Pro Se

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STATE SUPREME COURT ORDERS PAROLE BOARD TO GIVE FAIR CONSIDERATION TO POSITIVE INSTITUTIONAL ADJUSTMENT

Two New York State Supreme Court justices strongly criticized the Parole Board in two recent cases, holding that its decisions to deny parole had misapplied the law. One judge observed that the Board may have been unduly influenced by shifting policy considerations. Their decisions, in Matter of Chan v. Travis, Index No. 3045-02 (Sup. Ct., Albany Co.) and Matter of Boudin v. Travis, Index No. 8264-02 (Sup. Ct., Albany Co.), are notable for running counter to the courts' generally deferential attitude toward the Board. In both cases, the Court reversed the decision of the Board and ordered that the inmates be granted new hearings.

The Chan case involved inmate Denny Chan, serving a sentence of 9 to 18 years for manslaughter. During his incarceration, he earned a bachelor's degree in business management from Maryland State University where his final year grade point average was 3.8. He was admitted to the national academic honor society. He was certified by the New York State Department of Labor as a computer programmer, for which he trained for two years. He served as a teacher's aid, an industrial worker, a carpentry apprentice and a pre-release counselor. He had no disciplinary infractions. The Board, in its decision, noted Chan's good behavior, but held that the "serious nature" of his offense "preclude[d] early release." After exhausting his administrative appeals, Chan filed an Article 78 proceeding alleging that the Board had failed to sufficiently consider his good behavior and that its decision was influenced by political considerations.

The Court agreed. While the Board may place "heavy emphasis" on an inmate's crimes, the Court held, it could not assert that Chan's crime "precluded" his parole. "By legislative prescription" the Court wrote, both Chan's indeterminate sentences made him eligible for

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Also Inside . . .

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parole at the conclusion of his minimum term: "There is no exception for persons convicted of manslaughter . . . or [any] other violent crime."

The Court held it was not sufficient for the Board to merely "note" an inmate's good behavior in its written decision. "Noting" an inmate's positive institutional adjustment or achievements "is not tantamount to considering them in a fair, reasoned and individualized manner . . . Indeed, such cursory treatment turns on its head the reformative or rehabilitative principle underlying an indeterminate sentence."

The Court also credited Chan's allegations that the Board's decision was influenced by political factors – specifically, Governor Pataki's frequently expressed view that violent felons should not be granted parole. "Clearly," wrote the Court, "something has changed at the Parole Board . . . From [the record of this case] there is an undeniable inference . . . that the Board is *de facto* implementing Executive policy by curtailing parole for violent felons." "This State may be in transition to determinate sentencing and the abolition of traditional parole for all felons, but that may not be imposed by administrative fiat on this inmate and the class of inmates similarly situated."

The Court ordered that the Parole Board conduct a new hearing. A court does not have authority to order release on parole in a case challenging the denial of parole.

The Boudin case involved Kathy Boudin, an inmate well-known for her membership in the Sixties radical group the Weather Underground and involvement in the "Brinks Robbery" in 1981, for which she was serving a sentence of 20 years to life. At her sentencing, the sentencing judge stated, "I see no reason in the world why [she] should not be paroled at the expiration of the 20 years if the parole authorities are satisfied that's appropriate." During her incarceration she maintained an extremely positive prison record, becoming involved in AIDS education and adult literacy programs and earning a master's degree in adult education. Nevertheless, Governor Pataki had publicly expressed his opposition to her parole.

The Board panel that heard her case consisted of one member whose term had expired and who was looking to the Governor for reappointment. The panel denied parole, holding that "due to the violent nature and circumstances of the instant offense [Boudin's] release at this time would be incompatible with the welfare of society and would serve to deprecate the seriousness of the criminal behavior herein so as to undermine respect for the law." The Board made no mention of either the sentencing judge's recommendation or Ms. Boudin's prison accomplishments.

The Court reversed. Although the Court found that Boudin had not sufficiently supported her allegation that the Board was unduly influenced by political factors, it found that the Board's failure to even consider the sentencing judge's recommendations had violated Executive Law section 259-i, which expressly requires such consideration.

The Court also held that the Executive Law entitles an inmate "to a written determination stating the reasons for denying parole [which] 'shall be given in detail and not in conclusory terms.'" It found that the decision given in Boudin's case – a decision typical of those given in thousands of other cases – did not meet that standard.

The Court ordered that the Parole Board conduct a new hearing.

Cases Run Counter to Trends

The Chan and Boudin cases emerge against the backdrop of a sharp decline in parole for violent felons over the last decade. In 1993, for instance, 54 percent of violent offenders were paroled upon their first appearance before the Board. By 2002, that number declined to 20 percent. In many cases, the Board's decisions denying parole have placed heavy emphasis on the underlying crime while seemingly ignoring evidence of rehabilitation.

This trend has been a source of deep frustration for many inmates, particularly those who have worked hard to overcome their criminal convictions and maintain positive prison records. Many have argued that it is both unfair and illegal for the Board to place such heavy emphasis on the underlying crime as a reason to deny parole. They argue that once they have served their minimum terms of incarceration for the crimes for which they were convicted the parole inquiry should focus on how they have

behaved in prison and on any evidence they can present of rehabilitation. They have also argued that the decline in parole is evidence that the Board's decision making improperly reflects the Governor's desire to be seen as "tough on crime," rather than a fair and objective review of their individual cases.

New York's appellate courts have long been unsympathetic to such claims. They have generally held that the Parole Board has broad discretion to deny parole based on the seriousness of the underlying offense, so long as the record shows at least token consideration of the other factors listed in the Executive Law. *See, e.g.* Matter of Davis v. New York State Board of Parole, 114 AD2d 412 (2d Dep't 1986). In such decisions, the courts have suggested that it is within the Board's discretion to give greater weight to the underlying offense now than it has in the past and have rejected allegations that the Board is improperly influenced by politics.

Two cases from the past quarter illustrate the courts' usual deference to the Board. In Matter of Lue Shing v. Pataki, 754 N.Y.S.2d 96 (3d Dep't 2003), the Court rejected an inmate's allegations that the Board had failed to give him a fair hearing and was instead merely implementing a policy of the Governor under which all violent felony offenders are denied parole without consideration or application of the statutory factors outlined in the Executive Law. The Court held that its review of the record showed that the Board's decision did not reflect any pre-determination of the matter consistent with an alleged Gubernatorial policy. Although the record reflected petitioner's exemplary prison record, the Court found that this "is but one factor to be considered by the Board, because "discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined'" and "it is permissible for the Board to place emphasis on the serious nature of a petitioner's crimes in denying parole" (citations omitted).

In Matter of Hakim v. Travis, 754 N.Y.S.2d 600 (3d Dep't 2003), the court rejected an inmate's appeal of his parole denial notwithstanding evidence in the record of his productive use of time during his incarceration and his clean disciplinary record. The Court found that the Board had considered all the required statutory factors, and that since those included the serious nature of petitioner's crime, it was permissible for the Board to reject a parole application on that ground. The Court rejected the inmate's argument that the Board is precluded from basing its most recent denial of parole on the same grounds that it invoked it its previous determination. Since the Board is required to consider the same statutory factors each time an inmate appears before it, "it follows that in many cases the same aspects of an individual's record will constitute the primary grounds for denial of an application for parole release."

Parole Board Gets the Final Word

The Chan and Boudin decisions are all the more remarkable against this background of declining parole and hostile courts. Whether they represent a trend, however, remains to be seen. The Division of Parole is appealing the Chan decision to the same court that decided Lue Shing and Hakim. And the Board *again* denied parole to Ms. Boudin at her court-ordered re-hearing.

NEW LAWS TO PROVIDE FOR EARLIER RELEASE

A message from Tom Terrizzi
PLS Executive Director

Responding to pressure to reduce state spending in a time of severe budget strain, the 2003 New York State budget bill introduced several new laws intended to speed the release of certain persons now serving time for non-violent felonies. In addition, DOCS has re-interpreted some existing statutes with the same goal. Regardless of the motivation for these acts, they are a welcome contrast to twenty years of tougher sentencing laws. The following is a summary of some of the news laws.

Merit Time expanded for A-1 drug felonies

The budget bill amends section 803(d) of the Correction Law to permit persons serving an

indeterminate sentence for an A-1 drug felony (i.e., criminal sale of a controlled substance in the first degree) to receive a merit time allowance of up to one-third off the minimum term. This is substantially more than the one-sixth off the minimum which applies to other non-violent indeterminate sentences.

Where such a person is serving multiple sentences, the sentences will be calculated as follows: If the person is serving two or more concurrent sentences, one of which is an A-1 drug felony, the minimum of the A-1 one may be reduced by one-third, while the minimums of the other felony or felonies may be reduced by one-sixth. The sentence with the longest minimum determines when the person is eligible for release. If the person is serving two or more consecutive sentences, one of which is an A-1 drug felony, the aggregate of the minimum terms may be reduced by one-third for the A-1 portion of the sentence and by one-sixth for the other felony or felonies minimums.

