

EXHIBIT E


# A Race to the Bottom

Speed & Savings Over  
Due Process:  
A Constitutional Crisis

June 2008

TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN

EVALUATION

 NATIONAL  
LEGAL AID &  
DEFENDER  
ASSOCIATION



**Evaluation of Trial-Level  
Indigent Defense Systems in Michigan**

**A Race to the Bottom  
Speed & Savings Over Due Process:  
A Constitutional Crisis**

June 2008

Researched & Written by:  
National Legal Aid & Defender Association

## Executive Summary

The National Legal Aid & Defender Association (NLADA) finds that the state of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts. The state of Michigan's denial of its constitutional obligations has produced myriad public defense systems that vary greatly in defining who qualifies for services and the competency of the services rendered. Though the level of services varies from county to county – giving credence to the proposition that the level of justice a poor person receives is dependent entirely on which side of a county line one's crime is alleged to have been committed instead of the factual merits of the case – NLADA finds that none of the public defender services in the sample counties are constitutionally adequate.

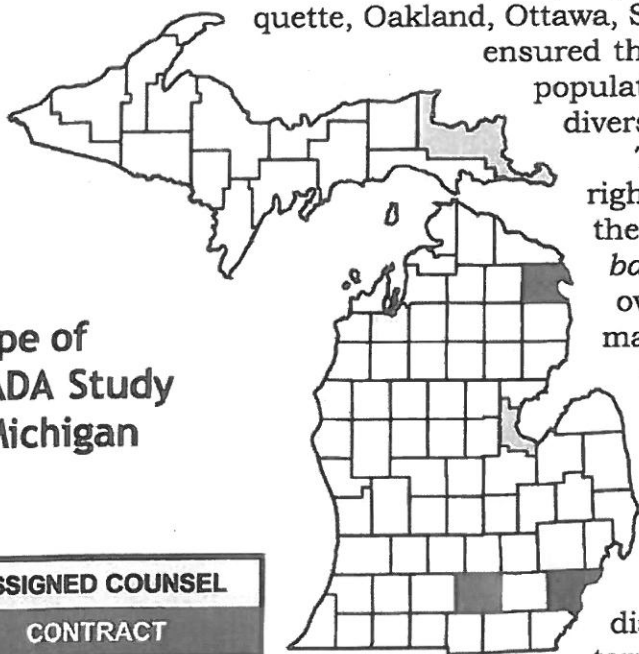
These conclusions were reached after an extensive year-long study of indigent defense services in ten representative counties in partnership with the State Bar of Michigan and on behalf of the Michigan Legislature under a concurrent resolution (SCR 39 of 2006). To ensure that a representative sample of counties was chosen to be studied, and to avoid criticism that either the best or worst systems were cherry-picked to skew the results, NLADA requested that an advisory group be convened to choose the sample counties. Created by SCR 39-sponsor Senator Alan Cropsy, the advisory group was composed of representatives from the State Court Administrator's Office, the Prosecuting Attorneys Association of Michigan, the State Bar of Michigan, the State Appellate Defender Office, the Criminal Defense Attorneys of Michigan, and trial-level judges. Ten of Michigan counties

were studied: Alpena, Bay, Chippewa, Grand Traverse, Jackson, Marquette, Oakland, Ottawa, Shiawassee and Wayne. The advisory group ensured that the county sample reflected geographic, population, economic and defense delivery model diversity.

The report opens with a retelling of the first right to counsel case in America – the case of the "Scottsboro Boys" in 1932, (*Powell v. Alabama*). Chapter I (pp. 1-4) presents an overview of our findings and concludes that many of the systemic deficiencies identified over three quarters of a century ago in the Scottsboro Boys' story permeate the criminal courts of Michigan today: judges hand-picking defense attorneys; lawyers appointed to cases for which they are unqualified; defenders meeting clients on the eve of trial and holding non-confidential discussions in public courtroom corridors; attorneys failing to identify obvious conflicts of interest; failure of defenders to properly prepare for trials or sentencings; attorneys violating their ethical canons to zeal-

