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July 11, 2014

The Honorable Deval L. Patrick, Governor
Commonwealth of Massachusetts
Massachusetts State House
Office of the Governor
Room 105
Boston, MA 02133

Re: Jason Davis
Vs: Paul Rennie, et al
Civil Action Number: 96-11598-MEL

Governor Patrick:

I hope you are well.

I represented Jason Davis while he was alive and continue to represent his Estate and family. 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); Davis v. Rennie, 178 F. Supp. 2d 28 (D. Mass. 2001).

I attach four letters exchanged between our offices in 2007 and 2008 which pertain to the Jason Davis case.[1] (1/1-9; 2/1-2; 3/1-6; 4/1). The subject matter of these letters was quite simple: they sought your assistance relative to the payment of the Davis case judgment. You refused, with all due respect, the cry for help from the Davis family.

On June 11, 2008 you, through your Deputy Chief Legal Counsel, informed the Davis family as follows:

> I have reviewed the materials that you have provided and researched the applicable law. Section 9 of Chapter 258 of the General Laws governs the Commonwealth's ability to pay judgments arising out of intentional tort or civil rights actions filed against individual state employees. The statute prohibits the Commonwealth from indemnifying an employee for civil rights violations involving grossly negligent, willful or malicious conduct. (2/1-2).

[1] Exhibits shall be referenced by citing to the pertinent exhibit number together with the page of same, e.g. (1/2). All exhibits referenced within this letter are attached hereto, incorporated herein and expressly made a part hereof.

On June 20, 2008 you, through your Deputy Chief Legal Counsel, informed the Davis family as follows:

> You are correct that the Legislature could pass legislation authorizing the Commonwealth to pay the punitive damages that the jury awarded against the individual defendants. Absent such legislation, Mass. Gen. L. ch. 258, Section 9 precludes the Commonwealth from paying those damages [involving grossly negligent, willful or malicious conduct]. (4/1).

Today you vetoed the very legislation that you advised the Davis family to file on June 20, 2008 because of the purported dictate of 258, §9. In 2008 you had advised them ***to file*** this legislation as a mechanism to ***sidestep*** the very authority (258, §9) which you employed today to ***defeat*** their legislation. To suggest that this "course of conduct" by you was arbitrary, capricious, whimsical and vexatious is an acute understatement. I must respectfully submit that I am appalled by your conduct especially since I had provided you with information – several years ago – which proved that a legislative bill had actually been successfully employed in this very context.

It is one thing to suggest that payment cannot be made under M.G.L. c. 258, §9. It is, quite another, thing to suggest that this statutory section bars payment from another source like, for instance, a legislative bill. Indeed, Governor Romney, as I informed you through the attached letters so many years ago, used a legislative bill to pay an intent based civil rights claim which was supposedly not subject to indemnification through M.G.L. c. 258, §9. (3/1-6). We need not, however, wrangle about legislative bills at this point since both you and the Attorney General have made it clear in recent weeks that indemnification of grossly negligent, willful, malicious and intent based conduct can be indemnified without resort to the legislative process and notwithstanding the supposed dictate of 258, §9.

It is respectfully submitted that your historical "position", to the effect that grossly negligent, willful, malicious or intent based conduct cannot be indemnified pursuant to or notwithstanding the dictate of M.G.L. c. 258, §9, is no longer viable. Joshua Messier was murdered during a restraint which went horribly awry at the Bridgewater State Hospital. As you know, the Attorney General for the Commonwealth of Massachusetts, Martha A. Coakley, ("Attorney General") represents the Messier Defendants in the civil case which was initiated by the Messier family. Only recently you and the Attorney General, acting in concert, after consultation, pursuant to an express agreement and while acting in your respective official capacities, agreed to pay or actually paid 3 million dollars to the Messier family for the intent based civil rights claims it asserted against the individual State employees who murdered their son.[2] Nine individuals are named as Defendants in the Messier

[2] It is my understanding, given the plain text of two letters forwarded by the Commonwealth's Attorney General to the Davis family, that, prior to June 25, 2014, no settlement agreement had been executed in the Messier case. This fact, even if true, would not dull the vitality of the constitutional violations asserted herein. The Commonwealth, through its Attorney General and Governor, exercised raw, unbridled and concerted State power relative to the "negotiation" and attempt to "settle" intent based civil rights claims which process included making at least a 3 million dollar offer of settlement. Whether this offer of settlement was thereafter "accepted" is actually inconsequential in discerning whether, in fact, constitutional violations arose since the mere exercise of the power to indemnify intent based civil rights claims violates the Constitution in the present context. It is this raw "power" to indemnify intent based civil rights claims, in the abstract, which violates the Constitution and not the arbitrary determination by a claimant whether to accept monies offered pursuant to this exercised power. Since State actors, while acting under color of State law and while clothed with State authority, employed governmental "power" to negotiate, attempt to settle and actually make multi-million dollar promises of payment, relative to intent based civil rights claims, the Constitution was violated in the present context. It is clear that since benefits bestowed upon one claimant (negotiation, settlement in principal and receipt of

case. None of them are constitutional officers. The civil rights claims asserted in the Messier civil rights case, as you know, arose in the mental health context as well. The Messier family did not file a bill in the legislature in order to obtain their settlement funds and their case was never tried before a judge or jury.

It is beyond all doubt that the Messier family has been or soon will be paid for intent based civil rights claims in violation not only of State law but in contradiction of the very basis upon which Jason Davis has long been denied payment by the Commonwealth of Massachusetts and you. I am sincerely glad that the Messier family will be paid. They deserve such a sum for their acute pain. That said, I respectfully submit that the Davis family deserves to be paid as well. They have struggled for 21 years. There should be equal handed treatment between the Messier and Davis families; each of them has suffered greatly and both asserted intent based civil rights claims. If the Commonwealth, as it has, sees fit to compensate the Messier family for intent based civil rights claims, asserted against individuals, then it clearly must do the same for the Davis family. The Constitution could command no less. The discrimination here is as crude as it is vexatious. One family is awarded with a guaranteed payment of their intent based civil rights claims while another family is informed that such a payment is forbidden under State law. The Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution foreclose the disparate treatment which is afoot here.

