PLS NOTES

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Ten Winthrop Square, Boston, MA 02110
Executive Director: Leslie Walker
Editor: Peter Costanza
Phone: 617.482.2773 WATS: 800.882.1413

County Prisoner Collect: 617.482.4124
Massachusetts state prisoner calls: *9004#
Call in Mondays 1-4 PM, emergencies from segregation 9-11 or 1-4 every day or write PLS at 10 Winthrop Square, Boston, MA 02110

SJC Limits AA Segregation

On November 27, the Supreme Judicial Court handed a significant victory to Massachusetts prisoners in LaChance v. Commissioner of Correction. For the first time, the state's highest court placed a constitutional limit on the DOC practice of burying prisoners in segregation on awaiting action status for months at a time.

Plaintiff Edmund LaChance was held in administrative segregation in the SMU at SBCC from January to November of 2006. During his segregation, he filed a *pro se* lawsuit arguing that he was entitled to the protection of the Departmental Segregation Unit (DSU) regulations, 103 CMR 421.00 *et seq.* These regulations provide that a prisoner may only be held in segregation after a hearing before an impartial board and a finding based on "substantial evidence" that the prisoner poses a "substantial threat" to the safety of himself or others, or to the operation of the facility. If, after the hearing, DSU placement is contemplated, the prisoner must be served in writing with a conditional release date of no longer than six months, absent extraordinary circumstances, and must be given conditions which, if met, will entitle the prisoner to release from the DSU.

The Supreme Judicial Court has previously held that these protections must be given to any prisoner held in conditions equivalent to a DSU. See Haverty v. Commissioner, 437 Mass. 737 (2002). During his SMU confinement LaChance was held in conditions comparable to the DSU: one hour of recreation five days a week in an outdoor cage, two "non-contact" visits per week of no more than an hour each, two books a week available from the library, and none of the religious, vocational, or rehabilitative programming available to men in the general population. His wrists and ankles were shackled whenever he was out of his cell. Although LaChance's SMU confinement was clearly as harsh as a DSU, he was never given a DSU hearing or other protections required by the regulations. In his suit LaChance argued that the DOC had violated his rights under the regulations, and under the Massachusetts and United States Constitutions. He also sought damages for the violation of his constitutional rights.

In April of 2010, the Superior Court allowed LaChance's partial motion for summary judgment, declaring that the conditions of his confinement in the SMU were substantially similar to those in a DSU and that defendants therefore violated the regulations as well as his right to due process under the state and federal constitutions. The court also denied the defendants' motion for summary judgment on damages, finding that they were not entitled to qualified immunity from damages because they had violated a clearly established right. The defendants filed an interlocutory appeal of the denial of qualified immunity, and the SJC took direct review of the appeal.

The SJC , deciding only on the qualified immunity issue, for the first time ruled that Massachusetts prisoners have a right under the U.S. Constitution to procedural in administrative segregation: "In light of the restrictive conditions to which LaChance was subjected in the SMU … we conclude that his ten-month detention on awaiting action status exceeded the bounds of reasonable confinement in administrative segregation, and gave rise to a liberty interest that was entitled to the protection of due process." The very limited review provided by the SMU regulations is insufficient, said the court. "None of these reviews entailed giving LaChance notice of the proceedings, much less an opportunity to speak on his own behalf or to test the purported basis of his continued confinement, And, although he was given notice each week of the administrative rationale for his detention in the SMU, he was never informed of steps he might take to mitigate the perceived need to retain him in segregation…."

As a matter of federal constitutional law, the court held that a prisoner in administrative segregation is entitled to, at a minimum, "notice of the basis on which he is so detained, a hearing at which he may contest the asserted rationale of his confinement, and a post hearing written notice explaining the reviewing authority's classification decision." The court indicated that the amount of time a prisoner may be held in segregation before such a hearing varies according to individual circumstances, but in no case may exceed ninety days, However, ruling that this constitutional right was not clearly established, the court held the defendants entitled to qualified immunity from damages.

The SJC did not directly address the lower court's ruling that the defendants had violated the DSU regulations. However, it did observe that the lower court correctly concluded that confinement in an SMU amounts to confinement in a DSU, and that "indefinite confinement in any unit where conditions are substantially similar to those in a DSU entitled an inmate to the protections afforded by the DSU regulations."