### Scope of NLADA Study in Michigan

ASSIGNED COUNSEL
CONTRACT
MIXED
PUBLIC DEFENDER



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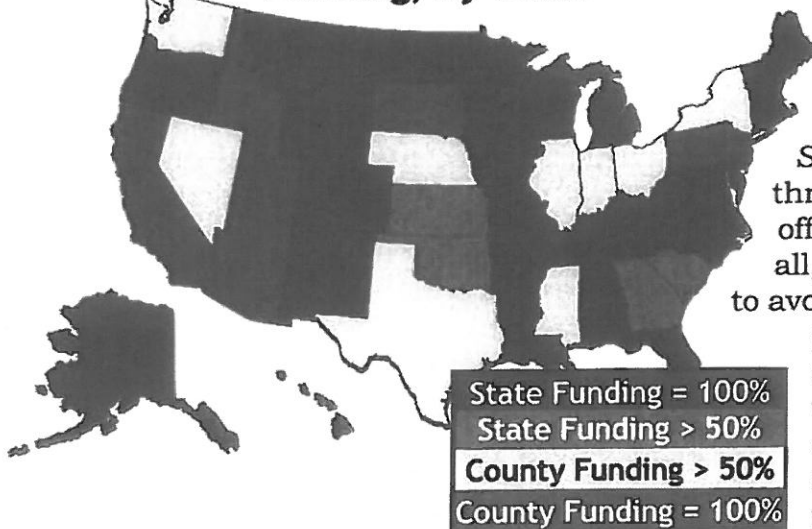
ously advocate for clients; inadequate compensation for those appointed to defend the accused; and, a lack of sufficient time, training, investigators, experts and resources to properly prepare a case in the face of a state court system that values the speed with which cases are disposed of over the needs of clients for competent representation.

Chapter II (pp. 5-14) presents the obligations that all states face under *Gideon v. Wainwright* – the mandate to make available to indigent defense attorneys the resources and oversight needed to provide constitutionally-adequate legal representation. Unfortunately, the laws of Michigan require county governments to pay for the state’s responsibilities under *Gideon* at the trial-level without any statewide administration to ensure adequacy of services rendered. This stands in contradistinction to the majority of states, thirty of which relieve their counties entirely from paying for the right to counsel at the trial-level.

Collectively, Michigan counties spend \$74,411,151 (or \$7.35 per capita) on indigent defense services; 38 percent less than the national average of \$11.86. Michigan ranks 44th of the 50 states in indigent defense cost per capita. The practical necessity of state funding and oversight for the right to counsel is premised on the fact that the counties most in need of indigent defense services are often the ones that least can afford to pay for it. The financial strains at the county level in Michigan have led many counties to choose low-bid, flat-fee contract systems as a means of controlling costs. In low-bid, flat-fee contract systems an attorney agrees to accept all or a fixed portion of the public defense cases for a pre-determined fee – creating a conflict of interests between a lawyer’s ethical duty to competently defend each and every client and her financial self-interests that require her to invest the least amount of time possible in each case to maximize profit. Chapter II ends with a documentation of Michigan’s historic, but ultimately ineffective, struggles to implement *Gideon*, including previous reports, case law, state bar actions and pending litigation.

The United States Supreme Court extended the right to counsel to misdemeanor cases in two landmark cases: *Argersinger v. Hamlin* and *Alabama v. Shelton*. The third chapter of the report (pp. 15-34) documents abuses of the right to counsel found throughout Michigan’s misdemeanor courts – the district courts. People of insufficient means in Michigan are routinely processed through the criminal justice system without ever having spoken to an attorney in direct violation of both *Argersinger* and *Shelton*. Many district courts throughout Michigan simply do not offer counsel in misdemeanor cases at all, while others employ various ways to avoid their constitutional obligation to provide lawyers in misdemeanor cases. These include uninformed waivers of counsel, offers by prosecutors to “get out of jail” for time served prior to meeting or being approved for a publicly-financed de-

### Trial-Level Indigent Defense Funding, By State



to avoid their constitutional obligation to provide lawyers in misdemeanor cases. These include uninformed waivers of counsel, offers by prosecutors to “get out of jail” for time served prior to meeting or being approved for a publicly-financed de-

## EVALUATION OF MICHIGAN'S TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS

fense counsel and the threat of personal financial strains through the imposition of unfair cost recovery measures. district courts across the state are prioritizing speed, revenue generation and non-valid waivers of counsel over the due process protections afforded by the United States Constitution. In fact, the emphasis on speed of case processing has led one jurisdiction – Ottawa County – to colloquially refer to the days on which the district court arraigns people as “McJustice Day” (their terminology, not ours). Our general observations across the state suggest that the Ottawa local vernacular is apt for describing Michigan’s valuing of speed over substance.

