assigned to private counsel on the MAACS roster, who are compensated by the counties rather than the state. In order to hire investigators or experts, MAACS roster attorneys must first request funding approval from judges at the trial court level. These requests present many challenges and are not routinely granted, requiring attorneys to conduct investigations on their own while facing heavy caseloads and limited resources.

SADO has one staff investigator for 25 attorneys across two offices. While this is not an ideal ratio, the benefit of having even one investigator on staff is abundantly clear. It was also abundantly clear how unfair the process was for MAACS roster attorneys to access an investigator for their cases. The aim of the AIP is to provide MAACS roster attorneys with the access to investigative support that SADO has found to be integral

in achieving the best outcomes for its clients, and in doing so create more parity between criminal defense attorneys and their prosecution counterparts.

**Thorpe: How does the project assist attorneys?**

**Marcuz:** The AIP assists attorneys through direct investigation and litigation support and has teamed up with SADO's Criminal Defense Resource Center to train roster attorneys on issues of appellate investigations, use of experts, and forensic issues. Foremost, the AIP provides investigative services where additional factual investigation is necessary to substantiate a legal claim on appeal. This commonly includes reviewing the work done by the investigating police department and the evidence compiled by the prosecution, identifying, locating, and interviewing independent witnesses, and obtaining records and other evidence not procured at the trial level. The project staff also works with appointed counsel to determine a strategy for using the evidence to support the legal issues.

In some cases, the project staff consults with attorneys who require support litigating extra-record issues or issues where expert assistance is required. In addition to helping attorneys frame legal issues, draft pleadings, identify appropriate experts, and seek funds from the trial court, the project staff has provided resources around forensic science issues, subpoenaed and prepared witnesses, and second-chaired evidentiary hearings.

As the project gains exposure, inquiries and requests for help are steadily increasing, and renewal grant funding will be sought.

**Thorpe: Andrew Lee serves as the Investigative Attorney of the team. Tell us about him and his role.**

**Marcuz:** Andrew Lee came to the AIP from the Orleans Public Defenders (OPD) in New Orleans, Louisiana. As a trial attorney at OPD, Andrew regularly worked alongside attorneys and investigators to find and meet with witnesses, collect written statements, and visit crime scenes. Many of Andrew's investigations revealed mitigating or exculpatory evidence, saving clients years in state custody. The AIP team works collaboratively on every case to develop and execute an investigation strategy. Andrew conducts investigations in the field and is very talented at communicating with witnesses and obtaining additional evidence. He also brings a trial attorney's perspective and skill set to preparing for evidentiary hearings in the trial court.

**Thorpe: SADO attorneys have obtained nearly 20 exonerations in recent years, most due to post-conviction investigations. Tell us about those.**

**Marcuz:** In most of these cases, no investigation was done at the trial court level. In many, appellate investigation was accompanied by use of experts. Appellate investigation not only led to just outcomes in these cases, but also the opportunity in some to find and prosecute the actual perpetrator of the crime. Many dozens of years would have been unnecessarily spent in prison at great state expense, had the exonerations not occurred.

SADO's most recent success story exemplifies the need for investigation and reinvestigation, especially as the presence of complex technological and scientific evidence becomes more commonplace. Derrick Bunkley became a suspect in a shooting and was arrested after the complainant identified him from a photographic lineup as one of the gunmen. When confronted by police, Mr. Bunkley denied any

involvement and maintained that at the time of the crime he had been at his mother's home and while there had taken photos on his phone and posted those pictures to Facebook. Prior to trial, defense counsel did not conduct an independent examination of the phone evidence, and at trial the prosecution suggested that Mr. Bunkley's mother had manipulated the time stamp on a Facebook photo in order to create an alibi for the crime. On appeal, SADO attorney Doug Baker, along with SADO Investigator Linda Borus and SADO programmer Eric Buchanan obtained Mr. Bunkley's cell phone records and used them to show that at the time of the crime, the phone accessed cell towers miles away. Further investigation showed that the photographs were taken at the time of crime as Mr. Bunkley had asserted, and the Facebook time stamp had not been tampered with. On February 19, 2016, the defense motion for new trial was granted. The prosecution then dismissed the charges and Mr. Bunkley was released from prison. He had originally been sentenced to a minimum of 17 years imprisonment.

Unfortunately, Mr. Bunkley's case is not an anomaly. Every day, indigent individuals are being convicted on an un-level playing field. Court-appointed trial attorneys face the same hurdles to obtaining investigators and expert witnesses at court expense as do court-appointed appellate counsel. Additionally, some trial attorneys are simply not trained to know how to determine when an investigator or expert is needed. Mr. Bunkley was lucky in that he had an appellate team that was able to properly address the issue and reveal the truth, which led to his exoneration. All individuals deserve the same opportunity and the same resources. That's what the AIP is all about.

**Thorpe: Tell us about your screening protocol and eligibility criteria.**

**Marcuz:** This project serves indigent defendants represented by MAACS appointed counsel. Cases that are appropriate for AIP assistance are those where appellate counsel has identified a meritorious legal issue and a need for investigation or expert testimony to support that issue. This typically includes some amount of preliminary investigation on the part of assigned counsel in order to assess the potential that additional resources will be fruitful. The AIP commits resources to cases where an objective review of the evidence supports a conclusion that the potential new or unrepresented evidence undermines confidence in the verdict or sentence. Notably, this final criterion does not amount to a requirement that a plausible claim of factual innocence can be developed through further investigation or testing. While the project certainly hopes to assist attorneys in investigating and litigating actual innocence cases, our goal is to provide support that assists attorneys in achieving better outcomes for their clients.

**Thorpe: When errors are identified, how are they addressed?**

**Marcuz:** Every case presents unique challenges. However, what is true across the board is that obtaining relief for clients on the basis of newly discovered evidence or evidence that would have and should have been secured through an adequate pretrial investigation is not an easy task. Consequently, a thorough appellate investigation includes considering why evidence was not uncovered earlier and how that evidence undermines confidence in the verdict or sentence.

In addition to conducting factual investigations, the AIP staff works to assist attorneys to better identify and substantiate the legal arguments implicated by the extra-record evidence. Our hope is that access to investigative and litigation support will result in more complete, and ultimately more successful, motion practice and evidentiary hearings.

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