PLS NOTES

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Parole Decisions Must Consider Disabilities

Richard Crowell v. Massachusetts Parole Board, 477 Mass. 106; 2017 Mass. LEXIS 347; (SJC 12203, May 15. 2017

Decisions to grant or deny parole must be handled in a manner that meets requirements of the Americans With Disabilities Act (ADA) and related state law. The ADA requires parole authorities to make reasonable modifications to their standard procedures and practices to ensure that people with disabilities have an equal opportunity to be released on parole. Disabilities that will put the ADA in play may be physical or psychiatric.

Crowell v. Massachusetts Parole Board was decided in May of this year by the Supreme Judicial Court. The case makes it clear that the ADA applies to the Board's substantive decision-making and not just to procedures at the hearing. There has never been any doubt that prisoners cannot be denied parole just because of a disability. The more difficult question addressed by the SJC in Crowell is how the parole board should evaluate a prisoner whose problematic conduct or dangerousness may be caused by the disability.

The court concluded that the ADA and the Massachusetts parole statute, G.L. c. 127, sec. 130, as well as Department of Justice regulations implementing the ADA, require the parole board to take reasonable measures to accommodate prisoners with disabilities. Although changes that would fundamentally alter the process of parole review are not required, meaningful assistance should be available to the prisoners up for parole.

The plaintiff in *Crowell* suffers from a traumatic brain injury. The parole board knew about his brain injury and that symptoms stemming from his disability might affect his behavior, both at the hearing and on parole. The court faulted the board because the record of the hearing failed to show that it had considered whether Mr. Crowell could be successful on parole if he were given appropriate programs and services. Instead, the board seems to have blamed him for not presenting an appropriate parole plan, and also for a negative attitude that may have been a symptom of his disability.

For these reasons, the court reversed the dismissal of the complaint and sent the case back to the trial court for further consideration under the ADA principles. Specifically, it stated that where a prisoner has a disability that affects the ability to prepare a release plan, the parole board should provide an expert or other assistance to help the prisoner develop a post-release programming plan. The court also said that was difficult to see how, in a case like Mr. Crowell's, the board could proceed without obtaining a

professional evaluation of the disability and recommendations for a post-release plan that would diminish the chances he would violate the terms of parole.

Mr. Crowell was represented by the Harvard Prison Legal Assistance Project. Prisoners' Legal Services, along with the ACLU and others, submitted an amicus brief.

The state prisoner phone line for PLS is *9004#. Call on Monday afternoons from 1 to 4 P.M. (general population) or 9 to 11 and 1 to 4 any weekday (if you are in seg).

Review of Massachusetts Criminal Justice Policies Identifies Opportunities For Improvement

The Council of State Governments (CSG) is a national nonprofit, nonpartisan membership association of state government officials that engage members of all three branches of state government. The CSG studies all areas of government policy and practice that come within the areas of state government authority, from roads and bridges to zoning. One of CSG's core areas is criminal justice.

Recently, CSG's Justice Center reviewed justice-related policy and practices in several states, one of which is Massachusetts. This review was not aimed at suggesting specific changes in law or regulations. Instead, it focused on identifying aspects of the operation of criminal justice institutions that are problematic.

Recidivism

During 2013, almost three-quarters of new sentences were imposed on individuals who had previous convictions.

The report makes four suggestions for reducing recidivism:

> expand ways of addressing causes of criminal behavior during incarceration and provide oversight and support during reentry, strengthen community supervision, improve access to behavioral health supports for people who have been identified as having mental health needs and likely to reoffend, and expand data system capacity across the criminal justice system

> Create meaningful incentives for people to successfully complete recidivism reduction programs during incarceration in DOC

> Ensure equitable ability to accrue earned time credit and completion incentives across risk level, classification level, and gender within DOC

> Improve coordination between DOC and the parole board to expedite the communication of programming requirements to prevent delays in release to parole

> Eliminate the prohibition against suspended sentences in state prison so that a Superior Court judge may impose a split sentence for a single criminal offense

> Expand capacity of evidence-based cognitive-behavioral programming in HOC facilities.

