PLS NOTES

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LIMITED REFORM OF CORI AND SENTENCING POLICY ENACTED

By Peter Costanza

CORI Reform

The multi-year campaign to reform the Massachusetts CORI law finally bore fruit at the end of July. Legislation signed by Governor Patrick on August 6, 2010, contains some improvements to CORI and sentencing policy.

● Employers can no longer ask job seekers about their criminal records at the first stage of the application process. This so-called "ban the box" provision removes from employment applications the often-routine question of whether the job applicant has CORI. Instead, questions about CORI can be asked only after the job-seeker has otherwise been deemed to be qualified. While this may seem to be a minor point, it combats the almost-automatic rejection at first glance over the employment application that currently plagues job-seekers with CORI. The change is to G.L. c. 151B, sec. 4.

● Felony convictions may be sealed after 10, instead of 15, years and misdemeanor convictions can be sealed after 5, instead of 10, years. Just as important, the waiting periods now begin at the start rather than at the end of any period of probation or parole. This change is to G.L. c. 276, sec. 100A.

● Non-convictions will not be available to prospective employers unless the job involves work with vulnerable populations like nursing home residents or children.

● The CORI system will no longer send out all convictions regardless of age, and also will not automatically send employers information about convictions that are old enough to seal.

● Criminal cases that are continued without a finding (CWOF) are no longer considered by the CORI system to be convictions after probation has been successfully completed.

● Employers can now only ask job-seekers about CORI after getting a signed authorization for a CORI check from the job seeker and providing him or her with a written copy of the CORI that the employer wants to ask about. This prevents applicants from being blindsided with CORI questions and should also provide an opportunity to dispute errors in CORI records because the job seeker will get to review the record before being asked about it.

● Employers are encouraged to use the official CORI system rather than private background checking companies because they get better protection from liability for rejecting applicants based on information obtained directly from the CORI system. Background checking companies will also be a bit more careful about which information they give out

now that the fine for illegally distributing private CORI information has been raised from $500 to $5000!

There are many exceptions and limitations on the reforms to sealing records. One feature of the new CORI check system that is very concerning is that the checking process for employers will move from a paper based system to an online system that will provide instant checks for information that is lawfully available to employers. In addition, many types of employers (schools, nursing homes, etc,) continue to get "all available" data which includes unsealed convictions and non-convictions. Some employers and agencies (DYS, DCF, Dept. of Early Child Education, etc.) continue to get sealed CORI data. The new legislation also provides, via G.L. c. 6, sec. 172 (a)(7), that housing authorities will continue to get convictions (sealed or not) and pending cases.

Section 129 of the bill: amends G.L. c. 276, sec. 100A, to add that Chapter 209A violation convictions are treated as felonies for purposes of sealing, and to add that people with sex offenses can seal these records after 15 years, but only if: (1) they have no duty to register as a sex offender for a crime in Massachusetts and, if the offense was committed out of state, they would not have to register as sex offender had the crime occurred here; and (2), they were never classified as a level 2 or 3 sex offender and at present, are not required to register as a sex offender. The same section also provides that convictions for crimes against public justice (perjury, witness intimidation, disrupting court proceedings, resisting arrest, etc.), state ethics violations (bribery of officials, etc) and firearms offenses under G.L. c. 140, secs. 121-131H are still never sealable.

This is by no means a complete description of the provisions of the new CORI system. There is no substitute for reading the whole bill. Questions about this legislation, including questions about the changes to sentencing that are included in it, may be addressed to PLS by letter or by phone call during our regular intake hours.

Mandatory Minimum Reform

The same legislation that reformed the CORI system contained some provisions easing so-called "school zone" mandatory drug sentencing. These changes *don't affect sentences to state prison* (Walpole or Framingham) sentences but do potentially impact mandatory drug sentences to county houses of correction. The change made is to G.L. c. 94C, sec. 32J, adding the following wording:

Any person serving a mandatory minimum sentence for violating this section shall be eligible for parole after serving one half of the maximum term of the sentence if the sentence is to a house of correction, except that such person shall not be eligible for parole upon a finding of any 1 of the following aggravating circumstances:

(i) the defendant used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or a weapon described in paragraph (b) of section 10 of chapter 269, or induced another participant to do so, during the commission of the offense;
(ii) the defendant engaged in a course of conduct whereby he directed the activities of another who committed any felony in violation of chapter 94C.
(iii) the offense was committed during the commission or attempted commission of a

violation of section 32F or section 32K of chapter 94C.