I will briefly recount the uncontroverted factual circumstances of the Davis case since they are pertinent to the ultimate legal conclusions which I will draw. These facts also evidence the unabashedly immoral conduct of the Commonwealth over the course of the last 21 years continuing to this date. On August 12, 1993 Jason Davis was an acutely mentally ill involuntarily committed inpatient housed at the Department of Mental Health's Westborough State Hospital facility. On that date he was beaten bloody by one Mental Health Care Worker (Phillip Bragg) while several other Mental Health Care Workers pinned him to the floor and while still others looked on and did nothing. Two of the staff members, who perpetuated the savage beating, were convicted violent felons which the Department of Mental Health - which operated the hospital - knew at hire.[3] A Nursing Supervisor (Joyce Weigers) looked on and actually encouraged the beating being performed by her boyfriend (Phillip Bragg). Jason Davis commenced a legal case in the Federal District Court in Boston where he won a 1998 jury verdict after a four week trial.[4] The verdict now stands at 2.1

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multi-million dollar promises to pay) were deprived to another similarly circumstanced clamant, based upon the purported dictate of State law, the Constitution was violated without proof of anything more. What is beyond cavil here is that at least a 3 million dollar offer of settlement was made by the Attorney General - with the blessing and acquiescence of the Commonwealth's Governor – relative to the intent based civil rights claims asserted in the Messier case. The Commonwealth has continuously asserted in Davis that the *power* to even make such an offer was proscribed by State law relative to judgments entered upon jury verdicts much less settlement agreements where no trial was conducted. (1/1-9; 2/1-2; 3/1-6; 4/1). Although the raw exercise of the power to indemnify is all that need be shown here, in order to prove the asserted constitutional violations, it is apparent that the Messier case was, in fact, reduced to a written settlement agreement. On June 25, 2014 the Attorney General twice asserted, during the course of a Mental Health Forum conducted in the public domain, that the Messier case was "resolved". "Resolved" is a term of art amongst lawyers which connotes execution of settlement papers. Certainly, cases are never "resolved" if negotiations are ongoing, settlement papers have yet to be executed and the prospect of a trial has not been eliminated.

[3] I previously provided the Attorney General with the indictments and plea dispositions of Phillip Bragg and Paul Rennie.

[4] A former Commissioner of the DMH, Eileen P. Elias, testified at trial that Phillip Bragg should not have been employed as a Mental Health Care Worker in 1992 (one year before the incident) given his violent tendencies.

million dollars. See Davis, 264 F. 3d, at 86-117; Trial Transcripts; Trial Exhibits; Indictments/Plea Dispositions (Phillip Bragg, Paul Rennie).

Special State Police Officer Plesh, who came upon the scene and stopped the carnage upon Jason Davis, 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". See Davis, 264 F. 3d, at 94-95; Trial Transcripts. Another eyewitness to the incident, the Defendant, 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 testified further that he observed a puddle of blood beside Jason Davis' head at the scene of the incident. The Charge Nurse, 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." Id.

Through its reported opinion the First Circuit recounted the brutalization of Jason Davis via the trial testimony of Special State Police Officer Greg Plesh and Jason Davis:

> He recounted: 'Jason is lying down the hallway, head is away from me, feet are towards me. Staff is encircling him. And it's not what I saw, it's what I felt. I initially felt the thud through the [concrete] floor and then heard a thud.' Plesh said he looked up and saw Bragg punch Davis in the head four to five times. Plesh continued: I turned to Joyce Wiegers who was on my right shoulder. When I saw Jason Davis being punched, I said, 'Did you see that? Are you going to do anything about this? Are you going to allow this to happen?.' She didn't say anything, and I really wasn't waiting at that point. Some more was occurring and at that point I decided to intervene. As the MHWs began rolling the patient onto his stomach, Bragg twisted Davis's neck to the side and Plesh climbed over the other MHWs to push Bragg away. Davis testified about the punching: 'It was over and over and over and over again. It was like it would never stop. And then I was calling for help and nobody was stopping them and they kept hitting me. I felt the blood; it was, you know, it was coming down my face.' Plesh said that Davis's 'eyes were rolling out of his head,' that '[t]here was swelling, bruising all in his face,' and that he checked to make sure that Davis's neck had not been broken. Tassone said that Davis's face was cut and bloody.

Davis, 264 F. 3d, at 94. (brackets supplied).

Special State Police Officer Greg Plesh testified at trial about the condition of Jason Davis' face in the midst of the bloody beating:

> The twist was so severe I at that point went around the pile, around Phillip Bragg, pushed Phillip Bragg off Jason Davis' head with my shoulder and then instantly went to his neck. And at that point, I noticed that his eyes were rolling out of his head. You could see the whites of his eyes. The eyes were up to the top. He was in a, what I would call a semiconscious state. There was some bleeding on the floor. There was swelling, bruising all in his face noticeable at that time.

Special State Police Officer Greg Plesh filed an incident report which includes the following paragraph:

> As many as eight (8) staff members were on top of Jason. Phillip Bragg was up by Jason's head and this officer observed him punch Jason Davis five or six times with extremely hard blows. This officer could hear every impact and instantly the client started to bleed and swell in the area of the eyes. forehead and temple area. I moved into stop the staff member but before I could get there Phillip used a head twist technique that I did have to stop. Extreme force was used, Jason's neck was being twisted to its limit. Phillip put a knee on Jason's head and with both hands was forcing Jason's head down into the floor. (Push up position). Jason could not stop resisting the other nursing staff at this point. This is an automatic defense response. This officer moved Phillip off Jason's head and checked his neck to make sure it had not been broke. Jason calmed down as soon as his head was released. While Phillip was holding Jason's head down the officer observed him say to Jason, this is what you wanted, what you got. (parentheses in original).

The First Circuit recounted the acute psychiatric injuries sustained by Jason Davis, as per his treating psychiatrist, within its reported opinion:

> 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. (emphasis supplied).

See Davis, 264 F. 3d, at 95, 117.

