

MCLS Notes

Massachusetts Correctional Legal Services, Inc.

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What is MCLS?

Massachusetts Correctional Legal Services (MCLS) provides legal assistance to prisoners, parolees, probationers and family members for problems arising out of incarceration. We are not part of the Department of Correction. We assist prisoners through direct representation in individual and class action civil lawsuits, through administrative and legislative advocacy, and by providing legal advice and information. We review problems involving conditions of confinement, inadequate medical and mental health care, unlawful use of force, discrimination, free speech, religious exercise, access to the courts, sentence computation, visitation, and many other issues facing prisoners and their families. This quarterly newsletter highlights recent developments in some of our cases, and in some areas that may be of interest to our readers.

Unfortunately, we are a small office and cannot take on many of the cases that are presented to us. We recently were forced to close intake for several weeks due to an unusually large number of letters received. We apologize for the problems this caused. We will continue to review our intake procedure and determine where to focus our resources in order to best serve our clients. We are now sending out forms in response to prisoners' letters telling the writer which staff member is assigned to review and respond to the letter. The forms also have other information that can be checked off to speed up our replies. This may seem less personal than a letter, but we hope it will mean you receive a quicker response.

Announcements

Join Us For AIDS Walk Boston 2000

MCLS staffers, board members and friends will form a Prison Justice Walk Team for the AIDS Walk Boston, which will be held this year on Sunday, June 4th. Friends of MCLS not presently constrained from taking a pleasant stroll along the Charles on a June afternoon are urged to contact Peter Costanza at MCLS if you would like to participate in our Walk Team (#6641). If you can't

walk with us, please consider sponsoring a Walk Team member with whatever you can afford. MCLS receives AIDS Walk funds to

promote compliance with HIV treatment protocols in both state and county correctional facilities.

Conference on Women in Prison

A free conference for the community entitled "A Call For Healing: Women in Prison, Families in Crisis" will be held on Saturday, May 13, 2000 at the Dimock Community Health Center in Roxbury. For more information, contact American Friends Service Committee, 2161 Massachusetts Ave., Cambridge, MA 02140. Phone: 617-661-6130.

New Prison Litigation Law

This edition of *MCLS Notes* contains a two-page information sheet on the new laws that were passed in November 1999 to prevent so-called "frivolous" litigation by prisoners. Everyone should become familiar with the new provisions on grievance procedures, indigency determinations, filing fees, and sanctions that can be imposed in connection with litigation.

New Law Makes It a Crime for Prison Employees to Have Sex With Prisoners

In November 1999, the legislature passed a law that makes it a crime for any person employed by a correctional institution to have sexual contact with a prisoner. The employee can be punished by imprisonment for not more than five years in a state prison, or by a fine of \$10,000 or both. Under this law, an inmate is considered incapable of consent to sexual contact with the employee.

Legal Notes

Early Parole for Pregnant Prisoners

MCLS recently advocated on behalf of a pregnant prisoner seeking early parole. Although

the parole was not granted, pregnant prisoners should be aware of the law that permits early consideration of parole. The language of General Laws Chapter 127, § 142, which was passed in 1918, allows a pregnant woman who is about to give birth to be paroled or discharged if it would be in the best interests of either the mother or the unborn child. The parole board regulation that governs this is 120 CMR 200.16. Please note that there is no right to be paroled or discharged under these provisions; it is up to the parole board or DOC to decide. They may decide to allow the woman to go to Houston House rather than release her to the street. MCLS suggests that pregnant prisoners talk with the medical staff of the institution to see if parole or discharge would be in the best interest of either the mother or the unborn child, and whether medical staff will write a letter stating this. Please write to MCLS attorney Amy Goldstein if you are pregnant and have questions about these provisions.

