PLS NOTES

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DOC Mental Health Care Settlement Reached

On April 12. 2012, the United States District Court for the District of Massachusetts approved a settlement agreement reached in *Disability Law Center v. Department of Correction, et al.* The objective of this litigation was to combat the terrible toll in suicide and self-injury generated by the DOC practice of always treating disruptive behavior by seriously mentally ill prisoners as deliberate, and confining those individuals for long stretches of time, sometimes years, in disciplinary segregation.

The case was filed by the Disability Law Center (DLC) on March 8, 2007, on behalf of all Massachusetts prisoners with mental illnesses. As the Massachusetts agency designated pursuant to the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§10801 et seq., DLC is authorized to pursue legal and other remedies to ensure that individuals with mental illness are protected from abuse and neglect. Plaintiff's attorneys are Bingham McCutchen, Nelson Mullins Riley & Scarborough, the Center For Public Representation, and Prisoners' Legal Services.

The parties began settlement discussions as early as November of 2007. After two years those discussions were frustrated because the state claimed the fiscal crisis prevented the defendant from implementing some of the reforms necessary to protect mentally ill prisoners. Thereafter, discussions were restarted while plaintiffs conducted extensive discovery, including visits by expert consultants to disciplinary and segregation units. Agreement was finally reached in November of 2011, but two rounds of further briefing were necessary before the court approved the agreement.

The agreement provides, in part, that prisoners suffering from designated serious mental illnesses including but not limited to schizophrenia, delusional disorder, major depressive disorder, and bipolar disorder, as well as dementia, developmental disabilities and severe personality disorders that result in "significant functional impairment involving acts of self-harm or other behaviors that have a seriously adverse effect on life or on mental or physical health" shall be screened out of placement in disciplinary segregation and be housed where they will receive appropriate mental health services. The alternative placements available are considered in the DOC's discretion and can range from an emergency mental health watch to long-term placement in a Residential Treatment Unit or a Secure Treatment Unit, depending on the evaluation by mental health staff. Such screening is required for every prisoner with serious mental illness who is sentenced to the Departmental Disciplinary Unit (DDU) before he begins a disciplinary sentence there. "Normally" such prisoners will not be held in the DDU unless special circumstances (including lack of any bed

space in secure treatment units) require, in which case specifically required additional mental health services will be provided in the DDU until the prisoner can me moved to an appropriate secure treatment unit.

Various restrictions are also in place with respect to seriously mentally ill prisoners housed in segregation units other than the DDU. The restrictions generally provide more contact with mental health staff and additional out of cell time to those individuals while they are confined in segregation.

The evaluation and classification provisions of the Settlement Agreement are complicated, but their overall purpose is to identify prisoners heading to segregation and prisoners currently in segregation who suffer from mental illness that is likely to be so compromised by segregation that they seriously harm themselves or other people, and to divert those individuals to housing placements where there is more emphasis on mental health treatment and less emphasis on pure punishment. The DOC agrees to maintain its existing 19 Secure Treatment Unit beds at SBCC, and its existing 10 Behavioral Management Unit beds at MCI-Cedar Junction, for at least the three years covered by the agreement.

The agreement also contains terms providing that DOC compliance with its terms shall be monitored by an expert hired by plaintiff Disability Law Center, for three years. If no serious violations of the agreement are committed, at the end of the three year period the case will be dismissed. If the plaintiff DLC decides that the DOC is violating any terms of the agreement within three years, the plaintiff may move to lift the stay of the case and litigate its claim that the DOC is in violation of the agreement term(s) in question.

Because the plaintiff Disability Law Center represents all prisoners with serious mental illness including prisoners not identified at the time of the filing of the case or the signing of the settlement agreement, the court was obliged to carefully review the proposed agreement to see that it was fair to the prisoners who it protects. The court found that it is.

Although this litigation has been stayed while the agreement is implemented, it will not really be over until the monitoring period is completed and the case has been dismissed. Both sides put a lot of work into coming up with an agreement that the DOC believes leaves it in control of the handling of segregation of mentally ill prisoners and that the Disability Law Center believes will put into place some meaningful protections for those individuals who are too ill to conform to prison rules. Substantial work remains to be done via the monitoring process to ensure that those protections will be effective.