Earned eligibility program expanded

The budget bill expands the earned eligibility program, Correction Law §805, to include those persons with a minimum of eight years on an indeterminate sentence, up from six years. The other eligibility rules stay the same.

Presumptive release created

The budget bill creates an entirely new category of release from prison called presumptive release. The new law, Corrrection Law § 806, permits the Commissioner of DOCS to "presumptively release" persons serving non-violent felonies who have been awarded an earned eligibility certificates at the expiration of their minimum terms and to release persons serving non-violent felonies who meet the criteria for merit time upon the expiration of 5/6ths of the minimum term. An inmate must apply for presumptive release. The Commissioner may refuse to release an otherwise eligible person if he determines that the release would not be consistent with the safety of the community or the welfare of the inmate. Persons previously convicted of or currently serving a sentence for a violent felony, A-1 felony or a sex offense are not eligible, nor are those who have "committed any serious disciplinary infraction." The details of the application process will have to be worked out by DOCS and the Division of Parole in new regulations.

The Commissioner can revoke a grant of presumptive release if a person gets a disciplinary infraction or fails to continue to participate successfully in an assigned work or treatment program after receiving a certificate of earned eligibility. Once released, the person will be in the custody of the Division of Parole. Like parolees and those on conditional release, all parole laws and regulations regarding supervision and revocation will apply to a person who is a presumptive releasee.

If a person is eligible for presumptive release but the application is denied by DOCS, that person will still appear at the parole board for release consideration at the merit time date. A denial of presumptive release does not automatically mean that early parole will also be denied.

Early termination of Parole

Finally, the bill creates another new statute which will permit the Division of Parole to grant a "merit termination of sentence" to most persons convicted of a non-violent felony who are on parole, conditional release or presumptive release. The old law referred to this as "discharge" from parole or conditional release. If granted, the merit termination ends the sentence.

The merit termination can be granted to those convicted of most non-violent felonies after one year of their release from prison. Like the old discharge law, the Division of Parole must determine that it is in the best interest of society to grant termination of the sentence. The Division must also determine if a person who is financially able to comply with an order of restitution or required to pay a mandatory surcharge made a good faith effort to do so.

Earlier Eligibility for Temporary Release

In addition to the above changes in the

law, DOCS has recently rE:-interpreted the Correction Law to provide earlier eligibility for the temporary release program. Previously, DOCS interpreted the law to mean that inmates were eligible for temporary release only when they were within two years of their parole eligibility date. Under the new interpretation, DOCS will permit inmates to be considered eligible for temporary release when they are within two years of their merit time date.

It was predicted during state budget discussions that up to 1300 people will get early release under these new laws this year. Much will depend, however, upon how quickly DOCS can get the necessary regulations in place, particularly for presumptive release, and how the Commissioner interprets his new authority.

NEWS AND BRIEFS

Son of Sam Law Survives Constitutional Challenge

New York's amended Son of Sam Law, (about which we reported in our last issue) has survived its first constitutional challenge. In New York State Crime Victims Board v. Abdul Majid, 749 N.Y.S.2d 837 (Sup. Ct., Albany Co., 2002), the court rejected an inmate's claims that the law violates the *ex post facto* clause and the due process clause of the federal constitution.

The Son of Sam Law allows crime victims to sue a convicted criminal within three years after learning that he has received funds in excess of $10,000.00, from any source (other than earned income or child support). It also authorizes the Crime Victims Board (CVB) to seek provisional remedies against convicted criminals on behalf of crime victims, to prevent the assets from being spent before the victim is able to bring suit.

In Crime Victims v. Abdul-Majid, the defendant, an inmate, had been convicted of murdering a police officer and attempting to murder another. On April 2, 2002, the CVB received notice that he was to receive a payment of $15,000.00 from the State of New York, in settlement of a civil lawsuit against the State.

The CVB brought a preliminary action against Abdul-Majid, seeking an injunction prohibiting him from "disbursing, distributing, encumbering or assigning" any funds in his inmate account pending the outcome of a lawsuit brought by the victims of his offense.

Abdul-Majid responded by challenging the law on constitutional grounds. He argued that the new statute violated the *ex post facto* clause of the Constitution. (The *ex post facto* clause prohibits the State from retroactively changing the definition of a crime, or from imposing a new punishment that did not exist at the time the crime was committed.)

The Court rejected this argument. It noted that statutes that merely create new civil remedies, as opposed to criminal punishments, do not violate the *ex post facto* clause. The provisions of the Son of Sam Law at issue in this case were those that authorize the CVB to seek an injunction of a convict's funds on behalf of crime victims. These provisions essentially authorize the CVB to act in the victims' place to apply for civil remedies that have always been available to crime victims. Thus, the Court found, they do not violate the *ex post facto* clause.

Abdul-Majid also argued that the statute violated the due process clause of the Constitution. (The due process clause prohibits the state from depriving its citizens of "life, liberty or property" without a rational basis for doing so. Where "there is a reasonable connection between [the deprivation] and the promotion of the health, comfort, safety and welfare of society," however, a "rational basis" for the statute will generally be found, and the due process clause will not be violated.) Here, the Court noted that the United States Supreme Court had found an earlier version of the Son of Sam law constitutional. In that case, Simon and Schuster v. Members of the New York State Crime Board, 502 U.S. 105, the Court held: "There can be little doubt . . . that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them. Every State has a body of tort law serving exactly this interest. The State's interest in preventing wrongdoers from dissipating their assets before victims can recover explains the existence of the State's statutory provisions for prejudgment remedies and orders of restitution." The New

resulted in the Legislature amending the law to provide additional due process protections to offenders in risk level classification hearings. *See*, Doe v. Pataki, 3. F.Supp.2d 456 [S.D.N.Y. 1998].)

In Connecticut Dept. of Public Safety v. Doe, __ U.S. __, 123 S.Ct. 1160 (2003), the Court reversed the Second Circuit and upheld the Connecticut statute, finding that a mere injury to one's reputation does not constitute a deprivation of a liberty interest. It is thus unlikely that the additional due process protections added to the New York statute after Doe are required by the federal constitution.

Three Strikes Laws

In two consolidated cases, the Supreme Court upheld California's three strikes law, which mandates prison sentences of 25 to life for a third felony conviction, regardless of the nature of the conviction. One of the cases involved a defendant, Leandro Andrade, who was given a fifty-year sentence for stealing less that $150.00 worth of childrens' videos from two K-Mart stores. The other case involved defendant Gary Albert Ewing, who was sentenced to 25 years to life for stealing three golf clubs worth $1200. In the two 5-4 decisions, the Court found that the three strikes laws do not violate the Eighth Amendment's ban on cruel and unusual punishment and are a valid means for state lawmakers to attempt to keep career criminals off the streets, even when the third crime committed is a relatively minor one.

In Lockyer v. Andrade, ___.U.S. ___, 123 S.Ct. 1166 (2003), the Court reversed a ruling by the Ninth Circuit which had ruled that Andrade's sentence was "grossly disproportionate" to his crime and thus violated the Eighth Amendment. The high court reversed, finding that it was unclear as a matter of federal law whether the sentence was unconstitutional and that, therefore, the federal courts should defer to the California State Courts – which had previously held the statute to be constitutional – because their judgment was not an unreasonable application of clearly established federal law.

Four justices dissented, finding no justifiable reason for such long sentences. In a strongly worded opinion, Justice Souter wrote: "Whether or not one accepts the state's choice of penalogical policy as constitutionally sound, that policy cannot reasonably justify the imposition of a consecutive 25-year minimum for a second minor offense committed soon after the first triggering offense, Andrade did not somehow become twice as dangerous to society when he stole the second handful of videotapes, his dangerousness may justify treating one minor felony as serious and warranting long incapacitation, but a second such felony does not disclose greater danger warranting substantially longer incapacitation. Since the defendant's condition has not changed between the two closely related thefts, the incapacitation penalty is not open to the simple arithmetic of multiplying the punishment by two without resulting in gross disproportion even under the State's chosen benchmark."

Setting aside the dissenters, however, the Court also upheld the three strikes law in Ewing v. California, __U.S.__, 123 S.Ct. 1179 (2003). There, Justice O'Connor wrote: "State legislatures enacting three strikes laws made a deliberate policy choice that individuals who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional punishment approaches, must be isolated from society to protect the public safety . . . Though these laws are relatively new, this court has a longstanding tradition of deferring to state legislatures in making and implementing such important policy decisions."

Mandatory Immigration Detention

One decision likely to have an immediate impact on New York State inmates is Demore v. Kim, 123 S.Ct. 1708 (2003), in which the Court ruled, in another 5-4 decision, that the federal government may detain lawful immigrants convicted of "aggravated" felonies without bond during the pendency of their deportation hearings. The decision upheld the mandatory-detention provisions of a 1996 immigration law, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA"). For New York inmates who are not U.S. citizens, this decision means they will almost certainly be detained by the INS after their criminal sentences have been

completed, without any entitlement to bail or a bond, until their deportation proceedings end.

The mandatory detention provisions of the IIRAIRA replaced an earlier law which gave the Attorney General the discretion to release individuals on bond while their deportation cases went forward as long as they presented neither a flight nor a security risk. Tens of thousands of so-called "criminal aliens" have been imprisoned under the new law.

