

PLS NOTES

Winter 2009 - 2010

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SJC RULES THAT BRISTOL SHERIFF CANNOT IMPOSE "PAY FOR STAY" AND OTHER FEES NOT AUTHORIZED BY STATUTE

On January 5, 2010, the Supreme Judicial Court unanimously affirmed a Superior Court decision rejecting contentions by Bristol County Sheriff Thomas Hodgson that various statutes or the common law give sheriffs authority to charge prisoners "rent" for each day of incarceration. As a result of this decision, Sheriff Hodgson will have to return roughly three quarters of a million dollars that he took from prisoners in the Bristol County House of Correction, plus interest, for daily "cost of care" fees, for medical care, haircuts, and for GED examinations.

The case, *Souza, et al. v. Hodgson, et al.*, was filed by MCLS in July of 2002, and was handled by PLS Litigation Director James Pingeon. The sheriff made a number of sweeping claims in the case,

including that he is a "constitutional officer" and entitled therefore to carry out the functions of his office without any statutory authorization whatsoever. The SJC reviewed the history of the office of sheriff in England as well as America and concluded that the things that common law authorized the sheriff to do did *not* include charging fees. Fee collection by sheriffs has always been authorized by specific statutes, which led to the conclusion that if there is no statute authorizing the sheriff to collect a fee, it is unlawful for him to impose it.

The Bristol County Sheriff is not the only sheriff in Massachusetts who imposes unlawful fees on prisoners. These fees are particularly offensive when exacted from prisoners who are in jails (like the Bristol County House of Correction) where there are no paying jobs whatsoever. In that situation the fees drain funds from the families of prisoners, who must come up with substantial amounts of money in order for their loved ones to have any canteen, money for stamps, or money for phone calls home. Massachusetts sheriffs need to cease immediately the practice of extracting money from prisoners' families in the guise of "cost of care," "pay for stay," and other charges which impoverish, not the individuals in custody, but their loved ones.

If you were charged "cost of care" or similar fees at Bristol County or in any other jail or house of correction in Massachusetts, contact PLS.

MASSACHUSETTS SENATE PASSES CORI AND SENTENCING REFORM BILL: HOUSE TO CONSIDER LEGISLATION IN JANUARY

The Massachusetts State Senate at the end of its formal session for this year passed Senate Bill 2220. This bill includes major legislative changes in CORI (Criminal Offender Record Information), mandatory minimum sentences for drug offenses, the supervision of homeless sex offenders, a new mandatory parole for all prisoners not subject to probation or parole at the conclusion of their sentences, and 'constructive custody', i.e. the placement of prisoners outside of prisons and jails under house arrest for example.

The CORI portion of S.B. 2220 makes improvements including reducing the time for sealing criminal records from ten years to five years for a misdemeanor and fifteen years to ten years for a felony. It would automatically filter out misdemeanors and felonies older than five and ten years from any reports sent to employers, landlords or volunteer agencies, and it would delete any reference to records that ended in dismissal or a not guilty. It would 'ban the box' on application forms (i.e. employers could no longer ask on written applications if an applicant has a criminal record), and it would ban private companies from collecting CORI and selling it. At the same time all employers, landlords and volunteer agencies could have access to CORI from a state operated web site, and could deny employment based on the CORI. The general public would also have access to recent CORI on line. There would be a charge to employers,

etc. estimated to be about \$20 per request.

The bill also provides that all homeless sex offenders would have to be monitored by GPS by the probation department, but a proposal to ban homeless sex offenders from homeless shelters was defeated as was a new '3 strikes you're out' measure.

S. 2220 would make all prisoners serving state sentences for drug offenses eligible for parole and work release at two-thirds of their minimum sentence (county prisoners would be eligible at one-half of their sentence). This is an important first step towards reducing the draconian penalties for drug dealing and possession. If enacted into law this provision may significantly affect overcrowding, especially in county houses of correction. It still leaves a long way to go to get to a policy that effectively reduces the harm from what is essentially an addiction problem.

On the other hand, there is another negative aspect to the bill: mandatory post release parole. Because everyone coming out will be subject to a period of post-release supervision, costs will increase significantly and the case load of parole officers will increase. There is serious potential to increase prison overcrowding by returning parolees for technical violations of paroles that would not be imposed under present law.

One way to evaluate the proposals contained in S.B. 2220 is ask whether they will be effective in reducing the rate of recidivism. A major new report by the Boston Foundation and the Boston based Crime and Justice Institute,

[Priorities and Public Safety: Reentry and the Rising Cost of our Corrections System](#), urges that reduction of recidivism should be the explicit goal of all criminal justice and corrections policies. That report is also reviewed in this issue of [PLS Notes](#).