Since by the time of the SJC ruling LaChance was long out of segregation, he cannot seek to enforce the regulations. Therefore PLS has brought a separate case, Cantell et al. v. Spencer et al., to establish that all DOC prisoners held in SMUs in administrative segregation are entitled to the benefit of the DSU regulations. The DOC has argued that the constitutional ruling in LaChance means that they need not adhere to the DSU regulations if prisoners are awaiting action in SMUs. Plaintiffs maintain that the clear language of LaChance establishes that SMUs are indeed equivalent to DSUs and therefore, under Haverty and decades of previous case law, prisoners in SMUs must be given the protection of the DSU regulations. Decisions on class certification and the defendants' motion to dismiss in the Cantell case are pending.

The LaChance case was handled by PLS attorneys Bonnie Teneriello and James Pingeon, who is PLS' Litigation Director.

Bristol County Overcrowding Case Settled

In 1998 PLS filed Kelley v. Hodgson to address overcrowding and related sanitary and safety issues in two facilities run by the Bristol County Sheriff, the Ash Street Jail in New Bedford and the Bristol County House of Correction in North Dartmouth. The Ash Street Jail was built in 1828,

and is the oldest continually operating jail in the country. Ash Street's cells are 6 by 8 feet. In 1998, Ash Street lacked proper fire exits, a sprinkler system, and a secure receiving area for processing arriving prisoners. The gym was in such poor condition that it had been closed to all use. At the time PLS filed Kelley v. Hodgson, Ash Street's 48 square foot cells were double-bunked except for one of the eight tiers, which was used to hold pre-arraignment detainees, including women, received from several Bristol County police departments. Because of the extreme overcrowding at Ash Street, prisoners there were required to eat in their cells. At the time the suit was filed, well over half of the men in Ash Street were locked in cell 23 hours five days a week and 24 hours on weekends.

The North Dartmouth facility is "modern," but when the suit was filed it was debilitated by triple celling and housing of prisoners in non-housing areas, notably day rooms, generally in plastic "boat" beds on the floor. The third man in each cell slept on a mattress on the floor. Additional men beyond those sleeping in the cells were required to use the toilet and sink in the nearest cell. In July of 1998 there were 56 prisoners in one unit that contained sixteen cells. Both the Ash Street Jail and the North Dartmouth House of Correction suffered from severe shortages of showers and recreational, educational, and of rehabilitative programming, as would be expected in jails running at more than twice their capacity.

In October of 1998 plaintiffs obtained a preliminary injunction that required that the Ash Street Jail be single celled and that North Dartmouth be double celled without "housing" prisoners in day rooms, corridors, or other common areas.

For the next fifteen years this preliminary injunction remained in place, with occasional adjustments occasioned by skirmishes over accommodating pre-arraignment detainees, women (in an additional building changed into a women's facility), and immigration detainees who the sheriff took on despite the severe overcrowding. There was also a modification of the preliminary injunction to prevent the sheriff from locking the doors on cells in a dry cell unit (with toilets at the end of each tier).

The sheriff did make substantial safety modifications at Ash Street: emergency unlocking for the cells, a sprinkler system, and a second means of egress from the tier area in the event of fire. The gym was rebuilt and is now in use. Ash Street remains (and will remain under the settlement terms) single-celled. There is now a modular unit at North Dartmouth which has made feasible permanent compliance with the double celling restriction and prohibition against sleeping prisoners in plastic boats on the floor or in common areas in the celled areas of that facility. All prisoners at Ash Street and North Dartmouth are to have access to a working toilet either in their cell or placed in such a manner as to provide access without the assistance of guards.

Plaintiffs waived claims for money damages as part of the settlement. The settlement was approved by the Superior Court on December 10, 2012.

A number of present and former PLS attorneys, as well as private counsel, represented the plaintiffs during the course of the Kelley case. Particular mentions go to Beth Eisenberg, James Pingeon, Lisa Otero, Peter Costanza, Douglas Salveson, and the late Greta Janusz.

States Close Prisons: Massachusetts Bucks Trend

Prison populations are declining in many states as a result of reforms in sentencing policy. In 2011 at least thirteen states either closed prisons or considered doing so. Prisons "on the chopping block" ranged from the 198-bed Cabarrus Correctional Facility in North Carolina to *seven* New York State facilities totaling 3,800 beds. Connecticut is closing three prisons totaling 2,205 beds. Other states reducing their reliance on incarceration are Colorado, Georgia, Michigan, Florida, Nevada, Oregon, Rhode Island, Texas, Washington, and Wisconsin. Prisons closed or being considered for closure in 2011 had a total capacity of over 15,500 beds. Since 2002, Michigan has closed *21* facilities as a result of sentencing and parole reforms, reducing capacity by over 12,000 beds and saving its taxpayers $339 million. During 2010, the U.S. Bureau of Justice Statistics reported the first decline in overall state prison population since 1977.