In affirming the constitutionality of the new law the Court overruled four federal appeals courts that had declared the mandatory-detention provision unconstitutional as applied to lawful permanent residents, since they have more rights than aliens who have not been lawfully admitted into the country.

The case involved a Korean-born Californian lawful immigrant named Hyung Joon Kim, who is still contesting his deportability and is not yet subject to a final order of removal. Mr. Kim came to the United States from Korea with his family at the age of 6 and became a permanent resident two years later. After two criminal convictions in California as a teenager, one for burglary and one for theft, he was placed in deportation proceedings and imprisoned under the new law. After three months in detention, he filed a petition for a writ of habeas corpus arguing that he was constitutionally eligible for release while challenging his deportation

Five Justices found no constitutional requirement for a hearing at which a detained immigrant could demonstrate eligibility for release on bond. Chief Justice Rehnquist, writing for the majority, said that "against a backdrop of wholesale failure" by immigration authorities under the old law to deal with rising rates of crime by aliens, Congress had adequately demonstrated a need to imprison aliens awaiting deportation for past crimes to keep them from committing new crimes. While Congress might have permitted "individualized bail determinations," in the past he said, "when the government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal."

In a dissenting opinion, Justice Souter said the decision was "at odds with the settled standard of liberty," under which the government does not have the right to detain an entire class of people but must justify the detention of individuals on a case-by-case basis. "Due process calls for an individual determination before someone is locked away," Justice Souter said.

Note: This issue of Pro Se went to press before the Court's decision in Overton v. Bazzetta, __U.S. __, 123 S.Ct. 12612 (2003), in which the Court upheld highly restrictive visitation regulations in Michigan. Pro Se will take a close look at the Overton decision and its likely implications for New York inmates in our next issue.

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Abdul-Majid responded by challenging the law on constitutional grounds. He argued that the new statute violated the *ex post facto* clause of the Constitution. (The *ex post facto* clause

prohibits the State from retroactively changing the definition of a crime, or from imposing a new punishment that did not exist at the time the crime was committed.)

The Court rejected this argument. It noted that statutes that merely create new civil remedies, as opposed to criminal punishments, do not violate the *ex post facto* clause. The provisions of the Son of Sam Law at issue in this case were those that authorize the CVB to seek an injunction of a convict's funds on behalf of crime victims. These provisions essentially authorize the CVB to act in the victims' place to apply for civil remedies that that have always been available to crime victims. Thus, the Court found, they do not violate the *ex post facto* clause.

Abdul-Majid also argued that the statute violated the due process clause of the Constitution. (The due process clause prohibits the state from depriving its citizens of "life, liberty or property" without a rational basis for doing so. Where "there is a reasonable connection between [the deprivation] and the promotion of the health, comfort, safety and welfare of society," however, a "rational basis" for the statute will generally be found, and the due process clause will not be violated.) Here, the Court noted that the United States Supreme Court had found an earlier version of the Son of Sam law constitutional. In that case, Simon and Schuster v. Members of the New York State Crime Board, 502 U.S. 105, the Court held: "There can be little doubt . . . that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them. Every State has a body of tort law serving exactly this interest. The State's interest in preventing wrongdoers from dissipating their assets before victims can recover explains the existence of the State's statutory provisions for prejudgment remedies and orders of restitution." The New York court found the Supreme Court's discussion conclusively established that the Son of Sam law is reasonably related to a legitimate state interest, and thus did not violate the due process clause.

After rejecting defendant's constitutional challenges, the Court addressed the merits of the CVB's request for an injunction. To obtain an injunction the moving party must show, (1) a likelihood of success on the merits, (2) irreparable injury should the injunction not be granted and, (3) equities that favor injunctive relief. Here, the Court held, "the victims of defendant's crimes and the citizens of this State would be irreparably damaged if the defendant was allowed to spend the funds in his inmate account before a court could determine whether he will be required to pay that money over to his victims." Consequently, the Court granted the CVB's request and enjoined Abdul- Majid from spending his money, pending the outcome of the victim's lawsuit.

Paroled Inmate Wins New Hearing on License Application

LaCloche v. Daniels, 755 N.Y.S.2d 827 (Sup. Ct., N.Y. Co., Feb. 13, 2003)

Petitioner LaCloche, a parolee, was convicted in 1991 of robbery in the first degree. During his incarceration he completed vocational training to become a barber. He received good evaluations, became first a barber's assistant and then a professional barber, and trained other inmates. He also earned a high school equivalency diploma. In August of 2000, anticipating parole, he applied to the New York State Division of Licensing Services for a certificate of registration as a barber's apprentice. His application was denied on the ground that his criminal history "indicated lack of good moral character and trustworthiness required for licensure."

Correction Law § 752 states that "no application for any license . . . shall be denied by reason of the applicant's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of 'good moral character' when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses, unless: (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought; or (2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."

Correction Law § 753, meanwhile, states that the Division of Licensing Services must consider several factors in determining whether

someone who has been convicted of a crime lacks 'good moral character.' These include the public policy of New York to encourage the licensure and employment of persons previously convicted of one or more criminal offenses; the duties and responsibilities necessarily related to the license or employment sought; the bearing the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities; the time which has elapsed since the occurrence of the criminal offense or offenses; the age of the person at the time of occurrence of the criminal offense or offenses; the seriousness of the offense or offenses; any information produced by the person, or produced on his behalf, regarding his rehabilitation and good conduct; and the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

LaCloche challenged the Division pf Licensing Service's decision in court. He argued that it was absurd for the State to provide him with vocational training in prison and then refuse to grant him a license to practice the very vocation for which it had trained him.

The Court ruled in favor of LaCloche. It found that the Division had failed to consider any of the factors listed by the Correction Law other than petitioner's criminal conviction. The court also noted the irrationality of the State's position: "If the State offers this vocational training program to persons who are incarcerated, it must offer them a reasonable opportunity to use the skills learned thereby, after they are released from prison. Otherwise, there would be little incentive to the prisoner to study this skill. To refuse to certify an applicant as a barber apprentice solely because of a previous criminal conviction would be to deny the applicant the opportunity to practice a trade which the State itself taught him/her." Consequently, the decision was reversed and the Division was ordered to reconsider the LaCloche's application.

State Found Liable for Inmate Death

Arias v. State of New York, 755 N.Y.S.2d 223 (N.Y.Ct.Cl., 2003)

A Court of Claims Judge has held New York State liable for the death of an inmate, William Newborn, who died of a drug overdose at Green Haven Correctional Facility in 1997. The Court found the State liable for medical malpractice and negligence.

Newborn was in protective custody at Green Haven. In May , a DOCS counselor referred him for a psychiatric evaluation after noticing his "rapid mood swings and poor disciplinary record." After evaluation, he was designated a "Level One" OMH patient, meaning that he required the most intensive level of care and "one-to-one administration of medication by a nurse." He was subsequently prescribed large quantities of Pamelor, a brand name of Notriptyline, an antidepressant.

In July, Newborn appeared before the Parole Board. Later that month he reportedly told a social worker that he would attempt suicide if denied parole. On July 24, a DOCS psychiatrist prescribed both Trilafon and Elavil to help him sleep. (The court later found that "[i]t is medically contraindicated to prescribe Elavil and Pamelor at the same time.") At the end of July he found out he had been denied parole and would have to serve at least two more years in prison.

On August 1, at approximately 12:50 p.m., he requested to go back to his cell from the exercise yard to get ready to go to PSU. He was allowed to leave and return to his cell. He asked a correction officer to leave his cell door open in case the escort officer was late, but the C.O. refused. He became agitated and was told by the C.O. that if the escort officer did not arrive in 20 minutes, he would let him out of his cell. The escort officer never came.

At approximately 1:20 p.m., he began calling for the Block officer. An officer arrived but refused to let him out of his cell. He then became "wild" and "trashed his cell." Officers spoke with him for about twenty minutes, trying to calm him down. After straightening his cell, he was allowed to go back to the yard but within 15 minutes he requested to go back to his cell complaining that "they" would not leave him alone. OMH was notified that he was talking to himself and they requested that someone escort him to PSU, but apparently this request was never followed.

At approximately 2:00 p.m., another C.O.

saw him grab something and put it to his mouth: "The block officer observed him throwing an empty container to the floor. When questioned what it was, he told the officer it was pills for his headaches and to help him sleep. He then laid down on the floor. He was questioned several times as to what he ingested and he insisted that he only took one pill. The C.O. noted that the empty bottle was dated July 30 and originally contained 30 pills." Eventually he was transported to an outside hospital after becoming non-responsive and suffering a seizure. He died of complications due to an overdose of Notriptyline 13 days later.

