Pro Se

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NEW YORK HIGH COURT EXPANDS DOCS' LIABILITY FOR INMATE ASSAULTS

In a rare victory for inmates, New York State's highest court, the Court of Appeals, held that the State may be liable when one inmate assaults another if it failed to provide adequate supervision at the time of the assault. In previous cases, courts have held that the State could be liable in such cases only if it had specific knowledge that an assault was likely to occur. The new case thus expands the circumstances under which the State may be liable in "inmate-on-inmate" assault cases.

The case, Sanchez v. State of New York, 99N.Y.2d. 247(2002) arose from an incident that occurred in 1995 at Elmira Correctional Facility. Inmate Sanchez was working as a teacher in the facility program building when he was assaulted by two unidentified inmates. When the assault occurred there was only one officer stationed on the floor to supervise approximately 100 inmates and he was busy assisting inmates returning video equipment and was unable to see the area where the assault occurred. Sanchez sued the State, alleging that the officer's negligent supervision had contributed to the assault.

When is an assault foreseeable?

The question at issue in Sanchez was whether the assault had been foreseeable. Under traditional principles of tort law, the law of negligence, a defendant can only be held liable for an accident if the accident was "foreseeable" – that is, if the defendant knew or should have known that circumstances under his control created an unreasonable risk that the accident would occur.

Prior to Sanchez New York State courts had generally held that there were only three circumstances in which the state could have "foreseen" and inmate-on inmate assault:

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Also Inside . . .

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if, 1) the State knew the victim was at risk and failed to take reasonable steps to protect him or her; 2) the State knew the assailant was dangerous, but failed to protect other inmates from him or her; or, 3) the State had both notice that an assault was likely to occur and an opportunity to intervene to protect the victim, but failed to do so. The courts had consistently rejected claims alleging that mere absence of supervision made an assault foreseeable. *See, e.g.*, Colon v. State of New York, 620 N.Y.S.2d 1015 (3rd Dep't 1994).

Inmate Sanchez had testified at trial that he was completely surprised by the assault. He knew of no enemies at Elmira and had no reason to believe he was going to be attacked. Consequently, both the lower court and the appellate court dismissed his claim. Since there was no evidence in the record to show that the State either knew that an assault on Sanchez was likely to occur, that he was at a heightened risk of attack, or that his assailants were particularly dangerous, the appellate court held, there was no basis for holding the State liable for failing to take additional measures to prevent the assault. Sanchez v. State, 732 N.Y.S.2d 471 (3rd Dep't 2001).

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What the State Should Have Known

The Court of Appeals reversed the appellate court decision. The Court of Appeals held that the appellate court's focus on what the State *actually knew* was too narrow; it prevented consideration of another factor important to the question of foreseeability – that is, what the State *should have known*, based both on its expertise and prior experience in running prisons and its own policies and practices designed to address the risks of inmate assaults.

The Court noted that Sanchez had presented evidence at trial which suggested the State knew that the type of supervision provided by the correction officer at the time of the attack would increase the risks of inmate assaults. For instance, Sanchez had presented the correction officer's Individual Security Post Description, which required that the officer "remain alert and monitor inmates' behavior...to prevent or stop assaults...on inmates." He also presented the State Commission of Corrections Minimum Standards for County Jails, which state that staff must maintain "active supervision"of prisoners outside of their housing area and define "active supervision" as "the uninterrupted ability to communicate orally with and respond to each prisoner...[and] the ability...to immediately respond to emergency situations." 9 NYCRR 7003.2, 7003.4.

Sanchez had also presented the testimony of an expert in prison management. The expert testified that the assault occurred during "go-back," a time notorious for inmate assaults and argued that the physical layout of the area where the assault occurred made it impossible for one officer to maintain either the "active supervision" called for in the Commission on Corrections Standards or the kind of active visual monitoring of inmates called for in DOCS' Security Post Description. He also testified that when the assault occurred, the correction officer was 60 feet away from Sanchez, in the storeroom, where he was unable to see the assault occur, much less prevent it.

The Court found that these factors raised a legitimate question as to whether it was foreseeable that lax supervision by the correction created a heightened risk that Sanchez would be assaulted, despite the absence of information indicating the presence of a specific threat. The Court noted that the State had written standards of supervision which required the presence of an officer who could maintain constant contact with inmates, monitor their behavior and provide "active supervision."

Since the very purpose of those standards was to prevent inmate assaults, the Court concluded, the State could not argue that when those standards were not met, an assault was unforeseeable.

What Does Sanchez Mean?

The Sanchez decision does not change the underlying law of negligence. To win a claim against the State in an inmate assault case you must still present evidence to show that the assault was foreseeable. In addition, the Sanchez Court emphasized that its holding did not mean that the State must provide "unremitting surveillance in all circumstances," nor did it make the State an insurer of inmate safety: "When persons with dangerous criminal propensities are held in close quarters" the Court noted, "inevitably there will be some risk of unpreventable assault." The mere occurrence of an assault does not itself establish that the State was negligent. However, Sanchez does break the rigid view of foreseeability that has prevailed in the lower courts and opens the door to claims that the State can be found negligent based upon its failure to provide adequate supervision. Since such claims had been all but ruled out under prior law, Sanchez represents a broad expansion of the law.

MIXED MESSAGES: COMMENTS FROM THE PLS EXECUTIVE DIRECTOR

Buried in Governor Pataki's proposed budget is a parole initiative which has been received with mostly positive reviews by prison advocates. The Governor proposes to accelerate the release dates of 1,300 people serving time for non-violent felonies. He would do this through the expanded use of the earned eligibility and merit time programs.

This is a welcome initiative by the Governor, which seems to reverse the trend of the past decade which focused on lengthening sentences, even for those serving non-violent felonies. But it's too early to suggest that New York will follow the trends in other states to reexamine all sentencing policies with an eye toward a more rational, individualized approach to sentencing and parole release.

Many of the same people who might be released early by the Governor's plan, and many others, would also benefit from repeal of the second felony offender law. Although often lumped in with the debate on the Rockefeller Drug laws, the second felony offender laws force judges to give prison sentences to those who would be better served by alternatives to prison, such as community based drug treatment programs. The Governor, so far, has not supported a roll back of mandatory sentencing which would gives judges the authority to set sentences based on the record and circumstances of the person before them.

The Governor has also called for the total elimination of parole, even for non-violent felony offenses. This would eliminate any individualized review of a persons rehabilitative efforts by the Parole Board.

There is another message regarding prison sentences not mentioned in Governor' Pataki's budget. This agenda has been carried out by the Division of Parole over the past eight years. People serving time for violent felonies are finding it harder and harder to get parole, despite service of long sentences and proof of their rehabilitation.

Of the nearly 67,000 inmates now in New York's prisons, 12,611 are facing a maximum sentence of life. Eighty-nine are serving life without parole. For those convicted of violent felonies, the odds of getting out at a first Board appearance, despite an excellent institutional record, continues to drop.

Of 162 violent offenders up for parole in 1991-92, 39 were granted release. Of the 232 considered in 2001-02, only 10 were released, according to the Division of Parole. "That's a significant drop" according to Tom Green, a Division spokesman. "The parole board [is] looking at people who commit violent felonies with a more jaundiced eye."

Even those people who have served the maximum term of their determinate sentence may not get released under a questionable interpretation of the Penal Law supported by DOCS and Parole. Those agencies argued

unsuccessfully recently that DOCS has the authority to hold someone past the maximum term of their determinate sentence, without a violation of the terms of post-release supervision. This has led the Advisory Committees of the Courts, the criminal defense bar and other prison advocates to back an amendment to the Penal Law which says no one can be held beyond the maximum term of a determinate sentence without a finding of a violation.

These are contradictory messages from the Governor, the courts and criminal justice agencies. The message is that differences between individual people is less important, particularly at initial Board appearances. Individual accomplishments and efforts will not be recognized

It's time again for a comprehensive examination of the sentencing policies and practices in this state. A common sense approach will save the state money, redirect lives and free up resources to support cost effective drug treatment programs and proven alternatives to incarceration. It will also restore money to the state education budget, mistakenly siphoned off to support prison expansion.

Tom Terrizzi is Executive Director of Prisoners' Legal Services of New York.

NEWS AND BRIEFS

Federal Court

First Amendment : Inspection of Inmate Mail

Duamutef v. Hollins, 297 F.3d 108 (2nd Cir. 2002)

The plaintiff, an inmate, had a disciplinary history involving prohibited organizational activities including charges that he had printed unauthorized fliers for inmates and organized inmate demonstrations. In 1995, DOCS officials opened his general, non–privileged correspondence and found a publication containing the phrase, "Blood in the Streets" in the title. Concerned that the publication had a "provocative tone," the officials authorized a 30-day watch of plaintiff's mail. It was later determined that the publication was an economics book entitled "Blood in the Streets: Investment Profits in a World Gone Mad."