Supreme Court Holds that Life Without Parole for Kids Violates the Eighth Amendment

On June 25, the United States Supreme Court issued a 5-4 decision in Miller v. Alabama and Jackson v. Hobbs, addressing the constitutionality of Life without Parole sentences for juveniles. The decisions recognize that it is unconstitutional to sentence juveniles to Life without Parole. The court was right to abolish this extreme practice and bring the United States in line with sentencing practice in the rest of the world.

In the decision, the Court recognized the truth that kids are different. The Jackson and Miller decisions continue the trend from Stanford v. Kentucky (1989), Roper v. Simmons (2005)and

Graham v. Florida (2010), that require states to move away from extreme sentencing practices and refocus on ways to hold youth accountable, but with the long-term goal of rehabilitation and reintegration. We now have the opportunity to institute age-appropriate sentencing policies that reflect children's capacity to grow and change.

Criminal defense and prisoner advocates are just beginning to review and analyze the Miller and Jackson decisions. It is already apparent that they represent an important step in reducing and abolishing Juvenile Life without Parole sentences in Massachusetts. However, much work remains to be done. In the next few weeks, they will be working through the decisions and trying to determine their impact on litigation and legislative strategy against Juvenile Life without Parole litigation in the Commonwealth.

In addition to the civilizing role of the Supreme Court stance against Juvenile Life Without Parole, great credit is due to those courageous legislators who have worked in the State House on this issue. Particular mention is due to the tremendous leadership of Representative Malia, Senator Chandler and all of the sponsors of H. 1346 and S. 672 as well as the Chairs of the Joint Committee on the Judiciary, Senator Creem and Representative O'Flaherty. The dedicated Representatives and Senators supporting this bill have ensured that the arguments against mandatory life incarceration for children in the Commonwealth are heard on Beacon Hill.

Upcoming Hearing on Prison Phone Rates

On Thursday, July 19, the Department of Telecommunications and Cable (DTC) will hold a public hearing on prison telephone rates and service. This is in response to a petition that PLS and the law firm Stern, Shapiro, Weissberg and Garin filed on behalf of prisoners, attorneys, friends and family members who pay for prison phone calls. It will be a chance for the public to show the damage caused by phone rates so high that many cannot maintain ties with loved ones, which is key to success after prison. The hearing will be at the DTC, 1000 Washington Street, Hearing Room E, in Boston

The Petitioners argue that the current prison phone rates are unjust and unreasonable, and ask the DTC to set reasonable rates. Because prison phone service is a monopoly, the DTC regulates the rates charged by providers. A "just and reasonable" rate should be based on the costs of providing phone service plus a reasonable profit for the phone companies Prisoners in many counties and their loved ones now pay $3.00 just to connect their call, in addition to per-minute charges and high service fees for debit card accounts.

In particular, the Petitioners challenge the telephone companies' practice of paying "commissions" to prison facilities, a cost which has nothing to do with providing phone service, but which the companies pass on to prisoners and their loved ones. In some counties, commissions make up more than half the cost of phone calls. The Petitioners argue that commissions are not a legitimate business cost and may not be passed on to customers in the form of sky-high phone rates. They also argue that technical advances have brought down the actual cost of providing telephone services in recent years.

Additionally, the petition raises quality of service issues, such as dropped calls, poor connections, repetitive announcements that calls are being recorded, and billing issues such as the failure to give itemized bills or provide customer service.

After the public hearing, the case will proceed to an additional, evidentiary hearing, where the Petitioners will put on evidence, including expert testimony. The DTC has not yet decided on the phone companies' requests to dismiss the case, but PLS believes that dismissal is unlikely. The public hearing will happen regardless.

"Three Strikes:" An Obsolete "Solution" Stalks Beacon Hill

"Three Strikes" legislation has failed to improve public safety in other states, while draining taxpayers' resources to fund bursting prisons. So why does Massachusetts want to expand it now? Two bills currently in a joint House – Senate conference committee, H.3818 and S.2080, would do just that. A conference committee is convened to iron out differences in proposed legislation that exists in different forms in the House and the Senate.