Boston area newspapers now seem to be supportive of CORI reform. [Boston Herald](#) columnist Marjorie Egan did a positive column on December 20th. An editorial in the [Boston Business Journal](#) on December 4th was generally supportive, as was a substantial article on November 26, by Howard Manly in the [Bay State Banner](#). There was also a good editorial on November 25 by Ed Forry, publisher of the [Dorchester Reporter](#).

S.B. 2220 will be taken up by the Massachusetts House of Representatives when it resumes its formal session in January. The House is likely to make changes, and there is no reason why anyone, including prisoners and their family members, cannot suggest appropriate changes to their state representatives.

This summary of Senate Bill 2220 is reprinted from the web site of the Criminal Justice Policy Coalition.

COMMUNITY HELP WITH CORI-RELATED PROBLEMS

A community organization called the Boston Workers' Alliance (BWA) offers CORI advocacy to people who have issues getting work, housing, or social benefits because of CORI. The BWA is located at 411 Blue Hill Ave. in Dorchester and is open Monday to

Friday 10 A.M. to 6 P.M. The phone number is (617) 606-3580, their web site is at www.BostonWorkersAlliance.org, and their email address is info@BostonWorkersAlliance.org. Help with CORI issues is also available from the Legal Assistance Advocacy and Resource Center (LARC) at (617) 603-1700. LARC can provide information on clearing default warrants, and obtaining and sealing CORI. The LARC phone line is open Mon. – Fri. (except Wednesday afternoons) from 9:00 A.M. to 3:15 P.M. and Tuesday evening from 5:00 to 7:00 P.M.

BOSTON FOUNDATION HOSTS FORUM TO PUBLICIZE REPORT ON PRISON AND JAIL COSTS AND ALTERNATIVES TO INCARCERATION.

On Thursday, December 3, 2009 the Boston Foundation hosted a forum to publicize and discuss its report released that day, [Priorities and Public Safety: Reentry and the Rising Costs of Our Corrections System](#). The report focuses on the relentless growth of prison, probation, and parole expenditures in Massachusetts without evidence that those increases benefit public safety and despite the fact that other government services are starved for funds.

Hosted by Paul S. Grogan, the President and CEO of the Boston Foundation, the panel consisted of the report's author, Len Engle, who is a policy analyst at Community Resources For Justice, Robert Gittens, who is a Vice-President of Northeastern University and a former chairman of the Parole Board, Mary Beth Heffernan, Undersecretary (now Secretary) of Public Safety and

Homeland Security, Michael J. Widmer, President of the Massachusetts Taxpayers Foundation, and Judith Sachwald, who is at Community Resources For Justice and is also a former director of the Maryland Department of Parole and Probation.

The report recommends that Massachusetts ease the fiscal burden of prisons, jails, probation and parole by adopting strategies that have reduced prison populations and recidivism in other states. In 2009, Massachusetts will have spent more than \$1.2 billion on corrections. The only larger state service components are local aid to cities and towns and the Department of Education. Public Health, local aid, and the state university system have actually shrunk as percentages of the state budget over the past decade, whereas DOC's share of the budget has grown by 12%, spending by the county sheriffs has increased by 30%, parole increased 2.6%. Probation expenditures increased by 163%.

Population increases cannot account for this spending growth. The prison and jail population in Massachusetts grew more than 300 percent between 1980 and the mid '90s, but the increase over the past ten years - roughly the same period as the spending increases outlined above - is only about five percent. The number of people on parole actually decreased.

Recent budget cuts made because of the collapse of tax revenue in the recession have hit all manner of state and local services hard. Higher education was cut 17%, public health 14%, and local aid 28%. Cuts to corrections, probation, and parole have all been in the single digits. Overall, incarceration and supervision expenses have grown rapidly during

good financial times but have been spared hard cuts during the financial collapse.

If these spending patterns were associated with improved recidivism, policymakers might at least partially justify them on that basis, but the report says that they have not been. "This was measured by an examination of the number of times parole was revoked, by rates of recidivism rates for corrections populations and by surrenders or returns to incarceration of those on probation. The review of those who re-offended is spotty in parts because of a lack of data, especially after 2002."

