

MCLS NOTES

Massachusetts Correctional Legal Services, Inc.

8 Winter Street, 11th Floor, Boston, MA 02108-4705

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What is MCLS?

Massachusetts Correctional Legal Services (MCLS) provides legal assistance to prisoners, parolees, probationers and family members for problems arising out of incarceration. We are not part of the Department of Correction. We assist prisoners through direct representation in individual and class action civil lawsuits, through administrative and legislative advocacy, and by providing legal advice and information. We review problems involving conditions of confinement, inadequate medical and mental health care, unlawful use of force, discrimination, free speech, religious exercise, access to the courts, sentence computation, visitation, and many other issues facing prisoners and their families. This quarterly newsletter highlights recent developments in some of our cases, and in some areas that may be of interest to our readers.

Unfortunately, we are a small office and cannot take on many of the cases that are presented to us. We will continue to review our intake procedure and determine where to focus our resources in order to best serve our clients. We are now sending out forms in response to prisoners' letters telling the writer which staff member is assigned to review and respond to the letter. The forms also have other information that can be checked off to speed up our replies. This may seem less personal than a letter, but we hope it will mean you receive a quicker response.

Announcements

Prisoners' Right to Vote Is Up For a Vote

Election Day is November 7, 2000. In addition to voting for the President and other government officials, this election will include ballot question #2 on whether the state constitution should be amended to prohibit prisoners from voting. The law currently allows prisoners to vote by absentee ballot in the city or town where they lived before being incarcerated. Like other voters, prisoners can only vote if they are U.S. citizens, residents of Massachusetts, and at least 18 years old at the time of the election. Prisoners do not need to register to vote separately from submitting the absentee ballot because they are considered "specially qualified voters."

Prisoners who are planning to vote by absentee ballot should request one as soon as

possible. Absentee ballots can be requested in writing from the city or town where the prisoner lived before being incarcerated. Prisoners should print their name, the address where they lived before being incarcerated, their address at the prison where they want the absentee ballot sent, and a statement saying they are incarcerated. The request for an absentee ballot must also be signed. Send it to:

Board of Registrars or Election Commission
City or Town Hall
[Your city or town], MA [ZIP code for city or town]

After voting, the completed ballot must be received by the local election office before the polls close on Election Day.

New Prison Litigation Law

This edition of *MCLS Notes* contains a two-page information sheet on the new laws that were passed in November 1999 to prevent so-called "frivolous" litigation by prisoners. Everyone should become familiar with the new provisions on grievance procedures, indigency determinations, filing fees, and sanctions that can be imposed in connection with litigation.

New Law Makes It a Crime for Prison Employees to Have Sex With Prisoners

In November 1999, the legislature passed a law that makes it a crime for any person employed by a correctional institution to have sexual contact with a prisoner. The employee can be punished by imprisonment for not more than five years in a state prison, or by a fine of \$10,000 or both. Under this law, an inmate is considered incapable of consent to sexual contact with the employee.

Good Luck Lisa!

After nearly five years at MCLS, attorney Lisa Otero is leaving to pursue new challenges. In addition to her accomplishments through litigation and advocacy, Lisa has also served as the director of MCLS's HIV advocacy project. She recently expanded the project to include advocacy for prisoners with hepatitis C. We will miss her greatly.

Legal Notes

Cronin v. O'Leary

Challenge to Prohibiting Ex-Offenders From Human Services Jobs

In April 2000, Massachusetts Law Reform Institute, the Civil Liberties Union of Massachusetts, and Massachusetts Correctional Legal Services filed a class action lawsuit on behalf of four named plaintiffs challenging a policy of the Massachusetts Executive Office of Health and Human Services (EOHHS), that bars state agencies and state-funded human services agencies (contractors and sub-contractors) from hiring individuals with certain criminal histories or charges pending.