Following the incident a massive cover up ensued, as observed by the First Circuit Court of Appeals, which included false allegations against Special State Police Officer Greg Plesh and the alteration of medical records by Charge Nurse Joyce Weigers. See Davis, 264 F. 3d, at 94-96, 115-117, 86-117 (1st Cir. 2001). Jason Davis' life went into a downward spiral, after the events of August 12, 1993, and he died six (6) years after his trial. Jason Davis was 38 years old when he died.

The Commonwealth of Massachusetts, through its Attorney General, appealed to the United States Court of Appeals for the First Circuit and thereafter attempted to appeal to the United States Supreme Court. Jason Davis "won" in all three Federal Courts: he won the four (4) week Federal District Court trial, he won the appeal in the First Circuit Court of Appeals and the Commonwealth's Writ of Certiorari was denied by the United States Supreme Court. Jason Davis was acutely suicidal throughout the appellate process which caused his family and loved ones to themselves sustain acute stress throughout this four (4) year period.

This matter constitutes, as the reported opinions on the *Davis* case demonstrate, one of the most vile circumstances in the history of the Massachusetts' Department of Mental Health. My word need not be taken, as to any of the facts of the Davis case, since the First Circuit Court of Appeals has already recounted these gruesome factual circumstances, in its rather robust reported opinion, and since the Attorney General possesses the entire trial transcript and exhibits in her archives. See Davis, 264 F. 3d, at 86-117. The Davis case is actually a landmark civil rights case for it expressly holds that Doctors, Nurses and Staff members employed at State operated mental institutions have a constitutional obligation, under the Fourteenth Amendment's Due Process Clause, to intervene and curtail physical abuse by fellow staff upon involuntarily committed mentally ill inpatients. Id., at 264 F. 3d, at 97-102. For its part the Commonwealth, through its then Attorney Generals, Scott Harshbarger and Thomas Reilly, actually asserted in three federal courts that there was no constitutional obligation - on the part of the staff who stood idly by and watched Jason Davis being savagely brutalized – to intervene and stop the bloody carnage which was taking place. Each of these three federal courts rejected this contention. I turn to your 2008 contention that indemnification is legally foreclosed in the present context.

It is respectfully submitted that the position which you took in 2008, in regard to the payment by the Commonwealth of the Davis judgment, is essentially the same position which the Commonwealth has taken for 17 years. The Commonwealth has continuously posited that it cannot and will not indemnify intent based civil rights claims asserted against individual employees since only claims sounding in negligence (unintentional harm) are subject to indemnification under applicable State law. See M.G.L. c. 258, §§ 2, 9. The Davis family readily concedes that the 1998 federal jury verdict was rendered relative to intent based civil rights claims which are, on their face, not subject to indemnification under M.G.L. c. 258, §9 in the context presented in *Davis*.[5] See Davis, 264 F. 3d, at 86 - 117; Jury Verdict. On its face, only negligent conduct is subject to indemnification under M.G.L. c. 258, §9; not conduct which is grossly negligent, willful or malicious. See M.G.L. c. 258, §9. On June 11 and 20, 2008 you echoed this sentiment through your previously quoted letters. However, you and the Attorney General, it is submitted, no longer subscribe to the positions set forth by your office in 2008 nor do you subscribe to the facial dictate of M.G.L. c. 258, §9 any longer.

It is respectfully submitted that you and the Attorney General agreed to pay or have actually paid 3 million dollars to the Messier family for the intent based civil rights claims it asserted against individual employees in its Complaint. On and prior to May 4, 2009 Joshua K. Messier was an acutely psychiatrically ill inpatient housed at the Bridgewater State Hospital for the purposes of psychiatric observation. On May 4, 2009 Joshua K. Messier was murdered during the course of a four (4) point mechanical retrain which went horribly awry. **The first five words of the Complaint, which was filed by the Estate of Joshua Messier, read as follows: "[t]his is a civil rights action..."** Indeed, the first three counts of the complaint are expressly premised upon State and Federal civil rights statutes. Counts IV, V and VI of the Complaint sound in Assault, Battery and Intentional Infliction of Emotional Distress which claims are also not supposed to be subject to indemnification given that the complained of conduct is intentional, willful and malicious. See M.G.L. c. 258, §§2, 9.

A duly recorded and authorized death certificate was generated on May 22, 2009 by the Commonwealth of Massachusetts and same was executed by a Massachusetts Physician. Joshua K. Messier's death certificate lists his "manner of death" as "homicide". Joshua K. Messier's duly

[5] The defendant - employees found liable in Davis were not constitutional officers.

recorded and authorized "Report of Autopsy" was generated on May 5, 2009 by the Commonwealth and same was executed by a Massachusetts physician. Joshua K. Messier's "Report of Autopsy" lists "homicide" as his cause of death. Joshua K. Messier's "Report of Autopsy" depicts, with exactitude and precision, numerous blunt force trauma injuries to Joshua K. Messier's head, neck, torso and extremities. The internet based and publicly available videotaped death of Joshua K. Messier ("Messier Video") dictates that he was murdered as a result of the intentional and willful excessive force being employed upon him.

The text of M.G.L. c. 265§1 (First and Second Degree Murder under Massachusetts law) reads, in part, as follows:

> **Section 1.** Murder committed with deliberately premeditated malice aforethought, with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

The Death Certificate, Report of Autopsy and Messier Video all dictate that "homicide" was the cause of death and that actions undertaken by those who murdered Joshua Messier could not have been subject to indemnification, on the face of the Massachusetts' Indemnification statutes, since the culprits acted in at least a grossly negligent, willful or malicious fashion. Conduct which consists of "extreme atrocity or cruelty" simply does not equate to negligent conduct. When an individual is "murdered" under Massachusetts law, by state employees who are not constitutional officers, indemnification under M.G.L. c. 258 is prohibited since murder consists of conduct which is at least grossly negligent, willful or malicious. Only mere "negligent" acts, it must be recalled, are subject to indemnification under the facial dictate of M.G.L. c. 258 §2, 9 in the context of public employees who are not constitutional officers. Although the State is concededly a named as a party in the Messier case, the negligence claims asserted against it are collectively capped at $100,000 under M.G.L. c. 258, §2. Thus, at least 2.9 million dollars of the 3 million dollar settlement which was or will be paid by the Commonwealth in Messier was paid or will be paid by it for intent based civil rights claims asserted against individuals.[6] The disparate treatment, as between the Davis and Messier families relative to indemnification, violates the Constitution.

