Chapter 10: Corrections and Prisoners' Rights

Martin C. Gideonse
§ 10.1. Parole Eligibility — Aggregation of Sentences. A small addition to the literature on the metaphysics of sentence calculation is to be found in *Durham v. Massachusetts Parole Board*.\textsuperscript{1} It was already established that in general an inmate who happened to receive consecutive sentences, whether for related or unrelated crimes, was entitled to "aggregate" the parole eligibility times on the consecutive sentences in order to determine a single date for parole eligibility, obviating a need for a meaningless interim parole grant from one sentence to another.\textsuperscript{2} Drawing upon a rarely extant source, legislative history, as well as the statutory language of General Laws chapter 127, section 133(c),\textsuperscript{3} *Durham* recognizes an exception to the *Henschel* aggregation principle when an inmate is facing a sentence for a crime committed while on parole, and where the sentence for that parole crime is imposed from and after the expiration of the sentence from which he was paroled.\textsuperscript{4}

The plaintiff began serving his sentence on July 14, 1969 and on December 18, 1970 Durham was released on parole.\textsuperscript{5} Upon revocation of his parole, the plaintiff was returned to custody on March 6, 1975.\textsuperscript{6} On October 2, 1975 he received a new sentence for the crime committed while on parole, to take effect from and after his original sentence.\textsuperscript{7} On May 6, 1978

\textsuperscript{3} G.L. c. 127, § 133(c) provides:

Parole permits may be granted by the parole board to prisoners subject to its jurisdiction at such time as the board in each case may determine; provided \ldots\ (c) that no prisoner held under a sentence containing a minimum sentence for a crime committed while on parole shall receive a parole permit until he shall have served two thirds of such minimum sentence, or, if he has two or more sentences to be served otherwise than concurrently for offences committed while on parole, two thirds of the aggregate of the minimum terms of such several sentences, but in any event not less than two years for each such sentence.
\textsuperscript{5} *Id.*, at 327, 416 N.E.2d at 955.
\textsuperscript{6} *Id.*
\textsuperscript{7} *Id.*
he finished serving his 1969 sentence, rendering him ineligible for parole on the 1975 sentence until May 5, 1982. What Durham argued was that by aggregating the minimum terms of both sentences his date of parole eligibility really was September 30, 1979. He sought a declaratory judgment that he was eligible for parole and an order that he be afforded a parole release hearing. A superior court judge granted this relief, whereupon the defendant parole board moved for and received a stay of the judgment and order until resolution on appeal.

The statute mandates serving two-thirds of the parole crime sentence. Since an inmate cannot be deemed to be serving that sentence until the original sentence either expires by parole or otherwise, under Durham an inmate who is sentenced for a parole crime, from and after, must either serve the entire first sentence, or successfully go through the motions of the parole hearing on the original sentence before the clock may tick for real parole eligibility.

The Court characterized the inmate’s claim in Durham as asking that he be permitted to have, in essence, “banked” parole eligibility time prior to the imposition of sentence on the parole crime, during the period he was either incarcerated on the original sentence, even though parole eligible on that sentence, or while he was peaceably on parole from that sentence. Since the case reports that the inmate received a six to ten year sentence on October 2, 1975, a parole crime sentence on which parole eligibility is two-thirds of the minimum time, and Durham is also reported to have asserted his new parole eligibility to be September 30, 1979, the Court’s characterization of Durham’s claim may be somewhat misleading. However Durham himself may have framed the question, the Court explicitly leaves open the more interesting question, whether the parole board practice of not even beginning to count parole eligibility on the parole crime sentence until the expiration of the earlier sentence by parole or otherwise, was justified, or whether parole eligibility on the “parole” crime sentence should start upon the imposition of that sentence.

The policy underlying the Henshel aggregation principle should apply to from and after sentences imposed for parole crimes. Absent aggregation, the parole board must make a series of parole decisions, a "procedure

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1 Id. at 327-28, 416 N.E.2d at 955.
2 Id. at 328, 416 N.E.2d at 955-56.
3 Id. at 328, 416 N.E.2d at 956.
4 Id. at 328, 328 n.5, 416 N.E.2d at 956, 956 n.4.
5 See G.L. c. 127, § 133(a) which applies to assault and battery by means of a dangerous weapon, the crime the plaintiff was convicted of on both occasions. 1981 Mass. Adv. Sh. at 327, 416 N.E.2d at 955.
7 Id. at 332-33 n.7, 416 N.E.2d at 958 n.7.
[which] makes little sense since the decision to grant parole is to be based on whether the board believes the prisoner can live freely outside of prison without violating the law."