A condition of such parole may be enhanced supervision; provided, however, that such enhanced supervision may, at the discretion of the parole board, include, but shall not be limited to, the wearing of a global positioning satellite tracking device or any comparable device, which shall be administered by the board at all times for the length of the parole.

This new parole-eligibility provision goes into effect 90 days after the enactment of the "CORI Reform Bill," which was signed by Governor Patrick on August 6. There are two important things to remember about it.

- First, it does not *parole* anyone, but merely authorizes the parole board to *consider* prisoners for parole at one half their maximum term.
- Second, there is a *possibility* that the parole board will apply this provision retroactively, to include prisoners currently serving eligible school-zone sentences. However, the new statute does not require this and the parole board may decide not to do so. Even if it does, because many hundreds of people are affected, it will take the parole board considerable time to schedule and complete such parole reviews.

Pre-Trial Diversion

One of the more exciting provisions in the legislation makes a reform that several sheriffs have been seeking for some time. The sheriffs have regarded it as a population-management tool, but it also implicates powerful rehabilitation incentives. It is found in Section 79 of the bill, which amends G.L. c. 127 to add a new Section 20B. This new section allows sheriffs (and in the case of women detainees at MCI-Framingham, the commissioner of correction) to place suitable *pretrial detainees* on electronic monitoring outside the physical limits of the jail. Detainees who successfully comply with the requirements of such pretrial diversion programs get jail credit for the time they spend in the program *and* they may earn good time for approved programs, work, and educational activities in which they participate while on the bracelet. The time credit benefits for participation in pretrial diversion are not limited to county sentences, although it is up to the discretion of sheriffs to determine who is suitable for these programs and it is unlikely that detainees facing state time will be deemed qualified. As with other reforms in the bill there are also categorical exclusions for persons charged with certain crimes, including murder, many drug trafficking offenses, and for charged or past sex offenders.

Although this legislation is a very limited reform, the provision for pretrial bracelets, together with the new ½-maximum parole eligibility for house "school zone" convictions, potentially will affects a substantial portion of people in the county jails and houses of correction and may permit some reduction of overcrowding in those facilities.

En la oficina de PLS (Servicios Legales para Prisioneros) se habla español, y este periódico está disponible en español.

PLS knows of problems with some Parole Board calculations of parole eligibility and discharge dates. If you believe such an error affects you, write to PLS, 8 Winter Street, 11th floor, Boston, MA 02108, attention "Parole Calculations."

FIGHT OVER PRISON FEES MOVES FROM THE COURTS TO THE LEGISLATURE

By Peter Costanza

PLS fought the Bristol County Sheriff's system of prisoner fees starting in 2002, when it filed ***Souza v. Hodgson,*** a class action challenge to his unauthorized daily "pay-for-stay" fees, as well as unlawful fees for medical care, haircuts, and GED examinations. The superior court allowed PLS' motion for summary judgment in July of 2004, and in August 2004, the single justice denied the Sheriff's motion relief pending appeal. On March 30, 2005, the court allowed plaintiffs' motion for class certification, and ordered the Sheriff to return the fees. The Sheriff appealed. On January 5, 2010, the Supreme Judicial Court affirmed the lower court's ruling in all respects. PLS is attempting to negotiate a procedure to notify the class and distribute the funds paid, plus interest. The court has scheduled a hearing for November 29, 2010 to resolve any disputed issues.