Recommendations

The Report says that Massachusetts should follow the example of states that have actually implemented policies that move offenders out of prison and into the community. Michigan is held out as one example, because it has over the past six years closed 13 prisons, reduced its prison population by 7%, and saved over \$500 million, all while reducing recidivism. Kansas is another success story. After the state realized that the majority of new prison admissions were technical probation or parole violators, it established a policy of keeping noncriminal violators in the community and of requiring a 20% reduction in probationers sent to prison for technical violations. Result: three closed prisons, \$34 million in savings so far with another \$80 million anticipated.

Although Massachusetts cannot implement revisions as extensive as Michigan's immediately, the Report concludes that the Commonwealth should move from endless talk about

getting “smart on crime” to the following changes:

- Make the reduction of recidivism the collective goal of the criminal justice system.
- Establish uniform data collection and information sharing.
- Insist that research guide policy-making.
- Examine laws and practices that restrict access to supervised reentry programs in the community for non-violent individuals.
- Collaborate with multiple stakeholders in the communities to which prisoners return and use the existing community capacity to improve reentry outcomes and reduce the risk of re-offense.
- Reconsider resource allocations that direct significant resources to prison and jail infrastructure and proportionally far fewer resources to programs and services that are proven to reduce recidivism.
- Direct corrections resources to managing and preparing higher-risk prisoners for successful transition into the community.
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- **PLS Notes is available in Spanish by request and is posted on the PLS web site in English and Spanish. Currently, there are PLS staff members who speak Spanish, Portuguese, French, Swahili, Kinyarwanda, and Russian.**
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SUPERIOR COURT HOLDS BRISTOL COUNTY SHERIFF LIABLE FOR CONDITIONS AT THE ASH STREET JAIL AND THE BRISTOL COUNTY HOUSE OF CORRECTION

On September 14, the Suffolk Superior Court (Cratsley, J.) ruled that Bristol County Sheriff Thomas Hodgson is liable to sentenced prisoners and pre-trial detainees who were double-celled in the Ash Street Jail in New Bedford, triple-celled in the Bristol County Jail and House of Correction in North Dartmouth, or subjected to certain other unconstitutional conditions of confinement (slept in common areas, slept on the floor on plastic "boats," and locked into cells that lack toilets and sinks. The partial summary judgment for plaintiffs came in Kelly, et al. v. Hodgson, et al., which was filed in 1998. The superior court granted a preliminary injunction against the double and triple bunking and use of common areas as dormitories in October of 1998, and amended that order to prohibit locking prisoners in dry cells in September of 2004.

To establish liability via summary judgment the plaintiffs had to show that there was no issue of fact as to (1) an unusually serious risk of harm, (2) defendant's actual knowledge or willful blindness to that unusual risk, and (3) defendant's failure to take obvious steps to address that known and serious risk. The court found that Massachusetts case law since the 1980s prohibited locking prisoners in dry cells, and that cases equally as old prohibited the use of plastic "boats" as beds and double celling prisoners in small cells. The cells at the Ash Street Jail are six by

eight feet and it is the oldest continually operational jail in the United States.

The court wrote: "The plaintiffs' assertion of liability relies on findings that the defendant's admitted practice of (1) locking prisoners in cells without immediate access to toilets, (2) housing prisoners on the floor, and (3) housing multiple prisoners in small cells violated the Eighth Amendment. My findings are as follows: First, there is no dispute that the defendant engaged in all of these practices. Second, there is no dispute that these practices posed unusually serious health risks. Third, there is no dispute that the defendant had actual knowledge of these serious health risks. Fourth, there is no dispute that the defendant failed to take obvious steps to alleviate the serious health risks posed by dry cells prior to 2004 and overcrowding prior to 1998."

The court also determined that qualified immunity was not available to the sheriff in his official capacity as county sheriff. (The court had dismissed the sheriff in his individual capacity from the case in an earlier decision.) The matter of damages for the plaintiffs will be determined by further proceedings in the case.

APPEALS COURT INTERPRETS NEW WRONGFUL CONVICTION LAW

In 2004, the Legislature enacted the Massachusetts Erroneous Convictions, Law., G.L. c. 258D, inserted by St. 2004, C. 444, sec. 1, to provide monetary compensation and other relief to eligible persons wrongly convicted and incarcerated for felony offenses. In Guzman v. Commonwealth, decided June 24, 2009, the Appeals Court

reversed a superior court judgment that the plaintiff would not be able to prove that he was within the class of persons whom the statute was designed to benefit. The subsection interpreted by the decision is G.L. c. 258D, sec. 1(B).