Plaintiff sued, arguing that the watch on his mail was in retaliation for an earlier grievance he had filed. The District Court dismissed his suit. On appeal, the Second Circuit Court of Appeals held that a liberal reading of his complaint suggested that the plaintiff was making a First Amendment complaint for censorship of his mail. On analysis, however, the Court concluded there was no violation of the First Amendment under these facts. The Court noted that the Supreme Court has upheld broad restrictions on inmates' rights to correspond with prisoners in other institutions (Turner v. Safely, 482 U.S. 78 [1987]) as well as regulations prohibiting inmates from receiving publications deemed detrimental to prison security. Thornburgh v. Abbott, 490 U.S. 401 (1989). Likewise, the Second Circuit has held that "a valid, rational connection between the decision to impose a watch on [a prisoner's] mail and the desire to ensure the good of the prison and the rehabilitation of the prisoners" will generally be sufficient to uphold the validity of a watch on mail.

The Court concluded that, in this case, the officials' actions were rationally related to legitimate penological interests. Despite the fact that the book turned out to be a harmless economics text, its inflammatory title, combined with plaintiff's prior disciplinary history of prohibited organizational activities, was enough reason to impose the mail watch. The Court held: "[I]t is generally sufficient for a prison official to base a security decision on the title alone. Considering the limited resources of prison systems and the intense pressure to prevent security problems, we cannot expect more of corrections personnel in most circumstances."

Eighth Amendment : Restricted Diet

Phelps v. Kapnolas, 308 F.3d 180 (2nd Cir. 2002)

Plaintiff Phelps was an inmate at Southport Correctional Facility when he was placed on a restricted diet for fourteen days. The restricted diet consisted of raw cabbage and "loaf" – a bread like substance containing ground vegetables. Phelps filed a lawsuit in federal court alleging that the diet "did not contain sufficient calories, vitamins, or nutrients to maintain his physical or mental health and that, as a result of the diet, he "lost over thirty pounds, suffered severe abdominal pain, and severe emotional distress." He alleged that prison officials' actions in putting him on the diet violated his right under the Eighth Amendment to be free from "cruel and unusual" punishment.

To state a claim under the Eighth Amendment, a prisoner's complaint must plead both an *objective* element – that the prison officials' transgressions were "sufficiently serious" to "violate contemporary standards of decency," – and a *subjective* element – that the officials acted, or failed to act with a "sufficiently culpable state of mind." *(i.e.*, that they "knew or should have known" that the conditions posed an unreasonable risk of harm to the inmate, and that they acted with "deliberate indifference" to the inmate's health or safety. Farmer v. Brennan, 511 U.S. at 834, 114 S.Ct. 1970 (1994)

Here, the lower court held that the plaintiff's allegations, even if true, did not state a claim under the Eighth Amendment. The lower court found that the plaintiff's complaint contained "no allegation that any defendant, through the imposition of the restricted diet for fourteen days, acting with deliberate indifference, placed Phelps at substantial risk of serious harm [the subjective element] or that Phelps's weight loss or abdominal pains constituted serious harm rising to the level of an Eighth Amendment violation [the objective element]."

The Court of Appeals reversed. Regarding the subjective element of the claim, the Court noted that thecomplaint specifically alleged that the defendants "knew or recklessly disregarded that the restricted diet . . . was nutritionally inadequate" and knew their actions "were likely to inflict pain and suffering and extreme emotional distress." The Court held that, regardless of the truth of these allegations, the complaint had sufficiently pleaded them to allow the plaintiff to go to trial. Consequently, the Court found the lower court erred in dismissing the claim.

Eighth Amendment : Second Hand Smoke Exposure

Davis v. State of New York 316 F.3d 93 (2nd Cir. 2002)

In 1993, the Supreme Court held that an inmate may state a claim for an Eighth Amendment violation based on prison officials' deliberate indifference to his exposure to second hand smoke. Helling v. McKinney, 509 U.S. 25, 113 S.Ct. 2475 (1993) The Court held that in order to prevail in such a claim, the inmate must show that he is likely to suffer serious harm as a result of unreasonably high levels of smoke and that prison officials acted with deliberate indifference to his health.

Plaintiff Davis was an inmate at Attica Correctional Facility. He filed a federal lawsuit against prison officials claiming that he had been exposed to unreasonably high levels of second hand smoke and that prison officials had been deliberately indifferent to his plight. He sought both damages and a permanent injunction. The lower court dismissed his complaint, concluding that his complaint failed to raise a genuine issue of fact as to whether he had been exposed to unreasonable levels of second-hand smoke.

The Court of Appeals reversed. The Court noted that Davis's complaint alleged that since his arrival at Attica in 1993, he had always been housed in areas where the majority of inmates were smokers; that, in the honor block area, he was surrounded by seven inmates who smoked so much that "the smell of smoke fills the air

and enter[s] my cell in a manner as though I myself was smoking"; that the smoke caused dizziness, difficulty breathing, coughing, watery eyes, blackouts and respiratory problems and that it threatened both his current and future health; that the ventilation in his cell was inadequate; and that he had been forbidden from opening the windows to his cell by correction officials who were indifferent to his plight. The court found that these allegations were more than sufficient to state a claim under Helling, and it concluded that the lower court erred in dismissing plaintiff's suit without allowing it to go to trial.

Prison Litigation Reform Act : "Three Strikes" Rule

Malik v. McGinnis, 293 F.3d 559 (2nd Cir. 2002)

One of the provisions of the Prisoners' Litigation Reform Act of 1995 (the "PLRA") states that an inmate shall not be allowed to bring an action in federal court *in forma pauperis*, that is, without first paying the filing fee, if he has, "on 3 or more prior occasions, while incarcerated...brought an action or appeal in a court of the United States that was dismissed on the grounds that it (was) frivolous, malicious or fail(ed) to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). This has been dubbed the "three strike rule."

Plaintiff Malik, while at Attica Correctional Facility, commenced an action in federal district court alleging that officials at Southport Correctional Facility had violated his Eighth Amendment right to be free from cruel and unusual punishment by restricting his diet for thirty-five days. He also moved to file his complaint *in forma pauperis*. The District Court found that Malik had had at least four cases previously dismissed for "three strike" reasons and, therefore, denied Malik's motion. In addition, the Court ruled, Malik did not fall within the exception to the three strikes rule for inmates in "imminent danger of serious physical injury" because his allegation concerned his treatment at Southport, and the complaint was not brought until Malik was at Attica. Consequently, the Court held, the complaint would be dismissed unless Malik payed the full filing fee. Malik appealed.

On appeal, Malik argued that the "imminent danger" exception to the "three strikes" rule only required him to show that he was in danger of serious physical harm at the time the incident occurred, not at the time the complaint was filed. Since the restricted diet had placed him in "imminent danger of serious physical harm," at Southport, he argued, the exception should apply.

The Court of Appeals rejected this argument. The Court found that although section 1915(g) allows a prisoner to escape the "three strikes" rule if he is under "imminent danger of serious physical injury", Congress's use of the present tense in the statute implied that the danger must exist at the time the complaint is filed. Further, by using the word "imminent" in the statute, Congress indicated that it intended to include a safety valve for the "three strikes rule" to prevent *impending* harms, not harms that had already occurred.

State Court : Disciplinary Hearings

Confidential Information: Harmless Error

Matter of Perez v. Goord, 750 N.Y.S.2d 906 (3rd Dep't 2002)

Petitioner was found guilty of violating prison disciplinary rules prohibiting violent conduct, possession of a weapon, refusing a direct order and assault on an inmate. The charges arose from an allegation that he had used a razor to slash another inmate's face and refused a correction officer's orders to desist. When he was returned to his cell he was observed removing an article from his mouth that appeared similar to the weapon used in the attack and flushing it down the toilet. The charges were affirmed based on the misbehavior

report, an unusual incident report and certain confidential information.

Petitioner challenged the hearing on the grounds that the hearing officer failed to notify him that confidential information was going to be used in the hearing and for failing to state a reason that the information should be kept confidential. Generally, when confidential information is used in a prison disciplinary hearing, the hearing officer must inform the inmate that it is being used and state why it cannot be disclosed. *See*, Matter of Boyd v. Coughlin, 481 N.Y.S.2d 769 (3rd Dep't 1984).

Here, however, the court found that the failure of the hearing officer to do so was harmless because the evidence produced at the hearing was sufficient to sustain the charges even without consideration of the confidential information. Moreover, the confidential information related to a collateral incident and not to the petitioner's guilt on the charges themselves. Under these circumstances, the Court found, there was "no basis to disturb the determination."

