MCLS NOTES

August 2009

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TESTIMONY OF MASSACHUSETTS CORRECTIONAL LEGAL SERVICES IN SUPPORT OF CORI REFORM

Presented to a hearing of the Judiciary Committee held at the Massachusetts State House on Monday, July 27, 2009.

Massachusetts Correctional Legal Services strongly favors the reform of the CORI system. Our clients, the state's incarcerated men and women, face a barrage of obstacles to their successful reintegration into society following their release. As you are hearing firsthand today, CORI presents a huge barrier to successful reentry since it severely restricts the opportunities available to these women and men to secure housing and employment. We support the bills before the committee today that would reform CORI.

The most comprehensive of the reform measures, **H.3523/S.1608, "An Act to Reform CORI, Restore Economic Opportunity, and Improve Public Safety,"** is an excellent, studied attempt to remove the most oppressive and counterproductive aspects of the CORI system that currently stand in the way of successful reentry for the thousands of women and men who are released from the state's prisons and jails every year. This bill would limit the CORI that is available to non-law enforcement individuals and agencies to conviction and open case data. It would permit the sealing of criminal records that are no longer predictive of future behavior, after seven years for felonies and three years for misdemeanors. The Act requires that people who request and read CORI be trained in how to read and use it. It allows the purging of juvenile records at a judge's discretion, as well as the purging of erroneous convictions. It accomplishes this much-needed reform without compromising appropriate law enforcement access to all CORI data. MCLS also supports the other bills before the committee that mirror discrete sections of H.3523/S.1608,[1] though we urge the committee and the legislature to support this bill and comprehensive CORI reform.

MCLS also strongly supports **H.1373, "An Act to Ease the Transition of Ex-Offenders."** The bill addresses key reentry issues in several critical ways and takes concrete steps to improve ex-prisoners' chances of finding and keeping housing and employment after release. Among other provisions, H. 1373 would:

- Provide much-needed supplemental funding to hire additional educational staff in county correctional facilities as well as funds for transitional employment services for young adult offenders in Boston. Although additional funds are needed throughout the correctional system, this is a step in the right direction.
- Improve discharge planning within Houses of Correction and establish a pilot program at the Suffolk County

[1] H.1323 (reduces period for sealing conviction CORI to seven years for felonies and three years for misdemeanors), H.1324 (accelerating sealing of non-conviction and other non-predictive CORI), H.1372 (purging juvenile records), and H.3517, H.3990 (purge dismissed charges).

House of Correction that incorporates key features of the Hampden County Correctional Center's highly successful, nationally recognized reentry program. Again, improved discharge planning is a necessity throughout the state. Any and all successful elements of the pilot program at Suffolk County HOC should be replicated at all of the state's facilities.

- Improve the employment prospects for ex-prisoners by offering additional tax credits to businesses that employ formerly incarcerated men and women. This represents a wise investment by the Commonwealth since it increases the chances that ex-prisoners will find gainful, lasting employment.
- Improve housing prospects for ex-prisoners by allowing them to contest the relevance of CORI when seeking public housing and by granting the public housing authority permission to admit ex-prisoners on a probationary basis.

The successful reintegration of the men and women who have been incarcerated in the state's prisons and jails is one of the biggest challenges facing the Commonwealth. H.1430 represents an important step forward in smoothing that transition in a comprehensive and meaningful fashion.

While we support the Governor's efforts to reform CORI, including Executive Order 495, we believe that key elements of the Administration's CORI bill before you today, H.4107, "An Act to Enhance Public Safety and Reduce Recidivism by Increasing Employment Opportunities," move in a decidedly wrong direction. The Governor's bill would widen access to CORI information by making it available via the Internet. The bill provides that all members of the general public – children, neighbors, colleagues at work, strangers – would have access to at least some CORI information online. This is an ominous development that we strongly oppose. The ways that this information might be used to harm individuals with CORI in major and minor ways are endless. The notion at the core of the bill that giving all prospective employers in the Commonwealth access to a fuller range of CORI information will somehow increase the employment prospects of individuals with CORI also strikes us as counterproductive, at best. We cannot support H.4107 as currently written.

There are other bills before the Committee today that would expand access to CORI to more occupations and individuals, that, like the Governor's bill, would put CORI information on the internet and open people's records to public inspection, and others would expand CORI to cover interstate information, and so on. We strongly oppose those bills, which would only shrink the already limited ability of our clients to find jobs and housing, thereby further frustrating if not derailing our clients' attempts to reintegrate successfully into society. Why? Because the bills would contribute to the public safety crisis described below.