Because the *Souza* decision held that there was no statutory authority for the sheriffs to charge "pay for stay" and most of the other fees at issue in that case, Sheriff Hodgson and some (but not all) of the other Massachusetts sheriffs are now trying to obtain legislative authorization to charge such fees. This past July, the sheriffs' lobbying resulted in an "outside section" (numbered 177) being attached to the Fiscal Year 2011 Massachusetts Budget. An "outside section" is a provision of law attached to the state budget that has little or nothing to do with actual budgetary appropriations. legislation. Outside Section 177 establishes a special commission "to study the feasibility of establishing inmate fees." The commission consists of the secretary of public safety (chair), the president of the Massachusetts Sheriffs' Association, two additional sheriffs, the chief counsel of the committee for public counsel services, a representative of the state guards' union, and a representative from PLS. The commission started work in September. It is required to "make a comprehensive study of the feasibility of establishing inmate fees within the correctional system of the commonwealth." The study "shall include, but not be limited to, the types and amount of fees to be charged, including a daily room and board fee and medical co-pays; revenue that could be generated from the fees; the cost of administering the fees; the impact on the affected population; use of the collected fees by the respective sheriff's office; method and sources of collecting the fees; impact on the prisoner work programs; waiver of the fees for indigents; exemptions from the fees for certain medical services; and forgiveness of the balance due for good behavior." It is to make its report to the legislature by March 1, 2011.

The sheriffs who favor fees are likely to press hard for the commission to recommend fee-authorizing legislation. The ultimate decision about what fees, if any, to impose on prisoners' families and friends will be made by the legislature.

Legislators listen to constituents (people who live in their districts and vote). The PLS web site contains a link (www.plsma.org) to a site that will tell you who your state senator and state representatives are based on your address. If you have access to the internet you can go there to find your state senator and representative. If you are a prisoner, urge

your friends or family to speak with their legislators about any proposed fees.

DOC SUICIDES SOW SORROW AND ANGER

In the first six and a half months of this year, eight DOC prisoners have killed themselves. This is almost twice as many people as committed suicide last year, and four times the national *annual* average. This disaster comes three years after the DOC hired national prison suicide expert Lindsay Hayes to review anti-suicide policies and procedures in Massachusetts, and two years after the DOC claimed to have implemented all of Hayes' major recommendations.

The 2007 Hayes report criticized the DOC for physical defects in watch cells that facilitated suicide, and also for using segregation to punish prisoners who act out because of mental illness. The DOC says that it fixed the cells and hired a new mental health services provider called (MHM Services). It has not said what it has done to reduce the misuse of segregation.

Things are getting worse. This summer the DOC has laid off 28 staff because of budget cutbacks. It is trying to leverage the mental health staff by concentrating prisoners with open mental health issues at OCCC, in part to take advantage of the treatment capabilities that already exist at the Bridgewater complex. Although the reorganization of OCCC is in progress, whatever the DOC has done since 2007 to reduce suicides is clearly insufficient. PLS has called for a wider investigation which the Department has rejected as unnecessary.

PLS believes that the key to reducing some suicide lies in reducing the use of punitive segregation, especially on prisoners with documented mental health issues. It does not take a psychology degree to figure out that segregation is a dangerous practice to apply to prisoners who are suffering from mental illness. A prison culture that not infrequently permits guards to encourage mentally ill prisoners to "do it right next time" also must be dealt with.

America's prisons are, as a practical matter, mental hospitals. The 25% rate of mental illness in Massachusetts is in line with the national average. Why then, is the suicide casualty rate four times the national average? PLS, the Disability Law Center, the Center for Public Representation, and two private law firms sued DOC in 2007 to stop the use of segregation on mentally ill prisoners. In August of 2010, U.S. District Court Judge Mark L. Wolf ordered a former contractor for the state prison system yesterday to provide him with the psychiatric treatment records of about 25 inmates who committed or attempted suicide while in solitary confinement from 2005 to 2007. The judge is going to determine whether to provide those records to the plaintiffs in the case. Perhaps that litigation will shine a light into segregation units across the state.