The American Bar Association’s *Ten Principles of a Public Defense Delivery System* constitute the fundamental standards that a public defense delivery system should meet if it is to deliver – in the ABA’s words – “effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney.” To show the interdependence of the ABA *Ten Principles*, NLADA chose one jurisdiction – Jackson County – around which to explain the importance of the *Principles* and to document how Michigan counties fail to meet them. That analysis, set forth in Chapter IV (pp. 35-56) extensively details how judicial interference impacts attorney workload and performance. In so doing, Jackson County becomes the poster child for reform in the state – not because county officials and policy-makers are inured to the problems of the poor, but because they fail to

### Per-Capita Spending

33.	Tennessee	\$9.30
34.	Alabama	\$9.17
35.	North Dakota	\$8.80
36.	Rhode Island	\$8.67
37.	Kansas	\$8.53
38.	Hawaii	\$8.26
39.	Maine	\$8.20
40.	Pennsylvania	\$8.10
41.	Oklahoma	\$8.02
42.	Idaho	\$7.83
43.	South Carolina	\$7.65
44.	Michigan	\$7.35
45.	Texas	\$7.04
46.	Indiana	\$6.77
47.	Arkansas	\$6.65
48.	Utah	\$5.22
49.	Missouri	\$5.20
50.	Mississippi	\$4.15
	<b>NATIONAL AVERAGE</b>	<b>\$11.86</b>

Comparing indigent defense systems across state lines is difficult, at best, given jurisdictional variances related to: delivery model, population, geographical expanse, prosecutorial charging practices, crime rates, county versus state funding, three strikes laws, and the death penalty (among others). For example, the state of Alaska has the highest cost per capita indigent defense spending (\$40.96) due almost entirely to the fact that public defenders must travel by air for many court appearances. So, whereas a high cost per capita may not necessarily guarantee that a state is providing adequate representation, a low indigent defense cost per capita certainly is an indicator of a system in trouble. Michigan ranks 44th of the 50 states.

## EXECUTIVE SUMMARY

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provide constitutionally adequate services despite their desire to do so.

Chapter V (pp. 57-82) is a documentation of how the other representative counties fail the ABA *Ten Principles* highlighted in the previous chapter. This section begins with an analysis of how Bay County is devolving from a public defender model into a flat-fee contract system because of undue political interference. The chapter also recounts the lack of an adversarial process in Ottawa County, where indigent defense services has devolved to the point where defense attorneys call the prosecuting attorney and ask him to have law enforcement conduct further investigations rather than conducting independent investigations themselves. Despite the overall dedication and professionalism of thousands of citizens employed in the police and prosecution functions in Michigan, it is simply impossible to always arrest and prosecute the right defendant for the right crime and mete out accurate and just sentences in every instance. Without a functioning adversarial justice system, everyday human error is more likely to go undiscovered and result in the tragedy of innocent people being tried, convicted and imprisoned.

In addition, Chapter V discusses many other systemic deficiencies in the delivery of the right to counsel across the state, including:

- The failure of the representative counties to ensure that their public defenders are shielded from undue judicial interference, as required by *Principle 1*. In Grand Traverse County, for example, the judiciary forces public defense attorneys to provide certain legal services for which they are not compensated if they wish to be awarded public defender contracts.
- The failure of the representative counties to manage and supervise its public defense attorneys' workload as required by ABA *Principles 5* and *10*. In Oakland County, one judge indicated that because attorneys are not barred from private practice or taking public cases in other counties or courts, attorneys are overworked, spread too thin and frequently not available on the date of a preliminary examination. Quality of representation is left to the defense attorney to define, balance and sometimes struggle with. Beyond that nothing is done to ensure the rendering of quality representation.
- The failure of the representative counties to provide public defense attorneys with sufficient time and confidential space to attorney/client meetings as required by *Principle 4*. The district court in Chippewa County, for example, provides no confidential space within which an attorney may meet with clients. For out-of-custody clients, most attorneys wait in line to bring their clients one-by-one into the unisex restroom across from judge's chambers to discuss the charges, while others will talk softly in the corridor.
- The failure of Michigan counties to adhere to ABA *Principles 6* and *9* requiring that public defense attorneys have experience and training to match the complexity of the case. It is difficult, at best, to construct an in-depth analysis of the lack of training in Michigan when the bottom line is that there is no training requirement in virtually any county-based indigent defense system outside of the largest urban centers. Even the training provided in the large urban centers is inadequate. Criminal law is not static – and public defense practice in serious felony cases has become far more complex over the past three decades. Developments in forensic evidence require significant efforts to understand, defend against and present scientific evidence and testimony of expert witnesses.
- The failure of the representative counties to provide indigent defense clients with vertical representation, i.e., continuous representation by the same attorney from the time



