MCLS NOTES

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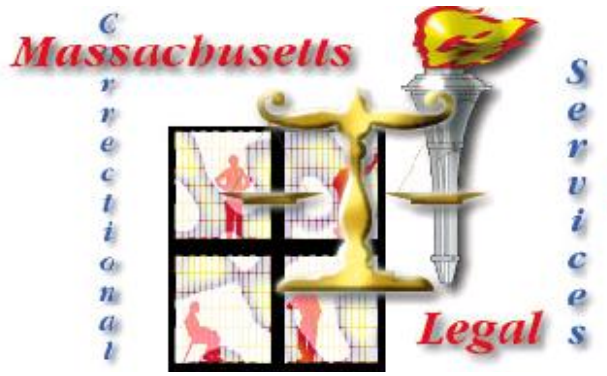

Injunction Issues Against Bristol Jail "Pay For Stay"

On July 28, 2004, the Bristol Superior Court (Moses, J.) issued an injunction against the collection of rent, medical co-pay, GED and other charges from prisoners in the Ash Street Jail in New Bedford and the Bristol County Jail and House of Correction in North Dartmouth. The order issued in *Souza, et al. v. Hodgson, Bristol County Sheriff,* a class action filed in 2002 by MCLS' Litigation Director, Jim Pingeon. Shortly thereafter, a single justice of the Appeals Court denied the defendant's application for a stay of the order pending appeal. On March 31, 2005, the court ruled that the case can proceed as a class action. The judge also stated that the court would allow the sheriff to pursue an appeal before ordering him to return the money (about $700,000) that he seized from prisoners in his custody. MCLS believes that the sheriff is likely to pursue an appeal.

Sheriff Thomas Hodgson is an old-school "tough-on-crime" politician whose polices have polarized Bristol County. Some years ago he gained much publicity by re-instituting chain gangs on county roads and other public work projects. Although some people in the county love the idea, others are outraged, and several Bristol County towns have asked the sheriff to not use chain gangs (which he calls "tandem work crews") within their limits. Sheriff Hodgson likes to present himself to the public as concerned about the taxpayers' pocketbook. Therefore, he tries to portray policies such as the five dollar per day rent that he began collecting from prisoners in his custody as ways to save the public money and teach prisoners "responsibility" at the same time. There were two problems with the sheriff's prisoner fees, however. One problem is legal, and the other is moral.

No law gives the sheriff the power to charge prisoners a daily fee for being in jail. Nor is there a law that says he can charge prisoners for medical care. In fact, the network of laws governing the power and authority of sheriffs in Massachusetts makes him the guardian of the property of prisoners, including whatever money they may have with them when they come into jail or that they may receive from family members while they are in jail. There *are* certain fees and charges that can be taken out of a prisoner's funds because the law says that they can. The victim-witness fee is probably the best known such charge. Another permitted fee is for haircuts. But the law passed by the legislature that authorizes that fee provides that the Commissioner of

Correction may set the amount of the fee for the counties as well as the DOC. The Commissioner may also authorize medical care fees for *state* prisoners, but the law does not apply to the counties. The sheriff is not free to dream up medical or other charges on his own.

The moral problem with Sheriff Hodgson's fee policies is that the prisoners in the Ash Street Jail and the North Dartmouth House of Correction have no way to pay the fees that he imposed. In many places prisoners can earn small amounts of money through their prison jobs, jobs that might pay 25 cents to 2 dollars an hour. Massachusetts state prisoners in work release programs can have regular jobs in the community and make normal wages. In that kind of situation it may make some sense for prisoners to "kick in" some money towards the cost of their custody. And in fact Massachusetts state prisoners in work release do contribute in that way. But Sheriff Hodgson does not have a single paying job for the more than one thousand prisoners in his custody. The result of this situation is that it was usually the *families* of Bristol prisoners who were paying the sheriff's charges. Where is the justice in that?

This is an important case. Several other sheriffs in Massachusetts impose unauthorized fees on their prisoners, and the final result in this case will be important to the families of many if not most of the approximately twelve thousand people in county jails across the state.