The "'purpose of the Equal Protection Clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents.' " Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (citation omitted). "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by

[6] If the release in Messier were drawn to settle only the negligence claims, for 3 million dollars, this "settlement" posture would be acutely disingenuous for the following reasons: (i) negligence claims, asserted against the State or any one of its departments, are capped at $100,000; (ii) the Messier Complaint itself is captioned as a civil rights complaint and seeks civil rights damages and relief; (iii) the autopsy dictates that the complained of conduct was intentional, willful and malicious; (iv) the video of the murder of Joshua Messier dictates that the complained of conduct was intentional, willful and malicious; and (v) your comments, in the aftermath of the Messier murder, dictate that the complained of conduct was intentional, willful and malicious as is actually conceded by the Commonwealth through such comments. As an aside and as a matter of law, a tort action cannot – at once – be both intentional and negligent. It is one or the other.

public authority with an evil eye and an unequal hand, so as practically to make unjust and unequal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886). "When we consider the nature and theory of our institutions of government, the principals upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." Id., at 369-370.

It is beyond cavil that the Messier family was or will soon be paid for intent based civil rights claims in violation not only of State law but in contradiction of the very basis upon which Jason Davis has long been denied payment of his verdict and judgments by the Commonwealth of Massachusetts and you. The agreement by you and the Attorney General to pay the intent based civil rights claims in Messier – while concurrently depriving the Davis family of the payment of their intent based civil rights claims because such a payment would supposedly violate State law – plainly and simply implements invidious, arbitrary, vexatious and intentional discrimination relative to two similarly circumstanced families.[7] This constitutes governmental conduct which is "purely personal and arbitrary..." Id., at 369-370. This is the very type of conduct at which the Fourteenth Amendment directs itself through its Equal Protection and Due Process Clauses.[8] Our Constitution manifestly does not sanction the blatant and vexatious discrimination which has been and is being practiced here. "The touchstone of due process is the protection of the individual against arbitrary action of the government." Dent v. West Virginia, 129 U.S. 114, 123 (1889). The Commonwealth's conduct, in providing the Messier family with a right they concurrently deprive the Davis family of in a similar circumstance, affronts the most basic and oldest tenets of our Constitution:

> It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest -- that this shall be a government of laws -- because, to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency, the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in Boyd v. United States, 116 U. S. 616, 116 U. S. 635, should never be forgotten: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*' Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces, and one or the other must of necessity perish whenever they are

[7] The 3 million dollar offer of settlement alone violates the Equal Protection and Due Process Clauses of the United States in the context of the Davis case.

[8] The Supreme Court has expressly recognized that illegal discriminations under the Equal Protection Clause "may be so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). On the very same day that it held that States could not maintain racially segregated schools under the Equal Protection Clause the Supreme Court also held that the District of Columbia could not do so under the Due Process Clause of the Fifth Amendment since racial discrimination concurrently violated due process. Id.; Brown v. Board of Education, 347 U.S. 483, 495 (1954); See also Schneider v. Rusk, 377 U.S. 163, 168 (1964).

> brought into conflict. To borrow the words of Mr. Justice Day, 'there is no place in our constitutional system for the exercise of arbitrary power.' *Garfield v. Goldsby,* 211 U. S. 249, 211 U. S. 262. To escape assumptions of such power on the part of the three primary departments of the government is not enough. Our institutions must be kept free from the appropriation of unauthorized power by lesser agencies as well. And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments -- even petty encroachments -- upon the fundamental rights, privileges, and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties.

Jones v SEC, 298 U.S. 1, 23-25 (1936).

The discrimination at issue here is so crude, blatant, vexatious and arbitrary that it unmistakably violates the core concepts upon which the Equal Protection and Due Process Clauses of the Fourteenth Amendment are premised. One family is awarded with a guaranteed payment of their intent based civil rights claims while another family is informed that an identical type of payment is forbidden under State law. The Attorney General and you have access to the reported cases, all trial transcripts and all trial exhibits in the Davis case. I previously forwarded to the Attorney General an assortment of documents including the Janet Wu TV (WCVB –Channel 5) video link, the link to Adrian Walker's (Boston Globe) article and the plea dispositions of the two (2) convicted violent felons who, with others, beat Jason Davis bloody on August 12, 1993.

The Davis family is tired. It has suffered greatly and continues to suffer greatly at the hands of the State. We respectfully call upon you, as the Governor of the Commonwealth of Massachusetts, to end this suffering which was exacerbated today by your veto. It is humbly submitted that the prior and continuing conduct of the Commonwealth is manifestly shameful. The adage that the King can turn a blind eye and a deaf ear to the very harm which he has caused – through his own egregious conduct – is not tenable here. This is especially so when this conduct placed society's most vulnerable citizens (mentally ill) in harm's way. It is not surprising that harm was, in fact, occasioned upon one of these citizens. [9]

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[9] The disparity in treatment, as between the Davis and Messier families, cannot be justified premised upon the contention that payment of the Messier case settlement was more "reasonable" than would be the payment of the Davis jury verdict and judgments entered thereon. The Messier case, it must be recalled, was "settled" without a trial even being conducted which means that no trier of fact found any fact or made any determination concerning the reasonableness of "damages" sought through the settlement. Conversely, the Davis case was not only tried before a jury for one (1) month but the Court, in the aftermath of the jury verdict, actually entered a remittitur in the amount of $525,000. Davis, 264 F. 3d, at 96. Thus, not only did the Davis case result in a jury verdict – long held to be sacred in our judicial system and inherently "reasonable" in its own right - but the Court itself thereafter insured further reasonableness by reducing the jury verdict by a factor of $525,000. Id. Thus, two triers of fact insured that the judgment entered in the Davis case was "reasonable" in amount. The United States Court of Appeals for the First Circuit Court then concurred when it ruled that there was a "reasonable" relationship between the damages awarded and injuries sustained." Davis, 264 F. 3d, at 95, 117. The long and short of the matter is that the Messier indemnification, in the presence of a refusal to indemnify the Davis family, cannot be justified on the basis that the Messier settlement amount was more "reasonable" than the verdict and judgments in Davis. It simply was not. The disparity in treatment, as between the Davis and Messier families, likewise cannot be justified premised upon the contention that payment of the Messier settlement was necessitated because the conduct of the Messier case

