
COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

BERKSHIRE, SS.

No. SJC-13495

COMMONWEALTH,
Appellee,

v.

QUASIM L. HASTINGS,
Defendant-Appellant.

ON APPEAL FROM AN ORDER OF THE BERKSHIRE SUPERIOR COURT

**BRIEF OF INTERVENOR MASSACHUSETTS PAROLE BOARD
IN SUPPORT OF APPELLANT**

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QUESTION PRESENTED

Whether the trial court may, pursuant to G.L. c. 261, §§ 27A-27G, authorize the use of funds for indigent individuals with mental disabilities to retain expert witnesses in connection with their parole hearings?

STATEMENT OF THE CASE

On March 12, 2004, the defendant, Quasim L. Hastings, pleaded guilty to one count of murder in the second degree. See G.L. c. 265, § 1; RA I:5.¹ He was sentenced to life in prison with the possibility of parole. Id. The circumstances surrounding that crime are not revealed by the instant record, nor are they relevant to this appeal.

On March 6, 2018, the Massachusetts Parole Board (“Parole Board” or “board”) referred the defendant to the Committee for Public Counsel Services (“CPCS”) for the provision of counsel in light of the board’s determination of the difficulty in communicating with the defendant and/or his participation on account of his mental illness and/or self-injurious behavior. RA I:49. Counsel for the defendant was appointed about one month later. Id. at 6. The defendant was denied parole after his initial hearing in 2019. See id. at 16.

¹ Citation format will be as follows: to the defendant’s brief as “D.B. [page number],” and to the defendant’s record appendices as “RA [Volume]:[page number].”

On June 6, 2022, the defendant filed an ex-parte motion for funds to retain a forensic psychologist to assist with his preparation for his upcoming parole hearing. RA I:16-20. This motion cited to Crowell v. Massachusetts Parole Bd., 477 Mass. 106 (2017), and G.L. c. 261, §§ 27A-27G. Id. at 16. A Superior Court judge (Mulqueen, J.) subsequently allowed the defendant's motion for funds. Id. at 7, 16.

The defendant filed a second ex-parte motion for funds on August 12, 2022. RA I:7, 25. In this motion, the defendant sought funds to retain a forensic social worker "to assist in preparation of a release plan for his upcoming parole hearing." Id. at 25. A different Superior Court judge (Wilkins, J.) endorsed the motion by asking the defendant to provide "authority for authorizing funds for use in a parole hearing." Id. at 7, 24. The defendant filed a memorandum of law in response to Judge Wilkins's endorsement. Id. at 7. On September 22, 2022, Judge Wilkins denied the defendant's motion for funds as follows:

The Court's authority under G.L. c. 261, [§] 27B is limited to 'any civil, criminal or juvenile proceeding or agreed appeal in any court.' A parole hearing is not 'in any court.' While the defendant may have a constitutional right to funds, the obligation to provide those funds resides in the Parole Board or the executive agency or with the legislature.

Id. at 28.

On October 24, 2022, the defendant filed a motion for reconsideration and an accompanying memorandum of law. RA I:7, 34. In a memorandum of decision dated November 15, 2022, Judge Wilkins denied the defendant's motion for

reconsideration for the reasons discussed in more detail immediately below, and he reported the propriety of his ruling to the Appeals Court pursuant to Mass. R. Civ. P. 64(a) and/or Mass. R. Crim. P. 34, resulting in this appeal.² Id. at 64-70.

In denying the motion for reconsideration, Judge Wilkins found that the judiciary’s authority to issue expert funds to indigent defendants is limited by G.L. c. 261, § 27B. RA I:65-66. On the Superior Court’s reading of that statute, it could authorize funds only for proceedings that take place “in any court.” Id. at 66. Thus, Judge Wilkins declined to authorize the funds for use in connection with the defendant’s parole hearing because it would not take place “in any court.” Id. at 66-68. Judge Wilkins noted that this Court recognized a “constitutionally-based exception to this rule” in Diatchenko v. District Attorney for the Suffolk Dist., 471 Mass. 12, 27 (2015) (“Diatchenko II”), by holding that juvenile homicide offenders sentenced to life in prison were entitled to funds for expert witnesses for use in their parole hearings. RA I:66-67. Judge Wilkins concluded, however, that because the

² Although this case is captioned as a criminal case, Judge Wilkins noted that Mass. R. Civ. P. 64(a) “appears to govern a report of the court’s ruling on the [m]otion in this case.” RA I:68. The court also reported its decision under Mass. R. Crim. P. 34, if the defendant so consented. See Mass. R. Crim. P. 34 (“If . . . with the consent of the defendant, after conviction of the defendant, a question of law arises which the trial judge determines is so important or doubtful as to require the decision of the Appeals Court, the judge may report the case so far as necessary to present the question of law arising therein”). The defendant consented on December 20, 2022. RA I:71.

defendant’s right to parole consideration here arose by statute rather than under the constitution, see G.L. c. 127, § 133A,³ the defendant’s relief rested exclusively with the Parole Board. Id. at 67. In the end, Judge Wilkins concluded that the defendant’s motion for funds must be denied “[s]olely as a matter of statutory constraint” in the absence of a constitutional rule of law to the contrary.⁴ Id. at 67-68.

This case entered in the Appeals Court on February 2, 2023. See Appeals Court Docket No. 2023-P-0105. On June 23, 2023, the defendant filed an application for Direct Appellate Review in this Court. See Supreme Judicial Court Docket No. DAR-29395. The Parole Board, which was not originally a party to this case, sought to intervene in the Appeals Court, and permission was granted on September 11, 2023. See Appeals Court Docket No. 2023-P-0105. On September 20, 2023, this Court allowed the defendant’s application for Direct Appellate

³ In relevant part, G.L. c. 127, § 133A provides: “Every prisoner who is serving a sentence for life in a correctional institution of the commonwealth . . . except prisoners serving a life sentence for murder in the first degree . . . shall be eligible for parole at the expiration of the minimum term fixed by the court under section 24 of chapter 279.”

⁴ Nevertheless, Judge Wilkins subsequently allowed the defendant’s motion for relief pending appeal on December 23, 2022, providing funds for his parole hearing. See Mass. R. App. P. 6(a) and (b); RA I:8.

Review. See Supreme Judicial Court Docket No. DAR-29395. The Parole Board, as intervenor, now submits this brief in support of the defendant-appellant.⁵

STATEMENT OF THE FACTS

In his memorandum of decision denying the defendant's motion for funds for a forensic social worker, Judge Wilkins set forth the following factual background, which the Parole Board does not challenge:

Mr. Hastings is indigent. He is eligible for parole consideration. He has received appointment of counsel in the parole proceeding because he requires the assistance of counsel due to mental illness or self-injurious behavior affecting his ability to communicate or participate in his parole proceedings. He is mentally disabled and has requested funds to ensure that he is not denied the opportunity for parole because of his disabilities. To support his request for parole he needs a comprehensive parole release plan that addresses his specific needs, including the need for intra-agency referrals, completion of psychosocial assessments and coordination of specialized residential care. A Social Services expert is necessary to prepare such a plan. Otherwise, the Parole Board may well lack the information needed to make a decision about his readiness to be in the community in light of his mental disability and psychological status, as well as to conclude

⁵ It is the Parole Board's understanding that the defendant's parole hearing was conducted in August of 2023, although that fact is not contained in the record. To the extent the Court believes that this matter is therefore moot, the Court should nevertheless decide the issue presented here. This Court has "discretion to review a case notwithstanding its mootness where the issue is of public importance and is capable of repetition yet evading review." Commonwealth v. Feliz, 486 Mass. 510, 513 (2020). That standard is met here. The outcome of this case will impact a substantial number of incarcerated individuals. Moreover, this case presents a question that has divided trial court judges. As Judge Wilkins noted, the issue of expert funding in connection with parole hearings "recurs frequently and requires appellate resolution." RA I:64. No appellate decision in Massachusetts has answered the question presented in this case.

that he has presented a post-release plan that minimizes the probability of reoffense and shows a reasonable probability that he will live without violating the law. A person with sufficient funds would spend his or her own money for such a purpose when seeking release on parole.

The Parole Board has no funding for expert evaluations. It lacks the administrative structure to pay a third-party vendor for such evaluations.

RA I:65.⁶

SUMMARY OF THE ARGUMENT

The trial court erred in denying the defendant's motion for postconviction funds for a forensic social worker to assist him with his parole hearing. The plain language of G.L. c. 261, § 27B permits the authorization of such funds in connection with a parole hearing. Moreover, even if § 27B is ambiguous on this point, the statute's purpose and the legislative intent behind its enactment and application demonstrate that such funds are permitted thereunder.