Section 133 of chapter 127 does not foreclose applying that principle. Subsection (a) establishes parole eligibility at two-thirds of the aggregated minimum time for sentences imposed for certain specific crimes; subsection (b) sets parole eligibility at one-third of the aggregated minimum time for all other crimes; subsection (c) simply sets a two-thirds eligibility for inmates based on offender characteristic (i.e. parole status at the time of commission of the crime) rather than offense characteristic. The Durham exception could, moreover, lead to the odd result that a parolee who is sentenced for a parole crime, but who happened to have remained at large pending disposition of the parole offense, may be more leniently treated in terms of ultimate parole eligibility, than one whose parole was revoked prior to the disposition of the parole crime.

§ 10.2. Escape — Necessity. There was good news and bad news in the Survey year for prisoners charged with escape.¹ The good news is that the Supreme Judicial Court in Commonwealth v. Thurber² recognized that necessity, as distinct from compulsion based upon duress or coercion, might negate criminal purpose as an essential element in the context of prison escapes.³ Moreover, where the evidence fairly raises an issue as to necessity, the Commonwealth must prove beyond a reasonable doubt that there was no necessity.⁴

The bad news is that the circumstances required to establish necessity are relatively constrained and the Supreme Judicial Court approved the exercise of wide discretion in the trial judge's employment of hypotheticals illustrating those circumstances. The relevant circumstances include a specific threat of death, of forcible sexual attack or of substantial bodily injury in the immediate future, no time available for a complaint to the prison authorities or a history of futile complaints, no time for resort to courts, no evidence of force or violence towards prison personnel or other "innocent" persons in the course of the escape, and an immediate report to the proper authorities upon attaining a position of safety from the immediate threat.⁵

¹ 368 Mass. at 136, 330 N.E.2d at 484.
² § 10.2. G.L. c. 268, § 16 provides, in part:
A prisoner who escapes or attempts to escape from any penal institution other than the Massachusetts Correctional Institution, Framingham, or from land appurtenant thereto, or from the custody of any officer thereof or while being conveyed to or from any such institution, may be pursued and recaptured and shall be punished...
⁴ Id. at 882, 418 N.E.2d at 1256.
⁵ Id. at 883, 418 N.E.2d at 1256 (relying on People v. Lovercamp, 43 Cal. App.3d 823,
In the course of charging the jury on necessity, the trial judge invited the jury to consider whether or not, if the inmate had gone over the wall by means of a ladder and had pulled the ladder up with him, the necessity had ended at that point, or whether or not, having gone twenty feet from the wall, he was now in a position of safety and had a viable alternative to continuing the escape.6 Implying that escape is a form of continuing crime, the Supreme Judicial Court indicated that the hypotheticals adequately stated the principle that the escape could be justified by necessity only so long as the necessity continued.7

The Court's opinion, although complete, does not seriously address "[t]he real question presented in this case ... [of] whether the prisoner should be punished for helping to extricate himself from a situation where society has abdicated completely its basic responsibility for providing an environment free of life threatening conditions...."8 In this case, the defendant presented evidence that certain guards and inmates at the Massachusetts Correctional Institution at Concord planned and attempted to take his life in retaliation for reporting the beating of an inmate by a guard.9 Such an episode is not uncommon in modern prisons.10 Yet the Court adopted the same continuing offense theory as the United States Supreme Court did in a federal escape case in United States v. Bailey,11 requiring an escapee to turn himself in as soon as he is free of an immediate threat.12 Moreover, the Supreme Judicial Court approved of an instruction inviting the jury to consider the necessity terminated once the inmate was over the wall, but not mentioning the fact that "the escapee, realistically, faces a high probability of being returned to the same prison and to exactly the same, or even greater, threats to life and safety."13 It is hoped that the burden of proof analysis of the Thurber Court will provide for the just resolution of prison escape cases.

§ 10.3. Involuntary Medical Treatment — Need for Court Order? In Commonwealth v. Myers1 the Supreme Judicial Court rejected a suggestion of mootness for an inmate who had, between the entry of a superior court order authorizing involuntary life saving treatment and the time of argu-

831-32 (1974)).
6 Id. at 884, 418 N.E.2d at 1257.
7 Id. at 885, 418 N.E.2d at 1257.
10 United States v. Bailey, 444 U.S. at 422.
12 Id. at 413-15. The Court made no distinction between duress and necessity. Id. at 410.
13 Id. at 427 (Blackmun, J., dissenting).

ment of the appeal before the Supreme Judicial Court, voluntarily taken the required treatment. The Court approved a balancing test for rendering involuntary treatment. The Court, in other circumstances, had already identified four countervailing state interests to be weighed against acknowledging an individual’s right to exercise his or her own private judgment with respect to treatment: “(1) the preservation of life, (2) protection of interests of innocent third parties, (3) the prevention of suicide, and (4) the preservation of the ethical integrity of the medical profession.” In Myers, the Supreme Judicial Court added a fifth state interest, the state’s interest in upholding orderly prison administration.