The most striking part of the CSG report is also the most specific. It drills down into existing practices of the DOC, the sheriffs, probation and

parole to provide clear evidence of how the status quo is ineffective at controlling recidivism.

> **A sizable portion of people never had access to recommended programming prior to their release** due to either long wait lists for program access or a lack of program offerings in the facility where they were housed. In 2015, 17 percent of people assessed as needing a substance use treatment program, and 41 percent of people assessed as needing a "criminal thinking" program did not participate in the recommended programming or treatment prior to release, either because they were not in a facility where the program was available or because they were not accepted into the program before their sentence expired.

> Less than half of people released from DOC completed the programs recommended as necessary to reduce their risk of recidivism. In 2015, only 45 percent of people identified as having substance use needs completed recommended programming prior to release from DOC. In the same year, only 27 percent of people completed necessary programs to reduce "criminal thinking". Incentives for participation in recidivism-reduction programming are focused on monthly participation, rather than the successful completion of programs. Currently, people can accrue up to 5 days of earned time credit per program per month, up to a maximum of 10 days a month for active participation in programming. **Completing** a program can earn a total of 10 days of earned time credit if the completed program lasted more than six months.

> One out of every three people leaving prison is released without supervision. More than 30 percent of people who leave DOC do not receive community supervision, and people assessed as being at a high risk of recidivating are the ones who are *most* likely to be released without supervision.

> DOC and the parole board develop separate case plans to prepare someone for release from prison. Currently, DOC and the parole board use different risk and needs assessment instruments and develop separate case plans at different times to prepare someone for release from prison. It is common for someone to be assigned additional programming requirements at their initial parole hearing, delaying the possibility of their parole.

> People remain incarcerated in DOC for long periods of time after parole eligibility or a positive parole vote. In 2015, on average, people in DOC who received a positive parole vote were released to parole 206 days after the vote, a total of 297 days after their parole eligibility date. Eighteen percent of people who were granted a positive parole vote were not released to parole supervision before their sentence expired. Sentencing has a significant impact on who does and does not receive post-release supervision from DOC. Nearly 20 percent of people serving state prison sentences were ineligible for parole and had no post - release probation.

> Less than half of people serving state prison sentences will be reviewed by the parole board to determine eligibility and release to post-release supervision. Nearly half of sentences have guaranteed post-release supervision through "from and after" probation. The number, type, and capacity of recidivism reduction programming varies from one HOC to another. There is currently no designated state funding to support recidivism-reduction programming in HOCs; nor are there statewide standards to guide programming and require performance measures to track outcomes. There is no consistency in what is offered and no core group of program

offerings across all 13 HOCs, making it difficult for statewide supervision agencies to coordinate services for people returning to their communities. While there is a broad range of programs, few focus on cognitive-behavioral interventions, which are a proven method of reducing recidivism. Sheriffs offer 389 different programs that target a variety of needs, and the extent of programming varies by location. Some HOCs offer as few as 10 programs and others offer as many as 70. While studies have found cognitive-behavioral risk measurements to be among the most predictive of future criminal activity, only 9 percent of reviewed programs were dedicated to cognitive-behavioral interventions to impact criminal thinking.

The CSG report is a valuable contribution to the discussion of prison policy in Massachusetts. In January 2017, the governor filed a statute that includes some of the CSG recommendations. It remains to be seen how many of its recommendations will actually become law and actual practice in Massachusetts.

Credit: Katie Mosehauer, Steve Allen, Monica Peters, and Cassondra Warney, CSG Justice Center-Massachusetts Criminal Justice Review: Working Group Meeting 6 Interim Report (New York; The Council of State Governments Justice Center, 2016). Reprinted with permission from The Council of State Governments Justice Center.

Attention Bristol County Prisoners

Prisoners' Legal Services is seeking information regarding prisoners who have friends or relatives who are paying for phone calls via the prison phone company Securas. People who have paid substantial sums of money in order to have phone contact with Bristol County prisoners may make good witnesses in proceedings against the high phone rates charged by Securas.

