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April 13, 2007

The Honorable Deval Patrick, Governor
Massachusetts State House
Room 360
Boston, MA 02133

Dear Governor Patrick:

Could I please meet with you about a Federal Civil Rights case which began when my mentally ill client's blood was spilled on a floor at the Westborough State Hospital and ended with the Commonwealth's Attorney General unsuccessfully attempting to appeal to the U.S. Supreme Court? [1]

My mentally ill client won in the Federal District Court in Boston, the First Circuit Court of Appeals and the Supreme Court. This matter constitutes, as the reported opinions demonstrate, one of the most vile circumstances in the history of the Massachusetts' Department of Mental Health.

I attach a letter I sent to you when you were Governor-Elect.

I can only right this wrong with your help.

Thank you.

Sincerely,
BRENDAN J. PERRY & ASSOCIATES, P.C.

By: _____
Christopher M. Perry

CMP/pmc

[1] See Davis v. Rennie, 264 F. 3d 86 (1st Cir. 2001); see also Davis v. Rennie, 997 F. Supp 137 (D. Mass. 1998); Davis v. Rennie, 553 U.S. 1053 (2002).

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November 7, 2006

The Honorable Deval Patrick, Governor Elect
Patrick-Murray Election Campaign
56 Roland Street
Suite 100D
Boston, MA 02129

Re: Jason Davis

Dear Governor Elect Patrick:

The spirit and passion of your November 7, 2006 acceptance speech drove me to forward this letter now rather than waiting until January, 2007.

I truly hope that this letter "reaches your desk" and that we eventually have a chance to meet. You clearly are the last bastion of hope for the *Davis* case. The ability of our most vulnerable citizens to retain their most precious Federal Civil Rights hangs in the balance.

The Federal District Court in Boston, the United States Court of Appeals for the First Circuit and the United States Supreme Court have all spoken but nobody in positions of governmental power has done anything. In fact, all in power, including two of your predecessors, turned a blind eye and a deaf ear to what truly is one of the most horrific incidents in the history of the Massachusetts' Department of Mental Health.

The Federal District Court in Boston, the United States Court of Appeals for the First Circuit and the United States Supreme Court all rejected the Commonwealth's specious attempts to defend against the indefensible. See Davis v. Rennie, 264 F. 3d 86 (1st Cir. 2001); Davis v. Rennie, 997 F. Supp 137 (D. Mass. 1998); Davis v. Rennie, 553 U.S. 1053 (2002). The United States Court of Appeals for the First Circuit spoke very clearly and at great length about what actually transpired in the *Davis* case. See Davis v. Rennie, 264 F. 3d 86 (1st Cir. 2001). This opinion sets forth the objective facts at play in this matter.

On August 12, 1993 Jason Davis was an involuntarily committed inpatient at the Westborough State Hospital who was then suffering from a variety of acute and life long psychiatric disorders. He was then 28 years old and had been systematically institutionalized from the time that he was 17. He was first diagnosed, as having suffered from acute and permanent psychiatric disorders, when he was but 5 years old.

On August 12, 1993 Jason Davis was beaten bloody on the floor of a locked wing at the Westborough State Hospital by a staff member (Phillip Bragg) while numerous other staff members pinned him to the floor, looked on and did nothing. The Charge Nurse, Joyce Weigers, who was romantically linked to Phillip Bragg, stood idly by as the onslaught continued all the while refusing to stop the carnage. Special State Police Officer Greg Plesh came upon the scene and immediately intervened. While the brutalization of Jason Davis was ongoing Special State Police Officer Greg Plesh inquired of Weigers as to whether or not she was going to "do anything about this". She said and did nothing.

The Commonwealth "defended" in three Federal Courts, including the United States Supreme Court, predicated upon one basic legal proposition: The United States Constitution does not require State Mental Health Care Workers or Charge Nurses to prevent their fellow employees from brutalizing involuntarily committed mentally ill inpatients in their presence. How could any State even assert such a position in this "day and age" and how would such a legal position, if adopted, ever generally benefit mentally ill inpatients housed in our State operated mental institutions? It goes without saying that the Commonwealth is required to espouse legal positions which benefit the public at large. How could the Commonwealth's legal "position" in the *Davis* case ever achieve this objective?