During the Survey year, the Court refused to answer a further question posed by the Commissioner of Corrections in Commissioner of Corrections v. Ferguson, namely, whether the Commissioner was required to obtain prior judicial approval before administering life saving treatment to a non-consenting inmate. The Court found the question moot. Not only had the prisoner evidently voluntarily taken treatment, and had been paroled, but he had neither briefed nor argued the question as reported to the Supreme Judicial Court by the superior court judge before whom the Commission had sought a preliminary injunction and declaratory relief.

Ferguson represents a particularly apt application of the doctrine of mootness, not simply because nobody appeared to argue “the other side” of the question before the court. From the point of view both of inmates and of prison administrators, an answer either way to the reported question might create difficulty. Prison administrators should perhaps focus on developing internal procedures which effectively distinguish between genuine emergencies requiring life-saving treatment and those cases evoking a paternal imposition of prescribed treatment, as opposed to seeking a carte blanche order at the risk of inviting unwanted and detailed judicial interventionism.

§ 10.4. Overcrowding — Executive and Judicial Powers. Another attempt by penal authorities to seek judicial guidance on a prospective problem, as perceived by them, founded on the twin shoals of mootness and lack of standing in Penal Institutions Commissioner for Suffolk County v. Commissioner of Correction. Claiming that overcrowded conditions at

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1 Id. at 260-62, 399 N.E.2d at 455-56.
3 379 Mass. at 255, 399 N.E.2d at 457.
5 Id. at 1254, 421 N.E.2d at 446.
6 Id.
7 Id.

Deer Island House of Corrections, plus the expected impact of a planned program of renovation, would create conditions so severe as to constitute cruel and unusual punishment, the penal institution's Commissioner of Suffolk County sought a court order requiring the Commissioner of Corrections for the Commonwealth to transfer inmates from Deer Island under the Commonwealth Commissioner's powers. No attempt having been made even to discuss the possible problem with the Commonwealth Commissioner of Corrections, the Supreme Judicial Court was unable to find that there was any actual controversy between the respective Commissioners. Moreover, the Court found "perverse" the notion that the penal Commissioner, the official most directly responsible for preventing the infringement of any constitutional rights as a result of conditions, had standing to vindicate that right before a tribunal. Perverse may be too harsh a word, given the realities of well intentioned prison authorities caught between a rock and a hard place, and given the practicalities of enforcing, or vindicating, such rights. Whether or not "perverse," there was, as the Court recognized, no clear identity of interest between those who possessed such constitutional rights, the inmates and those who sought to vindicate.

The Supreme Judicial Court also put a stop to an attempt by the superior court, acting perhaps in collusion with the Commissioner of Corrections, to alleviate overcrowding in state correctional institutions by remanding persons sentenced to state prison to county houses of corrections, without having obtained the consent of the concerned County Sheriff. In its Sheriff of Middlesex County v. Commissioner of Corrections ruling, the Court narrowly defined the powers of the superior court when faced with overcrowded facilities, even though the Court agreed "that inmate population levels in excess of the capacity of correctional institutions increase the risks of danger to the public, to the inmates, and to the correctional staff."

Not particularly concerned that traditionally only inmates serving a given sentence could challenge sentences allegedly at variance with the sentences prescribed by the legislature, and ignoring the standing question addressed in Penals Institutions Commissioner, the Court found that even the aid of a

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2 Id. at 362-63, 416 N.E.2d at 959-60. Under G.L. c. 124, § 1(g)
3 ... the commissioner of correction ... shall ... (g) determine at the time of commitment, and from time to time thereafter, the custody requirements and program needs of each person committed to the custody of the department and assign or transfer such persons to appropriate facilities and programs.”
5 Id. at 366, 416 N.E.2d at 962.
6 Id. at 366-67, 416 N.E.2d at 962.
9 Id. at 1227, 421 N.E.2d at 76.
superior court order of remand to a house of correction for one who would otherwise be a state prisoner was insufficient to circumvent the statutory requirement under chapter 127, section 97 of the General Laws that the Commissioner's power to make such a transfer required a Sheriff's approval. The Court also stated that absent any emergency with constitutional implications the superior court does not have judicial power to override the clear statutory requirement, under chapter 279, section 23 that no sentence awarded a male prisoner in excess of two and a half years be executed in a house of correction. The Court found support for its statutory interpretation in the doctrine of the separation of powers, the judiciary not being properly concerned with ongoing conditions of confinement.