CPCS IMPLEMENTS A NEW 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 CPCS Innocence 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. **This program accepts cases whether or not there is DNA available for testing.**

For assistance contact:

Debra S. Krupp, Program Director
CPCS Innocence Program
44 Bromfield Street
Boston, MA 02108

DOC prisoners may use the preauthorized CPCS speed dial number *9009#. Others may call 617-482-6212.

HOW TO HANDLE MEDICAL GRIEVANCES IN THE DOC

By Joel Thompson

In the August 2009 Notes, I wrote about reasons to grieve an issue and complete the entire grievance process ("exhaust your administrative remedies"). One important reason was to preserve your right to seek relief in the courts later on, a right that may be lost if you do not complete the grievance process, under the Prison Litigation Reform Act (42 U.S.C. § 1997e) and its state counterpart (M.G.L. c. 127 § 38F).

Since that time, the medical grievance procedure in the state prisons has been rewritten. The DOC's medical contractor, UMass Correctional Health, changed the steps that must be taken and the issues that may be grieved. Although the new policy appears to limit the types of complaints that may be grieved, we recommend that you continue to grieve any medical matter.

I will not get into all of the details of the new medical grievance procedure. Please refer to the procedure itself (UMCH Policy No. 12.00: Inmate Medical Service Grievance Mechanism) for deadlines and other details. In summary, the new procedure changed the first two steps of the three-part medical grievance process. Those steps are now as follows:

1. Before filing a grievance, the prisoner must present his or her issue at staff access period, to the Clinical Administrator (formerly the Health Services Administrator). Prisoners with disabilities, housing restrictions, or who have no medical administrator at staff access period must present their issues by writing an informal letter to the Clinical Administrator.

2. If the issue is not resolved informally, the prisoner can then file a medical grievance. The Clinical Administrator receives the grievance but does not decide it, as used to be the case. He or she decides whether to forward it to UMCH's central office. If the grievance is forwarded, UMCH central office reviews and decides on the grievance. (This office used to perform the first appeal; now it performs the initial grievance response.)

3. If the prisoner is not satisfied with the response from UMCH, he or she may file an appeal to the DOC Health Services Division. This used to be the second appeal; now it is the only appeal.

By removing one of the appeals and substituting an informal process at the start, UMCH has eliminated one round of pa-

perwork (except for those who must write a letter instead of going to staff access).

Under the new procedure, UMCH also eliminated all of the paperwork for a large category of issues: requests for alternate treatment plans. This type of issue is now non-grievable. The reason for this new rule makes some sense for both prisoners and medical administrators. By policy, neither UMCH administrators nor DOC will "overrule" the treatment decisions of the clinical providers. This fact is well known to many of you who have filed medical grievances and appeals in the past. If your medical grievance complained about the treatment (or lack of treatment) that was being provided, the grievance and your appeals would usually be denied with an explanation that the grievance authority would not overrule the provider's clinical decision, and with the advice that you should discuss the issue with the provider.

There is no doubt that the old process was aggravating. It took time and effort to see a medical grievance through all three levels of review. The paperwork was cumbersome and there were often lengthy delays. All that work seemed like a waste of time when the final answer was that the grievance authority would not even consider the issue. It was infuriating to be told to talk to the provider, because that conversation obviously had already happened or else there never would have been a need to file the grievance.

At first blush, the new policy offers hope that prisoners with complaints about their treatment can avoid this senseless exercise, and at the same time be sure that they have exhausted their administrative remedies. Federal and state law only requires prisoners to complete a grievance procedure that is available; if the grievance policy says that treatment issues are non-grievable, there is no grievance procedure available.

It would appear, then, that a prisoner could take a complaint about medical care to court, without having to worry about grieving first. There is a potential trap here, however. If you do not file a medical grievance, because you believe that the issue concerns your treatment plan, and if you later file a lawsuit over your treatment, you may find the defendants arguing that your issues were grievable, and that the case should be dismissed for failure to exhaust administrative remedies. How could the defendants make such an argument? They could argue that your claim does not fall into the category of "requests for alternate treatment plans," but some other category. For example, the new medical grievance procedure states that "operational procedures or practices" are grievable, as are "the actions or conduct of staff members." These terms are not precisely defined, so while you may say the issue involves the treatment plan, the defendants may argue that it involves something else.