Special State Police Officer Plesh testified during the course of the four week Federal Civil Rights trial that he "noticed that [Jason Davis' eyes] were rolling out of his head. [He] could see the whites of his eyes. The eyes were up to the top. He was in what [Greg Plesh] would call a semi-conscious state." Officer Plesh testified further that he "feared [that Jason Davis] had a hurt neck, that his neck might have been broken". One of the eyewitnesses to the incident, Nicholas Tassone, observed that Jason Davis looked like "a fighter looks after they get out of the ring, how sometimes they get cut on their eye, and they have blood dripping down their face." Mr. Tassone observed a puddle of blood beside Jason Davis' head at the scene of the incident. Joyce Weigers told Davis, after the beating, that "this is what you get when you act – this is what you get when you act like this." Following the incident a massive cover up ensued which included false allegations against Special State Police Officer Greg Plesh and the "doctoring" of medical records by Charge Nurse Joyce Weigers. See Davis, 264 F. 3d, at 91-98,115-117.

Trail testimony by Jason Davis' psychiatric expert dictated that the incident of August 12, 1993 caused a variety of psychiatric injuries to him and that it exacerbated the psychiatric disorders from which he had suffered throughout his life. The physician's testimony, as recounted by the United States Court of Appeals for the First Circuit, was as follows:

> Davis presented additional medical evidence at trial from Dr. R. Amos Zeidman, his treating psychiatrist for periods beginning in 1991. In late 1996 or early 1997, Dr. Zeidman diagnosed Davis with Post Traumatic Stress Disorder (PTSD) as a result of the physical restraint at Westborough. He said that Davis 'was horrified' by the event because '[h]e thought he was going to die.' Dr. Zeidman said that Davis's PTSD symptoms included insomnia, anxiety, panic states, flashbacks, nightmares, and an inability to concentrate. He said that Davis was having difficulty making progress in therapy because he was afraid to trust anyone and that '[t]he quality of his life has suffered terribly for this.' Here, the evidence supports a finding of significant actual and potential harm. According to Dr. Zeidman, the psychological harm Davis has suffered from the incident has seriously affected his quality of life, causing a

range of PTSD symptoms, demonstrating the reasonable relationship between the injury and the amount of the award.

Davis, 264 F.3d., at 95.

During the course of the Davis trial documentation entered into evidence demonstrated that Phillip Bragg was a convicted violent felon upon hire at the Westborough State Hospital. In fact, prior to his commencement of employment, he had been incarcerated as a result of his having been convicted for shooting a 16 year old boy in the eye with a gun at short range. Bragg also had, prior to his date of hire, an extensive history of drug addiction, alcohol abuse and impulse control problems. The Department of Mental Health employment records, generated by it in relation to Bragg prior to August 12, 1993, also evidenced the fact that he had a serious, extensive and continuously escalating problem controlling his violent proclivities relative to the employment of excessive force upon patients. Each of Bragg's problems were memorialized in documentation which the Department of Mental Health both authored and possessed well in advance of August 12, 1993. **The real "kicker" is this: a former Commissioner of the DMH, Eileen P. Elias, expressly testified during the Federal Trial that Phillip Bragg should not have been employed as a Mental Health Care Worker in 1992, which was one year before the *Davis* incident, given his acute employment deficiencies.**

It is pertinent to note the exact nature of the constitutional claims upon which Davis prevailed in relation to the "Davis Six". The pertinent portion of the District Court jury instructions were as follows:

> "First: Mr. Davis contends that the Group 2 defendants deprived him of his constitutional rights under federal and Massachusetts law by FAILING TO INTERVENE TO PROTECT HIM FROM MR. BRAGG'S ALLEGED ASSAULT. To prevail on this claim, Mr. Davis must establish by a preponderance of the evidence as to each defendant separately:
>
> 1) That defendant was present at the scene of the alleged excessive use of force by Mr. Bragg at the time it occurred;
>
> 2) That defendant actually observed the alleged excessive use of force by Mr. Bragg;
>
> 3) That defendant was in a position where he or she could realistically prevent the alleged use of excessive force by Phillip Bragg; and
>
> 4) That there was sufficient time available to that defendant to prevent the alleged excessive use of force.
>
> In sum, on this claim against the Group 2 defendants, you must determine as to each defendant whether he or she actually knew of Mr. Bragg's alleged punching, whether he or she could have prevented it, whether there was enough time to do so, and whether he or she failed to do so."

