

MCLS Notes

Massachusetts Correctional Legal Services, Inc.

8 Winter Street, 11th Floor, Boston, MA 02108-4705

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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 also understand that there are often delays between the time a prisoner writes to us and when we respond. We receive thousands of letters, and it takes time to review, investigate, research, and respond to each one. We understand that it is frustrating to wait for a response and then be told that we can't help with that specific problem. MCLS is in the process of reviewing our intake procedure and determining where to focus our resources in order to best serve our clients.

One change we have recently made is that we are 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 it will mean you receive a quicker response.

Announcements

Special Edition on New Prison Litigation Law

This edition of *MCLS Notes* will highlight only a few of our cases. The rest of the issue is a two-page information sheet on the new laws that

were recently passed 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 along with the state budget 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

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 *ex post facto* 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 all prisoners serving second degree life. The parole board is applying the amendment to prisoners serving sentences for crimes committed before the June 19, 1996 effective date of the amended statute. We believe this retroactive application of the law is a violation of the U.S. and Massachusetts Constitutions. We are arguing that changing the parole setback period is a change in the terms of the prison sentence.

We are asking for a Declaratory Judgment. That means that we are asking the court to declare that the setback period change cannot be applied to *anyone* who is convicted of a crime committed before June 19, 1996. You do not need to contact us if you are a prisoner who fits the above description. Wait until we see the results of the litigation. If we win, we will prepare a packet of information concerning what the next move should be for all prisoners affected.

Long-Awaited Decisions in *Haverty* and *Gilchrist*

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. *Gilchrist v. DuBois* challenges the pre-lockdown Phase system at MCI-CJ. In *Haverty*, Superior Court Judge Charles M. Grabau, in a well-reasoned opinion, gave MCI-CJ prisoners a victory, holding that their confinement is "atypical and significant," entitling them to due process protections set forth in regulations which the DOC has ignored. Judge Grabau also held that Latino prisoners made an initial showing of illegal racial discrimination, but that the DOC's general denials of racial motivation, however "limited," were sufficient to create an issue of material fact to be resolved at trial. A hearing on a flurry of *Haverty* post-judgment motions was held in December before Judge Grabau, who took a number of matters under advisement, including uncontested motions to sever the resolved due process claim (so it can go up on appeal sooner) and set the remaining issues for trial, defendants' motion to stay any final order pending appeal, and plaintiffs' motion to award earned good time credits to prisoners denied the opportunity to participate in work and programs due to their confinement in segregation without due process protections. In *Gilchrist*, the Appeals Court approved of the way in which Judge Maria Lopez analyzed the due process claim in finding for the plaintiff, but held that the record was incomplete, and sent the case back to the trial court.

Ahearn v. Vose

Plumbing at SECC

This class action, filed in 1990 to challenge the lack of flush toilets and running water in the cells at SECC, is still scheduled for trial on February 22, 2000. 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.

Soffen v. Maloney Misidentification of Sex Offenders

This class action was filed by four 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.

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.

MCLS staff will attempt to keep abreast of developments and advise prisoners accordingly.

Landry v. Attorney General Seizure of Blood for DNA Database

In April 1999, the Supreme Judicial Court upheld the new DNA Database law. 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). The SJC ruled that obtaining the DNA sample is a reasonable search and seizure under the Fourth Amendment, given the "diminished privacy rights" of prisoners, the "minimal intrusion" of the blood test, and the "legitimate government interest in the investigation and prosecution of unsolved and future criminal acts by the use of DNA in a manner not significantly different from the use of fingerprints." The Court also denied relief under the state constitution, and rejected arguments that the law requires regulations to be issued on the use of force to obtain samples. The plaintiffs have asked the U.S. Supreme Court to review the decision, although collection of blood samples could resume in the mean time. The plaintiffs are represented by lawyers at the Committee for Public Counsel Services and the ACLU.

CURE Telephone Rates Campaign

The national organization Citizens United for the Rehabilitation of Errants (CURE) is organizing the Equitable Telephone Charges (ETC) Campaign to attempt to educate state policy makers and telephone company executives regarding the importance of telephone contact for the families and friends of prisoners and the impact of the high rates charged. The campaign is modeled after a successful pilot campaign in Michigan. Using a holiday and special events theme, participants will be asked to send materials (which will be provided) to legislators, governors, prison officials, and telephone company board members and customers.

Anyone interested in participating in the campaign should contact Kay Perry, ETC Campaign Coordinator, c/o MI-CURE, PO Box 2736, Kalamazoo, MI 49003-2736 or call (616) 383-0028. There is no charge for participation.

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).

Community Treatment Program

The Goldfarb Behavioral Health Clinic of the Lemuel Shattuck Hospital has a program entitled The Integration Project. This project is for ex-offenders returning to the community who need mental health and/or substance abuse services. The project also serves people who are on parole and probation. For more information contact Joy Eckstine or Keith Lamontagne at (617) 522-8110, ext. 375 or 147, or write to them at the Shattuck Hospital, 170 Morton St., Jamaica Plain, MA 02130.

Disciplinary Hearings

Due to limited resources, MCLS can advise, but cannot provide direct representation, in administrative proceedings. For assistance, contact:

1) PLAP, Austin Hall, Harvard Law School, Cambridge, MA 02138, collect calls: (617) 495-3127;

2) Prisoner 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).

Send them a copy of your disciplinary report with a brief explanation. You may be able to obtain a continuance until you find out whether representation is available. Where 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. For those who call collect outside of intake hours on Mondays, if your call is not accepted, it means that there is no attorney available to speak with you. 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. You should not assume that the staff member who handled your previous letter will handle the new matter. It is best not to send us originals of important documents if you need them returned to you. In addition, MCLS cannot forward any mail to other people or agencies for you.

Website and E-mail: MCLS is in the process of changing its internet addresses. New contact information will appear in the next edition.