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counsel is appointed until the client's case is resolved as recommended in ABA *Principle 7*. Judges in Wayne County, for example, spontaneously appoint attorneys in courtrooms as "stand-ins" when attorneys fail to appear or remove the appointed attorney from the case and appoint an attorney who happens to be in the courtroom.

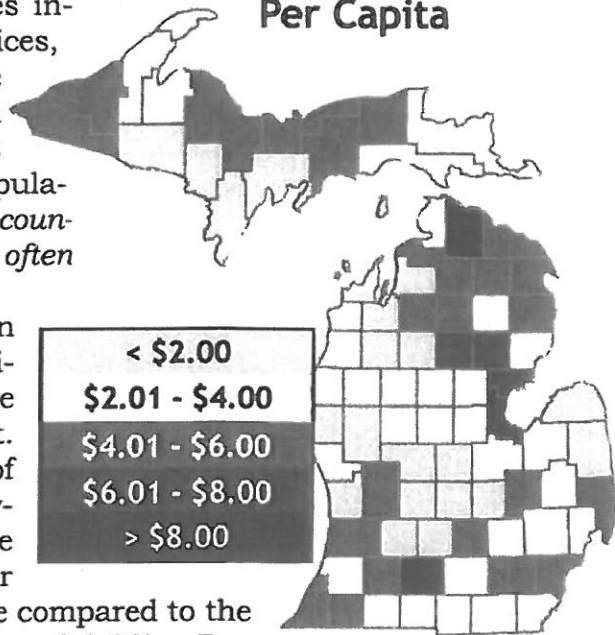
One of the reasons why *Gideon* determined that defense lawyers were "necessities" rather than "luxuries" was the simple acknowledgement that states "quite properly spend vast sums of money" to establish a "machinery" to prosecute offenders. This "machinery" – including federal, state and local law enforcement (FBI, state police, sheriffs, local police), federal and state crime labs, state retained experts, etc. – can overwhelm a defendant unless she is equipped with analogous resources. Without appropriate resources, the defense is unable to play its role of testing the accuracy of the prosecution evidence, exposing unreliable evidence, and serving as a check against prosecutorial or police overreaching. Chapter VI (pp. 83-90) looks specifically at the ABA *Ten Principles'* call for parity of the defense and prosecution functions. In detailing the great disparity in resources all across the state, the report notes that an NLADA representative had the privilege of attending a conference of the Prosecuting Attorneys Association of Michigan (PAAM) in which prosecuting attorneys made presentations on how prosecutors are underpaid, overworked, lack sufficient training, and work under stringent time guidelines which make the proper administration of justice difficult. The deficiencies of the prosecution function highlight how exponentially worse is the underfunding of the defense function.

Our constitutional rights extend to all of our citizens, not merely those of sufficient means. The majority of people requiring appointed counsel are simply the unemployed or underemployed – the son of a co-worker, the former classmate who lost her job, or the member of your congregation living paycheck-to-paycheck to make ends meet. Though we understand that policy-makers must balance other important demands on their resources, the Constitution does not allow for justice to be rationed due to insufficient funds. The issues raised in this report illustrate the failure on the part of the state of Michigan to live up to the mandate of the U.S. Supreme Court's *Gideon* decision. Though some may argue that it is within the law for state government to pass along its constitutional obligations to its counties, it is also the case that the failure of the counties to meet constitutional muster regarding the right to counsel does not absolve state government of its original responsibility to assure its proper provision.

the amount of money these poorer counties can dedicate toward education, social services, healthcare, and other critical government functions that could positively affect and/or retard rising crime rates. The inability to invest in these needed government functions can lead to a spiraling effect in which the lack of such social services increases crime, further depressing real estate prices, which in turn can produce more and more crime – further devaluing income possibilities from property taxes. And, since less affluent counties also tend to have a higher percentage of their population qualifying for indigent defense services, *the counties most in need of indigent defense services are often the ones that least can afford to pay for it.*<sup>11</sup>