The legal standard set forth above was extracted by the District Court from Gaudreault v. Municipality of Salem, Mass., 923 F.2d 203, 207 & n.3 (1st Cir. 1990) and Graham v. Connor, 490 U.S. 386 (1989). The former case is a failure to intervene case and the later is an excessive force case. Both of these claims speak to the intent based actions of the culprit. Id.

Through its verdict the jury expressly held that that each of the "Davis Six" had both the time and opportunity to stop the brutality against Jason Davis but intentionally choose to do nothing. Five of the "Davis Six" were also found to have violated an even higher legal "standard". **The District Court Judge charged that punitive damages should be imposed by the jury if it believed that "the Defendants acted so outrageously and evidenced such a degree of malice or callousness that they deserved to be punished and that an example and deterrent is necessary to make sure that these Defendants and others will be less likely to engage in such conduct in the future. You may award punitive damages if you find that the Defendant in question acted maliciously or wantonly. That is, if their acts were prompted by ill will."**

Five of the "Davis Six" were expressly found by the jury to have acted wantonly, maliciously and with ill will...i.e they were desirous of intentionally subjecting Jason Davis to the brutalization which was exacted upon him by Phillip Bragg and they maliciously did so. The punitive damages which were assessed, as noted by the First Circuit in its reported opinion, were "$500,000 each against Bragg and Weigers; $250,000 against Rennie; and $100,00 each against Fitxpatrick, Gillis and Hanlon." Davis, 264 F. 3d, at 96. **It is incredible to note that a number of the Defendants in the Davis case are still employed in a patient care capacity by the Department of Mental Health. How could this ever be?** Davis was the victor in each of the three Federal Courts in which his case was litigated. The Second Amended Judgment of the United States District Court for the District of Massachusetts, which was left undisturbed by both the United States Court of Appeals for the First Circuit and the United States Supreme Court, presently stands at $1,874,889.

The egregiousness of the Davis incident was clearly exacerbated by the Commonwealth's representation of the "Davis Six" in three Federal Courts. The Commonwealth is legally required to refuse litigation representation if it "will not further the interests of the Commonwealth or the public." Clerk of Superior Court for Middlesex County v. Treasurer and Receiver General, 386 Mass. 517, 437 N.E. 2d 157 (1982). It is manifest that the Commonwealth's representation of the "Davis Six" was acutely adverse to the general interests of the mentally ill for a host of reasons the most primary of which is that its central legal argument was not only inconsistent with age old United Sates Supreme Court precedent but was such that, if adopted, it would have provided Mental Health Care Workers with a perpetual constitutional license to simply stand idly by while fellow workers beat mentally ill inpatients bloody. It is beyond cavil that representation of the "Davis Six" by the Commonwealth was entirely inconsistent with the role which the Commonwealth must play in the administration of its own laws.

The Commonwealth's status as the "defender" of the "Davis Six" was actually egregious on many different fronts: (i) It argued for the advancement of a legal position which would have resulted in unchecked brutality against all mentally ill inpatients housed in our State Mental Hospitals; (ii) It defended those who brutalized the mentally ill knowing full well that such brutalization had occurred; (iii) It attempted to advance legal positions, on behalf of a limited number of "clients", which were clearly adverse to the interests of society's most vulnerable citizens; (iv) It shirked its responsibility to prosecute the very clients which it defended; and (v) It was never interested in finding true justice for the mentally ill in the *Davis* case because it was so consumed by "beating" Jason Davis.

