Pro Se

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SUPREME COURT AFFIRMS STRICT LIMITS ON PRISON VISITATION

The Supreme Court affirmed strict limitations on prison visitation this past term, in a case which, although it arose in Michigan, is likely to have implications in New York. Using unusually broad language, the Court held that the regulations – among the strictest in the nation – were constitutional because they were "rationally related to a legitimate penological objective" and because inmates prohibited from having visitors by the regulations have alternative means, such as letter writing, to maintain contact with the outside world. The case, Overton v. Bazzetta, 123 S.Ct. 2162 (June 16, 2003) was decided by a 9-0 vote.

The case is likely to affect inmates in New York because the Department of Correctional Services is known to be revising its visitation policies – with the goal, in part, of increasing the use of visitation restrictions as means of punishing inmate misbehavior. Many of the changes that DOCS seeks in its visitation program had previously been blocked by the federal courts. Overton makes it more likely such changes will be permitted.

The regulations upheld in Overton impose non-contact visitation on all high security inmates, limit visits from children under the age of eighteen to the children, grandchildren or siblings of inmates and allow the suspension of *all* visitation for inmates who commit two or more substance abuse violations. Both a local district court and the Sixth Circuit Court of Appeals had found that the regulations impermissibly infringed on inmates' rights to freedom of association and to maintain contact with family members.

In overruling those decisions the Supreme Court held that prisoners' freedom of association is extremely limited. "[F]reedom of association is among the rights least compatible with incarceration," the Court wrote, and "some curtailment of that freedom must be expected in the prison context." *(Continued on page 2)*

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The only question to be asked about the Michigan regulations, the Court held, is whether they "bear a rational relation to legitimate penological interests." If so they should be found to be constitutional.

The Court had little trouble finding that the regulations did bear a rational relation to legitimate penological interests. For example, the Court set aside the plaintiffs' contention that prohibiting inmates' minor nieces and nephews from visiting bore no rational relationship to penological interests. The Court held that the restriction was rationally related to the prison system's interests in "maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury." Such a restriction, the Court held, "promote[s] internal security, perhaps the most legitimate of penological interests . . . by reducing the total number of visitors and by limiting the disruption caused by children in particular." "To reduce the number of child visitors, a line must be drawn, and the categories set out by these regulations are reasonable."

The Court similarly upheld the regulations' ban on visitation for inmates with two or more substance-abuse violations. This restriction, the Court found, "serves the legitimate goal of deterring the use of drugs and alcohol within the prisons." "Drug smuggling and drug use in prison are intractable problems" the Court wrote, and "[w]ithdrawing visitation privileges is a proper and even necessary management technique to induce compliance with rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose."

The Court rejected inmates' arguments that a two-year ban on visitation was overly severe and was sometimes imposed in cases involving only minor rule violations. "We agree the restriction is severe," wrote the Court, but "we will not substitute our judgment for that of prison officials concerning either the infractions reached by the regulations nor the length of the restrictions imposed."

To inmates' claims that a complete ban on visitation violated the Eighth Amendment prohibition against cruel and unusual punishment, the Court responded bluntly:

> [The ban] undoubtedly makes the prisoner's confinement more difficult to bear. But it does not, in the circumstances of this case, fall below the standards mandated by the Eighth Amendment . . . Michigan, like many other States, uses withdrawal of visitation privileges for a limited period as a regulation means of effecting prison discipline. This is not a dramatic departure from accepted standards for conditions of confinement. Nor does the regulation create inhumane prison conditions, deprive inmates of basic necessities or fail to protect their health and safety. Nor does it involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur.

The Court thus upheld the most severe of visitation restrictions, the ban on all visitation for inmates convicted of two or more substance abuse violations, on the ground that it was "rationally related" to a legitimate penological objective and did not violate inmates' Eighth Amendment rights.

News and Briefs

DOCS Institutes New Rate Structure for Phone-Home Program But Retains Criticized Commissions

The Department of Correctional Services has instituted a new rate structure for its phone-home program in an effort, it says, to increase fairness and reduce fees for the majority of calls. Advocates for inmates and their families, however, are criticizing the new rates because they nearly double the rates of some calls, without reducing either the overall costs of the program or the enormous commissions DOCS receives from it.

Under the new system, DOCS has abolished the old rate categories for inmate phone calls – of which there were 126, depending on the time of day, day of the week, distance of the call and other factors – and replaced them with a flat rate of $3.00 per call, plus 16 cents per minute. The new rate structure went into effect on September 14, 2003.

According to figures supplied by DOCS, the new rates will result in a modest reduction of the cost of a long distance call, which constitute more than 80% of inmate phone calls. For example the cost of a nineteen minute *inter*lata call - a long distance call within the state but not within the same area code - has decreased from an average cost of $6.44 to $6.04 under its new plan.

The cost of a local (or *intra*data) call, however -- one made within the same area code – has doubled in price. For example, the cost of a nineteen minute local call rose, under the new rate structure, from an average of $3.02, to the same $6.04 now paid for a nineteen minute long distance call.

DOCS notes that the new rate system is "revenue-neutral," which means that the overall profits made by the telephone company from the phone-home program – as well as the hefty commissions it pays to DOCS for the privilege – remain the same. This is because the modest reduction in the price of a long distance call is made up for by the sharp increase in the price of local calls.

Critics charge that all calls could be significantly less expensive if DOCS did not take such a big percentage of the profits. Under DOCS' current telephone contract (with MCI) it receives a 57.5% percent commission on the revenues made by the phone-home program. In the 2001/2002 fiscal year, this translated to $22.4 million in extra revenue for DOCS. This year alone DOCS predicts receiving more than $23 million in commissions from the phone-home program. Critics note that since all inmate phone calls must be placed collect, that money is coming from the pockets of inmates' friends and family.

DOCS, however, defends its new rate structure as being responsive to prior criticisms that the phone-home program was too expensive. DOCS points out that the new system reduces the rates for more than 80% of inmate calls. It also argues that by standardizing the rate it allows inmates and their families to know in advance what the cost of a call will be – something that was almost impossible when there were 126 variable rates. Although DOCS concedes that rates will rise substantially for *local* calls, it argues that this is only fair, because family members and friends of inmates who live within a local calling area of the inmate's prison are generally more able to visit than those living in different area codes. Thus, DOCS argues, raising the rates on calls received by them is a reasonable way of lowering rates for the majority of calls, which are received by persons who do not live close to prisons.

Criticism remains, however, since the new rate structure does nothing to reduce DOCS' overall commissions from the program, and consequently does little to bring the high costs of an inmate telephone call in line with those of the general public. DOCS counters that the high commissions are needed to pay for the sophisticated security costs associated with a prison telephone program that regular consumers don't have to pay for, such as the PIN number system and the ability to monitor and trace inmate telephone conversations. DOCS also points out that inmates, unlike other consumers, are not required to pay the maintenance fees and taxes for their telephone service – fees which often total $30.00 per month for the average consumer. Finally, DOCS argues, the commissions are used to pay for a range of inmate benefits which the State Legislature would be unlikely to support from general tax revenues. These include such things as cable television service, free bus service for visiting family members, the Family Reunion Program, the medical parole program and the nursery and family development program at Bedford Hills, which allows incarcerated mothers to stay with their infant children. "Inmates do not have a right to make telephone calls," said James B. Flateau, DOCS spokesman. "If they are going to make phone calls, we believe it is smart to charge a commission and use the funds to offset the costs that taxpayers pay for inmate programs."

Critics point out, however, that out of the $23.4 million in commissions anticipated this fiscal year, the state reports that only

$330,000 is spent annually for the operation and maintenance of the phone equipment. Further, almost 75% of the revenue received by DOCS from the phone-home program – $17.6 million of this year's anticipated $23.4 million – is used to pay for medical costs, including AIDS drugs and training for medical staff. These are costs, critics argue, which the State has a responsibility to pay for, and which should therefore be shouldered equally by all taxpayers Taking the money from the phone-home program, the critics charge, amounts to imposing a regressive tax on some of the poorest citizens of the state – the family members of inmates. Referring to the provision of medical care to inmates, Robert Gangi, Executive Director of the Correctional Association of New York, a non-profit group that monitors prison conditions states: "That is the government's responsibility. It should not impose an unfair burden on inmates' friends and families to pay part of that bill." "The families have done nothing wrong, so why are they being taxed?" asked William T. Martin, a lawyer representing inmate families in New York.

Friends and family members of inmates have brought a variety of lawsuits alleging that the fee-structure of the phone home program is unfair. One such lawsuit, brought in state court, was recently dismissed on the grounds that the court had no authority to review rates that had already been approved by the Public Service Commission (PSC). In dismissing the complaint, the trial court stated: "Telephone companies may not deviate from the rates filed with the PSC (Public Service Commission) or FCC (Federal Communications Commission) without filing and receiving approval of the new rates. Although claimants might have sought rate relief from the PSC for the intrastate calls at issue here, it does not appear that claimants ever chose to do so." Bullard v. State, (N.Y. Ct. of Claims No. 103138, May 1, 2002), *aff'd*, 763 N.Y.S.2d 371 (3d Dep't July 31, 2003). In so holding the court indicated that had the claimants sought rate relief from the PSC, the PSC would have had the authority to review that request.