The Davis family full well knows that money will never bring back their son, brother and cousin nor will it fully compensate their family for the torment visited upon Jason Davis on August 12, 1993. However, payment of the third amended judgment in Jason Davis' case will finally mark a place in time where the Commonwealth admits that it was both wrong and not above the law. It will also cement the proposition that the historic laws Jason Davis made will be neither in vain nor unappreciated by the very government which subjected him to the torment which he suffered on August 12, 1993. The conduct of the Commonwealth, from the date on which the Davis verdict was rendered to present date when Jason Davis' legislation was vetoed, demeans the gravity of the situation and the great benefit which the novel and constitutionally significant line of *Davis* reported cases mean to this Circuit and Nation. Worse yet, the Commonwealth's prior and continuing conduct demeans the acute physical and psychiatric torment suffered by Jason Davis at the hands of the convicted violent felons hired by the State.

I respectfully posit that it is time to end this sordid and protracted display of alarmingly immoral conduct on behalf of our State. The Davis family should not be left to wrangle in the legislature. You profess, with all due respect, to be civil rights minded individual, lawyer and Governor. I am still shocked at the treatment which the Davis case has received from our Government and you in particular. The Davis case presents "law and order" issues in the civil rights arena. I still wonder why our State Government has run from it for 21 years. "Spite" is the only logical conclusion. The Constitution now compels the Commonwealth to pay the Davis judgments but one would think morality alone would compel this same result. Citizens are called to task when they do wrong and our government should be no different. The bright light of day should shine upon the atrocities committed by Department of Mental Health so long ago. Until it does, the cries of our most vulnerable, voiceless and defenseless citizens and their families will go unheard in the wind. Our government, after all, lies at the root of this entire problem: it hired the convicted violent felons who brutalized Jason Davis, it knew better than to place these felons, and other short tempered individuals, in direct patient care roles but it did so anyway. That acute harm befell Jason Davis was a surprise to nobody.

Governor, I respectfully call upon you to provide the Davis family with the treatment accorded to the Messier family: payment of the entire third amended judgment in Davis[10] at once. If such an offer is not extended by you to the Davis family, within ten (10) business days next following the above date, it will assume that no such offer will be forthcoming. In that event the Davis family will forthwith again resort to the Courts for justice under the Federal Civil Rights Act. It will sue both you and the Attorney General, inter alia, for your violations of the Due Process and Equal Protection Clauses of the United States Constitution. Your conduct since 2008 has, with all due respect, been manifestly shameful as it relates to the Jason Davis case and his family. Your veto today is incomprehensible. **You advise the Davis family to engage in a course of conduct to sidestep the**

---

defendants was "more" evil than the Davis case defendants. As noted, no trier of fact made any factual findings as to any fact including "evilness" unlike the Davis case where the jury, as a precondition to imposing punitive damages, found that the liable defendants (as per the jury instructions) acted "maliciously", "wantonly" and that "their acts were prompted by ill will" toward Jason Davis. As the First Circuit held, "[t]here was sufficient evidence to support the jury's verdict that the appellants acted with 'evil motive' toward Davis." Davis, 264 F. 3d, at 115. There is no legal justification for the disparity in treatment as between the Messier and Davis families.

[10] The Third Amended Judgment as entered by the United States District Court for the District of Massachusetts in civil action number 96-11598-MEL.

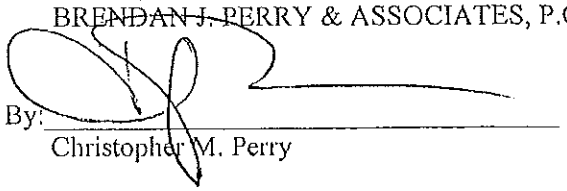
dictate of M.G.L. c. 258, §9 and, when they do, you use this very statute to veto their legislation?

Governor, you called the Messier case "awful", "horrible", "tragic" and "disgusting". I submit that the Davis case is too. I would ask that you help the Davis family. It is time that the Commonwealth of Massachusetts became fully accountable for what it did to Jason Davis on August 12, 1993. Improvement, after all, only comes through full accountability.

It would be nice to close the door on one of the ugliest chapters in the history of our State. A chapter, I respectfully submit, that should have been closed long ago.

I appreciate your attention to this matter and, if we cannot resolve it, I will file the Complaint in the United States District Court for the District of Massachusetts ten days hence.

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



By: _____
Christopher M. Perry

CMP/pmc
Enclosures

Certified Mail Return Receipt Requested No.: 7010 3090 002 1873 7040

Federal Express Priority No. 8017 4238 0396

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EXHIBIT 1

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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.

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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.

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 Ollis 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

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EXHIBIT 2

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THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT

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E. ABIM THOMAS
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June 11, 2008

Christopher M. Perry, Esq.
Brendan J. Perry & Associates, P.C.
95 Elm Street
P.O. Box 6938
Holliston, MA 01746

Dear Mr. Perry:

I write in response to your request for Governor Patrick's assistance in directing the Commonwealth to pay a punitive damages award that your now-deceased client, Jason Davis, obtained in a civil rights action filed against certain individuals who worked at Westborough State Hospital in 1996.

I have reviewed the materials that you provided and researched the applicable law. Section 9 of Chapter 258 of the General Laws governs the Commonwealth's ability to pay judgments arising out of intentional tort or civil rights actions filed against individual state employees. That statute prohibits the Commonwealth from indemnifying an employee for civil rights violations involving grossly negligent, willful or malicious conduct.