The Court held that the State was fully liable for Newborn's death. It found that the undisputed record suggested that medical malpractice and substandard psychiatric care had facilitated a preventable suicide. The State had failed to coordinate treatment between physicians in DOCS and those in OMH, had neglected to adequately review Newborn's history of mental illness, had failed to detect his deteriorating mental condition and neglected to respond appropriately and promptly to his overdose. Among other things, the Court noted that DOCS' policies specifically state that drugs be administered only by appropriately licensed personnel "who shall ensure that psychottropic medications such as Pamelor/Nortriptyline are swallowed by the inmate patient." Those policies were not followed. The Court also relied upon a report by the State Commission of Correction Medical Review Board which had found Green Haven's management of Newborn's medication to be deficient.

The State argued that Newborn had also been negligent and, therefore, it should only be partly liable. The court held: "The issue of contributory negligence in a suicide case is whether, based upon the entire testimony presented, the trier of facts concludes the injured person was able to control his actions." This is to be measured "not based upon the objective standards of a reasonable person, but rather . . . upon the capacity of the patient and his perception of danger, considering the degree of his illness. . . . General allegations, merely conclusory in nature and unsupported by competent evidence are insufficient to defeat claimant's entitlement to summary judgment." Here, the Court found, the State had submitted only an affirmation of its counsel, which was not based upon any "personal knowledge of the essential facts" and was thus insufficient to defeat the claimant's motion for summary judgment. The Court also noted that the State had failed to submit any evidence from a medical expert "to establish that decedent was not so mentally impaired that he was able to control his own actions. . . ." Therefore, the Court concluded, Newborn could not be found contributorily negligent

A trial on damages will be scheduled at a later date.

Violation of Visitation Regs Results in Damages For Inmate

The decision in Dawes v. State of New York, 755 N.Y.S.2d 221 (Ct. of Cl., 2003) is straightforward enough: Claimant Dawes was awarded $100 in damages after DOCS restricted his visitation privileges in violation of the provisions of 7 NYCRR 200.5. It is more colorful, however, with some background.

More then twenty years ago, New York State inmates, represented by Prisoners' Legal Services, challenged the constitutionality of the then-existing visitation regulations. The inmates won. A federal district court held that the DOCS' regulations were unconstitutional because they granted DOCS the authority to withhold or revoke visitation for virtually any reason without due process of law. *See,* Kozlowski v. Coughlin, 539 F.Supp. 852 (S.D.N.Y., 1982) As a result, DOCS entered into a consent decree in which it promised to institute new visitation regulations. The new regulations, now codified at 7 NYCRR 200.5, *et seq.*, protected inmates' visitation rights by stating that visitation may only be suspended or revoked for "visit-related" misconduct, providing both the inmate and the visitor an opportunity to contest the restriction. See, 7 NYCRR § 200.5(a)(4).

In 2001, DOCS moved to terminate the consent decree. In doing so, it relied on provisions of the Prison Litigation Reform Act of 1995 ("PLRA") which require courts to terminate any consent decree governing prison conditions "if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than

necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(b)(2). The District Court granted DOCS' termination motion. It reasoned that the Supreme Court, in a decision issued six years after the original Kozlowski decision, had held that inmates had no constitutional right to visitation at all (*citing* Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989)) and that, therefore, the consent decree necessarily went "further than necessary" to protect inmates' federal rights. Plaintiffs have appealed this decision, arguing that the district court misinterpreted Kentucky and that the due process clause does indeed protect inmates' visitation rights. That appeal is still pending.

In the meantime, the question arose whether the regulations that were drafted pursuant to Kozlowski – and which remain on the books – may still be enforced in *state* court, despite the fact that the federal court has terminated the consent decree, which required them. This is where Dawes comes in.

In January of 2000, inmate Dawes received a misbehavior report for allegedly assaulting a staff member. The incident was unrelated to a visit. Nevertheless, the next day, he received a memorandum from a Captain stating that, as a result of the assault, his visitation would be restricted to the "non-contact" area and he would remain in full mechanical restraints during any visit. Dawes sued for damages in the state Court of Claims, alleging that the visitation restriction violated his rights under the regulations. After a trial, the Court ruled initially in the state's favor: It held that DOCS' regulations concerning restraints gave them authority to restrict Dawes' visitation to the non-contact area. Dawes obtained counsel and moved to reargue. In his motion, he pointed out that the Kozlowski regulations were still on the books, even though the consent decree, which required them, had been terminated. So long as they existed, he argued, they could, and should, be enforced by the state courts. The Court agreed and reversed itself. It held that DOCS had violated the visitation regulations by prohibiting Dawes from having contact visitation as a result of misbehavior that was not visit-related. (The Court noted that DOCS has many other means of punishing and deterring assaults on staff without having to limit his visitation rights in contravention of their own regulations.)

The inmate was represented in his motion to reargue by Prisoners' Legal Services of New York.

Family Court: Inmate Has Right to Attend Child Support Hearings. . . .

Matter of Kirchner o.b.o F.G. v. E.H., 755 N.Y.S.2d 793 (N.Y. Fam. Ct. 2003)

In this case, the respondent E.H., an incarcerated father, was ordered to pay child support in the amount of $25.00 per month. He objected on the grounds that he had not been produced at the hearing and afforded the opportunity to defend himself against the petition, despite the fact that his incarceration was known to the hearing officer who entered the child support order. The court agreed. Although Family Court Act § 413(1)(g) establishes $25.00 per month as the minimal amount of child support that may be paid, the Court of Appeals has held that a court may grant an order of less than $25.00 in appropriate cases, even down to $0.00 child support. Matter of Rose v. Moody, 83 N.Y.2d 65, 607 (1993). Thus, not only was the inmate-father in this case deprived of his right to attend the hearing, but also the court could not rule out that had he been allowed to attend he might have persuaded the hearing examiner that the appropriate child support in his case was less than $25.00. Under those circumstances, the Family Court was wrong to proceed without him. The Court noted that DOCS has provisions for conducting telephonic hearings and ordered that the child support hearing be held again with the father in telephonic attendance.

. . . .But No Right to Counsel in Visitation Hearing

Matter of Ward v. Jones, 757 N.Y.S.2d 127 (3d Dep't 2003)

Petitioner Ward, an inmate, sought visitation with his two children. Following a hearing in Family Court, at which the parties

appeared *pro se* and testified, the Court denied petitioner's application, finding that visitation would not be in the children's best interest. Petitioner appealed. In his appeal he argued that he was denied his right to assigned counsel at the Family Court hearing. The court rejected his claim. The Family Court Act § 262(b) states that "a judge may assign counsel to represent any adult in a [Family Court] proceeding if he determines that such assignment . . . is mandated by the constitution of the state of New York or of the United States." Thus, at issue was whether either the Federal or the State Constitutions required appointment of counsel.

The Supreme Court has held that "when the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." Santosky v. Kramer, 455 U.S. 745 (1982). Fair procedures, however, are not automatically equated with the appointment of counsel. Here, the court found that the basic procedures used by the Family Court were fundamentally fair: Petitioner was afforded an evidentiary hearing at which he was permitted to state his case for visitation at length; the issue was not complicated, no expert testimony was required to resolve petitioner's application and the respondent, petitioner's ex-wife, was not represented by counsel. Under those circumstances, neither the New York nor the Federal Constitution require appointment of counsel.

Note: If the issue is one of termination of parental rights as opposed to visitation, however, the court is required to appoint counsel to represent the parent whose parental rights might be terminated.

Sentence Computation : Arrest and Conviction on New Charge While on Temporary Release Counts as Absconding

Two recent cases addressed the question of whether an arrest on a new charge while on temporary release interrupts the service of the sentence that was being served when the arrest occurred. In both cases, the inmates lost.

The questions arise under Penal Law §70.30(7). That section is titled: "Absconding from temporary release or furlough program." It provides that when a person on temporary release "fails to return" to his facility at or before the time prescribed for his return, "such failure shall interrupt the sentence and such interruption shall continue until the return of the person to the institution in which the sentence was being served." It also provides that any time served in custody after the interruption of the sentence, that is based upon an arrest on another charge, which culminates in a conviction, may be credited to the original sentence. In such cases, however, "the credit allowed *shall be limited to the portion of the time spent in custody that exceeds the period, term or maximum term of imprisonment imposed for such conviction.*" Penal Law §70.30(7)(c) (emphasis supplied).

In Matter of Maccio v. Goord, 756 N.Y.S.2d 412 (Sup. Ct. Alb. Co. Feb. 25, 2003) petitioner, an inmate, failed to return from his temporary release program after being arrested in Nassau County. He was subsequently sentenced on the Nassau County charges to one year and thirty days. He served approximately eight months, and was returned to DOCS eight days after his county sentence ended. He argued that since he was involuntarily held in the Nassau County jail, he did not "abscond" from temporary release and, therefore, his state sentence should not have been interrupted while he was serving his definite sentence in the Nassau County Jail. Furthermore, he argued, he had been found not guilty of absconding at his disciplinary hearing.

The Court found that Penal Law §70.30(7) was nevertheless applicable: "Petitioner's conduct of being arrested on another criminal charge which culminated in a conviction falls squarely into the category of behavior defined by Penal Law §70.30(7)(c) which limits any jail time credits to the portion of time spent in custody *that exceeds* the period, term or maximum term of imprisonment imposed for such conviction. Petitioner spent eight months incarcerated in the Nassau County Jail upon his convictions there. Accordingly, this Court holds and determines that respondent has correctly refused to credit petitioner with any time served from April 16, 2001 to December 10, 2001." The Court went on, however to award petitioner credit for the eight days he spent in local custody after his county sentence ended, since that time

did exceed "the period, term, or maximum term of imprisonment imposed" by the County Court.