Confidential Information: Witnesses

Matter of Moore v. Miller, 749 N.Y.S.2d 312 (3rd Dep't 2002)

Petitioner was found guilty of violating prison disciplinary rules regarding assaults on other inmates. The misbehavior report stated that three confidential witnesses had witnessed petitioner assault another inmate on the basketball courts.

Petitioner appealed, asserting that the Hearing Officer did not assess the reliability of the confidential informants. The Court disagreed. The Court found that the Hearing Officer had personally interviewed one of the informants and conducted a detailed interview with the officer who received the information from the other two informants. This gave him sufficient basis to determine the credibility and reliability of the informants. The court concluded that the confidential information, in addition to the misbehavior report and the other testimony, provided substantial evidence of the petitioner's guilt.

The Court also rejected petitioner's claim that he was denied witnesses. The Court found that one of the witnesses petitioner had called had refused to attend the hearing because he claimed not to have seen the incident. The other witnesses called by the petitioner were correction officers, and the hearing officer had concluded that their testimony was irrelevant to the incident in question. Under those circumstances, the Court held, there was no reason to conclude that petitioner was improperly denied witnesses.

Drug Testing: Urinalysis Testing

Matter of Quinones v. Selsky, 747 N.Y.S.2d 64 (3rd Dep't 2002)

Petitioner was found guilty of refusing to obey a direct order and violating urinalysis testing procedures on the grounds that he failed to provide a urine sample within three hours after being requested to do so. Petitioner appealed, arguing that the charges should be dismissed because he spoke and understood only Spanish and he was never told, in Spanish, of the consequences of his failure to provide the urine sample. The Supreme Court rejected this claim. The Court found that the record reflected that petitioner was provided with an interpreter from the time he was ordered to provide the sample up until the time of his disciplinary hearing and that he repeatedly affirmed that he understood the proceedings.

After the Supreme Court's decision, the petitioner made a motion to reopen his case based upon allegedly newly discovered evidence. In his motion he argued that his inability to produce the urine sample was not his fault: it was caused by a condition known as "social phobia," one symptom of which can be the inability to urinate when others are present. In support of this motion he submitted medical records from a psychiatric center documenting

that he had actually been diagnosed and treated for social phobia. The Supreme Court nevertheless denied his motion on procedural grounds.

The Appellate Division affirmed holding that a motion to reopen must be based on newly discovered evidence. The medical documents submitted by petitioner predated the return date of his Article 78 proceeding. Thus, the facts contained in those documents were known to him at the time of his original proceeding and could have been presented by him at that time. Under those circumstances, the Court held, a Court should not reopen a case that has already been litigated.

Employee Assistance : Harmless Error

Matter of Brown v. Goord, 750 N.Y.S.2d 800 (3rd Dep't 2002)

Petitioner challenged the results of a disciplinary hearing in which he was found guilty of violent conduct, assaulting staff and interfering with an employee. Petitioner claimed that he was denied adequate employee assistance because his assistant refused to provide him with various documents, including medical records and photographs describing the injuries he allegedly inflicted upon the staff. The court rejected his claim. The court found that the petitioner had failed to establish that he suffered any prejudice from any alleged deficiencies on the part of his assistant. The Court believed both the employee assistant and the hearing officer were wrong to assert that the medical records and photographs of the correction officers were irrelevant to the charges. The Court nevertheless concluded that petitioner had suffered no injury from their error because similar information regarding the correction officer's injuries was contained in other documents that were in the record. Accordingly, the Court concluded, the hearing officer's error was harmless.

Practice Pointer: *Often, in challenging a disciplinary hearing, it is necessary to show how any alleged procedural defect in the conduct of the hearing worked against your ability to defend yourself. Otherwise, the court may find that the error was "harmless" and is not grounds for reversing the result.*

Exhaustion of Administrative Remedies

Matter of Dagnone v. Goord, 748 N.Y.S.2d 707 (3rd Dep't 2002)

Petitioner was found guilty in a Tier III hearing of violating a number of disciplinary rules, including attempted escape. The hearing was reversed on administrative appeal because the tape recording was incomplete and only partly audible. A re-hearing was held and petitioner was again found guilty. He filed a second administrative appeal. While the second appeal was pending, he filed an Article 78 proceeding arguing that it had been improper for DOCS to order the second hearing and asserting that the charges should have been reversed after his initial appeal. DOCS' moved to dismiss the case, arguing that the petitioner had failed to exhaust his administrative remedies.

The court agreed with DOCS. By arguing that the second hearing had been improperly brought, the Article 78 proceeding was, in essence, seeking judicial review of that hearing. The administrative appeal of the hearing was still pending, however. Consequently, the Article 78 proceeding was commenced prematurely and was appropriately dismissed.

Practice Pointer: *You must exhaust administrative remedies prior to bringing an Article 78 proceeding.*

Notice: Possession of Contraband

Matter of Edwards v. Goord, 748 N.Y.S.2d 707 (3rd Dep't 2002)

Petitioner was found guilty of violating prison disciplinary rules regarding the possession of a weapon after a search of his cell revealed a metal shank hidden in the binding of a book.

Although he admitted at the hearing that the book was his, petitioner argued that he did not have exclusive access to his cell and had no idea that a weapon was hidden in the binding. The Court held that these assertions merely created an issue of credibility; the hearing officer was free to resolve the issue against the petitioner. The Court noted, a reasonable inference of possession may arise from the fact that the weapon was found in an area within the inmate's control.

Petitioner also argued that the hearing should be reversed on the ground that the misbehavior report had failed to provide him with adequate notice of the charged misbehavior because the author of the report had failed to sign it or note the date of its preparation. The Court rejected this argument too, noting that the missing information did appear in the body of the report and, the reporting officer testified at the hearing and was available for questioning. Under those circumstances, the Court held, petitioner had failed to demonstrate any prejudice as a result of the lack of information in the misbehavior report.

Statute of Limitations

Matter of Lott v. Goord, 745 N.Y.S. 2d 119 (3rd Dep't 2002)

Petitioner was found guilty of violating certain disciplinary rules. The decision was administratively affirmed on February 9, 2001. The Statute of Limitations for commencing an Article 78 proceeding is four months from the date on which you receive notice that the decision you wish to challenge has been administratively affirmed. In this case, the petitioner had until, approximately, June 11, 2001, to file an Article 78 proceeding, *i.e.*, four months from February 9, 2001 (June 9, 2001, fell on a Saturday.) (He may have had a few additional days, because the statute runs from the date you receive *notice* of the affirmance, not the date on which the decision is actually affirmed.)

On May 25, 2001, petitioner attempted to commence an Article 78 proceeding challenging the hearing. He submitted his papers, including a proposed order to show cause, a verified petition and an application for poor person's relief, to the Supreme Court in Ulster County. Approximately 10 days later, on June 4, 2001, the Court Clerk informed him that his papers were being returned because he had used an outdated form for his poor person's application. When returning all the papers, the Court Clerk enclosed what was intended to be the proper form. However, when petitioner resubmitted this form with all his other papers, it was discovered that the Court Clerk had sent him the same out-of-date form that he had submitted with his original papers. On June 20, 2001, the Court Clerk provided him with the correct form for poor person's relief. By then, however, the Statute of Limitations had passed. Petitioner submitted the completed form and the proceeding was commenced on July 5, 2001, the date on which it was received by the Court Clerk and an index number was assigned. The Supreme Court then dismissed the petition on the ground that the Statute of Limitations had passed.

The Appellate Division reversed the decision of the lower court. The Court held: "Upon review of the particular circumstances of this case, assuming that the commencement of this proceeding was untimely, we deem it appropriate to correct any mistakes that contributed to the finding of untimeliness." The Court reinstated the petition "in the interest of justice."

Substantial Evidence

Matter of Rushing v. Goord, 749 N.Y.S.2d 314 (3rd Dep't 2002)

Petitioner, an inmate, suffered two fractured ribs and a split lip after an altercation with a correction officer. The correction officer wrote a misbehavior report charging petitioner with assault on staff. According to the misbehavior report, petitioner had punched the officer in the face without provocation. At the

disciplinary hearing, petitioner disputed this version of the events. He testified that the correction officer had assaulted him because of the nature of his crime. The hearing officer refused to credit petitioner's version of events and found him guilty. Petitioner appealed.

The Third Department affirmed the hearing officer's findings: "The disparity between petitioner's description of the incident and that of the correction officer's raised an issue of credibility for resolution by the Hearing Officer. As substantial evidence supports the determination under review, it will not be disturbed."