Another lawsuit, a federal class action, has been brought by the law firm of Levy, Phillips & Konigsberg together with the Center for Constitutional Rights. That lawsuit, Best-Deveaux, et al v. Goord, et al, alleges that the agreements between DOCS and MCI violate the 1st and 14th Amendments in that they burden the right to freedom of speech and association guaranteed to plaintiffs under the Constitution; plaintiffs' due process rights; plaintiffs' right to contract under Article 1 Section 10 of the Constitution; and various anti-monopolization and accounting laws. That lawsuit is still pending.

In response to DOCS' rate change proposal, Prison Families of New York, an advocacy organization, delivered a petition containing thousands of signatures to the PSC. The petition calls on the PSC to hold public hearings regarding the fairness of DOCS' phone-home program. Alison Coleman, director of Prison Families of New York, notes that many other states use calling cards or allow direct dialing. Those calls are not as expensive for the consumer but "they are still affording those states and the federal government some money." Ms. Coleman asserts that prisoners' friends and families want to and should be involved in a decision-making process that ultimately affects them. "We are the consumers," she said.

The PSC has sixty days from the implementation of the new fee structure to consider petitions and letters of complaint and to determine whether hearings into DOCS' new rate structure are appropriate.

A Bill to Improve Treatment of Inmates With Mental Illness Introduced in the Assembly

A message from Tom Terrizzi, PLS Executive Director

The chair of the New York State Assembly Corrections Committee, Jeffrion Aubry, has introduced groundbreaking legislation intended to improve the treatment of people with mental illness in prison.

The bill would establish several "psychiatric correctional facilities" to be located at each of DOCS' regional hubs. The facilities would be operated jointly by the Office of Mental Health and the Department of Correctional Services, but all decisions concerning treatment, conditions of

confinement and discipline would be subject to the approval of the OMH Clinical Director. The day to day operation of the facilities would be DOCS' responsibility.

The bill would also exclude inmates with serious mental illness from isolated confinement related to inmate discipline and, instead, provide a mechanism through which such inmates may be referred, assessed and transported to a psychiatric correctional facility. The facilities would provide medically appropriate custodial care, supervision, treatment and, where appropriate, discipline, for inmates with serious mental illness.

The bill also requires the establishment of a mental health transitional services program to be run by OMH, to prepare inmates for entry back into the community. The program would provide for continuing mental health care upon release, insure advanced applications for Medicaid are filed and make referrals to outside mental health, educational, vocational and housing services.

In justification for the bill, the Assembly sponsors noted that the incidence of serious mental illness among inmates within the state prison system has increased significantly in recent years. Currently, approximately 12 percent of the prison population – some 8,000 inmates – are affected by serious mental illness. Studies have shown that when this population is disciplined using solitary confinement, inmates engage in acts of self-mutilation and commit suicide at a rate three times higher than inmates in the general prison population. Furthermore, inmates with serious mental illness often experience a continuing cycle of mental deterioration in solitary confinement, followed by periods of in-patient care in a psychiatric hospital, followed by a return to solitary confinement. One corrections officer described inmates who experience this phenomenon as being "like a ping pong ball, bouncing between punitive segregation and Central New York Psychiatric Facility."

"The correction system has become the largest mental health facility in the state, but people with serious mental illness do not belong in 23-hour lockdown in special housing units," said Assemblyman Jeffrion Aubry, when he opened public hearings on the bill in Rochester in October. The hearings are being co-sponsored by the Assembly Corrections and Mental Health Committees. Assemblyman Aubry contends this bill will recognize the inhumanity and counter-productive nature of certain forms of punishment for inmates who have serious mental illness. He stated that better treatment will insure lower rates of recidivism and relapse when such prisoners are released from prison, as well as make the prisons easier to manage and safer for staff and inmates alike.

The Assembly Committees will be conducting two additional hearings. The next hearing is scheduled for November 18, 2003 in New York City and the final hearing in Albany on January 13, 2004. Advocates for prisoners, people with mental illness, psychiatric experts, family members of inmates who are mentally ill, and former inmates will testify at these hearings.

The Department of Correctional Services and the Office of Mental Health have not yet commented on the proposed legislation.

Anyone can submit comments regarding the bill, Assembly Bill No. A08849. If you would like to have input into the process, please send your written comments to Assemblyman Jeffrion Aubry, 526 LOB, Albany, NY 12248.

Federal Cases

1st Amendment - Freedom of Religion

Court Rejects DOCS' Ban on "Five Percenter" Literature and Practices; Finds Nation to be Legitimate Religion

Marria v. Broaddus, 2003 WL 21782633 (S.D.N.Y. July 30, 2003)

A federal district court in New York has reversed the Department of Correctional Services' long-standing ban on Five Percenter literature and practices, holding that the ban violated an inmate's right to freedom of religion. The decision, a breakthrough in New York, is the first time that the Five Percenters and their religion, the Nation of Gods and Earth, have been given legal recognition.

In its opinion, the court stated the Nation of Gods and Earth is an offshoot of the

Nation of Islam. It teaches that only five percent of people teach the identity of the true and living God, as well as freedom, justice, and equality to all human families. In contrast to the Nation of Islam's belief that Allah appeared on Earth in the person of its founder, Master Fard Muhammad, the Nation of Gods and Earth professes the belief that every black man is an embodiment of God, with the proper name Allah.

The court noted that the New York DOCS, like almost all corrections departments across the country, has long considered the Nation to be nothing more than a violent gang, and therefore refused to recognize it. It has also prohibited its adherents from congregating in groups of more than five, receiving Nation literature or observing various Nation practices.

The district court, however, in a long and carefully considered decision, found that DOCS' decision to treat Five Percenters as a security threat was neither well reasoned nor well informed.

In addressing the inmate's challenge to DOCS' policy, which was brought by inmate Rashaad Marria, also known as Intelligent Allah, the court first considered whether the inmate was sincere in his belief in Nation principles and, second, whether those principles could properly be considered a religion. To both questions, the court found that the answer was yes.

The court then applied the provisions of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a) ("RLUIPA"). RLUIPA, which provides broader protections to the religious activities of inmates than does the Federal or State Constitutions, which states, "[n]o government shall impose a substantial burden on the religious exercise of persons residing in or confined to an institution . . . unless [it] demonstrates that imposition of the burden . . . is in furtherance of a compelling governmental interest and . . . is the least restrictive means of furthering that . . . interest." The court easily found that DOCS' complete ban on Five-Percenter literature and practices caused a "substantial burden" on the inmate's exercise of his beliefs.

Next, the court addressed whether DOCS had a "compelling governmental interest" in maintaining the ban.. According to the court, DOCS "failed to provide any evidence that its decision to treat 'Five Percenters' as a security threat was either reasoned or informed." DOCS could produce no evidence concerning its initial decision to treat the Nation as a gang and not a religion and its witnesses admitted that they could do no more than speculate about why the decision was made or what evidence was used to make it. The court found that DOCS' decision to label the Nation a security threat was based solely "on the subjective sense of the decision-makers . . . that the group as a whole was a gang." "However," the court went on, "it is clear that DOCS knows little about the Nation's seemingly legitimate existence outside prison" and DOCS' litigation position that Five Percenter literature contained violent messages "indicates that it was misinformed about at least that aspect of the Nation . . . and suggests that its treatment of the Nation exclusively as a gang may be based on either exaggerated fears or speculation." The court continued:

> That is not to say that there are not prisoners who would describe themselves as Five Percenters who have committed crimes or otherwise violated prison regulations. [However] there are prisoners who would describe themselves as Catholics, Protestants, Jews, Muslims, NOI, etc. who likewise violate prison regulations . . . but no one would suggest that such facts preclude the classification of these recognized groups as religions deserving of First Amendment protection.

After finding that DOCS' complete ban on Nation literature or practices violated Marria's 1st Amendment rights, the court ordered DOCS to allow him to obtain a copy of "120 Degrees," the central text of Nation beliefs and practices, the Supreme Alphabet and Mathematics, a book of numerological devices central to Nation beliefs and practices – all previously banned– and to re-evaluate its ban on *The Five Percenter*, the Nation newsletter, by either passing it through the media review committee and/or making it available in the

prison library. The court also ordered DOCS to determine what can be done "consistent with security concerns" to accommodate Marria's requests to participate in supervised Five Percenter gatherings, and to receive late meals and gather with other inmates on Nation fast dates.

Inmate Prevails in Religious Challenge to TB Skin Test

Selah v. Goord, 255 F.Supp.2d 42 (N.D.N.Y. 2003)

An inmate claiming a religious opposition to a tuberculosis skin test convinced a federal judge that New York's policy of confining, for at least one year, prisoners who refuse to submit to a TB test for religious reasons "appears entirely arbitrary and irrational." The Judge, Thomas McAvoy, issued a preliminary injunction barring the state from administering the skin test to the plaintiff while the action is pending. The case is one of several clashes between the First Amendment rights of prisoners and the state's interest in preventing the spread of a highly infectious and potentially deadly disease.

The case involved an inmate named Selam Selah. Selah, an Ethiopian Orthodox Christian, contends he is spiritually opposed to taking the annually required purified protein derivative (PPD) skin test, which is used to detect latent tuberculosis. Prisoners who refuse the test are placed on "tuberculin hold," which means they are generally confined to their cell. DOCS contends the test – required of both inmates and staff – has resulted in a dramatic reduction in the incidence of TB in New York prisons.