In People ex rel. Pughe v. Parrott, 302 A.D.2d 823, ___ N.Y.S.2d___ (3d Dep't 2003) the inmate tried a different tack on the same problem: Pughe was participating in a work-release program when he was arrested on federal charges. That arrest led to a federal conviction and a 162-month federal sentence. After serving 89 months he was returned to state custody in 2001. The state re-computed his sentence, refusing to credit him with any of the time that he had served on the federal sentence, pursuant to Penal Law § 70.30(7)(c). Pughe sued. He argued that absconding from temporary release required an intentional act and, since he had not intended to abscond, §70.30(7) should not apply to him. He found support for this argument in the twelve-year-old case of People ex rel Hammer v. Keane, 143 Misc.2d 132, *aff'd* 171 A.D.2d 895, *lv denied* 78 N.Y.2d 863. In that case, the Court found that because the title of §70.30(7) refers to absconders, and because absconding requires an intentional act, it did not apply when someone was arrested on new charges.

The Court rejected both Pughe's argument and the twelve-year-old precedent. While the heading of the statute may help clarify an imprecise provision it may not alter or limit the effect of unambiguous language in the statute itself. Here, the Court held, the language of the statute applies unambiguously to anyone who "fails to return" from temporary release, regardless of whether the failure was intentional. Moreover, it found, subsection (c) of the statute plainly reflects the Legislature's intent that inmates absent from temporary release not receive credit against their sentences for time served upon conviction of a new charge. Accordingly, it concluded, §70.30(7) "unambiguously provides for sentence interruption whenever a person on temporary release fails to return regardless of whether the failure is intentional."

2d Circuit Addresses Retaliation Claims

Prisoners frequently allege that some action taken against them by a prison official, such as the writing of a misbehavior report, was actually in retaliation for their exercise of a constitutionally protected right, such as the filing a grievance. Retaliating against an inmate for the exercise of a constitutionally protected right is illegal, and may be grounds for a lawsuit against the prison official accused of taking the retaliatory action. Courts, however, treat such claims "with skepticism and particular care," because "virtually any adverse action taken against a prisoner by a prison official – even those otherwise not rising to the level of a constitutional violation [themselves] – can be characterized as a constitutionally proscribed retaliatory act." Dawes v. Walker, 239 F. 3d 489 (2d Cir. 2001).

Consequently, to survive a motion to dismiss a retaliation claim, an inmate asserting the claim must advance "non-conclusory" allegations that (1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and adverse action. Dawes, *id.*, at 492. To prove the claim, the inmate bears the burden of showing that his constitutionally protected conduct was a "substantial" or "motivating" factor in the adverse action of the prison officials. The burden then shifts to the officials. If they can show that the same action would have been taken even absent a retaliatory motive, then the inmate will lose a motion to dismiss.

Two recent cases from the Second Circuit Court of Appeals illustrate retaliation claims. One of the claimants was successful, the other was not.

In Gayle v. Gonyea, 313 F.3d 677 (2d. Cir. 2002) the plaintiff, an inmate at Bare Hill Correctional Facility, claimed that after he wrote a letter to the Superintendent to complain about an incident which had occurred the previous day, in which a prison vehicle had allegedly run over another inmate, he was interviewed by the defendant, Captain Gonyea. He was later served with a misbehavior report, written by Gonyea, charging him with participating in "actions detrimental to the facility." The basis for the charge, according to Gonyea, was that, during the interview, "Gayle . . . told me he was an inmate advocate against staff racism and misconduct. . . [He] admitted to me that he had no personal knowledge of the incident but he was telling other inmates in population to write complaints to Albany and the Superintendent on the matter.

. . . [He] stated inmate action would be the only way to make people aware of the problems with staff at Bare Hill. Gayle threatened inmate unrest and people getting hurt. Gayle stated he advocated inmates and officers taking off their shirts and fighting to solve their disagreements. Gayle stated that he advises other inmates to file lawsuits and write complaints against staff at this facility. Gayle stated he would continue to be the facility [sic] biggest problem until he got transferred."

Gayle was found guilty at his disciplinary hearing. After an administrative appeal, the hearing was reversed, but not until Gayle had served his full term in SHU. Gayle brought a lawsuit in federal court charging Gonyea with having written a false misbehavior report in retaliation for his constitutionally protected complaints to the Superintendent. Defendants moved for summary judgment, alleging that the complaint failed to state a claim. The lower court granted their motion but the Court of Appeals reversed. The Court found that Gayle had submitted sufficient evidence relevant to his burden of proof to at least bring his claim to trial. There was no question that the First Amendment protected his letter to the Superintendent. He alleged that Gonyea's misbehavior report was filed in retaliation for his letter. That allegation was supported by at least enough circumstantial evidence that a reasonable jury could conclude that he was right: The misbehavior report was written shortly after the complaint was filed; it arose from statements made during a conversation about the grievance; Gonyea's testimony at the disciplinary hearing failed to support the charges in important respects and was denied by Gayle in other respects and the hearing had been administratively reversed. The Court particularly noted that Gonyea's testimony that Gayle had stated that "he would continue to be the Facility's biggest problem, until he gets a transfer" did not describe any conduct prohibited by the rule Gayle was charged with violating, but merely indicated that, in some vague sense, Gayle was planning to be a pain in the neck. All of this, the Court found, could lead a jury to conclude that Gayle "intended to accomplish that end by further and more frequent protected activity rather than any violation of prison rules and that Gonyea's real motive [in writing the misbehavior report] was to prevent such additional protected activity."

In Davis v. Goord, 320 F.3d 346 (2d Cir. 2003) the plaintiff stated that after he filed a grievance against several facility doctors, the doctors retaliated against him by, among other things, calling him "stupid," and by discontinuing his high fiber diet. In this case, the Court concluded that the plaintiff had failed to state a retaliation claim. Although, as in Gayle, there was no question that plaintiff's conduct in filing a grievance was protected activity, the Court found that the insulting or disrespectful comments allegedly made by the doctors did not rise to the level of retaliation. "Only retaliatory conduct that would deter [an] individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action [in a retaliation claim]." The allegation that the doctors discontinued Davis's medically prescribed diet *could* rise to the level of constitutionally actionable adverse action, however plaintiff could not show that there was a causal connection between that action and his complaints about the doctors. In fact, the doctors had restricted his diet *before* he had filed his grievances. Davis' claim that the doctors had acted because they had heard about a prior lawsuit he had filed in another facility concerning his medical care, unsupported by any evidence, was insufficient to support a connection between the dietary restrictions and the protected activity. Under those circumstances, the Court found, plaintiff had not stated an actionable claim for retaliation, and his claim was properly dismissed.

DISCIPLINARY ROUNDUP

The good, the bad and the ugly, from this quarter's disciplinary cases:

Contraband : Confidential Information Establishes Possession

In the Matter of Weaver v. Goord, 754 N.Y.S.2d 67 (3d Dep't 2003)

Petitioner, an inmate, challenged a disciplinary disposition finding him guilty of

smuggling and unauthorized possession of controlled substances based upon a confidential investigation which allegedly disclosed that he had been selling drugs. Petitioner argued that since no controlled substances were found in his possession there was insufficient evidence to find him guilty of the charges. The Court held, "[i]t is well settled, however, that substantial evidence may consist of confidential information relayed to the hearing officer so long as the officer has made an independent assessment to determine that the information is 'reliable and credible'. Our review of the *in camera* material contained in the record before us discloses that the Hearing Officer independently assessed the reliability and credibility of the confidential information before relying upon it as evidence of petitioner's guilt" (citations omitted).

Contraband : Inmates Found to Possess Contraband

Matter of Black v. Goord, 753 N.Y.S. 2d 770 (3d Dep't 2003)

Petitioner Black was found guilty of violating various prison disciplinary rules including possession of drugs. Two misbehavior reports charged that he "was seen in the shower area acting suspiciously and, when ordered to leave. . . . was observed trying to stuff something in the shower drain. After he finally complied with an order to step away from the area, two pieces of rubber glove, rolling paper and an unknown substance later identified as marihuana, were uncovered in the area and placed in a bowl. While being escorted out of the area, which contained approximately 25 other inmates, petitioner grabbed the contents of the bowl from the correction officer, crumpled it and threw it. Mr. Black argued that he was not actually found in "possession" of the marihuana and therefore could not be found guilty of possession of drugs. The Court rejected this argument, holding that "the testimony regarding his suspicious behavior and that he was the only one in the shower area gives rise to an inference of possession even though access to the area may not have been exclusive."