Practice Pointer: *It is not enough, in a challenge to a disciplinary hearing, to show that the hearing officer did not believe your side of the story. You must show either that the hearing officer's conclusions were not supported by "substantial evidence" or that there was a serious procedural error in the conduct of the hearing which prevented you from having a fair chance to present your side of the story.*

Matter of Whitfield v. Fischer, 739 N.Y.S.2d 720 (2nd Dep't 2002)

Petitioner was charged with violating a prison disciplinary rule prohibiting the possession of stolen property. The charge arose from his failure to return three books he had borrowed from the prison library. Upon receiving the misbehavior report he immediately returned the books. At his disciplinary hearing he claimed to be unaware that they were overdue. The hearing officer found that because he had borrowed books from the library in the past it could be "assumed" that he knew the rules and was therefore guilty of intentionally keeping the books.

The Appellate Division reversed. The Court held that there was no evidence presented to support the hearing officer's assumption that petitioner had intended to keep the books. The only evidence presented at the hearing was that petitioner had unintentionally retained the books beyond their due date and that he immediately returned them upon being informed that they were overdue. That evidence, the Court concluded, "does not give rise to an inference of any intentional wrongdoing with regard to the books and can be distinguished from cases in which inmates intentionally damage library books or otherwise evidence an intent to prevent their recovery."

Vagueness of Rules

Matter of Mitchell v. Fischer 752 N.Y.S.2d 97 (2nd Dep't 2002)

Petitioner was found guilty of violating Rule 107.10 (7 NYCRR 270.2[B][8][i]) after throwing water at a correction officer. Rule 107.10 states that an inmate shall not physically or verbally obstruct or interfere with an employee at any time. Petitioner argued that this rule was unconstitutionally vague and failed to provide him with adequate notice of precisely what conduct was prohibited. The Court found that a rule is not unconstitutionally vague if it "informs a reasonable person of the nature of the offense prohibited and what is required of him or her." The test is whether the statute provides an adequate warning as applied in a specific situation. "A vagueness challenge" the Court held, "must be addressed to the facts before the court, and a court cannot consider the possibility that a statute may be vague as applied in other hypothetical situations."

In this case, the petitioner supported his argument with hypothetical facts. The Court dismissed his hypotheticals and held that a reasonable person would understand that throwing water at a correction officer would violate the rule because it would be likely to physically interfere with the officer's duties. As applied to these facts, therefore, the Court held the rule was not unconstitutionally vague: It provided petitioner with adequate notice that the conduct in which he engaged was prohibited.

Matter of Hughes v. Goord, 750 N.Y.S.2d 798 (3rd Dep't 2002)

Petitioner was found guilty of possessing contraband after officers discovered a list of three officers, with their social security numbers, in his cell. He asserted that he had obtained the information through a Freedom of Information Law request while serving as a legal assistant assisting another inmate with an assault claim against the officers. In court, he argued that the rule against possession of contraband was unconstitutionally vague. The rule defines "contraband" as "any article that is not authorized by the superintendent."

The Court rejected petitioner's claims. "We find this language sufficient to have placed petitioner on notice that he would be in violation by retaining personal information regarding correction officers at least two years after he could have held any reasonable belief that he was authorized to possess it. Petitioner's professed ignorance of this rule does not dictate a contrary result as applied to these facts."

Family Court

Termination of Parental Rights

In Re Guardian Ship of Tamara Liz H, 752 N.Y.S.2d 634 (1st Dep't 2002)

A finding of "permanent neglect" of a child may result in the termination of parental rights and in the child being placed under a guardianship or placed for adoption. In this case, a finding of permanent neglect was supported by the fact that the respondent-mother, who was incarcerated, "failed to offer any resource for the child other than continued foster care for as long as she remained in prison."

The court noted that although the Commissioner of Social Services for the City of New York had tried to encourage and strengthen the parental relationship by arranging for the respondent to visit the child, the respondent was absent without notice from most of the visits and was eventually incarcerated at a facility impractical for the child to visit, due to a medical condition which made travel difficult. Although the agency informed the respondent of the child's medical condition and the special therapies she would require, the respondent was unable to offer a viable caretaker.

The court held: "The Legislature did not intend to approve a plan of indefinite foster care for the child of an incarcerated parent who is serving a lengthy prison term and who cannot provide the child with an alternative living arrangement."

Visitation

Matter of Rodenbaugh v. Gillen, 738 N.Y.S.2d 621 (4th Dep't 2002).

The petitioner, an inmate, sued in Family Court for visitation with his child at the correctional facility where he was incarcerated. Family Court granted his petition, but limited the visitation to only four days per year during specified months. Petitioner appealed. The Appellate Division affirmed the order for "reasons stated in the decision at Family Court" (which it did not repeat). It added that the Family Court did not abuse its discretion in failing to specify the duration of each permitted visit: There was no evidence in the record concerning the length of each visit. The Court held, in view of evidence that the child was uncomfortable in petitioner's presence, it may be appropriate to impose limits on the duration of the visit. If the parent who had custody of the child were to act unreasonably in limiting the duration of the visits, the Court concluded, petitioner could seek modification of the order of the Family Court to specify the duration of each visit.

State Court : Conditional Release, Parole, Post Release Supervision

Conditional Release: Programming Requirements

Matter of Bolster v. Goord 752 N.Y.S.2d 403 (3rd Dep't 2002)

Petitioner pleaded guilty to one count of burglary in full satisfaction of an indictment which charged him with a variety of other offenses, including several sex offenses. During his incarceration he refused to participate in DOCS' treatment program for sex offenders on the ground that he had not been convicted of a crime involving sexual misconduct and had never admitted committing any of the unlawful sexual acts that had been alleged in the indictment. When he became eligible for conditional release the Time Allowance Committee withheld his good time based on his refusal to attend the sex offender program. Petitioner brought suit, seeking to restore his good time.

The Court affirmed the decision of the Time Allowance Committee. "Good behavior allowances are a privilege" held the Court, " 'and no inmate has the right to demand or to require that any good behavior allowance be granted.' " (*Citing* 7 NYCRR 260.2.) So long as the TAC's decision to withhold good time is made in accordance with law and is not arbitrary or capricious, it is not subject to judicial review.

In this case, the Court found the decision to withhold petitioner's good time had a rational basis in the record based upon the contents of the pre-sentence report. Moreover, the Court found, the crime for which he was convicted, burglary in the third degree, had an element of sexual misconduct underlying it. Based on these facts, the Court concluded that the decision to withhold petitioner's good time "had a rational basis in his failure to participate in a program designed to treat the type of behavior that led to his conviction and imprisonment."

Parole Denial

Torres v. New York State Division of Parole, 750 N.Y.S.2d 759 (1st Dep't 2002)

Petitioner challenged the denial of his request for parole. His institutional record was extremely positive. He had a record of good behavior while incarcerated, he had many accomplishments and a good work record while in prison, many letters of support were submitted on his behalf, and his employability, his involvement in institutional programs and his plans upon release all weighed heavily in favor of granting parole. Nevertheless, the Board denied parole. The Court found that the Board did not act "arbitrarily and capriciously" in denying him parole, notwithstanding his positive record. The Court held that his positive post-conviction activities, however commendable, remained overshadowed by the "extraordinary severity" of his crime.

Parole Violations

Matter of Ramos v. New York State Division of Parole 752 N.Y.S.2d 159 (3rd Dep't 2002)

Petitioner, while on parole, was convicted of a new offense in Florida. After serving his Florida term he was returned to New York on a parole warrant. At a parole revocation proceeding, he pleaded guilty to one violation charge. As part of his plea agreement, the Administrative Law Judge recommended that he be held for 30 months, with the understanding that the Parole Board would not be bound by that recommendation. Thereafter, the Board determined to hold him to his maximum term. Petitioner brought suit, alleging that his guilty plea was not "knowing and voluntary" because he had not understood that the Board was not bound by the terms of the plea agreement. The court disagreed. The record showed that he had been represented by counsel at the revocation hearing, he was advised by the ALJ that the

Board could decide to hold him beyond the recommended 30 months, he was asked whether he understood the consequences of the plea agreement and he was told that he could plead "not guilty." Moreover, he affirmatively stated that he understood the plea. Under those circumstances, the court found, he could not argue that he did not understand the possible consequences of his plea.

Sex Offenders : Sex Offender Registration Act

Matter of Mandel, 742 N.Y.S.2d 321 (2nd Dep't 2002)

New York's Sex Offender Registration Act (SORA) (Correction Law Art. 6-C) requires that individuals convicted of certain sex offenses register their residence with the State of New York. SORA also provides the criteria concerning who must register in cases in which the offender was convicted outside the State of New York (*see* Correction Law § 168-a [2] [b]), as well as procedures to ensure that out-of-state offenders are registered (*see* Correction Law § 168-k).