Because § 27B permits this Court to authorize the issuance of expert funds for parole hearings, the pertinent question is whether § 27B, and the related statutory scheme, apply to the circumstances presented in this case. Persons with disabilities are afforded significant protection under the law. As relevant here, a person with a

⁶ The Parole Board does not dispute the defendant's cognitive and behavioral limitations as outlined in the August 2, 2019 report by Dr. Robert T. Kinscherff, which is contained in the defendant's impounded record appendix; nor does the board dispute that these deficiencies render the defendant mentally impaired. See 29 C.F.R. § 1630.2(j)(3)(iii); RA II:6, 10-11.

disability should be provided a reasonable accommodation to ensure that they are not excluded from meaningfully participating in the parole process. That obligation derives from both state constitutional and statutory law.

The Parole Board's obligations to accommodate prisoners with disabilities were outlined by this Court in Crowell. This Court stated, albeit in dicta, that where the board is aware of a prisoner's mental disability that could impact his or her ability to prepare a plan of release, the board should reasonably modify its policy by considering whether particular requirements or services in a release plan would enable the prisoner to qualify for parole. An expert allows the board to accommodate the prisoner's disability by giving fair consideration to how the prisoner's cognitive limitations or mental illness could impact his or her chance at release, and whether these limitations could be mitigated in some way.

Consistent with these observations, § 27B authorizes expert funds for the defendant's forensic social worker. Individuals with disabilities may not be discriminated against during the parole process, and this Court has indicated that the board may have an affirmative obligation under federal and state law, when it is clearly aware of a prisoner's disability, to consider how their disabilities impact their chance to secure parole. These potential obligations come from the Massachusetts Constitution and applicable statutes. As a result, this Court should conclude that § 27B authorizes the requested funds. This Court has done so in the juvenile homicide

context, where the constitution required that those defendants receive meaningful access to the parole process. A similar analysis applies to the present case, particularly in light of the constitutional obligations at issue in both cases, and because the board's interpretation does not create a novel result or process.

ARGUMENT

EXPERT FUNDS ARE AVAILABLE TO INDIVIDUALS WITH MENTAL DISABILITIES IN CONNECTION WITH THEIR PAROLE HEARINGS UNDER G.L. c. 261, § 27B, GIVEN THE CONSTITUTIONAL AND STATUTORY PROTECTIONS AFFORDED TO INDIVIDUALS WITH MENTAL DISABILITIES AND THE PAROLE BOARD'S NEED TO REASONABLY ACCOMMODATE THEM.

The plain language of G.L. c. 261, § 27B permitted the trial court to authorize funds for a forensic social worker. To the extent the statutory language is ambiguous, extrinsic evidence of legislative intent supports the same result. The constitutional and statutory protections for the mentally disabled, and the concomitant obligations to reasonably accommodate them imposed on the board, all discussed in detail, *infra*, further support the conclusion that such funds are available under § 27B for the parole hearings of prisoners with mental disabilities.

A. Standard Of Review.

Questions of statutory interpretation are reviewed by this Court *de novo*. Commonwealth v. Wimer, 480 Mass. 1, 4 (2018). “A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its

plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result.” Sullivan v. Brookline, 435 Mass. 353, 360 (2001). “To determine the Legislature’s intent, [this Court] look[s] to the words of the statute, ‘construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished.’” Commonwealth v. Garvey, 477 Mass. 59, 61 (2017), quoting Boston Police Patrolmen’s Ass’n v. Boston, 435 Mass. 718, 720 (2002). This Court must “derive the words’ usual and accepted meaning from sources presumably known to the statute’s enactors, such as their use in other legal contexts and dictionary definitions.” Commonwealth v. Campbell, 415 Mass. 697, 700 (1993), quoting Commonwealth v. Zone Book, Inc., 372 Mass. 366, 369 (1977). Clear and unambiguous statutory language ends any inquiry into legislative intent. Commonwealth v. Wassilie, 482 Mass. 562, 573 (2019). “Where the statutory language is not conclusive, [this Court] may ‘turn to extrinsic sources, including the legislative history and other statutes, for assistance in [its] interpretation.’” Commonwealth v. Wynton W., 459 Mass. 745, 747 (2011), quoting Commonwealth v. Deberry, 441 Mass. 211, 215 (2004).

B. G.L. c. 261, § 27B Permits A Trial Court To Authorize Funds To An Indigent Defendant In Connection With A Parole Hearing.

The plain language of G.L. c. 261, § 27B authorizes the provision of funds for indigent prisoners in connection with their parole hearings. And, even if the Court were to find any ambiguity in the statutory text, existing evidence of the Legislature's intent confirms as much. Judge Wilkins mistakenly reached a contrary conclusion in denying the defendant's request for a forensic social worker.

1. *G.L. c. 261, § 27B unambiguously authorizes funds in connection with parole hearings.*

Section 27B contains two paragraphs which, when read together and harmoniously, permit the authorization of expert funds for prisoners with mental disabilities who are appearing before the board for their parole hearings. The first paragraph of § 27B provides, in pertinent part:

Upon or after commencing or answering to any civil, criminal or juvenile proceeding or appeal in any court, . . . any party may file with the clerk an affidavit of indigency and request for waiver, substitution or payment by the commonwealth of fees and costs upon a form prescribed by the chief justice of the supreme judicial court and in accordance with the standards set forth in sections twenty-seven C to twenty-seven F, inclusive, and sworn to under oath by the affiant.

Judge Wilkins determined that the phrase "in any court" curtailed his authority to issue funds in connection with parole hearings. RA I:66.

But § 27B contains another paragraph, not mentioned in the decision below. It states that "[a]n indigent party may subsequently file one or more supplementary

affidavits requesting the waiver, substitution or payment by the commonwealth of fees and costs not previously granted at any time while the case is still pending in the original court or elsewhere.” G.L. c. 261, § 27B, second para. (emphasis added).

Elementary rules of statutory interpretation command that the second paragraph of § 27B may not be discarded as mere surplusage. Selectmen of Topsfield v. State Racing Comm’n, 324 Mass. 309, 312-13 (1949) (phrases in statute must be “construed as consistent with each other so as to form a harmonious enactment”); Meunier’s Case, 319 Mass. 421, 423 (1946) (“None of [a statute’s] words is to be rejected as surplusage, and none is to be given undue emphasis. Each is to be accorded the appropriate weight and meaning which the context and an examination of the statute as a whole show the framers of the statute intended it to have”). Accordingly, the second paragraph must be read in context of the first paragraph to ensure that each provision of the statute is given effect.⁷ See Dacey v. Burgess, 491 Mass. 311, 316 (2023); Worcester v. College Hill Properties, LLC, 465 Mass. 134, 139 (2013).

⁷ A review of § 27B’s legislative history reveals that the second paragraph was inserted by the Legislature in 1980. See St. 1980, c. 539, § 6, available at: <https://archives.lib.state.ma.us/bitstream/id/287581/1980acts0539.pdf>. As far as the Parole Board is aware, this provision has never been cited or discussed in a Massachusetts case.

The plain language of § 27B’s second paragraph contains two operative provisions. First, the case must be “still pending.” Here, the defendant was sentenced to life in prison in 2004, with the possibility of parole in fifteen years. RA I:5. Because an integral part of the defendant’s sentence had not yet materialized at the time that he requested expert funds in 2022, his case remained pending. The defendant’s opportunity for parole consideration was part of the sentence that he received, and that opportunity remained pending when he requested the expert funds at issue here. Parole opportunity arises by statute, see G.L. c. 127, § 133A, and is considered “a component” of the original criminal sentence. Diatchenko II, 471 Mass. at 19 n.12. See United States v. Paskow, 11 F.3d 873, 879 (9th Cir. 1993) (noting, in context of ex-post facto analysis, that “parole eligibility is part of the sentence for the underlying offense”). Stated differently, a defendant’s opportunity to have a meaningful parole hearing “is part of the law annexed to the crime.”⁸ Fender v. Thompson, 883 F.2d 303, 305 (4th Cir. 1989) (citation omitted). Cf.

⁸ Fender and the cases cited therein address this principle in the context of assessing whether a statutory amendment that eliminated the prospect of parole eligibility after a conviction violated the Constitution’s ex-post facto clause. See Fender, 883 F.2d at 305-06 (collecting cases for proposition “that the retrospective application of a statute modifying or revoking parole eligibility would, [f]or prisoners who committed crimes before [the statute’s] enactment . . . substantially alter[] the consequences attached to a crime already completed, and therefore change[] the quantum of punishment” (citations and quotations omitted)).

Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (“the revocation of parole is not part of a criminal prosecution” (emphasis added)).