Questions and Answers

Has Sheriff Hodgson stopped charging rent and has he stopped charging for medical care? Yes. On July 30, 2004, the Bristol County Sheriff's Department circulated a memo announcing that it had stopped charging the five dollar daily fee, medical fees, and the fee for GED tests. The haircut fee was lowered to $1.50, which is the amount established by the Commissioner of Correction for state prisoners. The court ruled that because the Commissioner's fee was $1.50, Sheriff Hodgson's $5.00 haircut fee was excessive.

Will people get their money back? We hope so. Although the trial court has ruled in our favor, the sheriff is entitled to an appeal, which we expect him to take. "It ain't over 'till it's over."

When will people get their money back? We don't know. The courts will decide if, when and how the money will be refunded. The total amount of money taken is apparently about $700,000. It will be necessary to find thousands of present and former Bristol County prisoners who should get refunds.

Will people get interest on their money? We don't know. The court will have to decide that and the question has not yet been argued before the judge.

What should people do to get their money back? The procedure for retrieving funds has not been set. Be sure that MCLS has your name and address and that you give us any change of address if you move. We have to be able to find you in order to give you any money you are entitled to, and the courts often will not permit us to hold money for very long for people whom we cannot locate.

There is a new MCLS direct dial number for state prisoners: (877) 249-1342

Due Process Improvements At MCI-Cedar Junction

For the past ten years "anti-gang" measures have been the hot topic among corrections officials across the country. In the Massachusetts DOC those initiatives took the form of almost permanent lockdown of prisoners identified as gang members. These men were warehoused in the so-called STG ("Security Threat Group" is DOC-speak for gang) Blocks at Walpole. The conditions in those blocks are terrible, but what was in some ways worse was that the DOC often assigned men to those blocks regardless of their charges or their behavior while in prison. Men were sent to the STG blocks for having the wrong tattoos, for "gang" hand gestures, and for speaking the wrong language (usually Spanish). In *Haverty v. Commissioner*, the court ruled that DOC could not lawfully confine prisoners in any of the restrictive units in the East Wing of MCI-Cedar Junction, including the gang blocks, without giving the prisoner a hearing that complied with the DSU regulations, 103 CMR 421. As a result of this decision, DOC released many prisoners from restrictive confinement in the East Wing because it could not prove that they would be a significant threat if released from conditions that were functionally equivalent to a DSU. It also converted all but two of the restrictive East Wing units into general population blocks, but unfortunately, tightened up conditions in population.

Since DOC refused to allow prisoners who were confined in the STG blocks to contest their gang label at their East Wing hearings, MCLS filed a motion challenging the lack of fair gang determination procedures. (As part of the *Haverty* case, MCLS also argued that the assignment of men to the STG blocks was racist, but after a three-week trial, DOC wriggled out of that claim). On March 9, 2004, however, the court ruled that DOC could no longer hold a prisoner in an STG block unless it could prove his gang membership at a DSU hearing where the prisoner had the opportunity to present evidence and call witnesses. The court rejected the DOC's claim that the "validation" process under the STG policy was good enough. As a result, the number of men in STG status is down and individuals in an STG block have some hope of moving to population.

Damages for East Wing confinement. In *Longval v. Department of Correction,* a case in which MCLS filed an *amicus* brief, the superior court has determined that men who are members of the *Haverty* class may bring individual actions for damages for their confinement in the restrictive East Wing at MCI-Cedar Junction. The DOC had argued that because the *Haverty* case did not seek monetary damages, class members had waived their right to sue for damages. This DOC argument bordered on the frivolous and the court rejected it. However, the *Longval* court also held that damages are not available for a different reason: because the defendants in *Haverty* have qualified immunity because it was not apparent prior to the *Haverty* decision that their procedures for East Wing confinement were unlawful. Plaintiffs are appealing the qualified immunity portion of the *Longval* decision.

There is a new MCLS direct dial phone number for state prisoners: (877) 249-1342. County prisoners must call collect on (617) 482-4124. Intake call hours are on Monday from 1 to 4 P.M., or the same hours on Tuesday if Monday is a holiday.

ADA Discrimination in Programming Prohibited

Shedlock v. Department of Correction was filed by a prisoner who alleged that the DOC had discriminated against him because of his disability in violation of the Americans With Disabilities Act (ADA) and Article 114 of the Massachusetts Constitution. The plaintiff was a prisoner with serious mobility impairments who was denied a first floor cell. The Supreme Judicial Court overturned a Superior Court decision which had held that the ADA protected only against complete exclusion from a program and was therefore not violated because the prisoner was able to drag himself up the stairs. It also rejected the argument that the DOC had done all that the law required merely by giving the plaintiff a cane. The case holds that the DOC must provide "reasonable accommodation" to ensure that prisoners with disabilities can access programs without experiencing undue pain or inconvenience. MCLS joined with the Disability Law Center and the American Civil Liberties Union on an *amicus* brief filed in *Shedlock*.