Last year, Judge McAvoy concluded that Selah's religious objections to the PPD test were sincere – a pre-requisite to establishing his First Amendment claim. The judge also found that the PPD testing procedure burdened his constitutional right to practice his religious beliefs.

A prison practice or policy which burdens constitutional rights will nevertheless be permitted so long as it is rationally related to a legitimate penological objective. Thus, at issue in the latest phase of the case was whether DOCS' policy of imposing a one year confinement hold on all inmates who refuse to take the PPD test was rationally related to a legitimate penological objective. Since the plaintiff at this stage was only seeking a preliminary injunction pending the final outcome of the trial, the judge focused only on whether he had a "likelihood of success" on the merits.

The evidence in the case showed that when an inmate is turned over to DOCS, he or she is subjected to a PPD test and chest x-ray to detect the presence of TB. Inmates who refuse the PPD test are first counseled as to its importance. Then, if they continue to refuse the test, they are placed on tuberculin hold, where they are routinely offered the test and regularly monitored for signs of active disease. Prisoners remain in tuberculin hold for one year.

Selah had consented to PPD tests in the past and was willing to undergo other non-invasive procedures, such as a sputum test and x-ray exam. He claimed, however, that a literal reading of Leviticus 19:28 – which prohibits making "any cuttings in your flesh" – compelled him to refuse to submit to skin tests like PPD.

The state advanced several rationales for its one-year tuberculin hold policy. It argued that the threat of confinement coerces compliance with the testing policy. Additionally, it maintained that the policy limited contact with other individuals during the critical first year following exposure to TB, when there is a greater chance that latent TB may be converted into active, contagious TB.

Judge McAvoy, however, observed that Selah had consented to a shorter stay on tuburculin hold, one that would allow for a sputum test to confirm that he did not have active TB. He found no reason to require prisoners to spend a longer period of time in relative isolation.

The court did find reasonable the state's argument that it needs to quarantine an inmate who may be contagious. However, the court held, while that makes sense for inmates newly admitted to the prison system, it does not

make sense for prisoners like Selah, who had previously undergone PPD testing and were found to be negative. "The court can find no difference between an inmate who has completed a year on tuberculin hold, and is thus excused from annual testing, and Selah, who has previously been determined to be negative."

The state also expressed concern that accommodating Selah's religious objections would result in a flood of similar actions by other inmates. It noted that since Reynolds v. Goord, 103 F.Supp.2d 316, a Southern District case involving a Rastafarian, was decided in 1999, three similar cases have arisen in the Northern District. In Reynolds a district court barred the state from forcing a prisoner to undergo a skin test or from placing the inmate on one-year tuberculin hold.

Judge McAvoy, however, found that three cases in three years hardly suggests that litigation has opened a "floodgate" for religious objectors. He also observed that the state has no statistics of the number of religious objections to the test.

8th Amendment - Cruel and Unusual Punishment

No 8th Amendment Violation Found in Delay of HIV Treatment

Smith v. Carpenter, 316 F.3d 178 (2d Cir. 2003)

Mr. Smith, the inmate plaintiff in this case, was being treated for HIV, the virus which causes AIDS. The treatment consisted of a drug "cocktail" designed to prevent deterioration of the immune system and slow the progression of the HIV infection. On two occasions in 1998 and 1999, the defendants, prison officials, failed to provide Smith with his HIV medication, in the first instance for five days, and in the second instance for seven days. Smith sued, alleging that the failure to provide him with his medication violated his rights under the Eighth Amendment.

In order to establish an Eighth Amendment claim arising out of inadequate medical care, a prisoner must prove both an "objective" prong – that he suffered from "serious" medical needs – and a "subjective" prong – that the defendants acted with "deliberate indifference" to those needs. The issue in this case was whether the presence of HIV infection is sufficient, standing alone, to meet the "serious needs" test of an eighth amendment claim.

At trial, defendants produced a medical expert who agreed that missing HIV medication can be harmful in some circumstances, leading to viral mutation and drug resistance. He went on to testify, however, that in this case the plaintiff had suffered no injury. His medical records showed no evidence that he had developed any resistance to the drug treatment and his "viral load" – the measure of body's resistance to HIV – had actually increased during his incarceration.

With that in mind, the jury found that Smith did not suffer from a "serious" medical need, and could not, therefore, establish the first prong of his eighth amendment claim. The District Court upheld the verdict, finding that the jury was entitled to rely on the expert testimony in finding that plaintiff did not suffer from a "serious" medical need.

On appeal, Smith argued that his HIV status was a "serious" medical need in-and-of-itself, and that it was error for the lower court to have relied on the expert's testimony that he had not suffered any ill effects from the interruption of his care. He argued that the District Court effectively imposed a standard of *actual* harm in assessing the jury's finding of no serious medical need when he was only required to establish a *potential* for serious future injury in order to state an Eighth Amendment claim.

The court disagreed. Smith was not contending that the defendants ignored his HIV infection by failing to provide adequate care in general, but only that there had been two short-term lapses in otherwise adequate care. Under those circumstances, the court found, the delay or interruption in treatment, not the underlying medical condition, must be "sufficiently serious," to state an Eighth Amendment claim. In analyzing whether the delay in treatment in this case was sufficiently serious to state a claim, the court held that it was appropriate for the jury to consider whether Smith had been harmed by the delay. Smith argued that because an Eighth Amendment claim may be based on

defendant's conduct in exposing an inmate to an unreasonable risk of *future* harm, the absence of *present* injury is not relevant to assessing the severity of the risk to which the inmate was exposed. The defendants, however, had presented credible medical testimony suggesting that Smith had not been exposed to an unreasonable risk of future harm due to his periods of missed HIV medication. The court found that the jury was free to consider that testimony in determining whether the asserted deprivation of medical care was sufficiently serious to establish an Eighth Amendment claim.

Inmate Wins Sex Change Treatment

Brooks v. Berg, 270 F.Supp.2d 302 (N.D.N.Y. 2003)

A New York inmate seeking a sex change is entitled to medical treatment at taxpayer expense that could lead to gender reassignment, the federal district court for the Northern District of New York held recently. The court said that the state cannot draw a distinction between prisoners who began treatment for a gender identity disorder before incarceration from those who discover their transsexual issues while in prison.

Currently DOCS allows prisoners who commenced the process of gender reassignment before they were imprisoned to continue their treatment, but denies that option to inmates who seek to initiate procedures once they are behind bars.

"Surely inmates with diabetes, schizophrenia, or any other serious medical need are not denied treatment simply because their conditions were not diagnosed prior to incarceration," held the court. The court made clear that it is not ordering a sex change or a specific medical regimen for the inmate. Rather, it is merely requiring the state to provide medical and psychiatric services to determine the appropriate course of action. "Prison officials are obliged to determine whether plaintiff has a serious medical need and, if so, to provide him with at least some treatment," wrote the court.

The inmate, a 34-year-old prisoner at Clinton Correctional Facility, contended that he was aware of his female identity since childhood but became familiar with Gender Identity Disorder (GID) only while imprisoned. GID, also known as gender dysphoria and transsexualism, is a medically and judicially recognized psychiatric disorder. Since 1998, the inmate had been seeking the diagnostic psychotherapy he believed would ultimately lead to "electrolysis, vocal chord modulation, breast implant surgery" and other procedures to complete his transformation into a female.

DOCS, however, has a policy pursuant to which it may continue therapy for prisoners who commenced the procedure before they were sent to prison, but "during incarceration transsexual surgical operations are not honored." It relied on that policy in denying treatment to the plaintiff.

The court rejected the state's defense and held for the inmate on the grounds of due process and the Eighth Amendment's prohibition against cruel and unusual punishment. It wrote that the state failed to provide "adequate treatment for [the inmate's] serious medical needs," and failed to "explain the puzzling distinction that the policy makes between those inmates who were diagnosed before incarceration and those who were diagnosed after being incarcerated."

Deprivation Order Held Not To Violate Eighth Amendment

Trammell v. Keane, 338 F.3d 155 (2d Cir. 2003)

Reginald Trammell was serving a SHU sentence in late 1994 for assaulting a correction officer when, according the Second Circuit Court of Appeals, his behavior became "more and more uncontrollable." In one five-week period he was cited for at least sixteen disciplinary violations, primarily for throwing various substances – drinks, soup, spit, urine and feces – at correctional officers. Matters came to a head on December 16, 1994, when Trammell spit or threw liquid at Correctional Officer Fernandez, a notary, who had gone to his cell to notarize legal papers for him. Later

that day, Deputy Superintendent Kehn issued the first of several deprivation orders, depriving Trammell of "all state and personal property in [his] cell except one pair of shorts. No recreation, No shower, No hot water, No cell bucket because it is determined that a threat to the safety or security of staff, inmates or state property exists." Pursuant to the order, Trammell was deprived of all of his clothing except for one pair of undershorts, all of his toiletries, his mattress, his blanket, and his cell bucket and he was placed on the "loaf" diet for approximately 95 days. He also alleged that he was deprived of toilet paper for a week.

Trammell sued, alleging that these conditions violated the Eighth Amendment's protections against cruel and unusual punishment. The Second Circuit Court of Appeals ruled against him.