Furthermore, the meaning of “still pending” is informed by the modifying adverb “elsewhere” in the second operative provision of § 27B. See Commonwealth v. Wright, 88 Mass. App. Ct. 82, 87 (2015) (“a modifying clause is said to modify only that which immediately precedes it”). Supplemental funds may be authorized while the case remains pending “in the original court or elsewhere” under § 27B. “Elsewhere” is a broad, general term that naturally encompasses a wide swath of conduct or jurisdictional area.⁹ See State v. Novak, 338 N.W.2d 637, 639-40 (N.D. 1983) (operating under the influence statute applied to public and private property where related statute made motor vehicle laws applicable “upon highways and elsewhere throughout the state”); State v. Campbell, 756 N.W.2d 263, 270 (Minn. Ct. App. 2008) (statutory “phrase ‘recognized elsewhere in the law’ is admittedly

⁹ Often when the word “elsewhere” appears in statutes of the Commonwealth, the term relates to an outside jurisdiction. See, e.g., G.L. c. 90, § 6 (“a motor vehicle or trailer which by reason of its interstate operation is registered in this commonwealth and elsewhere may display the register number plates of this and any other state or country in which it is registered”); G.L. c. 90, § 10 (“no person shall operate on the ways of the commonwealth any motor vehicle, whether registered in this commonwealth or elsewhere, if the registrar shall have suspended or revoked any license to operate motor vehicles”); G.L. c. 266, § 89 (“Whoever, . . . by a pretended written certificate or diploma, or otherwise in writing, knowingly and falsely pretends to . . . be a graduate or to hold any degree, of a college or other educational institution of this commonwealth or elsewhere, . . . shall be punished . . .”).

broad”). Where the Legislature authorized funds under the first paragraph of § 27B to a “civil, criminal or juvenile proceeding or appeal in any court,” but provided for the availability of funds in the second paragraph “at any time while the case is still pending . . . elsewhere,” the second paragraph should be construed more broadly to authorize funds for expert witnesses in connection with parole hearings. If the Legislature intended the second paragraph to merely apply to the identical circumstances of the first paragraph, it could easily have said so. Beeler v. Downey, 387 Mass. 609, 616 (1982) (“where the Legislature has employed specific language in one paragraph, but not in another, the language should not be implied where it is not present”). Simply put, the use of “elsewhere” in the second paragraph of § 27B indicates that the Legislature did not intend to limit that provision to judicial proceedings, but also considered it applicable in other, related contexts, like the parole proceeding at issue here.

2. *Even if G.L. c. 261, § 27B is ambiguous, evidence of the Legislature’s intent confirms that the statute may generally apply to parole hearings.*

Should this Court determine that G.L. c. 261, § 27B is ambiguous, extrinsic sources confirm that the statute applies to parole hearings. “Where the words of the statute are ambiguous, [this Court will] strive to make it an effectual piece of legislation in harmony with common sense and sound reason and consistent with legislative intent.” Ryan v. Mary Ann Morse Healthcare Corp., 483 Mass. 612, 620

(2019), quoting Commonwealth v. Pon, 469 Mass. 296, 302 (2014). Further guiding this Court faced with an ambiguous statute is the “interrelationship of different statutes,” which are construed harmoniously “and not to undercut each other.” Ryan, 483 Mass. at 620 (quotation omitted).

The statutory scheme at issue here was designed to promote fairness and equality for indigent litigants, thereby supporting the proposition that the Legislature did not intend to strictly cabin the scheme’s applicability to pending judicial proceedings. General Laws c. 261, §§ 27A-27G are “statutory provisions generally authorizing the payment of public funds to cover costs and fees of indigent litigants.” Diatchenko II, 471 Mass. at 26. These statutes, also known as the Indigent Court Costs Law, “create[] a mechanism for indigent persons to obtain waivers or reductions of court fees and other costs incurred during litigation.” Reade v. Secretary of Commonwealth, 472 Mass. 573, 574 (2015). “The Indigent Court Costs Law exists to ‘ensur[e] that the doors of the Commonwealth’s courts will not be closed to the poor.’” Adjartey v. Central Div. of Housing Court Dep’t., 481 Mass. 830, 840 (2019), quoting Reade, 472 Mass. at 574. “The equitable and consistent application of this law is therefore critically important to safeguarding every Massachusetts litigant’s ability to ‘obtain right and justice freely, and without being obliged to purchase it.’” Adjartey, 481 Mass. at 840, quoting Art. 11 of the Massachusetts Declaration of Rights.

The primary source of insight into the Legislature’s intent surrounding the applicability of G.L. c. 261, §§ 27A-27G occurred in 2012, when the Legislature significantly expanded access to forensic and scientific testing and analysis in postconviction proceedings. See Commonwealth v. Wade, 467 Mass. 496, 497 (2014). Under G.L. c. 278A, § 10, the costs of analysis¹⁰ “shall be paid” where “the moving party meets the definition of indigency under said section 2 of said chapter 211D, as an extra fee or cost under sections 27A through 27G, inclusive, of chapter 261” (emphasis added). The Legislature therefore concluded that, in the postconviction proceeding context, “extra fees and costs” in G.L. c. 261, §§ 27A-27G encompasses costs in circumstances that may arise long after the appeals process has been exhausted.

This Court did not have the benefit of this additional insight into the Legislature's intent concerning the operation of G.L. c. 261, §§ 27A-27G, when it decided earlier cases involving the use of funds under those provisions. See Doe, Sex Offender Registry Bd. No. 89230 v. Sex Offender Registry Bd., 452 Mass. 764, 779 (2008) (Doe) (“the statutory scheme governing indigent fees and costs, G.L. c. 261, §§ 27A-27G, read as a whole, makes clear that it is concerned with fees and

¹⁰ “Analysis” is defined as “the process by which a forensic or scientific technique is applied to evidence or biological material to identify the perpetrator of a crime.” G.L. c. 278A, § 1.

costs that relate directly to the prosecution or defense of actions and appeals pending in a court”); Commonwealth v. Davis, 410 Mass. 680, 684 (1991) (Davis) (G.L. c. 261, § 27C provides for costs “aimed at a prosecution, defense, or appeal” (quotations omitted)). While those two decisions broadly refer to G.L. c. 261, §§ 27A-27G applying only in the context of pending judicial proceedings, the circumstances of each case were different than those presented here, and, as noted, subsequent legislative developments related to those cases actually support the Parole Board’s reading of the relevant statutory scheme.

Start with Davis. There, the defendant, convicted of murder, sought \$3,000 under G.L. c. 261, § 27C(4) (Rev. to 1990) to cover the cost of testing physical evidence in preparation for a new trial motion. Davis, 410 Mass. at 681-82. Section 27C(4) provided (and still provides) for costs to an indigent litigant that were “reasonably necessary to assure [him] as effective a prosecution, defense or appeal as he would have if he were financially able to pay.” Id. at 684. This Court dismissed the appeal because the defendant did not follow the procedural requirements of the gatekeeper statute, G.L. c. 278, § 33E. Id. at 683. Nevertheless, this Court noted, in dicta, that the defendant’s motion for costs was “not aimed at a prosecution, defense, or appeal” as required by § 27C(4), and that statute therefore did not provide funding in the context of a postconviction motion for new trial. Id. at 684 (quotations omitted). Nearly twenty years later, in Doe, the plaintiff was

denied \$3,000 under G.L. c. 261, § 27B for an expert witness for use before the Sex Offender Registry Board. Doe, 452 Mass. at 778. This Court upheld the denial of funds because “the statutory scheme governing indigent fees and costs, G.L. c. 261, §§ 27A-27G, read as a whole, makes clear that it is concerned with fees and costs that relate directly to the prosecution or defense of actions and appeals pending in a court.” Id. at 779. Citing the dicta from Davis, this Court further held that the focus of these provisions “is on fees and costs necessary or appropriate for conducting the actual proceeding pending in a court, not an underlying adjudicatory proceeding before an administrative agency.” Id.

In particular, Doe cited Davis for the proposition that the statutory funding scheme is not focused on proceedings before administrative agencies. Doe, 452 Mass. at 779. But the dicta in Davis did not involve a proceeding before an administrative agency; rather, the defendant there was seeking to file a new trial motion in the Superior Court. Davis, 410 Mass. at 684. And where Doe repeated the assertion several times that G.L. c. 261, §§ 27A-27G is limited to “pending” trials or appeals, the Legislature made clear that the statutory scheme applies to the postconviction setting, which was at issue in Davis.¹¹ Doe, 452 Mass. at 778-79.

¹¹ This Court amended Mass. R. Crim. P. 30(c)(5) in 2001 to allow a trial judge “to allow the defendant costs associated with the preparation and presentation of a motion [for new trial].” That provision, however, does not identify from where the costs are to be paid.

Therefore, a close examination of Doe and Davis reveals that they do not compel the conclusion that G.L. c. 261, §§ 27A-27G apply only to funding requests in pending judicial proceedings.

C. The Constitutional And Statutory Protections Afforded To Those With Disabilities In Massachusetts, And The Parole Board's Obligation To Reasonably Accommodate Them In Certain Instances, Confirm That Individuals With Mental Disabilities May Obtain Expert Funds For Use In Connection With Their Parole Hearings Under G.L. c. 261, § 27B.

Having established that the Indigent Court Costs Law permits the allowance of expert funds in the parole setting, an examination of the constitutional and statutory protections afforded to those with disabilities, as well as the Parole Board's obligation to reasonably accommodate them in certain circumstances, confirm that individuals with mental disabilities may obtain expert funds to assist with the development of a release plan for their parole hearings under G.L. c. 261, § 27B.