These proposed bills would require judges to impose the maximum sentence for a host of crimes (there are 688 felonies on the books in Massachusetts) when a defendant is convicted for the third time of a crime from the list. The Senate has proposed that a person who has twice been convicted of a felony and sentenced in each case to three or more years in state prison, will, upon conviction of a third felony, be sentenced to the maximum possible sentence for that third offense, with parole eligibility at 2/3 of that maximum sentence. There is a House version of the same proposal that is more severe, in that it requires that the sentences for the two "predicate" felonies be for *any* state prison term.

Additional provisions of the proposed Senate bill would condemn a person sentenced for the third time of any of 29 specified violent felonies, when the sentence for the two predicate felonies were at least three years in state prison, to serve the maximum term and be *completely ineligible* for parole, work release, or any good conduct deductions. The House has made an almost identical proposal differing only in the list of some of the 29 crimes.

For both the House and Senate proposals, 17 of the 29 crimes carry a maximum sentence of life. This means that if these proposals are enacted there will be 18 crimes instead of 1 carrying a mandatory sentence of life without possibility of parole. A surer recipe for programmatic and financial collapse of the prison system under the weight of a host of geriatric lifers would be hard to devise.

There are some other spectacular provisions in one or the other of these proposals. In one version of the Senate, for example, it is proposed to expands the existing state wiretapping statute to allow wiretapping for the investigation, not just of organized crime offenses, but for murder, manslaughter, juror or witness intimidation, along with any offense that involves the illegal sale, purchase, or transfer of a firearm. (The original Senate proposal included wiretaps for investigation of drug crimes as well.)

The most recent proposals do include some improvements to existing law. For example, S.2080 has sections that would reduce mandatory minimum sentences for some drug crimes, increase earned good time, and decrease the size of a "school zone" for drug crimes. And the most recent version in the House abandons the scheme for mandatory post-release supervision. However, the useful reforms in these legislative proposals are not enough to counteract their over-all negative impacts. For those with internet access, detailed analysis of the pending "three strikes" proposals is available at smartoncrimema.org.

CPCS Innocence Program

If you have been convicted of a crime that you did not commit, the CPCS Innocence Program may be able to help you. The Program represents indigent Massachusetts state defendants who are actually innocent of the crime(s) of which they have been convicted. CPCS has funding to conduct investigations, to hire experts, and to perform forensic testing. Cases are eligible whether or not there is DNA available for testing. For assistance contact:

Lisa Kavanaugh, Program Director
CPCS Innocence Program
44 Bromfield Street
Boston, MA 02108

Additional Litigation Against Unlawful County Fees

Bentley v. Sheriff, Essex County

In October of 2011, PLS filed a class action against the Essex County Sheriff challenging his policy of charging prisoners for medical care, including a $30 "medical processing fee" charged to all prisoners upon admission the Essex County Correctional Facility. The suit also challenges fees for sick calls, doctor calls, dentist calls, optometric services, and prescription medications. Attorneys David Kelston and Jeffrey Thorn, under the auspices of the National Lawyers' Guild, also represent the plaintiffs. Given the result in the Bristol County fees litigation (*Souza v. Hodgson)*, wherein the Supreme Judicial Court held that the sheriffs lack authority to impose medical fees without legislative authorization, the defendant has seen the writing on the wall. The sheriff has agreed to stop charging the medical care fees while negotiations proceed to settle the case.

NOTICE TO ESSEX COUNTY **PRISONERS**

Bentley, et al. v. Sheriff Frank G. Cousins
Essex Civil Action No. 2011-1907

On October 7, 2011, the Massachusetts Chapter of the National Lawyers Guild and Prisoners' Legal Services filed a class action suit in the Essex County Superior Court on behalf of inmates in the custody of the Essex County Sheriff who have been charged a medical processing fee or a medical co-payment. The suit asks the Court to order the Sheriff to stop charging the fees and to return any such fees charged in the past.