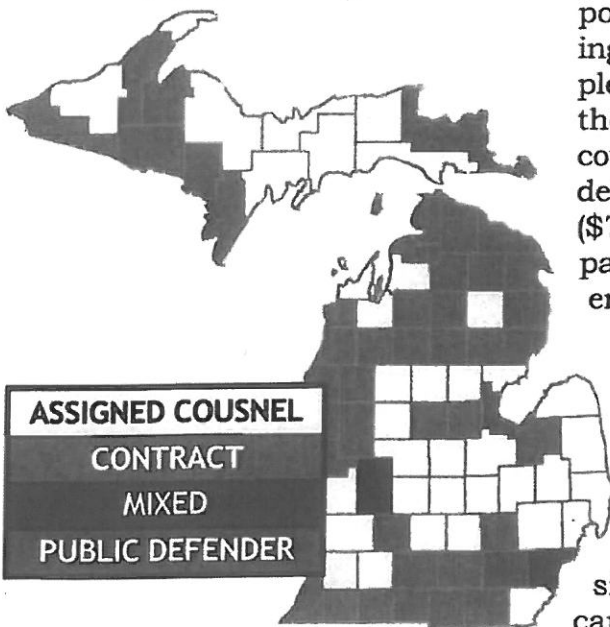
To see if this national phenomenon held true in Michigan, the NLADA site team studied comparison crime statistics and economic indicators. The median poverty rate for Michigan is 10.5 percent. The 38 counties that have a lower percentage of their population living in poverty than the state average also have a lower crime index percentage than the state average (8.21 index crimes per

**Indigent Defense Spending Per Capita**



1,000 people compared to the state average of 9.28). By contrast, the 44 counties with higher percentages of poverty than the state average have a correspondingly higher crime index (10.23 crimes per 1,000 people, or a 10 percent greater frequency of crime than the state average). Correspondingly, the poorer counties in Michigan indeed spend more on public defense services than the more affluent communities (\$7.88 per person in the poorer communities compared to a state average of \$7.35 and the more affluent county average of \$6.19).<sup>12</sup>

**County-By-County Defender Systems**



This dynamic puts a financial strain on less affluent counties – or in a state like Michigan experiencing an on-going recession – the majority of counties. Collectively, Michigan counties spend \$74,411,151<sup>13</sup> (or \$7.35 per capita) on indigent defense services; 38 percent less than the national average of \$11.86). Michigan counties are significantly behind the national mean for per capita spending on defender services of \$10.39

(Michigan counties collectively spend 29 percent less than the national mean). Indeed, Michigan ranks 44th of the 50 states in indigent defense cost per capita). Michigan, for example, would need to spend approximately \$104,366,050 to meet the state funding per capita spending of a state like Alabama – a state that is generally seen as not providing

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constitutionally adequate representation.<sup>14</sup> Indeed, the state of Michigan would need to spend \$120,033,400 to match the national average indigent defense cost-per-capita.<sup>15</sup>

### *County Attempts to Fund the State's Constitutional Mandate*

Although national standards recommend the use of staffed public defender offices wherever the population and caseload are sufficient to support such programs,<sup>16</sup> assigned counsel and contract attorneys provide most of the indigent defense services in Michigan. In fact, there are only five staffed public defender offices<sup>17</sup> in the entire state. The Kent County Public Defender's Office maintains a staff of 13 attorneys and contracts with the county to handle about 50 percent of the cases for that jurisdiction each year. The other 50 percent are handled by assigned counsel holding annual contracts with the county. The Legal Aid and Defender Association of Detroit, a not-for-profit corporation,<sup>18</sup> receives 25 percent of the assignments from Wayne County, while the rest are handled by assigned counsel. In Oakland and Macomb counties, both of which are heavily populated portions of the greater Detroit metropolitan area, there is no public defender office at all.

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As recently as of the early 1990s when 34 counties paid by the hour, Michigan was known as a state that followed the assigned counsel model of indigent defense delivery. That is no longer the case, as most now rely on a mixture of assigned counsel and flat fee contracts. Twenty-nine counties (of 83 total, or 35 percent) rely exclusively on individual assigned counsel for trial level representation of indigent defendants. In addition, Wayne and Kent counties assign private counsel in 75 percent and 50 percent of their cases respectively.