The Worcester County Sheriff and his medical provider did just that, in a case now pending in the First Circuit Court of Appeals. *Ramos v. Flynn, et al.*, Docket No. 09-2179. The plaintiff brought suit claiming that the defendants' treatment of his drug withdrawal and worsening illness was so inadequate as to violate his civil rights. The plaintiff had not filed a grievance about his treatment, because the county's grievance policy

said simply that "medical decisions" were not grievable. The defendants moved for summary judgment, contending that while "medical decisions" were not grievable, "access to medical care" was grievable, and that the plaintiff's complaints really involved access. The U.S. District Court agreed with the defendants, finding that the plaintiff had failed to exhaust his administrative remedies. *Ramos v. Flynn*, 2009 WL 2207191 (D. Mass. July 22, 2009). The plaintiff's appeal of that decision is currently pending in the First Circuit. (PLS filed an amicus curiae brief supporting the plaintiff.)

Given these circumstances, we cannot advise DOC prisoners that it is safe to skip the medical grievance process, even when you are requesting an alternate treatment plan. For any medical issue you have, we recommend that you follow the new medical grievance process until you are told in writing that the issue is not grievable. Bring the issue to staff access period, and if the issue is not resolved, file a medical grievance. The Clinical Administrator may review the grievance and find that it concerns a non-grievable issue. If the Clinical Adminstrator or UMCH returns your grievance to you, saying that your issue is non-grievable, then you are done. If the grievance is processed, then follow the process through and appeal any negative result to DOC Health Services Division. This would appear to be the only way that you can be sure to preserve your right to seek relief from the courts, if your medical concerns continue to go unaddressed.

UPDATE FOR BRISTOL COUNTY PRISONERS

On January 5, 2010, the Supreme Judicial Court held that Bristol County Sheriff Thomas Hodgson acted unlawfully by charging prisoners a "cost of care" fee, as well as certain other fees for medical care, haircuts, and GED services. If you paid any of these fees, you are entitled to a refund. To get your refund, write to PLS**.** When you write, please include your name, your birth date, social security number, and an address where you can be contacted. If you move, give PLS your new address.

HIPAA APPLIES TO PRISONERS

By Joel Thompson

In court filings, the Department of Correction's medical services contractor has invoked the Health Insurance Portability and Accountability Act, commonly known as HIPAA.

Congress enacted HIPAA in 1996. Much of the act deals with administrative changes designed to improve health care delivery, such as ensuring portability of coverage for preexisting conditions, and standardizing the electronic communication of billing and claims information. A central component of the law, however, is privacy. HIPAA directs the Secretary of Health and Human Services to develop regulations to preserve the privacy of health information. These regulations set limits on who may access a patient's health information, and when, how, and with whom that information can be disclosed to others.

As the implementing regulations reveal, these privacy requirements are not universal. They apply only to "covered entities," a term defined to include health care providers who transmit health information electronically in connection with certain transactions. Those transactions largely revolve around the processing of claims, but they also include more treatment-specific issues like referrals to other providers.

It is not always clear whether a medical provider for a jail or prison is a "covered entity" under HIPAA. The answer may depend on specific facts about how the provider operates. But the DOC's medical provider, UMass Correctional Health, has argued to the U.S. District Court that HIPAA applies to it. In *Disability Law Center, Inc. v. Massachusetts Department of Correction, et al.,* No. 1:07-cv-10463-MLW, an action challenging the segregated confinement of seriously mentally ill prisoners, the Plaintiff DLC (represented by PLS, the Center for Public Representation, Bingham McCutcheon, and Nelson Rollins) requested certain suicide-related morbidity and mortality reviews from UMCH. UMCH, which is not a defendant, opposed the production. UMCH argued that the information sought was protected by HIPAA, and that HIPAA's privacy regulations prevented UMCH from disclosing the requested information without a valid release or HIPAA-compliant court order.