The plaintiffs have been barred from jobs in the human services field because of their criminal histories, but are otherwise qualified to work in shelters, substance abuse treatment and recovery programs, and other human services agencies. The EOHHS policy (Procedure No. .001) includes a wide range of crimes and has affected countless individuals seeking jobs and internships in the human services field. The policy also hamstring many employers who want to hire employees whose past experience may be an asset to the job (such as recovering addicts who would be good role models to work with people in substance abuse programs). Cross motions for summary judgment were filed on August 31, 2000.

Roman v. Maloney

Abusive Use of the Restraint Chair

MCLS recently filed a lawsuit alleging excessive use of force over an incident in which a prisoner was strapped in a restraint chair for fourteen hours. The lawsuit also alleges that the DOC defendants failed to accommodate and treat the plaintiff's mental illness.

Early Parole for Pregnant Prisoners

MCLS recently advocated on behalf of a pregnant prisoner seeking early parole. Although the parole was not granted, pregnant prisoners should be aware of the law that permits early consideration of

parole. The language of General Laws Chapter 127, § 142, which was passed in 1918, allows a pregnant woman who is about to give birth to be paroled or discharged if it would be in the best interests of either the mother or the unborn child. The parole board regulation that governs this is 120 CMR 200.16. Please note that there is no right to be paroled or discharged under these provisions; it is up to the parole board or DOC to decide. They may decide to allow the woman to go to Houston House rather than release her to the street. MCLS suggests that pregnant prisoners talk with the medical staff of the institution to see if parole or discharge would be in the best interest of either the mother or the unborn child, and whether medical staff will write a letter stating this. Please write to MCLS attorney Amy Goldstein if you are pregnant and have questions about these provisions.

Rashad v. Commonwealth

Challenge to Dismissal of Lost Property Claim

MCLS is representing a prisoner in the Appeals Court after his *pro se* claim under the Mass. Tort Claims Act (G.L. c. 258) for lost and damaged property was dismissed by the Superior Court as "*de minimis*." The Court ruled that the amount of money damages involved was not worth the court's time or the cost of a trial. If you have a claim for lost property, be sure to read the information on the new prison litigation laws in this issue. You can also write to "Intake" at MCLS to get an updated information packet on lost property claims. If your case is dismissed as being "*de minimis*," please send a copy of the court's order to MCLS attorney Amy Goldstein.

Collette v. Mass. Parole Board

5 Year Setback for Lifers

MCLS is challenging the parole board's application of the 1996 amendment to G.L. c. 127 § 133A that allows for a five year setback (instead of three years) in between parole reviews for prisoners serving second degree life. We are arguing that it is a violation of the *ex post facto* clauses of the federal and state constitutions to apply that amendment retroactively to prisoners who are serving second degree life for crimes committed before the effective date of the amendment.

Unfortunately, there have been a series of U.S

Supreme Court decisions which hold that a prisoner will have to prove that she or he would have been paroled sooner before such an application of the statute can be considered unlawful. For example, a prisoner would have to prove that if he had gotten a two year setback, he would have been paroled at that time. This is very difficult to prove. We are in the midst of doing discovery of the parole board's records concerning this matter.

If we win this case it will affect all prisoners serving second degree life for crimes committed before the effective date of the statute. (We asked for declaratory relief.) In the meantime, this office does not have the resources to take on other clients for this issue. Nor can we provide representation for prisoners who have been denied parole and are seeking to appeal or reverse that decision. We will keep prisoners advised of the status of the case.

Haverty Update

Haverty v. DuBois is a class action which challenges the confinement of prisoners at MCI-Cedar Junction in "Security Threat Group" (STG) and other restrictive East Wing blocks. There has been no final decision in this case. Superior Court Judge Charles M. Grabau decided to sever the due process claim, which was decided in plaintiffs' favor, from the other claims on which a trial is necessary (equal protection, abuse of force). This will allow the favorable decision we received to be tested on appeal sooner. In fact, the DOC filed their notice of appeal only a few days after the order was issued.

Unfortunately, Judge Grabau stayed (postponed) the effectiveness of his order that prisoners may not be confined without compliance with the regulations governing "Departmental Segregation Units" while the order is being appealed.