Petitioner was convicted in federal court of possession of child pornography. He was later notified that his case had been referred to the New York State Board of Examiners of Sex Offenders for review, and for a determination of whether he was required to register with the State of New York as a convicted sex offender. His attorney sent a letter to the Board arguing that registration was not warranted. The Board nevertheless determined that registration was required on account of the federal conviction. It recommended that the petitioner be assessed a "level 1" risk and (as the statute requires) referred the matter to County Court for a hearing.

At the hearing, petitioner asserted that the Board had incorrectly determined that he must register. The County Court concluded that it was without authority to review that claim in a SORA proceeding and petitioner appealed.

The Appellate Division affirmed the decision of the County Court. Under SORA, the Board of Examiners is empowered to determine whether a person must register. The County Court's function is limited to determining the duration of the registration and the level of risk assessment assigned. Since the court's function in a SORA proceeding is limited, it was without authority to review the underlying determination of the Board that petitioner must register. In order to challenge that decision, petitioner would have to bring a separate Article 78 proceeding against the Board.

State Court : Sentence Computations

Concurrent Sentences: DOCS' Authority to Challenge Sentence

Matter of Murray v. Goord, 747 N.Y.S. 2d(1st Dep't 2002)

The facts of this sentence computation case are complicated, but the ultimate holding is not: The Court concluded that DOCS has no authority to change the terms of an inmate's sentence, even if it thinks the sentence was illegal.

The petitioner in this case was first sentenced on a drug conviction. Later, in front of another judge, he pled guilty to a manslaughter charge. The judge in the manslaughter case ordered that the sentence run consecutively to the sentence previously imposed in the drug case. The two convictions were then consolidated for appeal. On appeal, the Appellate Division reversed the drug conviction but affirmed the manslaughter conviction. The petitioner returned to Supreme Court on the drug case and accepted a plea bargain on condition that the sentence imposed run concurrent with the sentence already imposed in the manslaughter case. The judge accepted his plea and ordered that the new sentence run concurrent with the manslaughter sentence.

When petitioner arrived in state custody, however, DOCS took the position that the concurrent sentence was illegal. It made several

arguments, one of which relied upon Criminal Procedure Law section 430.10. That section provides, "[e]xcept as otherwise specifically authorized by law, when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced." DOCS argued that because the manslaughter sentence had already commenced, it could not be changed, under CPL 430.10, by the subsequently imposed sentence in the drug case.

The Appellate Division disagreed. As an initial matter, the Court held that DOCS had no jurisdiction to challenge the commitment it had received in the drug case. "Irrespective of any opinion [the Department] might entertain towards the order of commitment [in the drug case] they are not vested with the discretion to ignore its terms. As the last order of commitment received from the Supreme Court, the order supersedes any prior order of commitment. Furthermore, by presuming to determine the court's authority to issue the order, respondents have intruded upon the prerogative of this Court to decide [any legal question that may arise concerning the order]." Moreover, in analyzing the commitment itself, the Court concluded that it was entirely legal, despite DOCS' objections.

Jail Time: Dismissal/Acquittal Clause

Matter of Guido v. Goord, 749 N.Y.S. 2d 915 (3rd Dep't 2002)

In 1989, petitioner was arrested and charged with several crimes in Florida. He was eventually acquitted of some of the charges and, on April 22, 1990, the remaining charges were dismissed. The next day, on April 23, 1990, he was extradited to New York to face charges in that State. He was convicted of the New York charges and sentenced to a term of 12 ½ to 25 years. He then commenced an Article 78 proceeding arguing that his New York sentence should be credited with the 411 days of jail time that he had previously served in Florida.

Penal Law § 70.30(3) addresses jail time. The so-called "dismissal/acquittal clause" of that statute states: "In any case where a person has been in custody due to a charge that culminated in a dismissal or an acquittal, the amount of time that would have been credited against a sentence for such charge, had one been imposed, shall be credited against any sentence that is based on a charge for which a warrant or commitment was lodged during the pendency of such custody." Here, the petitioner's Florida charges were dismissed and the New York State warrant was lodged against him during the pendency of his Florida custody. Thus, one would think that the plain language of the statute requires that the amount of jail time that would have been credited to the Florida sentence, had one been imposed, should be credited to the New York sentence. However, that isn't the case.

Although the dismissal/acquittal clause would apply if both of the charges had arisen in New York, the New York courts have "established an entirely different set of rules" for situations in which a New York prisoner seeks credit for jail time spent in a foreign jurisdiction. Matter of Keffer v. Reid, 473 N.Y.S.2d 479 (2nd Dep't 1984) *citing* Matter of Peterson v. New York State Dept. of Correctional Services, 473 N.Y.S.2d 473 (1984). Under those circumstances, the jail time served on the dismissed charges can only be credited to the New York sentence if the prisoner can demonstrate that the confinement was *solely* the result of the New York warrant or detainer. In this case, petitioner's incarceration in Florida was not due solely to the New York detainer, but also by the criminal charges that had been filed against him in Florida. Therefore, the Court held, petitioner was not entitled to receive credit against his New York sentence for that time he had served in Florida.

State Court : Other

Lag Pay

Matter of Williamson v. Goord, 730 N.Y.S.2d 387 (4th Dep't 2001)

Petitioner appealed the denial of a grievance in which he challenged the lag pay provision of DOCS' Directive 2788. This provision requires the equivalent of 15 days' wages to be withheld from an inmate while he or she is incarcerated and returned upon his or her release from incarceration. Petitioner contended that no wages should be withheld from him because he had been sentenced to life imprisonment without the possibility of parole.

The Court rejected petitioner's argument. DOCS, the court held, has broad discretion over the wages of inmates and may hold them in trust until an inmate is released. Courts will not interfere with DOCS' exercise of that discretion "absent a showing of a statutory violation or an abuse of discretion." Neither of those had been shown in this case. Here, the Court noted, the petitioner could be released from prison for a variety of reasons, including medical furlough or reversal of his judgment of conviction or modification of his sentence on appeal, at which time the withheld wages would be returned to him.

Court of Claims

Late Claims: Medical Malpractice

Matter of Gonzalez v. State of New York 730 N.Y.S.2d 387 (3rd Dep't 2002)

Plaintiff had a tooth extracted at Sullivan Correctional Facility in November of 2000, but continued to experience pain. In January of 2001, an x-ray revealed the presence of a bone fragment in the area of the original extraction. The bone fragment was removed by an oral surgeon. Approximately four months later, the plaintiff sought permission to file a late "notice of intention to file a claim" against the State of New York for medical malpractice. The Court of Claims denied the application and the Appellate Division affirmed.

To bring a lawsuit against the State of New York in the Court of Claims you must either file the claim within ninety days of the incident about which you are suing or serve a "Notice of Claim" upon the New York State Attorney General within the same time. If you fail to do either of these things within ninety days you may apply to the Court for permission to file a late claim within the one year statute of limitations.

In determining whether to grant the request for permission to file a late claim the Court will consider whether the delay in filing the claim was excusable, whether the state had notice of the essential facts constituting the claim, whether the state had an opportunity to investigate the circumstances underlying the claim, whether the claim appears to be meritorious, whether the failure to file or serve upon the attorney general a timely claim or to serve upon the attorney general a notice of intention resulted in substantial prejudice to the state; and whether the claimant has any other available remedy. Court of Claims Act § 10(6).

The Notice of Intention should have been served within ninety days of the January 2001, extraction of the bone fragment. The plaintiff offered no explanation for the four-month delay in bringing his action. Additionally, he failed to provide any medical evidence to support his allegations of dental malpractice. In light of those facts, and upon consideration of the other factors listed in the Court of Claims Act, the court found no reason to overturn the lower court's decision.

Practice Pointer: *A Notice of Intention to file a Claim must be served upon the Attorney General within 90 days of the event about which you want to sue. If you must request permission to file a late claim, you must tell the Court why you were unable to file the claim on time. To prevail in a medical malpractice case, you must present medical evidence, e.g., an affidavit from a*

doctor, that the care you received deviated from accepted medical practice and that such deviation caused your injury.

Res Ipsa Loquitur

Imhotep v. State of New York, 750 N.Y.S.2d 87 (2nd Dep't 2002)

Claimant, an inmate, sued the State after being injured when a bulletin board in his cell fell on him. A trial was held. Claimant testified that the last person to handle the bulletin board was the inmate who occupied his cell previously. There was no evidence regarding what caused the bulletin board to fall, nor any that the State had been notified of the existence of a dangerous condition. Claimant asserted that he was entitled to a judgment as a matter of law under the doctrine of *res ipsa loquitur*.