The committee faces a stark dilemma today since it appears that the people on the two sides of the debate may be asking you to reconcile the irreconcilable. On the one hand, you are being asked to increase public access to very sensitive information about an individual with a criminal history, and on the other, you are being asked to facilitate the successful reintegration of that person back into society.

We think that the committee must frame its attempt to reconcile this dilemma from the perspective of public safety. We know what happens when more and more

entities are granted wider access to increasing amounts of often difficult-to-decipher and sometimes trivial information about a person's criminal past: the information is used to block that person's access to housing, employment, and education. By expanding access to CORI, the legislature contributes to the creation of a growing and permanent subclass of people who cannot get around those blocks, and who end up unemployed, homeless, or, more likely, back in prison. People with CORI are finding themselves more and more trapped in a vicious cycle. If they cannot find legitimate employment, what are they expected to do? If they do not have family to support them, they are forced back into the only alternative readily available to them: a hidden and irregular, if not criminal, life style. It is no wonder that the recidivism rate in Massachusetts remains so high, at between 40 and 60%. We cannot see how expanding CORI or making it more accessible to increasing numbers of groups contributes to overall public safety if it simultaneously derails individual's attempts at reintegration.

MCLS supports the use of CORI for the purpose for which it was originally intended: use by the police, the courts, and criminal justice agencies that have a clear need to know this information. Its dissemination to any other groups must be based on an absolute need-to-know basis that carefully and tightly ties the information shared with the position sought. There is no reason why every employer in the state should have access to CORI information.

We urge the committee, and the legislature, to proceed carefully in modifying CORI. True public safety should be your primary consideration.

Did you know that Massachusetts spends more than a billion dollars a year to operate its prisons, jails, and houses of correction?

TO GRIEVE OR NOT TO GRIEVE?

By Joel Thompson

Every day, Prisoners' Legal Services (MCLS) advises clients to file grievances about the serious problems they face, and to follow the grievance procedure all the way through the last appeal. Every day, some prisoners ask us why they should bother. Many prisoners are skeptical about the grievance process because of personal experience, or because they see that the grievance process calls for a ruling by a staff member who either lacks the authority to order a remedy, or who is responsible for the problem being grieved in the first place. We urge prisoners to use the grievance process anyway, for several reasons.

WHY YOU SHOULD GRIEVE

1. <u>You can't go to court over a problem unless you grieve it first.</u> If the issue you face is important enough that you are even *thinking* about taking it to court, now or sometime in the future, you must grieve and complete all levels of appeal. It is that simple. Both federal and state law require prisoners to exhaust their administrative remedies before filing suit over prison conditions. *See* 42 U.S.C. 1997e(a); G.L. c. 127 § 38F. The exhaustion requirement covers almost every possible problem that a prisoner might want to take to court. It was developed specifically to deny prisoners access to the courts, and has proven to be very effective in cutting off prisoner claims, no matter how important or urgent they are.

You may see or hear of a case in which a lawsuit was allowed to go forward, even though the prisoner did not completely exhaust his or her administrative remedies. Such cases are very rare. If a prisoner plaintiff did not file a grievance and pursue

all available appeals about the matter being litigated, that lawsuit will likely be dismissed without ever getting to a ruling on the merits.

Prisoner plaintiffs have offered many reasons for why they should be excused from meeting the exhaustion requirement. Even where these reasons make practical sense, courts have repeatedly rejected them. Among the more common arguments:

The grievance authority cannot give me what I am asking for. Sometimes prisoners request a remedy that the grievance coordinator, or whoever reviews the grievance appeal, is not authorized to provide. The most common example is money damages. The U.S. Supreme Court has held that the prisoner must complete the grievance process anyway. *Booth v. Churner*, 532 U.S. 731 (2001).

A grievance is futile. Plaintiffs have argued that filing a grievance or appeal would be pointless, because their previous grievances were never granted, or no one's grievances are ever approved, or even because the plaintiff was told by prison staff that nothing would be done in response to a grievance. These arguments also generally fail. (Interestingly, the DOC's grievance approval rating is now over 30%).

I already put the administration on notice of the problem. Some prisoners have pointed to the fact that they wrote to the Superintendent, Commissioner or other administrators, or that they discussed the issue with someone at staff access period or during rounds. Several courts have held that these communications do not satisfy the exhaustion requirement, if the issue was grievable but was not grieved.