Judge Grabau also suggested that prisoners who were segregated without compliance with the DSU regulations are entitled to some amount of earned good time credits as compensation, and ordered the parties to negotiate a formula. No decision has been reached in this matter.

Ahearn v. Vose Plumbing at SECC

This is a class action, filed in 1990 to challenge the lack of flush toilets and running water in the cells at SECC. The court dates which had previously been scheduled both for hearing on the DOC's Summary Judgment motions and for trial have been postponed several times, despite our readiness to proceed. Currently, no specific date is set for either, although there is some indication the trial will go forward in the

fall. At the suggestion of the court, both sides will submit a joint motion for a Special Judge to be assigned to the case. Thereafter, that judge would hear all aspects of the case. It is hoped that an assignment of this sort will speed the resolution of the case.

The class of plaintiffs is *decertified* for purposes of trial because the damages are so individualized. The first trial will consist of the 5 or so named plaintiffs. (You do not need to worry about whether you are a "named plaintiff"; all the named plaintiffs have been notified.) Although in theory each plaintiff has the right to a trial, in fact the results of the first trial will probably go a long way to determining whether further trials are necessary and whether the case will be settled through negotiations. PLEASE REMEMBER THAT THERE IS NO GUARANTEE OF DAMAGES BEING AWARDED IN THIS CASE. It is essential that you keep us informed of any changes in address so that we may contact you directly when we need to do so. However, we cannot respond to individual letters. If you were imprisoned at SECC on or after August 7, 1990 in a cell without a flush toilet and you have not contacted us already, you should write to "Ahearn Case" at MCLS with the dates of your incarceration at SECC and your current address.

Sex Offender Misidentification

MCLS filed a class action on behalf of eight prisoners who were identified as sex offenders by the DOC for absurd reasons (public urination, "mooning" as a prank, consensual sexual relations 45 years ago with a minor close in age). Plaintiffs seek due process protections for prisoners designated as sex offenders, as well as individual relief.

Recent attempts to settle the case without extensive litigation were partially successful. Revised DOC policy now requires that newly admitted prisoners

who have committed certain relatively minor "sex crimes" receive a clinical assessment. This assessment was performed on the named plaintiffs in this action, all of whom were "cleared" of the sex offender label. The DOC states that this assessment right also applies to prisoners whose sex offender identification is based on the "sexual overtones" of conduct resulting in the conviction of a non-sex crime, but the policy does not say this and is deficient in other important respects. Further, the DOC is not willing to provide clinical assessment to many prisoners questionably identified prior to recent changes in policy. As a result, MCLS is aggressively pursuing their claims in ongoing litigation.

Prisoners who believe they have been misidentified should direct letters which tell their stories to MCLS attorney Phillip Kassel. Include: (1) the reason why you are designated as a sex offender; (2) whether you have been given any opportunity to contest the designation and, if so, what opportunity you have been offered; (3) any hardship you have suffered as a result of the designation such as harassment by correctional officers or other prisoners; loss of parole or more favorable custody status; loss of employment or programming opportunities. All letters should conclude with the following words: "Sworn and subscribed under the pains and penalties of perjury," followed by your signature. These letters will help us to establish the prevalence of this problem and could be used as affidavits in court if negotiations fail. Prisoners sending letters will not necessarily receive responses. Rather, all names will be placed on a list of prisoners whom we will notify of any procedural protections that result from the case.

Landry v. Attorney General Seizure of Blood for DNA Database

The law to create a DNA database went into effect on December 29, 1997. Most of the provisions of the law can be found in General Laws Chapter 22E. Inmates, probationers and parolees who were convicted of a list of offenses are required to give a blood sample. The law applies to anyone incarcerated on or after December 29, 1997, regardless of when the listed offense occurred. If you were convicted of a listed offense in the past, but you are incarcerated now for a different offense, you are still required to give a DNA sample. However, the law only applies to parolees and probationers who are on parole or probation as a result of the listed offense. The blood sample is taken by pricking the finger and squeezing out drops of blood onto a card. The law provides that authorities can use reasonable force to obtain the blood sample. Failure to comply can result in additional charges (jail and/or fine), disciplinary action, and revocation of parole or probation.