1. *Constitutional and statutory protections afforded to those with disabilities in Massachusetts.*

Massachusetts law protects people living with disabilities. The Massachusetts Equal Rights Act ("MERA"), G.L. c. 93, § 103, provides, in pertinent part: "(a) Any person within the commonwealth, regardless of handicap or age . . . shall, with reasonable accommodation, have the same rights as other persons . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property, including, but not limited to, the rights secured under Article [114] of the

Amendments to the Constitution.” Article 114 of the Amendments to the Massachusetts Constitution provides: “No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth.”¹² This Court has interpreted the word “handicap” synonymously with the word “disabled.” Adjartey, 481 Mass. at 847 n.24. MERA “creates a cause of action to enforce rights against handicap discrimination under art. 114 of the Amendments to the Massachusetts Constitution” Rodrigues v. Public Emp. Ret. Admin. Comm’n., 98 Mass. App. Ct. 514, 521 n.10 (2020).

In addition to these state authorities concerning the rights of people with disabilities, Title II of the Americans with Disabilities Act (“ADA”) specifies, in pertinent part, that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. See Cushing v. Packard, 30 F.4th 27, 45 (1st Cir. 2022) (en banc) (outlining relevant provision of ADA). The ADA defines an

¹² Art. 114 was enacted in 1980 and was modeled after a federal law known as the Rehabilitation Act, 29 U.S.C. § 794. Layne v. Superintendent, Mass. Corr. Inst., Cedar Junction, 406 Mass. 156, 159 (1989).

individual's disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))."¹³ 42 U.S.C. § 12102(1).

These laws all "prohibit the same conduct: disabled persons may not be 'excluded from participation in or be denied the benefits of' services, programs, or activities [of a public entity], and they may not 'be subjected to discrimination.'" Crowell, 477 Mass. at 111, quoting Shedlock v. Department of Correction, 442 Mass. 844, 854 (2004). And in Massachusetts, the Constitution and concomitant statutory provisions, notably, here, art. 114 and G.L. c. 93, § 103, "impose on State courts certain affirmative obligations to accommodate an individual with disabilities in order to provide her with access" to state proceedings. In re McDonough, 457 Mass. 512, 514 (2010) (noting principle in context of petition for relief filed by prospective witness in criminal prosecution, who had been found not competent to testify because a stroke had impaired her capacity to communicate orally). An individual's "substantive rights under MERA, art. 114, and the ADA are

¹³ "Major life activities" include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A). See McCauley v. Superintendent, Mass. Corr. Inst., Norfolk, 491 Mass. 571, 587 n.28 (2023).

significant.” Id. at 519-20. “It is therefore critically important that these laws be enforced in our courts, where every subject of the commonwealth has a right to obtain justice.” Adjartey, 481 Mass. at 847 (citation and emphasis omitted).

2. *The Parole Board’s role in assessing prisoners with mental disabilities.*

With respect to the Parole Board in particular, this Court has noted that the board’s actions or decisions should reflect that it “considered adequately the application of the ADA and [Massachusetts’s] own relevant constitutional and statutory provisions.” Crowell, 477 Mass. at 111. In Crowell, this Court reversed the allowance of the Parole Board’s motion to dismiss the plaintiff’s complaint and remanded for further development of the claim that he was discriminated against on account of his mental disability. Crowell, 477 Mass. at 107. Although this Court remanded the case on procedural grounds, it made several “observations” concerning the Parole Board’s role in assessing individuals with mental disabilities. Id. at 111.

Crowell explained that both the ADA and the parole statute, G.L. c. 127, § 130, “require the board to take some measures to accommodate prisoners with disabilities.” Crowell, 477 Mass. at 112. General Laws c. 127, § 130 permits the grant of parole if, “after consideration of a risk and needs assessment, . . . there is a reasonable probability that, if the prisoner is released with appropriate conditions

and community supervision, the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society.” Section 130 directs the board to consider, among other things, “whether risk reduction programs, made available through collaboration with criminal justice agencies would minimize the probability of the prisoner re-offending once released.” G.L. c. 127, § 130.

“Where the board is aware that a mental disability may affect a prisoner’s ability to prepare an appropriate release plan in advance of a parole hearing,” this Court stated in Crowell that “the board should make reasonable modifications to its policy, for example, by providing an expert or other assistance to help the prisoner identify appropriate postrelease programming.” Crowell, 477 Mass. at 112. The Parole Board “must be able to consider . . . the symptoms of a prisoner’s disability . . .” Id. at 113. Recognizing the importance of an expert’s evaluation in crafting an appropriate plan of release for a prisoner suffering from a mental disability, this Court further said:

with respect to the plaintiff’s limitations due to [traumatic brain injury] and how those limitations interact with the criteria for parole, it is difficult to see how the board could proceed without a professional evaluation of the [prisoner’s] condition and recommendation regarding a postrelease plan that might diminish the risk of recidivism.

Crowell, 477 Mass. at 114 n.16 (emphasis added). Indeed, Judge Wilkins found here that it is not feasible for the Parole Board to assess how a mentally disabled

prisoner's condition impacts his opportunity for release without an expert's evaluation. See RA I:65 (“To support [the defendant’s] request for parole[,] he needs a comprehensive parole release plan that addresses his specific needs, including the need for intra-agency referrals, completion of psychosocial assessments and coordination of specialized residential care. A Social Services expert is necessary to prepare such a plan.” (emphasis added)).

Crowell also reiterated that the Parole Board may not eschew its responsibility of protecting society from the release of a dangerous individual by making these accommodations. Crowell, 477 Mass. at 113. Indeed, “the board’s important role in protecting society from the early release of dangerous persons means that the board must be able to consider whether the symptoms of a prisoner’s disability mean that he or she has a heightened propensity to commit crime while released on parole.” Id. In the particular circumstances of Crowell, however, the record “show[ed] no consideration of how the plaintiff’s limitations affect[ed] his parole eligibility, whether these limitations could be mitigated with reasonable modifications, and whether other factors would nevertheless disqualify him from parole.”¹⁴ Id. at 114 (footnote omitted).

¹⁴ Here, as noted, the Parole Board referred the defendant to CPCS for appointment of counsel in 2018 on account of issues relating to the defendant’s mental health and/or self-injurious behavior. RA I:14-15. See RA I:52-53 ¶¶ 7-10 (describing process by which board refers prisoners to CPCS).

In short, this Court remarked that “once the board became aware that the plaintiff’s disability could potentially affect his ability to qualify for parole, it had the responsibility to determine whether reasonable modifications could enable the plaintiff to qualify, without changing the fundamental nature of parole.” Crowell, 477 Mass. at 113.

3. *Considering these protections and responsibilities, funds for expert witnesses must be made available for use in connection with the parole hearing for a prisoner with a mental disability.*

The rights and protections described above lend support to the conclusion that the board’s construction and understanding of G.L. c. 261, § 27B is not only consistent with its plain meaning, but also “appropriate” in the circumstances of this case. Cf. Diatchenko II, 471 Mass. at 27. The Parole Board’s position in that regard does not ask this Court to write on a blank slate. In Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 668, 674 (2013) (Diatchenko I), this Court held that the imposition of a life sentence without the possibility of parole for a juvenile convicted of murder in the first degree violated the Eighth Amendment of the United States Constitution and art. 26 of the Massachusetts Declaration of Rights. In order to cure the constitutional violation, the Court concluded that such offenders must be “be afforded a meaningful opportunity to be considered for parole suitability.” Id. at 674. In the wake of Diatchenko I, questions arose regarding how a juvenile homicide offender could obtain a “meaningful opportunity” for release on parole.

See Diatchenko II, 471 Mass. at 13-15. This Court addressed these questions in Diatchenko II.

In Diatchenko II, this Court considered, in part, a reported question concerning whether juvenile homicide offenders serving a life sentence were entitled to expert funds for use in their parole hearings to identify “the relationship between neurobiological immaturity and culpability in general as well as factors relating to each of their individual and family circumstances that may help both to explain past conduct and assess future risk of reoffending.” 471 Mass. at 25.

In answering this question, this Court began by acknowledging that, “[w]hile the assistance of a psychologist or other expert witness may not be necessary for every juvenile homicide offender serving a life sentence who seeks parole, in some cases such assistance may be crucial to the juvenile’s ability to obtain a meaningful chance of release” (emphasis added; footnote omitted)). Diatchenko II, 471 Mass. at 25. While this Court acknowledged “that G. L. c. 261, §§ 27A-27G . . . apply most directly to costs and fees relating to court proceedings, not proceedings before administrative or executive agencies like the board,” it nevertheless recognized that it was “appropriate” to construe those provisions to “authorize” a Superior Court judge to allow for the payment of certain fees in certain circumstances. Id. at 26-27 (emphasis added). Citing Doe and Davis, this Court reasoned that those cases “generally addressed the availability of costs for indigent defendants pursuing

nonconstitutionally mandated procedures” (footnote omitted)). Id. at 26. But because parole hearings for juvenile homicide offenders are constitutionally mandated, expert funds were required for their initial parole hearings in certain limited contexts.¹⁵ Id. at 27.