The Commonwealth simply wanted to **"win"** at any cost even if it had to make some **"bad law"** along the way which **"bad law"** clearly would have greatly disadvantaged the physical safety of all mentally ill persons housed within our State operated mental institutions. The speciousness of the Commonwealth's central legal argument is underscored by the fact that the reviewing Courts

resorted to age old and fundamental United States Supreme Court precedent as the basis to summarily reject the Commonwealth's position. Thus, not only did the Commonwealth attempt to disadvantage an entire class of our most treasured and vulnerable citizens, in an attempt to benefit but a few of its own "clients", but its unsuccessful attempt to do so was predicated upon a contorted view of the law which was entirely at odds with the foundational underpinnings of our legal system. **Once again....."win at any cost".** It is of consequence to note that the reviewing Courts resorted to Youngberg v. Romeo, 457 U.S. 307 (1982) in substantiation of the fundamental legal proposition that physical abuse against involuntarily committed mentally ill inpatients has long been unconstitutional. The *Romeo* case was decided some 21 years before the Davis incident even occurred. How could the Commonwealth ever argue the position which it did in light of Youngberg and its obligations to the mentally ill as a class?

The baselessness of the Commonwealth's principal legal contention is easily demonstrated to be so. Qualified immunity has long been a defense in civil rights cases. It protects State employees from liability as long as their conduct is not violative of "clearly established" legal principals which a reasonable person would have known about. Long before the ***Davis*** incident occurred the Supreme Court had expressly ruled that official action is not immune simply because that precise action had not previously been declared to be unlawful: "This is not to say that an official action is protected by qualified immunity unless the very action has previously been held unlawful...but it is to say that in light of pre-existing law the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 640 (1987). "The easiest cases don't even arise. There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such case arose, the officials would be immune from damages [or criminal] liability." United States v. Lanier, 520 U.S. 259, 271 (1997).

The Commonwealth's attempt to employ qualified immunity as a defense was premised on grounds which the Supreme Court expressly rejected in Youngberg, Creighton and Lanier. As noted by the First Circuit, the Commonwealth attempted to defend its employees on the ground that no Court had previously held that a Nurse or a Mental Health Care Worker had a constitutional duty to intervene to stop a fellow worker from physically beating a mentally ill inpatient. *See Davis*, 264 F. 3d, at 113. The First Circuit summarily rejected this argument. Id. The Commonwealth's legal position was baseless, circuitous and actually such that, if adopted, it would have caused great harm to the mentally ill in the Commonwealth. Its position was baseless because it was contrary to existing Supreme Court authority. Its position was circuitous because no liability could ever attach if the absence of a prior legal case, holding the precise action at issue in the present legal case to be illegal, could defeat the claim. In such a scenario there would never be a "first time" to characterize any action as "illegal" because there would never be a "prior case". The Commonwealth's contentions in this regard would have tipped the Federal Civil Rights act on its ear. How, prey tell, would the Commonwealth's proposed "rule of law" in the *Davis* case have protected the mentally ill as a class ? It simple would not have.

The Davis case warrants involvement by the Governor of this Commonwealth for reasons which are actually too limitless to list. Jason Davis was "right", the Commonwealth was "wrong" and the substantial constitutional law made by Jason Davis will benefit mentally ill persons in both the Commonwealth and in the United States for eternity. Jason Davis is sadly now deceased but he continues to be a true American hero because, although both acutely ill and initially involuntarily committed, he fought hard for substantial constitutional protections for an entire class of our most vulnerable citizens. Jason Davis' role in his own case was characterized by great honor: he fought courageously against his very own government which was itself bent on insuring that the higher good would never be accomplished. Jason Davis actually undertook and completed the role which the Commonwealth should have undertaken in this case. What honor was there in the

Commonwealth's "role" in the *Davis* case? The Commonwealth simply wanted to "win" at any cost even if it had to make some "bad law" along the way. The Commonwealth's "role" in the *Davis* case lacked both honor and integrity and was clearly disgraceful. This wrong should be righted.

The Rosa Parks of this world are too few in number whose voices are too often obscured by those who would contend that the status quo should prevail. The status quo in this case subjects our most vulnerable citizens, the mentally ill, to brutalization at the hands of those obligated to ensure their safety. **Why are some of the Defendants who were "convicted" in the Federal Civil Rights Trial still employed by the Department of Mental Health in patient care capacities?** I believe that there is no higher calling than to protect those who are incapable of protecting themselves from the hate and violence practiced upon them by our State employees. State employers and their employees, like our citizens, should be held accountable when they commit egregious acts of violence. The bright light of day should shine upon the atrocities committed by Department of Mental Health. Until it does, the cries of our most vulnerable citizens will go unheard as they continue to be brutalized by those who are entrusted with their care.