To prove a violation of the Eighth Amendment, an inmate must show, first, that the deprivation alleged is "objectively sufficiently serious" such that the plaintiff was denied "the minimal civilized measure of life's necessities," and, second, that the prison officials possessed a "sufficiently culpable state of mind" – that is, that they acted either with the intent to inflict pain on the inmate or with deliberate indifference to the consequences of their action.

In this case, the court found, Trammell could not satisfy the second prong of the Eighth Amendment test: He could not show that prison officials imposed the deprivation order either with the intent of hurting him or with deliberate indifference to his health and safety. The deprivation order, the court found, "while onerous, even harsh" was not intended to hurt him, but was, instead "reasonably calculated to correct [his] outrageous behavior." The court found it "especially significant" that the order was specifically drafted to punish Trammell for his misconduct, and to deter him from similar acts in the future while at the same time providing him with incentives to reform his behavior by stating that his property would be returned pending specified periods of good behavior. Thus, the court found, "Trammell held the keys to his own cell door . . . and could have rid himself of the harshest aspects of the order by simply reforming his behavior." Moreover, the court stated, the order had not been imposed with deliberate indifference to Trammell's health or safety, because prison officials regularly observed him to ensure that his health was not jeopardized during the deprivation period.

The court contrasted this case with that in Hope v. Pelzer, 360 U.S. 738 (2002). In Hope, the Supreme Court held that a state's practice of tying an inmate to a hitching post in the sun violated the Eighth Amendment. "Unlike the defendants in Hope, who implemented a particularly harsh disciplinary measure with no regard for the inmate's health, the less severe disciplinary measure here was regularly monitored by a nurse in order to ensure that his health was not jeopardized by the various deprivations imposed in response to his misconduct."

Form Over Substance? Second Circuit Dismisses Inmates' 8th Amendment Claim As Too Complicated, Vague.

Webb v. Goord, 340 F.3d 105 (2d Cir. 2003)

An ambitious lawsuit by a group of more than thirty inmates seeking to hold DOCS accountable for a wide variety of incidents that resulted in serious physical injuries failed recently, when the Second Circuit dismissed their complaint as unmanageable.

The inmates' complaint alleged more than forty separate incidents, including attacks by corrections officers, improper physical punishments, attacks by other inmates for which DOCS was allegedly responsible because of its failure to provide a safe prison environment and denials of medical care to plaintiffs suffering from injuries. Most of the forty-plus incidents were alleged to have taken place at fourteen separate DOCS facilities between 1997 and 1999, however the complaint also included incidents that occurred as long ago as 1990. As the court noted, the complaint constituted a "catalog of violence and ill treatment" toward inmates. For example, one plaintiff alleged that after DOCS denied his request to be placed in protective custody he was attacked so brutally by other inmates that

he required sixty-eight stitches in his face. Another alleged that an attack by corrections officers left him with seventeen broken bones in his face.

The court found, however, that it would be "extremely impractical" to litigate all forty - odd incidents in one trial. Among other things, the court noted, there were more than 100 named defendants. Moreover, the court found, the plaintiffs had not shown that the forty unrelated incidents – which occurred over ten years at fourteen separate DOCS facilities – established a violation of the Eighth Amendment by DOCS as a whole. "The necessary foundation of a finding that the prison *system* has violated the Eighth Amendment [as opposed to individual correction officers] is evidence of a concerted intent among prison officials, one expressed in discernable regulations policies or practices," wrote the court. A mere accumulation of individual incidents "does not necessarily amount to a qualitative violation of the Eighth Amendment" by the whole prison system.

Thus, although the court agreed that "each incident alleged by the plaintiffs involves grave allegations of rights violations either perpetrated or tolerated by DOCS officials" it dismissed the complaint as, essentially, unmanageable. In doing so, it "[took] pains to assert" that it was not "establishing a triumph of form over substance." Rather, the court asserted, its decision should stand for the proposition

> that form matters in our system of adjudication. It matters because it is conducive to the coherent presentation of a plaintiff's claims, to the allowance of a fair opportunity to defendants to challenge those claims, and to the provision of appropriate relief. In sum, a proper attention to form is a prerequisite to the fair and efficient vindication of rights.

14th Amendment – Due Process of Law

Prison Officials Not Immune From Suit For Imposing Disciplinary Sentence Without Due Process

Hanrahan v. Doling, 331 F.3d 93 (2d Cir. 2003)

After a prison riot at Mohawk Correctional Facility in 1997, plaintiff, inmate Hanrahan was identified by several correction officers as having assaulted another correction officer. A disciplinary hearing was held. During the hearing, the hearing officer denied Hanrahan access to certain exculpatory evidence, including a videotape of the riot and the testimony of a guard who would have provided him with an alibi. He found Hanrahan guilty and sentenced him to 10 years in SHU. The charges were affirmed on administrative appeal by Donald Selsky, the Director of Special Housing.

In 1998 Hanarahan was tried in state court on various criminal charges relating to the same alleged assault. His defense lawyer was able to obtain the evidence that both the hearing officer and Selsky had refused to consider and Hanrahan was acquitted of all charges. (Another inmate was eventually convicted of the assault for which Hanrahan had been charged.) After the acquittal, Hanrahan's lawyer wrote to Selsky to urge him to reverse the disciplinary sentence. Selsky eventually granted the request, however, by that time, Hanrahan had served 335 days of his 10 year SHU sentence.

Hanrahan filed a section 1983 lawsuit against both the hearing officer and Selsky, charging that they violated his right to due process of law by refusing to consider the exculpatory evidence at the time of his disciplinary hearing. The defendants moved to dismiss the suit. They argued that they were entitled to "qualified immunity" because it had not been established in 1997 – the time the events took place – that 335 days of SHU confinement were "atypical and significant" under the Supreme Court's 1995 decision in Sandin v. Connor, 514 U.S. 472. Therefore, defendants argued, it was unclear whether Hanrahan was entitled to due process in the first place. (In Sandin, the Supreme Court held that the due process protections inmates typically

receive when subject to disciplinary confinement – the right to a hearing, to call witnesses, and *etc.* – are only required by the constitution if the punishment that may be imposed would create an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.")

"Qualified immunity" is intended to protect government officials from lawsuits concerning actions they take about which the law is unclear and to allow them to act in areas of legal uncertainty without undue fear of subsequent liability. When the law is unclear, the theory goes, a government official should not be penalized for doing something that is only afterwards determined to be illegal. Courts analyze the qualified immunity defense by asking whether, given the caselaw as it existed at the time of the incident, a "reasonable official" would have been aware that his conduct was unlawful at the time that he engaged in it.

In this case, Hanrahan agreed that it was unclear in 1997 if 335 days of SHU time was "atypical and significant" under Sandin. He argued, however, that it was a mistake to measure defendants' qualified immunity defense according to the time he actually served. Rather, he argued, the defense should be measured according to the sentence that the hearing officer imposed (and which Selsky affirmed) – that is, the sentence they *thought* he would be serving.

The court agreed with Hanrahan: Because the reasonableness of the officials' conduct is judged "based on the information the officers had when the conduct occurred," the focus of the qualified immunity inquiry in this case should be on the 10 year SHU sentence the defendants *imposed* on Hanrahan – not the 335 days he actually he served.

Note: this decision applies only to determining whether defendants in a disciplinary due process case are entitled to qualified immunity. It does not apply to determining whether a due process violation occurred in the first place. So, for example, a prisoner sentenced to 10 years in SHU confinement, who was released after serving only ten days, would likely not be able to pursue a due process claim under Sandin, even if the defendants were not entitled to qualified immunity, because the courts do not consider 10 days of SHU confinement to be "atypical and significant."

State Cases

Discipline

Authorized Computer Use Does Not Support Allegation of Misuse of State Property

Matter of Bartley v. New York State Department of Correctional Services, 757 N.Y.S.2d 380 (3d Dep't 2003)

Petitioner Bartley was found guilty of prison disciplinary rules prohibiting possession of authorized material in an unauthorized area and misuse of state property after a security check disclosed a computer disk containing personal material, including petitioner's resume, photographs, computer games and personal letters. Petitioner was employed by the facility's volunteer services office where he had access to a computer. At his disciplinary hearing, petitioner admitted that the resume and the two letters were his, but testified that he had written them with the knowledge and permission of his supervisor, a correction counselor. He disavowed knowledge of the remaining material. The correction counselor confirmed petitioner's contentions, testifying that he had authorized petitioner's use of the computer for personal work, including the preparation of his resume and the two letters. He explained that, at the time, he was not aware that petitioner's use of the computers in this manner violated prison disciplinary rules.

The court reversed the guilty finding. "Having obtained his supervisor's authorization for the preparation of the material in question, petitioner cannot fairly be found guilty of unauthorized conduct or misuse of state property. No other evidence was presented linking [him] to the remaining five personal items on the disk. Inasmuch as the disk was found in a common area, the fact that three of the items on the disk belong to petitioner is insufficient, standing alone, to support the conclusion that all of the files on the disk were created by petitioner."