Some courts set rates by the hour and others by event with so-called fee schedules. As of April 2006, twenty circuits pay their assigned counsel solely by an hourly rate. Hourly rates vary widely from one county to another; as high as \$88.82 in Ottawa County to as low as \$40 in Eaton County – a rate last reviewed in 1978.

A fee (or event) schedule pays an attorney a fixed amount per task, regardless of the number of hours actually spent completing that task. An attorney in Leelanau County,<sup>19</sup> for example, will earn \$200 for the client interview and case preparation, \$100 for the preliminary hearing, another \$100 for a hearing on motion, \$600 for the first day of trial, and \$200 for each subsequent half-day in trial. Events tend to be further categorized in larger counties based on the seriousness of the charge. The use of fee schedules, it has been noted, rests “on the premise that if a lawyer handles enough assignments, things average out ... while fee schedules effectively pay at higher or lower rates depending on the number of hours invested in a given case, most will always pay more for a trial than a guilty plea.”<sup>20</sup> Often these fee schedules are adopted in jurisdictions with heavy caseloads as a cost-saving measure. Counties seeking to cut costs even further have often implemented low-bid flat-fee contracts.

Flat-fee contracting is oriented solely toward cost reduction, in derogation of ethical and constitutional mandates governing the scope and quality of representation.<sup>21</sup> Fixed annual contract rates for an unlimited number of cases create a conflict of interest between attorney and client, in violation of well-settled ethical proscriptions compiled in the *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, written by NLADA and adopted by the ABA in 1985. Guideline III-13, entitled “Conflicts

### Michigan's Financial Strains

Michigan counties may be the least suited to handle the burden of providing the right to counsel because of the serious financial strains of the local economy. State and local economists and policy-makers have been attempting to cope with an economy that has lagged toward the bottom of the nation for over a decade.<sup>a</sup> In fact, the state's growth rate since 1997 has ranked 48th in the nation.<sup>b</sup> Michigan ended 2006 with an unemployment rate of 7.1 percent (well above the national average of 4.5 percent).<sup>c</sup> Since 2001, an estimated 346,500 jobs have vanished in Michigan as manufacturers have shed 25 percent of their workforce in that time-span.<sup>d</sup> Michigan's flat tax rate on personal income is 3.90 percent giving it one of the lowest top brackets in the nation. Some cities impose additional income taxes. There is single business tax on small businesses that is set to expire by 2009,<sup>e</sup> and a corporate tax is levied on larger concerns. Michigan's state sales tax is six percent. The state does not allow city or local sales taxes. Property taxes are assessed on the local, not state, level.

At the same time, Michigan imprisons significantly more of its population than the majority of the 50 states. In 2004, Michigan had 263,100 adults under correctional supervision and a supervision rate of 3,527 per 100,000 persons, which ranked 4th among the

states and was about 27 percent above the national average.<sup>f</sup> That same year, the state's incarceration rate was 483 per 100,000 people, ranking 13th. The result of this reliance on the corrections system is a heavy cost to Michigan's taxpayers. Indeed in 2001, Michigan taxpayers paid 26 percent more per inmate than the national average; a cost per inmate of \$32,525 placed the state 8th nationwide.<sup>g</sup>

<sup>a</sup> Aguilar, Louis. “Economic Funk Won't End in 2006: As nation's outlook improves, Michigan will see 6th straight year of job losses, analysts say.” The Detroit News (Sunday, December 4, 2005). See: <http://www.detroitnews.com/apps/pbcs.dll/article?AID=/20051204/BIZ/512040341>

<sup>b</sup> See “Table 1. Growth Rates in Real GDP by State, 1997-2005” <http://www.bea.gov/bea/newsrel/gspnewsrelease.htm>

<sup>c</sup> Michigan Department of Labor & Economic Growth. ([http://www.milmi.org/admin/uploadedPublications/463\\_econsit.htm](http://www.milmi.org/admin/uploadedPublications/463_econsit.htm)).

<sup>d</sup> See Aguilar.

<sup>e</sup> [http://www.detroitchamber.com/public\\_affairs/index.asp?id=4&scid=&rcid=498](http://www.detroitchamber.com/public_affairs/index.asp?id=4&scid=&rcid=498)

<sup>f</sup> Correctional supervision statistics include prisons, jails, probations, and parole.

<sup>g</sup> National Institute of Corrections (<http://www.nicic.org/Features/StateStats/?State=MI>).