A similar analysis applies here. In order for the Parole Board “to help the prisoner identify appropriate postrelease programming” where it “is aware that a mental disability may affect a prisoner’s ability to prepare an appropriate release plan in advance of a parole hearing,” Crowell, 477 Mass. at 112, expert funds for the forensic social worker should have been made available – and were available – under G.L. c. 261, § 27B. This Court in Diatchenko II interpreted G.L. c. 261, §§ 27A-27G to cover parole hearings where a juvenile homicide defendant’s constitutional rights were at issue, and that same principle applies when, as in the circumstances presented here, the prisoner’s constitutional and statutory right to be free from disability discrimination in a parole hearing is at issue. See Crowell, 477 Mass. at 111-12. Crowell followed Diatchenko II and, for the first time, defined certain obligations of the Parole Board with respect to prisoners who are mentally disabled.

¹⁵ This Court also held that a juvenile homicide offender serving a life sentence was constitutionally entitled to appointed counsel to ensure a meaningful parole hearing in accordance with art. 26. Diatchenko II, 471 Mass. at 24. In the present case, the Parole Board takes no position on whether a prisoner with mental disabilities is entitled to counsel.

Diatchenko II did not purport to hold that the constitution necessarily limits how the language of G.L. c. 261, §§ 27A-27G may be construed or the precise contexts in which it may apply. Where this Court said that cases like Doe and Davis only “generally addressed the availability of costs for indigent defendants pursuing nonconstitutionally mandated procedures,” Diatchenko II, 471 Mass. at 26 (footnote omitted; emphasis added)), it left open the door for the funding statutes to be applied in other contexts where their statutory text and the constitution permit. See id. at 26-27 (“Moreover, even where a defendant’s right to a particular postconviction procedure is not constitutionally guaranteed, as is the case, for example, with motions for a new trial, this court has still required that indigent defendants nevertheless have meaningful access to whatever postconviction proceedings the State makes available”).

Trial judges already have discretion to authorize costs to guarantee indigent defendants meaningful access to postconviction proceedings under § 27B. See Commonwealth v. Conceicao, 388 Mass. 255, 261 (1983) (“the State need only ensure that indigent defendants have meaningful access to th[e] postconviction proceeding [of a motion for new trial]”); Mass. R. Crim. P. 30(c)(5). See also Shedlock, 442 Mass. at 854 (ADA and State constitution prohibit exclusion of participation by persons with disabilities in state programs). For prisoners with mental disabilities, meaningful access to the parole process may require professional

assistance with the development of a release plan tailored to their particular needs, such that their release “is not incompatible with the welfare of society.” See G.L. c. 127, § 130. Cf. Buckman v. Commissioner of Correction, 484 Mass. 14, 28-29 & n.24 (2020) (although prison superintendent was obligated to provide medical parole release plan, department had detailed access to prisoner’s mental health and medical records and “staff who are dedicated to developing individual reentry plans”). Simply stated, § 27B allows those who are mentally disabled to obtain an expert witness in their parole hearing, minimizing a risk that they will be unlawfully excluded from meaningful participation on the basis of their disability. As such, the trial court should have allowed the defendant’s motion for funds for a forensic social worker.

Moreover, the rule proposed herein is consistent with separation of powers principles. Whether the Parole Board decides to grant parole to any one individual, regardless of the nature of their disability, is solely a matter committed to the executive branch. See Rodriguez v. Massachusetts Parole Bd., 490 Mass. 596, 598 (2022). The judiciary’s role in these cases is generally “limited to ensuring that the board’s decision and proceedings are constitutional and consistent with any applicable statutes.” Id. See Commonwealth v. Amirault, 415 Mass. 112, 117 (1993) (a “judge cannot nullify the discretionary actions of the parole board”). “No prisoner is entitled to parole,” and the rule proposed in this case does not interfere

with that principle. Crowell, 477 Mass. at 112. It is simply based on an understanding of a particular statute, G.L. c. 261, § 27B, as permitting the court to authorize funds for expert assistance in a parole hearing for the mentally disabled. Nor does construing G.L. c. 261, § 27B to provide expert funding for prisoners with mental disabilities to use in their parole hearings infringe on the sentence imposed by the sentencing judge. See Commonwealth v. Cole, 468 Mass. 294, 299 (2014) (“The board, through its parole authority, has no power to extend a defendant’s imprisonment beyond the term imposed by the sentencing judge; it has the power only to permit a defendant to serve the balance of his term of imprisonment outside the prison walls . . .”). Cf. Diatchenko II, 471 Mass. at 19 n.12 (responding to dissent’s criticism that majority opinion extends parole hearing into part of sentencing process). The interpretation of G.L. c. 261, §§ 27A-27G proposed by the board, therefore, respects the relevant separation-of-powers boundaries, is consistent with this Court’s interpretation of the very same statute in Diatchenko II, and permits the board to take the steps recommended in Crowell.¹⁶

¹⁶ While Crowell suggested that the Parole Board’s responsibility to modify its policy exists once it becomes “aware that the . . . disability could potentially affect [the prisoner’s] ability to qualify for parole,” Crowell, 477 Mass. at 113, it is the prisoner who should “identify appropriate postrelease programming” for the board through expert or other assistance. Id. at 112.

Finally, in practical terms, the interpretation proposed by the Parole Board does not create a novel result or process. As identified in an affidavit from Attorney Mara Voukydis, the director of the CPCS's Parole Advocacy Unit, which was submitted by the defendant as part of the record below, RA I:54-55, ex-parte motions for expert funds for use in parole hearings have been allowed with some frequency in the Superior Court. See, e.g., Commonwealth v. Payne, Suffolk Superior Court Docket No. 0684CR10406, #114; Commonwealth v. Dones, Hampden County Superior Court Docket No. 0379CR00590, ##57-59; Commonwealth v. Dingle, Plymouth County Superior Court Docket No. 0183CR00523, #90; Commonwealth v. Bates, Worcester County Superior Court Docket No. 9185CR00986, #38.¹⁷ These decisions confirm that the approach urged by the board here is consistent with the actual (and for all that appears, workable) practice that at least some judges in the Superior Court have adopted.

In sum, parole-eligible individuals who demonstrate a qualifying mental disability are entitled “to a parole hearing and decision that considers reasonable modifications in light of [their] disability.” Crowell, 477 Mass. at 114 n.17. Where the Parole Board should consider an appropriate release plan for a prisoner with a disability, funds for a professionally-proposed plan – including appropriate

¹⁷ An appellate court “may take judicial notice of the docket entries and papers filed in separate cases” Home Depot v. Kardas, 81 Mass. App. Ct. 27, 28 (2011).

conditions for successful community re-entry – would assist the board in accommodating the disability. Id. at n.16. This Court should conclude that G.L. c. 261, §§ 27A-27G permits a Superior Court judge to authorize the allowance of funds for prisoners who are mentally disabled to use in connection with their parole hearings. That conclusion is consistent with the relevant statutory text, with this Court’s interpretation and construction of that text in analogous contexts, and with the relevant constitutional and statutory rights at issue.

CONCLUSION

For the foregoing reasons, this Court should conclude that G.L. c. 261, §§ 27A-27G permits trial judges to provide, in their discretion, funds for expert witnesses in connection with the parole hearings of prisoners with mental disabilities.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Andre A. Janiszewski, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure. The brief complies with the applicable length limit in Rule 20 because it contains 6,871 words in 14-point Times New Roman font (not including the portions of the brief excluded under Rule 20), as counted in Microsoft Word (version: Word 2016).

/s/ Andre A. Janiszewski
Andre A. Janiszewski
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2023, I filed with the Supreme Judicial Court and served the attached brief of the Massachusetts Parole Board in Commonwealth v. Hastings, No. SJC-13495, on Sharon Dehmand, Esq., counsel for the defendant, by electronic mail at s.dehmand@comcast.net.

/s/ Andre A. Janiszewski
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*** IMPOUNDED PER G.L. c. 261, §§ 27A-27G ***

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT
CRIMINAL NO. 0376CR00106

COMMONWEALTH

V.

QUASIM HASTINGS

MEMORANDUM OF DECISION AND REPORT TO THE APPEALS COURT
ON DEFENDANT'S MOTION FOR RECONSIDERATION
OF THE DENIAL OF THE DEFENDANT'S MOTION FOR FUNDS

The defendant, Quasim Hastings ("Hastings") pled guilty to second degree Murder on March 12, 2004. He was sentenced to life in the state prison. G.L. c. 127, § 133A. On August 12, 2022, Hastings filed an ex parte motion for funds for an expert in his upcoming parole hearing. After requesting and receiving a memorandum addressing the court's legal authority under G.L. c. 261, § 27B to grant funds for a parole hearing, the court endorsed that motion on September 22, 2022:

Endorsement on Memorandum of Law in Support of Quasim Hastings' Ex Parte Motion, (#39.0): Other action taken After review, denied. The Court's authority under G.L. c. 261, sec. 27B is limited to "any civil, criminal or juvenile proceeding or . . . appeal in any court." A parole hearing is not "in any court." While the defendant may have a constitutional right to funds, the obligation to provide those funds resides in the Parole Board or the executive agency or with the legislature. (Wilkins, J.)