I could not access the grievance process. There may be times when getting a grievance filed on time or in the correct form is impossible to do. Sometimes courts have acknowledged these circumstances, but the law on this point is murky. Moreover, this type of argument is very fact-intensive, and it can be very difficult to prove that you were completely unable to follow the grievance process. Many plaintiffs see their claims dismissed because although there were obstacles to filing a grievance or appeal, those obstacles did not make grieving impossible, or the obstacles were eventually lifted but the prisoner did not move fast enough to grieve afterward.

In one recent case, a plaintiff's medical claims were dismissed for failure to grieve his issues on time. *Smith v. Wrenn*, 2009 WL 1873666 (D.N.H.) (June 29, 2009). This case was dismissed despite the fact that the plaintiff made three arguments why it should not be dismissed.

First, he argued that his claim arose when he was transferred from New Hampshire to Texas, and that he did not become aware of his claim until nearly two years after the transfer, when he filed the grievance. The court disagreed, finding that certain facts proved that the plaintiff was on notice of the problem months before he grieved it. Second, the plaintiff argued that the New Hampshire grievance procedure did not apply to him once he was in an out-of-state prison. This argument also failed, as the First Circuit has held otherwise. Third, the plaintiff claimed that he was prevented from grieving by the restrictions on indigent postage. The court rejected this argument as well, finding that the prisoner had sufficient opportunity to mail a grievance back to New Hampshire.

The bottom line is that you must grieve any problem that you think you may want to take to court. And, even if you have no desire to bring a lawsuit over a particular issue, there are other reasons why you should grieve that issue.

2. The grievance process puts staff and administration on notice of the problem. Whether or not it is granted, your

grievance and your appeal alert prison staff to the existence of the problem you describe. Sometimes the administration will make operational changes that partially address a grievance if they receive a lot of grievances on the same issue, even if they deny the individual grievances. Finally, if in the future there is an investigation about the issue, whether an internal investigation, an outside agency review, or a lawsuit brought by prisoners, your grievance, especially if it is one of many on a particular issue, may help demonstrate that the problem is serious and that prison authorities were aware of it.

3. Grieving an issue signifies its importance to you. When PLS, other attorneys, family members, or other concerned parties inquire about an issue on a prisoner's behalf, and that prisoner has not grieved or appealed it, that will be the first thing that prison administrators bring up. They will say that if the prisoner did not pursue all the available administrative remedies, the issue must not really be that important to him or her. Of course there may be many reasons why a prisoner does not grieve, but grieving an issue will demonstrate that the issue is important to you, and that you did everything you could to resolve it.

4. The grievance, or an appeal, may be granted. Skepticism about the grievance process is understandable. The fact is, though, that some grievances are approved. Even if the relief provided is not what you asked for, it may be of some benefit to you.

HOW YOU SHOULD GRIEVE

If you choose to grieve an issue, it is important to be familiar with the grievance process for that particular issue, to follow the rules as best as possible, and to keep a record of your efforts. The U.S. Supreme Court has decided that prisoners will not be considered to have exhausted their administrative remedies unless they can show "proper exhaustion," which means following all the rules of the applicable grievance procedure. *See Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006). This includes the use of the right forms, sending them to the right person, and submitting them on time.

Occasionally, exceptional circumstances may make it impossible to follow the grievance procedure, and there may be legal arguments for why the exhaustion requirement should not apply. But you do not want to put yourself in the position of having to ask for an exception to the rule, because the court will almost certainly not give it to you.

There are a few steps that you can take to maximize your chances of success.

1. Determine which grievance process applies, and if in doubt, use more than one. Some prisons have different grievance procedures for different issues. For example, in the DOC and several county facilities, there is a medical grievance procedure with its own rules, forms, and coordinators, which is separate from the institutional grievance procedure. Before grieving, try to determine which procedure applies to your issue. The written grievance procedures should explain which issues they cover. If you have any doubt about which procedure you should follow (for example, a problem that involves both security and medical issues), use both of them. The response in one grievance process may direct you to the other one, but since time limits are often short, you are better off grieving the problem simultaneously with both procedures rather than using one procedure and then waiting to see if it works before using the other one.

2. Review and follow the rules and procedures for the grievance process you are using. Every grievance process has its own set of procedures. After the Supreme Court's ruling in *Woodford*, there is a strong incentive for prison authorities to reject grievances or appeals on "technicalities" (wrong form, after the deadline, etc.). Get a copy of the procedure for your grievance, and review it carefully. Try as much as possible to follow the procedure. If circumstances make it impossible to do so, explain those circumstances in your grievance or appeal. If circumstances improve, making it possible for you to comply with the procedure, do so as soon as possible. For example, if you were in segregation and asked for but did not receive a grievance form, use plain paper to make a grievance, and include an explanation of why you did not use the form. If you have not yet received a response and are released from segregation, file a grievance form for the same issue, explaining that this is the first time you have had a form available to you.