An Unaltered Pen Is Not Contraband

Matter of LaMage v. Selsky, 760 N.Y.S.2d 561 (3d Dep't 2003)

Petitioner was observed by a corrections officer attempting to stab another inmate with a pen. As a result, he was found guilty of engaging in violent conduct, assaulting another inmate, refusing a direct order and possessing contraband that may be classified as a weapon. He was sentenced to 18 months in SHU. On appeal, the court reversed that portion of the disposition finding him guilty of contraband because, it found, an unaltered pen cannot be considered contraband. The court sustained the charges relating to the assault, however, and remitted the case to the DOCS for the imposition of a penalty appropriate to the remaining charges.

Expungement of the Record Is Not Expungement of the Facts

Matter of Watkins v. Annucci, 758 N.Y.S.2d 853 (3d Dep't 2003)

Petitioner Watkins absconded from temporary release. Arrested and convicted on new charges, he was returned to DOCS with a new pre-sentence report, which referred to his having absconded from the prior sentence. He was subsequently found guilty of several disciplinary violations arising from his abscondence. However a state court reversed the disciplinary hearing on procedural grounds and ordered all references to it expunged from his institutional records. Some time later petitioner was denied parole. In denying him parole, the Parole Board relied, in part, on the pre-sentence report which referred to the fact that he had absconded from his prior sentence. Petitioner commenced an Article 78 proceeding, alleging that the Parole Board could not rely on the information in his pre-sentence report, because the state court had ordered references to his disciplinary hearing expunged.

The court disagreed, finding no impropriety in the Board's consideration of the pre-sentence report. Although DOCS was obliged to expunge all references to the disciplinary hearing from petitioner's records, it was not required to expunge all evidence of petitioner's abscondence from his records. The court noted, for example, that DOCS properly re-calculated petitioner's sentence to reflect the period of abscondence, and the reversal of petitioner's disciplinary hearing did not entitle him to credit for that time. Likewise, the court found, it was appropriate for the Board to consider petitioner's pre-sentence report, including the reference to the abscondence, in determining whether he should be granted parole.

No Evidence of Misbehavior In This Highly Charged Case

Fama v. Senkowski, 759 N.Y.S.2d 595 (3d Dep't 2003)

Petitioner Fama was found guilty after a tier II hearing of violating prison disciplinary rules prohibiting the possession of contraband, creating a fire hazard and tampering with an electrical device. As related in the misbehavior report, a search of the petitioner's cell disclosed that four extension cords had been plugged into a single outlet (the number permitted is two), thereby creating a fire hazard. In addition, the circuit breaker box serving petitioner's cell had been altered to provide his cell and several others with extra electrical power.

The court reversed the charges. As to the contraband charge, the court noted that electrical extension cords are specifically permitted in correctional facilities (*see* Title 7 NYCRR 724.4[h][6]). As to the remaining charges of creating a fire hazard and tampering with an electrical device, the misbehavior report alleged that petitioner had "conspired to create a fire hazard [and] have his cell breaker box altered to give him extra electricity to run all his devices." The court noted that the hearing officer had acknowledged during the hearing that petitioner had never had access to the catwalks where the circuit breakers are located. "Hence it was never established how the circuit breaker box was altered; who altered it. . . that petitioner engaged in a conspiracy; that petitioner could not have

operated 'all his devices' with unaltered circuit breakers; or that use of more than one extension cord, either generally or in this instance, created a fire hazard." Based on the insufficient evidence, the court reversed the hearing.

DOCS Fails to Prove Controlled Substance Violation

Matter of Hernandez v. Selsky, 759 N.Y.S.2d 604 (3d Dep't 2003)

Title 7 NYCRR § 1010.5 provides that in disciplinary proceedings alleging possession of contraband drugs, the hearing record must include:

> (a) the request for test of suspected contraband drugs form;
>
> (b) the contraband test procedure form;
>
> (c) the test report prepared by an outside agency subsequent to testing of the substance, if any;
>
> (d) a statement of the scientific princip[les] and validity of the testing materials and procedures used . . .

A correction officer observed inmate Hernandez take a hand-rolled marijuana cigarette from another inmate in the gymnasium and charged him in a misbehavior report with violations of disciplinary rules prohibiting possession of controlled substances and smuggling. At the hearing, however, none of the documents required by DOCS' regulations were admitted into evidence and, moreover, there was no testimony as to the testing procedure that had identified the substance of marijuana. The court, consequently, reversed that portion of the hearing which found Hernandez guilty of possession of a controlled substance. Nevertheless, the court found, the misbehavior report, coupled with Hernandez's admission at the hearing that he discarded something in the gym bleachers, provided sufficient support for the charge of smuggling.

Medical Care

State Courts Consider Hepatitis-C Treatment Issues

People ex rel. Sandson v. Duncan, 761 N.Y.S.2d 379 (3d Dep't 2003) and
In re Application of Domenech, 2003 WL 21374520 (Smith, J.) (N.Y. Sup. Ct., May 28, 2003)

Hepatitis-C, a slow-acting viral infection which can cause a breakdown of liver functions, affects as many as 14 percent of New York State inmates, according to some studies. The typical treatment consists of 24 to 48 weeks of weekly shots of interferon, an immune system protein, combined with daily doses of the antiviral medication ribavirin. The treatment has limited success, however, and significant side effects. Consequently, it is indicated for only a small percentage of those who test positive for the hepatitis-C virus, typically those whose infection is in a fairly advanced state. Moreover, because the virus is often spread by needle sharing among intervenous (I.V.) drug users, and because both alcohol and drug abuse have been correlated with reduced compliance with and decreased effectiveness of the treatment regimen, some medical professionals have concluded that treatment not be recommended for persons who are current drug or alcohol abusers.

In New York, DOCS has developed strict guidelines for determining which hepatitis-C positive inmates are eligible for treatment. The guidelines require, among other things, that eligible inmates be in a relatively advanced state of the disease, that they not be within 12 months of a parole eligibility date, that they be "highly motivated" and that they have no history of psychiatric problems. In addition, DOCS requires that inmates with a history of drug abuse be either enrolled in or have completed the Alcohol and Substance Abuse Treatment program (ASAT) before receiving treatment.

The strictness of New York's treatment eligibility guidelines has meant that only a very small percentage of New York inmates infected with the hepatitis-C virus actually receive treatment while in DOCS. The requirement that eligible inmates be drug free and be either enrolled in or have completed ASAT has been particularly controversial. Not all medical

professionals agree that this is a valid basis for refusing hepatitis-C treatment. For instance, guidelines issued by the National Institute of Health state that "active [i.v.] drug use in and of itself should not be used to exclude such patients from antiviral therapy," and other states – for example, Rhode Island – treat inmates who are actively using drugs.

Two recent state courts considered inmates' challenges to the requirement that they be enrolled in or have completed ASAT prior to entering into treatment. The two challenges resulted in two very different results.

In People ex rel. Sandson, the petitioner filed a habeas corpus proceeding, stating that he had been denied treatment for hepatitis C and arguing that the denial constituted cruel and unusual punishment in violation of the 8th Amendment of the U.S. Constitution. The court – after first noting that an Article 78 proceeding, not a habeas corpus proceeding, was the correct vehicle for the petitioner's complaint – held that he had failed to show cruel and unusual treatment. In order to state a medical care claim under the 8th Amendment, an inmate must show that the corrections officials were "deliberately indifferent" to his "serious medical needs." Here, the court held, "the specific treatment that petitioner demands has been withheld not out of indifference to his illness, but because of his failure to meet certain reasonable pre-requisites prior to commencement of the treatment, including that of demonstrating his continuing abstinence from substance abuse by successfully completing a substance abuse treatment program." Moreover, the record showed, "[n]ot only has petitioner failed to complete such a program, but it appears that he has continued to abuse controlled substances during his incarceration, as evidenced by administrative determinations finding him guilty of violating prison disciplinary rules" concerning controlled substances. Under these circumstances, the court held, petitioner's complaint was properly dismissed.

In In re Application of Domenech, by contrast, the petitioner alleged (and DOCS did not dispute) that he had been drug free for over thirty years. Moreover, DOCS did not allege that the treatment was being denied based on a medical justification, *i.e.*, that the treatment was contra-indicated because the petitioner was a current drug or alcohol user, or that ASAT was necessary because even though petitioner was not currently abusing drugs or alcohol he was likely to relapse without ASAT's assistance. Rather, DOCS was merely rigidly following the guidelines it had established for all inmates, regardless of individual circumstances. The court found, however, that "there is not a scintilla of evidence...showing that Petitioner is a current substance abuser or likely to relapse." Under those circumstances, it concluded: "the ASAT program is irrelevant . . . and cannot, as a matter of law, provide a medical justification for the continued denial of medical treatment . . . Accordingly, [DOCS'] policy as applied to this Petitioner is arbitrary and capricious and results in a deliberate denial of medical attention to his serious medical condition in violation of the Eighth Amendment."

Parole

Parole Board Must Consider Recommendations of Sentencing Court For Inmates with Indeterminate Sentences

Matter of Edwards v. Travis, 758 N.Y.S.2d 121 (2d Dep't 2003)

New York State law requires the parole board to consider, among other things, an inmate's institutional record, performance in a temporary release program, and release plans (*see* Executive Law § 259-i[2][c][A]). Additionally, when an inmate is serving an indeterminate sentence, the board is required to consider any "recommendations of the sentencing court." (Executive Law §§ 259-i[1][a][i], [2][c][A]).