On October 24, 2022, Hastings' counsel filed "Defendant's Ex-Parte Motion for Reconsideration of the Denial of the Defendant's Motion for Funds," ("Motion") requesting a hearing. The court held an ex parte hearing by zoom on November 4, 2022. After hearing, the Motion is DENIED. Because the legal issue recurs frequently and requires appellate resolution, the court REPORTS

MSA

ITS DENIAL TO THE APPEALS COURT UNDER MASS. R. CIV. P. and also, if the defendant consents, under Mass. R. Crim. P. 35.

FINDINGS OF FACT

Mr. Hastings is indigent. He is eligible for parole consideration. He has received appointment of counsel in the parole proceeding because he requires the assistance of counsel due to mental illness or self-injurious behavior affecting his ability to communicate or participate in his parole proceedings. He is mentally disabled and has requested funds to ensure that he is not denied the opportunity for parole because of his disabilities. To support his request for parole he needs a comprehensive parole release plan that addresses his specific needs, including the need for intra-agency referrals, completion of psychosocial assessments and coordination of specialized residential care. A Social Services expert is necessary to prepare such a plan. Otherwise, the Parole Board may well lack the information needed to make a decision about his readiness to be in the community in light of his mental disability and psychological status, as well as to conclude that he has presented a post-release plan that minimizes the probability of reoffense and shows a reasonable probability that he will live without violating the law. A person with sufficient funds would spend his or her own money for such a purpose when seeking release on parole.

The Parole Board has no funding for expert evaluations. It lacks the administrative structure to pay a third-party vendor for such evaluations.

DISCUSSION

Section 27B of G.L. c. 261 provides in relevant part:

Upon or after commencing or answering to any civil, criminal or juvenile proceeding or appeal **in any court**, including but not limited to civil actions, proceedings for divorce or separate support, summary and supplementary processes, and proceedings upon petitions to vacate, for review or, upon appeal in a criminal case, any party may file with the clerk

an affidavit of indigency and request for waiver, substitution or payment by the commonwealth of fees and costs upon a form prescribed by the chief justice of the supreme judicial court and in accordance with the standards set forth in sections twenty-seven C to twenty-seven F, inclusive, and sworn to under oath by the affiant. [Emphasis added].

The phrase “in any court” limits the authority to authorize payment by the Commonwealth. The Supreme Judicial Court “has held that G. L. c. 261, § 27C (4), provides ‘extra fees and costs,’ including funds for expert witnesses, [Note Omitted] only in the context of a ‘prosecution, defense or appeal.’” Diatchenko v. District Attorney for the Suffolk District, 471 Mass. 12, 26 (2015), citing Commonwealth v. Davis, 410 Mass. 680, 684 (1991). See also Commonwealth v. Arriaga, 438 Mass. 556, 569 (2003). In another administrative proceeding governed by due process requirements and addressing post-conviction consequences, the Supreme Judicial Court has also stated that G.L. c. 261, § 27A “refers solely to fees and costs connected to court proceedings.” Doe, Sex Offender Registry Bd. No. 89230 v. Sex Offender Registry Bd., 452 Mass. 764, 778-780 (2008). As the court noted in Diatchenko, 471 Mass. at 27, “these cases have generally addressed the availability of costs for indigent defendants pursuing nonconstitutionally mandated procedures.” The Defendant cites no general constitutional right to parole for adult offenders sentenced to life imprisonment, and the right to seek parole is statutory. G.L. c. 127, § 133A. Whatever the wisdom of the policy advocated by the Defendant in this case, this court is bound by the clear statutory language of G.L. c. 261, § 27B, as interpreted authoritatively by the Supreme Judicial Court.

The Supreme Judicial Court has recognized a constitutionally-based exception to this rule:

Because the postconviction proceeding at issue here, **a parole hearing for a juvenile homicide offender, is required in order to ensure that an offender's life sentence conforms to the proportionality requirements of art. 26**, the proceeding is not available solely at the discretion of the State. Rather, it is constitutionally mandated, and

as such, it requires certain protections not guaranteed in all postconviction procedures. It is appropriate, therefore, to construe G. L. c. 261, §§ 27A-27G, to authorize a Superior Court judge, upon motion of a parole-eligible, indigent juvenile homicide offender, to allow for the payment of fees to an expert witness to assist the offender in connection with his or her initial parole proceeding in certain limited contexts -- specifically, where it is shown that the juvenile offender requires an expert's assistance in order effectively to explain the effects of the individual's neurobiological immaturity and other personal circumstances at the time of the crime, and how this information relates to the individual's present capacity and future risk of reoffending. The judge may exercise discretion to do so when the judge concludes that the assistance of the expert is reasonably necessary to protect the juvenile homicide offender's meaningful opportunity for release.

Diatchenko, 471 Mass. at 27. The key rationale underlying this exception is the juvenile's right to a parole hearing arising out of a constitutional limitation on the court's authority to order a life sentence.

That is not the case here (assuming that the Supreme Judicial Court does not extend Diatchenko to defendants who just barely qualified as adults). In this case, the court imposed a life sentence for murder in the second degree. The defendant's right to parole consideration therefore arises by statute. G.L. c. 127, § 133A. That statute specifically delegates the authority over that parole proceeding and subsequent decision to "[t]he parole board." As the entity conducting the parole hearing, the Parole Board has the duty to accommodate the Defendant's disability. Crowell, 477 Mass. at 113 ("once the board became aware that the plaintiff's disability could potentially affect his ability to qualify for parole, it had the responsibility to determine whether reasonable modifications could enable the plaintiff to qualify, without changing the fundamental nature of parole."). This duty has nothing to do with the court's sentence or constitutional constraints upon sentencing. It affects the Parole Board at the time of exercising the purely executive function of considering whether to grant parole.

The fact that the Legislature and Parole Board had provided no statutory avenue for relief against the Executive does not require disregarding the plain language of G.L. s. 261, § 27B or

the controlling authority under that statute. Even if there is no statutory means of redress for violation of his state constitutional rights under Art. Amend. 114, Defendant may still have rights against the Parole Board and the Executive branch to access the funds he needs. See Layne v. Superintendent, Massachusetts Correctional Institution, Cedar Junction, 406 Mass. 156, 159-160 (1989). The court, however, has no authority to misread § 27B to accomplish that result.

Solely as a matter of statutory constraint, therefore, the court denies the request for funds under G.L. c. 261, § 27A-H. Without that statutory limitation, it would grant the Motion.

REPORT TO THE APPEALS COURT

Mass. R. Civ. P. 64(a) appears to govern a report of the court's ruling on the Motion in this case. This conclusion is not entirely clear, however.

Though captioned as a motion in a criminal case, the Motion does not address any proceeding in, or relief available, from the criminal court. The leading authority, Diatchenko, arose in a civil action commenced in the Supreme Judicial Court for Suffolk County. See also Crowell v. Mass. Parole Board, 477 Mass. 106, 112 (2017). That case followed a long line of cases holding that the grant of parole "lies exclusively within the province of the executive branch" and that denial of parole is reviewable in a civil action in the nature of certiorari. Id., 471 Mass. at 28-30. If parole were denied improperly, due to the failure to accommodate the Defendant's disabilities, review would be by certiorari. See Crowell, 477 Mass. at 112. Accordingly, the court reports the Denial of the Motion pursuant to Mass. R. Civ. P. 64(a) based upon the above findings of fact and, in the alternative finds that the order on the Motion so affects the merits of the controversy that the matter ought to be determined by the appeals court before any proceedings in this court.

Of course, the defendant could also consent to the report, in the event that Mass. R. Crim. P. 34 governs, or could appeal the denial pursuant to G.L. c. 261 § 27D. In either case, the question of the criminal or civil nature of the court's ruling would become moot.

The court believes that appellate resolution of this court's authority to authorize fees for experts in parole proceedings for adult defendants is highly desirable. It appears from Exhibit B to the Memorandum of Law in Support of the Defendant's Ex Parte Motion for Reconsideration (at ¶ 16) that at least 37 similar motions have been allowed, including an earlier motion in this very case. The Motion does not set forth the number of motions that have been denied, but, to the best of the court's recollection, the undersigned has denied one such motion in Middlesex County, which does not appear in the affidavit.¹ It is not surprising that there is no report of denials, because only allowances would result in paper trails of payments to experts.

REQUEST FOR RELIEF PENDING APPEAL

If the Defendant files a motion for relief pending appeal (Mass. R. App. 6(a), (b); G.L. c. 261, § 27D), the Court would seriously entertain a request to authorize the requested funds to be expended during the pendency of appeal. The Defendant's efforts for release on parole are highly time-sensitive, the loss of time in pursuit of parole is irreparable, and there is little burden on the Commonwealth, because the Treasury would almost certainly incur no net impact, where some agency of the Commonwealth likely has a duty to expend funds to accommodate the Defendant's disability during pursuit of his parole application.

