

PLS NOTES

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Court Rejects Automatic Treatment of Cell Phone as Escape Instrument

Prisoners' Legal Services recently received an order in the case of Ferreira v. Spencer, et al, which was filed in Suffolk Superior Court. The case challenged the Department of Correction's decision to convict a prisoner who was found in possession of a cell phone of an escape related disciplinary charge and assign him escape points under the classification system in spite of the fact that there was absolutely no evidence linking the cell phone to any escape related behavior.

Plaintiff Robert Ferreira, who originally filed the action pro se, was a prisoner at MCI-Norfolk when a cell phone was found in his cell. He was charged with several disciplinary code offenses including 2-1, unauthorized possession of an item likely to be used in an escape. At his disciplinary hearing, Mr. Ferreira argued that the cell phone did not work and that there was nothing linking the phone to anything escape related. The Hearing Officer found that possession alone was sufficient to sustain the 2-1 conviction. At his subsequent

classification hearing, Mr. Ferreira was given 7 escape classification points in addition to 5 category 2 classification points, which made him a candidate for transfer to SBCC. Despite the fact that the classification board voted to keep Mr. Ferreira housed in a medium security facility, an override landed him at SBCC.

On behalf of Mr. Ferreira PLS argued that both the disciplinary conviction and assessment of escape points were unsupported by evidence and arbitrary and capricious. The DOC states in its own memo issued in March of 2011 that prisoners found with a cell phone in medium and maximum security facilities should be charged with offense code 2-1, unauthorized possession of an item likely to be used in an escape, *or* a 2-24, conduct which interferes with the security of the institution, or both, as appropriate to the circumstances. It was clear that the DOC did not consider the circumstances and based its decision to convict Mr. Ferreira of the escape charge simply on possession of the cell phone, because no other evidence was presented and Mr. Ferreira's claim that the phone was not functional was never rebutted.

The judge ordered a new disciplinary hearing and ruled that absent evidence that the item was actually "likely to be used in an escape," Plaintiff could not be convicted of offense code 2-1. The judge also ordered the disciplinary sanctions suffered by Plaintiff Robert Ferreira removed.

The decision establishes that the DOC can no longer find prisoners guilty of unauthorized possession of an item likely to be used in an escape (offense 2-1) for having a cell phone without evidence that the cell phone was actually likely to be used in an escape. Without the 2-1 conviction, the DOC cannot justify the assignment of escape points.

PLS is interested in hearing from prisoners who have been charged with a 2-1 for possession of a cell phone who are either still challenging their case administratively or who have actions pending in court.

Mandatory Minimum Drug Sentences Eased

In August, the Massachusetts Supreme Judicial Court (SJC) decided *Commonwealth v. Galvin*, 466 Mass. 286 (2013). The case addresses the application of reductions to mandatory minimum drug sentences enacted as part of Chapter 192 of the Acts of 2012. *Galvin* holds that the reduced mandatory minimum sentences apply to defendants who committed their offense prior to August 2, 2012, who were convicted and sentenced after that date. [The table below lists the offenses affected by the reductions.]

Mandatory Minimum Drug Sentence Reductions – Effective August 2, 2012			
G.L. c.94C	Offense	Old Mand. Min.	New Mand. Min.
§32(b)	Distr. Cl. A Subs.	5yrs	3yrs
§32A(b)	Distr. Cl. B Subs.	3yrs	2yrs
§32A(d)	Distr. PCP Subs.	5yrs	3½yrs
§32B(b)	Distr. Cl. C Subs.	2yrs	18mos
§32E(a)(2)	Traff. Cl. D 100-2,000lbs	3yrs	2yrs
§32E(a)(3)	Traff. Cl. D 2,000-10,000lbs	5yrs	3 ½yrs
§32E(a)(4)	Traff. Cl. D >10,000lbs	10yrs	8yrs
§32E(b)(1)	Traff. Cl. B 14-28g	3yrs	2yrs
§32E(b)(2)	Traff. Cl. B 28-100g	5yrs	3 ½yrs
§32E(b)(3)	Traff. Cl. B 100-200g	10yrs	8yrs
§32E(b)(4)	Traff. Cl. B >200g	15yrs	12yrs
§32E(c)(1)	Traff. Cl. A 14-28g	5yrs	3 ½yrs
§32E(c)(2)	Traff. Cl. A 28-100g	7yrs	5yrs
§32E(c)(3)	Traff. Cl. A 100-200g	10yrs	8yrs
§32E(c)(4)	Traff. Cl. A >200g	15yrs	12yrs

The SJC said that the wording and the context of the statute indicate that the legislature intended that the benefits of the sentence reductions apply not only to individuals facing those particular mandatory minimum sentences in the future, but also to individuals already serving them. Although the reductions do not change the sentence *length* of anyone serving a mandatory minimum drug sentence imposed prior to the passage of the law, they do allow those individuals to become eligible for parole, work release, and good time at the new, reduced minimum. Accordingly, the SJC concluded: “It would be anomalous, if not absurd, in this context to conclude that the Legislature intended to provide reductions for everyone except the limited class of persons who committed offenses before the amendments but were not convicted and sentenced until after the amendments’ effective date.”