3. Keep a copy of everything you submit or receive. It is not unusual for disagreements to arise over whether a prisoner filed a grievance or an appeal, or whether the grievance authority responded. Keep copies of everything so that you can prove what you did. If you cannot make a photocopy of your grievance or appeal, write out a copy by hand that is identical to the one you submit, and hold on to it. Keep every document you get in response to your grievance or appeal. If you have to submit the administration's response to your grievance with your appeal, and you cannot get a photocopy made, explain in your appeal that you are submitting your only copy of the grievance response, and request that they give you a copy.

4. Use a calendar to keep track of important dates and deadlines. Mark down on a calendar the date that you submit a grievance or appeal, and the dates of any discussions or other actions that may be relevant (for example, dates that you requested a form but were denied it). Mark on the calendar the deadline that the grievance authority has to respond to you, and any deadlines you have to file an appeal by. A calendar can help you keep track of your own deadlines, and it can also serve as a record to show what steps you took and when.

Filing a grievance and appeal can be difficult. There may be a lot of paperwork involved. Most grievances are denied. However, if you are able to maintain an organized approach, you can only improve your chances of obtaining a favorable result, either through the grievance process itself or later on.

MCLS 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 MCLS/PLS at 8 Winter Street, 11th Floor, Boston, MA 02108, attention "Parole Calculations."

MCLS' speed dial phone number for state prisoners is automatically authorized on all DOC pin cards. The speed dial number is *9004#. The office accepts calls about new matters on Monday afternoons from 1 to 4 (Tuesday, if Monday is a holiday). County prisoners should call (617) 482-4124, collect, during that same time.

DIRECTOR'S COLUMN
by Leslie Walker

Hello and thanks for taking the time to read MCLS d/b/a Prisoners' Legal Services summer 2009 edition of Notes. I thought I'd take a minute to update you on some items of concern to prisoners and advocates.

Overcrowding—Massachusetts is experiencing some of the worst overcrowding in its history. While things in the DOC are terrible—including the double bunking of the maximum security prison at Souza Baranowski where prisoners are currently locked in their cells for approximately 19 hours a day—the counties are in even worse shape. While the overcrowding statistics are staggering (284% over design capacity in the Awaiting Trial Unit at MCI Framingham, 226% at MCI Concord and 177% at MCI Shirley with the mediums on average at 154% of design capacity) and the counties at 247% (Essex), 233% in Bristol and 183% in Norfolk, these numbers do not begin to tell the story of what the men and women in Massachusetts prisons are enduring. I toured the Middlesex Jail at the beginning of August and have never seen such horrible conditions. Male pre-trial prisoners on the 17th to 20th floors are jammed into every possible inch of floor space. Bunk beds are about a foot away from each other and cover nearly every inch of available space anyone could walk around in. The blocks were so thick with people that it was impossible to see the back walls of the units, which are unbearably hot. In some county seg units, three men are locked in a cell for 23 hours a day and five men occupy cells deigned for 2 with someone on the floor every night.

We all know the answers to overcrowding: less mandatory sentences, greater options including the use of bracelets for pre-trial detainees and sentenced prisoners, and an increased parole rate. Sheriffs and the DOC have the authority to mitigate overcrowding via special programs and the award of earned good time, but often fail to do so. And even though the federal government and states like Kentucky, Louisiana and South Carolina have modified their laws to address overcrowding, Massachusetts has yet to pass any modification of its sentencing laws.

Please lobby your legislators asking for changes to the mandatory minimum sentencing laws and ask your family and friends to do so as well by writing to the legislators at the Statehouse, Boston, MA, 02108. Family and friends can voice their support by calling 617-720-2000 and asking to be connected with their legislators. The MCLS web site at www.mcls.net contains a link to a web page that will tell you your state representative and state senator if you put in your address. Make sure to mention that Secretary Burke, Commissioner Clarke and Sheriff Cabral on behalf of the sheriff's association all testified in favor of modifications to mandatory sentencing (and CORI) laws on July 27, 2009.

Double bunking—MCLS has received several reports of problems with the SBCC double bunking that began in January 2009. If you know about or have experienced a serious problem with a cellmate and/or with staff at SBCC, please file a grievance about the issue and write to MCLS with the details and a copy of the grievance and the appeal.