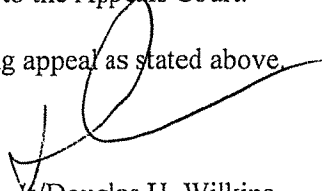
CONCLUSION

For the above reasons:

1. The court **DENIES** Defendant's Ex-Parte Motion for Reconsideration of the Denial of the Defendant's Motion for Funds.

¹ It is not clear whether a different judge subsequently granted that motion in Middlesex.

2. The Court **REPORTS** the correctness of its ruling to the Appeals Court.
3. The Court will entertain a motion for relief pending appeal as stated above.



s/Douglas H. Wilkins
Douglas H. Wilkins,
Justice of the Superior Court

Dated: November 15, 2022

ENTERED
THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT
NOV 15 2022
Deborah Stinson

Massachusetts General Laws Annotated

Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]

Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 11

Art. XI. Remedy by recourse to the laws; obtaining of right and justice freely, completely and promptly

[Currentness](#)

ART. XI. Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

[Notes of Decisions \(405\)](#)

M.G.L.A. Const. Pt. 1, Art. 11, MA CONST Pt. 1, Art. 11

Current through amendments approved February 1, 2023.

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Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Articles of Amendment

M.G.L.A. Const. Amend. Art. 114

Art. CXIV. Handicapped persons; discrimination

[Currentness](#)

ART. CXIV. No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth.

[Notes of Decisions \(42\)](#)

M.G.L.A. Const. Amend. Art. 114, MA CONST Amend. Art. 114
Current through amendments approved February 1, 2023.

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities (Refs & Annos)

42 U.S.C.A. § 12102

§ 12102. Definition of disability

Effective: January 1, 2009

[Currentness](#)

As used in this chapter:

(1) Disability

The term “disability” means, with respect to an individual--

- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability

The definition of “disability” in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph--

(I) the term “ordinary eyeglasses or contact lenses” means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term “low-vision devices” means devices that magnify, enhance, or otherwise augment a visual image.

CREDIT(S)

(Pub.L. 101-336, § 3, July 26, 1990, 104 Stat. 329; Pub.L. 110-325, § 4(a), Sept. 25, 2008, 122 Stat. 3555.)

Notes of Decisions (1887)

42 U.S.C.A. § 12102, 42 USCA § 12102

Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

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Unconstitutional or Preempted Limited on Constitutional Grounds by [Reickenbacker v. Foster](#), 5th Cir.(La.), Dec. 03, 2001

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities (Refs & Annos)
Subchapter II. Public Services (Refs & Annos)
Part A. Prohibition Against Discrimination and Other Generally Applicable Provisions

42 U.S.C.A. § 12132

§ 12132. Discrimination

Currentness

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

CREDIT(S)

(Pub.L. 101-336, Title II, § 202, July 26, 1990, 104 Stat. 337.)


Notes of Decisions (1200)

42 U.S.C.A. § 12132, 42 USCA § 12132

Current through P.L. 118-19. Some statute sections may be more current, see credits for details.

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Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XV. Regulation of Trade (Ch. 93-110h)
Chapter 93. Regulation of Trade and Certain Enterprises (Refs & Annos)

M.G.L.A. 93 § 103

§ 103. Equal rights; age and handicap; violations; remedies

[Currentness](#)

(a) Any person within the commonwealth, regardless of handicap or age as defined in chapter one hundred and fifty-one B, shall, with reasonable accommodation, have the same rights as other persons to make and enforce contracts, inherit, purchase, lease, sell, hold and convey real and personal property, sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, including, but not limited to, the rights secured under Article CXIV of the Amendments to the Constitution.

(b) Any person whose rights under the provisions of subsection (a) have been violated may commence a civil action for injunctive and other appropriate equitable relief, including, but not limited to, the award of compensatory and exemplary damages. Said civil action shall be instituted either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

(c) A violation of subsection (a) shall be established if, based upon the totality of circumstances, it is shown that any individual is denied any of the rights protected by subsection (a).

(d) An aggrieved person who prevails in an action authorized by subsection (b), in addition to other damages, shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be determined by the court.


Credits

Added by [St.1990, c. 156](#).

[Notes of Decisions \(65\)](#)

M.G.L.A. 93 § 103, MA ST 93 § 103

Current through Chapter 25 of the 2023 1st Annual Session. Some sections may be more current, see credits for details.

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Proposed Legislation

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XVIII. Prisons, Imprisonment, Paroles and Pardons (Ch. 124-127)

Chapter 127. Officers and Inmates of Penal and Reformatory Institutions. Paroles and Pardons (Refs & Annos)

M.G.L.A. 127 § 130

§ 130. Granting of parole permits; record of decision; jurisdiction of parole board over parolee; terms and conditions including payment of child support due under support order; certificate of termination of sentence; alcohol and drug free housing requirement

Effective: January 13, 2019

[Currentness](#)

No prisoner shall be granted a parole permit merely as a reward for good conduct. Permits shall be granted only if the board is of the opinion, after consideration of a risk and needs assessment, that there is a reasonable probability that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society. In making this determination, the parole board shall consider whether, during the period of incarceration, the prisoner has participated in available work opportunities and education or treatment programs and demonstrated good behavior. The board shall also consider whether risk reduction programs, made available through collaboration with criminal justice agencies would minimize the probability of the prisoner re-offending once released. The record of the board's decision shall contain a summary statement of the case indicating the reasons for the decision, including written certification that each board member voting on the issue of granting a parole permit has reviewed the entire criminal record of the applicant, as well as the number of members voting in favor of granting a parole permit and the number of members voting against granting a parole permit. Said record of decision shall become a public record and shall be available to the public except for such portion thereof which contains information upon which said decision was made which said information the board determines is actually necessary to keep confidential to protect the security of a criminal or civil investigation, to protect anyone from physical harm or to protect the source of any information; provided, however, that it was obtained under a promise of confidentiality. All such confidential information shall be segregated from the record of decision and shall not be available to the public. Said confidential information may remain secret only as long as publication may defeat the lawful purposes of this section for confidentiality hereunder, but no longer. A prisoner to whom a parole permit is granted shall be allowed to go upon parole outside prison walls and inclosure upon such terms and conditions as the parole board shall prescribe, but shall remain, while thus on parole, subject to the jurisdiction of such board until the expiration of the term of imprisonment to which he has been sentenced or until the date which has been determined by deductions from the maximum term of his sentence or sentences for good conduct and any further deductions for compliance credits granted pursuant to [section 130C](#), provided that such combined deductions shall not exceed 35 per cent of the term of imprisonment to which the prisoner has been sentenced, or until such earlier date as the board shall determine that it is in the public interest for such prisoner to be granted a certificate of termination of sentence. In every case, such terms and conditions shall include payment of any child support due under a support order, as defined in [section 1A of chapter 119A](#), including payment toward any arrearage of support that accrues or has accrued or compliance with any payment plan between the prisoner and the IV-D agency as set forth in chapter 119A, provided, however, that the board shall not revise, alter, amend or revoke any term or condition related to payment of child support unless the parole permit itself is revoked. If the terms and conditions prescribed by the board include residence in alcohol and drug free housing, the board shall refer and require that the prisoner to whom the permit is granted reside in alcohol and drug free housing that is certified under [section 18A of chapter 17](#) in order to satisfy those terms and conditions.

Credits

Added by St.1941, c. 690, § 2. Amended by St.1946, c. 543, § 2; St.1948, c. 450, § 2; St.1955, c. 770, § 67; St.1980, c. 155, § 2; St.1989, c. 268, § 2; St.1998, c. 64, § 180; St.2012, c. 192, § 36, eff. Aug. 2, 2012; St.2014, c. 165, § 157, eff. June 1, 2015; St.2018, c. 72, § 6, eff. Jan. 13, 2019.


[Notes of Decisions \(64\)](#)

M.G.L.A. 127 § 130, MA ST 127 § 130

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Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XVIII. Prisons, Imprisonment, Paroles and Pardons (Ch. 124-127)
Chapter 127. Officers and Inmates of Penal and Reformatory Institutions. Paroles and Pardons (Refs & Annos)

M.G.L.A. 127 § 133A

§ 133A. Eligibility for parole; notice and hearing; parole permits; revision of terms and conditions; revocation; arrest; right to counsel and funds for expert

Effective: April 13, 2018

[Currentness](#)

Every prisoner who is serving a sentence for life in a correctional institution of the commonwealth, except prisoners confined to the hospital at the Massachusetts Correctional Institution, Bridgewater, except prisoners serving a life sentence for murder in the first degree who had attained the age of 18 years at the time of the murder and except prisoners serving more than 1 life sentence arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction, shall be eligible for parole at the expiration of the minimum term fixed by the court under [section 24 of chapter 279](#). The parole board shall, within 60 days before the expiration of such minimum term, conduct a public hearing before the full membership unless a member of the board is determined to be unavailable as provided in this section. Notwithstanding the previous sentence, the board may postpone a hearing until 30 days before the expiration of such minimum term, if the interests of justice so require and upon publishing written findings of the necessity for such postponement. For the purposes of this section, the term unavailable shall mean that a board member has a conflict of interest to the extent that he cannot render a fair and impartial decision or that the appearance of a board member would be unduly burdensome because of illness, incapacitation, or other circumstance. Whether a member is unavailable for the purposes of this section shall be determined by the chair. Board members shall appear unless said chair determines them to be unavailable. Under no circumstances shall a parole hearing proceed pursuant to this section unless a majority of the board is present at the public hearing. Unless a board member is unavailable due to a conflict of interest, any board member who was not present at the public hearing shall review the record of the public hearing and shall vote in the matter.