The current recession and reforms in sentencing policy are the main reasons for these changes. A number of states are struggling to lower prison costs whether prisons are actually closed or not. Although the Michigan prison population has declined substantially, the legislature there is struggling to contain costs. One-third of Michigan's state workforce works in criminal justice positions. Michigan's exemplary reduction in population was accomplished by repeal of almost all of the state's mandatory minimum drug sentences, which were replaced with sentencing guidelines. Powerful political forces resist prison closures even where prison populations shrink. New York reduced its prison population from 71,600 in 1999 to 59,300 ten years later, but opposition from the guards' union and from politicians representing (the generally rural) areas where prisons are located has made the actual closing process very slow. The relentless pressure of the recession finally produced a compromise that closed seven New York facilities.

Meanwhile, Massachusetts' prison population continues to sit between 24 and 25 thousand, split pretty evenly between state and county facilities. And Massachusetts is still building. In November of 2011, the 190-bed Hampden Women's Center opened. At the end of September of 2012, it was 90% full.

This article is based on a briefing paper authored by Nicole D. Porter, State Advocacy Coordinator of The Sentencing Project.

Parole Board Delays Revocation Decisions For Second Degree Lifers

The "new" Parole Board appointed in 2011 is taking many months to render decisions following revocation hearings for second degree lifers. PLS Litigation Director Jim Pingeon estimates that the typical wait for a decision is nine months to a year. Some individuals have been waiting well over a year for decisions. For all parolees, even those who eventually receive "favorable" decisions, the time to actual re-parole may be months to years. The reason for that is that the Parole Board often imposes conditions for parole release that may take months or years to fulfill. An example of such a condition is a requirement that an individual complete six months in work release before actual parole release, where the prisoner is in medium security and is told by the classification board that they think he needs

"more time at medium" before he goes to minimum security.

There were 112 known lifer parole hearing results for the period April 2011 (when the "new" parole board took office) through October 2012. Of these known outcomes, 87 people were denied, 62 with a five year setback. Only 21 people received "positive" votes. *Just two (2) people were actually released.* The gap between the number of "positive results" and actual releases to parole supervision is because three of the "positive votes" were paroles either to consecutive sentences (two) or, in one case, to an ICE detainer, and the other 15 are working through the various conditions set on their release by the parole board, including months to years of waiting in lower security prisons.

Future Second Degree Life Parole Will Become Even More Difficult

Parole will be even more elusive for persons sentenced to second degree life in the future. The sentencing legislation passed last year contains provisions that make parole much less likely for people sentenced to second degree life for crimes committed after August 2, 2012.

First, the new law requires a two-thirds majority rather than a simple majority vote of the Parole Board in order to grant parole to individuals serving second degree life sentences. Second, individuals serving multiple second degree life sentences will no longer be eligible for parole at all if: (1) the life sentences arise out of separate and distinct incidents that occurred at different times and (2) the second offense occurred after the first conviction. That is, such multiple second degree life sentences will in effect be first degree life sentences.

The new law requires that sentencing judges set a fixed minimum term of not less than 15 years or more than 25 years for people sentenced to second degree life. This requirement applies to crimes committed after the passage of the Act.

As a result, individuals sentenced to second degree life for crimes committed after August 2, 2012, will not all be eligible for parole after serving 15 years. Instead, they will be parole eligible at the minimum term set by the judge. Individuals with second degree life sentences that include a fixed minimum term will, arguably, be eligible to earn good time.

PLS is looking for second degree lifers who had revocation hearings many months ago but have still not received a decision. If you are in that situation please write to PLS Litigation Director James Pingeon. Include information about how many prior paroles and revocations you have had, when you were paroled and revoked in each case, what the prior revocations were for, what the most recent revocation was for, and when your revocation hearing was held. Also include any information that you may have learned from your IPO or the Parole Board itself, either at the hearing or afterwards, about the reason your revocation decision is taking so long.