SECC Damages Claims

The ancient and filthy Southeastern Correctional Center is now history. The courts long ago required the DOC to replace the "pak-a-potties" used there with standard bathrooms. The case that produced this result, *Ahearn v. Vose*, also contained damages claims on behalf of thousands of men who had been housed in those barbaric conditions. The damages claims were dismissed by the Superior Court, and MCLS appealed that decision. The appeal was argued in January and the Appeals Court's ruling is pending.

Sex Offender Classification Changes

The Suffolk Superior Court has dismissed all class claims in *Soffen, et al. v. Maloney, et al.*, SUCV99-1228. *Soffen* was filed as a class action by prisoners mis-identified as sex offenders by the DOC for absurd reasons like public urination, "mooning" as a prank, and consensual sex with like-aged adolescents (the 17-year old guy with a 16-year old girlfriend situation). DOC policy sends almost all prisoners with such convictions, even when they date from many years ago and are not the conviction for which the individual is currently serving time, to the Sex Offender Treatment Program (SOTP).

The plaintiffs in *Soffen* asked the court to require hearings to determine whether they need to complete that program. As anyone in prison knows, "referral" to the SOTP is a serious matter, because the difference between being a regular prisoner and being a prisoner who is labeled as a sex offender is almost as bad as the difference between being free and being in prison. It can cost you your life. It is not hard to imagine the rage and frustration of a prisoner labeled as a sex offender because he "mooned" a passing motorist 20 years ago on his way to a rock concert, or of the fellow who was convicted of underage sex with his girlfriend as an adolescent, and then married the woman and raised kids with her. These were actual plaintiffs in the case. Unfortunately, the court did not believe that referral to the SOTP constitutes a deprivation of liberty that requires a hearing.

However, during the course of the *Soffen* case, the DOC changed its rules for "referring" people to the SOTP so that only prisoners who have actually been convicted

of sex offenses listed in G.L. c. 6, sec. 178C, at some point in their lives are referred to the program. Before *Soffen*, prisoners who had never been convicted of a sex crime but whose "official versions" or even prison disciplinary convictions were deemed by the DOC to have "sexual overtones" were also sent to the SOTP. The present regulations, which went into effect in October of 2003, spare many prisoners the indignity and stress of unwarranted sex offender labeling. The DOC said in one of its court filings in *Soffen* that 400 prisoners were "de-identified" as sex offenders under the policy revisions.

Injunction Obtained Against Bristol House of Correction Sanitary Deprivations

MCLS has another case against the Bristol County Sheriff, called *Kelley, et al. v. Hodgson. et al.,* SUCV1998-3083-C. It concerns conditions of confinement at the Ash Street Jail and the North Dartmouth House of Correction. In 1998 the court enjoined Sheriff Hogson from housing more than one person in each cell at Ash Street or more than two people in each cell at North Dartmouth, and also forbade the sheriff from sleeping people on plastic boats, on the floor, or in common areas. The cells at Ash Street are little brick vaults six by eight feet – barbaric, but not surprising for a jail built in 1828.

In the summer of 2002, the Bristol County Sheriff's Department added a new twist to its incarceration initiatives by locking prisoners into their cells in two large (48-cell) "dry" units at North Dartmouth. To the uninitiated, locking prisoners in their cells seems normal, but our readers know that locking people in dry cells is not normal. A "dry" cell is a cell that lacks both a sink and a toilet. Dry cell units are not unusual – such units have common bathrooms at the end of the tier that are shared by all the prisoners on the tier – but such units are used, or are supposed to be used, only for minimum security prisoners who are not locked in. The North Dartmouth House of Correction was built about 1990. The units in question were operated for twelve years as minimum security units, until the Bristol Sheriff decided to install locks on the cell doors. The result of the sheriff's action was predictably disgusting, with people urinating and occasionally defecating into makeshift containers in their cells while waiting for permission to get to the bathroom. Thirsty prisoners were afraid to drink water for fear that they would get a d-report an hour or so later for urinating into a bottle.