Said board shall at least thirty days before such hearing notify in writing the attorney general, the district attorney in whose district sentence was imposed, the chief of police or head of the organized police department of the municipality in which the crime was committed and the victims of the crime for which sentence was imposed, and said officials and victims may appear in person or be represented or make written recommendations to the board, but failure of any or all of said officials to appear or make recommendations shall not delay the paroling procedure; provided, however, that no hearing shall take place until the parole board has certified in writing that it has complied with the notification requirements of this paragraph, a copy of which shall be included in the record of such proceeding; and provided further, that this paragraph shall also apply to any parole hearing for an applicant who was convicted of a crime listed in [clause \(i\) of subsection \(b\) of section 25 of chapter 279](#) and sentenced and committed to prison for 5 or more years for such crime and does not show that a pardon has been issued for the crime.

After such hearing the parole board may, by a vote of two-thirds of its members, grant to such prisoner a parole permit to be at liberty upon such terms and conditions as it may prescribe for the unexpired term of his sentence. If such permit is not granted, the parole board shall, at least once in each ensuing five year period, consider carefully and thoroughly the merits of

each such case on the question of releasing such prisoner on parole, and may, by a vote of two-thirds of its members, grant such parole permit.

Such terms and conditions may be revised, altered and amended, and may be revoked, by the parole board at any time. The violation by the holder of such permit or any of its terms or conditions, or of any law of the commonwealth, may render such permit void, and thereupon, or if such permit has been revoked, the parole board may order his arrest and his return to prison, in accordance with the provisions of [section one hundred and forty-nine](#).

If a prisoner is indigent and is serving a life sentence for an offense that was committed before the prisoner reached 18 years of age, the prisoner shall have the right to have appointed counsel at the parole hearing and shall have the right to funds for experts pursuant to chapter 261.

Credits

Added by St.1955, c. 770, § 70. Amended by St.1956, c. 731, § 9; St.1965, c. 766, § 1; St.1973, c. 278; St.1982, c. 108, § 2; St.1996, c. 43; St.1997, c. 217, § 1; St.2000, c. 159, § 230; St.2012, c. 192, §§ 37 to 39, eff. Aug. 2, 2012 St.2014, c. 189, § 3, eff. July 25, 2014; St.2018, c. 69, § 98, eff. April 13, 2018.

[Notes of Decisions \(26\)](#)

M.G.L.A. 127 § 133A, MA ST 127 § 133A

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Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title VI. Costs and Fees (Ch. 261-262)
Chapter 261. Costs in Civil Actions (Refs & Annos)

M.G.L.A. 261 § 27B

§ 27B. Affidavit of indigency; waiver, substitution or state payment of fees or costs; supplementary affidavits

[Currentness](#)

Upon or after commencing or answering to any civil, criminal or juvenile proceeding or appeal in any court, including but not limited to civil actions, proceedings for divorce or separate support, summary and supplementary processes, and proceedings upon petitions to vacate, for review or, upon appeal in a criminal case, any party may file with the clerk an affidavit of indigency and request for waiver, substitution or payment by the commonwealth of fees and costs upon a form prescribed by the chief justice of the supreme judicial court and in accordance with the standards set forth in [sections twenty-seven C to twenty-seven F](#), inclusive, and sworn to under oath by the affiant.

An indigent party may subsequently file one or more supplementary affidavits requesting the waiver, substitution or payment by the commonwealth of fees and costs not previously granted at any time while the case is still pending in the original court or elsewhere.

Credits

Added by St.1974, c. 694, § 3. Amended by St.1977, c. 142; St.1978, c. 478, § 268; St.1979, c. 344, § 15; St.1980, c. 539, § 6.

[Notes of Decisions \(16\)](#)

M.G.L.A. 261 § 27B, MA ST 261 § 27B

Current through Chapter 25 of the 2023 1st Annual Session. Some sections may be more current, see credits for details.

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title VI. Costs and Fees (Ch. 261-262)
Chapter 261. Costs in Civil Actions (Refs & Annos)

M.G.L.A. 261 § 27C

§ 27C. Granting requests for waiver, substitution or state payment

Effective: July 1, 2011

[Currentness](#)

(1) If the affidavit is filed with the complaint or other paper initiating the proceeding, the clerk shall receive the complaint or other paper for filing and proceed as if all regular filing fees had been paid. Such filing shall be conditional until either (a) the affidavit is granted or (b) if the affidavit is denied, the payment of necessary and regular filing fees is made within five days of the denial of the affidavit, or such further time as the court may allow, or within five days of the denial of any appeal relating to the affidavit, whichever is later.

(2) If the affidavit appears regular and complete on its face and indicates that the affiant is indigent, as defined in [section twenty-seven A](#), and requests a waiver, substitution or payment by the commonwealth, of normal fees and costs, the clerk shall grant such request forthwith without hearing and without the necessity of appearance of any party or counsel.

(3) If the affidavit does not appear to satisfy the condition of paragraph (2), the clerk or register shall forthwith bring the affidavit to the attention of the justice or judge, as the case may be. The justice or judge may grant such request forthwith or may have the clerk or register notify the affiant that a hearing will be held on the affidavit within five days. If it appears at the hearing that there is a serious question as to the affiant's indigency, as defined in [section twenty-seven A](#), then before making a finding of indigency, the court shall consider the following facts with respect to the applicant as of the time of hearing, in the immediate past and with respect to the immediate future; his age, education, training, physical and mental ability and number of dependents; gross and net income; regular and extraordinary expense, if any; assets and liabilities; whether or not he is a recipient of public assistance and for what purposes; and any other facts which are relevant to the applicant's ability to pay court costs.

(4) If the court makes a finding of indigency, it shall not deny any request with respect to normal fees and costs, and it shall not deny any request with respect to extra fees and costs if it finds the document, service or object is reasonably necessary to assure the applicant as effective a prosecution, defense or appeal as he would have if he were financially able to pay. The court shall not deny any request without first holding a hearing thereon; and if there is an appeal pursuant to [section twenty-seven D](#) following a denial, the court shall, within three days, set forth its written findings and reasons justifying such denial, which document shall be part of the record on appeal.

(5) The clerk of each court shall conspicuously post in the part of his office open to the public a notice informing the public in plain language of the availability of waiver, substitution or payment by the commonwealth of fees and costs for indigent persons.

(6) If the court makes a finding that the applicant could reasonably pay part of the normal fees and costs or extra fees and costs, the court may assess a reasonable partial payment towards said fees or costs and a date by which same is to be paid by the applicant. The court shall not order partial payment without first holding a hearing thereon, and if there is an appeal pursuant

to [section 27D](#) following such an order, the court shall, within 3 days, set forth its written findings and reasons justifying the order of partial payment, which document shall be part of the record on appeal.

Credits

Added by St.1974, c. 694, § 3. Amended by St.1978, c. 478, § 269; St.1980, c. 539, § 7; [St.2011, c. 68, § 120, eff. July 1, 2011](#).

[Notes of Decisions \(69\)](#)

M.G.L.A. 261 § 27C, MA ST 261 § 27C

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Massachusetts General Laws Annotated
Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)
Title II. Proceedings in Criminal Cases (Ch. 275-280)
Chapter 278A. Post Conviction Access to Forensic and Scientific Analysis (Refs & Annos)

M.G.L.A. 278A § 10

§ 10. Cost of analysis

Effective: May 17, 2012

[Currentness](#)

The costs of the analysis shall be paid:

(1) by the moving party if the moving party does not meet the definition of indigency under [section 2 of chapter 211D](#) and has sufficient means to make such payment;

(2) if the moving party meets the definition of indigency under said section 2 of said chapter 211D, as an extra fee or cost under [sections 27A through 27G, inclusive, of chapter 261](#); or

(3) if a person is indigent, but has the ability to pay a reduced fee as defined under said section 2 of said chapter 211D, by the moving party to the maximum feasible amount possible given the financial resources of the moving party as the court deems equitable.

Credits

Added by [St.2012, c. 38, eff. May 17, 2012](#).

M.G.L.A. 278A § 10, MA ST 278A § 10

Current through Chapter 25 of the 2023 1st Annual Session. Some sections may be more current, see credits for details.