As you have explained, the jury in this case was instructed that it could award punitive damages against a defendant only if it found that the defendant had acted "maliciously or wantonly." In light of that instruction, Section 9 bars the Commonwealth from paying the punitive damages portion of the verdict. .

You have confirmed that the Commonwealth paid the compensatory damages portion of the verdict in 2002, totaling approximately $177,760, on behalf of a defendant whom the jury found did not engage in malicious conduct. That payment was

permitted by Section 9. Unfortunately, the additional payment that you now seek is not.

Sincerely,

Michael J. Pineault

EXHIBIT 3

26

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BRENDAN J. PERRY
CHRISTOPHER M. PERRY

TEL: (508) 429-2000
FAX: (508) 429-1405

June 20, 2008

Michael J. Pineault, Esquire
Chief Deputy Legal Counsel
Commonwealth of Massachusetts
Executive Department
State House
Room 271
Boston, Massachusetts 02133

Re: Jason Davis Case

Mr. Pineault:

The within is responsive ("Response") to your letter ("Letter") dated June 11, 2008.

I would again like to thank you and Kate Cook for the time you expended on the Davis matter.

Through your Letter you indicated that State Indemnification Statute[1] cannot be used as a vehicle for paying the Davis judgment. I agree. In sum and substance, the central legal conclusion in the Letter was that since the Davis Defendants were found to have acted "maliciously or wantonly" the State Indemnification Statute[2] forecloses payment under its provisions. Davis has always readily conceded that this statute does not provide a vehicle for payment. Moreover, Davis never sought the assistance of the Governor predicated upon the dictate of the State Indemnification Statute and does not now. It is one thing to suggest that payment cannot be made under the State Indemnification Statute. It is quite another to suggest that this statute actually precludes the State from paying the Davis judgment from another source. It does not and never has.

I would like to continue to confer with the Governor's office on the issues raised in Davis since, it is respectfully submitted, the contentions set forth in the Letter are actually irrelevant to the

[1] M.G.L. c. 258, §9 precludes indemnification if the conduct of the culprit is found to have been "grossly negligent, willful or malicious..."

[2] M.G.L. c. 258, §9

disposition of this matter. A rhetorical question is worth asking at the outset: It is illegal for the State to pay a judgment entered against several State Mental Health Care Workers, acting under color of State law authority, who pin a mentally ill inpatient to the floor so that one of their own can beat him bloody in front of a Charge Nurse who, all the while, actually looks on and encourages the onslaught?

I. INTRODUCTION

This Response demonstrates that: (i) The Governor and Massachusetts Legislature possess the legal authority to pay the entire Davis judgment notwithstanding the provisions of the State Indemnification Statute; (ii) Two State Attorneys General in the Davis case were of the opinion that indemnification was permissible under State Law notwithstanding the provisions within the State Indemnification Statute; and (iii) the State previously made a payment of more than $177,000 in the Davis case which payment was actually forbidden under the State Indemnification Statute. Any one of these grounds support the contention that payment of the Davis judgment may now be made.

II. THE LEGISLATURE AND THE GOVERNOR HAVE THE LEGAL AUTHORITY TO PAY JUDGMENTS WHICH CANNOT BE INDEMNIFIED UNDER THE STATE INDEMNIFICATION STATUTE

As recently as March, 2005 the Massachusetts Governor, Massachusetts Legislature and State Attorney General all agreed that judgments, which cannot be paid through the use of the State Indemnification Statute, may nonetheless still be paid by the State. All one need do to verify this contention is to read the 2005 Massachusetts Legislative Record concerning Dennis R. Smith, read the appended Boston Globe article and read the files maintained by the Suffolk Superior Court. See Bijan Mohammadipour v. Dennis R. Smith; (Suffolk Superior Court, 2005); Boston Globe, City & Region Section, Section B, March 26, 2005 at pages B1, B4. Simply put, the Governor, Massachusetts Legislature and the Attorney General all necessarily agreed in Mohammadipour that it is not "illegal" for the Commonwealth to pay a civil rights judgment even though it clearly cannot be paid under the State Indemnification Statute.

The appended Boston Globe article specifically notes that Dennis R. Smith "had deliberately violated [Plaintiff's] civil rights" as the verdict entered in that case also proves.[3] Further, the jury in the Mohammadipour case found the Defendant to have acted "willfully, deliberately, maliciously or with reckless disregard..."[4] in depriving Bijan Mohammadipour of his civil rights. These findings did not, however, preclude the Governor, Massachusetts Legislature or State Attorney General from joining together to introduce a special bill to pay the Mohammadipour judgment even though such judgment could not have been paid under the State Indemnification

[3] See Boston Globe, City & Region Section, Section B, March 26, 2005 at pages B1; See Bijan Mohammadipour v. Dennis R. Smith; (Suffolk Superior Court 2005)

[4] See Boston Globe, City & Region Section, Section B, March 26, 2005 at pages B1, B4; Massachusetts Legislative Record; Bijan Mohammadipour v. Dennis R. Smith; (Suffolk Superior Court, 2005).

Statute. From an indemnification standpoint the Mohammadipour and Davis cases are legally indistinguishable.

The Plaintiff in Mohammadipour was paid as a "result of a supplemental spending bill" approved by the Legislature which mentioned Dennis R. Smith by name.[5] This "process" is certainly not part of M.G.L. c. 258, § 9 and it clearly demonstrates that the Massachusetts Governor, Legislature and Attorney General have plenary power to pay Court judgments even if M.G.L. c. 258, § 9 cannot be employed. To suggest that the Governor, Legislature and Attorney General do not have this right would be to underestimate the breadth and scope of powers which the branches of Government enjoy. Archived records from the Settlement and Judgment Fund and scores of legislative records augment the contentions in this section.