If you believe you have been sentenced to an incorrect mandatory minimum sentence based on the SJC’s decision in *Galvin* and would like assistance, you should contact your criminal defense attorney or the Committee for Public Counsel Services (CPCS). State prisoners can contact CPCS by dialing *9009#. County prisoners can contact CPCS at: **(617) 482-6212**.

Donate to PLS!

The simplest way to donate to PLS is by charging your donation to your credit card. There is a link to a form for doing this on the home page of PLS’ website at www.plsma.org. The donation page is secure, and your donation is tax deductible. Or send a donation to PLS, 10 Winthrop Square, Boston, MA 02110

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

DOC WILL USE VISITOR-SNIFFING DOGS

The Massachusetts Department of Correction has announced that it will start using drug-sniffing dogs on visitors to medium and maximum security prisons likely during the first week in November. The policy is described as a method to reduce smuggling of drugs to prisoners by visitors. These “sniff searches” will be done on a random basis and will apply to “all staff” as well as “anyone visiting selected facilities, for any reason, including contractors, volunteers, and attorneys.” Dogs will sniff visitors on a random basis in the pedestrian traps.

Although the DOC announcement describes the sniffer dogs as “non-aggressive,” the routine use of dogs to sniff visitors raises safety and emotional concerns among many friends and family members of prisoners.

The DOC has posted an explanation of the dog search policy on its web site. The explanation includes a YouTube video that states the reasons for the policy and shows a dog being used to search the visitor lockers in a prison lobby and a line of visitors in a pedestrian trap. The video, which is also being played in the waiting rooms of some DOC prisons, insists that the dogs that will be used are non-aggressive and that they do not bite or scratch. The dogs are Golden Retrievers or Labrador Retrievers rather than the German Shepherds that people normally think of when they think of police dogs. The video states that when these dogs smell drugs they are trained to press their noses to the location (a place in a room or a location on a person) where the drug smell originates. The DOC web site says that if a dog alerts to drugs on a visitor, that visitor will be asked to submit to a thorough search by guards.

The visitor may refuse to be searched, but if consent to the search is refused, the person will be immediately barred from all DOC facilities, the same as what happens if a visitor refuses a search after failing to pass through a metal detector. The search procedure and visitor bar for refusing a search are the same as in the existing Visiting Procedure regulation, CMR 483.00.

Details that need to be clarified include what kind of search will be made if the dog responds positively to a visitor. Also, the DOC web site says that visitors with dog allergies can bring a doctor’s note and “alternate arrangements” will be made. According to the DOC alternate accommodation will also be made for people, including children, who indicate that they are afraid of dogs. The DOC has not specified what “alternate arrangements” means, or how easily they will be available in the midst of the busy activity of processing visitors.

One problem with the dog search policy is that it is a change in visiting procedure that affects the public and therefore should be subject to the notice and public hearing requirements of the Massachusetts Administrative Procedure Act (APA). The APA is designed to require state agencies to get public comments, including in-person testimony, from people affected by proposed agency regulations before they go into effect. So far there is no indication that the DOC intends to hold a hearing on the new dog search rules.

Community and legal discussions of this new dog search policy are ongoing. Prisoners' Legal Services will be involved in these discussions and is evaluating all options, including locating potential plaintiffs. PLS will keep the public updated on community and legal response to the new dog search policy on its web site, Facebook page and Twitter feeds.

PLS 40th Anniversary Celebration

On Thursday, November 21, Prisoners' Legal Services will celebrate forty years of work on behalf of Massachusetts prisoners. The event will be at Bingham McCutchen LLP, at One Federal Street in Boston, starting at 5:30. PLS invites all of its friends and supporters who are not otherwise detained to this evening of conversation, reminiscence, appetizers and beverages. The featured speaker will be **Stephen B. Bright**, President and Senior Counsel of the Southern Center for Human Rights.

Mr. Bright has received many awards for his lifetime of dedication to civil and human rights, including the ABA Thurgood Marshall Award, the ACLU Roger Baldwin Medal of Liberty, and the NACDL Lifetime Achievement Award. He is a visiting lecturer at Yale, and in 2012 was the Yale Law School commencement speaker. Mr. Bright has a national reputation as an opponent of the death penalty, an advocate of the right to counsel for poor people accused of crimes, and an expert on judicial independence, sentencing, racial discrimination in the criminal justice system, and prison conditions and practices. We hope that you will join us in welcoming Mr. Bright to our celebration!