Res Ipsa Loquitur is a Latin phrase meaning "the thing speaks for itself." In the law of negligence it is a claim that a particular accident could not have happened unless the defendant was negligent. If established, it means that the claimant should win his suit with no evidence other than the fact that the accident occurred.

In Imhotep the Court rejected claimant's assertion that he was entitled to judgment based on the theory of *res ipsa loquitur*. The Court noted that the doctrine can only be invoked if the claimant establishes three elements: (1) the accident is of a kind which ordinarily does not occur absent someone's negligence, (2) the accident is caused by an agency or instrumentality in the exclusive control of the defendant, and (3) the event was not the result of action on the part of the plaintiff. Here, however, the evidence at trial showed that the bulletin board had been affixed to the wall for at least eight years prior to falling. Thus, it cannot be said that the accident was of the sort that would not ordinarily occur absent negligence. Furthermore, the claimant testified that the last person to handle the board was the inmate who occupied claimant's cell previously. Where an instrument is under the control of persons other than the defendant, *res ipsa loquitur* does not apply.

PLS SETTLES MENTAL HEALTH CLAIMS ON BEHALF OF INMATES

PLS recently settled two cases alleging an Eighth Amendment violation of inadequate mental health care on the part of DOCS employees. In Charnock v. Padman, et. al, PLS sued DOCS officials for failing to adequately treat an inmate who suffered from a mental illness. Mr. Charnock, the plaintiff, suffered from a panic disorder. He had been taking the anti-psychotic medication Xanax, as well as other medications, for over 18 months. He was transferred to Marcy Correctional Facility on a Friday and upon arrival was told that the medications he had been taking were not available at the pharmacy but would be available the next Monday. On Monday, the defendant, Dr. Padman, ordered that Mr. Charnock's medications be discontinued. He began to suffer severe anxiety attacks as a result of the withdrawal of the medication and he engaged in bizarre behavior that resulted in him being charged with misbehavior and placed in solitary confinement. Five days after the medication had been discontinued, he attempted to commit suicide.

PLS filed two actions on behalf of Mr. Charnock. In Charnock v. State, brought in the Court of Claims, Mr Charnock alleged that defendant's actions constituted medical malpractice. In Charnock v. Padman, et. al., brought in federal court under §1983, he alleged that the defendant's actions constituted deliberate indifference to his serious medical needs, the constitutional standard.

During discovery in the federal action, the Assistant Attorney General indicated that DOCS was willing to settle both claims. On the Court of Claims case, the State offered to provide a monetary settlement to Mr. Charnock. On the federal section 1983 case, the defendants offered to amend DOCS' Directives to provide uninterrupted health care to inmates during and after transfer.

As result of this settlement, in September 2002, DOCS issued a new Directive relating to the transfer of inmates from a Level 1 to another Level 1 facility. A new Directive for transfers involving Level 2 and 3 facilities (i.e., those without OMH staff) was issued in December 2002.

There are three documents that implement the new polices: 1) DOCS' Division of Health Services Policy #1.22 dated 10-01-02; 2) a revision Notice to DOCS directive #4918, "Inmate Health Care During Transfer," dated 12/01/02; and 3) a DOCS Policy Revision Notice, revising Health Service Policy Manual (HSPM) #3.07, "Pharmacy Services," dated 12/01/02.

The new policy provides that when an inmate is transferred from one facility to another, staff at the sending facility must fax prescriptions to the receiving facility and to any in-transit facility, as soon as the staff knows the transfer date, route, and destination of the inmate. This should give receiving and intransit facilities more opportunity to obtain any medications that they might not have in stock.

The second case, Waters v. Andrews, et al., (W.D.N.Y., 97-CV-0407) involved an Albion inmate who was placed in SHU for mental health observation in May 1994 after admitting to prison authorities that she had considered harming herself two days earlier. Ms. Waters alleged in her complaint that, although she was menstruating at the time of being strip frisked and placed into SHU, she was only provided with one paper gown, one sanitary napkin and no undergarments or other means to hold the sanitary napkin in place during her approximately 2 ½ days of SHU confinement. She was also denied soap, toothpaste, a toothbrush, a washcloth or other towel, denied a shower while under observation status and was denied any additional paper gowns or other clothing even after her gown became ripped and blood stained, exposing her body to male correctional staff and construction workers in the unit. Ms. Waters also alleged that she was denied appropriate mental health treatment while confined in SHU.

During discovery defendants offered to settle. Negotiations led to the plaintiff agreeing to enter into a settlement agreement awarding monetary damages.

Practice Pointer: *To establish an Eighth Amendment claim for inadequate medical care, a prisoner must prove "deliberate indifference to [his] serious medical needs." Estelle v. Gamble, 429 U.S. 97 (1976). This standard has both an objective and subjective element. The objective element requires a prisoner to show that his medical condition is an objectively serious one. The subjective element requires the prisoner to prove that the prison officials had actual knowledge of the seriousness of the condition yet acted with deliberate indifference to it. Brock v. Wright, 315 F3d 158 (2nd Cir. 2003).*

With respect to the objective element, it has been held that there is no exact guide as to what constitutes a "serious medical need." In Chance v. Armstrong, 143 F.3d 698 (2nd Cir. 1998), the court set forth a "non-exhaustive list" of factors to consider, including, 1) whether a reasonable doctor or patient would perceive the medical need in question as 'important and worthy of comment or treatment,' 2) whether the medical condition significantly affects daily activities, and (3) the existence of chronic and substantial pain.

With respect to the subjective element, courts have held that prisoners must be able to show that the prison officials knew that the inmate had a serious medical condition or faced substantial risk of serious harm and "disregard[ed] that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, 511 U.S. 825, (1994). However the Supreme Court has emphasized that the Eighth Amendment is not a vehicle for bringing medical malpractice claims, nor it is a substitute for state tort law. Estelle v. Gamble, 429 U.S. 97 (1976). "[N]ot every lapse in prison medical care will rise to the level of a constitutional violation." Smith v. Carpenter, 316 F3d 178 (2nd Cir. 2003) "A prisoner must demonstrate more than an

inadvertent failure to provide adequate medical care by prison officials to successfully establish Eighth Amendment liability." Id.

UNDERSTANDING THE NEW 'SON OF SAM' LAW

In the summer of 2001, New York State significantly broadened the so-called "Son of Sam" law. The new law requires that whenever a person convicted of certain crimes receives money in excess of $10,000.00, notification must be given to the victim of the crime. It also provides a variety of mechanisms to make it easier for crime victims to sue the person convicted of the crime of which they were victim. The net effect of these changes is to make it more likely that if you receive substantial funds – whether as the result of a lawsuit, or as a gift, inheritance, or investment – the money will become the object of a lawsuit by the victim of the crime for which you were convicted. Inmates expecting to receive such funds will be well advised to become familiar with the details of this new law.

The law defines a category of funds as "funds of a convicted person." Funds of a convicted person are defined as "all funds and property received *from any source*" by a person convicted of certain specified crimes, excluding child support and earned income. The specified crimes include all violent felonies, all first degree felonies, all "B" felonies, grand larceny in the second and fourth degrees, criminal possession of stolen property in the second degree, and any offense "for which a merit time allowance may not be received." Drug offenses under Penal Law section 220 or 221, as well as the crimes of welfare fraud and gambling are excluded. (Thus, if you were convicted of a drug offense under Penal Law section 220 or 221, the law does not apply to you, even if the conviction was for a first degree felony or a "B" felony.)

The law requires that if you receive "funds of a convicted person" in excess of $10,000.00, the State Crime Victims' Board (CVB) must be notified. The law contains a variety of provisions to insure that the notification occur. For example, it states that whenever any person or entity agrees to pay "funds of a convicted person" whose "value, combined value or aggregate value...exceeds... $10,000.00," that person or entity must notify the CVB. See Executive Law § 632-a(2). Another provision states that the Department of Correctional Services must notify the CVB whenever an inmate's inmate account contains more than $10,000.00. See Correction Law § 500-c(7)

The law also requires the CVB to notify all of the known victims of the crime for which you were convicted that you have received "funds of a covicted person." A "crime victim" is defined in the law not just as the victim of the offense, but also as the *representative* of the victim. Under some circumstances, the CVB itself is authorized to act on behalf of the victim.

In addition, the law extends the statute of limitations within which a crime victim may bring a lawsuit against you to recover money damages for injuries suffered as a result of your crime. Under the new law there are now three such statutes of limitations. The first applies to all crime victims. It states that any crime victim may bring a suit against the person convicted of the crime in which they were injured at any time within seven years of the conviction for the crime. The second applies only to victims of one of the crimes covered by the new Son of Sam law. It states that those victims may bring suit within *ten years* of the conviction. The third statute of limitations also applies only to victims of crimes covered by the Son of Sam law. It states that such victims, in addition to being able to bring a suit against you within 10 years

of the conviction, may also bring a suit against you at any time within three years after they "discover" that you have received "funds of a convicted person." So, for example, if you have been convicted of one of the crimes covered by the Son of Sam law and you receive "funds of a convicted person," the victim of your crime may bring a lawsuit against you at any time within three years of the date that he or she "discovers" the existence of the funds.