Non-Lifer DOC Paroles Also Sharply Reduced

The "regular" parole process has also been throttled down by the new parole board. State prisoners serving sentences other than life, who are 82% of the DOC population, saw their parole rate drop from 66% in 2009 to 31% in 2011. According to the DOC, 73% of the non-lifer population, over 6,200 prisoners, will be released by parole or expiration of sentence. To the extent that that DOC estimate was prepared before the "new" parole board took office, it may be inaccurately high, however. In 2010, 891 state prisoners were released to parole supervision. In 2011, only 395 prisoners were released to parole,

which is a drop of over 50%. Although the favorable parole vote rate increased in 2012, the number of prisoners actually released to parole supervision in the first half of 2012 was 276, still only 60% of what it was during the same period in 2010. In addition to long-term delays in actual parole release caused by preconditions required by the parole board, many more prisoners are waiving parole hearings rather than subject themselves and their families to degrading proceedings which offer no realistic chance of a positive vote. The number of hearing waivers went from 447 in 2010 to 538 in 2011.

County Parole Severely Limited

Almost everyone serving a county sentence is eligible for parole at some point, most at one half of their sentence. The big exception is people serving some mandatory drug sentences. In 2010, 64% of county prisoners who appeared before the parole board received a favorable vote. In 2011 that rate was 40%. But as is the case with state prisoners, the favorable vote rate is no longer closely correlated with the parole release rate. In 2010, 3,417 county prisoners were actually released to parole supervision; in 2011, only 2,008 prisoners were released to parole, a 40% drop. The word was also out in the houses of correction: 1,949 county prisoners waived parole hearings in 2010, 2,103 did so in 2011.

Bottom Line: More Prisoners

Failure to parole people of course means that fewer people will be on parole. At the end of 2010 2,489 people were on parole supervision in Massachusetts. One year later there were 1,649, a drop of 840. That is more than 800 additional Massachusetts prisoners as a direct result of the policies of this parole board than would otherwise have been the case. Although more than 1,000 prisoners became newly eligible for parole under the 2012 reforms, as of November, 2012 only 23 of those prisoners had actually been released by the parole board.

Last but not least: the daily cost of keeping a person in prison in Massachusetts now averages about $130. The daily cost for parole supervision is about $7. Those 800 additional prisoners cost the taxpayers roughly $28,400 per day.

State Drug Lab Scandal Continues to Affect Open and Closed Drug Cases

The mess created by the misconduct of Annie Dookhan, who was a chemist at the Jamaica Plain laboratory that performed drug testing on evidence for criminal prosecutions in much of Eastern Massachusetts, continues to expand. On December 20, Dookhan pleaded not guilty to 27 counts of mishandling and tampering with drug evidence that had been entrusted by prosecutors to the lab where she worked for analysis, for perjury, as well as for lying about her own professional credentials. Dookhan worked for the Department of Public Health lab in Jamaica Plain for nine years. According to a December 20 story in the Boston Globe, about 160 people had been released as a result of the state investigation into Dookhan's misconduct, and the governor has requested $30 million in special appropriations for court, prosecutorial and defense resources to cope with the crisis.

So far, the investigation has revealed that Dookhan processed as many as 60,000 drug samples, affecting tens of thousands of cases. Additional information about the scope of the misconduct at the J.P. lab will determine whether

convictions relying on testing by other chemists at the lab must also be examined.

Defendants currently facing charges based on evidence tested in that lab should speak with their criminal defense attorneys about how mishandling of drug evidence may affect their cases. People who are serving sentences for drug convictions in Barnstable, Bristol, Dukes, Essex, Middlesex, Nantucket, Norfolk, Plymouth, or Suffolk Counties may have had their evidence "tested" by Dookhan and should seek legal advice.

If you were convicted of a drug offense in any of those counties and would like to have your case screened for assignment of counsel, call the Committee for Public Counsel Services at 617-482-6212 or 1-800-882-2095 and ask to be connected with the "drug lab intake" extension. DOC prisoners may also call CPCS at the following preauthorized speed dial: *9009#.

Rulemaking Proceedings in Progress For In-State And Interstate Prison Phone Calls

Last July, the Massachusetts Department of Telecommunications and Cable (DTC) held a hearing on a petition challenging the telephone call rates applied to prisoner calls to points within Massachusetts . The petition was filed by PLS and the firm of Stern, Shapiro, Weissberg and Garin. It asserts that in-state prison call rates are out of line with the actual costs of providing the service, especially to the extent that prison phone companies pay "commissions" to the prisons and jails from which the calls originate. Further proceedings on the DTC petition are expected to take many months.