If you think you may be a class member and want to participate in this case, notify the lawyers for the class by writing to:

Prisoners' Legal Services, Inc.
10 Winthrop Square, 3rd fl
Boston, MA 02110

When you write, please include your name, your birth date, social security number, and an address where you can be contacted upon your release. IF YOU MOVE AT ANY POINT, PLEASE LET CLASS COUNSEL KNOW YOUR NEW ADDRESS.

Legislature Rejects "Pay For Stay" County Jail Fees

On April 24, 2012. the Massachusetts House rejected, by a vote of 44 to 110, legislation proposed by Representative Elizabeth Poirier, (R-N. Attleboro) that would have imposed a five-dollar per day housing fee, as well as fees for medical appointments, pharmacy prescriptions, dental care, and eyeglasses, on county prisoners. The measure's supporters argued that the daily fee would teach prisoners responsibility and that it would help cover costs of incarceration. Opponents included Representative Cory Atkins of Concord, who pointed out that daily incarceration fees in practice come from prisoners' families. Moreover, prisoners' often cannot fees even from work-release earnings because the structure of many mandatory sentences prevents prisoners from ever entering work-release. (It is also the case that there are no paid prisoner jobs at all in the county jails and houses of correction.)

Representative Ruth Balser, (D-Newton) , also spoke against the proposal. She said that current policies have cut rehabilitation programs and do not amount to being "smart on crime" because just locking people up, without more, does not make them less likely to commit additional crimes after release.

Chelsea Representative Eugene O'Flaherty pointed out that a study commission set up by the legislature recommended against county "pay for stay" fees and that the Suffolk County Sheriff,

who has the largest county prisoner count in the state, has not called for such fees.

Rep. Michael Costello of Newburyport, said that he had not heard from any sheriff in support of the proposed fees other than Bristol County's Thomas Hodgson. He pointed out that there are already a number of fees placed on prisoners that go into the Commonwealth's general fund.

The House debate on the measure touched on the recently-concluded litigation by PLS against the Bristol County Sheriff , Souza v. Hodgson. Rep. Elizabeth Poirier (R-North Attleboro) said, "I think most of us are aware that prior to my having filed this amendment the sheriff in Bristol County instituted this provision and had collected quite a few hundred thousand dollars, I think in the range of $800,000, but the court ruled he couldn't do that and had to return the money…."

As a result of the Souza case, over the past month more than a thousand former Bristol County prisoners have received refunds, with interest, of money unlawfully seized from them by Sheriff Hodgson.

The State of Lifer Paroles

From the time the "new" Massachusetts Parole Board took office in April 2011 to June 14, 2012, 62 decisions on parole applications by lifers have been published to the Parole Board's web site. Of those published hearings, 7 were actually held before the "old" board. One decision, mentioned below, is for a new hearing with representation.

- Of the 62 decisions, only 2 parolees have actually been "released on parole" in the sense that they are living in the community under parole supervision.
- Only 4 were given release dates within two weeks of their decisions. As of mid-June, 2 of those 4 were still incarcerated, and already past the release date approved by their hearings.
- Of the 17 decisions to release, 12 were re-releases following revocations, 1 was a review hearing, and 4 were initial parole hearings.
- Of the 17 decisions for release, 13 are conditioned on further periods of time without incident. Three require 6-9 months, 8 require between 1 and 2-1/2 years, 1 is a parole to a 9-20 year "from and after" sentence, and 1 is to an ICE detainer after 1 year.

There have been 44 denials with setbacks (period of time to next review).

- One denial with an 18 month setback.
- Five denials with 2 year sertbacks
- Four denials with 3 year setbacks
- Four denials with 4 year setbacks
- Thirty (30) denials with 5 year setbacks

From January through the end of May of 2012, the board published 37 decisions on second degree lifers. Six of those individuals were approved to home or residential treatment locations in six months or less. Twenty men and one woman were denied outright, with setbacks of between two and five years. Nine were given reserve dates from six to thirty months down the road, conditional on successful completion of periods of time in some combination of minimum and pre-release custody. And of those given dates many months away, one will be going to another state, one will be going to an ICE detainer, and one will be going to a 9-20 from and after. One decision simply grants a new hearing, at which the convict is to be represented by counsel, because it was apparently obvious at his hearing that he was too mentally ill to make a presentation to the parole board.