MCLS Staffing—MCLS' funding was reduced by approximately 18% for the current fiscal year and more cuts are likely. MCLS is down to 5.5 lawyers and four paralegals for over 25,000 state and county

prisoners. We are litigating 25 cases, half of which are class action or multiple plaintiff cases. As advocates, we focus the majority of our time on prisoners who need our help with health and mental health care, segregation, staff brutality and other life-threatening conditions of confinement. Please try to be patient when we are unable to help prisoners with less than life-threatening concerns and when we take longer to respond to requests for assistance.

Thank you.

Prisoner Recovers $5,000 For Physical Brutalization

Bargoot v. Russo, et al., United States District Court (MA) Civil Action No. 07-10505-PBS, has settled for $5,000. The plaintiff, who at the time was in the SMU at Souza-Baranowski Correctional Center, was forced to spend a night stripped naked in a locked tier shower with the water turned off after guards swept water full of feces and urine into the shower stall. The case was handled by MCLS staff attorney Bonnie Tenneriello and senior paralegal Al Troisi.

Incarceration is Not an Equal Opportunity Punishment

On June 30, 2004, there were 2,131,180 people in U.S. prisons and jails. That's a rise of 2.3% during the 12 previous months. Federal prisons are growing almost 5 times faster than state prison populations. As of June 30, 2004, the U.S. incarceration rate was 726 per 100,000 residents. But when you break down the statistics you see that incarceration is not an equal opportunity punishment.

Select U.S. Incarceration Rates

Whites: 393 per 100,000
Latinos: 957 per 100,000
Blacks: 2,531 per 100,000

Gender is an Important Determiner of Who Goes to Prison

All Females: 123 per 100,000
All Males: 1,348 per 100,000
White males: 717 per 100,000
Latino males: 1,717per 100,000
Black males: 4,919 per 100,000

Break it Down by Age and Race, and You Can See What is Going on Even More Clearly:

For Black males ages 25-29: 12,603 per 100,000. (That's 12.6% of Black men in their late 20s!)

Or you can make some international comparisons:

South Africa under its former apartheid government was internationally condemned as a racist society. The United States of America incarcerates Black men at almost six times the rate under the apartheid regime.

South Africa under apartheid in 1993:
Black males: 851 per 100,000
U.S.A. in 2003:
Black males: 4,919 per 100,000

What does it mean that the leader of the "free world" locks up Black males at a rate 5.8 times higher than the most openly racist government in the world?

Statistics as of June 30, 2004, from Bureau of Justice Statistics Prison and Jail

Inmates at Midyear 2004, Tables 1, 13 and 14, and Census Bureau population estimates for 2004.

South Africa figures from Marc Mauer, Americans Behind Bars: The International Use of Incarceration.

Overall article reprinted from The Prison Policy Project:

http://www.prisonpolicy.org/articles/not_equal_opportunity.pdf

Community Help With CORI-Related Problems

A community organization called the Boston Workers' Alliance is offering CORI advocacy to assist people who have issues getting work, housing, or social benefits because of CORI. Boston Workers' Alliance is located at 411 Blue Hill Avenue in Dorchester and is open Monday to Friday 10 A.M. to 6 P.M. The phone number is (617) 606-3580. They have a website at http://www.BostonWorkersAlliance.org and an email address, which is info@BostonWorkersAlliance.org.

If you have been denied housing or a job because of a criminal record background check, you can also contact the Massachusetts Law Reform Institute at 617-357-0700 ext. 504 or 1-800-717-4133 ext. 504.

Help with CORI sealing may also be available by calling the Legal Advocacy and Resource Center (LARC) at (617) 603-1700.

Overcrowding Snapshot

DOC Population 3/30/2009:	11,380
County Population 3/30/09:	12,973
Total:	24,353

County total includes DOC prisoners in county houses of correction.

MCLS Notes is available in Spanish by request and is posted on the MCLS web site in English and Spanish. Currently, there are MCLS staff members who speak Spanish, Portuguese, French, Swahili, Kinyarwanda, and Russian.

Are you factually innocent of the crime for which you are currently incarcerated? The New England Innocence Project (NEIP) provides pro bono legal assistance to people who have claims of actual innocence and who were wrongly convicted in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island or Vermont.

NEIP does not charge for its services. The New England Innocence Project 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.

Please address all correspondence to the following address:

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

Massachusetts Correctional Legal Services
Eight Winter Street, 11th Floor
Boston, MA 02108-4705

Non-Profit Organization
U.S. Postage Paid
Boston, MA

Permit No. 58866

Speed Dial phone number for MCLS for state prisoners: *9004#

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 MCLS for free on 1-800-882-1413 toll free from anywhere in the state. Prisoners who cannot reach us by phone should write to: MCLS / 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, MCLS accepts calls on Tuesday from 1:00 to 4:00.

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