Matter of Clark v. Selsky, 754 N.Y.S.2d 607 (3d Dep't 2003)

Petitioner Clark was found guilty of violating disciplinary rules prohibiting the unauthorized possession of controlled substances. The record established that he had been released from his cell in order to distribute water to the other inmates. After returning to his cell, he asked to be released again because he had forgotten to return the water bucket. Prior to letting petitioner out, a search of the slop sink area revealed a finger of a plastic glove containing 16 packets of heroin, which the correction officer confiscated. Petitioner was then released from his cell, searched the sink area and returned to his cell.

Petitioner claimed that he could not be found guilty of possessing the heroin because other inmates also had access to the slop sink area. The correction officer who authored the misbehavior report testified, however, that the area had previously been searched and that petitioner was the only inmate who had access to it prior to the narcotics being found. The Court found that this gave rise to a reasonable inference of possession by the petitioner since the area was within his control.

Direct Orders : Inmates Must Follow Them

Matter of Davis v. Goord, 753 N.Y.S.2d 409 (3d Dep't 2003)

Petitioner Davis was found guilty of violating the disciplinary rule prohibiting inmates from refusing a direct order, after he was charged with having refused to comply with a correction officer's order to enter his newly assigned, double bunked cell. Petitioner contended that his refusal to obey the order was justified because it had been his understanding that he was not eligible for double bunking. The Court found, however, that it is well settled that inmates are not permitted "to decide for themselves which orders to obey and which to ignore" (*citing* Matter of Rivera v. Smith, 63 N.Y.2d 501). "To avoid sanctions, an inmate must comply with a direct order, even if he or she perceives it to be improper. Redress may be sought thereafter

through the grievance procedure established by the Department of Correctional Services."

Documentary Evidence : Denial of Right to Present Evidence Is Harmless Error

Matter of Vidal v. Burge, 755 N.Y.S.2d 692 (4th Dep't 2003)

Petitioner Vidal challenged a Tier II hearing in which he was found guilty of violating disciplinary rule 106.10 (refusing a direct order); 107.11 (harassment); 112.22 (obstruction of visibility into cell or room) and 118.30 (untidy cell or person). At the hearing, petitioner requested a copy of a complaint that he had earlier filed against the author of the misbehavior report, as well as a copy of the policy and procedure memorandum governing cell searches. The Court acknowledged that petitioner had the right to submit relevant documentary evidence and concluded that the Hearing Officer erred in denying his requests. The Court found, however, that the error was harmless: "The Hearing Officer credited petitioner's testimony with respect to the complaint filed against the author of the misbehavior report, and the policy and procedure manual was not exculpatory."

Practice pointer: When challenging a disciplinary hearing on procedural grounds, it is important to show how an alleged procedural error prejudiced your ability to defend yourself. Otherwise, the court may dismiss your claim, as in the above two cases, on the ground that the error was "harmless."

Drug Testing : Hair Test Doesn't Overcome Urinalysis Test

Matter of Mathie IV v. Selsky, 755 N.Y.S.2d 340 (3d Dep't 2003)

Petitioner Mathie IV was found guilty in a disciplinary hearing of using a controlled substance based on the positive results of two urinalysis tests. After his disciplinary hearing he obtained a forensic hair analysis from an outside laboratory at his own expense. The results of the hair analysis were negative but DOCS refused his request to reverse the charges. Petitioner appealed. The Court upheld the guilty finding, holding that the misbehavior report, the positive results of the urinalysis tests and the testimony of the correction officer who obtained and tested the specimen, constituted substantial evidence to support the determination, notwithstanding the new evidence. The Court also rejected petitioner's allegation that the disciplinary charges were fabricated in retaliation for his "well-publicized success as a stock trader and human rights litigant." That allegation, the Court held, merely raised a question of credibility which the hearing officer was free to resolve against the petitioner.

Drug Testing : No Excuse Found for Failure to Provide Urine Sample

Matter of Cruz v. Goord, 754 N.Y.S.2d 597 (3d Dep't 2003)

Petitioner Cruz was found guilty of violating urinalysis-testing procedures after he admittedly failed to provide a urine sample within three hours. He contended that he was wrongly found guilty because his inability to produce the urine sample was caused by Indocin, a prescription anti-inflammatory medication that can cause fluid retention. The Court found this contention to be controverted by petitioner's testimony at the hearing during which he conceded that the medication does not actually prevent him from urinating and that he had, in fact, urinated several times on the day in question. In the alternative, petitioner argued that shy bladder syndrome contributed to his inability to produce a urine specimen. He submitted no evidence, however, to support his contention that he suffered from this condition, rendering it a question of credibility that, the Court held, was properly resolved by the hearing officer.

Drug Testing : Wrong Date on Urinalysis Form Found Harmless Error

Matter of Hilts v. Selsky, 755 N.Y.S.2d 333 (3d Dep't 2003)

Petitioner was found guilty of unauthorized use of a controlled substance after a urinalysis test proved positive for marijuana.

He challenged the determination asserting that the incorrect date stamped on some of the documentation relating to the testing should result in a reversal. The Court held that "[a]n inadvertent error that resulted in the incorrect date being stamped on some of the documentation relating to the urinalysis tests does not provide grounds for annulment. There has been no showing that this clerical error had any impact on the accuracy of the test results or that the defense of petitioner's case was in any way prejudiced thereby." The petitioner also asserted that since the hearing officer signed the form authorizing the testing, he should be precluded from presiding at the hearing. The Court rejected this argument, holding that "[n]othing in the relevant regulations supports [the] contention."

Harassment Violation : No Proof of Intent Needed

In the Matter of Van Bramer v. Selsky, 2003 WL 756054 (3d Dep't 2003)

Petitioner was found guilty of harassment, in violation of disciplinary rule 107.11. The charge related to an alleged attempt by the petitioner to "initiate a personal relationship with a female employee in a college registrar's office by writing her an unsolicited letter that was disturbing to her." The Court found that, "[a]lthough petitioner characterizes his letter as nothing more than a flirtatious effort to obtain a pen pal, our reading finds repeated use of sexual innuendo, requests for personal information and intimate details, and a suggestion of in-person contact in the near future." This, the Court held, was sufficient to support the disciplinary charge. "Petitioner's letter can reasonably be read as annoying and alarming because the female employee became aware of petitioner's rape conviction.

Petitioner's contention that he lacked the requisite intent to annoy or alarm is unavailing, for such intent is not an element of the charged misconduct. Given the deference this Court affords to the interpretation of disciplinary rules by the Commissioner of Correctional Services any doubt in this regard must be resolved in the Commissioner's favor."

Notice: Ambiguous Misbehavior Report Deemed Sufficient

In the Matter of Hamilton v. Selsky, 755 N.Y.S.2d 518 (3d Dep't 2003)

Petitioner, an inmate, was charged with creating a disturbance. While watching television coverage of the events of September 11, 2001, he allegedly made derogatory comments about "the Americans," indicating that "they got what they deserved." A correction officer observed that the remarks "agitated other inmates whose family members were among those feared to have been victims of the attacks and exacerbated the already tense atmosphere in the facility, thereby threatening the order of the facility."

At the disciplinary hearing, the watch commander testified that the "reporting officer had notified him of the incident shortly after it occurred, expressing his concern over the potentially disruptive impact of petitioner's words." The evening watch commander gave additional testimony, stating that he had been informed when he came on duty that anti-American statements had been made by some inmates, exacerbating the tense atmosphere at the facility. In response, he had directed that the inmates be identified and served with misbehavior reports. The Court held that this testimony, in conjunction with the misbehavior report, provided sufficient evidence to support a determination of guilt. The Court rejected petitioner's allegation that the misbehavior report was so ambiguous as to require annulment, holding that, "[t]he factual allegations contained therein were sufficiently detailed to apprize [petitioner] of the specific incident and charge filed against him, thereby enabling him to prepare a defense."

Inmate Can't Claim Lack of Notice

Matter of Taylor v. Poole, 753 N.Y.S.2d 573 (3d Dep't 2003)

Petitioner Taylor was convicted of having violated disciplinary rules after a frisk of his cube revealed a treatise written by the Black Panther Party that encouraged African Americans to offer

armed resistance to governmental authority. The rule he was convicted of having violated, disciplinary rule 105.12 (7 NYCRR 270.2[b][6][iii]), prohibits inmates from possessing "organizational .... materials," and it defines an "organization" as "any gang or any organization which has not been approved by the deputy commissioner for program services." Petitioner argued that he could not be found guilty of this rule violation because he had never been provided with the 1998-revised edition of the "Inmate Behavior Rule Book," which was the first edition to contain the rule. Therefore, he claimed, he lacked notice of its contents. However, the court noted, petitioner conceded that a copy of the rule book was readily available in the facility library, "thereby belying [his] claimed lack of notice of its contents."

Substantial Evidence : Evidence Is Insufficient to Support Correspondence Charge

Matter of Collins v. Pearlman, 302 A.D.2d 382 (2d Dep't 2003)

Petitioner Collins challenged his conviction of disciplinary charges on the grounds that the findings were not supported by substantial evidence. The misbehavior report stated that a package addressed to him contained legal documents belonging to another inmate. The return address on the package belonged to an unidentified third party. Petitioner was charged with having violated facility correspondence procedures and with providing unauthorized legal assistance to another inmate. At a Tier II hear, petitioner testified that he had provided authorized legal assistance to the inmate while they were both at the same facility together but had lost contact with him when he was transferred out.