This breakdown means that 6 of the 37 may *possibly* be *released* on parole during 2012. Tallying decisions to parole to an ICE detainer, to another state's supervision, or to a long from and after Massachusetts sentence as "favorable" parole votes obscures the fact that such votes do not comport with the commonsense understanding that a person who has been paroled is living and (hopefully) working in society under the supervision of a parole officer. Additionally, there are "hidden" delays in these votes: to "complete" a year in minimum security, you first must get to minimum security. Bed shortages can mean months if not a year or more of waiting to go to minimum after being classed there. These dynamics are a large part of the reason that there was a 58 percent drop in the number of people released on parole – from 1,028 in 2010 to 435 in 2011. That's a drop of 593 releases on parole.

The situation with non-lifer paroles also contributes to the regrowth of the prison population. The approval rate for non-lifers coming up for parole since May of 2011 was 45%, whereas it had been 58% in 2010.

Bad as these numbers are, they cannot capture the gratuitous suffering inflicted on hundreds of parole applicants and their families by the present parole board. One rejected parole applicant set down his feelings the evening following his hearing, which was more of an inquisition.

"I came back to {my cell] totally devastated, feeling traumatized…. I went to my cell in a daze. My TV was on but I couldn't focus. At some point during the evening, the following words coming from a TV program penetrated the fog in my mind: 'You can't convince someone you changed if they don't want to believe in change."

"I now know what it means when it is said, "'I feel violated.'" I left the Parole Board feeling robbed of all hope. I left the parole board today feeling as if all the changes and progress over the last 17 years was so insignificant in the eyes of this board that they saw no change at all. I left the parole board today feeling that the board's message to me was 'the label habitual criminal' means I am beyond change.

"My parole hearing was not a hearing at all. I mean nothing I said was heard and when it was time for my family, loved ones, and support network to speak, the chairman got up and walked out, claiming a prior engagement, leaving the chairman duties in the hands of another board member who then proceeded to rush my supporters through their testimony saying they had another hearing scheduled.

"My mother, my friends and loved ones have been a source of strength, inspiration and encouragement, telling me not to give up, stay positive and keep striving to be better. Right now I feel drained. Yet I refused to be robbed of the concept that change is possible because I know without doubt that I am not the same person I once was and the changes in me are truly evident for those who will take an honest look, I will cling to the idea that 'hope springs eternal' because I believe in me. I like the direction that I have chosen. The important people in my life see the positive progress, they continue to have faith and believe in me.

"I am committed to the path of positive change. I will do the work that needs to be done. "I believe in change, I believe in me."

It seems that the parole board has been characterizing all those conditional paroles subject to considerable time periods "without incident" as favorable parole decisions. Although

technically correct, this practice obscures the practical truth, which is that almost nobody is going anywhere. As the population numbers pile up, the truth will be out. Change comes to many people while in jail. Change needs to come as well to this parole board.

-PLS Notes acknowledges the research done by Harley Racer in the law offices of Stern, Shapiro, Weissberg & Garin.

"Smart on Crime" Proponents Visit Massachusetts

On April 4, 2012, Massachusetts legislators and executive branch officials got a glimpse of how rational criminal justice reform was implemented elsewhere. The presenter was Gerald Malloy, a state senator from South Carolina, who was invited to Boston by Prisoners' Legal Services. Senator Malloy played a key role in designing and implementing criminal justice reform in a state with a prison system about the size of Massachusetts, where a counterproductive attitude of being tough on crime without being smart on crime fed uncontrolled prison growth.

Senator Malloy spoke to criminal justice reformers from Boston area organizations and to interested legislators, including Rep. Ellen Story, Rep. Christopher Markey, Rep. Byron Rushing, Rep. Gloria Fox, and Rep. Carlos Henriquez, who chairs the Massachusetts Black and Hispanic Legislative Caucus, which arranged for the use of the State House's Gardner Auditorium. Following his presentation, he met privately with Massachusetts Senator Cynthia Creem, Mo Cowan, Governor Patrick's Chief of Staff, members of the Black and Latino Caucus and Greg Torres and Bruce Mohl of MassInc. / Commonwealth magazine.