III. THE COMMONWEALTH'S ACTIONS IN THE DAVIS CASE ALONE PROVE THAT IT IS ENTITLED TO INDEMNIFY NOTWITHSTANDING THE PROVISIONS OF THE STATE INDEMNIFICATION STATUTE

In the context of the Davis case two Attorneys General made settlement offers both before and after judgment entered upon the jury verdict. These two offers were obviously extended by the two Attorneys General, in their respective capacities as the lead law enforcement officers for the Commonwealth of Massachusetts, notwithstanding any principal espoused within M.G.L. c. 258, § 9. Moreover, these offers were also extended notwithstanding the fact that all of Davis' claims were clearly not subject to indemnification under the State Indemnification Statute. These settlement offers themselves dictate that the State Indemnification Statute does not exert a preclusive effect upon the Commonwealth's ability to pay the Davis judgment. How could it if they State is to retain the ability to have a "moral compass" ? The ambit of Section 9 of c. 258 cannot be extended to encompass an arena over which it has no application.

IV. A PRIOR PAYMENT BY THE COMMONWEALTH IN THE DAVIS CASE EVIDENCES THE FACT THAT PAYMENTS CAN BE MADE BY THE STATE NOTWITHSTANDING ANY OSTENSIBLY INCONSISTENT PROVISION IN THE STATE INDEMNIFICATION STATUTE

Within the denial Letter you offhandedly suggested that a prior partial payment to Davis of more than $177,000 was actually "permitted by Section 9..." of Chapter 258. If this contention were true it would, in turn, now dictate that this partial payment cannot be used as "precedent" to obtain additional payments still due under the Davis judgment. With all due respect, this contention is legally erroneous.

Payments under M.G.L. c. 258, § 9 are not "permitted" if the Defendant's conduct is found to have been "grossly negligent, willful or malicious" (emphasis added). The payment of more than $177,000 to Davis was made in relation to that portion of the jury verdict/judgment which pertained to Nicholas L. Tassone. The jury expressly found that Tassone did not stop others from utilizing excessive force upon Davis notwithstanding the fact that Tassone was present, observed the excessive force, was in position to stop it and had the time to do so.

[5] See Boston Globe, City & Region Section, Section B, March 26, 2005 at pages B1;

The claims asserted against Tassone obviously were intent based Federal Civil Rights claims. (See Fourth Amendment; 42 U.S.C. § 1983). Tassone unequivocally was found by the jury to have engaged in conduct which was at least "grossly negligent" and "willful" insofar as he intentionally failed to stop excessive force being committed in his presence even though he clearly had the time and ability to do so. This conduct was not, by any stretch of the imagination, "careless" conduct that unintentionally and mistakenly resulted in harm to Davis. Since Tassone's conduct was at least "grossly negligent" and "willful" it is beyond cavil that the State Indemnification Statute could not have been employed to pay the "Tassone" portion of the Davis judgment. This payment alone evidences the fact that the Commonwealth, within the context of the Davis matter itself, concluded that the State Indemnification Statute does not exert a preclusive effect on its ability to pay "intent" based civil rights verdicts. This "payment" is in accord with the payment in Mohammadipour.

V. INDEMNIFICATION ALTERNATIVES

The Commonwealth need not decide this matter on indemnification grounds or any ostensible hook in M.G.L. c. 258, § 9. The Commonwealth could unilaterally determine, in a money bill, that it is desirous of paying the Estate of Jason Davis a sum certain for his injuries. The legislative Bill, previously filed by Vincent Pedone, cast it as a "moral obligation". This Bill could be resurrected and amended to expressly state that it does not indemnify any person in relation to any claim or judgment. This language would take the Bill right out of the "indemnification" arena.

VI. ASSISTING THE EXECUTIVE BRANCH IN OTHER AREAS

I respect your decision regarding c. 258 but clearly do not agree with it. Our disagreement in this regard should not, however, foreclose my ability to assist the Commonwealth in other areas. I voted for the Governor and am an energetic supporter of his. I hope the Executive Branch lets me assist it because I have, it is humbly submitted, obtained specialized knowledge in a seemingly obscure area of Constitutional law which can clearly benefit all mentally ill inpatients housed in our DMH facilities. The Commonwealth needs much help in this area. I am willing to give it.

I would like to offer, on a pro bono basis, to assist the Commonwealth in eradicating the egregious conditions within the DMH which I learned about while litigating Davis and other cases. I talked about these egregious conditions during our conference on June 3, 2008. My offer in this regard is not an empty one. It is heartfelt. It must be recalled that supervisory claims were asserted in the Davis case stemming from continuous and systematic violence being exacted upon mentally ill inpatients at DMH facilities. There is much work to be done to help our most vulnerable citizens housed in DMH facilities. The issues which need to be rectified include those set forth in the two reported legal opinions which I provided to you in the Davis matter.

VII. CONCLUSION

If the State is desirous of paying the Davis' Judgment it is legally entitled to do so.

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

By: _____
Christopher M. Perry

CMP/pmc
Enclosure

Cc: Kate Cook, Esquire
Deputy Legal Counsel
Commonwealth of Massachusetts
Executive Department
State House
Room 271
Boston, Massachusetts 02133

City & Region

THE BOSTON GLOBE SATURDAY, MARCH 26, 2005

Measure sheltered ex-state official

Was defendant in rights lawsuit

By Jonathan Saltzman
GLOBE STAFF

Governor Mitt Romney and state lawmakers quietly approved a budget amendment last fall that saved a politically connected former state employee from having to pay $250,000 in damages for retaliating against a whistleblower.

A Suffolk County jury awarded $750,000 last June to Bijan Mohammadipour, a high-ranking state engineer who said he was humiliated and stripped of job duties after he pointed out hazardous conditions at an asbestos-filled state office building.

The state was ordered to cover two-thirds of the award, but the rest was to be paid by his former boss, Dennis R. Smith, who, the jury concluded, had deliberately violated Mohammadipour's civil rights.

But Smith, a prominent Plymouth Republican who has made regular contributions to GOP candidates and who heads the New England office of the federal General Services Administration, won't have to pay a penny because of a special law passed in September.

In a little-noticed provision included in a supplemental spending bill and mentioning Smith by name, Romney and the overwhelmingly Democratic Legislature provided that the state cover Smith's portion of the damages and his legal expenses, up to $1 million.