Prisoners' Legal Services is also seeking information regarding prisoners who are housed in segregation units at Bristol County House of Correction who may have mental health diagnoses**.** PLS staff members have recently visited the Bristol County House of Correction as part of an effort to address problems with segregation practices at the North Dartmouth facility. The units of interest are EE, Max, EC, FB and HB. PLS is particularly interested in contacting prisoners who have been repeatedly placed in segregation or who have spent long periods of time in segregation and may have a mental illness. If you have any information you can share with PLS regarding this issue please write or call **Bonnie Tenneriello** or **Al Troisi**.

Mental Health Care at Worcester County House of Correction

PLS is taking a closer look at the medical and mental health care services in the Worcester County Jail and House of Correction. **We would like to hear from anyone who was in Worcester County anytime in the last three years. PLS would like to ask some questions about your experience of health, mental health, and substance abuse care there.** If you are willing to answer some questions for us about your experience, please write or call **Joel Thompson or Al Troisi. PLS' mailing address is**

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PLS Seeks Information on DOC's Treatment of Deaf and Hard of Hearing Prisoners

PLS is looking for information about the experiences of deaf and hard of hearing prisoners in DOC custody. For example, PLS would like to hear about problems with: access to interpreters for medical appointments and administrative hearings, access to educational and rehabilitative programs, religious services, awareness of safety alarms and announcements, and ability to communicate with their loved ones in the community. If you have any such information that you would like to share with PLS, please write or call PLS and ask for **Tatum Pritchard** or **Lizz Matos**.

Legislative Proposals

Medical Placement of Terminal and Incapacitated Prisoners

Sponsors: Sen. Pat Jehlen, Rep. Chris Markey, Rep. Sean Garbally, Rep. Claire Cronin

These bills propose to place Massachusetts in the ranks of states that permit incapacitated and dying prisoners to be placed in non-incarcerated locations such as nursing homes and hospices.

Solitary Confinement Reform

Sponsors: Sen. James Eldridge (S.1306) and Rep. Russel Holmes (HD.3460)

Massachusetts is currently one of the few states that lock up prisoners for up to ten years for a disciplinary offense or for administrative reasons. In either case the prisoner is locked into a small cell for 23 hours per day five days a week and for 24 hours on weekends. Many individuals who end up in solitary have mental health problems that are made worse by solitary confinement. This legislation will prohibit placement of people in solitary if they suffer from mental illness, or are deaf or blind or aged. Most importantly, it would limit placement in solitary to fifteen days for any one offense, and require one hour per day of out-of-cell time. It would also make improvements to non-disciplinary administrative segregation by requiring conditions as nearly as possible to those in the general population, and allow disabled prisoners in segregation to have access to supportive medical equipment. It also requires vocational, educational and rehabilitative programming for prisoners in administrative segregation, including programming that makes possible earned good time. Prisoners in administrative segregation would also be entitled to receive a plan for release to general population and fifteen day reviews of progress towards release to population. Prisoners could not be held in disciplinary segregation for more than ninety days unless it was established that they were still dangerous. The bill also limits the practice of releasing prisoners from segregation straight to the community by requiring written certification of the need for such confinement within six months of release, and provides for enhanced re-entry services to prisoners who are certified to remain in solitary within six months of release. This bill has the support of a coalition of community groups.

Parole Reform

The Massachusetts legislature is considering Senate and House versions of parole reform legislation. The bills are S.779 (sponsored by William Brownsberger) and H.3121 (sponsored by

Rep. Dave Rogers). The bill would expand the Parole Board from seven to nine, and would permit six members of the Board to sit as a full Board for the purpose of second-degree lifer hearings. It requires at least three members of the Board to have at least five years' experience in the fields of psychiatry, psychology, social work, or substance abuse disorder. At least one member of the Board would have to be a licensed mental health professional.