Locking prisoners for any period of time in cells without plumbing violates the most basic Department of Public Health regulations governing jails and prisons. The practice has also been condemned by several court decisions in Massachusetts and elsewhere. As a result, on September 10, 2004, the Suffolk Superior Court ordered Sheriff Hodgson to unlock the cell doors in his "dry" units.

There has been substantial activity in the *Kelley* case during the past few months. If you or someone you know was housed under conditions that violate the court order at either the Ash Street Jail in New Bedford or the Bristol County Jail and House of Correction at North Dartmouth at any time since late 1995, and you are willing to be a witness at the upcoming trial, please call MCLS toll free at 1-800-882-1413 (from any non-prison phone in Massachusetts), collect from county institutions at (617) 482-4124, or direct from state institutions at (877) 249-1342.

Other Litigation

Denial of Legal Assistance to Prisoners on Mental Health Watch

Brown, et al. v. Maloney, et al. opposes the DOC's practice of denying prisoners on mental health watch status *all* attorney access by preventing them from receiving legal visits, making legal phone calls, or mailing or receiving any legal mail. Both sides moved for summary judgment. On May 27, the court enjoined DOC from denying a lawyer visit for more than 72 hours to any person held on mental health watch.

Guard Assaults

MCLS is handling three guard assault cases seeking damages for beatings inflicted on prisoners at MCI-Cedar Junction. The scope of our Rapid Response to Brutality Project, which previously included Cedar Junction and MCI-Framingham, was extended this past fall to include SBCC. We will also consider handling assaults at other facilities, including the counties.

Wrongful Death

Obba v. Commonwealth of Massachusetts is a wrongful death damages action brought on behalf of the estate of a prisoner who killed himself in the DDU. MCLS is handling this matter, which is in discovery, along with private counsel.

Improper Use of Restraint Chair

Roman v. Commissioner is a case challenging the prolonged placement of a prisoner in a restraint chair. MCLS is negotiating with the DOC to prevent inappropriate use of restraints, particularly on persons with mental disorders.

Project Spotlight: Prison Liaison Visits

MCLS has divided up the major DOC facilities among its advocacy staff. Each advocate is committed to visiting "his" or "her" prisons at least once every three months. Several of the larger prisons are double-covered. Assignments at this time are as follows:
MCI-F, MTC, OCCC: Laura Anderson
OCCC, MTC: Peter Costanza
MCI-CJ, Shirley Med.: Lyonel Jean Pierre
NCCI, SBCC: Lauren Petit
MCI-Concord, BSH: Jim Pingeon
MCI-CJ, MCI-Norfolk: Bonnie Tenneriello
MCI-F, SBCC, Shirley Med.: Leslie Walker

The purpose of these visits is not to do intake for individual problems but to keep MCLS staff informed about general problems and concerns that are shared by all or most of the prisoners in the facility. MCLS prisoner board members and others serve as liaisons.

Apuntes de MCLS está disponible en español

MCLS Notes is available in Spanish. Please share this information with Spanish-speaking prisoners. MCLS has also translated many of its information packets into Spanish. Spanish versions of our information materials will be provided, where available, to people who request them over the phone or in writing. Aceptamos cartas escritas en español.

El número directo de MCLS para los presos del DOC es (877) 249-1342. De los condados llame (617) 482-4124 (collect).

Dealing With the PLRA

The Prison Litigation Reform Act (PLRA), like its companion measure, the Anti-Terrorism and Effective Death Penalty Act (AEDPA), came into being as part of an appropriations bill to fund the Department of Justice for fiscal 1996. The sponsors of PLRA argued that "frivolous" prisoner litigation and "activist" federal courts needed to be curbed, and the PLRA has certainly succeeded in reducing the number of civil rights cases filed by prisoners challenging their conditions of confinement. Immediately after its enactment, such filings fell by about one-quarter. The Act places significant restrictions on the ability of prisoners to file civil rights cases challenging the conditions under which they are confined, as well as restrictions on the powers of federal courts to issue relief in such cases. The provisions of PLRA now create a difficult obstacle course that prisoners seeking either injunctive relief or damages must successfully traverse to challenge living conditions in their facility or staff actions affecting constitutional and statutory rights. The question is whether the Act has made it so difficult for prisoners, who are often barely literate, to bring such cases that prisoners now have no effective remedy for serious constitutional abuses.