In this case, the Division of Parole conceded that it did not consider the sentencing minutes before it rendered its decision denying petitioner Edwards' parole application. The minutes revealed that the sentencing judge did not intend the petitioner to serve more than the minimum term of imprisonment. The court found that since the minutes contain what is, essentially, a recommendation of the sentencing court, the Division's admitted failure to consider the minutes required that the determination be reversed and remitted to the Division for a new hearing.

Procedure

Inmates Filing Article 78 Proceedings Must Follow Orders to Show Cause

Matter of Spriles v. McGinnis, 758 N.Y.S.2d 546 (3d Dep't 2003)
Matter of Britt v. Goord, 758 N.Y.S.2d 551 (3d Dep't 2003)
Matter of Martinez v. Goord, 757 N.Y.S.2d 502 (3d Dept 2003)

The first step in commencing an Article 78 proceeding is to file a proposed "Order to Show Cause" (OSC) with the court. The OSC – a document which "orders" the defendants to "show cause" why the petition should not be granted and specifies how and on whom it should be served – will generally be signed by a judge and returned to you for service on the respondents. In order to commence the proceeding you must serve the signed OSC on the persons and in the manner specified in the order, as well as follow any other instructions that the court may have added. Three cases illustrate the consequences of failing to do so.

In Matter of Spriles, the OSC required the petitioner to serve the superintendent and to file an affidavit of service with the court. After the petitioner failed to do so, the respondents moved to dismiss. The Supreme Court granted the motion and the Appellate Division affirmed, noting that there was no evidence that the conditions of the petitioner's confinement prevented compliance with the order. "Given petitioner's failure to comply with the relaxed service requirement set forth in the order to show cause, Supreme Court properly dismissed the petition." Similarly, in Matter of Britt, the court dismissed the petition after finding that "[a]lthough petitioner served process upon the Attorney General, he failed to effect service upon respondent, thereby violating the . . . order to show cause." The court also dismissed a petition in Martinez v. Goord, in which the petitioner failed to serve either the Attorney General or the respondent, holding, "[a]n inmate's failure to satisfy the service requirements of an order to show cause requires dismissal . . . unless there is a showing that the restrictions imposed by imprisonment precluded compliance."

These cases should serve as a reminder for inmates contemplating filing an Article 78 proceeding that it will be necessary to carefully follow the procedures in the OSC to avoid having the proceeding dismissed.

Inmates with questions about Article 78 proceedings can request Prisoners' Legal Services' Form Memo, "How to File an Article 78 Proceeding on Your Own" by writing to Prisoners' Legal Services, Central Intake, 118 Prospect St., Suite 307, Ithaca, NY 14850.

Other Cases of Interest

Man Wins Bid To Keep Name Off Sex-Offender Registry

People v. Bell 2003 WL 21649678 (N.Y. Sup. Ct., June 30, 2003)

Sherman Bell, a former inmate convicted 22 years ago of kidnapping a 3-year-old to extort money from her parents, convinced a state court recently that it would be unconstitutional to require him to register as a sex offender. Upon his release from prison in 2001 after completing a 20-year sentence, Bell found that he was required to register under New York's Sex Offender Registration Act (SORA) because first degree kidnapping (where the victim is less than 17 years old and the offender is not a parent) is one of the crimes to which the act applies.

Bell objected, arguing that his crime had no sexual component whatsoever. The court agreed, noting that courts in both Ohio and Florida have found that the automatic inclusion of ex-inmates whose crimes had no sexual component to a sex-offender registry violated the ex-inmate's right to substantive due process. The court also found that by including a kidnapping offense that does not necessarily include a sexual component in the definition of "sexual offender" "renders the sexual offender registration statute over-inclusive" and violates the equal protection clause of the Fourteenth Amendment. The court went on to conclude that when a person has been convicted of a crime for which SORA classification is mandatory, but no element of the crime involves a sexual component, a hearing must be conducted, at which "evidence of some sexual facet to the defendant's actions or

motivation sufficient to sustain a classification as a sexual offender" must be presented, in order to sustain the classification.

Conviction Overturned for Inmate Who Allegedly Attacked Guard

People v. Santos, 761 N.Y.S.2d 651 (1st Dep't 2003)

Evidence that a prison guard attacked inmates and engaged in a coverup is enough to void the conviction of an inmate who allegedly assaulted the guard, a divided appeals court recently ruled.

Ruling 3-2, the Appellate Division, First Department held that the inmate, Jeffrey Santos, could have defended himself better at trial if he had known about the guard's past.

The guard, Edward Lanza, pleaded guilty in an administrative proceeding to assaulting three Riker's Island inmates in 1996, but not until after Mr. Santos was convicted of assaulting Mr. Lanza. Mr. Santos, who had claimed he was attacked by Mr. Lanza, submitted Mr. Lanza's plea in a post-trial motion to vacate his conviction.

A Manhattan Supreme Court judge granted Mr. Santos' motion, and the majority of the First Department agreed with her reasoning, saying the credibility of the guard, who testified against Mr. Santos, was the most significant issue at trial. "We do not find that the motion court improvidently exercised its discretion in finding that this newly discovered evidence was not merely collateral, as the complainant's history of assaultive behavior went to the very heart of this defendant's trial defense," wrote the majority.

In a dissenting opinion, Justice Peter Tom wrote that the administrative pleading of the guard, which resulted in a loss of three vacation days and no criminal charges, did not undermine the prosecution's other evidence against Mr. Santos. The origin of the confrontation between the two was disputed. The prosecution alleged that Mr. Santos was taken to a holding cell after having been accused of rummaging through the purse of a psychiatric social worker in the facility health clinic. When Mr. Lanza prepared to give Mr. Santos a misbehavior report for being in the health clinic without permission, Santos allegedly became belligerent and punched Lanza in the face. Other guards entered the cell and the scuffle, restraining Mr. Santos.

Santos claimed that he had been directed by a doctor to wait in the social worker's office. Once he was moved to the holding cell, Lanza distracted him with the misbehavior report paperwork and then punched him in the face. Santos then claimed that Lanza asked another guard to punch Lanza in the face, so he could pin the fight on Santos.

While the majority stressed the importance of Lanza's past infractions, Justice Tom expressed disbelief that Lanza's behavior could overwhelm the testimony of other guards, inconsistent testimony from inmates who witnessed the fight and Mr. Santos's story about Lanza's self-inflicted wounds. "A conviction may be vacated on the basis of new evidence only if the new evidence would probably have resulted in a verdict more favorable to the defendant," wrote the Justice. "Without any motive to frame the defendant, there was simply nothing incredible concerning the testimony of the People's witnesses that defendant was caught in a restricted area rummaging through a worker's pocketbook, and later lashed out at a corrections officer attempting to serve him with a [misbehavior report] before being subdued. It also appears inconceivable that Captain Lanza would cause self-inflicted facial injuries including a laceration which needed eight stitches, and which required emergency treatment and subsequent therapy just to frame defendant for no apparent reason."

Son of Sam Law Survives Death, But Not Child Support

New York State Crime Victims Bd. ex rel. Hernon v. Zaffuto, 763 N.Y.S.2d 442 (Sheridan, J.) (Sup. Ct., Albany Co., June 20, 2003)

New York's Son of Sam Law permits the New York Crime Victims' Board to seek an injunction against an inmate who receives "funds of a convicted person" in order to prohibit the inmate from spending the funds. The purpose is to insure that if an inmate receives a substantial sum of money while incarcerated, the money will

not be "wasted," but will instead remain available to compensate any victims of the inmate's crimes.

Michael Zaffuto was convicted of robbery in the first degree and sentenced to a prison term. While incarcerated he brought a lawsuit against the State of New York, alleging medical malpractice. The lawsuit was settled for a substantial sum, but Zaffuto died shortly thereafter. The money – $87,000 – went to his heirs: $30,000 to his ex-wife, Cristal, and $57,000 to his son, Blake.

The Crime Victim's Board then sued Cristal and Blake, seeking an injunction prohibiting them from spending any of the settlement until the victim of Zaffuto's crime, James Hernon, had an opportunity to sue the estate for the injuries he suffered during the robbery. The Zaffutos responded with a variety of arguments: First, they argued, the Son of Sam law was intended only to apply to convicted criminals; it was not intended to apply in this situation, where the perpetrator of the crime was deceased. The court disagreed. Executive Law § 632 a(1)(c) defines "funds of a convicted person" as "all funds and property received from any source by a person convicted of a specified crime, *or by the representative of such person* as defined in [§ 621(6)] of this article excluding child support and earned income . . . ." The cross-referenced provision, Executive Law § 621(6) provides that: Representative' shall mean one who represents or stands in the place of another person, including but not limited to ... *an executor or heir* of another person . . ." Thus, the court concluded, the Son of Sam law was intended to apply to the funds of inmates even after they die.

Cristal and Blake next argued that they were victims of Michael just as much as was James Hernon and that, therefore, they had an at least equal entitlement to the funds. Specifically, Cristal argued that Michael owed her more than $30,000 in child support payments at the time he died, while Blake argued that Michael never provided financial support and had only intermittent contact with him during his formative years.