Rashad v. Commonwealth
Challenge to Dismissal of Lost Property Claim

MCLS is representing a prisoner in the Appeals Court after his *pro se* claim under the Mass. Tort Claims Act (G.L. c. 258) for lost and damaged property was dismissed by the Superior Court as "*de minimis*." The Court ruled that the amount of money damages involved was not worth the court's time or the cost of a trial. If you have a claim for lost property, be sure to read the information on the new prison litigation laws in this issue. You can also write to "Intake" at MCLS to get an updated information packet on lost property claims. If your case is dismissed as being "*de minimis*," please send a copy of the court's order to MCLS attorney Amy Goldstein.

Collette v. Mass. Parole Board
5 Year Setback for Lifers

MCLS is challenging the parole board's application of the 1996 amendment to G.L. c. 127 § 133A that allows for a five year setback (instead of three years) in between parole reviews for prisoners serving second degree life. We are arguing that it is a violation of the *ex post facto* clauses of the federal and state constitutions to apply that amendment retroactively to prisoners who are serving second degree life for crimes committed before the effective date of the amendment.

Unfortunately, there have been a series of U.S Supreme Court decisions which hold that a prisoner will have to prove that she or he would have been paroled sooner before such an application of the statute can be considered

unlawful. For example, a prisoner would have to prove that if he had gotten a two year setback, he would have been paroled at that time. This is very difficult to prove. We are in the midst of doing discovery of the parole board's records concerning this matter.

If we win this case it will affect all prisoners serving second degree life for crimes committed before the effective date of the statute. (We asked for declaratory relief.) In the meantime, this office does not have the resources to take on other clients for this issue. Nor can we provide representation for prisoners who have been denied parole and are seeking to appeal or reverse that decision. We will keep prisoners advised of the status of the case.

Haverty Update

Haverty v. DuBois is a class action which challenges the confinement of prisoners at MCI-Cedar Junction in "Security Threat Group" (STG) and other restrictive East Wing blocks. Superior Court Judge Charles M. Grabau recently decided a number of motions made by the parties. He agreed to sever the due process claim, which was decided in plaintiffs' favor, from the other claims on which a trial is necessary (equal protection, abuse of force). This will allow the favorable decision we received to be tested on appeal sooner. In fact, the DOC filed their notice of appeal only a few days after the order was issued.

Unfortunately, Judge Grabau stayed (postponed) the effectiveness of his order that prisoners may not be confined without compliance with the regulations governing "Departmental Segregation Units" while the order is being appealed.

Judge Grabau also suggested that prisoners who were segregated without compliance with the DSU regulations are entitled to some amount of earned good time credits as compensation, and ordered the parties to negotiate a formula.

Ahearn v. Vose
Plumbing at SECC

This is a class action, filed in 1990 to challenge the lack of flush toilets and running water in the cells at SECC. The court dates which had previously been scheduled both for hearing on the DOC's Summary Judgment motions and for trial have been postponed several times, despite our readiness to proceed. Currently, no specific date is set for either, although there is some indication the trial will go forward in the fall. At the suggestion of the court, both sides will submit a joint motion for a Special Judge to be assigned to the case. Thereafter,

that judge would hear all aspects of the case. It is hoped that an assignment of this sort will speed the resolution of the case.

The class of plaintiffs is *decertified* for purposes of trial because the damages are so individualized. The first trial will consist of the 5 or so named plaintiffs. (You do not need to worry about whether you are a "named plaintiff"; all the named plaintiffs have been notified.) Although in theory each plaintiff has the right to a trial, in fact the results of the first trial will probably go a long way to determining whether further trials are necessary and whether the case will be settled through negotiations. PLEASE REMEMBER THAT THERE IS NO GUARANTEE OF DAMAGES BEING AWARDED IN THIS CASE. It is essential that you keep us informed of any changes in address so that we may contact you directly when we need to do so. However, we cannot respond to individual letters. If you were imprisoned at SECC on or after August 7, 1990 in a cell without a flush toilet and you have not contacted us already, you should write to "Ahearn Case" at MCLS with the dates of your incarceration at SECC and your current address.