Guzman was convicted of cocaine trafficking in 1993 at a trial in which his own defense attorney deprived him of defense witnesses who would have supported his alibi defense. The rationale for the new trial order was that Guzman was denied the effective assistance of counsel at trial because, to avoid what trial counsel perceived to be a conflict of interest, trial counsel made decisions and took actions that prejudiced Guzman's defense and deprived him of a fair trial. Specifically, trial counsel failed to call two witnesses ("A" and "B") who would have supported Guzman's defense of mistaken identity. Guzman's lawyer not only failed to call these witnesses, but successfully moved in limine to prevent the Commonwealth from calling one of them as a witness, despite knowing that he would be helpful to Guzman. Counsel adopted this course of action because he had represented "A" in a recently completed case and had assisted "B's" attorney in a third, pending case. Guzman's lawyer believed that he would have to withdraw from representing Guzman if either "A" or "B" testified. An additional twist in the case was that the two chief prosecution witnesses were Kenneth Acera and Walter Robinson, two police detectives who subsequently pled guilty to federal charges that they had over the years submitted, and caused other detectives to submit, sworn affidavits containing knowingly and materially false information about informants and surveillance activities, that they had used these warrants to

seize and keep for themselves money and property from the premises and the persons searched, and that they had prepared and returned false search warrant inventories to cover up their wrongdoing.

Guzman was successful on a motion for a new trial and that success was affirmed by the Appeals Court. He then moved, in 1997, to dismiss the indictment against him with prejudice on the ground that the then-indicted police detectives were unavailable and essential to the prosecution case. That motion was granted. The detectives pled guilty the next year. But when Guzman brought his action under the Erroneous Convictions Law the superior court granted summary judgment against Guzman and dismissed his claim on the ground that he would not be eligible to prove that he was within the class of persons defined by G.L. c. 258D, sec. 1(B), as eligible for compensation under the statute.

Carefully reviewing the statutory language, the Appeals Court determined that "[T]he issue before us may be stated as follows: Has the Commonwealth demonstrated, by reference to the summary judgment record, resolving all conflicts in the record in Guzman's favor, that Guzman has no reasonable expectation of proving by clear and convincing evidence that the order granting his motion for a new trial, as affirmed by this court, was issued on grounds that tend to establish that he did not commit the crimes in question? The court decided that it had not so demonstrated, and reversed, restoring Guzman's claims.

The lesson of the case is that it is by no means a simple matter to recover against the commonwealth for a wrongful

conviction. The statute is designed to assist people who have had to do time on a wrongful conviction and who are able to establish by clear and convincing evidence that they are actually innocent of not only the crime for which they did time, but of any other offense stemming from the events associated with the wrongful conviction. People whose convictions were vacated on 'technicalities' need not apply. The statute is, however, a significant step forward in society's recognition of the terrible consequences of wrongful convictions. If you have been victimized in this way, G.L. c. 258D is well worth studying.

Note: The Supreme Judicial Court has granted further appellate review in Guzman. Argument is scheduled for April.

NEW ENGLAND INNOCENCE PROJECT COMBATS WRONGFUL CONVICTIONS

If you are factually innocent of the crime for which you are incarcerated, The New England Innocence Project (NEIP) may be able to assist you. The NEIP provides pro bono (free) legal help to people who have claims of actual innocence and who are wrongly convicted, in Maine, Massachusetts, Connecticut, New Hampshire, Rhode Island and Vermont. The NEIP considers cases in which a conviction is final and in which scientific testing or other new investigative leads could establish a strong likelihood that the individual is factually innocent. Address correspondence as follows:

Intake Coordinator
New England Innocence Project
c/o Goodwin Procter
53 State Street
Boston, MA 02109

BULLETINS

- Last summer the incidence of staff-on-prisoner assault complaints dropped sharply in connection with the transfer of the men at MCI-Cedar Junction to SBCC. During the fall that change has held up. Unfortunately, prisoner-on-prisoner violence at SBCC has increased in frequency and seriousness. On October 8, 2009, a PLS client at SBCC was stabbed 32 times and spent weeks in the hospital. On November 4, two staff members were stabbed by a prisoner. Both incidents were related to protests against double-bunking at SBCC. Currently, about one-third of the thousand cells at SBCC are doubled up.
- An independent study commissioned by the DOC supports what many prisoners and PLS has long been saying about over-classification rates and total numbers. There are not really 1300 maximum security prisoners in DOC custody. The "MGT" report states that although the DOC's discretionary overrides of classification levels are at 12%, in line with best practices nationally (5 to 15 percent), mandatory overrides in Massachusetts are out of control. The total override rate here is 34%.