That argument received more consideration from the court. In order to obtain an injunction a party must show, among other things, that the *equities* are in his or her favor – *i.e.*, that it is just to grant the injunction. The court found that in this case, where Zaffuto's funds were subject to claims for both child support and recompense for a crime victim, two distinct public policies – that of insuring that child support obligations are met and that of assisting the victims of crimes in obtaining compensation from the funds of the perpetrators – come into conflict. The court held that as between those two objectives, "the compelling nature of child support payments tips the equitable scale away from the payment to a crime victim." Consequently, it refused to grant the CVB's request to freeze the funds owed to Cristal. The court found that Blake's argument, however, was weaker. It held that his contentions failed to overcome the State's interest in compensating crime victims. It therefore granted the CVB's request to freeze the funds due him.

QUESTIONS AND ANSWERS ABOUT THE DNA DATABANK

In 1994, the Legislature passed a law requiring certain "designated offenders" to give blood samples for forensic DNA testing and data banking. As originally enacted, the statute applied only to persons convicted of certain violent felonies, sex offenses and escape offenses on or after January 1, 1996.

In 1999, the Legislature re-wrote the law. The new law expanded the list of "designated offenses" for which blood can be taken and provided that, in most cases, it may be applied retroactively – that is, blood can be taken even if you were convicted of the offense before the date the law became effective – so long as you are still serving the sentence for the designated offense at the time the blood is taken. For a second category of offenses, particularly drug offenses, blood can only be taken if you were convicted of the offense on or after December 1, 1999. For yet a third category of offenses, primarily those involving escape and absconding, blood can be taken only if you were also convicted of some other designated offense within the last five years. Because this is confusing we have prepared a chart indicating which crimes the statute applies to and when it

applies. The chart appears at the end of this article.

What follows are some additional questions and answers about the DNA databank law.

1. How does the law work?

If you have been convicted of one of the designated offenses (and the law is otherwise applicable to you) you will be notified of your obligation to provide a blood sample. After it has been taken the blood sample will be forwarded to an authorized DNA laboratory for testing and analysis. After the sample is analyzed and its' individual characteristics noted, the results are forwarded to the state DNA databank (technically known as the "identification index"). See, Executive Law § 995-c.

2. Do they have to take blood? Why can't they take a hair or saliva sample instead?

The new law provides only that a "sample appropriate for DNA testing" must be taken. Therefore, theoretically, a hair or saliva sample might be sufficient. The law, however, leaves the final decision as to what kind of sample is "appropriate" up to the Division of Criminal Justice Services. DCJS has decided that a blood sample is the most reliable, hence "appropriate," sample. Since no court has as yet held that taking a blood sample for DNA databank purposes constitutes an unreasonable invasion of any of your constitutional rights, we believe that a court would hold DCJS's decision to use blood samples, over other possible sampling materials, to be a reasonable one. In Lunney v. Goord, 736 N.Y.S.2d 718 (3d Dep't 2002) the petitioner argued that DOCS should not be allowed to take a blood sample if he was willing to provide a hair or saliva sample instead. The court disagreed, holding: "Although [the statute] does not specify that a blood sample must be used, [it] requires 'a sample appropriate for DNA testing' and it is undisputed that a blood sample is appropriate for DNA testing. The statute clearly does not give petitioner the option to dictate the type of sample to be taken."

3. Who is allowed to see the results?

Executive Law § 995-c(6) states that DNA records contained in the state DNA identification index shall be released only for the following purposes:

- to federal, state or local law enforcement agencies, or district attorney's offices in connection with the investigation of a crime, or to assist in the recovery or identification of human remains, including the identification of missing persons, and
- to a defendant or his or her representative, for criminal defense purposes, and
- to an "entity authorized by the [New York State Division of Criminal Justice Services] for the purposes of creating...a population statistics database" – but only after personally identifiable information has been removed.

4. Is there anyone who can't see the results?

Yes. The new law contains a confidentiality provision. Executive Law § 995-d prohibits DNA test results from being distributed, without your permission, to insurance companies, employers or potential employers, health care providers, private investigating services and so on.

5. Can I obtain a copy of the test results?

Yes. The Division of Criminal Justice Services has published regulations concerning how to go about getting your test results. The regulations are published at 9 NYCRR § 6192.10. You must make a request to DCJS. In

your request, you must provide your name, any aliases used, date of birth, NYSID number (if known); sex; race; date of sentence for the offense for which the sample was taken and the court which sentenced you (if known). You must also provide fingerprints from both hands, a passport sized color photograph taken within the last twelve months, your current address and phone number (if available). All of this information must be provided under your signature, which must be notarized and include the following statement: "False statements made herein are punishable as a class A misdemeanor pursuant to § 210.45 of the New York State Penal Law." The request should then be forwarded to the Division of Criminal Justice Services, 4 Tower Place, Albany, NY 12203. According to the regulations DCJS should provide you with a response within 30 days, by certified mail, return receipt requested.

6. What happens if I refuse to give a blood sample?

If you refuse to give a blood sample you will most likely be given a "direct order" to provide the sample and, if you still refuse, you will be disciplined through the regular disciplinary system. You could, presumably, continue to be disciplined until you agree to provide a sample. *See, e.g.*, Thompson v. Selsky, 734 N.Y.S.2d 348 (3d Dep't 2001) (inmate disciplined for refusing a direct order to provide a blood sample).

7. Is this law legal?

Most states now have DNA databank laws similar to that of New York. Such laws have so far survived every legal challenge that has been brought against them. Courts have held, for example, that these laws do not violate inmates' First Amendment right to practice their religion, their Fourth Amendment right against unreasonable search and seizure, their Fifth Amendment right against self-incrimination, their Eighth Amendment right against cruel and unusual punishment or their Fourteenth Amendment right to equal protection, due process, and privacy. Courts have also held that retroactive application of these statutes – that is, their application to crimes committed before the statute was passed – does not violate the *ex post facto* clause of the Constitution or the double jeopardy clause.

8. My religion forbids the drawing of blood. Doesn't this statute violate my rights under the First Amendment?

No. Courts that have looked at this issue have consistently held that because DNA databank statutes are: neutral with respect to religion; of general applicability; not applied differently to anyone because of their religious beliefs; and only incidentally affect religious belief; they are acceptable under the First Amendment. The courts have also found that any small impact on religious freedom caused by the taking of blood is counter-balanced by the state's interest in maintaining a permanent record of various offender's DNA to help in solving past or future crimes and that, therefore, they do not unduly burden religious belief. *See*, Shaffer v. Saffle, 148 F.3d 1180 (10th Cir. 1998), *cert den.*, 119 S.Ct. 520; Ryncarz v. Eikenberry, 824 F.Supp. 1493 (E.D. Wash. 1993).

9. Isn't the taking of blood an unlawful search and seizure under the Fourth Amendment?

No. The Fourth Amendment protects you against unreasonable searches and seizures. It is for this reason that the police typically need "probable cause" to search your person or your home. However, courts that have looked at whether the taking of blood for a DNA databank violates inmates' Fourth Amendment rights have consistently held that it does not, even if the blood is taken without a warrant or probable cause. The Second Circuit Court of Appeals, for instance, has held (with respect to a Connecticut's DNA databank law) that various "special needs" of the state that go beyond mere law enforcement permit physical testing of this

sort without a warrant or probable cause. Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999). The Second Circuit also has jurisdiction over New York cases. It is therefore likely that it would apply the same analysis to New York's statute. Many other courts have found that inmate's have reduced privacy interests in the first place, and have upheld the statutes on those grounds. See Jones v. Murray, 962 F.2d 302 (4th Cir. 1992).

10. What about my Fifth Amendment right against self-incrimination?

Under the Fifth Amendment you cannot be forced to say anything that might incriminate you in a crime. However, this amendment has traditionally been applied only to oral, or "testimonial" evidence. It does not usually prevent you from being required to produce physical evidence. For that reason, courts that examined the question have uniformly held that DNA databank laws do not violate the Fifth Amendment rights of inmates. See Boling v. Romer, 101 F.3d 1336 (10th Cir. 1996).

11. I was convicted before this law was passed. Does the application of this law to me violate the *ex post facto* clause?

The *ex post facto* clause of the constitution prevents the state from punishing you for conduct that occurred before the conduct was illegal. However, to be a violation of the *ex post facto* clause, a statute must actually punish you, or increase your punishment, for something you did before the passage of the statute. In many cases the new DNA statute will apply to inmates because of crimes or convictions for which they were convicted prior to the statute becoming law (on December 1, 1999). The New York State Court of Appeals recently held, however, that because the intention of the statute is only to aid in future investigation, not increase punishment for past crimes, it is not prohibited by the *ex post facto* clause. Kellogg v. Travis, 100 N.Y.2d 407 (2003).

12. What if I am punished with administrative sanctions, including a loss of good time, for refusing to give blood? Wouldn't *that* be a violation of the *ex post facto* clause in those circumstances?

No. Courts that have examined this question have found that administrative sanctions suffered by an inmate's refusal to provide blood samples, including loss of good time, are a result of their failure to follow lawful orders, and not a result of the commission of a crime. Therefore, they have held, such sanctions do not violate the *ex post facto* clause. *See, e.g.*, Gilbert v. Peters, 55 F.3d 237 (7th Cir. 1995); Kruger v. Erickson, 875 F.Supp. 583 (D.Minn. 1995), aff'd on other grounds, 77 F.3d 1071 (8th Cir. 1996); Cooper v. Gammon, 943 S.W.2d 699 (Mo. Ct. App. W.D. 1997).