Sex Offender Misidentification

MCLS filed a class action on behalf of eight prisoners who were identified as sex offenders by the DOC for absurd reasons (public urination, "mooning" as a prank, consensual sexual relations 45 years ago with a minor close in age). Plaintiffs seek due process protections for prisoners designated as sex offenders, as well as individual relief.

Recent attempts to settle the case without extensive litigation were partially successful. Revised DOC policy now requires that newly admitted prisoners who have committed certain relatively minor "sex crimes" receive a clinical assessment. This assessment was performed on the named plaintiffs in this action, all of whom were "cleared" of the sex offender label. The DOC states that this assessment right also applies to prisoners whose sex offender identification is based on the "sexual overtones" of conduct resulting in the conviction of a non-sex crime, but the policy does not say this and is deficient in other important respects. Further, the DOC is not willing to provide clinical assessment to many prisoners questionably identified prior to recent changes in policy. As a result, MCLS is aggressively pursuing their claims in ongoing litigation.

Prisoners who believe they have been misidentified should direct letters which tell their stories to MCLS attorney Phillip Kassel. Include: (1)

the reason why you are designated as a sex offender; (2) whether you have been given any opportunity to contest the designation and, if so, what opportunity you have been offered; (3) any hardship you have suffered as a result of the designation such as harassment by correctional officers or other prisoners; loss of parole or more favorable custody status; loss of employment or programming opportunities. All letters should conclude with the following words: "Sworn and subscribed under the pains and penalties of perjury," followed by your signature. These letters will help us to establish the prevalence of this problem and could be used as affidavits in court if negotiations fail. Prisoners sending letters will not necessarily receive responses. Rather, all names will be placed on a list of prisoners whom we will notify of any procedural protections that result from the case.

SOTP/Civil Commitment Update

The Department of Correction recently began asking prisoners identified as sex offenders to sign a form that waives the right to confidentiality in Sex Offender Treatment Program (SOTP) therapy sessions. Although prisoners have long been required to sign a similar form, the latest version is revised in a particularly troublesome way. Prisoners who sign the form give consent to treatment staff to testify against them in lifetime civil commitment proceedings for "sexually dangerous" persons. Prisoners who refuse to sign the form are terminated from the SOTP. Many prisoners have contacted MCLS for help in deciding whether to sign this form.

Civil commitment (for a period of a day to life) for "sexually dangerous" persons was recently reestablished by the legislature after having been abolished for many years. A number of Superior Court judges have since held that convictions resulting from offenses committed before the law was passed on September 10, 1999 cannot be used to support a civil commitment based on "sexual dangerousness." These cases are on appeal. In the mean time, if you are approaching your discharge date and are notified that civil commitment proceedings will be started, you will be entitled to a court-appointed lawyer to represent you. The Committee For Public Counsel Services (CPCS) is the public defender service that handles these cases.

Until the recent cases are decided by an Appeals Court, prisoners convicted of sex crimes for offenses which occurred before September 10, 1999, as well as prisoners who were convicted of offenses on or after that date, need to think carefully and be *extremely cautious* about signing the new

form. While it is an individual decision, *signing this form may be dangerous. In many cases, the risks will outweigh any benefit.*

Treatment staff encourage prisoners to be honest and disclose information about themselves and their offenses in SOTP therapy. It is possible that prisoners will reveal private thoughts or inclinations that will support the Commonwealth's assertion of "sexual dangerousness" when recounted later in a civil commitment proceeding. If you are too cautious in these therapy sessions, that could be used against you to show that you are not rehabilitated and at risk to reoffend. In other words, participation in SOTP therapy could be used against you later if you do speak honestly and if you don't speak honestly. Given the potential for *lifetime* civil commitment, *these are grave risks.* If you decide to sign the waiver, another option is to write on it that you are signing it under duress.