Legal Challenges:

In April 1999, the Massachusetts Supreme Judicial Court upheld the law in the case *Landry v. Attorney General*, 429 Mass. 336 (1999). The U.S. Supreme Court refused to hear the case and the SJC's decision is final. The SJC ruled that obtaining the DNA sample is a reasonable search and seizure under the Fourth Amendment, given the "diminished privacy rights" of prisoners, the "minimal intrusion" of the blood test, and the "legitimate government interest in the investigation and prosecution of unsolved and future criminal acts by the use of DNA in a manner not significantly different from the use of fingerprints." The Court also denied relief under the state constitution, and rejected arguments that the law requires regulations to be issued on the use of force to obtain samples.

In June 1999, the SJC issued a decision in another case about the DNA database, *Murphy v. Department of Correction*, 429 Mass. 736 (1999). In that case, the court ruled that prisoners must provide a blood sample if they were convicted of a listed offense in the past, even if they are currently serving a sentence for a non-listed offense. The law applies to anyone incarcerated on or after December 29, 1997, regardless of when the listed offense occurred. However, the law only applies to parolees and probationers who are on parole or probation as a result of the listed offense.

A recent superior court case raised the issue of whether the DNA sample must be taken "within 90 days of the effective date of the act. . ." as stated in a section (§ 8) of the DNA law that was not codified in G.L. c. 22E. A preliminary injunction was denied in that case, but the action is still pending.

Fees Assessed for the Cost of the Test:

The DNA law states that the cost of taking the DNA sample must be paid by the person required to give a sample, unless that person is indigent as defined in the Indigent Court Costs Act, G.L. c. 261, § 27A. See G.L. c. 22E, § 4. The cost of the test is \$110. The DOC recently issued a policy setting forth who is considered indigent and how the fee for the DNA sample will be taken from the inmate accounts. There is a question about whether DOC's policy complies with the indigency standard in G.L. c. 261. This issue is being litigated by a group of *pro se* prisoners. If the lawsuit is successful, it will likely apply to all indigent prisoners who are subject to the DNA law. MCLS will continue to monitor the matter and may file another lawsuit if necessary.

Disciplinary Hearings

Due to limited resources, MCLS can advise, but cannot provide direct representation, in administrative

proceedings. For assistance, send a copy of your disciplinary report with a brief explanation to:

1) Prison Legal Assistance Project (PLAP), Austin Hall, Harvard Law School, Cambridge, MA 02138, collect calls: (617) 495-3127; closed in May and January;

2) Prisoners' Assistance Project (Sept. to Feb. only), Northeastern University School of Law, 716 Columbus Ave., Suite 212, Roxbury, MA 02120, collect calls: (617) 373-3660 (Sept. to Feb. ONLY).

You may be able to obtain a continuance until you find out whether representation is available. If direct representation is not available, the law schools can provide self-help materials.

Prisoners should be aware of the time limitations in the disciplinary hearing process set forth in 103 CMR 430. The reporting officer and other witnesses (as well as physical and documentary evidence) must be requested in writing within 24 hours of receiving the witness request form (see 103 CMR 430.11). Prisoners are advised to write a summary of what each witness will say (or the significance of other evidence) to show why the witness is relevant. Prisoners may appeal a guilty finding or sanction to the superintendent within 5 days of receiving the hearing officer's decision (103 CMR 430.18). Prisoners then have 60 days from the administrative decision to bring state law claims in court pursuant to Massachusetts General Laws Chapter 249, § 4 (action in the nature of certiorari). There is a 3 year statute of limitation to file in court for federal civil rights violations and for declarations of rights.

MCLS Attorney Telephone Assistance

Inmates who wish to speak to an MCLS attorney, please call collect: (617) 482-4124, Mondays from 1 p.m. to 4 p.m. Families and friends of inmates may call our toll free number (within MA): 1-800-882-1413. Prisoners who cannot reach us by phone are encouraged to write to the attorney handling their case or to the "Intake Attorney." Please include your commitment number.