13. Does the law apply to me?

The DNA databank law applies to you in two circumstances.

1. You were convicted of one of the following "designated offenses" on or after December 1, 1999 *or* you were convicted of one of the following offenses *before* December 1, 1999 *and* you are still serving the sentence for that conviction (even if you are on parole):

120.05 Assault in the 2nd degree

120.06 Gang Assault in the 2nd degree

110.00/120.06 Attempted Gang Assault in the 2nd degree

120.07 Gang Assault in the 1st degree

110.00/120.07 Attempted Gang Assault in the 1st degree

120.08 Assault on a Peace, Police Officer, Fireman or EMS professional

110.00/120.08 Attempted Assault on a Peace, Police Officer, Fireman or EMS Professional

120.10 Assault in the 1st degree

110.00/120.10 Attempted Assault in the 1st degree

120.11 Aggravated Assault upon a Peace or Police Officer

110.00/120.11 Attempted Aggravated Assault upon a Peace or Police Officer

120.60(1) Stalking in the 1st degree

125.15 Manslaughter in the 2nd degree

125.20 Manslaughter in the 1st degree

110.00/125.20 Attempted Manslaughter in the 1st degree

125.25 Murder in the 2nd degree

110.00/125.25 Attempted Murder in the 2nd degree

125.27 Murder in the 1st degree

110.00/125.27 Attempted Murder in the 1st degree

130.25 Rape in the 3rd degree

130.30 Rape in the 2nd degree

130.35 Rape in the 1st degree

110.00/130.35 Attempted Rape in the 1st degree

130.40 Sodomy in the 3rd degree

130.45 Sodomy in the 2nd degree

130.50 Sodomy in the 1st degree

110.00/130.50 Attempted Sodomy in the 1st degree

130.65 Sexual Abuse in the 1st degree

130.66 Aggravated Sexual Abuse in the 3rd degree

130.67 Aggravated Sexual Abuse in the 2nd degree

110.00/130.67 Attempted Aggravated Sexual Abuse in the 2nd degree

130.70 Aggravated Sexual Abuse in the 1st degree

110.00/130.70 Attempted Aggravated Sexual Abuse in the 1st degree

130.75 Course of Sexual Conduct Against a Child in the 1st degree

110.00/130.75 Attempted Course of Sexual Conduct Against a Child in the 1st degree

130.80 Course of Sexual Conduct Against a Child in the 2nd degree

135.20 Kidnapping in the 2nd degree

110.00/135.20 Attempted Kidnapping in the 2nd degree

135.25 Kidnapping in the 1st degree

110.00/135.25 Attempted Kidnapping in the 1st degree

140.20 Burglary in the 3rd degree

110.00/140.20 Attempted Burglary in the 3rd degree
140.25 Burglary in the 2nd degree

110.00/140.25 Attempted Burglary in the 2nd degree

140.30 Burglary in the 1st degree

110.00/140.30 Attempted Burglary in the 1st degree

150.15 Arson in the 2nd degree

110.00/150.15 Attempted Arson in the 2nd degree

150.20 Arson in the 1st degree

110.00/150.20 Attempted Arson in the 1st degree

160.10 Robbery in the 2nd degree

110.00.160.10 Attempted Robbery in the 2nd degree

160.15 Robbery in the 1st degree
110.00/160.15 Attempted Robbery in the 1st degree

215.16 Intimidating a Victim or Witness in the 2nd degree

215.17 Intimidating a Victim or Witness in the 1st degree

110.00/215.17 Attempted Intimidating a Victim or Witness in the 1st degree

255.25 Incest

265.02(4), (6), (8) Criminal Possession of a Weapon in the 3rd degree

110.00/265.02(4), (5) and (6) Attempted Criminal Possession of a Weapon in the 3rd degree as a lesser included offenses of that section as defined in 220.20 of the Criminal Procedure Law

265.03 Criminal Possession of a Weapon in the 2nd degree

110.00/265.03 Attempted Criminal Possession of a Weapon in the 2nd degree

265.04 Criminal Possession of a Dangerous Weapon in the1st degree

110.00/265.04 Attempted Criminal Possession of a Dangerous Weapon in the 1st degree

265.08 Criminal Use of a Firearm in the 2nd degree

110.00/265.08 Attempted Criminal Use of a Firearm in the 2nd degree

265.09 Criminal Use of a Firearm in the 1st degree

110.00/265.09 Attempted Criminal Use of a Firearm in the 1st degree

265.12 Criminal Sale of a Firearm in the 2nd degree

110.00/265.12 Attempted Criminal Sale of a Firearm in the 2nd degree

265.13 Criminal Sale of a Firearm in the 1st degree

110.00/265.13 Attempted Criminal Sale of a Firearm in the 1st degree

265.14 Criminal Sale of a Firearm with the Aid of a Minor

110.00/265.14 Attempted Criminal Sale of a Firearm with the Aid of a Minor

2. You were convicted of one of the following offenses *and* were convicted of one of the offenses listed in section 1, above, within the last five years:

205.10 Escape in the 2nd degree

205.15 Escape in the 1st degree

205.17 Absconding from Temporary Release in the 1st degree

205.19 Absconding from a Community Treatment

3. You were convicted of one the following offenses on or after December 1, 1999:

155.30(5) Grand Larceny in the 4th degree

220.18 Criminal Possession of a Controlled Substance in the 2nd degree

220.21 Criminal Possession of a Controlled Substance in the 1st degree

220.31 Criminal Sale of a Controlled Substance in the 5th degree

220.34 Criminal Sale of a Controlled Substance in the 4th degree

220.39 Criminal Sale of a Controlled Substance in the 3rd degree

220.41 Criminal Sale of a Controlled Substance in the 2nd degree

220.43 Criminal Sale of a Controlled Substance in the 1st degree

220.44 Criminal Sale of a Controlled Substance in or near School Grounds

A Correction

*In our last issue of **Pro Se** we intended to report on three cases from the Supreme Court's 2002/2003 term which we felt would be of interest to New York State inmates. Due to a printing error the article appeared without the headline, the introduction, or the first third of the text. We regret the error and we reprint the omitted material below. For those who wish to read the whole article, this material should have preceded the text that appears on page 6 of the Summer, 2003, issue of **Pro Se**.*

Supreme Court Affirms Novel Restraints on Convicts' Freedom

The current Supreme Court term has brought little good news for inmates, as the Court has upheld the constitutionality of a variety of new and novel laws intended to further reduce the freedom of various categories of offenders, including "Megan's Laws" for sex offenders, "three strikes" laws for repeat offenders and mandatory immigration detention for non-citizen offenders. We provide an overview, below.

Megan's Laws

In 1996, President Bill Clinton signed legislation mandating that states adopt laws requiring convicted sex offenders to register with local law enforcement agencies after their release and granting access to such information to the public. Over time, all fifty states adopted some version of what is commonly referred to as

"Megan's Law." New York's version, the Sex Offender Registration Act, or SORA (Correction Law § 168, *et. seq.*), requires sex offenders to register their current address with the Division of Criminal Justice Services, assigns each sex offender one of three "risk levels" and permits law enforcement agencies to provide information about the offender to "entities with vulnerable populations." The amount of information that may be provided depends on the risk level the offender has been assigned.

This term the Supreme Court upheld the constitutionality of the Megan's Laws of both Alaska and Connecticut. These decisions make it highly unlikely that any future challenge to the New York law would succeed.

The Alaska version of Megan's Law not only requires sex offenders to register with the authorities but also requires that their photographs and other identifying information be placed on the Internet. Offenders who were convicted before the law was enacted challenged it on *ex post facto* grounds. The *ex post facto* clause of the constitution prohibits the imposition of new punishments on persons who were convicted prior to the enactment of the punishment. In Smith, et al., v. Doe, et. al., __U.S.___, 123 S.Ct. 1140 (2003) the Court rejected the plaintiffs' argument. The dispositive question, according to the Court, was whether the legislature intended to impose an additional punishment on sex offenders or whether it merely intended to enact a non-punitive, civil regulatory scheme. Upon analysis, the Court found that there was nothing in the statute to indicate that the legislature sought to create anything other than a civil scheme designed to protect the public from harm. New York's Megan's Law has already survived a similar attack. *See*, Doe v. Pataki, 120 F.3d 1263 (2d. Cir. 1997).

The Connecticut version of Megan's Law requires persons convicted of sex offenses to register with the Department of Public Safety (DPS) when released and requires DPS to post a sex offender registry containing the registrants' names, addresses, photographs and descriptions on the Internet and to make the registry available to the public in certain state offices. The law was challenged as violating the due process clause of the 14th Amendment, in that it did not provide registrants with a pre-deprivation hearing to determine whether they were likely to be "currently dangerous." The Second Circuit agreed, holding that the law deprived registered sex offenders of a "liberty interest"without a due process hearing. A similar challenge to New York's law had previously succeeded and had 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), however, the Court upheld the Connecticut statute, finding that a mere injury to one's reputation does not constitute a deprivation of a liberty interest. This makes it likely that the additional due process protections added to the New York statute after Doe would not currently be found to be required by the federal constitution.

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