The Romney administration endorsed the measure because it believed that Smith "acted in good faith in carrying out his job responsibilities and . . . should not face a potentially catastrophic financial loss," Harry Grossman, general counsel for the Executive Office of Administration and Finance, said in a statement. If the state had not come to Smith's aid, Grossman added, it would have difficulty attracting and retaining talented managers.

Asked whether Smith's political ties had anything to do with it, a Romney spokeswoman declined to comment.

But Mohammadipour and his lawyer said the special provision flies in the face of a 1994 Massachusetts law passed specifically to protect whistleblowers.

"On the one hand, the Commonwealth is saying, 'We don't like people who retaliate against whistleblowers,'" said his lawyer, Eric Maxwell, who said he only learned this month about the measure's passage. "On the other hand, it's now protecting the guy who went after the whistleblower."

Smith, who has served as regional administrator of the General Services Administration since 2001 and makes $148,200 a year, did not return phone calls to his office yesterday.

Leslie Greer, a special assistant attorney general who defended Smith and the state in the civil lawsuit, said yesterday that the law was not intended to protect only Smith. She said state officials were worried about managers bolting from their jobs if they feared being held personally liable in such suits.

From 1993 to 2001, Smith served as superintendent of the Bureau of State Office Buildings under Governors William F. Weld and Paul Cellucci and Acting Governor Jane Swift. Prior to that, he directed the Boston regional office of the US Department of Education.

A former math teacher, Smith has made several contributions to Republican politicians on the state and federal level in recent years, including $1,000 to George W. Bush in his first run for president and then $2,000 in his reelection bid.

Mohammadipour sued the state and Smith in Suffolk Superior Court, citing violations of the state's whistleblower-protection statute and federal and state civil rights laws.

He testified at trial that Smith orchestrated a campaign to discredit him, excluded him from meetings, downgraded his employee evaluations, and barred him from the State House after Mohammadipour drew attention to potentially dangerous asbestos at the Saltonstall State Office Building in 1994. The building was closed in 1999, then gutted and renovated at a cost of $146 million.

A Newton psychologist hired by Mohammadipour testified that the Iranian-born Danvers engineer, now 52, suffered from panic attacks, depression, and symptoms similar to post-traumatic stress disorder as a result of the retaliation.

Greer countered at trial that Mohammadipour never proved he was punished for complaining about unsafe conditions or met legal standards required to prove that federal and state laws had been broken. Nonetheless, the jury sided with Mohammadipour.

One juror said afterward that she felt Mohammadipour had set an impressive example for other state employees. "I'm honored to have somebody like Bijan making sure that when we come into these buildings, we are safe," said juror Linda Nash.

Mohammadipour, the principal engineer for the Bureau of State Office Buildings, said this week that the special legislation covering Smith's damages could embolden other managers to retaliate against whistleblowers.

"How would you encourage anybody who's been involved with the Big Dig and they've seen wrongdoing to come out and blow the whistle if the entire government rewards the person who retaliates against the whistleblower?" he said.

Under Massachusetts tort law, the state can typically protect the personal finances of an individual sued for violating civil rights statutes while carrying out his or her job. But the law specifically excludes defendants who "acted in a grossly negligent, willful, or malicious manner."

The jury in Mohammadipour's suit concluded that Smith acted "willfully, deliberately, maliciously, or with reckless disregard" of Mohammadipour's free speech rights by retaliating against him, according to a question posed to the jury.

After the verdict, Greer said, she met with Romney administration officials and the attorney general's office about passing a special law to pick up Smith's portion of the award and legal expenses.

"The problem wasn't so much that they wanted to reimburse Smith," Greer said. "It was that if [his] stood out there and a former state manager loses his house because of personal liability, who's going to go work for the state?"

Greer said the reason Maxwell was drawing attention to the special law now was because she filed two motions in the past week seeking to have the jury award thrown out in Superior Court.

Fearing that possibility or a reversal of the verdict on appeal, Maxwell wanted to embarrass state officials to extract a big settlement, she said.

Maxwell called that ludicrous, saying that if state officials "weren't embarrassed by the verdict of this jury, then they will never be embarrassed by anything."

Jonathan Saltzman can be reached at jsaltzman@globe.com.

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EXHIBIT 4

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THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT

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BOSTON, MASSACHUSETTS 02133
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June 20, 2008

Christopher M. Perry, Esq.
Brendan J. Perry & Associates, P.C.
95 Elm Street
P.O. Box 6938
Holliston, MA 01746

Dear Mr. Perry:

I write in response to your letter dated June 20, 2008.

You are correct that the Legislature could pass legislation authorizing the Commonwealth to pay the punitive damages that the jury awarded against the individual defendants. Absent such legislation, Mass. Gen. L. ch. 258, § 9 precludes the Commonwealth from paying those damages.

I will forward your offer of *pro bono* assistance to the Department of Mental Health. Thank you for extending it.

Sincerely,

Michael J. Pineault

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Travel History

Date/Time	Activity	Location
7/14/2014 Monday		
2:18 pm	Delivered	MA
	Left at front door. Package delivered to recipient address - release authorized	
10:29 am	Delivery exception	SOUTH BOSTON, MA
	Customer not available or business closed	
7:46 am	On FedEx vehicle for delivery	SOUTH BOSTON, MA
5:56 am	At local FedEx facility	SOUTH BOSTON, MA
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DATE & TIME	STATUS OF ITEM	LOCATION
July 14, 2014 , 11:32 am	Delivered	BOSTON, MA 02133
Your item was delivered at 11:32 am on July 14, 2014 in BOSTON, MA 02133.		
July 14, 2014 , 8:39 am	Depart USPS Sort Facility	BOSTON, MA 02205
July 13, 2014 , 4:26 am	Processed through USPS Sort Facility	BOSTON, MA 02205
July 12, 2014 , 5:05 am	Depart USPS Sort Facility	BROCKTON, MA 02301
July 11, 2014 , 9:45 pm	Processed through USPS Sort Facility	BROCKTON, MA 02301
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Boston, MA 02133

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