Finally, the law authorizes the CVB to act to prevent any person covered by Son of Sam from "wasting" (*i.e.* spending) any funds he or she may receive before the crime victim has an opportunity to bring a lawsuit. It can do this by applying to a court to freeze the funds, pending the litigation. Using this law, the Board has sued to freeze several inmates' funds. The net effect of these changes is to make it highly likely that if you receive a substantial sum of money from any source, excepting child support payments or earned income, the victim of your crime will become aware of the existence of that money, and will be able to initiate a lawsuit against you to obtain damages for injuries suffered as a result of your crime.

Prisoners' Legal Services continues to receive numerous questions about this new statute. Some of the most frequently asked questions are as follows:

- **Is it possible to avoid the effects of the statute by giving my money to someone else, or directing that any money owed to me be payed to someone else?**

Probably not. The statute applies both to convicted persons and their "representatives." A "representative" is defined as "one who represents or stands in the place of another person, including but not limited to an agent, an assignee, an attorney, a guardian, a committee, a conservator, a partner, a receiver, an administrator, an executor or an heir of another person, or a parent of a minor." Executive Law § 621. So, if you try to give your money to another person, or direct that the money be given to another person, that person would become your "assignee", or representative, and all of the provisions of the statute would apply: The CVB would have to be notified, they would notify the victim(s) of the crime, and victim(s) would be able to bring suit against both you and your representative.

- **Is there any money that is excluded from the notice requirement?**

Yes. The statute excludes both "earned income" and child support payments from the notification requirement. "Earned income" is defined as "income derived from one's own labor or through active participation in a business as distinguished from, for example, dividends or investments." Since both earned income and child support payments are excluded from the definition of "funds of a convicted person" they do <u>not</u> have to be reported to the CVB, even if you receive more than $10,000.00. That does not mean, however, that "earned income" would not be available to a crime victim if he or she were to win a judgment against you. It only means that payment or receipt of such income would not have to be reported to the CVB.

- **What if I settle or win a lawsuit against the State?**

Money that you may win in a suit against the State (or anyone else) is considered "funds of a convicted person" (if you have been convicted of one of the crimes covered by the Son of Sam law). Consequently, it would have to be reported to the CVB if the payment exceeded $10,000.00. Executive Law 632-a. *See also*, Correction Law § 500-c. *However*, the

statute provides that if the money you receive as the result of a judgment in a lawsuit represents "compensatory damages", then *ten percent* of that money is immune to a judgment on behalf of a crime victim. So, for example, say you win $20,000.00 in a lawsuit against Department of Correctional Services staff based on allegations that they used excessive force against you. Later, the victim of your crime sues you for damages for injuries caused during the course of your crime. Then, $2,000.00 of the money you won in your suit against DOCS would be immune from any judgment the victim might obtain against you. This rule only applies to compensatory damages. It does not apply to punitive damages. So, if you win $10,000.00 in compensatory damages, but $50,000.00 in punitive damages, the rule would only protect 10% of the $10,000.00 awarded for compensatory damages.

- **Is there anything else that is immune to a judgment on behalf of the crime victim?**

Yes. The law states that the first *one thousand dollars* deposited in your inmate account is immune from any judgment that a crime victim may obtain against you. This sum is *in addition to* the 10% compensatory damages exclusion discussed above. Thus, if you have $1,000.00 in your inmate account, and you win $20,000.00 in compensatory damages in a lawsuit, $2,000.00 of the latter, *plus* the $1,000.00 already in your account, would be immune from suit.

- **Does the statute continue to apply even when I have been released from prison?**

Yes. The statute applies to persons who are serving an undischarged indeterminate, determinate or definite sentence, including persons on parole or post-release supervision. The statute also applies for three years *after* you have completed your maximum term, or have been discharged from parole. In that case, however, only funds that are paid to you as a result of "any interest, right, right of action, asset share, claim, recovery or benefit of any kind" that accrued prior to the expiration of your sentence would have to be reported to the CVB. So, for example, if you received an inheritance two years after your maximum term had expired, that money would not have to be reported to the CVB because it did not "accrue" while you were serving your sentence. If, on the other hand, two years after your maximum term has expired, you settle a lawsuit about something that happened while you were incarcerated, you would still have to report that to the CVB, because the right to sue accrued while your sentence was still running.

In addition, if you receive earned income during a period when you are supposed to be under parole supervision, but you are not in compliance with the terms of your parole, (you are delinquent) that income will become subject to the reporting requirements, even though it would not be otherwise.

- **Where can I read this new law for myself?**

Unfortunately, the new law was passed in a complicated way. It was passed as a series of amendments to a large number of different sections of law. The actual law consists of amendments, for instance, to the Executive Law, the Corrections Law, the Civil Practice Law, the Surrogate's Court Act and the Criminal Procedure Law, among others. Thus, there is no one single place to view the whole law. The most important parts of the law, however, those which define "funds of convicted person" and state the reporting requirements for such funds, can be found in New York's Executive Law, Sec. 632-a. You should be able to find this in your law library.

Since this is a new law, you will probably need to check the "pocket part" to see the amendments to section 632-a. Your law librarian should be able to help you with this.

POST-RELEASE SUPERVISION

In 1998, the Legislature passed "Jenna's Law", part of which requires that all persons convicted of violent felonies receive determinate sentences. A determinate sentence is one which does not allow for parole or discretionary release after the minimum period of imprisonment. An individual with a determinate sentence may earn good time and qualify for conditional release but the good time available is limited to one day for every seven days served (as opposed to one day for three days served of an indeterminate sentence). Thus an individual with a determinate sentence must serve at least six-sevenths of the term before becoming eligible for conditional release. *See* Correction Law § 803(1)(c); Penal Law § 70.40(1)(b).

Jenna's Law also requires that all persons subject to a determinate sentence serve a period of "post-release supervision" after release from prison. *See* Penal Law §70.45. The legislative history behind these new provisions indicates that the Legislature passed them as a way to provide greater protection to the public and to promote successful inmate reintegration into the community.

Both the determinate sentence and post-release supervision sections of Jenna's Law apply only to violent felony offenses committed on or after September 1, 1998. *See* Penal Law § 70.45. Offenses committed prior to September 1, 1998, are governed by the law in effect at the time the offense was committed. A determinate sentence for a violent felony committed on or after September 1, 1998, is technically incorrect if it fails to include a period of post-release supervision. Post-release supervision is similar in most ways to parole or conditional release. It is administered by the Board of Parole, which is "empowered to establish and impose conditions during the post release period in the same manner as it does for individuals on parole or conditional release." Penal Law § 70.45(3). People v. Goss, 733 N.Y.S.2d 310 (3rd Dep't 2001). *See also* Executive Law §§ 259-a, 259-c, 259-e, 259-f, 259-i, 259-j. In addition to other parole-type conditions, post-release supervision may include a mandatory period of up to six months in a residential treatment facility immediately following release from prison. A residential treatment facility is a "correctional facility consisting of a community based residence in or near a community where employment, educational and training opportunities are readily available. . . ." *See* Correction Law § 2(6).

Post-release supervision is distinct from both parole and conditional release, however, in that you may not turn down post-release supervision the same way you can turn down parole and simply "max-out." Post-release supervision is required by law to follow a determinate sentence.

There is presently controversy over whether post-release supervision is distinct from parole and conditional release in another way. It is well settled that both parole and conditional release are discretionary. That is, the Division of Parole is not required to grant you parole when you become eligible, nor is DOCS required to grant you conditional release. It was assumed however, that neither DOCS nor Parole had the discretion to hold you in prison beyond the expiration of your maximum term of incarceration, even if the term of incarceration was to be followed by a term of post-release supervision.

Recently, however, several cases have come to the attention of Prisoners' Legal

Services in which DOCS and the Division of Parole have refused to release inmates who have served their maximum terms of incarceration to post-release supervision. They have relied on the language of Jenna's Law which allows the Division of Parole to set the conditions of post-release supervision. They have argued that post-release supervision, like parole or conditional release, is discretionary, and that if you are unable to meet the conditions they impose for post-release supervision (for example, if you have not found housing that satisfies the conditions of the Division of Parole), they may continue to hold you in prison even beyond your maximum term. This has not yet been unequivocally decided by the courts but it seems clear that the Legislature intended post-release supervision to serve as a period of transition to civilian life, and did not intend that it be served in prison (absent a violation of its terms). In at least one case, a Court has ruled that post-release supervision is *not* like parole in this respect, and that DOCS *must* release you to post-release supervision when you have served the maximum term of the determinate sentence. *See* People ex rel. Lasch v. Berbary, Index No. I 2002-11884 (Sup. Ct. Erie Co., Dec. 19, 2002). (The State may, however, place you in a residential treatment facility for the first six months of post-release supervision.) It is likely that this issue will continue to be the subject of future litigation.