The Court's twin 1981 decisions affecting institutional overcrowding reveal a real reluctance to encourage judicial involvement, although these decisions can hardly be characterized as overly technical. Nevertheless, the Court was careful to point out in both cases that a constitutional attack, if properly raised, probably would be considered. Given the Court's conservative tenor on this issue, however, and in light of the United States Supreme Court's recent decision in Rhodes v. Chapman, it appears unlikely that inmates will easily succeed in a due process or cruel and unusual punishment clause attack.

Both of these cases, as well as the Ferguson case discussed above, provide little guidance for the practitioner faced with the Scylla of mootness, on the one hand, and the Charybdis of complex class actions, on the other. Over any period of time, inmates tend to be transferred, paroled, or forgiven.

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9 G.L. c. 127, § 97 provides, in part:

The commissioner may transfer any sentenced prisoner from one correctional institution of the commonwealth to another, and with the approval of the sheriff or of the county from any such institution except a prisoner serving a life sentence to any jail or house of correction, or a sentenced prisoner from any jail or house of correction to any such institution except the state prison, or from any jail or house of correction to any other jail or house of correction.

For some of the development of this statute see McGrath, Criminal Law, Procedure and Administration, 1955 ANN. SURV. MASS. LAW § 12.10, at 128-29; McGrath, Criminal Law, Procedure and Administration, 1962 ANN. SURV. MASS. LAW §§ 11.3 and 11.6, at 125 and 128-31.


11 G.L. c. 279, § 23 provides:

"No sentence of a male convict to imprisonment or confinement for more than two and one half years shall be executed in any jail or house of correction."


13 Id. at 1229-30, 421 N.E.2d at 77-78.


disciplinary sanctions, not always for reasons unrelated to the fact that litigation has been bruited about, or commenced. A stringent application of the doctrine of mootness results in many arguable but systematic and systemic abuses being elusive subjects for litigation. Well-phrased gentle hints to correctional officials are all too likely to fall on deaf ears.\textsuperscript{16} Class actions, under Rule 23 of the Massachusetts Rules of Civil Procedure, are a ponderous weapon with which to attack abuse, and, particularly in respect to the framing of effective relief, may lead to "over-lawyering." In either case, real plaintiffs, or named plaintiffs, remain vulnerable to more or less subtle retaliatory steps, where a retaliatory motive is notoriously difficult to prove. A prospective litigator may wish to focus on establishing a factual basis for a ruling that a given issue is likely to recur and which will evade judicial review, thus setting the stage for declaratory relief under chapter 231A of the General Laws.

\section*{10.5. Support of Prisoners.} Although a Sheriff must consent to receive a State prisoner, he has no such option with respect to inmates serving "House" time. Regardless in which county the house sentence is imposed, the sheriff must accept any prisoner sent to him by a court under chapter 279, section 15. The balance of trade as concerning the county of sentencing versus the county of service has no natural tendencies to reach full bilateral settlement. Yet chapter 127, section 125 provides that a sentencing county \textit{may} reimburse the receiving county, and that disputes as to the amount of reimbursement fall within the jurisdiction of the superior court sitting in either county.\textsuperscript{1} Although the legislature in 1946 substituted the word "may" for "shall," the Supreme Judicial Court in \textit{County Commissioners of Franklin v. County Commissioners of Worcester}\textsuperscript{2} minimized the effect of the substitution by holding, quite reasonably, that it would be illogical to allow the superior court power to resolve a dispute between counties where the sentencing county appeared to offer something by way of reimbursement, but not where it offered nothing.

\begin{footnotes}
\item[10.5] G.L. c. 127, § 125 provides:
The expense of supporting a prisoner transferred from a jail or house of correction in one county to another, removed from the Massachusetts Correctional Institution, Bridgewater to a house of correction, or sentenced to a jail or house of correction in a county other than that in which he was convicted, may be paid by the county where he was sentenced. If the amount to be paid cannot be agreed upon by the county commissioners of the two counties, it may be determined by the superior court sitting in either county.
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