Please RSVP by November 7. You can do that, and purchase tickets, via a link at www.plsma.org/40years, by calling Valerie Linhardt at (617) 482-2773 ext. 118, or by emailing her at mlinhardt@plsma.org.

PLS is deeply grateful to the following law firm sponsors of this anniversary event:

Bingham McCutchen LLP
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Shea and Larocque
Stern Shapiro Weissberg & Garin LLP.

FCC Caps Interstate Prison Telephone Rates

In August, The Federal Communications Commission ("FCC") placed temporary caps on rates for interstate prisoner telephone calls and declared its intention to set permanent limits. Coming after a decade of advocacy, the decision was a triumph for prisoners, their loved ones, and the civil rights, religious and legal groups who submitted live testimony, hundreds of comments, and briefs in support of regulatory controls on these phone charges. Acting FCC Chairwoman Mignon Clyburn, in an emotional announcement, said, "For 10 years, the families and friends of inmates have been asking the FCC to ease the burden of an inmate calling rate structure. Their wait is finally over." This regulatory action directly affects only interstate rates (i.e., calls made to someone in another state from the one where the prisoner is calling from) but the ruling is also good news for ongoing efforts to regulate Massachusetts' in-state rates.

The FCC's Report and Order, released on September 26, 2013, sets temporary limits on what companies can charge until permanent rates are established. Rates below a "safe harbor" of twelve cents per minute for debit and prepaid calls and fourteen cents per minute for collect calls will be presumed just and reasonable. While the phone companies may seek to justify higher charges, in no case may they charge more than twenty one cents per minute for debit and prepaid calls or twenty five cents per minute for collect calls. Calls made from Massachusetts prisons and jails to people within Massachusetts will not be affected.

The FCC also ordered that all charges, including "ancillary charges," such as for putting funds in a debit account, must reflect the actual cost of

providing the service. The Order also forbids phone companies from passing on to consumers the cost of “site commissions,” which are cash payments made to correctional facilities. The phone companies are required to submit data on their actual costs for providing prison phone service so that the FCC can set permanent rates. In fact, the FCC is considering a flat rate of seven cents per minute, regardless of how long-distance the call is. For now, the FCC has limited the order to interstate calls. The vast majority of prisoner phone calls are in-state, and the FCC is considering whether to extend its order to cover those calls as well. The ruling will go into effect 90 days after it is published in the Federal Register, which is expected shortly.

Shortly before the FCC ruling was announced, the Massachusetts Department of Telecommunications and Cable (“DTC”) ruled that a petition brought by PLS on behalf of Massachusetts prison telephone consumers will go forward, denying for the most part a motion to dismiss by the companies. The DTC is the state agency with jurisdiction over prison calls made from Massachusetts prisons and jails to locations within Massachusetts. This ruling opens an investigation into per-call connection fees charged by the companies, dropped calls and other quality of service issues, as well as billing practices. The DTC hearing officer dismissed the petitioners’ challenge to the state limit on per-minute charges of ten cents per minute or \$1.50 for fifteen minutes, but PLS has filed an appeal on behalf of the petitioners arguing that seven cents per minute, with no per-call charge, is a reasonable rate.

PLS will continue to vigorously push for lower in-state rates, and the FCC has also indicated that it may regulate in-state as well as interstate rates. At the same time, the phone companies are likely to appeal the FCC ruling. While the federal and state proceedings may each take some time to play out, the FCC decision is an important step towards ending the ruthless exploitation of prisoners’ families by telephone companies and

by the prisons and jails that demand cash “commissions” that are passed on to consumers.

CPCS Innocence Program

If you have been convicted of a crime that you did not commit, the CPCS Innocence Program may be able to help you. The CPCS Innocence Program represents indigent Massachusetts state defendants who are actually innocent of the crime(s) of which they have been convicted. ***CPCS has federal funding to conduct investigations and hire forensic experts in non-DNA cases.*** CPCS also has federal funding to hire experts and perform DNA testing that could help establish innocence in violent felony cases.

For assistance contact:

**Lisa Kavanaugh, Program Director
CPCS Innocence Program
21 McGrath Highway
Somerville, MA 02143
(617) 623-0591**

New DOC Medical and Mental Health Grievance Procedure

As reported in the June 2013 PLS Notes, there is a new medical and mental health contractor for the DOC, Massachusetts Partnership for Correctional Healthcare (MPCH). MPCH has changed the grievance system in place for health care. While the process and the forms remain largely the same, there are some changes that are important to keep in mind.