The bill also would subject the Parole Board's decision-making to evidence-based guidelines based on a validated risk and needs assessment tool. The Board would have to consider good behavior and participation in work, education, and treatment programs. Prisoners would also be released at the time of parole eligibility unless clear and convincing evidence shows that the prisoner would violate the law if released. This legislation would also call on the Parole Board to consider whether, with the provision of reasonable accommodations, a prisoner with a disability would be suitable for parole. If the prisoner's disability could impede their parole success, the Board would have to schedule a psychological or medical examination to evaluate the risk presented by the disability ad t explore what services or programs might lessen the risk of reoffending. The need for exploration of alternatives for prisoners with disabilities has been emphasized by the SJC decision in *Crowell v. Massachusetts Parole Board* (discussed in the lead article, above).

Parole guidelines would be available to the public. When the Board adjusts them it would be required to publically report on the proposed changes and the reasons for them. Reasons for denials of parole would be recorded and should refer to specific elements in the prisoner's risk profile. A denial would also have to list any tasks that the prisoner must complete to get a positive vote at their next hearing. Each voting member would have to certify that they reviewed the prisoner's entire criminal record. The Board would have to provide a numerical breakdown of how the members voted. Finally, there would be quarterly release of aggregated data on grants, denials, recissions, and revocations of parole.

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Appeals Court Tightens Time Limits For Revocation Proceedings for Second Degree Lifers

Archer, et al. v. Chairman, Mass. Parole Board, et al., 15-P-1351 (Mass. Appeals Ct., Aug. 78, 2017)

Plaintiffs are parolees serving Second Degree Life sentences who had timely preliminary revocation hearings, but whose decisions as to whether they should be re-paroled (final revocation hearings) were not held within sixty days of return to custody. Two-part revocation hearings had been Parole Board practice for years. Plainitiffs claimed that the Parole Board's practice had the effect of splitting the revocation "hearing" into a process that often took months longer than the sixty-day time period for revocation hearings permitted by 120 CMR 303.18 and the twenty-day time period for issuing decisions after a hearing set out in 120 CMR 303.26(1). Plaintiffs also said that delays of more than sixty days in the final revocation decision violate the Due Process clauses of the

Fourteenth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. This claim was supported by the decision of the United States Supreme Court in *Morrissey v. Brewer, which* says that the "parole revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months…would not appear to be unreasonable."

Mr. Archer's was returned to custody for violating his conditions of parole on Oct. 5, 2010. His preliminary revocation hearing was held on Oct. 15, and his final revocation hearing occurred on Nov. 24, 2010. However, the Parole Board did not consider whether he should be re-paroled at that time. The question of re-parole was not addressed until a revocation review hearing on Sept. 27, 2011, and Archer did not receive a written decision informing him of his re-parole hearing date until April 19, 2013. That decision set the date for his next revocation review at September, 2016, more than six years after he was initially taken into custody. Mr. Archer therefore raised another claim, which was that the elongated hearing process to which he has been subjected violated G.L.c. 127, sec. 133A, which provides that when the Parole Board declines to parole or re-parole a second degree lifer, it shall reconsider the decision at least once in "each ensuing five year period."

Although Archer and the other plaintiffs were alleging that the Parole Board failed to follow its own time-limit regulations as well as the constitutionally required sixty day limit, the court said that the "heart of the plaintiffs' claim" was not an issue of statutory or regulatory interpretation. "Rather, the plaintiffs raise a factual dispute about whether the board follows its regulations as a matter of practice, including whether it considered less severe sanctions and alternatives to confinement during the final revocation hearings." As the plaintiffs claimed that the board has not made such an examination of alternatives, and the defendants did not claim to have done so, the Appeals Court determined that the existence of a factual dispute had not been denied, and therefore that the trial court's dismissal of the complaint must be reversed.

PLS Notes está disponible en español. Pídalo si quieres. Además PLS está buscando ayuda de prisioneros quien habla español que pueden servir como contactos con la gente que no hablan inglés. Aceptamos llamadas y cartas en español igual como en inglés.

PLS Is Eager to Hear from Non-English Speakers Who Need PLS' Help

While PLS hears from significant number of prisoners for whom English is not their first language, particularly Spanish speakers, PLS does not receive requests for assistance from prisoners of Asian descent or others who speak limited or no English. Since PLS has the ability to both have any letters translated and to continue communication with prisoners through interpreters, would readers please encourage such prisoners contact PLS for assistance? Thank you.

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