What does HIPAA applicability mean for DOC prisoners? As *DLC v. DOC* shows, it means that their medical provider must follow HIPAA's requirements limiting the use or disclosure of a prisoner's health information. These requirements include a patient's right of access to his or her own health information, which may be of particular interest to prisoners.

HIPAA's implementing regulations lay out the rights a patient has to review his or her health information. *See* 45 CFR 164.524. Section 164.524(a)(1) gives patients "a right of access to inspect and obtain a copy" of their personal health information. A patient's request must be answered in a timely and adequate way, and access must be provided at a convenient time and place. §§ 164.524(b), (c).

The provider may deny a patient's request if it falls into one of several exceptions that are listed in the regulation. Some denials are reviewable, meaning the patient can appeal to a person designated by the provider to review such decisions. §§ 164.524(a)(3), (4). Other denials are not reviewable. Section 164.524(a)(2). One particularly relevant ground for denial involves prisoners. A prison or prison health care provider "may deny, in whole or in part, an inmate's request to obtain a copy of protected health information, if obtaining such copy would jeopardize the health, safety, security, custody, or rehabilitation of the individual or of other inmates, or the safety of any officer, employee, or other person at the correctional institution or responsible for the transporting of the inmate." § 164.524(a)(2)(ii).

This ground for denial appears to be broad, but it only allows the provider to deny a copy of the health information; it does not deny inspection. Prisoners may request the chance to inspect their health information, then, without bringing this exception into play.

A request to inspect health information, instead of obtaining a copy of it, will also exempt the patient from HIPAA's fee provisions. By regulation, a provider may charge a "reasonable, cost-based fee" for preparing a copy of health information, including the labor cost of preparing copies. § 164.524(c)(4). This fee provision specifically relates to copies, not to requests for inspection.

Massachusetts has state laws and regulations that protect privacy and access to one's own health information. Where

HIPAA's privacy provisions offer more protection than state law, they supersede state law, so if a prisoner is having difficulty getting access to health information, that prisoner may want to include HIPAA as a basis for his or her request.

In future newsletters, we will take a closer look at your medical privacy rights under state and federal law.

DOC EXPANDS OPPORTUNITIES TO EARN GOOD TIME

Effective June 1, 2010, by memo from the Commissioner, the DOC changed its policy regarding *future* earned good time to permit prisoners to earn up to 7.5 days per month "for successful program participation in any one category [work, education/vocation, and other rehabilitative activities] or utilizing a combination of all three categories, provided that no more than two and one half (2.5) days per month are awarded for each program activity within the category. For example, a prisoner participating in the educational programs of General Equivalency Diploma (GED), English as a Second Language (ESL) and Adult Basic Education (ABE) may receive up to 2.5 days for each of these programs in which he/she has successfully participated, even though each one falls under the general category of education."

In addition, "[o]ffenders who successfully participate on Community Work Crews may be awarded five (5) days of earned good time for each successful month of participation; two and one-half (2.5) days for work participation and two and one half (2.5) days for rehabilitation programs."

Prisoners cannot hold two jobs until everyone in their institution is employed.

Lastly, prisoners who participate in Residential Treatment Units (RTUs) may earn up to five days of earned good time per month if they successfully comply with the elements of their personalized treatment plans. Such elements can include structured group or individual activities, absence of threatening or injurious behavior, work assignment and educational programming within the RTU.

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PLS (formerly MCLS) has arranged with the DOC for a **toll free speed dial number** that is accessible to all **state** prisoners on the PIN system. **County prisoners must call collect on (617) 482-4124.**

Families and friends of prisoners can also call PLS for free on 1-800-882-1413 toll free from anywhere in the state. Prisoners who cannot reach us by phone should write to: Prisoners' Legal Services, Eight Winter St., Boston, MA 02108.

Regular call-in hours are 1:00 to 4:00 on Monday afternoons unless it is an emergency, in which case you can call whenever you can get a phone during business hours (9:00 A.M. to 4:00 P.M., Monday to Friday). On weeks when Monday is a holiday, PLS accepts calls on Tuesday from 1:00 to 4:00.

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