Senator Malloy explained that in 2006, South Carolina had a "lock 'em up and throw away the key" attitude. Its sentencing practices were the result of repeated instances of creating new crimes and increasing the penalties for existing crimes based on reaction to headlines rather than evidence – based policy making. In short, the S. Carolina approach to sentencing resembled the present approach in Massachusetts.

At the same time, S. Carolina was experiencing a record number of serious violent criminal offenses being committed all over the state and record recidivism. Criminal cases jammed court dockets. Not surprisingly, S. Carolina's prison system was well over capacity, and prisoners were spending ever more time behind bars. In addition, the recession greatly limited resources available to the criminal justice system.

In response to these multiple problems, news media began focusing articles and editorials on S. Carolina's criminal justice system crisis. Constituents began contacting their elected officials demanding that something be done to make the state a safer place to live. Local elected officials began looking to members of the legislature for answers. Stakeholders in the criminal justice system mostly agreed that change was necessary, and members of the legislature became willing to listen to ideas for alternative solutions.

The Legislative Task Force

Senator Glenn McConnell, President Pro Tempore of the S. Carolina Senate and Chairman of the Senate's Judiciary Committee, appointed a task force to study the overall criminal justice system in the state in order to identify problems and come up with possible solutions. Senator Malloy was appointed to chair the task force, which was bipartisan.

The task force members educated themselves through extensive research, presentations, and testimony from criminal justice stakeholders including judges. In the end, the task force recommendations to the legislature were based on consensus of the stakeholders and the legislators who were members of the task force. There was broad agreement on what was wrong and what to do about it.

The Sentencing Reform Commission

The task force recommended that the legislature establish a Sentencing Reform Commission. This was done in 2008. The commission consisted of members of the legislature, the judiciary, and the executive branch. The commission elected Senator Malloy to serve as its chair, and leaders of both parties, in both houses of the legislature appointed its members. The commission undertook the same sort of self-education that had been accomplished by members of the task force. But the commission went further, and worked with the Pew Center on the States Public Safety Performance Project, the Crime and Justice Institute, and Applied Research Services - organizations with deep experience investigating and formulating criminal justice policy – to analyze sentencing data and generate policy options to reduce recidivism, hold defendants accountable, and maximize the benefits realized from the state's limited financial resources.

The commission used "evidence-based practices" – measures that have been tried and shown by numerical assessment to work – from other states. But in order to do that it was first necessary to perform a detailed analysis in order to determine what policies actually contributed to expanding prison population and high recidivism rates in S. Carolina.

Other States' Initiatives

South Carolina is not the only jurisdiction to undertake "smart on crime" sentencing reforms. At least 21 states have implemented significant sentencing and parole reforms over the past three years in order to use criminal justice resources more efficiently and limit unnecessary incarceration. Kansas and Texas have embraced a strategy that blends incentives for reduced recidivism with greater use of community supervision for lower-risk offenders. Those two states often impose sanctions other than prison for parole and probation violators whose infractions are technical, such as missing a counseling session. Kansas and Texas' data indicate that these reforms have reduced crime and cut costs. In Kansas, probation and parole revocations to prison have dropped by 48 percent, and new crimes by parolees dropped 26 percent. The state has saved $33 million to date and is projected to save an additional $162 million over the next decade. Similarly, Texas has seen a similar reduction in probation revocations by 26 percent, while saving $511 million to date and is projected to save an additional $522 million in averted costs over the next decade.

This past spring, ROCA featured former Texas Republican state representative Jerry Madden at its annual fundraising breakfast. Rep. Madden urged more than 500 Massachusetts policymakers, business and civic leaders to focus on data and science rather than emotional responses to violent crimes when formulating sentencing, probation, and parole policies. "There's two choices – either open the door and let more out or you can figure out a way to slow them from coming in," said Madden. "So what you have to do is to figure out how to keep people out of the prisons and you can do a better job with them in the community."

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