Of course, refusal to sign the waiver form and to participate in SOTP can also be used against a prisoner in a later civil commitment proceeding. In addition, prisoners terminated from the SOTP lose any possibility of moving to minimum security and of enhancing chances for parole, since DOC policy forbids prisoners identified as sex offenders who refuse treatment to transfer below medium security. It is not clear, however, if this factor is entitled to much weight when deciding whether or not to sign the waiver. While MCLS does not have any statistics on the number of SOTP participants who move to lower security, our sense is that *few identified sex offenders ever make it through all the levels of the SOTP into minimum security. Therefore, the possibility of moving to minimum security may not justify the risk of improving the Commonwealth's case against you in later civil commitment proceedings.*

Prisoners who refuse to sign the waiver also forfeit the potential for developing a good relationship with a therapist who can help *fight* civil commitment down the road. This might be especially important for a prisoner convicted of a serious sex offense who will likely face a strong case for civil commitment. Also, some prisoners may regret losing the opportunity to genuinely benefit from treatment and improve as human beings. These are matters which must be weighed individually.

Landry v. Attorney General Seizure of Blood for DNA Database

In April 1999, the Supreme Judicial Court upheld the new DNA Database law. The U.S. Supreme Court recently declined to hear the case, so the SJC's decision is now final. The law requires anyone who is incarcerated or on probation or

parole for various listed crimes to submit a DNA sample. Penalties for noncompliance include jail time and/or a fine, and force may be used to obtain the blood sample. The law also states that the person submitting the blood sample is charged for the cost of the test (unless he or she is indigent).

In June 1999, the SJC issued a decision in another case about the DNA database, *Murphy v. Department of Correction*. In that case, the court ruled that prisoners must provide a blood sample if they were convicted of a listed offense in the past, even if they are currently serving a sentence for a non-listed offense. The law applies to anyone incarcerated on or after December 29, 1997, regardless of when the listed offense occurred. However, the law only applies to parolees and probationers who are on parole or probation as a result of the listed offense.

HIV Treatment at South Bay

MCLS attorney Lisa M. Otero and paralegal Dianne McLaughlin are investigating the provision of HIV/AIDS medical treatment at the South Bay HOC. We invite South Bay inmates who have concerns about the HIV medical treatment they are receiving to write to us and describe in detail the problems they have encountered (no telephone calls, please).

Disciplinary Hearings

Due to limited resources, MCLS can advise, but cannot provide direct representation, in administrative proceedings. For assistance, send a copy of your disciplinary report with a brief explanation to:

1) Prison Legal Assistance Project (PLAP), Austin Hall, Harvard Law School, Cambridge, MA 02138, collect calls: (617) 495-3127; closed in May and January;

2) Prisoners' Assistance Project (Sept. to Feb. only), Northeastern University School of Law, 716 Columbus Ave., Suite 212, Roxbury, MA 02120, collect calls: (617) 373-3660 (Sept. to Feb. ONLY).

You may be able to obtain a continuance until you find out whether representation is available. If direct representation is not available, the law schools can provide self-help materials.

Prisoners should be aware of the time limitations in the disciplinary hearing process set forth in 103 CMR 430. The reporting officer and other witnesses (as well as physical and documentary evidence) must be requested in writing within 24 hours of receiving the witness

request form (see 103 CMR 430.11). Prisoners are advised to write a summary of what each witness will say (or the significance of other evidence) to show why the witness is relevant. Prisoners may appeal a guilty finding or sanction to the superintendent within 5 days of receiving the hearing officer's decision (103 CMR 430.18). Prisoners then have 60 days from the administrative decision to bring state law claims in court pursuant to Massachusetts General Laws Chapter 249, § 4 (action in the nature of certiorari). There is a 3 year statute of limitation to file in court for federal civil rights violations and for declarations of rights.

MCLS Attorney Telephone Assistance

Inmates who wish to speak to an MCLS attorney, please call collect: (617) 482-4124, Mondays from 1 p.m. to 4 p.m. Families and friends of inmates may call our toll free number (within MA): 1-800-882-1413. Prisoners who cannot reach us by phone are encouraged to write to the attorney handling their case or to the "Intake Attorney." Please include your commitment number.