The majority of those mandatory overrides are upward and based on sentence length. PLS has litigation pending against the present point-based classification system based on the claim that it is a "regulation" that was promulgated without the notice and opportunity for comment required by the Massachusetts Administrative Procedure Act.

- PLS is planning to work with CPCS, Shelter Legal Services, and the Massachusetts Division of Veterans' Affairs to provide legal assistance and representation to veterans of the Iraq and Afghanistan wars who, because of chronic PTSD and traumatic brain injuries are increasingly coming into the criminal justice system.
- PLS has filed an administrative proceeding with the Massachusetts Department of Telecommunications and Cable asserting that the rates for in-state prisoner telephone calls are excessive and the quality poor, both within the DOC and at various county facilities. (Interstate calls are the subject of another administrative proceeding before the FCC in Washington, D.C., in which PLS is not involved.) This matter is being handled by PLS attorney Brad Brockmann together with PLS Board president Patricia Garin.
- PLS is aware of problems with some Parole Board calculations of parole eligibility and discharge dates. If you believe that there is an error in the calculation of your parole discharge or eligibility date, write to PLS, 8 Winter Street, 11th floor, Boston, MA 02108, attention "Parole Calculations."

BOSTON MUNICIPAL COURT INSTITUTES NEW CORI CLEARING SYSTEM

One of the biggest problems that people run into when trying to clear up their CORI is the need to go to two separate hearings in each court where CORI is recorded to straighten it out. Since last May, the BMC has been running a test program in the form of Standing Order 1-09. This is a procedural order of the court that allows a person with CORI to file, pursuant to G.L. c. 276, sec. 100C, a single petition to seal three or more criminal records from two or more divisions of the BMC if the defendant was found not guilty or if a dismissal or *nolle prosequere* or a finding of no probable cause was entered in each matter. The petition should be filed in the court division in whose territory the person resides. This system is scheduled to run for a year, after which the BMC will see how well it has worked and decide whether to continue, modify, or end it.

Help with CORI issues is available from the Legal Assistance Advocacy and Resource Center (LARC) at (617) 603-1700. LARC provides information on clearing default warrants, and obtaining and sealing CORI.

The LARC phone line is open Mon. – Fri. (except Wednesday afternoons) from 9:00 in the morning to 3:15 in the afternoon. LARC also maintains evening phone hours on Tuesday, from 5:00 to 7:00 P.M.

PLS LEGAL PRESENTATION AT MCI-NORFOLK

On the evening of December 10, 2009 and at the invitation of Superintendent Gary Roden, PLS Director Leslie Walker and staff attorney Bonnie Tenneriello went to MCI-Norfolk to talk with a group of prisoners there about the work of the office. The meeting covered (1) kinds of assistance that PLS offers to prisoners, (2) the exhaustion requirements of the Prison Litigation Reform Act, and (3) the disciplinary hearing process and appeals. The presentation was in the CSD Building and lasted over an hour. By the terms of PLS' agreement with DOC, the presenters did not offer individual assistance to the men there, but all were informed that they could contact PLS by phone or by mail at other times. The evening went well.

Leslie Walker and staff attorneys at PLS are willing to attend similar sessions at other prisons. A number of years ago PLS staff made such presentations at a number of the prisons on a regular basis. Commissioner Clarke is the first commissioner in a long time to be open to such presentations. Please bear in mind, however, that DOC procedures require that invitations to speak to prisoner groups must come from the superintendent of the facility. PLS will continue to explore the possibility of bringing staff members to other prisons in the coming months.

Prisoners' Legal Services
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Speed Dial phone number for PLS for state prisoners: *9004#

PLS formerly MCLS has arranged with the DOC for a **toll free speed dial number** that is accessible to all **state** prisoners on the PIN system. **County prisoners must call collect on (617) 482-4124.**

Families and friends of prisoners can also call PLS for free on 1-800-882-1413 toll free from anywhere in the state. Prisoners who cannot reach us by phone should write to: PLS / Prisoners' Legal Services, Eight Winter St., Boston, MA 02108.

Regular call-in hours are 1:00 to 4:00 on Monday afternoons unless it is an emergency, in which case you can call whenever you can get a phone during business hours (9:00 A.M. to 4:00 P.M., Monday to Friday). On weeks when Monday is a holiday, PLS accepts calls on Tuesday from 1:00 to 4:00.

En la oficina de PLS (Servicios Legales para Prisioneros) se habla español. El número directo de PLS para los presos del DOC es *9004#. Los presos de los condados deben llamar el número (617) 482-4124 (a carga reversada).