The PLRA is complicated and there is now quite a bit of case law construing it. MCLS Notes cannot address all of its complexity, but we will try to address "bite-sized" bits of it over the next few issues. This issue addresses the PLRA requirement that prisoners must exhaust all administrative remedies against an injustice before filing a civil rights law suit. **Credit: this material comes from an article by attorney Elizabeth Alexander of the National Prison Project of the ACLU.**

The exhaustion requirement is not jurisdictional. See Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999); Wendell v. Asher, 162 F.3d 887 (5th Cir. 1998); Wright v. Morris, 111 F.3d 414 (6th Cir. 1997). Most of the federal circuits have held that failure to exhaust is an affirmative defense that must be raised by the defendants. The Sixth Circuit alone requires automatic dismissal if the prisoner does not demonstrate exhaustion in the complaint, and a prisoner may not amend to cure the failure to allege exhaustion. Baxter v. Rose, 305 F.3d 486 (6th Cir. 2002). Some of the cases holding that failure to exhaust is an affirmative defense are Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003); Brown v. Croak, 312 F.3d 109 (3d Cir. 2002) (holding that defendants had waived failure of exhaustion); Casanova v. Dubois, 304 F.3d 75 (1st Cir. 2002); Foulk v. Charrier, 262 F.3d 687 (8th Cir. 2001) (treating failure to exhaust as affirmative defense but allowing amendment to raise defense); see also Jackson v. District of Columbia, 254 F.3d 262 (D.C. Cir. 2001); Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Jenkins v. Haubert, 179 F.3d 19 (2d Cir. 1999); Underwood v. Wilson, 151 F.3d 292 (5th Cir. 1998) (exhaustion requirement may be subject to waiver).

If the court finds that the prisoner has not exhausted, the case is dismissed without prejudice. Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532 (7th Cir. 1999); Wendell v. Asher, 162 F.3d 887 (5th Cir. 1998); Wright v. Morris, 111 F.3d 414 (6th Cir. 1997). Exhaustion must be completed prior to filing suit. Johnson v. Jones, 340 F.3d 624, 2003 WL 21982179 (8th Cir., Aug. 21, 2003).

There is not a great deal of case law yet addressing whether a prisoner who is time-barred from an administrative remedy (many

grievance systems have deadlines of 5-15 days) thereafter forever loses his constitutional or statutory claim. A prisoner in this situation would be well advised to appeal through all the levels of the grievance system and explain in the grievance the reasons for the failure to file on time. See Harper v. Jenkins, 179 F.3d 1311 (11th Cir. 1999) (holding that prisoner who filed an untimely grievance was obliged to seek a waiver of the time limits in the grievance system).

The Sixth Circuit has held that if a prisoner files a grievance and pursues all available appeals, he or she has exhausted, regardless of whether the grievance and/or appeals were timely under the prison or jail grievance rules. Thomas v. Woolum, 337 F.3d 720, 2003 WL 21731305 (6th Cir., July 28, 2003). Similarly, the Fifth Circuit has held that, where a prisoner's grievance was rejected as untimely, but the prisoner had a broken hand and could not file, the court should not dismiss for failure to exhaust, because "one's personal inability to access the grievance system could render the system unavailable." The court also emphasized that, in such circumstances, the prisoner needs to try to exhaust when he or she can, but that the court is not bound by the grievance system's rejection of the grievance as untimely. Days v. Johnson, 322 F.3d 863 (5th Cir. 2003).

Finally, the statute of limitations is tolled while the prisoner is in the process of exhausting. Johnson v. Rivera, 272 F.3d 519 (7th Cir. 2001); Brown v. Morgan, 209 F.3d 595 (6th Cir. 2000); Harris v. Hegmann, 198 F.3d 153 (5th Cir. 1999).

The PLRA applies to prisoner claims of violations of federally protected civil rights, whether the case is filed in federal court or state court. It does **not** apply to claims that the DOC has violated *state* (Massachusetts) statutes or regulations. However, separate Massachusetts statutes do require that prisoners exhaust administrative remedies before filing state law claims. The Massachusetts statutes limiting prisoner law suits are found at G.L. c. 127, §§ 38E and 38F; at G.L. c. 261, §§27A and 29; and G.L. c. 231, § 6F. Prisoners (and attorneys) who wish to file law suits on behalf of prisoners should familiarize themselves with these statutes before filing any complaint.