The hearing officer found him guilty of both charges and sentenced him to 30- days keeplock and loss of privileges. The Court reversed. Although a misbehavior report by itself can constitute substantial evidence of an inmate's misconduct, the report must be "sufficiently relevant and probative" to constitute substantial evidence. In Matter of Hendrix v. Williams, 684 N.Y.S.2d 730 (2d Dep't 1998) the court had held that an inmate's receipt of correspondence from another inmate's aunt does not violate any of the policies and procedures governing the inmate correspondence program and that his possession of legal documents belonging to another inmate, without more, did not establish that he provided unauthorized legal assistance to another inmate. The evidence presented in this case was no more than that presented in Hendrix.

Witnesses : Inmate Has No Right to Be Present for Hearing Officer's Witnesses

In the Matter of Chastine v. Selsky , 755 N.Y.S.2d 330 (3d Dep't 2003)

In this case, the petitioner was found guilty of fighting after a guard observed him in a fistfight with another inmate in the yard. The petitioner originally raised an issue of substantial evidence so the case was transferred to the Appellate Division pursuant to CPLR Article 78, but once there, the petitioner abandoned that claim. The Court, however, retained the case in the interests of justice and judicial economy and addressed the underlying alleged procedural errors.

The petitioner challenged the hearing on the grounds that he was not allowed to be present during a telephone interview with the correction officer who had authored the misbehavior report. The Court found this argument unavailing. The Court held that, "[a]lthough an inmate has the right to be present during the testimony of any witness whom the inmate has called to testify, in this instance, the reporting officer was called as a witness by the Hearing Officer; hence, petitioner had no right to be present." (citations omitted)

LONG TERM ADMINISTRATIVE SEGREGATION

Prison officials have the authority to place inmates in SHU on the basis of an administrative segregation recommendation made pursuant to 7 NYCRR §301.4. Whether the recommendation is carried out is decided at a hearing, which is conducted much like a Tier III disciplinary

hearing. The question to be decided at the hearing is whether "the inmate's presence in general population would pose a threat to the safety and security of the facility." 7 NYCRR §301.4(b). If the hearing officer determines that standard has been met, the inmate can be placed in administrative segregation for an unspecified period of time.

Often, administrative segregation is used to confine an inmate for only short periods of time. 7 NYCRR §301.4(e) provides that, when appropriate, an inmate in administrative segregation will be "evaluated and recommended for transfer to a facility where it is determined the inmate may be programmed into general population." However, in some cases, individual inmates have been held in administrative segregation over long periods of time. The U.S. Supreme Court has held that while it is constitutional for prison officials to place inmates in administrative segregation, they "must engage in some sort of periodic review of the confinement. . . . " Hewitt v. Helms, 459 U.S.460, 477 n. 9 (1983). Lengthy administrative segregation is unconstitutional if prison officials fail to do the periodic review that could document the need, or lack of need, for continued administrative segregation.

In some cases, inmates have challenged administrative segregation by bringing §1983 damage actions in federal court, on the ground that either prison officials failed to conduct the required periodic reviews, or that the reviews that were conducted were a sham. In McClary v. Kelly, 87 F.Supp. 2d 205 (W.D.N.Y., 2000), *aff'd* 237 F.3d 185 (2d Cir. 2001) a jury found that prison officials had failed to conduct any meaningful review of an inmate's continuing need for administrative segregation, and awarded the inmate substantial money damages as compensation for the four years he was held in administrative segregation; the reviews that were conducted were found to be a sham. Similarly, in Giano v. Kelly, 2000 WL 876855 (W.D.N.Y. 2000) the Court awarded compensatory damages on the ground that the required periodic reviews of the need for continued administrative segregation were a sham.

In the Giano case, the Court went on to address the administrative segregation review process in more detail. The Court held that where the reasons for administrative segregation change after the completion of the hearing, the inmate must be informed of the new reason and given an opportunity to respond to the new reason.

In Ferguson v. Goord, PLS represented an inmate in an Article 78 proceeding challenging the administrative segregation review process, on the ground that the administrative segregation review process, as defined in the regulations at the time, did not give an inmate any opportunity to learn the reasons for administrative segregation, or to challenge those reasons, after the initial administrative segregation hearing. In particular, the regulations did not even require that an inmate be told the reasons for administrative segregation when the reasons changed, as was required, in dicta, by the Court in Giano. In the Ferguson case, PLS argued that DOCS should tell an inmate why he or she is being held in administrative segregation whenever the reasons change.

In November 2002, while the Ferguson case was pending, DOCS issued new regulations which changed the administrative segregation review process, as set forth in 7 NYCRR §301.4(d). There are two main changes. The first change affects the frequency of administrative segregation reviews. Under the old regulation, an inmate placed in administrative segregation would have his or her status reviewed every seven (7) days for the first two months, and every thirty (30) days thereafter. The new regulation spreads out the time between reviews. Under the new regulation, administrative segregation reviews occur every sixty (60) days.

The second change in the administrative segregation review process gives inmates some input in the review process. Under the old review process, an administrative segregation review would be conducted and a form would be filled out every thirty (30) days. The inmate was not advised of the reasons for continuing administrative segregation, and had no opportunity to challenge the reasons or the need for continuing administrative segregation. Under the new regulation, a three-member facility

committee, with one member each from the facility's counseling staff, a security supervisor, and member of the facility's executive team, reviews the inmate's conduct over the past sixty (60) days and then issues a written recommendation to the superintendent to continue or end administrative segregation, supported by reasons. If the superintendent's decision is to continue administrative segregation, then the inmate is to be informed of the reasons that are the basis of the decision to continue administrative segregation, and the inmate may then submit a written response. The inmate's written response will be considered as part of the next sixty (60) day review.

The new regulations for periodic review of administrative segregation are by no means ideal, but they are a big improvement over the old review process since an inmate will now be told why he or she is being kept in administrative segregation, and will have a chance to submit a written response, challenging the reasons for administrative segregation.

THE PRISON LITIGATION REFORM ACT (PLRA): BEYOND EXHAUSTION

The enactment by Congress of the Prison Litigation Reform Act (PLRA) in 1996, has made it much more difficult for prisoners to file lawsuits in federal court about the conditions of their confinement. The PLRA has many parts to it. Probably the most significant part of the PLRA requires that, before you file a complaint in federal court about something that happened to you in prison, you first "exhaust" all available administrative remedies. (*See*, 42 U.S.C. § 1997e(a)). The exhaustion requirement has raised numerous questions for New York State inmates, such as what administrative remedies are "available" in New York and what exactly does it mean to "exhaust" them? Lower federal courts examining these questions have differed widely on the answers, depending on the facts of the case before them. The December 2002-edition of *Pro Se* took a detailed look at some of the still-unresolved questions regarding exhaustion and we reported in our March 2003-edition that the Second. Circuit Court of Appeals has requested counsel in five pending cases to resolve some of these questions. (Prisoners' Legal Services and the Prisoners' Rights Project of the Legal Aid Society will represent the inmates in four of those five cases.) Questions aside, the safest course will always be:

File a grievance on any issue about which you think you might later want or need to file a federal lawsuit and appeal that grievance through all available levels of appeal.

You should obtain a copy of your facility's grievance policy and follow it as closely as you can.

Exhaustion, however, was not the only part of the PLRA. This article looks at three additional aspects of the PLRA of which you should be aware before you file a lawsuit about prison conditions in federal court.

I. Filing Fees (28 U.S.C. § 1915(b))

Under the PLRA all prisoners filing a lawsuit in federal court must pay the federal court filing fees in full. You can still file as a "poor person" (*in forma pauperis*), however this means only that the court will allow you to pay the filing fee over time, through monthly installments from your prison commissary account, rather then paying the full fee up front. The filing fee will not be waived.

A complex statutory formula requires prisoners filing *in forma pauperis* to pay an initial fee of 20 percent of the greater of the prisoner's average balance or the average deposits to the account for the preceding six months. After the initial payment, the prisoner is to pay monthly installments of 20% of the income credited to the account in the previous month until the fee has been paid. This procedure requires the prison to cooperate administratively in the process for assessing the court's statutory fee.

(The current filing fee for instituting a

civil action in the Northern, Western and Southern Districts of New York is $150.00.)

II Three Strikes and You're Out (28 U.S.C. § 1915(g)

Another provision of the PLRA requires that each lawsuit or appeal you file that is dismissed because a judge decides that it is frivolous, malicious, or does not state a proper claim count as a "strike." After you get three strikes, you cannot file another lawsuit *in forma pauperis* – that is, you cannot file unless you pay the entire court filing fee up-front. The only exception to this rule is if you are at risk of suffering serious physical injury in the immediate future. A court will evaluate whether you are in "imminent danger" based on the time at which you file the lawsuit, not the time at which the incident which gave rise to the lawsuit occurred. Malik v. McGinnis, 293 F.3d 559 (2d Cir. 2002).