The regulatory system for telephone charges is complicated. The Massachusetts DTC only has jurisdiction over phone calls within Massachusetts. Rates for calls that cross state lines are regulated by the Federal Communications Commission (FCC) in Washington, D.C. For the last nine years, petitions for regulation of interstate prison call rates have been pending before the FCC. In 2012, the FCC finally began proceedings on those petitions. On December 24, 2012, the FCC adopted a Notice of Proposed Rulemaking, which is a formal invitation to the prisoner advocates who filed the petition and the prison authorities and prison phone service companies who responded to the petition, to submit comments and evidence in support of their positions.

Some of the issues that will be addressed in the FCC proceeding include

- Whether the FCC should regulate interstate prison call rates at all, or leave the matter to individual states or prison authorities,
- If yes, how to determine fair rates,
- Whether to prohibit per-call fees ("call setup fees"), especially for reconnecting dropped calls,
- What actual call rates should be,
- Whether call charges should cover a certain amount of free calling to all prisoners in a jail or prison,
- What position to take with respect to collect calling, debit calling, and prepaid calling systems,
- Whether the practice of requiring prison phone service companies to pay "commissions" to prison authorities should be limited or prohibited.

In the FCC Notice of Proposed Rulemaking, Commissioner Ajit Pai stated that the proceeding was commenced "in response to calls to action

from hundreds of inmates and their families, Members of Congress, the National Association of Regulatory Utility Commissioners, numerous civil rights organizations, the FCC's own Consumer Advisory Committee, and my own colleague, Commissioner Mignon Clyburn. It should not take a letter from Congress, it should not take manifold resolutions, it should not take hundreds of individual signatures to get the FCC to act on a *nine- year- old* petition for rulemaking."

Anyone may submit comments in the rulemaking proceeding up to sixty days after the Notice of Proposed Rulemaking is published in the Federal Register. As the notice has not appeared in the Federal Register as of the date of this article (January 3,2013) that closing date is at least sixty days thereafter.

PLS Initiatives for 2012

PLS has identified several areas of concern for attention in 2013. These issues can receive a combination of attention via client advocacy, legislative advocacy, and litigation.

Stop solitary. PLS will focus on reducing the use of solitary confinement in DOC and county facilities.

Medical release. This work will be focused on developing a mechanism for early release of prisoners who are seriously ill or infirm.

tion 35 commitments at MCI-Framingham. PLS will continue work with the multi-organization coalition that is exploring ways to challenge confinement of civilly committed women, without adequate treatment, at MCI-Framingham.

Staff assaults at ECCF (Essex HOC). The Essex County Correctional Facility has for several years shown a pattern of frequent brutality against prisoners in custody there. Related issues are misuse of restraint chairs and K-9s. PLS plans to address these problems via litigation.

Sex offender classification and parole. Currently the DOC precludes all prisoners who are eligible for SDP commitment from placement in minimum security. This mandatory classification override is inconsistent with the statute that requires DOC to assess who is likely to be committed under chapter 123A. PLS intends to address this in court. The case will also challenge the parole board's interpretation of the provision in the SDP statute that requires six months' notice to the D.A. before the prisoner can be released. The parole board interprets the statute to permit delaying notice to the D.A. until parole is actually granted rather than six months before the parole eligibility date. In the many instances where the parole board never paroles the prisoner, he or she is prevented from ever going below medium security during his or her sentence and consequently loses programming opportunities, including work release, that are important aids to re-entry.

Discrimination against wheelchair users in DOC custody. PLS is looking at the practices of assigning wheelchair users to the infirmary because of a shortage of handicap cells, at the chronic shortage of pushers, and poor accessibility to and quality of wheelchairs.

Prisoners held illegally on immigration detainers. ICE sometimes places immigration detainers on prisoners just before or at the time of their scheduled release. The ICE detainer is valid for only 48 hours, but many prisons and jails routinely hold people for weeks or months on detainers. This issue, however, requires more research.

Prisoners' Legal Services
Ten Winthrop Square, 3d Floor
Boston, MA 02110

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PLS' phone numbers are: *9004# for DOC prisoners and (617) 482-4124 (collect) for county prisoners. The regular business number is (617) 482-2773

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