The length of post-release supervision can range from one and one half years up to five years, depending on circumstances. Penal Law § 70.45(2). For *first time* violent felony offenders, sentenced under Penal Law § 70.02, the length of post-release supervision will be as follows: For Class B or C violent felony the period of post release supervision is five years, unless the court specifies a shorter period of not less than two and one half years; for Class D or E violent felonies, the period of post-release supervision is three years, unless the court specifies a shorter period of not less than one and one half years. For second or persistent violent felonies, sentenced under Penal Law § 70.04, the period of post-release supervision must be five years. *See* People v. Goss, 733 N.Y.S.2d 310, 314 (3rd Dep't 2001).

Release on post-release supervision interrupts any period of imprisonment left to serve on an aggregate maximum or maximum sentence. The time remaining on the sentence is "held in abeyance" until post-release supervision is successfully completed or until a person is returned to the custody of the Department of Correctional Services because of a violation of the conditions of post-release supervision. Penal Law § 70.45(5)(a). If post-release supervision is successfully completed, then any confinement time left on the maximum sentence (time "held in abeyance") will be eliminated as the post-release time will be credited against it. Penal Law § 70.45(5)(b).

Like a violation of parole, a violation of the terms of post-release supervision may result in revocation of supervision. The revocation and hearing procedures are generally the same as those for parole and conditional release. *See* Penal Law § 70.45(4); Executive Law § 259-i(3)(4). The penalties for a violation of post-release supervision, however, are likely to be more severe than those for a violation of parole or conditional release. If a person on post-release supervision is found delinquent and has their supervision revoked they must serve *at least* six months in prison before re-release to post-release supervision is possible, even if the remaining time on the post-release supervision included in the original sentence was less than six months. Penal Law § 70.45(5)(d)(iv); Penal Law §§ 70.45(1), (5)(d). If your time remaining on the post-release supervision included in the original sentence is more than six months, the time assessment for a delinquency may be up to the remaining balance but not more than five years. But if the time left from your

aggregate maximum original prison sentence allows for a longer period of further imprisonment, than the six month to five year limits do not always apply. A longer period in prison is possible because the period of post-release supervision will be interrupted while the original sentence is completed. Penal Law §§ 70.45(1) , (5)(d), (e), (f). In other words, if your post-release supervision is revoked it is possible that you could go back to prison for more than five years. Moreover, good time is not awarded during any time assessment period.

A number of inmates have written to Prisoners' Legal Services to complain that, although they pled guilty to crimes that would subject them to the requirements of Jenna's Law, they were never told that a period of post-release supervision would be included as part of their sentence. This situation raises complicated legal issues.

If you pled *not* guilty and were convicted and sentenced following a trial, then there is really no legal way to challenge the post-release supervision attached to the sentence after the confinement. All determinate sentences for violent felonies must include a period of post-release supervision under Penal Law § 70.45.

If, on the other hand, you pled guilty, the result may be different. All guilty pleas must be knowingly, voluntarily and intelligently made. Under New York law, this means that the person pleading guilty must be aware of all the "direct" consequences of his or her plea. People v. Ford, 633 N.Y.S.2d 270 (1995). Thus, at the time of your guilty plea, the trial court should have made sure you knew about all the consequences of your plea which would have a "definite, immediate and largely automatic effect" on your punishment. Ford, 86 N.Y.2d at 403. Post-release supervision has been held to be a direct consequence of a plea. People v. Goss, 733 N.Y.S.2d 310 (3rd Dep't 2001); People v. Catu, 749 N.Y.S.2d 397 (Sup.Ct. New York Co., Oct. 18, 2002). Therefore, if you agreed to plead guilty you should have been told about the post-release supervision you would have to serve after your confinement.

What should you do if you were not told that a period of post-release supervision was included in your sentence? If you find out about it only after the time for direct appeal has passed, the only way to challenge the issue is with a motion under Criminal Procedure Law (CPL) Article 440. CPL § 440.10 permits you to ask the court to vacate the sentence and allow you to withdraw your flawed guilty plea.

Before doing this, however, you will want to ask yourself if there will really be any benefit to you in withdrawing your plea. Withdrawing your plea has the legal effect of restoring you to "prepleading status." CPL § 440.10(7). The State will press new charges against you. These may be the same charges you faced previously or they may be more severe. You will have to choose whether to plead guilty or go to trial based on whatever new charges are presented. One thing that you will not be able to do, however, is to plead guilty to the same charges to which you previously pled guilty and obtain a new sentence that does not include a period of post-release supervision, since such a sentence would be illegal under Jenna's Law. *See e.g.*, People v. Yekel, 733 N.Y.S.2d 643 (3rd Dep't 2001); People v. Cooney, 735 N.Y.S.2d 834 (3rd Dep't 2002).

Thus, withdrawing your plea may or may not benefit you. In addition, if you are convicted of any of the violent felony offenses listed above, your sentence will still include post-release supervision. Therefore, you should weigh your options carefully and, preferably, discuss them with an attorney before proceeding.

PLRA Exhaustion Update

In the previous edition of Pro Se, we reported on the state of the law which requires exhaustion of administrative remedies before filing a Sec. 1983 action in federal court. A recent Second Circuit opinion summarizes some of the issues currently pending.

In Ortiz v. McBride, decided March 21, 2003, the 2nd Circuit stated:

"This court has noted that under the administrative scheme applicable to New York prisoners, resolution of an inmate's grievances through informal channels can satisfy the exhaustion requirement of 42 U.S.C. 1997e(a). See Marvin v. Goord, 255 F. 3d 40, 43, n. 3(2nd Cir. 2001) (per curiam) (citing 7 N.Y.C.R.R. 701.1). More recently, we have ordered that counsel be appointed in four pending cases that address whether inmates who did not fully comply with the dictates of New York law nonetheless exhausted their claims in other ways. Abney v. New York Dep't of Corr. Servs., No. 02_0241 (2nd Cir. Feb. 13, 2003) (order granting motion to appoint counsel); *Johnson v. Reno,* No. 02_0145 (2nd Cir. Feb. 13, 2003) (same); *Hemphill v. New York,* No. 02_0164 (2nd Cir. Oct. 18, 2002) (same); *Giano v. Goord,* No. 02_0105 (2nd Cir. Aug. 22, 2002) (same). "

In Ortiz, the 2nd Circuit has extended the PLRA issues it will address stating:

"While Ortiz's attempts to exhaust his Eighth Amendment claim may be more limited than those at issue in these cases, Ortiz has contended that he filed written grievances without receiving a response and that he was deterred from further pursuing administrative remedies by the guards' threat of assault. And that is enough to raise the issue currently being considered by us in the four just mentioned cases.

In addition to the question of whether Ortiz administratively exhausted his Eighth Amendment claim for purposes of the PLRA this case raises the question of whether the PLRA requires that a prisoner exhaust *every* claim raised in order to be able to proceed on any one claim. In other words, if Ortiz has not administratively exhausted his Eighth Amendment claim, does the PLRA bar consideration of his Fourteenth Amendment due process claim, a claim which all agree was administratively exhausted? District courts in this circuit are currently split on the question of whether the PLRA requires such "total exhaustion."

The 2nd Circuit decided that:

"Given the complexity of these and other issues in this case, we believe it appropriate to appoint counsel to represent Ortiz in this appeal, if he so chooses. . . . In addition to any other arguments counsel may choose to raise, the following issues should be addressed: (1) whether Ortiz's proffered evidence that he administratively exhausted his Eighth Amendment claim satisfies the requirements of Sec. 1997e(a); (2) whether Sec. 1997e(a) requires "total exhaustion" and, if so, whether Ortiz may now withdraw any unexhausted claims; (3) whether Ortiz's factual allegations that the conditions of his confinement in SHU were unusually harsh sufficed to raise the question of whether that confinement implicated a constitutionally protected liberty interest so as to preclude 12(b) dismissal; (4) whether Ortiz's complaint adequately pled, or could be amended adequately to plead, that the defendants are subject to supervisory liability, under the test described in Wright v. Smith, 21 F 3d 496, 501 (2nd Cir. 1994), for the alleged Eighth Amendment violations."