The Commonwealth wasted literally hundreds of thousands of taxpayer dollars on its indefensible legal positions and when it came time to "do the right thing" it ran for the proverbial hills. It is respectfully submitted that the Commonwealth should now should stand tall and do what morality dictates ought to be done: pay the entire Second Amended Judgment to Jason Davis' father who both lived through the agony of his son's ordeal and attended the month long Federal Civil Rights Trial. We are, after all, a civilized society and we should act like one. Governments should be characterized by integrity and honor both of which have been sorely absent from this entire "process". Two legislative bills, filed in an attempt to pay the Federal District Court's Second Amended Judgment, have wallowed and been met only with failure (House Bill H-3998 and House Bill H-2913). I would, with your assistance, the assistance of the House of Representatives and the Senate, like to right the wrongs committed on the floor of a locked wing at the Westborough State Hospital on August 12, 1993.

Litigation which I have instituted against the DMH has also brought to light a wide variety of additional egregious constitutional infirmities which are ongoing within the DMH including its policies regarding the "voluntary admission" of patients who are actually incompetent when they "sign themselves in..." This particular "issue" was actually "front and center" in the Davis litigation when it was proved that Jason Davis was incompetent when he "voluntarily" admitted himself to the Westborough State Hospital in 1993. See Davis v. Rennie, 997 F. Supp 137 (D. Mass. 1998). This admission "issue", although enormous in scope and constitutional magnitude, is only one of many which confront the Massachusetts' Department of Mental Health.

I would very much appreciate the opportunity to meet with you concerning the Davis case and other matters germane to the constitutional operation of our State Hospitals.

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Sincerely,
BRENDAN J. PERRY & ASSOCIATES, P.C.

By:_____
Christopher M. Perry

CMP/pmc

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High court rejects state appeal

Case involved beating of Westboro State Hospital patient

By Mark Melady
TELEGRAM & GAZETTE STAFF

The U.S. Supreme Court has turned back a state appeal of a federal circuit court ruling upholding damages in the 1993 beating of a Westboro State Hospital patient.

At issue was whether state mental health workers had a constitutional duty to stop another worker from beating patient Jason Davis after he returned drunk to the hospital from an unauthorized absence.

"It's the end of the road," Christopher M. Perry, the lawyer for Mr. Davis, said yesterday. On Monday, the Supreme Court let stand the circuit court ruling.

"This means that mental health care workers and nurses have an unequivocal duty under the Constitution to intervene when a fellow employee is physically brutalizing a patient," Mr. Perry said.

Testimony in a 1998 federal civil rights case showed that Mr. Davis, then 27, was restrained by hospital workers while another worker, Phillip E. Bragg, beat Mr. Davis, bruising and bloodying him.

Named as defendants in the case were nurse Joyce Welgers and mental health workers Paul Rennie, Richard Gillis and Michael Hanlon. The state argued in the trial that there was no federal case law establishing the constitutional duty of the nurse or health worker to intervene to stop Mr. Bragg.

The federal district judge in the case instructed the jury to find for the patient if it concluded it was "objectively reasonable" that excessive force had been used.

The state argued the judge should have told the jury to apply a tougher standard — that the beating had to "shock the conscience" or show "deliberate indifference" to the patient's rights.

The appeal was initiated by then-Attorney General Scott Harshbarger and continued by current Attorney General Thomas F. Reilly. The 1st Circuit Court upheld the trial finding and Mr. Reilly appealed to the Supreme Court.

"The attorney general has all along contended that hospital workers had no obligation to stop another hospital worker from beating a patient," Mr. Perry said. "I don't get that one. I thought the attorney general was supposed to advance positions that benefit the public at large."

The damages award was about $1.62 million, Mr. Perry said.

5/17/02
Worcester Gazette