III Physical Injury Requirement (42 U.S.C. § 1997e(e))

A third provision of the PLRA provides that you cannot file a lawsuit seeking compensatory damages for mental or emotional injury unless you can also show physical injury. Courts have generally interpreted this provision as applying only to money damages. It would not, for instance, prevent you from filing an action for injunctive or declaratory relief, even if the only injury you could claim was mental or emotional. Other courts have held that both nominal damages (i.e., an award of $1.00, intended only to recognize that you were wronged but not to compensate you) and punitive damages (damages intended to punish the defendants for bad conduct rather than compensate you for an injury) are still available even when compensatory damages are barred by the physical injury requirement. Thompson v. Carter, 284 F.3d 411 (2d Cir. 2002) (Likewise, a claim for injury to property may still be maintained, even without physical injury. *Id.*)

Courts have split on whether a claim for a violation of a constitutional right is really a claim for mental or emotional injury in the absence of an allegation of a resulting physical injury (or injury to property). For example, in one case, a prisoner complained that prison policies prevented him from attending the services of his religion, in violation of the First Amendment. The court held that he could not pursue his claim for compensatory damages, assuming that the injury for which he sought compensation was a mental or emotional one. Allah v. Al-Hafeez, 226 F.3d 247 (3d. Cir. 2000). In another case, a court held that an inmate's complaint about being exposed to unconstitutional prison conditions -a filthy cell – were barred absent allegations of physical injury. Harper v. Showers, 174 F.3d 716 (5th Cir. 1999) These rulings are questionable as other courts have held that First Amendment claims are not claims for a mental or emotional distress and are thus not barred by the physical injury requirement. Rowe v. Shake, 196 F.3d 778 (7th Cir. 1999); Canell v. Lightner, 143 F.3d 1210 (9th Cir. 1998). One could argue, for instance, that the injury suffered by inmate Allah – not being able to go to church – was a concrete deprivation of his first amendment right to freedom of religion that took place in the real world, not just in the plaintiff's head. Likewise, with respect to the claim about the filthy cell, it could be argued that any condition that rises to the level of being unconstitutional – i.e., one that denies the "minimal civilized measure of life's necessities" (Wilson v. Seiter, 501 U.S. 294 (1991)) – imposes more than mere "mental or emotional" injury and, thus, should not be barred by the physical injury requirement.

Courts differ, too, over what constitutes sufficient harm to qualify as a physical injury. One court has held that a bruised ear does not qualify as a physical injury. Sigler v. Hightower, 112 F.3d 191 (5th Cir. 1997). The Second Circuit has adopted the view that the injury "must be more than *de minimis*, but need not be significant to overcome the physical injury requirement. Liner v. Goord, 196 F.3d 132 (2d Cir. 1999). The court in that case, held that "alleged sexual assaults" (also described as "intrusive body searches") "qualify as physical injuries as a matter of common sense" and "would constitute more than *de minimis* injury."

All of these provisions – the exhaustion requirement, the filing fee, the "three strikes rule" and the physical injury requirement – were intended to make it more difficult for inmates to file lawsuits in federal court. As you navigate these barriers it will be helpful to at least know and understand the rules.

TO NOTARIZE OR NOT TO NOTARIZE, THAT IS THE QUESTION!

It has been said that "our system would crumble if people didn't believe in the promise to tell the truth." David S. Thun, In the Spirit of Truth, Nat'l Notary (Nat'l Notary Ass'n, Canoga Park, Cal.), Nov. 2000, at 13 (quoting California attorney Jason M. Russell). In an attempt to enhance their own credibility regarding truthfulness, inmates often have their signature on various documents notarized prior to sending those documents out of the prison. Often, such notarization is not necessary and may cause unnecessary delays in the processing and/or investigation of a complaint. PLS has received numerous letters from inmates who delayed sending their letters because they were waiting to have their signature notarized. In other circumstances, we have witnessed inmates who have missed court deadlines or who have suffered significant delays in seeking administrative relief because, even though notarization was not necessary, they have waited until their papers were notarized before sending them out.

When an individual has a document notarized, he is merely acknowledging to the notary that he has signed the document. If the document contains a jurat, which is a paragraph that states that the document has been signed and the signer has acknowledged under oath that the contents of the document are true, the notarization simply means that the signer has told the notary that the contents of the document are true. Inmates often have documents notarized that do not need to be notarized and sometimes fail to obtain a notarization when one is necessary. The purpose of this article is to give inmates guidance on when a notary public should be requested and what type of notarization should occur. The following includes excerpts of a publication from the National Notary Association website (www.nationalnotary.org) which answers many of the most common questions about the function of a Notary Public and the purpose of having a document notarized.

What is a Notary Public?

A Notary Public is a public servant appointed by state government to witness the signing of important documents and administer oaths.

Why are documents notarized?

Documents are notarized to deter fraud and to ensure they are properly executed. An impartial witness (the Notary) identifies signers to screen out impostors and to make sure they have entered into agreements knowingly and willingly.

How does a Notary identify a signer?

Generally, the Notary will ask to see a current identification document or card with a photograph, physical description and signature. A driver's license, military ID or passport will usually be acceptable.

Is notarization required by law?

For many documents, yes. Certain affidavits, deeds and powers of attorney may not be legally binding unless they are properly notarized. With other documents, no. Private entities and individuals may require notarization to strengthen the document and to protect it from fraud.

Does notarization make a document "true" or "legal?"

No. A notarization typically means the signer acknowledged to the Notary that he or she signed the document or vouched under oath or affirmation that the contents of the document were true.

May a Notary give legal advice or prepare legal documents?

Absolutely not. A Notary is forbidden from preparing legal documents or acting as a legal advisor unless he or she is also an attorney. Violators can be prosecuted for the unauthorized practice of law, so a Notary cannot answer your legal questions or provide advice about your particular document.

May a Notary prepare or notarize immigration papers?

Only a few immigration forms must be notarized, such as the Affidavit of Support (1-134, I-864), but the U.S. Immigration and Naturalization Service (INS) regulations state that no one may prepare or file another person's immigration papers unless he or she is an attorney or a U.S. Department of Justice-approved "accredited representative." Notaries may provide clerical, secretarial or translating assistance with INS forms as long as they do not provide legal advice, and then may notarize these forms.

Can a Notary refuse to serve people?

Only if the Notary is uncertain of a signer's identity, willingness, mental awareness, or has cause to suspect fraud. Notaries may not refuse service on the basis of race, religion, nationality, lifestyle, or because the person is not a client or customer.

Where can I report unethical or unprofessional Notaries?

Any wrongdoing or illegal activity should be reported to law enforcement and the appropriate Notary-regulating state official. In New York State this would be the Secretary of State.

Can a Notary notarize a copy of a birth or death certificate?

No. A Notary should not certify a copy of a birth or death certificate. Instead you should contact the state Bureau of Vital Statistics or county clerk's office in the county where the birth occurred. For foreign birth certificates, you should contact the consulate of the country of origin.

Can a Notary notarize an undated document?

If there is a space for a date it should be filled in with the correct date or lined through by the document signer. If the document simply doesn't have a date, it is acceptable to notarize it.

Can a Notary notarize a fax or a photocopy?

Yes. A photocopy or fax may be notarized, but only if it bears an original signature. That is, the copy must have been signed with pen and ink. A photocopied or faxed signature may never be notarized. Note that some public recorders will not accept notarized signatures on photocopied or faxed sheets because they will not adequately reproduce in microfilming.

Can a Notary notarize a document with blank spaces?

This is prohibited by law in several states. Even if not addressed in statute, a prudent Notary will skim the document for blanks and ask the document signer to fill them in. If they are intended to be left blank, then the signer can line through them or write N/A.

Does a document have to be signed in the presence of a Notary?

Yes and No. In most states, documents requiring acknowledgments do not need to be signed in the Notary's presence. However, the signer must *appear* before the Notary at the time of notarization to acknowledge that he or she freely signed for the purposes stated in the document. An acknowledgment certificate indicates that the signer personally appeared before the Notary, was identified by the Notary, and acknowledged to the Notary that the document was freely signed.

On the other hand, documents requiring a jurat must indeed be signed in the Notary's presence, as dictated by the typical jurat wording, "Subscribed (signed) and sworn to before me . . . " In executing a jurat, a Notary guarantees that the signer: personally appeared before the Notary, was given an oath or affirmation by the Notary, and signed in the Notary's presence. In addition, even though it may not be a statutory requirement that the Notary positively identify a signer for a jurat, it is always a good idea to do so.

Can you become a Notary?

A person convicted of felony cannot be appointed as a notary public. See McKinney's Executive Law §130 et.seq. Also, certain misdemeanors are considered disqualifying. However, should a person convicted of any crime obtain an executive pardon or a certificate of good conduct from the parole board, he or she may be considered for appointment.

In Conclusion

Although having a document notarized may make you *feel* as if it is more "legal" that is not usually the case. There are documents, typically certain types of court documents, that require notarization and for those documents it is very important to comply with the notarization procedures. However, with respect to many other documents, such as letters to your attorney or friends or family or even administrative complaints that you may wish to file, there is no reason to have those documents notarized; such a practice unnecessarily wastes time, and sometimes money.

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