Disciplinary Hearings

MCLS does not handle disciplinary hearings. For assistance with d-hearings, contact PLAP, Austin Hall, Harvard Law School, Cambridge, MA 02138, collect calls: (617) 495-3127.

Parole Hearings

The Prisoners Assistance Project at Northeastern University Law School may be able to help people (especially lifers) with parole hearings coming up next fall and winter. Write to: Prisoners Assistance Project, 716 Columbus Ave., Rm. 212, Roxbury, MA 02120

El número directo de MCLS para los prisioneros del DOC es (877) 249-1342.

Warrant Clearing and Additional Legal Assistance for MCI - Framingham

The Women's Bar Association has a Framingham Project that provides volunteer services for women at MCI-Framingham who need assistance with legal matters related to their incarceration but not directly related to the prison system. The project assists women with custody matters, guardianships, protective orders, and the like. The project can now also assist a limited number of women with warrant clearing. Women at MCI-Framingham who need help clearing warrants should call or write MCLS. MCLS will forward requests for help with all such problems Women's Bar Association Framingham Project. Requests for help clearing warrants should include the court and case numbers.

If you are a prisoner at MCI-Framingham or South Middlesex Pre-Release Center and have warrants that need to be cleared or problems with custody, guardianship, and similar matters, call MCLS at (877) 249-1342 on Monday afternoons from 1:00 to 4:00 P.M. or write to MCLS at Eight Winter Street, Boston, MA 02108.

Book Review: Defending Justice, by Palak Shah

Beginning with the election of Ronald Reagan in 1980, American politics have moved steadily to the right. Virtually every aspect of law and public policy has trended away from respect for human rights, which include both civil rights like racial and sexual equality, and also "economic" rights such as the right to a living wage and to adequate subsistence level support for persons unable to work because of physical and mental illness or old age. These degenerative changes in public discourse did not happen spontaneously. They were the result of a sophisticated and coordinated nationwide attack on the ideas and the morality of social responsibility, funded by conservative foundations and "think tanks" that systematically researched methods for motivating working people to support policies and politicians who have gradually made the average American's life poorer and more fearful. Defending Justice is a publication of Political Research Associates, a progressive "think tank" which is devoted to providing information and analysis to combat right-wing thought. This book is of special interest to prisoners and their families because, of course, the vast expansion of the American prison system over the past twenty-five years is a critical element of the conservative agenda. A few chapter headings suffice to illustrate the value of this book: "What Accounts For The Success of the Get Tough on Crime Movement," "History of Law and Order Discourse," "History of Racially Disparate Drug Enforcement," "Criminalizing Native American Sovereignty," "Women and Reproductive Rights," "War on Terrorism and Immigrants," and "Victims Rights," are a few of the topics treated in depth by this publication. There is even a section on the political role of prison guards' unions, focused on the most powerful guards' union in the country, the California Correctional Peace Officers' Association. Defending Justice can be ordered for ten dollars from Political Research Associates, 1310 Broadway, Suite 201, Somerville, MA 02144. For those with access, chapters can be downloaded free over the internet at http://www.defendingjustice.org.

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New phone number for MCLS for state prisoners: (877) 249-1342

MCLS has arranged with the DOC for a new toll free number that is accessible to all **state** prisoners on the PIN system. **This number, which is direct dial, not collect, is (877) 249-1342. County prisoners must call collect on (617) 482-4124.**

Families and friends of prisoners can also call MCLS on 1-800-882-1413 toll free. Prisoners who cannot reach us by phone should write to: MCLS, Eight Winter St., Boston, MA 02108.

Regular call-in hours have not changed: 1 to 4 on Monday afternoons unless you are in segregation, in which case you can call between 9 and 4, Monday to Friday. If you are calling from seg, please state your unit to our receptionist to get through. On weeks when Monday is a holiday, MCLS accepts call-ins on Tuesday from 1 to 4.

Dialing instructions for state prisoners

Dial (877) 249-1342. You will hear, “please enter your PIN number.” Enter your PIN number. The phone will be answered, “legal services.” You have 30 minutes. Please hold until an advocate takes your call.