First, MPCH is returning to a system in which the Health Services Administrator (HSA) at the prison responds to the initial grievance. This had been the case for years under UMass Correctional Health, but was changed in 2009 to a procedure in which the HSA forwarded grievances to the

central grievance coordinator, unless they were improperly filed. The MPCH policy returns to a process in which the HSA is the initial decisionmaker.

Second, MPCH continues to require that before filing a medical grievance, a prisoner first bring the issue to the HSA's attention through informal means. However, those informal means are not limited to staff access (or letters for those unable to attend staff access). By policy, prisoners may also make their concerns known through "sick call visits, or during scheduled appointments." This change should make it easier for prisoners to complete the informal process before filing a grievance.

Third, the appeal process has changed, and it no longer includes the DOC Health Services Division. If the HSA's response to the initial grievance is not satisfactory, a prisoner submits an appeal form (including the original grievance form and response with the appeal). The appeal is sent to the MPCH Grievance and Appeal Coordinator, care of MPCH Services, 50 Commerce Way, Norton, MA 02766. The grievance process is complete after this one appeal.

Other aspects of the medical and mental health grievance process remain unchanged. As always, it is important to be mindful of the time limits for grieving a health care issue – 10 working days from the incident or situation, or from receiving a response to an informal request. The deadline for submitting an appeal is also 10 working days, from receipt of the grievance response. We recommend that prisoners keep copies of the forms they submit and the responses they receive (since responses must be submitted with an appeal), whenever possible. If a photocopy cannot be obtained, prisoners should handwrite an identical form and keep that second original for their records.

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.

Defendants currently facing charges based on evidence tested in the Jamaica Plain drug lab where Dookhan worked 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 call CPCS at the following preauthorized speed dial: *9009#. CPCS can also be contacted at 44 Bromfield Street, No. 2, Boston, MA 02108.

PLS has a Facebook page:
www.facebook.com/prisonerslegalservices.

PLS also has a Twitter feed:
<http://twitter.com/plsma>.

Food Stamps and Cash Assistance Benefits Affected by Incarceration

State and federal regulations cut off food stamp (now called SNAP) and cash assistance benefits to people who are incarcerated for more than thirty days, or sometimes to persons who are in violation of parole conditions. The rules and procedures governing benefit cut-offs for ex-offenders are complicated. It sometimes happens that individuals who have been released from custody are wrongly told that they are ineligible for food stamps or cash assistance when they in fact should not be barred. Other persons who may have parole violations may still be eligible unless a current arrest warrant has been recently issued. The decision about such benefit cut-offs is normally made by the Department of Transitional Assistance (DTA).

DTA is the state agency that administers federally funded food stamp benefits (now called SNAP). DTA also administers TAFDC cash assistance benefits for families with children or pregnant women and EAEDC cash assistance benefits for elders and persons with disabilities (often individuals with pending SSI applications or legal immigrants who are not eligible for SSI).

PLS does not provide assistance with benefit cutoffs that are related to incarceration, but help may be available from other legal services offices. If you or a loved one have food stamp or cash assistance benefits denied on the grounds that you were incarcerated or were or are in violation of a parole condition, you should contact the civil legal services office that serves the area where you live. You can find your local legal services office at the web sites

www.MassLegalServices.org/FindLegalAid, or www.MassLegalHelp.org. If you cannot reach your local legal services office or if you are told that it does not handle benefit cutoffs related to incarceration, you can also call Victoria Negus at the Massachusetts Law Reform Institute (MLRI) at (617) 357-0700 ext. 315. MLRI may be able to advise you on next steps.

Tony Winsor Passes

We are very sad to report that Ernest “Tony” Winsor passed away early in the morning of November 4, 2013.

Tony was hired as an attorney at the Massachusetts Law Reform Institute on November 4, 1970. Over the course of his 4 decades at MLRI he left an indelible imprint on our community, advancing—indeed, defining—how justice should be delivered and administered to poor people in our Commonwealth.

Tony Winsor was a giant in the legal community and his legacy will live on through his remarkable body of work. He was a brilliant lawyer and fearless advocate for the poor, the forgotten and disenfranchised—a lawyer who exemplified the very best of the profession. He was one-of-a-kind, serving as an inspiration for generations of advocates.

Tony was the author of [The CORI Reader](#), and maintained a life-long commitment to prisoners’ rights. He served on the Board of Directors of PLS for more than thirty years.

PLS staff joins hundreds of legal services workers across Massachusetts in mourning the loss of our beloved Tony. His spirit, intelligence, and good cheer will be sorely missed. His spirit lives on in all those who fight for justice.

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